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Law, Race, and the Epistemology of Ignorance

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Law, Race, and the Epistemology of Ignorance

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Abstract

Philosophers and other theorists have developed the field of epistemology which is the study of human knowledge. Critical race theorists have begun to explore how epistemological theory and insights may illuminate the study of race, including the analysis of race and the law. Such use of epistemology is appropriate because theoretical work on knowledge can be used to advance one of the key goals of critical race theory which is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America. In this regard, philosophers and other theorists have recently begun to develop an “epistemology of ignorance” which is an examination of the complex phenomenon of ignorance that seeks to describe different forms of ignorance, examining how they are produced and sustained, and what role they play in knowledge practices. In particular, theorists have begun to apply an epistemology of ignorance to issues of race, racism and white privilege and are exploring how forms of ignorance operate in enabling racial oppression or domination. Legal scholars have begun to use some of the insights of the epistemology of ignorance in analyzing certain aspects of law and the legal profession. No one, however, has sought to examine the epistemology of ignorance at work in the area of race and law in as comprehensive a fashion as this article. This comprehensive treatment makes it possible to reveal the magnitude of the negative impact of the production of ignorance in the legal context on various racial minority groups. Accordingly, this article seeks to explore the epistemology of ignorance at work in the context of law and race and reveal how the production of ignorance has helped enable the dominant group to subordinate racial minorities in America

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I. INTRODUCTION

Philosophers and other theorists have developed the field of “epistemology” which is “the study of human knowledge.”¹ Critical race theorists have begun to explore how epistemological theory and insights may illuminate the study of race, including the analysis of race and the law.² Such use of epistemology is appropriate because theoretical work on knowledge can be used to advance one of the key goals of critical race theory which is “to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America[.]”³ In this regard, philosophers and other theorists have recently begun to develop an “epistemology of ignorance” which “is an examination of the complex phenomenon of ignorance” that seeks to describe “different forms of ignorance, examining how they are produced and sustained, and what role

1. ROBERT C. SOLOMON, INTRODUCING PHILOSOPHY: PROBLEMS AND PERSPECTIVES 95 (2d ed. 1981).

2. See, e.g., George A. Martínez, *Arizona, Immigration, and Latinos: The Epistemology of Whiteness, the Geography of Race Interest Convergence and the View from the Perspective of Critical Theory*, 44 Az. St. L.J. 175 (2012).

3. KIMBERLÉ CRENSHAW ET. AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT XIII (1995).

they play in knowledge practices.”⁴ In particular, theorists have begun to apply “an epistemology of ignorance to issues of race, racism, and white privilege” and are exploring how forms of ignorance operate in enabling racial oppression or domination.⁵ Legal scholars have begun to use some of the insights of the epistemology of ignorance in analyzing certain aspects of law and the legal profession.⁶ No one, however, has sought to examine the epistemology of ignorance at work in the area of race and law in as comprehensive a fashion as this article. This comprehensive treatment makes it possible to reveal the magnitude of the negative impact of the production of ignorance in the legal context on various racial minority groups. Accordingly, this article seeks to explore the epistemology of ignorance at work in the context of law and race and reveal how the production of ignorance has helped enable the dominant group to subordinate racial minorities in America.

In Part II, the Article explains the leading ideas behind the epistemology of ignorance, which requires whites to misinterpret and misrepresent matters dealing with race in order to maintain their position as the dominant group. In Parts III–VIII, the Article sets out—through a series of important examples—how the dominant group has constructed an epistemology of ignorance in the area of race and law. In particular, Sections III–VIII contend that the dominant group has constructed an epistemology of ignorance (1) in the area of law with respect to Native Americans; (2) in the area of law with respect to Mexican-Americans; (3) in the area of employment law; (4) in the area of immigration law and policy in the Trump era, including the Muslim Travel Ban Case and in the matter of child separation at the border; (5) in the area of Federalism in recent United States Supreme Court cases dealing with Medicaid expansion and voting rights; and (6) in the areas of legal scholarship and in the outlawing of ethnic studies in Arizona. The Article argues that this production of ignorance has helped whites maintain their socially dominant position in the United States.

4. Shannon Sullivan & Nancy Tuana, *Introduction*, in RACE & EPISTEMOLOGIES OF IGNORANCE I (Shannon Sullivan & Nancy Tuana eds., 2007).

5. *Id.*

6. April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 572 (2016) (using the epistemology of ignorance in analyzing women’s right to an abortion); Dermot Feenan, *Understanding Disadvantage Partly through an Epistemology of Ignorance*, 16 SOC. & LEGAL STUD. 509 (2007) (employing the epistemology of ignorance in studying the appointment of women judges).

II. THE EPISTEMOLOGY OF IGNORANCE

Epistemologists of race have recognized that socially dominant groups do not necessarily have a privileged access to knowledge about the social world.⁷ As philosopher Charles Mills has explained: “[H]egemonic groups characteristically have experiences that foster illusory perceptions about society’s functioning whereas subordinate groups characteristically have experiences that (at least potentially) give rise to more adequate conceptualizations.”⁸

In this regard and in the context of race, Charles Mills theorizes that there is a “Racial Contract” that governs race relations in society.⁹ This Racial Contract contains an epistemological provision which constitutes an agreement “about what counts as a correct, objective interpretation of the world . . . for agreeing to this view, one is (‘contractually’) granted full cognitive standing in the polity, the official epistemic community.”¹⁰ This “Racial Contract require[s] that whites engage in a significant degree of misunderstanding, misinterpretation and misrepresentation on matters related to race.”¹¹ As a result, Mills contends that “[t]he Racial Contract prescribes for its signatories an inverted epistemology, an epistemology of ignorance, a particular pattern of localized and global cognitive dysfunctions (which are psychologically and socially functional), producing the ironic outcome that whites will in general be unable to understand the world they themselves have

7. Rebecca Mason, *Two Kinds of Unknowing*, 26 *HYPATIA* 294-307, 301 (2011). “That is to say, although membership in a socially powerful group affords certain benefits, privileged social perception is not necessarily among them. Although epistemic access is differentiated according to social location, powerful groups do not *ipso facto* get a better view.” *Id.*

8. CHARLES MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* 28 (1998). Charles Mills has been a pioneer in analyzing the ways in which racial oppression is connected “to our conceptions and productions of knowledge.” Sullivan & Tuana, *supra* note 4, at 2.

9. See CHARLES MILLS, *THE RACIAL CONTRACT* (Cornell University Press, 1997). See also Mason, *supra* note 7, at 301-02. “Mills introduces the notion of the ‘Racial Contract’ as a way to challenge the assumptions of white political philosophy . . . Mills’s framework is conducive to discussions of race and white racism that structure society as we think we know it. Thus instead of focusing on a forward-looking, ideal contract that purports to describe the structure of a perfectly just society in which we would like to live, Mills focuses on a historical, non-ideal contract that describes the origin and nature of the unjust society in which we currently live.” *Id.*

10. MILLS, *supra* note 9, at 18.

11. Mason, *supra* note 7, at 302. See also Alison Bailey, *Strategic Ignorance*, in *RACE & EPISTEMOLOGIES OF IGNORANCE*, *supra* note 4, at 77, 80. “Implicit agreement to misrepresent the world is coupled with constant pressure to accept these counterfeit images as real currency . . . This steady parade of misrepresentations generates a racialized moral psychology in which white perception and conception, memory, experience and testimony are shaped by a willful and habitual inversion of reality.” *Id.* See also Linda Martín Alcoff, *Epistemologies of Ignorance: Three Types*, in *RACE & EPISTEMOLOGIES OF IGNORANCE*, *supra* note 4, at 39, 40. “[O]ppressive systems produce ignorance as one of their effects.” *Id.*

made.”¹² This “white ignorance” “is the product of an epistemic agreement among whites to see the world wrongly—that is, to cultivate and sustain a system of false beliefs.”¹³ Such ignorance enables whites to maintain their socially dominant position with respect to racial minorities.¹⁴ Indeed, white ignorance is “linked with white supremacy,” it “distorts reality,” and “supports a delusion of white racial superiority.”¹⁵

Epistemologists of race seek to bring to light and uncover:

[W]hat Mills has called a “racial fantasyland” that undergirds white dominance and privilege. This fantasyland constitutes the epistemology of ignorance that prevents whites from perceiving the reality and effects of their own beliefs concerning racial difference. Such cognitive blindness requires fundamental revision, for it rests on what Mills calls a “consensual hallucination,” an invented delusional world where white moral consciousness is filtered by norms of social cognition that derive from an unconscious sense of dominance in the world.¹⁶

12. MILLS, THE RACIAL CONTRACT, *supra* note 9, at 18. *See also* Sullivan & Tuana, *supra* note 4, at 2. “For Mills, the epistemology of ignorance is part of a white supremacist state in which the human race is racially divided into full persons and subpersons. Even though—or, more accurately, precisely because—they tend not to understand the racist world in which they live, white people are able to fully benefit from its racial hierarchies, ontologies, and economies.” *Id.*

13. Mason, *supra* note 7, at 302. *See also* Charles Mills, *White Ignorance*, in RACE & EPISTEMOLOGIES OF IGNORANCE, *supra* note 4, at 11, 16. Mills uses “*ignorance* to cover both false belief and the absence of true belief.” *Id.*

14. Mason, *supra* note 7, at 302. *See also* Martin Alcoff, *supra* note 11, at 48. Alcoff interprets Mills’s argument as follows:

1. One of the key features of oppressive societies is that they do not acknowledge themselves as oppressive. Therefore, in any given oppressive society, there is a dominant view about the general nature of society that represents its particular forms of inequality and exploitation as basically just and fair, or at least the best of all possible worlds.
2. It is very likely, however, that the dominant representation of the unjust society as a just society will have countervailing evidence on a daily basis that is at least potentially visible to everyone in the society.
3. Therefore, cognitive forms of assessment will have to be maintained that allow for this countervailing evidence to be regularly dismissed so that the dominant view can be held stable.

15. Sullivan & Tuana, *supra* note 4, at 3.

16. Dan Flory, *The Epistemology of Race and Black American Film Noir: Spike Lee’s Summer of Sam as Lynching Parable*, reprinted in SPIKE LEE READER 196, 201 (Paula Massood ed., 2008). *See also* Martin Alcoff, *supra* note 11, at 49. “Mills suggests that ‘whiteness,’ which he carefully defines as a political construct rather than simply an ethnic category, brings with it a ‘cognitive model that precludes self-transparency and genuine understanding of all social realities,’ that it ensures that whites will live in a ‘racial fantasyland, [or] a consensual hallucination,’ and that the root of all this is the ‘cognitive and moral economy psychically

In this paper, I seek to reveal the epistemology of ignorance or “racial fantasyland” at work in the area of law.

III. LAW, THE EPISTEMOLOGY OF IGNORANCE AND NATIVE AMERICANS

The dominant group has constructed an epistemology of ignorance with respect to Native

Americans. The dominant group has engaged in “misunderstanding, misinterpretation and misrepresentation” on matters related to Native Americans and the law. They have created a racial fantasyland with respect to Native Americans which has helped the dominant group to maintain their socially dominant position just as predicted by theorists of the epistemology of ignorance.

With respect to Native Americans, a key way the epistemology of ignorance has been constructed has been for the courts to misdescribe and misrepresent Native Americans as warlike savages.¹⁷ For example, in an 1835 case, *State v. Foreman*,¹⁸ the Tennessee Supreme Court described and justified the White European settlement of the United States as follows:

[T]he principle by which the country was taken possession of, was the only rule of action possible to be observed . . . it was more just the country should be peopled by Europeans, than continue the haunt of savage beasts, and of men yet more fierce and savage, who, ‘if they might not be extirpated for their want of religion and just morals, they might be reclaimed for their errors’ . . . [a] rule of which savages of the description have no just right to complain.¹⁹

The Court also observed that the Native Americans of the “immense

required for conquest, colonization, and enslavement.” *Id.*

17. See Ann E. Tweedy, “*Hostile Indian Tribes . . . Outlaws, . . . Wolves, . . . Bears . . . Grizzlies and Things Like That?*” *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PENN. J. CONST. L. 687, 709-23, 710 (2011). “Nonetheless, the notion of Indians as warlike savages, which was based in large part on the historical myth of the savage war, survived and lives on even now in the collective memory and in case law defining Indians as such and using their alleged savagery to justify deprivations of tribes’ sovereign rights.” *Id.*; WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED 41 (2010). “Thus, in the important cases defining Native American Rights, the decisions branded Indians as savages—that is, brutish people who lack attributes normal to civilized human beings—and treated them accordingly.” *Id.*; Mills, *White Ignorance*, *supra* note 13, at 11, 26-27.

18. 16 Tenn. 256 (1835).

19. *Foreman*, 16 Tenn. at 265; Tweedy, *supra* note 17, at 712-13.

west and northwest” were “[t]ribes that subsist on raw flesh, and are savage as the most savage beasts that infest that mighty wilderness.”²⁰ Similarly, the highest territorial court of Idaho observed in 1874 that “the whole country” was “inhabited by wild and barbarous savages.”²¹ Likewise, the Nevada high court opined in 1883 that “[i]n 1861, the Indians here were savages in name and fact” and that they “killed inoffensive white men.”²² Indeed, the early American “case law monolithically portrays the tribes, many of whom were presumably fighting to retain their lands, as savage aggressors.”²³

The use of such language misdescribing and misrepresenting Native Americans as savages, implicating the epistemology of ignorance, enabled the dominant group to subordinate Native Americans. For instance, during the so-called “heroic age of the Supreme Court,” Native Americans “lost more times than not, at a ratio in fact of 2 to 1” at a time “when the greatest chief justice of all time talked about them [as savages in] this way.”²⁴ Even after the 1954 landmark decision of the U.S. Supreme Court in *Brown v. Board of Education*,²⁵ overturning legally compelled segregation of African-Americans, the Supreme Court continued to misdescribe and misrepresent Native Americans “as culturally and racially inferior wandering ignorant savages[.]”²⁶ For instance, in *Tee-Hit Ton v. United States*,²⁷ a case decided one year after *Brown*, the Supreme Court stated:

Every American school boy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.²⁸

In *Tee-Hit-Ton*, “the Court uses the language of savagery” to support its

20. *Id.* at 713.

21. *Pickett v. United States*, 1 Idaho 523, 530 (1874); Tweedy, *supra* note 17, at 714.

22. *State ex rel. Truman v. McKenney*, 2 P. 171, 179 (1883); Tweedy, *supra* note 17, at 714.

23. *Id.*

24. ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* xviii (2005). See also ECHO-HAWK, *supra* note 17, at 5 (describing a movement among “legal scholars who present a powerful case for decolonizing federal Indian law and confronting the Supreme Court about its continued use of legal precedent tainted with racism . . . [who question whether] legal advocates [can] expect to win lawsuits by citing cases that call Native Americans ‘savages’ and by relying upon legal principles founded on the racial inferiority of their clients”).

25. 347 U.S. 483 (1954).

26. WILLIAMS, *supra* note 24, at xxi.

27. 348 U.S. 272, 289-90 (1955).

28. 348 U.S. at 289-90.

holding “that the Tee-Hit-Ton tribe was not entitled to Fifth Amendment compensation” because the “tribes generally have lost their lands to the United States through conquest rather than arms-length transactions.”²⁹

Similarly, in *Oliphant v. Suquamish Indian Tribe*,³⁰ a decision handed down in 1978, the Supreme Court held that “an Indian Tribe lacks criminal jurisdiction over non-Indians committing crimes on its reservation,” and therefore Indian courts had no power to judge white Americans.³¹ In justifying its conclusion that the rights of Native Americans are inferior to those of whites, the *Oliphant* court relied on an 1891 case, *In re Mayfield*,³² and “its blatantly racist nineteenth-century judicial language of Indian savagery and white supremacy”³³ and explained:

In *In re Mayfield*, the court noted that the policy of Congress had been to allow the inhabitants of the Indian Country ‘such power of self-government as was thought to be consistent with the safety of the white population with which they may come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization.’³⁴

This misdescription and misrepresentation of Native Americans as savages has enabled the dominant group to maintain its socially dominant position. As Robert Williams has explained: “The racist precedents and language of Indian savagery used and relied upon by the justices throughout this ongoing historical period of legalized racial dictatorship have most often worked . . . to justify the denial to Indians of important rights of property, self-government, and cultural survival.”³⁵

29. Tweedy, *supra* note 17, at 721.

30. 435 U.S. 191 (1978).

31. WILLIAMS, *supra* note 24, at xxiii. See also ECHO-HAWK, *supra* note 17, at 21. In *Oliphant*, “the Court refused to let tribal courts try whites for crimes committed on Indian reservations. Even though tribal courts are as sophisticated as any other court, Justice Rehnquist’s opinion severely restricted their reach. Tribal courts are *not really* a part of the American judicial system, because tribes lost their sovereignty and gave up ‘their power to try non-Indian citizens.’ Under the colonial structure, only the courts of the conqueror may judge a white man and tribal government tribunals cannot sit in judgment of white citizens.” *Id.*

32. 141 U.S. 107 (1891).

33. WILLIAMS, *supra* note 24 at xxiii.

34. *Oliphant*, 435 U.S. at 204.

35. WILLIAMS, *supra* note 24, at xxv. See also Tweedy, *supra* note 17, at 739. “These precedents denied tribes sovereign rights based in large part on the implicit justification of Indian savagery. When these precedents are relied upon now, they are expanded . . . to justify even greater incursions upon tribal sovereignty.” *Id.*; ECHO-HAWK, *supra* note 17, at 41. “Many cases affecting Native Americans have produced stark injustices . . . Those cases usually describe Indians as ‘inferior,’ ‘ignorant,’ ‘savages,’ ‘heathens,’ or ‘uncivilized.’” *Id.*

IV. LAW, THE EPISTEMOLOGY OF IGNORANCE AND MEXICAN-AMERICANS

The dominant group also has engaged in the epistemology of ignorance regarding Mexican-Americans. They have misunderstood, misinterpreted, and misrepresented various issues regarding Mexican-Americans and the law. This construction of a racial fantasyland with respect to Mexican-Americans has also helped the dominant group to maintain a socially dominant position in American society.

For example, one of the ways Mexican-Americans were misinterpreted to their disadvantage was to misconstrue the racial identity³⁶ of Mexican-Americans as white for purposes of determining whether they were adequately represented on juries in criminal trials. In *Hernandez v. Texas*,³⁷ an all-white jury convicted a Mexican-American man, Pete Hernandez, of murder.³⁸ He sought to reverse his conviction on appeal on the ground that Mexican-Americans had been excluded from the jury.³⁹ He supported his argument by citing cases that had held that excluding African-Americans

36. "Today the very idea of a racial identity trial may seem bizarre. Trials involving racial identity, however, were common occurrences in local American courts from their beginnings in the late eighteenth century well into the twentieth century, encompassing people of European, African, Asian, Mexican, and Native American ancestry from the deep South to the industrial North to the far West." ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* 3 (2008).

37. 251 S.W. 2d 531 (Tex. Crim. App. 1952). For more on *Hernandez*, see "COLORED MEN" AND "HOMBRES AQUI": *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (Michael A. Olivas ed., 2006); Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican-Americans and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in *RACE LAW STORIES* 273 (Rachel F. Moran & Devon W. Carbado eds., 2008); Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 *CHICANO-LATINO L. REV.* 153 (2005); Steven H. Wilson, *Brown over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 *LAW & HIST. REV.* 145 (2003).

38. See Haney López & Olivas, *supra* note 37, at 280-81. "Between October 8 and 11, 1951, Hernandez was tried by an all-white jury" and "on October 11, 1951," he was found guilty of murder and sentenced to life in prison. *Id.*

39. See Haney López & Olivas, *supra* note 37, at 276. "The central legal claim in *Hernandez* was whether Mexican-Americans were entitled to a 'jury of their peers' that included other Mexican-Americans." *Id.* "To the extent it was important to litigate the racial exclusivity of the jury system in Texas, the facts of *Hernandez* were perfect: In a county more than 14% Mexican-American, there had been no Hispanic jurors in over a quarter century." *Id.* at 284. See also Wilson, *supra* note 37, at 161. "To support their contention that the exclusion of Mexican-Americans from the juries must have been deliberate, Cadena and Garcia obtained a stipulation from the state and county attorneys that there were males of 'Mexican or Latin American' descent in Jackson County who were eligible to serve as members of either a commission or a jury. The state and county attorneys also agreed to stipulate that, at least during the previous twenty-five years, no one with a Spanish surname had served on a jury commission, grand jury, or petit jury in Jackson County." *Id.*

from juries violated the constitution's guarantee of due process and equal protection and contended that the exclusion of Mexican-Americans should similarly amount to a constitutional violation.⁴⁰ The court responded to the argument by observing that the Fourteenth Amendment protects only two groups of people: blacks and whites. The court held that Mexican-Americans were white persons for purposes of the equal protection and due process clauses.⁴¹ Moreover, since the juries that had indicted and convicted the defendant were comprised of white people, there was no equal protection violation.⁴²

In *Hernandez*, then, Mexican-Americans were misrepresented or misconstrued as white and were unable to assert a distinctive non-white identity which might have offered more protection on the jury. As a result of this misrepresentation, the Fourteenth Amendment provided no protection for Mexican-Americans and the dominant group was able to exclude them from juries.

The *Hernandez* case is consistent with earlier Court of Criminal Appeals of Texas decisions holding that Mexican-Americans were white for purposes of jury selection. For example, in *Sanchez v. State*,⁴³ the defendant Anecito Sanchez was convicted of murder and was sentenced to ten years in prison. On appeal, Sanchez argued that he had been convicted in "violation of the due process clause in that there was a continual and uninterrupted practice in Fort Bend County of discriminating against Mexican-Americans as a race . . . in the selection of grand jury commissioners and grand jurors."⁴⁴ The Court held that there was no constitutional violation because Mexican-Americans "are not a separate race but are white people of Spanish descent, as has often been said by this court."⁴⁵ Accordingly, the Court stated that "[w]e find no ground for discussing the question further and the complaint raised by this

40. See Wilson, *supra* note 37, at 162. "When they presented the case before the Texas Court of Criminal Appeals, Cadena and Garcia sought to appropriate a 'rule of exclusion' that the U.S. Supreme Court had announced in *Norris v. Alabama* (1935). Alabama's State Supreme Court had let stand the conviction of Clarence Norris—one of nine black's 'Scottsboro Boys' who had been convicted of the rape of two white women—despite the exclusion of African-Americans from both the grand and petit juries. The U.S. Supreme Court had reversed, ruling that state action, whether by the legislative court or executive, to exclude from jury service 'all persons of the African race, solely because of their race or color' when the same were both available and qualified to serve, had denied 'a person of the African race' the equal protection of the laws and was contrary to the Fourteenth Amendment. Cadena and Garcia sought to persuade the Texas court to apply this reasoning to Mexican Americans." *Id.*

41. *Hernandez*, 251 S.W.2d at 536.

42. *Id.*

43. 156 Tex. Crim. 468 (1951).

44. 156 Tex. Crim. at 469.

45. 156 Tex. Crim. at 469. See also Johnson, *supra* note 37, at 172 (observing that historically "Mexican American litigants found it difficult to prevail in cases seeking to vindicate their civil rights because of the law's classification of Mexicans as white").

bill will not be sustained.”⁴⁶

That this was a misconstrual of the race of Mexican-Americans is revealed in affidavits collected by Alonso Perales, a pioneering civil rights attorney, during roughly the same time period as the *Hernandez* and *Sanchez* cases which show that Mexican-Americans were not treated or viewed as white in every day encounters.⁴⁷ For instance, a Mexican-American named Ernesto Perez stated in his sworn affidavit that on June 21, 1943, he was told by an usher at a movie theater in Hondo, Texas, that he not allowed to sit in the center or middle section of the theater because it “was for white people only” and that another part of the theater “was reserved for Mexicans.”⁴⁸ Perez informed the usher that “[Perez] was classified as white by the United States Government in Washington. . . .”⁴⁹ Perez then appealed to the manager of the theatre who told Perez that “No, you are not white; you are a Mexican.”⁵⁰ Similarly, Jesus Valdez stated in a sworn affidavit, dated June 26, 1941, that he did construction work at a location where “drinking pails” were designated “as follows: ‘For Whites;’ ‘For Mexicans;’ and ‘For Negroes.’”⁵¹ When Valdez took a drink of water out of a pail marked “For Whites,” the foreman terminated his employment “because [Valdez] had drunk water out of the pail marked ‘For Whites.’” In defense, Valdez told the foreman that:

I considered myself as white as he or any other person. [The foreman] then said substantially the following: “You are discharged, and any other person of Mexican or African descent who drinks water out of the pails marked “For Whites” will be discharged also.”⁵²

Similarly, a “1950 survey” of white Texans published in a leading Texas

46. 156 Tex. Crim. at 469. *See also* GROSS, *supra* note 36, at 282. “In its *Sanchez* ruling the Court of Criminal Appeals berated the two lawyers for their ‘exhaustive brief’ . . . citing cases which, either intentionally or loosely refer to Mexican people as a different race.” *Id.*

47. For more on Alonso Perales, see *IN DEFENSE OF MY PEOPLE: ALONSO S. PERALES AND THE DEVELOPMENT OF MEXICAN-AMERICAN PUBLIC INTELLECTUALS* (Michael A. Olivas, ed., 2012).

48. ALONSO S. PERALES, *ARE WE GOOD NEIGHBORS?* 194 (1974).

49. PERALES, *supra* note 48, at 194.

50. PERALES, *supra* note 48, at 194.

51. PERALES, *supra* note 48, at 211.

52. PERALES, *supra* note 48, at 211. *See also* DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* 265 (1987). “The ‘Latin American’ and black workers were not permitted to use the drinking fountains or the toilets and bathing facilities provided for Anglos. Nor were they permitted to punch the same time clock or receive their pay through the same window used by Anglos.” *Id.*

newspaper showed that such whites “viewed Mexicans as a different race.”⁵³ The survey reported that Anglo Texans “make no effort to cover up their prejudices against Latin-Americans” and feared “race mixing” with Mexicans.⁵⁴

As predicted by the epistemology of ignorance, the misconstrual of Mexican-Americans as white enabled whites to maintain their dominant position in society. The dominant group was able to exclude Mexican-Americans from juries and thereby subordinate Mexican-Americans through unjust or unfair jury convictions and by protecting whites in jury trials from Mexican-Americans attempting to assert their rights.⁵⁵ Indeed, as Professors Haney Lopez and Olivas have explained:

[i]n the context of Texas race politics . . . to put Mexican Americans on juries was tantamount to elevating such persons to equal status with whites. The idea that ‘Mexicans’ might judge whites deeply violated Texas’s racial caste system—and placing Mexican-Americans on juries became critical to the caste system’s demise. . . . [and putting an end to] a key pillar of Jim Crow: the belief that whites should judge all but be judged by none but themselves.⁵⁶

Beyond the exclusion from juries, in the not-too-distant past, Mexican-Americans along with other racial minorities faced a general Jim Crow form of oppression and were therefore segregated and excluded from taking part in dominant white or Anglo society.⁵⁷ Indeed, as Richard Valencia has

53. GROSS, *supra* note 36, at 269.

54. GROSS, *supra* note 36, at 269.

55. See Haney López & Olivas, *supra* note 37, at 284. “To be sure, all-white juries imperiled Mexican-American defendants who, like Hernandez himself, risked hostile and biased convictions. Moreover, the Mexican-American community suffered because white juries rarely and reluctantly convicted whites for depredations against Mexican-Americans.” *Id.*; Johnson, *supra* note 37, at 182-83. “Latina/o underrepresentation on juries can be expected to have substantive impacts. In the 1960s, Chicano activist attorney Oscar “Zeta” Acosta challenged the grand jury system in Los Angeles County by defending Chicana/o political activists charged with criminal offenses just as the League of United Latin American Citizens did on behalf of Pete Hernandez and Mexican Americans in *Hernandez v. Texas*. The unstated hope was that the inclusion of Latina/os on grand juries would affect the outcome of cases. At a minimum, the parties sought a more impartial jury that would not hold Mexican ancestry against Mexican defendants.” *Id.*

56. Haney López & Olivas, *supra* note 37, at 284. See also Johnson, *supra* note 37, at 182. “As *Hernandez v. Texas* exemplifies, discrimination in the selection of petit and grand juries has long plagued Mexican-Americans in the United States. Exclusion of Latina/os from jury service historically has denoted the subordinated status of Latina/os in American social life.” *Id.*

57. See DERRICK BELL, RACE, RACISM AND AMERICAN LAW 110 (3d ed. 1992). “[N]o

observed:

As a colonized people, Mexican Americans faced segregation in, or exclusion from, for example, movie theatres, restaurants, and public accommodations (e.g., swimming pools). . . . For many Mexican Americans, segregation spanned from the ‘cradle to the grave.’ There was forced segregation in maternity wards and separate cemeteries for whites and Mexican Americans. . . . The treatment of Mexican Americans as nonpeers allowed whites to maintain their system of privilege and domination.⁵⁸

Such segregation was so all encompassing and oppressive that it seemed to create separate worlds for Mexican-Americans and whites. David Montejano explains:

On the social plane, the rules of etiquette served to acknowledge Anglo superiority before the Mexican. Mexicans were expected, according to a historical account of a Winter Garden county to have a ‘deferential posture and respectful voice tone’ whenever in the presence of Anglos. All contact between American and Mexican followed rather explicit rules. Movie houses, drugstores, restaurants, retail stores, banks, schools, and so on—the institutions of ‘modernity’—had brought with them definitions of the ‘proper place’ of Mexicans. Public buildings were seen as ‘Anglo territories,’ Mexican women were ‘only supposed to shop on the Anglo side of town on Saturdays, preferably during the early hours when Anglos were not shopping’: Mexicans were allowed only counter and carry-out service at Anglo cafés and all Mexicans were expected to be back in Mexican town by sunset. So completely segregated were the two towns that, in effect, ‘there was an Anglo world and a Mexicano world’ whose main point of contact was the ‘dusty fields.’⁵⁹

detail was too small in the frantic effort to seal off contact between blacks and whites . . . The law had created two worlds so separate that communication between them was almost impossible.” *Id.*; MONTEJANO, *supra* note 52, at 160. “The modern order framed Mexican-Anglo relations in stark ‘Jim Crow’ segregation. Separate quarters for Mexican and Anglo were to be found in the farm towns. Specific rules defined the proper place of Mexicans and regulated interracial contact. The separation was so complete and seemingly absolute that several observers have described the farm society as ‘castelike.’” *Id.*

58. RICHARD R. VALENCIA, *CHICANO STUDENTS AND THE COURTS: THE MEXICAN AMERICAN LEGAL STRUGGLE FOR EDUCATIONAL EQUALITY* 7 (2008).

59. MONTEJANO, *supra* note 52, at 168.

One of the most damaging aspects of this system of Jim Crow was the segregation of Mexican-American children in the public schools.⁶⁰ Such segregation clearly revealed the:

Intent of [white] farm settlers to build separate institutions for the races. . . . The farm settlers understood well the potentially corrosive force of ‘educating Mexicans’ for the maintenance of their divided world. The divisions of the racial order made little sense if Mexicans were better educated than some Anglos or if both were ‘mixed’ in schools. Educating the Mexican also raised the danger that Mexicans might seek ‘social equality’⁶¹

Mexican-Americans challenged such school segregation in the courts.⁶² These cases implicate the epistemology of ignorance. For example, the court misconstrued reality in an historic Texas desegregation case. In *Independent School Dist. v. Salvatierra*,⁶³ Mexican-American plaintiffs challenged the segregation of Mexican-American children in the public schools in Del Rio, Texas. The League of United Latin American citizens (LULAC)⁶⁴ initiated this law suit “as a test case intended to bring an end to segregation in Texas.”⁶⁵ The school district was segregating Mexican-American children in

60. See GROSS, *supra* note 36, at 267. “In Texas in the 1930s and 1940s, as in much of the Southwest and California, most Mexican American children attended separate schools; indeed by 1930, 90 percent of all south Texas schools were segregated.” *Id.*

61. MONTEJANO, *supra* note 52, at 191.

62. See GROSS, *supra* note 36, at 269. “Thus, in Texas and California, Mexican Americans suffered many of the Jim Crow practices endured by African Americans there and in the South. And, like blacks, they responded to racial injustice by organizing, petitioning, and litigating.” *Id.*; BRIAN D. BEHNKEN, FIGHTING THEIR OWN BATTLES: MEXICAN AMERICANS, AFRICAN AMERICANS, AND THE STRUGGLE FOR CIVIL RIGHTS IN TEXAS 3 (2011). “Much like their African American counterparts, Mexican American civil rights activists focused on military service and lawsuits to challenge the segregation of Mexican origin people.” *Id.*

63. 33 S.W.2d 790 (1930). “This [*Salvatierra*] case was the first Mexican American desegregation lawsuit in the State of Texas.” VALENCIA, *supra* note 58, at 15.

64. For more on LULAC, see CYNTHIA E. OROZCO, NO MEXICANS, WOMEN OR DOGS ALLOWED: THE RISE OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT (2009). “In this social, political, legal and diplomatic context, Mexican Americans organized a number of civic groups that were specifically formed to fight discriminatory practices against their own community. Business leaders created the League of United Latin American Citizens . . . in 1929, for example, at the height of a nativist movement in the U.S. that fostered the revival of the Ku Klux Klan and led the federal government to create a comprehensive regime of immigration controls. The founders of LULAC aimed to integrate Mexican-descended persons into the U.S. mainstream, that is, to “Americanize” the community. LULAC’s constitution called for members to be loyal citizens. It also stressed the importance of learning English.” Wilson, *supra* note 37, at 154.

65. VALENCIA, *supra* note 58, at 16. See also CARLOS KEVIN BLANTON, THE STRANGE

the first three grades in a separate school building. The white children were taught in a separate school. The school district claimed that it segregated the Mexican-American children because they started school late since they were migrant farm workers and because of linguistic problems arising out of the assertion that they spoke Spanish and not English.⁶⁶ The court ruled:

That the school authorities have no power to arbitrarily segregate Mexican children, assign them to separate schools, and exclude them from schools maintained for children of other white races, merely or solely because they are Mexicans. An unlawful segregation will be effectuated if the rules for segregation are arbitrary and are applied indiscriminately to all Mexican pupils in those grades without regard to their individual aptitudes or attainments, while relieving children of other white races from the operation of the rules, even though some of them, as for instance, those who tardily enter the terms, may be subject to the classification given the Mexican children. To the extent that the classification is arbitrarily imposed upon those of one race, but relaxed in its application to those of other races so as to exclude the latter from its operation, it constitutes an unlawful racial discrimination.⁶⁷

The court ruled that it could not say that the district's reason for segregating the Mexican-American children was "unreasonable, if impartially applied to all students alike. . . . To the extent that the plan adopted is applied in good faith . . . with no intent or effect to discriminate against any of the races involved, it cannot be said that the plan is unlawful or violative even of the spirit of the constitution."⁶⁸ The court then held that the plaintiffs had no right of action "[s]ince it has not been shown in this case that the school authorities are at this time enforcing unlawful segregation against any particular child or children, or intends to do so, or that the

CAREER OF BILINGUAL EDUCATION IN TEXAS, 1836-1981 95 (2004). "Litigated by LULAC attorneys, the *Salvatierra* case first challenged the segregation of Mexican American children in Texas and the American Southwest." *Id.*

66. *Id.* at 17. "Rather, the basis for the separation lay on two educational grounds. First, the superintendent noted that about half of the Mexican-American children joined their parents in the migratory stream of picking cotton and working on ranches during part of the school year. As a result, the superintendent added, the children upon return to school were several months 'retarded from the standpoint of enrollment,' and thus for the children to receive efficient instruction they needed to be segregated in the Mexican school. Second, the superintendent testified that the Mexican American children required segregated instruction because of language needs." *Id.*

67. *Salvatierra*, 33 S.W. 2d at 795.

68. *Id.*

individual complainants are suffering or threatened with injury and damage peculiar to themselves . . .”⁶⁹

The court seems to misdescribe and misinterpret the situation. There was a good argument that the reasons offered by the district for segregation were pretextual and that in fact the discrimination was based on race and therefore was unlawful and arbitrary. For instance, the Superintendent testified that he did not segregate the white children who started school late into the school for the Mexican-American children.⁷⁰ Moreover, the Superintendent based segregation on the fact that the Mexican-American children spoke Spanish even though he admitted in his testimony that “the best way to learn a language is to be associated with the people who speak that language.”⁷¹ This would have meant that the Spanish speaking children should have been integrated into the school for white children so that the Mexican-American children would have the best prospects for learning English. Thus, “[i]n *Salvatierra*, the educational justification for the segregation of the Mexican American was merely a smoke screen for the school board’s race based opposition to mixing young Mexican American and white children in the same classroom.”⁷²

Just as Charles Mill’s theory would predict, the court seems to have been constructing a racial fantasyland where racial discrimination did not exist even though there was evidence indicating the presence of discrimination based on race. The court seemed unable to perceive this reality as it observed:

It is to the credit of both races that notwithstanding widely diverse racial characteristics, they dwell together in friendship, peace, and unity, and work amicably together for the common good and a common country. Racial dissensions, if any occur, are so rare and slight as to escape public notice, and we look in vain into the law books for evidences of such dissensions. It is a matter of pride and gratification in our great public educational system and its administration that the question of race segregation, as between Mexicans and other white races, has not heretofore found its way into the courts of this state, and therefore the decision of no Texas court is available in the

69. *Id.* at 796.

70. 33 S.W. 2d at 793.

71. *Id.*

72. VALENCIA, *supra* note 58, at 18. *See also* GROSS, *supra* note 36, at 255. “Unlike earlier trials, these twentieth century trials were less the genuine efforts of a white society to determine what race was and how it should be treated than the strategic attempts of a self-consciously racist society to segregate a group perceived as nonwhite without admitting that the segregation was based on race per se. In the court records, unself-consciously racist statements sit side by side with elaborate efforts to deny racial prejudice, and the court actors seem less concerned with understanding race than with finding acceptable ways to enforce the racial views they already held.” *Id.*

disposition of the precise question presented here.⁷³

Contrary to the court's description of alleged racial harmony in Texas, Texas was, in fact, well-known for its racism against Mexican-Americans. As Professor Kevin Johnson has explained:

Although not alone in discriminating against persons of Mexican ancestry, Texas earned a reputation for its multi-racial caste system. Indeed, in negotiating the agreements with the United States creating the Bracero Program, the Mexican government initially insisted on barring temporary workers from employment in Texas because of the notorious discrimination against persons of Mexican ancestry in the Lone Star State.⁷⁴

Significantly, the epistemological mischaracterization of Mexican-Americans as white, as we observed in the context of jury selection, was also used to subordinate Mexican-Americans in the context of school segregation. School districts "cynically employed 'Mexican Americans' status as 'white' to 'desegregate' black schools by integrating them with Mexican Americans—much as the courts of the 1940s had cynically relied on Mexicans' 'whiteness' to deny their civil rights claims."⁷⁵ Historian Brian Behnken explains how this "integration" and "desegregation" worked: [since the school district] still classified Mexican Americans as white, by pairing [Mexican American] schools and black schools the district achieved 'integration.' [Mexican Americans] would serve as symbolic 'whites' for desegregation purposes—'pawns, puppets, and scapegoats' as one activist put it—thereby ensuring that predominantly Anglo schools remained white.⁷⁶

V. EMPLOYMENT DISCRIMINATION LAW AND THE EPISTEMOLOGY OF IGNORANCE

With respect to the epistemology of ignorance, "a lack of knowledge . . . often is actively [or consciously] produced for purposes of domination and exploitation."⁷⁷ Sometimes the ignorance is unconsciously produced.⁷⁸

One of the areas where there is evidence of the epistemology of ignorance being used against racial minorities in law is in the context of

73. *Salvatierra*, 33 S.W. 2d at 794.

74. Johnson, *supra* note 37, at 155-56. See also BEHNKEN, *supra* note 62, at 28 ("The Mexican Jim Crow also threatened to undermine the Bracero Program. Indeed, due to segregation the Mexican government banned braceros from working in Texas").

75. GROSS, *supra* note 36, at 289.

76. BEHNKEN, *supra* note 62, at 200.

77. Sullivan & Tuana, *supra* note 4, at 1.

78. *Id.* at 1-2.

employment discrimination lawsuits. In this connection, “Section 703 of Title VII prohibits employers from failing or refusing to hire, or from discharging or otherwise discriminating against any individual because of his or her race, color, religion, sex, or national origin.”⁷⁹ In the context of an employment discrimination lawsuit, once a plaintiff has made a prima facie case⁸⁰ of employment discrimination, the defendant must produce a legitimate, nondiscriminatory reason for the employment action.⁸¹ Once the defendant has produced such a reason, plaintiff must prove that the reason or reasons are merely pretextual and the true reason is discriminatory.⁸²

One way that the epistemology of ignorance arises in the area of employment law, then, is that defendants will often give reasons for their actions which are not the real or true reasons for their actions—i.e., as predicted by the epistemology of ignorance, they will misdescribe or misrepresent reality. Consider some examples of this misdescription or cover-up of the true reasons for employer actions.⁸³

79. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1168 (1995).

80. “The McDonnell Douglas-Burdine prima facie case merely attempts to ‘rule out the most common reasons for adverse job actions,’ entitling the plaintiff who proves a prima facie case to a presumption that intentional discrimination has taken place.” Deborah C. Malamud, *The Last Minuet: Disparate Treatment after Hicks*, 93 MICH. L. REV. 2229, 2233 (1995). For instance, “[i]n a termination case . . ., to establish a prima facie case the plaintiff need only show that: (1) he is a member of a protected class . . .; (2) he was working in a job for which he was qualified; (3) his employment was terminated; and (4) his position remained open or was subsequently filled by someone of similar qualifications.” Krieger, *supra* note 79, at 1177.

81. *Tex. Dept. of Community Aff. v. Burdine*, 450 U.S. 248, 254-55 (1981). *See also* Malamud, *supra* note 80, at 2233. “In order to avoid a directed verdict, the employer must then meet a burden of *production*—as opposed to a burden of persuasion—by introducing evidence of a legitimate, nondiscriminatory reason for its decision.” *Id.*

82. *Burdine*, 450 U.S. at 255-56. *See also* Krieger, *supra* note 79, at 1178. “Under the *McDonnell Douglas/Burdine* model of disparate treatment proof, after a defendant articulates a legitimate nondiscriminatory reason for the contested employment decision, the plaintiff can prevail only by proving that the proffered reason was not the ‘true reason’ for the decision, but a ‘pretext for discrimination.’ In any cause adjudicated under the *McDonnell Douglas/Burdine* paradigm, the reason an employer offered to explain the negative action taken against a target employee must accordingly be classified as either the ‘true’ reason for its action or a ‘phony reason’—a ‘sham,’ ‘mask,’ ‘façade,’ or ‘cover-up’ for the ‘true’ discriminatory motive. Given the rhetoric of *McDonnell Douglas* and its progeny, finding against an employer at the third stage of proof is, in essence, finding that the employer has lied to the plaintiff and the court.” *Id.*

83. “The most common method of proving pretext is to show that the employer’s proffered reason is not worthy of credence either because it appears implausible in light of data upon which such an employment decision should have been based, or because it appears inconsistent with decisions reached in similar cases involving employees outside of plaintiff’s protected class. . . . More specifically . . . the conscious discriminatory purpose required to prevail in a disparate treatment case might be inferred from the following types of evidence:

For instance, in *Jauregui v. City of Glendale*,⁸⁴ a Hispanic police officer who had been denied promotion seven times brought a lawsuit against the City of Glendale alleging that the City had discriminated against him on the basis of race or national origin in violation of Title VII. The City defended on the ground that “Jauregui was never promoted because he possesses poor interpersonal relationship skills and strong interpersonal skills are essential for a police supervisor.”⁸⁵ The district court held that “Jauregui had been discriminated against in violation of Title VII.”⁸⁶ The City’s statement purporting to justify the failure to promote constitutes a misrepresentation, thus implicating the epistemology of ignorance. That this is the case is clearly seen in the fact that, on review, the court of appeals found that the City’s asserted justification was a mere pretext and misdescription of reality because (1) the City had failed to include “specific examples of Officer Jauregui’s purported lack of interpersonal relationship skills . . . in his performance evaluations” and (2) a white male police officer “with lower scores on the objective examinations” was “promoted over Officer Jauregui” even though the white officer “had a lack of ‘interpersonal relationship skills’ recorded in his performance evaluations.”⁸⁷ The court found that this “inconsistency in the City’s selective application of its asserted basis for denying promotion itself creates an inference of unlawful discrimination.”⁸⁸

Similarly, in *Bennum v. Rutgers State University*,⁸⁹ Alfred Bennum, a Hispanic Associate Professor who was denied promotion to full professor, brought a Title VII lawsuit against Rutgers University alleging that he had been denied a promotion on the basis of race or national origin. The District Court found that Bennun had established “a prima facie case of disparate treatment and that Rutgers’s proffered nondiscriminatory reason, failure to meet the university’s high standards for full professorship . . . was a pretext

(1) Evidence that the objective data maintained by the defendant did not support the result reached by the decisionmaker; (2) Evidence that the decisionmaker seemed to undervalue or ignore facts favorable to the employee; (3) Evidence that the decisionmaker made a judgment about the plaintiff without being able to point to specific events which would reasonably support such a judgment; or (4) Evidence showing that similarly situated [white] employees were on occasion treated more favorably.” Krieger, *supra* note 79, at 1179-1180.

84. 852 F.2d 1128 (1988).

85. *Id.* at 1131.

86. 852 F.2d at 1131.

87. *Id.* at 1135.

88. *Id.* See also Krieger, *supra* note 79, at 1181. “We know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.” *Id.* (quoting *Furnco Construction Corp. v. Waters* 438 U.S. 567, 577 (1978)).

89. 941 F.2d 154 (1991).

for discriminatory denial of the promotion. . . .”⁹⁰ The court of appeals found that Rutgers’s purported nondiscriminatory reason for failure to promote Bennun, “the poor quality and insufficient quantity of his research,” was a pretext because white professors were granted promotion under more lenient standards than were applied to Bennun.⁹¹ For instance, the University had found that a white professor’s publications were “above average in quantity . . . while Bennun’s publication rate was questionable,” even though Bennun had 18 more publications than the white professor.⁹² Again, this case shows how the dominant group misrepresents or misdescribes reality by providing pretextual reasons for their employment actions in a way that implicates the epistemology of ignorance. Indeed, some scholars argue that the employment “law of pretext in general” is deeply problematic in that it “emboldens employers to lie about their true motivations and facilitates their avoidance of liability by relying on secrets and lies.”⁹³

Moreover, the epistemology of ignorance is protected and promoted by making summary judgment easier to obtain for employers—and thereby enabling them to win without a trial—in cases where pretextual reasons have been advanced to justify employment decisions taken against minority employee plaintiffs. In such situations, the proof structure associated with the legal doctrine in this area—namely, the McDonnell Douglas-Burdine line of cases—to the extent that it “does shape decisionmaking [on summary judgment], its effects are often detrimental to [employee] plaintiffs . . . because McDonnell Douglas-Burdine renders courts less able to recognize forms of discrimination that do not straightforwardly match the proof structure’s template.”⁹⁴

90. *Id.* at 158-59.

91. 941 F.2d at 177, 178-180.

92. *Id.* at 179. *See also*, Krieger, *supra* note 79, at 1181. “Pretext analysis thus rests on the assumption that, absent discriminatory animus, employment decisionmakers are rational actors. They make evenhanded decisions using optimal inferential strategies in which all relevant behavioral events are identified and weighted to account for transient situational factors beyond the employee’s control. If an employer’s proffered explanation for its decision is shown to be irrational or implausible in light of the relevant data set, the trier of fact may conclude, and to find for the plaintiff, must conclude, that the reasons given did not really motivate the decisionmaker, but were simply contrived to mask discriminatory intent.” *Id.*; Malamud, *supra* note 80, at 2258 n.100. “The growing literature of the critical race theory movement is built upon, and stands witness to, the perception by legal scholars from ‘outsider’ groups that ‘racism is normal, not aberrant, in American society’ . . . a perception that would support the conclusion that ‘arbitrary’ decisions that are adverse to ‘outsiders’ are in fact discriminatory.” *Id.* (quoting Richard Delgado, *Introduction* in *CRITICAL RACE THEORY: THE CUTTING EDGE* XIV (Richard Delgado Ed. 1995)).

93. Natasha T. Martin, *Colloquium: Pretext in Peril*, 75 MO. L. REV. 313, 329 (2010) (citing Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539 (2001)).

94. Malamud, *supra* note 80, at 2279-2280.

Beyond all of this, perhaps the best way of proving such discriminatory discharge or treatment is by showing that similarly situated employees have been treated differently.⁹⁵ However, where the employer lacks knowledge that similarly situated employees have been treated differently, such ignorance may constitute a defense to the allegation that discrimination has taken place.⁹⁶ Thus, as predicted by the epistemology of ignorance, the ignorance of the employer enables the employer to engage in racial domination or discrimination and undermine the rights of minority employees.

VI. IMMIGRATION LAW AND POLICY IN THE TRUMP ERA AND THE EPISTEMOLOGY OF IGNORANCE

In November 2016, Donald Trump was elected President of the United States.⁹⁷ Some contend that Trump was elected President because he took a very strong position on immigration enforcement.⁹⁸ Among other things, Trump strongly attacked immigrants from Mexico and promised to construct

95. See Martin, *supra* note 93, at 323. “To show pretext, the plaintiff presents evidence from which one can draw a discriminatory animus. The method of presenting pretextual evidence varies widely, but the most common avenues include the use of comparative data involving similarly situated individuals, statistics reflecting the overall composition of the employer’s workforce, inconsistencies or contradictions in the employer’s explanation or other information surrounding the circumstances of the plaintiff’s employment that raise an inference of discrimination.” *Id.*

96. See *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1366 (7th Cir. 1988).

97. Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 255 (2018).

98. *Id.* at 256. See also Kristina M. Campbell, *Dreamers Deferred: The Broken Promise of Immigration Reform in the Obama Years*, 25 TEX. HISP. J.L. & POL’Y. 1, 4 n.15 (2018). “Since he assumed office in January 2017, there has arguably been no issue used more by President Trump than immigration in order to both unite his supporters and divide his opponents.” *Id.*; Gowri J. Krishna, *Growing the Resistance: A Call to Action for Transactional Lawyers in the Era of Trump*, 7 TENN. J. RACE GENDER & S. J. 206, 211 (2018). “Trump’s campaign rhetoric” spoke “of removing all undocumented immigrants from the U.S.” *Id.*; Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 198 (2019). “[Trump] began his presidential campaign by denouncing Mexican migrants as ‘rapists.’” *Id.*; Kevin R. Johnson, *The New Latinx “Repatriation”? Removals, Criminal Justice, and the Efforts to Remove Latinx Peoples from the United States*, U. OF CAL. DAVIS LEGAL STUD. RES. PAPER SERIES, March 18, 2019, at 22. “From day one of his campaign, [Trump] made aggressive immigration enforcement the cornerstone of his platform.” *Id.*

a “great, great wall⁹⁹ along the southern border.”¹⁰⁰ In addition, Trump called for “a total and complete shutdown of Muslims entering the United States.”¹⁰¹ Shortly after Trump was sworn in as President of the United States, on January 27, 2017, Trump promulgated an Executive Order 13,769 (EO-1) which sought to ban immigrant and nonimmigrant entry into the United States from seven primarily Muslim nations: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen.¹⁰² The legality and constitutionality of the order was almost immediately challenged in the lower federal courts and in *Washington v. Trump*,¹⁰³ the federal district court enjoined the enforcement of EO-1.¹⁰⁴ Subsequently, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s injunctive order.¹⁰⁵ In the face of this judicial action, President Trump issued an amended Executive Order 3,780 (EO-2) on March 6, 2017, to replace the first EO-1.¹⁰⁶ EO-2 again barred entry into the United States from predominantly Muslim countries but sought to correct some of the problems that the lower courts had found in EO-1.¹⁰⁷ EO-2 was subsequently enjoined by federal district courts in Hawaii,¹⁰⁸ and in Maryland.¹⁰⁹ The U.S. Courts of Appeals for the Fourth and Ninth Circuits affirmed these injunctions.¹¹⁰ In response to these judicial decisions, President Trump on September 24, 2017, announced a Presidential proclamation (the Proclamation) restricting immigration from eight

99. Professor Hing explains the symbolism of the wall: “To the Author, the symbolism is significant. Its message of exclusion is clear. Latinos—primarily Mexicans—are not wanted. But the message of exclusion reaches communities on *both* sides of the border—Latinos are not wanted on either side of the border. This is a message not simply intended for undocumented immigrants. The Wall’s message is one of de-legitimizing Latinos already in the United States.” Hing, *supra* note 97, at 319-320.

100. Hing, *supra* note 97, at 256-57. See also *Donald Trump Speech, Debates and Campaign Quotes*, NEWSDAY, Nov. 10, 2016. With respect to Mexican immigrants, Trump observed: “When Mexico sends its people, they’re not sending their best. They’re sending people who have lots of problems, and they’re bringing problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And, some, I assume, are good people.” *Id.*

101. Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391, 392 (2018). See also Shalin Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 21-22 (2019). “Critics note that President Trump has a long history of expressing animus towards people of color and Muslims during his campaign and after taking the oath of office.” *Id.*

102. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

103. No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

104. Wash. v. Trump, *supra* note 103, at *1.

105. Wash. v. Trump, 847 F.3d 1151 (9th Cir. 2017).

106. Exec. Order No. 13,780 82 Fed. Reg. 13209 (Mar. 9, 2017).

107. *Id.* §2(c), 82 Fed. Reg. at 13213.

108. Haw. v. Trump, 245 F. Supp. 3d 1227 (D. Haw. 2017).

109. Int’l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017).

110. Int’l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017); Haw. v. Trump, 859 F.3d 741 (9th Cir. 2017).

countries.¹¹¹ Again, the Proclamation was enjoined by district courts in Maryland and Hawaii.¹¹² The Courts of Appeals for the Fourth and Ninth Circuits affirmed the issuance of the injunctions, with the Fourth Circuit holding that the Proclamation violated the Establishment Clause of the U.S. Constitution and the Ninth Circuit finding the Proclamation violated the Immigration and Naturalization Act (INA).¹¹³ On appeal in the U.S. Supreme Court, the Court upheld in a 5-4 decision the validity of the travel ban announced in the Proclamation.¹¹⁴ Writing for the Court, Chief Justice Roberts concluded that the Proclamation did not violate either the INA or the Establishment clause.¹¹⁵ The U.S. Supreme Court decision in the Muslim travel ban case implicates the epistemology of ignorance.

As to the epistemology of ignorance “a lack of knowledge . . . often is actively [or consciously] produced” or unconsciously produced in order to subordinate or oppress people.¹¹⁶ This phenomenon has occurred in the Muslim travel ban case in a very striking way. In the Travel ban case, the Supreme Court has, in essence, produced ignorance which has enabled the government to engage in discrimination and subordinate ethnic or religious minorities. As Justice Sotomayor observed in her dissent in the Muslim travel ban case, the Supreme Court failed to uphold the First Amendment guarantee by leaving “undisturbed a policy first advertised openly and unequivocally as a ‘total and complete shutdown of Muslims entering the United States behind a façade of national security concerns.’”¹¹⁷ In so doing, the court actively produced a lack of knowledge of the President’s true primary motives in enacting the Proclamation or executive order banning travel to the United States. The court, in essence, ignored a series of Presidential statements which demonstrated the intent to discriminate against Muslims. Justice Sotomayor sets out the following to demonstrate that “the Proclamation was motivated by hostility and animus to the Muslim faith”¹¹⁸:

111. Proclamation No. 9645, 82 Fed. Reg. 45161, 45165-67 (Sept. 24, 2017).

112. *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017); *Haw. v. Trump*, 265 F. Supp. 3d 1140 (D. Haw. 2017). “[The Proclamation] was challenged in federal court. Plaintiffs were Hawaii, the Muslim Association of Hawaii, and three individuals. Plaintiffs claimed that [the Proclamation] prevented their affiliates from entering the United States in violation of, among other things, the [Immigration and Nationality Act] and the Establishment Clause.” Comment, *First Amendment—Establishment Clause—Judicial Review or Pretext—Trump v. Hawaii*, 132 HARV. L. REV. 327, 328 (2018).

113. *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018); *Haw. v. Trump*, 878 F.3d 662 (9th Cir. 2017).

114. *Trump v. Haw.*, 138 S.Ct. 2392 (2018).

115. *Trump v. Haw.*, 138 S.Ct. at 2415, 2423.

116. See Sullivan & Tuana, *supra* note 4, at 1-2.

117. *Trump v. Haw.*, 138 S.Ct. at 2433.

118. *Id.* at 2435.

- (1) “[O]n December 7, 2015 [Trump] issued a formal ‘statement’ calling for a total and complete shutdown of Muslims entering the United States.”¹¹⁹
- (2) “In January 2016, during a Republican primary debate,” Trump stated that he did not want “to ‘rethink [his] position on banning Muslims from entering the country.’”¹²⁰
- (3) “In March 2016, he expressed his belief that ‘Islam hates us . . . [W]e can’t allow people coming into the country who have this hatred of the United States [a]nd of people who are not Muslim.’”¹²¹
- (4) In March 2016, “Trump called for surveillance of mosques in the United States, blaming terrorist attacks on Muslim’s lack of ‘assimilation’ and their commitment to ‘sharia law.’”¹²²
- (5) That same month, he stated that “Muslims ‘do not respect us at all.’”¹²³
- (6) In June 2016, he used somewhat different language and characterized his “proposal as a suspension of immigration from countries where there’s a proven history of terrorism” but he stated that in so doing he was not “‘pulling back from’ his pledged Muslim ban.”¹²⁴
- (7) “On January 27, 2017 . . . Trump signed EO-1 entitled ‘Protecting the Nation from Foreign Terrorist Entry in the United States.’”¹²⁵ The next day one of Trump’s advisers indicated EO-1 was a legal version of the Muslim ban.¹²⁶ On February 3, 2017, a federal district court in Washington enjoined the enforcement of EO-1.¹²⁷ The United States declined to continue defending EO-1 and stated that the President would issue a new executive order in place of EO-1.¹²⁸
- (8) “On March 6, 2017, President Trump issued [EO-2].”¹²⁹ One of Trump’s advisers stated that “the EO-2 would ‘have the same

119. *Id.*

120. *Trump v. Haw.*, 138 S.Ct. at 2435-36.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Trump v. Haw.*, 138 S.Ct. at 2437.

129. Exec. Order No. 13,780, 82 Fed. Reg. 13209 (EO-2).

basic policy outcome’ as EO-1.”¹³⁰ U.S. district courts in Hawaii and Baltimore enjoined EO-2 and its travel bans before it could take effect. The Fourth and Ninth Circuit affirmed those orders.¹³¹ In June 2017, the U.S. Supreme Court granted certiorari and allowed certain aspects of the EO-2 to go into effect pending appeal.¹³²

- (9) While lawsuits were pending, Trump made additional assertions suggesting that Muslims should be excluded from the U.S.A.¹³³ For instance, Trump said “that EO-2 was just a ‘watered down version of the first one.’”¹³⁴ He also asserted “that it was ‘very hard’ for Muslims to assimilate into Western culture.”¹³⁵ In September 2017, “Trump issued the Proclamation which restricts entry of certain nationals from six Muslim-majority countries.”¹³⁶ In November 2017, Trump retweeted three anti-Muslim videos.¹³⁷ The White House Deputy Press Secretary explained the videos by relating them to the Proclamation observing “that the ‘President has been talking about these security issues for years now, from the campaign trail to the White House’ and ‘has addressed those issues with the travel order that he issued earlier this year and the companion Proclamation.’”¹³⁸

Given all of this, Justice Sotomayor states that “a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus rather than by the Government’s asserted national security justifications.”¹³⁹

Despite this, the majority actively produces ignorance as to the main reason for the issuance of the Proclamation which results in the subordination of Muslims—a religious or ethnic minority. The Court observed that the issue is “not whether to denounce the statements” but rather the “significance

130. Trump v. Haw., 138 S.Ct. at 2437.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 2438.

137. *Id.*

138. Trump v. Haw., 138 S.Ct. at 2438.

139. *Id.* See also Comment, *First Amendment—Establishment Clause*, *supra* note 112, at 334. “On one view, some of the President’s statements were ‘smoking gun’ evidence that [the Proclamation] arose from a desire to target foreign nationals on the basis of religion. ‘I think Islam hates us,’ he had said, ‘and we can’t allow people coming into this country who have this hatred of the United States.’” *Id.*

of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.”¹⁴⁰ The Court observed that “[f]or more than a century, this court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the government’s political departments largely immune from judicial control.”¹⁴¹ The Court then said that when the executive excludes a foreign national from entering “on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the asserted constitutional interests of U.S. citizens.”¹⁴² The Court further explained that this “deferential standard of review” has been applied “across different contexts and constitutional claims” and “‘has particular force’ in admission and immigration cases that overlap with ‘the area of national security.’”¹⁴³ Although the Court said that an application of this deferential *Mandel* standard would ask “only whether the policy is facially legitimate and bona fide,” it nevertheless stated that “for our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review.”¹⁴⁴ This standard of review asks “whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve vetting processes.”¹⁴⁵ As a result, the Court said that it “may consider plaintiffs’ extrinsic evidence, but will uphold the policy as long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”¹⁴⁶ Given this, the Court then observed that it “hardly ever strikes down a policy as illegitimate under rational basis scrutiny.”¹⁴⁷ And the Court stated that it had struck down policy under the rational basis standard only when “the laws at issue lack any purpose other than a ‘bare . . . desire to harm a politically unpopular group.’”¹⁴⁸ The Court then held that this Proclamation is related to legitimate state interests and that it cannot be said that the Proclamation is “‘inexplicable by anything but animus.’”¹⁴⁹ The Court held that “there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns.”¹⁵⁰ For example, the Court pointed out (1) that “the

140. *Trump v. Haw.*, 138 S.Ct. at 2418.

141. *Id.*

142. *Id.* at 2419.

143. *Trump v. Haw.*, 138 S.Ct. at 2419.

144. *Id.* at 2420.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 2420-21.

150. *Id.* at 2421.

Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices,” (2) that “the text says nothing about religion,” (3) that the “policy covers just 8% of the world’s Muslim population,” (4) that the policy “reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies,” (5) that “since the President introduced entry restrictions . . . three Muslim-majority countries . . . have been removed from the list of covered countries” and that the Proclamation states that the restrictions “will remain in force only so long as necessary to ‘address the identified inadequacies and risks,’” (6) “the Proclamation includes significant exceptions for various categories of foreign nationals,” and (7) “the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or non-immigrants.”¹⁵¹ The Court held that “[u]nder these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review.”¹⁵²

In so doing, the Court, in essence, ignored the strong evidence that the Proclamation was primarily the result of prejudice against Muslims. The use of the rational based scrutiny allows the Court to, in essence, set aside the discriminatory statements against Muslims. As Justice Sotomayor pointed out in her dissent, the majority “utterly failed to address in its legal analysis” the President’s statements which “strongly support the conclusions that the Proclamation was issued to express hostility toward Muslims and exclude them from the country.”¹⁵³ As a result, Justice Sotomayor concluded that “it simply cannot be said that the Proclamation has a legitimate basis.”¹⁵⁴ The majority of the Court has therefore actively constructed an ignorance as to the primary reason for the issuance of the Proclamation. As Justice Sotomayor explained, the Court has accepted the government’s invitation to set aside “the President’s problematic statements” and “defer to the President on immigration and national security.”¹⁵⁵ Indeed, Sotomayor said that the majority sees “the President’s charged statements about Muslims as irrelevant.”¹⁵⁶

Another striking way in which the majority constructed ignorance as to whether the Proclamation was motivated by bias against Muslims as opposed

151. *Trump v. Haw.*, 138 S.Ct. at 2421.

152. *Id.* at 2423.

153. *Id.* at 2442.

154. *Id.*

155. *Trump v. Haw.*, 138 S.Ct. at 2440.

156. *Id.* at 2447. See also Comment, *First Amendment—Establishment Clause*, *supra* note 112, at 334. “The travel ban decision thus suggests that even the strongest evidence of discriminatory motive will not trigger heightened scrutiny, so long as that evidence is extrinsic to the face of the law under challenge. So even when challengers to a law like [the Proclamation] can persuade a court to ‘look behind’ that law, doing so may be futile.” *Id.*

to national security is found in the fact that the government refused to make the administrative process reports on which the Proclamation was purportedly based available to the public.¹⁵⁷ Obviously, it would be difficult to make an informed decision as opposed to a decision based on ignorance that the Proclamation was based on legitimate national security reasons when the supporting documents and reports are not publicly available.

Interestingly, some commentators were hopeful that in the Travel Ban case Justice Kennedy might be “perhaps most primed for edification regarding the newly manifest points of perfunctory judicial review in exclusion cases.”¹⁵⁸ They thought that Justice Kennedy’s “reputation as defender of Constitutional liberty” might lead Kennedy to find, in light of “Trump’s extensive record of anti-Muslim statements,” that Trump’s facially neutral “national security interest was provided in bad faith, as a pretext for its [anti]Muslim purpose.”¹⁵⁹ However, this hope proved to be in vain. Justice Kennedy joined “the Court’s opinion [in *Trump v. Hawaii*] in whole.”¹⁶⁰ Justice Kennedy expressed only a seemingly empty admonition that:

[T]here are numerous instances in which the statements and actions of government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and promise.¹⁶¹

157. *Id.* at 2443 (Breyer, J., dissenting) (citing Int’l Refugee Assistance Project v. Trump (*IRAP II*), 883 F.3d 233 (4th Cir. 2018)) (“[T]he government chose not to make the review publicly available” even in redacted form.).

158. Matthew J. Lindsay, *The Perpetual “Invasion”: Past as Prologue in Constitutional Immigration Law*, 23 ROGER WILLIAMS U. L. REV. 369, 385 (2018).

159. *Id.* at 390.

160. *Trump v. Haw.*, 138 S.Ct. at 2423 (Kennedy, J., concurring).

161. *Id.* at 2424; see also Frank Colucci, *When Structure Fails: Justice Kennedy, Liberty and Trump v. Hawaii*, 70 HASTINGS L.J. 1141, 1142 (2019) (“Justice Anthony M. Kennedy’s final concurrence in *Trump v. Hawaii* shaped both initial reactions to his retirement from the U.S. Supreme Court and first assessments of his legacy. Commentators called his vote to join the *Trump* majority, which allowed President Trump’s order banning entry by nationals of several countries to take effect, a ‘betrayal,’ a ‘surrender,’ and a ‘coup.’ Others categorized Kennedy’s last opinion as ‘depressing defeatism,’ ‘at odds’ with the ‘animating principles’ of his larger approach to law. Still others read it as an ‘empty gesture’ and ‘an expression of

Beyond the Travel Ban case, the Trump administration has practiced the epistemology of ignorance—misrepresentation and misinterpretation—in regard to other immigration issues. Perhaps the central focus of Trump’s presidential campaign was on immigration issues.¹⁶² He particularly encouraged a crackdown on immigrants of color.¹⁶³ Indeed, one commentator has argued that Trump’s immigration enforcement initiatives, which largely target Latinos, constitute “a concerted effort to remove [Latino] people, including large numbers of Mexicans and Central Americans from the United States.”¹⁶⁴ In so doing, he made misrepresentations, implicating the epistemology of ignorance, to justify immigration enforcement efforts against Latinos and others and thereby helped advance the oppression and exclusion of immigrants of color. As a result, Trump helped preserve the socially dominant position of white Americans. First, Trump argues that President Obama had failed to enforce the immigration laws.¹⁶⁵ This was a misrepresentation of fact. In reality, President Obama deported extremely large numbers of undocumented immigrants on the order of about 400,000 persons per year.¹⁶⁶ Trump used this alleged lack of enforcement of immigration laws to justify the implementation of draconian

defeat and a loss”).

162. Lindsay, *supra* note 158, at 369 (“Donald Trump ascended to the presidency largely on the promise to protect the American people—their physical and financial security, their culture and language, even the integrity of their electoral system against an invading foreign menace”).

163. *Id.* (During the campaign, Trump argued that “[o]nly extraordinary defensive measures, including ‘extreme vetting’ of would be immigrants, a ban on Muslims entering the United States, and a 2,000-mile-long wall along the nation’s southern border could repel the encroaching hordes”).

164. Johnson, *supra* note 98, at 4

165. President Donald Trump, Immigration Speech (Sept. 1, 2016).

166. Brian Bennett, *U.S. Reported Record Numbers of Immigrants*, L.A. TIMES (Oct. 6, 2010), <https://www.latimes.com/archives/la-xpm-2010-oct-06-la-na-illegal-immigration-20101007-story.html>; *see also* Campbell, *supra* note 98, at 14 (“Deportations increased during the first four years of Obama’s presidency with a high of 400,000 noncitizens being removed from the United States in 2012. The total number of persons removed by the Obama Administration exceeded the total number of persons removed in the prior 100 years. While Obama and members of his administration argued that they were merely enforcing the law as dictated by Congress, the fact remains that the manner in which the DHS aggressively enforced the removal of noncitizens is unparalleled. The Agency’s myopic focus on removing ‘criminal aliens’ from the United States has resulted in the inequitable and unjust enforcement of immigration law, causing the removal of thousands of long-term legal permanent residents of the United States . . . and other legal noncitizens convicted of misdemeanors and other non-serious crimes”); Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016), <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> (“Between 2009 and 2015, [Barack Obama’s] administration has removed more than 2.5 million people through immigration orders, which doesn’t include the number of people who ‘self-deported’ or were turned away and/or returned to their home country at the border by U.S. Customs and Border Protection (CBP).”).

immigration laws and policies directed especially at Latinos and Muslims.

Beyond this, President Trump issued two additional executive orders which were aimed at immigration enforcement on the border and in the interior of the nation.¹⁶⁷ The Trump administration attempted to justify these orders and their expanded enforcement of the immigration laws against undocumented immigrants on the grounds that immigrants constitute a crime problem. For instance the Interior E.O. provides:

Tens of thousands of removable aliens have been released into communities across the country, solely because their home countries refuse to accept their repatriation. Many of these aliens are criminals who have served time in our federal, state and local jails. The presence of such individuals in the United States, and the practices of foreign nations that refuse the repatriation of their nationals, are contrary to the national interest.¹⁶⁸

Likewise, the Border E.O. provides:

[T]ransnational criminal organizations operate sophisticated drug and human trafficking networks and smuggling operations on both sides of the southern border, contributing to a significant increase in violent crime and United States deaths from dangerous drugs. Among those who illegally enter are those who seek to harass Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.¹⁶⁹

These claims regarding the criminal threat allegedly posed by undocumented immigrants constitute misrepresentations and, therefore, implicate the epistemology of ignorance. In fact, scholars have long pointed out that “immigrants are less likely to commit serious crimes or be behind bars than the native born, and high rates of immigration are associated with lower rates of violent crime and property crime.”¹⁷⁰

167. See Exec. Order No. 13767 of Jan. 25, 2017, 82 Fed. Reg. 8793 (Jan. 25, 2017) [hereinafter *Border E.O.*]; Exec. Order No. 13768 of Jan. 25, 2017 82 Fed. Reg. 8799 (Jan. 25, 2017) (hereinafter *Interior E.O.*).

168. *Interior E.O.*, *supra* note 167, at § 1; Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 633 (2017).

169. *Border E.O.*, *supra* note 167, at § 1; Johnson, *supra* note 168, *Immigration and Civil Rights in the Trump Administration*, at 633.

170. Walter Ewing et. al., *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNS. (July 13, 2015), <https://www.americanimmigrationcouncil.org/research/>

In addition, we see another example of the epistemology of ignorance at work in the area of immigration in the Trump administration in the controversy involving the separation of children from undocumented parents at the border. In April 2018, the Trump administration stated that it would enact a so-called “zero tolerance” immigration policy by which they would bring a criminal prosecution against all adults who illegally enter into the United States.¹⁷¹ If these detained and criminally charged adults had children with them, the children were separated from them because the children are not criminally charged and could not be placed in jail.¹⁷² The government separated about 2,500 children from their parents as a result of this zero tolerance policy.¹⁷³ The United States Department of Health and Human Services Office of Refugee Resettlement took custody of these children.¹⁷⁴ Once word reached the general public about the separation of children from their parents, many were outraged.¹⁷⁵ Former First Ladies expressed their

criminalization-immigration-united-states; see also Philip L. Torrey, *Alternative Facts in the War on Immigrants*, HARV. L. & POL’Y. REV. (2017), <https://harvardlpr.com/2017/03/03/alternative-facts-in-the-war-on-immigrants>; (“Here’s the truth on immigrants and crime. Numerous studies have shown that the crime rate among immigrants is significantly lower than among native-born U.S. Citizens. In the 1990s and 2000s, as the immigrant population dramatically grew in the United States, FBI data shows that the violent crime rate simultaneously plummeted. These and other statistics demonstrate that the vast majority of immigrants are law-abiding, contributing members of society”); Hing, *supra* note 97, at 273 (“However time and again studies demonstrate that immigrants are less crime prone than natives or have no effect on crime rates. Relatedly, macro level analysis show that ‘increased immigration does not increase crime and sometimes even causes crime rates to fall’”).

171. See Marilyn Haigh, *What’s Happening at the Border? Here’s What We Know about Immigrant Children and Family Separations*, TEX. TRIBUNE (June 18, 2018), <https://www.texastribune.org/2018/06/18/separated-immigrant-children-families-border-mexico>; see also Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 769-70 (2019) (Attorney General Sessions stated that under this “zero tolerance policy” that “‘If you cross the Southwest border unlawfully, then we will prosecute you. It’s that simple.’ . . . [and] that his goal was to prosecute ‘100 percent’ of people who entered without authorization.”).

172. See Haigh, *What’s Happening at the Border*, *supra* note 171. See also Marouf, *Executive Overreaching*, *supra* note 171, at 772 (“[A]fter the Trump administration instituted a ‘zero tolerance policy, a new much more visible phase of family separation began. DHS began separating children from their parents when they were apprehended together at the border.”).

173. See Haigh, *supra* note 171.

174. *Id.* (“They were sent to over a hundred different facilities for children all across the United States. The vast majority of these children came from Guatemala (56%) and Honduras (33%).”); Marouf, *supra* note 171, at 772.

175. *Id.*; see also Marouf, *supra* note 171, at 772 (“Between April and June 2018, the separation of children erupted into a nationwide scandal”); Mari J. Matsuda, *This Is (Not) Who We Are: Korematsu, Constitutional Interpretation, and National Identity*, 128 YALE L.J. FORUM (2019) (“Bear Witness: we saw children torn from their parents at the border, babies incarcerated, toddlers appearing alone at legal hearings, children held in cages, children dying

strong opposition to this policy.¹⁷⁶ In denying a motion to dismiss a lawsuit challenging the separation of children from their parents, a federal judge stated that the allegations regarding child separation “describe government conduct that arbitrarily tears at the sacred bond between parent and child” and said that the conduct “is brutal, offensive, and fails to comport with traditional notions of fair play and decency.”¹⁷⁷ As a result of this controversy, the Administration began to engage in misstatements and misrepresentations about this child separation policy in ways that implicate the epistemology of ignorance. The administration made numerous misstatements regarding the separation of children. First, the president and administration officials stated that the law or judicial decisions required the separation of the children.¹⁷⁸ For instance, on June 15, 2018, Trump said, “I hate the children being taken away. The Democrats have to change their law. That’s their law.”¹⁷⁹ On June 7, 2018, Attorney General Jeff Sessions blamed a court decision for the child separation policy: “Because of the *Flores* consent decree and a 9th Circuit decision, ICE can only keep families detained together for a very short period of time.”¹⁸⁰ Similarly, White House Press Secretary Sarah Huckabee Sanders stated on June 14, 2018, regarding the

in custody; psychotropic drugs and sexual abuse handed out to children at private prisons we paid for. We witnessed and many said as loudly as they could: ‘This is not who we are.’ Even an administration that first argued for the deterrent value of child separation retreated when outrage came from within the Republican Party”); Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CUNY L. REV. 1, 3-4 (2019) (“In the summer of 2018, a united and forceful public outcry mounted in response to the United States government’s family separation policy at the U.S.-Mexico border. Americans across the political spectrum protested as pictures, videos and audio recordings of children being forcibly separated from their parents were circulated nationwide. The mainstream media, in its coverage of the disaster, reported on the devastating consequences of removing children from their parents. Medical groups were outraged about the impact on children, describing the separations as child abuse. Due process and judicial oversight for the separated families seemed to be non-existent”).

176. See Matt Stevens & Sarah Mervosh, *The Four Former First Ladies Condemn Trump’s Border Policy*, N.Y. TIMES (June 19, 2018) <https://www.nytimes.com/2018/06/19/us/politics/first-ladies-trump-family-separation.html> (“Now, in the span of about 24 hours, all four living former first ladies have added their voices to the chorus of public critique, calling the practice [of separating children from their parents at the border] ‘immoral,’ ‘disgraceful’ and a ‘humanitarian crisis’”).

177. Erik Larson, *Judge Calls Trump’s Border Separations of Children ‘Brutal’*, BLOOMBERG (June 6, 2018), <https://www.bloomberg.com/news/articles/2018-06-07/aclu-suit-over-child-separations-at-border-may-proceed-judge>.

178. Salvador Rizzo, *The Facts about Trump’s Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border>.

179. *Id.*

180. *Id.*

child separation, “It’s the law and that’s what the law states.”¹⁸¹ On June 17, 2018, Homeland Security Secretary Kirstjen Nielsen went so far as to state that “We do not have a policy of separating families at the border. Period.”¹⁸² These statements were all untrue.¹⁸³ They therefore constitute misstatements and misrepresentations about the child separation policy as would be predicted by the epistemology of ignorance. Contrary to these assertions by Trump and his employees, “immigrant families are being separated primarily because the Trump administration in April began to prosecute as many border offenses as possible as part of the zero tolerance policy.”¹⁸⁴ As a result, “the Trump administration implemented this policy by choice and could end it by choice. No law or court ruling mandates family separations.”¹⁸⁵

Under these circumstances, these misrepresentations regarding family separation helped enable the subordination and exclusion of immigrants of color, and, thereby, helped enable whites to maintain their socially dominant position in American society. In this regard, family separation “is a government tool of oppression that has a deeply rooted history in the United States, tracing back to the colonization of indigenous peoples and chattel slavery.”¹⁸⁶ As one commentator has explained, “Trump’s family separation policy echoes the process of indigenous elimination in which indigenous children were forcibly separated from their families and sent to government funded residential schools,” and “the forced separation of families that was part of the African slave trade.”¹⁸⁷

181. *Id.*

182. *Id.*

183. *Id.*; see also Marouf, *supra* note 171, at 772-73 (“President Trump and DHS Secretary Nielsen initially denied having a policy of separating children, but the administration’s internal documents contradicted that assertion”).

184. Rizzo, *supra* note 178.

185. *Id.*; see also Marouf, *supra* note 171, at 73 (“Once Trump realized the unpopularity of the family separation policy, he blamed Democrats for it, claiming that their ‘bad legislation’ was the problem and that he had no choice in the matter. However, no law required children to be separated at the border”); see also Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 611-12 (2019) (“No previous administration resorted to the separation of families as a device to deter migration from Central America. The Trump Administration at least for a time pursued such a policy even though it had other policy options at its disposal. The administration, for example, could have continued the policy of allowing bond hearings for migrant families and releasing them if they were not a flight risk or a danger to the community. Children thus could have been bonded out with their families so that families could have remained intact”); see also Adela C. Licona & Eithne Luibheid, *The Regime of Destruction: Separating Families and Caging Children*, 30 FEMINIST FORMATIONS, Issue 3, 45, 51 (2018) (“President Trump repeatedly claimed that he ‘hated’ to separate families, but was required to do so because of ‘bad laws’ passed by Democrats. In fact, there is no law requiring families crossing the border to be separated”).

186. Jennings, *supra* note 175, at 4.

187. Monika Batra Kashyap, *Unsettling Immigration Laws: Settler, Colonialism and*

In this connection, child separation in the context of immigration is an issue that has been hidden and implicates the epistemology of ignorance in other important ways. Perhaps surprisingly, states have begun “removing children from undocumented immigrant parents and terminating their parental rights.”¹⁸⁸ Normally, the settled law has been that “courts may not terminate the rights of fit parents.”¹⁸⁹ However, in the immigration context, there has been a “largely unnoticed, change in the law.”¹⁹⁰ With respect to undocumented immigrants, fitness does not constitute a barrier to the deprivation and elimination of the rights of the parents to the child.¹⁹¹ To the contrary, “when courts and agencies believe that termination is in a child’s best interests, they will find that a parent’s undocumented status alone is sufficient to demonstrate unfitness.”¹⁹² Usually, three general sorts of reasons are given to establish that termination of the undocumented immigrant’s parental rights is in the child’s best interest: (a) “it is not in the child’s best interest to live in a foreign country”; (2) “life in the United States provides more opportunities”; and (3) “many of these children have the opportunity to be adopted by American families.”¹⁹³ Thus, the states have been empowered to “permanently deprive” undocumented immigrant parents of their children “separating them indefinitely with little hope of being reunited.”¹⁹⁴

This brutal trend of terminating the parental rights of undocumented immigrants implicates the epistemology of ignorance as it surely

the U.S. Immigration Legal System, 46 URB. L.J. 548, 567-68 (2019); see also Licona & Luibheid, *supra* note 185, at 45-46 (“The Trump family separation policy builds on a long and brutal history of separating children from their families and communities. The U.S. Government has consistently valued and supported white, middle-class, married families as a means to build the nation. Families that are indigenous, of color, poor, queer, and non-normative gender have been treated as threats to fear and expel or labor to exploit. The forced separation of migrant families at the border fits into the United States long history of treating enslaved families as property whose members can be sold away from one another, forcing Native American children into boarding schools designed to violently strip away their language, culture, identity, family and community ties, immigration policies designed to prevent immigrants of color from settling and forming families; punitive, deeply inadequate social welfare policies, and domestic policies that punish, impoverish, incarcerate, and destroy poor, queer, indigenous, and racialized U.S. citizen families in part by cultivating a cradle-to-prison pipeline that makes the United States the most incarcerated nation in the world”).

188. Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J. LAW & SOC. JUST. 1, 4 (2012).

189. *Id.*

190. *Id.*

191. *Id.* at 4-5.

192. *Id.*

193. *Id.*

194. Sarah Rogerson, *Unintended and Unavoidable: The Failure to Protect Rule and Its Consequences for Undocumented Parents and Their Children*, 50 FAM. CT. REV. 580, 581 (2012).

misrepresents and misdescribes what is in the best interests of the child. “Although these actions are purportedly taken in the best interests of the children, empirical research shows that children suffer emotional and psychological harm when they are separated from their parents or placed into foster care after their parents are detained.”¹⁹⁵ As Yoshikawa and Suarez-Orozco have explained:

Research by the Urban Institute and others reveals the deep and irreversible harm that parental deportation causes in the lives of their children. Having a parent ripped away permanently, without warning, is one of the most devastating and traumatic experiences in human development. . . . In the long run, the children of deportation faced increased odds of lasting economic turmoil, psychic scarring, reduced school attainment, greater difficulty in maintaining relationships, social exclusion and lower earnings.¹⁹⁶

Moreover, in a recent review of the literature examining “the impact of deportation-related family separations on psychosocial well-being of children among the Latin[o] population” the authors found:

That the accumulation of psychosocial stressors due to deportation-related family separation produced significant effects on children’s mental health and well-being. Youth experienced a range of negative mental health outcomes including: depression, anxiety and trauma.¹⁹⁷

VII. FEDERALISM IN RECENT SUPREME COURT CASES AND THE EPISTEMOLOGY OF IGNORANCE

The notion of “constitutional federalism” involves the idea “of judicial enforcement of structural limits on federal power, usually for the purpose of leaving greater scope for state and local authority.”¹⁹⁸ In the era of Chief

195. *Id.* at 582.

196. Hirokazu Yoshikawa & Carola Suarez-Orozco, Opinion, *Deporting Parents Hurts Kids*, N.Y. TIMES (April 20, 2017); see also Rogerson, *supra* note 194.

197. Kristina Lovato, Corina Lopez, Leyla Karimli & Laura Abrams, *The Impact of Deportation Related Family Separations on the Well-being of Latinx Children and Youth: A Review of the Literature*, 95 CHILDREN & YOUTH SERVS. REV., 109, 114 (2018).

198. Illya Somin, *Federalism and the Roberts Court*, 46 PUBLIUS: THE JOURNAL OF FEDERALISM, 441, 442 (2016); see also Martin H. Redish, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 344 (1990) (“The interests of ‘federalism,’ on the other hand, ‘represent . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments,’ where the federal government attempts to protect

Justice John Roberts,¹⁹⁹ the idea of federalism has become extremely important.²⁰⁰ The Roberts Court has recently handed down some major cases in the area of federalism which illustrate the epistemology of ignorance at work in the area of race and law. As federal judge Lynn Adelman has recognized, “[f]or African-Americans, particularly those living in the states of the former confederacy, the impact of the federalist doctrine has been devastating. . . .”²⁰¹

For instance, in *NFIB v. Sebelius*,²⁰² the Supreme Court considered the constitutionality of the Patient Protection and Affordable Care Act, sometimes also known as “Obamacare.” In *Sebelius*, the Supreme Court upheld the Affordable Care Act’s individual mandate to buy health insurance as a tax.²⁰³ The Court, however, went on to hold that the Affordable Care Act’s expansion of Medicaid²⁰⁴ which required the states to cover “a new category of beneficiaries was unconstitutionally coercive because” the federal government “could theoretically withdraw all . . . of federal Medicaid funding” if the state failed to cover the new beneficiaries, namely, persons with incomes of up to 138 percent above the poverty level.²⁰⁵

federal rights ‘in ways that will not unduly interfere with the legitimate activities of the States’”) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)); *see also* Charlton C. Copeland, *Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement*, 15 U. PA. J. CONST. L. 91, 106 (2012) (“Federalism, understood as the separation of substantive authority of the state and national government, provides the recipe for the protection of state authority as a constitutional commitment”).

199. *See* Benjamin Pomerance, *The Center of Order: Chief Justice John Roberts and the Coming Struggle for a Respected Supreme Court*, 82 ALB. L. REV. 449 (2019), for a recent analysis of the role and judicial philosophy of Justice Roberts.

200. *See generally*, Somin, *supra* note 198.

201. Lynn Adelman, *Laundering Racism through the Courts*, 65 DISSENT, 111, 111 (2018).

202. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

203. *Id.* at 574; *see also* Somin, *supra* note 198, at 446-47 (“[Chief Justice] Roberts broke with the Court’s other four conservatives and upheld the mandate on the basis that it could be interpreted as a tax authorized by Congress’s power to impose taxes. He claimed that the mandate could be considered a tax because an individual’s failure to purchase insurance (i) triggered a relatively small monetary fine collected by the Internal Revenue Service, (ii) does not qualify as a crime if the fine is paid, and (iii) does not require a showing of criminal intent. . . .”).

204. Copeland, *supra* note 198, at 126 (“Medicaid is often cited as one of the paradigmatic examples of cooperative federalism in American legislative history. Indeed, it is not hyperbolic to declare Medicaid as the most significant federal-state program in American history. Medicaid relies on states to administer programs that provide access to medical care for the indigent and reimburses state governments for a portion of the costs incurred.”).

205. Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 5 (2013); *see also* Copeland, *supra* note 198, at 95-96 (“The Court’s invalidation of parts of the Medicaid Expansion provision was perhaps the biggest

In reaching and justifying this conclusion that there was unconstitutional coercion, the U.S. Supreme Court misdescribed and misrepresented the facts regarding Medicaid expansion, thus implicating the epistemology of ignorance. One of the key reasons the Court had for holding that the Medicaid expansion was unconstitutional coercion against the states was that the Affordable Care Act “had changed the Medicaid program so dramatically as to transform it into an entirely new program.”²⁰⁶ Justice Roberts explained:

The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of needs: the disabled, the blind, the elderly, and needy families with dependent children. . . . Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the healthcare needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.²⁰⁷

One of the main reasons the court gave for concluding that the Affordable Care Act Medicaid expansion was a new program and unconstitutionally coercive is that the plurality stated that prior Medicaid expansions did not put existing Medicaid funding at risk but placed conditions “only [on] the new [Medicaid] funding.”²⁰⁸ This constitutes a misdescription of reality implicating the epistemology of ignorance. Contrary to the plurality’s position, Congress has expanded Medicaid on a number of occasions.²⁰⁹ With respect to each expansion of Medicaid in 1967, 1972, 1988, and 2003, the states could lose all Medicaid funding if the states

surprise of the otherwise unpredictable decision. By invalidating the ACA’s grant of authority to the Secretary of Health and Human Services to withhold all of a state’s federal Medicaid reimbursement as a penalty for not expanding Medicaid eligibility, the Roberts Court became the first court to hold a federal spending statute unconstitutionally coercive of state governments. The extent to which the court has transformed the national-state relationship is unclear. What is clear is that the Court’s position is a sharp break from past precedent and calls into question the national-state relationship in the administration of one of the central pillars of cooperative federalism.”).

206. Adelman, *supra* note 201, at 115.

207. 567 U.S. at 583.

208. *Id.* at 582.

209. Huberfeld et al., *supra* note 205, at 20-21.

failed to expand Medicaid coverage.²¹⁰ For instance, in 1967, Congress expanded Medicaid to broaden coverage for children.²¹¹ In 1972, Congress amended Medicaid by creating a federal Supplemental Security Income (“SSI”) program which replaced a program for the aged, blind and disabled.²¹² In 1988, Congress expanded Medicaid coverage by creating “uniform mandatory eligibility categories up to 133% FPL for pregnant women and children from birth to age 5, and up to 100% FPL for children ages six to eighteen.”²¹³ These changes represent a major increase in the number of people who were covered by Medicaid.²¹⁴ In 2003, Congress expanded Medicaid by creating “coverage for outpatient prescription drugs in the Medicare program.”²¹⁵ Given all of this, Professors Huberfeld, Leonard and Outterson conclude that “the Roberts plurality was historically inaccurate when it suggested that prior Medicaid expansions were voluntary or did not put already existing program funds at risk.”²¹⁶ Moreover, these authors conclude that “[t]hese changes have not been mere tinkering but significant expansion [of Medicaid] in both kind and degree.”²¹⁷

Under these circumstances, the Affordable Care Act’s expansion of Medicaid represented not a new program but just another expansion of the original Medicaid program “by extending coverage to all citizens and legal residents with incomes up to 133% of the Federal Poverty Level.”²¹⁸ Justice Roberts argued that the Affordable Care Act represented a different program in kind “because unlike the pre-ACA Medicaid, the Medicaid expansion ‘does not care for the neediest among us.’”²¹⁹ This, however, was a misrepresentation of reality, raising the spectre of the epistemology of ignorance. The pre-ACA Medicaid categories of beneficiaries all covered poor persons—e.g., poor senior citizens and poor disabled persons.²²⁰ The category created by the Affordable Care Act also covered poor persons, namely, poor adults.²²¹ Given this, contrary to Justice Robert’s position, the Affordable Care Act expansion did not represent a new program differing in kind because “the basic function of Medicaid, both before and after the expansion, was the same: to provide healthcare to poor people.”²²² As

210. Huberfeld et al., *supra* note 205, at 21-24.

211. Huberfeld et al., *supra* note 205, at 21-22.

212. Huberfeld et al., *supra* note 205, at 22.

213. Huberfeld et al., *supra* note 205, at 23.

214. *Id.*

215. *Id.*

216. Huberfeld et al., *supra* note 205, at 24.

217. *Id.*

218. Huberfeld et al., *supra* note 205, at 25.

219. *Id.* at 25 (quoting Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 635 (2012)).

220. Huberfeld et al., *supra* note 205, at 25.

221. *Id.*

222. Adelman, *supra* note 201.

Professors Huberfeld, Leonard and Outterson explained:

The Medicaid expansion was significant. But on closer examination, it was just another step in another step in a regular process of incrementalist modification to the existing program, akin to prior amendments over the past half century. Each of the prior coverage expansions, redefinitions of eligibility, and funding adjustments have changed the terms of the cooperative arrangement between the federal government and participating states. The ACA's Medicaid amendments were no more dramatic than these earlier changes. The Court's claim that the expansion was an entirely new program does not square with the historical record.²²³

Since the Court decided that the Medicaid expansion was unconstitutional coercion, it had to devise a remedy. Instead of holding the entire Affordable Care Act unconstitutional, the Court simply made the Medicaid expansion optional for the states.²²⁴

The operation of the epistemology of ignorance regarding the Affordable Care Act Medicaid expansion has resulted in the subordination and oppression of African-Americans. The NFIB ruling making Medicaid expansion optional for the states resulted in almost every southern state opting out of the Affordable Care Act Medicaid expansion.²²⁵ In declining to participate in the Medicaid expansion, these states "severely restrict[ed] social-service benefits to their poorest citizens, most of whom are African-Americans."²²⁶ Moreover, as Stephen Griffin has observed this "southern failure" in the wake of the *Sebelius* decision was "both predictable and very unfortunate in terms of its impact on health outcomes for all the poor in the southern states, but especially for racial minorities."²²⁷

The *Sebelius* court had in the record a report by the Kaiser Family Foundation which showed that the southern states had "extremely restrictive

223. Huberfeld et al., *supra* note 205, at 29.

224. Huberfeld et al., *supra* note 205, at 40.

225. Adelman, *supra* note 201; *see also* Somin, *supra* note 198, at 447 ("Nonetheless, this part of the decision turned out to be enormously consequential. As of early 2016, nineteen Republican-controlled state governments have rejected the Medicaid expansion, including such major states as Texas and Florida. . . . This development affects medical care for millions of people and redirects many billions of dollars of government spending. The Court's invalidation of the ACA's mandatory Medicaid expansion is probably the most important ruling invalidating a federal statute on federalism grounds since the New Deal").

226. Adelman, *supra* note 201.

227. Stephen Griffin, *The Tragedy of the Medicaid Expansion (Part II)*, BALKINIZATION (Mar. 4, 2017), <https://balkin.blogspot.com/2017/03/the-tragedy-of-medicaid-expansion-part.html>.

Medicaid eligibility standards” reflecting a history of racial discrimination dating from the era of slavery that “severely restrict[ed] social service benefits to their poorest citizens, most of whom are African-American.”²²⁸ “Medicaid ‘has greatly increased access to healthcare and has significantly improved the health outcomes of low-income Americans by virtually every conceivable measure—including infant mortality, maternal mortality, disease incidence and life expectancy.’”²²⁹ Thus, the failure to expand Medicaid, resulting in part from misdescriptions and misrepresentations of reality in *Sebelius* as predicted by the epistemology of ignorance, will result in the “suffering and premature deaths of millions of citizens, many of them poor African-Americans.”²³⁰

The Supreme Court’s recent decision in *Shelby County v. Holder*²³¹ provides another example of the epistemology of ignorance operating in the context of federalism and reinforcing the subordination of racial minorities. In *Shelby County*, the Supreme Court overturned a significant portion of Voting Rights Act of 1965. Congress promulgated the Voting Rights Act as part of its effort to carry out the Fifteenth Amendment’s²³² outlawing of discrimination on the basis of race in the area of voting.²³³ In this regard, Section 5 of the Voting Rights Act required certain states to obtain approval from federal officials—the U.S. attorney general or the federal district court in Washington, D.C.—before changing their laws dealing with voting.²³⁴ The

228. Adelman, *supra* note 201.

229. Griffin, *supra* note 227 (quoting SHANNA ROSE, FINANCING MEDICAID: FEDERALISM AND THE GROWTH OF AMERICA’S HEALTH CARE SAFETY NET (2013)).

230. Mark A. Hall, *States’ Decisions Not to Expand Medicaid*, 92 N.C. L. REV. 1459, 1477 (2014).

231. 570 U.S. 529 (2013).

232. The Fifteenth Amendment was one of three constitutional amendments that Congress enacted “at the close of the Civil War” for the purpose of “preventing ‘Southerners from re-establishing white supremacy.’” Adam Bolotin, *Out of Touch: Shelby County v. Holder and the Callous Effects of Chief Justice Roberts Equal State Sovereignty*, 49 J. MARSHALL L. REV. 751, 753 (2016).

233. 570 U.S. at 536–37. “In an effort to remediate the recurring problem of racial discrimination in voting against blacks, President Lyndon B. Johnson signed the Voting Rights Act into law on August 6, 1965. As stated by President Johnson, the Act was ‘a triumph for freedom as huge as any victory that has ever been won on any battlefield.’” Ashley M. White, *The Demolition of the Voting Rights Act: The Combat to Overcome Voter Suppression of Disenfranchised Citizens — Shelby County v. Holder*, 5 WAKE FOREST J.L. & POL’Y 193, 200 (2015).

234. See Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 386 (1985) (in order to make sure “that states and counties did not implement new methods of racial discrimination in voting . . . Congress . . . adopted the provisions contained in Section 5 of the Act, requiring each targeted or ‘covered’ jurisdiction, if it wished to implement a voting standard, practice or procedure” to secure approval from “the United States District Court for the District of Columbia” or “the attorney general of the United States”).

States would then have to establish that the proposed changes did not prevent or limit the right to vote on grounds of race.²³⁵ In *Shelby County*, the Supreme Court invalidated as unconstitutional Section 4 of the Voting Rights Act which sets out the coverage formula for the preclearance requirement in Section 5 of the Voter's Rights Act. The Court held that the coverage formula was unconstitutional because it violated the "fundamental principle of equal sovereignty among the states" in as much as it was not "grounded in current conditions" or "justified by current needs" and was instead "based on 40-year-old data."²³⁶

The court's decision in *Shelby County* provides another example of the epistemology of ignorance as the court, in substance, actively produced ignorance as to whether there was a current need for the preclearance requirement. In her dissenting opinion, Justice Ginsberg set out the current facts or conditions that continued to justify the need for the preclearance requirement: (1) states "continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated; (2) even though there were increasing numbers of minorities registering to vote and voting, "other measures may be resorted to which would dilute increasing minority voting strength"; (3) Congress compiled an extensive 15,000 page record containing "countless 'examples of flagrant racial discrimination' since the last reauthorization . . . [including] systematic evidence that 'intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that Section 5 preclearance is still needed.'"²³⁷ Thus, the Court "ignored the extensive legislative record compiled by Congress establishing the persistence of voting discrimination in the covered jurisdictions."²³⁸

Given the demonstrated continuing need for preclearance, it was

235. 42 U.S.C. § 1973.

236. 570 U.S. at 542, 544, 556–557. "These categorical judgments suggest the view that racial discrimination in voting is naturally isolated in time and scope. The majority's analysis forecloses the possibility that the historical discrimination in the covered jurisdictions involved particular institutions designed to produce long term unlawful political power, such as especially racially identified and racially polarized political party structure." Martha T. McCluskey, *Toward A Fundamental Right to Evade Law? The Rule of Power in Shelby County and State Farm*, 17 BERKELEY J. AFR.-AM. L. & POL'Y 216, 221 (2015).

237. 570 U.S. at 565. See also McCluskey, *supra* note 236, at 222 ("In fact, Ginsberg's dissent noted Congress considered evidence in 2006 showing an increase in voting changes in the colored jurisdictions deemed objectionable because of racial discrimination in the period from 1982 to 2004 compared with the earlier period of enforcement from 1965 to 1982").

238. Adelman, *supra* note 201; see also Angelica Rolong, 46 TEX. TECH. L. REV. 519, 547 (2014) ("The majority in *Shelby County* failed to see the copious amount of evidence gathered by Congress and ignored the purpose of the movement that led to the passage of the [Voting Rights Amendment]").

reasonably foreseeable that southern states would enact laws intended to limit the vote of racial minorities. For example, shortly after the *Shelby County* decision, “the North Carolina State Legislature passed a ‘monster voter suppression law that required strict photo ID, cut early voting and eliminated same day registration and pre-registration for 16 and 17 year olds.’”²³⁹ The law “‘excluded many of the alternative photo IDs used by African Americans’” and “‘retained only the kinds of IDs that white North Carolinians were more likely to possess.’” Indeed, the Fourth Circuit bluntly states “that the law targeted African Americans ‘with almost surgical precision.’”²⁴⁰ Similarly, shortly after the *Shelby County* ruling, “Texas announced that its previously blocked discriminatory voting laws would immediately go into effect.”²⁴¹ Indeed, since the Supreme Court’s decision, fourteen states have passed laws limiting voting which might not have satisfied the preclearance requirements if Section 5 had been upheld.²⁴² In other words, the *Shelby County* “decision opened the floodgates, enabling states . . . with the most egregious histories of discriminating against the voting rights of minorities to start discriminating all over again: and thereby “do great harm to the voting rights of African-Americans in the South. . . .”²⁴³

Given the extremely negative results for racial minorities resulting from the judicial enforcement of federalism in *Sebelius* and *Shelby County*, these decisions powerfully support the general view that “federalism is a disaster for racial and ethnic minority groups.”²⁴⁴ The epistemology of ignorance has aided the use of federalism to subordinate persons of color.

239. Matthew Murillo, *Did Voter Suppression Win President Trump the Election?: The Decimation of the Voting Rights Act and the Importance of Section 5*, 51 U.S.F. L. REV. 591, 606-07 (2017).

240. N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214-215 (4th Cir. 2016).

241. Adelman, *supra* note 201.

242. Murillo, *supra* note 239, at 607-08.

243. Adelman, *supra* note 201; *see also* Rolong, *supra* note 238, at 559 (“The Supreme Court’s decision in *Shelby County* will create consequences for Texas voters, as well as voters in other formerly covered jurisdictions. As a result of this decision, minority voters should expect to see the imposition of more second-generation barriers, especially on local levels where there is little oversight”).

244. Ilya Somin, *Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1291 (2019); *see also* McCluskey, *supra* note 235, at 228 (“*Shelby County* may herald . . . a revival of an older constitutional ideal assuming that law’s protection normally and naturally must lead to accommodate the weight of unequal economic and racial power”).

VIII. LEGAL SCHOLARSHIP, THE OUTLAWING OF ETHNIC STUDIES IN ARIZONA, AND THE EPISTEMOLOGY OF IGNORANCE

Another way in which the epistemology of ignorance is implicated in law is in the area of legal scholarship. In particular, ignorance has been produced in the area of law through the exclusion or marginalization of racial minorities in the context of legal scholarship. In a now famous article, Richard Delgado found that “white scholars” had engaged in “systematic occupation of, and exclusion of, minority scholars from the central areas of civil rights scholarship.”²⁴⁵ This exclusion resulted in certain defects, including defects in knowledge.²⁴⁶ For instance white scholars “were unaware of basic facts about the situation in which minority persons live or ways in which they see the world.”²⁴⁷ Delgado found that “the exclusion of minority writing about key issues of race law . . . causes bluntings, skewings and omissions in the literature dealing with race, racism and American law.”²⁴⁸ In a follow-up article, written about ten years later, Delgado found that minority authors “are still not being integrated fully or equally into the colloquies, exchange, and dialogues of legal scholarship.”²⁴⁹ He concluded that “imperial scholarship will continue to be with us a long time.”²⁵⁰ Indeed, Professor Juan Perea has recently confirmed Delgado’s prediction:

Thirty years after he wrote his first *Imperial Scholar* article, the situation is pretty much unchanged since Richard wrote the *Imperial Scholar Revisited*. There are certainly more scholars of color in academia today, publishing and adding to our wealth of knowledge. Yet in the main writings on race remain marginalized. The knowledge we have produced has neither been integrated into

245. Richard Delgado, *The Imperial Scholar*, 132 U. PA. L. REV. 561, 566 (1984) (Leading critical race theorist Professor Derrick Bell has called this *Imperial Scholar* article “an intellectual hand grenade, tossed over the wall of the establishment as a form of academic protest.”). Juan F. Perea, *Of Word Grenades and Impermeable Walls: Imperial Scholarship Then and Now*, 33 LAW & INEQ. 443, 447 (2015) (quoting Jon Wiener, *Law Profs Fight the Power*, NATION, Sept. 1989 at 246 (quoting Derrick Bell); see also Robert S. Chang, *Richard Delgado and the Politics of Citation*, 11 BERKLEY J. AFR. AM. L. & POL’Y 28 (2009) (“[The *Imperial Scholar* article] created a firestorm of sorts with what one critic called a ‘serious charge of invidious racism on the part of respected legal scholars’”).

246. Delgado, *supra* note 245, at 566-73.

247. *Id.* at 567-68.

248. *Id.* at 573; see also Chang, *supra* note 245, at 30-31 (The “exclusion of minority scholars” leads to the “distortion of legal knowledge and limited vision of justice”).

249. Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1372 (1992).

250. *Id.* at 1372.

the canon, nor has it had its proper influence in the realms of today's imperial scholars.²⁵¹

This production of ignorance in the context of legal scholarship has resulted in the subordination of racial minorities because it leads to ineffective advocacy of the rights and interests of racial minorities and sets up barriers to advancement of racial minorities in the legal academy in terms of obtaining tenure and promotion.²⁵²

Similarly, the dominant group also has actively sought to produce ignorance in seeking to outlaw ethnic studies²⁵³ in Arizona. The Tucson Arizona Unified School District established a program of Mexican-American Studies in 1998.²⁵⁴ This Mexican-American studies program was very successful and produced high academic achievement for Latino students who participated in the program.²⁵⁵ Indeed, these Latino students “surpassed all other students on the state’s graduation exam and graduated at a higher rate than their Anglo peers” and “enrolled in college at a percentage that is 129 times greater than the national average for Chicano/a students.”²⁵⁶ This program developed knowledge based on “the Chicano/Latino Voice, experience, perspective, and history.”²⁵⁷ Led by the Arizona State Superintendent of Instruction, Tom Horne, who claimed that the Mexican-American studies program “promoted the separation of the races, ethnic solidarity, hatred of whites, and the overthrow of the U.S. government,” the

251. Perea, *supra* note 245, at 447.

252. See Chang, *supra* note 245, at 30-34.

253. “The Ethnic Studies movement constituted a broad effort to challenge the constricted disciplinary perspectives that have historically defined the Western academy. The appearance of a multitude of subaltern standpoints from which new knowledges, histories, and political futurities were being generated threw into question the boundaries and procedures that had worked to contain, discipline, and legitimize the Western sciences.” Alex J. Armonda, *Advancing an (Im)possible Alternative: Ethnic Studies in Neoliberal Times*, 7 TEX. EDUC. REV. 30, 31 (2019).

254. See Lupe S. Salinas, *Arizona’s Desire to Eliminate Ethnic Studies Programs: A Time to Take the “Pill” and Engage Latino Students in Critical Education About Their History*, 14 HARV. LATINO L. REV. 301, 305 (2011). The Mexican-American Studies Program was developed as a result of litigation brought to desegregate the Tucson Unified School District. M. Isabel Medina, *Silencing Talk About Race: Why Arizona’s Prohibition of Ethnic Studies Violates Equality*, 45 HASTINGS CONST. L.Q. 47, 67-72 (2017).

255. Salinas, *supra* note 254, at 301-302.

256. Salinas, *supra* note 254, at 302.

257. Salinas, *supra* note 254, at 301-302; see also Armonda, *supra* note 253, at 31 (“[W]e must frame the push for Ethnic Studies as but one important expression of a broader effort to challenge the coloniality of the academy and academic knowledge as such. This is a project that aims to disrupt the ontologies, epistemologies, and dominant ideologies that are positioned in schools as neutral, objective, ahistorical, or atheoretical[.]”).

Arizona legislature enacted H.R. 2281 outlawing ethnic studies.²⁵⁸ The statute provided: “The legislature finds and declares that public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people.”²⁵⁹ The statute further provided:

A school district or charter school in this state shall not include in its program of instruction any course or classes that:

- (1) Promote the overthrow of the United States government.
- (2) Promote resentment toward a race or class of people.
- (3) Are designed primarily for pupils of a particular ethnic group.
- (4) Advocate ethnic solidarity instead of the treatment of pupils as individuals.²⁶⁰

Finally, the statute provided a penalty for districts that refused to comply with the requirements of the anti-ethnic studies statute in that ten percent of the monthly apportionment of state aid to the district would be withheld.²⁶¹ H.B. 2281 was designed to outlaw Mexican-American studies in Arizona.²⁶² Following the enactment of the statute, Superintendent Tom Horne announced that the Tucson Mexican-American studies program failed to comply with the statutory requirements.²⁶³ In response to the Superintendent, the Tucson school board ordered the teachers in the Mexican-American studies program “to shift to other subjects or resign.”²⁶⁴ The authorities also confiscated “textbooks and other materials” which were used in the program

258. Salinas, *supra* note 254, at 304.

259. Ariz. Rev. Stat. § 15-111.

260. Ariz. Rev. Stat. § 15-112(A).

261. Ariz. Rev. Stat. § 15-112(B).

262. See Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513, 1522 (2013); see also Jessica A. Solyom & Bryan McKinley Jones Brayboy, *Memento Mori: Policing the Minds and Bodies of Indigenous Latinas/os in Arizona*, 42 CAL. W. INT’L L.J. 473, 478 (2012) (“Arizona House Bill 2281, signed into law on May 11, 2010, is legislation intended to target racialized citizens and legal residents” and was “created to specifically target the Mexican-American Raza Studies Program in the Tucson Unified School District[.]”).

263. Delgado, *supra* note 262, at 1523; See also Kevin Terry, *Community Dreams and Nightmares: Arizona, Ethnic Studies and the Continued Relevance of Derrick Bell’s Interest-Convergence Thesis*, 88 N.Y.U. L. REV. 1483, 1500 (2013) (“In December of 2010, Horne issued findings that the TUSD’s Program violated [H.B. 2281] because the program was ‘designed primarily for pupils of a particular ethnic group’”).

264. Delgado, *supra* note 262, at 1523.

“in front of crying students.”²⁶⁵ Obviously, outlawing ethnic studies programs which were developing knowledge based on the Mexican-American experience, is an example of the dominant group actively producing ignorance and suppressing knowledge as predicted by the epistemology of ignorance theorists. This suppression of knowledge and production of ignorance in the context of ethnic studies has enabled the subordination of racial minorities by “imped[ing] the academic and economic success” of people of color in an effort to “protect the economic and powerful interest of whites.”²⁶⁶

IX. CONCLUSION

In this article, I have sought to reveal—through a series of important examples—how the dominant group has constructed an epistemology of ignorance in the area of race and the law. This epistemology of ignorance requires the dominant group—in order to maintain their socially dominant position—to “engage in a significant degree of misunderstanding, misinterpretation and misrepresentation on matters related to race.”²⁶⁷ In particular, I have argued that the dominant group has constructed an epistemology of ignorance (1) in the area of law with respect to Native Americans; (2) in the area of law with respect to Mexican-Americans; (3) in the area of employment discrimination law; (4) in the area of immigration law and policy in the Trump era; (5) in the area of federalism in recent United States Supreme Court cases; and (6) in the areas of legal scholarship and in the outlawing of ethnic studies in Arizona. I also have argued that this production of ignorance has helped enable whites to maintain their socially dominant position in American society.

265. *Id.*

266. Solyom & Brayboy, *supra* note 262, at 502.

267. Mason, *supra* note 7, at 302.