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2022

## Whiteness as Contract

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### Recommended Citation

Marissa Jackson Sow, *Whiteness as Contract*, 78 Wash. & Lee L. Rev. 1803 (2022).

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# Whiteness as Contract

Marissa Jackson Sow\*

## *Abstract*

*2020 forced scholars, policymakers, and activists alike to grapple with the impact of “twin pandemics”—the COVID-19 pandemic, which has devastated Black and Indigenous communities, and the scourge of structural and physical state violence against those same communities—on American society. As atrocious acts of anti-Black violence and harassment by law enforcement officers and white civilians are captured on recording devices, the gap between Black people’s human and civil rights and their living conditions has become readily*

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*apparent. Less visible human rights abuses camouflaged as private commercial matters, and thus out of the reach of the state, are also increasingly exposed as social and financial inequalities have become ever starker. These abuses are not effectively reached by antidiscrimination law, leaving Black and Indigenous people with rights, but no remedies, as they are forced to navigate a degraded existence suspended somewhere between citizen and foreigner, and more importantly, between life and death.*

*In analyzing the persistence, resilience, and agility of white supremacy in the United States, this Article proposes a departure from reliance on the extant antidiscrimination legal frameworks in the United States. The Article offers a theory of whiteness as contract, providing scholars, activists, and movement lawyers with a new prism of analysis for the structural and physical violence that those raced as Black endure at the express direction of the state. Despite federal law formally establishing racial equality with respect to citizenship—and with citizenship, the rights to contract and to property—an invisible common law sets forth that Black people are not in privity with the state and lack contractual capacity with the white body politic or its individual members. Under the terms of this contract for whiteness, for which those raced as white have bargained, Black people lack capacity to negotiate, occupy, or exercise a reliable authority over property. Moreover, whenever Black people are found to be in trespass on white property, they have no expectation of physical integrity, liberty, or life—or of remedies for breaches thereof.*

*An end to anti-Black state violence requires revoking the terms of whiteness and instituting a new social contract that accords Black people full political personhood and full citizenship, complete with full contracting capacity and authority, and full protection of their contracts and proprietorship. Scholars and advocates committed to ending structural and physical anti-Black brutality may use the new analytical prism proposed in this Article to explore new advocacy strategies and to consider meaningful racial justice remedies.*

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## INTRODUCTION

On July 4, 2020, Vauhxx Booker went to Lake Monroe, some sixty miles south of Indianapolis, Indiana, to watch the lunar eclipse with a group of friends.<sup>1</sup> At some point during his visit, a group of white men accused Booker, a Black civil rights activist in the Bloomington area and a member of the Monroe County Human Rights Commission, and his friends of trespassing upon private property.<sup>2</sup> According to Booker, he and his friends apologized, but the men—one of whom was wearing a hat featuring a Confederate flag—set upon him and assaulted him.<sup>3</sup> The assault was partially captured on video by a group of bystanders, and the video shows the men surrounding Booker and pinning him against a tree while he and the bystanders pleaded for him to be left alone.<sup>4</sup> The video captures the men shouting explicitly racist language at Booker and berating him for fraternizing with “five white friends.”<sup>5</sup> Booker later reported that the men called for someone to bring a noose, and Booker sustained a number of injuries, including a concussion and having his hair ripped out.<sup>6</sup> The police responded to the incident but declined to arrest Booker’s attackers.<sup>7</sup> Booker commented on his assault later that evening, characterizing the assault as an “attempted lynching.”<sup>8</sup> The FBI announced an investigation into the violent assault days later.<sup>9</sup>

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1. See Johnny Diaz, *F.B.I. to Investigate Case of Black Man Pinned by White Man in Indiana*, N.Y. TIMES (July 8, 2020), <https://perma.cc/9CJG-RYEA>.

2. See Meagan Flynn, *Black Activist Says He Was Victim of “Attempted Lynching” by White Group in Incident Partially Caught on Video*, WASH. POST (July 7, 2020), <https://perma.cc/ES9Q-CR38> (detailing the assault of Vauhxx Booker and including a video that captures a portion of the incident).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Diaz, *supra* note 1.

Outrage following Booker's attempted lynching was swift: local officials condemned the attack, and protesters assembled on Monday, July 6, 2020, outside of the Monroe County Courthouse in support of Booker.<sup>10</sup> During the protest, however, the driver of a red vehicle accelerated into the crowd of protesters,<sup>11</sup> contributing to a trend by civilians and law enforcement agents of using their vehicles as weapons against civil rights protesters.<sup>12</sup> After the attempted lynching, Booker joined a most unfortunate cohort of Black people who became the victims of America's racist violence for the offense of being alive and present in the wrong place at the wrong time.<sup>13</sup> He is fortunate to have survived, and he is even more fortunate that so many other people witnessed his attack, and that at least one of those people captured a portion of the vicious assault on camera for the rest of the world to witness as well.<sup>14</sup>

2020 cast a bright light on the stark difference in the realities of life and death between white and Black people in the United States. While global uprisings have directly responded to anti-Black state violence captured on recording devices, other

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10. Flynn, *supra* note 2.

11. *Id.*; see also Jacey Fortin, *Indiana Woman Is Accused of Driving into Demonstrators*, N.Y. TIMES (July 9, 2020), <https://perma.cc/QA5G-PWF8> (reporting that a sixty-six-year-old woman was captured on video driving her vehicle into protesters and was arrested and charged with two felony counts of criminal recklessness, and one count of leaving the scene of an accident resulting in serious bodily injury).

12. See Ray Levy Uyeda, *Over 60 People Have Driven Their Cars into BLM Protesters Since May*, MIC (July 9, 2020), <https://perma.cc/QU5J-922J> (reporting that at least sixty-eight people drove vehicles into Black Lives Matter protesters between May 25, 2020 and July 9, 2020); Alex Ward, *People are Running Over George Floyd Protesters. Are Far-Right Memes to Blame?*, VOX (June 1, 2020, 3:10 PM), <https://perma.cc/8CPE-B354> (describing University of Chicago research director Ari Weill's theory that far-right memes are encouraging civilians and law enforcement officers to plow their vehicles into crowds of racial justice protesters).

13. See, e.g., Aruna Viswanatha, *U.S. Hate Crimes Rose in 2020 with Jumps in Racially Motivated Incidents*, WALL ST. J. (Aug. 30, 2021, 7:41 PM) <https://perma.cc/772F-FLKZ> (describing the increase in racially-motivated crimes, specifically highlighting a 40 percent rise in anti-Black violence in 2020).

14. See Joshua Nevett, *George Floyd: The Personal Cost of Filming Police Brutality*, BBC NEWS (June 11, 2020), <https://perma.cc/T44E-3JY7> (describing the movement to hold police accountable for acts of brutality by recording such incidents and identifying the recording of the 1992 beating of Rodney King as the movement's original catalyst).

widespread, but less publicly visible, human rights abuses against Black people have denigrated their qualities of life to a state suspended between life and death. Days after Vauhxx Booker escaped with his life in Indiana, a team of attorneys with the American Civil Liberties Union (ACLU) of Michigan brought suit in federal court in Detroit, demanding a permanent end to the water shutoff program under which Detroiters suffered for nearly seven years.<sup>15</sup> In Detroit, where monthly water and sewage bills can exceed \$150, over 140,000 Detroiters had their water disconnected from 2014 until March 2020.<sup>16</sup> Shortly before the first cases of COVID-19 were recorded in Michigan in March 2020, the governor's office refused to intervene in the water shutoff program, noting that it had no reason to believe that the lack of running water posed a health emergency.<sup>17</sup> Evidence shows that Detroit's Blackest neighborhoods were most impacted by the shutoffs, and that a positive correlation exists between zip codes with the most shutoffs and the most cases of COVID-19.<sup>18</sup>

The most obvious and prevalent approaches to addressing these anecdotes is through the prism of rights.<sup>19</sup> In Booker's case, the matter is criminal and, therefore, a matter of public concern, even though the defense asserted by his attackers is that he was trespassing upon private land while on his way to the lake.<sup>20</sup> Should Booker wish to advance a civil rights complaint, he will need to prove that he was attacked because of

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15. See Class Action Complaint ¶¶ 18–20, *Taylor v. City of Detroit*, No. 2:20-cv-11860-SDD-APP, 2020 WL 3883610 (E.D. Mich. July 9, 2020) [hereinafter Class Action Complaint].

16. See *id.* ¶ 4.

17. See *id.* ¶¶ 71–74; Christine Ferretti, *State: "Insufficient" Data to Support Ban on Water Shutoffs in Detroit*, DET. NEWS (Feb. 26, 2020, 3:39 PM), <https://perma.cc/838A-GHH7>; Caroline Llanes, *Whitmer Will Not Use Executive Powers to End Detroit Water Shutoffs*, MICH. RADIO (Feb. 27, 2020, 4:09 PM), <https://perma.cc/8WLH-988A>.

18. See *Detroit Water Shutoffs Led to More COVID-19 Cases*, WLNS (July 9, 2020, 4:02 PM), <https://perma.cc/4BBM-PSCD>.

19. See Janneke Gerards, *The Prism of Fundamental Rights*, 8 EUR. CONST. L. REV. 173, 178–79 (2012) (describing the “prism-like character” of fundamental rights, where one specific right may implicate a broad spectrum of tangential interests).

20. See Michael Levenson & Johnny Diaz, *2 White Men Charged After Helping Pin Black Man to a Tree in Indiana, Officials Say*, N.Y. TIMES (July 17, 2020), <https://perma.cc/UJJ9-TYX2>.

his race or other protected status.<sup>21</sup> Because of the presence of video, he may be able to meet the standard of proof—a difficult accomplishment in a country where proving racial discrimination in a court of law is notoriously difficult and less than 2 percent of civil rights referrals to the Department of Justice are prosecuted.<sup>22</sup>

Both local and federal governments have reminded the people of the City of Detroit that they do not enjoy a right to water;<sup>23</sup> rather water is a commodity that must be paid for.<sup>24</sup> However, a right to water is firmly recognized by the international human rights system.<sup>25</sup> Moreover, it is undeniable that human beings cannot live without water even when they are not threatened by a deadly virus mitigated by diligent hand washing. Reflecting attempts to privatize Detroit's water

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21. See James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 660 (1992) (explaining how hate crime statutes typically require proving that the defendant “assaulted, harassed, or intimidated another person” on the basis of that person’s race, religion, or national origin).

22. See Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121, 130 (2015) (“Nevertheless, DOJ investigations do not guarantee a prosecution, regardless of its findings, and research has shown that between 1986 and 2003, less than 2% of federal civil rights referrals to the DOJ were actually prosecuted.”).

23. See Amanda Klasing, *Water Is a Human Right—in Flint, in Michigan, and the US*, HUM. RTS. WATCH (July 11, 2018, 6:27 PM), <https://perma.cc/R7KP-NR9R>

The US government and its state and municipal authorities have stubbornly refused to acknowledge people’s right to water. In 2014, a US federal judge in Michigan ruled that there was “no enforceable right” to water after the city of Detroit started massive shutoffs of household water supplies if people did not pay their water bill.

24. See Michelle Miller, *Detroit Water Shut-Offs Bring U.N. Scrutiny*, CBS NEWS (Oct. 20, 2014, 7:05 PM), <https://perma.cc/9LH8-MPXV> (quoting Detroit Mayor Mike Duggan’s Chief of Staff as saying, “At the end of the day, everybody’s gotta pay their water bill”); see also Robert Snell & Steve Pardo, *Judge Won’t Stop Shutoffs, Says No Right to Free Water*, DET. NEWS (Sep. 29, 2014, 12:10 PM), <https://perma.cc/S7CK-J36F> (quoting Federal Bankruptcy Judge Steven Rhodes as saying, of the argument that a right to water exists in Detroit, “There is no such right or law . . . . The last thing [Detroit] needs is this hit to its revenues”).

25. See G.A. Res. 70/169, at 1 (Dec. 17, 2015); G.A. Res. 64/292, at 2 (July 28, 2010).



authority, and the ongoing commodification of water in the City,<sup>26</sup> the rights-focused arguments for restoration of water services in Detroit have not yet prevailed in the courts.<sup>27</sup> Notwithstanding the strength of the case the ACLU brought on behalf of Detroiters, a federal judge has found that the City of Detroit has a lawful interest in collecting on outstanding water bills.<sup>28</sup>

At the core of these anecdotes is the question of the right and ability of Black people in the United States to traverse, possess, or enjoy property. Enjoyment of the right to property is a core benefit of American citizenship and of American personhood.<sup>29</sup> This Article uses contract theory to explain why Black people's possession of property—including their rights to home ownership and life-sustaining utilities, their rights to personal physical integrity, their rights to cast votes, and their rights to existence in a public space—is regularly met with brutal resistance. In articulating a theory of personhood in which Black people are stripped of contractual capacity and the rights to political, commercial, or personal proprietorship, I explain how grave, anti-Black human rights abuses are tolerated and sanctioned within the United States. Governments escape liability for such abuses by promoting a formal legal contract under which all American citizens are entitled to the equal protection of the law while supporting private ordering under which the terms of whiteness are met.

Cheryl Harris has described whiteness as property.<sup>30</sup> This Article sets forth the theory of whiteness as contract; or, whiteness as property that is *bargained-for*. The Article's central argument is that whiteness is the product of

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26. See Class Action Complaint, *supra* note 15, ¶ 42.

27. See *Lyda v. City of Detroit (In re City of Detroit)*, 841 F.3d 684, 700 (6th Cir. 2016) (stating that the list of fundamental rights is limited, and that there is no fundamental right to water service).

28. See *id.* at 701 (explaining that maintaining a financially stable municipal entity is a valid governmental purpose and that substantive due process only requires that the city's policy be "rationally related" to said governmental purpose).

29. See U.S. CONST. amend. V ("No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.").

30. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1715–16 (1993).

contracting—both commercial and social—that creates, and continues to negotiate, an invisible common law that preserves control over property, capital, power, and contracting authority for those raced as white. The contract’s goals are primarily economic, relying upon the expropriation of Indigenous land and the exploitation of Black labor on the expropriated land.<sup>31</sup> This Article explores the use of commercial contracting by the state, as well as the state’s interference with commercial contracting by Black people, as a way of maintaining and consolidating the benefits of whiteness guaranteed by white social contracting.

To test the theory, I focus on the twin performance mechanisms of whiteness: structural and physical brutality.<sup>32</sup> The violence against Black people in the United States should not be regarded as a failure of democracy’s engineering but as evidence of its flawless operation. We should instead regard water shutoff programs and land grab policies, along with the scourge of anti-Black police brutality and vigilante harassment, as sophisticated mechanisms for repairing breaches—real or perceived—to the terms of whiteness. This Article makes the case that what appears to be a gap in legal protections is actually where the terms of whiteness are written in an “invisible ink,”<sup>33</sup> negotiating and maintaining a sociopolitical and economic order that places Black and Indigenous people outside of the law, outside of personhood, and—as necessary—outside of property, via displacement, dispossession, disenfranchisement, or death.

In this Article, I focus primarily on people of African descent who are raced as Black in the United States and secondarily on First Nations or Indigenous American peoples. I do so for the purpose of establishing a case study of how whiteness works, and not to exclude or erase the experience of Latinx, Middle Eastern and North African, or Asian and Pacific Islander

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31. *See id.* (identifying the construction of race as a means of expropriating Black labor and Indigenous land).

32. This is a departure from the theory of the Racial Contract, discussed in Part I. The Racial Contract describes the tools of “physical violence and ideological conditioning”—“the two traditional weapons of coercion”—as chief performance mechanisms. CHARLES W. MILLS, *THE RACIAL CONTRACT* 83 (1997) [hereinafter MILLS, *THE RACIAL CONTRACT*].

33. Adam Serwer, *The Coronavirus Was an Emergency Until Trump Found Out Who Was Dying*, *ATLANTIC* (May 8, 2020), <https://perma.cc/D6TY-SFKE>.

communities, who also endure the burdens of being raced as non-white in the United States. Because Blackness is constructed in opposition to whiteness in the United States, focusing on the experiences of Black people's exclusion from America's social contract provides for a prototypical case study. Moreover, the oppositional constructions of whiteness and Blackness ensure that anti-Blackness is universal. Non-Black people of color along with people of color who are of African descent (who may or may not identify as Black) know that proximity to whiteness comes with greater access to the rights discussed in this Article, and that proximity to Blackness comes with greater exclusion from them.<sup>34</sup> For that reason, focusing on Black people is actually the best way to test the theories this Article proffers.

I define Indigenous peoples as those nations and communities of people who were the earliest inhabitants of the Americas. Indigenous American peoples are not a race, but rather nations of people who have been racialized and who, like other peoples, have been *raced*.<sup>35</sup> The Article recognizes that the term "Indigenous" is limiting insofar as all peoples are indigenous to one place or another. For the purposes of this Article, however, and with respect to the Americas, I use an expansive definition of "Indigenous" that is inclusive of First Nations' Americans, Indigenous Amazonian Brazilians, and Latinx peoples from Central and South America with recent and significant Indigenous ancestry. I recognize that individual people to whom my definitions of Blackness or whiteness may apply may also be Latinx or Indigenous, and I also acknowledge that people may be Black and Indigenous at once, and that mixed European ancestry is also a part of the Black and Indigenous experience. Such is the nature of race and race-ing.

I use an expansive definition of Blackness that includes all peoples having sub-Saharan African ancestry, acknowledging that African peoples are themselves "indigenous" to the African continent and come from nations and sovereign empires with

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34. See Janice Gassam Asare, *How Communities of Color Perpetuate Anti-Blackness*, FORBES (July 19, 2020, 11:26 PM) <https://perma.cc/DH9C-Y8G5>.

35. See, e.g., Vikas Gampa et al., *Racialization as a Barrier to Achieving Health Equity for Native Americans*, 22 AMA J. ETHICS 874, 874 (2020), <https://perma.cc/4BET-CHFB> (PDF).

long and important precolonial histories. This definition is intentionally inclusive of people commonly known as “Hispanic,” “Latino,” or “Latinx” who hail from the Caribbean region and Central and South America, including, but not limited to, people of partial, significant, or predominant African descent from Brazil, Puerto Rico, and the Dominican Republic. This definition of Blackness can include people raced as “colored” in South Africa, for example, or people of mixed Indo- and Afro-descendant ancestry in Guyana, Jamaica, or Trinidad. It similarly acknowledges Afro-descendant communities in Arab states such as Iraq, Saudi Arabia, and Yemen, in South Asia, and in the Pacific.

In Part I of the Article, I establish the theory of whiteness as contract. I also articulate a theory of race and personhood that establishes Black people as third-party beneficiaries of this contract under the most favorable circumstances, subcontractors under other circumstances, and as trespassers in the least favorable (and most life-threatening) cases, due to their subordinated status as natural beings devoid of politics. In Part II, I set forth the terms of the contract, including terms of performance and provisions for remedying breach. Part III applies the theory of whiteness as contract to the following case studies: the water shutoff and mortgage foreclosure scandals in Detroit, Michigan; the civil settlements and criminal investigations relating to the Flint water scandal; and Byron Allen’s lawsuit against Comcast Corporation for racial discrimination under § 1981 of the Civil Rights Act of 1866.<sup>36</sup> Part IV discusses social and political action as a meaningful path toward the revocation of the contract of whiteness and reparative justice for Black people in the United States.

### I. RECOGNIZING THE CONTRACT

In this Part of the Article, I establish a theory of how whiteness and, by opposition, non-whiteness (and particularly Blackness) is constructed, and for what social, political, legal, and economic purposes. In doing so, I articulate theories of relationships between whiteness and American citizenship, whiteness and the state, and contracts and the state that

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36. 42 U.S.C. § 1981; *see generally* Comcast Corp. v. Nat’l Ass’n of Afr.-Am.-Owned Media, 140 S. Ct. 1009 (2020).

simultaneously center both social contracting and commercial contracting. I, therefore, intentionally run afoul of extant legal frameworks and prevalent thinking concerning the proper placement of contract theory and the utility of both American and international antidiscrimination law in the fight to dismantle systematic and structural racism. A major objective of this Article is to disabuse scholars of the idea that contract theory is only useful and applicable in the private sector: by characterizing the state as the negotiated product of the body politic, which contracts among itself the terms of political personhood, citizenship, privileges, and rights; by demonstrating the extent to which state actors intentionally facilitate and perpetuate racial contract negotiation, formation, and performance; and by highlighting the role that the law and law enforcement continue to play in undergirding and giving explicit force to racial contracting, even when such contracting is not valid per classical contract theory, or otherwise tangible or legally enforceable.

To establish this theory, I use as a point of departure the seminal works of two renowned scholars in the fields of philosophy and law—Charles Mills’s theory of the Racial Contract<sup>37</sup> and Cheryl Harris’s theory of whiteness as property.<sup>38</sup> These works, by themselves, mete out devastating blows to the idea that contracts are private affairs that are not impacted, and not to be impacted, by race or politics. They also undermine the prevalent belief among lawyers that constitutions, and laws more broadly, are not contracts.<sup>39</sup> Having firmly established that race is a sociopolitical

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37. See generally MILLS, *THE RACIAL CONTRACT*, *supra* note 32.

38. See generally Harris, *supra* note 30.

39. There exists a longstanding debate among legal scholars over whether contract theory may be applicable to constitutions. For example, critics point out that unlike most contracts, constitutions are not enforced by a third party. See Tom Ginsburg, *Constitutions as Contract, Constitutions as Charter*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 182, 184 (Denis J. Galligan & Mila Versteeg eds., 2013), <https://perma.cc/N3F8-AL5H> (PDF). More fundamentally, “[t]he social contract that many political theorists have presented as the conceptual foundation of political society seems, from the viewpoint of an Anglo-American lawyer, to be a very poor excuse for a contract, indeed, one that can be considered a contractual relationship only by a strenuous exercise of the imagination.” Joseph H. Kary, *Contract Law and the Social Contract: What Legal History Can Teach Us About the Political Theory of Hobbes and Locke*, 31 *OTTAWA L. REV.* 73, 75 (1999).

construction meant to consolidate economic wealth and power amongst those people raced as white and that this construction is bargained-for, I turn to the work of personhood scholars to build my sub-theories. The first proffers the rights to property and contracting authority as the preserves of whiteness and as verboten or otherwise severely curtailed for Black people—preventing Black people from being able to rely on privity with the state, and therefore preventing Black people from enjoying a reliable right to own, possess, or be present on, any property therein. The second posits that Black people are therefore constructed out of full humanity, citizenship, and even a reliable expectation of life and physical safety, reduced within society to a status of tenancy when their presence (and labor and capital) is required, and otherwise regarded as squatters and trespassers.

A. *The Benefit of the Bargain: Negotiating Whiteness and its Perks*

In early July 2020, a Mississippi state elections commissioner, Gail Welch, posted via Facebook that she was concerned about a potential increase in Black voter registration and turnout.<sup>40</sup> Welch said, “I’m concerned about voter registration in Mississippi . . . The blacks are having lots [of] events for voter registration. People in Mississippi have to get involved, too.”<sup>41</sup> Her post went viral and she was rapidly condemned for her remarks.<sup>42</sup> Welch claimed that her remarks were meant to be private and that they were not racist.<sup>43</sup> Welch also claimed that she meant to encourage and not suppress voter turnout; indeed, she explicitly called for white voter mobilization so that Black people in Mississippi, whose interests apparently conflict with the interests of white people in Mississippi, would not obtain electoral victory.<sup>44</sup>

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40. Lici Beveridge, *Mississippi Election Commissioner’s Social Media Comment About Black Voters Causes Uproar*, CLARION LEDGER (June 30, 2020, 8:38 AM), <https://perma.cc/ZJW3-5686>.

41. *Id.*

42. *See id.*

43. *See id.*

44. *See id.*

Welch's horror at Black people's exercise of their voting rights is shockingly inconsistent with the formal values of a liberal democracy,<sup>45</sup> and certainly raises questions about her fitness as an elections commissioner. Equally remarkable about her commentary is the fact that it is a candid, full-throated articulation of the democracy's invisible, informal values—that Black gain (of franchise and political capital, in this case) is white loss.<sup>46</sup> Her comments are more remarkable still because they also articulate, quite casually and in print, Welch's view of personhood.<sup>47</sup> In Mississippi, according to Welch, there are “the Blacks” and then there are “people,” by which she means “white people.”<sup>48</sup>

Mills's contract relies upon two primary formation and enforcement mechanisms also implicitly encompassed by Harris's theory of whiteness as property: ideological conditioning and brutality.<sup>49</sup> Both scholars acknowledge that the creation of race is a mechanism of delegating privilege and power to some while withholding it from others, which was made possible via the development of ideology justifying the forcible seizure of land; the abduction, sale, and enslavement of generations of Afro-descendant human beings; and the massacres of Indigenous nations.<sup>50</sup> The order established by the combination of ideological conditioning and brutal force are what is commonly known as white supremacy, and what I refer to throughout this Article—using the language of contract—as the terms of whiteness.

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45. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).

46. See CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 4–6 (2016) (“The trigger for white rage, inevitably, is black advancement.”).

47. See Beveridge, *supra* note 40.

48. See *id.*

49. MILLS, THE RACIAL CONTRACT, *supra* note 32, at 83.

50. See *id.* at 82–83 (asserting that the racial state functions to safeguard “white-dominated policy” through physical violence and enslavement); Harris, *supra* note 34, at 1716 (“The origins of property rights in the United States are rooted in racial domination. Even in the early years of the country, it was not the concept of race alone that operated to oppress Blacks and Indians; rather, it was the interaction between conceptions of race and property . . .”).

1. The Racial Contract in U.S. Law: A Construction of Caste and Power

Ta-Nehisi Coates has said that race is “the child of racism and not the father.”<sup>51</sup> Race is a social construct, but it is equally, and more consequentially, a legal construct. The theory of whiteness as contract is the theory of an invisible contract, under which Black Americans exist and are policed and governed. Mills understands this contract to be:

[A] set of formal or informal agreements or meta-agreements between the members of one subset of humans, henceforth designated . . . as white, and coextensive . . . with the class of full persons, to categorize the remaining subset of humans as ‘nonwhite’ and of a different and inferior moral status, sub-persons, so that they have a subordinate civil standing . . . .<sup>52</sup>

A common retort to the presentation of the theory of the Racial Contract is that the Racial Contract is not a real contract, but rather a metaphor based in the theory of social contracting.<sup>53</sup> Those who offer such rejoinders generally do not believe that social contracts are real, limiting their definition of real contracts to those tangible agreements which are enforceable under the law.<sup>54</sup> Other critics will make the case that statutes and constitutions are a “poor excuse”<sup>55</sup> not just for contracts, but even for social contracts, as they do not represent the consent of

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51. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 7 (2015).

52. MILLS, *THE RACIAL CONTRACT*, *supra* note 32, at 11.

53. See Gregory Slack, *From Class to Race and Back Again: A Critique of Charles Mills’ Black Radical Liberalism*, 84 *SCI. & SOC’Y* 67, 68 (2020), <https://perma.cc/UG3W-S8HA> (PDF)

The whole point of *The Racial Contract* was to first apply the metaphor of the class/domination contract from Rousseau’s *Discourse on the Origin of Inequality* in order to reveal the historical reality of a racial contract to subordinate nonwhites on a global scale, and then to reintroduce the liberal social contract story of truly free and equal citizens coming together to forge a just society as a normative yardstick.

54. See Paul Lermack, *The Constitution Is the Social Contract so It Must Be a Contract . . . Right? A Critique of Originalism as Interpretive Method*, 33 *WM. MITCHELL L. REV.* 1403, 1405 n.8 (2007).

55. Kary, *supra* note 39, at 75.



all citizens.<sup>56</sup> But Mills’s theory of the Racial Contract is more than a metaphor: Mills discusses a real social contract that creates and employs race to establish and enforce an economic order, and which has at times and in places been enforceable as public, codified law and which has also been enforced within the private and public sectors alike via traditional commercial contracting.<sup>57</sup> Social contracting is of intrinsic value when discussing the rights of and relating to property, as the regulation of property is a central goal of social contract theory.<sup>58</sup> Under the Racial Contract, all of the negotiating parties are those whose consent matters: those people, raced as white, to whom political personhood and contractual capacity is attributed and who demonstrate their assent to the contracting process by performing the Contract per its terms.<sup>59</sup> The concrete consequences of this social contracting for Black people are real, and therefore Black theory concerning the role of social and commercial transacting in the perpetuation of race and racism—which are necessarily disruptive of “classical” knowledge—matters.<sup>60</sup> Like Mills, I seek to decolonize social

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56. See Ginsburg, *supra* note 39, at 185 (“[A] geographically dispersed ethnic or political minority may have no effective opportunity to secede and so may be effectively coerced to join the constitutional order without either explicit or implicit consent. For such citizens, the contract metaphor runs out . . .”).

57. See MILLS, THE RACIAL CONTRACT, *supra* note 32, at 9–11.

58. Rosseau, Locke, Hobbes, and Kant all used social contract theory to advance theories of property rights and citizenship, thus establishing a relationship *between* property rights and citizenship. See Elisabeth Ellis, *Citizenship and Property Rights: A New Look at Social Contract Theory*, 68 J. POL. 544, 555 (2006), <https://perma.cc/XCK3-WPBH> (PDF) (“The social contract idea remains the basis of contemporary democratic politics; particular theories of property rights and citizen capacity have continuing relevance only insofar as they promote contractarian freedom under prevailing social circumstances.”); Paul Seabright et al., *Evaluating Social Contract Theory in the Light of Evolutionary Social Science*, EVOLUTIONARY HUM. SCIS. (Ruth Mace ed., 2021), <https://perma.cc/E85B-BBJH> (PDF) (discussing the similarities between the social contract theories of Hobbes and Rosseau).

59. See MILLS, THE RACIAL CONTRACT, *supra* note 32, at 11–12 (“[T]he Racial Contract is not a contract to which the nonwhite subset of humans can be a genuinely consenting party. . . . Rather, it is contract between those characterized as white *over* the nonwhites, who are the objects rather than the subjects of the agreement.”).

60. See *id.* at 13–14

[T]he Racial contract establishes a racial polity, a racial state, and a racial juridical system, where the status of whites and nonwhites

contract theory by applying it to the bargain for whiteness. However, I also assert the applicability of classical contract theory to the construction and negotiation of whiteness and non-whiteness and contend that social and commercial contracting serve each other in maintaining the terms of whiteness as property, as personhood, and as power.

A key contribution of Mills's theory of the racial contract is its contextualization, if not outright repudiation, of key aspects of Rawls's idealistic social contract.<sup>61</sup> As with so many other critiques of Rawls's social contract theory, Mills's theory reveals that Rawls's ideals—including his veil of ignorance—are no match for human realities such as power and special interests such as racial identity.<sup>62</sup> Rawls, of course, envisioned a fair society devoid of inequality of any type.<sup>63</sup> He realized that this society did not exist, but he believed it was attainable.<sup>64</sup> Indeed, Rawls's theory of justice envisions a society for which many Americans—and especially non-white Americans—persistently lobby. Accounting for the reality of race requires the decolonization of social contract theory—this means recognizing that the social contract theories of Hobbes, Locke, and Rawls are themselves the products of Western philosophical tradition and, therefore, the products of thinkers who existed (and whose thinking is highly valorized) because they were Western and

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is clearly demarcated by law or custom. And the purpose of this state, *by contrast with the neutral state of classical contractarianism*, is, *inter alia*, specifically to maintain and reproduce this racial order, securing the privileges and advantages of the full white citizens and maintain the subordination of nonwhites.

61. See RAWLS, *supra* note 45, at 302 (setting forth Rawls's theory of social contract, in which contracting parties—blind to all demographic information—agree on principles of justice: the greatest equal liberty possible, equal opportunity for all offices and positions, and the arrangement of socioeconomic inequality such that it most benefits the most disadvantaged).

62. See CHARLES W. MILLS, *BLACK RIGHTS/WHITE WRONGS: THE CRITIQUE OF RACIAL LIBERALISM* 87 (2017) [hereinafter MILLS, *BLACK RIGHTS/WHITE WRONGS*].

63. See RAWLS, *supra* note 45, at 12 (describing the original position of equality as a situation in which “no one knows his place in society, his class position or social status” and “no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances”).

64. See *id.* at 12.

white.<sup>65</sup> Secondly, the decolonization of social contract theory requires the amplification and valorization of thought from non-white thinkers from colonies or the Global South. Said another way, Mills's theory of the social contract is itself decolonial, and decolonization requires that his theories not be considered marginal with respect to those of Hobbes, Locke, and Rawls, but rather centered as a standard—as the warning warbling of the miner's canary—by which the theories hailed by colonizing forces are tested and adjudged.<sup>66</sup>

The United States' primary social contract—the United States Constitution—established the centrality of property ownership, and necessarily, the right of contract to American citizenship. Black people were formally excluded from these rights, and the terms of the Racial Contract were set forth in law with particular clarity by Justice Taney in the Supreme Court's decision in *Dred Scott v. Sandford*.<sup>67</sup> He stated,

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?<sup>68</sup>

Taney's answer to his own question was emphatically negative. It firmly placed Black people outside of the American political project and franchise. He ruled that American citizenship would remain perpetually out of reach for people of African descent, whether enslaved or free:

We think . . . that [Black people] are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and

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65. Mills directly confronts Rawls and the white hegemony of political philosophy in later work, proposing in response to the race-blindness of Rawls a "black radical liberalism" that is meant to serve as a "radical revision," which allows Rawls's theory to be retrieved for racial justice and repudiates "the overarching contract myth that the impartial state was consensually created by reciprocally respecting rights-bearing persons." MILLS, BLACK RIGHTS/WHITE WRONGS, *supra* note 62, at 206–09.

66. See *id.* at 201 (proposing Black radical liberalism as a means of decolonizing political theory).

67. 60 U.S. 393 (1857).

68. *Id.* at 403.

privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.<sup>69</sup>

With the formal end of chattel slavery came the period of Reconstruction, and with Reconstruction came transformational legislation to formally revoke the racist social contract upon which the Republic had been founded.<sup>70</sup> Notably, the Constitution's Three-Fifths Clause, which expressly quantified Black sub-personhood vis-à-vis white personhood, was replaced with the Fourteenth Amendment—overturning *Dred Scott* and guaranteeing Black Americans (but not Indigenous Americans) United States citizenship.<sup>71</sup> In one of the rare instances in which whiteness is even mentioned in the United States Code, sections 1981 and 1982<sup>72</sup> established for non-white people the rights to make and enforce contracts, and to property, as “enjoyed by white citizens.”<sup>73</sup> This legislation was thorough and clear. For example, § 1981 elaborates that the term “make or enforce contracts” includes “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship” and that “[t]he rights protected by this section are protected

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69. *Id.* at 404–05.

70. See Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421, 1437–39 (2021) (discussing the phrase “enjoyed by white citizens” in the Civil Rights Act of 1866 and how that language established an antidiscrimination standard that allowed local governments “to be evaluated by how they treated people of color *in relation to white people*, rather than in any absolute sense”); see also Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 724 (2011) (explaining that “the post-Civil War amendments and their application sought to delete the distinction between legal persons and nonpersons”).

71. See Ellis, *supra* note 70, at 732–33 (explaining “the constitutional norm of equality imbedded in the Fourteenth Amendment”).

72. 42 U.S.C. §§ 1981–1982.

73. Leong, *supra* note 70, at 1424–25.

against impairment by nongovernmental discrimination and impairment under color of State law.”<sup>74</sup>

Even as antidiscrimination laws sought to reform Western legal systems, they did little, if anything, to transform the underlying ideologies of white supremacy and the desire to dominate material resources that undergird both. The backlash against Reconstruction-era reforms such as the Civil Rights Act of 1866 was marked by campaigns of vicious violence,<sup>75</sup> including lynchings, massacres, and lootings of Black American property and assets.<sup>76</sup> The signatories to the white supremacist racial contract viewed antiracist legal reforms as breaches to the contract and always sought to remedy those breaches via legal, illegal, and extralegal means.<sup>77</sup>

After the Civil War, between 1865 and 1885, tens of thousands of formerly slaveholding American Southerners moved to Brazil at the enthusiastic invitation of Brazilian Emperor Dom Pedro II.<sup>78</sup> Slavery would remain legal in Brazil until 1888,<sup>79</sup> and Dom Pedro wanted the Americans to bring with them agricultural techniques for growing cotton.<sup>80</sup> Still more white American Southerners fled to what is now Belize, but was then British Honduras, forming the Confederate Settlements in British Honduras.<sup>81</sup> The British government sold

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74. *Id.* at 1424 n.13.

75. See Harris, *supra* note 30, at 1746.

76. See *id.*

77. See MILLS, THE RACIAL CONTRACT, *supra* note 32, at 20–21.

78. See Terrence McCoy, *They Lost the Civil War and Fled to Brazil. Their Descendants Refuse to Take Down the Confederate Flag*, WASH. POST (July 11, 2020), <https://perma.cc/MKK9-2M3K> (explaining that by offering free transport, cheap land, and easy path to citizenship, Emperor Dom Pedro II induced the immigration of between 8,000 and 20,000 Southerners following the Civil War); Simon Romero, *A Slice of the Confederacy in the Interior of Brazil*, N.Y. TIMES (May 8, 2016), <https://perma.cc/4VR8-A72U> (discussing Emperor Dom Pedro II's alliance with the Confederate States of America during the Civil War and his efforts to lure white immigrants to Brazil in the 1860s and 1870s).

79. See McCoy, *supra* note 78.

80. See *id.*

81. See DONALD C. SIMMONS JR., CONFEDERATE SETTLEMENTS IN BRITISH HONDURAS 26 (2001) (discussing successful efforts to attract Confederate settlers to British Honduras); William D. Pederson, Book Review, 21 J. THIRD WORLD STUDS. 312, 312 (2004) (“As British Honduras, it beckoned thousands

arms to the Confederate states during the American Civil War, underscoring yet again the economic and racial interests at play with respect to the perpetuation of whiteness, particularly across national and colonial borders.<sup>82</sup>

Ultimately, as this Article contends, the Racial Contract has never been revoked. As a social contract, it uses statutory law, but is not dependent upon it. Signatories to the Contract viewed the Reconstruction-era legislation as a breach of the Contract, and they revolted against the attempts at social transformation: (1) using vicious state-sanctioned white violence to terrorize and kill Black people;<sup>83</sup> (2) simply fleeing to other territories in hopes of replicating the same racial and economic order;<sup>84</sup> and (3) replacing de jure racial oppression with de facto racial subordination.<sup>85</sup> The Racial Contract, then, transformed itself from a formal contract codified in federal law to an informal contract. The Contract, which was once plainly visible, would become invisible, or semi-visible, as necessary.

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of Confederates who mistakenly perceived it as a setting conducive to perpetuation of their endangered culture built upon slave labor.”).

82. See SIMMONS, *supra* note 81, at 9.

83. See, e.g., LEE-ANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* 109 (2008) (describing the Easter Sunday massacre of approximately 150 Black militiamen in Louisiana by white supremacists in Colfax, Louisiana in 1873); PAUL ORTIZ, *EMANCIPATION BETRAYED: THE HIDDEN HISTORY OF BLACK ORGANIZING AND WHITE VIOLENCE IN FLORIDA FROM RECONSTRUCTION TO THE BLOODY ELECTION OF 1920*, at 62 (2005) (discussing how “all-white juries allowed white citizens—and law enforcement officials—to inflict physical harm against African Americans” in Florida).

84. See McCoy, *supra* note 78 (“[H]istorians say one of the central draws was a country where Southerners could freeze time and continue a lifestyle that had been put to a violent end in the United States.”); SIMMONS, *supra* note 81, at 28 (discussing how “as conditions worsened for former Confederates . . . the era of group migration began for British Honduras”).

85. See Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 679 (2002) (“Much as the once unspeakable traumas of slavery touched the lives of those beyond its immediate grasp, . . . the collective memory of klan sexual terror has persisted, contributing in intangible but nonetheless significant ways to the perpetuation of de facto subordination in the face of de jure equality.”).

## 2. White Supremacy and the Terms of Whiteness

Frances Lee Ansley has defined white supremacy as encompassing much more than “self-conscious racism of white supremacist hate groups,”<sup>86</sup> classifying it as: “[A] political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.”<sup>87</sup> Ansley articulates two models of white supremacy in her attempt to account for the persistence of racism and the varied approaches of scholars charting out legal and political strategies for achieving racial justice—the class model and the race model.<sup>88</sup> The class model characterizes white supremacy as a system that uses racism as means to justify and secure class dominance and economic power,<sup>89</sup> while the race model articulates a system in which all white people, regardless of class, are united in a collective interest to be—and to feel—superior to non-white peoples, both materially and psychologically.<sup>90</sup>

Fusing Ansley’s class and race models, as Ansley herself recommends,<sup>91</sup> provides for a model in which people raced as white rely on a shared heritage of imperial or colonial rule to guarantee their exclusive political, economic, and social power. The contracting of whiteness depends on Black and Indigenous labor, innovations, and creative talent, and therefore depends on exclusive control over Black and Indigenous human capital.<sup>92</sup> Essentially, white supremacy requires perpetual domination over Black and Indigenous labor and land, first established via

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86. Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989).

87. *Id.*

88. *See id.* at 1024.

89. *See id.* at 1025.

90. *See id.* at 1035.

91. *See id.* at 1050 (“The wisdom of both the race and class models are needed.”).

92. *See id.* at 1026 (describing a system of “super-exploitation” that “creates an underclass that can be summoned, moved, or rebuffed almost at will, thereby facilitating the mobility of capital and improving the system’s ability to control and channel investment”).

the commercial contracting of territory and enslaved human beings.

To maintain this racially-casted domination, signatories to the social contract of whiteness continue to negotiate the terms of whiteness to fight the existential threats to that domination—including the struggle of Black and Indigenous peoples for their own contracting and property-holding authority.<sup>93</sup> White supremacy is threatened by the presence of Black and Indigenous peoples on their own native lands with any other status besides the personal property of white people. The historical solution to this problem was dispossession (of land, family, and physical liberty), confinement (to reservations and plantations), exclusion (from the political project, citizenship, legal protections, and privileges), and elimination (via massacres, lynchings, destruction of family structures, and cultural and discursive erasure).<sup>94</sup> These mechanisms are regularly employed today, via mass incarceration, immigration policy, gentrification schemes and redlining, the destruction or dispossession of land and community utilities, social murder, and systematic killings.<sup>95</sup>

The ideology of white supremacy justifies such atrocities as land seizures, enslavements of human beings, and massacres. Those invested in white supremacy came to believe in the truth of that ideology, not only because it served their economic interests, but also because it served their social, psychological, and political interests.<sup>96</sup> Colonizers, slave owners, and every other person invested in the maintenance of European-American (physical and political) expansion used

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93. See Leong, *supra* note 70, at 1447–66 (describing the discrepancies between white and non-white people as it pertains to the right to contract and the right to property); Harris, *supra* note 30, at 1727–28 (discussing whiteness as a property interest in the context of the Native American experience with the property laws of the colonizers).

94. See Harris, *supra* note 30, at 1736 (“Many theorists have traditionally conceptualized property to include the exclusive rights of use, disposition, and possession, with possession embracing the absolute right to exclude.”).

95. See Hansford & Jagannath, *supra* note 22, at 123, 154.

96. See Tom Gjelten, *White Supremacist Ideas Have Historical Roots in U.S. Christianity*, NPR (July 1, 2020, 1:38 PM), <https://perma.cc/S5XV-2C9B> (“A fear that their regional culture was at risk lay behind much of the opposition to the civil rights movement among Southern Christians.”); Ansley, *supra* note 86, at 1025.



philosophy, science, and religion to empiricize—and therefore legitimize—white supremacy, which was meant to legitimize the brutal methods by which the racial state would be established and perpetuated.<sup>97</sup> Under this model, the signatories to whiteness had to believe that the sons of Europe were destined and called by God to dominate and order the world as they pleased, and that whatever they did to African and Indigenous peoples—no matter how immoral, destructive, or violent—was good and, more importantly, innocent because African and Indigenous people were not human and could never become political or legal persons with rights.<sup>98</sup> This ideology places African and Indigenous people outside of the realm of politics that white men have built around and on top of them, on their soil, and with their forced labor, excluding them from citizenship and the authority to contract, hold, and convey property associated therewith.<sup>99</sup>

### 3. The Racial Superstate: Whiteness, Extraction, and Exploitation Worldwide

While this Article focuses on how whiteness is negotiated and ultimately contracted in the United States, whiteness is indeed a form of property for which people continue to bargain. In Puerto Rico, for example, where a significant percentage of the population is of African descent, approximately 75 percent of the population identifies as white.<sup>100</sup> By attempting to bargain for whiteness as a social and political status simply by asserting it (and by denying Blackness), Afro-Puerto Ricans are attempting to obtain the privileges that whiteness affords and avoid the burdens of Blackness.<sup>101</sup> In South Asia and Sub-Saharan Africa, even in non-white societies, the practice of skin bleaching is prevalent because of the social capital—and

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97. *Id.*

98. *See* MILLS, *THE RACIAL CONTRACT*, *supra* note 32, at 20–21.

99. *See id.* at 11.

100. *See* Natasha S. Alford, *Why Some Black Puerto Ricans Choose 'White' on the Census*, N.Y. TIMES (Feb. 9, 2020), <https://perma.cc/AM9N-3J2H> (last updated Aug. 7, 2020).

101. *See id.* (describing the historical privileging of whiteness on the island, formalized by the policy of *gracias al sacar*, which allowed Black Puerto Ricans with mixed racial heritage to petition Spain to be reclassified as white for a fee).

corresponding political and financial capital—attached to (even the appearance of) whiteness.<sup>102</sup>

Mills discusses the Racial Contract not just as a foundational element of the Racial State, but also of the Racial Superstate.<sup>103</sup> The creation of race and whiteness was not only a means of developing the American project then, but also of creating the present global institutional order and global governing frameworks and norms.<sup>104</sup> Whiteness was created to facilitate imperial conquest and colonial rule. But whiteness has not only achieved its goals through crowns and formal colonial dominions. States may now rely upon the private sector to uphold racist social contracting through the use of commercial contracting, especially where public-private contracting and partnerships are in play.

As discussed later in the Article, the employment of private-public contracting in Detroit effectuates the state's dispossession of Black Detroiters of water and real property through the creation of the Great Lakes Water Authority (GLWA), a public body corporate.<sup>105</sup> This is not a uniquely American problem, as Brazilian President Jair Bolsonaro has accelerated his policy of seizing Afro-Indigenous lands for use by corporate developers.<sup>106</sup> Tendayi Achiume describes the global

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102. See Pavithra Rao, *Paying a High Price for Skin Bleaching*, AFR. RENEWAL (Apr. 9, 2019), <https://perma.cc/7RPV-KS8Q> (quoting Shingi Mtero as saying, of the reasons for skin bleaching, “[I]t’s not necessarily to physically be white, it’s about wanting to access things white people have easy access to—privileges, economic and social status. . . . Light skin is what men want . . . marriage serves as a form of social capital”); Francesca Regalado, *Asia’s Skin Whitening Market Reckons with Global Antiracist Push*, NIKKEI ASIA (July 1, 2020, 1:56 PM), <https://perma.cc/D9DF-VT6H> (“Skin whitening products continue to be widely available and popular in South and Southeast Asia, where there is a history of equating fairness with beauty, related to status and the influences of the colonial era.”).

103. See MILLS, *THE RACIAL CONTRACT*, *supra* note 32, at 33 (“Globally, the Racial Contract creates Europe as the continent that dominates the world; locally, within Europe and the other continents, it designates Europeans as the privileged race.”).

104. See *id.* at 36–39 (discussing the global dominance of “Europe and the former white settler states,” namely in terms of the “centrality of racial exploitation to the U.S. economy”).

105. See *infra* Part III.

106. See Ernesto Londoño & Leticia Casado, *As Bolsonaro Keeps Amazon Vows, Brazil’s Indigenous Fear ‘Ethnocide’*, N.Y. TIMES (Apr. 19, 2020), <https://perma.cc/9ZTU-HXTF> (describing President Bolsonaro’s campaign of

“extractivism economy,” in which “the removal of raw materials from territories that were previously colonized” is followed by “the processing, sale and consumption of those materials in a global economy that disproportionately benefits nations, transnational corporations and consumers in the Global North or so-called developed world.”<sup>107</sup> Where states can no longer openly subordinate entire swaths of the Global South’s populations to white domination under formal colonialism, they have allowed corporations to replicate and reify the colonial sociopolitical and economic order through their business plans and practices.<sup>108</sup>

### B. *Whiteness as Property, Whiteness as Contract*

In *Whiteness as Property*, Cheryl Harris articulates her theory of the racial subordination of Black and Native American peoples in the United States as undergirded by “a racialized conception of property implemented by force and ratified by law.”<sup>109</sup> My intervention is straightforward. Because property is acquired and disposed of pursuant to contracting, my theory of whiteness as contract operationalizes Harris’s theory of whiteness as property<sup>110</sup> and contributes an operator’s manual for the machinery of white supremacy. Harris identifies the mechanisms of the Racial Contract without specifically naming them: she says that whiteness as property “has taken on more subtle forms, but retains its core characteristic—the legal legitimation of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the

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commercial development of Indigenous lands and his destruction of legal protections thereof); Jessica Brice & Michael Smith, *The Amazon Is Fast Approaching a Point of No Return*, BLOOMBERG (July 29, 2021, 12:01 AM), <https://perma.cc/3A8H-R4CX> (“Brazil’s government is engaged in an active campaign to open up the Amazon to privatization and development—first by turning a blind eye as public and protected lands are raided and cleared, and then by systematically pardoning the people responsible and granting them legal title to the stolen lands.”).

107. E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Global Extractivism and Racial Equality*, 3, U.N. Doc. A/HRC/41/54 (May 14, 2019).

108. *See id.* at 12.

109. Harris, *supra* note 30, at 1715.

110. *Id.*

maintenance of white privilege and domination.”<sup>111</sup> Whiteness as property explains whiteness as a possession, as capital,<sup>112</sup> and as a status<sup>113</sup> in which one holds a property interest.<sup>114</sup> It explains race as a noun.

Whiteness as contract explains the utilization of private order and private law to mask itself and its protection of racial constructions, as well as how exactly it preserves power and control over property. It explains whiteness as activity and process—as formation, negotiation, performance, enforcement, remedy. Whiteness as contract explains the never-ending renegotiation and reifying of *race-ing*—as a verb.

Property and contract are companions, and this relationship has long been recognized in federal American law. The rights to enjoy contract and property are core, twin benefits of American citizenship, which the Reconstruction Era statutes, sections 1981 and 1982, make explicit.<sup>115</sup> These statutes, enacted as part of the Civil Rights Act of 1866, specify that “all persons” shall have the rights to “make and enforce contracts”<sup>116</sup> and to “inherit, purchase, lease, sell, hold, and convey real and personal property”<sup>117</sup> “as is enjoyed by white citizens.”<sup>118</sup> The Civil Rights Act of 1866 was an attempt at formal revocation of the Racial Contract. And it is significant that lawmakers viewed as crucial the combined dismantling of the Contract and the legal construction of racial equity with respect to the rights of contracting and proprietorship.

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111. *Id.*

112. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2158 (2013) (“American history reveals a long tradition of assigning value to race. Whiteness and property are intricately related. Historically, whiteness both allowed possession of property and itself functioned as property . . .”). Notably, whiteness functions as financial capital as well as social capital, each of which may be converted into the other. *Id.* at 2156.

113. See Harris, *supra* note 30, at 1734–37 (describing whiteness as “status property” that can be converted into tangible property).

114. See *id.* at 1734 (stating that the reputation of being white “was treated as a species of property, or something in which a property interest could be asserted”).

115. 42 U.S.C. §§ 1981–1982.

116. *Id.* § 1981.

117. *Id.* § 1982.

118. *Id.* §§ 1981–1982.

In my definition in whiteness as contract, the rights of people raced as white to contract and enjoy property and proprietorship are an essential term. Equally essential to the contract is that Black proprietorship and economic, social, or political competition with white persons are *verboden*. This is not to suggest that Black people cannot buy, sell, rent, or sublet real property. Rather, Black people occupy a place of permanent month-to-month and at-will tenancy in the United States and, as such, they have no rights or protections in the United States on which they can regularly or reasonably rely. When they benefit from the democratic project or from the market economy, it is often as third-party beneficiaries; when they participate in the same, it is often as subcontractors; and when that participation or benefit becomes a threat to white domination, it becomes a problem to be solved.

The right to enjoy contract and property has historically been central to whiteness and citizenship in the United States,<sup>119</sup> with whiteness and citizenship as interchangeable statuses under federal law prior to Reconstruction.<sup>120</sup> Despite formal changes to the letter of the law, the centrality of contract and property to whiteness, and therefore, to full citizenship, endures. Because, as discussed in Part II, the terms of whiteness construct Black people below and outside of personhood, Black people do not fully enjoy the right to contract, or even the legal capacity to contract, with the state. Neither can Black people expect the state, then comprised exclusively of the white body politic, to respect their ownership or possession of real or personal property, inclusive of their common water supply.

## II. THE TERMS OF THE CONTRACT: IN BLACK AND WHITE

In Part II, I offer a definition of whiteness as contract that challenges the exclusivity of mainstream private contract theory

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119. See Harris, *supra* note 30, at 1715–16; see generally Leong, *supra* note 70 (discussing the invisibility and centrality of whiteness in the United States, made visible in U.S. federal law by 42 U.S.C. § 1981 and § 1982);

120. See Harris, *supra* note 30, at 1744; see also Brief for Plaintiff in Error at 9, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210) (describing whiteness as the “most valuable sort of property”); *Dred Scott v. Sandford*, 60 U.S. 393, 451–52 (1857) (enslaved party) (permanently excluding Black people and their descendants from U.S. citizenship, based on the right of white people of “property in a slave . . . expressly affirmed in the Constitution”).

while also demonstrating the role that commercial contracting plays in facilitating and enforcing racial social contracting. A key element of the contracting of whiteness is its duality. Achille Mbembe says, “a proslavery democracy is . . . characterized by its bifurcation.”<sup>121</sup> This duality allows it to operate unseen, even in plain sight. It is both metaphorical and tangible, camouflaged in private ordering by public entities. It is the life force of liberal democracy and dependent on the tyrannical rule of some by others.<sup>122</sup> The Contract is both forbidden by antidiscrimination laws and facilitated by them.

Because the “racial contract is an exploitation contract,”<sup>123</sup> it necessarily fails to contemplate or engage those it seeks to exploit,<sup>124</sup> and instead contracts them as objects of the contract and the ensuing exploitation and extraction.<sup>125</sup> Central to the racial contract is the bifurcated construction of race in a manner that supports economic exploitation and extraction. Those raced as white are considered human and political and regarded as citizens, shareholders, contractors, and proprietors; those raced as non-white are considered subhuman and apolitical and regarded as strangers, trespassers, criminals, leeches, and contracted-for property.<sup>126</sup> The theory of whiteness as contract adds a key and complex component to Mills’s theory: it is a theory of contract that depends upon the presence of, and harmony between, metaphorical, real-but-intangible, and

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121. ACHILLE MBEMBE, *NECROPOLITICS* 17 (2019). Per Mbembe, such a society is comprised of two orders—“a community of fellow creatures governed . . . by the law of equality” and “a category of non-fellows . . . that is also established by law.” *Id.* The white body politic that forms the racial state is that community of fellow creatures, while non-white people are governed “by the law of inequality” in what Mbembe describes as a “community of separation.” *Id.* at 17–18.

122. *See id.* at 17.

123. MILLS, *THE RACIAL CONTRACT*, *supra* note 32, at 9.

124. *See id.* at 3 (“[T]he peculiar contract to which I am referring . . . is not a contract between everybody (‘we the people’) but between just the people who count, the people who really are people (‘we the white people’).”).

125. *See id.* at 11–12 (“[T]he Racial Contract is not a contract to which the non-white subset of humans can be a genuinely consenting party.”).

126. *See id.* at 11 (“The Racial Contract is that set of . . . agreements or meta-agreements . . . between . . . one subset of humans, henceforth designated as ‘white, and coextensive . . . with the class of full persons, to categorize the remaining subset of humans as ‘nonwhite’ and of a different and inferior moral status . . .”).

tangible and enforceable contracts. That is to say, the contracting of whiteness is a complex system of tacit social contracting and commercial contracting that secures and protects property and wealth for a self-created, exclusionary, yet ever-negotiable “community of fellow creatures.”<sup>127</sup>

Whiteness as contract is an agreement of the authors of the global settler colonial project, bargained-for amongst themselves to establish white supremacy, via the expropriation, extraction, and exclusive domination of real property, natural resources, human or other capital, and sociopolitical franchise. The contractors bargained for exclusive white economic, political, and social power—or full personhood—and they also bargained for the exclusion of Black people from full personhood, including the right to contract with the white body politic or exercise personal, social, or political proprietorship.<sup>128</sup> As a social contract, whiteness uses the law to perpetuate social order—capitalizing on both public and private law when it can and resorting to private ordering when public law is unavailable or too inconvenient.<sup>129</sup> Constitutions and statutes give whiteness the force of law; however, the invisible law of whiteness, which was negotiated by the people who orchestrated political domination in the United States at its founding, now serves as a shadow Constitution. When it is not legally enforceable under public law, it may be legally enforceable under private ordering, or even physically enforceable via sanctioned means regardless of their illegality or obvious injustice.

The application of contractual theory and language to the discussion of racist human rights violations provides an analytical tool for activists and advocates who are conditioned and educated to view human and civil rights in terms of nature and morality.<sup>130</sup> Though human rights are inalienable,<sup>131</sup> humanity alone is insufficient to guarantee respect for those rights. Rather, laws are constructed and contracted by people

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127. MBEMBE, *supra* note 121, at 17.

128. *See id.* at 14.

129. *Id.*

130. For an example of an educational resource on human rights that describes human rights in terms of nature and morality, see *What Are Human Rights?*, COUNCIL OF EUR., <https://perma.cc/7DQY-T2XD>.

131. *Id.*

with the power and authority to engage in contracting and nation-building. Seeking antiracist social transformation only on the basis that white supremacy is morally wrong makes little sense in the face of a social order for which racist economic exploitation and domination are expressed goals.<sup>132</sup> By explaining the role of contracting in creating and enforcing race and racism, I attempt to decolonize contract theory—moving from a theory of contract that assumes racial equality with respect to contractual capacity to a theory that demands intersectional analysis because race is central to contractual capacity and racism is central to a contract’s enforceability.

Classical contract theory requires a bargained-for exchange resulting in mutual benefits to the contracting parties.<sup>133</sup> It provides for defenses to a breach in performance of the contract.<sup>134</sup> Human and civil rights laws are based on the principle that all humans have certain inalienable rights;<sup>135</sup> as such, who considers such rights or who qualifies as human is material information. Also important is what or who determines which of these rights is inalienable and why. While the rights may be natural, the laws codifying them in our society are not. Laws are not only mere human constructions, but also fundamental human contracts.<sup>136</sup> The elements of a contract are

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132. As an example, Isabel Wilkerson describes the investment of white supremacists in Donald Trump’s 2016 candidacy and their hope that his administration would serve as a “cocksure champion for the dominant caste, a mouthpiece for their anxieties” and “the last hope for white people” within America’s “unspoken hierarchy, since the founding of the Republic.” ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 6–7 (2020). An appeal to the immorality of racism was and has continued to prove ineffective to those championing the Trump administration. Wilkerson quotes one Trump supporter as saying of Trump to a Hillary Clinton supporter in 2016, “Yes, I know he mouths off at times . . . but, he will restore our sovereignty.” *Id.* at 6.

133. See Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW* 208 (Peter Benson ed., 2001).

134. *Id.*

135. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 1–2 (Dec. 10, 1948) (“All human beings are born free and equal in dignity and rights . . . Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.”).

136. Laws are contracts because they are legally enforceable agreements. See RESTATEMENT (FIRST) OF CONTRACTS § 1 (AM. LAW INST. 1932); see also RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).



mutual assent, a bargained-for exchange, and the absence of defenses such as lack of capacity, duress, undue influence, or illegality.<sup>137</sup> Illegal contracts are unenforceable, as are contracts made when at least one party was under duress.<sup>138</sup> Contracts of adhesion may also be voidable when they are so lopsided that it is unconscionable.<sup>139</sup>

The contract of whiteness relies on strict adherence to certain terms in order to perform. Whiteness requires exclusive and ultimate control over wealth, which manifests as domination of real property, control over non-white persons present on real property, and an unfettered ability to extract resources from both the persons and the property.<sup>140</sup> As with tangible, commercial contracts, breaches to the contract of whiteness are remedied and performance of the contract as per its terms is prioritized. In this Part of the Article, I consider the terms of whiteness, but with a focus on how they manifest as consequences for Blackness.

#### A. *Blackness as Existential Purgatory*

The impact of the Detroit water shutoff program on the lives of the Detroiters subjected to disconnections reveals the narratives—mostly of Black women—whose existences are

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137. RESTATEMENT (SECOND) OF CONTRACTS §§ 332–333 (AM. LAW INST. 1981).

138. See *id.* § 175(1) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

139. The contract of adhesion is a contract between enterprises with strong bargaining power and a weaker party, who, “in need of the goods or services, is frequently not in a position to shop around for better terms,” which are “à prendre ou à laisser.” Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943). A contract of adhesion may be void for unconscionability. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965) (holding that when one party lacks meaningful choice and the terms of the contract are unreasonably favorable to the other party, such a contract may be unconscionable because of extreme inequality in bargaining power, and thus, set aside).

140. See Cheryl I. Harris, *supra* note 30, at 1715–16 (explaining that the subjugation of Black and Indigenous people—which was accomplished by making Black people property and taking away Indigenous rights to property—helped accomplish the goal of exploiting Black labor and conquering Indigenous lands in the United States).

suspended between the human and the non-human animal, or somewhere between life and death. It is a settled fact that human beings cannot survive without water and cannot thrive without clean running water.<sup>141</sup> It is equally settled, in the human rights canon, that human beings have a right to water.<sup>142</sup> In Detroit, homes subjected to water disconnections risk referrals to Child and Family Services because homes lacking running water are considered unsafe for children.<sup>143</sup> But no such right to water is recognized in the United States, which has been used to justify the water shutoff program by Detroit's local government as well as the federal court presiding over Detroit's municipal bankruptcy.<sup>144</sup>

Prior to Governor Whitmer's institution of a temporary moratorium on the shutoffs in March 2020,<sup>145</sup> Detroiters were forced to survive for months, and even several years, without water because of the City's extremely high water and sewage pricing.<sup>146</sup> One elderly woman, who had been without water for two years, described saving up enough coins to wash her clothes at the laundromat every couple of months and only flushing her toilet after bowel movements.<sup>147</sup> Of her plight, she said, "You use your brain. You scramble. You survive because you're used to dealing with nothing."<sup>148</sup> Another woman, Mattie McCorkle,

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141. See *1 in 3 People Globally Do Not Have Access to Safe Drinking Water*—UNICEF, WHO, WHO (June 18, 2019), <https://perma.cc/6U54-U8FM>; Class Action Complaint, *supra* note 15, ¶ 256.

142. See Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 130 (2020) (citing U.N.H.R. Council, *Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water & Sanitation*, 10 U.N. Doc. A/HRC/30/39 (Aug. 5, 2015)).

143. See MICH. DEP'T OF HEALTH & HUM. SERVS., CHILDREN'S PROTECTIVE SERVICES MANUAL § 71311 (Apr. 2021).

144. See *Lyda v. City of Detroit (In re City of Detroit)*, 841 F.3d 684, 699–700 (6th Cir. 2016) (rejecting the plaintiffs' claim that they had a "substantive due process 'right to water service at a price they can afford to pay'" because "there is no fundamental right to water service").

145. Mich. Exec. Order No. 202028 (Mar. 28, 2020).

146. See Class Action Complaint, *supra* note 15, ¶ 2; Maria Zamudio & Will Craft, *So Close, Yet So Costly*, APM REPS. (Feb. 7, 2019), <https://perma.cc/KVE3-MXA8>.

147. See Joel Kurth, *Detroiters Struggle to Survive Without City Water*, DET. NEWS, <https://perma.cc/2HTQ-ZKV3> (last updated Dec. 14, 2015, 6:50 AM) (quoting longtime Detroit resident Fayette Coleman).

148. *Id.*

described the experience of filling up buckets of water at a car wash for months to bathe herself and her three children as if she were “less than a person.”<sup>149</sup>

The treatment of Detroiters like Ms. McCorkle by their local governments begs the question: *In a society where all people are guaranteed equal rights under the law, are Black people really people at all?* Bernadette Atuahene and Timothy Hodge underscored the centrality of property to personhood in their work on the property foreclosure scandal in Detroit by mentioning that foreclosure has “injurious emotional, social, political, and cultural consequences” as well as financial impact.<sup>150</sup> Of the relationship between home ownership and personhood, Atuahene and Hodge note, “When the home is foreclosed upon, a family loses more than an economic asset; their personhood is also impacted.”<sup>151</sup> There are political ramifications bearing on personhood too, because ownership of “property serves as a bulwark against state encroachment on individual autonomy.”<sup>152</sup> Ms. McCorkle’s feelings of sub-humanity, then, stem from the fact that the deprivation of an essential utility—itsself property, and also inextricably linked to the habitability of her real property—stripped her of social, political, and even natural personhood by the state.<sup>153</sup>

Commissioner Welch’s views on race and personhood were not only a reflection of Justice Taney’s view on Black sub-personhood in *Dred Scott*,<sup>154</sup> but also reflect Homer Plessy’s views concerning whiteness as capital<sup>155</sup> and the Supreme Court’s rulings attaching American citizenship to one’s status as either white or Black per the Naturalization Act of 1906.<sup>156</sup>

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149. Joel Kurth, *In Detroit, Surviving Without Running Water Has Become a Way of Life*, BRIDGE MICH. (Oct. 24, 2018) [hereinafter Kurth, *Surviving Without Running Water*], <https://perma.cc/M5TZ-7VF4>.

150. Bernadette Atuahene & Timothy R. Hodge, *Statecraft*, 91 S. CAL. L. REV. 263, 267–68 (2018).

151. *Id.*

152. *Id.* at 268.

153. See Kurth, *Surviving Without Running Water*, *supra* note 149.

154. See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (enslaved party).

155. See Brief for Plaintiff in Error, *supra* note 120 (describing whiteness as the “most valuable sort of property”).

156. See, for example, *United States v. Thind*, 261 U.S. 204, 207 (1923), in which Thind attempted to premise his eligibility for status as white, and

In *Plessy v. Ferguson*,<sup>157</sup> the Court upheld racial segregation by declaring that Black people were “separate but equal”—“tiered personhood”<sup>158</sup> that elevated the legal status of Black peoples in the United States while still insisting upon their subjugation.

Though centuries have passed since the Three-Fifths Clause was repealed and replaced by the Fourteenth Amendment, the sociopolitical *personhood* of Black people in America remains an unsettled question. The legal rights of Black Americans, while solid in theory and codified, are still uncertain in practice. Where rights and remedies are concerned, social contract theory asserts that natural humanity has never been enough. Rights are political constructions, given force by and through law, and most importantly, bargained for by a body politic.<sup>159</sup> That Black people have been excluded from the body

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therefore, U.S. citizenship, on his own “revulsion” toward lower caste Indians, which he presented to the Court as comparable to white anti-Blackness in the United States (and proof of his own whiteness). This Article focuses on anti-Black racism, but it is also important to recognize that the contracting of whiteness applies similar, if not identical, terms of sub-humanity to Indigenous life. Justice Marshall’s doctrine of discovery obliterated Indigenous rights, identity (which is deeply connected to land), and sovereignty by declaring that Indigenous lands belonged to the United States government because the U.S. government had taken them. *See, e.g., Johnson v. M’Intosh*, 21 U.S. 543, 573–74 (1823) (recognizing the principle that those who “discover” land, own the land—regardless of prior occupancy by Indigenous people). When Black people were granted American citizenship under the Fourteenth Amendment in 1868, the U.S. government explicitly stipulated that Indigenous peoples would still be excluded from citizenship, and they were granted citizenship—without the right to vote—in 1924. *See Addie C. Rolnick, The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 980–81 (2011). The U.S. government used the grant of citizenship to Indigenous Americans—not all of whom wished to become U.S. citizens—as a method of forcibly assimilating Indigenous people and stripping them of their cultural identities. *Id.* The goal was to “kill the Indian in [them] and save the man,” which clearly characterizes Indigeneity as inconsistent with humanity. *Id.* at 980; *see* ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES 169 (2014).

157. 163 U.S. 537 (1896).

158. Ellis, *supra* note 70, at 724, 733.

159. That civil and political rights are bargained for by citizenry is central to social contract theory. *See* JEAN-JACQUES ROSSEAU, A TREATISE ON THE SOCIAL COMPACT; OR THE PRINCIPLES OF POLITICAL LAW 29 (1762); Carliss Chatman, *If a Fetus Is a Person, It Should Get Child Support, Due Process and Citizenship*, WASH. POST (May 17, 2019), <https://perma.cc/J5UR-B9WM> (discussing the passage of the Alabama Human Life Protection Act, which confers personhood on fetuses from the point of conception onward and making

politic necessarily means that rights that would apply to them on the basis of their natural humanity in theory, do not apply to them in practice.<sup>160</sup>

Of course, many Black scholars have addressed Black people's persistent exclusion from full citizenship benefits in the United States (and beyond) despite the nation's formal commitments to the equality of all citizens under the law.<sup>161</sup> Journalist and author Isabel Wilkerson has advanced a theory of race as a mere "visible manifestation" of the nation's caste system, which concerns power and is perpetuated by division of labor.<sup>162</sup> For Wilkerson, the subordination of some people under others is, as Mills posits, about exploitation and domination, but unlike Mills, Wilkerson minimizes race as a sort of discursive crutch that Americans use when they should, in fact, be describing caste.<sup>163</sup> While I agree with Wilkerson that white supremacy is sustained by the caste-ing of human beings and that white supremacy has always held wealth extraction and domination as its goals,<sup>164</sup> I join the chorus of race scholars who

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the case that such personhood must be accompanied by the full benefits of citizenship, including due process rights).

160. See MILLS, *THE RACIAL CONTRACT*, *supra* note 32, at 13 (describing a departure from the social contract with disparaging effects on Black people).

161. See S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community*, 34 *FORDHAM URB. L.J.* 833, 842 (2007) ("Today, the exclusion of women, African-Americans, and other groups from American society is not sanctioned. No one person in contemporary American society is considered more important than any other—it is that notion of equality that forms the basis of American citizenship.").

162. See Sunil Khilnani, *Isabel Wilkerson's World-Historical Theory of Race and Caste*, *NEW YORKER* (Aug. 17, 2020), <https://perma.cc/PT4C-FEUE> ("Underlying and predating racism, and holding white supremacy in place, is a hidden system of social domination: a caste structure that uses neutral human differences, skin color among them, as the basis for ranking human value."); see generally WILKERSON, *supra* note 132.

163. Wilkerson claims that "race does the heavy lifting for a caste system that demands a means of human division." WILKERSON, *supra* note 132, at 18. She further claims that "we may mention 'race,' referring to people as black or white or Latino or Asian or indigenous, when what lies beneath each label is" caste. *Id.*

164. See *id.* at 42–43 (describing the enslavement of Africans in the United States as a response "to the European hunger for the cheapest, most pliant labor to extract the most wealth from the New World").

understand that while caste is not necessarily race, race is always caste.<sup>165</sup>

Atiba Ellis's theory of tiered personhood posits Blackness as a form of personhood that is subordinated to whiteness but still part of the political and social project.<sup>166</sup> Per Ellis, political personhood is a status allowing people to exercise constitutional rights and receive constitutional protections, and a framework for reifying status and stratifying those of certain status and power above or below others.<sup>167</sup> Notably, Ellis describes the concepts of personhood and citizenship as conceptually distinct.<sup>168</sup> The Racial Contract essentially fuses the two concepts by granting those natural persons raced as white full personhood, citizenship in both the racial state and the racial superstate, and the core rights (of property and contract)—and by stripping those raced as Black of political personhood, citizenship, and rights<sup>169</sup> irrespective of formal legal transformations-as-codified.

Lolita Buckner Inniss also elucidates the dynamics created and exploited by whiteness in her work on white witnesses. For Inniss, white people and men are public people who “deploy power both by observing and by being observed . . . dismantle and erect visual barriers by shaping laws, rules and norms,” while non-white people and non-men are private people “who see little and are little seen.”<sup>170</sup> Whiteness requires the relegation of non-white people to private life because the public domain is the political, contracting, and decision-making realm from which non-white people are excluded so that they may be efficiently

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165. See, e.g., *id.* at 42 (noting, in her description of the development of caste in the now-United States, that Indigenous peoples and Africans already occupied the lowest rungs of hierarchy because they were not Christians “upon arrival” and that the “concept of race” would emerge to “justify their eventual and total debasement”); *id.* at 17 (acknowledging that the American caste system is “race-based”).

166. See Ellis, *supra* note 70, at 729–30.

167. See *id.* at 725.

168. See *id.* at 724–25.

169. See *id.* at 731–33 (describing how the Supreme Court systematically allocated rights due under the Constitution to African Americans in proportion to acceptable norms of personhood).

170. Lolita Buckner Inniss, *Video Surveillance as White Witnesses*, AIN'T I A FEMINIST LEGAL SCHOLAR TOO? (Sept. 30, 2012), <https://perma.cc/S8BB-LR JW>.

and effectively exploited.<sup>171</sup> By placing Black people outside of the public, they are placed out of the realm of politics even when (or especially if) public law offers a grant of rights and a promise of equal protection of the law.<sup>172</sup> The private order can therefore carry forth exploitation and human rights abuses not reached by the law.<sup>173</sup> Uncovering abuse and exploitation perpetuated in the private order often requires the act of a public person—for example, white witnesses who record abuses against Black people—to elevate the atrocities experienced by Black people into public consciousness and discourse.<sup>174</sup>

Inniss's theory of the private versus public person is clearly expressed in Governor Whitmer's executive order concerning the water shutoff program in Detroit, which contrasts the health and wellbeing of Black Detroiters—a private matter of no concern to the State—with the public health and wellbeing of white people placed at risk by Black people's lack of running water.<sup>175</sup> With respect to the human rights abuses and brutality that the state metes out on Black and Indigenous people, discussed in Part III, I depart from Inniss's theory by

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171. See Ellis, *supra* note 70, at 736.

172. See *id.* (“What was true of these personhood cases concerning African Americans is that the Court privileged the dominant form of social construction during American history: white male supremacy.”).

173. See *id.* (explaining how Supreme Court jurisprudence maintains “a tiered society where those who possess political personhood in full are allowed to dominate contests between those who have full personhood and those who do not”—allowing those with political personhood to better amass capital).

174. See Inniss, *supra* note 170; *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020) (noting that the public “became aware of the circumstances surrounding George Floyd’s death because citizens standing on a sidewalk exercised their First Amendment rights and filmed a police officer kneeling on Floyd’s neck until he died”); *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) (“[T]he proliferation of bystander videos has spurred action at all levels of government to address police misconduct and to protect civil rights.” (internal quotation omitted)). In an amicus brief by Professors Katherine Mims Crocker and Brandon Hasbrouck in support of neither party with respect to defendants’ motion to dismiss in *Dyer v. Smith*, amici curiae discuss “the powerful role that video recording can play in protecting the public—especially communities of color—from abusive government conduct.” Brief for Neither Party at 1, *Dyer v. Smith*, No. 3:19cv921, 2021 WL 694811 (E.D. Va. 2021).

175. See Mich. Exec. Order No. 202028 (Mar. 28, 2020) (rescinded), <https://perma.cc/AMF7-ASTM> (mandating the provision of water to all Michigan residents to slow the spread of COVID-19).

understanding “private people” as those “who see *much* and are little seen.”<sup>176</sup> With respect to policing of Black proprietorship or possession of space, as discussed in Part III, I would describe private people as those “who see much and are highly surveilled.”<sup>177</sup>

Like Ellis, Pateman and Mills discuss tiered personhood in *The Contract and Domination*—writing of white men as contractors and of white women and non-white men as subcontractors while non-white women are nonpersons void of contractual capacity.<sup>178</sup> I understand white people to be contractors—agreeing with Ellis that white men are tiered higher than white non-men<sup>179</sup>—and Black and Indigenous people and lands as the objects of those contracts, or contractees, and therefore politically nonpersons.<sup>180</sup> This is particularly true in the case of non-white non-men;<sup>181</sup> as an exception to the rule, some non-white non-men and non-white men may act as subcontractors. Per the theory of sub-contractorship, Black men have been delegated the power over water policy in Detroit and trade in the collective of Black women who collect rainwater on their roofs and any money to pay their water bills as consideration in exchange for proximity to politics and power—or to whiteness.<sup>182</sup> In the case of Breonna Taylor, a Black Attorney General failed to indict the police officers who killed her as she was sleeping, and was immediately placed on the President’s list for consideration as a potential Supreme Court Justice candidate.<sup>183</sup> Again, the bargained-for

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176. Innis, *supra* note 170.

177. *Id.*

178. See CAROLE PATEMAN & CHARLES MILLS, *THE CONTRACT AND DOMINATION* 4 (2007).

179. See Ellis, *supra* note 70, at 748.

180. See *id.* at 736.

181. See *id.* (“[T]he economic status and societal benefits that came from excluding women from the political sphere and relegating them to the domestic sphere demonstrated how political personhood was not given to women. It too created a master class (men) and a subservient class (women).”).

182. See Drew Costley, *The Blackest City in the US Is Facing an Environmental Justice Nightmare*, *GUARDIAN* (Jan. 9, 2020), <https://perma.cc/6AMK-CWCZ>.

183. See Andrew Wolfson et al., *Trump Lists Kentucky AG Daniel Cameron as Potential US Supreme Court Nominee*, *COURIER J.*, <https://perma.cc/38K2-CMVZ> (last updated Sept. 9, 2020, 7:42 PM).



consideration was a Black female victim of state violence and the community seeking justice on her behalf. By contrast, while white women's citizenship has been subordinated to white men's citizenship, white women retain the de facto policing power that is a marker of full citizenship<sup>184</sup> by regularly using the power against Black people.<sup>185</sup> Race is political and legal, rather than biological. Whiteness is a constructed identity that is imbued with power and control, and therefore it is not particularly remarkable that a person raced as Black of any gender could reify whiteness as a subcontractor or even as the head of a local, state, or federal government.<sup>186</sup> Not only does one's racial status depend upon legal and social definitions, and change therewith according to time and place, but also the proximity to whiteness of both individuals and groups of people is similarly fluid.<sup>187</sup> By delegating a measure of the power of whiteness to individual people raced as Black, signatories to the contract of whiteness can conceal the existence of the contract and weaponize the Black subcontractors as a mirage and shield against Black complainants to gaslight them.

Despite the formal status as American citizens, Black Americans do not fully enjoy the rights of citizenship. They instead occupy a place and space outside of politics (social contracting) and proprietorship (commercial contracting). While Black people can no longer be held as chattel, the lived realities of Black Americans are as wards of the state—incarcerated or not—and as nonpersons whom white civilians have the power to contain, detain, expel, or eliminate.<sup>188</sup> Black people's possession

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184. MILLS, *THE RACIAL CONTRACT*, *supra* note 32, at 83–84 (describing the need for constant surveillance of “sub-persons” by “the coercive arms of the state”).

185. See, e.g., Kim Wynne, *Black Woman Says White Woman Had Police Called on Her Family at Fort Lauderdale Pool*, NBC 6 S. FLA., <https://perma.cc/X8TV-TKJM> (last updated July 25, 2020, 9:26 AM) (“A Black woman is speaking out and organizing a protest after she says the police were unjustly called on her and her family while they were swimming together at a pool in a Fort Lauderdale park.”).

186. See Harris, *supra* note 30, at 1717.

187. See Ellis, *supra* note 32, at 733.

188. See Harris, *supra* note 30, at 1716 (“Even in the early years of the country, it was not the concept of race alone that operated to oppress Blacks and Indians; rather, it was the interaction between conceptions of race and property that played a critical role in establishing and maintaining racial and economic subordination.”).

of property—as owners or occupiers—is consistently and persistently threatened, whether by deed theft or discriminatory property tax assessments,<sup>189</sup> by unfair utility pricing structures,<sup>190</sup> immigration policy,<sup>191</sup> or modern-day lynch mobs.<sup>192</sup> Black people are tenants at best and trespassers at worst; they are natural-born persons, but not part of the American body politic; they are not contractors, but often the objects of the contract or the consideration therefore. Because Black people are present but not persons within the United States, they are not legally or politically alive; moreover, even physically speaking, while alive, Black people are often *near death, near-death, or nearly dead*.

### B. Blackness, Reliance, and Promissory Estoppel

If the idea of Black sub-personhood or non-personhood as a bar to Black contractual capacity leaves some unconvinced, then the fact that Black people exist and operate under continuous duress also means that Black people cannot contract, and therefore cannot be contractors, with the State.<sup>193</sup> Part III of this Article articulates a theory of brutality as a contractual

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189. See Andrew Van Dam, *Black Families Pay Significantly Higher Property Taxes than White Families, New Analysis Shows*, WASH. POST (July 2, 2020), <https://perma.cc/XV8R-YPEG> (explaining that, nationally, “black families pay 13 percent more in property taxes each year than a white family would in the same situation, a massive new data analysis shows”).

190. See Kathiann M. Kowalski, *Racial Disparities Persist in Electric Service. Is ‘Willful Blindness’ to Blame?*, ENERGY NEWS NETWORK (July 1, 2020), <https://perma.cc/EP27-S5U6> (“On average, African Americans pay a disproportionately greater share of their income for energy needs . . .”).

191. See Charles Kamasaki, *US Immigration Policy: A Classic, Unappreciated Example of Structural Racism*, BROOKINGS (Mar. 26, 2021), <https://perma.cc/4WLZ-KFZQ> (“The toughening of immigration laws coincided with a shift of immigration from Europe to newcomers from Latin America, Asia, and Africa, often in the context of racialized debates targeted mainly at Latinos.”).

192. See Sean Collins, *Ahmaud Arbery Was Lynched*, VOX (May 21, 2020, 10:30 AM), <https://perma.cc/F93K-NJRQ> (comparing Ahmaud Arbery’s murder to past lynchings and commenting that “[i]n watching that video, we don’t just see Arbery’s final moments; we are also reminded of the ugly, racist history that has left the US with a sinister legacy it has been unable to reckon with”).

193. Duress makes a contract unenforceable and voidable. See RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 174–175 (AM. L. INST. 1981).

enforcement mechanism, which suggests not only that Black people's duress under the yoke of that brutality makes contracting impossible, but also that Black people are governed to perpetuate Black duress—for the *express purpose* of making Black contracting and proprietorship impossible.

The theory of the Black subcontractor makes a noble effort to account for Black people's engagement in commercial contract and participation in government as voters, elected officials, and as political appointees and civil servants.<sup>194</sup> However, the theory possesses one insurmountable flaw if the theory of whiteness as contract is to hold: the theory of whiteness does not allow for Black privity with or inclusion in the state. Subcontractors are still contractors, and Blackness's lack of contractual capacity is central to the theory of whiteness.

A better explanation for Black Americans' continued engagement with the State, agitation for inclusion in and protection by the State, participation in the State, and reliance on the State is the doctrine of promissory estoppel, which serves as an alternative to consideration.<sup>195</sup> A claim of promissory estoppel is established by demonstrating four elements: a promisor, a promise, reasonable reliance upon a promise, and detriment suffered by the promisee.<sup>196</sup> While Black people do not have the capacity to contract with the State and therefore have no enforceable contracts with the State per the terms of

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194. See Anna Brown & Sara Atske, *Black Americans Have Made Gains in U.S. Political Leadership, but Gaps Remain*, PEW RSCH. CTR. (Jan. 21, 2021), <https://perma.cc/5VR3-KM5F> (providing statistics demonstrating the steady increase in black political leadership at the federal level since 1965).

195. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 317 (1986) (“[B]argained-for consideration and non-bargained-for reliance are equivalent to the extent that the existence of either in a transaction may manifest the intentions of one or both of the parties to be legally bound.”); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 62 (1936) (“The difficulties in proving reliance and subjecting it to pecuniary measurement are such that [people] knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise in any case where the legal sanction was of significance to [them].”).

196. RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. L. INST. 1932) (“A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”).

whiteness, they have reasonably relied upon the Civil Rights Acts of 1866, 1964,<sup>197</sup> and 1968,<sup>198</sup> and the Equal Protection Clause of the Fifth and Fourteenth Amendments for the rights to contract and proprietorship, and indeed, for their due process rights and the other benefits of American citizenship.<sup>199</sup> The case studies in Part III demonstrate the ways in which Black Americans rely on the formal promise of equality under the law, which includes the rights to contract and proprietorship, to their detriment. The doctrine of promissory estoppel provides a clear and convincing explanation for why Black Americans continue to agitate for rights they deserve despite the resistance of the white body politic to include them in their social contracting. Significantly, the doctrine of promissory estoppel provides remedies for Black Americans for their reasonable reliance, which offers a path toward reparatory measures for those Black people who have been wrongfully deprived of their life, liberty, and property as the result of their reliance on a right to contract and proprietorship.

The right to enjoy contract and property is, and historically has been, central to whiteness and citizenship in the United States,<sup>200</sup> with whiteness and citizenship as interchangeable statuses under federal law prior to Reconstruction.<sup>201</sup> Despite formal changes to the letter of the law, not much has changed;

197. Pub. L. No. 89352, 78 Stat. 241.

198. Pub. L. No. 90284, 82 Stat. 73.

199. See Ellis, *supra* note 70, at 733 (detailing “the process of defining personhood, in how African Americans were excluded entirely from personhood in *Dred Scott*, granted limited personhood through partial recognition of citizenship rights in *Plessy*, and then ultimately granted full personhood by the Court in *Brown*”).

200. See generally Leong, *supra* note 70 (discussing the invisibility and centrality of whiteness in the United States, made visible in U.S. federal law by 42 U.S.C. § 1981 and § 1982); Harris, *supra* note 30.

201. See *Plessy v. Ferguson*, 163 U.S. 537, 549 (1896) (describing Plessy’s argument that “the reputation of belonging to . . . the white race, is ‘property,’ in the same sense that a right of action or of inheritance is property”); *Dred Scott v. Sandford*, 60 U.S. 393, 451 (1857) (enslaved party) (excluding Black people and their descendants from U.S. citizenship, based on the right of white people to “property in a slave . . . expressly affirmed in the Constitution”); Harris, *supra* note 30, at 1744 (“The concept of whiteness was carefully protected because so much was contingent upon it. Whiteness conferred on its owners aspects of citizenship that were all the more valued because they were denied to others. Indeed, the very fact of citizenship itself was linked to white racial identity.”).

the racial contract endures. Because the racial contract constructs Black people below and outside of personhood, it follows that Black people do not enjoy the right to contract, or even the legal capacity to contract, with white people or with the State. Neither can Black people expect the racial state to respect their possession of real or personal property, including their common water supply; in fact, insofar as Black proprietorship breaches the terms of the racial contract, Black people should expect the racial state to seek to remedy the breach.

*C. Blackness as Tenancy and Trespass: Resistance to Black Proprietorship*

Resistance to Black and Indigenous proprietorship is a defining characteristic of the contract of whiteness. The whiteness contract comes with a noncompete clause that must be enforced across a multitude of platforms and sectors.<sup>202</sup> From the formal designation of Black people as property before the end of slavery in the United States,<sup>203</sup> to legally enforced segregation in the United States,<sup>204</sup> to the present-day racial

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202. See, e.g., Harris, *supra* note 30, at 1758–77 (examining how whiteness pervades institutions such as higher education).

203. See *Dred Scott*, 60 U.S. at 407 (“In the opinion of the court . . . neither the class of persons who had been imported as slaves, nor their descendants . . . were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.”).

204. See *Plessy*, 163 U.S. at 550–51 (establishing the doctrine of separate but equal).

discrimination when buying<sup>205</sup> or selling a home,<sup>206</sup> Black proprietorship continues to pose a threat to whiteness that is unacceptable to whiteness's signatories, notwithstanding the Civil Rights Act of 1866.<sup>207</sup>

Exclusive white proprietorship includes exclusive control over politics, history, time, and space as well. Anti-Black voter suppression efforts, from the historical literacy tests and poll taxes,<sup>208</sup> to the fight over mail-in voting,<sup>209</sup> voter ID requirements,<sup>210</sup> and early voting that played a prominent role in President Trump's challenges to the 2020 presidential

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205. See Ann Choi et al., *Long Island Divided*, NEWSDAY (Nov. 17, 2019), <https://perma.cc/S8WZ-WN3X> ("In one of the most concentrated investigations of discrimination by real estate agents in the half century since enactment of America's landmark fair housing law, Newsday found evidence of widespread separate and unequal treatment of minority potential homebuyers and minority communities on Long Island."); Sascha Pfeiffer & Stefano Kotsonis, *Newsday Investigation Reveals Sweeping Real Estate Discrimination on Long Island*, WBUR (Nov. 25, 2019), <https://perma.cc/D96V-YAN5> (detailing a three-year investigation that found that African Americans were regularly steered away from predominantly white neighborhoods by real estate agents); Aaron Glantz & Emmanuel Martinez, *Modern-Day Redlining: How Banks Block People of Color from Homeownership*, CHI. TRIB. (Feb. 17, 2018, 2:30 PM), <https://perma.cc/RLS6-4XJS> ("Fifty years after the federal Fair Housing Act banned racial discrimination in lending, African Americans and Latinos continue to be routinely denied conventional mortgage loans at rates far higher than their white counterparts.").

206. See Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Aug. 25, 2020), <https://perma.cc/VT7N-C4CA> (last updated Aug. 27, 2020) (stating that the homes of Black homeowners are appraised at lower values than those of their white counterparts).

207. See 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

208. See *White Only: Jim Crow in America*, SMITHSONIAN NAT'L MUSEUM AM. HIST., <https://perma.cc/L5MD-KTXT> (explaining that voting barriers sharply reduced the number of registered Black voters in the South).

209. See Jane C. Timm, *An All-Out War over Mail Voting Has Erupted in Courts Across the U.S. Here's What's at Stake*, NBC NEWS (Aug. 15, 2020, 5:30 AM), <https://perma.cc/U8LK-8R57> (reporting on the "more than 175 suits in 43 states" contesting mail-in voting laws).

210. See Eliza Sweren-Becker & Hannah Klain, *The Fight for Voting Rights in 2021*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), <https://perma.cc/82TQ-AD7V> ("[M]ore than 160 bills introduced at the state level would restrict voters' access to the ballot . . .").

election results,<sup>211</sup> signatories to the Racial Contract continue to resist Black political proprietorship—from governance to the exercise of the right to vote consistently. In Part III, I discuss the resistance to Black governance of American urban centers such as Detroit. In previous work, I have discussed the propagation of derogatory narratives about urban centers led by Black governments as a mechanism for destabilizing those cities and justifying their destabilization, and the extractive rent-seeking practices of the white body politic resentful of its post-desegregation loss of political power.<sup>212</sup>

The ideological conditioning of the public to believe in the benevolence and banality of white supremacy, as well as the wickedness, frivolity, and criminality of Blackness, is key to maintaining control over the governance of American urban centers and those centers' assets. Ideological conditioning is a necessary ingredient for constructing race, as societies must believe in race for race to exist.<sup>213</sup> The signatories to the terms

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211. In 2020, President Donald Trump sought to cast doubt over the legitimacy of the presidential election, and then refused to accept the results and concede after he was defeated at the polls by former Vice President Joseph Biden. See Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, WASH. POST, <https://perma.cc/A2XR-CNMB> (last updated Mar. 11, 2021, 7:10 PM)

President Joe Biden was sworn in on Jan. 20, 2021. Former president Donald Trump . . . spent weeks uttering baseless allegations of election fraud that have been amplified by allies and conservative media outlets. His campaign . . . went to court in six states . . . to challenge . . . the vote—and lost more than 60 cases . . . .

see also Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020, 6:26 AM), <https://perma.cc/S544-6P85> (citing the NAACP Legal Defense Fund's legal challenges to the Trump campaign's efforts to invalidate the 2020 Presidential election); Mark Niquette & Gregory Korte, *Trump Challenge to Election Results Hits Hardest at Black Voters*, BLOOMBERG (Nov. 21, 2020, 6:00 AM), <https://perma.cc/3C88-4GXD> (reporting that the Republican chairwoman of the Wayne County Board of Canvassers tried to rescind her vote certifying the election after then-President Trump personally called her).

212. See Marissa Jackson Sow, *Coming to Terms: Applying Contract Theory to the Detroit Water Shutoffs*, 96 N.Y.U. L. REV. ONLINE 29, 36–37 (2021).

213. See COATES, *supra* note 51, at 7 (“Americans believe in the reality of ‘race’ as a defined, indubitable feature of the natural world. Racism—the need to ascribe bone-deep features to people and then humiliate, reduce, and destroy them—inevitably follows from this inalterable condition.”).

of whiteness know: in September 2020, then-President Donald Trump announced that he would create a commission on patriotic education and a grant for pro-American education in order to combat growing calls for antiracist education in the wake of the antiracist uprising stemming from the killing of George Floyd.<sup>214</sup> Per Trump, teaching children about systemic racism amounted to “child abuse”; he denounced critical race theory and the *New York Times*’s 1619 Project as “toxic propaganda.”<sup>215</sup>

As discussed below, the denial of Black peoples’ public personhood is not only political, but quite literal. Black people are private people, and the cruel irony of this designation is the fact that their private proprietorship of property is verboten and resisted with systematic regularity. Black people lack the capacity for contracting, and therefore lack the capacity for proprietorship under the Racial Contract. Under the terms of whiteness, unless as chattel, the only place for Black people is none at all.<sup>216</sup>

#### D. Blackness as Consideration and Cost

Cheryl Harris has recently written, “Chattel (Black) is the fusion of race and property—embodied as always essential and forever disposable.”<sup>217</sup> Whiteness as property—a status, a possession—that is contracted for, requires consideration or

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214. See Nicole Gaudiano, *Trump Creates 1776 Commission to Promote ‘Patriotic Education’*, POLITICO (Nov. 2, 2020, 5:36 PM), <https://perma.cc/H5M6-4SQH> (reporting that federal grant money would be used to promote “patriotic education” at public places, such as national parks, cemeteries, and museums); Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://perma.cc/D9DT-KRNC> (last updated Sept. 7, 2021) (“Minneapolis police officers arrested George Floyd, a 46-year-old black man, after . . . Mr. Floyd had bought cigarettes with a counterfeit \$20 bill. Seventeen minutes after the first squad car arrived at the scene, Mr. Floyd was unconscious and pinned beneath three police officers, showing no signs of life.”).

215. Nick Niedzwiadek, *Trump Goes After Black Lives Matter, ‘Toxic Propaganda’ in Schools*, POLITICO (Sept. 17, 2020, 1:10 PM), <https://perma.cc/PX4R-ZYF7>.

216. See FRANK B. WILDERSON III, *AFROPESSIMISM 196–98* (2020) (arguing that Black people occupy the ontological position of permanent captivity).

217. Cheryl I. Harris, *Reflections on Whiteness as Property*, 134 HARV. L. REV. F. 1, 1 (2020).



something of value that is exchanged so that the contract is fair and valid.<sup>218</sup> Within the context of contracting for whiteness, Black people and Indigenous land are the consideration, and thus simultaneously essential and disposable. Black and Indigenous bodies and land as capital are what make whiteness and white supremacy possible.<sup>219</sup> Whiteness only exists in opposition to non-whiteness.<sup>220</sup> White power exists only in opposition to Black dispossession.<sup>221</sup> White freedom was once explicitly premised on Black enslavement, and as demonstrated by the case study of financial extraction from Black Detroiters by Detroit city government and the surrounding suburbs in Part III, white wealth is still premised upon the extraction of money and assets from Black and Indigenous people.<sup>222</sup>

Even as Black people and their property are bargained for, Black people are also decidedly, and by definition, outside of the terms of whiteness. They may be the object of the contracts or subjected to the execution of the contracts, but they are not the contractors. If Black people benefit from white racial contracting and when they are dispossessed or otherwise harmed by the racial contracting, it is as third-party beneficiaries, survivors, or collateral damage. When Black contracting and proprietorship are permitted, it is as an externality. Or, in the case of Detroit, described in Part III, Black people's use and enjoyment of water is an externality to the commercial contracting between the City

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218. See Harris, *supra* note 30, at 1759.

219. See *id.* at 1774 (“Whiteness conferred on its owners aspects of citizenship that were all the more valued because they were denied to others . . . the trajectory of expanding democratic rights for whites was accompanied by the contraction of the rights of Blacks in an ever deepening cycle of oppression.”).

220. See WILDERSON, *supra* note 216, at 196 (arguing that the U.S. would cease to exist if it ceased being anti-Black).

221. See *id.* at 209 (theorizing that Black people embody a fundamental antagonism to civil society—dividing society into “two species: Black and Human”).

222. See *infra* Part III; Jackson Sow, *supra* note 212, at 54–55 (discussing the “sloppy” management of Detroit’s Water and Sewage Department that led to the demand of \$90 million dollars from Detroit’s poor residents); see also Bernadette Atuahene, *Predatory Cities*, *supra* note 142, at 169 (establishing the concept of the predatory city by discussing the extraction of wealth and expropriation of property from Black Detroit residents via illegal tax assessments); Atuahene & Hodge, *supra* note 150, at 294 (using the Detroit foreclosure scandal as an example of illegal governmental extraction).

of Detroit and the GLWA. Though the City and GLWA rely upon Black Detroiters to meet the cost of regional water and sewage,<sup>223</sup> their access to water itself is not a policy objective. The increase in waterborne illnesses among Detroiters whose water was disconnected by the City, similarly, is an unfortunate cost of the social and commercial contracting between the City and the suburbs.<sup>224</sup>

Black people as consideration and as cost reveals another aspect of the duality of the Racial Contract that makes the Contract difficult to recognize and acknowledge. The obscene exploitation and manipulation of Black people for the sake of whiteness is what Achille Mbembe has referred to as the “nocturnal body” of democracy.<sup>225</sup> Frank Wilderson’s theory of Afropessimism sets forth Blackness and Black people as “integral to human society but at all times and in all places excluded from it”<sup>226</sup>—a construction that conforms to a Racial Contract that excludes Black people from contracting and proprietorship even as it wholly depends on extracting capital from Black labor and Indigenous land. For Wilderson, “the Human is not an organic entity but a construct; a construct that requires its Other in order to be legible; and . . . the Human Other is Black.”<sup>227</sup>

To be Black is to be physically alive, and politically and economically viable—and profitable—for, and only for, the benefit of whiteness. To be Black is to be in constant temporal proximity to death because no matter where the Black body is physically present, it may be adjudged to be in the wrong place at the wrong time, or otherwise on property that whiteness requires and no longer wishes to share. To be Black is to be the lifeblood of American culture and society, even as Black

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223. See Claire Sabourin, *Responding to the Detroit Water Crisis: The Great Lakes Water Authority and the City of Detroit*, 51 WASH. U. J.L. & POL’Y 305, 310 (2016) (discussing the timeline of Detroit’s water crisis).

224. See Jennifer Chambers, *Experts: Water Shutoffs Causing Public Health Emergency*, DET. NEWS (July 26, 2017, 1:08 PM), <https://perma.cc/N35H-TDUA> (suggesting that the Detroit mayoral election negatively influenced the response of researchers who studied the adverse effects of the water crisis on Detroit residents).

225. See MBEMBE, *supra* note 121, at 15.

226. Vinson Cunningham, *The Argument of “Afropessimism”*, NEW YORKER (July 13, 2020), <https://perma.cc/V23L-JEPL>.

227. WILDERSON, *supra* note 216, at ix.

Americans are choked to death or killed in their sleep by police.<sup>228</sup> It is to be an essential worker during the COVID-19 pandemic, fueling the American economy for the lowest of wages, while at an increased risk of contracting the deadly virus because of one's inability to stay at home.<sup>229</sup> To be Black is to be necessary—mandatory, even—and, precisely because of that, a problem that must be solved.

### E. Breach

Breaches of the terms of whiteness are not only verboten, but must be remedied, because the Racial Contract is as fragile as it is firmly rooted in society. As the rights to contracting and proprietorship are central to whiteness, Black contracting capacity and proprietorship—public and private—pose impermissible existential threats to the contract. Though Black people are not parties to the contracting of whiteness, they are still capable of interference therewith, even without the intent to do so, precisely because the contracting of whiteness does not account for Black humanity and instead counts on the total exploitation and suppression of Black bodies.<sup>230</sup> According to the terms of whiteness, Black lives do not matter.<sup>231</sup> Thus, where Black contracting and proprietorship significantly threaten the white body politic's control of capital and power—as it almost always does—this activity will be suppressed and undermined by individual white citizens, the state, or both.<sup>232</sup>

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228. See Evan Hill et al., *supra* note 214 (compiling the evidence pertaining to George Floyd's death); Richard A. Opper Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://perma.cc/T28Y-AG7C> (detailing the events surrounding Breonna Taylor's death).

229. See Tiana N. Rogers et al., *Racial Disparities in COVID-19 Mortality Among Essential Workers in the United States*, WORLD MED. & HEALTH POL'Y, 2020 at 1, 1–2.

230. See WILDERSON, *supra* note 216, at 216 (“[T]he Slave's relationship to violence is open-ended, gratuitous, without reason or constraint . . .”).

231. See *id.* at 219 (stating that civil society's “schema” of violence renders Black life fungible).

232. See *id.* at 196 (arguing that civil society is, and always will be, anti-Black).

### III. CONTRACTUAL PERFORMANCE AND REMEDY: WHITE PROPERTY MATTERS

#### *A. The Detroit Water and Mortgage Crises: Structural and Ideological Violence as Performance Mechanism and Remedy of Breach*

This Part employs case studies to demonstrate how the terms of whiteness are executed and how breaches of those terms are remedied. Specifically, the case studies demonstrate how governments rely on coordinated campaigns of physical deprivation and psychological, political, and legal gaslighting to justify the employment of public policy and private ordering to dispossess Black people of private property and infringe on Black people's rights to contract and property.

Detroit and Flint provide excellent examples of how the white body politic resists and punishes Black proprietorship. In her discussion of Detroit's mortgage foreclosure crisis, Bernadette Atuahene classifies Detroit as a "predatory city," which she defines as an "urban area[] where public officials systematically take property from residents and transfer it to public coffers, intentionally or unintentionally violating domestic laws or basic human rights."<sup>233</sup> She then asks the question central to her writing on the matter: "Why do some financially desperate cities become predatory?"<sup>234</sup> It is helpful to consider why these cities become financially desperate in the first instance, and this Part explores answers to both questions by examining how the local government has used commercial contracting to extract resources from Detroiters and redistribute them to suburbanites in support of a white supremacist social contract that is actively in force in Southeastern Michigan.

Detroit is the most predominantly Black large city in the United States<sup>235</sup> and has long experienced social strife related to

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233. Atuahene, *supra* note 142, at 107.

234. *Id.* at 109.

235. See SONYA RASTOGI ET AL., THE BLACK POPULATION: 2010, at 14 (2011), <https://perma.cc/ZYR9-Y7VM> (PDF) ("Among the places with populations of 100,000 or more, the place[] with the greatest proportion Black alone-or-in-combination [was] Detroit, MI (84 percent) . . .").

racism and white supremacy.<sup>236</sup> Like other American cities, the transfer of political and administrative power from white to Black hands was immediately met with white flight and white rage by those white Detroiters who would not share space (Detroit was racially segregated) or power with Black people.<sup>237</sup> Black political power was accompanied by the emergence of Black upper and middle classes in the City of Detroit, whose members became civil servants, corporate managers and executives, and homeowners.<sup>238</sup> However, white flight cost the City of Detroit several hundreds of thousands of residents and the collective value of their tax base.<sup>239</sup> Many Black Detroiters left the city for the suburbs as well, exacerbating Detroit's financial woes.<sup>240</sup>

Prior to the desegregation attempts in Detroit, the city's white-led government envisioned, agreed to, and planned for an expansion of water service to the city's surrounding suburbs, to be subsidized by the city.<sup>241</sup> This regional plan may be considered an attempt to realize the ideal socially contracted society about which John Rawls would later write.<sup>242</sup> Desegregation made the plan impracticable; begging a Black-led, majority-Black city for access to its natural resources

236. Atuahene, *supra* note 142, at 123 (Detroit's population is now about 80 percent Black due to "state sanctioned racial and exclusionary zoning, and racially restrictive covenants, and redlining").

237. *See id.*

238. See John Gallagher, *1968 Project: Detroit's Black Middle Class Emerged from 1968's Upheaval*, USA TODAY (Mar. 18, 2018, 6:00 AM), <https://perma.cc/E4RD-ABYT> (reporting that economic opportunities for Black Americans "slowly and painfully" opened up after 1968).

239. *See id.* ("Many whites already believed that the equal opportunity movement was pushing too aggressively for change. White flight to Detroit's suburbs became a flood, ultimately costing the city of Detroit more than half its population."); Class Action Complaint, *supra* note 15, ¶ 39 (stating that the exodus of white Detroit citizens to the suburbs was "largely driven by fears of Black families moving into predominately white neighborhoods"); Atuahene, *supra* note 142, at 123 (reflecting on the significance of the 1968 Report of the National Advisory Commission on Civil Disorders in understanding the 1967 Detroit uprising).

240. *See* Class Action Complaint, *supra* note 15, ¶¶ 1, 40 (stating that Detroit was in "more than \$18 billion in present and future debt").

241. *See* Jackson Sow, *supra* note 212, at 59 (describing the City of Detroit's plan to provide suburban residents with water at a lower cost than urban residents).

242. *See generally* RAWLS, *supra* note 45.

was an impermissible breach of terms of whiteness. Post-segregation, the suburbs and their leaders still wanted Detroit's water; however, they did not want to compensate Detroit for the use thereof. Thus, they united in perpetuating a distinctly anti-Black narrative about Detroit as corrupt and criminal to persuade Detroit to subsidize suburban water delivery, even as white flight had decreased the city's population by hundreds of thousands, making water more expensive for Detroit residents.<sup>243</sup>

Because Detroit treats water and sewage as a common charge, remaining residents were on the hook for the delivery costs of water and sewage service<sup>244</sup>—meaning they would have to pay much more than they would have paid if the city were more densely populated. Though Detroit sits on the largest freshwater reservoir in the world, Detroiters have no say in how much they pay to use the water nor how much the suburbs pay them to use the water.<sup>245</sup> Detroiters' lack of the water supply and the costs of water consumption have been exacerbated by the privatization of the water.<sup>246</sup> As a result, pricing for water and sewage spikes with little notice, as it has for decades, even though water in the suburbs does not cost nearly as much.<sup>247</sup> Detroiters effectively pay white suburban residents reparations

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243. See Dana Kornberg, *The Structural Origins of Territorial Stigma: Water and Racial Politics in Metropolitan Detroit, 1950s–2010s*, 40 INT'L J. URB. & REG'L RSCH. 263, 273 (2016); Jessi Quizar, *A Bucket in the River: Race and Public Discourse on Water Shutoffs in Detroit*, 26 SOC. IDENTITIES 429, 434–37 (2020) (highlighting a “heavily racialized discourse” in favor of water shutoffs that distinguished those who are undeserving of sympathy and help because they are “lazy, unintelligent, irresponsible, conniving, thieving, criminal, and primitive”).

244. See Class Action Complaint, *supra* note 15, ¶ 44 (stating that the GLWA “uses Detroit’s water and sewer infrastructure to extend service to neighboring suburban counties”).

245. See Jackson Sow, *supra* note 212, at 57 (arguing that the formation of the GLWA transferred decision-making authority away from Detroit residents “to the suburbs”).

246. See Class Action Complaint, *supra* note 15, ¶ 42 (“Detroit’s emergency manager, as part of his purported efforts to address the city’s fiscal challenges, attempted to privatize Detroit’s water operations by selling the facilities and operations of DWSD. DWSD increased use of water shutoffs as a collection method to eliminate delinquent water accounts . . .”).

247. See *id.* at 45 (establishing that Detroit’s urban residents pay, on average, 10 percent more than their suburban counterparts).

for loss of power and proprietorship by subsidizing the cost of suburban water.

The Detroit and Flint water crises began in 2013 as former Michigan governor Rick Snyder was forcing Detroit to declare bankruptcy and submit to the governance by an emergency manager.<sup>248</sup> At the same time, Detroit elected its first white mayor in forty years.<sup>249</sup> In Flint, longstanding racial resentment over having to pay the City of Detroit more money prompted Flint officials to change Flint's water supply.<sup>250</sup> This caused the delivery of poisoned water to Flint residents,<sup>251</sup> which was subsequently covered up at the highest levels of state government.<sup>252</sup> Meanwhile, the loss of Flint's custom would cause the price of Detroit's high-quality water to rise for Detroit residents under its common charge pricing structure.<sup>253</sup> The rise in prices meant that Detroiters would not be able to pay for their

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248. See *id.* at 40–41 (explaining that Detroit filed for bankruptcy protection in 2013); see also Brie D. Sherwin, *Pride and Prejudice and Administrative Zombies: How Economic Woes, Outdated Environmental Regulations, and State Exceptionalism Failed Flint, Michigan*, 88 U. COLO. L. REV. 653, 683 (2017) (“Of all of the school districts and cities in Michigan where emergency managers were appointed, it has been estimated that all except one are majority African-American cities and school districts.”).

249. See Elliott C. McLaughlin, *Detroit Elects First White Mayor in More than 4 Decades*, CNN, <https://perma.cc/EH46-FCFM> (last updated Nov. 6, 2013, 9:22 PM) (reporting that Detroit's last white mayor, Roman Gribbs, served from 1970 to 1974).

250. See *In re Flint Water Cases*, 329 F. Supp. 3d 369, 415 (E.D. Mich. 2018) (asserting that Flint residents were deprived of their right to water); see also Jackson Sow, *supra* note 212, at 59 (“[T]he Flint water crisis was caused when Flint officials decided to change the City's water source from DWSD in 2013 to the Karegnondi Water Authority (KWA), despite the fact that the water supplied by DWSD was . . . safer than the water provided by KWA.”).

251. See ANNA CLARK, *THE POISONED CITY: FLINT'S WATER AND THE AMERICAN URBAN TRAGEDY* 145 (2018) (stating that Flint's water supply switch doubled the percentage of children with high blood lead levels).

252. See *id.* at 389 (pointing out that Bradley Wurfel, the Director of Communications for the Michigan Department of Environmental Quality, consistently dismissed studies finding that Flint's water supply was contaminated).

253. See Jackson Sow, *supra* note 212, at 59–60 (discussing the resistance to Detroit's Black governance and proprietorship of the southeastern Michigan regional water supply, and how that resistance directly contributed to both the Flint Water and Detroit Water shutoff scandals).

water.<sup>254</sup> Detroit's water bills are far higher than the average water bills throughout the United States.<sup>255</sup> Outstanding water bills were also added to homeowners' property tax assessments, which contributed to the number of homes illegally over-assessed for property taxes during the same time period.<sup>256</sup>

While it is nearly impossible to prove explicit anti-Black racist intent on the part of the relevant local, state, and federal authorities in a way that would meet the standards required by federal law, the mechanics and the impact of these scandals point to a decidedly necropolitical governance of Black people that obsesses over curbing Black power and proprietorship and expropriation of Black capital.<sup>257</sup> Wayne State University Law Professor Peter Hammer has described the water shutoffs as "strategic racism."<sup>258</sup> Rent-seeking by predominantly white, far wealthier suburbs requires that impoverished Black grandmothers pay close to two hundred dollars per month for water<sup>259</sup> and sewage to rent their own natural resources from a privatized water authority and also to subsidize the cost of the

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254. See Ferretti, *supra* note 17 (stating that approximately 33,000 homes lost water access over unpaid bills in 2014).

255. See Maria Zamudio & Will Craft, *A Water Crisis Is Growing in a Place You'd Least Expect It*, NPR (Feb. 8, 2019), <https://perma.cc/DZ4F-W366> (finding that a family of four in Detroit paid more for water than families in Chicago, Buffalo, and Phoenix in 2018).

256. See Atuahene, *supra* note 142, at 110 ("[M]any affected residents were not even supposed to be paying property taxes in the first place because they live below the federal poverty threshold and hence qualified for the Poverty Tax Exemption (PTE).").

257. See MBEMBE, *supra* note 121, at 71 (arguing that scapegoating non-white people enables the state's "murderous functions").

258. PETER J. HAMMER, *THE FLINT WATER CRISIS, KWA AND STRATEGIC-STRUCTURAL RACISM* 1 (2016), <https://perma.cc/NQ7M-SRTG> (PDF). Professor Hammer describes strategic racism as the manipulation of intentional racism, structural racism and unconscious biases for political and economic purposes and posits it as being at play in the Flint Water scandal. *Id.* at 3. Hammer has also cited strategic racism as a motivating factor for the Detroit water shutoff scandal. See Rose Hackman, *What Happens When Detroit Shuts Off the Water of 100,000 People*, ATLANTIC (July 17, 2014), <https://perma.cc/U3X7-MH4J> (quoting Professor Hammer's explanation of how redlining, white flight, and other factors were partly to blame for how the water crisis was handled).

259. The Author's mother, a grandmother living in Detroit, received a bill (on file with author) for over \$180, pursuant to a sudden rate hike, for water and sewage in August 2020. See Jackson Sow, *supra* note 212, at 44–48.



water to the suburbs.<sup>260</sup> When extraction as compensation for Black breach of the Racial Contract is no longer possible, dehumanization begins: having to collect rainwater in buckets, not being able to bathe regularly or wash one's hands, or not having tap water to drink. The city adopted the practice of painting tap taps with bright blue paint after water was disconnected.<sup>261</sup>

As the COVID-19 pandemic began to rage, the City of Detroit and State of Michigan eventually realized that water deprivation was untenable as a public health matter,<sup>262</sup> though in February 2020 the State of Michigan and the City of Detroit claimed that water shutoffs had no impact on Detroiters' health.<sup>263</sup> And yet, even after the City's implementation of a shutoff moratorium and a \$25 fee for water service restoration, activists and residents complained that water had not been restored to many households despite Governor Whitmer's executive order.<sup>264</sup> The City of Detroit blamed the discrepancy between its claims and the activists' claims on the number of vacant houses in Detroit, contending that many homes without water were not occupied, and further claiming that it had used "best efforts" to locate occupied homes without water.<sup>265</sup> Thus, if

260. See Jackson Sow, *supra* note 212, at 59 (stating that Detroit city planners consciously decided to supply suburban residents with cheaper water than urban residents).

261. See Class Action Complaint, *supra* note 15, ¶ 64 ("The spray paint is a source of humiliation and embarrassment for affected residents and their neighbors, as it serves no discernable purpose other than to constantly remind the community that the residents do not have water.").

262. See Joel Kurth, *Detroit Moving Faster to Restore Water, but Hundreds Still Without Service*, BRIDGE MICH. (Mar. 21, 2020), <https://perma.cc/YTR9-ENMN> ("Detroit is rushing to restore [water] service because of sanitation fears as the coronavirus pandemic sweeps Michigan.").

263. See Joel Kurth, *Detroit Says No Proof Water Shutoffs Harm Health. Get Real, Experts Say*, BRIDGE MICH. (Feb. 26, 2020), <https://perma.cc/VY9T-LFKM> (quoting Detroit's Chief Public Health Officer's declaration that "there is no clear data to suggest whether or not there are other health risks related to water service interruptions").

264. See *id.*; Steve Neavling, *More Than 2,500 Homes in Detroit Still Without Water After City Pledged to Restore Service Amid Coronavirus Outbreak*, Det. MetroTimes (Mar. 20, 2020, 1:14 PM), <https://perma.cc/XS62-A9CX> (listing challenges to water restoration such as "getting a response from tenants or owners of the roughly 2,500 homes without water").

265. See Sarah Cwiek, *Detroit Says It's Restored Water to Nearly Everyone Amid COVID-19*, MICH. RADIO (Apr. 20, 2020, 6:56 AM),

the blue paint was not meant to help the City of Detroit in its record-keeping, it seems very likely that the only goal of the blue paint was to humiliate the victims of their manmade crisis as well as threaten their health and wellbeing.<sup>266</sup>

In Flint, delivering poisoned water to residents and lying about the water quality was not sufficiently atrocious for local officials. Flint residents were also subjected to shutoffs for not paying for the poisoned water, even though they could not use it and had never agreed to the use of corroded pipes in the first instance.<sup>267</sup>

As of December 2021, Governor Whitmer has not put a permanent end to the water shutoff program, which means that the water shutoffs may resume whenever she determines that the state of emergency related to the COVID-19 pandemic is over.<sup>268</sup> Governor Whitmer temporarily halted the shutoffs after determining that the shutoffs placed the lives of Michiganders in jeopardy, but several days earlier, she declined to do so on behalf of Detroiters who had submitted their request for a moratorium on the basis of public health in November 2019.<sup>269</sup>

The message is clear: the creation of inhumane living conditions by the state is necessary to govern Black Detroiters,

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<https://perma.cc/MVP2-ZNPW> (quoting the statement by the Director of Detroit Water and Sewerage Department that the department used “best efforts” to locate residences without water, reconnect water services, and remedy the conditions that prevent reconnection).

266. See Class Action Complaint, *supra* note 15, ¶ 213 (“[T]he lack of water service in many residents’ homes is humiliating to residents because of Defendant Detroit’s practice of marking customers’ homes with bright blue paint when their water service is or is about to be disconnected, which leads to the stigmatization of residents.”).

267. See *In re Flint Water Cases*, 329 F. Supp. 3d 369, 385 (E.D. Mich. 2018) (stating that many Flint residents were afflicted with illness or disease, such as Legionnaires’ disease, because of contaminated water).

268. Mayor Mike Duggan has extended a temporary moratorium on water shutoffs through 2022. See James David Dickson, *Water Shutoffs Can Resume in Michigan, but Communities in No Rush*, DET. NEWS (Apr. 1, 2021, 6:05 AM), <https://perma.cc/4UKG-RK4H>; see also Jackson Sow, *supra* note 212, at 64 (recognizing that Detroit’s urban residents still lack a seat at the table concerning the shutoffs).

269. See Caroline Llanes, *Whitmer Will Not Use Executive Powers to End Detroit Water Shutoffs*, MICH. RADIO (Feb. 27, 2020), <https://perma.cc/GHC2-S9UX> (reporting that Civil Rights groups, like the ACLU, are not optimistic that Governor Whitmer will intervene to end the water shutoffs).

but such conditions will not be tolerated as long as Black suffering might create white suffering.<sup>270</sup>

### 1. Contractual Capacity and the Gaslighting of Detroit

Bolstered by the fact that the now-privatized GLWA is a public body corporate, the City of Detroit, the State of Michigan, and the federal courts continue to treat Detroiters as if they had entered into a contract for utilities with the GLWA and are simply failing to respect their bargain.<sup>271</sup> In reality, however, no such bargain has ever occurred.<sup>272</sup>

Researchers have studied the impact of racism and racist narratives on public opinion of the Detroit water shutoffs and found that anti-Black sentiments have fueled support for the shutoff program.<sup>273</sup> Researchers have also studied racist resentment of white people against Black municipal governance in Michigan, finding that such resentment contributed to the Flint water crisis as well as the Detroit water crisis.<sup>274</sup> It is noteworthy that both water scandals and the mortgage foreclosure scandal escalated over the same period of time and emerged out of the same set of transactions.<sup>275</sup> Each scandal was intentionally created via government policy and was reliant on

270. See Jackson Sow, *supra* note 212, at 64 (“Human health and hygiene of Black Detroiters is separate from the public health and safety of the state’s white body politic in the language of the order, and in reality.”).

271. See Class Action Complaint, *supra* note 15, ¶ 43 (explaining that the GLWA was “designated as a ‘public body corporate’ and it ultimately became the hub of a regional water system”); Jackson Sow, *supra* note 212, at 38 (“Detroit recognizes no right to water; instead, its leadership has made clear that water is a utility that may be enjoyed if paid for.”).

272. See Jackson Sow, *supra* note 212, at 39–40 (“Detroiters do not bargain with their local government for the rates they pay, nor have they had a say in the shutoff policy; indeed, due to disenfranchisement, they cannot.”).

273. See Class Action Complaint, *supra* note 15, ¶¶ 21–23 (arguing that Black residents “disproportionately experience water shutoffs” because 95 percent of the water shutoffs affected areas with “a population that was greater than 50% Black”).

274. See Sherwin, *supra* note 248, at 682 (explaining that state officials in Flint “made hasty decisions based on economics, giving little thought to the disproportionate impact to the community,” and that “[s]ocioeconomically disadvantaged communities have all of the burdens, but lack most of the amenities”).

275. See Atuahene, *supra* note 142, at 125 (describing the mortgage crisis in Detroit, the high mortgage foreclosure rates, and the subprime loans).

the duality of the public presence of formal law and an invisible, racist common law.<sup>276</sup>

In previous work, I asked and answered the following question: *What status do Black people hold within the City of Detroit?* I concluded that Black people had been excluded from Detroit's social contract, maintained through private, commercial contracting.<sup>277</sup> I advanced the argument that the state and local governments' persistent contentions that Detroiters were breaching their contracts with the Detroit Water and Sewerage Department (DWSD) and with the GLWA by failing to pay for water delivery are a form of ideological conditioning that provided social and political justification for the governmental shutoff policies.<sup>278</sup> The gaslighting of Detroiters is essential to the success of the water shutoff policies as depriving human beings of water is too egregious—and too dangerous—to be allowable without finding a way to hold the deprived people responsible for the deprivations.<sup>279</sup>

So goes the history of racist atrocities in the United States, with the enslavement of Africans and the massacres and dispossession of Indigenous Americans justified by the deconstruction of African and Indigenous humanity.<sup>280</sup> As people cannot be deprived of their life, liberty, and property without good reason, the solution has been to deny the humanity of the deprived.<sup>281</sup> And as life, liberty, and property are the rights of citizens, excluding classes of people from the citizenry also opens the door for otherwise impermissible deprivations.<sup>282</sup>

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276. See Jackson Sow, *supra* note 212, at 63 (“Detroit’s water shutoff crisis is an unnatural disaster, intentionally designed and executed to cause burden and suffering to people—relying upon anti-Black narratives and stereotypes to justify the policy and garner public support.”).

277. See *id.* at 48–49.

278. See *id.* at 50.

279. See *id.* at 35.

280. See Harris, *supra* note 30, at 1716 (explaining that “the origins of property rights in the United States are rooted in racial domination” and that the “*interaction* between conceptions of race and property . . . played a critical role in establishing and maintaining racial and economic subordination”).

281. See *id.* (“The hyper-exploitation of Black labor was accomplished by treating Black people themselves as objects of property.”).

282. See *id.* at 1718 (describing the slave codes that “codif[ie]d the extreme deprivations of liberty already existing in social practice” such as preventing

The pre-desegregation agreements to share Detroit's water with the surrounding suburban regions is reflective of social contracting amongst people who saw shared humanity, citizenship, needs, and interests in each other, and who were completely comfortable having collective access to and control of Detroit's natural resources as white people.<sup>283</sup> Having to share resources with or rely on Black government officials and residents for water was decidedly not part of the bargain.<sup>284</sup>

In fact, the City of Detroit's response to Detroiters' real property ownership and their property interests (to say nothing of their rights to life) in Detroit's freshwater reserves is demonstrative of Detroiters' lack of contractual capacity *as well as* the voidability of the contracts for which they do bargain.<sup>285</sup> With respect to the water shutoffs, I have previously explained that the price of water and sewerage service and delivery in Detroit is not bargained for democratically, whether by millage, referendum, or any other means of popular input. Instead, a Board of Water Commissioners votes on a budget and rate increases and simply announces when rate increases will go into effect.<sup>286</sup> To the extent that Detroiters do bargain for their water simply by being present in Detroit-based housing and consuming that water when available, such a contract would be a contract of adhesion at best.<sup>287</sup> Nor do Detroit residents have

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enslaved persons from traveling, owning property, gathering publicly, or being educated).

283. See Jackson Sow, *supra* note 212, at 59 (describing Detroit's power over the water supply and the corrupt nature of the leadership and governance prior to Detroit's racial desegregation).

284. See *id.* ("The high price that Detroiters pay for water is rooted in white resistance to . . . Black possession of real property and natural resources.").

285. See *id.* at 48 ("[T]he deprivation of due process and arbitrary treatment that my mother and her neighbors' experience results from Black Detroiters' lack of the requisite personhood/citizenship status for contractual capacity with their local government.").

286. See *id.*

287. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) (explaining how an imbalance of power between a contract's parties can create a contract of adhesion). Such a contract may be void, as per the doctrine of unconscionability. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965)

[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no

any say as to whether or not they continue to subsidize the cost of water delivery to the suburbs via the leasing agreements in place with the GLWA.<sup>288</sup> The City of Detroit's decision to imperil the health and, indeed, the lives of Detroiters by depriving them of water for years is also per se demonstrative of the government's posture that it has no duty of care to Detroiters and is not in privity to them.<sup>289</sup> Thus, Detroiters lack the capacity to enter into both sociopolitical contracts and meaningful and fair commercial contracts with the City of Detroit with respect to water delivery.<sup>290</sup>

Of course, it cannot be said that Black people never exercise their rights to contract. Indeed, Black people in the United States make purchases with their Amazon Prime memberships, enter into residential leases, place their homes up for sale, and go out to eat. It is often the case, however, that Black people's attempts to enjoy the right to contract are interrupted, undermined, or otherwise challenged.<sup>291</sup> Therefore, the question is not whether Black people can ever exercise contractual capacity, but whether Black people have a legal personhood, and therefore, a contractual capacity, on which they can always rely.<sup>292</sup> Is Black contracting imbued with, or supported by, the force of law, or failing that, the law of force?

With respect to the contracts into which Detroiters do enter into for real property, Detroit's mortgage foreclosure crisis demonstrates the City's intentional lack of regard for the legal

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knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

288. See Jackson Sow, *supra* note 212, at 35–36, 40 (“[T]he City of Detroit maintains tangible contracts with predominantly white suburbs for the lease of Detroit's water, which the suburbs enjoy at pricing subsidized by Detroit's predominantly Black, inner-city residents. . . . Detroiters do not bargain with their local government.”).

289. See *id.* at 43.

290. See *id.*

291. See, e.g., Atuahene & Hodge, *supra* note 150, at 271 (discussing the historical attacks on Black proprietorship by local governments under Jim Crow via inflation of property tax assessments).

292. See Jackson Sow, *supra* note 212, at 42 (describing the scholarship on race and legal personhood).

enforceability of the contracts by which Detroiters acquire their homes.<sup>293</sup> For years, as documented by legal scholar Bernadette Atuahene, “the City of Detroit systematically and illegally inflated the assessed value of most of its residential properties, which led to inflated property tax bills unaffordable to many homeowners.”<sup>294</sup> As a result, the Wayne County Treasurer completed the foreclosure process for one out of every four properties in Detroit between 2011 and 2015, leading to “[e]xtraordinary tax foreclosure rates and extensive dispossession” of property.<sup>295</sup> Like the water shutoff crisis, the foreclosure crisis was no natural disaster or spontaneous tragedy, but a devastating catastrophe intentionally designed by the government to extract capital from Black Detroiters.<sup>296</sup>

The water and foreclosure crises are related. Pursuant to a 2006 policy adopted by the DWSD, the City of Detroit could tack unpaid water bills onto homeowners’ property taxes.<sup>297</sup> By Michigan law, Wayne County can, and did, foreclose on homes with more than three years of unpaid bills.<sup>298</sup> Research conducted in 2016 found that between 12 percent and 26 percent of the homes foreclosed in Detroit during that five-year period had water debt attached to them.<sup>299</sup> Data reported in 2020 shows

293. See *id.* at 32 (explaining that Detroit organized the foreclosure crisis that “disproportionately impacted Black Detroiters and undermined their enjoyment of property—which was created by unconstitutional tax assessments and has resulted in thousands of Black Detroiters losing their homes”).

294. Atuahene, *supra* note 142, at 107.

295. *Id.*

296. See Jackson Sow, *supra* note 212, at 61–62.

297. See Atuahene, *supra* note 142, at 130 (“When people could not afford to pay, the delinquent water bill would attach as a lien to the home, causing further property tax foreclosures and displacement.”).

298. See Sarah Cwiek, *Citizen Research Links Detroit Water Shutoffs, Tax Foreclosures*, MICH. RADIO [hereinafter Cwiek, *Citizen Research*] (Aug. 12, 2016, 6:21 PM), <https://perma.cc/A4GV-JXCR>; Atuahene & Hodge, *supra* note 150, at 293 (“Wayne County reimburses Detroit for any property tax revenue that it fails to collect; in exchange, the county receives the right to collect the revenues (with penalties and interests) and to confiscate the home if payment is not forthcoming after three years of delinquency.”).

299. See Cwiek, *Citizen Research*, *supra* note 298 (“Citywide, 11,979 of homes that went to auction had water debt included with property taxes. In dozens of census tracts, 12–26% of the tax-foreclosed homes fell into that category.”).

that between 2010 and 2017, Detroit over-assessed homeowners in the predominantly Black city to the tune of \$600 million.<sup>300</sup>

Perpetuating the narrative of Black irresponsibility and rent-seeking has contributed not only to the popular support for the water shutoff policy, but also to the foreclosures and dispossession of Black people's homes—even when they would have been able to retain their homes but for extraordinary water bill debt (much of which is inherited with home purchase for many Detroiters),<sup>301</sup> and even when the homeowner's home was not associated with water debt at all.<sup>302</sup> The narrative that Black people do not want to pay their bills contributes to the stigma around foreclosures that has chilled debate amongst Black Detroiters who do not want their families, friends, and fellow community members to feel shame at having been subjected to foreclosure or water disconnection, even when the City of Detroit is the party at fault.<sup>303</sup> Even where proprietors have met the terms of their legally enforceable contracts for real property, the state has intervened in those private contracts, deciding not to recognize their legal validity and effectively engaging in forcible land expropriation without compensation.<sup>304</sup> All the while, to justify these land seizures, the government relies on private methods of remedy for breach—the foreclosure process—which requires that the government characterize their

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300. See Aaron Mondry, *New Report Shows Detroit's Tax Foreclosure Crisis Was Even Worse Than We Thought*, CURBED DET. (Jan. 16, 2020, 12:54 PM), [perma.cc/63WQ-DG98](https://perma.cc/63WQ-DG98).

301. For example, Professor Atuahene recounted a conversation she had with a former Detroit City Council member, who blamed failure of homeowners to file property tax assessment appeals on “Black folks,” believing that they “do not read.” Atuahene, *supra* note 142, at 142.

302. See Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 U.C. IRVINE L. REV. 847, 855 (2019) (noting that most home purchases in Detroit occur through land contracts, which are poorly regulated and often result in purchasers discovering delinquent tax debt attached to the property only after the purchase is completed).

303. See Hackman, *supra* note 258 (“Some feel tarred by a general notion of shame and culpability for not being able to meet such a bare necessity as water.”).

304. See Jackson Sow, *supra* note 212, at 43 (“Black people cannot expect the racial state to respect their tangible and commercial contracts for ownership or possession of real or personal property, including their common water supply.”).



illegal seizures of real property as the rightful remedying of a breach by the Black proprietor.<sup>305</sup>

As the extent of the housing foreclosure scandal has become apparent, the city has—as with the water scandal—continued to deny responsibility for its wrongful actions and preferred instead to lay blame on the dispossessed homeowners:

Some activists and politicians, including City Council President Pro Tem Mary Sheffield, are weighing retroactive options like financial restitution for those affected in cash payments, zero-interest home-repair loans, or free Detroit Land Bank homes.

But Mayor Mike Duggan seems less willing to consider these options. “If you’re assessed too much, there’s a whole series of measures that you can take and a lot of people took advantage of those measures,” he said in an interview on the podcast *Reveal*. “I don’t know how you go back on past years where people didn’t avail themselves of the rights. What we’re trying to do is fix it going forward.”<sup>306</sup>

The narrative of the Black rent-seeker is particularly manipulative, given that, in both the cases of Detroit’s water bills and the foreclosure scandal, actual rent-seeking by the predominantly white surrounding suburbs were a major contributing factor to the crises—from Detroit’s subsidy of suburban water,<sup>307</sup> to Wayne County’s dire fiscal straits, and its need for the revenue from foreclosures of Detroit’s real property.<sup>308</sup> In Detroit, decades of racial resentment regarding Black proprietorship in and governance of Detroit continue to

305. See Atuahene & Hodge, *supra* note 150, at 265.

306. Mondry, *supra* note 300; see Atuahene & Berry, *supra* note 302, at 865

When, however, Mayor Duggan was asked what his administration planned to do to compensate Detroit residents for assessments that were, for years, in violation of the Michigan Constitution, he said that while it is unfortunate that this occurred, all Detroit residents had an opportunity to appeal their assessments and rectify the situation, so the city is not liable for any damages.

307. See Sabourin, *supra* note 223, at 313–14.

308. See Atuahene & Hodge, *supra* note 150, at 294 (“Wayne County has been using the [Delinquent Tax Revolving] Fund to fill its chronic budget shortfalls and to recover from its recent financial emergency. Consequently, the financially distressed county has come to rely on property tax foreclosures in Detroit to stay afloat.”).

manifest in concerted efforts to destabilize the city while literally profiting off its resources and camouflaging the scheme in a haze of anti-Black rhetoric and politics.<sup>309</sup> This dynamic does more than provide a reminder of the brutality of the terms of whiteness; it also offers demonstrable evidence of the relationship between private contracting and social contracting in supporting the preservation and renegotiation of white supremacy.

## 2. Black Proprietorship as Tenancy

The City of Detroit's systematic deprivation of Black Detroiters of water and real property provides empirical evidence for the argument that Black proprietorship is not supported or protected by the state.<sup>310</sup> Indeed, the extractive predation on Black proprietors by the City of Detroit and Wayne County illustrates that the state systematically resists and undermines Black proprietorship and contracting.<sup>311</sup> Scholars and Black advocates have made claims on record widely suspected within Detroit's Black communities—that the water shutoff policy and the property tax over-assessments are strategic means by the City of Detroit to force Black Detroiters out of the city in support of the city's plans for gentrification.<sup>312</sup>

The Racial Contract cannot abide Black proprietorship and governance. Whiteness is only valuable property when it is exclusive and exclusionary, and it is only exclusive and

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309. See Quizar, *supra* note 243, at 435 (describing the racialized discourse surrounding the water shutoffs).

310. See Atuahene, *supra* note 142, at 112–15 (detailing the empirical study of Detroit's tax assessments); Atuahene & Hodge, *supra* note 150, at 270–71 (providing data pointing to the racially discriminatory effects of the assessments); Atuahene & Berry, *supra* note 302, at 877–81 (describing the data and regression results that show that “thousands of Detroit home owners—mostly African-Americans—have lost their property due to unconstitutional taxation and subsequent foreclosure”).

311. See Atuahene & Hodge, *supra* note 150, at 270–71 (“[U]nconstitutional assessments in Detroit are part of a long and sordid history of racially discriminatory property tax administration in the United States.”).

312. See Hackman, *supra* note 258 (discussing Professor Peter Hammer's view that the city shuts off water “implicitly hoping people will move” characterizing the water shutoffs as a strategic way for the government to get Black people to leave the city).

exclusionary when it maintains a monopoly on enjoyment—and legal protection—of the rights to contract and property.<sup>313</sup> Consequently, Black people are wholly dependent upon the whims of the landlords and their deputized enforcement agents. They may be removed from property at any time, via displacement, containment, or elimination—possibly meeting the fates that awaited Breonna Taylor,<sup>314</sup> Atatiana Jefferson,<sup>315</sup> or Botham Jean,<sup>316</sup> who were at home, engaged in a mundane activity or asleep when the police shot them to death; or attacked, like Vauhxx Booker<sup>317</sup> or Christian Cooper,<sup>318</sup> for their presence thereupon by white citizens harnessing their lay policing authority. The law says that one’s home is one’s castle.<sup>319</sup> The Racial Contract says that Black people have no home and cannot be at home in the United States.

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313. See Jackson Sow, *supra* note 212, at 41 (“A primary goal of the racial contract is to create a stark economic domination by white people . . .”).

314. See Amina Elahi, ‘*Sleeping While Black*’: *Louisville Police Kill Unarmed Black Woman*, NPR (May 13, 2020, 6:33 PM), <https://perma.cc/HFJ5-7BB4>.

315. See *What We Know About the Fort Worth Police Shooting of Atatiana Jefferson*, N.Y. TIMES (Oct. 15, 2019), <https://perma.cc/V2R6-ST3J> (last updated Oct. 24, 2019).

316. See Erik Ortiz & Alex Johnson, *Amber Guyger Sentenced to 10 years for Murdering Neighbor Botham Jean*, NBC NEWS (Oct. 2, 2019, 10:02 AM), <https://perma.cc/8S56-XS9U> (last updated Oct. 3, 2019, 12:53 AM).

317. See *supra* notes 1–2 and accompanying text.

318. In a now-infamous incident, a white woman named Amy Cooper threatened to call the police on a Black man by the name of Christian Cooper, informing Mr. Cooper that she was going to tell the police that he was Black and threatening her life even though she knew that he had not attacked her, knowing that making such a claim might cause Mr. Cooper to be detained, imprisoned, physically harmed, or killed based on their respective races and genders. Ms. Cooper took these actions because she objected to Mr. Cooper telling her to leash her dog in the section of New York City’s Central Park called the Ramble, where pets are required to be leashed. See Sarah Maslin Nir, *How 2 Lives Collided in Central Park, Rattling the Nation*, N.Y. TIMES (June 14, 2020), <https://perma.cc/9FCD-ZPD4> (last updated Oct. 14, 2020); Sarah Maslin Nir, *White Woman Is Fired After Calling Police on Black Man in Central Park*, N.Y. TIMES (May 26, 2020), <https://perma.cc/4732-XRJE> (last updated Feb. 16, 2021).

319. See *Weeks v. United States*, 232 U.S. 383, 390 (1914) (“The maxim that ‘every man’s house is his castle’ is made a part of our constitutional law . . .”).

*B. Detroit vs. Flint: A Tale of Two Cities*

On August 20, 2020, the State of Michigan announced that it had reached a settlement agreement in the amount of \$600 million for the survivors of the Flint water scandal.<sup>320</sup> Once divided amongst the tens of thousands of victims likely eligible to receive awards, the individual awards will likely only amount to a few thousand dollars each.<sup>321</sup> Private claims against private companies involved in the debacle and public officials, including former Michigan governor Rick Snyder, will continue.<sup>322</sup> The state's attorney general, Dana Nessel, notably dropped all criminal charges against Flint officials in 2019 and restarted a criminal investigation, ultimately indicting former Governor Rick Snyder and eight other former officials on forty-one criminal counts in early 2021.<sup>323</sup>

The contrasting postures of the State of Michigan to the cities of Flint and Detroit regarding their respective water scandals may provide helpful insights into how social contracting shapes the relationship and duties of governments towards their citizens. I contend that the State of Michigan has acknowledged that it is in privity with the people of Flint and currently in the process of recognizing the residents of Flint as citizens and members of the body politic, with whom the state has breached its social contract. However, I also acknowledge the continued and competing presence of the effects of racial contracting in Flint, which have manifested in the form of water

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320. See Julie Bosman, *Michigan to Pay \$600 Million to Victims of Flint Water Crisis*, N.Y. TIMES (Aug. 19, 2020), <https://perma.cc/8MY4-32HE> (last updated July 29, 2021).

321. See Paul Eegan, *Michigan to Pay \$600M in Flint Water Crisis Settlement; Victim Compensation Fund Created*, USA TODAY (Aug. 20, 2020, 11:24 AM), <https://perma.cc/D8AA-5RAZ> ("Flint resident Nayyirah Shariff, director of the grassroots group Flint Rising, called the settlement 'disappointing' and 'not at all satisfactory.' 'I have seizures now, and because I'm an adult, I wouldn't probably get even \$6,000,' Shariff said."); Ken Haddad, *Flint Water Crisis Investigation: Here's Who Was Charged*, CLICK-ON-DETROIT, (Jan. 14, 2021, 3:26 PM), <https://perma.cc/TN7T-89JV>.

322. See Bosman, *supra* note 320.

323. *Id.* Nessel indicted nine former officials in early 2021. Brakkton Booker, *Ex-Michigan Gov. Rick Snyder And 8 Others Criminally Charged in Flint Water Crisis*, NPR (Jan. 14, 2021, 6:20 PM), <https://perma.cc/5WH8-DAE6>; Ken Haddad, *Flint Water Crisis Investigation: Here's Who Was Charged*, CLICK-ON-DETROIT, (Jan. 14, 2021, 3:26 PM), <https://perma.cc/TN7T-89JV>.

shutoffs that took place even after the Flint water scandal had been uncovered.<sup>324</sup>

1. Toward a Theory of a Breached Social Contract?

The Flint settlements offer the opportunity to propose a counter-theory to the theory of Black exclusion from social contracting, and thus, from the state. The State of Michigan's recognition of the unlawful harms to the people of Flint suggests a recognition of Flint residents' personhood and citizenship, and therefore their rightful property interest in clean, safe water.<sup>325</sup> Has the state not simply breached the terms of its social contract vis-à-vis Black people in America?

Despite an arguably paltry settlement amount, the fact that a settlement has been reached and that a criminal investigation into the water crisis and subsequent coverup is taking place draws a stark contrast to the governmental responses to the Detroit water crisis. The criminal investigation and the civil settlement acknowledge a contractual relationship between Flint residents and the City of Flint and the State of Michigan.<sup>326</sup> The settlement amount functions as a remedy for a contractual breach.<sup>327</sup>

Conversely, is it unlikely that the water scandal could have happened, and over the course of such a long period of time, were Flint not so heavily populated by Black people. Moreover, the

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324. See Zahra Ahmad, *Flint City Council Votes to Eliminate \$75 Water Shut Off Fee*, MLIVE (Nov. 29, 2019, 4:10 PM), <https://perma.cc/LC74-SCLL> (“There were 7,615 residences where water was shut off due to nonpayment in the fiscal year 2018, according to Flint’s Director of Public Works Rob Bincsik. There was \$571,350 in revenue generated from terminating water service for nonpayment of water bills, according to Bincsik.”); Anthony Baxter, *Opinion, Flint Residents are Being Punished for Not Paying for Poisoned Water*, GUARDIAN (Apr. 4, 2018, 10:28 AM), <https://perma.cc/LY7E-PNMW> (discussing Flint’s disconnection of water supply to victims of the Flint water scandal for nonpayment of water bills).

325. See Julie Bosman & Mitch Smith, *Gov. Rick Snyder of Michigan Apologizes in Flint Water Crisis*, N.Y. TIMES (Jan. 19, 2016), <https://perma.cc/Q8HQ-HBSK>.

326. See Rhea Suh, *A Major Step Forward in the Flint Water Crisis*, NAT. RES. DEF. COUNCIL (Mar. 28, 2017), <https://perma.cc/M5W4-55KV> (discussing the Flint settlement).

327. See *id.* (noting that the settlement “guarantees that the state kicks in \$67 million to help fix mistakes” and “extensive drinking water—testing programs far beyond what is required by the law”).

length of time it has taken for the smallest level of accountability to arrive is an indicator of the extent to which even severe crimes and violations perpetuated by the state against Black people are still largely regarded as little more than negative externalities. Despite attempts to bring justice to the people of Flint, it is clear that whiteness is still the law of the land, and a key ingredient of commercial and social contracting authority in the State of Michigan.

In addition to delivering poisoned water to Flint residents, the City of Flint has demanded that Flint residents pay for the poisoned water.<sup>328</sup> Like Detroit, many Flint residents are impoverished and would not have been able to pay their water bills under any circumstances.<sup>329</sup> Moreover, demanding payment for water that had already been found to be poisoned demonstrates the relentlessness and brutality of racial contracting and its accompanying politics of racialized property extraction.<sup>330</sup> As of 2018, close to one hundred Flint homes were being subjected to water disconnections by the City of Flint per day, including in the cold of winter.<sup>331</sup> Among the residents whose water was shut off were those who had already become ill from the poisoned water.<sup>332</sup>

The Detroit and Flint water scandals are related, and both are directly rooted in “white flight”—the refusal of white residents to share territory or government with Black people—from both cities, which created water affordability crises. The Flint water crisis was caused when Flint officials decided to change its water source from the DWSD to save

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328. See Baxter, *supra* note 324.

329. See *Poverty in Flint, Michigan*, WELFARE INFO (2017), <https://perma.cc/47FV-H9BM> (“One out of every 2.4 residents of Flint lives in poverty.”).

330. See Baxter, *supra* note 324 (discussing a resident of Flint who refuses to “pay for poison”).

331. See *id.* (“Up to 90 homes a day are being shut off. And it’s still winter.”).

332. See *id.*; Atuahene, *supra* note 142, at 122 (noting that white Detroiters refused to share territory with Black Detroiters, resisting efforts at integration with violent means, and fleeing the City with their social and financial capital when efforts to keep Black people out of white neighborhoods failed).

money in 2012 and 2013.<sup>333</sup> Doing so caused rates to increase in Detroit, which in turn made Detroiters unable to pay their steadily increasing water bills.<sup>334</sup> Flint officials bought into the anti-Black narrative that Detroit, which provided some of the best quality water in the United States, was cheating them, and the officials decided to build their own pipeline to the Karegnondi Water Authority.<sup>335</sup>

In more recent years, after the City of Flint restored its relationship with the GLWA (and began once again to source its water from Detroit), the City has reversed some of its most onerous billing policies and has acknowledged a need to be a “compassionate” city with respect to water service and delivery.<sup>336</sup> Like Detroit, Flint has suspended its water shutoff policy.<sup>337</sup> Unlike Detroit, Flint has made the decision to cover the increased cost of water from the rise in rates approved by the GLWA and not pass those increased costs along to Flint

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333. See Jackson Sow, *supra* note 212, at 59 (“[T]he Flint water crisis was caused when Flint official decided to change the City’s water source from DWSD in 2013 to the Karegnondi Water authority . . .”); Quizar, *supra* note 239, at 430–31 (describing the context and cause of the mass water shut off). See generally CLARK, *supra* note 251.

334. See CLARK, *supra* note 251, at 15–17 (describing the events leading to the change in the Flint water source, and some of its financial implications).

335. See Kornberg, *supra* note 243, at 275 (“[S]uburban charges against the water department administration contributed to characterizations of the City of Detroit as administratively incompetent, discriminatory—and ultimately criminal and corrupt. White suburban politicians thus drew on existing racial stereotypes to deflect their responsibility . . .”); Quizar, *supra* note 239, at 435–38 (detailing the reliance on anti-Black stereotypes by Detroit officials to advance a narrative in Detroit that Detroiters could pay their water bills but chose not to); CLARK, *supra* note 251, at 15 (describing how the switch to the Karegnondi Water Authority came about).

336. See Steve Carmody, *Flint Won’t Charge Residents for Previously Unmetered Water Use*, MICH. RADIO (Feb. 8, 2020, 9:57 AM), <https://perma.cc/2K96-M6AN>.

337. *Flint Continues Ban on Water Shutoffs After State Order Expires*, ABC12 NEWS (Mar. 31, 2021, 7:32 PM), <https://perma.cc/H9DN-M4GK>.

residents.<sup>338</sup> Detroit could do the same but so far chosen otherwise, hiking water rates for Detroiters in 2021.<sup>339</sup>

## 2. Social Contracting, Tort, and Criminal Law

Whether or not the State of Michigan is acknowledging the breach of an inclusive social contract with respect to the Flint residents whose water was poisoned, or is instead acknowledging the existence, salience, and impact of the Racial Contract on the victims of the Flint water scandal, the acknowledgment of the wrongs done to the people of Flint is a potential step toward justice for them. The discussion of the camouflaging of human rights abuses by governments in private ordering uses contract theory as a meaningful prism of analysis, but the use of contract theory should also be regarded as a point of departure for scholars and advocates who are also interested in the ways the law can effectuate racial justice and reparatory outcomes for race-based human rights violations.<sup>340</sup> Contract theory is extremely useful for identifying the machinery of structural and institutional oppression, as well as for identifying governments' cost-benefit analyses, which provide insight into whether or not government-sanctioned human rights abuses are the results of error and incompetence, or of intentional actions and policies with foreknowledge of the human cost of its decision-making.<sup>341</sup>

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338. See Zahra Ahmad, *Water Rates Go Up in Flint, but Residents Won't Pay More*, MLIVE (June 19, 2019, 1:29 PM) <https://perma.cc/EQ39-E5B5> (last updated June 19, 2019, 2:06 PM) ("The city's rate . . . will increase . . . City officials stated there will not be an increase in consumer water rates, however.").

339. See James David Dickson, *Price Hikes for Metro Detroit Water Bills to Kick in July 1*, DET. NEWS (June 29, 2021, 10:11 AM), <https://perma.cc/HHT2-DWNP> (noting that rates are set to increase by more than 1.5 percent for water and decrease by 0.6 percent for wastewater).

340. See Jackson Sow, *supra* note 212, at 40

Contract theory provides a valuable prism of analysis for scholars seeking to understand the predatory city . . . [and] provides insight into the interests of the bargaining parties, and how they negotiate and maintain sociopolitical orders, as it also reveals the presence of intolerable cost and inefficiencies resulting from the bargained-for agreements.

341. *Id.*



The State of Michigan has taken a step further with respect to the Flint water scandal. It has recognized the commission of tortious harm against Flint residents and the breach of a duty owed to the people of Flint by the State of Michigan.<sup>342</sup> The civil settlement can be regarded as a remedy for the breach of contractual duties owed by a government in privity with all of its citizens, as well as remedy for the breach of the government's duty of care. The acknowledgement of civil liability by the State of Michigan to Flint residents also opens the door to analysis of the government's duties using criminal law. Future work on racial contracting will move beyond contract theory to center the application of tort and criminal law as means of reparative justice for race-based human rights abuses committed by the government that are not easily reached by extant antidiscrimination law.

*C. Race, Contract, and the Courts: Comcast Corp. v. National Association of African-American Media*

How, then, should readers understand the reliance of a large proportion of the American population on the formal revocation of white supremacy in the law? How does one explain such Black luminaries as Barack Obama, Oprah Winfrey, Beyoncé, Kamala Harris, Clarence Thomas, and LeBron James? Critics of this Article's central thesis may claim that the period of Reconstruction was a definitive rescission of the nation's founding racial contract, with the Civil Rights Act of 1866 establishing a new antiracist social contract.<sup>343</sup> After all, Black

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342. Whether an action sounds in tort or contract is often unclear, as both tort and contract law involve breaches of duties. See John G. Shram, *Contract Law—The Collision of Tort and Contract Law: Validity and Enforceability of Exculpatory Clauses in Arkansas*, *Jordan v. Diamond Equipment*, 2005 WL 984513 (2005), 28 U. ARK. LITTLE ROCK L. REV. 279, 279 (2006)

[I]n some situations the line separating contracts from torts is . . . an uncertain, and at times, confusing area shaded in gray . . . . The issue at the intersection of contract and tort law is whether such a contract remains enforceable under contract law, or whether the contract violates tort law and is therefore void as against public policy.

343. See *The Civil Rights Bill of 1866*, U.S. HOUSE OF REPRESENTATIVES, <https://perma.cc/644A-HRW2> (highlighting various features of the Civil Rights Act, including the grant of full and equal benefits to all citizens, and the grant of citizenship to all persons born in America, except for American Indians).

Americans do have the formal legal right to engage in commercial contracting for goods, services, and property; many Black American adults do have the right to vote and may also be elected to hold public office; and, as a formal and official matter, Black people may live in the same neighborhoods and attend the same schools as white people.<sup>344</sup>

To such critics I offer, as rebuttal and in addition to the case studies I present in Part III, Atatiana Jefferson,<sup>345</sup> Breonna Taylor,<sup>346</sup> and the efforts of the GOP to invalidate the votes cast by African-American voters in Detroit, Philadelphia, and Atlanta after the November 2020 Presidential election.<sup>347</sup> I offer, as additional rebuttal, the Black Americans who will disproportionately face eviction and foreclosure due to the economic effects of the COVID-19 pandemic and the refusal of the federal government to offer them meaningful assistance to keep them in their homes.<sup>348</sup> Despite the notable achievements of many, there is no Black American who can rely on a right to due process in the United States—including the right of authority over and within the property they possess.<sup>349</sup> Those Black persons in America who do assert their rights to contract and proprietorship do so in breach of the social contract, and such breaches—when they are perceived to be excessive—constitute what Locke considered to be the failure of the state and trigger rebellion among the contracting parties.<sup>350</sup>

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344. See *id.* (“The legislation granted all citizens ‘full and equal benefits of all laws and proceedings for the security of persons and property.’”).

345. See *What We Know About the Fort Worth Police Shooting of Atatiana Jefferson*, N.Y. TIMES (Oct. 15, 2019), <https://perma.cc/JRR7-XHFB> (last updated Oct. 24, 2019).

346. See Oppel, *supra* note 228.

347. See *supra* note 211 and accompanying text.

348. See Yung Chun & Michal Grinstein-Weiss, *Housing Inequality Gets Worse as the COVID-19 Pandemic Is Prolonged*, BROOKINGS INST. (Dec. 18, 2020), <https://perma.cc/XW9D-XLHE> (“[D]ata from our recent survey indicates that the impact of COVID-19 on homeowners not only still exists, but it has significantly worsened, especially among Black and Hispanic households and young adults.”).

349. See Jackson Sow, *supra* note 212, at 45 (“Despite formal guarantees to the contrary, [Black Detroiters] had no right to expect dues process, responsive or competent government, dignity, decency or the basic ability to sustain our lives through consumption of water.”).

350. See John O’Toole, *The Right of Revolution: An Analysis of John Locke and Thomas Hobbes’s Social Contract Theories* (May 2011) (B.A. thesis,

The United States Supreme Court's unanimous ruling in *Comcast Corp. v. National Association of African-American-Owned Media*<sup>351</sup> stands as evidence that: the terms of whiteness are still in force; antidiscrimination law persistently fails to avail the rights of Black people, including those seeking to protest the denial of their rights to enjoy contract and property; and that the laws, and the courts enforcing them, actually affirmatively sustain the terms of whiteness by using the law as both a mirage of remedy and a barrier to remedy for Black people seeking to assert their rights to commercial and social contract.<sup>352</sup>

Byron Allen, a Black Detroit-born and Los Angeles-bred standup comedian-turned-media executive, and pertinently, the Chairman and CEO of Entertainment Studios, brought a \$20 billion suit against Comcast Corporation.<sup>353</sup> Allen brought the suit pursuant to § 1981 of the Civil Rights Act of 1866, alleging that Comcast refused to enter into contract with Entertainment Studios due to anti-Black racial discrimination.<sup>354</sup> Comcast refuted Allen's allegations, claiming that the failure to enter into contract after years of negotiations was "an ordinary business grievance masquerading as a racial discrimination claim,"<sup>355</sup> though Comcast repeatedly refused to hold meetings or entertain serious negotiations concerning a carriage contract, and representatives had directed derogatory, anti-Black language at Black protesters protesting against Comcast. The Central District of California dismissed Allen's suit without prejudice in August 2015, allowing Allen to file amended claims,

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Boston University), <https://perma.cc/4RML-BF8E> (PDF) ("[I]f the sovereign rebels against the original social contract, he returns the people to a state of war. He forfeits his power over them, and they can then 'revolt' . . .").

351. 140 S. Ct. 1009 (2020).

352. See *id.* at 1011 ("A § 1981 plaintiff bears the burden of showing that the plaintiff's race was a but-for cause of its injury, and that burden remains constant over the life of the lawsuit.").

353. *Id.* at 1013; see Tucker Higgins, *Comcast Poised to Beat \$20 Billion Race Discrimination Case at Supreme Court*, CNBC (Nov. 13, 2019, 11:33 AM), <https://perma.cc/ZT3J-2PYQ>.

354. See *Comcast*, 140 S. Ct. at 1013.

355. Memorandum in Support of Motion to Dismiss Plaintiffs' Complaint by Defendants at \*9, *Nat'l Ass'n of African-American Media v. Comcast Corp.*, No. 2:15-cv-01239-TJH-MAN (C.D. Cal. Feb. 20, 2015), 2015 U.S. Dist. Ct. Motions LEXIS 10.

before entering final judgment for Comcast.<sup>356</sup> Allen appealed the dismissal to the Ninth Circuit Court of Appeals, which rejected Comcast's claim that it had editorial discretion to select among the channels it carried, overturning the district court's dismissal.<sup>357</sup> The Supreme Court granted Comcast a writ of certiorari, for which Comcast petitioned, in June 2019.<sup>358</sup> Comcast argued that Allen needed to demonstrate that race was the but-for reason, or the sole deciding factor, for why Comcast did not enter into contract with Entertainment Networks, as opposed to the "motivating factor" analysis upon which the Ninth Circuit had relied.<sup>359</sup> On March 23, 2020, the Supreme Court sided with Comcast in an opinion by Justice Gorsuch, in which all justices joined except for Justice Ginsburg, who wrote a separate opinion that concurred in part and joined in the judgment.<sup>360</sup>

The decision was a blow to mixed-motive suits, which allow plaintiffs to successfully establish racial discrimination if they can demonstrate that a respondent acted with a combination of reasons for an adverse action, some of which were unlawful.<sup>361</sup> The Supreme Court previously ruled that victims of employment discrimination might prevail in actions using the mixed-motive rule in its 1989 *Price Waterhouse v. Hopkins*<sup>362</sup> decision, but as the Court has become decidedly more conservative, it ruled against expanding the use of the mixed-motive rule beyond the employment context on two

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356. See *Nat'l Ass'n of Afr.-Am.-Owned Media v. Comcast Corp.*, CV 15-o-1239 TJH (MANx), 2015 U.S. Dist. LEXIS 104012, at \*1, \*5 (C.D. Cal. Aug. 15, 2015).

357. *Comcast Corp. v. Nat'l Ass'n of Afr.-Am.-Owned Media*, 743 F. App'x 106, 107 (9th Cir. 2018).

358. *Comcast Corp. v. Nat'l Ass'n of Afr.-Am.-Owned Media*, 139 S. Ct. 2693, 2694 (2019).

359. See *Comcast*, 915 F.3d at 623 ("Charter argues that the Supreme Court's decision in two discrimination cases requires us to apply a but-for causation standard to § 1981 claims.").

360. See *Comcast*, 140 S. Ct. at 1019–21 (Ginsburg, J., concurring in part).

361. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) ("An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.").

362. See *id.* at 258 (finding in favor of the plaintiff in an antidiscrimination case under the mixed-motive doctrine).

occasions<sup>363</sup> before ruling against Allen.<sup>364</sup> Remarkably, the Court’s liberal wing sided with the conservative justices, with Justice Ginsburg indicating that she joined with her colleagues’ judgment—despite her reservations concerning the but-for test, which she found “ill suited to discrimination cases and inconsistent with tort principles”<sup>365</sup>—because of *stare decisis*.<sup>366</sup> Commentators have noted that the liberal justices have often complained of the conservative justices’ lack of respect for precedent, as they more frequently overrule past decisions of the Court, and that the liberal justices appear to have sacrificed the mixed-motive rule in the hopes of perhaps preserving other antidiscrimination protections against conservative overrule in the future.<sup>367</sup>

In an ironic end to Allen’s suit, Allen and Comcast reached an out-of-court settlement agreement and agreed to a carriage contract after the Supreme Court’s decision to grant Comcast’s motion to dismiss.<sup>368</sup> Allen’s suit demonstrates just how difficult it is for plaintiffs to prevail in racial discrimination suits, even using laws purportedly enacted to eradicate racial discrimination and provide legal remedy to those victimized thereby.<sup>369</sup> Indeed, racial discrimination may occur entirely subconsciously and may only be evidenced by the sort of

363. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) (holding that retaliation claims brought under Title VII must be proven using the but-for causation standard); *Jack Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (holding that a plaintiff bringing a disparate-treatment claim under the ADEA must prove that claim using the but-for causation standard).

364. See *Comcast Corp. v. Nat’l Ass’n of Afr.-Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020).

365. See *id.* at 1019–20 n.1 (Ginsburg, J., concurring in part).

366. See *id.* at 1020 n.1 (“I recognize, however, that our precedent now establishes this form of causation as a ‘default rul[e]’ in the present context.”).

367. See Ian Millhiser, *The Supreme Court Handed Down a Unanimous Decision That Bodes Ill for the Future of Civil Rights*, VOX (Mar. 25, 2020, 8:00 AM), <https://perma.cc/8Q7H-HP76>

The court’s liberal minority . . . finds itself shouting into a void that the principle of *stare decisis* is not being respected. . . . The most likely explanation is that they fear their conservative colleagues plan to overrule many seminal decisions in the future . . . .

368. See Cynthia Littleton, *Byron Allen and Comcast Settle Racial Discrimination Lawsuit, Set Carriage Deal for 3 Channels*, VARIETY (June 11, 2020, 7:00 AM), <https://perma.cc/V8XG-R6MX>.

369. See *Comcast*, 140 S. Ct. at 1013.

empirical evidence Allen provided of Comcast's carriage fees.<sup>370</sup> Moreover, few respondents will be unsophisticated enough to make it clear to a putative plaintiff or court that it is engaging in racial discrimination specifically, and only, on the basis of the plaintiff's race, even where it has done so.<sup>371</sup> However, even as the society better understands systemic, structural, and institutional forms of racism,<sup>372</sup> adjudication in the nation's federal courts has actually increasingly undermined antidiscrimination complainants by relying on formalism and insurmountably high standards of proof.<sup>373</sup> The *Comcast* ruling makes the successful establishment of a racial discrimination claim under § 1981 virtually impossible, which means that Black people's formal right to contract is essentially unsupported by the force of public law.<sup>374</sup> In so doing, the courts continue to give force to the invisible common law of whiteness while making public presentations of a commitment to racial equality under the law.<sup>375</sup> If the Civil Rights Act of 1866 was meant to mark the execution of a new social contract upholding principles of antiracism, *Comcast* demonstrates that such a

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370. See *Nat'l Ass'n of Afr.-Am.-Owned Media v. Comcast Corp.*, 915 F.3d 617, 621 (9th Cir. 2019) ("Plaintiffs' amended complaint also included direct evidence of racial bias. In one instance, Singer allegedly approached an African-American protest group outside Charter's headquarters, told them 'to get off of welfare,' and accused them of looking for a 'handout.'").

371. See Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 542–43 (2021) (arguing that the companies engaging in racial profiling will be shielded from equal protection claims by producing public statements that are "racially benevolent").

372. See HAMMER, *supra* note 258, at 1–3. While Professor Hammer's paper is proof of the updated knowledge available concerning the nature, mechanisms, and manifestations of racism, he acknowledges that many members of the public still maintain that racism can only exist when it is interpersonal and intentional. See *generally id.*

373. See Millhiser, *supra* note 367 ("*Comcast* . . . extends two prior decisions that made it harder for some plaintiffs to prevail in federal court.>").

374. See *Comcast Corp. v. Nat'l Ass'n of Afr.-Am.-Owned Media*, 140 S. Ct. 1009, 1014–15 (2020) ("[A] plaintiff bears the burden of showing that race was a but-for cause of its injury. And while the materials the plaintiff can rely on to show causation may change as a lawsuit progresses from filing to judgment, the burden itself remains constant.>").

375. See *id.* at 1014, 1011 (adopting a but-for test, noting that though the Ninth Circuit did not hold that a § 1981 claim required but-for causation, other circuits disputed that interpretation).

contract is illusory at best, and actually provides necessary cover to the Racial Contract while gaslighting putative and actual Black plaintiffs into believing that their experiences with racism and its cost are simply not racist enough.

#### IV. REVOKING THE RACIAL CONTRACT

Antidiscrimination law has, thus far, largely failed to reach the abuses described in this Article because under the law, disparate impact on Black people—empirical proof of harm—is worth less than explicit proof of racist discriminatory intent.<sup>376</sup> The Racial Contract demonstrates the permanent inadequacy of U.S. antidiscrimination law to reach complex issues of structural racism or racist, necropolitical schemes of governments that are sophisticated enough to avoid explicitly racist reasoning and discourse.<sup>377</sup> The ACLU complaint on behalf of the people of Detroit, for example, is nearly one hundred pages long.<sup>378</sup> It is comprehensive and replete with empirical data making the case that the shutoffs have disparately impacted Black people, in support of their state and federal civil rights claims.<sup>379</sup> This may not be sufficient to prove that the City of Detroit unlawfully abridged the rights of the Detroiters impacted by the shutoffs. The standards of review are structured so that even in the face of undeniable evidence of racist impact, the court may determine the relevant governmental body had lawful interest in carrying out the water shutoffs.<sup>380</sup>

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376. See Leong, *Enjoyed by White Citizens*, *supra* note 70, at 1467

In the context of the Equal Protection Clause, for instance, the Court has held that plaintiffs must show discriminatory intent to prevail. Legal scholars have long criticized the discriminatory intent requirement, arguing that the requirement does not capture . . . serious disparities that cannot be traced to a smoking gun of discriminatory intent.

377. See Jackson Sow, *supra* note 212, at 30 (“The Declaration of Independence states that all men are created equal; the racial contract limits this to white men with property.”).

378. See *generally* Class Action Complaint, *supra* note 15.

379. See *id.* ¶¶ 1–23 (stating the Brookings Institute found that ninety percent of the city’s zip codes with the highest number of confirmed COVID-19 cases were populations that were at least 80 percent Black).

380. See *id.* ¶¶ 260–64 (negating Detroit’s claim that its actions furthered a legitimate government interest).

Contract theory is a helpful prism through which American scholars can evaluate the gaps between the standards of care that the American government at the federal, state, and local levels owes the American citizenry and the lack of care it delivers to Black and Indigenous people. Contract theory is more helpful in locating the motivations of government to prey on Black and Indigenous people, extracting resources they enjoy, possess, and manage, and expropriating them for the benefit of white individuals, the state, and corporations—all of whom together form the Racial State. Though lawyers can do little to change the applicable standards of review in antidiscrimination actions, they can exploit the social and political momentum coming from the public's reaction to the revelations of the terms of whiteness. Using contract theory as a prism of analysis serves to measure the harm caused by the state's expropriation of Black property and its continued refusal to respect Black commercial and social contracting authority, for the purposes of demanding redress and reparation. This Part of the Article proposes strategies for divestment from whiteness as a means of sociopolitical organization and revocation of the contract of whiteness.

#### A. *Interpersonal Social Action*

In June 2020, a white woman named Susan, but now known on social media channels as “Permit Karen,” was captured on now-viral video harassing her Black neighbors, both of whom are professors of law, for constructing a patio on their own property in Montclair, New Jersey.<sup>381</sup> Much of the exchange was emblematic of other publicized confrontations of Black people by white people who feel that the Black people are enjoying their rights to contract or property in a way—trespassing upon the terms of the racial contract—of which the white person does not approve.<sup>382</sup> Susan objected to her neighbors' construction of a

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381. Erik Hawkins, *Watch: 'Permit Karen' Calls Cops on Neighbors in Montclair, New Jersey*, HEAVY, <https://perma.cc/RSB2-D7TJ> (last updated June 30, 2020, 11:38 PM).

382. See, e.g., Mihir Zaveri, *Video Shows Black 14-Year-Old Falsely Accused of Theft in a SoHo Hotel*, N.Y. TIMES (Dec. 27, 2020), <https://perma.cc/76P2-ESRW> (last updated Jan. 8, 2021) (reporting a woman falsely accusing a teenager of taking her phone caught on video by the teen's father).



patio on their own backyard.<sup>383</sup> She reportedly trespassed onto her Black neighbors' property on a number of occasions to harass them regarding the same, demanding to know if the neighbors had a permit for the work and expecting them to respond to her and otherwise submit to her authority as a white woman.<sup>384</sup> When Susan's neighbors asked her to leave their property, Susan decided to call the police and accuse Professor Hayat of having assaulted her, though he had not touched her.<sup>385</sup> Professor Hayat videotaped the interaction.<sup>386</sup> Remarkably, a number of other white neighbors, who were witnessing the interactions, stepped in to defend the Black couple and went out of their way to reject Susan's account of the interaction.<sup>387</sup> In doing so, they completely breached the terms of whiteness.

Increasingly widespread social discomfort over the harassment of Black people over their occupancy of property and their assertions of their rights to engage in contract has led to sweeping social and legal changes. A legislator in San Francisco introduced a bill named the Caution Against Racially Exploitative Non-Emergencies (CAREN) Act on July 8, 2020,<sup>388</sup> which would outlaw the racist weaponization of law enforcement to terrorize or harass people based on their race.<sup>389</sup> Similar, but less cleverly named, legislation has been introduced in other jurisdictions.<sup>390</sup> The lesson is clear: persistent and

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383. Hawkins, *supra* note 381.

384. *Id.*

385. *Id.*

386. The videotape depicts Susan calling the police and making false allegations. *See id.*

387. *Id.*

388. *See* S.F., CAL., POLICE CODE art. 9, § 637 (2020) (prohibiting contacting police to deprive another person of certain rights based on their "actual or perceived race, color, ancestry, ethnicity, national origin, place of birth, sex, age, religion, creed, disability, sexual orientation, gender identity, weight, or height").

389. The CAREN Act is intended to deter calls to police that are improper and racially motivated. *See* Evan Nicole Brown, *Will It Take a Clever Acronym to Stop Racially Motivated 911 Calls?*, N.Y. TIMES (July 24, 2020), <https://perma.cc/53BH-RBMW>.

390. *See* Alisha Ebrahimji & Amanda Jackson, *San Francisco's 'CAREN Act,' Making Racially Biased 911 Calls Illegal, Is One Step Closer to Becoming a Law*, CNN, <https://perma.cc/67NM-RNP4> (last updated Oct. 20, 2020, 11:54 PM).

intense social agitation, especially by the beneficiaries of whiteness, is an effective tool in demanding that the racial contract be replaced with an antiracist social contract.

### B. *Politics and Possibilities*

Politics changes the law more efficiently than the law changes politics. American law is, as noted by Frances Lee Ansley, resistant to transformative change, and is resistant by design to preserve a particular sociopolitical and economic order commonly known as white supremacy.<sup>391</sup> Politics is, however, a realm within which the terms of whiteness may be rescinded efficiently and effectively.

Racial contracting is not an activity that is restricted to people raced as white; however, even as Black people remain excluded from America's social contract, nothing prohibits them from contracting amongst themselves and allies determined to build a new society with new notions of justice and laws.<sup>392</sup> In fact, the centuries-long assertions by non-white people in the United States of their rights may be viewed as interference with the Racial Contract or as the negotiation of an antiracist social contract amongst a willing antiracist coalition. As progressive and radical groups have rejected the idea that America is a just and fair society, antiracist racial contracting has, like the Racial Contract, become increasingly visible and potent.

Antiracist racial contracting can take a number of forms but must always involve conscious resistance to white supremacy through contracting and proprietorship, in order to properly assert Black personhood and citizenship.<sup>393</sup> Organized

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391. See Ansley, *supra* note 86, at 997, 1031 (characterizing American law as anti-redistributionist and determining that an end to racism will require grassroots, multiracial social action, or "participation and involvement of people, black and white, throughout the lower ranks of our society").

392. See, e.g., Arielle Mitropoulos, *Supporting Black Businesses as Means to Combat Racism Grows in Momentum*, ABC NEWS (June 19, 2020, 4:07 PM), <https://perma.cc/ULS4-N8EP> ("Supporting black-owned businesses helps not just the business, but the entire communities at the center of the current demonstrations.").

393. See Matt Schrage, *Rousseau and Locke on Property and the State*, MATT SCHRAGE (Apr. 26, 2018, 4:39 PM), <https://perma.cc/BT3X-MXV4>. While Locke associated property rights as natural to humanity, and thus connected to natural personhood, Rousseau viewed property rights as the creation of the state and only existing pursuant to social contract. *Id.* Whether one agrees

campaigns encouraging people to (sometimes exclusively) support Black-owned and Indigenous-owned business, for example, are ways that people—particularly Black and Indigenous people—have leveraged their enjoyment of the rights to contract and their rights to acquire and sell property (in the form of goods and services).<sup>394</sup> While some individuals support these businesses as a way to support Black and Indigenous entrepreneurs' participation in the marketplace, develop community and multigenerational wealth, and accumulate property and power, others will seek to contract exclusively with Black or minority-owned businesses as a way to divest from an American economy premised upon white supremacy and anti-Black/Indigenous dispossession.

In future work, I look forward to analyzing another manifestation of antiracist racial contracting: that of Black organizers and community members who voted to oust the Trump administration in 2020. By asserting and promoting the rights of Black people to political proprietorship, Black community organizers engaged in formidable voter turnout and election protection campaigns for the sole purpose of defeating Donald Trump and his explicitly white supremacist platform.<sup>395</sup> These Black organizers took a leading role in both assembling a nationwide, multiracial, and otherwise diverse coalition of voters, and in galvanizing Black voters to negotiate amongst

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with Locke or Rousseau regarding the origin of property rights, it follows that the protection of the right of Black people to property ownership and possession is requisite to their natural personhood, political personhood, and citizenship/privity with the state.

394. See Cortne Bonilla, *Black-Owned Businesses Kept Up That Same Energy. Did You?*, REFINERY 29, <https://perma.cc/9MPL-8QJX> (last updated Sept. 1, 2020, 9:37 AM) (discussing the significant, but possibly temporary, uptick in support for Black-owned businesses in the aftermath of George Floyd's killing); Gene Demby, *Activists Are Pushing for Consumers to Support Black Businesses. Is it Sustainable?*, NPR (June 26, 2020, 4:58 AM), <https://perma.cc/82RH-UQ6K> (discussing support of Black businesses by Black patrons as a longstanding act of resistance via attempts to build independent community wealth); Mitropoulos, *supra* note 392 (discussing the uptick in widespread, multiracial support for Black businesses after George Floyd's death).

395. See Astead W. Herndon, *Georgia Was a Big Win for Democrats. Black Women Did the Groundwork.*, N.Y. TIMES (Dec. 3, 2020), <https://perma.cc/MF5T-E8FV> (last updated Dec. 5, 2020); Charlotte Alter, *How Black Political Organizers Shored Up the Democratic Base*, TIME (Sept. 18, 2020, 4:02 PM), <https://perma.cc/JM68-PVT7>.

themselves for the dismantling of a Trump-fortified Racial Contract.<sup>396</sup>

Centering Black contracting may prove helpful in evaluating antiracist racial contracting as either a subversive divestment from or interference with racist contracting, or as racial contract rescission. It may also prove quite useful in calcifying conceptualization of political engagement—certainly voting—as contractual negotiation and the exercise of sociopolitical proprietorship, as opposed to the concept of civic *duty*, which characterizes civic engagement as a burden rather than as an opportunity. Finally, centering Black contracting will support scholars, advocates, and activists in developing strategies for dismantling white supremacy via social and political action—critical tools in the fight for racial justice given the role that litigation within the current framework plays in undergirding, rather than undermining, the invisible common law of white rule.

### C. Remedies and Reparations

A principal value of viewing whiteness as contract is the insight it provides into the operations and machinery of white supremacy and its benefits and costs.<sup>397</sup> Because its *raison d'être* is the consolidation and domination of wealth and power, white racial contracting will continue until it is no longer profitable. An effective method of revoking the Racial Contract and dismantling white supremacy is to make the abuse and exploitation of Black people extremely costly. Constructing in Black and other non-white people an entitlement to reliance-based damages under the doctrine of promissory estoppel creates a legally solvent pathway towards reparatory justice.

Municipal legislatures are seeking to make the act of using law enforcement to discriminate against people on the basis of race a criminal offense. The San Francisco Board of Supervisors,

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396. *Id.*

397. See generally Ginsburg, *supra* note 39, at 182 (noting the worth of applying contract theory to the social and political foundations of constitutions because the theory of private contracting provides insights into how constitutions are “negotiated and maintained”). This Article has used contract theory as a means of providing insight into the negotiation and maintenance of the law, and terms, of white supremacy.

for example, unanimously voted in favor of the CAREN Act as a way to punish the use of 911 to persecute Black people for being present in public.<sup>398</sup> Similar legislation has been introduced in Los Angeles, New York City, and Grand Rapids.<sup>399</sup> This legislation undermines the contracting of whiteness in two major ways: by making the invisible common law that sanctions the harassment and coercive removal of Black bodies from public spaces highly visible, and revoking it in formal, public law; and by attaching costly criminal and civil penalties to such harassment.<sup>400</sup>

State and local governments can rescind whiteness in a number of ways. In the cases of Detroit and Flint, the local governments have the option of ending the politics of extraction and exploitation.<sup>401</sup> Those cities could tax utilities, for example, or charge affordable, flat rates for all regional water consumers. The State of Michigan could also offer grants and subsidies or discounts for all households previously victimized by water shutoffs and to all residents with incomes below a certain threshold. Alternatively, the State could offer tax credits to all water shutoff survivors, as well as to Flint water scandal survivors. And finally, the policy of disconnecting water must be abandoned, as a matter of both human rights and racial justice.<sup>402</sup>

Similar measures must be adopted to make victims of racialized real property dispossessions whole and to address the ongoing problem of racial discrimination in housing.<sup>403</sup>

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398. See Ebrahimji & Jackson, *supra* note 390 (reporting the introduction of the CAREN Act).

399. See *id.*

400. See *id.*

401. See *supra* notes 336–338 and accompanying text (highlighting the policy changes Flint, Michigan is making with respect to ending the politics of extraction via water).

402. See *supra* note 25 and accompanying text (noting that the human right to water is enshrined in international law); JOHN RAWLS, *THE LAW OF PEOPLES* 11–23, 78–81 (1999) (outlining respect for human rights as one of the eight principles of law). To create Rawls’s desired utopia, it is imperative that race be centered, confronted, and rectified by governments and by theorists. See MILLS, *BLACK RIGHTS/WHITE WRONGS*, *supra* note 62 and accompanying text.

403. See Mondry, *supra* note 300 (“There’s no way to make people whole again for the money lost in home values and tax bills [from the foreclosure scandal]. But something must be done.”).

Meaningful efforts at reparative justice may include tax credits for Black homeowners, settlements to all Black homeowners who have lost their properties or have been subjected to over-assessments by the City of Detroit, mortgage grants and low home financing rates for all survivors of the water scandals and mortgage foreclosure scandals, and an end to the practices of attaching water debt to property taxes and properties (as opposed to individuals). Any municipality or state genuinely interested in divesting from predatory policies aimed at draining life, liberty, and property from Black people for the sake of white profit can do so; they need only divest from whiteness and invest in a new, actively antiracist social contract in which Black and Indigenous interests are centered.

## V. CONCLUSION

Analyzing human rights abuses endured by Black people in the United States through the prism of private ordering is helpful because such rights do not easily correspond to remedies for the survivors of these abuses under extant legal frameworks despite the existence of formal rights and legal protections. The depths and gravity of these abuses also take on new conspicuousness and dimension when viewed not just as the violations of rights, but as material extraction and exploitation. Importantly, when human rights violations are viewed through the lens of economic exploitation, cost, and damages, the discussion of accountability and redress can more easily include concrete measures for reparative justice.

The racial justice uprisings of 2020 have reminded scholars and advocates that social movements catalyze legal and political change with much more efficiency and greater impact than legal change catalyzes social and political change. The uprisings have caused everyday people who are raced as white—to whom the economic, social, and political benefits of whiteness accrue daily—to acknowledge that they are beneficiaries of an illicit and unjust racist contract, even if they were never signatories, and to consider joining Black and Indigenous people in demanding the contract's immediate rescission.

In her testimonial to *The Racial Contract*, Jennifer Hochschild writes, "Mills has made it especially clear how whites dominate people of color, even (or especially) when they have no such intention" before noting "[h]e asks whites not to

feel guilty, but rather to do something much more difficult—understand and take responsibility for a structure they did not create but still benefit from.”<sup>404</sup> This Article does not ask white people not to feel guilty. It is my hope that white readers will recognize that human rights abuses against Black people are occurring in real time, often captured on iPhones and social media feeds, and thus in their presence.

This Article calls upon white people to recognize their individual and collective guilt and privilege. It exhorts them to confront their roles as either signatories to or beneficiaries of an ongoing series of negotiations over the benefits and spoils of white supremacy, for which many members of the white body politic will steal and kill to defend and uphold. In future projects, I look forward to discussing the embrace of white guilt as a prevention and cure for racism and racist atrocity. For now, however, this Article concludes with a call for white people to join communities of color in divesting from whiteness and denouncing the contracting of whiteness as unconscionable. This type of social action, combined by reparative policy changes restoring and protecting the rights of contracting and proprietorship to Black people, offers a meaningful path toward political personhood, reliable and equal protection of the law, and full enjoyment of American citizenship.

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404. See CHARLES W. MILLS, *THE RACIAL CONTRACT* iii (2014) (quoting Jennifer Hoshchild).