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The Consequences of Systemic Racism

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BOOK REVIEW

THE CONSEQUENCES OF SYSTEMIC RACISM

White Men's Law: The Roots of Systemic Racism. By Peter Irons. New York, N.Y.: Oxford University Press. 2022. Pp. xix, 291. \$29.95

*Reviewed by: Richard Delgado**

I. INTRODUCTION: RESILIENCE AND ITS LIMITS

If you kill a small animal of a certain species or swat an insect, the species itself is apt to survive and even flourish. They may produce more offspring to replace the numbers they lost.¹ They may even benefit from the reduced competition for food. With humans, additional mechanisms come into play. During wartime, if a member of a unit suffers an injury or death, a reservist may arrive to take his place. In civilian life, someone who loses a job may search and find a better one. If a teacher gives a good student a low grade on one assignment, she may try harder next time and perhaps earn a higher one.

With mass disasters, people may display resilience through collective action. After a flood, they may build higher houses or a seawall.² After a plague, their scientists may develop vaccines that will prevent its return next year.³ If survivors of a disaster find themselves in dire straits, society may send relief teams and offer loans to help them re-

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* Distinguished Professor of Law, Seattle University. Thanks to Jean Stefancic for invaluable comments and suggestions.

1. See *The Buck Stops Here: Do We Really Need to Cull Deer Herds?*, SCI. AM. (May 13, 2011), <https://www.scientificamerican.com/article/do-we-really-need-to-cull-deer-herds/> [<https://perma.cc/QBT8-M49H>] (discussing the “rebound effect” of hunting and natural disasters on the reproductive rate of wild deer).

2. In New Orleans, for example, the federal authorities helped build higher sea walls in the wake of a disastrous flood. Xander Peters, *Rising Waters Set Stage for More Sea Walls in U.S. Future*, CHRISTIAN SCI. MONITOR (Oct. 26, 2021), <https://www.csmonitor.com/Environment/2021/1026/Rising-waters-set-stage-for-more-sea-walls-in-US-future> [<https://perma.cc/94MK-V8FP>]. In the Netherlands, much of the country lies below sea level and survives with the aid of a system of dikes and sea walls. Eleanor Beardsley, *How the Dutch Mastered the North Sea*, NPR (Sept. 14, 2005, 12:00 AM), <https://www.npr.org/2005/09/14/4847805/how-the-dutch-mastered-the-north-sea> [<https://perma.cc/U4QZ-U8UY>].

3. See, e.g., Alice Park & Jamie Ducharme, *2021 Heroes of the Year: The Miracle Workers*, TIME (Dec. 13, 2021, 7:41 AM), <https://time.com/heroes-of-the-year-2021-vaccine-scientists/> [<https://perma.cc/N7GC-63FU>] (describing how teams of researchers worked to develop effective vaccines after the coronavirus swept the globe).

build or relocate.⁴ The group becomes safer and better protected over time.

Suppose, however, that the forces plaguing the group are intentional and stem from human action, not the natural kind. A new book by Peter Irons⁵ shows that with one such force—systemic racism—resilience and mutual aid do not come quite so easily. Racism is not impersonal, like a flood or wildfire, but a product of human action. It can immobilize a victim, especially if he or she is lacking in resources and knows that the episode is not a unique event but is likely to recur, again and again.⁶ If resistance proves unavailing, victims may try appealing to the better natures of the perpetrators.⁷ They may redouble efforts to demonstrate their own virtue.⁸ They may relocate to a different region or country where racism is less prevalent.⁹ They may try to pass laws against discriminatory behavior.¹⁰

But what if none of these measures is successful, and the superior force continues oppressing the weaker one? They may warn them not

4. See, e.g., *Programs to Support Disaster Survivors*, FEMA, <https://www.fema.gov/assistance/individual/disaster-survivors> [<https://perma.cc/48U6-KTWK>] (Sept. 29, 2023).

5. PETER IRONS, *WHITE MEN'S LAW: THE ROOTS OF SYSTEMIC RACISM* (2022).

6. That is, the injury is recurrent or systemic. See *infra* Part IV (discussing the effects of pervasive racism).

7. See, e.g., VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 50–53 (1988) (noting Native Americans' many demands for justice and civilized treatment); see also *Read Martin Luther King Jr.'s 'I Have a Dream' Speech in Its Entirety*, NPR (Jan. 16, 2023, 10:32 AM), <https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety> [<https://perma.cc/2FHP-2YAP>]; IRONS, *supra* note 5, at 12, 109 (discussing the NAACP's appeals to federal authorities after a modern lynching and attorney Albion Tourg e's advocacy on behalf of Homer Adolph Plessy).

8. *Sojourner Truth: Ain't I a Woman?*, NAT'L PARK SERV., <https://www.nps.gov/articles/sojourner-truth.htm> [<https://perma.cc/73CN-8RD5>] (Nov. 17, 2017); Frederick Douglass, *Self-Made Men*, PAPERS, LIBRARY OF CONGRESS (1854), <https://www.loc.gov/resource/mss11879.29002/#seq-26> [<https://perma.cc/XWY9-YP3M>] (noting that "from the various dregs of society, there come men who may well be regarded as the pride and as the watch towers of the [human] race"); see also Daniel Joslyn, "Good Men are God in the Flesh": Frederick Douglass, *Virtue Philosopher*, J. OF THE HIST. OF IDEAS: BLOG (Oct. 17, 2016), <https://jhiblog.org/2016/10/17/good-men-are-god-in-the-flesh-frederick-douglass-virtue-philosopher/> [<https://perma.cc/MK6V-2942>].

9. See IRONS, *supra* note 5, at 114, 118–19 (discussing the Great Migration in which southern Blacks resettled in the North); Daniel BaracsKay, *Puritans*, FIRST AMEND. ENCYCLOPEDIA (Jan. 1, 2009), <https://www.mtsu.edu/first-amendment/article/1372/puritans> [<https://perma.cc/SM3H-7TNV>] (describing that many of the early American colonists left England for Jamestown or other settlements in search of religious freedom). Oppressed people who cannot relocate elsewhere may band together for mutual support. See, e.g., ROBIN D.G. KELLEY, *HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION* (2015) (discussing a Black commune of communist farmers in Alabama).

10. See DELORIA, *supra* note 7, at 28–53, for a discussion on how Native Americans entered into treaties with whites in hopes of gaining protection against encroachment and killing, but the whites violated most of the treaties.

to speak out or resist.¹¹ They may point out that the current regime is perfectly legal, and that rebellion will bring swift punishment.¹²

With natural disasters, the survivors typically face few obstacles like these. But with the interpersonal kind, victims may learn that outright resistance is dangerous or futile and lose heart. Studies of the behavior of inmates in POW camps or Auschwitz, struggling to survive under captors who control every feature of their environment, show that at some point, many lose hope and simply give up.¹³

Much seems to depend on whether a group has reason to expect an improvement in their circumstances. For example, many immigrant groups from southern or eastern Europe who arrived in the U.S. in large numbers beginning around 1890 received very poor treatment on arrival.¹⁴ Everyday Americans saw them as inferior and likened them to Blacks, whom the natives had learned to despise.¹⁵ But most of the immigrants arrived with high hopes and, in time, did rise, aided by mutual self-help organizations and sympathetic social workers who taught them English, personal hygiene, and American ways.¹⁶ Their children attended free public schools and enrolled at universities like CUNY or Fordham.¹⁷ Their children today sit on the Supreme Court.¹⁸

11. *E.g.*, J. H. PARRY, *THE SPANISH THEORY OF EMPIRE IN THE SIXTEENTH CENTURY* 5–6 (1978) (noting that Spain insisted that indigenous people accept their conquest or face annihilation); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 91 (1990) (discussing much the same demand by U.S. settlers); IRONS, *supra* note 5, at 41 (quoting a prominent apologist for slavery who urged utmost resistance to the forces of abolition).

12. *See* *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572–73 (1823) (noting that appropriation of Indian lands was considered necessary to avoid bloodshed among Europeans vying for the same areas).

13. *See* VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 132, 146 (2006) (discussing conditions that promote survival in prison camps, including the role of hope).

14. *See, e.g.*, Karen Brodtkin Sacks, *How Did Jews Become White Folks*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* 395, 396 (Richard Delgado & Jean Stefancic eds., 1997); James R. Barrett & David Roediger, *How White People Became White*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR*, *supra*, at 402–03.

15. *See* MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 4–5 (1998); *see also* David Roediger, *Early Twentieth Century European Immigration and the First Word in Whiteness*, in *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 483, 484 (3d ed. 2015) [hereinafter *RACE AND RACES*]; IRONS, *supra* note 5, at 118–19, 131–32.

16. JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE: WITH AUTOBIOGRAPHICAL NOTES* 231–33 (1911); *see also* Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 70, 74 (1996), <https://doi.org/10.2307/3480903> (discussing this chapter in history).

17. *See* *CUNY's Educational Opportunities Provide Immigrant Students a Powerful Path to Success*, CUNY (Mar. 30, 2017), <https://www1.cuny.edu/mu/forum/2017/03/30/cunys-educational-opportunities-provide-immigrant-students-a-powerful-path-to-success/> [<https://perma.cc/6TSN-TRDL>] (noting that many immigrant children attended schools like CUNY).

18. *See* *Samuel Alito*, *BIOGRAPHY*, <https://www.biography.com/legal-figures/samuel-alito> [<https://perma.cc/JJS6-XQJF>] (Sept. 30, 2019); *Antonin Scalia*, *BIOGRA-*

With involuntary immigrants,¹⁹ by contrast, especially ones who are racialized, upward mobility is often much slower. With Mexican Americans, for example, the second generation is often worse off than the first in a pattern sociologists call “downward assimilation.”²⁰ Before the advent of casino gambling, Native Americans had the distinction of being, by many measures, the worst off of all minority groups, with high rates of crime, spousal abuse, unemployment, and alcoholism, and, like the Mexican Americans, enjoyed improved circumstances only after several generations, and then only slowly.²¹ And with African Americans, the path upward has been slow and difficult at best.²²

Why do some groups rise while others do not? Lawyer-historian Peter Irons’s book finds one answer in a surprising institution—the rule of law.²³ His well-written, but scholarly, book describes a centuries-long series of hammer blows, many administered through the legal system, that systematically reduced the chances of one group, African Americans, leading fulfilling lives.²⁴ Similar, but slimmer, bodies of recent writing are beginning to cover other groups,²⁵ but Irons’s is the most comprehensive and the most instructive.

This Review begins, in Part II, by summarizing the career of Peter Irons, whose name may be familiar as the lawyer who first brought to light the lies and deceptions that led to World War II internment for

PHY, <https://www.biography.com/legal-figures/antonin-scalia> [<https://perma.cc/8JTF-9Y8W>] (Sept. 6, 2019) (noting that both were sons of immigrants who arrived in this period).

19. Black slaves, for example. See ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA 51–56, 68–74 (1972) (coining the voluntary/involuntary classification); RACE AND RACES, *supra* note 15, at 72 (discussing it with different groups).

20. The phenomenon is also termed “segmented assimilation.” See ALEJANDRO PORTES & RUBÉN G. RUMBAUT, LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION 45, 53 (2001) (discussing Mexican Americans as a prime case, with the second generation frequently worse off than the first); See also ALEJANDRO PORTES & RUBEN G. RUMBAUT, *supra*, as reprinted in RICHARD DELGADO ET AL., LATINOS AND THE LAW 473, 474–76 (2d ed. 2021); IRONS, *supra* note 5, at 234–41 (noting the barriers to Mexican Americans’ advancement).

21. See Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 50–80 (2002); Dedrick Asante-Muhammad et al., *Racial Wealth Snapshot: Native Americans*, NAT’L CMTY. REINVESTMENT COAL. (Feb. 14, 2022), <https://nrcr.org/racial-wealth-snapshot-native-americans/> [<https://perma.cc/J8RF-EQK7>].

22. See Richard Delgado, *Derrick Bell’s Racial Realism: A Comment on White Optimism and Black Despair*, 24 CONN. L. REV. 527, 528 (1992); see also Lawrence Eppard & Erik Nelson, *Race and Place: How Community Disparities Affect Inequality*, BULWARK (June 9, 2022), <https://www.thebulwark.com/race-and-place-community-disparities-and-inequality/> [<https://perma.cc/RNT2-FV65>] (noting that African American poverty can be intergenerational, especially in neighborhoods deeply afflicted by poverty and social neglect).

23. See generally IRONS, *supra* note 5. Irons’s intention is clear in his title and reflected in every chapter in his book.

24. See *infra* Part III (outlining Irons’s book).

25. See, e.g., DELGADO ET AL., *supra* note 20.

Japanese American families living on the West Coast²⁶ and who pioneered the use of a little-known legal writ, *coram nobis*, to erase two Supreme Court decisions, *Korematsu v. United States*²⁷ and *Hirabayashi v. United States*²⁸ that, until then, had remained as blemishes on America's legal record.²⁹

Part III discusses Irons's argument, showing how society delivered a centuries-long series of assaults on the bodies and souls of a single group in such a manner as to afford few opportunities for relief. "Systemic Racism," the term in his subtitle, conjures the plight of an animal trapped by an inexorable tide of rising water, voracious predators, or all-powerful captors bent on using it for experimentation or food. His use of the term "systemic" emerges as entirely apt, inasmuch as it connotes an overpowering force that encompasses an entire group, leaving few opportunities to escape. Part IV discusses the consequences of systemic racism and asks why few sympathizers from the majority group have come to the aid of those laboring under it, and what conditions might motivate them to loosen, if only slightly, the chains holding the group back.

II. "A LITTLE-KNOWN WRIT"

Irons describes himself as a privileged white male who grew up in a succession of white, Protestant, staunchly Republican towns stretching from Massachusetts to Washington State as his father's work as a nuclear engineer took him from one job to another.³⁰ His family tree includes patrician forebears, one of whom arrived on the Mayflower; another was Abraham Lincoln.³¹ After earning a Ph.D. from Boston University and a J.D. from Harvard, he taught law at Boston College, where he describes his experience as unhappy.³² The students lacked intellectual curiosity and could not be interested in anything other than subjects that might be on the bar exam.³³ He soon exchanged law teaching for political science and spent over 20 years in that department at UC San Diego where he was much happier, writing a dozen books on the Supreme Court and constitutional litigation—some of which received prestigious prizes³⁴—and teaching students eager to learn about history and social thought.³⁵

26. See generally PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES* (1993).

27. *Korematsu v. United States*, 323 U.S. 214 (1944).

28. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

29. IRONS, *supra* note 5, at xviii (describing Irons's use of the writ).

30. *Id.* at xv.

31. *Id.*

32. Telephone Interview with Peter Irons (June 10, 2022) [hereinafter Irons Interview].

33. *Id.*

34. IRONS, *supra* note 5, at xviii.

35. Irons Interview, *supra* note 32.

A self-described beneficiary of systemic white privilege,³⁶ he began focusing on its opposite, systemic racism, as early as high school in Cincinnati, where his classmates, most of them sons and daughters of Republican upper-class families, were flagrantly and unabashedly racist, using terms like “jungle bunny” and “jigaboo” with abandon—a reflection, he wrote, of the “thoughtless racism that permeated our privileged White culture.”³⁷

He did not, however, turn out like his classmates. From his engineer father, he learned a reverence for facts.³⁸ He also acquired a deep respect for social action at the family’s church. Unlike many of their neighbors, his family attended a historic peace church that taught values of tolerance, anti-racism, and engagement in society.³⁹ His favorite Sunday school teacher was a memorable Black woman who took her young charges to Black churches to experience their exuberance, gospel music, and rewarding journey to the Promised Land.⁴⁰

As an undergraduate at Antioch College, one of Irons’s classmates was Eleanor Holmes Norton, who went on to become a law professor, D.C. delegate to Congress, and lifelong advocate for Black people. He remembers attending a youth march on Washington, D.C., under her leadership, marking the fifth anniversary of *Brown v. Board of Education* in May of 1959.⁴¹ He later joined with students from Howard University in picketing segregated theaters and restaurants in the D.C. area. Irons was also arrested for draft refusal, serving two years at a federal penitentiary in Danbury, Connecticut, where he met a number of Mafia bosses and Black Muslim inmates and read books by radical historian Howard Zinn.⁴² He began corresponding with Zinn, and after his release from prison, enrolled at Boston University, where he earned a Ph.D. in history under Zinn’s supervision.⁴³

After completing his Ph.D., he worked on behalf of Daniel Ellsberg on the Pentagon Papers case, finding the legal work so engrossing that he applied to Harvard Law School a year later.⁴⁴ He feared the worst, certain that his conviction would stand in the way, but the school was then boiling with antiwar sentiment so that his arrest for draft refusal may well have operated in his favor.⁴⁵ He took all the constitutional law and legal history courses that the school offered and, while still a student, challenged his earlier conviction. Irons suspected that his sentence was the product of a spiteful decision by his Selective Service

36. IRONS, *supra* note 5, at xvi.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at xvi–xvii.

43. *Id.* at xvii.

44. *Id.*

45. *Id.* at xvii–xviii.

board to draft him a year earlier than the regulations allowed, probably in reprisal for his antiwar activism, which did not sit well with the board.⁴⁶

In the course of his research, he came across a little-known writ, *coram nobis*, by which an aggrieved litigant might seek to correct a judgment based on evidence of governmental misconduct.⁴⁷ After he filed for relief under it, a judge vacated his conviction, and he later received a full pardon by President Gerald Ford,⁴⁸ thus restoring his rights to vote and practice law. Still later, he employed the same strategy to vacate the World War II convictions of Gordon Hirabayashi and Fred Korematsu for violating military curfew and internment orders, aided by a team of young lawyers and law students who were themselves sons or daughters of Japanese Americans who had been interned in the camps.⁴⁹

The author of many well-regarded books, Irons apparently has a special place in his heart for this one. Alert readers might note his dedication on the book's frontispiece to legendary labor organizer Mary Harris "Mother" Jones, whose motto was, "Pray for the dead, and fight like hell for the living."⁵⁰ He describes the book as his effort to engage with the reader in a vicarious conversation on systemic racism and persistent inequality in America.⁵¹ I offer this Review in the same spirit.

III. WHITE MEN'S LAW AND LIES: THE ROOTS OF SYSTEMIC RACISM

Over 400 years of history, privileged white men, some wearing judicial robes, treated African Americans as though they were "beings of an inferior order."⁵² Some of their primary tools were an array of oppressive laws, including slavery,⁵³ Jim Crow,⁵⁴ and segregation in theaters and restaurants,⁵⁵ as well as informal practices including social discrimination, violence, and lynching.⁵⁶ The brutality was ubiquitous, ranging across all areas of life, including schooling, housing, public accommodations, water fountains, the workplace, voting, and law enforcement.⁵⁷

46. *Id.* at xviii.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at xix.

51. *Id.* at xix.

52. *Id.* at 59–76.

53. *Id.* at *passim*.

54. *Id.* at 59–76, 84, 197–203.

55. *Id.* at 197–202.

56. *Id.* at 39, 81–83, 119, 126.

57. *Id.* at 110, 120–23, 136–37, 203–12.

Chapters on lynching,⁵⁸ Southern justifications for slavery (“Dem Was Hard Times, Sho’ Nuff”),⁵⁹ and white supremacy,⁶⁰ give the reader an insight into supremacy’s historical origins and root beliefs and convictions, often through the words and actions of Southern racists.

Subsequent chapters show how privileged whites circulated myths of Black stupidity and dirtiness (“The Foul Odors of Blacks”)⁶¹ and their supposed secret desires to kill their masters (“Negroes Plan to Kill All Whites”).⁶² They describe white efforts to block Black enrollment in white schools, universities, and the workforce (“Intimate Social Contact with Negro Men”),⁶³ as well as efforts by Black parents to challenge these measures (“I Thanked God Right Then and There” and “War against the Constitution”).⁶⁴

Later chapters describe the fight against segregation in housing and employment (“Two Cities—One White, the Other Black”),⁶⁵ and how whites framed their adversaries in these struggles as angry, frightening (“All Blacks are Angry”),⁶⁶ and out of line, even though careful social scientists had by then found the root causes of Black crime in hyper-segregation and pent-up frustration.⁶⁷ A final chapter and Epilogue revisit the site of many of the struggles that appear earlier in the book (“The Basic Minimal Skills”)⁶⁸ and summarize the reactions to recent police shootings and the January 6, 2021, storming of the U.S. Capitol (“Epilogue: Rooting Out Systemic Racism”).⁶⁹

Irons shows how privileged white men drafted and enforced laws that aimed to keep Blacks subjugated in practically every activity and sphere of life. He shows how this effort began over 400 years ago and shows little sign of abating even today. He cites hitherto unknown primary sources, news accounts, and suppressed voices of Black people themselves⁷⁰ and even puts them into his chapter titles.

White Men’s Law shows how a minority of white men, beginning in Jamestown or a little earlier (1607), created a system of interlocking laws and practices that maintained and expanded a system of white racism. It shows how racial hatred has shaped the legal system at every turn, and how minority people fought back since the very beginning and up to George Floyd and beyond. It shows how systemic ra-

58. *Id.* at 1–18, 116.

59. *Id.* at 19–39, 44–50.

60. *Id.* at 77–95.

61. *Id.* at 95–113.

62. *Id.* at 115–35.

63. *Id.* at 135–55.

64. *Id.* at 155–95.

65. *Id.* at 195–212.

66. *Id.* at 213–33.

67. *Id.* at 227–32.

68. *Id.* at 233–49.

69. *Id.* at 249–61.

70. *Id.* at 51–57.

cism has infected every major social institution, including education, schooling, and housing, and how society used lynching and other public demonstrations to quell Black resistance.

Irons is unsparing of the white men, some in judicial robes, who, beginning with the Redeemers, rolled back Black gains achieved during a short period of Reconstruction⁷¹ and cemented those setbacks by carving them in legal stone.⁷² He reproduces some of the language, dripping with condescension, with which the Supreme Court rejected litigators for Black causes as aiming to achieve special rights for people supposedly too indolent to rise by their own efforts.⁷³

He is at pains to show how Blacks rebelled at their mistreatment, sometimes quoting their own words of fury or discouragement.⁷⁴ For example, a former slave named Charlie Moses of Mississippi recalled that “Slavery days was bitter, an’ I can’t forget the sufferin’. Oh, God! God Almighty never meant for human beings to be like animals. Us Niggers has a soul an’ a heart an’ a min’. We aint like a dog or a horse.”⁷⁵ Irons points out, with complete accuracy, that slaves indeed had few more rights than farm animals, and that rebellion was met with swift reprisal.⁷⁶

Early chapters show how a legal regime that subjugated Blacks so openly spawned extra-legal behavior by white society that made sure Blacks remained in the places the law prescribed for them. Early pages discuss the lynching of a young Black man, Rubin Stacy, in Fort Lauderdale, Florida, in 1935.⁷⁷ A sheriff dragged Stacy into the backyard of a white woman whom he had been charged with assaulting and hung him from a tree limb until his neck snapped. These events took place in front of a white crowd that watched placidly, including a young girl dressed in a pristine white dress, caught by a photographer gazing at Stacy’s body and wearing an “enigmatic smile.”⁷⁸ He reproduces words by John Calhoun, Jefferson Davis, and others defending slavery and Jim Crow and asserting that Blacks were happier with life under those institutions than they would be in a rough-and-tumble society committed to open competition.⁷⁹

Final chapters look at major cities like Detroit that have large Black populations living in crowded houses, laboring at dead-end jobs, and denied good public schooling and medical care.⁸⁰ Despite efforts by Black leaders, these conditions have persisted for so many generations

71. *Id.* at 82–85, 97–100.

72. *Id.* at 59–66, 87–114.

73. *Id.* at 41–50, 98–100.

74. *Id.* at 51–56.

75. *Id.* at 55.

76. *Id.* at 81–83, 120–21, 202–03.

77. *Id.* at 2–18.

78. *Id.* at 3.

79. *Id.* at 40–48, 59.

80. *Id.* at 129–34, 241–47, 253–54.

that it raises the question why.⁸¹ Irons's answer: Because systemic racism allows white society to ignore the conditions under which Black people live, much as they looked away from slavery, Jim Crow, segregated schools, lynching, and segregated job markets in former times. Systemic racism, it seems, injures whites, too—although not nearly so much as Blacks—by teaching them to withhold empathy and cross-racial identification.

As Irons put it in a recent interview: “If we can't find solutions for Detroit, we can't find them for the nation as a whole.”⁸² Judging from his book, it would appear that we cannot find them for either location, at least not easily. But might that be because, as a society, we are not really looking? The answer requires an examination of systemic racism and its effects on those who suffer as well as those who inflict it.

IV. THE CONSEQUENCES OF SYSTEMIC RACISM: CUMULATIVE DISINVESTMENT

Peter Irons's book is subtitled, “The Roots of Systemic Racism.” Using his book as a springboard, I offer some thoughts on the *consequences* of systemic racism for both its victims and its perpetrators. Many books discuss and document systemic racism, including Derrick Bell's *Race, Racism, and American Law*, a leading text of the critical race theory school,⁸³ as well as works by liberal historians such as Howard Zinn⁸⁴ and Eric Foner.⁸⁵ Irons's book is one of the best of these. Yet few writers have discussed the “so what?” question. If American society is systematically racist and has been so for 400 years, what follows from that, and what does it mean for us today?

I begin by discussing the consequences of living under prolonged subjugation lasting many generations. I then consider the consequences for the privileged whites who live in and operate such a system, including liberals who deplore and wish it were otherwise. I am particularly interested in what living in such a system does to the faculty of empathy of those who live with and under it.

As an aid to understanding these consequences, the concept of *cumulative*, or *compound*, disinvestment will prove helpful. All readers will be familiar with the idea of compound interest, money that ac-

81. See *id.* at 219 (noting that some authorities, such as Arthur Jensen and Edward Banskfield, laid the blame on Black inferiority and low IQ); *id.* at 221 (stating others invented a “Black savage” stereotype as a source of the violence of some inner-city areas); *id.* at 223 (disputing these views and placing the blame squarely on systemic white racism).

82. See Marshal Zeringue, *Peter Irons's “White Men's Law,”* PAGE 99 TEST (Dec. 10, 2021, 8:05 AM), <http://page99test.blogspot.com/2021/12/peter-ironss-white-mens-law.html> [<https://perma.cc/4ZRE-4USK>] (quoting Peter Irons).

83. DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (6th ed. 2008).

84. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* (3d ed. 2003).

85. ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* (2006).

crues steadily so that the principal each year generates an even greater return than it did the previous one. Compound *disinvestment* occurs when a disadvantage attaching itself to an individual or group increases and augments the very disadvantaging feature that earlier set the group on a downward course and continues to do so into the future. The compounding effect is especially pernicious if each incident adds to a stigma-picture so that subsequent actors feel even freer to inflict further injuries on the same individual.

Readers may be familiar with those unfortunate souls who become ensnared in the criminal justice system and find themselves saddled with court or prison fees.⁸⁶ Unable to pay, they may miss a court hearing and find themselves slapped with further fees for requiring the system to search for them and bring them to court.⁸⁷ They may leave their hearing with an order to report to a social worker or parole officer, incurring further fees.⁸⁸ Fees upon fees—eventually rising to a total that no one with poor job prospects and few well-heeled friends should reasonably be expected to pay.

In a second example, two employees, one male, the other female, with very similar backgrounds and abilities, start out working at the same entry-level jobs in a large corporation.⁸⁹ In the company, men benefit from a small advantage at the time of annual review,⁹⁰ so that after one year the male is slightly ahead of the woman on the salary scale. At the time of their second such review, a different comparative disadvantage sets in for women employees, so that after two years the

86. See, e.g., David L. Hudson, Jr., *Penalizing Poverty: Judges Must Ensure Defendants Can Afford Court Costs Before Imposing Fines and Fees*, 106 AM. BAR ASS'N J. 32 (2020) (discussing “LFOs”—legal financial obligations that can entrap a victim in circumstances resembling debtor’s prison); Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [<https://perma.cc/2UVJ-FRGD>]; see also Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors’ Prisons*, 51 HARV. C.R.-C.L. L. REV. 189 (2016) (discussing much the same practice in municipal courts); Pat Eaton-Robb, *At \$249 Per Day, Prison Stays Leave Ex-Inmates Deep in Debt*, AP NEWS (Aug. 27, 2022, 10:00 AM), https://apnews.com/article/crime-prisons-lawsuits-connecticut-074a8f643766e155df58d2c8fbc7214c?utm_source=homepage&utm_medium=TopNews&utm_campaign=position_5 [<https://perma.cc/8TVD-DLF2>].

87. See Shapiro, *supra* note 86 (discussing jurisdictions that pad their budget by exacting fees from the unwary).

88. *Id.*

89. The example is from various lectures on workplace equity I have heard. See generally *The Simple Truth About the Gender Pay Gap*, AM. ASS’N OF UNIV. WOMEN, <https://www.aauw.org/resources/research/simple-truth/> [<https://perma.cc/NV6S-L8GN>] (listing several of the structural forces mentioned above).

90. Perhaps the company bases starting salary on a worker’s wage at his or her previous job. Interview with Anonymous, a leading feminist legal scholar, in Seattle, Wash., (Sept. 3, 2022) (describing this example as very common in her field); see also Paola Cecchi-Dimeglio, *How Gender Bias Corrupts Performance Reviews, and What to Do About It*, HARV. BUS. REV. (Apr. 12, 2017), <https://hbr.org/2017/04/how-gender-bias-corrupts-performance-reviews-and-what-to-do-about-it> [<https://perma.cc/6HZB-ZKPO>] (explaining subjectivity skews performance reviews in favor of men).

salaries of the two are even further apart. By their third year of work, both employees have shown leadership potential, but the company assigns the woman to head a small division (perhaps community relations) primarily staffed by women, whereas it assigns the man to one with a heavy male emphasis and more challenging tasks (perhaps the supply chain). Progress for the man is faster that year and in every subsequent one but for different reasons each time. The net result is that, for the woman, each annual review has been only slightly unfair or even, sometimes, not at all. Yet each review increases the likelihood of discrimination during the next one. Thirty years later they retire, having racked up good job records. But the man's salary is nearly double that of the woman's.⁹¹

Other readers may be familiar with studies of leading universities and their role in slavery and the slave trade, demonstrating how early wealth compounded over the years and was responsible for much of the institution's endowment.⁹² The universities became wealthier, but of course the slaves and their descendants did not, or at least not so rapidly as did the universities. And if their relative poverty made it difficult for many of their descendants to attend the very universities that were becoming richer as a result of their ancestors' labor, these descendants would be unlikely to accrue as much wealth as their white counterparts whose families never suffered under that disability.

Like compound interest, *compound disadvantage* can beset either an individual or a group. Readers may recall Thomas Piketty and his book, *Capitalism in the Twenty-First Century*, and its famous axiom: The rate of return on investment always exceeds the rate of growth of the economy at large.⁹³ The upshot is that the rich grow richer, and the gap between them and the rest ever larger.⁹⁴ Compound disadvantage works in much the same way but in the opposite direction. When it occurs, the poor get poorer with little chance of escaping their downward trajectory.

The disadvantage that sets the abovementioned cascade of events in motion may take many forms and is not limited to a low salary or little money in the bank. A consistently low legal status, enforced by watchful overseers is enough. The genius of Peter Irons's book lies in dem-

91. Interview with Anonymous, *supra* note 90 (describing a common result).

92. See, e.g., PRESIDENTIAL COMMITTEE ON HARVARD & THE LEGACY OF SLAVERY, HARVARD & THE LEGACY ON SLAVERY, (2022), <https://legacyof-slavery.harvard.edu/report> [<https://perma.cc/VY7H-E25Y>]; see also Anemona Hartocollis, *As Harvard Makes Amends for Its Ties to Slavery, Descendants Ask, What Is Owed?*, N.Y. TIMES (Sept. 12, 2022), <https://www.nytimes.com/2022/09/12/us/harvard-slavery-reparations-ancestors.html> (discussing the movement for reparations).

93. See generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014).

94. See Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879 (2007), <https://doi.org/10.5195/lawreview.2007.76> (noting this trend).

onstrating how pervasive one such cascade—white racism—is and how significant a role law has played in creating and maintaining it over the years.

A. *Consequences for the Victims of Systemic Oppression Abetted by the Law*

If you abuse a person, say a schoolchild named Jones, she will detest that treatment and try to avoid it by transferring to a different teacher, dropping out of school entirely, or leading a rebellion. Jones may research the Education Code in hopes of discovering a law that forbids teachers from carrying out the despised practice. She may also join with other like-minded students in going to the principal with their complaints.

But if Jones gets nowhere, she may become discouraged and decide that little can be done—that is just how the world is. Jones may stop doing her homework or start missing school. Once she does, the teacher may find it even easier to accomplish what she had been doing all along. She may talk to other teachers and tell them how poor a student Jones is.⁹⁵ Soon all the other teachers may share the same view of Jones—cumulative disinvestment in action.⁹⁶ If the teacher finds the scheme satisfying for some reason (e.g., sadism), she may heap further abuse on Jones and her friends.

Appreciating what is going on, the friends may opt out of the teacher's class or drop out of school entirely. Minority schoolchildren of all kinds—Blacks, Mexican Americans, Indians—often do.⁹⁷ Most people would if subjected to a few years of unremitting mistreatment, let alone 400. Apathy, like misplaced, disorganized anger, is not a viable solution to unrelenting oppression but a way of hardening oneself to it. Other approaches offer more promise, but before turning to some of them, ponder what is in it for the whites who operate such a system.

B. *Consequences for the Privileged Group*

Very few white people come across well in Irons's book. Its 280 pages are almost devoid of members of the white race who cast off white privilege and identified with the Blacks, much less went to live with them. He does mention the students, presumably many of whom

95. See generally ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM* (1968) (discussing the role of teachers' expectations in boosting or impeding student achievement); see also *supra* notes 85–86 and accompanying text (describing how a succession of events similar to the ones described here may contribute to a stigma-picture or stereotype).

96. See also *supra* notes 85–86 and accompanying text.

97. *High School Graduation Rates by Race 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/high-school-graduation-rates-by-race> [<https://perma.cc/2G8Q-28JW>].

were white like him, who went south during Freedom Summer or took part, for a few days, in a racial demonstration or protest. But few seem to have made a career of it as he or Eleanor Holmes Norton did. Exactly one member of the NAACP Legal Defense Fund that orchestrated the 20-year march toward *Brown v. Board of Education* was a white man.⁹⁸ And of the approximately 30 students Irons was able to recruit in what must have seemed a longshot effort to reverse the Japanese internment cases in the Ninth Circuit, apparently not a single one seems to have been white.⁹⁹

Two bodies of social science evidence help explain the low incidence of cross-racial sympathy and identification on display in Irons's book: a law-and-economics explanation and one based on an emerging approach known as "norm theory." As is often the case, understanding the source of a social dynamic is helpful in trying to combat it.

1. The Economics of Empathy

Recent writing on the role of empathy in human relations is beginning to show how that emotion serves evolutionary purposes, promoting group survival.¹⁰⁰ But it also aids the individual who cultivates the trait, by enabling him or her to understand what another person wants or needs and offer something that will lead to a mutually beneficial bargain or negotiation.¹⁰¹ Thus, a person who earns a reputation as empathic may be a more successful merchant or lover than one who cares little about other people or understands them in simplistic terms that are often wrong.¹⁰²

By the same token, a desperately poor, raggedly dressed hitchhiker standing beside the road in a pouring rain may elicit little sympathy. We reason, on some level, that such a person has little to trade. If we stop to pick him up, we will get a wet car seat and probably little else in return.¹⁰³ Similarly, a minority group member whose prospects in

98. See Jack Greenberg: *Brown v. Board of Education National Historical Park*, NAT'L PARK SERV., <https://www.nps.gov/people/jack-greenberg.htm> [<https://perma.cc/UQX8-BGY6>] (Dec. 16, 2020).

99. See Irons, *supra* note 5, at xviii (describing students as descendants of Japanese Americans).

100. Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOL. 35, 43–45, 49 (1971), <https://doi.org/10.1086/406755> (noting how animal behavior, such as bird calls, promotes the wellbeing of the group even if it does little for the individual animal); see also Victoria Stern, *3 New Books Explain the Roots of Altruism*, SCI. AM. MIND (July 1, 2015), <https://www.scientificamerican.com/article/3-new-books-explain-the-roots-of-altruism/> [<https://perma.cc/YC9A-VS9K>] (discussing the growth and development of this line of research from Trivers to today).

101. See Stern, *supra* note 100; see also Delgado, *supra* note 16, at 75 (describing empathy as a type of practical knowledge of value in everyday affairs).

102. Delgado, *supra* note 16, at 75 (discussing this mechanism).

103. Cf. *id.* at 75. (choosing to be empathetic to a hitchhiker is unlikely to benefit an individual, perhaps even harming them).

life are very poor is an unattractive object of sympathy. If we give people like him vouchers to live in our neighborhood, it may take a downturn, with unmown lawns and broken-down cars parked on front yards. The value of our own homes may drop.¹⁰⁴

Empathy, it turns out, works best with others of our own social class, that are like us and whose predicament we can readily understand—and who are likely to understand and respond to us later when we need a helping hand.

2. Norm Theory

An emerging school of social science holds that our response to a person in need is a function of how normal or abnormal their predicament strikes us. We read about a famine in Africa but are unmoved because we believe that famines are common in that part of the world so that the people must be used to them by now.¹⁰⁵ By contrast, if one sees their nice middle-class neighbor being evicted, one feels alarmed. That sort of thing is not supposed to happen in comfortable neighborhoods like ours.¹⁰⁶ Perhaps one prepares a sack of peanut butter sandwiches to tide them over their ordeal or looks up the address of a social service agency that can help.¹⁰⁷

3. Helping Behavior

Experiments of so-called “helping behavior” capture much the same response.¹⁰⁸ A white woman who is a confederate of the experimenter spills a bagful of groceries, and everyone stops to help.¹⁰⁹ A black woman with a crying baby does the same, and the passerby hurries by.¹¹⁰ Everyone assumes the black mother has a rough road in life, so what’s the point of stopping to help on just this one occasion? And as for the baby, they are always crying like that.

104. See Richard Digby-Junger, *White Flight*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/media/encyclopedias-almanacs-transcripts-and-maps/white-flight> [<https://perma.cc/D6KA-5PWC>] (describing the “white flight” phenomenon and its causes); see also IRONS, *supra* note 5, at 206–11 (describing its role in Detroit).

105. See Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYC. REV. 136, 137 (1986), <https://doi.org/10.1037/0033-295X.93.2.136> (explaining how expectations can make events appear “normal”); see also Delgado, *supra* note 16, at 76 (discussing the implications of this line of scholarship).

106. Delgado, *supra* note 16, at 76–77 (discussing neighborliness).

107. *Id.* (discussing studies of behavior on crowded subways and heavily traveled highways).

108. *Id.* at 76.

109. *Id.* at 76–77 (discussing classic studies of helping behavior).

110. *Id.*

Experiments with stranded motorists show much the same.¹¹¹ The upshot is that the more we learn about social life, the more selective our faculty of empathy tends to become. With groups that are poor and marginalized, empathy is often at low ebb.¹¹² Who wants to trade with an isolated wretch who has almost nothing to offer? As one of us put it on another occasion, empathy turns out to be least useful where it is needed most.¹¹³

And when inequality is deep and structural, as it is with race, empathy declines even more.¹¹⁴ In a completely fair world, empathy would be a powerful force for good, but this would require that everyone's experience or access to resources were roughly the same. But in a world like the one Irons describes, it has little claim on our emotions, especially when—as with Blacks—it is the product of legal action. Then, the observer is apt to shrug and think, “It's the law. What can be done?”

V. WHAT, INDEED, CAN BE DONE?

Hyperwhites: A New Obstacle to Reform

Two strategies, social contact¹¹⁵ and interest convergence,¹¹⁶ have proven reasonably reliable in reducing racism and its behavioral components. Unfortunately, the first takes a long time and requires an early start in life.¹¹⁷ The other requires a rare alignment of interests between whites and Blacks like the one that may have enabled an NAACP breakthrough in *Brown v. Board of Education*.¹¹⁸

Since both approaches are well known, I offer a few words on the downward pressure, now rising in contemporary life, that will require even greater ingenuity and skill than usual. My reading of America's racial history, including Peter Irons's book, inclines me to think that

111. Namely, white drivers are likelier to offer assistance to stranded motorists who are white and middle class than to ones who appear to be members of a minority group. *Id.* at 77.

112. *Id.*

113. *Id.* at 77–78; see generally Richard Delgado & Jean Stefancic, *Do Judges Cry? An Essay on Empathy and Fellow-Feeling*, 70 CASE W. RESRV. L. REV. 23 (2019).

114. See *supra* notes 100–04 and accompanying text (reviewing the reasons why this is so).

115. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 261–82 (25th anniversary ed. 1979).

116. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980), <https://doi.org/10.2307/1340546> (contending that advances for Blacks tend to materialize when they also benefit whites).

117. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1385–86 (1985) (noting that this approach requires contact beginning early in life in connection with cooperative activities such as sports).

118. See BELL, *supra* note 83; Spencer Bowley, *Learning from History: Predicting the Development of Class-Based Interest Convergence*, 101 B.U. L. REV. ONLINE 125, 126 (2021), <https://doi.org/10.2307/1340546>.

Karl Marx, while writing mainly about class, saw something about American society that was equally true about race.¹¹⁹ Just as a capitalistic economic system tends to increase inequality and generate periodic “crises,”¹²⁰ the system of racial oppression of which Irons writes can do the same.¹²¹ And when it does, it too requires a correction.¹²²

The resulting crisis, then, can be either class-based or racial in nature, like the one taking place today with the attack on critical race theory, on Black Lives Matter, the 1619 Project, and ethnic studies in K-12 schools.¹²³ “Don’t Say Gay” bills operate in much the same manner and tap many of the same instincts.¹²⁴ If Marx or Derrick Bell were alive today, they could easily see the accelerated disinvestment in the fortunes of Blacks occurring in our time as an instance of a surplus value theory of whiteness that operates as a counterpart of Marx’s famous axiom.¹²⁵ They could see young white men like those who marched in Charlottesville, whose whiteness lies at the intersection of looks, Northern European ancestry, and an exaggerated identification with Nordic music, festivals, medals, insignia, and even pairs of horns and suits of armor,¹²⁶ as venture capitalists of a new racial order.

Hyperwhites like these are not like your grandparents’ Scandinavian ancestors who blended into American life in cities and farms and were often delighted to have neighbors who were Black, Mexican, Chinese, or Italian. Today’s versions adore everything that they consider typical of Western civilization—ice hockey, not soccer; Icelandic

119. See KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 270–80 (Ben Fowkes trans., Penguin Classics 1992) (1867) (discussing his theory of surplus labor value); see also *Surplus Value: Economics*, BRITANNICA, <https://www.britannica.com/topic/surplus-value> [<https://perma.cc/9XGJ-D8MF>].

120. *Surplus Value: Economics*, *supra* note 119 (discussing how these periodic crises arise); see also PIKETTY, *supra* note 93 (documenting the trend toward economic inequality).

121. See Derrick Bell, *The Supreme Court 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 32 (1985), <https://doi.org/10.2307/1341120> (discussing contradiction-closing cases); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 38 (3d ed. 2017) (discussing Bell’s concept).

122. See Bell, *supra* note 121, at 21–37 (discussing how the Supreme Court complies with the instinctively felt necessity).

123. See, e.g., Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> [<https://perma.cc/9MZS-ZTBH>].

124. See, e.g., Amber Phillips, *Florida’s Law Limiting LGBTQ Discussion in Schools, Explained*, WASH. POST, (Apr. 22, 2022, 4:00 PM), <https://www.washingtonpost.com/politics/2022/04/01/what-is-florida-dont-say-gay-bill/> [<https://perma.cc/W22V-CZA6>].

125. That is, his surplus value theory of labor. See MARX, *supra* note 119 (explaining the theory).

126. See Steve Rose, *Norse Code: Are White Supremacists Reading Too Much into the Northman*, GUARDIAN (Apr. 22, 2022, 1:00 PM), <https://www.theguardian.com/film/2022/apr/22/norse-code-white-supremacists-reading-the-northman-robert-eggers> [<https://perma.cc/75VD-PZT7>].

sagas, not Toni Morrison. They are likely to see immigrants and minorities as irritants, requiring removal to their own squalid neighborhoods and schools.¹²⁷ No countervailing interest is apt to require serious consideration. To them, the country has no stronger interest than preserving and expanding whiteness and its heritage. Interest convergence is not a promising avenue for race reformers hoping to make common cause with them. Any correction would have to arrive from somewhere else.

Little surprise that at times like these, police shootings are on the rise,¹²⁸ attacks on ethnic studies, gay studies, and progressive schoolbooks have risen sharply,¹²⁹ and conservative voices are demanding tighter control over voting,¹³⁰ school curricula,¹³¹ and even the books that children can check out from public libraries.¹³²

In the long run, demography and social-contact theory are on the side of racial progress, and increasing competition from China is likely to motivate America's leaders to soften some of the hard lines of racial and class conflict that mark social life in this country.¹³³ This transformation will not happen easily, though, and in the meantime, scholars who produce books like *White Men's Law* will find a broad and well-deserved readership. Racial oppression, as Irons shows, has long roots, requiring new habits, laws, and practices to counter it effectively. Four hundred years is a long time to wait, and recent cases like *Shelby v. Holder*,¹³⁴ *Citizens United v. Federal Election Commission*,¹³⁵ and *Dobbs v. Jackson Women's Health Organization*¹³⁶ suggest that the wait could be even longer.

127. See Nicholas Confessore & Karen Yourish, *A Fringe Conspiracy Theory, Fostered Online, Is Refashioned by the G.O.P.*, N.Y. TIMES (May 15, 2022), <https://www.nytimes.com/2022/05/15/us/replacement-theory-shooting-tucker-carlson.html> [<https://perma.cc/AHH5-F9P3>] (discussing the "replacement theory").

128. See IRONS, *supra* note 5, at 256–59.

129. See Sawchuk, *supra* note 123.

130. See Ronald Brownstein, *Republicans Are Trying to Suppress More Than Votes*, ATLANTIC (Jan. 28, 2022), <https://www.theatlantic.com/politics/archive/2022/01/critical-race-theory-voting-rights-gop/621383/> [<https://perma.cc/YT85-DZPD>].

131. *Id.*

132. *Id.*

133. See Bowley, *supra* note 118.

134. See *Shelby Cnty. v. Holder*, 570 U.S. 529, 592 (2013) (holding that portions of the Voting Rights Act no longer apply to many states).

135. See *Citizens United v. FEC*, 558 U.S. 310, 385 (2010) (holding that the First Amendment prohibits certain limits on election funding).

136. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022) (holding that the Constitution does not protect the right to abortion).