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Antiracist Remedial Approaches in Judge Gregory's Jurisprudence

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Abstract

This piece uses the idea of antiracism to highlight parallels between school desegregation cases and cases concerning errors in the criminal justice system. There remain stark, pervasive disparities in both school composition and the criminal justice system. Yet even though judicial remedies are an integral part of rooting out systemic inequality and the vestiges of discrimination, courts have been reticent to use the tools at their disposal to adopt proactive remedial approaches to address these disparities. This piece uses two examples from Judge Roger Gregory's jurisprudence to illustrate how an antiracist approach to judicial remedies might work.

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INTRODUCTION

In the wake of George Floyd's murder, there was considerable public interest in learning more about antiracism.[1] Ibram Kendi's canonical work explains that antiracism is a commitment both to deconstructing power structures that allow racism to continue and to affirmatively constructing systems that facilitate equity and inclusion.[2] In Kendi's telling, it does not suffice for someone to merely not be racist; instead, Kendi argued, dismantling systemic inequalities requires people to take affirmative steps and adopt proactive, antiracist approaches.[3] At the time, people understood that claim as a call to educate themselves and one another about race and systemic inequality.[4] Pieces on antiracism invited readers to think about particular policies that might embed or reproduce racial inequalities, such as redlining, when mortgage loaners decline loans to Black families in certain housing areas, or other forms of housing discrimination.[5]

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1. *See, e.g.*, Marlene F. Watson et al., *Black Lives Matter: We Are in the Same Storm but We Are Not in the Same Boat*, 59 FAM. PROCESS 1362, 1362 (2020) (focusing on Black Lives Matter as a platform for educating people about racial inequality, oppression, and Black dehumanization).

2. *See* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 9–10 (2019) (identifying antiracist actions as those that "locate[] the roots of problems in power and policies" and "confront[] racial inequities"). For a critique of previous antiracist approaches, see generally Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity and Equal Protection*, 85 CORNELL L. REV. 1358 (2000).

3. KENDI, *supra* note 2, at 9–10.

4. *See, e.g.*, Anna North, *What It Means to Be Anti-Racist*, VOX (June 3, 2020, 1:50 PM), https://perma.cc/V6RU-4GUD ("To be an anti-racist . . . requires an understanding of history—an understanding that racial disparities in America have their roots, not in some failing by people of color but in policies that serve to prop up white supremacy."); Eric Deggans, '*Not Racist' Is Not Enough: Putting in the Work to Be Anti-Racist*, NPR (Aug. 25, 2020, 12:03 AM), https://perma.cc/G7QU-48NZ (encouraging readers to learn about the history of antiracism and to engage with movies and TV shows that challenge their notions of race and culture).

5. *See* North, *supra* note 4 (discussing how redlining led to Black Americans being "more likely to live in neighborhoods affected by environmental contamination"); Alvin Chang, *Living in a Poor Neighborhood*

There was also renewed focus on the judicial doctrines and laws governing policing and criminal justice, specifically qualified immunity.[6] Revisiting those doctrines became part of calls for antiracism.[7]

With that lens in mind, this piece explores some of the past and present approaches to judicial remedies for racial inequities. It draws a parallel between the Supreme Court's struggle over how to remedy school segregation (broadly defined to include schools that are primarily one race) and federal courts' struggles over whether to remedy errors in the criminal justice system that disproportionately fall on Black defendants. And it invites readers to think about what an antiracist jurisprudence on remedies would be.

I. SCHOOL DESEGREGATION REMEDIES

The aftermath of *Brown v. Board of Education*[8] (*Brown I*) captures how judicial remedies may be part of an antiracist jurisprudence. *Brown I* held that "[s]eparate educational facilities are inherently unequal" and invalidated school assignment policies that maintained segregated public schools by assigning students to schools based on their race.[9] Because school segregation was so prevalent at the time, it was unclear what *Brown I* required states and school districts to do in order

Changes Everything About Your Life, VOX (Apr. 4, 2018, 12:00 PM), https://perma.cc/849Y-BWPW (recounting how housing policies created "two divergent Americas, one with money, and one without—and the one without is largely black").

6. *See* Jacob Knutson, *Pew Poll: Americans Support Allowing Citizens to Sue Officers for Misconduct*, AXIOS (July 9, 2020), https://perma.cc/9U8F-B8TN (explaining what qualified immunity is and evaluating poll results on abolishing it); Ben Embry, *Why Now is the Time to End Qualified Immunity*, THE PITCH (July 13, 2020), https://perma.cc/9LU5-PGZF (arguing for an end to qualified immunity in the wake of George Floyd's murder by police).

7. *See* Nicole Cardoza, *Abolish Qualified Immunity.*, ANTI-RACISM DAILY (July 6, 2020), https://perma.cc/N4W5-GMDY (analyzing how qualified immunity prevents justice for victims of police violence).

8. 347 U.S. 483 (1954).

9. *Id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

to comply with the decision.[10] One possibility was that *Brown I* required schools to end school assignment policies that formally and explicitly assigned students to segregated schools based on race. A second possibility was that *Brown I* required states and schools to undertake affirmative steps to eradicate vestiges of segregation, and to bring about integrated schools.

The Supreme Court initially sidestepped this question. In *Brown v. Board of Education*[11] (*Brown II*), decided the year after *Brown I*, the Court said only that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems"[12] while courts would "be guided by equitable principles" in "shaping . . . remedies."[13] Although the Court emphasized "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis,"[14] the opinion became better known for the directive that courts should ensure that schools admit students on a racially nondiscriminatory basis "with all deliberate speed."[15]

While the Supreme Court stayed out of school desegregation litigation for a few years, except in a few cases involving massive resistance,[16] the Court began to enter the fray in the 1960s. When it did so, the Court issued opinions that seemed to adopt the second approach to the *Brown II* remedy—namely, that schools had to undertake affirmative steps to eliminate racial segregation in schools, even when they no longer had policies that explicitly assigned students to segregated schools on the basis of race.

For example, in *Griffin v. County School Board of Prince Edward County*,[17] the Court addressed Virginia's response to *Brown*. The Virginia legislature had initially closed all public schools that were integrated and granted funds to "private"

10. *See id.* (reserving the question of the proper remedy while noting "the wide applicability of this decision").

11. 349 U.S. 294 (1955).

12. *Id.* at 299.

13. *Id.* at 300.

14. *Id.*

15. *Id.* at 301.

16. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 4 (1958) (rejecting the Little Rock School Board's plan to suspend racial desegregation of schools).

17. 377 U.S. 218 (1964).

schools; after the school closures were invalidated by the Virginia Supreme Court on state law grounds, Virginia adopted a "freedom of choice" plan.[18] But Prince Edward County's public schools remained closed.[19] After finding that Prince Edward County's school policies were unconstitutional, the Court emphasized the importance of providing "quick and effective" relief.[20] The Court upheld the district court's injunction that prohibited county officials from paying tuition grants or tax exemptions related to tuition grants for private schools so long as the public schools remained closed.[21] The Court also stated that the district court could require officials to levy taxes "to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County."[22] And in a passage of the opinion that presaged what was to come, the Court declared that "[t]he time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these . . . children their constitutional rights."[23]

Green v. County School Board of New Kent[24] later addressed a "freedom of choice" plan adopted in the wake of *Brown*. The question in the case was whether the plan adequately remedied school segregation and *Brown* violations.[25] New Kent County, according to the Court, had a roughly equal number of white and Black residents, and the schools had roughly equal numbers of white and Black students.[26] In compliance with Virginia law, the district had initially maintained a segregated school system,

18. *Id.* at 221–23.

19. *Id.* at 222–23.

20. *See id.* at 232–33 (recognizing that an injunction would halt New Kent County's practices that "deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia").

21. *See id.* ("We have no doubt of the power of the court to give this relief to enforce the discontinuance of the county's racially discriminatory practices.").

22. *Id.* at 233.

23. *Id.* at 234.

24. 391 U.S. 430 (1968).

25. *Id.* at 432.

26. *See id.* (stating that out of 1,300 students in Kent County, 740 were Black and 550 were white).

and it continued to do so after *Brown*.[27] The county then adopted a school assignment policy that automatically reassigned students to their previous schools and allowed new students to be assigned by the Board.[28] Soon after that assignment was challenged as unconstitutional, the Board adopted a freedom of choice plan.[29]

The Court, in an opinion by Justice Brennan, invalidated the school's freedom of choice plan. The Court explained that "*Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution."[30] The Court underscored that states and school boards have the "affirmative duty to take whatever steps might be necessary" to bring about "a unitary system in which racial discrimination would be eliminated root and branch."[31] And the Court insisted that school boards must "bend their efforts" to achieve integration and dismantle segregation.[32]

Swann v. Charlotte-Mecklenberg Board of Education[33] recognized courts' broad powers to ensure that school boards were undertaking those efforts and fulfilling their constitutional obligations.[34] The Charlotte-Mecklenberg school district served a student body that was 71 percent white and 29 percent Black.[35] Yet Black students overwhelmingly attended schools concentrated in the city of Charlotte, and two-thirds of those students attended schools that served more than 99 percent Black students.[36] The district court rejected the school board's proposed plan for achieving integrated schools and imposed a

27. *Id.* at 432–33.

28. *Id.* at 433.

29. *Id.* at 434.

30. *Id.* at 437.

31. *Id.* at 437–38.

32. *Id.* at 438.

33. 402 U.S. 1 (1971).

34. *See id.* at 15 ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

35. *Id.* at 6.

36. *Id.* at 6–7.

court-ordered plan that the Supreme Court affirmed.[37] The court-ordered plan included: a "mathematical ratio" that operated as a presumption for the racial balance that the schools should reflect (which reflected the population of the district); "close scrutiny" of single-race schools; redrawn school zones and school district lines; and bus transportation of students.[38]

But that aggressive remedial approach, which required states to undertake efforts to root out vestiges of discrimination and allowed courts to push them in that direction, lasted a mere decade. Three later cases, *Keyes v. School District No. 1*,[39] *Milliken v. Bradley*,[40] and *Board of Education v. Dowell*[41] highlight the second alternative approach to judicial remedies for racial discrimination.

Keyes in particular underscores how courts can take a different approach to remedies even while they purport to embrace a broad interpretation of constitutional rights. *Keyes* addressed the Denver school system, which had never "mandated or permitted racial segregation in public education."[42] In *Keyes*, the plaintiffs "apparently concede[d] . . . that in the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action."[43] Based on the facts of the case, the Court concluded that the plaintiffs had shown that the state intentionally maintained segregation in a significant portion of the school system such that the court could presume other segregated schools in the system were also the result of intentional segregation.[44]

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37. *See id.* at 10 (explaining how the district court accepted a plan that had been modified by a court-appointed expert).

38. *Id.* at 22–30.

39. 413 U.S. 189 (1973).

40. 418 U.S. 717 (1974).

41. 498 U.S. 237 (1991).

42. *Keyes*, 413 U.S. at 191.

43. *Id.* at 198.

44. *See id.* at 206 ("On the question of segregative intent, petitioners presented evidence tending to show that the Board, through its actions over a period of years, intentionally created and maintained the segregated character of the core city schools.").

Justice Powell's separate writing foreshadowed a turning point in the Court's remedial jurisprudence. Justice Powell wrote separately to disagree with the Court's articulation of the constitutional right that was at stake in the cases.[45] The issue was not, Justice Powell explained, whether the state intentionally maintained a system of school segregation or mandated segregation in public education by law. "[P]resent constitutional doctrine," Justice Powell explained, "requir[es] affirmative state action to desegregate school systems."[46] And the existence of school segregation, Justice Powell wrote, had a "familiar root cause"—"segregated residential and migratory patterns the impact of which . . . was often perpetuated and rarely ameliorated by action of public school authorities."[47] The existence of segregated schools was "largely unrelated to whether a particular State had or did not have segregative school laws."[48] Justice Powell explained that he "would not . . . perpetuate the de jure/de facto distinction" and would instead hold "that where segregated public schools exist within a school district to a substantial degree, there is a prima facie case that the duly constituted public authorities . . . are sufficiently responsible."[49] "Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle."[50]

Yet while Justice Powell would have more expansively defined the constitutional right at issue in the school desegregation cases, he was considerably more circumspect about what judicial remedies might be appropriate to enforce that right. For example, whereas *Swann* endorsed the use of busing to achieve integrated schools, Justice Powell warned about "extensive student transportation solely to achieve integration" even though he had just emphasized school

45. *See id.* at 265 (Powell, J., concurring in part and dissenting in part) (taking issue with the "long leap" in the majority's application of constitutional doctrine).

46. *Id.* at 221.

47. *Id.* at 222–23.

48. *Id.* at 223.

49. *Id.* at 224.

50. *Id.* at 227.

districts' affirmative obligation to bring about integrated schools even where segregated schools were not the result of intentional or formal state segregation.[51]

Milliken v. Bradley and *Board of Education v. Dowell* announced formal limits that clipped the scope of judicial remedies for school segregation. *Milliken v. Bradley* involved a challenge to Detroit-area schools.[52] The district court had imposed a remedy spanning multiple school districts after finding that one school district had engaged in practices that were intended to perpetuate racially segregated schools.[53] The district court and court of appeals determined that a multidistrict remedy was necessary to prevent a metropolitan area that included primarily Black schools surrounded by neighboring districts with primarily white schools.[54] The Supreme Court rejected that remedy: "Before the boundaries of separate and autonomous school districts may be set aside . . . for remedial purposes . . . it must first be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation."[55]

In dissent, Justice White expressed the concern that "[t]he result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts."[56] And Justice Marshall, in a separate dissent, described the decision as "the Court's refusal to remedy separate and unequal education."[57]

Dowell cut back further on judicial remedies for segregation by imposing a time limit on courts' power to impose remedies for

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51. *Id.* at 242.

52. *See* Milliken v. Bradley, 418 U.S. 717, 722–23 (1974) (summarizing the respondents' allegations concerning public schools in Detroit).

53. *See id.* at 731–34 (detailing the scope of the district court's remedy to the segregation problem it identified).

54. *See id.* at 732–33 (explaining the district court's rationale for approving the multidistrict remedy).

55. *Id.* at 744–45.

56. *Id.* at 763 (White, J., dissenting).

57. *Id.* at 783 (Marshall, J., dissenting).

school systems that were segregated by law.[58] In that case, the school board had been subject to a judicially ordered desegregation plan for five years.[59] The school board voluntarily continued to follow the court-ordered plan for an additional six to seven years before abandoning it.[60] By that time, the Court reasoned, the "passage of time" made it inappropriate for courts to order judicially imposed remedies for formal segregation that had existed a little more than a decade earlier.[61]

II. CRIMINAL JUSTICE REMEDIES

With that background in mind, consider a similar relationship between rights and judicial remedies with respect to a particular issue in the criminal justice system—erroneous mandatory minimum sentences.

The criminal justice system is rife with racial disparities—disparities in who is arrested, what happens when someone is stopped or arrested, and what people are charged with (if charges are pursued).[62] Mandatory minimums, statutes

58. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 238 (1991) ("[T]he board's compliance with previous court orders is obviously relevant in deciding whether to modify or dissolve a desegregation decree, since the passage of time results in changes in board personnel and enables the court to observe the board's good faith in complying with the decree.").

59. *See id.* at 241 (explaining that in 1972, the District Court—after finding previous efforts to eliminate state-imposed segregation unsuccessful—"ordered the Board to adopt the 'Finger Plan,'" to desegregate schools).

60. *Id.*

61. *See id.* at 249

> The test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result.

62. *See* CHARLES PUZZANCHERA & SARAH HOCKENBERRY, JUVENILE COURT STATISTICS 2010, at 5–27 (2013), https://perma.cc/GG7P-YE64 (PDF) (documenting the volume of delinquency cases referred to juvenile court and examining the types of offenses charged and demographic characteristics of the juveniles involved by age, gender, and race); *Criminal Justice Fact Sheet*, NAACP (2021), https://perma.cc/5LG2-MJBT (highlighting racial disparities in all levels of the criminal justice system); Wendy Sawyer, *Visualizing the*

that establish a required minimum sentence for particular offenders, are no exception.[63] There are pronounced racial disparities in which defendants are charged and sentenced under statutes containing mandatory minimum sentences.[64] In the federal system, "black men have 1.75 times the odds of facing such charges, which is equivalent to a 5 percentage point (or 65 percent) increase in the probability for the average defendant."[65] And because mandatory minimum sentences are often harsh, "[t]he initial mandatory minimum charging decision alone is capable of explaining more than half of the black-white sentence disparities not otherwise explained by pre-charge characteristics."[66]

One particularly prominent example was the disparity between sentences for drug offenses involving crack versus powder cocaine. Under the Anti-Drug Abuse Act of 1986,[67] Congress imposed mandatory minimum sentences based on the

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Racial Disparities in Mass Incarceration, PRISON POL'Y INITIATIVE (July 27, 2020), https://perma.cc/9GYA-9JFD ("Systemic racism is evident at every stage of the system, from policing to prosecutorial decisions, pretrial release processes, sentencing, correctional discipline, and even reentry."); Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System is Racist. Here's the Proof*, WASH. POST (June 10, 2020), https://perma.cc/34EK-DTRP (compiling evidence of racial bias in the criminal justice system); ELIZABETH HINTON ET AL., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 1 (2018), https://perma.cc/8MJE-7SNX (PDF) (presenting an "overview of the ways in which America's history of racism and oppression continues to manifest in the criminal justice system, and a summary of research demonstrating how the system perpetuates the disparate treatment of black people").

63. *See* FAMM, MANDATORY MINIMUMS IN A NUTSHELL 1 (2012), https://perma.cc/4PEV-7JZ6 (PDF) ("A mandatory minimum is a sentence, created by Congress or a state legislature, which the court *must* give to a person convicted of a crime, no matter what the unique circumstances of the offender or the offense are.").

64. *See* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 1, 5 (2013) (explaining that "a black-white gap" in sentencing "appears to stem largely from prosecutors' charging choices, especially decisions to charge defendants with 'mandatory minimum' offenses").

65. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

66. *Id.* at 1323.

67. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841 (2004)).

amount of drug involved in the offense; Congress used a 100-to-1 disparity in the amounts of crack versus powder cocaine that triggered the mandatory minimum.[68] As a result of the 100-to-1 ratio, Black offenders served almost as much time in prison for a nonviolent drug offense as white offenders did for violent offenses, and 85 percent of the thousands of people sentenced for crack cocaine offenses under the 100-to-1 regime were Black offenders.[69]

It was against this backdrop of racial disparities in mandatory minimum sentences that the issue in *United States v. Surratt*[70] arose. The question in *Surratt* is a technical one about the availability of judicial remedies for mistaken convictions or sentences.[71] An extensive corpus of federal law governs the availability of federal post-conviction review for federal prisoners. For persons whose convictions and sentences have become final (i.e., their direct appeals and possible petition

68. *Compare* 21 U.S.C. § 841(b)(1)(A)(ii)(II) (codifying that anyone in possession of "5 kilograms or more of a . . . detectable amount of . . . cocaine . . . shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results . . . not less than 20 years . . . "), *with* § 841(b)(1)(A)(iii) (codifying that anyone in possession of "50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . shall be sentenced to a term of imprisonment which may not be less than 10 years or more . . . ").

69. *See* DOJ, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 112 (2003), https://perma.cc/L46C-B8KG (PDF) (highlighting that Black offenders served an average of 58.7 months for drug offenses, while white offenders served an average of 74.7 months for violent offenses); U.S. SENT'G COMM'N, ANALYSIS OF THE IMPACT OF AMENDMENT TO THE STATUTORY PENALTIES FOR CRACK COCAINE OFFENSES MADE BY THE FAIR SENTENCING ACT OF 2010 AND CORRESPONDING PROPOSED PERMANENT GUIDELINE AMENDMENT IF THE GUIDELINE AMENDMENT WERE APPLIED RETROACTIVELY 19 (2011), https://perma.cc/M6F5-H3TR (PDF) (showing that 85 percent of people who would benefit from a proposed amendment reducing mandatory minimum sentences are Black); Richard Hartley & J. Mitchell Miller, *Crack-ing the Media Myth: Reconsidering Sentencing Severity for Cocaine Offenders by Drug Type*, 35 CRIM. JUST. REV. 67, 71 (2010) ("Eighty-five percent of crack offenders who are subject to minimums are Black[.]").

70. 797 F.3d 240 (4th Cir. 2015), *reh'g en banc granted and dismissed as moot*, 855 F.3d 218 (4th Cir. 2017).

71. *See id.* at 244–45 (examining whether the defendant was entitled to post-conviction relief under a § 2255 motion where the sentencing guidelines recommended a penalty of 19.6 years, yet the court imposed a life sentence).

for certiorari to the Supreme Court have finished),[72] federal law provides them one year to file a motion under Section 2255[73] challenging their sentence.[74] And for persons who have already filed one motion under Section 2255, federal law provides that a "second or successive motion" must be certified by a court of appeals to contain either "newly discovered evidence . . . sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[75] Neither of those conditions explicitly permit federal prisoners to file second or successive motions under Section 2255 if they were mistakenly convicted or sentenced on the basis of an error of statutory interpretation—that is, a court misinterpreted a statute, rather than mistakenly upholding the statute as constitutional.[76]

In a series of decisions after these restrictions were enacted, courts held that federal defendants could nonetheless challenge their convictions or sentences under what is known as the "savings clause" of Section 2255—Section 2255(e). That section allows a federal prisoner to file an "application for a writ of habeas corpus" where "the remedy by [Section 2255] motion is inadequate or ineffective to test the legality of his detention."[77] Several courts held that a defendant could proceed under this section if the defendant was mistakenly convicted based on an error of statutory interpretation—that is, if the statute, properly interpreted, did not make the defendant's conduct a criminal

72. *See* Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987) ("But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review."); Greene v. Fisher, 565 U.S. 34, 39 (2011) ("Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from this Court has become time barred or has been disposed of.").

73. 28 U.S.C. § 2255.

74. *See id.* § 2255(f) (stating that a "1-year period of limitation shall apply to a motion under this section").

75. *Id.* § 2255(h).

76. *Id.*

77. *Id.* § 2255(e).

offense.[78] Several courts likewise held that defendants could proceed under that section where a defendant was sentenced above the correct statutory maximum based on an error of statutory interpretation—that is, where the statutes, properly interpreted, capped a defendant's term of imprisonment below the sentence the defendant actually received.[79] (Over the last several years, two courts of appeals have adopted a different approach, and suggested that defendants cannot rely on the savings clause under these circumstances.[80] One of the opinions was written by then-Judge Gorsuch on the United States Court of Appeals for the Tenth Circuit.[81])

The question in *Surratt* was whether a defendant could rely on the savings clause under a slightly different set of circumstances—where the defendant was mistakenly subject to a mandatory minimum sentence on the basis of an error of statutory interpretation.[82] In *Surratt*, the sentencing court determined that Mr. Surratt was subject to a mandatory minimum term of life imprisonment based on his prior

78. *See* Brown v. Rios, 696 F.3d 638, 640 (7th Cir. 2012) (finding that a defendant can use the habeas corpus statute to challenge the legality of a sentence based on an error in statutory interpretation under § 2255(e)); *In re* Jones, 226 F.3d 328, 333–34 (4th Cir. 2000) (concluding that under proper statutory interpretation, the conduct the defendant was incarcerated for was not criminal); *In re* Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997) (observing that the defendant could pursue a remedy under the federal habeas corpus statute where a shift in statutory interpretation would have resulted in the conviction and sentence being unlawful).

79. *See, e.g.*, Webster v. Caraway, 761 F.3d 764, 767 (7th Cir. 2014), *vacated by order granting reh'g en banc*, 769 F.3d 1194 (7th Cir. 2014); Bryant v. Warden, 738 F.3d 1253, 1274, 1277–79 (11th Cir. 2013); Gilbert v. United States, 640 F.3d 1293, 1306 (11th Cir. 2011); Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001).

80. *See* McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1085 (11th Cir. 2017) (en banc) (explaining that after careful review of the terms and whole text of the statute that "a change in caselaw does not trigger relief under the savings clause").

81. *See* Prost v. Anderson, 636 F.3d 578, 588 (10th Cir. 2011) (arguing that the language employed by Congress in writing the savings clause, as well as the history of the clause, "illustrates that Congress's purpose in enacting it surely wasn't to ensure that a prisoner will win relief on a meritorious successive motion, or receive multiple bites at the apple").

82. United States v. Surratt, 215 F. App'x 222, 223 (4th Cir. 2007).

drug-related convictions.[83] But that conclusion was based on an error of statutory interpretation—Mr. Surratt was not subject to that mandatory minimum.[84] Under the statutes properly interpreted, Mr. Surratt still could have been sentenced to a term of life imprisonment since life imprisonment was the statutory maximum term for Mr. Surratt's offense.[85] But the district court did not have to sentence Mr. Surratt to life imprisonment; it could have given him a different sentence. Instead, it imposed life imprisonment based on the belief that life imprisonment was the only permissible sentence under the statute.[86]

A panel of the United States Court of Appeals for the Fourth Circuit initially said that defendants could not rely on the savings clause under those circumstances—where defendants were mistakenly sentenced to a mandatory minimum term of imprisonment that still fell within the correct statutory maximum for their offense.[87] Judge Gregory authored a stinging dissent.[88] I won't rehash all of the arguments he made about why defendants can rely on the savings clause when they were improperly sentenced under a mandatory term of

83. *See id.* ("[A]t one point in the sentencing hearing the district court stated its agreement with the Government when the Government erroneously stated that Surratt's calculated advisory guideline range notwithstanding the statutory mandatory minimum, was 360 months to life, rather than 188 to 235 months."); 21 U.S.C. § 841(b)(1)(A) (codifying the conspiracy to possesses with the intent to distribute cocaine and other narcotics as a crime punishable up to life imprisonment).

84. *See* United States v. Simmons, 649 F.3d 237, 241 (4th Cir. 2011) (en banc) (overturning the Fourth Circuit's previous decision interpreting the relevant mandatory minimum).

85. *See* 21 U.S.C. § 841(b)(1)(A) (stating a term of life imprisonment as the statutory maximum for a violation of subsection (a) of the statute).

86. United States v. Surratt, 797 F.3d 240, 269 (4th Cir. 2015) (Gregory, J., dissenting).

87. *See id.* at 244 (majority opinion) (explaining that the district court correctly determined the savings clause did not confer jurisdiction to consider Surratt's petition).

88. *See id.* at 269 (Gregory, J., dissenting) ("Raymond Surratt will die in prison because of a sentence that the government and the district court agree is undeserved and unjust.").

imprisonment.[89] But suffice it to say there are many powerful ones—the Section 2255 remedy was created to streamline federal post-conviction review;[90] errors of statutory interpretation have long been cognizable in federal post-conviction proceedings;[91] the precedential backdrop to section 2255 was a regime in which errors of statutory interpretation could be corrected in second or successive motions;[92] and there are many reasons to think that the savings clause for federal prisoners preserves the habeas remedy for precisely those circumstances.[93] Section 2255, after all, authorizes claims challenging the "legality" of a "sentence" in addition to a conviction.[94]

While Judge Gregory's dissent did not carry the day in the panel decision in *Surratt*, it did lead the United States Court of Appeals for the Fourth Circuit to grant rehearing en banc in the

89. For a longer examination, see Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 GEO. L.J. 287, 300–01 (2019); Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 485–89 (2018) (examining various interpretations of Section 2255(e)); Leah M. Litman, *Judge Gorsuch and* Johnson *Resentencing (This is Not a Joke)*, 115 MICH. L. REV. ONLINE 67, 74–77 (2017) (critiquing an opinion that denied defendants a remedy under Section 2255(e)).

90. *See* United States v. Hayman, 342 U.S. 205, 213–14, 215, 217, 219 (1952) (recounting Section 2255's legislative history); *id.* at 218 (quoting a House Report stating that Section 2255 was designed to "provide[] an expeditious remedy for correcting erroneous sentences without resort to habeas corpus"); Boumediene v. Bush, 553 U.S. 723, 775 (2008) (explaining that Congress's "purpose and effect" in enacting Section 2255 "was not to restrict access to the writ but to make postconviction proceedings more efficient").

91. *See* United States v. Wheeler, 886 F.3d 415, 428 (4th Cir. 2018) ("[O]ne purpose of traditional habeas relief was to remedy statutory, as well as constitutional, claims presenting 'a fundamental defect which inherently results in a complete miscarriage of justice' and 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is present.'" (quoting Davis v. United States, 417 U.S. 333, 346 (1974))).

92. *See e.g.*, Sanders v. United States, 373 U.S. 1, 18 (1963) (explaining that abuse of the writ doctrine limited a second or successive claim predicated on a claim that was "deliberately withh[e]ld[]").

93. *See id.* at 10–11 (explaining that Section 2255 was "not intended to change the law as judicially evolved" on abuse of the writ doctrine governing second or successive petitions).

94. 28 U.S.C. § 2255(a), (e).

case.[95] President Barack Obama later commuted Mr. Surratt's sentence, which made the case moot and the en banc court never released an opinion.[96] But the order granting rehearing en banc in *Surratt*, which vacated the panel opinion, stood.[97] And it allowed the Fourth Circuit to later adopt Judge Gregory's approach to the savings clause in *United States v. Wheeler*.[98] In that case, the court held that defendants could challenge the erroneous application of a mandatory minimum sentence under the savings clause.[99]

There is a parallel between the school desegregation cases and the criminal sentencing ones. No one can deny the existence of stark racial disparities in education or in the criminal justice system,[100] even though people may dispute their precise causes. The cases raise the question of whether courts and other branches of the government have an obligation to eliminate the disparities and vestiges of discrimination root and branch.[101]

CONCLUSION

Federal resentencing is hardly the only area in which it could be helpful to think about what an antiracist approach to remedies might look like. Qualified immunity is another; as the introduction suggested, people invested in antiracism have already begun to train their focus on that body of law.[102]

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95. United States v. Surratt, 855 F.3d 218 (4th Cir. 2017) (en banc) (mem.).

96. *Id.* at 219.

97. *See id.* at 225 (Wynn, J., dissenting from the dismissal) ("Petitioner moved for rehearing en banc, which we granted, thereby vacating the panel opinion."); Surratt v. United States, 138 S. Ct. 554, 554 (2017) (denying certiorari).

98. *See* 886 F.3d 415, 433 (4th Cir. 2018) ("We agree with our sister circuits' view—and the view of Chief Judge Gregory's dissent in *Surratt*—that a sentencing error need not result in a sentence that exceeds statutory limits in order to be a fundamental defect.").

99. *See id.* at 428 ("[Section] 2255(e) must provide an avenue for prisoners to test the legality of their sentences. . . .").

100. *See supra* notes 26, 36, and 63–65 and accompanying text.

101. *See supra* notes 31–39 and accompanying text.

102. *See supra* notes 6–7 and accompanying text.

Here too, Judge Gregory's jurisprudence provides a roadmap; it addresses a fact pattern that has, tragically but unsurprisingly, occurred again.

Henry v. Purnell[103] involved a damages suit against a deputy sheriff who shot an unarmed suspect who was running away from the sheriff.[104] (The sheriff had a warrant for the suspect's arrest for failure to pay child support.)[105] The sheriff invoked the defense of qualified immunity, which shields officers against damages liability except in cases where the officer violates a clearly established constitutional right.[106] The officer argued that because he intended to discharge his taser, there was no clearly established violation (given the officer's uncertainty about whether he was discharging his gun).[107] A panel of judges on the Fourth Circuit initially agreed that the officer could be entitled to qualified immunity if mistaking the gun for the taser was reasonable, over a dissent by Judge Gregory.[108] The en banc court, in an opinion written by Judge Gregory, reversed that decision and found that the officer was not entitled to qualified immunity—and that the officer's use of deadly force against an unarmed fleeing suspect was a clearly established constitutional violation.[109] As Judge Gregory explained, what mattered is that the officer's actions were

103. 652 F.3d 524 (4th Cir. 2011) (en banc).

104. *Id.* at 527.

105. *Id.* at 532.

106. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

107. *See* Henry v. Purnell, 619 F.3d 323, 331 (4th Cir. 2010) ("Deputy Purnell responds that the short time period in which he had to act and his unfamiliarity with the gun and taser rendered his mistaken use of the firearm objectively reasonable.").

108. *Compare id.* at 340 ("The lawfulness of Deputy Purnell's conduct was thus open to reasonable dispute at the time of the shooting.") (internal quotation omitted), *with id.* at 345 (Gregory, J., dissenting) ("Officer Purnell failed to conform his conduct to the Supreme Court's specific mandate that police not use deadly force against suspects who are unarmed and who pose no threat to the officer or others.").

109. *See* Henry v. Purnell, 652 F.3d 524, 536 (4th Cir. 2011) (en banc) ("Purnell's use of deadly force against Henry was objectively unreasonable and violated clearly established law, namely *Tennessee v. Garner's* prohibition against shooting suspects who pose no significant threat of death or serious physical injury to the officer or others.").

clearly unlawful; it was irrelevant what the officer *thought* he was doing.[110]

If this fact pattern sounds familiar, it should: those are also the circumstances of Daunte Wright's death.[111] A police officer shot and killed Daunte after the officer apparently intended to use their taser.[112]

Much remains to be done to address systemic inequality in our constitutional system. Remedies cannot and should not be the only fix, since they are primarily backward looking and only somewhat preventative through deterrence. But as this piece has suggested, remedies are an integral part of rooting out systemic inequality and vestiges of discrimination. Judge Gregory's jurisprudence shows how.

110. *See id.* at 535 ("[T]he qualified immunity determination is an objective one, dependent not on the subjective beliefs of the particular officer at the scene . . . ." (internal quotation omitted)).

111. *See What to Know About the Death of Daunte Wright*, N.Y. TIMES (Apr. 23, 2021), https://perma.cc/CEV3-9854 (describing the arresting officer's mistaking of a firearm for a taser).

112. Shawn Hubler & Jeremy White, *How Could an Officer Mistake a Gun for a Taser?*, N.Y. TIMES (Apr. 13, 2021), https://perma.cc/X2ST-MWUY.