No. 13-1371

IN THE

Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL.,

Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF STUDENTS FROM THE NEW YORK UNIVERSITY SCHOOL OF LAW SEMINAR ON CRITICAL NARRATIVES IN CIVIL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

We are law students studying the African-American journey—from being "constitutional property" as slaves, to being designated citizens by the Reconstruction Amendments, and through a continuing struggle for full constitutional personhood. Taking this perspective, we view our constitution and statutory laws not merely as documents to interpret, but as significant forces in the lives of people striving for equality.

Each of us carries a slightly different story of America. These stories inform our interactions and shape the character of our national community. Some are reflected in—and amplified by—judicial discourse. The *Dred Scott v. Sanford* majority's narrative of the exclusion of African Americans from the "political family" foretold civil war. Stories of human dignity and tolerance in the prevailing opinions of *Lawrence v. Texas* reflected a broadening understanding of social diversity. It is incumbent upon this Court to be mindful of the social effects of the stories it tells.

The narrative of race in this country is very much in dispute. Some speak of racial inequality in the past tense and cast aspersions upon the continuing struggle for equality. But for many whose stories go unheard this struggle is a living reality

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than amicus curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

We will soon be lawyers tasked with safe-guarding the law. We worry about how to use lessons of the past as we shape the law of the future. As the next generation of litigators, legal scholars, and advocates, we hope to begin and sustain discussion of a national obligation to protect fundamental rights. As the future of the law, we seek a forward looking jurisprudence in the present. It is in this spirit that we urge the Court to consider the purpose of a disparate impact cause of action and to understand it in terms of the continuing narrative of the African American quest for full constitutional personhood.

SUMMARY OF THE ARGUMENT

If a child spills a glass of milk on the floor, she must clean it up. We do not first ask whether the milk was spilled intentionally. This Court's jurisprudence has long distinguished between intentional and unintentional discrimination. *Compare Griggs v. Duke Power Co.*, 401 U.S. 424 (U.S. 1971) (accepting disparate impact analysis in Title VII context) *with Washington v. Davis*, 426 U.S. 229 (1976) (rejecting disparate impact analysis under the Fourteenth Amendment). This distinction, however, can be illusory.

The proper focus of anti-discrimination statues is on *whether* wrongful discrimination exists, not on *why* it exists. When the Fair Housing Act forbids discrimination against any person "because of" race, 42 U.S.C. §§ 3604(a), 3605(a), it unquestionably reaches policies that unjustifiably cause a racially disparate impact. Disparate impact analysis requires the Court to determine whether milk has been spilled on the floor. If milk has been spilled, it should be cleaned up; if government resources have been allocated in an unjustifiably discriminatory way, the discrimination

should be corrected. Although analogizing discrimination to spilled milk may seem to some imprecise or, worse, trivial, it serves to make clear that willful or careless disregard for the negative consequences of allegedly neutral government policies should not be condoned; it also highlights a truth at once elemental and universal: wrong is wrong whether done on purpose or by accident. Ambiguous intentions and thoughtless actions neither excuse nor erase the discriminatory consequences of government policies undertaken behind the veil of neutrality.

This brief reviews histories of discrimination in electoral disenfranchisement, jury selection, and public welfare provision to demonstrate that the racially discriminatory effects of government action undertaken with openly discriminatory purpose are often mirrored by the subsequent racially discriminatory effects of actions undertaken with deceitful or careless intention. In so doing, the brief seeks to make two points: *First*, if disparate impact analysis is removed from the toolbox used to combat discrimination, discrimination will persist. Indeed, discrimination's "impact is greater when it has the sanction of the law." *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 494 (1954). Without a disparate impact cause of action, persistent housing discrimination will therefore be blessed with a new aura of official sanction. *Second*, known and unjustified discriminatory effects should be remedied. This deeply intuitive principle—that spilled milk should be cleaned up—should serve as a background principle for this Court's decision.

For the better part of this nation's history, racial discrimination was practiced openly by both private individuals and government actors. Under such

conditions, identifiable discriminatory intent was a functional proxy for wrongful discrimination. Today, our nation has undoubtedly made great progress. In addition to being more tolerant of one another and more appreciative of our diversity, we have collectively invested in a rule of law that has, at its core, a pledge of equal protection. Despite these advances, however, unjustified racial disparities remain. A jurisprudence that tolerates unjustified racial disparities so long as discriminatory intent is inconspicuous or ambiguous will not remedy this unjust reality. Under such a jurisprudence, discrimination will persist; careless and hazardous spills will remain on the floor.

Requirements of proof of intent are especially problematic under existing models of proof. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court outlined three ways in which discriminatory intent can be proven: First, discrimination may be established in light of the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. Second, "[t]he legislative or administrative history may be highly relevant" to proving intentional discrimination. *Id.* at 268. Finally, in rare cases, "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id.* at 266.

Subsequent applications of these seemingly reasonable measures have demonstrated, however, that intent is often prohibitively difficult to prove. A showing that a law was passed with full knowledge that it will have a discriminatory effect has been found insufficient to prove intentional discrimination. *See Personnel Administrator of Massachusetts v. Feeney*, 442

U.S. 256, 279 (1979) (holding that a law must be passed "because of," not merely "in spite of," its adverse effects upon an identifiable group"). In *Feeney*, the Court upheld a Massachusetts law that gave preference to veterans for government jobs even though 98% of the state's veterans were male and over a quarter of the state's residents were veterans. *Id*. at 270.

Even when confronted with overwhelming statistical proof of discriminatory results, the Court will generally not infer intent, unless it can point to a "smoking gun." Two cases demonstrate this point. *McCleskey v. Kemp*, 481 U.S. 279 (1987) demonstrates that even the most chilling statistical disparities will not rise to the level of proving intentional discrimination. In *McCleskey*, a study showed that the death penalty was imposed on African American defendants who killed whites in 22% of cases, but was imposed in only 8% of cases where whites killed whites. *Id*. at 286. Moreover, when African Americans were murdered, African American defendants received the death penalty in just 1% of cases and whites in merely 3% of cases. *Id*. Tellingly, in cases involving white victims and African American defendants, prosecutors sought the death penalty in 70% of cases, compared to seeking the death penalty in 15% of cases with African American defendants and victims and 19% of cases with African American victims and white defendants. *Id*. at 287. The Court held that *McCleskey* could not rely upon this overwhelming statistical disparity but had to prove that "decisionmakers in his case acted with discriminatory purpose." *Id*. at 292.

A voting discrimination case, *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980), further exemplifies this point. *Bolden* upheld Mobile, Alabama's at-large voting scheme despite the fact that it led to zero

African Americans being elected in a city in which they composed 35 percent of the population. The Court stated that "[a]lthough dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial voter dilution, the fact is that such a view is not supported by any decision of this Court. More importantly, such a view is not consistent with the meaning of the Equal Protection Clause as it has been understood in a variety of other contexts involving alleged racial discrimination." *Id*. at 67-68. Decisions such as the ones described above have made it enormously difficult to remedy wrongful discrimination except in those unusual cases where public officials have publically and specifically admitted invidious motives. This result flies in the face of repeated social science studies establishing that late twentieth and twenty-first century biases manifest in subtle ways. *See* Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005). Individuals who do not consciously intend to discriminate nevertheless tend to harbor and to perpetuate implicit biases. *Id*. at 1506-1513.[2]

Our history is marred by laws and policies imposed with unambiguous and express intent to discriminate against African Americans and other minorities. These laws created different classes of citizenship and

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[2] These biases influence behavior in all sorts of real-world interactions. For example, researchers found that despite apparently egalitarian intentions, prospective employers offered significantly more callbacks in response to resumes with names that sounded "White" than to resumes with "Black" sounding names, and police officers in a simulation were more likely to shoot unarmed black men than unarmed white men. *Id*. at 1513-1527.

entrenched unjustifiable differences in the ways that different individuals experience our legal, political, and social systems. As our nation evolved, purportedly race-neutral policies replaced formerly discriminatory policies. However, in many arenas—including, but not limited to, those outlined in this brief—disparate impacts remain. Racially disparate outcomes that were explicitly sought in darker days of our history persist as a result of policies and laws enacted with arguably race-neutral intentions. A doctrine that only targets easily demonstrable intent cannot end wrongful discrimination. Once it is determined that unjustifiable discrimination exists, it should be eradicated. Carelessly spilled milk should be wiped away.

ARGUMENT

RACIAL JUSTICE REQUIRES THAT COVERT AND UNWITTING DISCRIMINATION BE RECOGNIZED AND CONSCIOUSLY AVOIDED.

Time and again, overt racial discrimination ceases, only to be replaced by covert or unwitting but still unjustifiable racial discrimination. In what follows, we describe three significant repetitions of this unfortunate pattern: the history of electoral disenfranchisement, the history of jury exclusion, and the history of public welfare dispensation. The lesson of each is that prejudice and discrimination are only eradicated when the risks of prejudice and discrimination are acknowledged and both covert and unwitting discrimination are consciously and conscientiously avoided.

I. THE RIGHT TO VOTE: DISCRIMINATION CONTINUES BEHIND A VEIL OF NEUTRALITY

The exclusion of African Americans from our elective franchise is a prominent and unfortunate aspect of our history. It is unnecessary to recite in detail the shameful post-Reconstruction history of blatantly discriminatory uses of poll taxes, literacy tests, grandfather clauses, white primaries and the like. *See*, *e.g.*, Chander Davidson, *The Voting Rights Act: A Brief History, in Controversies in Minority Voting: The Voting Rights Act in Perspective* 7, 11-13 (Bernard Grofman & Chandler Davidson, eds. 1992). Moreover, it is well documented that practices such as voting time restrictions, voter identification requirements, selective understaffing of polling places, and selective challenges of voter qualifications continue to be used to minimize African American voting. *See*, *e.g.*, *Shelby County v. Holder*, 133 S. Ct. 2612, 2639-2642 (2013) (Ginsburg, J., dissenting); Wendy Weiser & Erik Opsal, Brennan Center for Justice, *The State of Voting in 2014* 3 (2014); Christopher Famighetti, Amanda Melillo & Myrna Pérez, Brennan Center for Justice, *Election Day Long Lines: Resource Allocation* 1 (2014). Facing squarely the fact that voting discrimination had become covert, Congress enacted a Voting Rights Act that gave the Department of Justice the ability to anticipate and thwart covert discrimination. Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973 et seq. (1964). The powers of the Department of Justice under the Voting Rights Act have now been somewhat limited, *Shelby County*, 133 S. Ct. at 2627-2631 (2013), but even those who sought and approved those limitations concede that there was a time when overt discrimination became covert and could not be remedied by measures that required direct

proof of discriminatory intent. *See Shelby County*, 133 S.Ct at 2624 ("Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States 'merely switched to discriminatory devices not covered by the federal decrees,' 'enacted difficult new tests," or simply "defied and evaded court orders.'" (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966))). We have had, then, in the area of voting rights, periods of blatant and at times official disenfranchisement followed by a period during which race conscious safeguards were utilized to some effect. *Id*. at 2619-2621, 2624-2626 (discussing the history of disenfranchisement and the progress made as a result of the Voting Rights Act). Nevertheless, people of color continue to be disproportionately disenfranchised by purportedly race-neutral laws and practices. *See*, *e.g*., *id.* at 2639-2642 (Ginsburg, J., dissenting); Weiser & Opsal, *supra*, at 3; Famighetti, Melillo & Pérez, *supra*, at 1.

The story of felony disenfranchisement provides a notable example of this. Like grandfather clauses, poll taxes, and literacy tests, felony disenfranchisement was blatantly used post Reconstruction to undermine the dictates of the Fourteenth and Fifteenth Amendments by reducing African American voting. Felony disenfranchisement laws differ, however, in that there has been no remedy at all for their continuing disparate impact. As we explain below, the original racial motivations of these laws are now masked by race-neutral justifications, but their disparate effects remain to threaten the concepts of equal representation that undergird our democracy.

A. The Promise of the Fifteenth Amendment is Explicitly Undermined.

While felon disenfranchisement laws have been present in our country in various forms since our founding, these laws saw a significant growth in both adoption and scope following the Civil War, particularly during and shortly after Reconstruction. *See* Nathan P. Litwin, *Defending an Unjust System: How Johnson v. Bush Upheld Felon Disenfranchisement and Perpetuated Voter Inequality in Florida*, 3 Conn. Pub. Int. L.J. 236, 237-39 (2003); Jeff Manza & Christopher Uggen, *Locked Out: Felony Disenfranchisement and American Democracy* 55 (2006). Indeed, during this period, ten southern states adopted felony disenfranchisement laws, while many others expanded their existing criminal disenfranchisement laws to cover a wider variety of crimes.[3] Manza & Uggen, *supra*, at 50, 55-60. For example, Alabama extended its criminal disenfranchisement law to cover crimes of "moral turpitude," while South Carolina extended disenfranchisement to "thievery, adultery, arson, wife-beating, housebreaking and attempted rape." *Id*. at 55-56. *See also* Litwin, *supra*, at 238.

During this period, states also put an emphasis on disenfranchisement provisions that applied to crimes more often associated with African Americans—even going so far as to extend disenfranchisement provisions to relatively minor crimes, such as intent to steal or using insulting gestures, while simultaneously excluding crimes like murder or fighting.

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[3] Alabama, Arkansas, Florida, Georgia, Mississippi, Missouri, North and South Carolina, Tennessee, and Texas all adopted felony disenfranchisement laws between 1865 and 1899.

Litwin, *supra*, at 238. For example, Mississippi extended its disenfranchisement provisions in 1890 to a select list of petty offenses—offenses enforced nearly exclusively against African Americans—while other, more serious crimes, such as rape or murder, did not trigger disenfranchisement. Manza & Uggen, *supra*, at 42.

Alabama provides a telling example of ever-expanding disenfranchisement provisions in the post-Civil War era. *Id.* at 57-58. Although Alabama lawmakers had disenfranchised most felons before the Fifteenth Amendment, they added retroactive provisions to disenfranchise those convicted of larceny in 1875; in 1901, crimes involving "moral turpitude" were also added. *Id*.

The motivations for these reforms were unambiguously discriminatory. An examination of several Southern constitutional conventions of the period, during which criminal disenfranchisement laws were either adopted or strengthened, shows as much. *See* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 537-43 (1993). South Carolina's convention was publicized as presenting the opportunity "to obviate all future danger, and fortify the Anglo-Saxon civilization against every assault from within and without," which meant dealing with "the all important question of suffrage." George B. Tindall, *The Campaign for the Disenfranchisement of Negroes in South Carolina*, 15 J. of S. Hist. 212, 224 (1949). In 1901, Virginia held a constitutional convention that was touted as having "a view to the elimination of every negro voter." *See* Shapiro, *supra*, at 537. Lawmakers themselves said explicitly that they were enacting criminal disenfranchisement laws

to combat the specter of African American voters. Attendants at Alabama's 1901 all-white constitutional convention openly aimed to "establish white supremacy" through suffrage; support for particular criminal disenfranchisement laws was garnered by noting that "[t]he crime of wife-beating alone would disqualify sixty percent of the Negroes." Manza & Uggen, *supra*, at 58. Mississippi's 1890 constitutional convention had similar aims. *See* Shapiro, *supra*, at 540. Indeed, in 1896 the Mississippi Supreme Court recognized the racial motivations underlying the convention, stating, "the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro . . .[r]estrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone." *See id*. at 540-41 (quoting *Ratliff v. Beale*, 74 Miss. 247, 266-67 (1896)). The Mississippi legislators were successful—two years after the convention, less than 6 percent of eligible African American voters were registered, whereas in 1867, nearly 70 percent had been registered. *Id*. at 538.

B. Racially Motivated Felony Disenfranchisement Laws Are Maintained Behind A Veil of Neutrality.

Today, disenfranchisement is one of the characteristics of our criminal justice system that sets us apart among western nations. The Sentencing Project et al., *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States* 3-4 (2013), *available at* http://sentencingproject.org/doc/publications/fd_ICCPR%20Felony%20Disenfranchisement%20Shadow%20Report.pdf. The disenfranchisement rate has grown

over time, increasing from 1.17 million people in 1976 to 5.85 people in 2010. Christopher Uggen et al., *State-Level Estimates of Felon Disenfranchisement in the United States*, *2010* 1-2 (2012). Presently, only two states—Maine and Vermont—do not restrict the voting rights of those involved in the criminal justice system; all other states and the District of Columbia, to varying degrees, prohibit voting among individuals currently incarcerated, on parole, or on probation, or those with certain convictions. ACLU, *Map of State Criminal Disenfranchisement Laws*, www.aclu.org, (last visited December 14, 2014), https://www.aclu.org/maps/map-state-criminal-disfranchisement-laws. Three states permanently disenfranchise all people with felony convictions: Florida, Kentucky, and Iowa. *Id*. An additional seven states, Alabama, Arizona, Mississippi, Nevada, Tennessee, Virginia, and Wyoming, disenfranchise those with certain felony convictions. *Id*. Overall, an estimated 5.85 million American adults are currently barred by prior convictions from voting; approximately 2.6 million of these individuals have completed their sentences. The Sentencing Project, *supra*, at 4. Convicted felons account for the largest single group of Americans that are currently prohibited from voting. Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 Stan. L. Rev. 611, 633 (2004).

The impact of this phenomenon is most keenly felt by African Americans. Today, 7.7 percent of adult African Americans have been disenfranchised, as compared to approximately 1.8 percent of non-African Americans. The Sentencing Project, *supra*, at 2. In Florida, Kentucky, and Virginia, at least twenty percent of adult African American have been disenfranchised. *Uggen et al., supra*, at 17. In Alabama,

Mississippi, Tennessee, and Wyoming, this number is greater than fourteen percent. *Id*. It is predicted that in states with laws that permanently disenfranchise felons, as much as 40 percent of the next generation of African American men will be permanently ineligible to vote. Goldman, *supra*, at 634.

Furthermore, the *execution* of felony disenfranchisement laws can lead to discriminatory results. For example, procedures for purging felon voters in Florida during the 2000 presidential election led to erroneous disqualifications of eligible voters due to false positives, name similarities, the counting of those with only misdemeanors convictions, and other errors. *Id*. at 636. *See also* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 Stan. L. Rev. 1147, 1157-1158 (2004). The wrongfully purged voters were disproportionately African American. *Id.* Discriminatory execution of felon disenfranchisement laws is a risk not only in the purging of voter rolls but also in processes by which voting rights can be restored: in states where restoration of voting rights is discretionary, disenfranchised African Americans are less likely than other disenfranchised citizens to win restoration. Goldman, *supra*, at 638-40.

Finally, there is strong demographic evidence that broad felon disenfranchisement laws respond to covert, if not overt, racial sentiment: the racial demographics of a state's prison population serve as a key indicator of whether a state will adopt felon disenfranchisement laws. An extensive study on the history of felon disenfranchisement in the United States found that:

> States with greater nonwhite prison populations have been more likely to ban convicted felons from voting than states with proportionally fewer nonwhites in the criminal justice system . . .Even while controlling for timing, region, economic competition, partisan political power, state population composition, and state incarceration rate, a larger nonwhite prison population significantly increases the odds that more restrictive felon disenfranchisement laws will be adopted.

Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 Am. J. of Sociology 559, 596 (2003).

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), a non-race-based equal protection challenge to a California felon disenfranchisement law, the Court held that because Section Two of the Fourteenth Amendment explicitly permitted the exclusion of felons, the law did not offend the Equal Protection Clause. Accordingly, facially neutral felon disenfranchisement laws have been held not to violate the Equal Protection clause unless they are shown 1) to produce a disproportionate impact and 2) to have been motivated by a racially discriminatory intent. *See Hunter v. Underwood*, 471 U.S. 222, 226-28 (1985). In *Hunter*, this Court struck down an Alabama felony disenfranchisement law that had remained in force since adoption in 1901 after concluding that the law was originally enacted for discriminatory reasons and continued to disproportionately disenfranchise African Americans. *Id*. at 226-30. However, the Court left open the question "whether a subsequent legislative re-enactment can

eliminate the taint from a law that was originally enacted with discriminatory intent." *Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1223 (11th Cir. 2005). Lower courts have subsequently answered this in the affirmative. *See, e.g., Cotton v. Fordice*, 157 F.3d 388, 391-92 (5th Cir.1988) (holding that amendments can save a facially-neutral disenfranchisement law from its "odious" origins). Moreover, many circuit courts have been reluctant to apply the Voting Rights Act to felon disenfranchisement laws. *See* Lauren Handelsman, *Giving the Barking Dog A Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 Fordham L. Rev. 1875, 1876-78 (2005). The essential takeaway is that felon disenfranchisement laws that were used to undermine the Fifteenth Amendment are allowed to persist without significant change.

Reasonable people may disagree as to the appropriateness of felon disenfranchisement *per se*. Felon disenfranchisement may be supportable if it is time-limited, limited to offenses that bear special relevance to one's capacity for democratic participation and administered in a race-neutral fashion. However, the impact of our current felon disenfranchisement laws is remarkably broad and anything but race neutral. Instead, these laws continue a legacy of discrimination, with devastating impact that is willfully ignored under our present "intent" based standards.

Nearly a century and a half has passed since the adoption of the Reconstruction Amendments, and nearly half a century since the passage of the Voting Rights Act. However, we still find ourselves with laws governing who can and cannot vote that disproportionately and severely impact African

American citizens—laws that were originally touted for this very same effect. Reluctance to look behind discriminatory effects leaves us willfully blind to the persistence of once blatant racial exclusions from the right upon which representative government depends.

II. THE RIGHT AND OBLIGATION OF JURY SERVICE: DISCRIMINATION PERSISTS UNDER REMEDIES IN NEED OF REFINEMENT

More than seventy years before *Brown v. Board of Education*—indeed, even before *Plessy v. Ferguson*—this Court declared that a state could not, consistently with the Fourteenth Amendment, exclude African Americans from jury service. *Strauder v. State of W. Virginia*, 100 U.S. 303 (1879). *Strauder*, however, marked a high point for equality in jury service. Nearly a century and a half after *Strauder*, the right of African Americans to serve on and to be judged by juries of their peers remains compromised. As in the case of voting discrimination, discrimination in jury selection moved from being formal and overt to being increasingly informal and covert. As in the case of voting discrimination, there is a persistent need for policies that consciously seek to prevent less blatant discrimination.

A. Official Discrimination in Juror Selection Yields to Subtle Evasion of Reconstruction's Citizenship and Equal Protection Guarantees.

Prior to the Civil War, African Americans were almost always officially excluded from juries. *See* Neil Vidmar & Valerie P. Hans, *American Juries: The Verdict* 71 (2007). While *Strauder* confirmed that

Reconstruction's promise of African American citizenship and equal protection of the laws would include the right of participation in jury systems, its ruling had limited practical effect. *Id*. A 1910 study found that in Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia, African Americans rarely served on juries. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 894 (1994). And in Alabama and Georgia, African Americans never served on juries. *Id*. at 894-95. Because of obstacles to their voting in the south, African Americans were often not on voter registration rolls from which jury lists were largely compiled. Vidmar & Hans, *supra*, at 71.

Moreover, officials appointed to compile and screen jury rolls often refused to find African Americans suitable for jury service. *Id*. For example, in 1919, the Virginia code was revised to create a system of lay commissioners to choose men suitable for jury service. *See* S. W. Tucker, *Racial Discrimination in Jury Selection in Virginia*, 52 Va. L. Rev. 736, 738 (1966). Commissioners were required to swear that they would select for jury service only those people whom they believed "to be of good repute for intelligence and honesty." *Id*. In practice, these non-judicial officers were expected to—and did—apply this standard to exclude African Americans under a presumption of unfitness. *Id*.

In 1935, racial discrimination in jury selection came to the forefront in the notorious *Scottsboro* case. In that case, nine young African Americans ranging in age from thirteen to twenty faced Alabama charges that they raped two white women on a train. Vidmar & Hans, *supra*, at 71; Michael J. Klarman,

Symposium: Criminal Appeals: Article: Historical Perspectives: Scottsboro, 93 Marq. L. Rev. 379, 380 (2009). After eight of the defendants were convicted and the Supreme Court of Alabama reversed the conviction of one, *see Norris v. Alabama*, 294 U.S. 587, 588 (1935), the U.S. Supreme Court intervened. The Court reversed the convictions of the remaining seven defendants, finding that their right to counsel had been denied. *Powell v. Alabama*, 287 U.S. 45 (1932). All nine were again indicted. Over the objection of counsel, three of the defendants then faced, and were convicted and sentenced to death by, all white juries. Klarman, *supra* at 399-400; Hilary Weddell, Note, *A Jury of Whose Peers?: Eliminating Racial Discrimination Injury Selection Procedures*, 33 B.C. J.L. & Soc. Just. 453, 456 (2013). Intervening in the case for a second time, the Supreme Court articulated *Strauder*'s oft repeated principle, applicable to both trial and petit juries:

> Whenever, by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States.

Norris, 294 U.S. at 589 (citing *Strauder*, 100 U.S. at 308-09 ; *Neal v. Delaware*, 103 U.S. 370, 397 (1881); *Gibson v. Mississippi*, 162 U. S. 565, 579 (1896). On the basis of uncontroverted evidence of *total* exclusion of African Americans from jury service, the Court again vacated the conviction of one. *Norris*, 294 U.S.

at 599. Ultimately, the State of Alabama dropped the charges against four of the boys, and the charges were dropped for a fifth after he pled guilty to assaulting a sheriff in a separate incident. Klarman, *supra*, at 412. The other four were convicted; the last was not released on parole until nearly 20 years after the alleged incident. Weddell, *supra*, at 457. In 2013, Alabama posthumously pardoned the "Scottsboro Boys" whose convictions still stood. John Edmond Mays & Richard S. Jaffe, *Feature: History Corrected—The Scottsboro Boys are Officially Innocent*, 38 Champion, Mar. 2014, 28, 30 (2014).

While *Strauder* and its progeny provided a remedy in cases of total exclusion of African Americans from jury rolls, there were still ample alternative methods of excluding African Americans from actual jury service. In Georgia, for example, one jurisdiction printed the names of white jurors on white tickets and African American jurors on yellow tickets to make it easy to determine the race of prospective jurors. Vidmar & Hans, *supra* at 72. Virginia purported to comply with the directive of *Norris* by requiring African Americans to be added to jury lists in proportion to their number in the state. Tucker, *supra*, at 740. In practice, however, of the eighteen African American men whose names appeared on jury lists between 1935 and 1949, not a single one was called for service until December 1949. *Id*. Thus, even after *Norris*, in some states the virtual exclusion of African Americans from juries continued.

Even where jury panels were chosen without administrative subterfuge, another form of thinly disguised discrimination persisted without check until 1986. Alschuler & Deiss, *supra*, at 896. Peremptory challenges, which generally allow attorneys to excuse

people from the jury without a stated reason, were used routinely to exclude African Americans from jury service. *See Id*. In 1965 the Supreme Court addressed this issue in *Swain v. Alabama*, 380 U.S. 202 (1965). The facts of *Swain* are telling: an all white jury in Talladega, Alabama sentenced an African American man to death after he was found guilty of raping a white woman. Alschuler & Deiss, *supra*, at 897. No African American had served on a jury in Talladega for fifteen years, and the prosecutor had removed all the eligible African Americans from the jury by way of peremptory challenges. *Id*. The Court held that this evidence was insufficient to establish intentional discrimination. *Swain*, 380 U.S. at 224. After *Swain*, lawyers had *carte blanche* to exclude African Americans from jury service premptorily.

B. Racial Discrimination in Jury Selection Proves Resistant to Policies that are Facially Race-Neutral but Inadequate to Address Covert or Unwitting Discrimination.

In 1986, the Court overruled *Swain* in *Batson v. Kentucky*, 476 U.S. 79 (1986) and replaced its *carte blanche* standard with a structured inquiry to determine whether a peremptory challenge is discriminatory. The still evolving standard provides roughly as follows: First, a party contesting the use of a peremptory challenge must show that she is a "member of a cognizable racial [or other protected] group," "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's group," and that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."

Id. at 96. The burden then shifts to the challenger to offer a neutral explanation for striking the person from the jury. *Id*. at 97. Then the trial court has "the duty to determine if the defendant has established purposeful discrimination." *Id*. at 98.

In his concurring opinion in *Batson*, Justice Marshall opined that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." *Id.* at 104. (Marshall, J., concurring). Unfortunately, Justice Marshall's prediction has proved true. In the immediate aftermath of Batson, prosecutorial offices provided trainings on how to mask efforts to exclude racial minorities from jury service. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 16 (August 2010), *available at* http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf. Race neutral reasons for excluding jurors have become "thinly-veiled excuses for removing qualified African Americans from juries." *Id*.

Studies have confirmed that racial disparity remains in peremptory removals of jurors. Comprehensive data on the effect of race in jury selection remains elusive, but a 1999 study in North Carolina gives insight into the impact that race plays in jury selection. *See* Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695 (1999). While the study found that overall whites and African Americans were excused from jury service by way of peremptory challenges at the same rate, 71% of African Americans excluded from jury service were dismissed by the state. *Id.* at 698. Moreover, in this

study 60% of the prosecution's peremptory challenges were used to exclude African Americans, yet they compromised only 32% of the jury pool. *Id*. at 698-99. The correlation between the challenging party (prosecution or defense) and the race of the juror was highly statistically significant ($x2 = 36.20$, $p < .001$). *Id*. at 699. The peremptory challenge thus remains a prosecution tool for eliminating African Americans from juries.

Batson's ineffectiveness to prevent unlawful discrimination is evident in both civil and criminal proceedings. *See* Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. Davis L. Rev. 1359 (2012). In her 2012 article, Professor Roberts surveyed all published federal decisions that addressed Batson challenges after *Hernandez v. New York*, 500 U.S. 352 (1991), (in which the Supreme Court held that "courts should give 'appropriate weight' to the fact that a peremptory strike's justification has a disparate impact on a certain race when determining whether purposeful discrimination motivated the strike") *Id*. at 362. Roberts, *supra*, at 1363. She found that, of the thirty-six cases brought by racial minorities or women alleging discrimination, not a single claim was successful. *Id*. Strikingly, on the other hand, all of three claims of anti-white discrimination were ultimately successful. *Id*. Professor Roberts suggests that these cases regarding stricken white jurors can provide guidance on how courts can more appropriately apply the *Batson* standards in cases involving jurors of color and/or female jurors; these cases, she writes, "endorse an informed, proactive role for the trial judge" to ensure that the alternative reasons offered in support of a peremptory challenge are sufficiently connected to the facts of the case, that

comparable justifications were or would have been used to strike other prospective jurors, and that the gravity of discrimination *against the prospective juror* has been considered. *Id.* at 1417.

It is not just the use of the peremptory challenge, however, that contributes to disparate racial outcomes in jury service. Voting records, from which people are routinely selected for jury service, are also skewed disproportionately by felon exclusion. At recent count, forty-seven states and the federal system statutorily exclude people convicted of a felony from jury service in one way or another. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 Minn. L. Rev. 592, 596 (2013). These policies have led to the elimination of nearly one third of African American men from juries. *See id*. at 602.

Looking specifically at statistics from the federal system illustrates the striking racial disparity caused by felony exclusion laws. In the federal system, it is estimated that 29 to 37% of African American men and 16 to 21% of all African American adults are excluded from jury service because of past criminal history. *See* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 Am. U. L. Rev. 65, 114 (2003). In comparison, only 6.5% of the overall adult population is excluded from jury service under current federal felony exclusion laws. *See id*. Felony exclusion from jury service, moreover, is just one of many policies that disproportionately disqualify African Americans from jury service. *See generally* Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 Nat'l Black L.J. 238 (1994). For example, people of color tend to move more often, making them more likely to be excluded from jury lists that are updated infrequently. *Id*. at 6-7.

This Court made clear 135 years ago that it is illegal under our principles of citizenship and equal protection to exclude African Americans from jury service. Yet discrimination persists. As a nation, we ought to ask how to fix this problem. But instead, case-by-case, we ask: was this problem caused intentionally? And when the answer to that is "no" or "maybe," we pretend that there is no problem at all.

III. PUBLIC WELFARE ELIGIBILITY: DISCRIMINATION IS RESTRAINED BUT RETURNS AS SUCCESSFUL REMEDIES ARE ABANDONED

The history of public welfare policy in the United States is inexorably intertwined with the nation's history of race. David Super, *Public Benefits Law* 33 (2006). At various points in history, disfavored minorities were systematically excluded from welfare rolls. *See id.* In time, largely as a result of civil rights advocacy, our welfare system has shed the blatantly discriminatory laws and regulations that defined it half a century ago. For a period after the civil rights movement it appeared that race discrimination in welfare administration had been largely eradicated by Congressional imposition of consciously race-neutral standards. Unfortunately, at a moment of apparent success, devolution of control of welfare eligibility to state and local officials resulted in a resurgence of discriminatory practices. A brief study of public assistance history and state administration of federal grants illuminates a startling resurgence of racially disparate outcomes.

A. Race-Based Discrimination Is First Practiced Openly

In 1910, states began, through mother's pension programs, to provide needy mothers with public assistance conditioned on home inspections and character evaluations. *See* Deborah E. Ward, *The White Welfare State: The Racialization of U.S. Welfare Policy* 28-43, 84-87 (2005). Eligibility and distribution were completely discretionary, resulting in varying policies and practices, but uniformly racially disparate outcomes. *See id.* at 63. Indeed, in 1931, the Children's Bureau found that 96 percent of aided families in the nation were white. *Id*. at 93-94.

Title IV of the Social Security Act of 1935 established the Aid to Dependent Children ("ADC") program to provide federal funds to needy families. *See* Social Security Act, ch. 531, §§401-06, 49 Stat. 620, 627-29 (1935) (codified as amended at 42 U.S.C. §§ 601-17 (1988 & Supp. V 1993)). Under the banner of "states' rights," State officials and Congressmen, particularly from Southern states, fought fiercely against federal standards for ADC administration. *See* Ward, *supra*, at 105; Jill Quadango, *The Color of Welfare* 21-22 (1994). This opposition was associated with ADC's potential to increase the leverage of African American agricultural and domestic service laborers in bargaining with their white employers. *Id*. Largely as a result of compromises with Southern officials, Title IV left states with broad discretion to set ADC benefit levels and eligibility requirements. Ward, *supra*, at 105-06. Although the Act loosened the eligibility requirements of then existing mothers' pension programs, it sanctioned the consideration of "moral character" and other subjective or questionably related factors in defining eligibility. *Id*. at 109.

This delegation to the states left room for rampant discrimination against African Americans particularly (but not only) in the Southern states. *See* Michael K. Brown, *Ghettos, Fiscal Federalism, and Welfare Reform*, *in* Race and the Politics of Welfare Reform 58-60 (Sanford Schram et al., eds. 2003). By the 1950s, all Southern states and some Northern states with large African American populations (including Michigan and Illinois) had enacted severely restrictive eligibility requirements. *Id*. at 59. Subjective moral standards, such as suitable home and substitute father rules, were used to determine eligibility; these standards were often vague and unevenly applied. *See* Ward, *supra*, at 127-128; *King v. Smith*, 392 U.S. 309, 313-315 (1968) (discussing Alabama's substitute father regulation and its administration). Some southern states adopted policies that cut off benefits during active farming seasons to ensure a dependent labor force. *See* Susan Tinsely Gooden, *Contemporary Approaches to Enduring Challenges: Using Performance to Promote Racial Equality under TANF*, *in Race and the Politics of Welfare Reform* 257 (Sanford Schram et al., eds., 2003); *see also* Ward, *supra*, at 127 (noting that in 1943, Louisiana agencies adopted a policy to deny benefits to those applicants needed in the cotton field, which sometimes included children as young as seven). Subjective moral guidelines and agricultural policies disproportionately affected African American families. For example, when Louisiana implemented its "suitable home" policy in 1960, 90 percent of all families deemed unsuitable were deemed so due to the birth of an illegitimate child, and of these, 95 percent were African American. *See* Ward, *supra*, at 127.

These practices were often unambiguously discriminatory, both in motivation and in practice. *See* Peter Edelman, *Welfare and the Politics of Race: Same*

Tune, New Lyrics?, 11 Geo. J. Poverty L. & Pol'y 389, 389-90 (2004). Undergirding welfare policy was the assumption that African Americans were less deserving or less needing of assistance. *Id*.; *see also* Gooden, *supra*, at 258 (citing a 1942 Bureau of Public Assistance study that attributed the paucity of African American recipients to an attitude that more job opportunities exist for African American women, that they always get along, and that "all they'll do is have more children").

The intent of lawmakers to depress African American access to assistance during this period seemed clear. Democratic Senator Robert C. Byrd argued repeatedly for the continuation of District of Columbia's man-in-the house rules, which excluded women in social relationships with men and were known to impact African American women almost exclusively. Edelman, *supra*, at 390-91. In Louisiana, categorical exclusion of African Americans from welfare was used to drive them from the state. *Id*. at 390. In 1958, Mississippi state representative David H. Glass introduced a bill that would require unmarried mothers who gave birth to an additional illegitimate child to undergo sterilization. Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 213-14 (1997). According to Glass, this measure was intended specifically to thwart "the negro woman" who "because of child welfare assistance [is making childbearing] a business," thus ultimately reducing the number of African American children on welfare. *Id*. During floor debates on the bill, another Mississippi representative stated, "[w]hen the cutting starts, they'll head for Chicago." *Id*. at 214.

These discriminatory attitudes were matched with discriminatory implementation of the ADC programs. In 1965, Director of the Bureau of Public Assistance Jane Hoey reported on the exclusion of African-American, Mexican, and Native American children from state ADC programs. *See* Ward, *supra*, 117-18. Mississippi, she reported, had instituted 10 percent quotas for African Americans in every county, whereby even in counties where African Americans made up 60 percent of the population, they were allowed to represent only 10 percent of the ADC rolls. *Id*. at 118. Additionally, "suitability" requirements were often vague and nothing more than proxies for race. *See id*. at 118-19. For example, in many states, while African American homes were essentially de facto "unsuitable," neglectful, or abusive, white parents were presumptively eligible for assistance. *Id.* at 118. As if vague and ambiguous eligibility requirements were not sufficient, New Deal era social workers in the District of Columbia administered two standard ADC benefit levels: one for African Americans, and a higher one for whites. Gooden, *supra*, at 257.

B. Civil Rights Protest, and Rules-Based Eligibility Standards Guide a Subsequent Period of Change.

Concurrently with civil rights movement protests of racial bias, lawmakers and administrators began to move from discretionary models to a more rule-based system. *See id.* at 261-64 (noting the linkages between welfare administration and civil rights struggles of the 1960s). Moreover, this Court began recognizing the need for more rules-based and statutory guidelines for determinations of eligibility and termination, and instituted procedural safeguards for those denied

benefits. *See, e.g., King v. Smith*, 392 U.S. 309 (1968); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Indeed, as part of this evolution, this Court looked unfavorably on morality-based determinations of eligibility—in 1968, the Court struck down Alabama's substitute father rules, holding that Alabama could not further its interest in discouraging immorality and illegitimacy through the denial of AFDC assistance to otherwise eligible children. *See King*, 392 US at 320. Lower courts followed the trend of requiring objective standards of welfare eligibility. *See, e.g., Baker-Chaput v. Cammett*, 406 F.Supp. 1134 (D. N.H. 1976) (holding that New Hampshire had violated welfare recipients' due process rights by not administeringits general assistance program according to written, objective, and ascertainable standards). As a result of this "federally influenced rule-bound regime," welfare discrimination decreased. Frances Fox Piven, *Why Welfare is Racist, in Race and the Politics of Welfare Reform* 331 (Sanford Schram et al., eds., 2003).

C. Devolution Marks a Return to Racial Bias

The progress of the Civil Rights Movement and the requirements of this Court have been undermined by the devolution of responsibility for welfare administration from the federal government to the states. Despite the race-neutral rhetoric that still surrounds welfare reform of the past 30 years, devolution has brought a clear increase in racially disparate *effects*.[4] Brown, *supra*, at 49-50.

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[4] Welfare administration, like so many other areas that govern how citizens experience and participate in the social, political, and economic spheres of our society, must operate in alignment with the principles of due process and equal protection to ensure

During the late 1980s and early 1990s, states began to exact more control over policies governing welfare eligibility. *See* Richard C. Fording, *Laboratories of Democracy or Symbolic Politics?: The Racial Origins of Welfare Reform, in Race and the Politics of Welfare Reform* 77 (Sanford Schram et al., eds., 2003). Through Section 1115 of the Social Security Act, states could seek waivers, or exemptions from rules laid out in the federal statute, and incorporate their own behavior modification measures. 42 U.S.C. § 1315. States received waivers allowing them to implement policies such as work requirements, "responsibility" requirements (*e.g.*, parental responsibilities such as assuring school attendance, family size caps, and child support) and time limits on assistance. States' policy choices regarding these waivers were shown to be correlated with the racial demographics of their recipients. *See* Fording, *supra*, 88-89. Specifically, one study of state welfare policy

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that discrimination and unequal treatment do not create regimes that undermine our democracy. As such, like other policy arenas, it is vulnerable to notions of federalism that prioritize so-called "state's rights" over federal protection of civil rights. This understanding of federalism can lead to devastating results for marginalized populations. *See, e.g., United States v. Morrison*, 529 U.S. 528 (2000) (citing balance of power concerns when limiting the Fourteenth Amendment's ability to prevent gender-based discrimination); *United States v. Cruikshank*, 94 U.S. 542 (1876) (invalidating the Enforcement Act of 1870 on federalism principles and declining to prosecute a white militia for the massacre of over one hundred people); *Bradwell v. Illinois*, 83 U.S. 130 (1873) (holding that the denial of bar admission to a woman was a proper exercise of the state's police power and untouchable by the Fourteenth Amendment). While our system of federalism does allow for the benefits that stem from local experimentation, when discriminatory effects are the outcome of such experimentation, the federal government should intervene.

choices in the early 1990s found that states with the largest number of African American families on ADFC rolls were five to six times more likely to adopt such waivers than states with predominantly white beneficiaries. *Id*. at 88.

The principle of increasing state control and local discretion became a building block of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996). *See* Fording, *supra*, 77. Indeed, PRWORA was characterized by devolution—that is, federal delegation of welfare administration policy to state bodies, and ultimately to administrative and bureaucratic entities and decision makers within states. *See generally* Fording et al., *Devolution, Discretion, and Local Variation in TANF Sanctioning*, 81 Soc. Serv. Rev. 2 (2007). Prior to 1996, states received federal monies to provide assistance to families with needy dependent children under the Aid to Families with Dependent Children program (AFDC), and were required to administer these plans according to federal statues and regulations promulgated by the United States Department of Health and Human Services. *Lukhard v. Reed*, 481 U.S. 368, 371 (1987). Under PRWORA, AFDC was replaced by Temporary Assistance for Needy Families (TANF), which provided block grants to states that in turn provide assistance to the poor. TANF allows states wide latitude to create their own welfare programs, determine eligibility requirements, and allocate funds. *See* Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 Geo. J. On Poverty L. & Pol'y 89, 97-98 (2002); Matthew Diller, *The Revolution In Welfare Administration: Rules, Discretion and Entrepreneurial Government*, 75 N.Y.U. L. Rev. 1121, 1146-48 (2000).

One study set out to specifically examine the various policy choices made by states during the immediate post-PRWORA period. Joe Soss et al., *The Hard Line and the Color Line: Race, Welfare, and the Roots of Get-Tough Reform, in Race and the Politics of Welfare Reform* (Sanford Schram et al., eds., 2003). It found race to be of paramount importance, particularly with regard to "get tough" welfare reform. *Id*. at 226. According to the authors, "no factor . . . eclipses the central importance of race." *Id*.

In particular, the study showed striking findings with regard to time limits and family caps on TANF benefits. *See id.* at 233-36. During the period prior to the passage of PRWORA, welfare reform advocates argued that these mechanisms could combat the specter of the life-long, work-averse welfare recipient and the so-called "welfare queen," whose desire for more benefits informed her reproductive choices. *Id*. at 244. The study found that states' adoption of these policies was "unrelated to any factor other than the racial composition of the rolls." *Id*. at 245. *See also id*. at 233. Controlling for other variables, family caps and strict time limits on TANF benefits were more likely—and only more likely—in states with higher percentages of African Americans or Latinos in their caseloads. *Id*. at 233. Thus, in these two, race-neutral policy areas—family caps and time limits—race-related factors not only have a large impact, but are indeed the only factors systematically related to policy choices. *See id.* at 245.

As a result of these disparate policy choices and their grounding in race, an African American client who misses a meeting with a case worker is more likely to live in a state where this behavior would result in termination of benefits for the full family,

while an African American client who has a baby is less likely to live in a state that would provide additional benefits to support that baby. *Id.* at 245. These policy choices have real impact on how different races of people experience the welfare state. For example, among TANF recipients in 1999, 63.7 percent of African American families were receiving benefits under the threat of full family sanction, while only 53.7 percent of white families faced this threat. *Id.*

The lesson of this history is that race discrimination can be controlled by the imposition of standards that consciously address the risk of discrimination, but it will continue or return without such policies.

CONCLUSION

Felony disenfranchisement, jury service, and public welfare eligibility are but three examples of how, as we noted in the opening of this brief, racially discriminatory effects of government action undertaken with openly discriminatory purpose are often mirrored by the subsequent racially discriminatory effects of actions undertaken with deceitful or careless intention. It would be a simple enough matter to add any number of other examples that would reinforce the exact same point, including, among others, the resegregation of public schools, the racialization of criminal laws, and the over-policing of black life. The arenas focused on in this brief, as well as others that space does not permit us to catalogue, clearly demonstrate the need for a disparate impact cause of action under the Fair Housing Act. By requiring explicit proof of intent, the court shields unjust outcomes behind the veil of the law and perpetuates a system of willful blindness to racial disparities. When it is determined that discrimination exists, conscious and conscientious efforts must be made to eradicate it.

Spills should be cleaned away, and those who cause them should be directed to be more mindful of the consequences of their actions.

Respectfully submitted,

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