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## Reimagining Public Safety

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## REIMAGINING PUBLIC SAFETY

*Brandon Hasbrouck*

**ABSTRACT**—In the aftermath of George Floyd’s murder, abolitionists were repeatedly asked to explain what they meant by “abolish the police”—the idea so seemingly foreign that its literal meaning evaded interviewers. The narrative rapidly turned to the abolitionists’ secondary proposals, as interviewers quickly jettisoned the idea of literally abolishing the police. What the incredulous journalists failed to see was that abolishing police and prisons is not aimed merely at eliminating the collateral consequences of other social ills. Abolitionists seek to build a society in which policing and incarceration are unnecessary. Rather than a society without a means of protecting public safety, abolitionists desire a society where the entire public is safe. That safety requires security in all our material needs, not merely protection from private violence.

Abolition democracy challenges us to envision a society where all people have the respect, education, economic resources, civil rights, and franchise necessary to participate fully in all significant aspects of public life—a society in which we are both safe and free. This challenge to our worldview is further compounded by the prevalence of inequality and a culture of violence in American society. In this Article, I meet that challenge with a groundbreaking look at how such a vision requires us to look at public safety not as a zero-sum game between liberty and security, but as a collaborative promotion of life, liberty, and pursuit of happiness for all.

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“[W]here life is precious, life is precious.”

—Ruth Wilson Gilmore<sup>†</sup>

### INTRODUCTION

Roberta Drury was picking up groceries to make her dinner, just like people do every day.<sup>1</sup> Ruth Whitfield and Celestine Chaney were similarly going about their mundane chores.<sup>2</sup> Heyward Patterson was helping another member of his community load groceries into his car after giving him a ride.<sup>3</sup> Aaron Salter Jr., a retired police officer, was working as a security guard at the Tops grocery store.<sup>4</sup> They, and five others like them, are all dead now because of a young white supremacist with an assault rifle.<sup>5</sup> As usual, the police took the killer into custody alive.<sup>6</sup>

Whom did the police make safer? No one, save perhaps the shooter. Whom did the potential of criminal legal proceedings make any safer? Surely not the shoppers and employees of Tops. Not even the “good guy with a

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<sup>†</sup> Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [https://perma.cc/BZF9-RNYP].

<sup>1</sup> Mihir Zaveri, Emma Bubola & Ali Watkins, ‘*All These Innocent Lives*’: *These Were the Victims in the Buffalo Attack*, N.Y. TIMES (May 15, 2022), <https://www.nytimes.com/2022/05/14/nyregion/victims-buffalo-shooting.html> [https://perma.cc/Z838-2VX2].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Jesse McKinley, *Grief and Anger Sweep Through Buffalo a Day After a Racist Massacre*, N.Y. TIMES (May 23, 2022), <https://www.nytimes.com/live/2022/05/15/nyregion/shooting-buffalo-ny/grief-and-anger-sweep-through-buffalo-a-day-after-a-racist-attack?> [https://perma.cc/3KH4-WHFW].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; Bruce C.T. Wright, *Violent White Folks Who Were Taken into Custody with Loving Care by Police*, NEWSONE (July 6, 2022), <https://newsone.com/playlist/white-arrested-with-by-police/> [https://perma.cc/5CCS-JBVA] (contextualizing the Buffalo shooter’s violence and soft treatment by police by presenting over two dozen incidents of violent white people given similarly soft treatment during their arrests).

gun”—with all the training of a law enforcement career—could save himself or those around him. Massive police budgets and draconian sentencing could not save the worshippers at Emmanuel Baptist Church,<sup>7</sup> those in the Tree of Life Synagogue,<sup>8</sup> nor the shoppers at the El Paso Walmart.<sup>9</sup> The white men behind those attacks all experienced conditions of alienation, became radicalized online, and had ready access to firearms. Law enforcement cannot alleviate those problems. We cannot police our way out of mass shootings, nor does it make any sense to try. Violence and coercion cannot cure violence and coercion.<sup>10</sup>

And yet America insists that more policing and more prisons can remedy the epidemic of substance use disorders, gang violence, and domestic violence. The preferred solution of the past six decades is to increase the number of roving agents of the state armed and authorized to violently enforce order. In a country where “order” exists along lines of race and caste, the results are predictable. Police startled Amir Locke in his home while executing a no-knock warrant, fatally shooting him before he had a chance to comply with their commands.<sup>11</sup> Michael Shane Carver was killed for trying to pull away during a traffic stop.<sup>12</sup> Police gunned down Mizael Corrales for backing up in a stolen car while they were trying to restrain him.<sup>13</sup> Police—rather than the requested crisis intervention team—

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<sup>7</sup> See Matt Zapposky, *Charleston Church Shooter: 'I Would Like to Make It Crystal Clear, I Do Not Regret What I Did,'* WASH. POST (Jan. 4, 2017), [https://www.washingtonpost.com/world/national-security/charleston-church-shooter-i-would-like-to-make-it-crystal-clear-i-do-not-regret-what-i-did/2017/01/04/05b0061e-d1da-11e6-a783-cd3fa950f2fd\\_story.html](https://www.washingtonpost.com/world/national-security/charleston-church-shooter-i-would-like-to-make-it-crystal-clear-i-do-not-regret-what-i-did/2017/01/04/05b0061e-d1da-11e6-a783-cd3fa950f2fd_story.html) [<https://perma.cc/N5C4-8LPE>].

<sup>8</sup> See Peter Smith & Mark Scoloro, *3 Years After Pittsburgh Synagogue Attack, Trial Still Ahead*, WHY? (Oct. 22, 2021), <https://why.org/articles/3-years-after-pittsburgh-synagogue-attack-trial-still-ahead/> [<https://perma.cc/B4VY-5P57>].

<sup>9</sup> See Vanessa Romo, *El Paso Walmart Shooting Suspect Pleads Not Guilty*, NPR (Oct. 10, 2019, 4:31 PM), <https://www.npr.org/2019/10/10/769013051/el-paso-walmart-shooting-suspect-pleads-not-guilty> [<https://perma.cc/G9UN-T5GB>].

<sup>10</sup> That problem persists beyond the context of white-supremacist mass shootings. See, e.g., *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 348–50 (4th Cir. 2021) (Gregory, C.J., concurring) (highlighting the failure of overpolicing—even by comparison to similar cities—to alleviate Baltimore’s violence in the face of massive underlying inequality).

<sup>11</sup> Holly Bailey, *What to Know About the Police Shooting of Amir Locke During a 'No-Knock' Raid*, WASH. POST (Apr. 6, 2022, 1:05 PM), <https://www.washingtonpost.com/nation/2022/02/15/amir-locke-police-shooting-explainer/> [<https://perma.cc/K9GK-GD3L>].

<sup>12</sup> *Officials Release IDs of Deputy and Suspect After Deadly Shooting During Traffic Stop*, WSOC-TV (Feb. 7, 2022, 2:41 PM), <https://www.wsoc.com/news/local/suspect-shot-killed-officer-involved-shooting-lincolnton-deputies-say/5WVSD3CL5NFDBDVWL4QMNIU5SA/> [<https://perma.cc/UGG2-RR3L>].

<sup>13</sup> Teri Figueroa, *'Why 13 Times?' Family of San Diego Man Fatally Shot as He Fled Sheriff's Deputies Seeks Answers*, SAN DIEGO UNION-TRIB. (July 15, 2022, 4:42 PM), <https://www.sandiegouniontribune.com/news/public-safety/story/2022-07-15/why-13-times-family-of-san-diego-man-fatally-shot-as-he-fled-sheriffs-deputies-seeks-answers> [<https://perma.cc/T3AN-GS3G>].

responding to a domestic disturbance fatally shot Shawn Wilson when he brandished a knife.<sup>14</sup> Police ran Derek Stortzum’s car off the road when he tried to elude them, killing him in the resulting collision.<sup>15</sup> Ralph Ennis, a seventy-seven-year-old man who suffered from dementia, died of a brain hemorrhage after sheriff’s deputies tackled him for failing to obey their commands.<sup>16</sup>

No jury in the country could have sentenced any of these people to death for their actions, yet police killed them all without any further process. Then, the same agency that killed Shawn Wilson shot a pregnant, unarmed Black woman five times just three and a half months later.<sup>17</sup> Police perpetuate unjust violence rather than protecting the public from it. Compounding the issue, those “lucky” enough to walk away with their lives must bear the emotional, mental, and financial costs of police violence—costs that the judiciary seldom charges back to the perpetrators.<sup>18</sup>

Policing as public safety persists because the few people it was designed to protect—mostly wealthy, white men—still reap its benefits. These are largely the same interests that benefited from policing’s original purpose: controlling workers, whether the threat they represented came from rebellion against their enslavement or unionization. Democracy—if it meant any more influence in the significant decisions affecting the lives of ordinary people than could be accomplished by voting for representatives—was and remains a threat to capital.<sup>19</sup> Through policing, the few may buy their security at the expense of the liberty and security of the many.

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<sup>14</sup> Emily Rittman & Nick Sloan, *Mother Wants Answers After Son Killed by Kansas City Police*, 13 WIBW (Feb. 12, 2022, 12:48 PM), <https://www.wibw.com/2022/02/12/mother-wants-answers-after-son-killed-by-kansas-city-police/> [https://perma.cc/2GEU-JG2X].

<sup>15</sup> Daniel Fair & Stephanie Nutt, *Florida Man Dies After Crash During Chase*, KSN.COM (Feb. 28, 2022, 8:10 AM), <https://www.ksn.com/news/one-person-dead-after-crash-during-police-chase/> [https://perma.cc/9S22-TU2V].

<sup>16</sup> Jack Moore, *Bodycam Shows Virginia Deputies Slamming 77-Year-Old Man into Truck*, WTOP NEWS (May 5, 2022, 4:09 PM), <https://wtop.com/virginia/2022/05/bodycam-shows-virginia-deputies-slamming-77-year-old-man-into-truck/> [https://perma.cc/4VRZ-GUNJ].

<sup>17</sup> Kalyn Womack, *Pregnant Black Woman Shot Five Times by Missouri Police*, ROOT (May 31, 2022, 1:32 PM), <https://www.theroot.com/pregnant-black-woman-shot-five-times-by-missouri-police-1848996287> [https://perma.cc/W2SG-PRA9].

<sup>18</sup> See Thomas Crocker, *The Fourth Amendment and the Problem of Social Cost*, 117 NW. U. L. REV. 473, 477–78 (arguing that the Supreme Court’s Fourth Amendment doctrine unfairly weighs the social cost of lawbreaking by citizens more heavily than the cost of illegality by police).

<sup>19</sup> Elections alone cannot create democracy, as they remain susceptible to the influence of the powerful. The recent electoral failure of projects to abolish the police in Minneapolis and exercise progressive prosecutorial discretion in San Francisco serve as object lessons in the ability of antidemocracy to win elections. See N’dea Yancey-Bragg, *Push to Disband Minneapolis Police Fails Despite Calls for Reform After George Floyd Death*, USA TODAY (Nov. 3, 2021, 7:36 AM),

As the harms of policing have become more apparent, activists have begun to call for the elimination of policing in its current form. Whether that comes as a call to defund the police or for complete abolition, our public debate on policing now admits the possibility that we should consign our police departments to the scrapheap of history. The legal academy, too, has taken notice. Professors Tracey Meares and Gwen Prowse explore rebuilding policing as an institution focused on specific public goods instead of one built around using force to promote isolation, segregation, and surveillance.<sup>20</sup> Professor Barry Friedman pursues this philosophical investigation into an exploration of what public safety could mean—and why the default view of “protection” as the encomium of the field fails.<sup>21</sup> Professor Allegra McLeod argues that abolition democracy requires a concept of justice as a collective quality of a society rather than the individualized reactions of police and prisons.<sup>22</sup> V. Noah Gimbel and Craig Muhammad advocate for public health and community-empowerment interventions as an alternative to policing.<sup>23</sup> Professor Amna A. Akbar goes even further, calling for a redistributive agenda as a remedy for our nation’s historical abuses in the interest of the propertied classes.<sup>24</sup> Considered together, these academic explorations are clearly beginning the work of imagining an abolitionist public safety—though it is only beginning.

This work largely coalesces around the body of academic explorations of abolition democracy. While this Article explores the concept of abolition democracy in greater depth in Part III, readers new to the concept may benefit from a working definition before reading onward. Abolition democracy is the creation of life- and liberty-affirming institutions that ensure all people have the respect, education, economic security and resources, civil rights, and franchise necessary to be free, informed, and

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<https://www.usatoday.com/story/news/nation/2021/11/02/minneapolis-police-proposal-dismantle-department-fails/8564868002/> [<https://perma.cc/YFX7-GCHH>]; Musadiq Bidar, *San Francisco Votes Overwhelmingly to Recall Progressive DA Chesa Boudin*, CBS NEWS (June 8, 2022, 11:37 AM), <https://www.cbsnews.com/news/chesa-boudin-san-francisco-da-recalled/> [<https://perma.cc/9LEC-KRKT>].

<sup>20</sup> See Tracey Meares & Gwen Prowse, *Policing as Public Good: Reflecting on the Term “To Serve and Protect” as Dialogues of Abolition*, 73 FLA. L. REV. 1, 22 (2021).

<sup>21</sup> See Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725, 733 (2022).

<sup>22</sup> See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1618 (2019).

<sup>23</sup> See V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1467 (2019).

<sup>24</sup> See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98 (2020).

active participants in all significant aspects of public life.<sup>25</sup> It is both the creation of these institutions and the removal of the injustices which hinder their creation.<sup>26</sup>

This Article builds on the work of other scholars of public safety and abolition democracy, but also recognizes the need for abolition democracy to embrace a radical transformation of institutions from the outset, beyond even the call for non-reformist reforms. Take, for instance, the work of Professor Barry Friedman, who calls on us to expand our notion of public safety beyond simply the function of protection currently administered by the carceral state.<sup>27</sup> But where Friedman's focus is on other things "vital to individual safety,"<sup>28</sup> this Article expands the notion of public safety to also include those things vital to the safety of the *community*. This shift in scope mirrors the expansion from restorative justice to transformative justice: not only must individuals be made whole, but communities must be protected by preventing future harms. Professor Allegra McLeod acknowledges the material security component of the abolition democracy project,<sup>29</sup> then focuses almost entirely on the efforts of abolitionist groups to remedy carceral and interpersonal violence.<sup>30</sup>

Framing abolitionist organizing with such primacy for remedying violence disserves the efforts and demands of radical liberationist movements past and present, whose mutual aid programs and focus on material security are every bit as important as their anti-violence organizing. Professor Amna Akbar identifies this transformative quality in her discussion of non-reformist reforms, along with the relationship between abolition and socialism.<sup>31</sup> Akbar's description of this process in terms of an existing system to undermine and a horizon to build towards by doing so, however, obscures how the initial work of building the just institutions of the horizon system is potentially a precursor to dismantling oppressive systems in the present. Abolition is not just the process of tearing down injustice, but

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<sup>25</sup> See W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 182–89 (The Free Press 1998) (1935) (discussing the push by leading abolitionists to ensure that emancipation came with the necessary education, civil rights, and economic resources for formerly enslaved Black people to become full citizens and voters in a new social and political order). "The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States." *Id.* at 189.

<sup>26</sup> See McLeod, *supra* note 22, at 1615 ("Justice for abolitionists is an integrated endeavor to prevent harm, intervene in harm, obtain reparations, and transform the conditions in which we live.").

<sup>27</sup> See Friedman, *supra* note 21, at 757.

<sup>28</sup> *Id.*

<sup>29</sup> See McLeod, *supra* note 22, at 1622 (discussing abolitionist organizations' pairing of an end to carceral violence with meeting the material needs of marginalized people among their lists of demands).

<sup>30</sup> See *id.* at 1623–37.

<sup>31</sup> See Akbar, *supra* note 24, at 103–04.

of building a more just world from the one that exists.<sup>32</sup> Again, these criticisms are not meant to imply that these scholars are on the wrong track, but rather to demonstrate the potential in carrying their ideas further.

We must take care in these explorations to recognize the problems we actually seek to redress. Merely treating policing as a social evil to be excised is unlikely to solve the underlying problems. Many of the calls to defund the police recognize this, at least in part, calling on the expenditures we currently make toward policing to instead be made in a broad array of social services. But even this usually stops short of recognizing the scope of the problem: policing is a symptom of a broader antidemocratic social and economic order.<sup>33</sup> Police violence enforces fundamentally unjust hierarchies of property and status, but it is not the only mechanism by which our society does so.<sup>34</sup> A call for the abolition—or even just defunding—of police must

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<sup>32</sup> See Ruth Wilson Gilmore, *Making Abolition Geography in California's Central Valley*, FUNAMBULIST (Dec. 20, 2018), <https://thefunambulist.net/magazine/21-space-activism/interview-making-abolition-geography-california-central-valley-ruth-wilson-gilmore> [<https://perma.cc/BVP4-XGFE>] (“Abolition is not *absence*, it is *presence*. . . . So those who feel in their gut deep anxiety that abolition means knock it all down, scorch the earth and start something new, let that go. Abolition is building the future from the present, in all of the ways we can.”).

<sup>33</sup> But see McLeod, *supra* note 22, at 1635 (discussing Black Youth Project 100 Chicago’s efforts to “democratize the local political economy” in the face of the overall antidemocratic character of public-spending decision-making).

<sup>34</sup> See, e.g., Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 337–38 (2014) (“Individuals within our culture (both members of hierarchically superordinate groups and of subordinate groups, e.g., who have internalized racial stigma) attribute negative, low-status characteristics to subordinated racial groups and have negative affective responses to them. This social practice indirectly affects individuals ascribed subordinated identities by subjecting them to a higher probability of social disadvantage.”); Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 800 (2009) (“[T]he more conscious we are of the possessions of others, the more that the social linkages that property forms may serve to magnify the communication of relative positioning.”); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 336 (2013) (“The criminalization of the poor, the policing of the poor, and the spectacle of punishing the poor serve expressive functions.”); Ben Winters, *Open-ish Government Laws and the Disparate Racial Impact of Criminal Justice Technologies*, 61 IDEA: L. REV. FRANKLIN PIERCE CTR. INTELL. PROP. 507, 509 (2021) (discussing the role of police access to technology in the policing and surveillance of marginalized communities).

It would also be inaccurate to say only that policing protects *property*, for it protects the property of the privileged while threatening the property of the marginalized. See Christopher Ingraham, *Law Enforcement Took More Stuff from People than Burglars Did Last Year*, WASH. POST (Nov. 23, 2015, 6:00 A.M.), <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/> [<https://perma.cc/F3W3-4YME>]; Cassie Miller, *Civil Asset Forfeiture: Unfair, Undemocratic, and Un-American*, SOUTHERN POVERTY L. CTR. (Oct. 30, 2017), <https://www.splcenter.org/20171030/civil-asset-forfeiture-unfair-undemocratic-and-un-american> [<https://perma.cc/VCX6-59Q9>] (“Because of racial profiling, black and Hispanic motorists are disproportionately searched and put at risk of having their cash assets seized, even though black and white drivers are equally likely to be found with narcotics.”).



recognize these broader structures and include a push to replace the entire system of these injustices.

This Article explores the necessary conditions of police abolition. Simply eliminating policing, with no further change, does not address our culture of violence and its underlying conditions. The pervasive nature of violence within American culture precludes any quick-fix solutions, but the process of shifting away from it is a necessary project. Violence has multiple causes,<sup>35</sup> requiring different solutions, but many of the material conditions that precipitate it also contribute to other harms. Remediating those conditions increases safety along multiple axes. This is somewhat apparent upon reflection: when people have better choices, they make better choices. Removing material pressures from people's lives can reduce violence by eliminating desperation and suffering and by creating meaningful alternatives. With these alternatives available, people can strengthen their communities in a virtuous cycle, much like how white suburbs were built in prior generations. Becoming more secure makes people more free—and becoming more free allows them to make themselves more secure—despite eighteenth-century wisdom to the contrary.

What is not contained below is an exhaustive prescription for the means that will achieve the ends of the abolitionist movement. Organizers and activists must continue to experiment, to calibrate their arguments and actions, and to secure liberty as best they can, even if sometimes only in fits and starts. Progress toward that goal is not, and could never be, a clean, straight line. Recognizing that, this Article is primarily concerned with mapping the terrain that we must traverse to achieve an abolition democracy. It examines the narrow and incomplete concept of “freedom” that people in America have been socialized to accept as true liberty. It challenges our collective comfort with violence, which exists in the American consciousness as both a problem and a solution. It gives the newly minted abolitionist the vocabulary and vision that they need to engage with the movement. And in the end, it aims to reimagine what the average citizen might one day mean to convey when they use the words “public safety.”

Part I explores how policing makes us unsafe. Policing's roots in slavery and factory exploitation carry down to the present as an ongoing system of violence against workers and marginalized people. Rather than reducing violence, the carceral violence of policing exacerbates its underlying causes. Part II looks at the prospect of simply removing policing. Without removing the underlying exploitative economic and social

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<sup>35</sup> CURT R. BARTOL & ANNE M. BARTOL, INTRODUCTION TO FORENSIC PSYCHOLOGY: RESEARCH AND APPLICATION 272–73 (2d ed. 2008).

conditions of American society, simply defunding the police is insufficient to bring about abolition democracy. While policing must be abolished, political realities mean that abolition will likely be the final stage of a process which makes policing obsolete. Part III discusses the shape of an abolition democracy and the changes necessary to bring it about, with an exploration of the necessary legal and constitutional structures that entails. This includes an examination of historical struggles in the direction of abolition democracy, including the Bread and Roses Strike, Roosevelt’s Four Freedoms, and the Black Panther Party’s Ten Point Program. Abolition democracy must encompass both liberation and material security: all members of society must have the education, dignity, franchise, material liberty and security, and resources to participate in all significant aspects of social, economic, and political life. In such a world, policing can be rendered obsolete.

#### I. HOW POLICING AS PUBLIC SAFETY MAKES US UNSAFE

*“[The police] are a very real menace to every black cat alive in this country. And no matter how many people say, ‘You’re being paranoid when you talk about police brutality’—I know what I’m talking about. I survived those streets and those precinct basements and I know. . . . And I’ll tell you this—I know what it was like when I was really helpless, how many beatings I got. And I know what happens now because I’m not really helpless. But I know, too, that . . . if he doesn’t know that this is Jimmy Baldwin and not just some other n—he’s gonna blow my head off just like he blows off everybody else’s head. . . . It could happen to my mother in the morning, to my sister, to my brother . . . . For me this has always been a violent country—it has never been a democracy.”*

—James Baldwin<sup>36</sup>

Despite the popular idea that police officers exist to “protect and serve,” policing does not make us safe. It did not make the children at Robb Elementary School in Uvalde, Texas safe when a shooter killed nineteen students and two teachers.<sup>37</sup> Several times, children trapped with the shooter called 911 begging for the police—who waited outside the door to the classroom for over an hour—to help them. Those officers’ training directed

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<sup>36</sup> The Dick Cavett Show, *James Baldwin Discusses Racism | The Dick Cavett Show*, YOUTUBE 13:54 (June 24, 2020) (originally aired on May 16, 1969, on ABC Television), <https://www.youtube.com/watch?v=WWwOi17WHpE> [<https://perma.cc/2H8H-NYA6>].

<sup>37</sup> Holly Yan & Aya Elamroussi, *‘We Failed Those Children’: Agony Is Compounded by Outrage After the Latest Details About the Uvalde Elementary School Massacre*, CNN (May 29, 2022, 9:05 PM), <https://www.cnn.com/2022/05/29/us/uvalde-texas-elementary-school-shooting-sunday/index.html> [<https://perma.cc/LQ5K-V7MP>].

them to move in and neutralize the shooter to save the children,<sup>38</sup> and yet they waited while their colleagues outside restrained distraught parents who had arrived to look for their children.<sup>39</sup> So much for the warrior cop.<sup>40</sup> But the police have no duty to protect the public, regardless of what's printed on the side of their cars.<sup>41</sup> This Part explores the history of policing and how its origins both contribute to this failure to protect the public and expose the public to considerable violence.

The United States maintains one of the most expansive and invasive carceral systems in the world.<sup>42</sup> Its well-documented carceral state involves over ten million arrests per year, over two million people imprisoned, four and a half million individuals on probation, one hundred million with a criminal record, and, unsurprisingly, the world's largest prison population.<sup>43</sup> Policing is the primary way this country addresses its most difficult and embedded social issues, including poverty, substance abuse, and mental illness.<sup>44</sup> The natural result finds the most vulnerable groups subject to the

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<sup>38</sup> *Id.*; TEX. H.R. INVESTIGATIVE COMM. ON THE ROBB ELEMENTARY SHOOTING, INTERIM REP. 18 (July 17, 2022) (finding that active shooter training such as that given to some of Uvalde's officers requires that responders "must have tools and training to immediately make entry and neutralize an active shooter threat").

<sup>39</sup> See Joshua Fechter & Reese Oxner, "The Wrong Decision": Texas DPS Says Local Police Made Crucial Error as School Shooting Continued, TEX. TRIB. (May 27, 2022, 8:00 PM), <https://www.texastribune.org/2022/05/27/uvalde-school-shooting-police-errors/> [<https://perma.cc/C4DG-4DNZ>].

<sup>40</sup> The "warrior cop" mentality represents the idea among police that they are the last resort for law and order in an increasingly dangerous society that is positioned against them. This approach is associated with the rise in the militarization of police and perpetuated by warrior-cop trainings that teach officers war tactics for use on civilians. See Alain Stephens, *The 'Warrior Cop' Is a Toxic Mentality. And a Lucrative Industry.*, TRACE (June 19, 2020), <https://www.thetrace.org/2020/06/warrior-cop-mentality-police-industry/> [<https://perma.cc/4C47-RQQU>].

<sup>41</sup> See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005); Ryan McMaken, *Police Have No Duty to Protect You, Federal Court Affirms Yet Again*, MISES INST. (Dec. 20, 2018), <https://mises.org/power-market/police-have-no-duty-protect-you-federal-court-affirms-yet-again> [<https://perma.cc/V6D3-QW9F>].

<sup>42</sup> Marie Gottschalk, *Democracy and the Carceral State in America*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 288, 289 (2014). The term "carceral," literally meaning "of or belonging to prison," encompasses a wide range of punitive state action including aggressive policing, public and private surveillance, imprisonment of adults, juveniles, and undocumented workers, parole, and more. Donna Murch, *The Many Meanings of Watts: Black Power, Wattstax, and the Carceral State*, 26 ORG. AM. HISTORIANS 37, 38 (2012).

<sup>43</sup> Kelly Lytle Hernández, Khalil Gibran Muhammad & Heather Ann Thompson, *Introduction: Constructing the Carceral State*, 102 J. AM. HIST. 18, 18 (2015); Allegra M. McLeod, *Confronting the Carceral State*, 104 GEO. L.J. 1405, 1406–08 (2016).

<sup>44</sup> See Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1341–42 (2021) (describing the shift in municipal budgets away from mental-health and other social services as police budgets ballooned, with many social service functions subsumed by police agencies).

worst of state carceral violence.<sup>45</sup> The outcome is not only morally outrageous, but unsustainably expensive and inefficient.<sup>46</sup>

Looking to the history of American policing, it is not hard to understand how and why the carceral state grew to this point. As Professor Alex Vitale explains, the police have always existed primarily to manage “dangerous” individuals by reinforcing the inequalities of race and class.<sup>47</sup> In the United States, the origin of policing is intimately tied to the control of the working class and slavery.<sup>48</sup> Our police system’s direct ancestor, the London Metropolitan Police, was formed to suppress the British industrial working class’s growing protests against the nation’s widespread poverty and political upheaval.<sup>49</sup> The London Metropolitan Police’s function to protect property, break strikes, and “produce a disciplined industrial work force,” expanded to northern American cities during the early 1800’s to control our growing industrial workforce.<sup>50</sup> In some cities, the police were created and employed specifically to suppress labor movements.<sup>51</sup> New York’s and Pennsylvania’s police forces were notably militant against the unionization of industrial workers, especially immigrants.<sup>52</sup>

America’s brutal history of slavery and racial discrimination also significantly shaped this early policing.<sup>53</sup> Large Southern cities like New Orleans and Savannah had full-time slave patrols that were often connected to the broader criminal system and developed into modern police forces.<sup>54</sup> Growing fear of slave rebellion throughout the mid-1800’s made slave patrols critical to slaveowners, who heavily relied on these groups to police the so-called “fugitive” enslaved.<sup>55</sup> The existence of these patrols often helped city-government officials prove the need for broader public

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<sup>45</sup> See McLeod, *supra* note 43, at 1407 (“We have come to rely on policing to address social concerns ranging from poverty, inequality, and addiction, to education, mental illness, and violence.”).

<sup>46</sup> See *infra* notes 107–116 and accompanying text.

<sup>47</sup> ALEX S. VITALE, *THE END OF POLICING* 52 (2017).

<sup>48</sup> *Id.* at 34.

<sup>49</sup> *Id.* at 35–36 (explaining the rise of the London Metropolitan Police as a response to growing industrial-class violence during the Peterloo Massacre).

<sup>50</sup> See *id.* at 36–37 (explaining the expansion of the modern police force from Boston to Chicago).

<sup>51</sup> *Id.* at 40.

<sup>52</sup> See *id.* at 37, 40 (stating that the Pennsylvania and New York police forces were especially large, formal, and militant).

<sup>53</sup> See McLeod, *supra* note 43, at 1407.

<sup>54</sup> VITALE, *supra* note 47, at 45–46.

<sup>55</sup> *Id.* at 46; E. Russ Williams Jr., *Slave Patrol Ordinances of St. Tammany Parish, Louisiana, 1835–1838*, 13 J. LA. HIST. ASS’N 399 (1972); Harvey Wish, *The Slave Insurrection Panic of 1856*, 5 J. S. HIST. 206 (1939); Laurence Ralph, *The Logic of the Slave Patrol: The Fantasy of Black Predatory Violence and the Use of Force by the Police*, 5 PALGRAVE COMM’NS 1, 3 (2019).

protection through a professional police force.<sup>56</sup> All of these forces functioned to surveil and control enslaved Black people in order to keep the system of white supremacy safe for slaveowners.

The abolition of slavery did not end the patrols though. After the Civil War, the Southern slave patrol system was replaced by a professional police force that then functioned to force newly freed Black people into “subservient economic and political roles.”<sup>57</sup> Northern policing also adjusted to emancipation, as leaders feared the migration of the newly freed to their own cities.<sup>58</sup> Viewing these individuals as socially and racially inferior, police used excessive force to uphold racially discriminatory laws and practices. The control of Black people embedded itself in the concept of crime control for decades to come, with the rise of the Civil Rights Movement bringing more aggressive policing to suppress racial-justice advocates. Throughout the 1980s, police power became further entrenched in the lives of the nonwhite and the poor, as police adopted the “broken-windows” approach that aggressively enforced low-level infractions, increasingly utilizing military-grade weapons to do so.<sup>59</sup> Rooted in controlling marginalized people for the safety of the elite, the carceral state’s expansion into areas of poverty, substance abuse, and mental illness is anything but unexpected.<sup>60</sup>

Today, America’s poor are one of the groups most heavily targeted by the carceral state.<sup>61</sup> Historically, welfare retrenchment and the extreme growth of mass incarceration have been intimately intertwined as two related systems controlled by the elites to secure social and economic inequality.<sup>62</sup> A precondition to these interrelated forces was the suppression of organized labor and the erosion of collective bargaining power. These intentional moves benefitted only the elites while gradually driving their disempowered workforce to government assistance programs—a rug that would soon be pulled out from under their feet. During the most significant period of welfare retrenchment in the 1980s, when programs serving the marginalized

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<sup>56</sup> Ralph, *supra* note 55, at 3.

<sup>57</sup> VITALE, *supra* note 47, at 47.

<sup>58</sup> *Id.* at 48.

<sup>59</sup> *See id.* at 7 (explaining that “[b]roken-windows policing” is an “attempt to shift the burden of responsibility for declining living conditions onto the poor themselves and to argue that the solution to all social ills is increasingly aggressive, invasive, and restrictive forms of policing that involve more arrests, more harassment, and ultimately more violence”).

<sup>60</sup> *See* O’Rourke et al., *supra* note 44, at 1340–41.

<sup>61</sup> Peter B. Edelman, *Criminalization of Poverty: Much More to Do*, 69 DUKE L.J. ONLINE 114, 117 (2020).

<sup>62</sup> Julilly Kohler-Hausmann, *Guns and Butter: The Welfare State, the Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87, 89 (2015).

groups sustained substantial financial cuts, the incarcerated population exploded. It was also during this period that both the carceral and social welfare systems increasingly revoked their rehabilitative missions to embrace punishment. Disproportionately comprised of low-income Black and Latino men, the carceral system has increasingly replaced the welfare state with consequences significantly burdening people of color living in poverty.<sup>63</sup>

This carceral state is not only deeply invasive into the lives of individuals in poverty but also further entrenches their low-income status. Welfare reforms throughout the 1990s subjected recipients to both administrative and police surveillance and punitive sanctions in the pursuit of rooting out welfare fraud.<sup>64</sup> For years, people applying for public assistance in certain states underwent procedures such as fingerprinting and photographing similar to that used for criminals booked for violations of the law.<sup>65</sup> Welfare recipients are still often subject to the procedures used for parolees, such as home searches by state officials and drug testing.<sup>66</sup> One Ninth Circuit case in 2006, *Sanchez v. County of San Diego*, held specifically that state police officers may conduct warrantless searches of welfare recipients' homes in order to verify applicants' eligibility for welfare benefits, regardless of Fourth Amendment protection.<sup>67</sup>

Entwined with the carceral state, the welfare system is designed to desensitize recipients to the mechanics of the carceral state. Fingerprinting, home invasions, and the like become the cost of doing business. The very same people subjected to these invasions often bear the brunt of broken-windows policing and other methods of criminalizing poverty.<sup>68</sup> Welfare recipients' rights begin to feel less firm and more ephemeral, and ultimately become a privilege that they cannot afford.

In addition to these invasions, contact with the carceral state itself too often forces individuals into poverty and functions to keep them there. Incarceration for any amount of time reduces an individual's employment

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<sup>63</sup> *Id.* at 89–91.

<sup>64</sup> *See id.* at 97.

<sup>65</sup> *Id.*

<sup>66</sup> *See* Arieane J. Jones, *United States: Poverty as Crime in a Wealthy Nation*, WORLD PRISON BRIEF (Mar. 24, 2022), <https://www.prisonstudies.org/news/united-states-poverty-crime-wealthy-nation> [<https://perma.cc/RPY5-LXXS>].

<sup>67</sup> 464 F.3d 916, 931 (9th Cir. 2006).

<sup>68</sup> *See* William M. Sage & Jennifer E. Laurin, *If You Would Not Criminalize Poverty, Do Not Medicalize It*, 46 J.L., MED. & ETHICS 573, 577 (2018) (linking the various forms of the criminalization of poverty in America); Frank Munger, *Dependency by Law: Poverty, Identity, and Welfare Privatization*, 13 IND. J. GLOB. LEGAL STUD. 391, 397 (2006) (pointing out the political links between welfare “reforms” and broken-windows policing).

and wages, with a recent study by the Bureau of Justice Statistics showing that 60% of individuals released from incarceration are unable to find employment.<sup>69</sup> Some states, such as New York, have further banned people with criminal convictions from multiple categories of jobs.<sup>70</sup> And those who do manage to find employment despite their criminal record will make 53% of the wages their nonincarcerated peers make in the first few months following release.<sup>71</sup> Exacerbating these disadvantages, Congress's 1994 welfare reforms allow states to bar individuals convicted of drug offenses from accessing food stamps, public housing, and other cash assistance, further trapping them in poverty and in many circumstances pushing people back into incarceration.<sup>72</sup>

Research on the social consequences of incarceration also shows that “the children of incarcerated parents are likely to experience diminished well-being.”<sup>73</sup> It is extremely difficult for an incarcerated parent to support their child from prison, and the parent will be further hindered after release because of their criminal record.<sup>74</sup> Further, low-income children themselves are at a much higher risk of interacting with the carceral system through the school-to-prison pipeline.<sup>75</sup> Nonwhite and poor children disproportionately attend the worst schools, where punitive policies often mean that children are sent to court instead of the principal's office for disciplinary offenses.<sup>76</sup> This means that too many children leave K–12 with juvenile records that

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<sup>69</sup> BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SPECIAL REPORT: EMPLOYMENT OF PERSONS RELEASED FROM FEDERAL PRISON IN 2010, at 14 tbl.5 (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/eprfp10.pdf> [<https://perma.cc/37GJ-X8DH>]; see also Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, PRISON POL'Y INITIATIVE (Feb. 8, 2022), <https://www.prisonpolicy.org/blog/2022/02/08/employment/> [<https://perma.cc/7VAA-HF2L>] (describing the results of the employment statistics study).

<sup>70</sup> Kohler-Hausmann, *supra* note 62, at 98; Megan Torrance, *Occupations Barred to Felons*, CHRON. (Feb. 15, 2022), <https://work.chron.com/occupations-barred-felons-29277.html> [<https://perma.cc/7AK9-N6ZH>] (discussing state and federal restrictions on the employment of felons in certain job fields, including healthcare, real estate, pest control, insurance sales, social work, veterinary medicine, and law enforcement).

<sup>71</sup> Wang & Bertram, *supra* note 69.

<sup>72</sup> See Kohler-Hausmann, *supra* note 62, at 98.

<sup>73</sup> Bruce Western & Christopher Muller, *Mass Incarceration, Macrosociology, and the Poor*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 166, 172 (2013).

<sup>74</sup> Hernández et al., *supra* note 43, at 19.

<sup>75</sup> See Edelman, *supra* note 61, at 117–18.

<sup>76</sup> AM. BAR ASS'N, ABA TASKFORCE ON REVERSING THE SCHOOL-TO-PRISON PIPELINE: REPORT, RECOMMENDATIONS AND PRELIMINARY REPORT 8–10 (2018); Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/> [<https://perma.cc/T7BL-D2H9>]; Laura Jimenez, Abel McDaniels, & Sarah Shapiro, *Public Schools Must Address Disparities in Discipline Rates*, CTR. AM. PROGRESS (Jan. 17, 2018), <https://www.americanprogress.org/article/public-schools-must-address-disparities-discipline-rates/> [<https://perma.cc/UBJ6-XMFT>].

continue to harm them past adolescence.<sup>77</sup> The harm from this system disproportionately falls on children of color and children with disabilities, who are also statistically more likely to deal with the carceral state as adults.<sup>78</sup>

There are countless laws across this country that criminalize specific behaviors associated with poverty, especially for unhoused people.<sup>79</sup> One survey of scores of U.S. cities found that 57% ban camping in specific locations, 18% ban sleeping in public, 43% ban sleeping in cars, and 53% prohibit sitting or lying down in some places.<sup>80</sup> Police routinely break up encampments of unhoused people, cutting them off from important services and leaving them more vulnerable to assault and the elements.<sup>81</sup> The carceral system violently reduces the inconvenience of low-income individuals to the general public while providing largely hollow social and economic support systems that offer little to no hope of breaking the cycles of poverty and criminalization.<sup>82</sup> In all these ways, the carceral state causes and perpetuates poverty, keeping generations of people locked in low-income socioeconomic positions.

The consequences of homelessness within the carceral system especially impact individuals suffering from mental illnesses, another group frequently harassed by the police.<sup>83</sup> The deinstitutionalization of state mental hospitals was instrumental to beginning the criminalization of mental illness.<sup>84</sup> Individuals were moved out of abusive facilities into communities that lacked the resources necessary to treat them, and eventually onto the street.<sup>85</sup> Without adequate structures to deal with the consequences of deinstitutionalization, the carceral system stepped forward as the primary

<sup>77</sup> *Who Is Most Affected by the School to Prison Pipeline?*, AM. U. SCH. EDUC. ONLINE PROGRAMS (Feb. 24, 2021), <https://soeonline.american.edu/blog/school-to-prison-pipeline> [<https://perma.cc/XYM5-GUQ6>].

<sup>78</sup> AM. BAR ASS'N, *supra* note 76, at 8–10.

<sup>79</sup> VITALE, *supra* note 47, at 92.

<sup>80</sup> *Id.*; Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 13), <https://ssrn.com/abstract=4034878> [<https://perma.cc/D9M5-8SXB>] (“In the place of a single vagrancy statute, a typical city may now have a dozen or more ‘public order’ ordinances separately punishing individuals for standing, sitting, sleeping, eating, begging, or sheltering oneself from the elements.”).

<sup>81</sup> VITALE, *supra* note 47, at 91.

<sup>82</sup> *Id.* at 90.

<sup>83</sup> Edelman, *supra* note 61, at 119; VITALE, *supra* note 47, at 76 (“One of the most tragic developments in policing in the last forty years has been the massive expansion of their role in managing people with mental illness and other psychiatric disabilities.”).

<sup>84</sup> Risdon N. Slate, *Deinstitutionalization, Criminalization of Mental Illness, and the Principle of Therapeutic Jurisprudence*, 26 S. CAL. INTERDISC. L.J. 341, 347 (2017).

<sup>85</sup> *See id.* (“State hospitals downsized or closed, resulting in more persons with mental illnesses gravitating to the streets and encountering a society and criminal justice system not equipped to deal with their needs.”).



source of relief. People with mental illnesses, forced into homelessness, were increasingly convicted and confined to prisons and jails.<sup>86</sup> By 2005, nearly 500,000 individuals with mental illnesses were incarcerated, compared to the 50,000 held in psychiatric hospitals.<sup>87</sup> Today, the National Alliance on Mental Illness (NAMI) estimates that people with mental illnesses are booked into jail two million times annually.<sup>88</sup> The three largest inpatient psychiatric treatment facilities are now the Los Angeles County Jail, New York's Rikers Island, and Chicago's Cook County Jail.<sup>89</sup> NAMI estimates that the overwhelming majority of these incarcerated individuals do not have access to proper treatment.<sup>90</sup>

The carceral system and policing are “particularly ill-suited” to handle individuals with mental illnesses.<sup>91</sup> Although arrests of persons with mental illnesses tend to be for minor, nonviolent crimes, contact with the police often results in jail or the emergency room.<sup>92</sup> Such contact saddles affected individuals with financial debts from bail and medical bills, plus the attendant psychological trauma, all of which perpetuate the cycle. Relying on these mechanisms of carceral control instead of critical, long-term social services is both expensive and ineffective at treating the individual, who will continue to experience their mental illness past their interaction with law enforcement.<sup>93</sup>

Emergency situations involving police and persons with mental illness are particularly dangerous.<sup>94</sup> As the Treatment Advocacy Center reports, “People with untreated mental illness are 16 times more likely to be killed during a police encounter than other civilians.”<sup>95</sup> Often, these killings occur when the police encounter someone with an object perceived to be a

<sup>86</sup> Kohler-Hausmann, *supra* note 62, at 91.

<sup>87</sup> *Id.*

<sup>88</sup> *Mental Illness and the Criminal Justice System*, NAT'L ALL. ON MENTAL ILLNESS, [https://www.nami.org/NAMI/media/NAMI-Media/Infographics/NAMI\\_CriminalJusticeSystem-v5.pdf](https://www.nami.org/NAMI/media/NAMI-Media/Infographics/NAMI_CriminalJusticeSystem-v5.pdf) [https://perma.cc/6NK5-YNER].

<sup>89</sup> VITALE, *supra* note 47, at 80.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 76.

<sup>92</sup> *Id.* at 76–77; see Donna Hall, Li-Wen Lee, Marc W. Manseau, Leah Pope, Amy C. Watson & Michael T. Compton, *Major Mental Illness as a Risk Factor for Incarceration*, 70 PSYCHIATRIC SERVS. 1088, 1089–91 (2019).

<sup>93</sup> VITALE, *supra* note 47, at 80–81.

<sup>94</sup> *Id.* at 76 (“The police are often the main agency engaged in both emergency and ongoing management of segments of this population. . . . [T]oo many [police interactions] result in arrest, incarceration, injury, and even death.”).

<sup>95</sup> *People with Untreated Mental Illness 16 Times More Likely to Be Killed by Law Enforcement*, TREATMENT ADVOC. CTR., <https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness/2976-people-with-untreated-mental-illness-16-times-more-likely-to-be-killed-by-law-enforcement> [https://perma.cc/H7MV-TPC4].

weapon.<sup>96</sup> If that person is impaired by mental illness and, as a result, refuses to drop the object or uses it in a threatening manner, the officer has a legal reason to use deadly force.<sup>97</sup> With the police encountering more and more people with mental illnesses, it is not shocking that an estimated one in every four police killings is of a person with a mental illness.<sup>98</sup> An encounter that ought to be the beginning of treatment and support in a well-functioning state becomes an execution in the name of “safety.”

An all-too similar experience exists for those suffering from substance-use disorders. The rise of the War on Drugs diverted important social service resources to expand police forces who, like the welfare system, abandoned rehabilitation for punishment.<sup>99</sup> Governor Nelson Rockefeller spent much of his fourteen years in office combating New York’s growing heroin problem by devoting significant financial resources to addiction programming and clinics.<sup>100</sup> Eventually, the difficulties in building a large network of treatment programs, mostly its cost and associated public controversy, gave way to more punitive proposals.<sup>101</sup> Rockefeller’s subsequent switch to mandatory life sentences without parole or probation for most drug offenses largely mirrored the federal shift toward responding to criminalized substance use with carceral violence.<sup>102</sup>

Today, drug offenses are the leading cause of arrest throughout this country, with over a million arrests for violation of state and federal drug laws in 2020.<sup>103</sup> Black people make up 24% of these arrests despite being only 13% of the population.<sup>104</sup> Drug crime additionally serves as a tool for surveillance by the carceral state, with 238,183 people on parole for drug law violations and 510,937 on probation for the same.<sup>105</sup> This carceral growth has had little positive effect on substance-abuse issues. The number of deaths caused by overdoses has steadily grown since the late 1990s to a total of 92,452 deaths in 2020.<sup>106</sup>

The origins and growth of the carceral state stand atop the coercion and control of people of color, the poor, the mentally ill, and those suffering from

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<sup>96</sup> VITALE, *supra* note 47, at 77.

<sup>97</sup> *Id.* at 78.

<sup>98</sup> *Id.* at 77.

<sup>99</sup> O’Rourke et al., *supra* note 44, at 1341; Kohler-Hausmann, *supra* note 62, at 95.

<sup>100</sup> Kohler-Hausmann, *supra* note 62, at 95.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 91, 96.

<sup>103</sup> *Drug War Statistics*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/drug-war-statistics> [<https://perma.cc/TYP5-DH4K>].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

substance abuse. Considering how focused the carceral state is on these populations and how invasive it is in their lives, the vast problems plaguing these communities only seem to be growing. Thirty-seven million people lived in poverty during 2020, with poverty rates for Black people reaching 19.5% and those for Latinx people reaching 17%.<sup>107</sup> About 63% of individuals with histories of mental illnesses receive no mental health treatment while incarcerated in federal and state prisons.<sup>108</sup> And despite the billions of dollars spent on drug law enforcement, an estimated 37.3 million Americans currently use illegal drugs.<sup>109</sup> Designed to undermine rather than aid the people it affects, the carceral state is ill-equipped to handle these public health issues. Investing in resources to grow the carceral state instead of providing necessary social services to tackle these issues will continue to preclude this country from much needed improvement.

The carceral state is as expensive as it is expansive. The United States spends \$81 billion a year on incarcerating people, though the economic harms are as high as \$182 billion.<sup>110</sup> In New York City, the cost of imprisoning someone in Riker's Island is \$1,525 per day, or \$556,539 per year.<sup>111</sup> That's almost enough to rent eleven average apartments in Manhattan for the same period.<sup>112</sup> And most of the people held at Rikers Island haven't even been convicted of a crime yet.<sup>113</sup> If the jail still held as many inmates as it did at its peak in the 1990s, it would cost more to operate than New Yorkers

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<sup>107</sup> *National Poverty in America Awareness Month: January 2022*, U.S. CENSUS BUREAU (Jan. 2022), <https://www.census.gov/newsroom/stories/poverty-awareness-month.html> [<https://perma.cc/8RRU-EYLA>].

<sup>108</sup> See *Mental Illness and the Criminal Justice System*, *supra* note 88.

<sup>109</sup> *Drug Abuse Statistics*, NAT'L CTR. DRUG ABUSE STAT., <https://drugabusestatistics.org/> [<https://perma.cc/N4FJ-MG9K>].

<sup>110</sup> See Casey Kuhn, *The U.S. Spends Billions to Lock People Up, But Very Little to Help Them Once They're Released*, PBS NEWSHOUR (Apr. 7, 2021, 5:18 PM), <https://www.pbs.org/newshour/economy/the-u-s-spends-billions-to-lock-people-up-but-very-little-to-help-them-once-theyre-released> [<https://perma.cc/A4BF-6P66>] (describing steep court costs, harms from gaps in the economy, and the necessity for reentry programs to borrow money at unsustainable interest rates).

<sup>111</sup> See *Comptroller Stringer: Cost of Incarceration per Person in New York City Skyrockets to All-Time High*, N.Y.C. COMPTROLLER (Dec. 6, 2021), <https://comptroller.nyc.gov/newsroom/comptroller-stringer-cost-of-incarceration-per-person-in-new-york-city-skyrockets-to-all-time-high-2/> [<https://perma.cc/F8H3-RE6P>].

<sup>112</sup> See *Manhattan, NY Rental Market Trends*, RENTCAFE (Mar. 2022), <https://www.rentcafe.com/average-rent-market-trends/us/ny/manhattan/> [<https://perma.cc/8DHF-QEAG>] (giving an average figure for monthly rent in Manhattan of \$4,265).

<sup>113</sup> See *New York's Infamous Rikers Island Jail Is to Close*, BBC NEWS (Oct. 18, 2019), <https://www.bbc.com/news/world-us-canada-50095418> [<https://perma.cc/T658-2SBT>].

spend on public transportation each year.<sup>114</sup> New York spends nearly nineteen times as much per inmate as it does per student.<sup>115</sup> The impacts of carceral violence on municipal, state, and federal budgets are enormous. The expenditure on policing and prisons robs the public of the material benefits those dollars could have funded.<sup>116</sup> Abolitionists seek to restore those benefits to society while ending the harms of carceral violence.

The choice is between a carceral system unfit for the purpose of reducing violence and riddled with collateral costs on the one hand and the provision of services well-suited to alleviating the harms of poverty, inequality, and mental illness on the other. Our society cannot, in good conscience or sound policy, continue to feed this system in its current design. It fails to protect us from violence or hardship, saps resources, and ultimately hurts people, their communities, and any hope of meaningful humanitarian progress. While the consequences of this carceral system are deep-rooted problems, simply removing the system will not create an abolition democracy. The next Part explores the challenges of pursuing abolition in the face of our culture of violence without fully redressing the underlying inequalities at the root of violence.

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<sup>114</sup> See *id.* (stating that the jail once held as many as 20,000 inmates); *MTA Operating Budget Basics*, METRO. TRANSP. AUTH., <https://new.mta.info/budget/MTA-operating-budget-basics> [<https://perma.cc/WZ49-RBS8>] (explaining that 38% of the MTA's total revenue of \$16.7 billion came from fares in 2019).

<sup>115</sup> See Aaron Smith, *N.Y. School Spending: Through the Roof, with Little to Show for It*, N.Y. DAILY NEWS (Nov. 26, 2021, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-ny-school-spending-results-20211126-qqw55a5eozg2bh6ptdzc5zr3e-story.html> [<https://perma.cc/3NZ3-5M7E>] (“All told, New York spends \$30,772 per student each year.”).

<sup>116</sup> See Valeria Vegh Weis, *Criminal Selectivity in the United States: A History Plagued by Class & Race Bias*, 10 DEPAUL J. SOC. JUST. 1, 12 & n.53 (2017) (discussing the correlation on national and local levels between higher welfare spending and lower incarceration rates and the historical expansion of police budgets at the expense of social services); Brenden Beck, Eaven Holder, Abigail Novak & Jacob Kaplan, *The Material of Policing: Budgets, Personnel and the United States' Misdemeanor Arrest Decline*, BRIT. J. CRIMINOLOGY (2022) (finding a consistent correlation between policing and crime such that more police officers resulted in a greater number of misdemeanor arrests); cf. Dwight D. Eisenhower, President of the United States, Address “The Chance for Peace” Delivered Before the American Society of Newspaper Editors (Apr. 16, 1953), <https://www.presidency.ucsb.edu/documents/address-the-chance-for-peace-delivered-before-the-american-society-newspaper-editors> [<https://perma.cc/D54W-57J2>] (“Every gun that is made, every warship launched, every rocket fired signifies, in the final sense, a theft from those who hunger and are not fed, those who are cold and are not clothed. This world in arms is not spending money alone.”).

## II. THE PROBLEM OF ONLY DEFUNDING THE POLICE

“*The price of culture is a Lie.*”

—W.E.B. Du Bois<sup>117</sup>

The current movement to end carceral violence encompasses a wide variety of positions, just as the original antislavery movement did. The triumph of antislavery politics rested on the ability of free-soil, antislavery, and abolitionist politicians to set aside their differences and unite the small farmers and industrial laborers of the North against the Slave Power and slavery.<sup>118</sup> Similarly, opposition to carceral violence finds allies among those who call for non-reformist reforms, defunding of police and prisons, and total abolition of the carceral state.<sup>119</sup> Abolition, however, is not aimed primarily at the removal of a harmful institution from society.<sup>120</sup> Removal of such harmful institutions is likely to prove a hollow victory if it is not accomplished by the establishment of abolition democracy and its accompanying life-affirming institutions.<sup>121</sup> If the culture of violence which produced the harmful institutions persists, so will the conditions necessary for their reemergence. This Part deals with the problems inherent in narrowly

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<sup>117</sup> W.E. BURGHART DU BOIS, *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* 205 (5th ed. 1904).

<sup>118</sup> See Matthew Karp, *The People’s Revolution of 1856: Antislavery Populism, National Politics, and the Emergence of the Republican Party*, 9 J. CIVIL WAR ERA 524, 528–29 (2019) (discussing the rhetorical devices employed by the emerging Republican Party to unite popular sentiment against the Slave Power, even among those who were hesitant to associate themselves with abolition); Graham Alexander Peck, *Abraham Lincoln and the Triumph of Antislavery Nationalism*, 28 J. ABRAHAM LINCOLN ASS’N 1, 3 (2007); Matt Karp, *The Mass Politics of Antislavery*, CATALYST (2019), <https://catalyst-journal.com/2019/10/the-mass-politics-of-antislavery> [https://perma.cc/G2QD-UJQQ].

<sup>119</sup> See, e.g., 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/BRH8-8GLZ] (“Regardless of your view on police power — whether you want to get rid of the police or simply to make them less violent — here’s an immediate demand we can all make: Cut the number of police in half and cut their budget in half.”); Alex Woodward, *‘We Are the Ones Who Keep Us Safe’: How Abolitionists See an America Without Police and Prisons*, INDEPENDENT (June 19, 2020, 11:54 PM), <https://www.independent.co.uk/news/world/americas/abolish-police-us-prison-reform-defund-13th-amendment-a9571816.html> [https://perma.cc/BQM6-5MLD] (“A lot of people are trying to say there’s a difference between police reform, defunding the police and abolition. And the call to defund the police is abolitionist. It’s a step towards abolition. It is not a separate, moderate or watered-down thing.”).

<sup>120</sup> See Phillip Atiba Goff, *‘Abolition’ Isn’t a Relic of Our Past. It’s the Key to Revitalising Democracy*, WORLD ECON. F. (Jan. 26, 2021), <https://www.weforum.org/agenda/2021/01/abolition-isn-t-a-relic-of-our-past-it-s-the-key-to-revitalising-democracy/> [https://perma.cc/Y8LJ-CQ2E] (“Abolition, however, is not a relic of history. It is an ongoing movement to rethink the systems that produce inequity and build a society that values the lives of the most vulnerable.”).

<sup>121</sup> See *id.* (“[A]bolition democracy isn’t just the fight to destroy oppressive institutions. It’s the fight to build just ones in their place.”).

approaching the defunding of the police, even in cases where funding is shifted to other, beneficial programs.

To redress the conditions of carceral violence, we must understand the popular ideas that support it. Support for carceral violence is not driven by empirical results—the rise in police budgets has not significantly curtailed crime.<sup>122</sup> In fact, the opposite may be true.<sup>123</sup> The political pressure to increase police budgets as a means of addressing violent crime is founded upon a misapprehension of what police actually do and how effective they are at it.<sup>124</sup> This is, in part, a product of decades of “copaganda” on television.<sup>125</sup> More recently, copaganda has moved online, with police departments turning to social media to burnish their image.<sup>126</sup> Copaganda is hardly unique among our media for normalizing violence,<sup>127</sup> but it promotes the more dangerous notion that violence is the most appropriate response to violence.

But overt and deliberate copaganda is not the only driver of our perception of violence in the media. News media share in this blame, particularly in the disproportionate coverage of violent crime in recent decades.<sup>128</sup> This trend is only amplified by the rise of social media as a news

<sup>122</sup> See Philip Bump, *Over the Past 60 Years, More Spending on Police Hasn't Necessarily Meant Less Crime*, WASH. POST (June 7, 2020, 1:42 PM), <https://www.washingtonpost.com/politics/2020/06/07/over-past-60-years-more-spending-police-hasnt-necessarily-meant-less-crime/> [https://perma.cc/R7A3-BPA].

<sup>123</sup> See Ramzi Saud, *Relationship Between Police Killings, City Spending, and Violent Crime*, TOWARDS DATA SCI. (Mar. 8, 2021), <https://towardsdatascience.com/police-killings-city-spending-and-violent-crime-61754788482b> [https://perma.cc/LXF2-LQ7W] (arguing that “defunding the police may be a viable solution to reducing crime as well as police killings.”).

<sup>124</sup> See Jeff Asher & Ben Horwitz, *How Do Police Actually Spend Their Time?*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html> [https://perma.cc/M92K-RHWS] (documenting that serious violent crimes only make up around 1% of all calls for service and around 4% of police service time).

<sup>125</sup> See Nina Metz, *Column: A Year After Some of the Most Intense BLM Protests, 'Copaganda' Is Still Alive and Well on TV*, CHI. TRIB. (July 1, 2021, 7:00 AM), <https://www.chicagotribune.com/entertainment/what-to-watch/ct-mov-copaganda-2021-2022-tv-season-20210701-pvckh4bzdzgf3p4xx4n6v54oda-story.html> [https://perma.cc/3J5S-9883].

<sup>126</sup> See Palika Makam, *Copaganda: What It Is and How to Recognize It*, TEEN VOGUE (Aug. 5, 2020), <https://www.teenvogue.com/story/what-is-copaganda-explainer> [https://perma.cc/8T9D-X3VB].

<sup>127</sup> See *Violence in the Media: Psychologists Study Potential Harmful Effects*, AM. PSYCH. ASS'N (2013), <https://www.apa.org/topics/video-games/violence-harmful-effects> [https://perma.cc/TT9Q-PWDC] (“[R]esearch has found that exposure to media violence can desensitize people to violence in the real world and that, for some people, watching violence in the media becomes enjoyable and does not result in the anxious arousal that would be expected from seeing such imagery.”).

<sup>128</sup> See Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 868–69 (2010) (discussing how media coverage of homicides and gang violence multiplied several times over during periods when those categories of crime were decreasing in prevalence).

source.<sup>129</sup> The result is a misinformed public primed to believe crime is worse and concentrated in different places than it really is<sup>130</sup>—a public the political proponents of carceral violence cultivate.<sup>131</sup>

Our culture of violence is not limited to our media, unfortunately. Racial violence is enshrined in our Constitution—especially through the Second Amendment.<sup>132</sup> Where police originated in slave patrols organized to create a general atmosphere of oppression for enslaved people, Southern states made sure to protect their power to organize militias to violently respond to potential rebellions of their enslaved populations.<sup>133</sup> Here, past is prologue, with racial disparities in the tolerated exercise of the right to bear arms and the right to self-defense.<sup>134</sup> Black men are gunned down merely for

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<sup>129</sup> See Rafael Prieto Curiel, Stefano Cresci, Cristina Ioana Muntean & Steven Richard Bishop, *Crime and Its Fear in Social Media*, 6 PALGRAVE COMM'NS 1, 8 (2020) (demonstrating the disproportionate coverage of murder and other violent crimes on Twitter in Mexico, despite property crimes making up a majority of actual criminal acts).

<sup>130</sup> See, e.g., Toni Monkovic & Jeff Asher, *Why People Misperceive Crime Trends (Chicago Is Not the Murder Capital)*, N.Y. TIMES (Sept. 27, 2021), <https://www.nytimes.com/2021/06/16/upshot/murder-crime-trends-chicago.html> [<https://perma.cc/8QET-X8BG>] (demonstrating public misperceptions about Chicago's crime rate, overall crime rates, and the relative prevalence of murder now and a few decades ago).

<sup>131</sup> See John Gramlich, *Voters' Perceptions of Crime Continue to Conflict with Reality*, PEW RSCH. CTR. (Nov. 16, 2016), <https://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality/> [<https://perma.cc/Q9AV-74LQ>] (“Leading up to Election Day, a majority (57%) of those who had voted or planned to vote said crime has gotten worse in this country since 2008. Almost eight-in-ten voters who supported President-elect Donald Trump (78%) said this, as did 37% of backers of Democrat Hillary Clinton.”).

<sup>132</sup> See generally CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* (2021) (chronicling the racial dimensions of the origin and development of the right to bear arms in America); ELIE MYSTAL, *ALLOW ME TO RETORT: A BLACK GUY'S GUIDE TO THE CONSTITUTION 31–40* (2022) (summarizing the racism at the heart of the Second Amendment and its relationship to our greater culture of violence). The Second Amendment is hardly the only piece of our Constitution to establish racial violence as fundamental law. The Three-Fifths Compromise, U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, normalized the dehumanization of enslaved Black people, while the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, cl. 3, required states to assist each other in the capture of enslaved people who attempted to escape their bondage.

<sup>133</sup> See MYSTAL, *supra* note 132, at 37.

<sup>134</sup> See Dahlia Lithwick, “*The Second Amendment Is Not Intended for Black People*,” SLATE (Aug. 3, 2021, 2:27 PM), <https://slate.com/news-and-politics/2021/08/second-amendment-guns-racist-black-americans-history.html> [<https://perma.cc/ZXA9-7Z5E>] (interviewing Carol Anderson about racial disparities in the treatment of gun rights, particularly highlighting the silence of the Second Amendment's usual defenders after the murder of Philando Castile); Dhoruba Bin Wahad, *Toward Rethinking Self-Defense in a Racist Culture*, MIT PRESS READER (May 30, 2020), <https://thereader.mitpress.mit.edu/toward-rethinking-self-defense-in-a-racist-culture/> [<https://perma.cc/MP9B-JH44>]; Karen Grigsby Bates, *Race and the Controversial History of 'Stand Your Ground' Laws*, NPR (Feb. 25, 2017, 8:28 AM), <https://www.npr.org/2017/02/25/517181355/race-and-the-controversial-history-of-stand-your-ground-laws> [<https://perma.cc/FK9P-94RK>]; Lulu Garcia-Navarro, *Why One Progressive Public Defender Hoped for an N.R.A. Victory*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/>

holding a weapon in the presence of police.<sup>135</sup> But when Black men are murdered, their killers often walk free because of putative self-defense.<sup>136</sup> Gun manufacturers and right-wing politicians have fostered a dangerous culture of extremism around the Second Amendment and gun ownership.<sup>137</sup> So long as we live under the suicide pact of gun manufacturers' preferred interpretations of the Second Amendment, we must grapple with the threat of racist private violence.<sup>138</sup>

Simply ending carceral violence would be an inadequate solution because it would not redress private violence, and the public would still support violent responses when private violence rears its head in the community. In the absence of criminal tribunals, our culture of racist and retributive violence would likely lead to calls to jail Black and other marginalized people who exercised their rights in response to violence against them.<sup>139</sup> The conditions for the return of carceral violence would exist from the moment of its removal.

But this is overly simplistic. The call to defund the police is almost universally accompanied by a corresponding call to invest in beneficial

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opinion/sharone-mitchell-jr-and-the-progressive-case-against-gun-permits.html [https://perma.cc/93VU-8CHQ] (discussing how gun-permit laws address neither the supply nor the demand for guns and instead result in the disproportionate punishment of marginalized people).

<sup>135</sup> See Bailey, *supra* note 11; Ben Finley, *Police Shooting Raises Questions over Black Man's Gun Rights*, AP NEWS (Dec. 1, 2021), <https://apnews.com/article/police-shootings-violence-gun-politics-virginia-9168d588ad353e8c12706e73e3242260> [https://perma.cc/EW7M-S6VD].

<sup>136</sup> See *Trayvon Martin's Mother: George Zimmerman Got Away with Murder*, CBS NEWS (Feb. 25, 2015, 6:13 PM), <https://www.cbsnews.com/news/trayvon-martins-mother-george-zimmerman-got-away-with-murder/> [https://perma.cc/67UB-VKDD]; Tom Jacobs, *Stand Your Ground Convictions Reveal Clear Racial Bias*, PAC. STANDARD (May 3, 2017), <https://psmag.com/news/stand-your-ground-convictions-reveal-clear-racial-bias> [https://perma.cc/4SNM-LLN7] (“A suspect is twice as likely to be convicted of a crime if the victim is white.”).

<sup>137</sup> See Jay Michaelson, *The Right-Wing Lie That's Killing Our Children*, ROLLING STONE (May 24, 2022, 11:43 PM), <https://www.rollingstone.com/politics/political-commentary/the-right-wing-lie-thats-killing-our-children-1358161/> [https://perma.cc/9S8U-683S]; Diana Palmer & Timothy Zick, *The Second Amendment Has Become a Threat to the First*, ATLANTIC (Oct. 27, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/second-amendment-first-amendment/620488/> [https://perma.cc/H86H-E8X4].

<sup>138</sup> See Michael Waldman, *How the NRA Rewrote the Second Amendment*, BRENNAN CTR. JUST. (May 20, 2014), <https://www.brennancenter.org/our-work/research-reports/how-nra-rewrote-second-amendment> [https://perma.cc/G5J4-GM3Y] (discussing the lobbying and political organizing through which the National Rifle Association upended the community-oriented—if racist—purpose of the Second Amendment to replace it with an absolute individual right); David S. Cohen, *Why It's Time to Repeal the Second Amendment*, ROLLING STONE (June 13, 2016, 5:42 PM), <https://www.rollingstone.com/culture/culture-news/why-its-time-to-repeal-the-second-amendment-95622/> [https://perma.cc/B4UH-DVYZ] (“The Second Amendment needs to be repealed because it is outdated, a threat to liberty and a suicide pact.”).

<sup>139</sup> See, e.g., Joshua Manson, *When Black Panthers Carried Guns, Conservatives Supported Gun Control*, BUZZFEED NEWS (Aug. 9, 2019, 10:14 AM), <https://www.buzzfeednews.com/article/joshuamanson/gun-control-history-race-black-panther-party-conservatives> [https://perma.cc/D9S9-B32Z] (describing efforts to pass gun-control laws targeted at restricting Black community members).



community services.<sup>140</sup> Some of those programs have documented histories of dramatically reducing violence.<sup>141</sup> Material investments in those programs should decrease violence, even while police budgets drop. But merely expanding services and programs that exist within our current cultural and economic framework will only go so far to curb violence. Our society is deeply unequal,<sup>142</sup> and inequality is itself a contributing factor to violence.<sup>143</sup> Social spending alone is unlikely to result in the deep, structural changes necessary to mitigate inequality driven by neoliberal globalization.<sup>144</sup> Without a means of redressing wealth and income inequality, violence is likely to persist, subjecting society to the risk of backsliding into the culture of retributive violence.

Meaningful carceral abolition must sail between Scylla and Charybdis, embodied in the American culture of violence and neoliberal globalized capitalism. The process of navigating the cultural shift required to redress

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<sup>140</sup> See, e.g., Kaba, *supra* note 119 (“We should redirect the billions that now go to police departments toward providing health care, housing, education and good jobs.”); Howard Henderson & Ben Yisrael, *7 Myths About “Defunding the Police” Debunked*, BROOKINGS (May 19, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/05/19/7-myths-about-defunding-the-police-debunked/> [<https://perma.cc/X9MK-M2DU>] (“To see real change in our society, policymakers must remove the barriers and fund necessary programming.”); *The Time Has Come to Defund the Police*, M4BL, <https://m4bl.org/defund-the-police/> [<https://perma.cc/ALX7-Q2XZ>] (“We need to see a shift from massive spending on police that don’t keep us safe to a massive investment in a shared vision of community safety that actually works.”); Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), <https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer> [<https://perma.cc/2CJM-9KW5>] (“We must cut the astronomical amount of money that our governments spend on law enforcement and give that money to more helpful services like job training, counseling, and violence-prevention programs.”).

<sup>141</sup> See Saud, *supra* note 123 (statistically demonstrating that increased education spending correlates to decreased violence); *infra* notes 188–193 and accompanying text.

<sup>142</sup> See Ana Hernández Kent & Lowell Ricketts, *Has Wealth Inequality in America Changed over Time? Here Are Key Statistics*, FED. RSRV. BANK ST. LOUIS (Dec. 2, 2020), <https://www.stlouisfed.org/open-vault/2020/december/has-wealth-inequality-changed-over-time-key-statistics> [<https://perma.cc/MZ3Y-ERXQ>].

<sup>143</sup> See Roy Kwon & Joseph F. Cabrera, *Income Inequality and Mass Shootings in the United States*, BMC PUB. HEALTH 7 (2019), <https://bmcpublihealth.biomedcentral.com/track/pdf/10.1186/s12889-019-7490-x.pdf> [<https://perma.cc/DSR9-8P83>] (“Given the evidence, the major policy implication of our study is that part of the solution to solve the growing mass shootings epidemic, and a litany of other social problems, may involve creating policies that can reduce the growing income inequality between Americans.”).

<sup>144</sup> See Andreas Bergh, Irina Mirkina & Therese Nilsson, *Can Social Spending Cushion the Inequality Effect of Globalization?* 33 (Rsch. Inst. of Indus. Econ., IFN Working Paper No. 1286, 2019), <https://www.ifn.se/wfiles/wp/wp1286.pdf> [<https://perma.cc/99SU-R9PS>] (“Using social spending data from the ILO and the World Development Indicators, economic globalization from the KOF globalization index, and Gini coefficients from the Standardized World Income Database, we have analyzed 140 countries over 40 years and found no evidence that social spending moderates the association between economic globalization and inequality, with the possible exception of education spending in non-OECD countries.”).

our fascination with retributive violence is less obvious, but there are a plethora of solutions for the problem of capitalism. Abolition favors a leftist, liberationist economic system, but which particular system it favors is a matter of debate. It will, however, be decidedly anti-capitalist.<sup>145</sup> The equality necessary for the persistence of abolition democracy requires democratic control of the workplace, housing, transportation, education, land, and natural resources. Or, as Allegra McLeod puts it, “Justice ought not to be primarily concerned with how often people comply with legal rules but instead should attend broadly to the quality of collective life, fair and more equitable distribution of material resources, and human flourishing.”<sup>146</sup>

This aspect of abolition democracy—the extension of justice and equity to the social and economic structures of America—is critical to the abolition of carceral violence. These changes, rather than simply defunding oppressive institutions, will enable the long-term success of abolition. Framing the debate around funding or defunding implicitly accepts capitalism’s rules of engagement; it is abolition that demands we envision a better world. With the understanding that the project requires remedies for both the culture of retributive violence and the ravages of neoliberal capitalism, the next Part addresses how abolition democracy makes the public safe and free.

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<sup>145</sup> See Akbar, *supra* note 24, at 111 (“As articulated by abolitionist organizers, defund advances a radical critique of police and neoliberal capitalism and a radical imagination around building a society that tends to people’s needs.”); Jamal Rich, *Prison and Police Abolition: Re-Imagining Public Safety and Liberation*, PEOPLE’S WORLD (June 30, 2020, 4:04 PM), <https://www.peoplesworld.org/article/prison-and-police-abolition-re-imagining-public-safety-and-liberation/> [https://perma.cc/X2WC-DELK] (“Abolition is synonymous with communism, building toward an egalitarian future built on democracy, justice, and equality.”); Sean Larson, *The Abolitionist Road to Socialism*, RAMPANT (July 23, 2020), <https://rampantmag.com/2020/07/the-abolitionist-road-to-socialism/> [https://perma.cc/7HN8-DFP6] (“Abolition, as conceived and practiced by Black feminist thinkers and organizers, is a revolutionary struggle to eradicate the conditions which give rise to prisons, police, and profit extraction. It is an eminently socialist aim.”); Julius Gavroche, “Anarchism” Is Just a Name—a Review of *Anarchism and the Black Revolution and The Nation on No Map: Black Anarchism and Abolition*, AUTONOMIES (Jan. 22, 2022), <https://autonomies.org/2022/01/anarchism-is-just-a-name-a-review-of-anarchism-and-the-black-revolution-and-the-nation-on-no-map-black-anarchism-and-abolition/> [https://perma.cc/Z38Q-SDGB] (noting that William Anderson’s abolitionism is loosely affiliated with anarchism, but not inherently beholden to theoretical precursors).

<sup>146</sup> See McLeod, *supra* note 22, at 1644.

## III. ABOLITIONIST PUBLIC SAFETY

*“We’ve got to face the fact that some people say you fight fire best with fire, but we say you put fire out best with water. We say you don’t fight racism with racism—we’re gonna fight racism with solidarity.”*

—Fred Hampton<sup>147</sup>

The goal of an abolitionist approach to public safety must be to bring about a society in which police are obsolete. Abolitionist activists and their movement-law allies in the academy have explored methods of alleviating violence in the community as alternatives to the carceral system. So far, most of these have been implemented largely on a local scale, but the results are promising. Such noncarceral interventions operate by addressing the root causes of criminalized violence rather than relying upon the state violence of threat, retribution, and containment.

An excessive focus on protection from violence, though, may fail to embrace a complete concept of public safety.<sup>148</sup> People are made unsafe by much more than violence alone. A complete concept of public safety must embrace not just protection from violence, but the public’s basic subsistence, housing, health and well-being, and opportunity.<sup>149</sup> A comprehensive approach to public safety comports with the basic program of abolition democracy: building institutions to promote the respect, education, economic security and resources, civil rights, and franchise necessary to ensure universal free, informed, and active participation in all significant aspects of public life.<sup>150</sup> Such a program promotes liberty through ensuring the material security necessary for meaningful opportunity and promotes security by providing people with the liberty to make better choices.

This Part begins by discussing the social, economic, and legal changes necessary for abolition, offering a vision of the society abolitionists seek to bring about. Next, it explores the efforts of contemporary abolitionists to provide alternatives to carceral violence. With that foundation in place, this Part proceeds to discuss the role of constitutional law in shaping new abolitionist legal institutions. The current state of constitutional law is hostile to abolition, but the Constitution contains the tools necessary to bring about an abolition democracy. Yet, the Constitution’s antidemocratic structures remain a potential stumbling block; abolitionists must also advocate for

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<sup>147</sup> Fred Hampton, Deputy Chairman, Black Panther Party, *Power Anywhere Where There’s People!* (1969), <https://www.marxists.org/archive/hampton/1969/misc/power-anywhere-where-theres-people.htm> [<https://perma.cc/9SSU-P4DW>].

<sup>148</sup> See, e.g., Meares & Prowse, *supra* note 20, at 20–21 (looking to history and to the voices of modern communities to explore the notion of public goods within a democracy).

<sup>149</sup> See Friedman, *supra* note 21, at 740–46.

<sup>150</sup> See DU BOIS, *supra* note 25, at 182–89.

fundamental constitutional change. Finally, this Part briefly discusses the particular challenge the judiciary presents to abolitionist government action.

A. *A Vision of Abolition Democracy*

Abolition democracy demands life-affirming institutions to ensure the liberty and material security of all members of society. Through these institutions, meaningful participation in all significant aspects of public life is guaranteed. Practically speaking, this requires that all people democratically participate in the decisions which affect their lives, whether those are matters of governance, economics, or social order. This includes a rejection of neoliberal capitalism, which generates perverse incentives for political leaders, destroys the time and care that citizens might otherwise dedicate to the pursuit of government, and drives the inequality that poses a direct threat to abolition of the carceral state.<sup>151</sup> While abolitionists generally agree that an abolition democracy must be anti-capitalist, there is some disagreement over the exact shape of its economy.<sup>152</sup> The policies of abolition democracy are necessarily redistributive, until such time as inequality is so reduced as to no longer pose a threat to the democratic participation of all members of society.

But democratic control of all meaningful aspects of public life goes farther than simple redistribution and support, encompassing the character of media, education, and decisions around land and natural resources. This broad program of democratic control includes a restorative and transformative vision of justice, both around incidents of violence and in its broader approach to the structure of society. This Section describes the various traditions that inform abolition democracy and the institutions that it must build before exploring how these traditions and institutions interact to make people both more secure and more free.

Modern abolition operates in a long tradition of demands for increased liberty and security together. Even restricting the inquiry to such calls beginning in the twentieth century, these precursors include a wide range of liberationist movements. Helen M. Todd, arguing for women's suffrage, argued it was necessary to obtain "life's Bread, which is home, shelter and security, and the Roses of life, music, education, nature and books, [to] be the heritage of every child that is born in the country."<sup>153</sup> Franklin Roosevelt emphasized four freedoms: the traditional freedoms of speech and worship,

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<sup>151</sup> See *supra* notes 140–144 and accompanying text.

<sup>152</sup> See McLeod, *supra* note 22, at 1619.

<sup>153</sup> Helen M. Todd, *Getting Out the Vote: An Account of a Week's Automobile Campaign by Women Suffragists*, 72 AM. MAG. 611, 619 (1911).

but also those from want and from fear.<sup>154</sup> The Black Panther Party’s Ten Point Program called for political and economic self-determination, including material security like housing and healthcare alongside community control of education and technology and an end to carceral violence.<sup>155</sup>

These visions applied democracy not just to the choice of government, but to the shape of the economy and culture. They echo in modern abolitionist movements’ programs such as #8toAbolition, the Green New Deal, and Red Nation’s Ten Point Program. These programs roundly call for economic opportunity,<sup>156</sup> an end to rampant environmental destruction,<sup>157</sup> equitable infrastructure,<sup>158</sup> an end to state violence against marginalized people,<sup>159</sup> and reparations.<sup>160</sup> Modern abolitionist movements operate in continuation of their predecessors by calling for material changes that make us both more free and more secure. There is a fine line between shelter and captivity, and abolitionists strive for “the right to live, not simply exist.”<sup>161</sup>

Before discussing the varieties of individual changes among the demands of movements, a discussion of their overarching approaches to

<sup>154</sup> Franklin D. Roosevelt, President of the United States, Address of the President of the United States Delivered Before a Joint Session of the Two Houses of Congress January 6, 1941 (Jan. 6, 1941), in H.R. DOC. NO. 77-1 (1941).

<sup>155</sup> HUEY P. NEWTON & BOBBY SEALE, TEN POINT PROGRAM (1966).

<sup>156</sup> See, e.g., H.R. Res. 109, 116th Cong. § 1(B) (2018) (pledging “to create millions of good, high-wage jobs and ensure prosperity and economic security for all people of the United States”); #8toAbolition, 8TOABOLITION, <https://www.8toabolition.com/> [<https://perma.cc/B5V8-BCA9>] (advocating direct financial investment in community-based programs and businesses, community-land trusts, and providing housing); 10 Point Program, RED NATION, <http://therednation.org/10-point-program/> [<https://perma.cc/Z2KY-JYJF>] (demanding a decent standard of living and the end of capitalism-colonialism).

<sup>157</sup> See, e.g., H.R. Res. 109 § 1(A) (setting a goal “to achieve net-zero greenhouse gas emissions through a fair and just transition for all communities and workers”); 10 Point Program, *supra* note 156 (calling for an end to all environmental degradation).

<sup>158</sup> See, e.g., H.R. Res. 109 § 1(C) (committing the federal government “to invest in the infrastructure and industry of the United States to sustainably meet the challenges of the 21st century”); #8toAbolition, *supra* note 156 (demanding free and accessible public transit and publicly-funded healthcare infrastructure).

<sup>159</sup> See, e.g., H.R. Res. 109 § 1(E) (pledging to promote “justice and equity” for marginalized communities); #8toAbolition, *supra* note 156 (demanding an end to carceral violence and the demilitarization of communities); 10 Point Program, *supra* note 156 (“We demand an end to the racist state institutions that unjustly target and imprison Native peoples and all oppressed peoples.”).

<sup>160</sup> See, e.g., H.R. Res. 109 § 1(E) (including reparations for historic oppression among the goals of the Green New Deal); 8TOABOLITION, 8 TO ABOLITION: ABOLITIONIST POLICY CHANGES TO DEMAND FROM YOUR CITY OFFICIALS 1, [https://static1.squarespace.com/static/5edbf321b6026b073fef97d4/t/5ee0817c955eaa484011b8fe/1591771519433/8toAbolition\\_V2.pdf](https://static1.squarespace.com/static/5edbf321b6026b073fef97d4/t/5ee0817c955eaa484011b8fe/1591771519433/8toAbolition_V2.pdf) [<https://perma.cc/32E6-RAT2>]; 10 Point Program, *supra* note 156 (demanding the repatriation of all Native lands—the entire Western Hemisphere and Pacific Ocean—to their Indigenous peoples).

<sup>161</sup> SARAH EISENSTEIN, GIVE US BREAD BUT GIVE US ROSES: WORKING WOMEN’S CONSCIOUSNESS IN THE UNITED STATES, 1890 TO THE FIRST WORLD WAR 32 (1983).

justice through community and solidarity is instructive. Modern abolitionist movements have variously called for restorative or transformative justice as an alternative to our present regime of retributive and carceral violence.<sup>162</sup> Restorative justice responds to harms by bringing together willing stakeholders to address those harms in ways that make the victim whole and aid the offender in reintegrating into the community.<sup>163</sup> While transformative justice also seeks healing and accountability for all involved, it further seeks to examine and build the kinds of relationships and communities that can intervene or even prevent future harms.<sup>164</sup>

Where restorative justice focuses on individual responsibility for harms, transformative justice takes a more community-oriented approach.<sup>165</sup> Both are valuable tools for organizations working toward an abolition democracy. While preventing harm in the first place is preferable, communities must also be able to respond and heal after a member is harmed. An abolition democracy would utilize these personal interventions to reduce and repair the harms of carceral and personal violence and exploitation. The various systemic changes among the demands of these movements also often seek to implement these alternative approaches to justice. The implication for police under such a regime is clear: obsolescence.

Getting there is not going to be easy. America's founding myths subsist on violence, sometimes venerating it, sometimes papering over it. The result is that our cultural conscience is infected with retributive violence, and this infection is perhaps the most daunting obstacle facing modern abolitionist movements. Culture is subtle, with differences across regions that confound outsiders. The project of shifting our culture's glorification of retributive violence will require considerable work organizing and educating the public. That may be aided, but unlikely accomplished solely, by democratization of media.

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<sup>162</sup> See McLeod, *supra* note 22, at 1614 (noting restorative justice among the demands of organizers in Freedom Square in Chicago); *id.* at 1628–30 (listing several transformative-justice projects across the country); Akbar, *supra* note 24, at 103 (noting transformative programs as a hallmark of non-reformist reforms).

<sup>163</sup> See Kejsi Demaj, *Restorative Justice: The Path to Abolishing the Current Criminal Justice System*, HARV. POL. REV. (Mar. 14, 2022), <https://harvardpolitics.com/restorative-justice-abolition/> [<https://perma.cc/CGX6-USSZ>].

<sup>164</sup> See Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMHARM.ORG (2018), <https://transformharm.org/transformative-justice-a-brief-description/> [<https://perma.cc/GN3U-K7PG>].

<sup>165</sup> McLeod, *supra* note 22, at 1630–31; see also Gabriella Paiella, *How Would Prison Abolition Actually Work?*, GQ (June 11, 2020), <https://www.gq.com/story/what-is-prison-abolition> [<https://perma.cc/H4B5-F7KQ>] (“Restorative justice is to try and restore relationships to how they were prior to a harm being done. Transformative justice, the purpose is to try and transform communities so that the harm cannot happen again.”).

Prior abolitionist movements understood the need for newspapers and even broadcast media.<sup>166</sup> Contemporary media, including social media, is plagued by anti-Black bias that compounds the effects of our country's cultural love for violence.<sup>167</sup> Democratic control of media would alleviate those effects, giving voices to marginalized communities instead of just oligarchs.<sup>168</sup>

Representation in the media matters too, though it's not the whole ball game.<sup>169</sup> Through a combination of print, broadcast, and electronic media, communities would be able to foster dialog on issues of importance to them on their own terms in an abolition democracy. Democratic media would not be beholden to the same propertied interests as corporate media is, and thus would lack its motivations to stoke fear through the news and push copaganda. If there is any hope of repairing our culture's violent tendencies, and thus of moving closer toward a free and fair abolition democracy, it must come through community organizing and democratic control of media.

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<sup>166</sup> See, e.g., Richard B. Kielbowicz, *The Law and Mob Law in Attacks on Antislavery Newspapers, 1833-1860*, 24 LAW & HIST. REV. 559, 568–70 (2006) (describing 1830s antislavery groups' strategy of using newspapers and mailing pamphlets to create the appearance of a cohesive national movement); *The Black Panther Party*, PACIFICA RADIO ARCHIVES, <https://www.pacificaradioarchives.org/black-panther-party> [<https://perma.cc/Q9AV-4RA3>] (including documentaries made by the Black Panther Party for broadcast).

<sup>167</sup> See Jessica Guynn, *Facebook While Black: Users Call It Getting 'Zucked,' Say Talking About Racism Is Censored as Hate Speech*, USA TODAY (July 9, 2020, 6:17 PM), <https://www.usatoday.com/story/news/2019/04/24/facebook-while-black-zucked-users-say-they-get-blocked-racism-discussion/2859593002/> [<https://perma.cc/N2F5-Z7Y8>] (“Not only are the voices of marginalized groups disproportionately stifled, Facebook rarely takes action on repeated reports of racial slurs, violent threats and harassment campaigns targeting black users, they say.”); Trevor Smith, *To Change Narratives About Black Men, We Must Start with Black Boys*, NONPROFIT Q. (Oct. 21, 2021), <https://nonprofitquarterly.org/to-change-narratives-about-black-men-we-must-start-with-black-boys/> [<https://perma.cc/FB5A-Y9JD>] (“Stories offered about Black people in the US have always served to degrade, dehumanize, or exploit Blackness while framing whiteness as the default superior. When aggregated, these harmful narratives coalesce into stereotypes that are not only damaging to the character of Black people; they lead to our deaths.”).

<sup>168</sup> Media democracy calls for both democratic control of media and the use of media as a catalyst for democratic political engagement. See David Skinner, Robert Hackett & Stuart R. Poyntz, *Media Activism and the Academy, Three Cases: Media Democracy Day, Open Media, and NewsWatch Canada*, 9 STUD. SOC. JUST. 86, 89 (2015) (discussing the goals of Media Democracy Day); Adam Ramsay, *How Can We Build a Democratic Media?*, OPENDEMOCRACY (Oct. 5, 2015), <https://www.opendemocracy.net/en/opendemocracyuk/how-can-we-build-democratic-media/> [<https://perma.cc/8NY6-DPCR>] (discussing the rise of user-supported news media in Scotland and its role in encouraging democratic engagement). Media democracy could contain elements with public funding, user funding, or a combination of the two, much like many public media companies and independent news websites now use.

<sup>169</sup> Kevin Leo Yabut Nadal, *Why Representation Matters and Why It's Still Not Enough*, PSYCH. TODAY (Dec. 27, 2021), <https://www.psychologytoday.com/us/blog/psychology-the-people/202112/why-representation-matters-and-why-it-s-still-not-enough> [<https://perma.cc/P6U6-LV3W>].

The connection between inequality and violence is often born out of the desperation of oppressed and isolated people.<sup>170</sup> Abolitionists seek to circumvent this mechanism of violence by ensuring that people’s material needs are universally met. When people have opportunities to provide for themselves and their families, along with dignity and community investment, their propensity to engage in violence is reduced.<sup>171</sup> Universal housing also contributes materially to public safety—both by preventing people from becoming unhoused and exposed to the elements and as a means for people experiencing intimate-partner violence or domestic violence to escape those situations.<sup>172</sup> Similarly, universal healthcare promotes public safety both directly and through its propensity to prevent desperation and mental-health crises. While mental illness does not particularly create a risk of violent behavior against others, it can exacerbate other risk factors and is amenable to treatment under a universal healthcare system.<sup>173</sup> By guaranteeing income, housing, and healthcare, an abolition democracy would improve public safety both through mitigation of physical risks and by preventing the conditions of desperation that can produce violence.

Abolition democracy would also reduce inequality by promoting equitable management of our physical environment. The legacies of colonization, slavery, redlining, and other exploitation could be ameliorated through reparations, particularly the redistribution of land. The concentration

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<sup>170</sup> See George Chidi, *The Source of Violent Crime in Atlanta Isn’t Mysterious: It’s Desperation, Born by Inequality*, ATLANTA MAG. (Jan. 21, 2022), <https://www.atlantamagazine.com/great-reads/the-source-of-violent-crime-in-atlanta-isnt-mysterious-its-desperation-born-by-inequality/> [<https://perma.cc/4T8W-4HPU>] (“[D]esperate people [about to commit crimes] have been cut off from the rest of society—by drugs or mental illness, by deeply dysfunctional relationships, by criminal records and more. They’re caught in a cycle of desperate hedonism. They think they’re going to die, so nothing really matters.”).

<sup>171</sup> See Thomas P. Wadsworth, *Employment, Crime, and Context: A Multi-Level Analysis of the Relationship Between Work and Crime* (2001) (Ph.D. dissertation, University of Washington) (<https://www.ojp.gov/pdffiles1/nij/grants/198118.pdf>) (discussing the relationship between jobs which provide a sense of investment in accomplishments and relationships and reduced propensity for criminalized behavior); MERCY CORPS, DOES YOUTH EMPLOYMENT BUILD STABILITY?: EVIDENCE FROM AN IMPACT EVALUATION OF VOCATIONAL TRAINING IN AFGHANISTAN 23 (2015), [https://europe.mercycorps.org/sites/default/files/2020-01/MercyCorps\\_AfghanistanINVEST\\_ImpactEvaluation\\_2015.pdf](https://europe.mercycorps.org/sites/default/files/2020-01/MercyCorps_AfghanistanINVEST_ImpactEvaluation_2015.pdf) [<https://perma.cc/LB96-MYGS>] (“Only an increase in respect in the community was seen to be associated with lower propensity towards violence, as measured through the two outcomes.”).

<sup>172</sup> See Felicity Kitchin & Leonie Grob, *Housing as a Means to Fight Violence Against Women*, CITIES ALL. (Nov. 24, 2021), <https://www.citiesalliance.org/newsroom/news/spotlight/housing-means-fight-violence-against-women> [<https://perma.cc/25VN-JJV6>].

<sup>173</sup> See, *Addressing Misconceptions About Mental Health and Violence*, COUNCIL STATE GOV’TS JUST. CTR. (Aug. 2021), [https://csgjusticecenter.org/wp-content/uploads/2021/08/CSGJC\\_Field-Notes\\_Addressing-Misconceptions-about-Mental-Health-and-Violence\\_2019-MO-BX-K001\\_508.pdf](https://csgjusticecenter.org/wp-content/uploads/2021/08/CSGJC_Field-Notes_Addressing-Misconceptions-about-Mental-Health-and-Violence_2019-MO-BX-K001_508.pdf) [<https://perma.cc/4SEL-KNYQ>].



of real property in the hands of the few is a driver of inequality.<sup>174</sup> Starting life poor means that, on average, your family will not reach the economic median for generations—and racial marginalization can slow that climb to an eternity.<sup>175</sup> Capitalism’s assumption of limitless natural resources drives extractive and exploitative behaviors that create environmental injustice.<sup>176</sup> Lack of transportation access limits options for people who lack the wealth to drive.<sup>177</sup> Poverty and lack of mobility—both social and physical—expose people to the ravages of exploitation and private violence.

Abolition democracy would address all these conditions through the democratization of our physical space. Land ownership, natural resources, urban planning, and transportation would all be reworked to serve the public good rather than capitalist interests. People would experience increased control over their lives by participating in decisions about their environments, circumventing the risk of desperation and alienation we now know under capitalism.

The core theme of these transformative, non-reformist reforms is that abolition democracy improves public safety by rejecting the capitalist credo of antidemocracy. As Professor Nikolas Bowie posits, “antidemocracy has sustained social hierarchies from the spread of political equality. Whether it comes in the form of violent repression, vetoes of legislation by unelected officials, or practically unamendable constitutional restrictions, antidemocracy has had a long half-life.”<sup>178</sup> Democracy generally, and abolition democracy specifically, requires that the whole population shares

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<sup>174</sup> See Paul Constant, *A Real Estate CEO Appraises the Home Ownership Inequality Problem in the US—and How to Fix It*, INSIDER (Aug. 21, 2021, 5:45 AM), <https://www.businessinsider.com/how-to-fix-homeownership-inequality-problem-in-us-2021-8> [<https://perma.cc/F7TJ-APHJ>] (“In the same way that corporate profiteers line their pockets while their workers fall below the poverty line, wealthy homeowners have rigged the system so their properties surge in wealth at the expense of millions of renters who have been frozen out of the system.”).

<sup>175</sup> See Richard Pickering, *Addressing the Widening Inequalities Created by Real Estate*, CUSHMAN & WAKEFIELD (June 22, 2020), <https://www.cushmanwakefield.com/en/united-kingdom/insights/covid-19/inequalities-created-by-real-estate> [<https://perma.cc/GE9C-TFCU>]; Dylan Matthews, *The Massive New Study on Race and Economic Mobility in America, Explained*, VOX (Mar. 21, 2018, 7:30 AM), <https://www.vox.com/policy-and-politics/2018/3/21/17139300/economic-mobility-study-race-black-white-women-men-incarceration-income-chetty-hendren-jones-porter> [<https://perma.cc/NB6M-BD9W>].

<sup>176</sup> See Karen Bell, *Can the Capitalist Economic System Deliver Environmental Justice?*, ENV’T RSCH. LETTERS 5–7 (2015), <https://iopscience.iop.org/article/10.1088/1748-9326/10/12/125017/pdf> [<https://perma.cc/PJJ6-HR9S>] (“The problematic components of capitalism—growth, the prioritisation of profit, the concentration of wealth and power, excessive competition and irrationality, as described here, seem fundamental to its very existence. To tamper with any of these components would, surely, threaten the system itself . . .”).

<sup>177</sup> See James Wilt, *To Fight Climate Change and Capitalism, We Must Decommodify Public Transit*, CANADIAN DIMENSION (Apr. 23, 2020), <https://canadiandimension.com/articles/view/to-fight-climate-change-capitalism-decommodify-public-transit> [<https://perma.cc/8L64-RWHY>].

<sup>178</sup> Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 161 (2021) (emphasis omitted).

in the exercise of power. Abolition democracy conceptualizes this power not as the power over another, but as the power to bring about changes in the world. This power is shared among all stakeholders in every significant aspect of public life. This necessarily subverts the tendency of those with accumulated wealth to erect exclusionary structures through the exercise of disproportionate power over the community.

While abolition democracy absolutely demands extending democracy beyond the traditional exercise of the franchise, it also must encompass the protection and promotion of marginalized people's votes. Black, brown, and Indigenous people's votes have been under assault in this country since the moment they first exercised the franchise.<sup>179</sup> Under an abolition democracy, restoration would, at a bare minimum, require that the franchise of all racially marginalized people be guaranteed regardless of immigration status or prior criminalization. But, as I have argued before, reparations at the ballot box should include extra weight given to the votes of people who were historically excluded from the franchise and continue to suffer from myriad forms of disenfranchisement.<sup>180</sup> Such a program would only be necessary until votes, financial and material reparations, and the life-affirming institutions of abolition democracy substantially eliminate the marginalization of these communities.

The skeptical response to this broad program would call it utopian—and in fairness, there is a utopian element to it. Envisioning a better society is a necessary precursor to realizing it. Professor Thomas Frampton recently discussed the skepticism at the heart of this criticism: that advocates for the abolition of prisons must account for what we will do about “the dangerous few.”<sup>181</sup> Frampton divides abolitionist responses into three camps—those who believe that a more humane form of confinement will persist for those few whose violence is not preempted by an abolitionist society; those who believe of course there will be no prison because the propensity for violence will be seriously curtailed in an abolitionist society; and those who believe that the question itself is a red herring, distracting from the very real solutions abolitionists are already advancing.<sup>182</sup>

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<sup>179</sup> See generally *A History of Voter Suppression*, NAT'L LOW INCOME HOUS. COAL. (Sept. 23, 2020), <https://nlihc.org/resource/history-voter-suppression> [https://perma.cc/G5X9-2ES2] (describing the U.S. political system's long history of voter suppression).

<sup>180</sup> Brandon Hasbrouck, *The Votes of Black Americans Should Count Twice*, NATION (Dec. 17, 2020), <https://www.thenation.com/article/society/black-votes-reparations-gerrymandering/> [https://perma.cc/ND75-ZP4K].

<sup>181</sup> Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2017–18 (2022). Frampton's discussion of skeptical responses to prison abolition is readily transferable to police abolition.

<sup>182</sup> *Id.* at 2019–31.

The vision advanced in this Section aligns most closely with the second of these responses. Frampton also identifies how this answer remains unsatisfying: it requests a leap of faith that the abolitionist program will significantly reduce the dangerous few and leaves the question of whether even a tiny fraction of the current dangerous few can acceptably exist within society.<sup>183</sup> To the first part of that objection, this Article and many of the abolitionist sources it cites document the very real reductions in violence that abolitionist interventions can create. To the second, Frampton's own essay supplies much of the answer. Even if we could agree on who the dangerous few are and identify them, incarceration does not prevent them from harming others, and most of the dangerous few—by any formulation—are already living freely in our present society.<sup>184</sup> The standard of success for an abolition democracy in this particular dimension would not be the total elimination of interpersonal harms, but the reduction of such harm to significantly lower levels than in our present society.

With that in mind, the next Section examines the material progress that current abolitionist projects have already made, providing substantial evidence for the proposition that their expansion to the establishment of abolition democracy would bear significantly greater fruit.

### B. *Current Abolitionist Interventions*

With the public largely convinced that policing is a necessary response to violence,<sup>185</sup> abolitionists bear the political burden of demonstrating that alternatives are viable and preferable.<sup>186</sup> Before this Part proceeds to a discussion of the constitutional dimension of abolitionist public safety and the role of the judiciary in potentially hindering its implementation, this Section first examines the current state of abolitionist public safety organizing. In particular, several ongoing projects merit mention as examples of common themes in abolitionist direct action. They tend to follow common themes: a public health focus on prevention and repair,

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<sup>183</sup> *Id.* at 2026.

<sup>184</sup> *Id.* at 2032–51.

<sup>185</sup> See Kim Parker & Kiley Hurst, *Growing Share of Americans Say They Want More Spending on Police in Their Area*, PEW RSCH. CTR. (Oct. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/10/26/growing-share-of-americans-say-they-want-more-spending-on-police-in-their-area/> [<https://perma.cc/N6PT-LQJK>] (documenting the shift in public opinion since the summer of 2020, when even at the height of outrage against police violence, a strong majority favored maintaining or expanding police funding).

<sup>186</sup> See, e.g., Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/KPC2-FV6K>] (sharing Gilmore's story of persuading a group of initially skeptical children at an environmental-justice conference that policing and prisons are counterproductive because they ultimately embody violence as a societal value).

refocusing economic conditions from individualist competition to solidarity, localized democratization, and opposing militarism at all levels.<sup>187</sup>

The public health approach to treating violence, while not strictly an abolitionist initiative, acknowledges that violence spreads within communities in much the same manner as a disease.<sup>188</sup> In contrast to traditional policing, public health preventative programs largely treat violence by encouraging trust and empathy while providing support for high-risk individuals to create alternatives to violence. Organizations such as Cure Violence and Flatlining Violence Inspires Peace seek to interrupt cycles of violence through the direct intervention of community members with at-risk individuals.<sup>189</sup> CeaseFire Chicago, which deployed violence interrupters and outreach workers to mediate disputes, proved tremendously effective at reducing homicides in high-risk communities.<sup>190</sup> The analogous SafeStreets Baltimore program, despite police opposition and interference, has remained effective at reducing violence in the neighborhoods it serves.<sup>191</sup> Community groups like Circles & Ciphers directly connect high-risk youth in conversation, art, and mutual aid programs.<sup>192</sup> Project Emancipation Now works directly with incarcerated people to help them leave gangs, politicize them, and return them to their communities empowered to lead.<sup>193</sup>

While these public-health-focused programs feature economic aid as one part of their approach to violence prevention through support and mutual

<sup>187</sup> See Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525, 551–56 (2022); Gimbel & Muhammad, *supra* note 23, at 1505–27; Akbar, *supra* note 24, at 106–17.

<sup>188</sup> See Gary Slutkin, *Violence Is a Contagious Disease*, in *CONTAGION OF VIOLENCE: WORKSHOP SUMMARY* 94, 104 (2013). The broken-windows theory employs a similar central metaphor, considering crime to spread in an escalating fashion from minor disorderly conduct to wildly dangerous violence at the hands of strangers. See Jenny E. Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1285, 1308 (2019). Broken-windows policing, however, mischaracterizes the problem it supposedly seeks to remedy as crime and disorder, ignoring the role of poverty in driving both minor public-order offenses and more serious and violent crimes of desperation. Furthermore, it incorporates a conception of public order which demands the policing of marginalized groups, particularly queer and trans communities of color. See Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1663–64 (2021).

<sup>189</sup> See Gimbel & Muhammad, *supra* note 23, at 1509–11; McLeod, *supra* note 187, at 551–52.

<sup>190</sup> See *id.* at 1514–15. Political opposition to the program’s refusal to interface with police initially led the state to defund CeaseFire, despite that lack of association with police being one of its most effective assets. *Id.* After high homicide rates followed CeaseFire’s shutdown, funding was restored. *Id.* at 1515.

<sup>191</sup> See *id.* at 1517–19.

<sup>192</sup> See McLeod, *supra* note 187, at 552; *Who We Are*, CIRCLES & CIPHERS, <https://circlesandciphers.org/about> [<https://perma.cc/2DRM-XYUG>]; Jennifer Steiner, *Creating Safe Spaces and Circles of Support*, MCC (June 3, 2021), <https://mcc.org/stories/creating-safe-spaces-circles-support> [<https://perma.cc/CQ4A-MSU3>] (describing Circles & Ciphers’s participation with other community groups to provide COVID-19 testing, mental-health support, and material aid such as clothes, cleaning and personal hygiene supplies, and baby products to youth in need).

<sup>193</sup> See Gimbel & Muhammad, *supra* note 23, at 1521.

aid efforts, other programs approach economic justice as the primary public safety intervention. Organizations like *#toAbolition* seek the end of the criminalization of acts associated with street economics and unhoused people, the provision of universal safe housing, and a public service infrastructure built to serve the most vulnerable members of the community.<sup>194</sup> The Movement for Black Lives similarly seeks to end resource extraction from Black communities, reform housing policy, and ensure high quality education for all.<sup>195</sup> Their vision further encompasses universal healthcare, childcare, and even basic income.<sup>196</sup> For now, these programs are mostly still in the organizing stage, but their heritage in programs like the Black Panther Party's free breakfasts is likely to inspire broader change.<sup>197</sup>

These demands by community organizers and public health programs reflect a fundamental realization about the inequities of the neoliberal economic order. Even though the technological advances of the past century could allow all of humanity to live in an age of abundance, an exploitative few instead control production and distribution for their own gain.<sup>198</sup> Building a racially just society will require that we build an economically just society. And just as building our unjust society was largely a product of our historical racism in property and property law,<sup>199</sup> constructing a just one must necessarily be a product of an affirmatively equitable allocation of property rights. Access to material goods and necessities is a precondition for the full realization of human fulfillment and the full liberation of oppressed communities in America. Abolitionist organizations have come to recognize this and structure their advocacy accordingly.

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<sup>194</sup> See *#toAbolition*, *supra* note 156; see generally *McJunkin*, *supra* note 80, at 6 (exploring the material and dignity benefits of a negative-rights approach to guaranteeing shelter to unhoused people).

<sup>195</sup> See *McLeod*, *supra* note 187, at 554.

<sup>196</sup> See *id.* at 554–55.

<sup>197</sup> See Erin Blakemore, *How the Black Panthers' Breakfast Program Both Inspired and Threatened the Government*, HISTORY (Jan. 29, 2021), <https://www.history.com/news/free-school-breakfast-black-panther-party> [<https://perma.cc/W3QV-W4BG>] (describing the Black Panther Party's mutual aid programs providing free breakfast to schoolchildren, which pressured the federal government to permanently authorize its own School Breakfast Program).

<sup>198</sup> See Geoff Gilbert, *Who Plans Our Political Economy? A Solidarity Economy Vision for Democratic Political Economy Planning*, 12 UNBOUND: HARV. J. LEGAL LEFT 101, 102–05 (2019).

<sup>199</sup> See K-Sue Park, *Race and Property Law*, in THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (forthcoming 2022) (manuscript at 15), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3423&context=facpub> [<https://perma.cc/H6QK-PXCQ>] (“The present reality of property—a deeply segregated and unequal public sphere and highly lucrative but destructive real estate market—is a direct consequence of the nation’s founding histories of racial violence.”).

The core thread running through these initiatives is the demand for more democratic control over the commons.<sup>200</sup> Abolitionists and their political allies are demanding that people have a meaningful say in all aspects of their lives without the domination of institutional powers over them.<sup>201</sup> #8toAbolition calls for investment in community self-governance, including transferring some decision-making to neighborhood councils, the return of land to Indigenous communities, and promoting community-resource groups such as tenant unions and community-owned businesses.<sup>202</sup> The National Alliance Against Racist and Political Repression advocates for community control over municipal budgets to allow reallocation of police funding to beneficial programs.<sup>203</sup> Red Nation, a grassroots Indigenous organization, extends the call for democratic control to divestment from militarism.<sup>204</sup> Red Nation further envisions a corresponding investment in environmental restoration, education, healthcare, and decolonization.<sup>205</sup> While these initiatives are also largely at the organizing stage, they, too, build upon the political organizing of previous radicals.<sup>206</sup>

The scope of the abolitionist project is enormous, and this Article cannot and should not provide a detailed roadmap for its completion. The original abolitionists labored for decades to organize the political will to oppose the Slave Power, which seemed invincible until the moment it lashed out in desperate violence at Fort Sumter.<sup>207</sup> Workers struggled for decades to win labor protections we now take for granted, dying at the hands of police, private detectives, and federal troops in the process.<sup>208</sup> The women's

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<sup>200</sup> See Akbar, *supra* note 24, at 114; Meares & Prowse, *supra* note 20, at 14–15.

<sup>201</sup> See Akbar, *supra* note 24, at 113.

<sup>202</sup> See #8toAbolition, *supra* note 156; see also *This Is Our Time*, GREENWOOD, <https://bankgreenwood.com/about/> (discussing the mission of a new Black-owned financial-services platform aimed at facilitating recirculation of Black and Latino wealth within the community).

<sup>203</sup> See Rich, *supra* note 145.

<sup>204</sup> See McLeod, *supra* note 187, at 555.

<sup>205</sup> See *id.*

<sup>206</sup> See Eve L. Ewing, *Mariame Kaba: Everything Worthwhile Is Done with Other People*, ADI MAG. (2019), <https://adimagazine.com/articles/mariame-kaba-everything-worthwhile-is-done-with-other-people/> [<https://perma.cc/X6B9-TAK7>] (discussing the examples of antifascism in the 1920s and 30s and Frederick Douglass's works as prefigurations of what abolitionist organizers must face in the current proto-fascist moment).

<sup>207</sup> See generally Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011) (discussing the development of constitutional arguments within the abolitionist movement over the three decades preceding the enactment of the Fourteenth Amendment); MANISHA SINHA, *THE SLAVE'S CAUSE: A HISTORY OF ABOLITION* (2016) (exploring the abolition movement's trajectory from well before the American Revolution to its ultimate triumph).

<sup>208</sup> See *Labor Wars in the U.S.*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/theminewars-labor-wars-us/> [<https://perma.cc/SR9V-U335>].

suffrage, Civil Rights, and LGBTQ rights movements faced similarly long struggles for even basic gains. The efforts described in this Section will not, on their own, lead inevitably to abolition democracy. But just as those goals are worth committing to, so too are these initial efforts to devise and implement abolitionist public policies. They represent the beginnings of a generational struggle for justice.

Modern abolitionists are already engaged in organizing a variety of projects aimed at both direct action and broad political change. These projects share a radical vision of a more egalitarian society founded in solidarity rather than individualistic competition. Of course, they will face political opposition from the forces that benefit from division and inequality.<sup>209</sup> That opposition should not discourage abolitionists from the urgency of organizing, but it will likely amplify the constitutional difficulties that an abolition-democracy program is likely to face. The next Section details both the extent of those constitutional difficulties and abolition's potential sources of strength within constitutional law.

### *C. Abolitionist Public Safety's Challenges and Opportunities in Constitutional Law*

The current state of the Supreme Court and the conservative legal movement's cognizance of their political advantages in constitutional litigation mean that the Constitution and constitutional law are likely to pose significant challenges to abolitionist legislation. Both the Court's perversions of the Reconstruction Amendments and the Constitution's structural institutions working exactly as designed present potential difficulties. This does not mean, however, that abolitionists should cede the field of constitutional law. There is still significant potential in abolition constitutionalism, particularly if political organizing can be turned to the project of reforming the Supreme Court. This Section proceeds with an examination of both the prevailing winds and abolition's hopes on the horizon within constitutional law.

The Reconstruction project faltered at the Supreme Court even before its political death in the Compromise of 1877. In *The Slaughter-House Cases*, the Privileges or Immunities Clause of the Fourteenth Amendment

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<sup>209</sup> See, e.g., Attack on American Free Enterprise System, Confidential Memorandum from Lewis F. Powell Jr. to Eugene B. Sydnor Jr., Chairman, Educ. Comm., U.S. Chamber of Com. (Aug. 23, 1971), (<https://www.greenpeace.org/usa/wp-content/uploads/2021/08/PowellMemorandumTypescript.pdf>) [<https://perma.cc/SD7X-UDH6>] (describing the rise of leftist and revolutionary movements as an "assault on the enterprise system").

was nearly written out of the Constitution.<sup>210</sup> In so doing, the Court did not consider decades of abolitionist advocacy around the clause's operative phrase.<sup>211</sup> Soon after *The Slaughter-House Cases*, the Court further curtailed the Fourteenth Amendment in *The Civil Rights Cases* by limiting its application to state action, preventing Congress from using it to protect citizens in their private transactions.<sup>212</sup> While the largest blow<sup>213</sup> against the Equal Protection Clause was in part mitigated by later case law,<sup>214</sup> the Court has recently seen fit to slide its jurisprudence back into the *Slaughter-House* era.<sup>215</sup> The Court, at least as currently composed, cannot be trusted to enforce abolitionist interpretations of the Reconstruction Amendments.

Even with the institution of slavery abolished by amendment, the Constitution still contains substantial protections for property interests that erect barriers to the economic reforms necessary to bring about abolition democracy. For example, the Contract Clause prohibits the states from impairing the obligations of contracts, which stops states from modifying or forgiving debts by statute.<sup>216</sup> The Contract Clause makes it extremely unlikely that any state or local government could attempt to redress the role of debt in racial wealth inequality.<sup>217</sup>

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<sup>210</sup> 83 U.S. 36 (1873); see also David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 341 (2003) (discussing Justice Miller's opinion that the Fourteenth Amendment did not contain a clear statement of intent to change the relationship between the states and the federal government, and therefore could not have meant to protect all fundamental rights of state citizens against state governments through the Privileges or Immunities Clause).

<sup>211</sup> See U.S. CONST. amend. XIV, § 1, cl. 2; Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 131 (2022) (discussing abolitionist advocacy around Article IV's Privileges and Immunities Clause that informed congressional enactment of the Fourteenth Amendment's Privileges or Immunities Clause). While today Justice Thomas continues to advocate for incorporation of the Bill of Rights against the states through the Privileges or Immunities Clause, he does so in lonely dissents. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) (arguing that “the *Slaughter-House Cases* sapped the Clause of any meaning”).

<sup>212</sup> 109 U.S. 3, 11–14 (1883); see also Hasbrouck, *supra* note 211, at 112.

<sup>213</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>214</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>215</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 274, 319–20 (1978) (holding that the university's special admission program for “economically and/or educationally disadvantaged” minority applicants violated the Equal Protection Clause of the Fourteenth Amendment); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that the city's program requiring prime contractors to subcontract at least 30% of the value of the contract to one or more minority business enterprises violated the Equal Protection Clause of the Fourteenth Amendment).

<sup>216</sup> See U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .”); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 280–81 (1988).

<sup>217</sup> See TASHFIA HASAN, KATHERINE LUCAS MCKAY & JOANNA SMITH-RAMANI, ASPEN INST., *DISPARITIES IN DEBT: WHY DEBT IS A DRIVER IN THE RACIAL WEALTH GAP 2* (Feb. 2022),



The Takings Clause of the Fifth Amendment, which requires that all appropriations of private property for public use include just compensation for the property owner, grants even more direct protection to property interests.<sup>218</sup> This presents a substantial barrier to reparations in the form of land. Meanwhile, the broad interpretation of the phrase “public use” enables policies of gentrification.<sup>219</sup> If the Court even agreed that reparations constituted a public use, property owners would need to be compensated for the fair market value of their land.<sup>220</sup> During the time since Reconstruction and its initial considerations of land reparations, the compounding harms of the abandonment of the project and subsequent racist policies have made reparations cost prohibitive absent politically unlikely budgetary decisions like defunding the military.

Even reconsidering the barriers formed by the Constitution’s protection of property interests and the Court’s evisceration of the Reconstruction Amendments presupposes political action. But in a myriad of ways, our “democracy” fails to function as such because the drafters of our Constitution feared the application of an “excess of democracy” and erected structural barriers to the popular will.<sup>221</sup> The Senate’s very structure ensures that political power remains malapportioned along lines drawn over a hundred years ago. A shrinking minority of the country’s population can command a majority in one of the two houses necessary to pass any legislation—and the Senate compounds this through the cloture rule.<sup>222</sup> This malapportionment spills over into the Electoral College, which ensures that the presidency—elevated in recent times to considerably greater power—remains at risk of being awarded contrary to the popular will of a majority.

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[https://www.aspeninstitute.org/wp-content/uploads/2022/02/FINAL-ASP-FSW\\_Disparities-in-Debt\\_020722-3.pdf](https://www.aspeninstitute.org/wp-content/uploads/2022/02/FINAL-ASP-FSW_Disparities-in-Debt_020722-3.pdf) [<https://perma.cc/GBV8-3ULB>] (“Disproportionate numbers of Black (18.9%) and Hispanic/Latino (11.3%) households were in net debt.”).

<sup>218</sup> See U.S. CONST. amend. V, cl. 5 (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>219</sup> See Donald J. Smythe, *The Power to Exclude and the Power to Expel*, 66 CLEVELAND STATE L. REV. 367, 404 (2018) (discussing the power of governments to abuse eminent domain to benefit some at the expense of others, often with the effect of driving gentrification).

<sup>220</sup> See *id.* at 372; Glynn S. Lunney Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 731 (1993) (“The Court has ruled that, generally, an award based upon the price a willing buyer would have paid a willing seller for the taken property in the market will satisfy this standard.”).

<sup>221</sup> *Madison Debates: May 31*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., [https://avalon.law.yale.edu/18th\\_century/debates\\_531.asp](https://avalon.law.yale.edu/18th_century/debates_531.asp) [<https://perma.cc/65RL-LFPV>].

<sup>222</sup> See Ian Millhiser, *Build Back Better Is the Latest Victim of America’s Anti-Democratic Senate*, VOX (Dec. 20, 2021, 1:10 PM), <https://www.vox.com/2021/12/20/22846504/senate-joe-manchin-build-back-better-democrats-republicans-43-million> [<https://perma.cc/ASG6-LX5Y>]; *About Filibusters and Cloture*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm> [<https://perma.cc/G5JE-2QLH>] (explaining the Senate’s requirement that a motion to bring a measure to a vote receive the support of sixty senators).

With the President and the Senate responsible for the selection of federal judges, the least democratic branch becomes even more antidemocratic. The antidemocratic Court nods along approvingly as state legislatures mount an all-out assault on the franchise, credulously accepting purportedly race-neutral justifications for the strategic suppression of voters.<sup>223</sup> The Court has repeatedly shrugged off notions of protecting the fundamental right to the franchise, leaving it to disenfranchised voters to empower themselves through voting—a contradiction Justice Kagan succinctly noted in her dissent to *Rucho v. Common Cause*.<sup>224</sup> Let them eat cake.<sup>225</sup> The right to vote—suppressed for many,<sup>226</sup> abolished for some,<sup>227</sup> and threatened for others<sup>228</sup>—is inextricably linked to all major issues, among them reproductive rights, civil rights, indigenous rights, and the structure of the courts. Indeed, this fundamental right is the gateway through which policy and social progress are escorted by popular will. Reinvigorating the power of the vote will be paramount to building abolition democracy.

Our nearly useless amendment process, reviled by scholars across the ideological spectrum, means that fixing these flaws will require

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<sup>223</sup> See, e.g., *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349–50 (2021) (upholding Arizona's out-of-precinct policy and ballot-collection restriction, noting that “partisan motives are not the same as racial motives,” despite “the voting preferences of members of a racial group”); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (finding voters' challenge to congressional redistricting maps as unconstitutional partisan gerrymandering to be a nonjusticiable political question); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding Section 4(b) of the Voting Rights Act, which was implemented to protect against racial discrimination in voting through preclearance, unconstitutional).

<sup>224</sup> See *Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting) (pointing out the flaws in calling on voters to utilize direct-democracy mechanisms absent in most states and relying on legislators elected from gerrymandered districts to end gerrymandering).

<sup>225</sup> While its attribution to Marie Antoinette is apocryphal, see *Did Marie-Antoinette Really Say “Let Them Eat Cake”?*, HISTORY (Aug. 31, 2018), <https://www.history.com/news/did-marie-antoinette-really-say-let-them-eat-cake> [<https://perma.cc/JAV3-KRFY>], the quote's sentiment aptly summarizes the conservative Justices' attitude to marginalized people and their votes.

<sup>226</sup> See Janelle Griffith, *‘We’re Very Concerned’: Black Voters Fear Changes to Georgia Voting Laws*, NBC NEWS (Mar. 2, 2022, 10:10 AM), <https://www.nbcnews.com/politics/elections/-concerned-black-voters-fear-changes-georgia-voting-laws-rcna17391> [<https://perma.cc/N37H-JY3X>] (“Passed last March, Georgia's law requires identification for mail-in voting, makes it illegal to take food or water to voters waiting in line, and allows state election officials to take over the administration of county elections.”).

<sup>227</sup> See Brandon Hasbrouck, *Don't Be Fooled by the 2022 Congressional Map*, NATION (Apr. 5, 2022), <https://www.thenation.com/article/politics/2022-congressional-map/> [<https://perma.cc/2J58-KJ2>] (discussing the millions of Americans who are disenfranchised by felony convictions or immigration status).

<sup>228</sup> See *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1251 (2022) (overturning state legislative districts approved by the Supreme Court of Wisconsin and sending the redistricting process back into a state of confusion).

supermajorities in Congress and the state legislatures.<sup>229</sup> Yet the unanimity necessary to achieve such supermajorities requires almost preternatural intervention. Historian C. Vann Woodward identified the Emancipation Proclamation as the moment that public sentiment elevated the Union's war effort to a quasi-religious imperative.<sup>230</sup> The Reconstruction Amendments required this fervor to pass; basic legislation to implement them should not.

Yet our Constitution's structure nearly demands it. Even without the obstructionism of its cloture rules, the Senate is fundamentally antidemocratic, allowing geographically efficient groups—such as white conservatives—to outvote significantly larger groups concentrated in cities.<sup>231</sup> With the Senate so difficult to alter or remove under our constitutional processes, its inherent antidemocratic nature effectively requires majoritarian policies to obtain supermajority voter support. Simply adopting a new constitution from whole cloth might be more practical than amending the current one.

But the Constitution does still contain reasons for hope. The Reconstruction Amendments, when read with an understanding of abolitionist advocacy in the decades preceding their passage, contain robust protections of individual rights with strong congressional-enforcement powers.<sup>232</sup> The abolition of slavery included not just the institution itself, but its badges and incidents—the structural discrimination that made slavery possible or its reinstatement easier. The Privileges or Immunities Clause extends not just the Bill of Rights but a wide range of unenumerated rights and protections to apply against the states. The Equal Protection Clause guarantees that the law provide the entire populace with substantive protection against private violence and deprivation. Contrary to popular opinion on the Court,<sup>233</sup> the Due Process Clause extends far enough to include substantive guarantees of fairness. And perhaps more important, Congress has the power to enforce all of these rights through legislation hard coded to be reviewed on a rational basis standard.<sup>234</sup>

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<sup>229</sup> See U.S. CONST. art. V (“[N]o state, without its consent, shall be deprived of its equal suffrage in the Senate.”). Any attempt to add representation for large states, reduce it for small states, or apply a proportional system would require the consent of each state.

<sup>230</sup> See C. VANN WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 73 (3d ed. 2008).

<sup>231</sup> See Emily Badger, *How the Rural-Urban Divide Became America's Political Fault Line*, N.Y. TIMES (May 21, 2019, 1:47 PM), <https://www.nytimes.com/2019/05/21/upshot/america-political-divide-urban-rural.html> [https://perma.cc/2NRF-JNPH].

<sup>232</sup> See Hasbrouck, *supra* note 211, at 141.

<sup>233</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247–48 (2022) (outlining significant constraints on the Court's willingness to consider a right guaranteed by the Fourteenth Amendment's substantive due process protections).

<sup>234</sup> See Hasbrouck, *supra* note 209, at 141.

If the Supreme Court could be reformed and staffed with abolitionist judges—or even just those that followed the actual original meaning of the Thirteenth and Fourteenth Amendments—the only real barrier to the establishment and preservation of abolition democracy would be political action. The next Section tackles the problem that the present judiciary presents for abolition and explores potential solutions.

#### D. *The Judicial Problem*

The scope of change required to bring about abolition democracy requires either the spontaneous generation of good faith within the conservative judiciary, or an entirely new constitutional order.<sup>235</sup> A new constitution would facilitate removing some of the worst obstacles to democracy in America like the Senate, the Electoral College, the states themselves, single-member districting, the unitary executive, and lifetime appointments to the Supreme Court.<sup>236</sup> More importantly, it would allow us to reevaluate what structures of government and conceptions of rights would facilitate a free, democratic, and cooperative society. Rather than trusting courts to devise their own standards of review for protecting those rights and evaluating legislation, such standards could be determined by democratic processes and clearly stated fundamental principles to ensure that rights are restricted no further than a free, democratic, and egalitarian society can tolerate.

Some of these changes are already possible under the Constitution if the political will to pursue them existed. Congress can radically alter the Supreme Court’s appellate jurisdiction, whether by carving out exceptions or by enacting regulations.<sup>237</sup> Congress could render the Court incapable of reviewing cases arising under the Reconstruction Amendments, for instance, or require a rational basis standard of review—which would largely comport with the explicit grants of power in those amendments.<sup>238</sup> Congress could

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<sup>235</sup> See Brandon Hasbrouck, *Allow Me to Transform: A Black Guy’s Guide to a New Constitution*, 121 MICH. L. REV. (forthcoming Apr. 2023) (manuscript at 16), <https://papers.ssrn.com/a=4093138> [<https://perma.cc/VER3-UYKD>].

<sup>236</sup> See *id.* at 17–22.

<sup>237</sup> U.S. CONST. art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”); Jamelle Bouie, *The Supreme Court Is the Final Word on Nothing*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/opinion/dobbs-roe-supreme-court.html> [<https://perma.cc/T8UT-KKA2>] (“Congress can strip the court of its ability to hear certain cases, or it can mandate new rules for how the court decides cases where it has appellate jurisdiction.”).

<sup>238</sup> See Hasbrouck, *supra* note 211, at 161 (“Congress drafted the enabling clauses with a deliberate eye to the *McCulloch* standard—the lax standard applied to such powers as Congress’s ability to levy taxes and spend for the general welfare.”).

also require supermajorities for the Court to reverse its prior rulings or declare legislation unconstitutional.<sup>239</sup>

But the very structure of courts would also need to change in an abolition democracy. Aside from facilitating the incarceration of criminalized individuals, our courts currently function to sanction the violence of police.<sup>240</sup> Matthew Clair and Amanda Woog explore how “[courts] are sites where the cruel minutiae of the carceral system is perpetrated and legalized, allowing the millions of stops, searches and arrests by police each year to become 2.3 million people imprisoned and separated from their families and 4.5 million people on probation and parole.”<sup>241</sup> And user-pay systems such as court costs and fines transfer wealth from heavily policed communities to the carceral state.<sup>242</sup>

Rather than such punitive systems, an abolition democracy would need a process more akin to mediation to foster truth and reconciliation, restorative justice, and transformative justice.<sup>243</sup> As a suggestion, an area’s governing institutions could make many trained mediators available, one of whom would be randomly assigned to chair the proceeding, with interested parties encouraged to bring an individual whose wisdom they trust to join the mediation team. Rather than our adversarial and punitive system of justice, any court of an abolition democracy would be a collaborative one dedicated to the well-being of the community and its individual members.

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The advancement of public safety under abolition democracy encompasses a broad range of programs, all under the democratic control of the community. Material necessities are guaranteed to promote public safety both through the direct sustenance of individual members and the collective good of reducing inequality and desperation. Communities can control the

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<sup>239</sup> Bouie, *supra* note 237.

<sup>240</sup> See Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. (forthcoming 2022) (manuscript at 2), <https://papers.ssrn.com/a=3785373> [<https://perma.cc/A8DM-A47T>] (noting the central role of courts in sanctioning the police violence that killed Breonna Taylor).

<sup>241</sup> *Id.* at 6.

<sup>242</sup> See MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., *THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES* 13 (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [<https://perma.cc/R5UM-4RP7>].

<sup>243</sup> Along these lines, Chicago announced a pilot mediation program for some police misconduct allegations, though the police union has resisted those efforts. See John Byrne & Alice Yin, *Mayor Lightfoot’s Police Oversight Pick Advances, Despite Controversy over Report Citing Slain Officer Ella French*, CHI. TRIB. (Feb. 9, 2022, 4:00 PM), <https://www.chicagotribune.com/politics/ct-chicago-police-oversight-lightfoot-kersten-20220209-6u5uqibz2vedja6vw7q2lj6psu-story.html> [<https://perma.cc/N7ET-QMTV>].

land and natural resources around them, preventing both exploitative systems of exclusion and environmental injustices. Democratic control of media allows communities to encourage vibrant discussion and public consideration of issues of common import rather than being at the mercy of oligarchs for access to information. When violence—hopefully rarely—does strike the community, a broader range of responses are available to both restore the victims and offenders to safety and dignity and to prevent recurrence of similar violence.

By removing sources of desperation and promoting democracy beyond the franchise, abolition democracy would liberate us and provide better choices. By ensuring that all members of the community are given input into important decisions and have options to pursue their own well-being, abolition democracy would promote the broadest sense of public safety. Personal liberty and community security are not in conflict under abolition democracy, but rather are intertwined in a virtuous circle.

#### CONCLUSION

*“Now you might finally be able to envision a world where people have learned to love, as they learned in our world to hate. Perhaps you will speak of Um-Helat to others, and spread the notion farther still, like joyous birds migrating on trade winds. It’s possible. Everyone—even the poor, even the lazy, even the undesirable—can matter. Do you see how just the idea of this provokes utter rage in some? That is the infection defending itself . . . because if enough of us believe a thing is possible, then it becomes so.”*

—N.K. Jemisin<sup>244</sup>

Policing is not public safety. It may masquerade as protection, but when a member of the community engages in physical violence against another, policing usually fails to prevent it. Even worse, policing requires carceral violence against members of the community, modeling the value that retributive violence is an appropriate response to harm. Policing’s fundamental limitation—that it merely responds to harms after they occur—renders it laughably ineffective as violence prevention. Meanwhile, policing itself, even when no bullets, batons, or harsh words fly, perpetuates violence against communities exposed to its intensive surveillance. It does not and cannot make people safe because it actively exposes them to violence.

Policing does what it was always meant to do: protect property interests from workers and other marginalized people. Those property interests bring

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<sup>244</sup> N.K. Jemisin, *The Ones Who Stay and Fight*, 116 LIGHTSPEED MAG. (Jan. 2020), <https://www.lightspeedmagazine.com/fiction/the-ones-who-stay-and-fight/> [https://perma.cc/K7WM-CW7K].

about violence within our society both directly through their police and indirectly through the ravages of inequality. Our constitutional order is arrayed against any social movement that threatens those property interests. Political power is malapportioned, property and contract are given special consideration in our fundamental law, and any attempt at amending the Constitution is rigged in favor of the status quo. The situation is dire for a movement that seeks to make the public safe by promoting material equality.

Yet abolition democracy offers a better world, albeit one possible only through considerable organizing and action. Abolition democracy's vision of public safety utilizes a prophylactic approach rather than policing's reactive model. When one critically considers the concept of public safety without the preconceived notion that it must be carceral, any sensible model must include such a prophylactic approach. Abolition democracy accomplishes this through a program of restorative and transformative justice, liberationist anti-capitalism, and community decision-making in solidarity. Meaningful participation in all significant areas of public life encourages a community to become both more safe and more free. Abolition democracy would be a world worth the considerable investment of our organizing, direct action, and dreams.