

This Is the House that Law Built: A Systems Story of Racism

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*Racism: A system of advantage based on race.*¹

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1. BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE 87 (20th anniversary ed. 2017).

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I. INTRODUCTION

Racism is a system; racism is systemic.

I am reminded of the old Indian folk tale about the six blind men and the elephant. Each of the six blind men encounters a different part of the elephant—her leg, her tail, the side of her belly, her ear, her trunk, and her tusk.² Each of the six blind men describes what he feels; each description conjures something different.³

The six blind men fall to arguing about the essence of the elephant.⁴ They awaken a napping Rajah, who advises them that each of them felt only one part of a very large animal.⁵ To learn the truth of the elephant, they must put all the parts together.⁶

Learning the truth of systemic racism is like learning the truth of the elephant: It calls for putting many parts together.

Yet learning the truth of systemic racism is also unlike learning the truth of the elephant because we encounter systemic racism from within: We *are* the system that is racism.

Everyone who lives in the United States encounters the elephant of systemic racism.⁷ I am white and grew up in a predominantly white neighborhood—systemic racism. The next city over, my mother’s parents, also white, were the only white family on a block in a neighborhood that was predominantly Black—systemic racism. My father’s parents, white

2. See *The Blind Men and the Elephant*, PEACE CORPS, <https://www.peacecorps.gov/educators/resources/story-blind-men-and-elephant/> [<https://perma.cc/AT8M-PUPV>].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* See also DAVID PETER STROH, SYSTEMS THINKING FOR SOCIAL CHANGE: A PRACTICAL GUIDE TO SOLVING COMPLEX PROBLEMS, AVOIDING UNINTENDED CONSEQUENCES, AND ACHIEVING LASTING RESULTS 33–34 (Joni Praded ed., 2015).

7. Shayanne Gal et al., *26 Simple Charts to Show Friends and Family Who Aren’t Convinced Racism is Still a Problem in America*, BUS. INSIDER (July 8, 2020, 10:04 AM), <https://www.businessinsider.com/us-systemic-racism-in-charts-graphs-data-2020-6> [<https://perma.cc/FKD8-PTPR>].

as well, lived in a small town in the Midwest where my father never saw a Black person growing up—systemic racism. I attended an elementary school that reflected my neighborhood’s white isolation and racial homogeneity and then a junior high school that was racially diverse, reflecting a number of adjacent but differently-populated neighborhoods—systemic racism.

I met and married a Black man, and my family questioned whether I had made my life more difficult than it needed to be—systemic racism. I had three biracial children and when we looked for schools that were racially diverse and in which kids across the board were doing well academically, we could not find one—systemic racism. In one of those schools, the white principal referred to kids of color as “those kids”—systemic racism. In community work, a Black leader bristled at being described as “articulate”—systemic racism.

The list continues and continues and continues. We have all felt this elephant.

As a legal scholar, I have explored the structures of systemic racism by dissecting how current legal structures operate to perpetuate white advantage and Black disadvantage—through the law of wealth and inheritance,⁸ of education,⁹ of housing,¹⁰ and of taxation.¹¹ I have also described everyday experiences of race in our personal lives¹² and, as a professor of law, ways in which we can name and interrupt racism in our teaching.¹³ The elephant’s skeleton communicates its size and shape.

8. See generally Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453 (2010).

9. See generally Palma Joy Strand, *Is Brown Holding Us Back? Moving Forward, Six Decades Later: Visionary States, Civic Locals, and Trusted Schools and Teachers*, 23 KAN. J.L. & PUB. POL’Y 283 (2013).

10. See generally Palma Joy Strand, “Mirror, Mirror, on the Wall . . .”: *Reflections on Fairness and Housing in the Omaha-Council Bluffs Region*, 50 CREIGHTON L. REV. 183 (2017) [hereinafter Strand, *Mirror, Mirror*]; Palma Joy Strand, *The Invisible Hands of Structural Racism in Housing: Our Hands, Our Responsibility*, 96 U. DET. MERCY L. REV. 155 (2019) [hereinafter Strand, *Invisible Hands*].

11. See generally Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J.L. & SOC. POL’Y 265 (2020).

12. See generally Palma Joy Strand, *Loving and Loving: Eroding the Stance of Other*, 50 CREIGHTON L. REV. 621 (2017).

13. See generally Palma Joy Strand, *We Are All on the Journey: Transforming Antagonistic Spaces in Law School Classrooms*, 67 J. LEGAL EDUC. 176 (2017).

As a parent and community member, I have become aware of and challenged the operation of systemic racism by contributing to initiatives that have sought to transform the racialized ways in which people interact—racialized interactions that lead to racialized outcomes.¹⁴ Conversations about race are not easy, but naming a problem is essential to addressing it.¹⁵ In the course of years—now decades—of engaging in and facilitating conversations about race and belonging, I have come to the conviction that being in genuine and authentic relationship with others is the “secret sauce” that is the essential counter to racism.¹⁶ Each of the elephant’s cells carries its DNA.

Identifying the structural and interpersonal aspects of racism as distinct yet also deeply integrated, I have sought to sketch systemic racism more holistically. In one prior article, *Racism 4.0*, I characterized racism as an “operating system” for our society.¹⁷ In that system, laws and institutions constitute the system’s “hardware,” while interactions and relationships between individuals serve as the “software.”¹⁸ More recently, a psychologist colleague and I have traced how everyday microaggressions between individuals and macro-injustices at the social or system level create and mutually reinforce each other.¹⁹ How does the way the elephant moves relate to the workings of her tendons, muscles, veins and arteries, and nervous system? How do signals from her brain lead to her moving in one direction or another?

The events of 2020 brought systemic racism into focus.²⁰ The COVID-19 pandemic affected everyone: We are all human, and we are all

14. See Palma Joy Strand & Melinda Patrician, *School Climate: Lessons We Learned While Planning a Community Forum*, 20 EDUC. WEEK 38 (2001); ROBERT G. SMITH ET AL., GAINING ON THE GAP: CHANGING HEARTS, MINDS, AND PRACTICE 63–65 (2011).

15. See, e.g., Palma Strand, “Civity” by Any Other Name, COMMON PARTY (Dec. 13, 2018), <https://www.thecommonparty.com/single-post/2018/12/13/-civity-by-any-other-name> [https://perma.cc/FFJ3-2EGV].

16. Palma Joy Strand, *Racism 4.0, Civity, and Re-Constitution*, 42 HASTINGS CONST. L.Q. 763, 780–81 (2015) [hereinafter Strand, *Racism 4.0*]; Palma Joy Strand, *Cultivating “Civity”: Enhancing City Resilience with Bridging Relationships and Increased Trust*, 50 IDAHO L. REV. 153, 169–70 (2013) [hereinafter Strand, *Cultivating “Civity”*].

17. Strand, *Racism 4.0*, *supra* note 16, at 765.

18. *Id.* at 771–75.

19. See generally Claudia E. Cohen & Palma Joy Strand, *Microaggressions and Macro-Injustices: How Everyday Interactions Reinforce and Perpetuate Social Systems of Dominance and Oppression* (unpublished manuscript) (on file with author).

20. See 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/QL4U-MFAX].

connected.²¹ Yet people of color contracted and died of the disease in disproportionate numbers.²² The death of George Floyd, coming on top of years of deaths of other Black citizens, was the weighted straw that broke the back of the “it’s just one bad apple” explanation.²³ The problems are systemic; racism is systemic.²⁴

Acknowledging that racism is systemic—that it is indeed a *system* of advantage, and disadvantage, based on race—brings us to an awareness of the magnitude of what we are facing. To take the elephant metaphor just one step further, we have tended to view racism as a howdah, the carriage-chair in which people can ride comfortably on the back of an elephant. The howdah is carried by the elephant and can readily be removed. If the elephant that is our democracy is weakened by carrying the howdah of racism, removing it solves the problem. Voila! *Brown v. Board of Education*²⁵ and its Equal Protection progeny will leave the elephant unburdened and free to breathe.²⁶ But if racism is the elephant, that is an entirely different story.

In this essay, I explore the system-ness of racism. A systems understanding of racism enables us to more fully comprehend the magnitude and depth of racism, its reach and rootedness. This systems understanding provides the foundation for some initial and overarching observations about law and systemic racism.

21. See Palma Strand, *We Are All Connected: Civity in the Time of COVID-19*, CIVITY (Mar. 20, 2020), <https://www.civity.org/?s=we+are+all+connected> [https://perma.cc/9ECM-DHKF].

22. See Palma Strand, *The Way Out of Tragedy*, CIVITY (May 4, 2020), <https://www.civity.org/?s=the+way+out+of+tragedy> [https://perma.cc/ZZX7-TJZ2].

23. Trevor Noah, *Police in America - Where Are the Good Apples?*, YOUTUBE (Apr. 14, 2021), <https://www.youtube.com/watch?v=FhhBocZnkoQ> [https://perma.cc/HA2R-3NRE].

24. John Esterle, Malka Kopell & Palma Strand, *It’s All About Relationships: Systems-Based Changemaking*, MEDIUM (Nov. 22, 2020), <https://medium.com/office-of-citizen/its-all-about-relationships-systems-based-changemaking-470207584bf4> [https://perma.cc/2EBE-DAAE].

25. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

26. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C. J., plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

II. “SYSTEMIC RACISM” = RACISM IS A SYSTEM

Referring to racism as a system does not mean simply that racism is big, messy, and intractable. Saying that racism is a system brings a wealth of work on systems to bear on a phenomenon that permeates our culture, our politics, and our economy—a phenomenon that reaches into our internalized psyches and our interpersonal interactions and also shapes our institutions, policies, and laws. Viewing racism through a systems lens, viewing racism *as a system*, provides an understanding of how racism functions, which is necessary for taking actions to neutralize and reverse it.²⁷

A. Racism is a System

Donella Meadows, seminal systems thinker and author of *Thinking in Systems*, provides a definition of a system: “A system is a set of things—people, cells, molecules, or whatever—interconnected in such a way that they produce their own pattern of behavior over time.”²⁸ Meadows, then, highlights three aspects of any system. A system is comprised of *elements*.²⁹ These elements are *interconnected*.³⁰ And the system has a function or *purpose*.³¹

Meadows notes that, though a system’s elements are most likely to be obvious to us, “[c]hanging elements usually has the least effect on the system.”³² In contrast, “[c]hanging relationships usually changes system behavior.”³³ According to Meadows, however, “the least obvious part of the system, its function or purpose, is often the most crucial determinant of the system’s behavior.”³⁴

In a society, all people of whatever ancestry, background, or description are individual actors in the system that is that society.³⁵ Viewing racism as a system, we see that its elements are, at least, all residents past and present. If changing the elements has the least effect on a system, it is not surprising that the essence of racism—the production of advantage and disadvantage based on race—has continued over time, even as people in

27. Esterle, Kopell & Strand, *supra* note 24.

28. DONELLA H. MEADOWS, THINKING IN SYSTEMS: A PRIMER 2 (2008).

29. *Id.*

30. *Id.* at 11.

31. *Id.*

32. *Id.* at 16.

33. *Id.* at 17.

34. *Id.*

35. See John W. Meyer & Ronald L. Jepperson, *The “Actors” of Modern Society: The Cultural Construction of Social Agency*, 18 SOCIO. THEORY 100 (2000).

successive generations die off and are replaced by their children, grandchildren, and so on.³⁶ Changing the elements does not change the system.

As a system, racism's relationships are how people interact with each other. The system of racism uses the social construction or ideology³⁷ of race to create roles, to allocate resources, and to establish relationships of power, of oppression, of dominance³⁸ between members of different groups, racially defined. Political philosopher Iris Marion Young highlighted the intricacy of the interactions that comprise what she termed "structural injustice" in a social system.³⁹ 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.⁴⁰ In this sense, racism can operate without "racists."⁴¹

Historically, racism's relationships of oppression and dominance were codified explicitly in law as well as being infused in cultural norms, beliefs, roles, and practices.⁴² Changing the law changes these relationships, but only to a certain degree. Many of the cultural norms, beliefs, roles, and practices of racism continue, often operating implicitly rather than explicitly.⁴³ In addition to re-creating racial advantage and disadvantage directly, these cultural norms, beliefs, roles, and practices lead to acceptance of racially disparate outcomes that emerge from policies and interactions that profess to be racially neutral.

And what is the function or purpose of the system of racism? Racism's function or purpose is the creation and maintenance of advantage and disadvantage based on race.⁴⁴ The social construction or ideology that is race prescribes for the people of the United States relationships in which advantage accrues to people designated white and disadvantage is assigned to those who are not, with particular disadvantage reserved for

36. See MEADOWS, *supra* note 28, at 182.

37. KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 121–24 (2012).

38. For a relational explication of power and for descriptions of oppression and dominance, see IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 30–38 (1990).

39. IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 43–52 (2011).

40. Strand, *Invisible Hands*, *supra* note 10, at 156.

41. *Id.*

42. *Id.*

43. Strand, *Racism 4.0*, *supra* note 16, at 765–71.

44. *Id.* at 773–78.

people designated Black.⁴⁵ People are the elements of the system of racism; the relationships that produce advantage and disadvantage are our interconnectedness.

As Meadows observed, changing the relationships within this system has indeed changed system behavior.⁴⁶ The system of racism that exists in 2021 is not the system of racism that operated in 1921, which was not the system of racism that operated in 1821. Yet to a significant degree, the fundamental function or purpose of the system of racism as it was created in the late 1600s and early 1700s⁴⁷ carries on. The system of racism continues—quite robustly—to operate to produce advantage and disadvantage along racial lines in health and educational outcomes;⁴⁸ in employment;⁴⁹ in vulnerability to incarceration and violence at the hands of law enforcement;⁵⁰ in wealth;⁵¹ in access to affordable and habitable housing;⁵² and more.

Racism’s evolution is characteristic of systems that are complex and adaptive. Complex adaptive systems (CAS) are comprised of many individual actors or agents that interact in ways that lead to the emergence of discernable patterns at the system level.⁵³ These systems self-organize;

45. *Id.* at 771.

46. *See* MEADOWS, *supra* note 28, at 16.

47. *See, e.g.*, JACQUELINE BATTALORA, *BIRTH OF A WHITE NATION: THE INVENTION OF WHITE PEOPLE AND ITS RELEVANCE TODAY* 1–27 (2013). Race met “the need to divide laborers as a means of social control.” *Id.* at 20.

48. *See, e.g.*, Sofia Carratala & Connor Maxwell, *Health Disparities by Race and Ethnicity*, CTR. FOR AM. PROGRESS (May 7, 2020, 9:04 AM), <https://www.americanprogress.org/issues/race/reports/2020/05/07/484742/health-disparities-race-ethnicity/> [<https://perma.cc/J6H9-34RU>]; *Racial and Ethnic Achievement Gaps*, STAN. CTR. FOR EDUC. POL’Y ANALYSIS, <https://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/> [<https://perma.cc/S5MQ-8DR4>].

49. *See, e.g.*, Jhacova Williams & Valerie Wilson, *Black Workers Endure Persistent Racial Disparities in Employment Outcomes*, ECON. POL’Y INST. (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-racial-disparities-in-employment/> [<https://perma.cc/78FG-BX27>].

50. *See, e.g.*, Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL’Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/> [<https://perma.cc/UE4U-WHYL>]; Elle Lett et al., *Racial Inequity in Fatal U.S. Police Shootings, 2015–2020*, 75 J. EPIDEMIOLOGY & CMY. HEALTH 394 (2021).

51. *See, e.g.* Strand & Mirkay, *supra* note 11, at 270–78; Strand, *supra* note 8, at 468–69, 473–77.

52. *See, e.g.*, Solomon Greene & Alanna McCargo, *New Data Suggest COVID-19 is Widening Housing Disparities by Race and Income*, URBAN INST. (May 29, 2020), <https://www.urban.org/urban-wire/new-data-suggest-covid-19-widening-housing-disparities-race-and-income> [<https://perma.cc/74DC-Y5RG>].

53. *See, e.g.*, Tim Sullivan, *Embracing Complexity*, HARV. BUS. REV. (Sept. 1, 2011), <https://hbr.org/2011/09/embracing-complexity> [<https://perma.cc/J96L-GPYA>]. *See generally* STEVEN JOHNSON, *EMERGENCE: THE CONNECTED LIVES OF ANTS, BRAINS, CITIES*,

causation is diffused and non-linear; and diversity within the system enables flexible and adaptive responses to changes in the environment that lead to overall system resilience.⁵⁴ As a result of the uniqueness of any system's members and interactions, the path of the system will also be unique.⁵⁵ Further, a system's history and initial conditions matter and will affect its trajectory; they are embedded in the system as it evolves.

Complex adaptive systems appear throughout our world. Living organisms are CAS; colonies of ants, flocks of birds, and schools of fish are CAS; and ecosystems are CAS.⁵⁶ In the human social sphere, cities and communities are CAS;⁵⁷ businesses and other organizations are CAS;⁵⁸ law is a CAS.⁵⁹ In all of these systems, individual agents or actors interact in ways that enable dynamic changes so that the system can continue its function or purpose in a shifting landscape.⁶⁰ Birds respond to their neighbors in a flock so as to enable all members of the flock in flight to avoid tall buildings as well as other birds.⁶¹ Members of a health care team collaborate in ways that enable them to treat patients during a pandemic.⁶² People in communities with cross-cutting relationships pull together to address challenges and build overall well-being.⁶³ Law adapts to changing norms regarding LGBT+ people and relationships.⁶⁴

Racism, a complex adaptive system, has adapted to changes in law—to the abolition of slavery after the Civil War and, almost a century later, to

AND SOFTWARE (2001); ROGER LEWIN & BIRUTE REGINE, *WEAVING COMPLEXITY AND BUSINESS* (2000); Palma Joy Strand, *Law as Story: A Civic Concept of Law (with Constitutional Illustrations)*, 18 S. CAL. INTERDISC. L.J. 603, 606–07 (2009) (describing characteristics and types of complex adaptive systems).

54. See, e.g., Strand, *Cultivating "Civity,"* *supra* note 16, at 157–67.

55. See *id.* at 163–64.

56. See generally JOHNSON, *supra* note 53.

57. Strand, *Cultivating "Civity,"* *supra* note 16, at 161.

58. LEWIN & REGINE, *supra* note 53, at 6.

59. Strand, *supra* note 53, at 619.

60. *Id.*

61. Anna Azvolinsky, *Birds of a Feather . . . Track Seven Neighbors to Flock Together*, PRINCETON UNIV. (Feb. 7, 2013, 3:00 PM), <https://www.princeton.edu/news/2013/02/07/birds-feather-track-seven-neighbors-flock-together> [<https://perma.cc/GRU4-HT9J>].

62. See, e.g., James W. Begun & H. Joanna Jiang, *Health Care Management During Covid-19: Insights from Complexity Science*, NEW ENG. J. MED. (Oct. 9, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7546528/> [<https://perma.cc/U238-2AXD>].

63. Strand, *Cultivating "Civity,"* *supra* note 16, at 167–90.

64. See generally Palma Joy Strand, *The Civic Underpinnings of Legal Change: Gay Rights, Abortion, and Gun Control*, 21 TEMP. POL. & C.R.L. REV. 117, 117–18 (2011).

the invalidation of Jim Crow in *Brown v. Board of Education*⁶⁵ and subsequent decisions and statutes. Racism has adapted to changes in prevailing cultural norms, beliefs, roles, and practices within the United States.⁶⁶ Racism today is often implicit rather than explicit: It manifests in microaggressions and “racelighting”⁶⁷ rather than overt discrimination and in the “slow” violence of lack of resources rather than the “fast” violence of lynching.⁶⁸ Explicit interpersonal racism, overt discrimination, and lethal violence persist but are now often contested. Public figures who make racially bigoted and offensive statements may be called out.⁶⁹ Evident racial discrimination may elicit legal action.⁷⁰ Lethal violence may result in criminal prosecution and even conviction as well as political pushback.⁷¹ #BlackLivesMatter.

B. Law Constructed the System that is Racism

Racism and race in the United States were both created by law. Historians have traced the origins of the division of residents of the not-yet-nation into people designated white and people designated not-white to statutes passed by colonial legislatures in the late 1600s and early 1700s.⁷² The white race was created by elites to divide indentured servants of various countries and continents of origin who were finding common cause in resisting economic exploitation.⁷³ The white race was

65. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

66. See Rashawn Ray, *Is the United States a Racist Country?*, BROOKINGS (May 4, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/05/04/is-the-united-states-a-racist-country/> [https://perma.cc/Y92V-AVNE].

67. J. LUKE WOOD & FRANK HARRIS III, CMTY. COLL. EQUITY ASSESSMENT LAB, *RACELIGHTING IN THE NORMAL REALITIES OF BLACK, INDIGENOUS, AND PEOPLE OF COLOR: A SCHOLARLY BRIEF* 10 (2021).

68. Palma Joy Strand, *The Shocking Lynching of Will Brown 100 Years Ago*, HIST. NEWS NETWORK (Oct. 14, 2018), <https://historynewsnetwork.org/article/170085> [https://perma.cc/4MUP-VPSK].

69. See, e.g., Jill Martin & Susannah Cullinane, *Creighton's Men's Basketball Head Coach Suspended After 'Plantation' Comment*, CNN (Mar. 5, 2021), <https://www.cnn.com/2021/03/05/sport/creighton-basketball-coach-plantation/index.html> [https://perma.cc/8YSE-B8VN].

70. See, e.g., Jason Zuckerman, *\$11.5 Million Settlement Reached in Racial Glass Ceiling Case Against Kaiser*, NAT'L L. REV. (May 3, 2021), <https://www.natlawreview.com/article/115-million-settlement-reached-racial-glass-ceiling-case-against-kaiser> [https://perma.cc/8PR7-W2XB].

71. See, e.g., Nate Morris, *Guilty on All Charges: Derek Chauvin Convicted in Killing of George Floyd*, BLACK WALL ST. TIMES (Apr. 20, 2021), <https://theblackwallstimes.com/2021/04/20/guilty-on-all-charges-derek-chauvin-convicted-in-killing-of-george-floyd/> [https://perma.cc/964G-VQJC].

72. BATTALORA, *supra* note 47, at 18–19.

73. *Id.* at 1–27. See also IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 40–42, 53–54, 67–68 (2016).

also created specifically by white men to appropriate white women's sexuality for themselves at a time when non-indigenous women in the colonies were in short supply and high demand.⁷⁴ Race was created to explain and justify exploitation.

Professor Jacqueline Battalora, in *Birth of a White Nation*, traces the use of law to create whiteness.⁷⁵ In 1640, a Virginia court imposed differential sentences on three indentured servants who escaped from their masters—four additional years of service for the Scot and the Dutchman but service for life for the “negro.”⁷⁶ The Virginia legislature in 1640 also passed a law prohibiting people of African descent from possessing firearms, though “the law appears to have been ignored and unenforced.”⁷⁷ Anti-miscegenation and fornication laws in Maryland and Virginia in 1664 and 1662 respectively “doubled the fine imposed for sexual intimacy outside of marriage when one party was ‘English or Christian’ and the other party was ‘negro.’”⁷⁸

Bacon's Rebellion in 1676, an armed insurrection in which indentured Europeans and indentured Africans literally joined forces, intensified elite fears of the servant class making common cause.⁷⁹ The Maryland legislature doubled down on anti-miscegenation in a law passed in 1681 in which the word “white” first appears in law; the Virginia legislature followed suit in 1691.⁸⁰ The Virginia Slave Codes followed, “link[ing] African-ness with a status of servitude” in contrast to the “parameters and conditions of European labor arrangements of limited bond-servitude [which] were framed by contract law . . . that ensured an agreed-upon termination date”⁸¹

Battalora notes that prior to these laws, “[t]he evidence . . . reveals . . . that European and African laborers shared a common experience of labor and daily life and, within this context, friendships and joint ventures, including marriage among the European and African laborers, were neither uncommon nor met with hostility.”⁸² The whiteness laws, passed by the property-owning and governing class, grew out of a specific economic

74. BATTALORA, *supra* note 47, at 1–27.

75. *Id.* at 15–17.

76. *Id.* at 15–16.

77. *Id.* at 17.

78. *Id.* at 16.

79. *Id.* at 17–20.

80. *Id.* at 21.

81. *Id.* at 34.

82. *Id.* at 32.

and social context in which it benefitted the ruling elites to “divide laborers as a means of social control.”⁸³ “Whiteness,” Battalora concludes, created a label of superiority for “whites” and deviance for others—though “[i]t is worth noting that the laws gave European laborers little more than they had before they were ‘white.’”⁸⁴ The notable exception to this was, according to Battalora, the benefit to “white” men of exclusive access to “white” women through anti-miscegenation laws.⁸⁵

Over time, the label of “white” and the concrete benefits associated with being “white” came to support an ideology of white superiority, which was reinforced by a social structure that provided benefits that attached to whiteness.⁸⁶ The ideology of white superiority was reinforced by a social structure that created disadvantages attaching to non-whiteness.⁸⁷ Race is frequently described as a social construction.⁸⁸ It is, perhaps, more accurate to acknowledge that it was legally constructed.

C. *The System of Racism—Roots and Branches*

Battalora’s description of racism is systemic.⁸⁹ A primary dynamic of systems is feedback loops.⁹⁰ In creating racism, law assigned disadvantage to people not designated white; law also articulated an accompanying ideology of white superiority.⁹¹ Over time, aided at the outset by a substantial push of enforcement,⁹² colonial elites created a feedback loop in which white supremacy ideology reinforced social structure, rendering acceptable and even “natural” a social structure that advantaged people designated white and disadvantaged others. That social structure of advantage and disadvantage, in turn, reinforced white supremacy ideology: People who had been given advantages were better able to marshal the resources necessary for superiority; people without those advantages lost out.⁹³

The history that Battalora offers also reveals the deep relationship between racism, capitalism, and patriarchy.⁹⁴ Racism was useful because

83. *Id.* at 20.

84. *Id.* at 36.

85. *Id.* at 37–41. *See also* KENDI, *supra* note 73, at 40–43.

86. BATTALORA, *supra* note 47, at 46.

87. *See id.* at 43–47.

88. *See, e.g.,* Megan Gannon, *Race is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue/> [https://perma.cc/NMX5-VG4X].

89. *See* BATTALORA, *supra* note 47, at 8–9.

90. *See* MEADOWS, *supra* note 28, at 25–34.

91. *See* BATTALORA, *supra* note 47, at 47–48.

92. *Id.* at 45.

93. *Id.*

94. *See id.* at 43.

it served dual capitalistic purposes.⁹⁵ First, it undermined the solidarity of people who were poor and bound to service, which made economic exploitation of that group easier: Division rendered within-class organizing and resistance more difficult, and it directed antagonism at others within the class rather than at elites.⁹⁶ Second, racism created a group of people whose sole allowable economic role was exploitation, which then came to define their social and political roles as well.⁹⁷

Racism is also integrally related to patriarchy. As Battalora describes, anti-miscegenation statutes in the mid-1600s were the earliest laws to provide for differential treatment based on the characteristic that would become race.⁹⁸ Though written to apply to men and women equally, enforcement of these laws targeted European and English women rather than men.⁹⁹ This skew, along with a shift away from the English common law rule that the status of a child followed that of the father, led to racism evolving early on into a system in which the sexuality of “white” women was limited to “white” men and appropriated as necessary to maintain racial purity.¹⁰⁰ Concurrently, the sexuality of non-“white” women was appropriated for the pleasure of “white” men and for the increase of their economic holdings.¹⁰¹ The sexuality of non-“white” men in this structure was constrained to non-“white” women, and the patriarchal power accorded to men as heads of family at that point in history was decimated.¹⁰² Anticipating Kimberlé Crenshaw’s analysis centuries later,¹⁰³ the history of racism shows that race and gender have intersected to create different experiences and different kinds of oppression for Black women and white women, for Black women and Black men, from its genesis.¹⁰⁴

The essential feedback loop of racism—law and policy reinforce white supremacy ideology, which reinforces law and policy—has evolved over the past three-hundred-plus years. In response to the system of slavery,

95. *Id.*

96. *Id.*

97. *Id.* at 44.

98. *Id.* at 37.

99. *Id.* at 37–38.

100. *Id.* at 38.

101. *Id.* at 38–39.

102. *Id.* at 40–41.

103. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

104. See, e.g., *id.* at 139–40.

resistant enslaved people and abolitionists challenged both white supremacy ideology and the social structure of slavery.¹⁰⁵ Eventually, the Civil War resulted in the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, amendments that on their face abolished slavery and created civil and political rights for African Americans as citizens.¹⁰⁶

But laws alone do not dismantle deep-seated social systems. After Reconstruction's brief attempt at enforcement of a level of racial equality,¹⁰⁷ racism adapted. White supremacy ideology—now increasingly bolstered by theories of eugenics and race-as-biology—re-emerged and gave root to the convict labor system,¹⁰⁸ to sharecropping,¹⁰⁹ to Jim Crow,¹¹⁰ to the domestic terror of lynching,¹¹¹ to American apartheid through restrictive covenants and redlining,¹¹² to the GI Bill for white veterans and racially exclusive unions.¹¹³ In the service of persistent white supremacy ideology, new laws created new social structures of racism.

The Civil Rights Movement that built to the mid-1900s again challenged both white supremacy ideology and the social structures that supported and were supported by it. In response, United States judicial law for the first time in *Brown v. Board of Education* issued a declaration of legal racial equality¹¹⁴—a high-profile statement of a national story that offered a significant rebuke to white supremacy ideology. United States law, in the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968, also enacted substantial revisions to the

105. See *The African American Odyssey: A Quest for Full Citizenship Abolition, Anti-Slavery Movements, and the Rise of the Sectional Controversy*, LIBR. OF CONG., <https://www.loc.gov/exhibits/african-american-odyssey/abolition.html> [<https://perma.cc/RB2B-TP6T>].

106. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

107. See *The African American Odyssey: A Quest for Full Citizenship Reconstruction and its Aftermath*, *supra* note 105.

108. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 53 (2008).

109. See *Sharecropping*, BRITANNICA, <https://www.britannica.com/topic/sharecropping> [<https://perma.cc/2WE4-UY4W>].

110. See *Jim Crow law*, BRITANNICA, <https://www.britannica.com/event/Jim-Crow-law> [<https://perma.cc/W5TA-VCSU>].

111. See *generally* EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017).

112. See *generally* RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

113. See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 4–5, 114 (2005).

114. Strand, *supra* note 9, at 288–89.

racial social structure in terms of access to both the benefits of American prosperity and voice in the political process.¹¹⁵

But, once again, laws alone do not dismantle deep-seated social systems. Once again, racism adapted—now operating through indirection though still via law.¹¹⁶ As African Americans and other people of color gained access to traditionally white spaces and resources, government commitment to investing in public goods and prosperity for working- and middle-class citizens declined.¹¹⁷ Mass incarceration, the “New Jim Crow,” provided a new vehicle for restricting the liberty of a disproportionate number of African Americans, especially men.¹¹⁸ And a new iteration of divide-and-conquer politics, fueled by dog whistle appeals to white racial anxiety in what law professor Ian Haney López terms “strategic racism,” enriched elites and weakened government overall.¹¹⁹

This reincarnation of a very old United States political strategy resulted in disinvestment in the lives of ordinary Americans and led not only to renewed disadvantage for citizens of color but also to compromised health and well-being for non-elite white citizens.¹²⁰ “Deaths of Despair”¹²¹ and “Dying of Whiteness”¹²² document the negative effects of today’s strategic racism on white citizens in life expectancy and other measures of well-being. This divide-and-conquer strategy overall has also drawn the nation into forgoing what former Demos president Heather McGhee has termed the “solidarity dividend”—the investment in public goods and human well-being and opportunity that would be obtainable if members of the working and middle classes of all races were to join political forces vis-à-vis elites.¹²³

115. Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7 (1964); Voting Rights Act of 1965, 52 U.S.C. § 10101 (1965); Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (1968).

116. Strand & Mirkay, *supra* note 11, at 291–96.

117. *Id.*

118. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

119. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 35–53 (2014).

120. *Id.*

121. See generally ANNE CASE & ANGUS DEATON, *DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM* (2020).

122. See generally JONATHAN M. METZL, *DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA’S HEARTLAND* (2019).

123. HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* 269 (2021).

III. THE 3 D'S OF LAW AND SYSTEMIC RACISM: ANTIDISCRIMINATION LAW IS DEFICIENT, DISTRACTING, AND DISINGENUOUS

Law is the backbone of our social structure. Law is the enacted and codified framework that constitutes our articulated collective story. As it did four centuries ago, law captures and communicates our ideology of race; law also affects and effects the social structures of continuing racism. Overall, law created and continues to maintain the system that is racism. It accomplishes this today while concurrently professing to be committed to opposing and dismantling racial inequality.

A. Law Averts Its Gaze from the System-ness of Racism: Law is Deficient

Law's role vis-à-vis racism is, in part, like the enabler of an addict. Though the evidence is apparent to everyone, the enabler studiously averts their eyes. The hallmark of this role is the choice to not name, not acknowledge, and not know.¹²⁴

In earlier work, I described the discrepancy between current manifestations of racism and the legal remedies available in cases of racial discrimination.¹²⁵ Racism frequently appears today as "patterns of racial disparity . . . racially disparate outcomes in education, health, economic resources, housing, and employment."¹²⁶ These social patterns confirm the continuity of the core function of the system of racism: Populations of people designated white experience advantage in the form of overall better outcomes, while other populations experience disadvantage in the form of overall worse outcomes.¹²⁷

Because these outcomes occur in populations, the etiology of a specific individual harm is difficult to ascertain. Did this particular white-designated person achieve educational success because of group advantage or because of their individual attributes? Did this particular Black mother die as a result of group disadvantage, or was there something idiosyncratic about her situation? Even if we know the patterns of advantage and disadvantage, it is almost impossible to disentangle the threads of causation

124. See, e.g., CHARLES W. MILLS, *THE RACIAL CONTRACT* 18 (1997) ("[O]n matters related to race, the Racial Contract prescribes for its signatories an inverted epistemology, an epistemology of ignorance, a particular pattern of localized and global cognitive dysfunctions (which are psychologically and socially functional), producing the ironic outcome that whites will in general be unable to understand the world they themselves have made.")

125. Strand, *Racism 4.0*, *supra* note 16, at 765–71.

126. *Id.* at 767–68.

127. See *id.* at 765–69.

when a wide range of interactions and factors combine to result in better or worse outcomes for specific individuals.¹²⁸

A multiplicity of causal factors also complicates determinations of responsibility. The concrete harms of structural injustice emerge from a system comprised of the interactions of many individuals in dynamic relationships and processes.¹²⁹ “Though stark, these patterns [of racial advantage and disadvantage] generally do not result from explicit or intentional racial discrimination. Nor are they the product of specific identifiable policies.”¹³⁰ Racial disparities often “occur[] without any wrongdoing on the part of the multiple individuals whose actions together create [them].”¹³¹

A lack of invidious intent, of wrongdoing, of guilt serves as an additional disconnect between the injuries and injustices of systemic racism and law’s remedial reach. Within a system of structural injustice, individuals often act in ways that contribute to disparate outcomes without intending harm.¹³² They may not even be aware that harm is occurring. Or they may intend a distribution of benefits without focusing on how partial distribution of benefits—a distribution that consistently advantages members of one group while members of another group lack access to benefits—effectively creates disadvantage. Though “disparate impact” makes an appearance from time to time in anti-discrimination jurisprudence, the core of that jurisprudence is intent.¹³³

All of these characteristics of how racism operates are characteristics of racism as a system. The etiology of injury is difficult to ascertain because systems operate in a non-linear fashion. The causation of harm is difficult to ascertain because systems operate interactively. And the intent to injure may be lacking because individuals in systems tend to focus on immediate incentives rather than eventual system-level outcomes.

Yet the core of anti-discrimination law—which is rooted in the underlying common law of tort and criminal law that regulate situations in which a person is harmed—consists of readily identifiable action by

128. Cf. Palma J. Strand, Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 583–84 (1983) (describing disconnect between causation of toxic torts and traditional tort liability).

129. See Strand, *Invisible Hands*, *supra* note 10, at 163.

130. Strand, *Racism 4.0*, *supra* note 16, at 767–68.

131. Strand, *Invisible Hands*, *supra* note 10, at 163.

132. See generally *id.*

133. See *id.* at 156.

one person in which injury is directly and observably caused to another person, and in which the intent of the person causing the harm is the primary determinant of whether law mandates remedial action.¹³⁴ Anti-discrimination law hews to common-law habits of linearity and the centering of individualized harm and intent. The results of systemic racism, precisely “[b]ecause of their systemic and non-individual character, . . . lie beyond the reach of current anti-discrimination law.”¹³⁵

When it comes to dismantling systemic racism, law is deficient.

B. Law Obscures a Systems Story About Racism: Law is Distracting

Current anti-discrimination law’s sounding in traditional common law and in Equal Protection inhibits the growth of a systems-based understanding of—a systems-based *story* about—racism. Systems thinker David Peter Stroh identifies “systems stories” as a foundational step in systems change: Such stories bring together “the contributions of all participants to the solution, an explanation of why their independent efforts fell short, and insights into what they could do more effectively given limited resources and an urgent need for change.”¹³⁶ Systems stories, which are best generated through people situated in different parts of a system sharing their various perspectives and experiences,¹³⁷ offer the individual members of a system an awareness of the system as a whole. Referring back to the metaphor with which I began this essay, a metaphor that Stroh also highlights, systems stories provide “an initial picture of ‘the elephant.’”¹³⁸ Systems stories bring the entire elephant into the frame.

According to Stroh, systems stories are the pathway to truly comprehending the structure of a system: “the many circular, interdependent, and sometimes time-delayed relationships among its parts.”¹³⁹ Yet human attention gravitates less to the longer-term system as a whole and more to individual and short-term events: “[People] want to know what is happening so that they can react quickly to the crisis at hand.”¹⁴⁰ This focus is completely understandable from a psychological perspective: People are agents within our social systems, and as individuals we perceive, act, and react at the interpersonal scale and the immediate time frame.¹⁴¹

134. See Strand, *Racism 4.0*, *supra* note 16, at 779.

135. *Id.* at 768.

136. STROH, *supra* note 6, at 30.

137. *Id.* at 32–35.

138. *Id.* at 36.

139. *Id.* at 38.

140. *Id.* at 36.

141. See *id.* at 36.

When it comes to systems stories of racism, law falls short. I am writing these words the day after a Minnesota jury found former police officer Derek Chauvin guilty of second-degree murder, third-degree murder, and second-degree manslaughter in the death of George Floyd on May 25, 2020.¹⁴² A video of Chauvin kneeling on Floyd's neck and of Floyd's final minutes and his death documented the homicide for anyone to see.¹⁴³

Floyd's death came only a few months into the COVID-19 pandemic.¹⁴⁴ At that point, the nation was already becoming aware of the disproportionate vulnerability of people of color to exposure to the disease and to dying of the disease. People of color were more likely to be "essential workers" who could not work remotely, more likely to live in less crowded or precarious housing, more likely to have pre-existing medical conditions, and more likely to lack adequate health insurance and care once the disease had been contracted.¹⁴⁵ The pandemic made systemic racism evident to the public as a whole and brought the language of "systemic racism" to the center of the public conversation.¹⁴⁶

The homicide of George Floyd, added to a long list of many deaths of unarmed Black citizens at the hands of law enforcement and others, sparked Black Lives Matter protests around the nation and around the world.¹⁴⁷ Against the background of the systemic racism that the pandemic made apparent, the frame for these protests was not simply about George Floyd. The frame was systemic racism in law enforcement and in the criminal justice system generally.¹⁴⁸ These protests transformed George

142. Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR (Apr. 20, 2021, 5:37 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial> [https://perma.cc/K8RQ-G8KX].

143. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/video/us/100000007159353/george-floyd-arrest-death-video.html> [https://perma.cc/E5CB-5PT5].

144. See Iris Halpern, *"I Can't Breathe": What the Coronavirus Pandemic and George Floyd Protests Have Taught Us About Race*, 1891 CWBA (Jan. 22, 2021), <https://www.the1891-cwba.org/post/i-can-t-breathe-what-the-coronavirus-pandemic-and-george-floyd-protests-have-taught-us-about-race> [https://perma.cc/SEM5-PQYS].

145. *Id.*

146. *Id.*

147. See *Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020, 3:22 PM), <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html> [https://perma.cc/XVK8-9P7T].

148. Halpern, *supra* note 144.

Floyd’s plea—“I can’t breathe”—into a statement of Black Americans’ experience of systemic racism generally.¹⁴⁹

The conviction of Derek Chauvin for the murder of George Floyd is emblematic of law’s story about racism. An individual white person, acting with intent, caused grievous injury to an individual Black person. Against the background of other Black individuals dying at the hands of other white individuals who are not convicted of any crime, this feels like justice. And yet Chauvin’s conviction, paradoxically, reinforces an individualistic “bad apples” story about police.¹⁵⁰

Comedian and social commentator Trevor Noah asks, “Where are the good apples?”¹⁵¹ Derek Chauvin was accused, tried, and convicted, but there were other police at the scene of George Floyd’s murder.¹⁵² Why did those other police officers not intervene? Why did they not stop Chauvin? Where were the “good apples” on that Minneapolis street corner on May 25, 2020?¹⁵³

Noah’s response is that police officers do not intervene because they know that the system is working the way it is designed to work.¹⁵⁴ Our system of policing, which is part of our criminal justice system, is designed to keep poor people down, which in the United States means keeping Black people down.¹⁵⁵ And the focus on apples, good and bad, draws our attention away from the fact that the tree producing the apples is rotten. Law reinforces stories about apples and in doing so draws attention away from stories about the tree.

One way to offer a skewed or incomplete description of a system is to spotlight one aspect of it—say, the tail of an elephant or the apples on a tree. Another way is to obscure the whole. What I referred to in an earlier essay as anti-discrimination law’s “[d]etermined ahistoricism”¹⁵⁶ performs this function with respect to racism as a system.

The United States Supreme Court’s jurisprudence around affirmative action and other remedial racial policies brackets—sets aside as irrelevant—

149. See *id.*

150. See Noah, *supra* note 23.

151. *Id.*

152. Daniella Silva, *What Derek Chauvin’s Conviction Means for Other Former Officers Charged in George Floyd’s Killing*, NBC NEWS (Apr. 21, 2021, 2:53 PM), <https://www.nbcnews.com/news/us-news/what-derek-chauvin-s-conviction-means-other-former-officers-charged-n1264875> [<https://perma.cc/2NL6-XYVZ>].

153. See *id.*

154. Noah, *supra* note 23.

155. Elizabeth Kai Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. (May 2018), <https://www.vera.org/publications/for-the-record-unjust-burden> [<https://perma.cc/EL59-E8P4>].

156. Strand, *Racism 4.0*, *supra* note 16, at 770.

the nation's racial history. Entertaining claims of discrimination by white plaintiffs on the basis of race requires studiously ignoring the historical context in which these claims arise. Recognizing reverse discrimination against whites in education¹⁵⁷ and employment¹⁵⁸ requires looking away from the exclusive access that white-designated citizens historically enjoyed to these and other forms of government largesse.¹⁵⁹ Overall, by endorsing a stance of colorblindness, courts look past the still-potent history of racialized decisions to an as-yet-to-arrive future. This hostility toward legislative enactments that respond to the history of racism in the United States was particularly evident in *Shelby County v. Holder*,¹⁶⁰ in which the Court struck down on non-textual constitutional grounds the preclearance provisions of the Voting Rights Act of 1965 by airily invalidating the congressional findings on which those provisions stood.

In part, the Court dismisses racism's history, which aligns with its failure to see racism as a system, out of its own institutional limitations. The Court, for all of its lofty role of constitutional explication, is still a court. The Minnesota court that convicted Derek Chauvin had no capacity to bring systemic racism in law enforcement to trial or to offer a remedy for that systemic racism. Similarly, the Supreme Court's purview is procedurally limited; the Court has only the power to say—in a specific disagreement between two parties—who wins and who loses. When asked upon his confirmation to the Court what he thought its role is, Justice Byron White said, "To decide cases."¹⁶¹ And yet we have ceded to the Supreme Court, with its constrained—even constipated—institutional role and voice, the status of chief raconteur of our core stories about what our responsibilities are to each other vis-à-vis racism and race.

157. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

158. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

159. See Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 584 (2014).

160. *Shelby Cnty. v. Holder*, 570 U.S. 529, 530, 556–57 (2013).

161. Charles Lane & Bart Barnes, *Longtime Justice Byron White Dies*, WASH. POST (Apr. 16, 2012), <https://www.washingtonpost.com/archive/politics/2002/04/16/longtime-justice-byron-white-dies/a5c2335a-81d8-4eb4-8696-1cc061a8b9f0/> [https://perma.cc/K76B-LLMT].

Stroh observes that “the system behaves the way it does in part because people are trying to prove that their assumptions are true and to achieve certain goals that they might not even be aware of or acknowledge.”¹⁶² Judicially-declared constitutional law continually feeds us a story that denies the system-ness of racism by over and over zooming in to focus on the micro while concurrently disregarding and discounting the story of the macro.

When it comes to acknowledging systemic racism, law is distracting.

*C. Law Leaves the System Purpose of Racism Undisturbed:
Law is Disingenuous*

The United States Constitution does not affirmatively provide a right to vote.¹⁶³ The various constitutional amendments that have expanded voting rights are framed in the negative: The federal and state governments are prohibited from denying citizens the right to vote based on “race, color, or previous condition of servitude” (the Fifteenth Amendment);¹⁶⁴ “sex” (the Nineteenth Amendment);¹⁶⁵ “failure to pay any poll tax or other tax” (the Twenty-Fourth Amendment);¹⁶⁶ or “age” for citizens 18 years and older (the Twenty-Sixth Amendment).¹⁶⁷ Within these explicit boundaries, the Supreme Court cases that established the one-person, one-vote rule for legislative apportionment¹⁶⁸ and have since provided other constitutional parameters for electoral fairness rest on the Equal Protection Clause of the Fourteenth Amendment.¹⁶⁹

The Equal Protection Clause has also been the basis for constitutional protections of fairness in education,¹⁷⁰ in other government benefits,¹⁷¹

162. STROH, *supra* note 6, at 66.

163. Jonathan Soros, *The Missing Right: A Constitutional Right to Vote*, DEMOCRACY (2013), <https://democracyjournal.org/magazine/28/the-missing-right-a-constitutional-right-to-vote/> [<https://perma.cc/WQZ5-JAWS>]; see also *We Need an Explicit Constitutional Right to Vote*, RIGHT TO VOTE AMEND., www.righttovoteamendment.com [<https://perma.cc/MC6N-MCH2>].

164. U.S. CONST. amend. XV, § 1.

165. U.S. CONST. amend. XIX.

166. U.S. CONST. amend. XXIV, § 1.

167. U.S. CONST. amend. XXVI, § 1.

168. *Reynolds v. Sims*, 377 U.S. 533, 533–34 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 1–2 (1964); *Avery v. Midland Cnty.*, 390 U.S. 474 (1968).

169. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking poll tax); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (invalidating requirement of property ownership); *White v. Regester*, 422 U.S. 935, 935–36 (1975) (invalidating state districts as diluting minority vote).

170. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Plyler v. Doe*, 457 U.S. 202 (1982).

171. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015).

and in housing.¹⁷² As with the right to vote, there is no explicit constitutional right to education¹⁷³—or to housing, health care, or employment.¹⁷⁴ The primary legal strategy for addressing racial inequalities has been to mandate equal treatment rather than equal outcomes. More fundamentally, the legal focus on equality has diverted attention from the fact that the government benefits that serve as the benchmark are often far from generous.

In the United States, substantive rights to the essentials of life are notable for their absence. The Thirteenth Amendment bars “slavery and involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted,” which protects only a minimum degree of liberty.¹⁷⁵ In 1873, the Fourteenth Amendment’s Privileges and Immunities Clause, which by its language promises affirmative rights and protections, was eviscerated by the Supreme Court.¹⁷⁶ Nor has the United States ratified the International Covenant for Social, Economic, and Cultural Rights, which would provide such affirmative rights.¹⁷⁷

With respect to taking a systems perspective on racism and race, the heavy reliance on Equal Protection—on equal treatment rather than on substantive rights or equity—reveals that the underlying purpose or function of the political, economic, and social system that is the United States was only partially transformed by the Civil War and the Amendments that followed it, as they have been interpreted and applied. We are accustomed to revering the Equal Protection Clause because of the incremental changes it has enforced: We see the Equal Protection glass as half full.¹⁷⁸ But equality does not amount to much when equality only brings people to a minimal level of benefit—substandard education, inadequate housing, unavailable health care, non-living-wage employment, lack of

172. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 432–33 (1985).

173. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 1–2 (1973).

174. See Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 372 (2006).

175. U.S. CONST. amend. XIII, § 1. This exception grounded extensive post-Civil War involuntary servitude through the legal device of convict labor. See Blackmon, *supra* note 108. This exception carries through to today’s mass incarceration practices. See 13TH (Kandoo Films 2016).

176. *Slaughter-House Cases*, 83 U.S. 36 (1873).

177. See Strand, *Racism 4.0*, *supra* note 16, at 792–95.

178. See *id.* at 793.

support for an infrastructure of care. The Equal Protection glass is also half empty.

As described above, the system of racism, an integral part of the social system that is the United States, was created by elites for the purposes of exploitation of others and enrichment of themselves through a divide-and-conquer strategy vis-à-vis non-elites.¹⁷⁹ This system led to poor designated-white people acquiescing in their own exploitation and class disadvantage because of their racialized interest in whiteness: No matter how poor or exploited, their status would be above Black, indigenous, and other people of color.¹⁸⁰ The strategy of using Equal Protection to counter racial disadvantage removed the status advantage of whiteness without offering in exchange a benefit in the form of actual material improvements. Moreover, the prospect of investing in people not designated white has been used consistently to marshal support for a lack of investment in all non-elites.¹⁸¹ The Equal Protection approach has the effect of creating a disadvantage to whites without what would be a corresponding offset—a share in the “solidarity dividend” described above.¹⁸²

Sociologist Arlie Hochschild describes a “deep story” of non-elite whites, a perception of their social, economic, and political reality.¹⁸³ “You are patiently standing in a long line leading up a hill, as in a pilgrimage. You are situated in the middle of this line, along with others who are also white, older, Christian, and predominantly male, some with college degrees, some not.”¹⁸⁴ As these people stand in line for the American Dream, others cut in front of them: “Blacks, women, immigrants, refugees, brown pelicans—all have cut ahead of you in line . . . You feel betrayed.”¹⁸⁵

Standing in line, forming a queue, happens in conditions of scarcity. Scarcity for non-elites in the United States, a monumentally prosperous nation,¹⁸⁶ occurs in conditions of economic inequality such as the increasing inequality the nation has experienced since around 1980.¹⁸⁷ Instead of investing in education, housing, health care, a living wage, and

179. BATTALORA, *supra* note 47, at 46.

180. *See id.* at 44. *See also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

181. *See, e.g.*, LÓPEZ, *supra* note 119, at 169–89; MCGHEE, *supra* note 123, at 17–65.

182. MCGHEE, *supra* note 123, at 255.

183. ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* 136 (2016).

184. *Id.*

185. *Id.* at 139–40.

186. Guy Sorman, *A Brief History of American Prosperity*, CITY J. (2012), https://www.city-journal.org/html/brief-history-american-prosperity-13510.html?wallit_nosession=1 [<https://perma.cc/2Z3Q-Y23G>].

187. *See* LOPEZ, *supra* note 119, at 2–3.

an infrastructure of care—as well as other infrastructure—we have invested in making the rich richer.¹⁸⁸ This has been enabled by what Ian Haney López describes as anti-government “dog whistle politics”: politics that set racial anxiety—the change in relative racial status that resulted from *Brown* and the great civil rights legislation of the 1960s—against a government that supports “them” rather than “us” and should therefore be starved and minimized.¹⁸⁹ Parsimonious policies lead to fewer public goods, greater anxiety, and more anti-government sentiment—a vicious cycle.

The throughline of the American *system* of racism has not changed. The purpose continues to be racial divide-and-conquer for exploitation and enrichment by elites. Equal Protection jurisprudence condemns racial inequality, at least in treatment by the government, but it does little to transform the continuation of the background conditions of exploitation that make racism so useful to economic elites.¹⁹⁰

This throughline persists despite anti-discrimination law’s condemnation of racial inequality. Because racial inequality does not address the fundamental system purpose, racial divide-and-conquer generates new legal and institutional structures for churning out racial disparities.

When it comes to countering the purpose of systemic racism, law is disingenuous.

IV. TRANSFORMING AND TRANSFORMATIVE SYSTEMS STORIES

We need systems stories in order to dismantle and transform racism. The predominant stories that law offers are deficient, distracting, and disingenuous. Questions arise: How can we locate and lift up non-law processes that have the potential capacity to create and share the systems stories that we need? Conversely, how can we bring law’s focus and power to the task of naming and dismantling racism?

188. See *id.* at 30, 75.

189. *Id.* at 171.

190. Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html> [https://perma.cc/Y86B-UAXB].

A. Systems Stories of Racism

Systems stories emerge from the sharing of many different stories, woven together into a collective story.¹⁹¹ Historians, poets, artists, politicians, quilters, singers, musicians, novelists, essayists, preachers, journalists, activists, and more—our voices all contribute to a systems story about racism. These individual stories alert us to the magnitude and texture of the system: They reveal the different parts of the elephant and remind us of the tree on which apples grow.

With systems stories, metaphors help us grasp both our micro experiences and the macro that is the entire system. The metaphors of the Indian elephant and Trevor Noah's tree both situate individuals within a diversified whole. Similarly, the Racial Equity Institute uses a groundwater metaphor for systemic racism: When you encounter dead fish in multiple lakes, look to the groundwater that connects them for the source of the problem.¹⁹² These metaphors offer organic images and webs of interconnection; they bring systems into our frame.

In law and politics, a familiar metaphor is the social contract.¹⁹³ The metaphor of a social contract is especially resonant when we have actual written documents—the Declaration of Independence, the United States Constitution, and the state constitutions—that ground the United States and our governments. These documents proclaim “Life, Liberty, and the pursuit of Happiness.”¹⁹⁴ They invoke “We the People.”¹⁹⁵ They promise rights and a “Republican Form of Government.”¹⁹⁶ The social contract evoked is one of democracy—of popular control and equality.¹⁹⁷

Philosopher Charles Mills reminds us of a deeper, pre-existing social contract: the “racial contract.”¹⁹⁸ According to Mills, “The Racial Contract is political, moral and epistemological, the Racial Contract is real, and

191. See Strand, *supra* note 53, at 620–26 (citing R. KEITH SAWYER, *SOCIAL EMERGENCE: SOCIETIES AS COMPLEX SYSTEMS* (2005)).

192. BAYARD LOVE & DEENA HAYES-GREENE, *RACIAL EQUITY INST., THE GROUNDWATER APPROACH: BUILDING A PRACTICAL UNDERSTANDING OF STRUCTURAL RACISM* (2018).

193. MILLS, *supra* note 124, at 9.

194. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

195. U.S. CONST. pmbl.

196. *Id.* art. IV, § 4.

197. Strand, *supra* note 9, at 289–90.

198. MILLS, *supra* note 124, at 5 (“I use [the term “Racial Contract”] not merely normatively, to generate judgments about social justice and injustice, but descriptively, to *explain* the actual genesis of the society and the state, the way society is structured, the way government functions, and people’s moral psychology.”). Cf. CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988) (discussing similar concept vis-à-vis gender).

economically, in determining who gets what, the Racial Contract is an exploitation contract.”¹⁹⁹ Mills observes:

Although no single act literally corresponds to the drawing up and signing of a contract, there is a series of acts—papal bulls and other theological pronouncements; European discussions about colonialism, “discovery,” and international law; pacts, treaties, and legal decisions; academic and popular debates about the humanity of nonwhites; the establishment of formalized legal structures of differential treatment; and the routinization of informal illegal or quasi-legal practices effectively sanctioned by the complicity of silence and government failure to intervene and punish perpetrators—which collectively can be seen, not just metaphorically but close to literally, as its conceptual, juridical, and normative equivalent.²⁰⁰

The Racial Contract as described by Mills is nothing less than the sweep of the historical domination of much of the world by Europeans and people of European descent—domination that was and is justified by and embodied in law.

Both the aspirational democratic social contract and the Racial Contract offer systems stories—“mental models”—about who we are and how we are to be with each other.²⁰¹ And, in fact, though these *systems*—democracy and racism—are in tension, telling both of these *systems stories* is important: If inclusive democracy is an aspiration toward which we seek to move, telling and understanding the reality of a systems story of racism can help move us forward.²⁰²

Counter-systems-stories, however, can be used to resist. Re-entrenchment, for example, may rest on a claim that democracy has already been achieved and in fact is now being undermined by the anti-racist project of telling the systems story of racism. This alternative story resists movement away from systemic racism; it resists movement toward inclusion. In this story, the howdah of racism has already been removed from the elephant of democracy.

199. MILLS, *supra* note 124, at 9.

200. *Id.* at 20–21.

201. Katie King, *Shifting My Mental Model: Systems Thinking in Action*, KNOWLEDGE WORKS (Oct. 26, 2020), <https://knowledgeworks.org/resources/shifting-mental-model-systems-thinking-action/> [https://perma.cc/SC6S-XE83].

202. *Transcript: Ezra Klein Interviews Ta-Nehisi Coates and Nikole Hannah-Jones*, N.Y. TIMES (July 30, 2021), <https://www.nytimes.com/2021/07/30/podcasts/transcript-ezra-klein-interviews-ta-nehisi-coates-and-nikole-hannah-jones.html> [https://perma.cc/9D95-REVP].

In clashes between stories about racism and democracy, law is often contested territory. I offer two examples from my own experience.

Example #1: The project by the Equal Justice Initiative (EJI) to commemorate lynchings throughout the United States reaches toward systems stories of racism. At EJI's National Memorial for Peace and Justice in Montgomery, Alabama, labeled jars of soil collected from the places where lynchings occurred sit in rows.²⁰³ Metal canisters the size and shape of human coffins engraved with the names of lynching victims are suspended from above like hanging bodies.²⁰⁴ There are over 800 canisters²⁰⁵—one for each United States county where documented lynchings of African Americans occurred. The project invites people and communities in those counties into a story-telling process about their local histories, about the lynchings that occurred and about the racism, past and present, of which those lynchings were a symptom.²⁰⁶ These local systems story-telling processes, including one in Omaha that I helped to organize,²⁰⁷ generate local systems stories about racism that are nested within the overarching systems story about racism that EJI is weaving.

Example #2: In the Fair Housing Act of 1968, Congress included a provision requiring the federal government to Affirmatively Further Fair Housing (AFFH).²⁰⁸ This provision recognized the federal government's intentional and active racial discrimination in the provision of housing through redlining and other practices conducted over decades in the twentieth century.²⁰⁹ In 2015, the U.S. Department of Housing and Urban Development (HUD) issued new regulations to strengthen implementation of the AFFH provision.²¹⁰ These regulations called for local communities receiving HUD funds to assess fair housing by examining local patterns of racial segregation and differential access to opportunity, and to take

203. EQUAL JUST. INITIATIVE, COMMUNITY REMEMBRANCE PROJECT CATALOG: A NEW COMMITMENT TO TRUTH AND JUSTICE 79.

204. *A New Tabernacle: Remembering Lynching in Montgomery Alabama*, MICH. STATE UNIV. MUSEUM (Aug. 22, 2018), <https://www.museum.msu.edu/a-new-tabernacle-remembering-lynching-in-montgomery-alabama> [<https://perma.cc/6GJ2-5ZH5>].

205. *Id.*

206. *Id.* at 6.

207. Palma Joy Strand, *Truth and Reconciliation Through Dialogue and Deliberation: Reflections from a Racially Divided America*, DELIBERATIVE DEMOCRACY DIG. (Dec. 18, 2020), <https://www.publicdeliberation.net/truth-and-reconciliation-through-dialogue-and-deliberation-reflections-from-a-racially-divided-america/> [<https://perma.cc/D995-Q3EW>].

208. *Affirmatively Furthering Fair Housing (AFFH)*, NAT'L FAIR HOUS. ALL., <https://nationalfairhousing.org/affh/> [<https://perma.cc/67JT-WV4V>].

209. Strand, *Mirror, Mirror*, *supra* note 10, at 189–94.

210. NAT'L FAIR HOUS. ALL., *supra* note 208.

measures to move toward equity.²¹¹ Rather than mandating particular actions or remedies, the regulations called for community reflection, deliberation, and generation of options for taking action.²¹² In Omaha, these regulations helped to spur continuing local systems story work around housing opportunity and equity,²¹³ even after the regulations were suspended and eventually rescinded.²¹⁴

The systems stories of racism in lynching and housing are contested—and law reflects that. With respect to lynching, journalist and activist Ida B. Wells protested lynching and led an anti-lynching campaign early in the twentieth century.²¹⁵ Further, a bill to make lynching a federal crime was introduced in Congress in 1918.²¹⁶ Anti-lynching legislation, however, has yet to be enacted into law by Congress, though the Emmett Till Anti-Lynching Act was introduced in 2019 and re-introduced in 2021.²¹⁷ The work of the Equal Justice Initiative, which carries Wells's anti-lynching crusade forward, offers a systems story of lynching as a manifestation of racism that we need to acknowledge and eradicate.²¹⁸ Yet the anti-racism political and social grounding for enacting law based on that systems story does not yet exist.

With respect to housing, the Fair Housing Act enacted the AFFH mandate for the federal government into law in 1968.²¹⁹ And yet the 2015 regulations promulgated by HUD to address segregated housing and racialized access to opportunity by neighborhood were first suspended in

211. See *Furthering Fair Housing*, NAT'L FAIR HOUS. ALL., <https://nationalfairhousing.org/affirmatively-furthering-fair-housing/> [<https://perma.cc/6V6W-FH8E>].

212. See Strand, *Mirror, Mirror*, *supra* note 10, at 194–98.

213. Strand, *Invisible Hands*, *supra* note 10, at 171–78.

214. See *infra* notes 220–21 and accompanying text.

215. See Sarah L. Silkey, *Ida B. Wells Won the Pulitzer. Here's Why That Matters.*, WASH. POST (May 7, 2020), <https://www.washingtonpost.com/outlook/2020/05/07/ida-b-wells-won-pulitzer-heres-why-that-matters/> [<https://perma.cc/4RJY-NQGV>].

216. *Dyer Anti-Lynching Bill*, NAACP (2021), <https://naacp.org/find-resources/history-explained/legislative-milestones/dyer-anti-lynching-bill> [<https://perma.cc/6E6R-VAT5>].

217. See Nicholas Fandos, *Frustration and Fury as Rand Paul Holds Up Anti-Lynching Bill in Senate*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/us/politics/rand-paul-anti-lynching-bill-senate.html> [<https://perma.cc/BMH9-NRWH>]; Emmett Till Antilynching Act, H.R. 55, 117th Cong. (2021).

218. EQUAL JUST. INITIATIVE, *supra* note 111.

219. See NAT'L FAIR HOUS. ALL., *supra* note 208.

2018,²²⁰ then terminated in 2020,²²¹ and then re-instated in 2021.²²² Over a half-century later, the popular resonance of the law that is AFFH remains unsettled.²²³ The Fair Housing Act and the 2015 AFFH regulations offered a systems story about unequal access to housing and neighborhoods of opportunity as a manifestation of racism that we need to acknowledge and eradicate. Yet a firm political and social grounding for that systems story to provide the basis for concerted anti-racist legal action does not yet exist.

These emergent systems stories reflect the complexity, historical grounding, and decentered nature of systemic racism. Lynching and other forms of physical violence against Black citizens and other people of color take place person-to-person. Though the specter of law is always present, law generally acts after the fact. Instigators of violence are prosecuted—or not. Access to habitable housing in neighborhoods of opportunity emerges from myriad decisions and interactions by various government officials at various levels and private actors acting individually and through corporations—all within a framework of laws related to zoning, inheritance, school boundaries, taxation and tax expenditures, employment opportunities, policing, and more.²²⁴

The emergent systems stories about racism generated in these two examples seem to be speaking almost a different language from the stories about racism in judicially-articulated anti-discrimination law. These emergent systems stories coalesce multiple voices; they focus on the collective, the historical, and the long-term; they look for complexity, nuance, and relationships. Rather than putting the elephant's tail under a magnifying glass, they seek to sketch the elephant, or at least large parts of the elephant. These systems stories zoom out from individual apples for a view of the entire tree. When they see dead fish, they look to the groundwater.

220. See Strand, *Invisible Hands*, *supra* note 10, at 159.

221. See Ashraf Khalil, *What the End of Obama Housing Rule Means for American Suburbs*, CHRISTIAN SCI. MONITOR (July 24, 2020), <https://www.csmonitor.com/USA/Politics/2020/0724/What-the-end-of-Obama-housing-rule-means-for-American-suburbs> [<https://perma.cc/R65S-Q95F>].

222. See *Biden Administration Reinstates Obama-Era AFFH Regulations*, NAT'L MULTIFAMILY HOUS. COUNCIL (June 17, 2021), <https://www.nmhc.org/news/nmhc-news/2021/biden-administration-reinstates-obama-era-affh-regulations/> [<https://perma.cc/A8CA-FXPN>].

223. See Olatunde C.A. Johnson, *AFFH and the Challenge of Reparations in the Administrative State*, REGUL. REV. (Oct. 26, 2020), <https://www.theregreview.org/2020/10/26/johnson-affh-challenge-reparations-administrative-state/> [<https://perma.cc/EZT4-2ZGP>].

224. See generally DAVID DANTE TROUTT, *THE PRICE OF PARADISE: THE COSTS OF INEQUALITY AND A VISION FOR A MORE EQUITABLE AMERICA* (2013) (summarizing how U.S. communities have been organized to create opportunity for some and deny opportunity to others).

Bringing in yet another systems metaphor, we can think of racism as a house.²²⁵ The foundation, floor, walls, and roof are structural racism—solid, long-term, generally built to last. The plumbing, electrical wiring, and HVAC are institutional racism—they create the conditions that we live in on an everyday basis. The furniture and rugs, shelves and drawers, are interpersonal racism—we interact with them in an improvisational way every day, and we move them around periodically. And the clothes in our closet, the throw pillows, the books on the shelves, these are internalized racism—aspects of our personalities and identities, the way we express and shape ourselves. Like the other racism metaphors, this one highlights the multiple levels of the system and the multiple ways and contexts in which we interact with it. Unlike the other racism metaphors, the house metaphor locates us inside the system—experiencing and also applying and using the various aspects of it.

This is the house that law built. Today, however, law concerns itself only with certain limited aspects of the house—perhaps the alignment of the walls, sometimes the plumbing, maybe adding a wireless network. Law disclaims responsibility, however, for the house's provenance and its faulty foundation; law disdains the missing stair tread, and it has no interest in peeling paint. Law overlooks crucial parts of racism and does not address the system as a whole.

C. Coalescing Civity Systems Stories to Crowd Out Racism

The lynching and housing-based systems stories of racism described above are emerging and were designed to emerge from community-based relational and collaborative processes.²²⁶ These processes seek to engage a broad range of people affected by historical and current events and policies. They encourage different voices and cross-cutting interactions.

Systems practitioner Stroh identifies three key strategies for constructing systems stories: engage key stakeholders and elicit their stories and concerns; establish common ground in terms of shared reality and direction; and build collaborative capacity so that people can hear each other's stories and work with one another.²²⁷ Iris Marion Young calls this kind of shared

225. I am indebted to Michele Chang, my co-facilitator at Conversations About Race & Belonging, for this metaphor.

226. See *supra* notes 203–14 and accompanying text.

227. See STROH, *supra* note 6, at 79–89.

story-creation deliberative democracy²²⁸ and concludes that “[i]n formally democratic societies with serious injustices” it offers a pathway for “promot[ing] social changes towards greater justice.”²²⁹ Practitioners of deliberative democracy and collaborative governance acknowledge the efficacy of these processes in addressing “wicked problems”²³⁰—the planning term for systems-based challenges.²³¹

The task here is not only to coalesce a systems story about racism but concurrently to nurture an alternative systems story. This alternative story must be anti-racist, but it must go beyond seeking to dismantle racism. It must also cultivate an affirmative vision of creating a different way for us to be with each other—an alternative grounding for our social, economic, and political interactions.²³²

The good news is that the threads with which to weave such a systems story are already with us—and have been for a long, long time. The Declaration of Independence,²³³ the “We the People” language of the United States Constitution,²³⁴ the Gettysburg Address²³⁵—these are only the most prominent. Over hundreds of years, millions of people have resisted the systems story of racism in ways large and public and also small and private: Frederick Douglass, Ida B. Wells, Ella Baker, Malcolm X, James Baldwin, Toni Morrison, William Barber, Resmaa Menakem, William Lloyd Garrison, Harriet Beecher Stowe, Abraham Lincoln, Anne Braden, Lyndon Baines Johnson, Joan Trumpauer, Jacqueline Battalora. And so many more.

This resistance was not only anti-racism seeking to dismantle racism. This resistance also carried within it an affirmative vision of building something in racism’s place: a Beloved Community, a Great Society. As Cornel West has observed, America bears not only a tradition of imperialism and oppression but also a tradition of “the determination of people to assert their human value.”²³⁶ And, emerging from that latter tradition, “a

228. See IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 22 (2000).

229. *Id.* at 35.

230. See, e.g., Martin Carcasson, *Tackling Wicked Problems Through Deliberative Engagement*, COLO. MUNS., Oct. 2013, at 9, 9–13.

231. See Tom Ritchey, *Wicked Problems: Modelling Social Messes with Morphological Analysis*, ACTA MORPHOLOGICA GENERALIS, 2013, at 1.

232. Palma Strand, *The Push of Antiracism and the Pull of Civity*, CIVITY (Aug. 31, 2021), <https://www.civity.org/the-push-of-antiracism%ef%bb%bf-the-pull-of-civity/> [<https://perma.cc/RJX7-YVX7>].

233. *Declaration of Independence: A Transcription*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/declaration-transcript> [<https://perma.cc/J8AV-5CNF>].

234. U.S. CONST. pmbl.

235. President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863).

236. CORNEL WEST, *DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM* 93 (2004).

vision of black democratic identity rooted in a love that embraces all—a love and trust that holds together a democratic community and society.”²³⁷

We already have, in fact, a robust systems story of civity—“a culture of deliberatively engaging in relationships of respect and empathy with others who are different.”²³⁸ Civity offers an interconnectedness that is based on interactions that recognize people’s shared humanity, that we are all members of the communities that we live in, that we all belong, that there is no hierarchy of human value.²³⁹ If civity is our systems story—as it is already for many of us, much of the time, and in many different circumstances—then the purpose of our system is not to create advantage and disadvantage. Rather, the purpose is solidarity; the purpose is justice.²⁴⁰ From a systems perspective, the systems result of a civity story will be a robust diversity and healthy communication across difference, the systems groundings for resilience.²⁴¹

Meadows highlights system purpose as the key to system function.²⁴² And she observes that “[i]f the interconnections change, the system may be greatly altered.”²⁴³ The system function emerges from the interactions of the actors within it—their relationships.²⁴⁴ The system function becomes the system story, the “how things are,” that in turn affects how people interact.²⁴⁵ Civity relationships drive a different system than relationships that value some people more than others; a civity story energizes those “We All Belong” relationships and provides that system its purpose.

If our vision is to shift from systemic racism to civity, our work is transforming relationships and constructing a new systems story. Stroh’s prescription above reveals that these goals are intertwined: When people connect with each other, when they tell their own stories and listen to others’, those stories coalesce into a shared collective story.²⁴⁶ The house

237. *Id.* at 96–97.

238. CIVITY, civity.org [<https://perma.cc/M9MC-FV7A>].

239. *See id.*

240. *See* YOUNG, *supra* note 228, at 31–33 (describing justice as self-determination and self-development, contrary to the injustices of domination and oppression).

241. *See* Strand, *Cultivating “Civity,” supra* note 16, at 176–90.

242. *See* MEADOWS, *supra* note 28, at 16.

243. *Id.*

244. *See id.*

245. *See id.* at 17.

246. *See generally* Strand, *supra* note 64, at 117–18 (describing how civic relationships and stories underlie changing norms, which lead to shifts in law and law-stories). *See also* JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* 2–3 (2000) (highlighting how stories animate and affect conflict).

we live in is re-constructed by how we are in relationship with one another and the stories we tell that reflect and animate those relationships.

The work of renovating and remodeling the house of racism to create a house of civility calls for authentic conversations about racism, race, and belonging among people designated white and with and among people who identify as Black, Indigenous, and other people of color. This work is happening—has been happening—all around us in many different contexts. Community commemorations of lynchings grow civility. Community soul-searching and action to address current effects of past deep discrimination in housing grow civility. These are just two examples; there are many, many more.

John Paul Lederach describes the “critical yeast” of peacebuilding as comprised of people who are “not like-minded or like-situated.”²⁴⁷ Diversity is crucial to systems resilience. We need “social spaces”²⁴⁸ in which people share stories to discover both their differences and their similarities. Racism and race have created a social system in which people’s experiences diverge because of their racial designation and identity.²⁴⁹ Creating relationships across race is vital to generating a civility systems story that can grow and flourish, that can crowd out racism.

A civility systems story necessitates a shift in our attitude toward difference; difference is how individuals experience system diversity. What if we collectively recognized the value of “identity politics”—of the immense social resource represented by different identities, cultures, and histories? Iris Marion Young contended “that political claims asserted from the specificity of social group position, and which argue that the polity should attend to these social differences, often serve as a resource for rather than an obstruction of democratic communication that aims at justice.”²⁵⁰ We can devote attention, intention, and resources to creating opportunities for a broad range of stakeholders and contributors to formulate and articulate their experiences and perspectives. To move from racism to civility, we need a politics of racial difference in which the experiences of white people and the experiences of people of color are all expressed and heard.

247. JOHN PAUL LEDERACH, *THE MORAL IMAGINATION: THE ART AND SOUL OF BUILDING PEACE* 91 (2005).

248. *Id.* at 96.

249. *Id.*

250. YOUNG, *supra* note 228, at 82.

D. Dancing With Systems in the House that Law Built

Relational processes ground systems transformation. These processes are improvisational, fluid, emergent. We cannot control systems; we can only influence them.

Recognizing this, Donella Meadows offered advice for “Dancing with Systems.”²⁵¹ The dancing metaphor goes beyond the metaphors that describe systems, even beyond the house metaphor that situates us within them.²⁵² Dancing invites us to pay attention to how we engage with the system from within and as part of the system. As the music swells, we need to not only mind our steps but also listen for changes in tempo, time, and volume. We need to remember that the music may extend beyond the ballroom and that, though we have learned the traditional moves of the dance, we can and will need to improvise.

1. Get the beat.
2. Listen to the wisdom of the system.
3. Expose your mental models to the open air.
4. Stay humble. Stay a learner.
5. Honor and protect information.
6. Locate responsibility in the system.
7. Make feedback policies for feedback systems.
8. Pay attention to what is important, not just what is quantifiable.
9. Go for the good of the whole.
10. Expand time horizons.
11. Expand thought horizons.
12. Expand the boundary of caring.
13. Celebrate complexity.
14. Hold fast to the goal of goodness.²⁵³

“Get the beat.”²⁵⁴ “Go for the good of the whole.”²⁵⁵ “Expand the boundary of caring.”²⁵⁶ “Hold fast to the goal of goodness.”²⁵⁷ Complex systems are

251. Donella Meadows, *Dancing with Systems*, THE DONELLA MEADOWS PROJECT, <https://donellameadows.org/archives/dancing-with-systems/> [<https://perma.cc/TTA7-CVMD>].

252. *See generally id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

often described as existing at the border of order and chaos;²⁵⁸ dancing captures the experience of being at that border.

How do we dance with systems in the house that law built?

Despite law's limitations, there is already a lot of civility in law. In its creaky and often cumbersome way, our imperfect democracy connects law with the civic body. Law—and legal change—have civic underpinnings.²⁵⁹ Law has the capacity to tell a civic story through civic process, to create space for people to have meaningful voice and for law to resonate widely and deeply as a result.²⁶⁰

We can push and pull law to become more civic. Though there are severe limits to judicially-created law, there is a vast terrain of possibility in law created by legislative bodies and by elected and appointed government officials “tak[ing] care that the laws [are] faithfully executed.”²⁶¹ This terrain extends beyond the federal government out into the states; into counties, parishes, and boroughs; and into cities, school and conservation districts, and more.

Conflict engagement practitioner and writer Jackie Font-Guzmán asks, “What if we stop seeing the legal infrastructure as the overarching umbrella under which all other conflict resolution processes fall? What if conflict processes become the overarching umbrella under which all conflict resolution/engagement processes fall, including law and the legal systems?”²⁶² What if we acknowledge the limited usefulness of Roberts Rules of Order²⁶³ and of Rules of Civil and Criminal Procedure and begin designing, conducting, legitimating, and *resourcing* processes to elicit and engage constructively with conflict both upstream and downstream—not to replace legislation and litigation but to surround them with a textured and nuanced multitude of ways for people, as fellow community members, to talk and listen to each other and to find common ground and direction? We need to co-create ways to engage with each other that reinforce civility through process.

258. See generally RICHARD T. PASCALE, MARK MILLEMAN & LINDA GIOJA, *SURFING THE EDGE OF CHAOS: THE LAWS OF NATURE AND THE NEW LAWS OF BUSINESS* (2000).

259. See generally Strand, *supra* note 64.

260. See generally Strand, *supra* note 53.

261. U.S. CONST. art. II, § 3.

262. Jacqueline N. Font-Guzmán, “*For Whom the Bell Tolls*” in *The Legal System: Access to Justice and Conflict Engagement*, 5 CREIGHTON J. INTERDISC. LEADERSHIP 20, 23 (2019).

263. See LAWRENCE E. SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING ROBERT’S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS*, at xvi (2006).

Law has immense creative capacity. Reimagining our legal infrastructure is an exciting challenge.²⁶⁴ Law can be more civic; law can help build a civility house for us all to live in.

V. CONCLUDING THOUGHTS

Though systemic racism has evolved, the core purpose or function of the system—creating advantage and disadvantage based on the divide-and-conquer strategy of race—continues. And yet, as historian Vincent Harding observed, “this country has been changed.”²⁶⁵ The consistent racial disparities that plague us today are not Jim Crow, and they are not slavery. Disproportionate deaths of Black citizens at the hands of law enforcement²⁶⁶ are not publicized lynchings attended by picnicking crowds; they are not the horrific and unbounded violence of slavery. Overt, explicit, and armed white supremacy is confined to a minority group of domestic terrorists;²⁶⁷ though many white citizens experience racial anxiety, they concurrently resonate to ideals of racial equality.

The task before us now as citizens is to engage in an “era of truth-telling”²⁶⁸ to create systems stories about racism so that we comprehend the system that we live in. It is also to imagine and tell anti-racist and civility systems stories so that civility grows strong and racism grows weak. None of this is work that we can dictate or control; instead, we must dance—be systems-aware and systems-savvy.

As lawyers, we can be of immense help in this endeavor. We must first, however, be straight with ourselves and others about the systemic nature of racism as well as law’s historical role in creating it. We need to use

264. See, e.g., Palma Joy Strand, *Disrupting Law, Reclaiming Justice: A Conversation at Creighton on Gillian Hadfield’s Rules for a Flat World*, 5 CREIGHTON J. INTERDISC. LEADERSHIP 1 (2019); Palma Joy Strand, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy*, DESIGN ISSUES, Spring 2020, at 99 (book review). See generally GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY (2017).

265. FUNDI: THE STORY OF ELLA BAKER (Icarus Films 1981); Strand, *Racism 4.0*, *supra* note 16, at 780 n.110.

266. Shea Streeter, *Lethal Force in Black and White: Assessing Racial Disparities in the Circumstances of Police Killings*, 81 J. POL. 1124 (2019).

267. Jenny Gross, *Far-Right Groups are Behind Most U.S. Terrorist Attacks, Report Finds*, N.Y. TIMES (Oct. 24, 2020), <https://www.nytimes.com/2020/10/24/us/domestic-terrorist-groups.html> [<https://perma.cc/H2V5-66AZ>].

268. Strand, *supra* note 207.

our legal expertise to unpack and expose law's current role in maintaining racism.²⁶⁹ And we need to 'fess up to law's half-hearted and ineffectual attempts to dismantle it. Only then can we fully engage with pushing and pulling law into the necessary work of systemic transformation.

269. See Strand, *supra* note 13, at 194–95 (“A certain kind of institutional forensics—dissecting the development of current institutions and understanding the etiology of their structure—reveals the source of current advantage and disadvantage as well as the way that facially neutral institutions may not actually be neutral.”).