

Cluster III

***319** INTRODUCTION

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I. INTRODUCTION

In this cluster, Alfredo Mirandé, Christopher Slobogin, and Kevin Johnson provide a LatCrit view of the jurisprudence of criminal procedure. Mirandé, examining recent Supreme Court decisions, argues that there is convincing evidence that the Fourth Amendment proscription on unreasonable searches and seizures has a "Mexican exception," [FN1] and wonders "whether non-resident aliens have sufficient connection to the United States to be considered one of 'the people.'" [FN2] Slobogin, examining the same set of cases as Mirandé, suggests that the decisions better support the existence of an "illegal alien" [FN3] exception rather than an exception specific to Mexicans. [FN4] Slobogin then speculates that another--perhaps the most likely--impetus for the Court's criminal procedure jurisprudence is a tone-deafness to the hardships of poverty. [FN5] Finally, Kevin Johnson points out the similarities between racial profiling in domestic law enforcement and in immigration enforcement, and identifies the common interest that Latinas/os and African Americans have in challenging these practices despite the obstacles that stand in the way of a political alliance. [FN6]

Criminal procedure in the United States is a field so inextricably intertwined with race that Charles Ogletree has described it as a branch of American race law. [FN7] Yet it differs markedly from antidiscrimination law, ***320** that body of law that most explicitly addresses issues of race and racism. Students of the law of antidiscrimination in employment, voting, and education are familiar with the Supreme Court's increasingly emphatic pronouncements of the dangers of racial classification. We are told that state racial classifications are inherently politically divisive and socially damaging; that they create psychological trauma and lasting stigma; that state racial classifications constitute racial discrimination in and of themselves; and that explicitly race-based state action must always receive the strictest judicial scrutiny. [FN8] Racialization of the law, in short, is an extremely dangerous thing.

The authors in this cluster all agree that the American criminal justice system is dramatically racialized. [FN9] The statistics are shocking and yet utterly familiar. As Johnson notes, African Americans constitute more than fifty percent of the population of prisons and jails in the United States, despite the fact that they constitute only twelve percent of the population; Latinas/os make up one-third of the prison populations in California and New York, despite the fact that they constitute only twenty-seven and thirteen percent of the population, respectively. [FN10] Yet, in stark contrast to ***321** the Court's fears about race-consciousness in education, employment, and voting, the Court has been reluctant to take seriously the possibility that state action might be necessary to combat the extreme racialization of American criminal justice.

Representative in this regard is the Court's opinion in [McCleskey v. Kemp](#). [FN11] In that case, the Court considered Eighth Amendment and Fourteenth Amendment equal protection challenges to Georgia's death penalty statute. [FN12] Warren McCleskey, a Black man sentenced to death for the murder of a White police officer during the course of a robbery, sought habeas corpus relief with the help of a sophisticated statistical study conducted by Professor David Baldus and his colleagues. [FN13] The study revealed, among other things, that persons who murdered Whites were statistically much more likely to be sentenced to death than were persons who murdered Blacks, and that Black murderers were more likely to be sentenced to death than White murderers. [FN14] In its opinion, the Court affirmed in no uncertain terms its commitment to eradicating racial prejudice from the criminal justice system. [FN15] Nevertheless, citing the familiar *322 antidiscrimination principle that racial discrimination must be conscious and deliberate to violate the Equal Protection Clause, the Court rejected McCleskey's claim because he could not prove that the prosecutors, the jury, or the Georgia Legislature had acted, in his particular case, with a discriminatory purpose. [FN16] Although the Court accepted Baldus' statistical findings as accurate for purposes of deciding the claim, the Court made equally clear that these findings, although shocking, did not constitute proof of discriminatory purpose: [FN17] "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." [FN18] The Court expanded on this position in its Eighth Amendment discussion:

McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. [FN19]

In their now-classic book, *Racial Formation in the United States*, [FN20] Michael Omi and Howard Winant treat political activity as "the continuous process of formation and superseding of unstable equilibria." [FN21] In this view, "the state" is best understood not as a unity, but as an unruly field of *323 institutions and individual and collective entrepreneurs, pursuing various material and ideological projects. [FN22] Some of these projects conflict, and some are consistent with one another; some projects gain strength over time, while others diminish in their political support. [FN23] At the same time, Omi and Winant claim that in the United States, "the state is inherently racial," [FN24] by which they mean that "[f]ar from intervening in racial conflicts, the state is itself increasingly the preeminent site of racial conflict." [FN25] Putting these insights together, they argue:

Every state institution is a racial institution, but not every institution operates in the same way. In fact, the various state institutions do not serve one coordinated racial objective; they may work at cross- purposes. Therefore, race must be understood as occupying varying degrees of centrality in different state institutions and at different historical moments. [FN26]

The law, I will argue, plays two important roles in the Constitution and maintenance of state-centered racial projects. First, since legal rules are central to the organization of all state action generally, and since race itself is such a creature of the law in the United States, legal rules are central to the Constitution and maintenance of racial projects with which state institutions are involved. Second, legal doctrine and ideology serve a jurisdictional function, making it possible for state racial projects that are very different, perhaps even opposed to one another, to coexist.

Recent criminal procedure jurisprudence--the subject of this Cluster-- provides an example of these two functions of the law. While one type of racialized state project--the social welfare state--has been under recent attack, another racialized state project--the penal state--is on the ascendancy. Both the social welfare state and the penal state interact with various institutions of the capitalist state, which itself is complexly racialized. Legal rules shape the meaning of race; the meaning of race, in turn, affects the fortunes of various state projects.

Meanwhile, legal doctrine and legal ideology make it possible for various state projects to coexist. Opinions like that of the majority in *McCleskey v. Kemp* reconcile the egalitarian ideals of the social welfare project with the racist practices of the penal state. The jurisprudence of *324 the Fourth Amendment similarly allows both *Mirandé's* "Mexican Exception" and *Slobogin's* race-neutrality to find a place in the law.

II. RACE AND CRIMINAL PROCEDURE

According to Alfredo *Mirandé*, "[t]he answer to the question of whether there is a Mexican Exception to the Fourth Amendment is at once both complex and at the same time remarkably simple." [FN27] The complex answer has to do with the reasoning the Court has offered to explain its holdings. As *Mirandé* notes:

While the [Supreme Court and other] courts have consistently held that in principle Hispanic, or Mexican, appearance is not sufficient to justify a stop, they have also held that Hispanic appearance is one of several factors that may, in conjunction with other articulable facts which, as in *Terry*, "taken together with rational inferences from those facts, reasonably warrant that intrusion." [FN28]

Under current Fourth Amendment jurisprudence, the apparent race of a suspect alone is not enough to support a stop, but race is a permissible factor to be considered if it is one among many other factors. For *Mirandé*, however, this principle must be understood in terms of how it is actually applied by law enforcement:

The reality of course is that there is a Mexican Exception. Mexican appearing persons are routinely stopped with articulable facts that are consistent with law-abiding behavior such as driving on a highway within 100 air miles of the border, driving a late model sedan, wearing a cap, and driving a car that appears to be weighed down, or has a number of passengers in it. [FN29]

In addition, "either looking at the officers, or not looking at the officers, may be interpreted as suspicious conduct." [FN30] If these "other factors" only justify suspicion when combined with apparent Mexican ancestry, then the suspect's race is the controlling factor after all.

Christopher Slobogin challenges *Mirandé's* assertion that there is a Mexican Exception. Carefully examining Supreme Court opinions, he *325 argues that, with one exception, [FN31] the cases better support an "illegal alien" exception. [FN32] As *Slobogin* points out, the Court has never limited its analysis or holdings in such a way as to restrict its relaxed judicial review to cases involving Mexicans. [FN33] The mere fact that many of the case names are Mexican does not suggest that other undocumented immigrants are immune to prosecution, nor have any of the Justices suggested that Mexican origin makes any difference to the analysis.

Whether *Slobogin* is really in disagreement with *Mirandé*, however, is not clear. *Mirandé's* argument may not be that the Supreme Court has created a doctrinal, "law on the books" Mexican Exception, but rather that the Supreme Court has created the

rhetorical and practical space for law enforcement officials to create their own "law in action" Mexican Exception. If this is so, Slobogin's analysis does not really contradict Mirandé's. Slobogin is concerned not with what the police and the INS actually do, but with what the Supreme Court says can be done. On this level, he is persuasive that the Court's Fourth Amendment jurisprudence supports a much broader underlying principle than a Mexican Exception. Yet, as Slobogin concedes, at the Mexican border, phenotypical race is relevant, perhaps central, to the project of identifying suspected undocumented immigrants. [FN34] Since it is the United States border with Mexico, and not with Canada that is most politically charged and, therefore, most intensively policed, the "illegal alien" exception and the Mexican Exception are largely contiguous. One way, then, to think about the seeming conflict between Mirandé and Slobogin is to think of it as the difference between "law on the books" and "law on the ground." Another way is to see their conversation as reflecting the juxtaposition of two different racialized projects of state power.

It would be surprising, indeed shocking, if there were a Mexican Exception at the level of constitutional doctrine. Since [Plessy v. Ferguson](#), [FN35] the Supreme Court has interpreted the Fourteenth Amendment to require that the state act in a race-neutral manner. Moreover, Plessy's interpretation of the equality principle served as a legal foundation for the American social welfare state, a loose set of institutions including not only the components of the "social safety net" (unemployment insurance, Social Security, AFDC), but also, in the wake of [Brown v. Board of Education](#), [FN36] *326 a federal administrative apparatus that manages employment, education, public family law, collects data, and issues statistics according to strict rules set forth by the judiciary. These rules prohibit malignant race-conscious "state action" in an ever-widening number of arenas, while at the same time keeping track of people by racial classification for the purpose of administering antidiscrimination law. Even while the Court's understanding of race-consciousness gradually broadened and its understanding of invidious state action narrowed, the Court was able, as in [Adarand Constructors, Inc. v. Peña](#), [FN37] to insist that its Fourteenth Amendment jurisprudence was unified by the suspect nature of state racial classifications. [FN38]

Defenders of this racialized social welfare state have pointed out that the ideal of equal citizenship has permitted an ever widening group of those formerly excluded from national citizenship to claim legal, political, and social rights. [FN39] Leftist critics of this project have condemned the project's focus on the individual and its failure to recognize the ways in which the values and privileges of elites are taken as the standard for those later to be "included." [FN40] Nevertheless, the liberal project remains home base for most lawyers concerned with racial justice. Indeed, in some ways liberal legalism is synonymous both with "the state" (as contrasted to "the market") and with "the rule of law" itself. Liberal legalism is also inextricably intertwined with a mode of governance that gives legal professionals, social science professionals, and other "experts," great authority and influence in the making of government policy. Austin Sarat and Jonathan Simon argue that this mode of governance has been focused on managing the "social" sphere:

For more than a century of "reform," which culminated in the "welfare state" of the 1950s, 1960s, and 1970s, the liberal rationality of government associated with *laissez faire* capitalism [FN41] and methodological individualism was generally *327 reordered around the social as a terrain for positive knowledge and effective governmental intervention In the twentieth century, ... [t]he space of legal constructs was colonized and occupied by "facts" generated by social scientists.

Law and government came to rely heavily on the methodologies and constructs of the social sciences in order to shape the exercise of governmental power in areas as diverse as prisons, schools, and labor Thus, whether we look to government policy, legal

doctrine, or social science, the residue of the era of social liberalism remains a powerful fusion of law, social science, and government. [FN42]

More recently, however, as Sarat and Simon recognize, governance by reliance on experts on "society" has come under attack. In the late 1960s and early 1970s, a long economic boom period gave way to a steady decline in prosperity. By the late 1970s and early 1980s, right-wing political activists and politicians, reinventing themselves as "neoconservatives," were using the economic crisis as an opportunity to attack government policies and programs associated with the "left," such as affirmative action and programs like Aid to Families with Dependent Children; to reject Keynesian economics in favor of new laissez-faire corporatist, "supply side" economic policies; and more broadly to attack "Big Government," or the ideal of governance through management of "the social," itself. [FN43] Legally, the project of dismantling the social welfare state has been associated with the capture of the federal judiciary by neoconservatives and libertarian sympathizers, and with the concomitant moves to restrict civil rights and liberties, to cut taxes, and to expand corporate and property rights as they have been traditionally understood. [FN44]

Even in the heyday of the social welfare state, however, the government's commitment to racial egalitarianism was always sharply limited by its relatively narrow scope. As I have discussed elsewhere, [*328 Plessy](#) [FN45] inaugurated an era in which White supremacy, though banished from official state policy, was allowed to thrive in the realm of "custom" and "the social"--a realm that included employment, education, industrial production and exchange, and residential housing patterns. [FN46] The revolution marked by [Brown v. Board of Education](#) [FN47] and the antidiscrimination statutes passed during the "Second Reconstruction" brought housing, employment, and education into the realm of "the public," but cases such as [Milliken v. Bradley](#) [FN48] and [Washington v. Davis](#) [FN49] thereafter indicated that nonconscious action and "market forces" would remain shielded from the mandate of racial equality. Moreover, the egalitarianism required by the Fourteenth Amendment was always limited by that amendment's limitation to citizens. Noncitizen residents of the United States, including most Asian American immigrants before 1952 and many Mexican immigrants, remained subject to color-conscious state policy. [FN50]

Despite their egalitarian aspirations, the institutions of the welfare state were deeply "raced" and "gendered" from the beginning, as policymakers took race into account in their efforts to distinguish between the deserving and the undeserving poor. [FN51] As welfare was increasingly marked as African American, welfare policies grew more punitive until "welfare as we know it" was finally abolished altogether. [FN52] The familial administrative state, as Dorothy Roberts has documented, has also been racialized: [FN53] nonwhite women and children are disproportionately subject to stunning levels of neglect and brutality in the adoption and foster care system. [FN54] Gabriel Chin has examined the ways in which administrative governance served to enforce the federal policy of Asian exclusion in the late nineteenth and early twentieth centuries. [FN55]

[*329](#) Finally, governance in the name of "the social" generally, and the social welfare state in particular, never completely displaced older forms of governance. Kevin Johnson's essay in this cluster explores the parallels between the contemporary state projects of immigration enforcement and domestic criminal law enforcement from the perspective of racial exclusion. [FN56] These state activities can be linked to a more generalized state project: the penal state.

Governments are responsible not only for "law" but for "order" as well; if liberal legalism represents the "law" in this equation, then the penal state-- also sometimes referred to

as the sovereign state--represents "order." The areas controlled by the state in its role as sovereign include domestic policing, immigration and naturalization matters, foreign policy, including treaty making, and war making. [FN57] Violence is a prominent feature of the sovereign state: domestic law enforcement and immigration, for example, are areas in which state officials are explicitly authorized to use violence against lawbreakers. [FN58] Additionally, in the sense in which "law" is *330 commonly opposed to "politics," political strategy is at the forefront of the workings of the sovereign state. The liberal legal state of rights where the rule of law holds sway is a place of reason and argument; the sovereign legal state is a place where might makes right, and power, rather than reason, settles disputes.

Where the liberal state treats its citizens as lacking in bodies, the penal state manages power through the marking and management of bodies. For Machiavelli, sovereign power is the "register in which sexuality and political purpose are thoroughly entwined." [FN59] As feminist scholars have demonstrated in detail, the exercise of sovereign power, whether by the military, the police, or border officials, is thoroughly masculinist: hostile to both women and sexual minorities as a matter of principle as well as practice. [FN60] Race also has long been central to the exercise of sovereign power in the United States. American history suggests that the social projects of creating the nation, and of creating the idea of "whiteness," have long been intertwined. [FN61] This is perhaps the most profound sense in which Omi and Winant are correct that the United States is a "racial state."

As Ian Haney López points out, the very first federal naturalization statute specified that prospective citizens of the United States be "White." [FN62] The post-Civil War amendment of this statute to permit naturalization by persons of African descent left in place the power of the national government to exclude other nonwhite groups, a power that has been treated as "plenary." [FN63] From this perspective, the "Mexican Exception" of *331 which Mirandé speaks is only one of the most recent manifestations of the continuing political project that historian Rogers Smith describes as "ascriptive Americanism." [FN64]

In contrast to the activities regulated by the welfare state, where race is thought to be a difference that makes no difference, the penal state both actively manages racial difference (in the form of people's racialized bodies) and actively constructs it (in the form of symbolic resources). Sovereign power is "about race" in the most obvious ways: law enforcement officials look for racial differences among people and direct violence against them based on what they find. As scholars have noted in exhaustive detail, United States prisons and jails are disproportionately full of African American and Latina/o bodies. As Mirandé emphasizes, immigration enforcement activities target Mexican-looking people, people who appear to be of Indio-Hispanic racial ancestry. [FN65] Kevin Johnson's essay describes the practices of racial profiling both at the border and on the streets. [FN66]

In addition, the sovereign state actively draws on racialized meanings and images to justify its actions. Sovereign power is a register in which the protection of abstract national and social bodies is understood as all-important, and to make these imaginary bodies seem real, elites appeal to the rhetoric of physical bodies. Immigration law protects the integrity of the national body; criminal law protects the integrity of the domestic body. Both areas of law are subject politically to "moral panics" in which the language of contagion, corruption, and impurity--rhetoric that uses bodily metaphors of health and disease to describe the nation--become prominent. [FN67] In both areas of the law, the task of protecting the fantasized purity of legal-social bodies from contagion is identified more or less explicitly with the task of controlling (actual) racialized bodies. From the nineteenth-century panic about the "Yellow Peril" to present-day fears about

Arab Americans, dark bodies are associated with threats to national and social integrity. [FN68] As Gabriel Chin has made clear, since the Chinese *332 Exclusion Cases, the Supreme Court has granted nearly plenary power to immigration officials to protect the national body, a protection that is permissibly race-conscious. [FN69] It is not surprising, therefore, that both police and immigration officials engage in racial profiling as a means of protecting the nation from disorder. [FN70] As Mirandé points out, protection of the nation from the "other" often means defending the Mexican border. [FN71] Johnson adds that police engage in an everyday, domestic version of this ethnic cleansing when they profile African American suspects. [FN72]

The contrast between these explicitly racialized state projects and the rhetoric of equality, in which state racial classifications are forbidden, could not be more stark. Yet, in practice, there is much less conflict between sovereign and liberal power than one might expect. Judges, who administer the liberal "rule of law," typically grant extreme deference and a high degree of discretion to state actors when those actors cite reasons of national security and public order. [McCleskey v. Kemp](#) [FN73] is only one example; another might be the infamous Supreme Court decision in [Korematsu v. United States](#). [FN74] Deference and discretion to the state actors charged with the business of exercising sovereign power provides a cover for racial and ethnic cleansing activities that would otherwise be considered anathema in an egalitarian society.

The jurisprudence of criminal procedure is a paradigmatic example of this co-dependent relationship between liberal rights and sovereign power. As many legal scholars have complained, although criminal procedure is highly constitutionalized, the Court has, especially in recent years, gone out of its way to show deference to the customary practices of police and other law enforcement officials. In the "salad days" of the Warren Court, the Supreme Court showed a willingness to disrupt business as usual in the name of protecting individuals accused of crime from police abuse, and the Court acknowledged the strong possibility that such abuse might not be *333 arbitrary but rather discriminatory in character. [FN75] Since that time, as Mirandé and Slobogin note, constitutional protections for individual persons under suspicion of criminal activity and individuals in the custody of the criminal justice system have been steadily eroded by the emergence of a series of ad-hoc "exceptions" to general protections. [FN76] These exceptions provide, once again, an excellent cover for the targeting of persons according to their perceived race. In this way, McCleskey stands for more than the intent requirement of the Fourteenth Amendment and how it applies to the criminal justice system; it stands for the complicity of liberal and sovereign power.

At the end of his essay, Slobogin develops the intriguing idea that a "poverty exception" underlies Fourth Amendment jurisprudence. [FN77] As he points out, "[s]everal Court decisions define expectations of privacy in a way that makes people who are less well-off more likely to experience warrantless, suspicionless government intrusions." [FN78] Moreover, Slobogin continues, "[e]ven in those situations where the interior of the home is not viewable from a public space, the homes of poor people are more likely to receive little or no Fourth Amendment protection." [FN79] The Court grants less Fourth Amendment protection to apartments, cars, and containers located outside a dwelling than to single-family homes; [FN80] has held that public arrests do not require a warrant, as opposed to arrests taking place in a private space; [FN81] has ruled that "brief police-citizen encounters on the street and on public transportation are 'consensual,'" [FN82] and most recently, has permitted custodial arrests even for very minor crimes. [FN83] Constitutional protection, in criminal procedure, is tied to the concept of a reasonable expectation of "privacy;" but privacy is tied to the ability to control access to private property.

Whereas the social welfare state and the penal state are centrally concerned with race--making sure that it does not matter or making sure that it does--the capitalist state is structurally indifferent to race. Indeed, the capitalist mode of power is, at least in principle, opposed to all status hierarchies because it obeys the single principle of economic efficiency or wealth maximization, under which all areas of social life should be subject to markets and within which all participants in markets are presumed equal, *334 even fungible, with one another. This does not mean, however, as some have argued, that racial discrimination has been or will soon be driven out by market forces. [FN84] Because capitalism both generates and thrives on inequality, and because markets are imperfect and not separate from politics, racial inequalities are perpetuated and often magnified by the market practices of production, exchange, and consumption, and by the processes of market creation. [FN85]

The criminal procedure cases Slobogin discusses are in accord with decisions in other areas of constitutional law concerning wealth and poverty. [FN86] It is uncontested that government "wealth classifications" in general do not receive heightened scrutiny. [FN87] Rather, as the Court reasoned in [Dandridge v. Williams](#), [FN88]

[f]or this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." That era long ago passed into history. [FN89]

Although the Court has mandated that government spend resources on poor people when access to legal counsel is at stake, that mandate is extremely narrow. [FN90] The general rule that the Constitution does not create *335 "positive" but only "negative" rights remains. In practice, this means that access to constitutional rights may be conditioned on the ability to pay for their exercise. The inability of the homeless and the poor to control access to property not only prevents them from exercising basic constitutional rights; but it also means that, to the extent they cannot enjoy all the rights and privileges of liberal citizenship, they are subject to the regulation and control of the administrative arm of the social welfare state, an apparatus that, as Jill Elaine Hasday explains, functions "to manage the dependency of poor people in a wage labor economy." [FN91] Thus, the law of government benefits, family law, and housing is bifurcated, with one set of rights for those who have access to property through income or wealth, and another set of rights (often couched in the legal terms of "privilege" rather than "right") for those who do not. [FN92] In the new era of privatization and erosion of the welfare state, responsibility for these "dependents" has increasingly been transferred to the penal state. [FN93]

Race, gender, and class are historically interrelated in the United States. At the founding of the nation, certain groups of people were excluded by law from full participation in capitalist activity: African Americans, as slaves, constituted property and thus could not hold property or make contracts themselves; married women, subject to the law of coverture, could not hold property or make contracts in their own names but were persons only indirectly, through their fathers and husbands; indigenous Americans were considered incapable of holding full title to land under the *336 doctrine of discovery. [FN94] The [Plessy](#) [FN95] era, as we have seen, gave constitutional sanction to the economic exploitation and to the exclusion of African Americans, Asian Americans, and other nonwhites through employment discrimination, housing discrimination, and the post-World War II "suburban-industrial complex," which was developed with the intensification of racial segregation and hierarchy in mind. [FN96] These and other state projects succeeded in obstructing the efforts of racialized groups to build capital, and systematically transferred wealth from people of color to Whites. In contemporary times,

people of color continue to routinely experience differential access to credit as well as discrimination in employment and housing, compounding the effects of past discrimination and exclusion. The legal and social institutions of capitalism have absorbed, and now reproduce, and even intensify, the economic inequalities generated by decades of White supremacy.

Here, again, the jurisdictional function of liberal legalism provides room for possibly conflicting state projects to co-exist. The social welfare state has attempted to implement norms of equality and, to a modest extent, substantive social and economic rights. At the same time, capitalism operates not to produce equality but inequality, and is indifferent to questions of distribution. The primary way in which the anti-egalitarian tendencies of capitalism are shielded from scrutiny through the egalitarian lens of the welfare state is through the "public/private distinction"--first criticized by the Legal Realists, later by Critical Legal Studies, and finally by mainstream constitutional theorists. [FN97] Despite near-constant critique, the *337 courts continue to treat common law institutions and distributions of power, particularly those central to capitalism, as pre-political and thus as "not state action." As Lisa Iglesias has put it, the United States subscribes to the idea of an "anti-political economy." [FN98] Keeping the economy away from politics, of course, makes it possible to preserve the anti-egalitarian tendencies of capitalism and shield them from critique.

From this perspective, Slobogin's suggestion that insensitivity to class, rather than hostility based on race, drives Fourth Amendment jurisprudence is again not so much in conflict with Mirandé's and Johnson's focus on race as it might first appear. On the one hand, Slobogin is surely right to suggest that "class" and "race" are not the same thing; [FN99] the state project of protecting and fostering corporate capitalism involves different institutions and different forms of power than the state project of preserving and protecting the imaginary national community, or the project of managing social welfare. The simple insistence that "it's all about race" thus fails to consider the complexities of how White supremacy functions in different arenas.

On the other hand, it has been my argument, following Omi and Winant, that each of these quite distinct state projects is nevertheless racialized. [FN100] Race and political economy are so deeply intertwined in the United States that class and race can never be fully separated. To this extent, Mirandé and Johnson are right to focus on White supremacy as a, if not the, master narrative.

III. CONCLUSION

Johnson's essay takes us to the point where the rubber meets the road. The complexities of racial formation in the contemporary United States mean, as Johnson explains, that Latinas/os and African Americans may experience short-term benefits from supporting the penal state's racialization of criminal law and immigration enforcement. [FN101] Yet, the long-term interest of both groups is in challenging, rather than strengthening, White supremacy. As Johnson puts it, "[o]nce race is let out of the proverbial genie's bottle ... it is difficult to limit where and when it will be considered by law enforcement authorities." [FN102] The result, as he acknowledges, is a classic "prisoner's dilemma": each player will be far *338 better off if it cooperates with the other, but neither can trust the other not to defect and thus seek a smaller but more certain benefit. [FN103]

Complicating the prisoner's dilemma is the fact that there is not one form of racism, but many. As Robert Chang and Keith Aoki have pointed out, "nativist" racism operates differently from color racism, and racialized groups can and do play these differences against each other. [FN104] Indeed, as Omi and Winant recognize, race itself is not a

stable thing but a social construction always in process. [FN105] We have seen different relationships between various state projects and racial formation. The social welfare state has sought to enforce norms of race neutrality in the "legal" sphere and to permit "social" management on the basis of race. The agencies of the penal state have entrusted state officials with the power and discretion to punish actual colored bodies in the name of an imaginary pure White national body. The institutions of the capitalist state have permitted racial differentials of political power to be leveraged in the creation and amassing of wealth. Racialized groups involved in politics in and around Omi and Winant's "racial state" face not one, but a multitude, of prisoner's dilemmas.

Moreover, we are now also facing potential changes in the organization of White supremacy, as the social welfare state gives way to both a newly revitalized penal state concerned openly with racial and cultural policing, and a newly revitalized "free market" capitalist state being exported around the world. Traditional civil rights and civil liberties arguments are uncertain tools in this new environment. [McCleskey](#) [FN106] symbolizes the deference liberal law pays to state forces that promise order and security, even when the terms of that security seem blatantly in conflict with egalitarian values. The survival of the public/private distinction represents the similar deference that protects the anti-political economy.

Although the essays in this cluster were written before the events of September 11, 2001, they are timely in their focus on the difficulties of confronting the penal state with liberal values. Slobogin demonstrates the difficulty in finding racism in the text of the applicable law. [FN107] Mirandé **339* reminds us of the layers of law not penetrable by courtroom arguments. [FN108] Johnson sets out both the necessity and difficulty (if not impossibility) of building coalitions among those groups that bear the burden of American elites' attempt to secure security for themselves. [FN109] If these essays do not offer us easy optimism, they at least make clear the difficulty of the path that lies ahead.

Footnotes:

FN1. Alfredo Mirandé, Is [There a "Mexican Exception" to the Fourth Amendment](#), 55 *FLA. L. REV.* 365 (2003).

FN2. *Id.*

FN3. Christopher Slobogin, The [Poverty Exception to the Fourth Amendment](#), 55 *FLA. L. REV.* 391 (2003).

FN4. *Id.*

FN5. *Id.* at 392.

FN6. Kevin R. Johnson, The [Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement](#), 55 FLA. L. REV. 341 (2003).

FN7. Gary Peller, [Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties](#), 67 TUL. L. REV. 2231, 2245 (1993) (citing Charles Ogletree, Lecture at the American Association of Law Schools Annual Meeting (Jan. 1990)).

FN8. See, e.g., [Shaw v. Reno](#), 509 U.S. 630, 643 (1993):

Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility "[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs."

Id. (citations omitted); see also [Rice v. Cayetano](#), 528 U.S. 495, 515 (2000) (defining "'racial discrimination' [as] that which singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics'"); [Adarand Constructors, Inc. v. Peña](#), 515 U.S. 200, 224 (1995) (concluding the Court's precedents establish that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

FN9. See generally Mirandé, *supra* note 1; Slobogin, *supra* note 3; Johnson, *supra* note 6.

FN10. See Johnson, *supra* note 6, at 347 n.31 (citing statistics cited by Kenneth Nunn and Margaret Montoya). As I write this Essay, a study by the Institute for Children, Youth and Families at Michigan State University has found that Latino youths receive longer terms of incarceration (and other harsher penalties) than White youths charged with the same offenses. See Latino Juvenile Offenders Get Harsher Treatment, Study Finds, 32 CRIM. JUST. NEWSL. 13, 2 (2000):

For example, among youths with no prior admissions to state correctional facilities, Latinos charged with violent offenses were more than five times as likely as whites to be incarcerated, (as opposed to other ... sanctions). Latinos charged with property offenses were nearly [twice] as likely as whites to be incarcerated [F]or drug offenses, the admission rate for Latinos was 13 times the rate for white youths, [and] ... the average term ... was more than double that of whites

Id. at 2-3. Overall, incarcerated Latino youths served an average of 305 days, compared to 193 days for White youths, and Latino youths were found to be "incarcerated in adult jails and prisons at far higher rates than white youths ... rates two to three times higher in nine states, three to six times higher in eight states, and seven to 17 times higher in four states." Id. at 3.

FN11. [481 U.S. 279 \(1987\)](#).

FN12. See *id.*

FN13. *Id.* at 283, 286-87.

FN14. See *id.* at 286. For example, Baldus and his colleagues found that, even after taking into account thirty-nine nonracial variables, defendants charged with killing White victims were 4.3 times more likely to receive a death sentence than were other defendants. *Id.* at 287. The study also found that prosecutors sought the death penalty in 70% of the cases involving Black defendants and White victims; 15% of the cases involving Black defendants and Black victims; and 19% of the cases involving White defendants and Black victims. *Id.* at 286-87.

FN15. See *id.* at 309-10:

Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury ... is a vital principle, underlying the whole administration of criminal justice." Thus, it is the jury that is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."
Id. (citations omitted) (footnotes omitted).

FN16. *Id.* at 298-99.

FN17. *Id.* at 297.

FN18. *Id.*

FN19. *Id.* at 311-13. In the last section of its opinion, the Court expressed its view on what was at stake:

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.

Id. at 316-37 (citations omitted) (footnotes omitted). Justice Brennan, in his dissent, described this concern, ironically, as a "fear of too much justice." *Id.* at 339 (Brennan, J., dissenting).

FN20. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994).

FN21. Id. at 84 (citing ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 182 (Quentin Hoare & Geoffrey Nowell Smith eds., 1971)).

FN22. Id. at 84-85.

FN23. Id. at 83.

FN24. Id. at 82.

FN25. Id.

FN26. Id. at 83.

FN27. Mirandé, *supra* note 1, at 385.

FN28. Id.

FN29. Id. at 385-86.

FN30. Id. at 386.

FN31. Slobogin concedes that [United States v. Martinez-Fuerte, 428 U.S. 543 \(1976\)](#), seems to support the existence of such an exception, but condemns the decision. Slobogin, *supra* note 3, at 399.

FN32. See *id.* at 392-99.

FN33. See *id.*

FN34. See *id.* at 398.

FN35. [163 U.S. 537 \(1896\)](#).

FN36. [347 U.S. 483 \(1954\)](#).

FN37. [515 U.S. 200 \(1995\)](#).

FN38. [Id. at 223-24](#) (identifying "skepticism," "consistency," and "congruence" as the unifying principles of equal protection jurisprudence).

FN39. See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989). Karst defines the "principle of equal citizenship" thusly: "Each individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat an individual as a member of an inferior or dependent caste or as a nonparticipant." *Id.* at 3.

FN40. See Angela P. Harris, [Beyond Equality: Power and the Possibility of Freedom in the Republic of Choice](#), 85 *CORNELL L. REV.* 1181, 1185 (2000).

FN41. I disagree with Sarat and Simon's characterization of the economy in this period as "laissez faire capitalism." Rather, I would argue that the dominance of "the social" as the paradigm of governance is strongly associated with the so-called economic "Golden Age," during which growth was high and economists confident of their ability to smooth out the highs and lows of the business cycle and to control inflation with fiscal and monetary policy. In economics during this period, as in the other social sciences, the prestige and confidence of experts in their ability to manage large-scale institutions and forces was at a maximum. See MICHAEL PERELMAN, *THE PATHOLOGY OF THE U.S. ECONOMY REVISITED: THE INTRACTABLE CONTRADICTIONS OF ECONOMIC POLICY* 15-17 (2002).

FN42. Austin Sarat & Jonathan Simon, [Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship](#), 13 *YALE J.L. & HUMAN.* 3, 5-6 (2001).

FN43. Emblematic here is Margaret Thatcher's famous statement, "There is no society. There are only individuals and families." Jon Margolis, *Market Versus Family Values; GOP Debate Cut to Core About Conservatism's Vision*, *CHI. TRIB.*, Mar. 24, 1996, at C7, [available at 1996 WL 2655294](#).

FN44. See generally Frank Valdes, *Culture, 'Kulturkampf,' and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash* (unpublished manuscript on file with author).

FN45. [163 U.S. 537 \(1896\)](#).

FN46. See generally Angela P. Harris, [Equality Trouble: Sameness and Difference in Twentieth-Century Race Law](#), 88 *CAL. L. REV.* 1923 (2000).

FN47. [347 U.S. 483, 495 \(1954\)](#) (concluding that racial segregation in public elementary schools is inconsistent with the Equal Protection Clause).

FN48. [418 U.S. 717, 745 \(1974\)](#) (noting that federal courts lack the power to impose interdistrict remedies for school segregation absent an interdistrict violation or interdistrict effects).

FN49. [426 U.S. 229, 238-43 \(1976\)](#) (noting that violations of the Equal Protection Clause require proof of discriminatory intent, not merely of discriminatory effect).

FN50. See Harris, *supra* note 46.

FN51. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 204 (1997).

FN52. *Id.* at 208-09.

FN53. See *id.* See generally DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

FN54. See ROBERTS, *supra* note 51, at 273.

FN55. Gabriel J. Chin, [Regulating Race: Asian Exclusion and the Administrative State, 37 HARV. C.R.-C.L. L. REV. 1, 37 \(2002\)](#).

FN56. See generally Johnson, *supra* note 6.

FN57. Family law can be understood as a project related to the project of the sovereign state. Like penal law, family law traditionally has provided generously for the exercise of White supremacy. More recently, the racial norms of the liberal project have slowly begun to infiltrate family law, in the wake of [Loving v. Virginia, 388 U.S. 1 \(1967\)](#) (holding that antisegregation statutes are unconstitutional under the Equal Protection Clause). Yet, explicit racial management has been slow to disappear. For example, in the context of the Multiethnic Placement Act, a federal statute intended to foster transracial adoptions, Rachel Moran explains:

Although the law is designed to establish a norm of colorblindness, enforcement officials continue to acknowledge the social and cultural relevance of race to family formation. Race is considered in evaluating parental competency at two levels. In the first place, the placement process can accommodate a prospective parent's preference for a child of the same race

After personal preferences are ascertained, race enters the process again when adoption agencies make objective evaluations of parental fitness. Because culture is presumptively relevant even though race is not, federal law leaves considerable room for same-race placements to persist out of concern that adoptive parents are not competent to raise children from a different background. By failing to define culture yet forbidding its use as a proxy for race, official interpretations hardly clarify which parenting strategies are desirable and which are disqualifying. Federal officials do not say whether

colorblind parenting is culturally insensitive or racially neutral. Nor do they tell adoption agencies whether color-conscious parenting is culturally competent or racist. Far from making a norm of colorblindness clear, current federal law leaves the mystery of what constitutes healthy racial socialization unsolved.

RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 143 (2001).

FN58. The practices of military, police, and immigration officials often overlap. Domestic police forces were developed on the model of the military, and the arm of the Immigration and Naturalization Service (INS) concerned with enforcement is organized similarly. In fact, critics have regularly complained about the "militarization" of both police and immigration practices, particularly in light of the various civil "wars" that presidential administrations have declared, first on drugs and more recently on terrorism. For one critique of the militarization of border control, see Timothy J. Dunn, *Border Militarization Via Drug and Immigration Enforcement: Human Rights Implications*, 28 *SOC. JUST.* 7 (2001).

FN59. Wendy Brown, *Finding the Man in the State*, in *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 186 (1995).

FN60. See, e.g., CYNTHIA H. ENLOE, *MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN'S LIVES* 37 (2000); CYNTHIA ENLOE, *BANANAS, BEACHES AND BASES* 65-92 (1989); Sylvanna Falcon, *Rape as a Weapon of War: Advancing Human Rights for Women at the U.S.-Mexico Border*, 28 *SOC. JUST.* 31 (2001); Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 *DUKE L.J.* 651, 690-91 (1996).

FN61. See, e.g., MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1998); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997).

FN62. IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1 (1996) (citing Act of March 26, 1790, ch. 3, 1 Stat. 103).

FN63. See Gabriel J. Chin, [Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration](#), 46 *UCLA L. REV.* 1, 6 (1998) ("The cases that created the plenary power doctrine ... not only continue to be cited but, in the words of one distinguished authority, 'said nearly everything the modern lawyer needs to know about the source and extent of Congress's power to regulate immigration.'").

FN64. See SMITH, *supra* note 61, at 36 (proposing that "ideologies of ascriptive Americanism have always done some of the work that civic myths do more effectively than liberalism or democratic republicanism, despite the mythical components that those traditions also possess").

FN65. See generally Mirandé, *supra* note 1.

FN66. See generally Johnson, *supra* note 6.

FN67. On the rhetoric of health, disease, and pollution in criminal justice policy, see, e.g., Martha Grace Duncan, In [Slime and Darkness: The Metaphor of Filth in Criminal Justice](#), 68 TUL. L. REV. 725, 751 (1994); Mona Lynch, [Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation](#), 27 LAW & SOC. INQUIRY 529, 530 (2002). On the dehumanizing of immigrants in public discourse, even by immigrant rights activists, see John S.W. Park, [Race Discourse and Proposition 187](#), 2 MICH. J. RACE & L. 175, 176 (1996).

FN68. For a historical examination of both racialized and gendered moral panics in the history of United States drug policy, see NANCY D. CAMPBELL, USING WOMEN: GENDER, DRUG POLICY, AND SOCIAL JUSTICE 11, 32 (2000).

FN69. See Chin, *supra* note 63.

FN70. Indeed, at least one commentator argues that domestic law enforcement officers subjectively experience their jobs as a kind of racialized colonial adventure. See generally James M. Doyle, ["It's the Third World Down There!": The Colonialist Vocation and American Criminal Justice](#), 27 HARV. C.R.-C.L. L. REV. 71 (1992).

FN71. Mirandé, *supra* note 1, at 388-89. Other times, it means defending the United States against Asian "spies." See Miriam Kim, [Discrimination in the Wen Ho Lee Case: Reinterpreting the Intent Requirement in Constitutional and Statutory Race Discrimination Cases](#), 9 ASIAN L.J. 117, 152 (2002). Recently, it came to mean protecting the United States against Arab "terrorists." See Leti Volpp, [The Citizen and the Terrorist](#), 49 UCLA L. REV. 1575, 1576-81 (2002).

FN72. Johnson, *supra* note 6, at 349-51.

FN73. [481 U.S. 279 \(1987\)](#).

FN74. [323 U.S. 214, 216 \(1944\)](#) (upholding the wartime internment of Japanese Americans, despite acknowledgment that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect").

FN75. See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999).

FN76. Mirandé, *supra* note 1, at 367-68; Slobogin, *supra* note 3, at 391, 393.

FN77. Slobogin, *supra* note 3, at 408-12.

FN78. *Id.* at 400.

FN79. *Id.* at 402.

FN80. *Id.*

FN81. *Id.* at 403-04.

FN82. *Id.* at 405.

FN83. *Id.* at 405-06.

FN84. See, e.g., Richard A. Epstein, [Standing Firm, on Forbidden Grounds](#), 31 *SAN DIEGO L. REV.* 1, 1 (1994) ("[T]he best set of overall social outcomes would come from a legal order that tolerated any form of private discrimination or favoritism, whether practiced by the most vicious and ardent white supremacist or the most dedicated proponent of diversity or affirmative action."); James E. Macdonald & Caryn L. Beck-Dudley, [A Natural Law Defense to the Employment Law Question: A Response to Richard Epstein](#), 38 *AM. BUS. L.J.* 363, 399-400 (2001) (describing Epstein's position on Title VII that rational racial discrimination should be permitted and that irrational racial discrimination will be driven out by market forces).

FN85. The discussion that follows focuses on initial allocations of property rights and systematic transfers of wealth according to political rules that link race strongly to class. However, it has also been suggested that another mechanism for the maintenance of racial discrimination in markets is that individuals have a preference or "taste" for discrimination because discrimination is a means by which social groups produce status for their members. See generally Richard H. McAdams, [Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination](#), 108 *HARV. L. REV.* 1003 (1995). If this is true, then even successful "reparations" programs that attempted to undo unjust transfers and creation of wealth would soon be stymied by continuing racial discrimination.

FN86. See generally Slobogin, *supra* note 3.

FN87. See, e.g., [San Antonio Indep. Sch. Dist. v. Rodriguez](#), 411 U.S. 1, 102 n.61 (1973).

FN88. [397 U.S. 471 \(1970\)](#).

FN89. [Id. at 484-85](#) (citations omitted).

FN90. See COLE, *supra* note 75, at 92 (describing the Court's moves to alleviate inequality as "more ceremonial bows than actual reforms").

FN91. Jill Elaine Hasday, [Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations](#), 90 GEO. L.J. 299, 301 (2002); see also NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS OF THE "POSTSOCIALIST" CONDITION 121-44 (1997) (discussing "dependency" as a keyword of the welfare state that labels individuals as targets for bureaucratic social control). For a philosophical exploration of the lack of freedom of the homeless in a society based on private property, see Jeremy Waldron, [Homelessness and the Issue of Freedom](#), 39 UCLA L. REV. 295 (1991).

FN92. See generally Hasday, *supra* note 91; see, e.g., [Dept. of Housing v. Rucker](#), 535 U.S. 125 (2002) (upholding against a due process challenge a federal statute giving local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity); William E. Forbath, [Constitutional Welfare Rights: A History, Critique and Reconstruction](#), 69 FORDHAM L. REV. 1821 (2001) (describing the ultimately failed effort by constitutional scholars to have the Court recognize welfare rights as property).

FN93. In the process, Malcolm Feeley and Jonathan Simon argue, the penal state itself takes on some of the characteristics of the bureaucratic state, although now based on principles of risk management rather than on social services. Feeley & Simon call this "the new penology." See Malcolm M. Feeley & Jonathan Simon, The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications, 30 CRIMINOLOGY 449, 449 (1992).

FN94. See [Johnson v. M'Intosh](#), 21 U.S. (8 Wheat.) 543 (1823) (describing the doctrine of discovery).

FN95. [163 U.S. 537 \(1896\)](#).

FN96. On suburbanization and the role of federal policy in the making of the Black ghetto, see MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 16-18 (1999). For a general discussion of racialized state policies that blocked Blacks from creating wealth, see *id.* at 37-45. For a discussion of historical state and private actions resulting in widespread racial discrimination in housing markets, see DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 26-59 (1993). On the importance of home ownership, subsidized for Whites but not for Blacks, see Phyllis Craig-Taylor, To Be [Free: Liberty, Citizenship, Property and Race](#), 14 HARV. BLACKLETTER L.J. 45 (1998). The post-slavery exploitation of Black labor included the sharecropping system, *id.* at 57-59; race discrimination on the part of unions and successful employer efforts to use African Americans as lower-wage "scabs," *id.* at 65; and the convict labor system. The alien land laws and the Japanese internment also intentionally prevented the development of

Asian American wealth. See Gabriel J. Chin, [Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context](#), 1 WYO. L. REV. 497, 505 (2001).

FN97. See, e.g., Cass R. Sunstein, *The Partial Constitution* 51-54 (describing the Legal Realist critique of laissez-faire through the recognition that "private" law was necessarily the product of government action); Mark Kelman, *A Guide to Critical Legal Studies* 102-09 (1987) (setting out the Critical Legal Studies critique of the public/private distinction); Sunstein, *supra*, at 3-4 (adopting a critique of "status quo neutrality" in constitutional law).

FN98. See Lisa Iglesias, *Structural Violence: Law and the Anti-Political Economy* (unpublished manuscript, on file with author).

FN99. Slobogin, *supra* note 3, at 400.

FN100. See OMI & WINANT, *supra* notes 20-26 and accompanying text.

FN101. Johnson, *supra* note 6, at 360-62.

FN102. *Id.* at 361.

FN103. *Id.*

FN104. Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 10 LA RAZA L.J. 1395, 1414 (1997) (noting that "[b]ecause of the construction of the national community as White and Black, Asian Americans and Latina/os are discursively produced as foreign").

FN105. Omi and Winant famously propose that "racial formation"--"the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed"--consists of "a process of historically situated projects in which human bodies and social structures are represented and organized." OMI & WINANT, *supra* note 20, at 55-56.

FN106. [481 U.S. 279 \(1987\)](#).

FN107. See generally Slobogin, *supra* note 3.

FN108. See generally Mirandé, *supra* note 1.

FN109. See generally Johnson, *supra* note 6.