

## WEAPONIZING PEACE

Yuvraj Joshi\*

*American racial justice opponents regularly wield a desire for peace, stability, and harmony as a weapon to hinder movement toward racial equality. This Essay examines the weaponization of peace historically and in legal cases about property, education, protest, and public utilities. Such peace claims were often made in bad faith and with little or no evidence, and the discord they claimed to address was actually the result of hostility to racial equality. For a time, the Supreme Court rejected dominant peace claims for precisely these reasons. This Essay further documents the weaponization of peace in current attempts to restrict Black Lives Matter protests, denigrate calls for police defunding, outlaw critical race theory, and dismantle affirmative action. By linking these historical and contemporary arguments, this Essay finds that dominant logics of peace mask the injustice, frustration, and despair felt by subordinated groups. The Essay urges closer scrutiny of appeals to peace that primarily function to stifle the pursuit of racial justice and to maintain status quo inequality.*

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\* Faculty Affiliate, UCLA School of Law Promise Institute for Human Rights; Research Scholar, UC Berkeley Miller Institute for Global Challenges and the Law; Assistant Professor, University of British Columbia Allard School of Law; J.S.D., Yale Law School. This Essay benefited from conversations with Michelle Wilde Anderson, LaToya Baldwin Clark, Michael Bronstein, Lucas Janes, Rachel Moran, Tim Mulvaney, and Peter Yu and from presentation at Columbia Law School. Special thanks to Thea Udwardia, Liana Wang, and Caitlin Cunningham for excellent research and editorial assistance and to the editors of the *Columbia Law Review*, especially Likhitha Butchireddygar, Jeff Rivas, and Alex Vasques, for their conscientious efforts.

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## INTRODUCTION

American racial justice opponents regularly wield a purported desire for peace, stability, and harmony as a weapon to hinder movement toward racial equality. In this weaponized form, peace maintains structural inequalities, as when then-Senator John C. Calhoun defended slavery as “indispensable to the peace” of both white and Black people.<sup>1</sup> It also limits redress measures, as when President Andrew Johnson called for the end of Reconstruction in a “time o[f] peace.”<sup>2</sup> Finally, organizations like the White Citizens’ Councils have regularly used peace as pretext for measures against racial equality.<sup>3</sup>

This Essay examines the weaponization of peace historically—from slavery to segregation—and in legal cases about property, education, protest, and public utilities.<sup>4</sup> It also draws links between past instances of weaponized peace and current ones, as found in attempts to restrict Black

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1. 13 Reg. Deb. 2186 (1837) (statement of Sen. Calhoun). Similarly, in defending racial segregation in 1964, then-Alabama Governor George Wallace maintained that “[w]hite and colored have lived together in the South for generations in peace and equanimity.” Letter from George C. Wallace, Governor, Ala., to Miss Martin (Apr. 14, 1964), in Gilder Lehrman Collection, No. GLC00295, Gilder Lehrman Inst. Am. Hist., [https://www.gilderlehrman.org/sites/default/files/inline-pdfs/T-00295\\_redacted.pdf](https://www.gilderlehrman.org/sites/default/files/inline-pdfs/T-00295_redacted.pdf) [<https://perma.cc/E5GJ-VHTK>].

2. Andrew Johnson, An Important Veto Message From President Johnson, *N.Y. Times*, Feb. 20, 1866, at A1, <https://www.nytimes.com/1866/02/20/archives/washington-news-an-important-veto-message-from-president-johnson-he.html> (on file with the *Columbia Law Review*).

3. Starting in the 1950s, these councils launched an all-out war on integration ostensibly to maintain “peace, good order and domestic tranquility.” Euan Hague, *The Citizens’ Council*, <http://www.citizenscouncils.com> [<https://perma.cc/9RK7-3FWQ>] (last visited Feb. 5, 2023) (internal quotation marks omitted) (quoting the *Citizens’ Council* (Jackson, Miss.), Oct. 1955, at 1).

4. Although illustrative, these are far from the only legal contexts in which weaponized claims about peace have arisen. In the family law context, Professor Jill Hasday notes that defenders of the common law doctrine of coverture claimed that it was “essential to family peace,” and if women were given freedom to make their own decisions, wives would “destroy their marital harmony, arouse the fierce (and potentially violent) opposition of their husbands, and undermine their own welfare.” Jill Elaine Hasday, *Protecting Them From Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 *N.Y.U. L. Rev.* 1464, 1500 (2009) (quoting Joseph R. Long, *A Treatise on the Law of Domestic Relations* 119 (1905)). In the criminal law context, Professor Jamelia Morgan examines disorderly conduct laws, which are a combination of common law offenses aimed at protecting the public order, peace, and tranquility, and argues that the criminalization of disorderly conduct reflects and reinforces deeply rooted discriminatory understandings about what behavior (and which persons) violate community norms. See Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 *Cal. L. Rev.* 1637, 1657 (2021).

Lives Matter protests, denigrate calls for police defunding, outlaw critical race theory, and dismantle affirmative action. By linking these historical and contemporary arguments, this Essay finds that dominant logics of peace mask the injustice, frustration, and despair felt by subordinated groups. The Essay urges closer scrutiny of appeals to peace that primarily function to stifle the pursuit of racial justice and to maintain status quo inequality.<sup>5</sup>

This Essay's analysis of weaponized peace focuses on those who consider racial justice a threat to peace, providing a companion to *Racial Justice and Peace*,<sup>6</sup> which centers Black activists for whom racial justice was a means to peace. Together, these works demonstrate how despite the widespread discussion of peace in American political discourse, those working for and against racial justice do not share common understandings of peace. While emancipatory understandings of peace entail justice as a precondition for peace, weaponized appeals to peace stifle the pursuit of justice to preserve an unjust status quo. American society must therefore learn to differentiate between these appeals to peace.

Although it focuses on American society, this Essay's analysis also adds to the international conversation around "transitional justice"<sup>7</sup> by providing a powerful example of how certain forms of peace are actually

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5. While this Essay focuses on the weaponization of peace against racial justice efforts, there are broader weaponizations of peace against people and communities of color. See, e.g., Jim Freeman, Daniel Kim & Zoe Rawson, *Black, Brown, and Over-Policed in L.A. Schools* 28 (2013), [https://www.njcn.org/uploads/digital-library/CA\\_Strategy-Center\\_Black-Brown-and-Over-Policed-in-LA-Schools.PDF](https://www.njcn.org/uploads/digital-library/CA_Strategy-Center_Black-Brown-and-Over-Policed-in-LA-Schools.PDF) [<https://perma.cc/R9WM-R4A3>] (finding that Black students were 29 times more likely than white students to be ticketed by the Los Angeles School Police Department for "disturbing the peace").

6. Yuvraj Joshi, *Racial Justice and Peace*, 110 *Geo. L.J.* 1325 (2022) [hereinafter Joshi, *Racial Justice and Peace*].

7. Transitional justice concerns how societies move from violence and oppression toward peace and justice. Although successful transitions require both peace and justice, these values can appear in tension when societies face choices between short-term peace and the pursuit of long-term justice, what is internationally known as the "peace versus justice dilemma." This Essay is one in a series of papers examining American racial justice issues from an international transitional justice perspective. See Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 *Wis. L. Rev.* 1 (comparing affirmative action in South Africa and the United States to show how integrating affirmative action and transitional justice can advance our understanding of both practices); Yuvraj Joshi, *Racial Equality Compromises*, 111 *Calif. L. Rev.* 529 (2023) [hereinafter Joshi, *Racial Equality Compromises*] (using transitional justice theory to demonstrate that American racial equality decisions are compromises); Joshi, *Racial Justice and Peace*, supra note 6 (examining American racial equality decisions as versions of the peace versus justice dilemma discussed in transitional justice); Yuvraj Joshi, *Racial Time*, 90 *U. Chi. L. Rev.* (forthcoming 2023) (on file with the *Columbia Law Review*) (discussing the role of time-based arguments in American racial justice struggles); Yuvraj Joshi, *Racial Transitional Justice in the United States*, in *Race and National Security* (Matiangai Sirleaf ed., forthcoming 2023), <https://ssrn.com/abstract=4088738> [<https://perma.cc/5QY4-NR3L>] (proposing that the centuries-long oppression of Black Americans necessitates a systematic response through transitional justice); Yuvraj Joshi, *Racial Transition*, 98 *Wash. U. L. Rev.* 1181 (2021) [hereinafter Joshi, *Racial Transition*] (theorizing different approaches to America's racial transition and

disadvantageous for democracy.<sup>8</sup> One of the central discussions in transitional justice is how to “reconcile legitimate claims for justice with equally legitimate claims for stability and social peace.”<sup>9</sup> The American experience teaches that not all claims to peace are equally legitimate and not all forms of peace are democratically advantageous.

This Essay proceeds in three parts. Part I provides a historical primer on weaponized appeals to peace, illustrating how dominant ideas about peace and related notions of tranquility, stability, order, unity, and harmony were routinely invoked to defend slavery and segregation and resist Reconstruction and civil rights. Often, this “peace” meant protecting white people’s property and their proprietary interest in whiteness, what Professor Cheryl Harris terms “whiteness as property.”<sup>10</sup> Racial justice was considered a threat to peace because it might lead to property destruction and devaluation<sup>11</sup> and because it might disrupt settled expectations based on white racial privilege.<sup>12</sup> This historical overview suggests that the language of peace, like that of compromise,<sup>13</sup> can provide a veneer of virtue to those hindering the pursuit of racial justice.

Part II demonstrates how *legal* arguments routinely weaponized peace to circumvent racial justice and how the Supreme Court treated these arguments. For much of its history, the Supreme Court prioritized quietude over justice: Cases like *Plessy v. Ferguson*, for example, maintained racial

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evaluating these approaches in light of transitional justice values). Relatedly, peacebuilding concerns how societies resolve injustice and pursue societal transformation in peaceful ways. On the relationship between transitional justice and peacebuilding, see generally Chandra Lekha Sriram, *Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice*, 21 *Glob. Soc’y* 579 (2007).

8. Professor K. Sabeel Rahman describes a multiracial democracy as one in which Black and Brown people have “full equal standing” as “members of the polity.” K. Sabeel Rahman, *Democracy Reform Symposium*, 109 *Calif. L. Rev.* 979, 981 (2021). Often, weaponized forms of peace excluded and undermined considerations of the standing of Black people. See *infra* Part I (discussing weaponized peace claims in social history); *infra* Part II (discussing the same in legal history).

9. See Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 *Hum. Rts. Q.* 321, 323 (2009) (discussing questions raised by transitional justice in Argentina after the end of the military dictatorship).

10. See Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1713 (1993) (explaining how American law “protect[s] settled expectations based on white privilege”).

11. Whereas enslavers considered abolition “subversive of the rights of property and the order and tranquility of society,” Thomas R. Dew, *An Essay on Slavery* 6 (Richmond, J.W. Randolph 1849), segregationists warned that integration would destroy property values and thus “disrupt cordial relations previously existing between the races,” *Brief for Defendant in Error, Buchanan v. Warley*, 245 U.S. 60 (1917) (No. 15-33), reprinted in 18 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 87, 106 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter 18 *Landmark Briefs*].

12. Organizations like White Citizens’ Councils warned about integration’s threat to “generations” of white southerners’ peace. See *infra* text accompanying note 46.

13. See generally Joshi, *Racial Equality Compromises*, *supra* note 7 (reflecting that the virtuous label of “compromise” obscures how concessions made to white supremacists damage the pursuit of racial equality).

apartheid for “the preservation of the public peace and good order.”<sup>14</sup> But in the early- to mid-twentieth century, the Court rejected the weaponization of peace in cases like *Buchanan v. Warley*,<sup>15</sup> *Cooper v. Aaron*,<sup>16</sup> *Watson v. City of Memphis*,<sup>17</sup> and *Cox v. Louisiana*.<sup>18</sup> Crucially, it did so because dominant peace arguments were often made in bad faith and with little or no evidence; the discord they claimed to address was actually the result of hostility to racial equality; and “public peace” was not more important than constitutional rights. As the Court rejected weaponized peace claims, racial justice opponents modified their arguments. By the 1970s, a more conservative Court accepted resistance to racial integration under the pretext of peace in cases like *Palmer v. Thompson*.<sup>19</sup>

Part III documents the weaponization of peace in our present moment. Racial justice protestors’ basic rights to speech and assembly are often curtailed by opponents who attempt to delegitimize protestors by characterizing them as violent. Following the 2020 racial justice uprisings, several states introduced legislation expanding penalties for unlawful assembly or civil unrest.<sup>20</sup> Given that the 2020 protests were overwhelmingly peaceful, these laws seem aimed not at preventing violence but at preventing racial justice uprisings from disrupting an oppressive status quo.<sup>21</sup> Moreover, despite protests highlighting flagrant and unchecked police brutality, police departments nationwide have received increased funding and support from those who see policing as a precondition for peace.<sup>22</sup> Meanwhile, bans on critical race theory and other so-called “divisive concepts” from public schools and workplaces accuse these ideas of causing

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14. 163 U.S. 537, 550 (1896).

15. 245 U.S. 60 (1917) (striking down a residential segregation ordinance); see also *infra* section II.A.

16. 358 U.S. 1 (1958) (requiring school integration); see also *infra* section II.B.

17. 373 U.S. 526 (1963) (requiring park integration); see also *infra* section II.C.

18. 379 U.S. 536 (1965) (overturning the conviction of a civil rights protestor); see also *infra* section II.D.

19. 403 U.S. 217 (1971) (allowing pool closures); see also *infra* section II.E.

20. Meg O’Connor, Republican Lawmakers Are Using the Capitol Riot to Fuel Anti-BLM Backlash, *Appeal* (Jan. 19, 2021), <https://theappeal.org/capitol-insurrection-anti-black-lives-matter-legislation/> [<https://perma.cc/6389-NRF2>] (documenting legislation expanding penalties for unlawful assembly or civil unrest).

21. Erica Chenoweth & Jeremy Pressman, This Summer’s Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds, *Wash. Post* (Oct. 16, 2020), <https://www.washingtonpost.com/politics/2020/10/16/this-summer-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds/> (on file with the *Columbia Law Review*) (finding that racial justice protests in the wake of George Floyd’s murder were overwhelmingly peaceful).

22. Grace Manthey, Frank Esposito & Amanda Hernandez, Despite ‘Defunding’ Claims, Police Funding Has Increased in Many US Cities, *ABC News* (Oct. 16, 2022), <https://abcnews.go.com/US/defunding-claims-police-funding-increased-us-cities/story?id=91511971> [<https://perma.cc/9A7V-765L>].

disharmony and appeal to civic peace.<sup>23</sup> One federal bill is literally called the PEACE Act.<sup>24</sup> Similarly, legal challenges to affirmative action depict race-sensitive inclusion as a threat to racial harmony.<sup>25</sup>

As weaponized peace discourse has been normalized in American society, it has eclipsed the more emancipatory understandings of peace that racial justice advocates have put forward.<sup>26</sup> Accordingly, judges and other actors may accept dominant group claims about peace without interrogating their factual and normative predicates and without considering the peace claims of subordinated groups. Working against this tendency, this Essay's conclusion outlines some considerations that should guide judges and other actors in assessing what claims to peace are legitimate and what kinds of peace are worth having.

### I. HOW PEACE BECOMES WEAPONIZED

*The white people also desire peace and harmony. This is all we want.*

— Senator James O. Eastland, defending segregation in 1955<sup>27</sup>

*If peace means accepting second-class citizenship, I don't want it.*

*If peace means keeping my mouth shut in the midst of injustice and evil, I don't want it.*

*If peace means being complacently adjusted to a deadening status quo, I don't want peace.*

*If peace means a willingness to be exploited economically, dominated politically, humiliated and segregated, I don't want peace.*

— Dr. Martin Luther King, Jr., delivering a sermon in 1956<sup>28</sup>

23. Sarah Schwartz, Map: Where Critical Race Theory Is Under Attack, *Educ. Week* (June 11, 2021), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/78BM-FBSK>]. For another comprehensive documentation of such laws, see CRT Forward, UCLA Sch. L. Critical Race Stud. Program, <https://crtforward.law.ucla.edu> [<https://perma.cc/32XT-RFU2>] (last visited Feb. 23, 2023).

24. Jennifer Schuessler, Bans on Critical Race Theory Threaten Free Speech, *Advocacy Group Says*, *N.Y. Times* (Nov. 8, 2021), <https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html> (on file with the *Columbia Law Review*); see also Press Release, Sen. Marco Rubio, Rubio, Cramer, Braun Introduce Legislation to Prohibit Federal Funding of Critical Race Theory in American History and Civics Education (Aug. 9, 2021), <https://www.rubio.senate.gov/public/index.cfm/2021/8/rubio-cramer-braun-introduce-legislation-to-prohibit-federal-funding-of-critical-race-theory-in-american-history-and-civics-education> [<https://perma.cc/W4JH-VMV4>].

25. See *infra* notes 244–251 and accompanying text.

26. See Joshi, *Racial Justice and Peace*, *supra* note 6, at 1340–47.

27. Senator James O. Eastland, Address at the Mississippi Association of Citizens' Council Statewide Meeting (Dec. 8, 1955), in *Ark. Faith*, Dec. 1955, at 9 [hereinafter *Eastland*, Address to Miss. Citizens' Council].

28. Martin Luther King, Jr., *When Peace Becomes Obnoxious*, Sermon Delivered at Dexter Avenue Baptist Church (Mar. 18, 1956), in 6 *The Papers of Martin Luther King, Jr.*:

For centuries, white supremacists in the United States have made racialized appeals to peace by depicting an oppressive status quo as peaceful and the pursuit of racial justice as unpeaceful. In the early 1800s, American defenders of slavery appealed to a fictional peaceful coexistence of white enslavers and the Black enslaved. Following Nat Turner's slave rebellion in 1831, Thomas R. Dew, president of the College of William and Mary, said that slavery was necessary to "change the wandering character of the savage, and make it his interest to cultivate peace instead of war."<sup>29</sup> He further rebuked abolitionist arguments made in the Virginia legislature as "wild and intemperate" and "subversive of the rights of property and the order and tranquility of society."<sup>30</sup> In his famous 1837 speech defending slavery as a "positive good," John C. Calhoun called it "indispensable to the peace and happiness of both [groups]."<sup>31</sup> He predicted that abolition would require "drenching the country in blood, and extirpating one or the other of the races" and would "destroy us as a people."<sup>32</sup>

Following the Civil War, Reconstruction opponents positioned Black people's equality as both extraneous and a threat to peace. In his 1907 book, *The Crucial Race Question*, for example, clergyman and author William Montgomery Brown urged that "[c]olored men should not claim and exercise the rights of citizenship in this White man's country" in the interests of "peace and good will among men."<sup>33</sup> "So long as the Negro maintained [a] subservient attitude and accepted the 'place' assigned him, a sort of racial peace existed," Dr. King later observed of this era.<sup>34</sup> "But it was an uneasy peace in which the Negro was forced patiently to submit to insult, injustice and exploitation."<sup>35</sup>

During Jim Crow, segregationists claimed that a separation of the races was necessary to maintain tranquility and harmony.<sup>36</sup> They depicted the South as a just and peaceful society being decimated by "outside agitators" like the Supreme Court and the NAACP.<sup>37</sup> Ironically, they made these

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Advocate of the Social Gospel, September 1948–March 1963, at 257, 259 (Clayborn Carson, Susan Carson, Susan Englander, Troy Jackson & Gerald L. Smith eds., 2007) (cleaned up).

29. Dew, *supra* note 11, at 24.

30. *Id.* at 6.

31. 13 Reg. Deb. 2186 (1837) (statement of Sen. Calhoun).

32. *Id.*

33. William Montgomery Brown, *The Crucial Race Question; Or, Where and How Shall the Color Line Be Drawn* 140 (1907).

34. Martin Luther King, Jr., *Nonviolence and Racial Justice*, 74 *Christian Century* 165, 165 (1957).

35. *Id.*

36. Professor Anders Walker observes that some segregationists counseled racial segregation as a "moderate" means to improve race relations and prevent racial conflict (in contrast to lynching, rape, and other forms of violence to assert white supremacy). Anders Walker, *Diversity's Strange Career: Recovering the Racial Pluralism of Lewis F. Powell, Jr.*, 50 *Santa Clara L. Rev.* 647, 653 (2010).

37. 102 Cong. Rec. 4461 (1956) (statement of Sen. Thurmond).

appeals to peace while themselves launching an all-out war on integration.<sup>38</sup> Ultimately, segregationists sought an oppressive “negative peace,” characterized by “the absence of direct violence” and gained through racial exclusion, as opposed to a “positive peace,” characterized by “the absence of both direct and indirect violence, including various forms of ‘structural violence’ such as poverty, hunger, and other forms of social injustice.”<sup>39</sup>

In May 1954, *Brown v. Board of Education* declared racial segregation in public education unconstitutional.<sup>40</sup> Segregationists in the *Brown* litigation argued that “the public peace, harmony and the general welfare” of their communities necessitated the teaching of Black and white students in separate classrooms.<sup>41</sup> Integrationists rejected such appeals to peace as illegitimate because “the fact that racial segregation accords with custom and usage or is considered needful for the preservation of public peace and good order” does not render it constitutionally legitimate.<sup>42</sup> Integrationists argued that segregation “does not promote the ‘comfort’ of its citizenry, and is totally irrelevant to the ‘preservation of the public peace and good order.’”<sup>43</sup>

Despite the *Brown* decision, uncompromising segregationists continued weaponizing peace to resist integration.<sup>44</sup> For example, Mississippi Senator James O. Eastland argued that segregation was part of states’ “police powers [to] promote peaceful and harmonious race relations.”<sup>45</sup> In November 1954, Louisiana passed an amendment allowing the use of police powers to maintain segregated schools in the interests of “public health, morals, better education, peace, and good order.”<sup>46</sup> Segregationist

38. On “massive resistance” to *Brown* and school integration, see Elizabeth Gillespie McRae, *Mothers of Massive Resistance: White Women and the Politics of White Supremacy* 1–20 (2018) (discussing the role of white women in maintaining Jim Crow).

39. See Dustin N. Sharp, Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice, 35 *Fordham Int’l L.J.* 780, 784 n.10 (2012) (citing Johan Galtung, Violence, Peace, and Peace Research, 6 *J. Peace Rsch.* 167 (1969)) (drawing this distinction); see also Wendy Lambourne, Transitional Justice and Peacebuilding After Mass Violence, 3 *Int’l J. Transitional Just.* 28, 34 (2009) (similar).

40. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

41. Brief of John Ben Shepperd, Attorney General of Texas, Amicus Curiae at 3, *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955) (Nos. 54-1, 54-2, 54-3 & 54-5), 1954 WL 72726.

42. Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 40, *Brown I*, 347 U.S. 483, 1953 WL 78288.

43. Brief of American Veterans Committee, Inc. (AVC), Amicus Curiae at 14, *Brown I*, 347 U.S. 483, 1952 WL 82042.

44. See Joshi, Racial Equality Compromises, *supra* note 7.

45. Eastland, Address to Miss. Citizens’ Council, *supra* note 27.

46. Neil R. McMillen, *The Citizens’ Council: Organized Resistance to the Second Reconstruction, 1954–64*, at 60 (1994). Similarly, in July 1956, North Carolina enacted the “Pearsall Plan,” which excused students from attending a court-ordered integrated public school to “help preserve the public peace.” Report of the North Carolina Advisory Committee on Education 11 (1956), [https://archive.org/details/reportofnorthcar00nort\\_0/page/8/mode/2up?q=peace](https://archive.org/details/reportofnorthcar00nort_0/page/8/mode/2up?q=peace) (on file with the *Columbia Law*



legislators responded to *Brown* by signing the “Southern Manifesto” of 1956, which alleged that the Supreme Court decision had created an “explosive and dangerous condition” by “destroying the amicable relations between the white and Negro races.”<sup>47</sup>

These allegations were echoed in 1963, when white people in Selma ran a full-page advertisement in the local *Times-Journal* that declared:

The white and Negro races have lived together in Selma and Dallas County for many generations in a state of peace and tranquility; and Selma will continue to be the home of both races long after agitators have done their evil work of poisoning the minds of some of our Negro citizens.<sup>48</sup>

Such depictions of “peace and tranquility” assumed Black people’s contentment with Jim Crow. As the Student Nonviolent Coordinating Committee, a civil rights organization formed in the wake of student-led sit-ins across the South,<sup>49</sup> responded: “Perhaps the whites, who did not fear police brutality, reprisal and lynchings with no legal recourse, lived in peace; the Negroes have not.”<sup>50</sup> Observing this discourse, one commentator opined: “The white people still believe, more passionately than ever, in racial harmony. The Negroes believe that, beyond all doubt, the price for racial harmony is one they inevitably have to pay.”<sup>51</sup>

Around this time, White Citizens’ Councils, a network of white supremacist organizations throughout the South, declared their mission as “the maintenance of peace, good order and domestic tranquility.”<sup>52</sup> According to the NAACP’s Roy Wilkins, the Councils sought to suppress violence in order to “turn[] the attention of the North away from the South and toward its own racial problems” and to “provid[e] ‘evidence’ that the Northern way of life which does not include state-imposed racial segregation produces racial clashes, whereas the Southern segregated system produces racial harmony.”<sup>53</sup> Indeed, *The Councilor* newsletter ran stories of unrest in Northern cities to show “startling contrast [with] the peaceful *segregated cities* of the South.”<sup>54</sup> According to the Councils, “the

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*Review*); Samuel Momodu, The Pearsall Plan (1956–1966), BlackPast (Aug. 31, 2016), <https://www.blackpast.org/african-american-history/pearsall-plan-1956-1966/> [<https://perma.cc/QTJ5-UVME>].

47. 102 Cong. Rec. 4460 (1956).

48. A Declaration of Basic Rights and Principles, Selma Times-J., Sept. 22, 1963, at 5.

49. SNCC, History.com (Aug. 24, 2021), <https://www.history.com/topics/black-history/sncc> [<https://perma.cc/9FLB-LZVF>].

50. Memorandum of the Student Nonviolent Coordinating Committee Office, Atlanta, on “A Declaration of Basic Rights and Principles” (on file with the *Columbia Law Review*).

51. John R. Fry, The Voter-Registration Drive in Selma, Alabama, *Presbyterian Life*, Jan. 15, 1964, at 12, 17.

52. Hague, *supra* note 3.

53. Letter from Roy Wilkins, Exec. Sec’y, NAACP, to J. Edgar Hoover, Dir., FBI (June 20, 1956) (on file with the *Columbia Law Review*).

54. Washington D.C.—A Haven for Integrationist Hoodlums, Councilor (Ass’n of Citizens’ Councils of La., Inc., Homer, La.), Feb. 1958, at 4, 5 (emphasis added).

maintenance of peace, good order and domestic tranquility” in the South required segregation, disenfranchisement, and white supremacy. Outlining these goals candidly in a fundraising appeal, the Selma chapter of the Councils promised to preserve “Racial Harmony” by “prevent[ing] sit-ins, mob marches and wholesale Negro voter registration efforts” from happening.<sup>55</sup>

Ultimately, these white supremacists cast the pursuit of racial justice as inherently unpeaceful. They especially blamed the NAACP and the Supreme Court for “creat[ing] strife and turmoil where no strife and turmoil existed before” and “caus[ing] hatred and hostility where before there was good will and harmony.”<sup>56</sup> Arkansas Attorney General Bruce Bennett claimed that any “turmoil and conflict between the races can be simply reduced to the amount of activity carried on by local branches of the NAACP.”<sup>57</sup> His “Southern Plan for Peace” called for “peaceful harmony between the white and Negro races” by suppressing the NAACP and other civil rights organizations.<sup>58</sup> He filed registration and tax suits against the NAACP, arguing that minimizing their activities would bring “peace and tranquility to the people of Arkansas again.”<sup>59</sup> Similarly, a Ku Klux Klan leader blamed racial conflict not on the KKK’s own racial terrorism but on the Supreme Court, which he said created “a situation loaded with dynamite . . . that can lead to bloodshed.”<sup>60</sup> Those making appeals for peace conveniently ignored that their notions of “peaceful harmony” required the subordination of Black people and that current strife and turmoil were the products of their own violent resistance to *Brown*.

From this historical overview, we can see why “peace” would be a popular tool in the white supremacist arsenal. Since peace is a legitimate social value, delaying or denying racial justice to maintain peace might seem more palatable than doing so out of open racial animus or protectionism. By invoking peace, Americans defending white supremacy could obscure the violence of the status quo, shield racist motives or

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55. Dallas County Citizens’ Council Advertisement, *Selma Times-J.*, June 9, 1963, at 3. Others, however, saw through this peaceful façade: The Catholic Interracial Council, for example, declared the White Citizens’ Councils a threat to “peace and security” and “our democratic way of life,” calling it “a racist organization which has launched ‘a campaign of hatred, violence and intimidation in the South.’” Press Release, Cath. Interracial Council, South’s White Citizens Councils Called a National Menace by CIC (Jan. 17, 1957) (on file with the *Columbia Law Review*).

56. 102 Cong. Rec. 6823 (1956) (statement of Rep. Williams (quoting Rep. Davis)).

57. Tony Freyer, *The Little Rock Crisis: A Constitutional Interpretation* 129 (1984) (quoting Ark. Att’y Gen. Bruce Bennett).

58. Yasuhiro Katagiri, *Black Freedom, White Resistance, and Red Menace: Civil Rights and Anticommunism in the Jim Crow South* 127–28 (2014) (quoting Ark. Att’y Gen. Bruce Bennett). Accordingly, Arkansas Act 115 forbade public employment of NAACP members. Act 115, 1959 Ark. Acts 327, 329.

59. Freyer, *supra* note 57, at 129.

60. N.K. Perlow, *KKK Leader Warns: ‘We Mean Business’*, *Nat’l Police Gazette*, Aug. 1956, at 5, 32.

designs from others, protect their self-image as peaceful rather than prejudiced or self-interested, and pass the blame onto justice-seeking groups for disrupting the peace.

Ultimately, those making these appeals were concerned only with the threat to peace posed by *changes to* the status quo, not with the threat to peace resulting from a *continuation of* the status quo. Yet, the continuation of an unequal status quo could threaten both short- and long-term peace.<sup>61</sup> Because the law has been a primary site for the weaponization of peace, this Essay now examines legal cases in which racial justice opponents have cited tranquility, stability, and harmony as reasons to limit racial justice.

## II. WEAPONIZED PEACE IN LEGAL CASES

This Part analyzes how the Supreme Court rejected weaponized peace claims as a basis for discriminatory treatment in several different contexts, including property rights, public education, public parks, and public demonstrations, as well as how it uncritically accepted such claims as a basis for the complete denial of the use of public pools.

### A. *Property*: *Buchanan v. Warley*

On May 11, 1914, Louisville, Kentucky, passed an ordinance that prohibited Black people from moving to a block with majority white residents.<sup>62</sup> The text of the ordinance mandated segregation “to prevent conflict and ill-feeling between the white and colored races” and “to preserve the public peace and promote the general welfare.”<sup>63</sup>

When Charles Buchanan, a white man, attempted to sell his house on a predominantly white block to William Warley, a Black man, Warley was prohibited from living there and did not complete the sale.<sup>64</sup> Buchanan sued Warley and alleged that the Louisville ordinance violated the Due Process Clause of the Fourteenth Amendment.<sup>65</sup>

Louisville attorneys defended the ordinance by arguing that it protected racial peace.<sup>66</sup> They argued that integration “ceases to be a constitutional right the moment it threatens the peace and good order of

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61. See Joshi, *Racial Justice and Peace*, supra note 6, at 1340–47. Relatedly, these appeals prioritize a negative peace based on the suppression of social conflict over a positive peace grounded in the pursuit of social justice, and they prioritize the experiences of dominant racial groups.

62. *Buchanan v. Warley*, 245 U.S. 60, 70 (1917).

63. *Id.* For examples of similar ordinances, see T.B. Benson, *Segregation Ordinances*, 1 Va. L. Reg. 330, 330 (1915) (“The purpose [of segregation ordinances] as usually expressed is to preserve the peace, prevent conflict and ill-feeling between the two races, and thereby promote the welfare of the city.”).

64. *Buchanan*, 245 U.S. at 70.

65. *Id.*

66. Brief for Defendant in Error, supra note 11, at 106.

society.”<sup>67</sup> They claimed that a Black person moving into a white block, simply to “gratify his inordinate . . . aspirations . . . of social equality with white people,” would destroy property values and thus “disrupt the cordial relations previously existing between the two races.”<sup>68</sup> City attorneys also characterized upholding segregation laws as simply the “duty of the white people to preserve the integrity of their own race and the peace of their own communities.”<sup>69</sup> Their brief concluded that the present law was needed to “safeguard . . . the community from lawlessness and breaches of the peace, which are the inevitable result of too intimate contact between the white and negro races.”<sup>70</sup>

Buchanan repudiated this weaponization of peace, arguing that the ordinance was not enacted in good faith or for the purposes declared.<sup>71</sup> Instead, it was drawn “with a view to placing the negro citizens of Louisville in as inferior a position as possible with respect to their right of residence and directly violating the spirit of the Fourteenth Amendment without transgressing the letter.”<sup>72</sup> Buchanan argued that nothing about Black people’s conduct made such an ordinance necessary.<sup>73</sup> Indeed, Black people had been allowed to live in the same home as their enslavers, but not as equal citizens across the street from white neighbors.<sup>74</sup> Rather, it was white people’s response to the possibility of racial equality that disrupted the peace.<sup>75</sup> Prejudice of race and color were the sole reason for the ordinance.<sup>76</sup> The law could not deny the rights of Black people in the name of peace simply to avoid aggravating lawless attacks by white neighbors.<sup>77</sup>

A series of amicus briefs supporting integration similarly disputed the ordinance’s reliance on peace. For example, the Baltimore branch of the NAACP criticized the ordinance’s stated purpose because, according to them, there had never been significant outbreaks of unrest in areas where

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67. *Id.*

68. *Id.*

69. *Id.* at 114.

70. *Id.* at 118. This argument aligned in a way with how property rights have been justified based on their ability to prevent breaches of the peace. As Professor Stewart Sterk observes: “At least since Aristotle, legal thinkers have justified property as a mechanism for avoiding quarrels and settling conflicts. Even the most libertarian of theorists acknowledge that the state must play a critical role in preventing feuds and controlling violence.” Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 *Wash. U. L.Q.* 417, 431 (2005).

71. Brief for the Plaintiff-in-Error, *Buchanan*, 245 U.S. 60, reprinted in 18 *Landmark Briefs*, supra note 11, at 3, 37.

72. *Id.* at 38.

73. Brief for the Plaintiff in Error on Rehearing, *Buchanan*, 245 U.S. 60, reprinted in 18 *Landmark Briefs*, supra note 11, at 491, 514–15.

74. *Id.* at 512.

75. *Id.*

76. *Id.*

77. *Id.* at 538.

white and Black people lived together.<sup>78</sup> Furthermore, the ordinance was incoherent because it permitted preexisting residential integration to persist but restricted further integration ostensibly to preserve community peace.<sup>79</sup> The brief argued, however, that any alleged “menace” to peace was equally likely in both situations.<sup>80</sup>

Wells H. Blodgett and Frederick W. Lehmann, affiliates of the American Bar Association, noted that although the stated purpose of the ordinance was the preservation of public peace, there were reports that prior to its enactment, white people had used violence to drive away Black people moving to the neighborhood.<sup>81</sup> Thus, they argued, the ordinance was enacted not so much to repress lawless violence perpetrated by whites but to accomplish, through law, the goal of that violence, thereby sanctioning the racism that motivated it.<sup>82</sup> The brief conceded that laws might be implemented to protect public peace but insisted that they must comply with the Constitution.<sup>83</sup>

The Supreme Court agreed with this sentiment. In 1917, the Court in *Buchanan v. Warley* struck down Louisville’s residential segregation ordinance.<sup>84</sup> “It is urged that this proposed segregation will promote the public peace by preventing race conflicts,” the Court said.<sup>85</sup> “Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.”<sup>86</sup> While acknowledging a “serious and difficult problem arising from a feeling of race hostility which the law is powerless to control,” the Court refused to resolve this problem by depriving citizens of their constitutional rights.<sup>87</sup>

Ultimately, *Buchanan*’s reach was limited. Cities across the South flouted the ruling through further weaponizations of peace.<sup>88</sup> Birmingham, Alabama, did so on the grounds that “threats to peace were so imminent and severe if African Americans and whites lived in the same

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78. Brief of Baltimore Branch of NAACP as Amicus Curiae, *Buchanan*, 245 U.S. 60, reprinted in 18 Landmark Briefs, supra note 11, at 217, 233.

79. *Id.* at 236–37.

80. *Id.*

81. Brief of Wells H. Blodgett and Frederick W. Lehmann as Amici Curiae, *Buchanan*, 245 U.S. 60, reprinted in 18 Landmark Briefs, supra note 11, at 255, 259–60.

82. *Id.*

83. *Id.* at 297–98.

84. *Buchanan*, 245 U.S. at 82.

85. *Id.* at 81.

86. *Id.*

87. *Id.* at 80–81.

88. See Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 46–48 (2017) (noting that “[m]any border and southern cities ignored the *Buchanan* decision” and adopted exclusionary housing practices that continued “until at least 1987”).

neighborhoods.”<sup>89</sup> Similarly, Atlanta, Georgia, asserted that “race zoning [was] essential in the interest of the public peace, order and security and will promote the welfare and prosperity of both the white and colored race.”<sup>90</sup> Moreover, *Buchanan* was grounded in the right to own property rather than racial equality.<sup>91</sup> Accordingly, it did not overturn *Plessy*’s “separate but equal” decision, and the Jim Crow apartheid system continued in its wake.

Forty years later, similar issues would resurface in the education context in what became known as the Little Rock Crisis of 1957. This crisis yielded the landmark 1958 decision in *Cooper v. Aaron*, which rejected the Little Rock School Board’s proposal to postpone integration in order to maintain “public peace.”<sup>92</sup>

#### B. *Education: Cooper v. Aaron*

In 1954, *Brown v. Board of Education* declared racial segregation in public education unconstitutional.<sup>93</sup> As the Little Rock School Board announced a phased integration plan to implement *Brown*, local segregationist groups, such as the Capital Citizens’ Council and the Mothers’ League of Central High School, stoked fears that integration would lead to violence.<sup>94</sup> They successfully directed their rabble-rousing at the Governor of Arkansas, Orval Faubus, who refused to permit the planned integration of Little Rock Central High School.<sup>95</sup>

Faubus purportedly sought to maintain a negative peace, which he claimed was under attack by integrationists. On September 2, 1957, Faubus

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89. *Id.* at 47. The Birmingham council president added that “this matter goes beyond the written law, in the interest of . . . racial happiness.” *Id.* (internal quotation marks omitted) (quoting the Birmingham city commission president). Birmingham’s racial zoning ordinance continued until 1950. *Id.*

90. *Id.* at 46. Robert Whitten, Atlanta’s city planner, wrote in 1922 that “[e]stablishing colored residence districts has removed one of the most potent causes of race conflict” and that this was “a sufficient justification for race zoning.” *Id.* (alteration in original) (internal quotation marks omitted) (quoting Robert Whitten). Atlanta continued to use its racial zoning map “for decades” after *Buchanan*. *Id.*

91. For a critique of *Buchanan* along these lines, see James W. Fox Jr., *Black Progressivism and the Progressive Court*, 130 *Yale L.J. Forum* 398, 415–16 (2021).

92. 358 U.S. 1, 16 (1958).

93. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

94. Karen Anderson, *Little Rock: Race and Resistance at Central High School* 57 (2010); Graeme Cope, “A Thorn in the Side”? The Mothers’ League of Central High School and the Little Rock Desegregation Crisis of 1957, 57 *Ark. Hist. Q.* 160, 162, 177 (1998). See generally McRae, *supra* note 38, at 185–216 (describing the role of white women in maintaining segregation in general and in efforts to entrench segregation in Little Rock in particular).

95. See Johanna Miller Lewis, *History of the Alternative Desegregation Plan and the Black Community’s Perspective and Reaction*, 30 *U. Ark. Little Rock L. Rev.* 363, 373–74 (2008) (discussing how segregationists pressured Faubus to stop integration).

declared a state of emergency due to an alleged “imminent danger of tumult, riot and breach of the peace” if the integration of Central High School proceeded.<sup>96</sup> On September 4, the day the school was to be integrated, he dispatched troops from the Arkansas National Guard to prevent nine Black children from entering the school building.<sup>97</sup> These Black children—known as the Little Rock Nine—faced terrifying abuse at the hands of white mobs emboldened by Faubus’s actions.<sup>98</sup>

President Dwight D. Eisenhower responded to the Faubus blockade by sending federal troops to Arkansas to maintain order and protect Black students entering Central High School.<sup>99</sup> As Eisenhower intervened in Little Rock, segregationist politicians across the country leveraged claims about peace to resist integration. Mississippi Senator John Stennis wrote to Eisenhower that integration would destroy “generations of peaceful and harmonious cooperation among the people of the two races.”<sup>100</sup> Illinois Representative Noah Mason cautioned that “[l]aws that violate or go contrary to the customs of a community never bring about social peace and harmony.”<sup>101</sup> Georgia Comptroller General Zack Cravey charged that Eisenhower could “return this nation to the normalcy of peace and harmony” but had instead chosen “catastrophe.”<sup>102</sup> Despite these complaints, Eisenhower urged compliance with federal court orders so that “the City of Little Rock will return to its normal habits of peace and order.”<sup>103</sup>

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96. Courts, 2 Race Rels. L. Rep. 931, 937 (1957) (reprinting Gov. Faubus’s proclamation).

97. “The Guard was not called out to prevent integration,” Faubus claimed, “but to keep the peace and order of the community.” Crisis Timeline: Little Rock Central High School National Historic Site, Nat’l Park Serv., <https://www.nps.gov/chsc/learn/historyculture/timeline.htm> [<https://perma.cc/R6W9-5698>] (last updated Jan. 24, 2022). Prior to the arrival of Black students, Major General Edwin Walker, head of Little Rock’s military district, assured Central High’s student body that “no one will interfere with coming, going, or your peaceful pursuit of your studies.” Id.

98. The Little Rock Nine included Minnijean Brown, Elizabeth Eckford, Ernest Green, Thelma Mothershed, Melba Patillo, Gloria Ray, Terrence Roberts, Jefferson Thomas, and Carlotta Walls. See generally Judith Bloom Fradin & Dennis Brindell Fradin, *The Power of One: Daisy Bates and the Little Rock Nine* 66–68 (2004) (telling the story of civil rights activist Daisy Bates and the Little Rock Nine). For Bates’s own recollection of the integration of Central High School, see generally Daisy Bates, *The Long Shadow of Little Rock: A Memoir* (1962).

99. President Dwight D. Eisenhower, Radio and Television Address to the American People on the Situation in Little Rock, 1957 Pub. Papers 689, 690 (Sept. 24, 1957).

100. Telegram from Senator John Stennis to President Dwight D. Eisenhower (Oct. 1, 1957) (on file with the *Columbia Law Review*).

101. Noah M. Mason, “Civil Rights” Against the Constitution, Hum. Events, July 13, 1957.

102. Telegram from Zack D. Cravey, Ga. Comptroller Gen., to President Dwight D. Eisenhower (Sept. 5, 1957) (on file with the *Columbia Law Review*).

103. Eisenhower, *supra* note 99, at 694.

Although the Little Rock Nine were able to enter the school by the end of September 1957, the Little Rock School Board later petitioned the courts to delay integration for two-and-a-half years.<sup>104</sup> Making a series of negative peace claims, the Board complained that *Brown* “pronounced a rule of law which is well in advance of the mores of the people of this region[,] and violent opposition to its principle has erupted.”<sup>105</sup> Delaying integration would reduce the “present highly emotional atmosphere, which has proven conducive to violence,” and enable people to “find a better understanding of the nature of the problems confronting them and, consequently, the direction in which the solutions lie.”<sup>106</sup> Indeed, the Board argued that transferring Black students to another school would protect *their* justice- and peace-related interests because their “high school education will not be interrupted” and “they will be spared the predictable mental torment and physical danger.”<sup>107</sup>

Representing the Black students at Central High School, the NAACP urged the Supreme Court to reject the Board’s proposal “to revert to segregated education as terms for peace with the lawless elements.”<sup>108</sup> Delaying integration would “teach[] children that courts of law will bow to violence,” which would amount to a “complete breakdown of education” worse than any temporary disturbance of schooling.<sup>109</sup> The NAACP also noted that further delay would encourage segregationists’ continued attempts to block the execution of federal orders, which would “subvert our entire constitutional framework.”<sup>110</sup> By contrast, enforcing integration would “restate in unmistakable terms both the urgency of proceeding with desegregation and the supremacy of all constitutional rights over bigots—big and small.”<sup>111</sup>

The United States government also urged the Court to reject an exclusionary negative peace. Solicitor General J. Lee Rankin filed an amicus brief arguing that “mere popular hostility” does not justify “depriving

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104. See Brief for the Petitioners, *Cooper v. Aaron*, 358 U.S. 1 (1958) (No. 58-1), reprinted in 54 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 553, 558, 566 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter 54 Landmark Briefs].

105. *Id.* at 584. The Board reasoned that “its task is not one of preserving the peace” or “quell[ing] defiance” to integration. *Id.*

106. Response to Application for Vacation of Order of Court of Appeals for Eighth Circuit Staying Issuance of Its Mandate, for Stay of Order of District Court of Eastern District of Arkansas and for Such Other Orders as Petitioners May Be Entitled to, *Cooper*, 358 U.S. 1, reprinted in 54 Landmark Briefs, *supra* note 104, at 547, 551.

107. Brief for the Petitioners, *supra* note 104, at 570.

108. Brief for Respondents, *Cooper*, 358 U.S. 1, reprinted in 54 Landmark Briefs, *supra* note 104, at 595, 606–07.

109. *Id.* at 602.

110. *Id.*

111. *Id.* at 603.



Negro children of their constitutional right.”<sup>112</sup> Like the pro-integration briefs in *Buchanan*, this brief highlighted that Black children had not caused unrest; rather, because they were Black, their mere presence had led others to engage in protest.<sup>113</sup> The United States also echoed concerns that appeasing segregationists in Little Rock “would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means.”<sup>114</sup> This possibility was especially troubling given how just a small number of active agitators had derailed the constitutional rights of the Little Rock Nine.<sup>115</sup>

Ultimately, *Cooper v. Aaron* rejected the preservation of public peace as a reason to deny a constitutional right to equality.<sup>116</sup> The Court clarified that *Brown II* permits a district court to consider “relevant factors” that might justify delaying complete integration but stated that this analysis “of course[] excludes hostility to racial desegregation.”<sup>117</sup> It added that the district court’s findings of unrest at Central High School during the 1957–1958 school year were “directly traceable” to the impermissible actions that Arkansas legislators and executive officials had taken to resist *Brown*’s implementation.<sup>118</sup> Invoking its decision in *Buchanan v. Warley*,<sup>119</sup> the Court concluded that although public peace and order are important, “law and order are not here to be preserved by depriving the Negro children of their constitutional rights.”<sup>120</sup>

Despite the *Cooper* litigation, Arkansas state officials continued to resist integration by weaponizing peace. On August 26, 1958, the Arkansas General Assembly passed a law allowing the governor to close any school when “necessary in order to maintain the peace” against violence caused by integration.<sup>121</sup> On September 18, Governor Faubus delivered a speech warning that “once total, or near total integration is effected, the peace, the quiet, the harmony, the pride in our schools, and even the good relations that existed heretofore between the races here, will be gone

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112. Brief for the United States as Amicus Curiae, *Cooper*, 358 U.S. 1, reprinted in 54 Landmark Briefs, supra note 104, at 611, 624.

113. *Id.* at 627.

114. *Id.* at 628.

115. *Id.* at 629.

116. The Supreme Court issued a per curiam opinion on September 12, 1958, with a full opinion issued on September 29. *Cooper*, 358 U.S. at 4–5 & n.\* (describing the sequence of events and reprinting the per curiam opinion in full).

117. *Id.* at 7.

118. *Id.* at 15.

119. 245 U.S. 60 (1917).

120. *Cooper*, 358 U.S. at 16. “The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.” *Id.*

121. Courts, 3 Race Rels. L. Rep. 869, 869 (1958) (reprinting Faubus’s school closing proclamation); see also Legislatures, 3 Race Rels. L. Rep. 1037, 1037–38 (1958) (reprinting both Faubus’s proclamation calling the special session and the text of his address to the Arkansas General Assembly).

forever.”<sup>122</sup> Nine days later, the people of Little Rock voted 19,470 to 7,561 in favor of closing public schools rather than desegregating.<sup>123</sup> Additionally, the Arkansas Pupil Placement Act of 1959 allowed school boards to consider transferring pupils based in part on “the possibility of breaches of the peace.”<sup>124</sup>

C. *Parks*: *Watson v. City of Memphis*

Like *Buchanan*, *Cooper* did not stop cities from weaponizing peace to delay integration. When Black residents of Memphis sued for immediate desegregation of public parks and other recreational facilities, the city resisted by asserting its “good faith” in complying with the law and the necessity of “gradual” desegregation “to prevent interracial disturbances, violence, riots, and community confusion and turmoil.”<sup>125</sup> The Sixth Circuit endorsed the city’s “unquestioned good faith” as well as its approach to maintaining “the present friendly and peaceful relations between all of the white and colored citizens of Memphis.”<sup>126</sup>

Black Memphians, however, challenged the city on both accounts. The facts did not support the city’s claim of good-faith compliance, their brief before the Supreme Court argued, because Memphis had opened several new segregated parks and facilities since the Court’s ruling declaring segregated parks unconstitutional.<sup>127</sup> The city’s appeal to peace similarly lacked evidence. While the city’s witnesses “expressed the fear that confusion, turmoil, violence and bloodshed would ensue if desegregation proceeded rapidly . . . , these oft-repeated convictions were supported by almost no facts.”<sup>128</sup> On the contrary, the Chairman of the Park Commission described Memphis as “singularly blessed by the absence of turmoil,” identifying no violence in any of the integrated facilities.<sup>129</sup>

Furthermore, even a real violent threat would not alone justify delaying integration.<sup>130</sup> Citing *Cooper* and *Buchanan*, the brief argued that if integration could proceed amid the Little Rock Crisis, then it could certainly proceed in Memphis.<sup>131</sup> At oral arguments, NAACP counsel

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122. Excerpts From the Speech of Governor Orval E. Faubus, Governor, Ark., Speech on School Integration, September 18, 1958, Univ. of Ark. Libraries, <https://libraries.uark.edu/specialcollections/research/lessonplans/FaubusSpeechLessonPlan.pdf> [<https://perma.cc/7GA4-J78R>] (last visited Feb. 4, 2023).

123. Crisis Timeline: Little Rock Central High School National Historic Site, *supra* note 97.

124. Act 461, § 4, 1959 Ark. Acts 1827, 1829.

125. *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963).

126. *Watson v. City of Memphis*, 303 F.2d 863, 868, 870 (6th Cir. 1962), *rev'd*, 373 U.S. 526.

127. Brief for Petitioners at 20, *Watson*, 373 U.S. 526 (No. 424), 1963 WL 105592.

128. *Id.* at 13.

129. *Id.* at 5.

130. *Id.* at 14.

131. *Id.* 14–15.

Constance Baker Motley added that “instead of shortening any period of disquiet and confusion, [gradualism] would certainly lengthen the period of racial unrest and disturbance.”<sup>132</sup> On this view, the elimination of racial inequities through integration and other measures would secure a more durable peace.

The Court in *Watson v. City of Memphis* declared that Memphis could not further delay desegregating its public parks and other recreational facilities.<sup>133</sup> Echoing *Cooper* from five years earlier, the Court’s unanimous decision rejected the claim that slowing the pace of integration was necessary to prevent “turmoil” by noting that “constitutional rights may not be denied simply because of hostility to their assertion or exercise.”<sup>134</sup> Furthermore, it found the asserted “fears of violence and tumult” and “inability to preserve the peace” to be merely “personal speculations or vague disquietudes of city officials.”<sup>135</sup> These officials had referred “only to a number of anonymous letters and phone calls” and “gave no concrete indication of any inability of authorities to maintain the peace.”<sup>136</sup>

While these positions aligned with those expressed in *Cooper* and *Buchanan*, *Watson* arguably went further toward recognizing the value of positive peace: It concluded that “goodwill between the races . . . can best be preserved and extended by the observance and protection, not the denial, of the basic constitutional rights here asserted.”<sup>137</sup>

While *Cooper v. Aaron* and *Watson v. City of Memphis* protected integration from weaponized public peace, the Court soon considered whether racial justice protests could be curtailed in the name of public peace in *Cox v. Louisiana*. Here, too, the Court was met with similar appeals from segregationists relating to peace and order but ultimately rejected them in favor of preserving constitutional rights.

#### D. *Protests: Cox v. Louisiana*

On December 15, 1961, Reverend B. Elton Cox led a peaceful civil rights demonstration and initiated a sit-in at lunch counters in Baton Rouge, Louisiana.<sup>138</sup> Cox was ordered to stop by the local sheriff, who deemed the sit-in a disturbance of the peace.<sup>139</sup> Cox was arrested and charged with four offenses under Louisiana law—(1) criminal conspiracy,

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132. Oral Argument at 19:42, *Watson*, 373 U.S. 526 (No. 424), <https://www.oyez.org/cases/1962/424> (on file with the *Columbia Law Review*).

133. *Watson*, 373 U.S. at 528, 539.

134. *Id.* at 535.

135. *Id.* at 536.

136. *Id.*

137. *Id.* at 537. The Court added that “[t]he best guarantee of civil peace is adherence to, and respect for, the law.” *Id.*

138. *Cox v. Louisiana*, 379 U.S. 536, 538–39 (1965).

139. *Id.* at 543.

(2) disturbing the peace, (3) obstructing public passages, and (4) picketing before a courthouse—and convicted of the latter three charges.<sup>140</sup>

At trial, the judge's decision hinged on a weaponized interpretation of public peace, stating: "It must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white [areas] . . . and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served."<sup>141</sup> Cox appealed, and the case reached the Supreme Court.

Defending the conviction, Louisiana argued that peaceful demonstrations are not protected by the First and Fourteenth Amendments irrespective of the place of the demonstration.<sup>142</sup> It also argued that because the Louisiana laws involved "are designed to maintain good order in society" and their concern for peace and good order "applies indiscriminately regardless of the membership of the group picketing or demonstrating," the fact that they were applied to punish Cox for an anti-racism demonstration did not pose a constitutional problem.<sup>143</sup>

In contrast, Cox argued that a robust right to peaceful demonstration must be protected.<sup>144</sup> Indeed, "[t]he more powerless, the more oppressed a minority is, the more important to all society is the right of peaceable assembly."<sup>145</sup> His brief explained that "[p]eaceable action in the streets calling attention to the evils of discrimination has been the lifeblood of protest against racial injustice in recent years . . . . Often it is the only means by which that 'free trade in ideas,' the essence of free speech, may be obtained."<sup>146</sup>

The brief also repudiated the false characterization of Cox's peaceful protest as a riotous one. It explained that although lower courts had suggested that a riot was "inevitable," averted only by timely action by the authorities, the evidence, including Cox's speech encouraging peaceful protest, proved no riot was at hand.<sup>147</sup> The brief thus posited that the protest's stance against racism, rather than its lack of peacefulness, was the true cause of Cox's arrest. With this understanding, it argued that "to permit a demonstration until it advocates ideas with which the authorities or the general public disagrees is a discriminatory application of the law which contributes both an interference with freedom of speech and a denial of equal protection of the laws."<sup>148</sup>

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140. *Id.* at 538.

141. *Id.* at 549–50 (internal quotation marks omitted) (quoting the trial court judge).

142. Consolidated Brief for Appellee at 4–9, *Cox*, 379 U.S. 536 (No. 24), 1964 WL 81197.

143. *Id.* at 8, 13.

144. Consolidated Brief for Appellant at 9–10, *Cox*, 379 U.S. 536 (No. 24), 1964 WL 81196.

145. *Id.* at 10.

146. *Id.* at 10–11.

147. *Id.* at 27.

148. *Id.* at 29.

Eventually, in 1965, the Supreme Court overturned Cox's conviction, rejecting Louisiana's argument that the conviction should be sustained because state witnesses believed that violence was about to erupt.<sup>149</sup> The Court noted that there was no evidence of "fighting words" or any form of violence in the demonstrations and that any fear of violence was based on the reaction of white citizens looking from across the street.<sup>150</sup> Further, it found that because a plain reading of the statute would allow convictions for any peaceful expression of unpopular views, convictions under the statute would infringe on constitutional protections for freedom of speech and expression.<sup>151</sup>

Despite the favorable ruling, however, the Justices referred to civil rights protestors as "mobs" and reinforced the idea that minority groups had no right to "patrol and picket in the streets whenever they choose."<sup>152</sup> This hedging led legal scholar Harry Kalven to write that the Court "bristled with cautions and with a lack of sympathy for such forms of protest."<sup>153</sup> The lack of sympathy was a harbinger of the Supreme Court's return to uncritically accepting weaponized peace claims in *Palmer v. Thompson*.<sup>154</sup>

#### E. *Pools*: *Palmer v. Thompson*

In 1962, after segregation had been declared unconstitutional, Jackson, Mississippi, decided to close rather than integrate all public swimming pools.<sup>155</sup> The district court found that closing the pools was justified to preserve peace and order and also because the pools could not be operated economically on an integrated basis.<sup>156</sup> The Fifth Circuit affirmed, with a vigorous dissent pointing out that peace was pretext for segregation: "[T]he pools were closed not to promote peace but to prevent blacks and whites swimming in the same water."<sup>157</sup>

Before the Supreme Court, Jackson argued that integrating the pools would lead to violence: It asserted that a preexisting risk of violent clashes between Jackson youth of different racial groups would be exacerbated by

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149. *Cox*, 379 U.S. at 558.

150. *Id.* at 550–51.

151. *Id.* at 551–52.

152. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 *Sup. Ct. Rev.* 1, 7.

153. *Id.* at 8.

154. 403 U.S. 217 (1971).

155. *Id.* at 218–19. Mayor Allen C. Thompson, when asked to explain Jackson's policy with respect to public transportation, stated that peace, prosperity, and happiness in the city had been achieved by separation of the races. See *Bailey v. Patterson*, 199 F. Supp. 595, 611 (S.D. Miss. 1961). Specific to the decision to close public pools, he cited "personal safety" and the maintenance of law and order as reasons to prohibit integration. *Palmer v. Thompson*, 419 F.2d 1222, 1225 (5th Cir. 1969).

156. *Palmer*, 403 U.S. at 219.

157. *Palmer*, 419 F.2d at 1230 (Wisdom, J., dissenting).

their close contact at the pools.<sup>158</sup> Jackson further argued that the promotion of public peace and the preservation of the economic condition could justify an exercise of the police power to maintain racial separation so long as this exercise did not result in unequal treatment.<sup>159</sup> Since all residents would be denied access to public pools, the city suggested that all racial groups were subject to equal treatment by this decision.<sup>160</sup>

Disputing Jackson's account, Hazel Palmer and other Black residents argued that the excuses of safety and economy were "mere smokescreens" based on unsupported speculation: There was no evidence that operating the pools on an integrated basis would endanger public safety.<sup>161</sup> Rejecting that Jackson's history held any peace worth preserving in the first place, Palmer and others explained that "the only peace established during 100 years of segregation was that imposed upon blacks by the force and repression of the dominant white society."<sup>162</sup>

Furthermore, even if Jackson's concerns were true, there was still no justification for closing the pools. Citing *Buchanan v. Warley* and related cases, Black residents drew upon Supreme Court jurisprudence since 1917 that reiterated how Black citizens could not be denied equality and freedom because their enjoyment of equal status might threaten the public peace.<sup>163</sup> They insisted that *Brown v. Board of Education* had not only rejected the exclusionary negative peace of Jim Crow but had also placed the United States on "the road to integration and equality, rather than segregation and repression, as the proper constitutional direction to ultimate racial peace."<sup>164</sup> Although the integration of public pools would not end racial strife, Palmer argued that circumventing integration would maintain it, for "long-suffered repression, not freedom and equality, . . . inevitably leads to violent upheaval."<sup>165</sup>

The United States government also urged the Supreme Court to dismiss Jackson's appeal to public peace.<sup>166</sup> Its brief argued that neither the asserted fears of violence nor the inability to preserve peace was proved at trial beyond speculation or vague claims of city officials; in fact, there was only evidence that transitions from segregated to integrated recreational facilities had been completed peacefully in the past.<sup>167</sup> The brief accepted that such transitions may require public officials to consider problems relating to safety and economy, but it argued that even where these problems

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158. Brief of Respondents at 10, *Palmer*, 403 U.S. 217 (No. 107), 1970 WL 122624.

159. *Id.* at 34.

160. *Id.* at 10.

161. Brief for Petitioners at 10, *Palmer*, 403 U.S. 217 (No. 107), 1970 WL 122623.

162. Reply Brief for Petitioners at 4, *Palmer*, 403 U.S. 217 (No. 107), 1970 WL 122625.

163. Brief for Petitioners, *supra* note 161, at 21.

164. Reply Brief for Petitioners, *supra* note 162, at 4.

165. *Id.* at 4.

166. Brief of the United States as Amicus Curiae at 8, *Palmer*, 403 U.S. 217 (No. 107), 1970 WL 122772.

167. *Id.* at 17.

exist, the solution should be tailored to the problem.<sup>168</sup> While it may be permissible for public facilities to temporarily close to facilitate prompt and orderly desegregation, there was no such objective here.<sup>169</sup>

The United States further cautioned that allowing pool closures would have a chilling effect on antiracism protests: The “price of protest is high,” and now Black people would see that they risked losing access to even segregated facilities and further enraging a white community that would also lose access if they protested segregation.<sup>170</sup> This would further entrench an oppressive negative peace by discouraging justice-seeking efforts in the future.<sup>171</sup>

Despite these arguments, in 1971, the Supreme Court held that Jackson’s decision to close rather than integrate all public swimming pools did not deny equal protection to Black residents.<sup>172</sup> A 5-4 majority agreed with the petitioners that preserving public safety, a fear of hostility, or a need to save money could not support otherwise impermissible state action.<sup>173</sup> However, the majority disagreed that any constitutional rights are denied by the closure of pools to white and Black people alike.<sup>174</sup> The majority considered the complete closure of pools to be permissible state action, irrespective of its basis in unfounded fears of violence.<sup>175</sup> Thus, Jackson could simply cite public peace to close pools, and the Court would not interrogate whether the city had closed pools to keep Black and white people apart.<sup>176</sup> In contrast, the dissent expressly rejected the argument that the pools could not be economical or safely run on an integrated basis, citing a lack of evidence.<sup>177</sup> The dissent found that arguments based on potential violence reflect the views “of a few immoderates” who purport to speak for the whole white population of Jackson.<sup>178</sup>

By permitting Jackson’s pool closures, *Palmer* enabled what author Heather McGhee has termed “drained-pool politics”—racialized zero-sum thinking that “if ‘they’ can also have it, then no one can.”<sup>179</sup> McGhee describes how such unwillingness to share resources harms all Americans by

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168. *Id.* at 18–19.

169. *Id.*

170. *Id.* at 16.

171. *Id.*

172. *Palmer*, 403 U.S. at 226.

173. *Id.*

174. *Id.*

175. *Id.*

176. In 2017, the Trump Administration cited *Palmer* “to categorically insulate its intent in effectuating the Muslim ban.” John-Paul Schnapper-Casteras, *The Problem with Palmer, Take Care* (May 7, 2017), <https://takecareblog.com/blog/the-problem-with-palmer> [<https://perma.cc/W5WW-DGLG>].

177. *Palmer*, 403 U.S. at 241.

178. *Id.* at 260.

179. What “Drained-Pool” Politics Costs America, *N.Y. Times: Ezra Klein Show* (Feb 16, 2021), <https://www.nytimes.com/2021/02/16/opinion/ezra-klein-podcast-heather-mcghee.html> (on file with the *Columbia Law Review*) (documenting a discussion with

preventing policies like universal health care and childcare.<sup>180</sup> Drained-pool politics undermines social peace by pitting Americans against one another despite their aligned interests.<sup>181</sup>

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As these cases highlight, racialized appeals to peace have routinely been used in legal arguments against racial justice. According to these arguments, Black people moving into predominantly white neighborhoods,<sup>182</sup> studying in integrated classrooms,<sup>183</sup> strolling in public parks,<sup>184</sup> sitting in large numbers at white lunch spots,<sup>185</sup> and swimming in public pools<sup>186</sup> were all unacceptable risks to public peace and good order.

For much of its history, the Supreme Court accepted such arguments to preserve an oppressive negative peace.<sup>187</sup> However, in *Cooper v. Aaron*, the Court held that “law and order are not . . . to be preserved by depriving the Negro children of their constitutional rights,”<sup>188</sup> a sentiment that echoed *Buchanan v. Warley*.<sup>189</sup> Yet, *Cooper* did not stop the weaponization of peace. Instead, through a dynamic that Professor Reva Siegel has called “preservation-through-transformation,” the “preservation” of racial separation occurred partly *through* the “transformation” of peace arguments into politically palatable forms.<sup>190</sup> Some integration opponents shifted from arguing for the continued segregation of public facilities, a strategy that the Court rejected in *Watson v. City of Memphis*, to arguing for the more palatable option of their complete closure, which the Court accepted in *Palmer v. Thompson*.<sup>191</sup> In both these cases, vague and dubious appeals to social peace had underpinned state action designed to avoid racial integration. Yet less than a decade after *Watson* and with the votes of two recent Nixon appointees, the Court in *Palmer* failed to interrogate the veracity, purpose, and effect of the peace claims used to justify pool closures.<sup>192</sup>

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Heather McGhee); see also Heather McGhee, *The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together* 273 (2021).

180. What “Drained-Pool” Politics Costs America, *supra* note 179.

181. McGhee, *supra* note 179, at 289.

182. See *supra* section II.A (discussing *Buchanan v. Warley*).

183. See *supra* section II.B (discussing *Cooper v. Aaron*).

184. See *supra* section II.C (discussing *Watson v. City of Memphis*).

185. See *supra* section II.D (discussing *Cox v. Louisiana*).

186. See *supra* section II.E (discussing *Palmer v. Thompson*).

187. See *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), superseded by constitutional amendment, U.S. Const. amend. XIV.

188. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958).

189. 245 U.S. 60 (1917).

190. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1113 (1997).

191. 403 U.S. 217, 226 (1971).

192. Compare *id.*, with *Cooper*, 358 U.S. at 26, and *Watson v. City of Memphis*, 373 U.S. 526, 536 (1963).



Taking their cue from these cases, legislators and litigants continued to weaponize peace in facially neutral arguments against racial justice measures. In *Crawford v. Board of Education*, for example, the Supreme Court upheld an amendment to the California Constitution that stripped state courts of the power to order mandatory desegregation except to remedy recognized Fourteenth Amendment violations.<sup>193</sup> The text of the amendment claimed that this was necessary for “preserving harmony and tranquility in this state and its public schools.”<sup>194</sup> In an amicus brief opposing the amendment, Margaret Tinsley and other parents of schoolchildren situated this language in historical context.<sup>195</sup> Citing references to peace, safety, and good order in cases such as *Dred Scott v. Sandford* and *Plessy v. Ferguson*, they argued that “the need for racial peace and harmony has been given as the justification for every other *retrogressive* racial action throughout the history of this country.”<sup>196</sup> They appealed to the *Buchanan–Cooper–Watson* line of cases to show that forsaking justice for the sake of an exclusionary negative peace was both morally and legally wrong.<sup>197</sup> Ignoring this history of weaponized peace, the majority opinion in *Crawford* upheld California’s amendment partly on the premise that it did not embody an explicit racial classification.<sup>198</sup> By contrast, Justice Marshall’s dissenting opinion said that California’s amendment did embody a racial classification and that the purported justification of “harmony and tranquility” could not sustain it.<sup>199</sup>

The expectation that weaponized peace claims will often be made in bad faith and on the basis of limited or poor-quality evidence is one of the many lessons from this legal history that are pertinent to present debates.

### III. WEAPONIZED PEACE IN CURRENT DEBATES

To this day, claims about peace are being deployed to stymie progress toward racial justice in multiple arenas, including police brutality and over-policing of Black and Brown communities, antiracism education, and racial inclusion in schools.<sup>200</sup> These contemporary peace claims share rhetorical and functional similarities with the historical ones discussed above.<sup>201</sup>

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193. See 458 U.S. 527, 531–35 (1982).

194. Cal. Const. art. I, § 7(a).

195. Brief of Amici Curiae Margaret Tinsley et al in Support of Petitioners at 9–10, *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (No. 81-38), 1981 WL 769835.

196. *Id.* at 10.

197. *Id.* at 13.

198. *Crawford*, 458 U.S. at 543 n.29, 544–45.

199. *Id.* at 559 n.6 (Marshall, J., dissenting).

200. These claims often raise familiar concerns about encroachments of property and settled expectations. See *supra* notes 10–12 and accompanying text.

201. Whereas Professor Christopher Bracey considers contemporary “domestic tranquility” arguments to have “rhetorical pedigree” in historical ones, Professor Jill Hasday notices both rhetorical and functional similarities between them. Compare Christopher A.

A. *The Black Lives Matter Movement, Anti-Protest Laws, and Anti-Defund Strategies*

In the Civil Rights Era, racial justice protestors were labeled “unpeaceful” to discredit them and limit their right to gather, speak, and demand justice. Professor Derrick Bell observes that for many white people living through that era, “there really were no peaceful, nondisruptive civil rights protests,” for each protest “represented a most threatening challenge” to white supremacy.<sup>202</sup> As Professor John A. Powell explains, the word “riot” was often used to describe mostly peaceful civil rights protests to convey the “sense of chaos, doom” they evoked for many white people in that era.<sup>203</sup>

This pattern continues today. In the month following George Floyd’s murder in 2020, an estimated fifteen to twenty-six million Americans took to the streets over the police killings of Black people.<sup>204</sup> While these protestors were overwhelmingly peaceful in the face of brutal responses by

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Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. Cal. L. Rev. 1231, 1235–36 (2006), with Hasday, *supra* note 4, at 1500. This Essay adopts a critical stance based on both rhetorical and functional similarities between historical and contemporary peace arguments against racial justice.

This does not mean that historical and contemporary arguments are identical. For example, whereas dominant peace claims were once made with varying degrees of overt racism, similar claims are now made in primarily facially neutral or “colorblind” terms within a legal framework that accepts racism beneath the veil of colorblindness. Thus, even as overt racism has been delegitimized, peace remains a “neutral” principle through which racial exclusion, inequities, and disempowerment may be justified. For critiques of how “colorblind” racial ideology de-historicizes race and divorces it from social meaning, obscures and legitimizes practices that maintain racial inequalities, and actively undermines rather than vindicates constitutional commitments to equality, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1337 (1988) (“The principal basis of [the Reagan Administration’s] hostility was a formalistic, color-blind view of civil rights.”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, 44 Stan. L. Rev. 1, 2 (1991) (arguing “that the United States Supreme Court’s use of color-blind constitutionalism . . . fosters white racial domination”); Ian F. Haney López, *“A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness*, 59 Stan. L. Rev. 985, 988 (2007) (“[I]t seems difficult to argue against the insistence that the state should finally eschew all racial distinctions. But as it stands now, this appeal depends almost entirely on the conflation of colorblindness as an ideal vision of a future society, and as a means to achieve this end.”).

202. Derrick Bell, *Race, Racism, and American Law* 555 (5th ed. 2004); see also Etienne C. Toussaint, *Blackness as Fighting Words*, 106 Va. L. Rev. Online 124, 128 (2020) (arguing that the very utterance of the phrase “Black Lives Matter” tends to conjure images of social unrest, disorder, looting, and subversion).

203. Katy Steinmetz, ‘A War of Words.’ Why Describing the George Floyd Protests as ‘Riots’ Is So Loaded, *Time* (June 8, 2020), <https://time.com/5849163/why-describing-george-floyd-protests-as-riots-is-loaded/> (on file with the *Columbia Law Review*).

204. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, *N.Y. Times* (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (on file with the *Columbia Law Review*).

police and white supremacist militias,<sup>205</sup> the use of the word “riot” remained widespread in media articles: “[U]se of riot was . . . about 28 times more common than uprising and 175 times more common than rebellion.”<sup>206</sup> Furthermore, their opponents’ rhetoric reduced these protesters to violent disruptors of peace, as opposed to communities in despair over generations of anti-Black state violence.<sup>207</sup> For example, President Donald Trump called the protesters in Minneapolis “thugs” and threatened to use militaristic force against them.<sup>208</sup> Trump’s Attorney General, Bill Barr, called protesters’ actions “fascistic” and bent on “tearing down the system.”<sup>209</sup>

Following these 2020 uprisings, several states introduced legislation expanding penalties for unlawful assembly or civil unrest, what have become known as “anti-riot” or “anti-protest” laws.<sup>210</sup> The United Nations Committee on the Elimination of Racial Discrimination raised concern about these states’ “increase in legislative measures and initiatives . . . that unduly restrict the right to peaceful assembly following anti-racism protests in recent years.”<sup>211</sup> Florida’s Combating Public Disorder Act, which

205. Steinmetz, *supra* note 203; see also Maria Cramer, New York Will Pay Millions to Protesters Violently Corralled by Police, *N.Y. Times* (Mar. 1, 2023), <https://www.nytimes.com/2023/03/01/nyregion/nypd-kettling-blm-protests-settlement.html> (on file with the *Columbia Law Review*).

206. *Id.*

207. See Joshi, *Racial Justice and Peace*, *supra* note 6, at 1346.

208. Safia Samee Ali, ‘Not by Accident’: False ‘Thug’ Narratives Have Long Been Used to Discredit Civil Rights Movements, *NBC News* (Sept. 27, 2020), <https://www.nbcnews.com/news/us-news/not-accident-false-thug-narratives-have-long-been-used-discredit-n1240509> [https://perma.cc/NFJ3-B9PR]. In contrast, Michael McDowell, a local leader of Black Lives Matter, said during the 2020 protests that “Minneapolis is burning” because “[t]here are folks reacting to a violent system.” Joshi, *Racial Justice and Peace*, *supra* note 6, at 1346 (alteration in original) (internal quotation marks omitted) (quoting Holly Bailey, Jared Goyette, Sheila Regan & Tarkor Zehn, *Chaotic Minneapolis Protests Spread Amid Emotional Calls for Justice, Peace*, *Wash. Post* (May 29, 2020), <https://www.washingtonpost.com/nation/2020/05/29/chaotic-minneapolis-protests-spread-amid-emotional-calls-justice-peace/> (on file with the *Columbia Law Review*)). Similarly, an unnamed Black man guarding his store said: “We want to see peace prevail, but tensions are high right now . . . . The pain and the things people are feeling right now is rooted for years.” *Id.* (alteration in original) (internal quotation marks omitted) (quoting Holly Bailey, Jared Goyette, Sheila Regan & Tarkor Zehn, *Chaotic Minneapolis Protests Spread Amid Emotional Calls for Justice, Peace*, *Wash. Post* (May 29, 2020), <https://www.washingtonpost.com/nation/2020/05/29/chaotic-minneapolis-protests-spread-amid-emotional-calls-justice-peace/> (on file with the *Columbia Law Review*)).

209. Justin Wise, Barr: The Left ‘Believes in Tearing Down the System’, *Hill* (Aug. 10, 2020), <https://thehill.com/homenews/administration/511271-barr-the-left-believes-in-tearing-down-the-system/> [https://perma.cc/Z2WU-HF7T].

210. O’Connor, *supra* note 20; see also Kathleen Bartzen Calver & Douglas M. McLeod, “Anti-Riot” or “Anti-Protest” Legislation? Black Lives Matter, News Framing, and the Protest Paradigm, 4 *Journalism & Media* 216, 216 (2023).

211. Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Reps. of the United States of America*, U.N. Doc. CERD/C/USA/CO/10-12, at 6 (Sept. 21, 2022), [https://tbinternet.ohchr.org/\\_layouts/](https://tbinternet.ohchr.org/_layouts/)

defines “riot” broadly and increases penalties for crimes committed during protests,<sup>212</sup> was cited as a prototypical example of this concerning pattern of legislation.<sup>213</sup> Florida Governor Ron DeSantis argued that such laws were needed to stop the “professional agitators bent on sowing disorder and causing mayhem in our cities.”<sup>214</sup> His comments echoed segregationists who complained about southern peace being decimated by “outside agitators” like the NAACP.<sup>215</sup>

While Florida’s bill was signed into law in April 2021, an injunction stopped its definition of “riot” from coming into force.<sup>216</sup> A federal district court in Tallahassee noted that the 2020 protests in Florida were “largely peaceful,” as DeSantis himself acknowledged at one point.<sup>217</sup> The court also situated the current law in the larger historical context of Florida’s anti-riot laws: Recalling Florida’s use of anti-riot laws to maintain Jim Crow era mores, the court recognized that “what’s past is prologue” and was correctly skeptical of Florida’s peace-related claims and proposed definition of “riot.”<sup>218</sup>

In the end, the court found that the law’s definition of “riot” was “vague and overbroad,” infringing constitutional rights of free speech and assembly as well as due process protections.<sup>219</sup> The court also acknowledged the concern that the law would be used against Black Floridians protesting racial injustice but not against those threatening or harming peaceful racial justice protesters.<sup>220</sup>

Some lawmakers have also cited the 2021 white supremacist insurrection at the United States Capitol as a reason to criminalize actions

15/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FUSA%2FCO%2F10-12&Lang=en [https://perma.cc/8U38-TW9Y].

212. H.B. 1, 2021 Leg. (Fla. 2021).

213. Comm. on the Elimination of Racial Discrimination, *supra* note 211, at 6. In a similar vein, the *Miami Herald’s* editorial board derided Florida’s anti-protest legislation as “redundant, racist and totally political,” designed to “make it dangerous for [Black Lives Matter] supporters to take to the streets, however peacefully.” Editorial, *Could Anything Be Worse Than Florida’s Stand Your Ground? Yes, A New, Racist Legislative Proposal*, *Mia. Herald*, Feb. 10, 2021, at A10.

214. O’Connor, *supra* note 20.

215. See, e.g., 102 Cong. Rec. 4461 (1956) (statement of Sen. Thurmond).

216. *Dream Defs. v. DeSantis*, 559 F. Supp. 3d 1238, 1288 (N.D. Fla. 2021).

217. *Id.* at 1250 n.5.

218. “Now this Court is faced with a new definition of ‘riot’—one that the Florida Legislature created following a summer of nationwide protest for racial justice . . . and in support of the powerful statement that Black lives matter.” *Id.* at 1250.

219. *Id.* at 1267. The court said that under Florida’s anti-protest law, “[T]he lawless actions of a few rogue individuals could effectively criminalize the protected speech of hundreds, if not thousands, of law-abiding Floridians.” *Id.* at 1284.

220. *Id.* at 1256. This decision is currently on appeal. Michael Moline, *FL Supreme Court to Help Interpret DeSantis’ 2021 Anti-Riot Law*, *Mia. Times* (Jan. 18, 2023), [https://www.miamitimesonline.com/news/florida/fl-supreme-court-to-help-interpret-desantis-2021-anti-riot-law/article\\_fbbdfed6-95be-11ed-9b08-cfd69ef1cb5.html](https://www.miamitimesonline.com/news/florida/fl-supreme-court-to-help-interpret-desantis-2021-anti-riot-law/article_fbbdfed6-95be-11ed-9b08-cfd69ef1cb5.html) [https://perma.cc/3PJU-ANZA].

otherwise associated with Black Lives Matter protests, such as blocking streets and camping outside state capitols.<sup>221</sup> Weaponized peace claims accordingly featured in state laws prohibiting specific conduct during protests. For example, Florida and other states enacted specific residential picketing laws to “protect[] the tranquility and privacy of the home and protect[] citizens from the detrimental effect of targeted picketing.”<sup>222</sup> These laws curtail protestors’ ability to assemble outside the homes of public officials to demand accountability, such as when groups gathered outside an Orlando home owned by Derek Chauvin, the police officer who murdered George Floyd.<sup>223</sup>

Invoking peace to limit protests against police brutality ignores how status quo policing regularly infringes on the peace of Black and Brown communities. Decades of “tough on crime” policies have led law enforcement to disrupt peace in these communities through constant surveillance and harassment and systematic targeting.<sup>224</sup> In January 2023, Memphis’s SCORPION police unit, which stood for Street Crimes Operation to Restore Peace in Our Neighborhoods, murdered Tyre Nichols, a twenty-nine-year-old Black man.<sup>225</sup> Far from promoting peace, these police officers’ “presence had spread fear in the predominantly low-income neighborhoods they patrolled, and records show that Black men were overwhelmingly their targets.”<sup>226</sup>

Today, racial justice opponents weaponize peace not just by passing laws limiting protest against police brutality but also by resisting efforts to defund the police. Despite the harms policing poses for Black and Brown communities, opponents have resisted reform efforts by depicting policing as the precondition for peace. For example, to counter racial justice cries of “No Justice! No Peace!,” a right-wing advocacy group erected “No

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221. O’Connor, *supra* note 20 (noting that some state officials, including DeSantis, cited the Capitol insurrection in support of anti-protest laws, but reporting that “experts say laws creating new criminal penalties for protesting are sure to be used mainly against minority groups—not far right extremists”).

222. House of Representatives Staff Final Bill Analysis, H.B. 1571, 2022 Leg., at 1 (Fla. 2022), <https://flsenate.gov/Session/Bill/2022/1571/Analyses/h1571z1.CRM.PDF> [<https://perma.cc/KXT6-2SPH>].

223. Crowds at Derek Chauvin’s Florida Vacation Home Prompt County to Consider Protest Limits, *Tampa Bay Times* (June 9, 2021), <https://www.tampabay.com/news/florida/2021/06/09/crowds-at-derek-chauvins-florida-vacation-home-prompt-county-to-consider-protest-limits/> [<https://perma.cc/FJ9K-7APY>].

224. See Monica C. Bell, *Anti-Segregation Policing*, 95 *N.Y.U. L. Rev.* 650, 754–55 (2020).

225. Mike Baker, *Special Memphis Police Unit Was Supposed to Stop Violence*, *N.Y. Times* (Jan. 27, 2023), <https://www.nytimes.com/2023/01/27/us/scorpion-unit-tyre-nichols-death.html> (on file with the *Columbia Law Review*).

226. Steve Eder, Matthew Rosenberg, Joseph Goldstein, Mike Baker, Kassie Bracken & Mark Walker, *Muscle Cars, Balaclavas and Fists: How the Scorpions Rolled Through Memphis*, *N.Y. Times* (Feb. 4, 2023), <https://www.nytimes.com/2023/02/04/us/memphis-police-scorpion.html> (on file with the *Columbia Law Review*).

Police, No Peace” billboards in cities across the United States.<sup>227</sup> According to its executive director, these billboards show that “Americans want safety, security, and a clear vision for how to quell the violence,” and “you cannot have peace without the police.”<sup>228</sup> Others have insisted on increasing police budgets and power to preserve public peace. “It turns out emboldening criminals while undermining law enforcement is not a recipe for peace and tranquility,” Trump’s acting Secretary for Homeland Security and a former police officer asserted in one op-ed.<sup>229</sup> In Texas, Governor Greg Abbott helped pass a measure to make it “fiscally impossible for cities to defund police” on the premise that doing so would invite “crime and chaos” into communities.<sup>230</sup> Such efforts weaponize peace by depicting racial justice protests as unpeaceful and by both downplaying the role of police in generating social unrest and exaggerating their role in maintaining social peace.<sup>231</sup>

Even if policing reduces crime, the reduction of crime is not always the only or necessarily the most important peace interest at stake. Communities also have significant peace interests in being free of the

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227. Joseph Patrick, “No Police, No Peace” Billboards Are Being Erected in Major Cities Across America, *Law Enft Today* (Sept. 16, 2020), <https://www.lawenforcementtoday.com/no-police-no-peace-billboards-are-being-erected-in-major-cities-across-america/> [https://perma.cc/82PS-REHS].

228. *Id.*

229. Chad Wolf & Scott G. Erickson, Opinion, *The Deadly Consequences of Emboldening Criminals and Undermining Police*, *Hill: Congress Blog* (Dec. 7, 2021), <https://thehill.com/blogs/congress-blog/homeland-security/584795-the-deadly-consequences-of-emboldening-criminals-and/> [https://perma.cc/RW5X-3NB4].

230. Brenna Goth & Ayanna Alexander, ‘Defund the Police’ in Cities Faces Ire of State GOP Lawmakers, *Bloomberg L.* (Mar. 16, 2021), <https://news.bloomberglaw.com/social-justice/defund-the-police-in-cities-faces-ire-of-state-gop-lawmakers> (on file with the *Columbia Law Review*).

231. For example, one recent study found that Black Lives Matter protests were significantly more common in cities with at least one police-related death. Vanessa Williamson, Kris-Stella Trump & Katherine Levine Einstein, *Black Lives Matter: Evidence that Police-Caused Deaths Predict Protest Activity*, 16 *Persps. on Pol.* 400, 406, 409 (2018). Another estimated that police lethal use of force fell by 15.8% on average following Black Lives Matter protests, resulting in approximately 300 fewer police homicides between 2014 and 2019. Travis Campbell, *Black Lives Matter’s Effect on Police Lethal Use of Force* 15 (May 13, 2021) (unpublished manuscript), [https://papers.ssrn.com/abstract\\_id=3767097](https://papers.ssrn.com/abstract_id=3767097) [https://perma.cc/N2LR-ZSS5]; see also Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 *Geo. L.J.* 1479 (2016) (discussing how policing can escalate rather than quell social unrest); Hakeem Jefferson, José Luis Gandara, Cathy J. Cohen, Yanilda M. González, Rebecca U. Thorpe & Vesla M. Weaver, *Beyond the Ballot Box: A Conversation About Democracy and Policing in the United States*, 26 *Ann. Rev. Pol. Sci.* (forthcoming June 2023) (manuscript at 1.2) (discussing how policing undermines democracy); Evelyn Skoy, *Black Lives Matter Protests, Fatal Police Interactions, and Crime*, 39 *Contemp. Econ. Pol’y* 280, 281 (2021) (“[A]n increase in the number of protests within a state is associated with a decrease in the number of Black fatalities from police encounters in the month immediately following the protests, yet there does not appear to be a longer lasting impact on the number of fatalities.”).

harms policing causes<sup>232</sup> and having access to social resources and infrastructure.<sup>233</sup> To assess whether policing advances peace, its impact on a fuller range of peace interests must be evaluated and compared to the alternatives to policing that racial justice advocates have proposed. Simply promoting policing as peacekeeping disguises police harms, distracts from structural inequities, and ignores that advocates' alternatives to policing might better advance peace.

B. *Antiracism Education, Critical Race Theory Bans, and Affirmative Action Litigation*

During the Civil Rights Era, segregationists sought to preserve “racial harmony” by preventing civil rights protests and the registration of Black voters.<sup>234</sup> Today, dominant groups seek to preserve “racial harmony” by preventing antiracism protests and education.<sup>235</sup> As historically, the present weaponization of peace takes “respectable” form in legislation alongside militant form in acts of domestic terrorism. A recent bomb threat to Tufts University’s diversity department, for example, blamed antiracism education for “causing division in our country.”<sup>236</sup>

As of February 2023, public officials across forty-four states have taken steps to ban what they deem “critical race theory” and other “divisive concepts” from being taught in public schools.<sup>237</sup> For example, an Ohio bill would ban classroom teaching and materials on “divisive or inherently racist concepts,” defined to include, among other things, “critical race theory,” “intersectional theory,” “The 1619 project,” and “diversity, equity, and inclusion learning outcomes.”<sup>238</sup> Other laws, such as those passed in

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232. On the trade-offs “between stopping crime and stopping police violence,” both of which can be understood as peace interests, see Note, Pessimistic Police Abolition, 136 Harv. L. Rev. 1156, 1177 (2023).

233. Professor Monica Bell observes how we live “in a world more focused on the interpersonal violence that shows up in crime statistics than the structural violence that does not.” Monica Bell, Black Security and the Conundrum of Policing, Just Sec. (July 15, 2020), <https://www.justsecurity.org/71418/black-security-and-the-conundrum-of-policing/> [<https://perma.cc/S2QM-PD3K>]. Professor Allegra McLeod describes the abolitionist project as “at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably.” Allegra M. McLeod, Envisioning Abolition Democracy, 132 Harv. L. Rev. 1613, 1615 (2019); see also Theresa L. Armstead, Natalie Wilkins & Maury Nation, Structural and Social Determinants of Inequities in Violence Risk: A Review of Indicators, 49 J. Cmty. Psychol. 878 (2021).

234. See *supra* text accompanying notes 51–60.

235. See Steve Toth, A Plea for Racial Harmony, Tex. Pub. Pol’y Found. (May 6, 2021), <https://www.texaspolicy.com/a-plea-for-racial-harmony/> [<https://perma.cc/948V-TE67>].

236. Clara McCourt (@McCourtClara), Twitter (Dec. 14, 2022), <https://twitter.com/McCourtClara/status/1603141710892224518> [<https://perma.cc/3TVV-MEJ8>].

237. Schwartz, *supra* note 23.

238. H.B. 616, 134th Gen. Assemb., Reg. Sess. (Ohio 2022).

Arkansas<sup>239</sup> and Virginia,<sup>240</sup> also prohibit any critiques of the notion of “meritocracy” and its role in perpetuating racial inequality.<sup>241</sup> In defending their state’s law, one Texas politician depicts racial justice uprisings as forces of “racial antagonism” that have replaced “normal life” with “lawlessness, violence, and destruction of private property and small businesses.”<sup>242</sup> Their “roadmap for racial harmony” seeks to “prevent Texas cities from becoming Portland and Seattle” by banning any teaching of America’s anti-Black, racist, and colonialist past and present.<sup>243</sup>

The claim that addressing race and racism is “divisive”—and thus disruptive of racial peace and harmony—has also shaped affirmative action law.<sup>244</sup> In 1978 in *Regents of the University of California v. Bakke*, opponents characterized affirmative action as “divisive” of society and the cause of “racial antagonism.”<sup>245</sup> In an opinion that would prove hugely influential in constitutional law, Justice Lewis Powell inscribed their resistance into law by arguing that affirmative action “may serve to exacerbate racial and ethnic antagonisms rather than alleviate them.”<sup>246</sup> Justice Powell concluded that affirmative action should be limited and permitted only in the pursuit of a diverse student body.<sup>247</sup> His opinion required affirmative action programs to use the racially covert and conciliatory language of “diversity,” as opposed to “justice,” to avoid antagonizing white litigants.<sup>248</sup>

But even diversity proved too divisive for staunch affirmative action opponents. In the two affirmative action cases currently before the Supreme Court, these opponents maintain that *any* consideration of race

239. Act 1014, 2021 Ark. Acts 4985.

240. Ending the Use of Inherently Divisive Concepts, Including Critical Race Theory, and Restoring Excellence in K-12 Public Education in the Commonwealth, Va. Exec. Order No. 1 (Jan. 15, 2022), <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-1-Ending-the-Use-of-Inherently-Divisive-Concepts.pdf> [<https://perma.cc/LX8M-6ERM>].

241. For a critique of traditional ideas of meritocracy, see Lani Guinier, *The Tyranny of the Meritocracy: Democratizing Higher Education in America* 7–17 (2015).

242. Toth, *supra* note 235.

243. *Id.*

244. On the development of affirmative action law, see Yuvraj Joshi, *Racial Indirection*, 52 U.C. Davis L. Rev. 2495, 2513–24 (2019).

245. Brief of Amicus Curiae Young Americans for Freedom at 25, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187991; see also Brief Amici Curiae for the Fraternal Order of Police, the Conference of Pennsylvania State Police Lodges of the Fraternal Order of Police, the International Conference of Police Associations and the International Association of Chiefs of Police at 3, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187969 (cautioning against “the racial quota, with all its divisive and arbitrary effects[] . . . becom[ing] a fixed feature in our professions and occupations”); Brief of the Chamber of Commerce of the United States of America Amicus Curiae at 40, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187976 (“Quotas are divisive and may lead to racial antagonism.”).

246. *Bakke*, 438 U.S. at 298–99 (opinion of Powell, J.).

247. *Id.* at 306–12.

248. *Id.*



in admissions, even in subtle and partial ways that neither guarantee nor preclude the admission of any applicant based on their race, is “inherently divisive.”<sup>249</sup> Essentially, opponents’ preferred “colorblind” approach aims to reduce racial discord by denying the existence of structural inequality and dismissing the salience of race and racism in people’s lives.<sup>250</sup> Meanwhile, their own legal strategies are predicated on inflaming racial resentments.<sup>251</sup> Again, although these arguments may appear different from the overtly segregationist arguments of the Jim Crow era, their functions are similar: to cast the pursuit of racial inclusion as an impediment to racial peace.

#### CONCLUSION: FROM WEAPONIZED TO JUST PEACE

American racial justice opponents have routinely appealed to fears of imagined violence and the preservation of a fragile peace that cannot suffer racial justice. Repeated across centuries and contexts, these peace claims have become a normal feature of American political discourse, making their insidious and unfounded logic easier to conceal.

Given their role in preserving white supremacy and resisting calls for Black equality historically, we should be more skeptical of peace claims that function to preserve an unequal status quo and frustrate racial justice efforts today.<sup>252</sup> Unhesitating acceptance of such claims can cause myriad harms. Weaponized peace claims have historically operated to justify and perpetuate structural inequalities. They have cast racial justice as a threat and its curtailment as a necessity, essentially promising an illusory peace in return for the continued subjugation of Black people. They have also eclipsed the more emancipatory understandings of peace that racial justice advocates have put forward. These features of weaponized peace claims counsel a more critical stance toward them, as reflected in cases like *Buchanan v. Warley*, *Cooper v. Aaron*, *Watson v. City of Memphis*, and *Cox v. Louisiana*. From these cases, we can identify some considerations that should guide judges and other actors assessing contemporary peace arguments.

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249. See Transcript of Oral Argument at 34, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707, (Sup. Ct. Oct. 31, 2022), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2022/21-707\\_9o6b.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_9o6b.pdf) [<https://perma.cc/53TR-DVKL>].

250. On the futility and harms of this “colorblind” approach, see Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 *Cal. L. Rev.* 1139, 1146–47 (2008).

251. Commenting on his Harvard litigation, Edward Blum stated: “I needed Asian plaintiffs . . . so I started . . . HarvardNotFair.org.” Brief for Amicus Curiae Walter Dellinger in Support of Defendant-Appellee on the Issue of Standing at 11, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020) (No. 1:14-cv-14176-ADB), 2020 WL 2847683.

252. See Hasday, *supra* note 4, at 1538 (making a similar claim regarding “mutual benefits” arguments used historically to subordinate women and racial minorities).

First, does a genuine threat to peace exist? Warnings of discord and unrest stemming from racial justice must be backed with reliable evidence to be considered persuasive. But as the cases mentioned above demonstrate, the evidence to support such dire claims is often limited, poor-quality, or nonexistent. For example, an FBI investigation found that Governor Faubus may have relied on “rumors, generalities or sources whose reliability was not fully established” to issue his edict against integration in Little Rock.<sup>253</sup> Similarly, the Court in *Watson v. City of Memphis* found the asserted “fears of violence and tumult” and “inability to preserve the peace” to be merely “personal speculations or vague disquietudes of city officials.”<sup>254</sup> And the Court in *Cox v. Louisiana* found any fear of violence to be similarly speculative and not credible enough to justify arresting Reverend Cox.<sup>255</sup>

Mere resentment or discomfort about racial justice does not necessarily amount to a genuine threat to peace. In the *Brown* litigation, for example, some integrationists disputed the claim that integration would necessarily result in an “immediate danger of open disturbances of the public peace.”<sup>256</sup> These integrationists were “not so naive as to discount the possibility of some forms of resistance” to desegregation but reasoned that “the prophecy of violence has so often been shown to be without substance that it is now made with little conviction.”<sup>257</sup> Indeed, the Little Rock Crisis showed how *elevating* resentment or discomfort about racial justice to a genuine threat may be precisely what leads to social unrest.<sup>258</sup>

Second, what is actually causing a threat to peace? The court of appeals in *Aaron v. Cooper* correctly diagnosed segregationist tactics, as opposed to the integration of Black children, as the cause of unrest in Little Rock: “It is more accurate to state that the fires, destruction of property, bomb threats, and other acts of violence, were the direct result of

253. FBI, No. 44-12284-2673, *Integration in Public Schools: Little Rock, Arkansas: Civil Rights—Contempt of Court*, at A-14 (1957), <https://arstudies.contentdm.oclc.org/digital/collection/p15728coll3/id/43898/rec/23> [<https://perma.cc/3LEW-U95P>]. Historian Tony Freyer notes that the U.S. government never used this “400-page report indicating that Faubus’s claims about violence were essentially groundless,” which further emboldened Faubus. Tony A. Freyer, *Enforcing Brown in the Little Rock Crisis*, 6 J. App. Prac. & Process 67, 72 (2004).

254. 373 U.S. 526, 536 (1963).

255. 379 U.S. 536, 550–51 (1965) (“[T]he ‘compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.’” (quoting *Watson*, 373 U.S. at 535)).

256. Brief for the Congress of Industrial Organizations as Amicus Curiae at 12, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 53-1, 53-2, 53-4, 53-10), 1953 WL 78290.

257. Brief for Amici Curiae (American Council on Human Rights et al.) at 13, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 52-413), 1952 WL 47260.

258. The Little Rock School Board argued in litigation that “[t]he effect of [Governor Faubus’s action] was to harden the core of opposition to the [integration] Plan[,] . . . and from that date hostility to the Plan was increased and criticism of the officials of the School District has become more bitter and unrestrained.” *Cooper v. Aaron*, 358 U.S. 1, 10 (1958) (internal quotation marks omitted).

popular opposition to the presence of the nine Negro students.”<sup>259</sup> The court noted that removing Black students from the school in order to quell an unrest they had not caused was an inappropriate legal solution.<sup>260</sup>

Unrest which stems from illegitimate negative emotions necessitates a different approach than unrest that stems from legitimate emotions.<sup>261</sup> In enforcing school integration in *Aaron v. Cooper*, the court of appeals opinion emphasized that unrest was “the direct result of popular opposition to the presence of the nine Negro students,”<sup>262</sup> and the Supreme Court opinion similarly traced the unrest to “drastic opposing action on the part of the Governor of Arkansas.”<sup>263</sup> In this case, unrest precipitated by white resistance to integration was not deemed worthy of deference because it ran contrary to the demands of law and justice. In contrast, the Kerner Commission Report, released in the wake of the 1967 racial unrest, indicated that unrest stemming from minority frustration was worthy of deference because it advanced the demands of law and justice.<sup>264</sup> Accordingly, the Kerner Commission recommended reforms to employment, education, the welfare system, housing, and policing.<sup>265</sup> Comparing these sources suggests that unrest in response to racial inequities is more democratically legitimate than unrest arising from white racism and protectionism.<sup>266</sup> Law should attend to the causes and consequences of social unrest, recognizing some sources of unrest as more legitimate than others.

259. 257 F.2d 33, 39 (8th Cir. 1958).

260. *Id.*

261. Political theorist Mihaela Mihai differentiates between “legitimate and illegitimate manifestations of public outrage,” observing:

Our outraged sense of justice can be misguided—oversensitive, lacking proof or solid arguments, or pushing us to perpetuate cycles of violence. . . . While negative emotions can be powerful forces of social change, they can also serve undemocratic purposes. However, if motivated by a concern with what is owed to everyone as an equal member of the political community and expressed in ways that do not push societies further down a spiral of abuse, they can stimulate important debates and catalyze institutional redress.

Mihaela Mihai, *Negative Emotions and Transitional Justice* 9 (2016).

262. *Aaron*, 257 F.2d at 38.

263. *Cooper*, 358 U.S. at 9.

264. Report of the National Advisory Commission on Civil Disorders 5–6 (1967).

265. *Id.* at 11–13.

266. Tracking ongoing far-right political violence in the United States, a report of the Armed Conflict Location and Event Data Project notes:

The strategies and drivers that fuel far-right activity are often inherently exclusionary, oriented around targeting a marginalized ‘other’ — sometimes explicitly for violence. These targets have included political opponents labeled as ‘communists’ and ‘socialists,’ the Black community, the Jewish community, the Muslim community, the LGBT+ community, women, and immigrants, amongst others. Even when such mobilization strategies fail to achieve certain key goals — like election victories — they

Third, what are the consequences of accepting weaponized peace claims? Limiting racial justice measures simply because their opponents cause or threaten unrest may both vindicate and incentivize resistance. The court of appeals in *Aaron v. Cooper* noted that a “‘temporary delay’ in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means” and refused to incentivize this type of opposition.<sup>267</sup> Similarly, Justice Frankfurter’s concurrence warned against vindicating such illegitimate negative emotions. By delaying integration, “the seemingly vindicated feeling of those who actively sought to block . . . progress” would beget further obstruction.<sup>268</sup> Giving in to this resistance would make both peace and justice more difficult to achieve in the long term. Giving them the power to define peace could enable them to dominate and dismantle the public sphere<sup>269</sup> and to privatize public goods like education.<sup>270</sup>

Fourth, are there emancipatory peace claims that outweigh or counterbalance the dominant group’s claims to peace? Racial justice advocates have long underscored the necessity of justice for achieving genuine social peace, and warned that absent justice, tranquility would not last.<sup>271</sup> These advocates have accordingly urged leaders to choose the enduring, positive peace of addressing racism over the illusory, negative peace of avoiding the issue of racism.<sup>272</sup> They have also asked the Supreme Court to move from avoiding racial conflict to affirming racial equity as the proper basis for peace.<sup>273</sup> Yet, even *Cooper v. Aaron* neglected the full range of emancipatory peace claims that were made widely both before and beyond the

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can still fuel a rise in contentious activity and can increase the risks of political violence faced by these targeted communities.

Roudabeh Kishi, *From the Capitol Riot to the Midterms: Shifts in American Far-Right Mobilization Between 2021 and 2022*, Armed Conflict Location & Event Data Project (Dec. 6, 2022), <https://acleddata.com/2022/12/06/from-the-capitol-riot-to-the-midterms-shifts-in-american-far-right-mobilization-between-2021-and-2022/> [<https://perma.cc/P8F6-PZWF>].

267. *Aaron*, 257 F.2d at 40.

268. *Cooper*, 358 U.S. at 25–26 (Frankfurter, J., concurring).

269. See *supra* notes 122–123 and accompanying text (discussing Governor Faubus’s invocation of public peace to justify closing public schools); *supra* Part II.E (discussing Jackson’s appeal to public peace to justify closing public pools).

270. For example, when the people of Little Rock voted to close public schools in the name of public peace, “[a] private school corporation formed to lease public school buildings and hire public school teachers, but federal courts prevented this.” See *Lost Year*, Encyc. of Ark., <https://encyclopediaofarkansas.net/entries/lost-year-737/> [<https://perma.cc/FTK5-YM78>] (last updated Jan. 30, 2023). Ultimately, private schools “opened to accommodate displaced white students,” but “[n]o private schools for black students emerged.” *Id.*; see also *supra* notes 122–123.

271. See Joshi, *Racial Justice and Peace*, *supra* note 6, at 1340–47.

272. A. Philip Randolph, Lester B. Granger, Reverend Martin Luther King, Jr. & Roy Wilkins, NAACP, *A Statement to the President of the United States* (June 23, 1958) (on file with the *Columbia Law Review*).

273. See *supra* text accompanying notes 164–165.

Court.<sup>274</sup> *Watson v. City of Memphis*, a lesser known case, came closer to recognizing the NAACP's claims about positive peace.<sup>275</sup> Today's chants of "No Justice! No Peace!" demand systemic changes necessary for a more peaceful United States.<sup>276</sup> These claims are important because they foreground the violence involved in maintaining the status quo and the injustice, frustration, and despair felt by marginalized communities. They further demonstrate that any tranquility arising from racial subordination is illusory and that an "obnoxious negative peace"<sup>277</sup> is in fact worth disrupting.

Ultimately, weaponized peace claims are harmful precisely because they thwart disruptions to short-term negative peace that might facilitate long-term positive peace. For decades, Black activists have seen social unrest as a necessary step on the path to justice. As Dr. King observed: "There is probably no way, even eliminating violence, for Negroes to obtain their rights without upsetting the equanimity of white folks. All too many of them demand tranquility when they mean inequality."<sup>278</sup> A. Philip Randolph, who worked closely with Dr. King, felt that Black people needed to disrupt an exclusionary negative peace in order to influence leaders "more concerned with easing racial tensions than enforcing racial democracy."<sup>279</sup> It is also worth remembering that Congress enacted the 1964 Civil Rights Act, which barred discrimination in federally supported programs, following protests throughout the South; the 1965 Voting Rights Act, which aimed to remove barriers to voting, after the historic marches from Selma to Montgomery; and the 1968 Fair Housing Act, which prohibited discrimination in the housing market, amid protests following Dr. King's assassination.<sup>280</sup> The American experience shows that some conflict can be

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274. See Joshi, *Racial Justice and Peace*, supra note 6, at 1360–61 (critiquing *Cooper* on these grounds).

275. See supra text accompanying note 137.

276. See Joshi, *Racial Justice and Peace*, supra note 6, at 1344–47 (discussing invocations of "No Justice! No Peace!" during the 2020 uprisings).

277. Martin Luther King, Jr., Letter From Birmingham Jail (Apr. 16, 1963), [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) [<https://perma.cc/D9SR-9G97>]. Based on their reading of this letter, Lani Guinier and Gerald Torres argue that "substituting racial peace for racial justice is a recipe for delaying racial justice." Lani Guinier & Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* 295 (2003).

278. Martin Luther King, Jr., Address Delivered to the Southern Christian Leadership Conference: The Crisis in America's Cities (Aug. 15, 1967), in *The King Issue*, Atlantic (Mar. 31, 2018), <https://www.theatlantic.com/magazine/archive/2018/02/martin-luther-king-jr-the-crisis-in-americas-cities/552536/> [<https://perma.cc/7SEM-2ALN>].

279. A. Philip Randolph, Remarks at the March on Washington (Aug. 28, 1963), in *St. Augustine Rec.*, <https://www.staugustine.com/story/news/2013/08/20/philip-randolphs-1963-march-washington-speech/15818957007/> [<https://perma.cc/D3V5-66DC>].

280. Timeline of the American Civil Rights Movement, Encyc. Britannica (Jan. 13, 2023), <https://www.britannica.com/list/timeline-of-the-american-civil-rights-movement> [<https://perma.cc/XV3V-QCWU>] (chronicling the enactment of these legislations).

constructive and even necessary to the achievement of a more just society—and that not every peace is worth preserving.