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Confronting Our Racist Exclusions: The Role of States in Repairing, Reimagining and Reconstituting the Social Contract

*Almas Sayeed**

The dual crises of the Coronavirus pandemic and Black-led uprisings catalyzed by the murder of George Floyd and many others cast a spotlight on the failure of the systems in place to support communities of color. This failure raises many questions about the resilience of the country's health and economic systems. It also prompts deep questions about the utility and meaning of the social contract, giving new life to a question traditionally debated by philosophers and now more broadly by organizers and cultural commentators: is the social contract broken? This paper considers the value of the social contract through one implied use – the country's safety net system – and examines recent California campaigns to close benefit exclusions aimed at undocumented adults. The paper argues that states can play a key role in addressing historically racist safety net exclusions and are central to the value and utility of the social contract.

INTRODUCTION	594
I. WHY SHOULD ANYONE CARE ABOUT THE "SOCIAL CONTRACT"?	597
II. THE SOCIAL CONTRACT AND THE SAFETY NET'S HISTORICAL EXCLUSIONS.....	600
III. CALIFORNIA'S EFFORT TO BUILD AN INCLUSIVE SAFETY NET: FROM PROP 187 TO HEALTH4ALL.....	605

* Deputy Director of Programs, California Immigrant Policy Center. The author extends her deep thanks to Associate Professor of Philosophy at Morgan State University, Anika Simpson, Sasha Feldstein, Deepen Gagneja, Shana Hurley, Sheena Paul, Will Poff-Webster, and the editors of the *Yale Law & Policy Review*.

IV. STATES, ORGANIZERS AND THE SOCIAL CONTRACT REIMAGINED	611
CONCLUSION	612

INTRODUCTION

One year after COVID-19 shut down cities and states due to its spread, the pandemic's dual public health and economic crises continue to destabilize the country's social systems. Communities deeply impacted by infection and death, unprecedented unemployment and worker displacement,¹ a wave of impending evictions as well as general unease about the country's political future are driving an uncertain and complex moment. While the forecast for long-term health and economic recovery looks brighter than it did six months ago, communities of color, in particular, will feel the impacts of this upheaval well beyond the current moment. The reason for this is clear: Communities of color have been decimated by the pandemic. Infection rates are three times higher among Black communities than white communities and even higher in Latino communities. The death rate is nearly double in the Black community than among whites,² and a lack of access to affordable and stable housing, nutritious food, predictable

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1. Kim Parker, Rachel Minkin & Jesse Bennet, *Economic Fallout from COVID-19 Continues to Hit Lower Income Americans the Hardest*, PEW RES. CTR. (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest> [https://perma.cc/P6Z2-KQRC]; *Research Shows Deep Racial and Social Inequality in Job Displacement, Unemployment Insurance Amid COVID-19*, UCLA LUSKIN SCH. PUB. POL'Y (Sept. 9, 2020), <https://luskin.ucla.edu/new-ucla-luskin-research-shows-nationwide-racial-and-social-inequality-in-job-displacement-unemployment-insurance-amid-covid-19> [https://perma.cc/75VB-JS3N].
 2. Scott Neuman, *COVID-19 Death for Black Americans Twice that for Whites, New Report Says*, NAT'L PUB. RADIO (Aug. 13, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/08/13/902261618/covid-19-death-rate-for-black-americans-twice-that-for-whites-new-report-says> [https://perma.cc/E5GL-D5N2]; see also Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> [https://perma.cc/P2BR-6URL].

income, and health insurance continue to exacerbate the deep impacts of COVID-19.³

While the pandemic reveals the deep gaps in the country's healthcare system, it also reveals the fragility of the economic structures in place to support low-income workers of color. Black and Latino communities experience higher rates of infection and death while simultaneously experiencing higher rates of unemployment and worker displacement into less secure jobs.⁴ Nearly half of all workers in agriculture, food services, and delivery are workers of color, earn low wages, do not earn hazard pay, and are unable to take adequate paid sick time, exacerbating the impact of the pandemic.⁵ Workers using an Individual Tax Identification Number to file their taxes instead of a Social Security Number are ineligible for even the most basic protections and benefits of the system.⁶ Yet, the precarious

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3. Oppel Jr. et al., *supra* note 2; see also Heeju Sohn, *Racial and Ethnic Disparities in Health Insurance Coverage: Dynamics of Gaining and Losing Coverage over the Life-Course*, 36 POPULATION RES. & POL'Y REV. 181, 182-83 (2017).
 4. Peter Coy, *Remarks: The Legacy of the Lost Year Will Be Devastating Inequality*, BLOOMBERG NEWS (Mar. 10, 2021), <https://www.bloomberg.com/news/articles/2021-03-10/covid-pandemic-made-racial-income-inequality-much-worse> [<https://perma.cc/HFY8-SSL8>] ("In February 2020 unemployment rates were just 3% for Whites, 4.4% for Hispanics, and 6% for Blacks. A year later, the respective rates were 5.6%, 8.5% and 9.9%.")
 5. See Kate Cimini, *Farmworkers Say Employers, Cal/OSHA don't Enforce COVID-19 Safety Regulations*, RECORD SEARCHLIGHT (Feb. 2, 2021), <https://www.redding.com/story/news/2021/02/03/california-farmworkers-say-employers-dont-enforce-covid-safety-regulations/4341556001> [<https://perma.cc/N4HC-5UE4>]; Celine McNicholas & Margaret Poydock, *Who Are Essential Workers? A Comprehensive Look at their Wages, Demographics and Unionization Rates*, ECON. POL'Y INST. (May 19, 2020), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates> [<https://perma.cc/R8AE-XEWT>]; Don Villarejo, *Increased Risks and Fewer Jobs: Evidence of California Farmworker Vulnerability During the COVID-19 Pandemic*, CAL. INST. FOR RURAL STUD. (July 25, 2020), https://donvillarejo.github.io/Fulltext/Farmworker_Vulnerability_COVID-19_Research-Report_Final_Villarejo_07-26-2020.pdf [<https://perma.cc/K9GA-2AK4>].
 6. Jacqueline Garcia & Jackie Botts, *We Live Paycheck to Paycheck: Undocumented Workers Struggle as Economy Grinds to a Halt*, CALMATTERS (Apr. 20, 2020), <https://calmatters.org/california-divide/2020/03/california->

system that these workers are keeping together is the same system charged with ensuring the country survives and recovers from the current moment. The dual public health and economic crises catalyzed a powerful uprising in response to police brutality and the murder of George Floyd in Minneapolis, leading to national movements to defund the police and a deep, fundamental call to change the country's social and economic systems.⁷

The pandemic and the country's uprising for racial justice both put pressure on the foundation and utility of the social contract: the implicit agreement that participating in a set of social rules results in some fundamental benefits for everyone. One implied manifestation of the social contract is the country's safety net, the benefits and programs designed to support the least well-off.⁸ Yet, as argued by philosopher Charles W. Mills, the "social contract" is rooted in white supremacy that deeply influenced its white, western architects.⁹ Reconstituting its meaning and value requires understanding and addressing both its roots and historical exclusions.

This Article suggests that the current historical moment offers an opportunity to reconstitute the social contract by acknowledging and understanding its white supremacist roots and, relatedly, how states are well-positioned to rebuild and reimagine who is worthy of protection.¹⁰ The

undocumented-workers-struggle-economy-coronavirus
[<https://perma.cc/8H97-STMP>].

7. Maneesh Arora, *How the Coronavirus Pandemic Helped the Floyd Protests Become the Biggest in U.S. History*, WASH. POST (Aug. 5, 2020), <https://www.washingtonpost.com/politics/2020/08/05/how-coronavirus-pandemic-helped-floyd-protests-become-biggest-us-history> [https://perma.cc/YTA2-7HXX]; Derek Hawkins, Katie Mettler & Perry Stein, *'Defund the Police' Gains Traction as Cities Seek to Respond to Demands for a Major Law Enforcement Shift*, WASH. POST (June 7, 2020), <https://www.washingtonpost.com/nation/2020/06/07/protests-defund-police> [https://perma.cc/YED3-QTLT].
8. Melissa Boteach, *Reimagining Our Social Contract: The Safety Net is Social Insurance for All Americans*, CTR. FOR AM. PROGRESS (Aug. 11, 2014), <https://www.americanprogress.org/issues/poverty/news/2014/08/11/95373/reimagining-our-social-contract-the-safety-net-is-social-insurance-for-all-americans> [https://perma.cc/29NL-66Z6].
9. See, e.g., CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997) (arguing that race lies at the center of Western political theory).
10. I am treating the "safety net" as an implied aspect of the social contract as applied through public policy, though the safety net is not a necessary or constitutive aspect of the social contract.

aim is to build systems better able to manage crises such as the current one. Given both the failure and exclusions in the federal system, I argue that states are well-positioned to begin this work. As an example, I examine California's attempt to build a more inclusive safety net by expanding Medi-Cal, the state's low-income health insurance plan, to include everyone, regardless of immigration status. I also briefly look at the state's recent success in expanding the Earned Income Tax Credit to ITIN filers. California's focus on including undocumented adults is requiring the state to reckon with its own racist history, acknowledge the critical role of immigrant communities, and consider ways states can build resilient systems. This work can be replicated in other states to build a more equitable social contract through state-level action.¹¹

I. WHY SHOULD ANYONE CARE ABOUT THE "SOCIAL CONTRACT"?

It is valuable to consider this historical moment through the lens of the social contract because of its centrality in legal systems and public policy. Conceptually, the "contract" assumes that everyone who participates gains the negative benefit of staving off the chaos of the "state of nature" as well as affirmative benefits, including protection, in exchange for giving up other rights, such as unchecked autonomy.¹² Offered by white, classical liberal philosophers as the rational alternative to the state of nature, the social contract further contemplates that participating in this arrangement and receiving its benefits is the best chance for most people to survive, and under the best circumstances, thrive. Less a literal quid pro quo between people, the social contract offers a helpful tool to understand the

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11. *A Blueprint for the Nation: Building Power from California to New York*, CAL. IMMIGRANT POLICY CTR. & N.Y. IMMIGRANT COAL. (Jan. 29, 2021), <https://caimmigrant.org/wp-content/uploads/2021/02/Blueprint-Digital-FINAL.pdf> [<https://perma.cc/ULJ5-L6Y8>].
 12. Fred D'Agostino, Gerald Gaus & John Thrasher, *Contemporary Approaches to the Social Contract*, STAN. ENCYCLOPEDIA OF PHIL. (May 31, 2017), <https://plato.stanford.edu/entries/contractarianism-contemporary> [<https://perma.cc/Q856-5XMF>]; see also CAROL PATEMAN, *THE SEXUAL CONTRACT* (1988) (arguing, like many feminists, that the social contract is rooted in sexism and patriarchy). Pateman's critique inspired Mills' analysis in *The Racial Contract*.

relationship between individuals and the state.¹³ While Hobbes, Locke, Rousseau, and Kant differed in some parts of their conception of the social contract, including the amount of individual freedom that must be given up in order to receive benefits, they agreed on the fundamental principle that all participants should gain from its benefits.¹⁴

The idea that the social contract works for everyone is deeply rooted in American consciousness. Even the “American Dream,” the debunked but persistent notion that playing by the proverbial rules creates equal access to America’s institutions and thus its prosperity, stems from stubborn adherence to the norms that underlie it, including the social contract.¹⁵ Yet, as Charles W. Mills has carefully outlined in his book, *The Racial Contract*, the conception of the social contract is shaped by legacies of white supremacy, racism, and colonialism.¹⁶ Mills argues that these legacies and western states’ focus on conquering the “other” are rooted in the very structure of the social contract. America’s colonization of indigenous nations and its history of enslavement impacted the way communities of color were envisioned in relation to the social contract, and the state’s relationship to these communities.¹⁷ The benefit of shared privileges from participation were reserved for some, while others were explicitly excluded. Race-based exclusion and a focus on conquering and civilizing “the savage” became central organizing principles to western democracies.¹⁸ The resulting exclusions created a class of exploited and unprotected labor as well as a white-supremacist culture that wholly excluded others and deeply disenfranchised communities of color. Mills further notes that while white philosophers made overtures of the social contract’s universal applicability, these same philosophers’ socio-historical experience of colonialism, race, and oppression is not explicitly acknowledged in their conceptions of the social contract. Locke’s emphasis on property rights and ownership was one clear example of a deep failure to grapple with these exclusions. Locke

13. JEAN-JACQUES ROUSSEAU, *THE MAJOR POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU: THE TWO DISCOURSES & THE SOCIAL CONTRACT* (2012).

14. D’Agostino et al., *supra* note 12.

15. See Eric Levitz, *These 3 Policy Failures Are Killing the American Dream*, N.Y. MAG. (Oct. 7, 2019), <https://nymag.com/intelligencer/2019/10/these-3-policy-failures-are-killing-the-american-dream.html> [<https://perma.cc/6QND-ZFAQ>].

16. MILLS, *supra* note 9, at 10–12.

17. *Id.*

18. *Id.*

placed special emphasis on property ownership as a social organizing principle even while property ownership was limited to white men. Thus, organizing society by a property right meant excluding most. While Mills and others have written extensively about this point, white, western philosophers' general failure to grapple with these gaps cast doubt on their commitment to a social contract built on equity.

Given this historical context, it is easy to dismiss the conception, development, and application of the social contract. Fast forward to the current moment in the wake of the pandemic and a deep racial reckoning, and the social contract seems to mean even less. The murders of George Floyd, Breonna Taylor, Rayshard Brooks, Daniel Prude, and many more at the hands of police who were obligated to protect them is valuable evidence that the social contract is broken in its current iteration and understanding. One layer deeper and it is arguably the failure of the social contract—from the absence of stable employment and the presence of poverty and continued over-policing not for his protection—that led to George Floyd's murder by the police.¹⁹ Mr. Floyd himself had COVID-19 at the time of his murder. At the height of the uprisings against racial injustice, comedian and commentator Trevor Noah encouraged his audience to consider whether the social contract holds any meaning at all given its basic benefits do not extend to Black communities no matter their participation in the contract's implicit—and even explicit—obligations.²⁰ Leaders in the Movement for Black Lives made similar calls for a reckoning with the racist exclusions built into the social contract.²¹ President Biden, both as candidate and since taking office, has made note of the failures of the social contract amid racism

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19. Kenya Evelyn, *In Life and Death, George Floyd's Plight Reflected the Burden of Being Black in America*, GUARDIAN (June 6, 2020), <https://www.theguardian.com/us-news/2020/jun/06/george-floyd-plight-reflected-burden-of-being-black-america> [<https://perma.cc/V8AP-XN7L>].
 20. The Daily Social Distancing Show, *George Floyd, Minneapolis Protests, Ahmaud Arbery & Amy Cooper*, YOUTUBE (May 29, 2020), https://www.youtube.com/watch?v=v4amCfVbA_c [<https://perma.cc/GG8G-CXLZ>].
 21. Kimberly Jones, *How Can We Win Kimberly Jones Video Full Length David Jones Media Clean Edit #BLM 2020 What Can I Do*, YOUTUBE (June 9, 2020), <https://www.youtube.com/watch?v=llci8MVh8J4> [<https://perma.cc/46RJ-Y8BB>] (noting how the country's history of racism, the Tulsa Massacre, and the murder of George Floyd fundamentally tear at the foundation and concept of the social contract).

and the impact of the COVID-19 pandemic.²² Given this, it's a valuable time to examine the utility and value of the social contract.

The social contract plays a central role in shaping social institutions, including how participants relate to one another. As part of this analysis, John Rawls' conceptualization of the "veil of ignorance" offers a helpful tool to assess both the morality of systems and their outcomes shaped by the social contract. The "veil of ignorance," often referred to as the "original position," asks a decision-maker to make decisions with enough information about the consequences of her decisions without knowing where the decision-maker, herself, is in the map of decision-making.²³ On this theory, not knowing one's ultimate social, racial, or cultural position would lead to creation of just systems because the decision-maker would avoid exclusions that could deeply impact her own position. At its core, then, the social contract contemplates a relational vision where people's lives and fates are tied to one another. But Mills notes that, as a theory, the "veil of ignorance" cannot be disembodied from the values, knowledge, and experience of the decision-maker.²⁴ Put simply, a disembodied, removed form of institution building is neither how law nor institutions are built. Instead, Mills argues that in its current construction, the "social contract" is more aptly described as a "racial contract" where race and exclusion are the primary organizing principles of systems and institutions. The history of the country's safety net system offers valuable insight into this exclusion.

II. THE SOCIAL CONTRACT AND THE SAFETY NET'S HISTORICAL EXCLUSIONS

History has shaped a safety net deeply impacted by the country's racist exclusions, or what I suggest can be characterized as the "racialized safety

22. Joseph R. Biden, Jr., *National Strategy for the COVID-19 Response and Pandemic Preparedness*, WHITE HOUSE (Jan. 21, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf> [https://perma.cc/4FMJ-7SAU]; Charisse Jones, *Joe Biden Pledges to Address Pay, Systemic Racism: 'Black and Latino Unemployment Gap Remains Too Large*, USA TODAY (Jan. 19, 2021), <https://www.usatoday.com/story/money/2021/01/18/biden-black-america-plans-boost-lending-address-racial-inequities/3578539001> [https://perma.cc/M2WB-GDEP].

23. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

24. MILLS, *supra* note 9, at 24-27.

net.” The term “racialized safety net” draws on Mills’ conception of the social contract and suggests that the history of the safety net’s exclusion is critical to understanding how it may be reconstituted and implemented today. Thus, a social contract shaped by racism and white supremacy, where relations between white America and people of color are built on servitude and exclusion, is inextricably linked to the safety net. A critical part of this discussion is who is deemed “worthy” of inclusion in the safety net. This Part illustrates America’s “racialized safety net.”

Although western, liberal philosophers failed to directly reckon with their social and economic contexts, Rousseau in particular warned that deep social inequity could threaten the functioning of the social contract and social institutions because such disparity creates incentive for participants to abandon it all together.²⁵ Mitigating against this inequity is the safety net.

Early anti-poverty programs are the best example of America’s attempt to try to make the social contract work for everyone. President Franklin Roosevelt’s New Deal ushered in a slate of poverty assistance programs and private sector regulations to aid the most vulnerable. Focusing on single mothers and veterans as the country recovered from two wars, the first iteration of the safety net programs created systems to aid the least well off. Later, Roosevelt’s signature on the Federal Fair Labor Standards Act (“FLSA”) ushered in the first federal minimum wage as well as basic labor standards and workers’ rights. Relatedly, the National Labor Relations Act of 1935 (“NLRA”) helped birth a powerful movement by giving workers the right to unionize and collectively bargain. Roosevelt also signed the Social Security Act, providing pensions for the elderly. Until then, helping the poor was largely a municipal or state responsibility. On its passage Roosevelt noted,

We can never insure 100% of the population against 100% of the hazards and vicissitudes of life but we have tried to frame a law which will give some measure of protection to the average citizen, and to his family, against the loss of a job and against poverty-stricken old age.²⁶

25. James I. MacAdam, *The Discourse on Inequality and the Social Contract*, 47 J. PHIL. 182, 308-14 (1972).

26. Alexa Keyes, *What Would Francis Perkins Think of the Current Social Security Debate?* NBC NEWS (Apr. 11, 2013), <http://www.nbcnews.com/id/51512861/t/what-would-frances-perkins-think-current-social-security-debate/#.XxuYmZ5Kg2w> [https://perma.cc/CX3V-KGAC].

But from its inception, federal safety net programs were built on exclusion, implicitly answering the question, “who should be included in anti-poverty protection?” America’s history of white supremacy cast a long shadow on this early attempt to support the least well-off. The NLRA specifically excluded farmworkers and domestic workers from union protection while these same workers were excluded from basic worker protection afforded by the FLSA—sectors overwhelmingly represented by Black and, later, immigrant workers.²⁷ The NLRA read limitations on domestic work broadly, preventing worker protection for child and adult caretakers.²⁸ The Federal Housing Administration, created to guide and protect an emerging middle class, refused to back loans for Black families or loans in Black majority households.

White America’s perception of social insurance and safety net programs shaped the programs’ expansion and access. Generally popular after the war, political support for these programs among white Americans collapsed after the Civil Rights era expanded access to Black communities. This perception impacted white America’s opinion of Medicare and Medicaid, signed into law in 1965 after the Civil Rights Act.²⁹ These opinions continued to critically shape how health insurance programs expanded.³⁰

Ironically, it was Reagan who popularized the term “safety net” even while he vilified it throughout his presidency.³¹ In a 1981 speech, Reagan

27. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 195 (2011). In 1966, the FLSA was amended to partially include farmworkers in minimum wage protection, though they remain excluded from overtime. Autumn L. Canny, *Lost in a Loophole: The Fair Labor Standards Act’s Exemption of Agricultural Workers from Overtime Compensation Protection*, 10 DRAKE J. AGRIC. L. 355, 365 (2005).

28. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [https://perma.cc/57JJ-KW33].

29. Janeen Interlandi, *Why Doesn’t the United States have Universal Healthcare? The Answer Has Everything to Do with Race*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/universal-health-care-racism.html> [https://perma.cc/B7GW-JX8M].

30. *Id.*

31. *How Did the Social Safety Net Get Its Name?*, MARKETPLACE (Apr. 2, 2013), <https://www.marketplace.org/2013/04/02/how-did-social-safety-net-get-its-name> [https://perma.cc/BDH2-T49B].

declared: “All those with true need can rest assured that the social safety net of programs they depend on are exempt from any cuts.”³² He further added, “[b]ut government will not continue to subsidize individuals or particular business interests where real need cannot be demonstrated.”³³ Reagan targeted means-tested programs for large cuts and deployed racist tropes to scapegoat Black women, particularly Black mothers. Popularizing the term “welfare queen” and deploying racist dog-whistling to garner support among the white middle class, Reagan made shrinking the safety net a rallying cry for white America.³⁴ For conservatives, the political framing drove the passage of a Welfare Reform plan that required harsh work requirements and penalized those unable to meet them.

The racialized safety net, based on race-based exclusion, helps make meaning of the safety net’s long-standing, structural exclusions. It also elucidates the safety net’s relationship to the criminal justice system. While less often discussed in anti-poverty analysis, it is not coincidental that at the same time, President Bill Clinton was considering the Personal Responsibility and Welfare Reform Act (“PROWRA”) that included strict, unforgiving work requirements. Clinton had recently signed the 1994 Violent Crime Control Act, ushering in an era of mandatory sentencing and institutionalizing mass incarceration for communities of color. Less often discussed is how these actions ushered in a wave of punitive policies to exclude people with records from safety net protections and programs.³⁵ Welfare Reform prohibited people with a felony drug conviction from receiving food assistance benefits under the Supplemental Nutrition

32. Ronald Reagan, U.S. Pres., Address Before a Joint Session of the Congress on the Program for Economic Recovery (Feb. 18, 1981), <https://www.reaganlibrary.gov/archives/speech/address-joint-session-congress-program-economic-recovery-1981> [<https://perma.cc/GFZ3-XJ4G>].

33. *Id.*

34. Gene Demby, *The Truth Behind the Lies of the Original ‘Welfare Queen’*, NAT’L PUB. RADIO (Dec. 20, 2013), <https://www.npr.org/sections/codeswitch/2013/12/20/255819681/the-truth-behind-the-lies-of-the-original-welfare-queen> [<https://perma.cc/386W-66LK>].

35. Kara Gotsch, *Criminal Justice Includes Food Security – We Can’t Ban the Social Safety Net*, HILL (May 16, 2019), <https://thehill.com/opinion/criminal-justice/444024-criminal-justice-includes-food-security-we-cant-ban-the-social> [<https://perma.cc/V6TW-72L4>].

Assistance Program (“SNAP”) or direct cash support under Temporary Assistance for Needy Families (“TANF”).³⁶

States, too, drew exclusionary lines. While the federal government used racially motivated exclusions for safety net programs, California was debating Proposition 187. This infamous ballot measure focused on excluding immigrants from public education, health care coverage, and other safety net programs.³⁷ Despite initial public opposition to the ballot measure, it passed by 59% of the vote.³⁸ Echoing Reagan and Speaker Newt Gingrich’s national dog-whistling, California’s sweeping prohibition built on a xenophobic narrative of fear mongering scapegoated immigrant communities. Then-Governor Pete Wilson, up for re-election, used commercials with ominous images of the border and a voice overlay whispering “they keep coming,” referring to immigrants crossing the border.³⁹ At the same time, California’s immigrant communities continued to build families and communities while fueling essential parts of the state’s economy. After its passage and early implementation, Proposition 187 was overturned by the courts. However, Proposition 187 laid the battleground for both immigrant rights and a reimagining of the social contract at the state level.

36. Teresa Wiltz, *More States Lift Welfare Restrictions for Drug Felons*, PEW TRUSTS (Aug. 9, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/09/more-states-lift-welfare-restrictions-for-drug-felons> [https://perma.cc/L5LA-S574]. This ban applies to people with records, regardless of whether they served their sentence in jail or prison or received a lighter sentence due to the non-violent and/or minor nature of the offense. However, states have the option to remove or modify this restriction, and all but four have modified the ban for at least one program.

37. Andrea Silva, *How California’s Prop. 187 Is Still Shaping Immigration Policy – 25 Years After it Passed*, WASH. POST (Nov. 25, 2019), <https://www.washingtonpost.com/politics/2019/11/25/how-californias-prop-is-still-shaping-immigration-policy-years-after-it-passed> [https://perma.cc/GR95-FQFQ].

38. Gustavo Arellano, *Proposition 187 Forced a Generation to Put Fear Aside and Fight. It Transformed California, and Me*, L.A. TIMES (Oct. 29, 2019), <https://www.latimes.com/california/story/2019-10-29/proposition-187-california-pete-wilson-essay> [https://perma.cc/EWA5-PKAY].

³⁹ Wilson’s Re-Election Ads on Illegal Immigration (July 15, 2007) <https://www.youtube.com/watch?v=o0f1PE8Kzng>

III. CALIFORNIA'S EFFORT TO BUILD AN INCLUSIVE SAFETY NET: FROM PROP 187 TO HEALTH4ALL

Despite its eventual failure in court, Proposition 187 began a domino effect of anti-immigrant policies across the country, including Arizona's SB 1070 that used explicit profiling to stop and detain immigrants. Proposition 187 also had the important and unexpected effect of shaping a generation of organizers who used the safety net's expansion as a political and organizing tool to include all Californians regardless of status.⁴⁰ In expanding the safety net and framing its expansion as a step towards building political power, organizers in California are reconstituting the American social contract. While much of the work to address this exclusion was fueled at the state level, the conversation in California was also deeply influenced by federal health insurance debates.

The debate over the 2010 Affordable Care Act ("ACA" or "Obamacare") initiated an important sea change in national discourse about the safety net. While the ACA suffered from partisan division, components of the bill garnered broad support. The ACA did more than create pathways for healthcare access for those eligible; it changed the way the country discussed and framed the ethics of healthcare access. Americans were confronted with stories of how many people were postponing preventive care due to high cost, how many families were uninsured, and how many were unable to get financially ahead due to medical debt even if they were insured.⁴¹

40. *Supra* 38.; *Proposition 187 Shook Latino Voters and Changed California Politics*, KCET (Nov. 8, 2019), <https://www.kcet.org/news-analysis/proposition-187-shook-latino-voters-and-changed-california-politics> [<https://perma.cc/3FHM-CUKB>].

41. Paul Krugman, *Health Care Horror Stories*, N.Y. TIMES (Apr. 11, 2008), <https://www.nytimes.com/2008/04/11/opinion/11krugman.html> [<https://perma.cc/H3CZ-E2P8>]; Sheila Rustgi et al., *Losing Ground: How the Loss of Adequate Health Insurance Is Burdening Working Families—Findings from the Commonwealth Fund Biennial Health Insurance Surveys, 2001-2007*, COMMONWEALTH FUND (Aug. 1, 2008), <https://www.commonwealthfund.org/publications/fund-reports/2008/aug/losing-ground-how-loss-adequate-health-insurance-burdening> [<https://perma.cc/V4NN-2H4J>]; *Survey: 79 Million Americans Have Problems with Medical Bills or Debt*, COMMONWEALTH FUND, <https://www.commonwealthfund.org/publications/newsletter-article/survey-79-million-americans-have-problems-medical-bills-or-debt> [<https://perma.cc/752M-B9L6>].

The generally favorable opinion of the ACA's policies on its passage and its increased support since the Trump Administration's attempt to dismantle it⁴² suggests a shift in the country's relationship to government. At the time of its signing, the late Senator Edward Kennedy noted: "While the explicit ethical justification is that health reform is decisive for the nation's future prosperity, health coverage is above all an ethical issue; at stake are not just the details of policy, but fundamental principles of social justice and the nation's character."⁴³ Kennedy's oft-quoted, values-driven description of health care access spoke to the heart of the issue for many uninsured Americans.

Notably, however, the ACA excluded undocumented immigrants. Undocumented immigrants, among the fastest growing uninsured population in the country, were prohibited from purchasing insurance under the ACA.⁴⁴ Undocumented immigrants also remained excluded from Medicaid, the federal health insurance program for low-income communities. In 2007, less than three years before the ACA's enactment, one in seven of the country's uninsured was an undocumented immigrant.⁴⁵ In states with a large undocumented population, the number of uninsured among the undocumented was even higher. Advocates in California moved quickly to address to address this gap.

While many parts of immigration law and policy fall within the purview of the federal government, federal waivers provide states the authority to augment and expand safety net eligibility.⁴⁶ In this way, California moved to

42. Allison Inzerro, *How Has Public Opinion on the ACA Shifted Over Time?*, AJMC (Feb. 20, 2020), <https://www.ajmc.com/view/how-has-public-opinion-on-the-aca-shifted-over-time> [<https://perma.cc/6CHM-HASF>].

43. DONNA K. HAMMAKER, THOMAS M. KNADIG & SARAH J. TOMLINSON, *HEALTH CARE ETHICS AND THE LAW* 112 (2016).

44. Between 1999 and 2007, the number of undocumented immigrants increased from an estimated 8.5 million to 11.8 million across the country and over 1.8 million were uninsured, representing 27% of the total increase in the uninsured population. Stephen Zuckerman, Timothy A. Waidmann & Emily Lawton, *Undocumented Immigrants Left out of Health Care Reform, Likely to Continue to Grow as Share of the Uninsured*, 30 HEALTH AFF. 10 (Oct. 2011), <https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2011.0604> [<https://perma.cc/DAS4-6GMD>].

45. *Id.*

46. For health insurance programs, the authority to implement and change insurance programs is found in Title XIX of the Social Security Act, Medicaid. *Program History*, MEDICAID, <https://www.medicaid.gov/about-us/program->

expand its low-income health insurance program to undocumented immigrant adults. While the expansion began while President Obama was in office, the expansion continued during President's Trump's term. Buoyed by progressive governor Gavin Newsom, advocates made the case to expand the state insurance program to all undocumented people. Organizers laid the foundation for a powerful campaign to ensure health insurance for everyone, regardless of immigration status. In 2015, California made a historic budget investment by expanding Medi-Cal to all children under the age of nineteen, regardless of immigration status.⁴⁷ Implemented in 2016, the expansion impacts 250,000 children.⁴⁸ As a result of this historic investment, the campaign to ensure all eligible Californians are included in Medi-Cal regardless of immigration status, also known as Health4All, was born.

California's Democratic legislative supermajority provided continued momentum to help advance this investment. Echoing the debate of Gingrich's Congress in the 1990s, backlash came from a targeted public discourse which pit investments for "citizens" against immigrant communities—going as far as to fuel a petition to recall Governor Newsom.⁴⁹ But the financial cost of *not* insuring immigrant communities,

history/index.html [https://perma.cc/P3LC-YZ42]; see also *State Waivers List*, MEDICAID, https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/index.html [https://perma.cc/43VA-36NN]. Some federal agencies that oversee and manage other safety net programs can permit states to expand eligibility for recipients. For example, the U.S. Department of Agriculture provides flexibility to states that want to expand SNAP. See *States Are Using Much-Needed Temporary Flexibility in SNAP to Respond to COVID-19 Challenges*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 26, 2021), https://www.cbpp.org/research/food-assistance/states-are-using-much-needed-temporary-flexibility-in-snap-to-respond-to [https://perma.cc/YW2K-LYZZ].

47. S.B. 4, 2015 Leg. (Cal. 2015).
48. Sophia Bollag, *Undocumented children can get California health care. Now Gavin Newsom wants young adults to have it, too*, CTR. FOR HEALTH JOURNALISM COLLABORATIVE (April 29, 2019), https://centerforhealthjournalism.org/undocumented-children-can-get-california-health-care-now-gavin-newsom-wants-young-adults-have-it-too [https://perma.cc/W4J3-JWZK].
49. Laurel Rosenhall, *Recalling a California Governor, Explained*, CALMATTERS (Jan. 27, 2021), https://calmatters.org/explainers/recalling-california-governor-explained [https://perma.cc/28ET-VYZQ]; Joseph Daniels, *The of Two Efforts to Recall Gov. Newsom Explains Why He Wants the Governor Gone*, ABC NEWS

including the country's largest population of elderly immigrants, kept the discussion alive.

Organizers and advocates led the early fight to expand Medi-Cal and galvanized a broad, diverse coalition of immigrant rights, health equity, and anti-poverty organizations to build the campaign for health equity. While the inclusion of children helped birth the campaign, the broader goal of including everyone, regardless of status, continues to drive the coalition's work. At the same time, the coalition's organizers have navigated complex and difficult challenges. Among the most difficult of these challenges is that organizers continue to grapple with the impact of the state's strategy to expand coverage to undocumented adults by age increments. The decision to expand coverage by age increments created difficult but also galvanizing moments for the broader campaign strategy.

In 2018, leaders of the Health4All campaign made the strategic decision to advance Medi-Cal for young adults ages 19-26 as well as the elderly over the age of 65. The strategy behind this investment was two-fold: First, there was political momentum to expand Medi-Cal for young adults within the Legislature, who are generally healthy and less expensive to insure; and second, coverage for older adults would ensure support for an aging community.

While expanding insurance to young adults was initially a campaign goal, the largely youth-led coalition focused on the goal of expanding Medi-Cal expansion to seniors. Expressing deep concern for their parents' and grandparents' lack of health care access and economic solvency, the focus of the campaign quickly moved to health insurance for elders. The campaign's media coverage, communications strategy, and legislative pressure elevated the stories of the elderly and their fight for health insurance, often narrated by the elderly themselves and more often by younger people involved in the campaign. In the spring of 2019, communities, including many elderly immigrants, rallied in Sacramento to ensure the state provided health insurance to seniors.⁵⁰ The young leaders in the crowd

10 (Nov. 15, 2019), <https://www.abc10.com/article/news/local/sacramento/why-gov-newsom-might-face-a-potential-recall-election/103-1c33b96a-b4db-49e5-9063-1e8aebc2e9b8> [<https://perma.cc/X8BC-DEL2>].

50. *California Considers Health Care for Undocumented Immigrants*, NBC NEWS (May 21, 2019), <https://www.nbcnews.com/news/latino/california-considers-health-care-undocumented-immigrants-n1008201> [<https://perma.cc/E85L-9NSE>]; Documentary: COVER/AGE, held by the California Immigrant Policy Center (Nov. 11, 2019), <https://caimmigrant.org/cover-age> [<https://perma.cc/UMW3-ASGM>].

were quoted as saying they would forego their own youth-coverage in exchange for their parents' and grandparents' access to health insurance.⁵¹

In January 2020, after five years of a focused Health4All organizing campaign, Governor Newsom included elderly, undocumented immigrants over the age of 65 in the state's Medi-Cal program. The proposal would provide health insurance to over 25,000 seniors throughout the state.⁵² Although organizers and advocates were quick to celebrate and move to program implementation, the Governor, facing the impact of a global pandemic that disproportionately impacted seniors, reversed course and dropped this historic health insurance expansion within weeks of its announcement.

The state's 25,000 undocumented, low-income seniors—who often go without coverage—were left out of the expansion plan for 2020. Despite a heated back and forth with and within the Legislature asking that the expansion be implemented in 2022, as of this writing, such expansion has been put off indefinitely. Organizers, however, continue to advocate. While this political hurdle is significant, organizers in the state are committed to advancing health care access for undocumented elderly people, and immigrant justice advocates have made its passage and implementation an urgent priority. Public opinion is also moving towards supporting health care access for undocumented immigrants.⁵³

California provides critical lessons in what it means to reconstitute the safety net and social contract. Similar to the federal government, California's safety net is subject to politicization and exclusion. After all, it was not long ago that the state passed Proposition 187 with a comfortable majority, and it has been a long road to reform and expand programs available to

51. COVER/AGE, *supra* note 50.

52. Laurel Lucia, *Towards Universal Health Coverage: Expanding Medi-Cal to Low-Income Undocumented Adults*, UC BERKELEY LABOR CTR. (Feb. 2019), <https://laborcenter.berkeley.edu/pdf/2019/Towards-Universal-Health-Coverage.pdf> [<https://perma.cc/2JXY-A3LW>].

53. Mark Baldassare et al., *PPIC Statewide Survey: Californians & Their Government*, PUB. POL'Y INST. OF CAL. 18 (Mar. 2021), <https://www.ppic.org/wp-content/uploads/ppic-statewide-survey-californians-and-their-government-march-2021.pdf> [<https://perma.cc/AX5N-HZ26>] (“In general, two in three Californians favor the idea of providing health care coverage for undocumented immigrants in the state. This marks a 12-point increase since we last asked the question in December 2015 (54% favor, 42% oppose) and a 23-point increase since the first time we asked this question in March 2007 (43% favor, 53% oppose).”).

communities. What is unique about California's move to include undocumented people in its safety net is that, in doing so, it is also grappling with its history of xenophobic exclusions and the fundamentals of the social contract, including its moral foundations. While some states have recently expanded their Medicaid programs, California's willingness to reposition communities historically excluded from the national narrative has the potential to shape both national and other states' conversations around the safety net.⁵⁴ Thus, there is a historic opening for all states to reverse and rebuild their support systems. In 2020, Illinois passed a policy to extend insurance coverage for their low-income, elderly seniors.⁵⁵ The fight in California for expansion to seniors, as well as other age groups, continues.

Confronting the history and exclusion of the safety net is about more than incrementally expanding anti-poverty programs for the least well-off. It also means understanding the impact of that racial exclusion and the complex ways in which income discrepancies affect communities. There are nearly two million undocumented immigrants in California and cumulatively they contribute \$3.2 billion in tax dollars to the state's economy.⁵⁶ Most are not poor enough to even qualify for low-income programs, but here again is the trap of the racial safety net: Built on exclusion, its goal is not to ensure everyone has resources to thrive, but instead to exclude and disenroll participants quickly. To this end, California's move to make the state more inclusive is not limited to health care access.

While the safety net may be an implied construal of the social contract, the tax system is arguably the most direct application of the social contract. Taxpayers pay money into a system in exchange for a series of benefits. Yet immigrant workers, who contribute \$11.74 billion to federal coffers and an

54. Most states have expanded their state health insurance programs. See *Status of State Medicaid Expansion Decisions: Interactive Map*, KFF (Mar. 12, 2021), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map> [https://perma.cc/8V9K-VGXX].

55. Odette Yousef, *Undocumented, Low-Income Illinois Seniors Can Soon Get Publicly Funded Health Coverage*, NAT'L PUB. RADIO (June 11, 2020), <https://www.npr.org/local/309/2020/06/11/874985727/undocumented-low-income-illinois-seniors-can-soon-get-publicly-funded-health-coverage> [https://perma.cc/XWN4-36E2].

56. Kayla Kitson, *California's Undocumented Immigrants Make Significant Contributions to State and Local Revenues*, CAL. BUDGET & POL'Y CTR. (Apr. 2019), <https://calbudgetcenter.org/resources/californias-undocumented-immigrants-make-significant-contributions-to-state-and-local-revenues> [https://perma.cc/V644-M3NS].

additional \$3 billion to the states, are excluded from key tax benefits like the Earned Income Tax Credit, a tax return provided to those who work full time and make less than a living wage. Just as with healthcare, organizers are galvanized to expand the Earned Income Tax Credit, the return of income taxes to the working poor, to include workers who file with tax ID numbers.

Although the expansion of health insurance to elders did not move to implementation in 2020, California is one of the first states to extend the Earned Income Tax Credit to those filing with a tax ID number. Like organizing efforts to expand Medi-Cal, the state's California Earned Income Tax Coalition ("CalEITC"), a diverse, broad-based alliance of organizations led by anti-poverty, tax equity, and immigrant rights organizers and advocates, drove this critical policy change. Over a three-year period, the coalition engaged a powerful set of strategies and tactics to win a \$45 million investment that would include immigrant workers in the state's EITC program. The expansion has the potential to reach 600,000 people and provides some minimal relief for families cut out of federal relief.⁵⁷ Over 200,000 children would benefit from including ITIN filers in the CalEITC. California's move is a valuable step in ensuring equal access to tax credits and safety net benefits. Additionally, it has the potential to make worker contributions visible in a moment when this work is often overlooked.

IV. STATES, ORGANIZERS AND THE SOCIAL CONTRACT REIMAGINED

Reconstituting the social contract offers a valuable first step in repairing the country's economic and social cleavages. But given critiques of the social contract and its constitutive parts, what does "reconstituting" the social contract mean?

Mills offers one way forward, noting that for the current reckoning with structural racism and police killings to have meaning in the future, it is important to maintain a "historical perspective on the racial *longue durée*," or the historical structures that have shaped racism's arch.⁵⁸ Reconstituting

57. Hafsa Fathima & Celina Tebor, *New Push in California for Immigrant Tax Filers to Receive Tax Credits*, L.A. TIMES (Dec. 12, 2019), <https://www.latimes.com/california/story/2019-12-12/new-push-in-california-for-immigrant-tax-filers-to-receive-tax-credits> [<https://perma.cc/5MEX-BXS5>].

58. Mills notes the country's history of enslavement, the Emancipation Proclamation, the Thirteenth, Fourteenth and Fifteenth, or Civil War, Amendments, *Brown v. Board of Education* Supreme Court decision, and racial uprisings as key points in this timeline. Woojin Lim, *The Racial Contract: Interview with Philosopher Charles W. Mills*, HARV. POL. REV. (Oct. 29, 2020),

the “social contract” will require a concerted national project to dismantle the “racial contract,” a direct examination of its white supremacist roots and an attempt to reconstitute its basic structure. To realize this goal requires what Mills calls a “national reconstruction project” that includes the position, experience, and knowledge of those excluded from institutions and what this means for rebuilding the social contract.

States are in a critical and unique position to begin the work of rebuilding the social contract and California provides one example.⁵⁹ The public health safety net and criminal legal systems that have further entrenched discrepancies due to COVID-19 are within all states’ purview to examine and fundamentally change. In California, for example, the move from the passage of Proposition 187 to rebuilding an inclusive safety net is a unique response to the state’s history and changing demographics

California’s example also demonstrates that states can reconsider a broad range of exclusions, including those based on immigration, in their examination and reconstitution of the safety net. Finally, community-led organizing strategies are a key component to any shifts in the locus of power. Broad-based coalitions that engage in critical power mapping, micro-targeting of stakeholders and assessing whether those most directly impacted are represented in the decision-making is not just critical to policy change but fundamental to grappling with the failures of the past social contract in order to reconstitute it equitably. While the work of organizers is central to this work, government stakeholders and policy advocates play equally critical roles.

California is a powerful example for other states. The current political moment has created an opening for organizers and coalitions to build wide-based support for resonant policy change that could fundamentally shift and change the way individuals and communities are centered in policy.

CONCLUSION

Current crises have deepened the country’s existing economic and social cleavages in profound ways. But neither the pandemic nor the powerful uprisings for racial justice are the cause of these discrepancies.

<https://harvardpolitics.com/interview-with-charles-w-mills>
[<https://perma.cc/37QT-5WJ3>].

59. *A Blueprint for the Nation: Building Power from California to New York*, CAL. IMMIGRANT POLICY CTR. & N.Y. IMMIGRATION COAL. (Jan. 29, 2021), <https://caimmigrant.org/wp-content/uploads/2021/02/Blueprint-Digital-FINAL.pdf> [<https://perma.cc/ULJ5-L6Y8>].

CONFRONTING OUR RACIST EXCLUSIONS

Instead, these inequities are built into the systems that are supposed to ensure the country's collective recovery, much of it grounded in the social contract.

Charles W. Mills argues that racism and colonialism deeply shaped the social contract that was the conceptual foundation for western democracies and that, instead of a neutral contract, the racial contract is a more useful tool. The racial contract shapes institutions and guides relationships between white people and people of color. Socio-economic and health indicators bear this out. Since the full brunt of COVID-19 impacted the country, Black and Latino communities have been disproportionately affected by infection and death. Grappling with the racialized safety net, or the safety net as defined by its historical exclusions, is one critical step in reconstituting the social contract.

Systematic exclusions in policy and implementation contributed to economic and health disparities that have led to worse economic and health outcomes for communities of color. Such exclusions have long-lasting, intergenerational impacts on families and communities. Although the safety net contemplates resources for the least well off, the racialized safety net, organized by exclusion and failures in implementation, did little to ensure the least-well off had resources to thrive. The current moment offers an opportunity to confront and reconstitute the safety net.

States have a unique part to play in advancing inclusive programs that have the potential to shift the history of exclusion and reset the social contract. California provides a valuable example of the hard work and complexity of confronting this history and correcting this harm. While states play a significant role, organizers and advocates grappling with the economic and health impacts of this moment are poised to carry this critical work forward.