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### Abolishing Racist Policing With the Thirteenth Amendment

Brandon Hasbrouck

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# U.C.L.A. Law Review

## Abolishing Racist Policing With the Thirteenth Amendment

Brandon Hasbrouck

### ABSTRACT

Policing in America has always been about controlling the Black body. Indeed, modern policing was birthed and nurtured by white supremacy; its roots are found in slavery. Policing today continues to protect and serve the racial hierarchy blessed by the Constitution itself. But a string of U.S. Supreme Court rulings involving the Thirteenth Amendment offers Congress a tool with which to target institutions that have preserved social, political, and official norms associated with slavery. In those cases, the Supreme Court held that Congress has broad enforcement authority under the Thirteenth Amendment to eliminate such “badges and incidents” of slavery. It is time to call modern policing what it is: a badge and incident of slavery that Congress should abolish under the Thirteenth Amendment. This is important for two principal reasons. First, there is power in naming the institution of policing as such. We must advance truth and reconciliation around race in America to facilitate healing, which requires us to address systemic and institutional failures, rather than merely the acts of individuals. Second, the Thirteenth Amendment empowers Congress to take bold action to transform policing and promote racial justice. To that end, this Essay describes how modern policing perpetuates structures of slavery within the context of badges and incidents of slavery. It explores Congress’s powers under the Thirteenth Amendment and proposes several legislative measures Congress should enact to effectively abolish the current institution of policing while reimagining public safety.

### AUTHOR

Assistant Professor of Law, Washington and Lee University School of Law. I want to thank Paul Butler for his helpful guidance and feedback. I also want to thank Alex Klein, Benjamin Hazelwood, and Jillian Hasbrouck for all of their support, feedback, and encouragement. Shout out to my research assistants Julia Kerr and Emily Dalessio for pure excellence, and to Warren Buff whose outstanding work made this Essay better. I am grateful for the extraordinary support of the Frances Lewis Law Center at the Washington and Lee University School of Law. Mad props to the amazing editors at the UCLA Law Review (Maya Chaudhuri, Benjamin Levine, and Ming Tanigawa-Lau) for superb editing and thoughtful comments that significantly advanced this piece. For my daughters. Black Lives Matter.



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## INTRODUCTION

[T]he slave went free; stood a brief moment in the sun; then moved  
back again toward slavery.<sup>1</sup>

—W.E.B. DuBois

Slavery has been fruitful in giving itself names. . . . [Y]ou and I and all  
of us had better wait and see what new form this old monster will  
assume, in what new skin this old snake will come forth next.<sup>2</sup>

—Frederick Douglass

Black people and communities know that police racially terrorizing us is nothing new in America. We live in fear. Our ancestors lived in fear. We fear that our agency—our fundamental right to life, liberty, and the pursuit of happiness—can be taken by the police for any reason or no reason at all. We cannot carry out basic human activities without our lives being threatened—you know, *anything while Black*. Indeed, police violence is a leading cause of death for Black people in America. Though racist policing has recently become part of the mainstream discourse, in many ways, police are doing what they have always done. The institution of policing was designed to protect and serve the racial hierarchy blessed by the U.S. Constitution itself.<sup>3</sup> But a string of U.S. Supreme Court rulings involving the Thirteenth Amendment offers the U.S. Congress a tool with which to fight institutions that have preserved social, political, and official norms associated with slavery’s control and disparate treatment of Black people. It is time to call modern policing what it is: a badge and incident of slavery that Congress should abolish<sup>4</sup> under the Thirteenth Amendment.

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1. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 26 (2012).
  2. Frederick Douglass, *The Need for Continuing Anti-Slavery Work*, in *FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS* 577, 579 (Philip S. Foner & Yuval Taylor eds., 1999).
  3. *See* U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”); U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).
  4. The word “abolish” is associated with a broad range of positions within the broader movement to end police terror. At first glance, it might bring to mind the total elimination of all police. *See generally* ALEX S. VITALE, *THE END OF POLICING* (2017) (arguing that policing must be eliminated because the underlying problem of police violence is policing itself). But some use the term to call attention to the necessity of dismantling the entire current structure before a

Abolition requires that we reimagine public safety and think about transformative, community-based measures. Short of fully eliminating police, abolition can embrace a greatly reduced role for police, with serious restrictions on their ability to initiate violence. There is no need to use police to deal with school disputes, most domestic violence cases, unhoused people, those who use controlled substances, or those who suffer from mental illness. Their roles enforcing municipal regulations and basic civil traffic violations, as well as the investigation of traffic accidents, could be better handled by separate government agencies. Police could still be responsible for investigating reported crimes, arresting people charged with crimes, and responding to reports of crimes in progress, including drunk driving—but all of these would be done unarmed. Armed police should be limited to responding to reports of armed and violent behavior in progress.

This Essay proceeds as follows. In Part I, I provide a succinct overview of Thirteenth Amendment jurisprudence. The Supreme Court has made it clear that Congress has broad power under the Thirteenth Amendment to identify badges and incidents of slavery, and to provide appropriate remedies. In Part II, I demonstrate the racist origins of modern policing and how the institution perpetuates structures of slavery. There, I contend that policing has been, and continues to be, about terrorizing and controlling the Black body—what I refer to as “racist policing”—and I trace the historical development of such practices from before the Thirteenth Amendment through the Jim Crow era to their modern forms. Finally, in Part III, I argue that Congress must exercise its broad powers under the Thirteenth Amendment and propose several legislative measures that effectively abolish the current institution of policing while reimagining public safety. We must reclaim the Thirteenth Amendment as a source of respect and protection for Black lives.

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more equitable one can take its place. See Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [https://perma.cc/W6WF-2CNH] (“But even a member of the task force, Tracey Meares, noted in 2017, ‘policing as we know it must be abolished before it can be transformed.’” (quoting Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), <http://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad> [https://perma.cc/8YYU-BKEB])). The police abolition movement also encompasses a push for eliminating the most abusive police practices as an intermediate step to further eliminating abusive policing. See MON MOHAPATRA ET AL., 8 TO ABOLITION: ABOLITIONIST POLICY CHANGES TO DEMAND FROM YOUR CITY OFFICIALS 5 (2020), [https://www.8toabolition.com/s/8toAbolition\\_V2.pdf](https://www.8toabolition.com/s/8toAbolition_V2.pdf) [https://perma.cc/357R-QU4K] (“We know abolition is far more transformative than 8 points or a website, and hope that these points serve as a resource that demonstrates practical changes we can make now towards abolition.”).

## I. THE THIRTEENTH AMENDMENT

The Thirteenth Amendment prohibits slavery and involuntary servitude, except as punishment for a crime, and provides Congress with the power to enforce this prohibition via appropriate legislation.<sup>5</sup> The Supreme Court, in the *Civil Rights Cases*,<sup>6</sup> interpreted the Thirteenth Amendment to grant Congress broad authority to eliminate the “badges and incidents” of slavery.<sup>7</sup> It was generally understood by many prominent jurists at the time that “badges and incidents” of slavery referred to racially discriminatory political, civil, and legal disadvantages arising out of slavery.<sup>8</sup> Justice Harlan, for example, believed that Congress could redress any race discrimination against Black people under the Thirteenth Amendment.<sup>9</sup> The Thirteenth Amendment has also, at times, supported a private right of action, but this essay is restricted in scope to Congress’s powers under Section 2 of the Thirteenth Amendment.<sup>10</sup>

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5. U.S. CONST. amend. XIII.

6. 109 U.S. 3 (1883).

7. *See id.* at 20 (“But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . .”).

8. *See, e.g., Blyew v. United States*, 80 U.S. (13 Wall.) 581, 599 (1872) (Bradley, J., dissenting) (“To deprive a whole class of the community of this right [to testify in court], to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law.”); *Le Grand v. United States*, 12 F. 577, 580–81 (Woods, Circuit Justice, C.C.E.D. Tex. 1882) (“It may be conceded that this amendment gives power to congress, not only to protect the personal freedom of the enfranchised citizens, but to remove from them every badge and restraint of slavery and involuntary servitude.”); *United States v. Rhodes*, 27 F. Cas. 785, 793 (Swayne, Circuit Justice, C.C.D. Ky. 1866) (No. 16,151) (“Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave states. Many of the badges of the bondman’s degradation were fastened upon them.”).

9. *See The Civil Rights Cases*, 109 U.S. at 35 (Harlan, J., dissenting) (“That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable.”).

10. *See The Peonage Cases*, 123 F. 671, 675 (M.D. Ala. 1903) (“The courts of the [New Mexico] territory, after the passage of the thirteenth amendment, holding that it destroyed the right formerly existing under the territorial laws to hold to service, released peons from compulsory service on writs of habeas corpus, wherever applied to . . .”). I will address the extension of this private right of action to the badges and incidents of slavery and other constitutional interventions under the Thirteenth Amendment in a future article to be titled, “What’s Free? Police Abolition and the Thirteenth Amendment.”

The Supreme Court would adopt Justice Harlan's broad framework in *Jones v. Alfred H. Mayer Co.*,<sup>11</sup> in which the Court held that Congress's power extends to outlawing modern-day practices that are a legacy or outgrowth of slavery, even if imposed by private actors.<sup>12</sup> Although the *Jones* Court did not define what "badges and incidents" of slavery are, it did declare that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."<sup>13</sup> Legislation established under the Thirteenth Amendment includes prohibitions against racially motivated violence,<sup>14</sup> conspiracies to interfere with civil rights,<sup>15</sup> and discrimination in the sale of property,<sup>16</sup> education,<sup>17</sup> employment, and contracts.<sup>18</sup>

## II. MODERN DAY POLICING AND THE LEGACY OF SLAVERY

White supremacy birthed and nurtured modern-day policing. Indeed, policing today can be traced directly to slavery and the racial regime it relies on and violently sustains.<sup>19</sup> Black Americans were stamped by police from the beginning

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11. 392 U.S. 409 (1968).

12. *Id.* at 439 ("The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes."). It is important to highlight that, under *Jones*, Congress would be able to regulate private security forces that would inevitably grow in power with fewer police. Just as private racial barriers to housing were as susceptible to regulation as government action, so too would Congress's authority to regulate racist policing extend to privately contracted security engaged in such practices.

13. *Id.* at 440.

14. 18 U.S.C. §§ 245, 249 (2018).

15. 42 U.S.C. § 1985 (2018).

16. 42 U.S.C. § 3604 (2018).

17. See generally Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361 (2016) (discussing the Second Freedmen's Bureau Bill of 1866, a vetoed piece of Reconstruction legislation intended to provide, at a minimum, economic security and education as central conditions of freedom and full citizenship for formerly enslaved persons).

18. 42 U.S.C. § 1981 (2018).

19. Hip-hop artist KRS-One made this connection in "Sound of da Police":

Officer, Officer, Officer, Officer! Yeah, officer from overseer. You need a little clarity? Check the similarity! The overseer rode around the plantation. The officer is off patrolling all the nation. The overseer could stop you what you're doing. The officer will pull you over just when he's pursuing. The overseer had the right to get ill. And if you fought back, the overseer had the right to kill. The officer has the right to arrest. And if you fight back they put a hole in your chest! Woop! They both ride horses. After 400 years, I've got no choices!

KRS-ONE, *Sound of da Police*, on RETURN OF THE BOOM BAP (Jive Records 1993); see also ANGELA J. DAVIS, *POLICING THE BLACK MAN*, at xii (2017) ("From the arrival of the first slaves in Jamestown in 1619 to the lynchings of the nineteenth and twentieth centuries to the present

as something less than human.<sup>20</sup> We have been called “the animal, the superpredator, and the monster. As James Baldwin remarked in 1966, “[T]he police are simply the hired enemies of this population. They are present to keep the Negro in his place and to protect white business interests, and they have no other function.”<sup>21</sup>

### A. Pre-Thirteenth Amendment Policing

In both the North and the South, formal policing in America has racist roots. Formal policing in the South developed in the 1700s as slave patrols.<sup>22</sup> The principal tasks of slave patrol policing were to terrorize enslaved Blacks to deter revolts, capture and return enslaved Blacks trying to escape, and discipline those who violated any plantation rules.<sup>23</sup> Slave patrols had significant and unfettered power within their communities that derived from Slave Codes.<sup>24</sup> Slave patrols would forcefully enter homes to look for criminal activity—such as harboring enslaved Blacks seeking freedom—or simply because they could.<sup>25</sup> If this sounds too familiar, it is because it should. Police today routinely enter the homes of Black people for no legitimate reason and steal Black lives. In Kentucky, Breonna Taylor

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day—black boys and men have been unlawfully killed by those who were sworn to uphold the law . . .”).

20. IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 458 (2016) (connecting modern perceptions of Black people to “[s]laveholders’ racist theory of African Americans as more dependent”).
21. James Baldwin, *A Report From Occupied Territory*, *NATION* (July 11, 1966), <https://www.thenation.com/article/archive/report-occupied-territory> [<https://perma.cc/C82B-ATAU>].
22. Olivia B. Waxman, *How the U.S. Got Its Police Force*, *TIME* (May 18, 2017, 9:45 AM), <https://time.com/4779112/police-history-origins> [<https://perma.cc/Q7B5-3JF4>]; see also RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 28 (2014) (discussing the history of slave patrols).
23. GARY POTTER, *THE HISTORY OF POLICING IN THE UNITED STATES* 3 (2013), <https://plsonline.eku.edu/sites/plsonline.eku.edu/files/the-history-of-policing-in-us.pdf> [<https://perma.cc/YF8C-Y3MV>].
24. See Michael E. Ruane, *Freedom and Slavery, the ‘Central Paradox of American History’*, *WASH. POST* (Apr. 30, 2019, 3:28 PM), [https://www.washingtonpost.com/local/freedom-and-slavery-the-central-paradox-of-american-history/2019/04/30/16063754-2e3a-11e9-813a-0ab2f17e305b\\_story.html](https://www.washingtonpost.com/local/freedom-and-slavery-the-central-paradox-of-american-history/2019/04/30/16063754-2e3a-11e9-813a-0ab2f17e305b_story.html) [<https://perma.cc/F5D5-GT35>] (detailing the authority of anyone pursuing an enslaved person who was declared a runaway, including the authority to kill or dismember—usually by cutting off toes).
25. See Connie Hassett-Walker, *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*, *CONVERSATION* (June 4, 2019, 8:42 AM), <https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816> [<https://perma.cc/UZB5-8Q4M>] (“Members of slave patrols could forcefully enter anyone’s home, regardless of their race or ethnicity, based on suspicions that they were sheltering people who had escaped bondage.”).



was shot eight times by police who broke down her door while she was asleep in her bed.<sup>26</sup> In Texas, Atatiana Jefferson was shot and killed by a police officer while playing video games with her nephew in her living room.<sup>27</sup> Botham Jean was shot and killed while eating ice cream in his living room by an off-duty police officer.<sup>28</sup> Slave patrols had the authority to seize, punish, and return enslaved Blacks who had left the plantation without written permission.<sup>29</sup> They bred dogs “specifically . . . for the systematic use of putting down slave rebellions, canine warfare, colonial enterprising, and torture.”<sup>30</sup> This unconstrained power to police Black movement persists today. Massive racial disparities exist in rates of police

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26. Amina Elahi, ‘*Sleeping While Black*’: Louisville Police Kill Unarmed Black Woman, NPR (May 13, 2020, 6:33 PM), <https://www.npr.org/2020/05/13/855705278/sleeping-while-black-louisville-police-kill-unarmed-black-woman> [<https://perma.cc/9M79-UCDJ>].
  27. Elizabeth Chuck & Tim Stelloh, *Fort Worth Police Officer Who Fatally Shot Atatiana Jefferson Charged With Murder*, NBC NEWS (Oct. 14, 2019, 8:13 PM), <https://www.nbcnews.com/news/us-news/fort-worth-police-officer-who-fatally-shot-atatiana-jefferson-resigns-n1065866> [<https://perma.cc/4UGW-9PKM>].
  28. *Bodycam Footage Played in Court Shows Moments After Cop Fatally Shot Her Neighbor*, CBS NEWS (Sept. 24, 2019, 6:59 PM), <https://www.cbsnews.com/news/amber-guyger-trial-bodycam-played-in-court-shows-moments-after-cop-fatally-shot-neighbor-botham-jean-2019-09-24> [<https://perma.cc/ZTL8-7D4Q>].
  29. Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE, no. 2, 1988, at 51, 59.
  30. P. Khalil Saucier, *Traces of the Slave Patrol: Notes on Breed-Specific Legislation*, 10 DREXEL L. REV. 673, 680 (2018). The use of dogs to control Black labor continued in prison camps under Jim Crow. “When prisoners escaped, they were pursued by dogs that were undoubtedly the canine descendants of those that had been used on the plantations to recapture runaway slaves.” Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 357 (2001). Modern use of police dogs against Black bodies continues this tradition of dehumanization. See Ann L. Schiavone, *K-9 Catch-22: The Impossible Dilemma of Using Police Dogs on Apprehension of Suspects*, 80 U. PITT. L. REV. 613, 632 (2019) (suggesting that police dogs may be involved in more deaths than reported, such as that of Phillip White, a Black man, who was attacked by a police dog during his arrest but reportedly died of a heart attack); Jeannine Bell, *Dead Canaries in the Coal Mines: The Symbolic Assailant Revisited*, 34 GA. ST. U. L. REV. 513, 521 (2018) (discussing the U.S. Department of Justice’s pattern and practice investigation into racially biased policing in Ferguson, Missouri: “Of the fifteen times Ferguson police dogs bit people, all were African-American victims.”); Madalyn Wasilczuk, *The Racialized Violence of Police Canine Units 3* (July 23, 2020) (unpublished manuscript) (on file with author) (“The disproportionate use of police canines against Black boys and men should not be surprising given the disproportionate use of police force against them in general and given the history of police dogs in particular.”). The use of police dogs is not inherently racist, but rather presents a violent and dehumanizing vehicle for officers’ own racial biases. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 31 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/SV6W-B2WT>] (“This permissiveness [in the department’s canine policy], combined with the absence of meaningful supervisory review and an apparent tendency to overstate the threat based on race, has resulted in avoidable dog bites to low-level offenders when other means of control were available.”).

traffic stops,<sup>31</sup> stop and frisks,<sup>32</sup> citations,<sup>33</sup> and narcotic search warrants.<sup>34</sup> Data demonstrating that Black people are repeatedly and disproportionately targeted by police has led some courts to suggest that racial profiling can be a legitimate basis for Black flight during a police encounter.<sup>35</sup>

The same is true for the North. Modern policing in the North can be traced to the 1830s.<sup>36</sup> During that time period, policing was created to control free Blacks who were labelled by police as dangerous.<sup>37</sup> Since America's founding, this assumption of dangerousness subjected free Blacks to constant scrutiny and invasion of privacy by white authorities.<sup>38</sup> Laws, such as the Fugitive Slave Act of

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31. See *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings> [<https://perma.cc/L6L2-793Y>] (last visited June 26, 2020) (documenting rates of stops and searches of Black and Latinx drivers as compared to whites).
  32. See Al Baker, *City Police Officers Are Not Reporting All Street Stops, Monitor Says*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/nyregion/nypd-stop-and-frisk-monitor.html> [<https://perma.cc/X9BA-3PU6>]; see generally *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (holding the city liable for violations of the Fourth and Fourteenth Amendments due to its indirect indifference to discriminatory stop and frisk policies); *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001) (certifying a class against the city for racial profiling in stop and frisks).
  33. See Richard G. Greenleaf et al., *Race-Based Decisions: Traffic Citations and Municipal Court Dispositions*, CTR. ON JUV. & CRIM. JUST. (2011), [http://www.cjcj.org/uploads/cjcj/documents/Race-based\\_decisions.pdf](http://www.cjcj.org/uploads/cjcj/documents/Race-based_decisions.pdf) [<https://perma.cc/ZP5E-8SGQ>] (documenting the overcitation of Black drivers for traffic and driver's license violations); *BART Board Discusses Report Showing Racial Disparities in Citations*, KTVU (Feb. 27, 2020), <https://www.ktvu.com/news/bart-board-discusses-report-showing-racial-disparities-in-citations> [<https://perma.cc/DY3T-3V9V>] (last visited June 26, 2020) (discussing disparities in citations issued on the San Francisco Bay Area's regional transit system).
  34. See Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER RACE & JUST. 183 (2002) ("To briefly summarize, we found that members of the Black and Hispanic communities in San Diego County were significantly over-represented as targets of narcotics search warrants. By contrast, White residents were under-represented when compared to their percentage of the population and studies showing patterns of drug use and drug distribution activities."). The disparity in authorization of narcotics search warrants creates a threat to Black Americans in the supposed safety of their homes that echoes the slave patrols' power of forced entry.
  35. See, e.g., *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) ("Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.").
  36. POTTER, *supra* note 23, at 2.
  37. See *id.* at 4 ("The suggestion was that public drunkenness, crime, hooliganism, political protests and worker 'riots' were the products of a biologically inferior, morally intemperate, unskilled and uneducated underclass."). Blacks, along with immigrants, were considered "dangerous classes" who police must control.
  38. See I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1289 (2017) (describing New York City's "lantern laws," which required free Blacks on the streets after sunset to either be accompanied by a white person or to carry a lantern with a lit candle, making them "knowable, locatable, and contained within the city" (quoting SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 79 (2015))).

1850,<sup>39</sup> federalized Black dangerousness and suspicion in the North, providing slave catchers and police authority to surveil and capture runaway enslaved Blacks and free Blacks.<sup>40</sup> The myth of racial difference and racialized laws constructed a false narrative of Black criminality. That is, Black people pose a direct criminal threat to white people solely because we are Black—a racist trope that keeps us under perpetual surveillance.<sup>41</sup> It is why Ahmaud Arbery was hunted down and shot while jogging in a predominantly white neighborhood by a former police officer.<sup>42</sup> White people understand this narrative and are not afraid to remind us. Just ask Amy Cooper, who recently called the police on Christian Cooper, a Black man, claiming that he threatened her life after he simply requested that she comply with park rules and leash her dog in Central Park.<sup>43</sup> This dangerousness narrative has also been used as a justification to overpolice majority-minority communities—the myth that Black-on-Black crime is out of control. Statistically, however, perpetrators and victims of violent crime—across all races—tend to be members of the same race.<sup>44</sup>

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39. This Act compelled U.S. Marshals to act as slavecatchers—imposing a \$1000 fine for disobedience—and granted them the power to conscript bystanders as *posse comitatus* to aid in this task. Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 25 (2008).
40. “Although abolitionists raised money to purchase freedom for many returned fugitives, the federal resolve was clear. The law was applied in thirteen cases within the first three months of its passage, and all but two of those arrested were returned to slavery.” James Oliver Horton & Lois E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Law*, 68 CHI.-KENT L. REV. 1179, 1186 (1993). “The danger of abduction plagued free blacks throughout the eighteenth and early nineteenth century, but the 1850 law increased that danger by declaring that alleged fugitives had no right to a defense or jury trial.” *Id.* at 1189.
41. See, e.g., SIMONE BROWN, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 77–78 (2015) (discussing the heightened surveillance of Black people because of perceived dangerousness).
42. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/M4F6-8MV9>]; see Richard Fausset & Rick Rojas, *Where Ahmaud Arbery Ran, Neighbors Cast Wary Eyes*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/article/satilla-shores-ahmaud-arbery-killing.html> [<https://perma.cc/9UZC-79J4>] (“They’re not used to seeing a lot of black faces around here.”).
43. Amir Vera & Laura Ly, *White Woman Who Called Police on Black Man Bird-Watching in Central Park Has Been Fired*, CNN (May 26, 2020, 4:21 PM), <https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html> [<https://perma.cc/96BY-NSRQ>]. For even the slightest things, police involvement too often results in a death sentence for Black people. Jelani Jefferson Exum calls this “the death penalty on the streets.” Jelani Jefferson Exum & D.A. Telman, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 MO. L. REV. 987 (2016).
44. *Research Confirms That Entrenched Racism Manifests in Disparate Treatment of Black Americans in Criminal Justice System*, VERA INST. JUST. (May 3, 2018), <https://www.vera.org/newsroom/research-confirms-that-entrenched-racism-manifests-in-disparate-treatment-of-black-americans-in-criminal-justice-system> [<https://perma.cc/AW3B-RZSF>].

Recently, Chief Judge Roger L. Gregory of the United States Court of Appeals for the Fourth Circuit explored the consequences of racist policing and Black dangerousness. In a *tour de force* concurring opinion, Chief Judge Gregory provided an honest and scathing critique of policing in “two Americas”:

In a society where some are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles, it is still within their own communities—even those deemed “dispossessed” or “disadvantaged”—that they feel the most secure. Permitting unconstitutional governmental intrusions into these communities in the name of protecting them presents a false dichotomy. My colleague insists on a Hobson’s choice for these communities: decide between their constitutional rights against unwarranted searches and seizures or forgo governmental protection that is readily afforded to other communities.<sup>45</sup>

Police have long been the face of oppression to Black people.

## B. Post–Thirteenth Amendment Policing and Jim Crow

For over a century after slavery was formally abolished by the Thirteenth Amendment, police were the masters of ceremonies of Jim Crow. The Black Codes—criminal laws that applied only to Black people and were intended to control the Black body—allowed police to terrorize Blacks to enforce racial subjugation.<sup>46</sup> These laws were deliberately crafted to return Blacks to slavery by a different name—convict leasing—that echoes in modern prisons today.<sup>47</sup> Police developed coercive techniques to get innocent Blacks to confess to crimes they did not commit. One such technique was torture. Specifically, public lynchings emerged in the 1890s to “extract a confession by whipping or burning” the Black body.<sup>48</sup> Police not only sanctioned this practice, but often participated in the

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45. *United States v. Curry*, No. 18-4233, 2020 WL 3980362, at \*14 (4th Cir. July 15, 2020) (Gregory, C.J., concurring).

46. *Convict Leasing*, EQUAL JUST. INITIATIVE (Nov. 1, 2013), <https://ejl.org/news/history-racial-injustice-convict-leasing> [<https://perma.cc/R6W4-J6ZE>].

47. Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177> [<https://perma.cc/XDA9-3YDW>].

48. Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 276 (2007); see also David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC’Y REV. 793, 811–12 (2005) (documenting the emergence of public torture lynchings in the 1890s and their reliance on “confessions induced under torture”).

mutilation of Black flesh.<sup>49</sup> In *Brown v. Mississippi*,<sup>50</sup> in which admitting coerced confessions as evidence at trial was finally ruled unconstitutional, three Black tenant farmers were convicted of murdering a white planter.<sup>51</sup> The only evidence of this crime were their confessions, which had been obtained through police torture that included repeated hanging and whipping of one of the defendants until he confessed.<sup>52</sup> Police continue to use similar coercive techniques today to get Black people to confess to crimes they did not commit, and rarely face consequences.<sup>53</sup>

### C. Mass Incarceration and the New Jim Crow

The passage of the Civil Rights Act of 1964,<sup>54</sup> which formally ended Jim Crow, ushered in a war that targeted Black people with surgical precision—the War on Drugs. President Richard Nixon wanted to create a strong carceral state to control Black people—“the Angela Davis crowd,” as he put it.<sup>55</sup> John Ehrlichman, White House counsel to President Nixon, confirmed this rationale behind the War on Drugs: “Look, we understood we couldn’t make it illegal to be young or poor or black in the United States, but we could criminalize their common pleasure . . . . We understood that drugs were not the health problem we were making them out to be, but it was such a perfect issue . . . that we couldn’t

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49. *Id.*

50. 297 U.S. 278 (1936).

51. Roberts, *supra* note 48, at 276.

52. *Id.*

53. Kate Storey, ‘When They See Us’ Shows the Disturbing Truth About How False Confessions Happen, *ESQUIRE* (June 1, 2019), <https://www.esquire.com/entertainment/a27574472/when-they-see-us-central-park-5-false-confessions> [<https://perma.cc/GR9L-MRPS>] (exploring the coerced, false confessions of the Central Park Five); see also David Brand, *Appellate Court Reverses Queens Teen’s 2018 Murder Conviction*, *QUEENS DAILY EAGLE* (June 26, 2020), <https://queenseagle.com/all/appellate-court-reverses-queens-teens-2018-murder-conviction> [<https://perma.cc/NE6M-MCD3>] (“At his 2018 trial, Churaman’s attorneys Rhiya Tivedi and Ron Kubby said Churaman was ‘spoon-fed’ information about the home invasion by Detective Barry Brown in order to elicit a videotaped confession.”); Andrew Cohen, *Confessing While Black*, *MARSHALL PROJECT* (Dec. 12, 2014, 8:37 AM), <https://www.themarshallproject.org/2014/12/12/confessing-while-black> [<https://perma.cc/2392-JKUW>] (“Detective McDaniel . . . told Jackson that he needs to confess that he killed Clifford Harvey in self-defense because he cannot get a fair trial in Peoria because he is a young, African American male—something he has no power to change. He told him that the judges and the potential jurors . . . will be working off of stereotypes . . . and not only will the stereotypes apply to him, they will also negate the credibility of any witnesses he might call.”).

54. Pub. L. No. 88-352, 78 Stat. 241.

55. Becky Little, *What the Nixon Tapes Reveal About the Attica Prison Uprising*, *HISTORY* (Sept. 11, 2019), <https://www.history.com/news/nixon-tapes-attica-prison-uprising> [<https://perma.cc/ESU5-WRZJ>].

resist it.”<sup>56</sup> There is general agreement that the War on Drugs is the single most important explanation for mass incarceration.<sup>57</sup>

America became further entrenched in this war under the Reagan, Bush, and Clinton Administrations. All three championed being tough on crime by federalizing more crimes and creating draconian sentencing regimes. Importantly, when waging a war that targets Black people, you need soldiers who are trained in anti-Blackness: police. To that end, this costly war armed the police with the most sophisticated, and largely constitutional, arsenal with which to enforce racial subjugation: racial profiling,<sup>58</sup> stop and frisk,<sup>59</sup> pretextual stops,<sup>60</sup> excessive force,<sup>61</sup> and qualified immunity.<sup>62</sup> Paul Butler refers to these as police superpowers.<sup>63</sup> These superpowers perpetuate Blue-on-Black violence.<sup>64</sup>

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56. Larry Gabriel, *Joining the Fight*, DET. METRO TIMES (Aug. 10, 2011), [http://www.metrotimes.com/detroit/joining-the-fight/Content?oid\\_2148184](http://www.metrotimes.com/detroit/joining-the-fight/Content?oid_2148184) [<https://perma.cc/FEF6-GDN2>].
  57. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 53–58 (2012) (describing the genesis of mass incarceration in the War on Drugs).
  58. See *id.* at 130 (“The dirty little secret of policing is that the Supreme Court has actually granted the police license to discriminate.”).
  59. See *id.* at 63 (“[S]o long as a police officer has ‘reasonable articulable suspicion’ that someone is engaged in criminal activity *and* dangerous, it is constitutionally permissible to stop, question, and frisk him or her—even in the absence of probable cause.” (quoting *Terry v. Ohio*, 392 U.S. 1 (1968))).
  60. See *id.* at 67 (“[P]olice officers use minor traffic violations as an excuse—a pretext—to search for drugs, even though there is not a shred of evidence suggesting the motorist is violating drug laws.”); see also *Whren v. United States*, 517 U.S. 806, 806, 810–13 (1996) (holding that when police officers would have probable cause to stop vehicles for traffic infractions, it is irrelevant whether they do so for pretextual reasons).
  61. See Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1289 (2019) (“[F]ederal courts abdicat[e] their interpretive role and allow[] the administrative policies of police departments to define the meaning of excessive force under the Fourth Amendment.”).
  62. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (“[T]he right the official is alleged to have violated must have been ‘clearly established’ in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” (citation omitted)).
  63. *Professor Paul Butler Installed as the Albert Brick Professor of Law*, GEO. L. (Apr. 17, 2017), <https://www.law.georgetown.edu/news/professor-paul-butler-installed-as-the-albert-brick-professor-of-law> [<https://perma.cc/9ZFU-V86X>].
  64. See generally Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (exploring the process of how police contact and surveillance of Black persons, police culture and training, and immunizing factors within the legal system transform police violence into justifiable force).

Increasingly intense and frequent policing of Black communities has predictably resulted in the mass incarceration of Blacks.<sup>65</sup> The advent of police superpowers has so profoundly reshaped the carceral system as to require a far greater influx of public funds to prisons than to police departments.<sup>66</sup> This expanded carceral system has developed into a sophisticated and subtle means of exploiting Black labor.<sup>67</sup> Just as Jim Crow policing served a policy of controlling Black labor,<sup>68</sup> mass incarceration continues its tradition.<sup>69</sup>

### III. POLICE ABOLITION

Despite extensive evidence to the contrary, some look at this history and view it as evidence that we have come a long way. But reality shows that Blacks are disproportionately stopped by the police, searched by the police, and assaulted by

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65. See ALEXANDER, *supra* note 57, at 98 (“When the War on Drugs gained full steam in the mid-1980s, prison admissions for African Americans skyrocketed, nearly quadrupling in three years, and then increasing steadily until it reached in 2000 a level *more than twenty-six times* the level in 1983.”); PAUL BUTLER, CHOKEHOLD 61 (2017) (“African American men are arrested mainly so that they can be officially placed under government surveillance.”); Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1537 (2016) (“Police stops and arrests of black males are, of course, a means of increasing their incarceration rate.”)
66. See Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 U. CHI. LEGAL F. 165, 187 (“[E]ven with its late start, mass incarceration has greatly outstripped the expansion of public policing. Since 1970, public spending on prisons in the United States has gone up by 375 percent, compared to just 20 percent for police.”); see also Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 566 (2017) (“[W]e cannot solve African-Americans’ vulnerability to mass incarceration and police violence (aspects of our criminal justice system Americans generally view as extraordinary and unnecessary) unless we also solve African-Americans’ vulnerability to police surveillance and contact (aspects of our criminal justice system Americans generally view as ordinary and necessary).”)
67. See James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1530 (2019) (“The present-day prison has become the ultimate company town, where management can force inmates to work, unilaterally set their wages (at zero, if desired), unilaterally set rent, force inmates to buy necessities from the company store, compel inmates to work beyond their normal release dates by driving them into debt, and use them to obtain public money for housing, punishing, and rehabilitating them.”)
68. See Brian Sawers, *Race and Property After the Civil War: Creating the Right to Exclude*, 87 MISS. L.J. 703, 732 (2018) (“Historical documents show that planters demanded broader property rights to control black labor. The timing of the closing of the range in the South is consistent with the labor control thesis, but inconsistent with explanations rooted in economic progress.”); Bennis, *supra* note 47 (“[T]he proliferation of prison labor camps grew during the Reconstruction era following the Civil War, a time when southern states established large prisons throughout the region that they quickly filled, primarily with black men.”)
69. See ALEXANDER, *supra* note 57, at 156–57 (tracing the origins of the exploitation of Black labor under mass incarceration through convict leasing to slavery).

the police, and are much more likely to be killed by police during a routine stop.<sup>70</sup> The fact that George Floyd’s murder inspired mass protests in thousands of cities and towns across America underscores how the epidemic of police violence cannot simply be chalked up to one rogue officer, an isolated incident, or a few bad apples.<sup>71</sup> Millions are recognizing the patterns. And to date, progressive police

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70. See David A. Harris, *Racial Profiling*, in 2 REFORMING CRIMINAL JUSTICE: POLICING 117, 122 (Erik Luna ed., 2017), [https://law.asu.edu/sites/default/files/pdf/academy\\_for\\_justice/Reforming-Criminal-Justice\\_Vol\\_2.pdf](https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_2.pdf) [<https://perma.cc/MWM5-TF34>] (“To observers of these trends, it came as no surprise when, in the 1990s, following directly from the DOJ-based Pipeline training, state police drug-interdiction units seemed to concentrate on highway traffic stops of men from minority groups, particularly African-Americans, but also Latinos.”); Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1248 (2019) (“On nonlethal uses of force, there are racial differences—sometimes quite large—in police use of force, even after controlling for a large set of controls designed to account for important contextual and behavioral factors at the time of the police-civilian interaction. As the intensity of use of force increases from putting hands on a civilian to striking him with a baton, the overall probability of such an incident occurring decreases but the racial difference remains roughly constant.”); Darwin BondGraham, *Black People in California Are Stopped Far More Often by Police, Major Study Proves*, GUARDIAN (Jan. 3, 2020, 1:00 AM), <https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force> [<https://perma.cc/EZ3M-W5VG>] (“According to the new data, black people are much more likely to have firearms pointed at them by police officers. They also are more likely to be detained, handcuffed and searched. At the same time, when the police search black, Latino and Native American people, they are less likely to find drugs, weapons or other contraband compared to when they search white people.”); German Lopez, *There Are Huge Racial Disparities in How US Police Use Force*, VOX (Nov. 14, 2018, 4:12 PM), <https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities> [<https://perma.cc/HF5B-DN43>] (“Black people are much more likely to be shot by police than their white peers.”).

71. While a contemporary reader with even a cursory exposure to current events has no need for extensive documentation of the ubiquity of police violence, future readers might. “There is no question that the number of police killings of civilians in the U.S.—who are disproportionately Black and other people of color—are the result of policies and practices that enable and even encourage police violence. Compared to police in other wealthy democracies, American police kill civilians at incredibly high rates.” Alexi Jones & Wendy Sawyer, *Not Just a Few “Bad Apples”: U.S. Police Kill Civilians at Much Higher Rates Than Other Countries*, PRISON POL’Y INITIATIVE (June 5, 2020), <https://www.prisonpolicy.org/blog/2020/06/05/policekillings> [<https://perma.cc/2RSG-N78R>]. Moreover, American police perceive killing people as community caretaking. See Alexandra L. Klein, *Volunteering to Kill 19* (unpublished manuscript) (on file with author) (explaining that law enforcement officers who have participated in firing squads “connect the community functions of policing with executions.”). It is particularly telling that American police have nearly universally responded to protests against their use of violence on Black bodies with excessive force. During the protests in the aftermath of George Floyd’s murder at the hands of Minneapolis police, police around the country have turned to attacking journalists. Trevor Timm, *We Crunched the Numbers: Police—Not Protesters—Are Overwhelmingly Responsible for Attacking Journalists*, INTERCEPT (June 4, 2020, 4:00 PM), <https://theintercept.com/2020/06/04/journalists-attacked-police-george-floyd-protests> [<https://perma.cc/SBG7-PCWX>]. In nearly every major U.S. city, police have turned tear gas—banned as a weapon of war by the Chemical Weapons Convention—on crowds of protesters. K.K. Rebecca Lai et al., *Here Are the 100 U.S. Cities Where Protesters Were*



reform measures have simply not worked. One frequently suggested remedy is reform in police hiring, focusing on local citizens so that the composition of police departments accurately reflects their cities' populations.<sup>72</sup> Yet even in cities with police forces that are more representative of their populations' racial diversity, the problem of police violence continues, in part because of fundamental failings of even "community policing" reforms.<sup>73</sup> The Minneapolis Police Department embraced and implemented progressive police reforms—from community policing and diversity, to implicit bias and de-escalation trainings, to bans on

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*Tear-Gassed*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/interactive/2020/06/16/us/george-floyd-protests-police-tear-gas.html> [<https://perma.cc/7F8B-JMND>]; Marissa J. Lang, 'What choice do we have?': Portland's 'Wall of Moms' faces off with federal officers at tense protests, WASH. POST (July 22, 2020), <https://www.washingtonpost.com/nation/2020/07/22/portland-moms-protests>.

72. See, e.g., Alan Berube & Natalie Holmes, *Minority Under-Representation in City and Urban Policing*, BROOKINGS (July 14, 2016), <https://www.brookings.edu/blog/the-avenue/2016/07/14/minority-under-representation-in-city-and-suburban-policing> [<https://perma.cc/VS6M-9XCG>] ("Thus, places with the widest demographic disparities between law enforcement officers and local residents may need to pay special attention to their community policing strategies, as well as consider more proactive efforts to hire and retain diverse members of those communities.").
73. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2126 & n.253 (2017) (summarizing previous scholarship on the vague and contradictory meanings attached to "community policing"); Sarah Childress, *The Problem With "Broken Windows" Policing*, FRONTLINE (June 28, 2016), <https://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing> [<https://perma.cc/N4L6-NES9>] (describing the damage done to community relationships through broken windows policing and its failure to reduce crime); *Five Years After Ferguson, Policing Reform Is Abandoned*, EQUAL JUST. INITIATIVE (Aug. 12, 2019), <https://ej.org/news/five-years-after-ferguson-policing-reform-abandoned> [<https://perma.cc/KJM6-RVE6>] (detailing the failure of the reforms proposed in the wake of Michael Brown's extrajudicial execution and the subsequent failure of will to enact reform); cf. GOVERNING, DIVERSITY ON THE FORCE: WHERE POLICE DON'T MIRROR COMMUNITIES 6–12 (2015), <https://www.governing.com/gov-data/safety-justice/police-department-officer-demographics-minority-representation.html> [<https://perma.cc/2XA4-7HEL>] (documenting the racial composition of major urban police departments, including majority-minority departments in Atlanta, New Orleans, and Washington); John Burnett, *What Happened on New Orleans' Danziger Bridge?*, NPR (Sept. 13, 2006, 1:28 AM), <https://www.npr.org/templates/story/story.php?storyId=6063982> [<https://perma.cc/M4WA-4DYV>] (investigating the death of a mentally disabled Black man who was shot seven times—five in the back—by New Orleans police in the aftermath of Hurricane Katrina); *Ex-Atlanta Officers Get Prison Time for Cover-Up in Deadly Raid*, CNN (Feb. 24, 2009), <https://www.cnn.com/2009/CRIME/02/24/atlanta.police> [<https://perma.cc/M75Y-WEH4>] (reporting on sentencing of Atlanta police officers who killed an innocent ninety-two-year-old Black woman in her own home); Ella Fassler, *D'Quan Young Was Killed by an Off-Duty DC Cop 10 Months Ago. His Mother Still Has No Answers.*, THINKPROGRESS (Apr. 1, 2019, 8:00 AM), <https://archive.thinkprogress.org/dc-police-department-secrecy-transparency-cop-killings-dquan-young-b4ddcd7dc0a7> [<https://perma.cc/QW5N-YPEX>] (describing the opacity surrounding the killing of a Black man by an off-duty police officer in Washington, D.C. and the inadequacies of potential procedural reforms without substantive reforms).

“warrior style” policing, among other things—and still George Floyd was murdered.<sup>74</sup>

Police violence is systemic and can only be stopped by a systemic racial justice intervention. The Thirteenth Amendment is built for this moment—it is a “tool for progressive political mobilization”<sup>75</sup> that must be used to combat racial terror by the police. It is important to underscore that while racist policing practices might seem like a textbook problem for Congress to address under its Fourteenth Amendment authority to provide for equal protection under the law, there are both social and legal reasons to prefer a Thirteenth Amendment remedy. First, the trauma of slavery was inadequately addressed during Reconstruction, then compounded by Jim Crow and the New Jim Crow—“Black Americans have never received true reconciliation . . .”<sup>76</sup> To move toward a future where respect for human rights and a pluralistic society is possible, America must directly grapple with the roots of modern policing in the institution of slavery.<sup>77</sup> While truth and reconciliation alone are insufficient to achieve restorative justice, they “are valuable practices that can help resolve some aspects of conflict by facilitating healing.”<sup>78</sup> A process of truth and reconciliation can—and should—identify and address systemic and institutional failures, rather than merely the acts of individuals.<sup>79</sup> To heal the damage of racist policing, we must acknowledge and address it as one of the badges and incidents of slavery. Second, if Congress seriously wants to address the problems of racist policing, its power to do so is broader under the Thirteenth Amendment than under the Fourteenth

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74. Philip V. McHarris & Thenjiwe McHarris, Opinion, *No More Money for the Police*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/opinion/george-floyd-police-funding.html> [<https://perma.cc/75PV-Z9SV>].

75. Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1737 (2012).

76. Benjamin Zinkel, Comment, *Apartheid and Jim Crow: Drawing Lessons From South Africa’s Truth and Reconciliation*, 2019 J. DISP. RESOL., no. 1, at 229, 255.

77. Cf. Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.) (declaring that South Africa’s Truth and Reconciliation Commission was necessary for such a purpose: “SINCE the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex; AND SINCE it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future . . .”).

78. Emily B. Mawhinney, Comment, *Restoring Justice: Lessons From Truth and Reconciliation in South Africa and Rwanda*, 36 HAMLIN J. PUB. L. & POL’Y, no. 2, 2015, at 21, 23.

79. Zinkel, *supra* note 76, at 247–48 (comparing the Greensboro Truth and Reconciliation Commission’s efforts to address systemic racism with the South African Truth and Reconciliation Commission’s focus on individual instances of human rights abuses).

Amendment.<sup>80</sup> The *Civil Rights Cases* clarified Congress's broad power to remedy the badges and incidents of slavery—and while the Court's initial conclusion that discriminatory treatment was not such a badge or incident, an error it corrected in *Jones*, it identified “[c]ompulsory service,” “restraint of . . . movements” and other burdens.<sup>81</sup> Modern day policing, as this Essay has illustrated, is one such badge or incident.

Congress should enforce the Thirteenth Amendment by effectively abolishing racially discriminatory policing that exists today. What might this look like in practice? Many people feel nervous when they hear the word abolition, believing it demands the disbandment of all police forces overnight. But there are a number of common-sense legislative measures Congress has the authority to take that would transform policing into an institution that is far less likely to serve as an instrument of violence against Black bodies. Specifically, Congress should ban discriminatory policing practices such as stop and frisk<sup>82</sup> and racial profiling,<sup>83</sup>

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80. Since *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress has seen its power to enforce the guarantees of the Fourteenth Amendment constrained by the Court's interpretation of the underlying rights protected. The inadequacy of the Fourteenth Amendment under current U.S. Supreme Court jurisprudence, combined with the breadth of Congress's Thirteenth Amendment power, favors the use of the latter to legislate against unjust policing. See Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1144 (1992) (“[T]he Fourteenth Amendment's notable successes pale in comparison to the promise it originally offered. Indeed, the amendment's marred record raises questions about the ability of constitutionalism and judicial review to succeed.”); cf. Jason Mazonne & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 329 (2017) (arguing that Congress's Fourteenth Amendment powers may still have enough force after *Boerne* to support a remedy for police misconduct). Because this issue requires greater exploration, I have chosen to address it in another article. See *supra* note 10.

81. The Civil Rights Cases, 109 U.S. 3, 22 (1883).

82. See Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 WM. & MARY BILL RTS. J. 689, 731 (2016) (arguing that discriminatory policies such as stop-and-frisk should be abandoned not only for their unconstitutionality, but because they produce no tangible benefit while greatly harming the health of those they target); see also *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016) (Sotomayor, J., dissenting) (“The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.”).

83. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 33–47 (2004). For an explanation of how racial profiling is a systemic problem beyond the biases of individual officers, see Carbadó, *supra* note 64, at 1486–90.

end qualified immunity,<sup>84</sup> abrogate the *Monell* standard<sup>85</sup> and sovereign immunity,<sup>86</sup> and disarm police of military weapons.<sup>87</sup> These steps will, among other things, disincentivize racist policing, remove legal barriers so that victims of constitutional violations can seek redress against police officers, cities, and states, and disarm police of their superpowers. To go further, legislators should approve reparations for victims of past police terror.

In addition, Congress should withhold federal funds from all state and local law enforcement until the following mandatory actions are taken. First, the creation of civilian commissions, which would “transfer power from the police to the communities most affected by mass incarceration,” as K. Sabeel Rahman and Jocelyn Simonson have written, by giving communities “the ability to set policies, discipline officers, and control police budgets.”<sup>88</sup> These commissions would be able to replace a significant portion of the police force with community-oriented services like social workers, educators, and violence intervention specialists, which are better able to respond to many situations currently handled by police. It is well documented that police are terribly equipped to handle much police work, including resolving domestic and school disputes.<sup>89</sup> Moreover, it is crucial that

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84. See generally Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (laying out qualified immunity’s lack of common law roots, failure to achieve its policy goals, and constitutional unsavoriness while rejecting alternative defenses of the doctrine).
85. *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978) (holding that a local government may not be held liable for injuries inflicted by its employees or agents unless those individuals’ actions reflect official policy or custom).
86. See Katherine Mims Crocker, *Beyond Qualified Immunity* (forthcoming) (on file with author) (arguing that Congress should abrogate *Monell* and sovereign immunity at least for excessive-force claims).
87. Catie Edmondson, *Lawmakers Begin Bipartisan Push to Cut Off Police Access to Military-Style Gear*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/us/politics/police-military-gear.html> [https://perma.cc/7TWD-N3J6].
88. K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 681 (2020). Congress has the ability to condition federal police funding on their creation. See *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (holding that the indirect imposition of a minimum drinking age by encouraging state action was a valid exercise of Congress’s spending power).
89. See TK LOGAN & ROB VALENTE, WHO WILL HELP ME?: DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 2 (2015), <http://www.thehotline.org/wp-content/uploads/sites/3/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf> [https://perma.cc/ZE8X-SXQX] (“More than half said calling the police would make things worse[.]”); Melissa Jeltsen, *Don’t Use Domestic Violence Victims to Derail Police Reform*, HUFF. POST (June 5, 2020, 6:23 PM), [https://www.huffpost.com/entry/domestic-violence-defund-police\\_n\\_5eda8fe1c5b692d897d2de13](https://www.huffpost.com/entry/domestic-violence-defund-police_n_5eda8fe1c5b692d897d2de13) [https://perma.cc/2AYY-KMRW] (“Claims that ‘defunding the police’ will harm women ignore dire problems in policing gender-based crimes today.”); Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html>

commissions are given the space to reimagine public safety and think about community-based measures that can be transformative. Here, commissions can reduce police budgets and reinvest funds in education, health care, housing, employment, community health, mental health, and other social services.<sup>90</sup> Second, the implementation of annual implicit bias, sensitivity, and deescalation trainings. Finally, the development of a data system that accurately tracks race in police contacts, including traffic stops, citations, searches, warrants, use of force and killings, and arrests, as well as the officers involved.

Congress can also incentivize certain actions. First, Congress should lead by example—decriminalize all federal drug possession offenses. In so doing, Congress should provide additional resources to states that decriminalize minor offenses, including drug possession, traffic, and quality-of-life violations. This will help end the “broken windows” policing that has led to mass criminalization. Second, Congress should encourage states to end armed enforcement of traffic and quality-of-life violations. Too often Black lives are taken by “shoot first, think later” police officers during these routine encounters.<sup>91</sup> Wayne Jones, Malissa Williams, Philando Castile, and Rayshard Brooks, to name a few. Even the HBO hit *Watchmen*, a pro-police show, imagines a world in which police officers are

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[<https://perma.cc/3G8C-WQVG>] (discussing studies showing that students of color and those with disabilities “are more likely to be harshly punished for ordinary behavior” and a report from the Congressional Research Service showing that the presence of school resource officers produces no documented reduction in crime or student discipline).

90. For example, this sort of community-driven model of public health and safety will be adopted by Minneapolis following a vote of their city council to disband the police department. The details remain open to public comment and discussion. See Tommy Beer, *Minneapolis City Council Unanimously Votes to Replace Police With Community-Led Model*, FORBES (June 12, 2020, 5:25 PM), <https://www.forbes.com/sites/tommybeer/2020/06/12/minneapolis-city-council-unanimously-votes-to-replace-police-with-community-led-model/#580fi9be71a5> [<https://perma.cc/M44E-Y353>]. The movement is not confined to Minneapolis, with other cities taking varied approaches. Compare Daniel Beekman, *Seattle City Council Homes in on Police Department Cuts as Defunding Proponents and Skeptics Mobilize*, SEATTLE TIMES (July 18, 2020, 6:00 AM), <https://www.seattletimes.com/seattle-news/politics/seattle-city-council-homes-in-on-police-department-cuts-as-defunding-proponents-and-opponents-mobilize/> [<https://perma.cc/55CZ-47BB>] (“Last week, seven of nine council members said they would support a high-level proposal—laid out by the coalitions Decriminalize Seattle and King County Equity Now—to cut police spending by 50% and redirect the money to alternative 911 responders, community services and affordable housing.”), with Tyler Waldman & Robert Lang, *City Council Approves \$22.4M in Cuts to Police, Prosecutors*, WBAL (June 15, 2020), <https://www.wbal.com/article/464307/124/city-budget-committee-makes-227m-in-cuts-to-police-prosecutors> [<https://perma.cc/MFW5-TN36>] (discussing cuts to police overtime and the elimination of entire units without the ability to reallocate funding to specific non-police services in Baltimore).

91. *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

disarmed and must seek—and be granted—permission to access their service weapon during traffic stops.<sup>92</sup>

Lastly, Congress should create a new division of the Department of Justice (DOJ) dedicated to investigating and prosecuting civil rights violations by the police. Such a division would replace the current Community Oriented Policing Services (COPS)<sup>93</sup> and absorb the police oversight functions of the Civil Rights Division’s Special Litigation Section. Where COPS currently awards grants, the new division would act as a gatekeeper for all federal funding to local police departments. The new division could both bring civil suits against police agencies for pattern and practice violations and independently initiate criminal prosecutions on its own authority against police officers. This is important to avoid different branches of the DOJ reaching opposing conclusions in the same case and, thus, failing to prosecute, as we have recently seen with the police killing of Eric Garner.<sup>94</sup> The division would need to be granted independence from the Attorney General to carry out its mission, with its members removable only for cause.<sup>95</sup> As it did with the Voting Rights Act, which targeted jurisdictions with

92. See *Watchmen: It’s Summer and We’re Running Out of Ice* (HBO television broadcast Oct. 20, 2019) (depicting a traffic stop in which the officer must address the likely presence of drugs, alcohol, firearms, or explosives and his perceived threat level—all of which he rates as “high”—before his handgun is released).

93. See *About the COPS Office*, COPS, <https://cops.usdoj.gov/aboutcops> [<https://perma.cc/8KL2-JMBZ>] (last visited July 22, 2020) (explaining the role of the COPS Office).

94. See Katie Benner, *Eric Garner’s Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/nyregion/eric-garner-case-death-daniel-pantaleo.html> [<https://perma.cc/E4Z9-7UQ6>] (discussing how Attorney General Barr declined to press charges in Eric Garner’s death after federal prosecutors in Brooklyn and those in the civil rights division of the Department of Justice (DOJ) had an internal disagreement over whether to go forward with the case).

95. This is important in light of growing concerns that the independence of the DOJ is eroding. See Scott Harshbarger, *Why 27 Distinguished DC Lawyers Filed a Complaint with Bar Association Against Attorney General Barr*, JUST SEC. (July 22, 2020), <https://www.justsecurity.org/71598/why-we-filed-a-complaint-with-the-dc-bar-against-attorney-general-william-barr/> [<https://perma.cc/P552-PGHN>] (“All of these matters are part of Mr. Barr’s pattern of placing the president’s personal and political interests ahead of his ethical duty to represent the interests of the United States in dispensing evenhanded justice under the rule of law and upholding the Constitution.”); Adam Klansfeld, *‘Spectacularly Backfired’: Prosecutor’s Firing Sparks Rebellion at SDNY*, COURTHOUSE NEWS SERV. (June 22, 2020), <https://www.courthousenews.com/spectacularly-backfired-prosecutors-firing-sparks-rebellion-at-sdny/> [<https://perma.cc/W4UT-EL2F>] (“Three years apart, two Manhattan U.S. attorneys refused requests from Washington to quietly step down from their posts in extraordinary flare-ups of rebellion. Both involved whispers of political interference with cases of interest to the president. Both resulted in the prosecutors being fired, and both men wound up replaced by their trusted deputies.”); Neil Vigdor, *These Are the Roger Stone Prosecutors Who Quit the Case*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/us/politics/roger-stone-federal-prosecutors.html> [<https://perma.cc/7WS9-4ETR>] (“On Tuesday, the four main federal prosecutors working on the obstruction and perjury case

historically racist election laws, Congress should also develop a preclearance formula that takes account of all the data points noted above, and should direct this new DOJ division to review them before federal funding is released. Increased information-gathering would also allow this division to open pattern and practice investigations against police departments that continually discriminate against Black and Brown people.

All of these steps would move us closer to a world where *all* communities have the resources they need to be safe. A world where “the talk” does not exist.<sup>96</sup> A world where we are not dehumanized or killed. A world where police are simply not needed and public safety is reimaged. A world where we are free. It is a world worth imagining.

### CONCLUSION

Black lives have historically never mattered to police—we have always been the property, the subject, or the enemies of their war. It is time to abolish the institution of policing and replace it with true racial equality and justice. If Black lives actually matter, then Congress must look to the Thirteenth Amendment to implement radical changes in policing. Perhaps this is Thirteenth Amendment Optimism.<sup>97</sup> Perhaps this is our chance to call on our democratic institutions to affirm Black humanity. Until then, as Colson Whitehead lamented in *The Nickel Boys*, “[e]ven in death [we all should be] trouble[d].”<sup>98</sup>

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of Roger J. Stone Jr. shared another distinction: They quit the case. The abrupt withdrawals came after the Justice Department overruled their recommendation for a stiffer sentence for Mr. Stone, a longtime friend and informal adviser of President Trump.”)

96. “For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.” *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

97. See *generally* Greene, *supra* note 75. Thirteenth Amendment Optimism is, broadly, the view: . . . that the Thirteenth Amendment may be read to prohibit not just slavery and involuntary servitude but also racial profiling, felony disenfranchisement, hate speech, child labor, child abuse, anti-abortion laws, domestic violence, prostitution, sexual harassment, the use of police informants, anti-anti-discrimination laws, the denial of health care, the Confederate flag, the use of orcas at SeaWorld, and even laws permit-ting physician-assisted suicide.

*Id.* at 1733–34.

98. COLSON WHITEHEAD, *THE NICKEL BOYS* 3 (2019).