UNRAVELING THE WEB OF LEGAL PROTECTION: RACE, POLICE MISCONDUCT, AND THE FAVORABLE TERMINATION RULE

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ABSTRACT

The murder of George Floyd raised greater awareness of the pervasiveness of racialized police violence in the United States. Advocates, activists, and concerned policymakers have drawn attention to legal barriers that prevent accountability for police who kill and abuse Black, Indigenous, and other people of color ("BIPOC"), such as qualified immunity. However, the true extent of the legal system's protections regarding racialized police misconduct remains unrecognized. A key example of this is the favorable termination rule, which many jurisdictions have interpreted as imposing an "indications-of-innocence" standard. This standard, in numerous instances, serves as a procedural loophole that prevents civil rights redress against police officers who bring false criminal charges. Since there are many well-documented examples of police targeting BIPOC with false charges, the indications-of-innocence standard has a racist impact. This essay examines how the indications-of-innocence standard serves as one thread in a vast invisible web of legal protections that enables racialized police misconduct.

INTRODUCTION

Larry Thompson, a Black man, was at home in his Brooklyn apartment with his wife and newborn daughter when police pounded on the door.[1] They demanded to enter and examine the baby in response to what turned out to be a false tip.[2] When Mr. Thompson objected to the warrantless search, police forced their way into his apartment, roughed him up, and charged him with resisting arrest and obstructing governmental administration.[3] Mr. Thompson was arrested, jailed, and forced to attend multiple court appearances.[4] Ultimately, the ill-founded criminal charges were dismissed in the "interest of justice."[5] However, justice had not been achieved. To obtain redress for the wrongs that Mr. Thompson had endured from his false prosecution, he needed to bring a civil rights action.

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1. Brief of Plaintiff-Appellant at *6, Thompson v. Clark, No. 19-580 (2d Cir. July 23, 2019), 2019 WL 3338063.
2. *Id.*
3. *Id.* at *7–8.
4. *Id.* at *8.
5. *Id.* at *9–10.

Two years later, Mr. Thompson sought to vindicate his rights via a 42 U.S.C. § 1983 ("Section 1983") action in federal court, but his claim for relief was barred by the Second Circuit's interpretation of the favorable termination rule.[6] To satisfy the favorable termination rule, the Second Circuit imposes an "indications-of-innocence" standard, which requires an affirmative showing of innocence to prevail on a claim regarding the prosecution of false charges. Mr. Thompson's lawsuit claimed that police officers violated his Fourth Amendment rights by, among other things, "using legal process to effectuate an unreasonable seizure."[7] To raise a claim of unreasonable seizure pursuant to legal process (commonly known as a malicious prosecution claim) in the Second Circuit, Mr. Thompson had to satisfy the indications-of-innocence standard. But because Mr. Thompson's charges in the underlying criminal case had been dismissed, he had no opportunity to demonstrate his innocence. Accordingly, Mr. Thompson's malicious prosecution claim was thrown out.[8]

Mr. Thompson's case reveals how the indications-of-innocence standard creates a catch-22: unfounded criminal charges are, by their nature, likely to be dismissed because they are not based in fact. But the very dismissal of those charges precludes the person targeted by the malicious prosecution from obtaining civil relief, since the dismissal is not treated as an affirmative indication of innocence in many jurisdictions. In this way, officers who pursue false charges like resisting arrest—sometimes to cover up their own excessive use of force—escape accountability for their misconduct. The indications-of-innocence standard thus not only contravenes the purpose of Section 1983, which was established to protect Black, Indigenous, and other people of color ("BIPOC") from unconstitutional state action, but the standard also allows, if not incentivizes, police officers to engage in racialized misconduct without fear of consequences.

This essay exposes how the indications-of-innocence standard creates an insidious procedural loophole that bars relief for people targeted by false charges and serves as a tool of racialized police violence. The aim of this essay is to draw attention to this often overlooked racist legal standard, and to illustrate three enduring barriers to racial equity under the law: (I) courts turn a blind eye to pervasive issues of racism even when they are central to the case; (II) legal recourse against state-executed acts of racism are foreclosed through a web of interconnected, but seemingly unrelated legal doctrines; and (III) white-centric juridical racism entrenches white privilege and BIPOC subordination in profound but often-undetected ways.

I. THE INDICATIONS-OF-INNOCENCE STANDARD AND JUDICIAL DISREGARD OF RACISM

Issues of racism are pervasive in legal matters, but routinely ignored by the courts. Larry Thompson has taken his case all the way up to the United States Supreme Court, in a case styled *Thompson v. Clark*. The question before the Court, which heard oral argument but has not yet issued an opinion,[9] is whether a plaintiff

6. *See* Part I (explaining favorable termination rule).
7. Brief of Plaintiff-Appellant, *supra* note 2, at *10.
8. Thompson v. Clark, 364 F. Supp. 3d 178, 197 (E.D.N.Y. 2019).
9. This essay was part of the Notre Dame Law Symposium on *Race & the Law: Interdisciplinary Perspectives* held March 26, 2022. On April 4, 2022, the Supreme Court issued an opinion in *Thompson v.*

who seeks to bring a malicious prosecution claim pursuant to Section 1983 must show that the criminal proceeding against him "ended in a manner that *affirmatively* indicates his innocence," or whether it is enough to show that the proceeding "ended in a manner not inconsistent with his innocence."[10] At oral arguments, there was no mention of race, racism, or any racial implications of the indications-of-innocence standard. However, racism is at the heart of the case.

In 1871, the Ku Klux Klan Act was enacted to protect Black Americans from state-sanctioned white supremacist violence.[11] Section I of the Act, now incorporated and known as Section 1983, was designed to "protect the people from unconstitutional action under color of state law."[12] Section 1983 provides a vehicle for individuals to sue state and local government officials for violating their federal constitutional rights, including being subject to unconstitutional criminal proceedings.[13] The core objective of Section 1983 is to provide an opportunity to hold state actors accountable for constitutional violations, such as the pursuit of false charges against BIPOC.

A plaintiff bringing a federal civil rights action under Section 1983 must satisfy the "favorable termination" rule. In 1994, the Supreme Court in *Heck v. Humphrey*[14] held that plaintiffs seeking recovery for an unconstitutional imprisonment or conviction under federal civil rights laws must show that their prior criminal proceedings ended favorably.[15] The rationale behind the favorable termination rule is the desire to avoid parallel litigation and prevent the creation of two conflicting resolutions regarding the same set of facts.[16] In the malicious prosecution context, courts do not want a valid criminal conviction to exist alongside a valid civil judgment deeming that same conviction wrongful. Courts have developed different standards for evaluating what constitutes a favorable termination.

To satisfy the favorable termination rule, the Eleventh Circuit requires that Section 1983 plaintiffs establish that the criminal proceedings against them "formally ended in a manner not inconsistent with [their] innocence."[17] This not-inconsistent-with-innocence approach ensures the finality of the prior criminal proceedings while also allowing for the reality that criminal proceedings do not always offer an opportunity for an accused person to obtain any finding of innocence, as was the case for Larry Thompson.

However, Larry Thompson was not in the Eleventh Circuit. He was in the Second Circuit—which, like many jurisdictions, uses the restrictive indications-of-

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Clark, overturning the indications-of -innocence standard at the federal level and holding that a plaintiff need only show that the prosecution ended without a conviction to demonstrate favorable termination. 142 S. Ct. 1332 (2022). The injustice posed by similar indications-of-innocence standards at the state level is ongoing and the subject of further exploration in a forthcoming article by Professor Jasmine Gonzales Rose.

10. Brief of Plaintiff-Appellant, *supra* note 2, at *30–31 (emphasis added).

11. *The Ku Klux Klan Act of 1871*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1851-1900/hh_1871_04_20_KKK_Act/ (last visited May 12, 2022).

12. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

13. 42 U.S.C. § 1983 ("Every person who, under color of any [law] . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .").

14. 512 U.S. 477 (1994).

15. *Id.* at 486–87.

16. *Id.* at 484.

17. Luke v. Gulley, 975 F.3d 1140, 1144 (11th Cir. 2020).

innocence standard.[18] This standard requires plaintiffs to demonstrate that the criminal proceedings against them concluded with an affirmative indication of their innocence. Having a case dismissed "in the interest of justice" or because the evidence is otherwise insufficient to support a prosecution typically does not qualify as an affirmative indication of innocence.[19] This means that victims of trumped-up or fabricated charges will often have no opportunity to seek civil recourse for violations of their constitutional rights.

Indeed, the indications-of-innocence standard arguably precludes redress for malicious prosecutions in the most egregious cases. Since false charges are unsupported by any evidence, they are inherently likely to be dismissed—and, therefore, terminate without any indication of innocence. The more unfounded the false criminal charges instigated by police, the more egregious the violations of civil rights, and thus the more pressing the need for the matter to be heard by the courts. However, the more unfounded the charges are, the more likely it is that the charges will be dismissed before an opportunity for any affirmative finding of innocence arises. Thus, the indications-of-innocence standard decreases opportunities for courts to hear cases of particularly flagrant acts of malicious prosecution. This standard is more restrictive than necessary to address the finality and consistency concerns articulated by the Supreme Court in *Heck*. The Eleventh Circuit's not-inconsistent-with-innocence standard adequately addresses finality and consistency concerns without barring potentially meritorious malicious prosecution claims from review.

The indications-of-innocence standard perpetuates racial inequity by shielding police officers from accountability for racialized misconduct, and mitigating Section 1983's ability to deter such misconduct. We filed an amicus brief in *Thompson v. Clark* examining three ways that false charges may be wielded as a tool of racialized policing: (1) the use of false charges to cover up police violence; (2) the use of false charges to punish people for exercising their constitutional rights; and (3) the use of false charges as part of widespread police scandals.[20] These examples, discussed below, demonstrate the need for courts to meaningfully review malicious prosecution claims, including those in which the underlying criminal charges were ultimately dismissed. So long as courts ignore such issues of racism, these abuses will remain unremedied.

First, data reveal that police officers have pursued false charges like resisting arrest and obstruction of justice as a way of covering up their excessive use of force, frequently against BIPOC. The practice of hiding police misconduct through such charges is so pervasive that these charges are colloquially referred to as "cover charges."[21] In many parts of the country, BIPOC are disproportionately

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18. *See, e.g.*, Smalls v. Collins, 10 F.4th 117, 138 (2d Cir. 2021) ("It makes sense to require a favorable termination indicative of innocence in the context of malicious prosecution claims where the essence of such claims 'is the alleged groundless prosecution.'"); *see also* Cordova v. City of Albuquerque, 816 F.3d 645, 651 (10th Cir. 2016); Jordan v. Town of Waldoboro, 943 F.3d 532, 545 (1st Cir. 2019); Kossler v. Crisanti, 564 F.3d 181, 188 (3d Cir. 2009) (en banc); Salley v. Myers, 971 F.3d 308, 309 (4th Cir. 2020); Jones v. Clark County, 959 F.3d 748, 763 (6th Cir. 2020); Awabdy v. City of Adelanto, 368 F.3d 1062, 1068 (9th Cir. 2004).

19. *See, e.g.*, Lanning v. City of Glens Falls, 908 F.3d 19, 28 (2d Cir. 2018) (holding that when dismissal of criminal charges is in interest of justice, it cannot provide basis for favorable termination).

20. *See* Brief for the Boston University Center for Antiracist Research as Amici Curiae in Supporting Petitioner at 8-26, Thompson v. Clark, 142 S. Ct. 1332 (2022) (No. 20-659).

21. *Id.* at 8 (citing PAUL CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY 142–46 (Pantheon Books 1969)).

victims of cover charges.[22] Moreover, civil rights investigations and investigative reporting have demonstrated strong ties between police use of force and cover charges. For example, between 2004 and 2018 in Chicago, Illinois, "[i]nvestigative reporting . . . showed that two-thirds of cases involving officer use of force . . . also involved cover charges."[23] In 2009, in San Jose, California, "70% of cases involving cover charges also involved officer use of force."[24] Additionally, in 2017, the Department of Justice ("DOJ") "uncovered cases in which police officers in Chicago, Illinois pursued false assault and battery charges against victims of police violence . . . ."[25] Resisting arrest charges are so closely associated with police misconduct that "some police departments and prosecutors' offices internally monitor" them.[26]

Second, false charges may be used to deter BIPOC from exercising their constitutional rights, as exemplified by the DOJ report on police practices in Ferguson, Missouri following the 2014 police killing of Michael Brown.[27] That investigation revealed that the Ferguson Police Department ("FPD") had engaged in unconstitutional revenue-generating tactics in predominantly Black communities, and pursued unsupported charges against people who asserted their rights in response to such misconduct.[28] Among other things, DOJ investigators found that FPD officers wrongfully arrested people for "talking back to officers, recording public police activities, and lawfully protesting perceived injustices."[29] Officers used charges like "failure to comply, disorderly conduct, interference with an officer, [and] resisting arrest" to respond to incidents of lawful "disrespect."[30] Sometimes, when people tried to walk away from unlawful police encounters, FPD officers responded violently, "and then arrested the victims of their violence for supposedly failing to comply, or resisting."[31] Many of these charges were brought "almost exclusively" against Black people; at the time of the DOJ's report, "Black people accounted for 94% of all failure to comply charges, 92% of all resisting arrest charges, 92% of all peace disturbance charges, and 89% of all failure to obey

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22. *See id.* at 10–11 (citing Eric Nalder et al., *"Obstructing" Justice: Blacks Are Arrested on "Contempt of Cop" Charge at Higher Rate*, SEATTLE POST INTELLIGENCER (Feb. 28, 2008), https://web.archive.org/web/20080302164032/http://seattlepi.nwsource.com/local/353020_obstructmain28.asp); *id.* at 10–12.

23. *Id.* at 10 (citing Jonah Newman, *Chicago Police Use "Cover Charges" to Justify Excessive Force*, CHI. REP. (Oct. 23, 2018), https://www.chicagoreporter.com/chicago-policeuse-cover-charges-to-justify-excessive-force).

24. *Id.* (citing Sean Webby, *Mercury News Investigation: San Jose Police Often Use Force in Resisting-Arrest Cases*, MERCURY NEWS (Aug. 13, 2016, 11:08 PM), https://www.mercurynews.com/2009/10/31/mercury-news-investigation-san-jose-police-often-useforce-in-resisting-arrest-cases/).

25. *Id.* at 9–10 (citing C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 82 (2017), https://www.justice.gov/opa/file/925846/Download).

26. *Id.* at 10 (citing Mark Joseph Stern, *The Police Lie. All the Time. Can Anything Stop Them?*, SLATE (Aug. 4, 2020, 11:51 AM), https://slate.com/news-and-politics/2020/08/police-testilying.html).

27. *Id.* at 15–19.

28. *Id.* at 15–16 (citing C.R. DIV., U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

29. *Id.* (quoting C.R. DIV., U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

30. *Id.*

31. *Id.* at 16–17.

charges."[32] The DOJ's investigation in Ferguson reveals how the pursuit of false charges can be used as a tool to "maintain racial subordination[,] . . . stifle unwelcome criticism," and quell dissent.[33]

Third, police have falsely arrested BIPOC in several large-scale scandals, illustrating the widespread and systemic nature of this problem. "Between 1995 and 2017 . . . police falsely arrested more than 1,800 people" in fifteen such scandals, which spanned thirteen cities.[34] These cases generally involved planted evidence, and "[t]he victims of these false charges were 'overwhelmingly' Black and Latino/a/x[/e]."[35]

Although *Thompson v. Clark* specifically dealt with a Black man charged with the highly suspect crimes of resisting arrest and obstructing governmental administration, and despite the reality that BIPOC are the most vulnerable to false cover charges, the Supreme Court did not address race or racism during oral arguments. When courts choose to ignore salient issues of racism, they are saying something. They are saying that racism does not matter. Moreover, to ignore the systemic subordination of BIPOC is to preserve and perpetuate it. Until we reckon with the racialized implications of the indications-of-innocence standard, it will remain intact as a thread in the web of legal protection that shields police officers from accountability for pursuing false charges against BIPOC.

II. THE WEB OF LEGAL DOCTRINES BARRING RECOURSE FOR RACIALIZED POLICING

Legal recourse against racialized police violence and misconduct is barred by a web of interconnected, but seemingly unrelated legal doctrines. On the criminal justice front, even the most egregious cases—such as police killings—result in limited accountability. Prosecutors are reluctant to prosecute;[36] grand jurors are disinclined to indict;[37] petit juries fail to render guilty verdicts;[38] and, even in the rare event of a conviction, judges generally impose more lenient sentences on law enforcement officers than civilians.[39] Criminal charges for police misconduct that

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32. *Id.* at 17 (citing C.R. DIV., U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

33. *Id.*

34. *Id.* at 19 (citing SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 22 (2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf) .

35. *Id.*

36. Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html.

37. Nicole Hong & Sarah Maslin Nir, *Inside the Secretive Legal Process That Can Shield Police from Charges*, N.Y. TIMES (Aug. 3, 2021), https://www.nytimes.com/2021/05/22/nyregion/daniel-prude-death-letitia-james.html.

38. Michael Wines, *In Police Shootings, Finding Jurors Who Will Say 'Not Guilty,'* N.Y. TIMES (May 31, 2017), https://www.nytimes.com/2017/05/31/us/police-shootings-trial-jury.html.

39. *See, e.g.*, Janelle Griffith, *Police Who Kill Often Receive Lenient Or No Punishments. Derek Chauvin Could Be the Exception*, NBC NEWS (June 24, 2021), https://www.nbcnews.com/news/us-news/police-who-kill-often-receive-lenient-or-no-punishments-derek-n1272152; The Associated Press, *Last of 4 Connecticut Officers Sentenced in Police Bias Case*, N.Y. TIMES (Feb. 12, 2014), https://www.nytimes.com/2014/02/13/nyregion/last-of-4-connecticut-officers-sentenced-in-police-bias-case.html.

result in harms short of death are even less likely to be heard by courts.[40] And criminal charges for instigating false charges are rarely subject to criminal consequences.[41]

With little opportunity for accountability for racialized police misconduct through the criminal legal system, BIPOC victims must turn to the civil system. Section 1983 was created to provide a path for victims of unconstitutional—and particularly racially motivated and biased—state action to seek damages. However, a variety of legal doctrines created by courts, such as qualified immunity, frustrate the purpose of Section 1983. In *Pierson v. Ray*,[42] a 1967 case involving the false arrest of faith leaders who were part of the Freedom Rides in Mississippi, the United States Supreme Court first recognized qualified immunity as a defense.[43] In the 1982 case of *Harlow v. Fitzgerald*,[44] the Court expanded the doctrine to allow government actors to avoid personal liability under civil rights law so long as they can show that their conduct did not violate a "clearly established" rule.[45] In other words, the victim of state misconduct is required to meet the impossibly high burden of showing that a court previously addressed identical conduct under identical circumstances.

Qualified immunity is a racially unjust doctrine, as the loophole it has created allows many police perpetrators of racial violence to avoid liability.[46] While this doctrine previously permitted civil suits against police officers to be quietly dismissed, qualified immunity has rightfully gained increasing attention and criticism.[47] This criticism is laying the groundwork for change. The New York City Council voted earlier this year to establish a set of local rights that replicate federal constitutional rights, and to eliminate qualified immunity as a defense to civil rights claims brought under the local law.[48] Supreme Court justices have also expressed disapproval of the doctrine. In one dissenting opinion, Justice Sonia Sotomayor described qualified immunity at the federal level as an "absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment."[49] Justice Clarence Thomas has said that qualified immunity "stands on shaky ground" and "in an appropriate case" should be reconsidered.[50]

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40. PHILIP MATTHEW STINSON, SR. ET AL., U.S. DEP'T OF JUST., POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED 151 (2016) (finding that out of 3,328 cases of violence-related police crime, not including those resulting in fatalities, only 39.5% ended in criminal conviction for the officer).

41. Heather Hope, *Jury Finds Former La Mesa Police Officer Not Guilty of Filing a False Police Report About the Arrest of Amaurie Johnson*, CBS8 (Dec. 10, 2021, 6:35 PM), https://www.cbs8.com/article/news/crime/matt-dages-jury-verdict/509-28a7d0e9-cadb-4f03-99e6-2184c7db3047.

42. 386 U.S. 547 (1967).

43. *Id.* at 554.

44. 457 U.S. 800 (1982).

45. *Id.* at 818.

46. *Qualified Immunity*, EQUAL JUST. INITIATIVE, https://eji.org/issues/qualified-immunity/ (last visited May 12, 2022).

47. Madeleine Carlisle, *The Debate over Qualified Immunity Is at the Heart of Police Reform. Here's What to Know*, TIME (June 3, 2021, 6:35 PM), https://time.com./6061624/what-is-qualified-immunity/; Ed Yohnka et al., *Ending Qualified Immunity Once and for All Is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable/.

48. Corey Crockett, *City Council Votes to End Qualified Immunity for NYPD Officers*, PIX11 (Mar. 25, 2021, 11:32 PM), https://pix11.com/news/local-news/city-council-votes-to-end-qualified-immunity-for-nypd-officers/.

49. Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

50. Hoggard v. Rhodes, 141 S. Ct. 2421, 2421–22 (2021).

The indications-of-innocence standard is another, but lesser-known, obstacle in need of attention and reform. Coupled with qualified immunity and the lack of criminal prosecution against police perpetrators, the indications-of-innocence standard contributes to a web that protects racialized police misconduct and blocks efforts to seek justice. This standard stands in the way of racial justice and requires public scrutiny.

To the extent that policing is a method of maintaining racial order, the indications-of-innocence standard is a small but significant component in this system. Policing in the United States began with the slave patrols.[51] A core, but tacit, role of policing in the United States has been to maintain the existing racial hierarchy.[52] The foreclosure of civil rights claims arising from the pursuit of false criminal charges removes a critical check on racialized police misconduct and contravenes the purpose of Section 1983, which is to hold state actors accountable for constitutional rights violations, particularly those motivated by racism.

Legal doctrines like qualified immunity and the indications-of-innocence standard protect government actors and allow courts to avoid confronting abusive and racist practices. They also ignore the racialized foundations of the criminal legal system that make it harder for people like Mr. Thompson to hold police accountable for abuses. Although the Court in *Thompson v. Clark* did not grapple with the racist effects of the indications-of-innocence standard during oral argument, we must not lose sight of what is at stake when courts close their doors to police misconduct claims. We must keep our eye on the web of legal mechanisms in the criminal and civil justice systems that work together to protect police officers who abuse BIPOC.

III. THE INDICATIONS-OF-INNOCENCE STANDARD AS AN EXAMPLE OF JURIDICAL RACISM

The acceptance of the indications-of-innocence standard is an example of contemporary juridical racism. In its modern manifestation, juridical racism is equal parts structural, systemic, and white-centric racism. Juridical racism is sustained not by denying the existence of racism outright, but by narrowly defining racism as individual, intentional, and overt discrimination.[53] While racial discrimination is certainly a form of racism, judges' exclusive focus on individual, intentional, and overt racial discrimination provides a basis for courts to disregard structural, systemic, and white-centric racism. Ignoring these mainstay forms of racism allows racial subordination to continue unchecked under the law.

Structural racism is generally understood as seemingly race-neutral social, economic, and government policies and practices that interact to advantage people classified as white and disadvantage those classified as nonwhite, to varying degrees. Systemic racism is a type of structural racism that is perpetuated within a

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51. Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, AM. BAR ASS'N (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish/.

52. Aya Gruber, *Policing and "Bluelining,"* 58 HOUS. L. REV. 867, 879 (2021); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 24 (2019); Wenei Philimon, *Not Just George Floyd: Police Departments Have 400-Year History of Racism*, USA TODAY (June 7, 2020, 2:44 PM), https://www.usatoday.com/story/news/nation/2020/06/07/black-lives-matters-police-departments-have-long-history-racism/3128167001/.

53. An exception to this is reverse racism claims, where race-conscious decision-making is claimed to negatively impact individual white persons.

specific system, often systems that were founded on racist principles or practices but now carry on under the guise of equal opportunity and treatment. Aspects of structural racism work together seamlessly to maintain racial privilege and subordination. The indications-of-innocence standard is a prime example of structural and systemic racism, as well as an example of how judges pay little attention to these forms of racism.

As discussed above, police disproportionately target BIPOC with violence, as well as violations of privacy, freedom of movement, and other civil rights. False charges are a tool of racialized misconduct and are often used to cover up other acts of such misconduct. The indications-of-innocence standard ensures that many victims of false charges, who are frequently BIPOC, are unable to have their associated civil rights claims reviewed by the courts. In this way, the system of policing, which was founded on restricting the free movement and safety of enslaved Black people, maintains its original aim. Under the indications-of-innocence standard, racialized police misconduct is protected and accordingly incentivized. The creation of the indications-of-innocence standard and its continued use are instances of juridical racism.

A traditional response to evidence of structural and systemic racism is to claim that it is simply the result of happenstance, not racial subordination or privilege, and thus not worthy of attention and reform. This is incorrect. The indications-of-innocence standard was not judicially created in the absence of racism. It is a product of white-centric racism. White-centric racism includes white transparency, white normativity, and white racialized reality. White normativity is an unconscious belief that white experiences, practices, and beliefs are inherently natural, normal, and correct for everyone.[54] White transparency is "the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."[55] White transparency occurs when "the white point of view masquerades as colorless, raceless, and systematically devoid of bias."[56] White racialized reality is the way that white people in the United States collectively experience aspects of the current racial order in the United States as benefits, rather than detriments.[57]

From a white-centric perspective, policing serves to enhance public safety, and the criminal legal system is a fair one in which only the culpable are prosecuted. Those operating from this perspective do not anticipate that police will target community members and then cover up their misconduct with false charges, or that prosecutors will proceed with charges against innocent people. The white-centric assumption is that state actors—police and prosecutors alike—will act fairly. However, this is not the experience of BIPOC in the United States. It is not surprising that judges create and affirm doctrines from a white-centric viewpoint because judges are disproportionately white when compared to the general population.[58] One of the dangers of a judiciary that does not reflect the

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54. PATRICIA J. WILLIAMS, SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE 6 (1997).

55. Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

56. Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865, 871–72 (1998).

57. Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2282 (2017).

58. State trial and appellate judges are 83% and 80% white, respectively. TRACEY E. GEORGE & ALBERT H. YOON, AM. CONST. SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGEMENT ON STATE

racial demographics of the country is that judges create and sustain procedural rules and substantive doctrines which privilege white people and subordinate BIPOC.

This is not to say that white judges cannot be antiracist.[59] They can, and some are. However, it takes conscious effort to recognize that white experiences are not the norm and that racial discrimination and subordination by state actors are a standard experience for BIPOC in the United States. Judges should seek out and consider the perspectives of BIPOC communities that are targeted by policing before creating or affirming rules that limit access to civil rights redress. Judges should seek to maximize rather than restrict access to civil rights claims so that courts can serve as a check on policing. Judges should also look out for tell-tale signs of rules and doctrines that protect racialized police violence and misconduct. They should ask: Does the rule or doctrine serve to limit access to judicial review of alleged civil rights violations? Does it undermine the purpose of the civil rights law that was enacted? Could the lack of judicial review and subsequent lack of accountability incentivize state actors' mistreatment of BIPOC? When applied to the indications-of-innocence standard, the answer to each of these questions is in the affirmative. The indications-of-innocence standard is a racist rule that should be rejected by the courts.

CONCLUSION

Since the murder of George Floyd, recognition of the pervasiveness of racialized police violence and other misconduct has increased. The names of some individual officers who have committed violence have become well-known and a few have been successfully prosecuted. But what is even more promising is increased recognition of judicially-created doctrines, like qualified immunity, that create a web of legal protection for racialized police misconduct. The indications-of-innocence interpretation of the favorable termination rule is yet another invisible thread in this web that safeguards and emboldens police. Increasing awareness of the many ways that this web ensures that policing maintains the existing racial order in the United States is an important first step to unraveling it. Qualified immunity and the indications-of-innocence standard should be household names that are better known than the likes of "Derek Chauvin." While individual police officers inflict direct harm on BIPOC communities, the bigger harm is imposed by the web of legal protection that shields and even incentivizes this racist misconduct.

COURTS? 1, 7 (2016), http://gavelgap.org/pdf/gavel-gap-report.pdf. Seventy-three percent of active federal judges are white. Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019), https://www.americanprogress.org/article/building-inclusive-federal-judiciary/. Yet, in 2020, white people (not including those who identify as Hispanic) only made up 57.8% of the United States population. Mike Schneider, *Census Data: US Is Diversifying, White Population Shrinking*, AP NEWS (Aug. 13, 2021), https://apnews.com/article/race-and-ethnicity-census-2020-7264a653037e38df7ba67d3a324fc90d.

59. Similarly, BIPOC judges can engage in juridical racism as well.