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2018 TERM

FOREWORD: ABOLITION CONSTITUTIONALISM

Dorothy E. Roberts

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*Dorothy E. Roberts**

Slavery has been fruitful in giving itself names . . . and you and I and all of us had better wait and see what new form this old monster will assume, in what new skin this old snake will come forth next.

— Frederick Douglass[1]

You have to act as if it were possible to radically transform the world. And you have to do it all the time.

— Angela Y. Davis[2]

INTRODUCTION

In 1997, Curtis Flowers was charged with murdering four employees of the Tardy Furniture store in the small Mississippi town of Winona.[3] Flowers is black.[4] Three of the victims, including the store's owner, Bertha Tardy, were white, and one was black.[5] Flowers was tried for

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[1] FREDERICK DOUGLASS, *The Need for Continuing Anti-Slavery Work*, *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 577, 579 (Philip S. Foner & Yuval Taylor eds., Lawrence Hill Books 1999) (1950–75).

[2] Angela Y. Davis, Distinguished Professor Emerita, Univ. of Cal., Santa Cruz, Lecture at Southern Illinois University Carbondale (Feb. 13, 2014).

[3] Flowers v. Mississippi, 139 S. Ct. 2228, 2236 (2019).

[4] *Id.*

[5] *See In the Dark: July 16, 1996*, at 5:43–6:20, APM REP. (May 1, 2018), https://podcasts.apple.com/us/podcast/id1148175292 [https://perma.cc/H44A-SDJK].

capital murder six times by the same white prosecutor, Doug Evans.[6] More than two decades after Flowers was first sentenced to death, his case reached the U.S. Supreme Court on one issue: whether Evans's jury selection tactics in the sixth trial violated Flowers's Fourteenth Amendment rights.[7] By that point, the prosecutor's scheme for getting a capital conviction of a black man was crystal clear: Evans "relentless[ly]" sought to try Flowers before an all-white jury.[8] Over the course of six trials, Evans used peremptory challenges to strike forty-one of forty-two prospective black jurors.[9]

On June 21, 2019, the Court overturned Flowers's conviction.[10] In a 7-2 decision, written by Justice Kavanaugh,[11] the Court held that the prosecutor's blatant pattern of racial discrimination was so "extraordinary" that it violated the Equal Protection Clause of the Fourteenth Amendment.[12] In dissent, Justice Thomas, who excused Evans's strikes of black jurors as "race-neutral,"[13] found solace in one aspect of the majority's decision: "The State is perfectly free to convict Curtis Flowers again."[14] Flowers remains incarcerated; upon his release from death row, he will be taken into local custody again, awaiting a decision from the State regarding the possibility of a seventh trial.[15]

As *Flowers v. Mississippi*[16] indicates, criminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery — despite the dominant constitutional narrative that those forms of subordination were abolished. Key aspects of carceral law enforcement — police, prisons, and the death penalty — can be traced back to slavery and the white supremacist regime that replaced slavery after white terror nullified Reconstruction. Criminal punishment has been instrumental in reinstating the subjugated status of black people and preserving a racial capitalist power structure.

Many individuals have therefore concluded that the answer to persistent injustice in criminal law enforcement is not reform; it is prison

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6 *See id.*; *Flowers*, 139 S. Ct. at 2236.

7 *See Flowers*, 139 S. Ct. at 2234–35, 2238.

8 *Id.* at 2246.

9 *See id.* at 2235.

10 *See id.* at 2228, 2251.

11 *Id.* at 2229.

12 *Id.* at 2251; *see id.* at 2242 ("Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process.").

13 *Id.* at 2253 (Thomas, J., dissenting).

14 *Id.* at 2274.

15 *See* Alissa Zhu, *Supreme Court Sided with Curtis Flowers. He Remains in Prison. What's Next?*, MISS. CLARION LEDGER (June 27, 2019), https://www.clarionledger.com/story/news/2019/06/27/supreme-court-sided-curtis-flowers-he-still-prison-whats-next-forwinona-mississippi-man/1552081001 [https://perma.cc/HLN7-TMTS].

16 139 S. Ct. 2228.

abolition.[17] Incarcerated people have rebelled against prisons through spontaneous uprisings, organized protests, and legal claims since the 1960s.[18] Some activists mark the launch of the current prison abolition movement as occurring at an international conference and strategy session, *Critical Resistance: Beyond the Prison Industrial Complex*, held at the University of California, Berkeley, in September 1998.[19] Formed

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[17] *See, e.g.*, ABOLISHING CARCERAL SOCIETY 4 (Abolition Collective ed., 2018) (laying out a manifesto for "abolish[ing] a number of seemingly immortal institutions and drawing inspiration from those who have sought the abolition of all systems of domination, exploitation, and oppression — from Jim Crow laws and prisons to patriarchy and capitalism"); ABOLITION NOW!, at xii (CR10 Publ'ns Collective ed., 2008) (collecting works that further the "struggl[e] to tear down the cages of the [prison industrial complex]"); ANGELA Y. DAVIS, ABOLITION DEMOCRACY 35–37 (2005) [hereinafter DAVIS, ABOLITION DEMOCRACY] (noting the connections between the prison industrial complex and the persistence of structural racism); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 15–21 (2003) [hereinafter DAVIS, ARE PRISONS OBSOLETE?] (questioning why society takes prison for granted); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007) [hereinafter GILMORE, GOLDEN GULAG] (noting the "proliferation of antiprison groups" during the early 2000s); STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISONS, at xiii (Joy James ed., 2000) ("Prisons . . . exist as a central dilemma for a racially constructed and class-stratified democracy."); *Introduction*, *in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1568, 1568 (2019) (noting the "calls for urgent and drastic change" of the carceral system); *End the War on Black People*, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/end-war-on-black-people [https://perma.cc/PPA4-VY43] (demanding "an end to all jails, detention centers, youth facilities and prisons as we know them").

[18] *See* DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA 11 (2014) [hereinafter BERGER, CAPTIVE NATION] (providing a "critical history of racial justice activism and the prison between 1955 and 1980"); RONALD BERKMAN, OPENING THE GATES: THE RISE OF THE PRISONERS' MOVEMENT 1–3 (1979) (tracing the rise of the prisoners' movement in the 1960s); JAMIE BISSONETTE, WHEN THE PRISONERS RAN WALPOLE: A TRUE STORY IN THE MOVEMENT FOR PRISON ABOLITION 9–12 (2008) (chronicling the struggle for prison reform at MCI Walpole in Massachusetts); ERIC CUMMINS, THE RISE AND FALL OF CALIFORNIA'S RADICAL PRISON MOVEMENT, at vii (1994) (chronicling the history of California prisoners between 1950 and 1980 and the "emergence of a highly developed radical convict resistance movement"); GEORGE JACKSON, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON, at ix (1970) (presenting the "testament" of George Jackson, an incarcerated man "who transformed himself into the leading theoretician of the prison movement"); HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY, at xiii (2016) (providing a "comprehensive history of the Attica prison uprising"); DONALD F. TIBBS, FROM BLACK POWER TO PRISON POWER: THE MAKING OF *JONES V. NORTH CAROLINA PRISONERS' LABOR UNION* (2012) (narrating a historic victory for prisoners' rights that emerged from the struggle for black liberation); *see also* LEE BERNSTEIN, AMERICA IS THE PRISON: ARTS AND POLITICS IN PRISON IN THE 1970S 1–17 (2010) (tracing the ways in which cultural expression in prisons allowed prisoners to participate in "American public life," *id.* at 16).

[19] *See* ABOLITION NOW!, *supra* note 17, at xi; Rose Braz et al., *The History of Critical Resistance*, 27 SOC. JUST., Fall 2000, at 6, 6; Angela Y. Davis & Dylan Rodríguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST., Fall 2000, at 212, 216–17; *Critical Resistance: Beyond the Prison Industrial Complex 1998 Conference*, CRITICAL RESISTANCE, http://criticalresistance.org/critical-resistance-beyond-the-prison-industrial-complex-1998-conference [https://perma.cc/2AF5-A2ET]; Critical Resistance, *The Hard Road to Abolition//Strategies to Win, Profiles in Abolition Event* at 14:00, VIMEO (Sept. 19, 2016), https://vimeo.com/196237369 [https://perma.cc/HHK9-VT7U] [hereinafter *Profiles in Abolition*]. The prison abolition movement should be distinguished from the movement to abolish prostitution. *See, e.g.*, Laura Agustín, *The*

in 1997, the Critical Resistance organizing collective gathered more than 3500 activists, former prisoners, lawyers, and scholars over three days "to address the alarming growth of the prison system, popularize the idea of the 'prison industrial complex' (PIC), and make 'abolition' a practical theory of change."[20] Critical Resistance founders developed the concept of the "prison industrial complex" to name the expanding apparatus of surveillance, policing, and incarceration the state increasingly employs to solve problems caused by social inequality, stifle political resistance by oppressed communities, and serve the interests of corporations that profit from prisons and police forces.[21] Along with Critical Resistance, which is now a national chapter-based organization working with various grassroots campaigns, a nationwide network of activists is organizing to abolish the prison industrial complex and to build a society that has no need for prisons.[22]

It is hard to pin down what prison abolition means. Activists engaged in the movement have resisted "closed definitions of prison abolitionism"[23] and have instead suggested a variety of terms to capture what prison abolitionists think and do — abolition is "a form of consciousness,"[24] "a theory of change,"[25] "a long-term political vision,"[26] and "a spiritual journey."[27] Professor Dylan Rodríguez, a founding member of Critical Resistance,[28] lyrically describes abolition as "a practice, an analytical method, a present-tense visioning, an infrastructure in the making, a creative project, a performance, a counterwar, an ideological struggle, a pedagogy and curriculum, an alleged impossibility that is

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New Abolitionist Model, JACOBIN (Dec. 6, 2017), https://www.jacobinmag.com/2017/12/sex-work-the-pimping-of-prostitution-review [https://perma.cc/566V-CCQ2].

[20] *Critical Resistance: Beyond the Prison Industrial Complex 1998 Conference*, *supra* note 19.

[21] *See What Is the PIC? What Is Abolition?*, CRITICAL RESISTANCE, http://criticalresistance.org/about/not-so-common-language [https://perma.cc/75BC-NGHP].

[22] *See CR Structure & Background*, CRITICAL RESISTANCE, http://criticalresistance.org/about/cr-structure-background [https://perma.cc/67R3-TC8Z]. In this Foreword, I will use the term "prison abolition" to encompass the claim that various aspects of the criminal punishment system, including prisons, jails, detention centers, policing, surveillance, and the death penalty, should be abolished. Moreover, this Foreword focuses on abolition of carceral punishment, though abolition theory extends beyond the criminal punishment system to include other aspects of the carceral state, including the foster care and deportation systems. *See infra* section I.A, pp. 12–19.

[23] *Overview: Critical Resistance to the Prison-Industrial Complex*, 27 SOC. JUST., Fall 2000, at 1, 5.

[24] *Profiles in Abolition*, *supra* note 19, at 1:27.

[25] Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (April 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/4GZZ-NFM6] (quoting Michelle Alexander).

[26] CHARLENE A. CARRUTHERS, UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS, at x (2018).

[27] *Spirituality and Abolition — Call for Submissions*, ABOLITION (Aug. 2, 2018), https://abolitionjournal.org/spirituality-and-abolition-call-for-submissions [https://perma.cc/8SS4-8KAT].

[28] *Critical Resistance: Beyond the Prison Industrial Complex 1998 Conference*, *supra* note 19.

furtively present."[29] Moreover, movements that refer to themselves as abolitionist are working to dismantle a wide range of systems, institutions, and practices beyond criminal punishment (such as "the wage system, animal and earth exploitation, [and] racialized, gendered, and sexualized violence")[30] and forms of oppression beyond white supremacy (such as "patriarchy, capitalism, heteronormativity, ableism, colonialism," imperialism, and militarism).[31] While I recognize that all of these oppressive systems and the movements for their eradication are interconnected,[32] this Foreword will focus specifically on the movement to abolish the prison industrial complex, conceived of as rooted in chattel slavery in the United States, as a starting point to examine the potential for a new abolition constitutionalism.

For purposes of my analysis, I find especially useful three central tenets that are common to formulations of abolitionist philosophy. First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained.[33] Second, the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime.[34] Third, we can imagine and build a more humane and democratic society that no longer relies on caging people to meet

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[29] Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, *in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1575, 1578 (2019).

[30] *Manifesto for Abolition*, ABOLITION, https://abolitionjournal.org/frontpage [https://perma.cc/5P3V-JMHK]; *see* Allegra M. McLeod, *Envisioning Abolition Democracy*, *in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1613, 1617 (2019) [hereinafter McLeod, *Envisioning Abolition Democracy*] ("Abolitionist organizers understand their work to be related to the historical struggles against slavery and its afterlives, against imperialism and its legacies in more recent practices of racial capitalism, and against immigration enforcement and border fortification.").

[31] *Manifesto for Abolition*, *supra* note 30 (referring to "*all* revolutionary movements, insofar as they have abolitionist elements"); *see* Rodríguez, *supra* note 29, at 1578 (placing abolition within a "(feminist, queer) Black liberation and (feminist, queer) Indigenous anticolonialism/decolonization" tradition); Michael Hames-Garcia, *Abolition Is a Goal that I Use to Orient My Thinking and Action: Michael Hames-Garcia on Abolition*, ABOLITION (June 26, 2015), https://abolitionjournal.org/michael-hames-garcia-abolition-statement [https://perma.cc/66JS-VXHR] (positing that abolition is antiracist, antisexist, antihomophobic, and so forth).

[32] *See* PATRICIA HILL COLLINS & SIRMA BILGE, INTERSECTIONALITY 55 (2016) (discussing how "forms of violence within separate systems might in fact be interconnected"); HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE 4 (Keeanga-Yamahtta Taylor ed., 2017) [hereinafter HOW WE GET FREE] (describing "oppressions as 'interlocking' or happening 'simultaneously,' thus creating *new* measures of oppression and inequality"); Dorothy Roberts & Sujatha Jesudason, *Movement Intersectionality: The Case of Race, Gender, Disability, and Genetic Technologies*, 10 DU BOIS REV. 313, 318–24 (2013) (exploring the phenomenon of "coalitions across movements where political organizations focused on different causes, often rooted in differing identity categories, engage in collective action to achieve shared goals," *id.* at 318); *see generally* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT (1990).

[33] *See infra* section I.B.1, pp. 19–42; *see also* Rodríguez, *supra* note 29, at 1580–84.

[34] *See infra* section I.B.2, pp. 42–43; *see also* Rodríguez, *supra* note 29, at 1584–87.

human needs and solve social problems.[35] These tenets lead to the conclusion that the only way to transform our society from a slavery-based one to a free one is to abolish the prison industrial complex.

To date, there has been no sustained analysis of the relationship between the prison abolition movement and the U.S. Constitution. Prison abolition activists and scholars rarely seek support for their claims in constitutional law.[36] Nor have they included an abolitionist interpretation of the Constitution in their vision of a transformed society without prisons. Some not only have eschewed constitutional law as a means to achieve prison abolition but also have argued that constitutional law serves to facilitate and legitimate state violence against black and other marginalized people.[37] This oppositional approach to the Constitution is understandable given that so much of the Supreme Court's constitutional jurisprudence since its inception in the slavery era has been anti-abolitionist.[38] Yet the Constitution was interpreted by past freedom activists as an abolitionist document: many antislavery activists viewed the Constitution as a foundation for their arguments and for developing an alternative reading that called for freedom and democracy. Even after the Civil War, a Radical Republican Congress amended the text explicitly to end slavery and extend citizenship to black people based on the ideas and advocacy of an abolitionist movement.[39] At the same time, the Reconstruction Amendments contained compromises that blocked their potential for dismantling the racial capitalist structure.[40] By 1900, a campaign of white supremacist terror, laws, and policies had effectively

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[35] *See infra* section I.B.3, pp. 43–48; *see also, e.g.*, *Profiles in Abolition*, *supra* note 19.

[36] Abolitionist theorizing and activism have largely occurred separately from lawyers and the legal academy. *Introduction*, *supra* note 17, at 1568–69.

[37] Joy James, *Introduction, Democracy and Captivity*, *in* THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS, at xxii, xxv–xxx (Joy James ed., 2005) [hereinafter James, *Democracy and Captivity*]; *see also* Jalil A. Muntaqim, *Musings on US Judicial Repression*, THE ABOLITIONIST, Summer 2008, at 7, https://abolitionistpaper.files.wordpress.com/2011/01/abolitionist-issue-9-summer-2008-english.pdf [https://perma.cc/783Y-T9JV]; Erica Meiners, *Notes Against & Beyond Our Carceral Regime: Erica Meiners on Abolition*, ABOLITION (Aug. 12, 2015), https://abolitionjournal.org/erica-meiners-on-abolition [https://perma.cc/8D76-JE74].

[38] *See infra* section II.D, pp. 71–93. In response to Professor Jack Balkin's observation that "[w]ithin our legal culture the idea of fidelity to the Constitution is seen as pretty much an unquestioned good," J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1704 (1997), I once argued that "[i]n light of all the indignities showered upon blacks . . . under color of the Constitution, I would think the presumption would be that blacks should repudiate the document and all the injustice for which it has stood." Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761, 1761 (1997) [hereinafter Roberts, *Blacks' Fidelity*].

[39] *See infra* pp. 62–64.

[40] *See infra* pp. 65–67.

nullified the Amendments and replaced abolition with Jim Crow as the constitutional regime.[41]

Engaging the relationship between past abolition constitutionalism and the current prison abolition movement raises a number of provocative questions. Can legal scholars help to revive the abolitionist values in the Reconstruction Constitution to support contemporary abolitionist claims? Can prison abolitionists strategically use an abolitionist reading of the Constitution to defend their radical vision and implement steps toward achieving it? Might prison abolitionists craft a new abolition constitutionalism that serves as a charter for a society without prisons?

In this Foreword, I make the case for an abolition constitutionalism that attends to the theorizing of prison abolitionists. Although there are many grounds for prison abolition and many venues for abolitionist advocacy, my purpose here is to examine prison abolitionist theory and organizing as it relates to the U.S. Constitution in particular. There are two paths this interrogation might take. One uses prison abolition theory to evaluate the Constitution's provisions and the jurisprudence that has interpreted them in order to rebuke their failure to abolish slavery-like systems and install a democratic society. The other goes further to propose a constitutional paradigm that supports prison abolitionists' goals, strategies, and vision. The first path is resigned to the *futility* of employing U.S. constitutional law to dismantle the prison industrial complex and other aspects of the carceral state. The second path finds *utility* in applying the abolitionist history and logic of the

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[41] *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 443 (1988) [hereinafter FONER, RECONSTRUCTION] (recounting the violence perpetrated by the Ku Klux Klan and the ways in which it "raised in its starkest form the question of legitimacy that haunted the Reconstruction state"); HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 29–35 (2019) (tracing the political, economic, and legal forces that led to dismantling Reconstruction legislation and "solidif[ying] Southern states as governed by legal segregation and discrimination," *id.* at 35); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 5 (2008) (discussing President Ulysses Grant's struggle to end Klan terror in the 1870s and stating that it "simply underscored the fact that Reconstruction, for all its initial promise, had turned into a long, violent slog"); *id.* at 251 (claiming that Reconstruction "ended amid bloodshed"); RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON 116–17 (1965) (claiming that the interpretation of the Fourteenth Amendment in the *Civil Rights Cases*, decided in 1883, "virtually assured the subsequent development of Jim Crow laws," *id.* at 117); GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 39 (2013) (arguing that the Reconstruction Amendments "were inadequate to prevent the regime of . . . Jim Crow"); RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 115–16 (2004) (discussing the "white revolution" that spread from Louisiana to Mississippi and South Carolina, *id.* at 115); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 8 (1955) ("The new Southern system [under Jim Crow] was regarded as the 'final settlement,' the 'return to sanity,' the 'permanent system.'").

Reconstruction Amendments to today's political conditions in the service of prison abolition.

I believe both approaches are worthy of consideration, and considering both is essential to developing a theoretically and pragmatically useful legal framework to advance prison abolition. Neither is based on a naïve faith in U.S. law or the judges who apply it to radically change carceral society. Indeed, it is the realization that white supremacy is deeply woven into the fabric of every legal institution in the United States and upheld by U.S. constitutional law that made me an abolitionist in the first place. The tension between recognizing the relentless antiblack violence of constitutional doctrine, on one hand, and demanding the legal recognition of black people's freedom and equal citizenship, on the other, animates this Foreword as it has long animated abolitionist debates on the U.S. Constitution.[42] Despite my disgust with the perpetual defense of oppression in the name of constitutional principles, I am inspired by the possibility of an abolition constitutionalism emerging from the struggle to demolish prisons and create a society where they are obsolete.

This Foreword analyzes the potential for a new abolition constitutionalism as follows. In Part I, I provide a summary of prison abolition theory and highlight its foundational tenets that engage with the institution of slavery and its eradication. I discuss how abolition theorists view the current prison industrial complex as originating in, though distinct from, racialized chattel slavery and the racial capitalist regime that relied on and sustained it, and their movement as completing the "unfinished liberation"[43] sought by slavery abolitionists in the past. Part II considers whether the U.S. Constitution is an abolitionist document. I interrogate the historic abolition constitutionalism by examining antebellum abolitionists' readings of the Constitution and their partial incorporation into the Reconstruction Amendments, as well as the Supreme Court's jurisprudence obstructing the Amendments' transformative potential. I pay close attention to the Supreme Court's most recent decision interpreting the relationship between the Fourteenth

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[42] *See infra* section II.B, pp. 54–62. As a legal scholar who works in academia, I also write this Foreword with the constant sense of tension between wanting my scholarship to be useful to abolition activists and recognizing the tendency of academic enterprises to "filter[] professionalism and conformity into activism." Joy James, *7 Lessons in 1 Abolitionist Notebook: Joy James on Abolition*, ABOLITION (June 25, 2015), https://abolitionjournal.org/joy-james-7-lessons-in-1-abolitionist-notebook [https://perma.cc/Q6NN-6NXA] [hereinafter James, *7 Lessons*]; *see* HOW WE GET FREE, *supra* note 32, at 13 ("Political analysis outside of political movements and struggles becomes abstract, discourse driven, and disconnected from the radicalism that made it powerful in the first place."). From its inception, the prison abolition movement has included a mix of grassroots activists and former prisoners, as well as lawyers and scholars (and some who traverse these identities). Abolition is both a practical and intellectual endeavor. *See* Critical Resistance, *Angela Davis, "We Need Intellectuals,"* YOUTUBE (Mar. 22, 2018), https://youtu.be/edqwLobytVI [https://perma.cc/L3ZE-CDQQ]. I approach this Foreword with the aim that my analysis will be productive without detracting from the radicalism of prison abolition.

[43] *See Profiles in Abolition*, *supra* note 19, at 1:39.

Amendment and carceral punishment — *Flowers v. Mississippi* — to analyze the Justices' rejection of an abolitionist approach in their ruling.

Finally, Part III links Parts I and II by exploring the relationship between prison abolition and the U.S. Constitution. I argue that, despite the ascendance of proslavery and anti-abolition constitutionalism, we should consider the abolitionist history of the Reconstruction Amendments as a usable past to help move toward a radical future. I hope to show that the prison abolition movement can reinvigorate abolition constitutionalism. In turn, today's activists can deploy the Reconstruction Amendments instrumentally to further their aims and, in the process, construct a new abolition constitutionalism on the path to building a society without prisons.

I. THE NEW ABOLITIONISTS

Since the Critical Resistance organizing collective formed in 1997, grassroots activists, prisoners and former prisoners, and scholars organizing to end prisons have developed a coherent, though amorphous, set of theories, principles, and strategies that guides their abolition movement. They have articulated these ideas in numerous books,[44] articles in scholarly journals and mass media,[45] conference presentations,[46]

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[44] *See, e.g.*, sources cited *supra* note 17.

[45] *See, e.g.*, Dan Berger, *Social Movements and Mass Incarceration: What Is to Be Done?*, 15 SOULS 3, 10–16 (2013) (arguing that a new social movement toward decarceration is "on the [r]ise," *id.* at 10); Kelly Lytle Hernández, *Amnesty or Abolition? Felons, Illegals, and the Case for a New Abolition Movement*, 1 BOOM: J. CAL. 54, 63–66 (2011) (discussing the relationship between mass incarceration and constitutional history and the importance of abolitionist critiques); *Overview: Critical Resistance to the Prison-Industrial Complex*, *supra* note 23, at 2 (highlighting the national abolition movement built by Critical Resistance and introducing a special issue of *Social Justice* featuring "system analyses" and "articles centered on organizing for change" with respect to abolition); Julia Chinyere Oparah (formerly known as Julia Sudbury), *Reform or Abolition? Using Popular Mobilisations to Dismantle the "Prison-Industrial Complex,"* 77 CRIM. JUST. MATTERS 17, 17 (2009) (examining how prison abolitionist grassroots campaigning is "transform[ing] popular understandings of mass incarceration" and leading to "new political possibilities"); *Introduction*, *supra* note 17 (discussing scholarship and activism on prison abolition outside the legal community and introducing legal scholarship building on this work); Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/235V-6YEG] (describing the ways in which prison abolitionists organize for concrete reforms as part of a broader transformative vision); Ruth Wilson Gilmore, *The Worrying State of the Anti-Prison Movement*, SOC. JUST. (Feb. 23, 2015), http://www.socialjusticejournal.org/the-worrying-state-of-the-anti-prison-movement [https://perma.cc/QGV7-Z7JM] (calling attention to "areas of particular concern" for the prison abolition movement after an increase in the U.S. prison and jail population).

[46] *See, e.g.*, Claire Delisle et al., *The International Conference on Penal Abolition (ICOPA): Exploring Dynamics and Controversies as Observed at ICOPA 15 on Algonquin Territory*, 12 ABOLITIONISM 1, 3–14 (2015) (presenting areas of contention and proposed initiatives from ICOPA, an international conference bringing together prison abolitionists); Harvard Law Review *Prison Abolition Symposium* (Apr. 11–12, 2019) (presenting abolitionist scholars, organizers, and stakeholders in conversation on the current and future intersections of abolitionist theory and praxis).

speeches,[47] video interviews,[48] and blogs,[49] as well as on social media.[50] Their work is too voluminous for me to discuss comprehensively in this Foreword.[51] In this Part, I will begin by summarizing abolitionist thinking about the prison industrial complex and expanding forms of carceral statecraft in order to describe the apparatus that abolitionists are seeking to dismantle. Then I will turn my attention to three central tenets of abolitionist philosophy that are especially useful to my analysis of abolition constitutionalism. First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime. Third, we can imagine and build a more humane, free, and democratic society that no longer relies on caging people to meet human needs and solve social problems.

A. The Prison Industrial Complex and the Carceral State

The United States stands out from all nations on Earth for its reliance on caging human beings.[52] In the last forty years, the U.S. incarcerated population exploded from about 500,000 to more than two million.[53] The U.S. federal and state governments lock up more people

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[47] *See, e.g.*, Ruth Wilson Gilmore, Conversation with Rachel Kushner at the Lensic Performing Arts Center (Apr. 17, 2019), https://lannan.org/events/ruth-wilson-gilmore-with-rachel-kushner [https://perma.cc/YPG4-MK42] (discussing Professor Ruth Wilson Gilmore's work).

[48] *See, e.g.*, *Breaking Down the Prison Industrial Complex Video Project*, CRITICAL RESISTANCE, http://criticalresistance.org/videoproject [https://perma.cc/ZW8Y-E95H] (publishing series of videos discussing the prison industrial complex and the abolition movement).

[49] *See, e.g.*, ABOLITION BLOG, https://abolitionjournal.org [https://perma.cc/CR2T-74XX] (publishing a variety of voices reflecting on incarceration and abolition).

[50] For instance, activist Mariame Kaba had more than 140,000 Twitter followers as of October 2019. Mariame Kaba (@prisonculture), TWITTER, https://twitter.com/prisonculture?lang=en [https://perma.cc/N4GG-JZ2V].

[51] For a useful compilation of numerous abolitionist sources, see *Prison Abolition Syllabus*, AFR. AM. INTELL. HIST. SOC'Y (Nov. 20, 2016), https://www.aaihs.org/prison-abolition-syllabus [https://perma.cc/9HSP-Q6BB].

[52] *See, e.g.*, MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 4–5 (2015) (describing the United States as "the world's warden," *id.* at 5). For discussions of different aspects of the prison system's role within the United States, see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); GILMORE, GOLDEN GULAG, *supra* note 17; ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMEICA (2016); KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965 (2017); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014); CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS (1999); and ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010).

[53] SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2019), https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf [https://perma.cc/5PS4-2AT7] (noting that the United States has "2.2 million people currently in the nation's

and at higher rates than do any other governments in the world, and they do so today more than they did at any other period in U.S. history.[54] Most people sentenced to prison in the United States today are from politically marginalized groups — poor, black, and brown.[55] Not only are black people five times as likely to be incarcerated as white people,[56] but also the lifetime probability of incarceration for black boys born in 2001 is estimated to be thirty-two percent compared to six percent for white boys.[57] The female incarceration rate has grown twice as quickly as the male incarceration rate over the past few decades, and black women are twice as likely as white women to be behind bars.[58] This

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prisons and jails"); *State Prisons, Local Jails and Federal Prisons, Incarceration Rates and Counts, 1925–2016*, linked within *Data Toolbox*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/data [https://perma.cc/45EK-QWX8] (showing a count of roughly 479,000 incarcerated people in 1980). This change represents a 340% growth. For comparison, the U.S. population increased by only 43% during that same period. *Compare 1980 Decennial Census of Population and Housing*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/decade.1980.html [https://perma.cc/AXV4-48KM], *with Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019*, linked within *National Population Totals and Components of Change: 2010–2018*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html#par_textimage_2011805803 [https://perma.cc/M8YP-3Q97].

[54] *See* NAT'L RESEARCH COUNCIL OF THE NAT'L ACAD., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (2014) [hereinafter THE GROWTH OF INCARCERATION] ("The growth in incarceration rates in the United States over the past 40 years is historically unprecedented and internationally unique."); Heather Ann Thompson, *Why Mass Incarceration Matters: Crisis, Decline, and Transformation in Postwar History*, 97 J. AM. HIST. 703, 703–04 (2010) (describing the rise of mass incarceration in the United States as "something without international parallel or historical precedent," *id.* at 703); Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (Apr. 21, 2019), https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html [https://perma.cc/RBV3-6A9K] (observing that the United States has the "highest incarceration rate in the world"); Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate than Any Other Country*, WASH. POST (July 7, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country [https://perma.cc/3JFC-8YTG]; Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), https://www.prisonpolicy.org/global/2018.html [https://perma.cc/WP57-AJWU] ("Compared to the rest of the world, *every* U.S. state relies too heavily on prisons and jails to respond to crime.").

[55] *See* SENTENCING PROJECT, *supra* note 53, at 5; *Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet [https://perma.cc/5VYN-KZHU]; Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://www.prisonpolicy.org/reports/income.html [https://perma.cc/2J89-V69W]. For discussions of the implications of these trends, see generally ALEXANDER, *supra* note 52; and MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA (2011).

[56] *Criminal Justice Fact Sheet*, *supra* note 55.

[57] Adam Tooze, *Quantifying Incarceration*, JACOBIN (Nov. 1, 2017), https://www.jacobinmag.com/2017/11/mass-incarceration-statistics-united-states [https://perma.cc/K4TM-JCFJ].

[58] Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Nov. 13, 2018), https://www.prisonpolicy.org/reports/pie2018women.html [https://perma.cc/RMU8-5ERY]; *Criminal Justice Fact Sheet*, *supra* note 55. On the growth and experience of women's incarceration, see PAULA C. JOHNSON, INNER LIVES: VOICES OF AFRI-

astounding amount of human confinement should not be seen as an unfortunate consequence of crime prevention policies or as an isolated blemish on America's otherwise fair system of criminal justice.[59] Rather, prisons are part of a larger system of carceral punishment that legitimizes state violence against the nation's most disempowered people to maintain a racial capitalist order[60] for the benefit of a wealthy white elite.[61]

The prison industrial complex emerged in the second half of the twentieth century from the merger of social welfare programs and crime control policies.[62] As Professor Elizabeth Hinton documents in *From the War on Poverty to the War on Crime*, Democrats and Republicans in the 1960s and 1970s paired federal assistance to urban neighborhoods of color with surveillance, militarized policing, harsh sentencing laws,

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CAN AMERICAN WOMEN IN PRISON (2003) (sharing narratives of currently and formerly incarcerated women, as well as criminal justice officials and support networks); VICTORIA LAW, RESISTANCE BEHIND BARS: THE STRUGGLES OF INCARCERATED WOMEN (2009) (exploring experiences of, and resistance by, incarcerated women); ANDREA J. RITCHIE & BETH E. RICHIE, THE CRISIS OF CRIMINALIZATION: A CALL FOR A COMPREHENSIVE PHILANTHROPIC RESPONSE 3 (2017), http://bcrw.barnard.edu/wp-content/nfs/reports/NFS9-Challenging-Criminalization-Funding-Perspectives.pdf [https://perma.cc/6C8Q-AWLW] (noting that one in two black trans women will be incarcerated in their lifetime); CAROLYN SUFRIN, JAILCARE: FINDING THE SAFETY NET FOR WOMEN BEHIND BARS (2017) (surveying experiences of incarcerated pregnant women and examining the conception of jail as a safety net for marginalized mothers); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1478–83, 1493–99 (2012) [hereinafter Roberts, *Prison, Foster Care*]; and Michele Goodwin, *Invisible Women: Mass Incarceration's Forgotten Casualties*, 94 TEX. L. REV. 353, 358 (2015) (reviewing ALICE GOFFMAN, ON THE RUN (2014) and JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015)).

[59] *Cf.* Rodríguez, *supra* note 29, at 1588–90 (describing incarceration as "a method of normalized . . . dominance and violence over particular people[]"). *See generally* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017) (describing systemic disparities between the treatment of white men and black men as a result of race-based policing).

[60] The term "racial capitalism" indicates that capital accumulation and labor expropriation in the United States have always relied on a racial hierarchy and the deep inequalities that hierarchy produces. *See* CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 2 (Univ. of N.C. Press 2000) (1983) (describing how "[t]he development, organization, and expansion of capitalist society pursued essentially racial directions . . . [and thus, how] racialism . . . inevitably permeate[d] the social structures emergent from capitalism"); Jodi Melamed, *Racial Capitalism*, 12 CRITICAL ETHNIC STUD. 76, 77 (2015) ("Capital can only be capital when it is accumulating, and it can only accumulate by producing and moving through relations of severe inequality among human groups . . . and racism enshrines the inequalities that capitalism requires."); Dan Berger, Opinion, *Rise in White Prisoners Doesn't Change Innate Racism of Prisons*, TRUTHOUT (Apr. 28, 2019), https://truthout.org/articles/rise-in-white-prisoners-shows-prison-racism-goes-beyond-disparities [https://perma.cc/K8WG-G5UN] ("Prison is and always will be a tool to preserve capitalist inequalities, which are most acutely felt through racism (what a number of people call racial capitalism)."); *see also* Dan Berger, *How Prisons Serve Capitalism*, PUB. BOOKS (Aug. 17, 2018), https://www.publicbooks.org/how-prisons-serve-capitalism [https://perma.cc/9NN7-HZM8] [hereinafter Berger, *How Prisons Serve Capitalism*]; *Prisons and Class Warfare: Interview with Ruth Wilson Gilmore*, HIST. MATERIALISM, http://www.historicalmaterialism.org/interviews/prisons-and-class-warfare [https://perma.cc/9BTJ-VSKP] [hereinafter *Prisons and Class Warfare*].

[61] For studies of that system, see generally DAVIS, ABOLITION DEMOCRACY, *supra* note 17; GILMORE, GOLDEN GULAG, *supra* note 17; and Rodríguez, *supra* note 29.

[62] *See* HINTON, *supra* note 52, at 10–11.

and prison expansion, based on shared assumptions of innate black criminality.[63] Thus, "[t]he roots of mass incarceration had been firmly established by a bipartisan consensus of national policymakers in the two decades prior to Reagan's War on Drugs in the 1980s."[64] The astronomical expansion of prisons in the last forty years occurred during a process of government restructuring that transferred services from the welfare state to the private realm of market, family, and individual. The United States set the global trend in cutting social programs while promoting free-market conditions conducive to capital accumulation, resulting in one of the slowest growth rates of spending on basic social needs.[65] Beginning with "Reaganomics" — the Reagan Administration's economic policy based on tax cuts, business deregulation, and reductions in federal spending — and extending to the Clinton Administration's restructuring of welfare, the United States underwent a period of intensified privatization.[66] Government policymakers coupled this neoliberal dismantling of the social safety net with intensified carceral intervention in poor communities of color.[67] The consolidation of corporate power in recent decades depended not only on increased market-based privatization but also on increased punitive control of marginalized people who are excluded from the market economy because of racism.[68]

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[63] *Id.* at 3–4, 10–25; *see* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017) (exploring the "acts and attitudes of African American citizens and leaders," *id.* at 14, with respect to the mass incarceration of black people).

[64] HINTON, *supra* note 52, at 11.

[65] *See, e.g.*, DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 31, 88 (2005); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 11 (Duke Univ. Press 2009) (2004) [hereinafter WACQUANT, PUNISHING THE POOR]; *Social Expenditure — Aggregated Data*, ORG. FOR ECON. CO-OPERATION & DEV., https://stats.oecd.org/Index.aspx?datasetcode=SOCX_AGG# [https://perma.cc/HWT8-D5XM].

[66] *See, e.g.*, HARVEY, *supra* note 65, at 3 (charting the historical roots of this privatization trend and noting that "[d]eregulation, privatization, and withdrawal of the state from many areas of social provision have been all too common" among neoliberal states, including the United States); Angela P. Harris, *Rotten Social Background and the Temper of the Times*, 2 ALA. C.R. & C.L. L. REV. 131, 138 (2011); *see also* GWENDOLYN MINK, WELFARE'S END (1998) (challenging the period's welfare reforms as an assault on poor single mothers).

[67] *See* HENRY A. GIROUX, THE TERROR OF NEOLIBERALISM 58–80 (2004) (connecting neoliberalism to both privatization and racism); GOTTSCHALK, *supra* note 52, at 10–14; BRETT STORY, PRISON LAND: MAPPING CARCERAL POWER ACROSS NEOLIBERAL AMERICA 12–19 (2019); WACQUANT, PUNISHING THE POOR, *supra* note 65, at 151–208 (tracing the expansion of the carceral government and its racial element); Bernard E. Harcourt, *Neoliberal Penality: A Brief Genealogy*, 14 THEORETICAL CRIMINOLOGY 74 (2010); *see also* ANDREA J. RITCHIE, EPICENTER: CHICAGO: RECLAIMING A CITY FROM NEOLIBERALISM (2019), https://www.politicalresearch.org/sites/default/files/2019-06/Epicenter%20Chicago%20-Ritchie%20-BLM-Chicago%206.2019.pdf [https://perma.cc/YZW2-LA95].

[68] *See* DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 41 ("[P]rison becomes a way of disappearing people in the false hope of disappearing the underlying social problems they represent.").

In sum, beginning in the 1960s, U.S. policymakers have supported elites by intensifying carceral measures in order to address the social problems and quell the unrest generated by racial capitalism.[69] As Professor Dan Berger explains: "[C]arceral expansion is a form of political as well as economic repression aimed at managing worklessness among the Black and Brown (and increasingly white) working class for whom global capitalism has limited need."[70] Thus, the relationship between racial capitalism and carceral punishment extends far beyond extracting profits from prison labor and private prisons, which does not characterize most of the prison industrial complex's operation.[71] Rather, prisons are the state's response to social crises produced by racial capitalism, such as unemployment and unhealthy segregated housing, and to the rebellions waged by marginalized people who suffer most from these conditions.[72]

The physical expansion of prisons is facilitated by criminalizing subordinated people so that caging them seems ordinary and natural. Indeed, Critical Resistance co-founder Provost Julia Chinyere Oparah identifies as a key "logic of incarceration"[73] the "racialization of crime" so that crime is associated with dangerous and violent "black, indigenous, immigrant, or other minority populations."[74] Longstanding stereotypes of black criminality are marshalled to turn everyday black life into criminal activities.[75] For example, order-maintenance policing relies on an association between the identification of lawless people and racist notions of criminality to legitimize routine police harassment and arrest of black people.[76] Likewise, during the "crack epidemic" of the Reagan era, the longstanding devaluation of black motherhood was crucial to converting the "public health problem of drug use during pregnancy into a crime, addressed by [arresting and imprisoning] black women rather than providing them with needed health care."[77]

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[69] Berger, *How Prisons Serve Capitalism*, *supra* note 60.

[70] *Id.*

[71] GILMORE, GOLDEN GULAG, *supra* note 17, at 21 (noting that "very few prisoners work for anybody while they're locked up" and, "[a]lthough the absolute number of private prisons has indeed grown, the fact is that 95 percent of all prisons and jails are publicly owned and operated").

[72] *Id.* at 26 ("In my view, prisons are partial geographical solutions to political economic crises, organized by the state, which is itself in crisis."); Berger, *How Prisons Serve Capitalism*, *supra* note 60.

[73] Julia Chinyere Oparah (formerly known as Julia Sudbury), *Transatlantic Visions: Resisting the Globalization of Mass Incarceration*, 27 SOC. JUST., Fall 2000, at 133, 147.

[74] *Id.* at 135.

[75] *See* BUTLER, *supra* note 59, at 21–28; KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 88–145 (2010).

[76] Dorothy E. Roberts, *Supreme Court Review, Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 806–08 (1999) [hereinafter Roberts, *Race, Vagueness*].

[77] Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1599 (2017) [hereinafter Roberts, *Democratizing*]; *see* DOROTHY E. ROBERTS,

Not only does the prison industrial complex serve as the state's solution to economic and social problems, but carceral approaches to these problems are also ever more common beyond prisons. I described this carceral expansion in a recent issue of this law review:

> All institutions in the United States increasingly address social inequality by punishing the communities that are most marginalized by it. Systems that ostensibly exist to serve people's needs — health care, education, and public housing, as well as public assistance and child welfare — have become behavior modification programs that regulate the people who rely on them, and these systems resort to a variety of punitive measures to enforce compliance.[78]

Public welfare programs are increasingly entangled with criminal law enforcement.[79] People who receive Medicaid or Temporary Assistance to Needy Families are subjected to intense surveillance by government agents as a condition of obtaining aid — and if they refuse aid, they are further subjected to child protective services investigations.[80] Homelessness, public school misbehavior, and health problems are all criminalized by calling police officers as the first responders to deal with problems that arise in these contexts.[81] The prison, foster care, and welfare systems operate together to form a cohesive punitive apparatus that punishes black mothers in particular.[82] At the same time, repressive fetal protection laws and abortion restrictions coalesce to criminalize pregnancy itself;[83] immigration law makes entering the

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KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 154–62 (1997) [hereinafter ROBERTS, KILLING THE BLACK BODY].

[78] Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1700 (2019) (reviewing VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018)) [hereinafter Roberts, *Digitizing*] (footnotes omitted); *see also* KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 43–46 (2011).

[79] Roberts, *Digitizing*, *supra* note 78, at 1702–04; *see Prisons and Class Warfare*, *supra* note 60 (describing how "social welfare agencies . . . have absorbed some of the surveillance and punishment missions of the police and prison system").

[80] *See* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 65–68, 73, 85–86 (2017); EUBANKS, *supra* note 78, at 7–9, 152–58; Spencer Headworth, *Getting to Know You: Welfare Fraud Investigation and the Appropriation of Social Ties*, 84 AM. SOC. REV. 171, 171 (2019) (showing how fraud investigators "exploit clients' social networks to extract" incriminating evidence, damaging socioeconomically marginalized people's social support networks); Roberts, *Digitizing*, *supra* note 78, at 1701–02; *see also* Spencer Headworth, Policing Welfare: Procedural Criminalization in Public Assistance (unpublished manuscript) (on file with author).

[81] Roberts, *Digitizing*, *supra* note 78, at 1702–06; *see also* Frank Edwards, *Family Surveillance: Police and Reporting of Child Abuse and Neglect*, 5 J. SOC. SCI. 50, 51 (2019) (noting that even "low-level" contact with police may result in child welfare investigations).

[82] Roberts, *Prison, Foster Care*, *supra* note 58, at 1491–92.

[83] *See* ROBERTS, KILLING THE BLACK BODY, *supra* note 77, at 150–201; Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 786 (2014); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 300–01, 331–35 (2013). On the reproductive justice movement,

United States without documentation a crime;[84] and militarized border security results in deportation, family separation, and detention in prisons and squalid concentration camps.[85]

As carceral logics take over ever-expanding aspects of our society, so does the cruelty that government agents visit on people who are the most vulnerable to state surveillance and confinement. Torture has been accepted as a technique of racialized carceral control.[86] The nation's public schools, prisons, detention centers, and hospitals serving poor people of color are marked not only by stark inequalities but also by

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see generally LORETTA J. ROSS ET AL., RADICAL REPRODUCTIVE JUSTICE (2017); LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE (2017); and JAEL SILLIMAN ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE (2004) (describing activism by women of color for reproductive justice).

[84] 8 U.S.C. § 1325 (2012). *See generally* AVIVA CHOMSKY, UNDOCUMENTED: HOW IMMIGRATION BECAME ILLEGAL (2014); MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS (2004); TORRIE HESTER, DEPORTATION: THE ORIGINS OF U.S. POLICY (2017); KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL (2010). On the immigrant rights movement, see ¡MARCHA!: LATINO CHICAGO AND THE IMMIGRANT RIGHTS MOVEMENT (Amalia Pallares & Nilda Flores-González eds., 2010); AMALIA PALLARES, FAMILY ACTIVISM: IMMIGRANT STRUGGLES AND THE POLITICS OF NONCITIZENSHIP (2015); and CHRIS ZEPEDA-MILLÁN, LATINO MASS MOBILIZATION: IMMIGRATION, RACIALIZATION, AND ACTIVISM (2017). On U.S. surveillance of and policing in Puerto Rico, see René Francisco Poitevin, *Political Surveillance, State Repression, and Class Resistance: The Puerto Rican Experience*, 27 SOC. JUST., Fall 2000, at 89, 90–93.

[85] STAFF OF H.R. COMM. ON OVERSIGHT & REFORM, 116TH CONG., REP. ON CHILD SEPARATIONS BY THE TRUMP ADMINISTRATION (Comm. Print 2019), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf [https://perma.cc/3HXY-76TD]; U.S. DEP'T OF HEALTH & HUMAN SERVS., OIG ISSUE BRIEF, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 1–2 (Jan. 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf [https://perma.cc/A6V8-GBNR]; S. POVERTY LAW CTR., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 4–7, 14–19 (2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf [https://perma.cc/AF4M-YBKB]; Smita Ghosh, *How Migrant Detention Became American Policy*, WASH. POST (July 19, 2019), https://www.washingtonpost.com/outlook/2019/07/19/how-migrant-detention-became-american-policy [https://perma.cc/Y9J7-6FZH]; Sophia Tareen, *As Trump Expands Deportation Powers, Immigrants Prepare*, AP (July 26, 2019), https://www.apnews.com/7a8cca3f25384ab084f8c35faa3c683f [https://perma.cc/7FHM-P2KT]; Jason Zengerle, *How America Got to 'Zero Tolerance' on Immigration: The Inside Story*, N.Y. TIMES MAG. (July 16, 2019), https://nyti.ms/2GgLyQ9 [https://perma.cc/9PEQ-DPXQ].

[86] *See* David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 798 (2005) (characterizing public torture lynchings as "a mode of racial repression . . . that deliberately adopted the forms and rituals of criminal punishment"); Dorothy Roberts, *Torture and the Biopolitics of Race*, 62 U. MIAMI L. REV. 229, 230–43 (2008) [hereinafter Roberts, *Torture*] (describing the history of the U.S. government's systematic torture of people of color as a means of racial subjugation in this country and abroad); Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, *in* TORTURE: A COLLECTION 105, 122 (Sanford Levinson ed., 2004) (explaining that lynchings and whippings of African Americans were justified by the belief that "blacks are a race of people inferior to any white person" and that "blacks deserve severe punishment"); *see also* LAURENCE RALPH, THE TORTURE LETTERS: RECKONING WITH POLICE VIOLENCE (forthcoming 2020) (recounting the history of police violence in Chicago).

dehumanizing bodily neglect and abuse committed by police officers and guards.[87] Further, as Rodríguez explains, "incarceration *as a logic and method of dominance* is not reducible to the particular institutional form of jails, prisons, detention centers, and other such brick-and-mortar incarcerating facilities."[88] Although prison abolitionists work to end prisons, their ultimate aspiration is to end carceral society — a society that is governed by a logic of incarceration.

B. Abolition Praxis: Past, Present, Future

Prison abolition theory has past, present, and future aspects, each of which animates activism simultaneously.[89] Prison abolitionists look back to history to trace the roots of today's carceral state to the racial order established by slavery and look forward to imagine a society without carceral punishment.[90] Both are critical motivations for abolishing the prison industrial complex. The case for abolition that is grounded in history and politics provides a compelling framework for understanding the need to eradicate the entire carceral punishment system as well as for identifying strategies to accomplish that goal. Indeed, we can see the extreme cruelty and degradation that characterize today's penitentiaries, police forces, and executions as the inevitable result of a racially subordinating system.[91]

1. Slavery Origins. — Many prison abolitionists have found the roots of today's criminal punishment system in the institution of chattel slavery.[92] Even before I thought of myself as a prison abolitionist, my analysis of current criminal justice issues consistently led me to a discussion of slavery. Whether interrogating racism in the prosecution of black

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[87] *See, e.g.*, Armando Lara-Millán, *Public Emergency Room Overcrowding in the Era of Mass Imprisonment*, 79 AM. SOC. REV. 866, 873–80 (2014); Roberts, *Digitizing*, *supra* note 78, at 1704–06; Christine Hauser, *Recordings Add Detail in Death of Woman Forced from Florida Hospital*, N.Y. TIMES (Jan. 7, 2016), https://nyti.ms/1mJlJMb [https://perma.cc/E9WS-DLMS].

[88] Rodríguez, *supra* note 29, at 1587.

[89] *See id.* at 1577 (describing abolition "as both a long accumulation and future planning of acts . . . dispersed across geographies and historical moments").

[90] *See id.* at 1610–11.

[91] *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1207 (2015) [hereinafter McLeod, *Grounded Justice*] ("[A] critical abolitionist ethic centers on how caging or confining human beings in a hierarchically structured, depersonalizing environment developed through historical practices of overt racial subordination tends inherently toward violence and degradation."); *see also* JONATHAN SIMON, MASS INCARCERATION ON TRIAL 3 (2014) (arguing that, because the conditions it creates are cruel and unusual, mass incarceration is itself unconstitutional). For selected accounts of prison conditions in the United States today, see U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN 5–8 (2019), https://www.justice.gov/opa/press-release/file/1150276/download [https://perma.cc/TH52-X645]; and RIKERS: AN AMERICAN JAIL (PBS 2017).

[92] *E.g.*, Kim Gilmore, *Slavery and Prison — Understanding the Connections*, 27 SOC. JUST., Fall 2000, at 195, 196 (discussing the ways the formation of the prison industrial complex is "related to," though "distinct from," histories of racialized chattel slavery).

women for pregnancy-related crimes,[93] the disproportionately high placement of black children in foster care,[94] the high rates of incarceration in black neighborhoods,[95] police torture of black suspects,[96] or gang-loitering policing,[97] I found it essential to understand these practices as originating in the enslavement of black people. That analysis helped me to see how these practices emanated from a carceral system that continues to perpetuate black people's subjugated status and, ultimately, to conclude the carceral system cannot be fixed — it must be abolished.[98]

The pillars of the U.S. criminal punishment system — police, prisons, and capital punishment — all have roots in racialized chattel slavery.[99] After Emancipation, criminal control functioned as a means of legally restricting the freedoms of black people and preserving whites' dominant status.[100] Through these institutions, law enforcement continued to implement the logic of slavery — which regarded black people as inherently enslaveable with no claim to legal rights[101] — to keep them in their place in the racial capitalist hierarchy.[102]

(a) Police. — The first police forces in the United States were slave patrols.[103] Beginning in the early 1700s, southern white men formed

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[93] *See* ROBERTS, KILLING THE BLACK BODY, *supra* note 77, at 152; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432–34, 1437–41, 1455 (1991).

[94] DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 9, 233–36, (2002).

[95] Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1275–76, 1296–99 (2004).

[96] Roberts, *Torture*, *supra* note 86, at 231, 236.

[97] Roberts, *Race, Vagueness*, *supra* note 76, at 778–79.

[98] Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 284–86 (2007) [hereinafter Roberts, *Constructing*]; Roberts, *Democratizing*, *supra* note 77, at 1604–07.

[99] Roberts, *Constructing*, *supra* note 98, at 267.

[100] *Id.*; *see* Gilmore, *supra* note 92, at 197–98.

[101] *See* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 34 (1991) ("The new racial classifications [during the U.S. slavery era] offered a basis for legitimating subordination that was unlike the justifications previously employed. By keying official rules of descent to national origin the classification scheme differentiated those who were 'enslaveable' from those who were not. Membership in the new social category of 'Negro' became itself sufficient justification for enslaveability.").

[102] *See* Gilmore, *supra* note 92, at 198.

[103] *See* ALEX S. VITALE, THE END OF POLICING 45–48 (2017); Mariame Kaba, *Foreword* to ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR, at xv (2017) [hereinafter Kaba, *Foreword* to RITCHIE] ("The origin story of modern American policing is slave patrols and union busting."); Andrea Miller, *Shadows of War, Traces of Policing: The Weaponization of Space and the Sensible in Preemption*, *in* CAPTIVATING TECHNOLOGY: RACE, CARCERAL TECHNOSCIENCE, AND LIBERATORY IMAGINATION IN EVERYDAY LIFE 85, 88 (Ruha Benjamin ed., 2019) [hereinafter CAPTIVATING TECHNOLOGY] ("Early iterations of the police in the United States include the slave patrols and night watches of

armed groups that entered slaveholding properties and roamed public roads to ensure that enslaved people did not escape or rebel against their enslavers.[104] Slave patrols monitored enslaved people to prevent them from engaging in forbidden activities such as "harboring weapons or fugitives, conducting meetings, or learning to read or write."[105] They also used the threat of violence to intimidate enslaved workers into obedience to enslavers.[106] Enslaved people who were caught planning resistance, running away, or defying the slave codes enacted to restrict them were subjected to violent punishments such as beatings, whippings, mutilation, and forced sale away from their families.[107] Modern police forces are descendants of armed urban patrols like the Charleston City Guard and Watch, which was established as early as 1783 to constantly monitor and inspect both enslaved and free black residents to "minimize Negro fraternizing and, more especially, to prevent the growth of an organized colored community."[108]

Enslaved people who worked on plantations and farms were under the "immediate control and discipline of their respective owners," who were often aided by hired overseers.[109] The overseers' job was to enforce enslaved workers' total subjugation to enslavers by violently reprimanding perceived disobedience and failures to meet productivity quotas.[110] The violence overseers inflicted on enslaved workers reflected a fundamental aspect of carceral punishment that survives

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the U.S. South and Northeast dating back to the early eighteenth century; the Texas Rangers established in 1835 in the Southwest; and anti-labor police formations in the late 1800s and early 1900s modeled after colonial occupation forces elsewhere."); *see also* RICHARD C. WADE, SLAVERY IN THE CITIES: THE SOUTH 1820–1860, at 80 (1964).

104 SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 18–24 (2001).

105 VITALE, *supra* note 103, at 46.

106 HADDEN, *supra* note 104, at 105–06, 117.

107 THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 340–42 (1996); JOHN SHELTON REED, MINDING THE SOUTH 69 (2003); KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 171–72, 174, 180, 187–88 (1956); Larry H. Spruill, *Slave Patrols, "Packs of Negro Dogs" and Policing Black Communities*, 53 PHYLON 42, 51–55 (2016).

108 VITALE, *supra* note 103, at 46–47 (quoting WADE, *supra* note 103, at 82).

109 WADE, *supra* note 103, at 80 (quoting *Communications. Charleston Neck*, CHARLESTON COURIER, Sept. 22, 1845, at 2).

110 *See* EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 121–44 (2014) ("Enslavers used measurement to calibrate torture in order to force cotton pickers to figure out how to increase their own productivity . . . ." *Id.* at 130.); TRISTAN STUBBS, MASTERS OF VIOLENCE: THE PLANTATION OVERSEERS OF EIGHTEENTH-CENTURY VIRGINIA, SOUTH CAROLINA, AND GEORGIA 2–3 (2018); Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation, The 1619 Project*, N.Y. TIMES MAG. (Aug. 14, 2019), https://nyti.ms/2H59Iow [https://perma.cc/2DJC-26AJ] (explaining that overseers' violence was "rational, capitalistic, all part of the plantation's design" and noting "punishments rose and fell with global market fluctuations").

today: the purpose of punishing black people was to reinforce their subjugation to white domination. Hence, enslaved people were punished for committing offenses defined as insubordination to enslavers, but were also punished regardless of their culpability for an offense. The celebrated abolitionist Frederick Douglass, who escaped slavery in Maryland in 1838,[111] emphasizes this point in his portrayal of the overseers he encountered while in captivity. His description of Austin Gore, an overseer who served Colonel Edward Lloyd on a plantation where Douglass spent two years of his childhood, is especially illuminating.[112] Gore was an ideal overseer because he "was one of those who could torture the slightest look, word, or gesture, on the part of the slave, into impudence, and would treat it accordingly."[113] Douglass elaborates:

> There must be no answering back to him; no explanation was allowed a slave, showing himself to have been wrongfully accused. Mr. Gore acted fully up to the maxim laid down by slaveholders, — "It is better that a dozen slaves suffer under the lash, than that the overseer should be convicted, in the presence of the slaves, of having been at fault." No matter how innocent a slave might be — it availed him nothing, when accused by Mr. Gore of any misdemeanor. To be accused was to be convicted, and to be convicted was to be punished; the one always following the other with immutable certainty.[114]

An enslaved man named Demby learned the price of refusing to submit to Gore's rule.[115] When Demby plunged into a creek to escape being beaten, Gore shot him dead with a musket.[116] Although slave law occasionally permitted the application of criminal homicide to convict slaveholders who killed their slaves, it exonerated those who killed slaves who resisted the slaveholders' lawful authority.[117] A "hostile attitude" or resistance to corporal punishment on the part of enslaved people like Demby provided legal justification for killing them.[118]

The status of enslaved Africans as the property of their white enslavers meant that, from the enslavers' perspective, black people were a perpetual threat to white people's property — a threat seen as so great it

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111 John Stauffer & Henry Louis Gates, Jr., *Introduction* to THE PORTABLE FREDERICK DOUGLASS, at xix (John Stauffer & Henry Louis Gates, Jr., eds., 2016).

112 *See* FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE (1845), *reprinted in* THE PORTABLE FREDERICK DOUGLASS, *supra* note 111, at 20, 28–31.

113 *Id.* at 28.

114 *Id.*

115 *See id.* at 29–30.

116 *See id.* Douglass notes that "killing a slave, or any colored person, in Talbot county, Maryland, is not treated as a crime, either by the courts or the community." *Id.* at 30.

117 Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1002–03 (2009).

118 *Id.* at 1003 (quoting Dave v. State, 22 Ala. 23, 33 (1853)).

necessitated employing armed forces to maintain order among the enslaved.[119] In the aftermath of Emancipation, when slaveholders' human property was no longer protected by slave law, "a new set of innovations and regulation[s] had to emerge, again under the rubric of policing."[120] Like overseers and slave patrols, Jim Crow police and private citizens who abetted them used terror primarily to enforce racial subjugation, not to apprehend people culpable for crimes.[121] Take, for example, coercive interrogation techniques, now known as "the third degree," that have become a staple of modern policing.[122] The first stage of lynching, typically carried out with the participation or sanction of the police, was often "extract[ing] a confession by whipping or burning the accused."[123] Prior to *Miranda v. Arizona*,[124] which barred the admissibility of presumptively coerced confessions, southern police routinely used torture to force blacks to confess to crimes.[125] For example, in *Brown v. Mississippi*,[126] three black tenant farmers were convicted for murdering a white planter; the sole evidence before the jury consisted of their confessions.[127] Those confessions were obtained through police torture, including the repeated hanging and whipping of one of the defendants until he confessed to a dictated statement.[128] The other two defendants' confessions were similarly coerced and tailored.[129] When overturning the

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119 *See* HADDEN, *supra* note 104, at 18–22.

120 Critical Resistance, *Do Black Lives Matter?: Robin D.G. Kelley and Fred Moten in Conversation*, at 11:30, VIMEO (Jan. 6, 2015), https://vimeo.com/116111740 [https://perma.cc/W2FQ-7NZL] [hereinafter Critical Resistance, *Do Black Lives Matter?*]; *see* SIDNEY L. HARRING, POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865–1915, at 250–51 (1983) (arguing that ruling elites used the police to control working-class communities and maintain the existing order of capitalist relationships).

121 *See* Garland, *supra* note 86, at 822 (explaining how lynchings had a "special significance as a legacy of the personal right of white men to control slaves and to exercise police power over them"); Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching?*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 21, 29 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) ("[L]ynchings . . . were highly ritualized expressive performances aimed at communicating the terms of the racial contract to blacks and whites alike."); Liz Philipose, *The Politics of Pain and the Uses of Torture*, 32 SIGNS 1047, 1053 (2007) (explaining that the circulation of lynching photographs served to exonerate the whites who perpetrated violence "by suggesting the culpability of the violated" black male); Roberts, *Torture*, *supra* note 86, at 231–34; Skolnick, *supra* note 86, at 105–06 ("[Lynching] served the double purpose of affirming the God-given racial superiority of all whites against any black and of intimidating black men who might think of challenging the reigning social order.").

122 *See* Skolnick, *supra* note 86, at 112–13.

123 Roberts, *Torture*, *supra* note 86, at 231.

124 384 U.S. 436 (1966).

125 *See id.* at 235–36.

126 297 U.S. 278 (1936).

127 *Id.* at 279.

128 *Id.* at 281–82.

129 *See id.* at 281–84.

convictions, the Supreme Court observed that "the signs of the rope on [one defendant's] neck were plainly visible during the so-called trial."[130]

Even after the civil rights movement, "[p]olice torture of suspects continues to be a tolerated means of confirming the presumed criminality of blacks."[131] For example, from the 1970s to the 1990s, white police officers in Chicago engaged in systematic torture of black residents.[132] Under the command of Lieutenant Jon Burge, police coerced dozens of confessions from suspects by beating them, burning them with radiators and cigarettes, putting guns in their mouths, placing plastic bags over their heads, and delivering electric shocks to their ears, noses, fingers, and genitals.[133] Burge's reign of torture was known and condoned by police officers, the State's Attorney's office, judges, and doctors at Cook County Hospital.[134] Racialized terror that bridged slave patrols, lynchings, and police whippings remained a feature of policing in the post–Civil Rights Era criminal punishment system.[135]

Police also serve as an arm of the racial capitalist state by controlling black and other marginalized communities through everyday physical intimidation and by funneling those they arrest into jails, prisons, and detention centers.[136] Numerous studies conducted throughout the

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[130] *Id.* at 281 (quoting Brown v. State, 161 So. 465, 470 (Miss. 1935) (Griffith, J., dissenting)).

[131] Roberts, *Torture*, *supra* note 86, at 236.

[132] *Id.*; *see* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1288–90 (1999).

[133] Roberts, *Torture*, *supra* note 86, at 236; Noah Berlatsky, *When Chicago Tortured*, THE ATLANTIC (Dec. 17, 2014), https://www.theatlantic.com/national/archive/2014/12/chicago-police-torture-jon-burge/383839 [https://perma.cc/6UY7-J4FY]. *See generally* JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 21–26, 60–87 (2000) (providing an account of the Chicago police tortures under Burge's command).

[134] Roberts, *Constructing*, *supra* note 98, at 277; *see* Bandes, *supra* note 132, at 1288–89, 1331.

[135] Roberts, *Torture*, *supra* note 86, at 237.

[136] *See* BUTLER, *supra* note 59, at 47–79 (noting the many ways in which the police state transforms "anxiety about black men into law and policy intended to contain and control them," *id.* at 48); RITCHIE, *supra* note 103, at 43–59; MICOL SEIGEL, VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE 20–21 (2018) (arguing that racial division and oppression are central to capitalism, with the police existing as an "antiblack force," *id.* at 21, to produce and enforce those necessities); VITALE, *supra* note 103, at 2–4, 34, 50–54, 61–67, 76–78, 100, 178–83 (reviewing increased police involvement with various marginalized groups and disparate use of force against minority racial groups and concluding that "the police exist primarily as a system for managing and even producing inequality by suppressing social movements and tightly managing the behaviors of poor and nonwhite people," *id.* at 34); George Lipsitz, *Policing Place and Taxing Time on Skid Row*, *in* POLICING THE PLANET: WHY THE POLICING CRISIS LED TO BLACK LIVES MATTER 123, 126–31 (Jordan T. Camp & Christina Heatherton eds., 2016) (explaining how the criminalization of poverty and aggressive policing serve to further subjugate the poor and reinforce their "powerlessness," *id.* at 127); *see also* Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 3, 4–5, 25–26 (Angela J. Davis ed., 2017) (explaining how deep historical forces like the presumption of black guilt have created a form of "legalized racial subordination," *id.* at 5); Rachel Herzing, Opinion, *Big Dreams and Bold Steps Toward a Police-Free Future*, TRUTHOUT (Sept. 16, 2015), https://truthout.org/articles/big-dreams-and-bold-steps-toward-a-police-free-future

nation demonstrate that police engage in rampant racial profiling.[137] The increasing militarization of police forces accentuates their role as an occupying force in communities of color and on Indian reservations.[138] Police harassment and violence against residents in poor, nonwhite neighborhoods is routine.[139] Police "brutality" is a misnomer because it suggests police violence is exceptional. Mariame Kaba, the founding director of Project NIA,[140] explains she "retired the term 'police

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[https://perma.cc/K6R9-WUFN] (describing police as "armed protection of state interests . . . [that] frequently clash with the communities targeted most aggressively by policing").

[137] *See, e.g.*, BUTLER, *supra* note 59, at 52–53, 59–61; Radley Balko, Opinion, *There's Overwhelming Evidence That the Criminal-Justice System Is Racist. Here's the Proof.*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof [https://perma.cc/WVA2-GTYH] (collecting studies addressing profiling and other issues and concluding that "the evidence of racial bias in our criminal-justice system isn't just convincing — it's overwhelming"); John Eligon, *Stopped, Ticketed, Fined: The Pitfalls of Driving While Black in Ferguson*, N.Y. TIMES (Aug. 6, 2019), https://nyti.ms/2T8PcAU [https://perma.cc/BD67-S558] (describing how black drivers continue to be stopped at far higher rates than white drivers and noting that this disparity has actually grown in Ferguson, Missouri, despite recent changes to laws).

[138] *See* AM. CIVIL LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 5, 25–26, 35–39 (2014), https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf [https://perma.cc/44G5-4MLE]; HINTON, *supra* note 52, at 184 (describing the "War on Crime" as "an actual violent conflict that involved the use of military-grade weapons and dangerous patrol tactics and that resulted in real gun battles and real victims"); VITALE, *supra* note 103, at 3 (describing police use of military-style weapons and units and stating that officers, many of whom have military experience, often have a "warrior mentality" and "think of themselves as soldiers in a battle with the public rather than guardians of public safety" (first quoting SUE RAHR & STEPHEN K. RICE, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NO. NCJ 248654, BULLETIN: FROM WARRIORS TO GUARDIANS: RECOMMITTING AMERICAN POLICE CULTURE TO DEMOCRATIC IDEALS 4 (2015), https://permanent.access.gpo.gov/gpo57170/248654.pdf [https://perma.cc/6VW3-EXN4])); Dian Million, *Policing the Rez: Keeping No Peace in Indian Country*, 27 SOC. JUST., Fall 2000, at 101, 111–12 (noting disproportionate rates of incarceration among Native Americans); Jonathan Mummolo, *Militarization Fails to Enhance Police Safety or Reduce Crime but May Harm Police Reputation*, 115 PROC. NAT'L ACAD. SCI. 9181, 9183 (2018); Donna Murch, *Crack in Los Angeles: Crisis, Militarization, and Black Response to the Late Twentieth-Century War on Drugs*, 102 J. AM. HIST. 162, 173 (2015); Fanna Gamal, Note, *The Racial Politics of Protection: A Critical Race Examination of Police Militarization*, 104 CALIF. L. REV. 979, 997–98 (2016) (illustrating the connection between the War on Drugs and police militarization); Kanya Bennett, *As We Remember the Militarized Response to the Ferguson Uprising, Trump Says Civilian Police Are Making "Good Use" of Military Weapons*, ACLU: SPEAK FREELY BLOG (Aug. 8, 2017, 5:15 PM), https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/we-remember-militarized-response-ferguson-uprising [https://perma.cc/2NCA-7V6J]; Paul D. Shinkman, *Ferguson and the Militarization of Police*, U.S. NEWS & WORLD REP. (Aug. 14, 2014), https://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization [https://perma.cc/DHK2-NEJR] (documenting increasing use of military weapons by police across the country against a backdrop of racial tension in Ferguson, Missouri).

[139] *See generally* BUTLER, *supra* note 59 (examining police violence against black men); RITCHIE, *supra* note 103 (examining police violence against black women and women of color).

[140] Mariame Kaba, *About Me*, BEING MK, http://mariamekaba.com [https://perma.cc/HG73-SEE8].

brutality'" because "[i]t is meaningless, as violence is inherent to policing."[141] Similarly, Professor Micol Seigel calls policing "violence work."[142] Police normally treat residents in communities of color in an aggressive fashion — shouting commands, handcuffing even children, throwing people to the ground, and tasing, beating, and kicking them.[143] For young men of color, the risk of being killed by the police is shockingly high and police use of force is among the leading causes of death.[144] Black women, women of color, and queer women are especially vulnerable to gendered forms of sexual violence at the hands of police.[145] These violent tactics are not in response to violent crime. Indeed, police officers actually spend a small fraction of time stopping violent offenders.[146] Most of the time, officers are engaged in patrolling ordinary people who are simply going about their everyday activities, generating high-volume arrests for petty infractions.[147]

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141 Kaba, *Foreword* to RITCHIE, *supra* note 103, at xv; *see* KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA (2004).

142 SEIGEL, *supra* note 136, at 9.

143 *See* BUTLER, *supra* note 59, at 49–56; RITCHIE, *supra* note 103, at 49, 154, 165–69, 178; THE W. BALT. COMM'N ON POLICE MISCONDUCT & THE NO BOUNDARIES COALITION, OVER-POLICED, YET UNDERSERVED: THE PEOPLE'S FINDINGS REGARDING POLICE MISCONDUCT IN WEST BALTIMORE 10–15 (2016), http://www.noboundariescoalition.com/wp-content/uploads/2016/03/No-Boundaries-Layout-Web-1.pdf [https://perma.cc/MB3F-8R4P] (detailing stories of police misconduct told by witnesses and victims in the Sandtown-Winchester neighborhood, which is predominantly African American, and revealing a belief that there is racism in law enforcement); *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES (Apr. 19, 2018), https://nyti.ms/2vbLdWy [https://perma.cc/B4JX-Z8ZV]; Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016), https://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html [https://perma.cc/2STQ-P9PX]; Mark Puente, *Undue Force*, BALT. SUN (Sept. 28, 2014), http://data.baltimoresun.com/news/police-settlements [https://perma.cc/ZQ3D-HCPU] (documenting cases of alleged police brutality and the millions of dollars the city has paid to settle lawsuits alleging that officers used excessive force); Rob Arthur, *New Data Shows Police Use More Force Against Black Citizens Even Though Whites Resist More*, SLATE (May 30, 2019), https://slate.com/news-and-politics/2019/05/chicago-police-department-consent-decree-black-lives-matter-resistance.html [https://perma.cc/S5GT-K7VX]; Justin P. Hicks, *Are Grand Rapids Police Alone in Handcuffing Black Youth at Gunpoint?*, MLIVE (Nov. 9, 2018), https://www.mlive.com/news/grand-rapids/2018/11/handcuffing_unarmed_youths_the.html [https://perma.cc/Y283-72TS]; *see also* City of Los Angeles v. Lyons, 461 U.S. 95, 113–20 (1983) (Marshall, J., dissenting).

144 Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCI. 16793, 16794 (2019) (finding the risk of being killed by police is highest for black men, who, at current levels of risk, face about a one in 1000 chance of being killed by police over the course of their lives).

145 *See* RITCHIE, *supra* note 103, at 104–26.

146 *See* Mychal Denzel Smith, *Abolish the Police. Instead, Let's Have Full Social, Economic, and Political Equality*, THE NATION (Apr. 9, 2015), https://www.thenation.com/article/abolish-police-instead-lets-have-full-social-economic-and-political-equality [https://perma.cc/5AV2-7KP5].

147 *See* BUTLER, *supra* note 59, at 61–64; VITALE, *supra* note 103, at 31.

Like the Black Codes and the slave codes before them, order-maintenance policies give police wide discretion to control black people's presence on public streets.[148] Law enforcement continues to enforce the logic of slave patrols, to view black people as a threat to the security of propertied whites, and to contain the possibility of black rebellion.[149] To Professor Fred Moten, police officers killed Michael Brown and Eric Garner because these black men represented "insurgent black life," which "constituted a threat to the order that [police] represent[] and . . . [are] sworn to protect."[150] There are numerous examples of state officials dispatching police to silence black protest, including the assassination of Black Panther Party leader Fred Hampton by the Chicago Police Department and the military-style assault on protesters in Ferguson, Missouri, after the killing of Michael Brown.[151] The recent spate of "BBQ Beckys" — white residents who call 911 on black men, women, and children engaged in harmless public activities like barbequing in a park or selling bottled water on a sidewalk[152] — spotlights the role of police to keep black people in their place for the benefit of white citizens.[153]

Abolitionists also include state surveillance — another descendant of the slave patrol[154] — as a major component of carceral punishment.[155] Today's computerized predictive policing is a high-tech version of vague loitering and vagrancy laws, which historically gave "'license to police officers to arrest people purely on the basis of race-based suspicion' [by] categorically identifying black people as lawless apart from their criminal conduct."[156] I previously described the situation in this law review as follows:

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[148] Roberts, *Race, Vagueness*, *supra* note 76, at 779–80; *see also* BUTLER, *supra* note 59, at 65; Jesse McKinley, *The "Gravity Knife" Led to Thousands of Questionable Arrests. Now It's Legal*, N.Y. TIMES (May 31, 2019), https://nyti.ms/2WzTohi [https://perma.cc/R3P8-SYRS].

[149] *See* SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 22–24 (2015) (suggesting "how certain surveillance technologies installed during slavery to monitor and track blackness as property . . . anticipate the contemporary surveillance of racialized subjects"); Miller, *supra* note 103.

[150] Critical Resistance, *Do Black Lives Matter?*, *supra* note 120, at 5:16.

[151] *See* JEFFREY HAAS, THE ASSASSINATION OF FRED HAMPTON: HOW THE FBI AND THE CHICAGO POLICE MURDERED A BLACK PANTHER (2010); Shinkman, *supra* note 138.

[152] Bill Hutchinson, *From "BBQ Becky" to "Golfcart Gail," List of Unnecessary 911 Calls Made on Blacks Continues to Grow*, ABC NEWS (Oct. 19, 2018), https://abcnews.go.com/US/bbq-becky-golfcart-gail-list-unnecessary-911-calls/story?id=58584961 [https://perma.cc/A9XL-Q3KR].

[153] *See* Chan Tov McNamarah, *White Caller Crime: Racialized Police Communication & Existing While Black*, 24 MICH. J. RACE & L. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3312512 [https://perma.cc/R8SP-5VXW].

[154] *See* BROWNE, *supra* note 149, at 16–21.

[155] *See* McLeod, *Grounded Justice*, *supra* note 91, at 1164, 1179, 1219; Berger, Kaba & Stein, *supra* note 45.

[156] Roberts, *Digitizing*, *supra* note 78, at 1714 (quoting Roberts, *Race, Vagueness*, *supra* note 76, at 806); *see* MUHAMMAD, *supra* note 75, at 1–14 (arguing that social scientists in the early twentieth

> Law enforcement agencies nationwide collect and store vast amounts of data about past crimes, analyze these data using mathematical algorithms to predict future criminal activity, and incorporate these forecasts in their strategies for policing individuals, groups, and neighborhoods. Judges use big-data predictive analytics to inform their decisions about pretrial detention, bail, sentencing, and parole. Automated risk assessments help to determine whether or not defendants go to prison, the type of facility to which they are assigned, how long they are incarcerated, and the conditions of their release.[157]

Some proponents of artificial intelligence claim these technologies help people make more objective decisions that are not tainted by human biases.[158] However, predictive algorithms have been revealed to "disproportionately identify African Americans as likely to commit crimes in the future."[159] This is because "[c]rime data collection reflects discriminatory policing. . . . [P]olice routinely bias data collection against black residents by patrolling their neighborhoods with far greater intensity than white neighborhoods."[160] Risk assessment models that

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century created a "statistical discourse," *id.* at 5, about black crime that supported the stereotype that black people were innately criminal).

157 Roberts, *Digitizing*, *supra* note 78, at 1716; *see* ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT 2–6 (2017); Andrew Guthrie Ferguson, *Illuminating Black Data Policing*, 15 OHIO ST. J. CRIM. L. 503, 505–08 (2018); Ric Simmons, *Big Data and Procedural Justice: Legitimizing Algorithms in the Criminal Justice System*, 15 OHIO ST. J. CRIM. L. 573, 573 (2018); Jason Tashea, *Calculating Crime*, 103 A.B.A. J. 54, 56–57 (2017); Anna Maria Barry-Jester, Ben Casselman & Dana Goldstein, *The New Science of Sentencing: Should Prison Sentences Be Based on Crimes That Haven't Been Committed Yet?*, MARSHALL PROJECT (Aug. 4, 2015, 7:15 AM), https://www.themarshallproject.org/2015/08/04/the-new-science-of-sentencing [https://perma.cc/R6PG-GPTU]. *See generally* Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOC. REV. 977 (2017) (describing how the Los Angeles Police Department's access to big data impacts its surveillance practices); Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 329–36 (2015) (discussing the Fourth Amendment implications of using big data in policing).

158 *See, e.g.*, sources cited in Roberts, *Digitizing*, *supra* note 78, at 1718.

159 *Id.*; *see* Kelly Hannah-Moffat & Kelly Struthers Montford, *Unpacking Sentencing Algorithms: Risk, Racial Accountability and Data Harms*, *in* PREDICTIVE SENTENCING: NORMATIVE AND EMPIRICAL PERSPECTIVES 175, 187–88 (Jan W. de Keijser et al. eds., 2019); Malkia Amala Cyril, *Black America's State of Surveillance*, THE PROGRESSIVE (Mar. 30, 2015), https://progressive.org/magazine/black-america-s-state-surveillance-cyril [https://perma.cc/37CT-N3YH]; Karen Hao, *AI Is Sending People to Jail — And Getting It Wrong*, MIT TECH. REV. (Jan. 21, 2019), https://www.technologyreview.com/s/612775/algorithms-criminal-justice-ai [https://perma.cc/3G9H-LMZ2].

160 Roberts, *Digitizing*, *supra* note 78, at 1719; *see* RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 82–84 (2019); Nick Pinto, *NYPD Disputes Gang Database Numbers — But Its Math Doesn't Add Up*, THE INTERCEPT (June 14, 2018, 2:51 PM), https://theintercept.com/2018/06/14/nypd-gang-database-city-council-dermot-shea [https://perma.cc/5TFH-JA9S]; *see also* CLARE GARVIE ET AL., CTR. ON PRIVACY & TECH. AT GEORGETOWN LAW, THE PERPETUAL LINE-UP: UNREGULATED POLICE FACE RECOGNITION IN AMERICA 53–57 (2016), https://www.perpetuallineup.org/sites/default/files/2016-12/The%20Perpetual%20Line-Up%20-%20Center%20on%20Privacy%20and%20Technology%20at%20Georgetown%20Law%20-%20121616.pdf [https://perma.cc/976X-2YYM].

import institutionally biased data become a "self-fulfilling feedback loop" where the prediction ensures future detection.[161] The rise of computerized risk assessments in the carceral punishment system reinforces the detachment of punishment from culpability and furthers the criminalization of whole communities. Computerized predictions identify people for government agencies to regulate from the moment of birth, without any regard to their actual responsibility for causing social harm: police gang databases have included toddlers.[162] Thus, the state uses artificial intelligence and predictive technologies to reproduce existing inequalities while creating new modes of carceral control and foreclosing imagination of a more democratic future.[163]

(b) Prisons. — During the slavery era, prison populations were composed almost exclusively of white people.[164] When slavery was abolished, the demographics of prisons shifted dramatically.[165] Southern law enforcement began to charge formerly enslaved African Americans with crimes and incarcerate them in growing numbers.[166] Imprisonment and the convict leasing system maintained black people's status as a disenfranchised and involuntary labor force for whites.[167] In its 1871 decision

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161 Ferguson, *Illuminating Black Data Policing*, *supra* note 157, at 516; *see also* CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION 27 (2016); William S. Isaac, *Hope, Hype, and Fear: The Promise and Potential Pitfalls of Artificial Intelligence in Criminal Justice*, 15 OHIO ST. J. CRIM. L. 543, 550–51 (2018) (describing a study finding a "dramatic increase in the predicted odds of targeting" areas already believed by law enforcement to be "high in crime," *id.* at 550).

162 *Beware of Gangster Babies: Calif. Database Slammed*, CBS NEWS (Aug. 15, 2016, 9:31 AM), https://www.cbsnews.com/news/calgang-california-gang-database-slammed-listing-babies-privacy-concerns [https://perma.cc/XT9L-9EVP]; *see also* HINTON, *supra* note 52, at 218–49 (describing federal juvenile delinquency policies during the 1970s that regulated black children based on predictions that they would commit future crimes).

163 *See* BENJAMIN, RACE AFTER TECHNOLOGY, *supra* note 160; CAPTIVATING TECHNOLOGY, *supra* note 103; Roberts, *Digitizing*, *supra* note 78, at 1699, 1712–13. *See generally* MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS (forthcoming July 2020) (discussing data-driven and electronic forms of state control and surveillance that are characterized as progressive alternatives).

164 Roberts, *Constructing*, *supra* note 98, at 268.

165 *Id.*

166 *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 57 (2006) ("In Alabama, for example, nonwhites made up just 2 percent of the prison population in 1850, but 74 percent by 1870."); *see also* Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 560 (2003) (drawing connections between race, criminal punishment, and felon disenfranchisement laws in U.S. history).

167 *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 5–6 (2009) (offering a history of convict leasing and "the centrality of its role in the web of restrictions put in place to suppress black citizenship"); *id.* at 9 ("By 1900, the South's judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans to comply with the social customs and labor demands of whites."); SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY 58–118 (2016) (comparing the experience of black females in the southern prison-labor system to the experience of slavery); TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW

Ruffin v. Commonwealth,[168] the Virginia Supreme Court of Appeals affirmed the similar status of slave and prisoner when it ruled that an incarcerated convict was "for the time being the slave of the State. He is civiliter mortuus; and his estate, if he has any, is administered like that of a dead man."[169] Likewise, black people convicted of petty offenses were "sold as punishment for crime" at public auctions as if they were still enslaved.[170]

A key assertion of prison abolition theory is that criminalization of black people following Emancipation served to maintain the racial capitalist system that had been built on slavery.[171] In an interview published in 2005, Professor Angela Y. Davis explained her ideas on the link between slavery and prison abolition:

> Now I am trying to think about the ways that the prison reproduces forms of racism based on the traces of slavery that can still be discovered within the contemporary criminal justice system. There is, I believe, a clear relationship between the rise of the prison-industrial-complex in the era of global capitalism and the persistence of structures in the punishment system that originated with slavery.[172]

In other words, the criminalization and imprisonment of black people following the Civil War are a critical link in the historical chain that ties the prison industrial complex to slavery.

Criminal punishment was a chief way the southern states nullified the Reconstruction Amendments, reinstated the white power regime, and made free blacks vulnerable to labor exploitation and disenfranchisement. Following the formal abolition of slavery, southern states targeted black men, women, and children for imprisonment by passing criminal laws known as Black Codes, modeled after the slave codes, which prohibited their freedom of movement, contract, and family life.[173] Between 1865 and 1866, legislatures "enacted harsh vagrancy

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SOUTH 61–102 (2015) (same); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 31–84 (1996) (describing the rise of prison farms and convict leasing in the post–Civil War South).

168 62 Va. (21 Gratt.) 790 (1871).

169 *Id.* at 796.

170 Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 627 & n.123 (2008).

171 *See* McLeod, *Grounded Justice*, *supra* note 91, at 1188 ("[C]riminal law enforcement functioned as the primary mechanism for the continued subordination of African Americans for profit [after the Civil War].").

172 DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 35.

173 W.E.B. DU BOIS, BLACK RECONSTRUCTION 166–80 (Atheneum Publishers, Inc. 1976) (1935); FONER, RECONSTRUCTION, *supra* note 41, at 199–203; 1 HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 13–14 (1977); THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 61–80 (1965); Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal-Justice System.*, N.Y. TIMES MAG. (Aug. 14, 2019), https://nyti.ms/2OQ49ZV [https://perma.cc/SBC6-CME4] [hereinafter Stevenson, *Slavery*].

laws, apprenticeship laws, criminal penalties for breach of contract, and extreme punishments for blacks, all in an effort to control black labor."[174] Black people who were out of work or simply present in public without adequate reason were routinely arrested for vagrancy, giving white officials license to jail them.[175] Blacks were also arrested and given long sentences for petty offenses that whites engaged in without consequence. Writing in 1893, journalist and activist Ida B. Wells gave the example of twelve black men who were imprisoned in South Carolina "on no other finding but a misdemeanor commonly atoned for by a fine of a few dollars, and which thousands of the state's inhabitants [white] are constantly committing with impunity — the carrying of concealed weapons."[176]

As the Court's *Timbs v. Indiana*[177] decision last Term discussed, Black Codes also employed economic sanctions to consign blacks to a form of debt slavery that coerced them into onerous involuntary labor.[178] In the decades after Reconstruction, fines kept many formerly enslaved people in forced servitude to white landowners.[179] Activist Mary Church Terrell warned in 1907 that the peonage system kept black people perpetually enslaved. "[T]here are scores, hundreds perhaps, of coloured men in the South to-day who are vainly trying to repay fines and sentences imposed upon them five, six, or even ten years ago," she

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[174] Pamela Brandwein, *Slavery as an Interpretive Issue in the Reconstruction Congresses*, 34 LAW & SOC'Y REV. 315, 324 (2000); *see also* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 933–52 (2019) [hereinafter Goodwin, *Thirteenth Amendment*] (describing Black Codes, convict leasing, debt peonage, and apprenticeship, "which entrapped the newly emancipated and freed Blacks into unpaid labor and incarceration," *id.* at 933).

[175] BLACKMON, *supra* note 167, at 1; DENNIS CHILDS, SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY 63 (2015); MARY ELLEN CURTIN, BLACK PRISONERS AND THEIR WORLD, ALABAMA, 1865–1900, at 45–46 (2000); HALEY, *supra* note 167, at 30; LEFLOURIA, *supra* note 167, at 58–59; ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 169 (1996).

[176] Ida B. Wells, *The Convict Lease System*, *in* THE REASON WHY THE COLORED AMERICAN IS NOT IN THE WORLD'S COLUMBIAN EXPOSITION: THE AFRO-AMERICAN'S CONTRIBUTION TO COLUMBIAN LITERATURE 23, 25 (Robert W. Rydell ed., 1999) (alteration in original) (quoting George W. Cable, THE SILENT SOUTH, TOGETHER WITH THE FREEDMAN'S CASE IN EQUITY AND THE CONVICT LEASE SYSTEM 152 (New York, Charles Scribner's Sons 1885)).

[177] 139 S. Ct. 682 (2019).

[178] *See id.* at 688–89.

[179] *See id.*; *see also* JACQUELINE JONES, THE DISPOSSESSED: AMERICA'S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT 107 (1992) (estimating "as many as one-third of all [sharecroppers] in Alabama, Mississippi, and Georgia were being held against their will in 1900"); JAY R. MANDLE, NOT SLAVE, NOT FREE: THE AFRICAN AMERICAN ECONOMIC EXPERIENCE SINCE THE CIVIL WAR 21–23 (1992) (describing the exploitative system of sharecropping).

wrote.[180] By compelling emancipated blacks to work for whites in payment of debts on threat of incarceration, the law substituted the unconstitutional system of chattel slavery with a legal system of peonage.[181]

Also adjoined to these forms of legally enforced servitude was the practice of systematically forcing black prisoners to toil on chain gangs and leasing black convicts as labor to planters and companies. By making free black people criminals, white authorities could compel them to work against their will in a system that not only constituted "slavery by another name,"[182] but also was so violent that it was "worse than slavery."[183] Between 1865 and 1880, every former Confederate state except Virginia established a system of leasing large numbers of black prisoners to railroads, coal mines, and other industries that were rebuilding infrastructures devastated by the Civil War.[184] Private lessees had complete custody and control of prisoners and were motivated to maximize their profits by extracting as much labor as possible with little incentive to preserve prisoners' welfare or lives.[185] The result was rampant punishment, torture, and killing of prisoners with complete impunity.[186]

State exploitation of prison labor reinforced a gendered and sexualized form of white domination of black women.[187] Black women were not protected by Victorian norms of femininity, which shielded most white women from the degradation of carceral violence and forced labor.[188] To the contrary, black women were far more likely than white women to be arrested for violating racialized gender standards by engaging in behavior deemed to be masculine, like public quarreling.[189] The wildly disparate treatment of white women and black women arrested for similar crimes is mind-boggling: for example, "[b]etween 1908 and 1938, only four white women were ever sentenced to the chain gang in Georgia, compared with almost two thousand Black women."[190]

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180 Brief for Petitioners at 29, *Timbs*, 139 S. Ct. 682 (No. 17-1091) (quoting Mary Church Terrell, *Peonage in the United States: The Convict Lease System and the Chain Gangs*, 62 NINETEENTH CENTURY & AFTER 306, 313 (1907)).

181 *See* Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 981 (2002).

182 *See* BLACKMON, *supra* note 167 (naming convict leasing as "slavery by another name").

183 *See* OSHINSKY, *supra* note 167, at 55–84; *see also* MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928, at 22 (1996).

184 *See* Howe, *supra* note 117, at 1009–10.

185 *See* OSHINSKY, *supra* note 167, at 56–60.

186 BLACKMON, *supra* note 167, at 70–71.

187 *See generally* HALEY, *supra* note 167; LEFLOURIA, *supra* note 167; Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1258–69 (2012).

188 *See* HALEY, *supra* note 167, at 75; LEFLOURIA, *supra* note 167, at 126–27; Ocen, *supra* note 187, at 1262.

189 *See* HALEY, *supra* note 167, at 29–30; Ocen, *supra* note 187, at 1262.

190 Ocen, *supra* note 187, at 1262.

Recent investigations by Professors Sarah Haley and Talitha LeFlouria provide critical documentation of the previously unacknowledged extent of black women's involvement in convict leasing, chain gangs, and forced domestic labor, dramatically expanding our understanding of antiblack violence and carceral control during the Jim Crow era.[191] Haley frames the common practice of chain-gang overseers whipping black female convict laborers as "sexualized gender- and race-specific rituals of violence mark[ing] the convict camp as a pornographic site" and producing a spectacle of gendered racial terror.[192] Newspapers also routinely vilified black women accused of crimes.[193] Black women resisted in multiple ways, including as organized club women, blues lyricists, and incarcerated petitioners and saboteurs.[194] Violence against enslaved and incarcerated black women was essential to preserving the racial capitalist state.[195] This state, in turn, constructed an ideology of black female depravity and deviance,[196] which undergirds black women's higher rates of incarceration to this day.[197]

I have emphasized how during the slavery and Jim Crow eras, state agents meted out punishment to black people without regard to their guilt or innocence. Criminalizing black people entailed both defining crimes so as to make black people's harmless, everyday activities legally punishable and punishing black people regardless of their culpability for

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191 HALEY, *supra* note 167; LEFLOURIA, *supra* note 167. For additional historical scholarship on the criminalization of black women and girls, see TERA EVA AGYEPONG, THE CRIMINALIZATION OF BLACK CHILDREN: RACE, GENDER, AND DELINQUENCY IN CHICAGO'S JUVENILE JUSTICE SYSTEM, 1899–1945 (2018); KALI N. GROSS, COLORED AMAZONS: CRIME, VIOLENCE, AND BLACK WOMEN IN THE CITY OF BROTHERLY LOVE, 1880–1910 (2006); CHERYL D. HICKS, TALK WITH YOU LIKE A WOMAN: AFRICAN AMERICAN WOMEN, JUSTICE, AND REFORM IN NEW YORK, 1890–1935 (2010); and Sowande' Mustakeem, *"Armed with a Knife in Her Bosom": Gender, Violence, and the Carceral Consequences of Rage in the Late 19th Century*, 100 J. AFR. AM. HIST. 385 (2015).

192 HALEY, *supra* note 167, at 91.

193 *Id.* at 27.

194 *Id.* at 122 (describing activism by the National Association of Colored Women); *id.* at 204–05, 214.

195 *Id.* at 3 ("State violence alongside gendered forms of labor exploitation made the New South possible, not as a departure from the Old, but as a reworking and extension of previous structures of captivity and abjection through gendered capitalism."); ROBERTS, KILLING THE BLACK BODY, *supra* note 77, at 22–55 (describing how the reproductive capacity of enslaved women was exploited to preserve and expand the slave state).

196 *See* HALEY, *supra* note 167, at 3; ROBERTS, KILLING THE BLACK BODY, *supra* note 77, at 10–12.

197 *See* RITCHIE, *supra* note 103, at 43–44; Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 58 UCLA L. REV. 1418, 1427 (2012) (exploring the "structural and institutional intersections that contribute to the risk and consequence of punishment for women of color [and the] discursive intersections that effectively marginalize, if not wholly erase, the significance of their vulnerability"); Roberts, *Prison, Foster Care*, *supra* note 58, at 1491–93 (offering an intersectional analysis of the punishment of black mothers in the prison and foster care systems).

crimes. Thus, for more than a century, vague vagrancy and antiloitering ordinances have given police officers license to arrest black people for standing in public streets — with no attention to whether or not their presence caused any harm to anyone.[198] The purpose of carceral punishment was to maintain a racial capitalist order rather than to redress social harms — not to give black people what they deserved, but to keep them in their place. Today, the state still aims to control populations rather than judge individual guilt or innocence, to "manage social inequalities" rather than remedy them.[199] A large body of social science literature explains criminal punishment as a form of social control of marginalized people.[200] Professor Issa Kohler-Hausmann, for example, argues that New York City criminal courts that handle misdemeanors "have largely abandoned the *adjudicative* model of criminal law administration — concerned with deciding guilt and punishment in specific cases" — and instead follow a "*managerial* model — concerned with managing people through engagement with the criminal justice system over time."[201] By marking people for involvement in "misdemeanorland," forcing them to engage in burdensome procedural hassles, and requiring them to engage in disciplinary activities,[202] this gargantuan branch of the criminal punishment system exerts social control over the city's black communities, with no real regard for residents' culpability for crime.

The explosion in imprisonment of African Americans at the end of the twentieth century represents the continuation of trends that originated even before the century's start. In describing the rise of convict leasing, W.E.B. Du Bois notes a fundamental feature of post-slavery carceral punishment: the disconnect between the rise of prisons and crime rates. "The whole criminal system came to be used as a method of keeping Negroes at work and intimidating them," Du Bois writes in *Black Reconstruction*.[203] "Consequently there began to be a demand of jails and penitentiaries beyond the natural demand due to the rise in

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198 Roberts, *Race, Vagueness*, *supra* note 76, at 788. This is not to say that prison abolition applies only to innocent or nonviolent people; prison abolitionists aim to end all incarceration and to create a society where no one is imprisoned.

199 Roberts, *Digitizing*, *supra* note 78, at 1712.

200 *See, e.g.*, BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 23–55 (2001); MARC NEOCLEOUS, THE FABRICATION OF SOCIAL ORDER: A CRITICAL THEORY OF POLICE POWER 92–115 (2000); WACQUANT, PUNISHING THE POOR, *supra* note 65, at xix; Christian Parenti, *Crime as Social Control*, 27 SOC. JUST., Fall 2000, at 43.

201 ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 4 (2018).

202 *See id.* at 3–5; *id.* at 10 (laying out the concepts of "marking," "procedural hassle," and "performance" embodied in misdemeanor management).

203 DU BOIS, *supra* note 173, at 506.

crime."[204] In a complement to Du Bois's observations about the economic motivations for incarcerating black people, Professor Alex Lichtenstein argues that social and political forces also produce higher incarceration rates:

> Stable incarceration rates appear in periods of white racial hegemony and a stable racial order, such as that secured by slavery in the first half of the 19th century or Jim Crow during the first half of the 20th. Correspondingly, sudden rises in incarceration, especially of minorities, tend to appear one generation after this racial hegemony has been cracked, as in the first and second Reconstructions of emancipation and civil rights.[205]

Thus, the skyrocketing prison population in the second half of the twentieth century cannot be explained solely as a response to increases in crime.[206] Prison expansion instead reflects a response to the needs of rising neoliberal racial capitalism that addresses growing socioeconomic inequality with punitive measures.[207]

The disconnect between social harm and carceral punishment is evident not only in state regulation of marginalized people but also in the immunity granted to state agents who commit social harms.[208] For reasons both legal and political, police,[209]

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[204] *Id.*

[205] Alex Lichtenstein, *The Private and the Public in Penal History: A Commentary on Zimring and Tonry*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 171, 176 (David Garland ed., 2001).

[206] *See, e.g.*, HINTON, *supra* note 52, at 175 (noting that prison expansion and incarceration rates in the 1970s had "little relationship to actual crime rates" and instead "correlated directly to the number of black residents and the extent of socioeconomic inequality within a given state"); MURAKAWA, *supra* note 52, at 2–4; THE GROWTH OF INCARCERATION, *supra* note 54, at 104–29 (finding that "[t]he policies and practices that gave rise to unprecedented high rates of incarceration were the result of a variety of converging historical, social, economic, and political forces," *id.* at 128).

[207] *See, e.g.*, GILMORE, GOLDEN GULAG, *supra* note 17; Berger, *How Prisons Serve Capitalism*, *supra* note 60; *Prisons and Class Warfare*, *supra* note 60.

[208] *See* McLeod, *Envisioning Abolition Democracy*, *supra* note 30, at 1638–41.

[209] *See* Monu Bedi, *Toward a Uniform Code of* Police *Justice*, 2016 U. CHI. LEGAL F. 13, 24–26 (observing that, although "[b]y and large, police officers and [civilians] are subject to the same criminal laws," *id.* at 24, states have modified those laws to accommodate police officers' duties using "very general language," which "leaves prosecutors with significant discretion," *id.* at 26); Mitchell F. Crusto, *Right to Life: Interest-Convergence Policing*, 71 RUTGERS U. L. REV. 63, 73 (2018) ("Currently, the legal standard for prosecuting police officers' use of lethal force gives great latitude to police officers to do their jobs, providing them with broad immunity."); McLeod, *Envisioning Abolition Democracy*, *supra* note 30, at 1639–41 (arguing that the "close ties" between police and prosecutors, *id.* at 1639, and the "many forms of excessive force deployed by police" that "the law itself countenances," *id.* at 1640, among other factors, lead to inadequate prosecution of police who act criminally). The doctrine of qualified immunity, meanwhile, protects officers from civil liability. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1152–54 (2018) (declining, on qualified immunity grounds, even to assess whether a police officer acted reasonably in shooting a woman who had behaved erratically and was holding a knife and instead concluding that the use of force did not violate any clearly established right).

prosecutors,[210] and corporate executives[211] generally avoid criminal liability even for inflicting serious harm. As I have explored previously, "[c]urrent legal doctrine condones police violence and makes individual acts of abuse — even homicides — appear isolated, aberrational, and acceptable rather than part of a systematic pattern of official violence."[212] Prosecutors who have used unconstitutional methods for obtaining wrongful convictions have not been criminally prosecuted themselves.[213] Few corporate executives have been charged with crimes for actions that caused billions of dollars in losses during the financial crisis of 2008.[214] Moreover, government officials responsible for devastating

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[210] *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 71 ("[R]esearch discloses only one conviction of a prosecutor [ever under the relevant federal civil rights statute]."); Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 585 (2017) ("Criminal liability has not proven to be a meaningful mode of prosecutorial accountability in fact."); *see also* Frederic Block, *Let's Put an End to Prosecutorial Immunity*, MARSHALL PROJECT (Mar. 13, 2018, 10:00 PM), https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity [https://perma.cc/JA3F-X3RW] ("Because of the present status of the law, the prosecutors responsible for [employing improper methods, such as withholding evidence or using false testimony, to obtain] the wrongful convictions [of over twenty individuals] have neither been held criminally nor civilly responsible for their shameful conduct."). The Supreme Court has also held that a prosecutor, when acting within his duties pursuing criminal prosecution, is immune from suit under § 1983. *See* Imbler v. Pachtman, 424 U.S. 409, 410, 427 (1976).

[211] *See* Peter J. Henning, *Why It Is Getting Harder to Prosecute Executives for Corporate Misconduct*, 41 VT. L. REV. 503, 506–07, 509 (2017) (observing that "prosecuting cases against corporate employees and executives, which has never been easy, is getting harder," *id.* at 507, due to, among other factors, complex corporate structures, "heightened intent requirements in many white-collar offenses," *id.* at 506–07, and courts' receptiveness "to arguments that statutes are being applied too aggressively by prosecutors," *id.* at 509); *see also* William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, THE ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368 [https://perma.cc/ANL6-KR5C] (reporting that only one Wall Street executive was incarcerated for his role in the 2008 financial crisis).

[212] Roberts, *Constructing*, *supra* note 98, at 278; *accord* Bandes, *supra* note 132, at 1288–92 (using an instance of police brutality to argue that such behavior is readily concealed because of a "nationwide code of silence" among officers, *id.* at 1291, and because of the targeting of marginalized groups within marginalized neighborhoods, which serves to make "brutality . . . seem unbelievable or aberrant to decisionmakers" coming from better-off neighborhoods that do not suffer the same abuses, *id.* at 1292); Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 68 (2014) ("[T]he use of stop and frisk as a mechanism of racial subordination is not an isolated example of overreach by rogue police officers, or even a rogue police force, but is instead a mechanism deeply connected to the history of racial subordination."); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 128–30, 163–64 (2017) [hereinafter Carbado, *From Stopping Black People*]; *see also supra* note 209 and accompanying text.

[213] *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 4–5 (2007).

[214] William D. Cohan, *A Clue to the Scarcity of Financial Crisis Prosecutions*, N.Y. TIMES (July 21, 2016), https://nyti.ms/2adauJG [https://perma.cc/57ZX-6SFU] (describing the "few attempts" to prosecute Wall Street executives for activities related to the crisis); Cohan, *supra* note 211; Chris Isidore, *35 Bankers Were Sent to Prison for Financial Crisis Crimes*, CNN (Apr. 28, 2016, 6:53 AM), https://money.cnn.com/2016/04/28/news/companies/bankers-prison/index.html [https://perma.

environmental harms, such as lead-poisoned water in Flint, Michigan, typically escape criminal prosecution.[215] In sum, criminal law treats prisons as essential to prevent or redress crimes committed by economically and racially marginalized people but unnecessary to address even greater social harms inflicted by the wealthy and powerful.

The criminal punishment system extends its subordinating impact beyond prison walls by imposing collateral penalties that deny critical rights and resources to formerly incarcerated people.[216] Felon disenfranchisement laws, for example, restrict incarcerated people's ability to vote during their sentences and after they are released,[217] and significantly dilute black political power.[218] The stigma of conviction, imposition of fines and fees, and exclusion from public benefits inflict a

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cc/YNY9-JQ89] (indicating that a total of thirty-five bankers, mostly from smaller institutions, ultimately went to prison due to their roles in the financial crisis).

215 Ed White, *Years After Flint Water Crisis Began, No One Is Behind Bars*, PBS NEWS HOUR (Jan. 18, 2019, 1:57 PM), https://www.pbs.org/newshour/health/years-after-flint-water-crisis-began-no-one-is-behind-bars [https://perma.cc/4ZQZ-27EL] (reporting that "no one is behind bars" as a result of the Flint, Michigan, water crisis, with seven of the fifteen people charged with crimes already having reached plea deals resulting in misdemeanor convictions); *see also* Joe Rubin, Opinion, *Hundreds of Workers Have Lead Poisoning. Why Hasn't Cal/OSHA Stepped In?*, L.A. TIMES (Oct. 14, 2018, 4:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-rubin-lead-cal-osha-20181014-story.html [https://perma.cc/P9QD-AVCD]; Michael Rubinkam, *Pittsburgh Water Authority Charged Criminally over Lead*, AP (Feb. 1, 2019), https://www.apnews.com/93a5592998 9f4f69b98cf78a007e5b6d [https://perma.cc/8XM4-KNCV] ("No individual employee of the Pittsburgh water authority was charged because state investigators didn't find evidence that anyone intended to hurt customers."); Joe Rubin, *Battery Blood: How California Health Agencies Failed Exide Workers*, CAPITAL & MAIN (Mar. 21, 2018), https://capitalandmain.com/battery-blood-how-california-health-agencies-failed-exide-workers-0321 [https://perma.cc/88CJ-K79S].

216 *See* Alec Ewald & Christopher Uggen, *The Collateral Effects of Imprisonment on Prisoners, Their Families, and Communities*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 83, 86–89 (Joan Petersilia & Kevin R. Reitz eds., 2012) (exploring various federal and state restrictions on and consequences for offenders, including deportation; limitations on driver's licenses; restrictions on ability to foster or adopt children; and loss of the right to vote, serve on juries, purchase firearms, serve in the military, work in certain professions or community service roles, or receive certain public health or financial benefits); Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1154–65 (2013) (discussing the exclusion of offenders from housing and employment markets); *see also National Inventory of Collateral Consequences of Conviction*, COUNCIL OF ST. GOV'TS JUST. CTR., https://niccc.csgjusticecenter.org [https://perma.cc/754F-SQQY] (containing a searchable database of policies relating to collateral consequences of a criminal conviction across the states).

217 Almost all states bar currently incarcerated people from voting, and many extend voting bans beyond a person's release. *See Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Dec. 21, 2018), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/SE8Z-XQLE].

218 *See* MANZA & UGGEN, *supra* note 166, at 79–80, 188–203 (using empirical analysis to show that "felon disenfranchisement affects a far greater proportion of the [black] electorate than of any other group," *id.* at 79, and that disenfranchisement as a whole likely affects election outcomes, to the point that "felon disenfranchisement poses a threat to political equality," *id.* at 203).

nearly insurmountable burden on people caught in the carceral web.[219] The association between slavery and prison makes these deprivations seem natural — despite the injustice of punishing people beyond the sentence they served and in a way that bears no relation to the crimes they committed. Just as it seemed unremarkable that enslaved people could not vote because they were not citizens, so today many people think: "Of course prisoners aren't supposed to vote. They aren't really citizens any more."[220] Thus, the inherent denial of citizenship rights to enslaved people is mirrored in the unquestioned denial of those rights to incarcerated people.

(c) Death Penalty. — Capital punishment, like police and prisons, has its roots in slavery and the preservation of white supremacy.[221] State executions have persisted in the United States because they function similarly to the extreme punishments inflicted on enslaved people and the state-sanctioned lynchings that replaced these punishments after Emancipation.[222] As Davis points out, "the institution of slavery served

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[219] *See* Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) ("Exorbitant tolls undermine other constitutional liberties."); Brief for Petitioners, *supra* note 180, at 26–27 (arguing that "[t]he power to fine people and confiscate their property is the power to limit their freedom," *id.* at 26, and that "[e]ven low-level offenders" can be subjected to debt monitoring and debilitating long-term monetary sanctions, *id.* at 27); ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 151–62 (2016) (describing the severe consequences of monetary sanctions on persons convicted of crimes).

[220] DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 38; *see also* McLeod, *Grounded Justice*, *supra* note 91, at 1213 (noting that the Supreme Court has made "conviction . . . the point at which moral (or at least constitutional) concern [for offenders] ends" and proposing an abolitionist ethic that rejects this narrative).

[221] *See* Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 675–76 (2015) (arguing that capital punishment persisted in the South, even as many northern states abolished it in the mid-1800s, because southern whites viewed "[t]he death penalty . . . as essential to maintaining control over the slaves," *id.* at 676); Ta-Nehisi Coates, *The Inhumanity of the Death Penalty*, THE ATLANTIC (May 12, 2014), https://www.theatlantic.com/politics/archive/2014/05/the-inhumanity-of-the-death-penalty/361991 [https://perma.cc/9Z4G-KPDR] ("In America, the history of the criminal justice [system] — and the death penalty — is utterly inseparable from white supremacy."); *see also* DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 35–37 (discussing the relationship between the death penalty and slavery and concluding that "[o]ne of the major priorities of the reparations movement should be the abolition of the death penalty," *id.* at 35).

[222] *See* Roberts, *Constructing*, *supra* note 98, at 272–75; *see also* SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 75–77 (2007) (discussing the legal system's complicity in lynchings); Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS TO THE KILLING STATE, *supra* note 121, at 96, 98–101 ("With the end of slavery, whites turned toward alternative forms of racial subjugation, and one of them was the death penalty." *Id.* at 100–01.); Bright, *supra* note 221, at 677 ("[T]here was often little difference between lynchings carried out by the mob and 'legal lynchings' that took place in courtrooms."); Kaufman-Osborn, *supra* note 121, at 36–39. In July 2019, the Justice Department announced that the federal government would resume executions of people sentenced to death. Sadie Gurman & Jess Bravin, *Federal Government Set to Resume Executions*, WALL ST. J. (July 25, 2019, 6:41 PM),

as a receptacle for those forms of punishment considered to be too uncivilized to be inflicted on white citizens within a democratic society."[223] Historically, race-based criminal codes imposed the death penalty on enslaved individuals for many more offenses than they did for whites.[224] Blacks were "commonly hanged" for "rape, slave revolt, attempted murder, burglary, and arson."[225] Moreover, condemned slaves were subjected to extra cruelty through what Professor Stuart Banner calls "super-capital punishment" — burning them alive at the stake.[226] Executions were also made especially degrading by displaying slaves' severed heads on poles in front of the courthouse, or allowing their corpses to decompose in public view.[227]

After Emancipation, white southerners began ritualistically kidnapping and killing black people to publicly reinforce white supremacy.[228] In 1893, Ida B. Wells observed that "the Convict Lease System and Lynch Law are twin infamies which flourish hand in hand in many of the United States."[229] Public torture proclaimed white dominion over black people, repudiated blacks' citizenship status,[230] and "literally reinstat[ed] black bodies as the property of whites that could be chopped to pieces for their entertainment."[231] Many lynchings were of black men accused of breaching racialized sexual boundaries by raping or disrespecting white women.[232] However, the majority of terroristic murders between 1890 and 1920 were intended to facilitate white theft of black

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https://www.wsj.com/articles/federal-government-set-to-resume-executions-11564066216 [https://perma.cc/U26T-PES5].

223 DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 37.

224 Banner, *supra* note 222, at 99–100.

225 *Id.* at 99.

226 STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 71 (2002).

227 *Id.* at 71–75. These practices continue in various forms today: the city of Ferguson left the body of Michael Brown on the street in public view for hours after he was killed by a white police officer. Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), https://nyti.ms/1qAFMqN [https://perma.cc/7JAU-YUKM].

228 Roberts, *Constructing*, *supra* note 98, at 273; *see* Banner, *supra* note 222, at 101–07.

229 Wells, *supra* note 176, at 23.

230 Roberts, *Torture*, *supra* note 86, at 232–33 ("The tortured black body displayed for public consumption affirmed the dominance of whites and exclusion of blacks from citizenship, and it served as a warning to anyone who defied this racial order."); *see also* DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 53 ("[L]ynching precisely defined its victims as beyond the possibility of citizenship.").

231 Roberts, *Torture*, *supra* note 86, at 232; *see* Garland, *supra* note 86, at 822–23 ("[Public lynchings] made it plain, to blacks and to whites, that despite Emancipation and Reconstruction, despite the 13th and 14th Amendments, black bodies remained the property of white people and could still be exploited for profit and for pleasure."); *see also* Kaufman-Osborn, *supra* note 121, at 29–30 ("To blacks, and especially black men, the lynched body communicated their vulnerability, their debasement, their exclusion from the community to which, by federal law, they now uneasily belonged." *Id.* at 30.); Skolnick, *supra* note 86, at 106.

232 *See, e.g.*, Garland, *supra* note 86, at 799, 825.

people's property.[233] As Frederick Douglass observed in 1893, displaying insolence was sufficient excuse for lethal victimization:

> The crime of insolence for which the Negro was formerly killed and for which his killing was justified, is as easily pleaded in excuse now, as it was in the old time and what is worse, it is sufficient to make the charge of insolence to provoke the knife or bullet. This done, it is only necessary to say in the newspapers, that this dead Negro was impudent and about to raise an insurrection and kill all the white people, or that a white woman was insulted by a Negro, to lull the conscience of the north into indifference and reconcile its people to such murder. No proof of guilt is required. It is enough to accuse, to condemn and punish the accused with death.[234]

Here, Douglass links his childhood observations of overseers' punishment of enslaved blacks to the lynchings of emancipated blacks occurring after the Civil War. The same logic of slavery that called for punishment of black insubordination to enforce white supremacy, regardless of culpability for a crime, was revived in lynching and persists in the modern prison industrial complex.

The hundreds of "public torture lynchings" that were a feature of southern society until almost 1940[235] call into question the dominant narrative that as civilizations have evolved, punishments have become more humane.[236] Instead, southern whites sent a message through medieval forms of punishment:

> [A]rchaic forms of execution involving torture, burning, and mutilation . . . show[ed] that "regular justice" was "too dignified" for black offenders. The public torture of blacks accused of offending the racial order demonstrated whites' unlimited power and blacks' utter worthlessness. This nation's rights, liberties, and justice were meant for white people only; blacks meant nothing before the law.[237]

Lynchings were the terrorist counterpart to state-supported debt peonage, convict leasing, disenfranchisement, and segregation laws that kept blacks subject to white domination.[238] Lynching black people was not

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[233] Lizzie Presser, *Kicked off the Land: Why So Many Black Families Are Losing Their Property*, NEW YORKER (July 15, 2019), https://www.newyorker.com/magazine/2019/07/22/kicked-off-the-land [https://perma.cc/2Y97-VHBD] ("Most black men were lynched between 1890 and 1920 because whites wanted their land." (quoting Ray Winbush, Director of the Institute for Urban Research at Morgan State University)).

[234] Frederick Douglass, *Introduction* to THE REASON WHY THE COLORED AMERICAN IS NOT IN THE WORLD'S COLUMBIAN EXPOSITION, *supra* note 176, at 7, 11.

[235] Garland, *supra* note 86, at 793–94.

[236] Roberts, *Constructing*, *supra* note 98, at 273; *see* Garland, *supra* note 86, at 796 ("[A] consideration of [public torture lynchings'] form and character would strongly contradict the received wisdom about the course of penal change and the civilizing process that accompanied it.").

[237] Roberts, *Torture*, *supra* note 86, at 233 (footnote omitted) (quoting Garland, *supra* note 86, at 814).

[238] Garland, *supra* note 86, at 811.

an exception to the law; it was part of the administration of justice and the larger system of legally sanctioned racial control.[239]

In the mid-twentieth century, the practice of lynching black people was replaced by the practice of subjecting them to the death penalty.[240] These legally sanctioned hangings, which deliberately resembled lynchings of the past,[241] purported to punish black men for raping white women.[242] New methods of execution were also implemented: in the 1950s in Mississippi, crowds of white onlookers gathered at southern courthouses to witness the electrocutions of black men in portable electric chairs that traveled from town to town.[243] After one such killing in Mississippi in 1951, the crowd on the lawn outside the courthouse "burst into cheers, then crushed forward in an effort to glimpse the corpse as it was removed from the building."[244] There was a smooth transition from lynching to state execution because "[a] culture that carried out so much public unofficial capital punishment could hardly grow squeamish about the official variety."[245]

Capital punishment continues to function as it did in the slavery and Jim Crow eras to reinforce the subordinated status of black people.[246] Today, states primarily use lethal injection in an attempt to make capital

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239 Roberts, *Constructing*, *supra* note 98, at 274.

240 *See* Bright, *supra* note 221, at 677–78; Jeffrey Toobin, *The Legacy of Lynching, On Death Row*, NEW YORKER (Aug. 15, 2016), https://www.newyorker.com/magazine/2016/08/22/bryan-stevenson-and-the-legacy-of-lynching [https://perma.cc/78TT-9ABE]; *Death Penalty*, SOUTHERN CTR. FOR HUM. RTS., https://www.schr.org/our-work/death-penalty [https://perma.cc/L7W7-SR85] ("The death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in the American South."); Lena Glickman, *State Sanctioned Murder: The Death Penalty and the Struggle for Racial Justice*, NAT'L COALITION TO ABOLISH DEATH PENALTY (Jan. 28, 2015), http://www.ncadp.org/blog/entry/state-sanctioned-murder-the-death-penalty-and-the-struggle-for-racial-justi [https://perma.cc/R4ZU-JDBS] ("The modern death penalty is rooted in slavery and lynching.").

241 *See* IFILL, *supra* note 222, at 30; Bright, *supra* note 221, at 677–78.

242 *See* Banner, *supra* note 222, at 106.

243 *See* PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 403 (2002).

244 *Id.*; *see also* Banner, *supra* note 222, at 101–07 (describing public "[e]xecution [c]eremonies," *id.* at 101); Liliana Segura, *The Stepchild of Lynching*, THE INTERCEPT (June 17, 2018, 9:00 AM), https://theintercept.com/2018/06/17/lynching-museum-alabama-death-penalty [https://perma.cc/UAJ7-ESSH] ("In 1905, the first legal execution for 'criminal assault' in North Carolina's Sampson County was attended by 25 people, who had bought tickets for the occasion.").

245 Banner, *supra* note 222, at 107.

246 *See* Bryan Stevenson, *Close to Death: Reflections on Race and Capital Punishment in America*, *in* DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE 76, 76–93 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) (discussing past and present discrimination in capital punishment's administration and concluding that "[t]he tolerance of racial bias in the modern death penalty era . . . represents a serious threat to anti-discrimination reforms and equal justice in America," *id.* at 92).

punishment "more palatable,"[247] on the logic that this method bears less resemblance to lynching than electrocution or hanging.[248] The fact that lethal injection carries its own risks of inflicting pain[249] has not undermined its constitutional status: last Term, in *Bucklew v. Precythe*,[250] a divided Court was unmoved by evidence that Missouri's lethal injection protocol would inflict cruel and unusual punishment on a prisoner, reasoning that "the Eighth Amendment does not guarantee . . . a painless death."[251] Although Bucklew was white, the Court's decision upheld lethal state violence that is disproportionately imposed on black men accused of killing white people.[252] Like the torture rituals of lynching, the death penalty survives in modern America as an uncivilized form of punishment because it continues to represent white domination over black people.

2. Not a Malfunction. — A first step to demonstrating the political illegitimacy of today's carceral punishment system is finding its origins in the institution of slavery. A second step is understanding that prisons, police, and the death penalty function to subordinate black people and maintain a racial capitalist regime. Efforts to fix the criminal punishment system to make it fairer or more inclusive are inadequate or even harmful because the system's repressive outcomes don't result from any systemic malfunction.[253] Rather, the prison industrial complex works

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247 *See* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 388–89 (1997) (explaining that some states have historically changed their execution methods to make execution "more palatable to the public," *id.* at 389); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 62–63 (2007) (explaining that lethal injection became "popular[]" in part because "hanging[] risked being too long and cruel," *id.* at 63).

248 *See* Kaufman-Osborn, *supra* note 121, at 41–42.

249 *See, e.g.*, CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 15–16 (2016).

250 139 S. Ct. 1112 (2019).

251 *Id.* at 1124.

252 *See* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 708–10 (1983) (finding that a black defendant in Georgia was twenty-one times more likely to be sentenced to death if the victim was white than if the victim was black); Stevenson, *Slavery*, *supra* note 173 ("Black defendants are 22 times more likely to receive the death penalty for crimes whose victims are white, rather than black.").

253 *See* BUTLER, *supra* note 59, at 5 (describing the criminal punishment system as "broke on purpose"); VITALE, *supra* note 103, at 4–30 (criticizing a number of police reforms to address injustice as ineffectual because "*that is how the system is designed to operate*," *id.* at 15); Kaba, *Foreword* to RITCHIE, *supra* note 103, at xv (arguing against reforming policing because a "system created to contain and control me as a Black woman cannot be reformed"); Rodríguez, *supra* note 29, at 1593 (criticizing the renarration of "carceral domestic war" in order to support reform rather than abolition: "But if this domestic war is reframed as a *discrete, mistaken excess* owing to criminological error, electoral opportunism, and moral failure — 'mass incarceration' — it can be redressed and reformed within the existing systems of law, policy, and liberal justice."); Mariame Kaba, *Prison Reform's in Vogue and Other Strange Things . . .*, TRUTHOUT (Mar. 21, 2014), https://truthout.org/articles/prison-reforms-in-vogue-and-other-strange-things [https://perma.cc/3QA6-

effectively to contain and control black communities as a result of its structural design. Therefore, reforms that correct problems perceived as aberrational flaws in the system only help to legitimize and strengthen its operation. Indeed, reforming prisons results in more prisons.[254]

3. A Society Without Prisons. — An essential component of prison abolitionist theory is the principle that eliminating current carceral practices must occur alongside creating a radically different society that has no need for them.[255] Prison abolitionists frequently define their work as consisting of two simultaneous activities, one destructive and the other creative. "It's the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within our culture," Kaba explains.[256] "And it's also the building up of new ways of . . . relating with each other."[257] This duality is essential to abolition both because prisons will only cease to exist when social, economic, and political conditions eliminate the need for them and because installing radical democracy is crucial to preventing another white backlash and reincarnation of slavery-like institutions in response to the abolition of current ones.[258]

Moreover, the success of nonpunitive approaches developed by abolitionists for addressing human needs and social problems can be a compelling reason to abandon current dehumanizing and ineffective

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XCLZ] ("With every successive call for 'reform,' the prison has remained stubbornly brutal, violent, and inhumane.").

[254] Rodríguez, *supra* note 29, at 1601 ("[T]he reform of the prison resulted in its expansion and bureaucratic multiplication." (emphasis omitted)).

[255] *See* CARRUTHERS, *supra* note 26, at x (defining abolition as "a long-term political vision with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment"); McLeod, *Envisioning Abolition Democracy*, *supra* note 30, at 1615 ("Justice in abolitionist terms involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably."); McLeod, *Grounded Justice*, *supra* note 91, at 1232 (describing a "broader conception of grounded justice [that] requires allocation of energy and resources to social structural responses over criminal prosecution and punishment"); Lisa Guenther, *These Are the Moments in Which Another World Becomes Possible: Lisa Guenther on Abolition*, ABOLITION (July 10, 2015), https://abolitionjournal.org/lisa-guenther-abolition-statement [https://perma.cc/LN8D-LK3Q] (describing abolition as "a negative process of dismantling oppressive structures and a positive process of . . . mak[ing] oppressive structures obsolete").

[256] *Episode 29 — Mariame Kaba*, AIRGO (Feb. 2, 2016), https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba [https://perma.cc/ETG2-M43L].

[257] *Id.*

[258] CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE (2016); DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 73 ("When I refer to prison abolitionism, I like to draw from the DuBoisian notion of abolition democracy. That is to say, it is not only, or not even primarily, about abolition as a negative process of tearing down, but it is also about building up, about creating new institutions."); *id.* (noting historical observations that "the negative process [of abolition] by itself was insufficient"); Fred Moten & Stefano Harney, *The University and the Undercommons: Seven Theses*, 22 SOC. TEXT 101, 114 (2004) (describing the object of abolition as the "abolition of a society that could have prisons, that could have slavery, that could have the wage, and therefore not abolition as the elimination of anything but abolition as the founding of a new society").

practices.[259] Above all, it is their vision of a world without prisons that gives abolitionists their lodestar. Abolitionists are working toward a society where prisons are inconceivable — a world where its inhabitants "would laugh off the outrageous idea of putting people into cages, thinking such actions as morally perverse and fatally counterproductive."[260] Because the current carceral system is rooted in the logic of slavery, abolitionists must look to a radically different logic of human relations to guide their activism.[261] That guiding philosophy cannot be invented theoretically, but must emerge from the practice of collectively building communities that have no need for prisons.

Citing Du Bois's critique of the post-Emancipation period in *Black Reconstruction*, Davis attributes the rise of prisons to the failure to institute a revolutionary "abolition democracy" that incorporated freed African Americans into the social order.[262] Slavery could not be truly and comprehensively abolished without economic redistribution, equal educational access, and voting rights. In Davis's words, "DuBois . . . argues that a host of democratic institutions are needed to fully achieve abolition — thus abolition democracy."[263] Understanding that prisons are not primarily designed to protect people from crime, but rather to address human needs and social problems with punitive measures, opens the possibility that we can eradicate prisons by addressing these needs and problems in radically different ways.[264]

Abolitionists, therefore, are both developing nonpunitive measures to deal with harm and creating new conditions to prevent harm from occurring in the first place, recognizing both as better approaches to ensuring safety and security than relying on police and prisons. Abolitionists address the root causes of harm by investing in

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[259] *See* McLeod, *Envisioning Abolition Democracy*, *supra* note 30, at 1628–33; *id.* at 1637 ("Conventional accounts of legal justice typically neglect the overwhelming discontinuity between the ideals of justice proclaimed and their deeply inadequate, often violent, racialized, and ultimately destructive realization."); *see also* Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 260–61 (2015) (noting that there is no evidence that policing and mass incarceration work to reduce harms, and asking: "What kind of legal culture allows the massive deprivation of basic liberty without *any* evidence?," *id.* at 261).

[260] Alexander Lee, *Prickly Coalitions: Moving Prison Abolitionism Forward*, *in* ABOLITION NOW!, *supra* note 17, at 109, 111.

[261] *See Profiles in Abolition*, *supra* note 19, at 14:55 (observing, in the words of Professor Ruth Wilson Gilmore, that the prison industrial complex "[cannot] be reformed within its own logic, but rather it would have to come apart"); *see also* GILMORE, GOLDEN GULAG, *supra* note 17, at 241–48; Kushner, *supra* note 25.

[262] DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 95–97.

[263] *Id.* at 96.

[264] *See id.* (noting that under an abolition democracy approach "we would propose the creation of an array of social institutions that would begin to solve the social problems that set people on the track to prison, thereby helping to render the prison obsolete"); *see also* DAVIS, ARE PRISONS OBSOLETE?, *supra* note 17.

people's basic needs and addressing the causes of interpersonal violence.[265] For example, anticarceral feminists have begun to think through what prison abolition entails with respect to ending domestic violence.[266] The multiple ways in which black women are subjected to punitive state control has sparked the need for a remedy to domestic violence that does not depend on police and prisons. Black anticarceral feminists analyze and address domestic violence in light of corresponding inequitable social structures; they understand intimate violence as inextricably connected to state violence.[267] This logic recognizes not only that the United States incarcerates black people as a response to

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[265] *See* Smith, *supra* note 146 (laying out an argument in favor of using "full social, economic, and political equality" to create a stable and safe society); Benji Hart, *You Are Already an Abolitionist*, RADFAG (Mar. 24, 2017), https://radfag.com/2017/03/24/you-are-already-an-abolitionist [https://perma.cc/RWT2-GEL2] (recognizing that it was "access to the basic things people needed, not the presence of police, that made [Chicago neighborhood] residents feel secure").

[266] *See, e.g.*, LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE (2018); BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 160 (2012); BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN 14 (1996) [hereinafter RICHIE, COMPELLED TO CRIME] (discussing social science's failure to consider the circumstances of battered women in jail); RITCHIE, *supra* note 103, at 241; EMILY L. THUMA, ALL OUR TRIALS: PRISONS, POLICING, AND THE FEMINIST FIGHT TO END VIOLENCE 160–61 (2019) (describing a 2015 conference organized around the need to center the movement to abolish gender violence within communities, rather than relying on police or prisons); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1049–52 (2000) (analyzing the positive and negative effects that an arrest-oriented approach to domestic violence has on victims' access to resources, and concluding that those effects may be ultimately negative); Critical Resistance & INCITE! Women of Color Against Violence, *Gender Violence and the Prison-Industrial Complex*, *in* COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 223, 223–26 (INCITE! Women of Color Against Violence ed., 2006) (assessing the impact of reliance on the criminal legal system to address domestic violence and calling on social justice movements to move away from this model); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 38–40 (2011) (advocating for transformative justice as a more suitable response to domestic violence than incarceration); Emily Thuma, *Lessons in Self-Defense: Gender Violence, Racial Criminalization, and Anticarceral Feminism*, 43 WOMEN'S STUD. Q. 52 (2015) (outlining the history of radical antiviolence and anticarceral organizing in response to domestic violence during the 1970s).

[267] *See generally Criminalizing Survival Curricula*, SURVIVED & PUNISHED, https://survivedandpunished.org/criminalizing-survival-curricula [https://perma.cc/Z3XU-UQWH] (containing curriculum units and activities addressing "the intersections between racialized gender-based violence and criminalization"); *see also* Kellie C. Murphy, *Beyond Cyntoia Brown: How Women End up Incarcerated for Self Defense*, ROLLING STONE (Jan. 28, 2019, 5:55 PM), https://www.rollingstone.com/culture/culture-features/cyntoia-brown-beyond-other-cases-775874 [https://perma.cc/Q4MD-PYPU] (telling the stories of women who were incarcerated for resisting gendered violence); Mariame Kaba, *There Are Thousands of Cyntoia Browns: Mariame Kaba on Criminalization of Sexual Violence Survivors*, DEMOCRACY NOW! (Jan. 10, 2019), https://www.democracynow.org/2019/1/10/there_are_thousands_of_cyntoia_browns [https://perma.cc/PJ4P-VF6P] (recounting the history of sex-trafficking survivor Cyntoia Brown's conviction, imprisonment, and clemency, and describing the number of similarly situated, but invisible, women in the United States).

social problems, but also that law enforcement has arrested, injured, or killed black victims of domestic violence who seek help from the state.[268]

Rejecting the carceral paradigm, black feminist abolitionists have proposed community-based transformative justice responses[269] that address the social causes of violence and hold people accountable without exposing them to police violence and state incarceration.[270] Mariame Kaba, for example, works on "creating new structures that will take the place of the current institutions that [abolitionists] want to completely abolish and eradicate" in part by building new solutions to private violence that "will allow people to feel safe . . . on the road towards the end," which, for Kaba, "is an abolitionist end."[271] The black feminist strategy for addressing domestic violence and youth violence suggests that prison abolition can be achieved without sacrificing security from violence.

Many abolition theorists, including Davis and Professor Ruth Wilson Gilmore, argue that creating a society without carceral approaches to addressing human needs requires radically overhauling the U.S. capitalist economy and replacing it with a socialist or communist system.[272] Enslaved African labor not only fueled the U.S. capitalist economy, but racial slavery also created an especially brutal form of

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[268] *See* RITCHIE, *supra* note 103, at 19–42, 183–85, 187 (examining the ways black women, indigenous women, and other women of color are uniquely affected by racial profiling, police brutality, and immigration enforcement); *see also* RICHIE, COMPELLED TO CRIME, *supra* note 266, at 4 (exploring the ways that black women who are survivors of gendered violence are marginalized, criminalized, and penalized for behaviors that violate societal gender roles).

[269] *See The Activist Files: Transformative Justice in an Era of Mass Criminalization, Mariame Kaba and Victoria Law*, CTR. FOR CONST. RTS. (Mar. 14, 2019), https://soundcloud.com/activist-files-center-for-constitutional-rights/episode-12-transformative-justice-in-an-era-of-mass-criminalization-mariame-kaba-and-victoria-law [https://perma.cc/TAS7-WYBH] (transcript available at https://ccrjustice.org/sites/default/files/Episode-12-Transformative-justice-in-an-era-of-mass-criminalization-Mariame-Kaba-and-Victoria-Law.pdf [https://perma.cc/SHA4-FHRD]).

[270] *See, e.g.*, *About Project NIA*, NIA DISPATCHES, https://niastories.wordpress.com/about [https://perma.cc/TRU3-H7UX] (explaining Project NIA's mission to address youth crime with "restorative and transformative practices" relying on "community-based alternatives"). I have criticized nonabolitionist models of restorative justice that rely on the criminal punishment system and ignore the ways in which offenders are often themselves survivors of state violence. *See* Dorothy E. Roberts, *Black Mothers, Prison, and Foster Care: Rethinking Restorative Justice*, *in* RESTORATIVE AND RESPONSIVE HUMAN SERVICES 116, 120–21 (Gale Burford et al. eds., 2019).

[271] *Profiles in Abolition*, *supra* note 19, at 9:05; *see also About Project NIA*, *supra* note 270; *Vision 4 Black Lives Webinar Series: Invest-Divest*, MOVEMENT FOR BLACK LIVES, https://soundcloud.com/mvmnt4bl/v4bl-webinar-series-economic/sets [https://perma.cc/F5FZ-Q898] [hereinafter *Invest-Divest*] (describing abolition, in the words of panelist Rachel Herzing, as "a set of political responsibilities" to develop collective security that does not rely on law enforcement).

[272] *See, e.g.*, DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 102–03; *see also Invest-Divest*, *supra* note 271; Mariame Kaba & John Duda, *Towards the Horizon of Abolition: A Conversation with Mariame Kaba*, NEXT SYS. PROJECT (Nov. 9, 2017), https://thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba [https://perma.cc/RJ3Q-P6R4] ("We're not going to abolish the police, if we don't abolish capitalism, by the way!").

capitalism.[273] The U.S. capitalist system, which is governed by profit and market competition, has been integral to racial subordination since the slavery era and is antithetical to guaranteeing everyone the income, housing, healthcare, and education required for a society without the stark inequalities in well-being that fuel the prison industrial complex.[274] Some abolitionists are implementing local social-change projects, based on principles of mutual aid rather than competition and profit, to foreshadow and move toward a society that has no need to cage people.[275] The Black Panther Party's social programs, including a free breakfast program for elementary school children, free health

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[273] BAPTIST, *supra* note 110, at xxvi ("From the exploitation, commodification, and torture of enslaved people's bodies, enslavers and other free people gained new kinds of modern power . . . [and] fueled massive economic change."); EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY & SOCIETY OF THE SLAVE SOUTH 3–10 (1965); Desmond, *supra* note 110 (tying America's "low-road" capitalism to slavery and noting that "racist capitalism . . . ignores the fact that slavery didn't just deny black freedom but built white fortunes, originating the black-white wealth gap that annually grows wider"); *see also* ERIC WILLIAMS, CAPITALISM AND SLAVERY (3d ed. 1994) (describing the role of slavery in financing the industrial revolution in Europe).

[274] *See* DAVIS, ARE PRISONS OBSOLETE?, *supra* note 17, at 16–17, 90–93, 105–08; LOÏC WACQUANT, PRISONS OF POVERTY 1–5 (Univ. of Minn. Press 2009) (1999); Jeff Adachi, *Interview*, 15 ASIAN AM. L.J. 225, 239–40 (2008); Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 601–10 (2012) (drawing connections between the privatization of prisons and mass incarceration); Gordon Lafer, *The Politics of Prison Labor: A Union Perspective*, *in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR 120, 120–27 (Tara Herivel & Paul Wright eds., 2003) (describing the "lure of prison labor," *id.* at 121, to employers and other political elements of prison labor); Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, 68 ARK. L. REV. 55, 57, 66–68, 73 (2015) (examining the "school-to-prison pipeline through a capitalistic lens, revealing that African American and Latino students expelled, suspended, or arrested in public schools are exploited by the prison industry," which relies on uneducated black and Latino boys and men for financial gain, *id.* at 81); Robert Scott, *Using Critical Pedagogy to Connect Prison Education and Prison Abolitionism*, 33 ST. LOUIS U. PUB. L. REV. 401, 403 (2014) ("Looking more deeply at the question of 'crime' in a stratified society, the abolitionist ideal is ultimately a world without capitalist constructions of scarcity and market competition such that prisons are no longer necessary."); Berger, *How Prisons Serve Capitalism*, *supra* note 60; *Prisons and Class Warfare*, *supra* note 60. *See generally* ROBINSON, *supra* note 60 (exploring the convergence of racialism and capitalism in Western societies).

[275] *See* McLeod, *Envisioning Abolition Democracy*, *supra* note 30, at 1628–33 (highlighting the work of organizers at the Cure Violence program in Chicago to identify community conflicts and provide community-led mediation; at the Oakland Power Projects in Oakland to train residents in de-escalation and other tactics; and at the White Bird Clinic's Crisis Assistance Helping Out on the Streets (CAHOOTS) program in Eugene, Oregon, which is operated through a central city ambulance dispatch "in cases of 'drug and substance abuse, poverty-related issues, and mental health crises' without involving police," *id.* at 1630 (quoting Rachel Herzing, *Big Dreams and Bold Steps Toward a Police-Free Future*, *in* WHO DO YOU SERVE, WHO DO YOU PROTECT?: POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 111, 156 (Maya Schenwar et al. eds., 2016))); *see also, e.g.*, Moten & Harney, *supra* note 258, at 114–15 (advocating for a political economy characterized by cooperation and solidarity which "would have a resemblance to communism"); *What Is Mutual Aid?*, BIG DOOR BRIGADE, https://bigdoorbrigade.com/what-is-mutual-aid [https://perma.cc/MZ6J-8UPT] (describing the Big Door Brigade's database of mutual aid projects that provide collective child care, housing, food, and legal services).

clinics, and an educational Intercommunal Youth Institute, provide another model for successful community-based services aimed at enhancing people's well-being, not increasing corporate profits.[276]

C. The Unfinished Abolition Struggle

As prison abolitionists describe their objective as dismantling systems rooted in slavery, they often frame their work as a continuation of the struggle waged by black freedom fighters and abolitionists during the slavery era.[277] In the program for its 1998 national conference, the Critical Resistance Organizing Committee posed the question animating the emerging prison abolition movement: "How can we imagine an abolitionism for the prison industrial complex in the way that 19th century activists imagined the abolition of the slave economy?"[278] To be clear, antebellum slavery abolitionists were not prison abolitionists. Rather, prison abolitionists today see continuities between the chattel slavery system and the prison system, as well as between the historic and current abolition movements. While human freedom required slavery abolition then, today it requires the abolition of the prison industrial complex that has replaced slavery as the bulwark of racial capitalism. "In the nineteenth century, antislavery activists insisted that as long as slavery continued, the future of democracy was bleak indeed," writes Davis.[279] "In the twenty-first century, antiprison activists insist that a fundamental requirement for the revitalization of democracy is the long-overdue abolition of the prison system."[280] Prison abolitionists find inspiration from the likes of Sojourner Truth, Denmark Vesey, Nat Turner, John Brown, and Harriet Tubman, for whom "[e]nding slavery appeared to be an impossible challenge . . . , and yet they struggled for it anyway."[281] Today's prison abolitionists are the heirs to a freedom movement that antislavery abolitionists began.

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[276] *See* Nick Chiles, *8 Black Panther Party Programs That Were More Empowering Than Federal Government Programs*, ATL. BLACK STAR (Mar. 26, 2015), https://atlantablackstar.com/2015/03/26/8-black-panther-party-programs-that-were-more-empowering-than-federal-government-programs [https://perma.cc/5EXZ-V3U8]. *See generally* ALONDRA NELSON, BODY AND SOUL: THE BLACK PANTHER PARTY AND THE FIGHT AGAINST MEDICAL DISCRIMINATION 1–22 (2011).

[277] *See* DAVIS, ARE PRISONS OBSOLETE?, *supra* note 17, at 39; Nik Heynen, *Toward an Abolition Ecology*, 1 ABOLITION 240, 240–47 (2018).

[278] *Critical Resistance: Beyond the Prison Industrial Complex* (Critical Resistance, Berkeley, C.A.), Sept. 25–27, 1998, at 2, http://criticalresistance.org/wp-content/uploads/2018/09/Critical-Resistance-1998-Conference-Program.pdf [https://perma.cc/VW2R-4XZ9] (conference pamphlet).

[279] DAVIS, ARE PRISONS OBSOLETE?, *supra* note 17, at 39.

[280] *Id.*

[281] *Manifesto for Abolition*, *supra* note 30. On enslaved people's resistance to slavery, including rebellions, organized escapes, and everyday acts of sabotage, see HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS (Int'l Publishers, Co., Inc., 1963) (1943); SARAH H. BRADFORD, HARRIET TUBMAN: THE MOSES OF HER PEOPLE (Dover Publ'ns, Inc. 2004) (1886);

References to completing the unfinished struggles of past abolition movements are common in current abolitionist discourse.[282] Prison abolitionists attribute this unfinished status to the violent evisceration of Reconstruction by white terrorists and its replacement with a Jim Crow regime that denied black people their newly won rights and preserved the racial capitalist power structure.[283] Professor Joel Olson highlights three elements of the antislavery abolitionist struggle that are particularly relevant to the current movement: "[the] model of the political actor as agitator, [the] emphasis on freedom, and [the] *willingness to follow the radical implications of their demands*."[284] For modern-day abolitionists, the radical implication of taking up the longstanding demand for freedom is the complete eradication of the prison industrial complex.

The centrality to prison abolition theory of the unfinished struggle to end slavery raises the question of the significance of the abolition constitutionalism that helped to guide the antebellum struggle. If the U.S. Constitution was a key battleground for slavery abolitionists, should prison abolitionists continue to wage the freedom struggle on that same terrain? If today's prison abolitionists are the heirs to an antislavery movement that forged a radically different reading of the Constitution, might they pursue a similarly transformative abolition constitutionalism for the current carceral era? To answer these questions, it is helpful to interrogate the role of antebellum slavery abolitionists in conceiving and drafting the Reconstruction Amendments after the Civil War. I turn now to the history of the Reconstruction Amendments as both a radical and a failed rewriting of the Constitution's protection of slavery and the racial capitalist order.

II. ABOLITION AND THE CONSTITUTION

A review of the scholarly literature and popular narratives about the Reconstruction Amendments makes clear that there is no coherent understanding of their original aims or meaning. Deep disputes among antebellum abolitionists over the original Constitution's stance on slavery presage the differences among contemporary abolitionists on the

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PATRICK H. BREEN, THE LAND SHALL BE DELUGED IN BLOOD: A NEW HISTORY OF THE NAT TURNER REVOLT (2015); STEPHANIE M.H. CAMP, CLOSER TO FREEDOM: ENSLAVED WOMEN AND EVERYDAY RESISTANCE IN THE PLANTATION SOUTH (2004); DANIEL RASMUSSEN, AMERICAN UPRISING: THE UNTOLD STORY OF AMERICA'S SLAVE REVOLT (2011).

[282] *See, e.g.*, *Manifesto for Abolition*, *supra* note 30 ("The shockingly unfinished character of these struggles can be seen from some basic facts about our present."). Gilmore defines abolition as "a form of consciousness" aimed always toward realizing the "unfinished liberation." *Profiles in Abolition*, *supra* note 19, at 11:03. But she is careful to ask: "Unfinished from what? . . . It is the history of the abolition of slavery, but it is also the abolition of the idea that somehow precapitalist forms of exploitation have not persisted through the entire capitalist system." *Id.*

[283] *See supra* note 41 and accompanying text.

[284] JOEL OLSON, THE ABOLITION OF WHITE DEMOCRACY 136 (2004) (emphasis added).

meaning and utility of constitutional law. After the Reconstruction Amendments were enacted, legal historians largely neglected the role that abolitionists played in the constitutional transformation.[285] It is safe to say that the views of the white supremacists who gutted the Thirteenth and Fourteenth Amendments have gained greater prominence than have the views of the slavery abolitionists who inspired the constitutional amendments and of the Radical Republicans who drafted them.[286]

The abolitionist soul of the Reconstruction Amendments is experiencing a renaissance, however. Some constitutional scholars have recently argued that the antislavery origins of the Reconstruction Amendments have been obscured by a revisionist historiography that downplays the influence and importance of the abolitionist constitutionalism that preceded the Amendments' passage.[287] Antislavery activists not only chose to fight on constitutional ground, but, in the process, also crafted an alternative reading of the Constitution that proved highly influential for a period of time.[288] Moreover, the fact that the

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[285] *See* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 165–73 (2011) (discussing how legal historians "long obscured" the abolitionist constitutional roots of Section 1 of the Fourteenth Amendment, *id.* at 165).

[286] James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist View*, 94 N.Y.U. L. REV. (forthcoming Dec. 2019) (manuscript at 1–2) (discussing prominence of Democrats' and former enslavers' interpretation of the Thirteenth Amendment's Punishment Clause); *see also* Barnett, *supra* note 285, at 170–72 (noting that two influential scholarly works' "chilly treatment" of abolitionist constitutionalism, *id.* at 170, may also have contributed to this lack of engagement).

[287] *See* Barnett, *supra* note 285, at 252 ("The contribution of abolitionist constitutionalism to the original public meaning of Section One [of the Fourteenth Amendment] has long been obscured by a revisionist history"); Louisa M.A. Heiny, *Radical Abolitionist Influence on Federalism and the Fourteenth Amendment*, 17 TEMP. POL. & C.R.L. REV. 155, 155, 169–72 (2007) (arguing that the Republican framers of the Fourteenth Amendment incorporated antebellum radical abolitionists' arguments regarding the power of the federal government over the states into the Amendment); Pope, *supra* note 286 (manuscript at 1) (arguing that the Thirteenth Amendment's Republican framers "took an entirely different view" of the Punishment Clause than the interpretation of the Punishment Clause that exists in legal and popular discourse); Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 701–20 (2009) (examining how abolitionist views on liberty and equality were incorporated into the Reconstruction Amendments); Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. CAL. L. REV. 369, 390–98 (2016) [hereinafter Tsesis, *Constitutional Interpretation*] (examining the incorporation of abolitionist sentiments into the Reconstruction Amendments); *see also* Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2005 (1999) [hereinafter Foner, *Strange Career*] (criticizing Professor Bruce Ackerman's *We the People* for neglecting to give credit to the formerly enslaved for their role in shaping the Reconstruction Amendments).

[288] *See* JACOBUS TENBROEK, EQUAL UNDER LAW 116–31, 234–39 (1965) (originally published as JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951)); Barnett, *supra* note 285, at 253–55; Foner, *Strange Career*, *supra* note 287, at 2004–05; Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1820–22 (2006) [hereinafter Tsesis, *Civil Rights Approach*].

Constitution remains open to these varying interpretations highlights the potential for prison abolitionists to reclaim an abolition constitutionalism — or construct a new one — that facilitates rather than impedes the completion of the freedom struggle begun by their predecessors.[289]

A. The Settler-Colonial and Slavery Constitution

The constitutional government of the United States was founded on the colonization of Native tribes and the enslavement of Africans.[290] It enshrined the power and freedom of a white male elite, along with the ability of this elite class to restrict the power and freedom of everyone else. The Constitution was built on a foundation of laws, passed in the colonies in the 1600s, that constructed a political hierarchy that divided people into racial categories with differing claims to power and privilege. For example, in 1662, the Virginia Colony imposed double punishment on Christians who "committ[ed] ffornication [sic] with a negro man or woman"; the statute also assigned to children born to black women and "got by any Englishmen" the status of their mothers — thereby making them enslaveable.[291] Racial laws gave propertyless white men special entitlements over black and Native people.[292] As I put it elsewhere, "[c]olonial landowners inherited slavery as an ancient practice, but they invented race as a modern system of power."[293]

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[289] *See* Pope, *supra* note 286 (manuscript at 2) ("Whether to continue denouncing the [Thirteenth] Amendment or to reclaim it for prisoners' rights is, then, less a question of jurisprudence than of constitutional politics.").

[290] *See* MARY FRANCES BERRY, BLACK RESISTANCE/WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 4 (Penguin Press 1994) (1971) (arguing slavery constituted an "integral part" of constitutional law); DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 16–19 (2009); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1800 (2019) (explaining the ways in which "traces of America's history with colonialism are woven in like threads to the fabric" of the Constitution); *see also* Tsesis, *Constitutional Interpretation*, *supra* note 287, at 370 ("The original Constitution contained clauses, which protected the institution of slavery, that were irreconcilable with the moral commitments the nation undertook at independence.").

[291] WILLIAM WALLER HENING, 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 170 (New York, R. & W. & G. Bartow, 1823) (reproducing Act XII, which was passed in 1662); *see also* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 42–45 (1978) (arguing that the statute reflected implicit "economic preferences and advantages to whites who sought to extend servitude and slavery," *id.* at 44).

[292] *See* HIGGINBOTHAM, *supra* note 291, at 40–48; DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 9–10 (2011) [hereinafter ROBERTS, FATAL INVENTION] (discussing Virginia laws that "gave propertyless whites special rights over slaves," *id.* at 9).

[293] ROBERTS, FATAL INVENTION, *supra* note 292, at 12. Northern states had outlawed slavery by 1827. *See* Aaron Schwabach, *Thomas Jefferson, Slavery, and Slaves*, 33 T. JEFFERSON L. REV. 1, 14–15 (2010). Nonetheless, they enforced a racial caste system that denied equality to free black residents. *See* CHRISTOPHER MALONE, BETWEEN FREEDOM AND BONDAGE: RACE, PARTY, AND VOTING RIGHTS IN THE ANTEBELLUM NORTH (2007); Roger D. Bridges, *Antebellum*

The framers made the exclusion of Africans and Native tribes from the democracy they established foundational to the Constitution.[294] Many of the nation's founders were enslavers themselves.[295] As white property holders, they had a vested interest in preserving the fledgling capitalist economy fueled by captive labor and racist ideology. The original Constitution contained no provision that ended the slave trade, no provision that freed enslaved Africans or prevented future enslavement, and no provision that protected black people from all manner of degradation on account of their race.[296] Although the word "slavery" appeared nowhere in the Constitution, several provisions explicitly enforced the institution.[297] As journalist Nikole Hannah-Jones summarizes:

Struggle for Citizenship, 108 J. ILL. ST. HIST. SOC'Y 296, 298 (2015); *see also* BAPTIST, *supra* note 110, at 309–42 (discussing how, by the 1840s, the North had built an industrial economy based on enslaved cotton labor); STEVE LUXENBERG, SEPARATE: THE STORY OF *PLESSY V. FERGUSON*, AND AMERICA'S JOURNEY FROM SLAVERY TO SEGREGATION (2019).

294 *See* BERRY, *supra* note 290, at 4 (arguing that the oppression of black people through slavery formed an essential part of constitutional law); Blackhawk, *supra* note 290, at 1800–01 (arguing that America's history of colonialism is embedded in the Constitution).

295 Anthony Iaccarino, *The Founding Fathers and Slavery*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/The-Founding-Fathers-and-Slavery-1269536 [https://perma.cc/8Z9L-ENAE] (listing slaveholding founders, including Presidents Thomas Jefferson, James Madison, and George Washington).

296 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 20 (2005) ("Slavery was the original sin in the New World garden, and the Constitution did more to feed the serpent than to crush it."). *See generally* Blackhawk, *supra* note 290 (discussing the Constitution's treatment of slavery in comparison to its treatment of Native tribes). Indeed, the primacy of slavery implies that it was foundational to the creation of the nation: the dominant paradigm that locates the Founding at the drafting of the Constitution, rather than at the origin of slavery, needs further interrogation. *See The 1619 Project*, N.Y. TIMES MAG. (Aug. 18, 2019), https://nyti.ms/2H4KijC [https://perma.cc/WZC7-2FPB] (describing a project that "aims to reframe the country's history, understanding 1619 as our true founding").

297 Of the Constitution's eighty-four clauses, "[s]ix deal directly with the enslaved and their enslavement . . . and five more hold implications for slavery." Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False when They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG. (Aug. 14, 2019), https://nyti.ms/2H63ygp [https://perma.cc/SS2Q-E2EG]; *see also* U.S. CONST. art. I, § 2, cl. 3 (determining apportionment of state representatives by adding the "whole Number of free Persons" and "three fifths of all other Persons"); *id.* art. I, § 7, cl. 1 (giving the House of Representatives, the population of which was partially determined by the Three-Fifths Clause, the power to raise revenue); *id.* art. I, § 8, cl. 1 (giving Congress the power to levy taxes and duties, which directly impacted enslavers' economic interests with respect to crops grown by slaves that were marketed abroad, such as indigo and tobacco); *id.* art. I, § 8, cl. 15 (allowing Congress to mobilize a militia, protecting against the threat of slave rebellions); *id.* art. I, § 9, cl. 1 (protecting the importation of slaves until at least 1808); *id.* art. IV, § 2, cl. 3 (guaranteeing the return of people "held to Service or Labour" who escaped from one state to another); WALDSTREICHER, *supra* note 290, at 3–9 (discussing the absence of slavery from the Constitution and highlighting constitutional provisions that nevertheless concerned and protected slavery). On the Constitution's references to Native tribes, see Blackhawk, *supra* note 290, at 1800 ("The Founding Constitution explicitly referenced Indians twice. The first reference was in the Commerce Clause, which provided Congress with the power in Article I, Section 8 to 'regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes' and again to explicitly 'exclud[e] Indians not taxed' from Article I's apportionment scheme." (alteration in original)).

> The Constitution protected the "property" of those who enslaved black people, prohibited the federal government from intervening to end the importation of enslaved Africans for a term of 20 years, allowed Congress to mobilize the militia to put down insurrections by the enslaved and forced states that had outlawed slavery to turn over enslaved people who had run away seeking refuge.[298]

In short, slavery was constitutional.

State and federal courts, including the Supreme Court, consistently ratified the slavery regime by interpreting key constitutional provisions and statutes in favor of slaveholders.[299] "At no point prior to the Civil War did the Supreme Court significantly limit slavery or even raise serious questions about its constitutionality," writes Professor Erwin Chemerinsky.[300] The Court's most controversial proslavery decision, *Dred Scott v. Sandford*,[301] ruled against a black man, Dred Scott, who had lived on free soil in Illinois and what was then the territory of Wisconsin and sued for his freedom in Missouri.[302] Rather than point to fundamental principles of equality or engage in careful textual exegesis, the Court pointed to the nation's coherent system of antiblack discrimination and conducted a cursory examination of the Constitution to establish that no black person was a citizen of the United States.[303] In his opinion for the Court, Chief Justice Taney noted that, at the time the Constitution was drafted, "the civilized portion of the white race" universally regarded black people as "so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."[304] The *Dred Scott* decision enshrined the distinguishing feature of American racial slavery that categorically excluded black people from democracy: the belief that "black people were not merely enslaved but were a slave race."[305] Thus, America's original constitutionalism was staunchly colonial, white supremacist, and proslavery.

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[298] Hannah-Jones, *supra* note 297.

[299] *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 119–21 (1975) (citing cases in which judges upheld slavery based on legal justifications).

[300] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW POLICIES 755 (5th ed. 2017); *see also* AMAR, *supra* note 296, at 260–65 (discussing the antebellum Supreme Court's slavery-related decisions); BERRY, *supra* note 290, at 53 (discussing a Supreme Court decision reaffirming the legal standing of proslavery groups).

[301] 60 U.S. (19 How.) 393 (1857).

[302] *Id.* at 493 (Campbell, J., concurring).

[303] *Id.* at 407–12 (majority opinion). Chief Justice Taney pointed to two clauses in the Constitution, regarding importation and recovery of slaves, to support his interpretation that the text excluded blacks from "people of the United States," though neither determined the legal status of free blacks. *Id.* at 411 (emphasis omitted).

[304] *Id.* at 407.

[305] Hannah-Jones, *supra* note 297.

B. The Radical History of the Reconstruction Amendments

A renewed interest among constitutional scholars in the abolitionist origins of the Reconstruction Amendments has generated important insights on antebellum abolitionists' thinking and activism regarding the Constitution. Recent research has illuminated an alternative public meaning of the Constitution residing in "largely forgotten books, pamphlets, articles, resolutions, and legal briefs," rather than on the pages of Supreme Court decisions.[306]

The nineteenth-century movement to abolish slavery prominently included engaging with the U.S. Constitution. Antislavery theorizing and activism were essential both to developing a reading of the existing constitutional text that rendered human bondage incompatible with fundamental constitutional principles of liberty, equality, and democracy, and to amending the text when those principles alone failed to end the slavery system.[307] The abolition struggle profoundly shaped not only the specific language of the Reconstruction Amendments but also the very meaning of those constitutional principles.[308] In opposition to the prevailing constitutional philosophy that upheld slavery, antislavery activists forged a radically divergent abolition constitutionalism.[309] Abolitionists fought for the amended Constitution to embody their radical constitutional vision and to install a "second founding" of the nation built on equal citizenship and freedom of labor.[310]

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[306] Barnett, *supra* note 285, at 167.

[307] *See* TENBROEK, *supra* note 288, at 234–39 (demonstrating that the Reconstruction Amendments represent the culmination of more than thirty years of antislavery efforts).

[308] *See* Barnett, *supra* note 285, at 168–69 (noting that abolitionists' constitutional arguments included all four concepts enumerated in Section 1 of the Fourteenth Amendment); Foner, *Strange Career*, *supra* note 287, at 2004 ("The origins of the idea of an American people unbounded by race lie not with the Founders, who by and large made their peace with slavery, but with the abolitionists."); Pope, *supra* note 286 (manuscript at 9) (noting that the Thirteenth Amendment "was conceived as a regime shift in constitutional law"); Tsesis, *Civil Rights Approach*, *supra* note 288, at 1800 (noting that the framers of the Thirteenth Amendment constitutionalized abolitionist ideas on "the universality of fundamental rights").

[309] *See* Foner, *Strange Career*, *supra* note 287, at 2004 ("In elaborating their criticism of slavery and attempting to reinvigorate the idea of freedom as a truly universal entitlement, the abolitionists developed what might be called an alternative constitutionalism."); *see also* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 26–56 (1986); DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 3 (1993) (arguing abolitionists developed a "right to conscience" that envisioned changing the Constitution from a pro-slavery document to one grounded in human rights); TENBROEK, *supra* note 288, at 167–69; WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 249–75 (1977). *But see* Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1174 (1992) (arguing the Fourteenth Amendment fulfills equality principles inherent in the original Constitution rather than radically transforming them).

[310] Elizabeth Reilly, *Introduction* to INFINITE HOPE & FINITE DISAPPOINTMENT: THE STORY OF THE FIRST INTERPRETERS OF THE FOURTEENTH AMENDMENT 1, 1 (Elizabeth

From the 1830s to the 1850s, abolitionists engaged in an intense — at times, acrimonious — debate over the Constitution's stance on slavery.[311] On one side stood the Garrisonians, whose namesake, William Lloyd Garrison, called the Constitution a "covenant with death and an agreement with hell" because it permitted slavery.[312] On the other were antislavery constitutionalists like Representative John Bingham, Lysander Spooner, and Theodore Dwight Weld, who read the Constitution instead as prohibiting or constraining the expansion of bondage.[313]

Abolitionists asserted a number of grounds for their claim that the Constitution was an antislavery document. First, they distinguished between the democratic principles stated in its text that repudiated the existence of slavery and the proslavery intent of its framers and proslavery interpretations of slaveholders and judges.[314] As Professor Randy Barnett explains, several leading abolitionists argued that the Constitution's inclusive language, including that of "We the People," trumped the exclusionary meanings promulgated to deny freedom to black people.[315] In his celebrated analysis of the Constitution, *The Unconstitutionality of Slavery*, published in 1845, Spooner elaborated that citizenship rights should extend to black people based on the original public meaning of the text rather than the intentions of its framers.[316] *Proceedings of the Convention of Radical Political Abolitionists*, a pamphlet published to commemorate the proceedings of an 1855 abolitionist convention, similarly urged readers "to construe the Constitution as it *reads*, and not as the slaveholders pretend that it *means*."[317]

Reilly ed., 2011) [hereinafter INFINITE HOPE & FINITE DISAPPOINTMENT] (noting that some have called the adoption of the Fourteenth Amendment the "second founding").

311 *See* DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 213–15, 293–94, 316–17 (2018); Barnett, *supra* note 285, at 167 ("From the 1830s to the 1850s, a truly remarkable body of constitutional argumentation was developed by . . . abolitionist lawyers and laymen to evaluate the constitutionality of slavery.").

312 Barnett, *supra* note 285, at 167; Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 414–15 (2012) (both quoting William Lloyd Garrison, *The Constitution: A "Covenant with Death and an Agreement with Hell,"* 12 THE LIBERATOR 71 (1842)). Garrison helped to launch the abolitionist movement with the publication of his newspaper *The Liberator* in January 1831. THOMAS G. MITCHELL, ANTISLAVERY POLITICS IN ANTEBELLUM AND CIVIL WAR AMERICA 1 (2007).

313 *See* Barnett, *supra* note 285, at 167; *see also* Randy E. Barnett, *From Antislavery Lawyer to Chief Justice: The Remarkable but Forgotten Career of Salmon P. Chase*, 63 CASE W. RES. L. REV. 653, 654 (2013).

314 *See, e.g.*, Barnett, *supra* note 285, at 201–03 (describing Lysander Spooner's argument that the assertions about the founders' intent should not be used to read protections for slavery into euphemistic passages in the Constitution).

315 *See id.* at 205–10, 245.

316 *See id.* at 198–210.

317 *Id.* at 243 (quoting CENT. ABOLITION BD., PROCEEDINGS OF THE CONVENTION OF RADICAL POLITICAL ABOLITIONISTS 6 (1855)).

Second, abolitionists argued that specific constitutional provisions made slavery illegal and black people citizens. Some abolitionists argued that, regardless of the Constitution's original provisions, the Due Process Clause of the Fifth Amendment took precedence and prohibited slavery.[318] In an 1859 speech, Bingham, who later served as a member of the Committee of Fifteen on Reconstruction in the Thirty-Ninth Congress,[319] described "the rights protected by the Fifth Amendment as 'natural or inherent rights, which belong to all men irrespective of all conventional regulations.'"[320] Bingham emphasized that because the text referred to "no person," it "makes no distinction either on account of complexion or birth — it secures these rights to all persons within its exclusive jurisdiction. This is equality."[321] That constitutional equality guarantee, Bingham noted, was not limited by "the interpolation into it of any word of caste, such as white, or black, male or female."[322]

Weld, a full-time antislavery activist married to abolitionist and women's rights advocate Angelina Grimké, also relied on due process concepts to oppose slavery.[323] He contested judicial protection of slaveholders' due process rights by observing that "[a]ll the slaves in the District have been 'deprived of liberty' by legislative acts."[324] Weld argued that if those legislative acts did not constitute due process of law, "then the slaves were deprived of liberty *unconstitutionally*, and these acts are *void*. In that case the *constitution emancipates them*."[325]

Another alternative reading of the Constitution extended the concept of birthright citizenship to African Americans, setting the stage for the Fourteenth Amendment's explicit provision. In her popular treatise, *An Appeal in Favor of that Class of Americans Called Africans*, published in 1833, feminist abolitionist Lydia Maria Child made the novel claim that black people were "compatriots, not foreigners."[326] Soon thereafter, the 1838 treatise *Rights of Colored Men to Suffrage, Citizenship and Trial by Jury*, by William Yates, became an influential authority on the legal status of free black people that defended their citizenship rights and argued against their expulsion from the United States.[327]

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[318] *See id.* at 179–82.

[319] *Id.* at 166–67.

[320] *Id.* at 251 (quoting CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (statement of Rep. John Bingham)).

[321] *Id.* at 252 (quoting CONG. GLOBE, 35th Cong., 2d Sess. 985 (statement of Rep. John Bingham)).

[322] *Id.* (quoting CONG. GLOBE, 35th Cong., 2d Sess. 985 (statement of Rep. John Bingham)).

[323] *See id.* at 176–82.

[324] *See id.* at 180 (quoting Theodore Dwight Weld, *The Power of Congress Over the District of Columbia*, N.Y. EVENING POST, Dec. 29, 1837–Jan. 30, 1838, at 40).

[325] *Id.* (quoting Theodore Dwight Weld, *The Power of Congress Over the District of Columbia*, N.Y. EVENING POST, Dec. 29, 1837–Jan. 30, 1838, at 40).

[326] Foner, *Strange Career*, *supra* note 287, at 2004.

[327] MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 1–5 (2018). Jones notes that "the equation linking rights and citizenship was

Even more neglected in constitutional history than these white abolitionists are black Americans who theorized and defended claims to equal citizenship. Although the fiery orator and prominent antislavery activist Frederick Douglass, to whom I will turn next, remains well known, other African Americans whose legal arguments contributed to antebellum abolitionist constitutionalism have received far less attention.[328] In *Birthright Citizens: A History of Race and Rights in Antebellum America*, Professor Martha Jones recounts how free black people living in Baltimore before the Civil War fought against the threat of deportation by making legal arguments in newspapers, legislatures, and courts that birth in the United States established their citizenship and guaranteed their rights.[329] Black Baltimoreans also advanced this claim by conducting themselves like rights-bearing citizens when they litigated disputes over property, credit, and family autonomy in court.[330]

Free African Americans' legal challenges to exploitative contracts with white people before the Civil War are especially instructive. In the antebellum period, black residents of Baltimore brought insolvency petitions, petitions for writs of habeas corpus, petitions for debt relief, and challenges to apprenticeship contracts with unscrupulous whites.[331] They also sometimes served as court-appointed trustees and even testified against white parties, at a time when state law prohibited such testimony.[332] For example, a laborer named Charles Snell petitioned for a writ of habeas corpus at the Circuit Court of Baltimore City to challenge the indenture of his seven-year-old daughter Mary to the mother of police officer James Maddox.[333] According to 1860 census records, Mary eventually returned to Snell's custody.[334]

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never fixed." *Id.* at 11. In the antebellum period, African Americans both sought to secure their rights as evidence of their citizenship and argued that citizenship was "the gateway to rights." *Id.*

328 *See* DU BOIS, *supra* note 173, at 724–27 (criticizing scholars of his time for ignoring the participation of emancipated slaves in the history of Reconstruction and failing to "conceive [of] Negroes as men," *id.* at 726).

329 JONES, *supra* note 327, at 10.

330 *Id.* at 19, 108–27 (citing *Owens v. Williams*, a case where the Baltimore Orphan's Court allowed for the return of a young black boy to his mother from his indenture and thus contemplated parental rights for black parents, and *Rollins v. Anderson Bros.*, a case where the limits of such parental rights were outlined when the plaintiff failed to regain custody of his apprenticed child).

331 *See id.* at 109.

332 *See id.*

333 *See id.* at 120–21.

334 *Id.* at 121. Black parents continued to use habeas corpus to contest the apprenticeships of their children after the Civil War. Radical Republican Judge Bond not only voided individual apprenticeship arrangements brought before him but also went on to hold all such contracts unconstitutional because the state's apprenticeship laws treated black and white children differently. *Id.* at 150 (discussing Judge Bond's conviction that since "the state's new constitution of 1864 abolished slavery . . . it also extinguished all legal distinctions between the races"). In 1867, the U.S. Circuit Court for the District of Maryland declared that the state's apprenticeship laws violated the Civil Rights Act of 1866. *Id.* at 218 n.9 (citing *In re* Turner, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247)).

Thus, antebellum abolitionist activists, lawyers, and ordinary black people asserted a robust reading of the Constitution's text that demonstrated the unconstitutionality of slavery. Through their legal scholarship, public propaganda, and court claims, slavery opponents constructed an abolition constitutionalism based on free labor and equal citizenship that contradicted the dominant jurisprudence favoring slaveholders.

An astounding aspect of this constitutional story is that many black abolitionists grounded their radical approach to citizenship and freedom in the U.S. Constitution itself, a text that had been written and interpreted to enslave them. For instance, as a formerly enslaved person, Frederick Douglass envisioned an abolitionist constitution even before slavery was abolished. I want to spotlight Douglass's approach to the Constitution because it illuminates the tension inherent in an abolition constitutionalism that recognizes the animosity of constitutional law toward black people while demanding constitutional recognition of black people's citizenship and humanity.

Douglass struggled mightily with whether the Constitution was a proslavery or antislavery document.[335] Douglass saw the Constitution's "radical defect" as an internal contradiction that put the document "at war with itself": "Liberty and Slavery — opposite as heaven and hell — are both in the Constitution," he wrote in April 1850.[336] Douglass initially advocated for the Garrisonian rejection of the Constitution as a slaveholding document. In 1849, he wrote:

> [T]he original intent and meaning of the Constitution (the one given to it by the men who framed it, those who adopted [it], and the one given to it by the Supreme Court of the United States) makes it a pro-slavery instrument . . . [that] I cannot bring myself to vote under, or swear to support.[337]

During a debate in support of this position, Douglass condemned the framers' "attempt[] to unite Liberty in holy wedlock with the dead body of Slavery, [through which] the whole was tainted. Let this unholy, unrighteous union be dissolved."[338]

By mid-1851, Douglass parted with the Garrisonians and declared that he planned to promote the antislavery interpretation of the

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335 *See* BLIGHT, *supra* note 311, at 215.

336 *Id.* (quoting Frederick Douglass, *Oath to Support the Constitution*, NORTH STAR, Apr. 5, 1850).

337 *Letter from Frederick Douglass to C.H. Chase*, NORTH STAR, Feb. 9, 1849, *reprinted in* 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: EARLY YEARS, 1817–1849, at 352, 353 (Philip S. Foner ed., 1950) [hereinafter LIFE AND WRITINGS].

338 FREDERICK DOUGLASS, *Is the Constitution Pro-Slavery?*, *in* 2 THE FREDERICK DOUGLASS PAPERS: SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS, 1847–1854, at 217, 223 (John W. Blassingame ed., 1979) [hereinafter THE FREDERICK DOUGLASS PAPERS]; *see also* Wilson J. Moses, *"The Ever-Present Now": Frederick Douglass's Pragmatic Constitutionalism*, 99 J. AFR. AM. HIST. 71, 77–78 (2014) (quoting Douglass as stating that he "wish[ed] to dissolve the Union" because of its support of slavery, *id.* at 78).

Constitution.[339] In his autobiography, Douglass describes his conversion to the antislavery side after years of careful consideration and abolitionist activism including publishing his paper, lecturing against slavery, and concealing fugitive slaves:

> By such a course of thought and reading I was conducted to the conclusion that the Constitution of the United States — inaugurated to "form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty" — could not well have been designed at the same time to maintain and perpetuate a system of rapine and murder like slavery, especially as not one word can be found in the Constitution to authorize such a belief.[340]

Douglass applied the well-accepted method of interpreting a document's parts in light of the whole: "[I]f the declared purposes of an instrument are to govern the meaning of all its parts and details, as they clearly should," he argued, "the Constitution of our country is our warrant for the abolition of slavery in every state of the Union."[341] Thus, Douglass read the Constitution as an abolitionist document at a time when no judge in the nation questioned slavery's constitutionality. To be clear, Douglass did not adopt the reigning constitutional meaning or an originalist interpretation based on the framers' intent.[342] Rather, he helped to construct a new abolition constitutionalism that radically departed from what prevailed.[343]

Douglass didn't renounce the proslavery interpretation out of ignorance of its origins or its use to uphold slavery. After all, this was the same activist who in 1852 delivered "the rhetorical masterpiece of American abolitionism"[344] in Rochester's Corinthian Hall, asking:

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[339] BLIGHT, *supra* note 311, at 216. Douglass's adoption of the antislavery perspective generated bitter public conflict between Douglass and Garrison over the Constitution's nature. *See id.* at 216–27. During the conflict, the two former comrades sunk into ad hominem attacks of each other's motivations. *See id.*

[340] FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 261–62 (MacMillan & Co. 1962) (1892) [hereinafter DOUGLASS, LIFE AND TIMES] (quoting U.S. CONST. pmbl.); *see also* Moses, *supra* note 338, at 73.

[341] DOUGLASS, LIFE AND TIMES, *supra* note 340, at 262.

[342] *But see* McConnell, *supra* note 309, at 1170 (attempting to align Reconstruction's "return to original principles" with Douglass's abolition constitutionalism).

[343] I disagree with Professor Michael McConnell's attempt to align the claim that the Reconstruction was "a return to original principles" with Douglass's abolition constitutionalism. McConnell's argument that the Fourteenth Amendment was not a radical departure from the original Constitution discounts the Constitution's colonial structure as well as the activism abolitionists undertook to amend it. *Compare id.* at 1175 (arguing that slavery was tolerated "only because of a combination of practical necessity and an over-optimistic belief that it would fade away as a result of its own inefficiency"), *with* Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 267 (2015) (criticizing the account of the United States as a civic polity dedicated to equality because this account "reads such aspirations back into the very founding of the United States, albeit while accepting the extent to which equality may have been deferred in historical fact").

[344] BLIGHT, *supra* note 311, at 230.

"What, to the American slave, is your 4th of July?"[345] His answer was to damn "the hypocrisy of the nation":

> To him, your celebration is a sham; . . . your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; . . . your shouts of liberty and equality, hollow mockery; . . . a thin veil to cover up crimes which would disgrace a nation of savages.[346]

Recognizing black people's forced exclusion from the Declaration's promises, he told more than five hundred abolitionists in attendance, "This Fourth of July is *yours*, not *mine*."[347]

Rather, Douglass adopted the antislavery view because he refused to concede constitutional authority to slaveholders.[348] He explained: "I am sick and tired of arguing on the slaveholders' side of this question, . . . although they are doubtless right so far as the intentions of the framers of the Constitution."[349] It was out of his political vision for an abolition constitutionalism, grounded in a mixture of natural law and constitutional principles that opposed slavery, that Douglass relinquished the proslavery reading of the Constitution.[350] In addition, Douglass argued for the constitutional necessity of abolition because the "Slave Power" increasingly threatened to engulf even white people's liberties. The Slave Power, a political term coined by abolitionists in the 1830s and widely used in the 1850s, "referred not only to Southern whites who owned slaves but to constitutional provisions and political practices that gave them disproportionate power in the federal government."[351] In 1854, Douglass warned white Americans that "[s]lavery aim[ed] at absolute sway" over the nation's future.[352] "It would drive out the school-master, and install the slave-driver, burn the schoolhouse, and erect the whipping-post, prohibit the Holy Bible and

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[345] FREDERICK DOUGLASS, *The Meaning of July Fourth for the Negro*, *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 1, at 188, 196.

[346] *Id.* at 196–97.

[347] *Id.* at 194; *see* Abigail Censky, *'What to the Slave Is the Fourth of July?': Frederick Douglass, Revisited*, NPR (July 5, 2017), https://n.pr/2uKB7MG [https://perma.cc/EHD6-YNV6] (noting that over five hundred abolitionists were in the audience for Douglass's speech).

[348] *See* BLIGHT, *supra* note 311, at 215. In response to the *Dred Scott* decision, Douglass denied that the Court had the authority to decide the question, declaring that "the Supreme Court of the Almighty is greater." *Id.* at 279 (quoting FREDERICK DOUGLASS, *The Dred Scott Decision*, *in* 2 LIFE AND WRITINGS, *supra* note 337, at 407, 411).

[349] *Id.* at 215 (quoting Letter from Frederick Douglass to Gerrit Smith (Jan. 31, 1851)).

[350] *Id.* at 215, 235. Historian Professor David Blight explains Douglass's embrace of the Constitution as "a kind of radical hope in the theory of natural rights, and in a Christian millennialist view of history as humankind's grand story, punctuated by terrible ruptures followed by potential regenerations." *Id.* at 236. Blight also notes that Douglass's abolitionist strategy evolved into "a mixture of righteousness and pragmatism." *Id.* at 270.

[351] Garrett Epps, *The Antebellum Political Background of the 14th Amendment*, *in* INFINITE HOPE & FINITE DISAPPOINTMENT, *supra* note 310, at 11; *see id.* at 11–12, 15.

[352] BLIGHT, *supra* note 311, at 272 (quoting FREDERICK DOUGLASS, *The Nebraska Controversy*, *in* 2 LIFE AND WRITINGS, *supra* note 337, at 276, 278).

establish the bloody slave code, dishonor free labor with its hope of reward, and establish slave labor with its dread of the lash."[353] To Douglass, then, basic constitutional principles were antagonistic to the existence of slavery, and the existence of slavery was antagonistic to the survival of constitutional democracy.

The hope Douglass found in the Constitution was also anchored in his awareness of the political work it would take to realize its antislavery values. Douglass warned against the foolish belief that principles by themselves would change power arrangements. "The whole history of the progress of human liberty shows that all concessions yet made to her august claims, have been born of earnest struggle," Douglass declared in a speech in Canandaigua, New York, on August 3, 1857.[354] "If there is no struggle there is no progress."[355] Douglass urged violent resistance to the Fugitive Slave Act, telling abolitionists they "ought to say to Slaveholders that they are in danger of bodily harm if they come here, and attempt to carry men off into bondage"[356] and predicting that "two or three dead slaveholders will make this law a dead letter."[357] Douglass saw the 1861 outbreak of the Civil War — what he later called the "abolition war"[358] — as ultimately deciding "which of the two, Freedom or Slavery, shall give law to this republic."[359] Thus, Douglass at once reimagined the Constitution's principles as opposed to slavery, denounced the nation's abysmal failure to abide by them, and recognized the physical and political battle it would take to abolish slavery in practice.

Douglass ultimately may have put too much faith in the amended Constitution's ability to guarantee black people's freedom once slavery ended. In her 1998 essay *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System*, Davis faults Douglass for centering his post-Emancipation advocacy on the right to vote rather than on opposing convict leasing's evisceration of blacks'

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[353] *Id.* (quoting DOUGLASS, *The Nebraska Controversy*, *supra* note 352, at 276, 278); *see also* DOUGLASS, LIFE AND TIMES, *supra* note 340, at 292–313.

[354] FREDERICK DOUGLASS, *West India Emancipation*, *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 1, at 358, 367.

[355] *Id.*

[356] FREDERICK DOUGLASS, *Resistance to Blood-Houndism*, *in* 2 THE FREDERICK DOUGLASS PAPERS, *supra* note 338, at 272, 275.

[357] *Id.* at 276. In 1851, Douglass and his wife Anna harbored William Parker, a black activist, and two escaped slaves, named Alexander Pinckney and Abraham Johnson, who had fled Christiana, Pennsylvania. Parker had organized a crowd to protect Pinckney and Johnson when their enslaver, Edward Gorsuch, traveled from Baltimore to retrieve them at gunpoint. Gorsuch was killed in the ensuing melee. BLIGHT, *supra* note 311, at 243.

[358] Frederick Douglass, *Speech of Frederick Douglass on the War*, DOUGLASS' MONTHLY, Feb. 1862, at 597.

[359] Frederick Douglass, *The New President*, DOUGLASS' MONTHLY, Mar. 1861, at 419.

nascent political power.[360] Still, Douglass's evolving engagement with both constitutional philosophy and radical political activism offers important insights on the potential for the revival of abolition constitutionalism in the present era.

C. The Reconstruction Constitution

In 1865, Congress enacted the Thirteenth Amendment to the U.S. Constitution, prohibiting slavery and involuntary servitude, except as punishment for crime, throughout the United States.[361] Slavery's defeat was met immediately by a terrorist effort to return newly freed blacks to servitude and reinstate white rule. President Abraham Lincoln's replacement, President Andrew Johnson, a white-supremacist former slaveholder, rejected Radical Republicans' vision for Reconstruction and supported the rights of southern states.[362] President Johnson subscribed to the view that enslaved people had conspired with their enslavers to oppress non-slaveholding whites, and he cast black people's political advancement in opposition to the common white man's rights.[363] President Johnson quickly began pardoning ex-Confederates and returning confiscated and abandoned land to slaveholders.[364] Instead of getting title to the land they occupied, as they deserved both as reparations and as reward, freed black people were forced into wage servitude for the white landowners.[365] "How many black men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known," writes Professor Leon Litwack in *Been in the Storm So Long: The Aftermath of Slavery*.[366] After sabotaging the process, President Johnson declared Reconstruction complete when Congress returned from recess in December 1865.[367] President Johnson also attempted to sabotage the Freedmen's Bureau, an agency of the War Department established by Congress in March

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[360] *See* ANGELA Y. DAVIS, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System*, *in* THE ANGELA Y. DAVIS READER 74, 74–79 (Joy James ed., 1998).

[361] U.S. CONST. amend. XIII, § 1.

[362] *See* BLIGHT, *supra* note 311, at 472 (describing President Johnson as a "staunch white supremacist who accepted the end of slavery but could not abide the idea of black civil and political rights"); FONER, RECONSTRUCTION, *supra* note 41, at 176–97.

[363] FONER, RECONSTRUCTION, *supra* note 41, at 181.

[364] *See* BLIGHT, *supra* note 311, at 472; FONER, RECONSTRUCTION, *supra* note 41, at 187–89.

[365] *See* BLIGHT, *supra* note 311, at 472.

[366] LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 276–77 (1979).

[367] BLIGHT, *supra* note 311, at 472. The Compromise of 1877, which officially ended Reconstruction, required the federal government to pull the last U.S. troops from the former Confederate states in exchange for Republican Rutherford B. Hayes claiming the presidency after the contested 1876 presidential election. C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 5–7 (Anchor Books 1956) (1951).

1865 to provide education, aid, land, and protection to newly freed blacks and white refugees.[368] Although Congress overrode his veto of an 1866 bill extending the Bureau's work for two years,[369] the Bureau's efforts to distribute land to southern blacks were thwarted by white terroristic thefts of black people's property and President Johnson's restoration of property to whites.[370]

The Radical Republicans responded to the crisis by passing the Civil Rights Act of 1866 over President Johnson's veto and enacting the Fourteenth Amendment in 1868 to extend to the formerly enslaved, as well as to any person born in the United States, the guarantee of citizenship.[371] The language of the Fourteenth Amendment can be traced to specific speeches and writings of leading antislavery advocates who developed an abolition constitutionalism in the preceding decades.[372] Most of these theorists were also intensely engaged in political activism and had been key players in the Liberty Party, which eventually became the Republican Party.[373] Radical Republican leaders, like Charles Sumner and Henry Wilson in the Senate and James Ashley and Thaddeus Stevens in the House, urged incorporating their vision of slavery eradication and free labor in the rewritten Constitution's text.[374]

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[368] *See* FONER, RECONSTRUCTION, *supra* note 41, at 68–69, 190.

[369] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1861 (1866); *Freedmen's Bureau Acts of 1865 and 1866*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm [https://perma.cc/8GM7-WSE7]; *see also* Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1367 (2016).

[370] *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 875 (1986) ("Finally, President Andrew Johnson, a Democratic Conservative, actually encouraged Southern resistance through his policy of appeasement."); Thomas D. Morris, *Military Justice in the South, 1865–1868: South Carolina as a Test Case*, 54 CLEV. ST. L. REV. 511, 521–23 (2006) (discussing the hope of freed blacks to become farmers, which ultimately proved to be "hollow . . . since the pardon and amnesty program of the President . . . carried with it the full restoration of all property rights," *id.* at 521); Trymaine Lee, *A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions and Exclusion, Separates Black and White America.*, N.Y. TIMES MAG. (Aug. 14, 2019), https://nyti.ms/2H2v6mP [https://perma.cc/LCX9-AE5Z] ("The period that followed the Civil War was one of economic terror and wealth-stripping that has left black people at lasting economic disadvantage.").

[371] U.S. CONST. amend. XIV; Note, *Congress's Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1216–20 (2015) (describing the passage of the Civil Rights Act of 1866).

[372] *See* Barnett, *supra* note 285, at 166–69; Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 610, 653–61. For a detailed analysis of the continuities between the constitutionalism of a number of abolitionist writers and activists, see Barnett, *supra* note 285.

[373] Barnett, *supra* note 285, at 169.

[374] *See* FONER, RECONSTRUCTION, *supra* note 41, at 228–31; Paul Finkelman, *The Historical Context of the 14th Amendment*, *in* INFINITE HOPE & FINITE DISAPPOINTMENT, *supra* note 310, at 35, 38–44 (discussing the politics of Stevens and Bingham and concluding "[t]he evidence suggests that for Stevens, Bingham, and other Republicans, black civil rights mattered," *id.* at 44); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1518–20 (2010) ("Senators and representatives stressed that the

The abolitionist Constitution was forged, as well, by ordinary black folks who abandoned plantations, served in the Union Army, and demanded recognition of their equal citizenship.[375] After 1867, four million formerly enslaved people grabbed the opportunity Emancipation afforded them to create their own economic, social, and political lives independent of white domination.[376] They gathered their family members,[377] established farms and businesses, and ran for public office.[378] Black Americans elected to southern legislatures helped to install egalitarian state constitutions, enact civil rights legislation, and establish public education.[379] Jones argues that, in the period surrounding the Civil War, the rights of African Americans were substantiated not only by Congress's enactment of the Reconstruction Amendments and the Civil Rights Act of 1866, but also by "a view of rights as secured through their performance."[380] "Free African Americans became rights holders when they managed to exercise those privileges that rights holders exercised. And often they did so in ways that local authorities were bound to respect and enforce," Jones explains — "[t]hey traveled between the states, they gathered in religious assemblies, they sued and were sued, testified, and secured their persons and property before the law."[381] Thus, by resisting white domination and acting like citizens, black people have secured greater freedom apart from official recognition of their rights, thereby changing the Constitution's meaning to encompass their freedom.

[Thirteenth] Amendment would protect the freedom of labor." *Id.* at 1518.); Tsesis, *Civil Rights Approach*, *supra* note 288, at 1801–02 (discussing the abolitionist principles behind the Thirteenth Amendment); Lea VanderVelde, *Henry Wilson: Cobbler of the Frayed Constitution, Strategist of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 173, 176 (2017) (discussing "Senator Henry Wilson's significance as leader of the Radical Republicans in developing the labor vision [of the Thirteenth Amendment] and amending the Constitution accordingly"); Zietlow, *supra* note 312, at 443–44 (examining Congressman James Ashley's antislavery interpretation of the Constitution, which influenced the drafting of the Thirteenth Amendment).

375 *See* FONER, RECONSTRUCTION, *supra* note 41, at 7–10; JONES, *supra* note 327, at 146–53; Foner, *Strange Career*, *supra* note 287, at 2005.

376 FONER, RECONSTRUCTION, *supra* note 41, at xxv, xxvii; *see also* MARY FRANCES BERRY, MY FACE IS BLACK IS TRUE: CALLIE HOUSE AND THE STRUGGLE FOR EX-SLAVE REPARATIONS 3–4 (2005) (telling the story of Callie House, a formerly enslaved woman from Tennessee, who organized emancipated African Americans to petition the federal government for pensions as reparations for slavery).

377 *See* HEATHER ANDREA WILLIAMS, HELP ME TO FIND MY PEOPLE: THE AFRICAN AMERICAN SEARCH FOR FAMILY LOST IN SLAVERY 1–3 (2012).

378 *See, e.g.*, THOMAS HOLT, BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION 1–5 (1977); CHARLES VINCENT, BLACK LEGISLATORS IN LOUISIANA DURING RECONSTRUCTION, at xix–xxi (S. Ill. Univ. Press 2011) (1976); Hannah-Jones, *supra* note 297.

379 *See* Hannah-Jones, *supra* note 297.

380 JONES, *supra* note 327, at 12.

381 *Id.*

The Reconstruction Constitution, however, was limited in numerous crucial ways. Although Radical Republicans like Ashley, Stevens, Sumner, and Wilson pushed to incorporate the abolition constitutionalism advanced by antislavery activists, they were forced to compromise their ideals and accept more moderate versions of the Amendments in order to achieve enough votes for enactment.[382] For example, Sumner introduced a Thirteenth Amendment that prohibited slavery without exception, providing that "[e]verywhere within the limits of the United States, and of each State or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave."[383] As I will discuss in more detail below, however, the exception for punishment of people convicted of crimes, which was contained in the enacted text, supported new forms of racial subjugation and labor exploitation that obliterated the Amendment's abolitionist ideals.

Stevens reluctantly voted for the watered-down text of the Fourteenth Amendment, passionately expressing his deep disappointment in its final wording, which departed dramatically from his abolitionist vision:

> In my youth, in my manhood, in my old age, I had fondly dreamed that . . . no distinction would be tolerated in this purified Republic but what arose from merit and conduct. This bright dream has vanished "like the baseless fabric of a vision." I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice, and leaving it, in many of its parts, to be swept through by the tempests, the frosts, and the storms of despotism.[384]

Stevens explained that he acquiesced in the agenda of his moderate colleagues because, living "among men and not among angels," he had failed to persuade them.[385] "Mutual concession, therefore, is our only resort, or mutual hostilities."[386] Senator James Grimes concurred: "It is not exactly what any of us wanted; but we were each compelled to

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[382] *See* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869, at 14 (1974) ("[R]adical Republicans knew that their conservative allies were not as committed as they to the racially egalitarian principles of the Republican party, and they were continually frustrated in their attempts to win what they conceived to be true security for the Union."); Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860–1870*, 17 CARDOZO L. REV. 2153, 2191–92 (1996) (describing Bingham's decision to change the language of suffrage from a "right" to a "privilege," *id.* at 2191, in order to secure the votes necessary for the Fourteenth Amendment's passage).

[383] Mark A. Graber, *Subtraction by Addition?: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501, 1503 (2012) (quoting CONG. GLOBE, 38th Cong., 1st Sess. 521 (1864) (statement of Sen. Charles Sumner)).

[384] *Id.* at 1501–02 (alteration in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (statement of Rep. Thaddeus Stevens)).

[385] *Id.* at 1502 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 3148 (statement of Rep. Thaddeus Stevens)).

[386] *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 3148 (statement of Rep. Thaddeus Stevens)).

surrender some of our individual preferences in order to secure anything . . . ."[387]

Although the Thirteenth Amendment ended the Constitution's protection of chattel slavery, it "did not resolve the issue of the newly freed slaves' political status."[388] The text itself, both in its guarantee of state protection and in its grant of political power, fell short of providing the necessary provisions to secure the rights of black people against political terror.[389] Nor did it ban specific means of black disempowerment, such as voter-qualification tests, convict leasing, and peonage.[390]

Further, while the Reconstruction Amendments changed the racial definition of citizenship that Chief Justice Taney relied on in denying all black people — whether enslaved or free — equal status with white people, they failed to accord black citizens equal political power.[391] In the racial order, black people remained members of a separate and inferior race. White abolitionists themselves had differing views about the implications of slavery's end and black people's citizenship.[392] Even the celebrated Stevens assured his fellow congressmen that equality in civil rights "does not mean that a negro shall sit on the same seat or eat at the same table with a white man."[393]

No weakness in the Reconstruction Amendments is reviled more by prison abolitionists than the Thirteenth Amendment's exception for "punishment for crime whereof the party shall have been duly convicted."[394] This clause is commonly interpreted to mean that a criminal conviction deprives individuals of protection against slavery and

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[387] *Id.* (quoting Letter from James Grimes to Mrs. Grimes (Apr. 30, 1866), *in* WILLIAM SALTER, THE LIFE OF JAMES W. GRIMES 292, 292 (1876)).

[388] DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 41 (5th ed. 2004) [hereinafter BELL, RACE, RACISM].

[389] *See* U.S. CONST. amend. XIII; BELL, RACE, RACISM, *supra* note 388, at 41–42; Wolff, *supra* note 181, at 1030 (noting Stevens "forcefully upbraided his peers for their failure to couple emancipation with economic reform").

[390] *See* U.S. CONST. amend. XIII; *see also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69–70 (1873) (failing to explicitly hold that the Thirteenth Amendment prohibits more subversive means of oppression).

[391] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 419–23 (1857); *see also* BELL, RACE, RACISM, *supra* note 388, at 42–43 (discussing the ineffectiveness of the Reconstruction Amendments).

[392] *See* Barnett, *supra* note 285, at 253–54 (comparing views of abolitionists regarding the meaning of clauses of the Reconstruction Amendments).

[393] FONER, RECONSTRUCTION, *supra* note 41, at 231 (quoting CONG. GLOBE, 39th Cong., 2d Sess. 252 (1867) (statement of Rep. Thaddeus Stevens)); *see also* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 50–63 (1988) (noting a lack of agreement on the meaning of the Fourteenth Amendment among its framers).

[394] Pope, *supra* note 286 (manuscript at 4–5) (quoting U.S. CONST. amend. XIII) (noting the consensus among critics of the carceral state that the "Punishment Clause permits practices they condemn as brutal and exploitative").

involuntary servitude.[395] Many prison abolitionists believe the crime exception was deliberately added to permit the reenslavement of black people by convicting them of crimes.[396] As discussed in Part I, beginning with prison chain gangs and convict leasing, the Punishment Clause facilitated the expansion of prisons as a form of state subordination of black people and forced exploitation of black labor.[397]

Interpreting the Punishment Clause as negating slavery's abolition, however, neglects the explicit opposition by the Amendment's Republican drafters to such an "absurd construction,"[398] which would allow southern states to reenslave African Americans "'[u]nder the *pretense*' of the Punishment Clause."[399] In a compelling analysis of congressional debates surrounding the Amendment, legal historian Professor James Gray Pope demonstrates that Republican members of Congress vehemently opposed convict leasing and forced labor as a misuse of the Punishment Clause and thus a violation of the Thirteenth Amendment — with words that sound strikingly similar to those of

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[395] *Id.* (manuscript at 4); *see also* Goodwin, *Thirteenth Amendment*, *supra* note 174, at 922–32 (discussing the Punishment Clause's preservation of forced penal labor); Howe, *supra* note 117, at 988 (arguing that the original public understanding of the Thirteenth Amendment was that the Amendment permitted enslaving criminals).

[396] *See, e.g.*, BISSONETTE, *supra* note 18, at 215 ("With the Thirteenth Amendment, the U.S. government restructured the institution of slavery: it went from being a privatized institution to a nationalized one. Slavery was never abolished in the United States. 'Ownership' simply changed hands."); CHILDS, *supra* note 175, at 63–64; *Beyond Prisons: An Interview with Laura Magnani*, THE ABOLITIONIST, Spring 2007, at 3, https://abolitionistpaper.files.wordpress.com/2011/01/abolitionist-issue-6-spring-2007-english.pdf [https://perma.cc/ZVX6-GUXR]; *Interview with Robert King Wilkerson*, THE ABOLITIONIST, Summer 2005, at 5, https://abolitionistpaper.files.wordpress.com/2011/01/abolitionist-issue-2-summer-2005-english.pdf [https://perma.cc/AHQ4-KC27] ("In part, the 13th [A]mendment states that slavery shouldn't abound within the shores of America unless one has been duly convicted of a crime. It tells me in one breath that slavery should not exist, and in the next breath it says that it can if you are duly convicted of a crime."); Jalil Muntaqim, *America Is a Prison Industrial Complex*, THE ABOLITIONIST, Summer 2012, at 4, https://abolitionistpaper.files.wordpress.com/2012/10/abolitionist-17-english.pdf [https://perma.cc/23J9-ULJ8]; Edgar Pitts, *Liberty vs Property*, THE ABOLITIONIST, Fall 2007, at 15, https://abolitionistpaper.files.wordpress.com/2011/01/abolitionist-issue-7-fall-2007-english.pdf [https://perma.cc/UVV7-RTQW]; 13TH (Kandoo Films 2016); *Profiles in Abolition*, *supra* note 19; *infra* pp. 105–06.

[397] *See* CHILDS, *supra* note 175, at 57–92; Howe, *supra* note 117, at 1008–09 (describing the rise of convict leasing, prisons, and labor camps "immediately" after the Thirteenth Amendment's passage, *id.* at 1009); *see also supra* pp. 29–33.

[398] Pope, *supra* note 286 (manuscript at 14) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Rep. Jacob Howard)). *But cf.* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 569 (2012) ("The definition of the 'badges and incidents of slavery' proposed in this Article is sufficiently narrow that Congress's Thirteenth Amendment enforcement power may well have limited applicability today.").

[399] Pope, *supra* note 286 (manuscript at 25) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 655 (statement of Rep. Thaddeus Stevens)). *But see* Howe, *supra* note 117, at 992–96 (arguing that the original understanding of the Thirteenth Amendment contemplated slavery as a legitimate deterrent and sanction for crime).

prison abolitionists today.[400] Representative Burton C. Cook of Illinois, for example, decried the passage of vagrancy laws "which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again."[401]

Pope argues that Republicans' conception of the Thirteenth Amendment as a "regime shift in constitutional law," which not only abolished slavery but also eliminated practices that denied "practical freedom" and instituted a free labor ethos, meant that they "read the Amendment's prohibitory clause broadly and its exception narrowly."[402] The consensus among historians that the Thirteenth Amendment approved convict leasing, based on the dominant post-Reconstruction reading,[403] contradicts the views expressed by its framers and denies the abolition constitutionalism that animated the Amendment's enactment.[404]

The debate over the Thirteenth Amendment leaves unanswered the question of why its drafters included the Punishment Clause at all. Professor Scott Howe, a criminal law scholar, argues that the Republican congressmen were well aware of the plain meaning of the text as an authorization to enslave people convicted of crimes and abuse them in the same way enslaved people were abused prior to the Civil War.[405] Howe points out that there was little discussion of the Punishment Clause language during the debate even after Sumner vehemently objected to its inclusion and explicitly noted that "there is an implication from those words that men may be enslaved as a punishment of crimes whereof they shall have been duly convicted."[406] To

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400 *Compare* Pope, *supra* note 286 (manuscript at 13–18), *with* sources cited *supra* note 396.

401 Pope, *supra* note 286 (manuscript at 14) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1123 (statement of Rep. Burton C. Cook)); *see also* Ghali, *supra* note 170, at 627–28 (discussing Representative John Kasson's proposal to clarify the Thirteenth Amendment's Punishment Clause to stop the reenslavement of blacks).

402 Pope, *supra* note 286 (manuscript at 9); *see also* Ghali, *supra* note 170, at 629, 631, 642 (discussing the original meaning of the Punishment Clause as ambiguous, and arguing that the clause can be interpreted narrowly and does not restrict all Thirteenth Amendment claims by prisoners); George Rutherglen, Essay, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1376–92 (2008) (discussing debates over the Punishment Clause).

403 *See, e.g.*, BLACKMON, *supra* note 167, at 53; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 72 (2004) (stating that "convict labor and convict lease were presumably permissible" due to the Thirteenth Amendment's "punishment for crime" exception); LICHTENSTEIN, *supra* note 175, at 43; REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941, at 8–9 (2008).

404 *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 17–18 (2004); Pope, *supra* note 286 (manuscript at 8–9).

405 *See* Howe, *supra* note 117, at 995–96.

406 *Id.* at 995 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1487–88 (1864) (statement of Sen. Charles Sumner)).

Howe, Congress's silence regarding Sumner's objection and the adoption of the clause with the objectionable language meant "there was clarity that it allowed slavery."[407]

In debates surrounding the Thirteenth and Fourteenth Amendments, however, the Republican congressmen directly stated their aim to protect emancipated blacks from white supremacist violence and labor exploitation.[408] Moreover, the congressional Republicans explicitly opposed convict leasing and took action to stop it by passing the Civil Rights Act of 1866, providing that black citizens would be subject to the same "punishment, pains, and penalties" as white citizens.[409]

Thus, both the abolition constitutionalism that inspired the Thirteenth Amendment and the words and actions of its radical framers suggest we should read the Punishment Clause quite narrowly.[410] Antislavery activists and Republicans in the Thirty-Ninth Congress vehemently objected to interpreting the clause as a license for convict leasing.[411] The historical evidence suggests they left in the Punishment Clause to permit continuation of the custom of sentencing people convicted of crimes to hard labor and did not anticipate criminal punishment would become a mechanism of reenslavement.[412] Moreo-

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[407] *Id.* at 996.

[408] CONG. GLOBE, 39th Cong., 1st Sess. 319 (1866) (statement of Rep. Lyman Trumbull); *id.* at 903 (statement of Rep. Burton C. Cook); *see also* Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 546 (1991) (arguing that the Thirty-Ninth Congress debates demonstrate that "[a] central purpose of the Fourteenth Amendment and Reconstruction legislation was to establish the right to protection as a part of the federal Constitution and laws, and thus to require the states to protect the fundamental rights of all persons, black as well as white"); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 131–32 (1991) (citing TENBROEK, *supra* note 288, at 116–34) (arguing that the Fourteenth Amendment incorporates abolitionists' view that the state must provide equal protection against private violence and private violation).

[409] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27; *see* Pope, *supra* note 286 (manuscript at 13–19); *see also* Heyman, *supra* note 408, at 551–52 (discussing how Republicans understood "civil rights" under the Civil Rights Act of 1866 to encompass the right of personal security and the right of personal liberty, *id.* at 552); Wolff, *supra* note 181, at 983 (noting that the Reconstruction Congress "outlawed peonage and passed criminal statutes under the authority of the Thirteenth Amendment to enforce that proscription" (citing 42 U.S.C. § 1994 (1994); Peonage Act of 1867, ch. 187, § 1, 14 Stat. 546 (1867) (codified at 18 U.S.C § 1581 (2000)))).

[410] *See* Goodwin, *Thirteenth Amendment*, *supra* note 174, at 978 (noting that "as a textual matter, the Thirteenth Amendment's Punishment Clause does not permit prison slavery, at least in the way it currently operates, because the clause protects slavery only as 'punishment for crime,' which, if narrowly defined, is meted out by statute or sentencing judge" (citing Wilson v. Seiter, 501 U.S. 294, 300, 302–03 (1991))); *see also* Ghali, *supra* note 170, at 625, 641 (arguing that the Punishment Clause does not categorically exempt prisoners from Thirteenth Amendment protections; rather, "punishment only includes one's prison sentence," *id.* at 641).

[411] *See supra* notes 398–401 and accompanying text.

[412] *See* Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 398 (2009) (arguing that consistency with Fifth and Eighth Amendment jurisprudence requires interpretation of the

ver, interpreting the clause today as license to convert slavery into imprisonment violates the aim of nineteenth-century abolitionists to free enslaved people. Abolition constitutionalism does not permit a reading of the Thirteenth Amendment that facilitates the very enslavement the Amendment aimed to abolish. Nevertheless, abolitionists' efforts were quashed by white supremacist terror that wiped out emancipated blacks' economic and political foothold, leaving them at the mercy of the emerging carceral regime.[413] Although it was not intended to provide for convict leasing, the Thirteenth Amendment provided insufficient protection to black citizens from being exploited, tortured, and killed in the system of bondage that replaced chattel slavery.

Antislavery rebellion, resistance, and activism succeeded in forcing radical changes to the Constitution. Influenced heavily by the abolition movement and its constitutionalism, Congress passed amendments that ended chattel slavery and extended citizenship to freed blacks. Yet activists like Frederick Douglass failed to achieve the ideals of freedom and democracy envisioned by the abolition constitutionalism they forged in antislavery struggle. Does this mean abolition constitutionalism is futile? It is important to remember that Douglass's reading of the Constitution did not depend on its framers' intent or the dominant public or judicial interpretation of its text. Abolition constitutionalism was not defeated by the Thirteenth Amendment's Punishment Clause, however Congress intended its meaning, or by white supremacist terror. Instead, the antislavery movement used abolition constitutionalism as a tool to press its claims and a guide to envision the free and democratic society it struggled for the nation to become.

Antislavery activists' abolition constitutionalism suggests a useful methodology for interpreting the Reconstruction Amendments today. First, this interpretative methodology embraces the Reconstruction

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Thirteenth Amendment to prohibit involuntary servitude for all but "those inmates who . . . have been . . . *sentenced*" to forced labor); Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 215 (2009) (arguing that the current "system of private, unpaid use of labor [in private prisons] too closely resembles the slave system that the Thirteenth Amendment sought to abolish" to be constitutionally permissible, despite the Amendment's exception for criminal punishments). At the time the Thirteenth Amendment was drafted, sentencing people convicted of crimes to prison and hard labor was considered more humane than prior corporal punishments. As today's prison abolitionists have argued, however, prisons themselves are inhumane. *See* GILMORE, GOLDEN GULAG, *supra* note 17, at 11 ("Prisons both depersonalized social control, so that it could be bureaucratically managed across time and space, and satisfied the demands of reformers who largely prevailed against bodily punishment, which nevertheless endures in the death penalty and many torturous conditions of confinement.").

413 *See generally* BLACKMON, *supra* note 167; FONER, RECONSTRUCTION, *supra* note 41; HALEY, *supra* note 167, at 58–118; LEFLOURIA, *supra* note 167; LICHTENSTEIN, *supra* note 175; OSHINSKY, *supra* note 167, at 55–106.

Amendments' constitutional imperatives to end enslaving systems, provide equal protection against state and private violence, and install full citizenship.[414] The antebellum abolitionists' aim was to eradicate completely the institution of racial slavery, which made black people the property of others who had the legal power to control their lives and exploit their labor. Second, an abolitionist methodology identifies systemic oppression by evaluating modern institutions' antecedents in slavery and other freedom-denying systems, as well as their current repressive impact. Third, it seeks to effect the structural changes required to achieve the Amendments' freedom and democracy aims. Abolishing slavery meant guaranteeing everyone's human right to freedom — to be free from domination by state or private masters, to be able to control one's own life and labor. Abolishing slavery also required equal protection from private or state violence that threatened to force people into subjugated statuses. Finally, abolishing slavery required granting to formerly enslaved people the full ability to participate as citizens in the nation's reconstructed democracy. With this methodology in mind, I turn to the Supreme Court's interpretation of the Reconstruction Amendments.

D. The Court's Anti-Abolition Jurisprudence

Every advance toward black liberation since the Civil War ended has been met with formidable political and judicial backlash.[415] Critical race scholar Professor Derrick Bell observed that the Reconstruction Era's constitutional compromise with respect to black people's freedom reverberates through contemporary adjudications of civil rights violations "in which the measure of relief is determined less by the character of harm suffered by blacks than the degree of disadvantage the relief sought will impose on whites."[416] Bell's writings, which within legal scholarship are some of the most piercing critiques of constitutional hypocrisy, became increasingly pessimistic about the chances for racial justice in America.[417] He pointed to white citizens' persistent refusal to

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[414] *See* Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 307 (2004) [hereinafter Tsesis, *Furthering American Freedom*] (describing the Thirteenth Amendment as "a source of sweeping constitutional power for enacting federal civil rights legislation"); *see also* Akhil Reed Amar, *The Supreme Court, 1991 Term — Comment: The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 155–56 (1992) (discussing the broad interpretation of the Reconstruction Amendments and noting that the Thirteenth Amendment "speaks directly to private, as well as governmental, misconduct," *id.* at 155); West, *supra* note 408.

[415] *See* ANDERSON, *supra* note 258, at 4–6.

[416] BELL, RACE, RACISM, *supra* note 388, at 13.

[417] *See, e.g.*, *id.* at 61–62; *see also* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM, at ix–xii (1992); DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM

abdicate their racial domination at the sacrifice of black people's rights.[418] Despite decades devoted to civil rights protest and litigation based on constitutional guarantees, the majority of black Americans saw their economic and political conditions worsen as the Court reinforced institutionalized forms of subordination.[419] In the end, Bell proposed that we approach the Constitution with "Racial Realism," based on the realization that "Black people will never gain full equality in this country."[420]

How can we reconcile Bell's sobering assessment of constitutional law as inevitably denying freedom to black people with an abolition constitutionalism that envisions their future freedom? Some guidance might be found in the thinking of an earlier abolitionist. Similarly to Bell, Frederick Douglass acknowledged the proslavery intent of both the white framers who drafted the Constitution and the white judges who interpreted it.[421] Douglass was also aware of white southerners' iron-clad resolve to preserve the Slave Power and believed it would take armed struggle to overcome it.[422] At the same time, Douglass refused to be bound by an understanding of the Constitution that supported slavery.[423] He recognized that court-made doctrines that maintained white supremacy were not constitutionally mandated and could be

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195–96 (2004); Derrick Bell, 1989 Sanford E. Sarasohn Memorial Lecture, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 402 (1990); Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518–19, 523–25 (1980); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 363 (1992) [hereinafter Bell, *Racial Realism*]; Derrick Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 4 (1985).

418 *See* BELL, RACE, RACISM, *supra* note 388, at 61 (describing America as a state where "power-based majoritarianism is the ongoing societal stabilizing fact" and noting that "most white citizens choose not to grant the citizens of color their full rights").

419 *See, e.g.*, Diana R. Donahoe, *Not-So-Great Expectations: Implicit Racial Bias in the Supreme Court's Consent to Search Doctrine*, 55 AM. CRIM. L. REV. 619, 621 (2018); Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 769–72 (1996) (discussing Supreme Court affirmative action and redistricting decisions that have negative impacts on black Americans' economic endeavors and political power); Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631 [https://perma.cc/K2NH-BJTG] (noting that "[t]he Supreme Court seems to share [a] sentiment [of animosity toward racial justice jurisprudence]" and that "[t]he past two decades have witnessed a rollback of the progressive legislation of the 1960s").

420 Bell, *Racial Realism*, *supra* note 417, at 373.

421 *See* Moses, *supra* note 338, at 73–74; *see also supra* pp. 58–61.

422 *See supra* p. 61; *see also* Leslie Friedman Goldstein, *Violence as an Instrument for Social Change: The Views of Frederick Douglass (1817–1895)*, 61 J. NEGRO HIST. 61, 66 (1976) ("By 1857, Douglass . . . accepted and hoped for a slave revolt in the South.").

423 *See* Moses, *supra* note 338, at 83.

overturned by a counter-constitutionalism that affirmed freedom and democracy.[424]

Racial Realism counsels against any faith in the moral power of the Constitution alone to dismantle the prison industrial complex.[425] Yet this conclusion need not preclude activists from imagining an alternative constitutionalism as part of a movement to abolish prisons. It is the commitment to building a radically different society, one that has eliminated carceral systems and the racial capitalist order they support, that makes an abolition constitutionalism realistic. This mash-up of Racial Realism and abolitionist vision, along with its interpretative methodology, forms a framework for evaluating the Court's anti-abolition jurisprudence.

1. Constitutional Counterrevolution. — After the Civil War, the U.S. Supreme Court took the side of the anti-abolitionists.[426] In doing so, it contributed to a "constitutional counterrevolution"[427] that robbed African Americans of their nascent political gains, reinstalled white supremacist rule, and reinforced the racial capitalist structure of labor exploitation.[428] The Court adopted the reading of the Reconstruction Amendments espoused by Democrats who supported the violent termination of radical Reconstruction rather than the meaning expressed by the Republicans who drafted the Amendments.[429] In a series of decisions, beginning with the *Slaughter-House Cases*[430] in 1873, the

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[424] *See id.* at 83–85 (describing Douglass's understanding that textualism was "two-faced; it could be used either to support or to undermine" the proslavery reading of the Constitution, *id.* at 84, and noting his "realization that the pro-slavery interpretation of the Constitution was morally and ideologically bankrupt," *id.* at 85); *see also supra* pp. 58–59.

[425] *See* Bell, *Racial Realism*, *supra* note 417, at 376 (suggesting that Racial Realists effectively challenged the premises that, after the Thirteenth and Fourteenth Amendments, the Constitution was intended to guarantee equal rights to black people, and that belief in the Constitution was key to achieving civil rights).

[426] *See* LOGAN, *supra* note 41, at 105 (observing that "[p]ractically all the relevant decisions" made by the Supreme Court in the late 1800s limited the rights of black people).

[427] Foner, *Strange Career*, *supra* note 287, at 2008 (describing the "effective nullification" of the Fourteenth and Fifteenth Amendments as demonstrated by "electoral campaigns, political treatises, and . . . court decisions").

[428] *See id.* at 2007–08.

[429] *See* Brandwein, *supra* note 174, at 316 (arguing that the Supreme Court adopted parts of the Northern Democratic narrative regarding the Civil War and Reconstruction Amendments in an 1873 case); Tsesis, *Civil Rights Approach*, *supra* note 288, at 1822 ("[T]he Supreme Court found a way of interpreting the [Constitution] according to the views of [opponents to abolitionist forces] in the Thirty-Eighth Congress."); *see also* Eric Foner, *The Supreme Court and the History of Reconstruction — And Vice-Versa*, 112 COLUM. L. REV. 1585, 1602–03 (2012) (observing that recent Supreme Court decisions have reflected a belief that "the judges gutting Reconstruction had more insight into the purposes of the laws and Amendments of Reconstruction than those who actually enacted them"); Pope, *supra* note 286 (manuscript at 27–28) (arguing that the Supreme Court sometimes refers to post-Reconstruction judicial opinions, rather than legislative actions at the time of the passage of the Reconstruction Amendments, to interpret the Amendments).

[430] 83 U.S. (16 Wall.) 36 (1873).

Court developed an anti-abolition jurisprudence that preserved white capitalist domination and shaped constitutional law for the next century.[431] The Justices interpreted the Reconstruction Amendments narrowly to bar white state majorities from passing explicit slave laws but left their power to restrict black people's freedom untouched.[432]

The Court also "crippled" the federal government's power to enforce the Reconstruction Amendments to protect blacks from white terror, speeding the collapse of Reconstruction in the South.[433] In *United States v. Cruikshank*,[434] the Court overturned convictions on federal charges of three white men who participated in the Colfax Massacre, a mob attack on a Louisiana courthouse resulting in the murders of dozens of black citizens.[435] The Supreme Court held that the indictments, brought under the Enforcement Act of 1870,[436] failed to allege the defendants' conduct violated the Fourteenth Amendment because the conduct was performed by private individuals and not state actors.[437] "The [F]ourteenth [A]mendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another," the Court concluded.[438] By requiring state action, the Court left southern blacks without federal protection from whites who sought to strip them of their citizenship rights through violent intimidation.[439] The Court's definition of unconstitutional state action was diametrically opposed to the Fourteenth Amendment's aim — to give equal protection to citizens

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[431] *See id.* at 67–82; FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION 20–63, 68–133 (2000) (documenting the Court's decisions, beginning in the 1870s, that helped drive a retreat from Reconstruction); Brandwein, *supra* note 174, at 316 ("In the *Slaughter-House Cases* (1873), the Supreme Court adopted crucial elements of the Northern Democratic narrative, even though the Democrats were the legislative losers."). *See generally* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (upholding state statute that allowed race-based segregation), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Civil Rights Cases, 109 U.S. 3, 25–26 (1883) (striking down provisions of the Civil Rights Act of 1875 under the Reconstruction Amendments and holding that the federal government cannot regulate private action); Pace v. Alabama, 106 U.S. 583, 585 (1883) (upholding state antimiscegenation statute).

[432] *See* sources cited *supra* note 431.

[433] SCATURRO, *supra* note 431, at 17 (arguing that the Court's decisions in the 1870s "directly undermined federal efforts to protect blacks during Reconstruction").

[434] 92 U.S. 542 (1876).

[435] *See* Wilson R. Huhn, *The Legacy of* Slaughterhouse, Bradwell, *and* Cruikshank *in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1071–72 (2009) (briefly summarizing the facts of *Cruikshank*); *see also* LANE, *supra* note 41, at 90–109 (describing the Colfax Massacre).

[436] Ch. 14, 16 Stat. 140; *see Cruikshank*, 92 U.S. at 560.

[437] *Id.* at 554 (holding that the Fourteenth Amendment "simply furnishes an additional guarantee against any encroachment by the States upon the fundamental rights which belong to every citizen").

[438] *Id.*

[439] Huhn, *supra* note 435, at 1077 (arguing that the Court's decision in *Cruikshank* prevented the federal government from protecting the rights of black citizens and "signaled open season on blacks and other racial minorities").

against private violence that forced them into subjugation.[440] As Professor Robin West points out, "[t]he 'state action,' . . . which is the object of the Amendment, is the breach of an affirmative duty to protect the rights of citizens to be free, minimally, of the subordinating, enslaving violence of other citizens."[441] Instead, the Court interpreted the Fourteenth Amendment as primarily shielding businesses from state regulation of contractual labor relations through "liberty of contract," rather than shielding black people from exploitation and discrimination.[442] In this way, the Justices converted the free labor aspiration of the Reconstruction Amendments into a shield for white capitalists to exploit the labor of a subjugated racial caste. Thus, the Court created a state action doctrine that permitted the government to shirk its Fourteenth Amendment duty to protect citizens equally, leaving emancipated blacks and, subsequently, other marginalized people vulnerable to the violent obliteration of their freedom and reinforcement of an unequal power structure.

2. The Court's Current Anti-Abolition Doctrines. — A dominant view of constitutional progress holds that the Civil Rights Era and the Court's landmark decision in *Brown v. Board of Education*[443] ushered in a new constitutional regime.[444] The abolitionist struggle, however, remains unfinished. Beginning with Bell's Racial Realism, critical race scholars have soundly demolished the victory narrative by exposing the embedded nature of racial inequality in legal institutions and the Court's complicity since *Brown* in preserving that inequality.[445] Racism is

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[440] *See supra* p. 69.

[441] West, *supra* note 408, at 143 (describing abolitionist interpretation of the Fourteenth Amendment state action requirement); *see also* Heyman, *supra* note 408, at 546 (noting that congressional debates over the Fourteenth Amendment suggest that "the constitutional right to protection was understood to include protection against private violence").

[442] *See* Foner, *Strange Career*, *supra* note 287, at 2007 (noting that by the late 1800s, the "enduring meaning" of the Fourteenth Amendment was perceived as contractual freedom rather than equal treatment of blacks).

[443] 347 U.S. 483 (1954).

[444] *See, e.g.*, 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 316–20 (2014) (arguing that *Brown* "provided a constitutional framework" for later civil rights legislation, *id.* at 316, and that those statutes were "public vindication" of the Court's decision in *Brown*, *id.* at 317); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 713 (2d ed. 2004) (arguing that the Court's opinion in *Brown* "represented nothing short of a reconsecration of American ideals").

[445] *See, e.g.*, Angela Harris, *Foreword* to RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY, at xvii–xxi (2001) (describing origins of critical race scholarship and noting that "racism is part of the structure of legal institutions" in the United States, *id.* at xx); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1756–57 (1993) [hereinafter Harris, *Whiteness as Property*] (arguing that *Brown* left a "mixed legacy," *id.* at 1757, since the Court failed to articulate a government obligation to eliminate inequality in resource allocation in the public or private domain and thus left white privilege intact). *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (noting that

"institutionalized."[446] Centuries of official white supremacy produced discriminatory laws, policies, and practices that privilege white people and disadvantage people of color.[447] Colonialism, slavery, and Jim Crow built legal structures that produce unequal outcomes without the need for race-specific laws or prejudiced decisions of individual state agents.[448] Residential segregation, for example, structures the lives of most black people to make them more vulnerable to surveillance, profiling, and punishment by government agents.[449] But the Court has failed to account for the systemic forms of racism that persist despite the gains of the civil rights movement.[450] Indeed, the Court's jurisprudence has been anti-abolitionist. Three of the Court's key anti-abolition doctrines are especially relevant to upholding the carceral punishment system: colorblindness, the discriminatory purpose requirement, and fear of too much justice.

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critical race theorists "have, for the first time, examined the entire edif[i]ce of contemporary legal thought and doctrine from the viewpoint of law's role in the construction and maintenance of social domination and subordination," *id.* at xi).

446 EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 3 (2003). *See generally id.* (arguing that racial inequality continues to exist in the United States despite claims that race is no longer relevant); KWAME TURE (formerly known as STOKELY CARMICHAEL) & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 4 (1967) (describing institutional racism as "less overt [and] far more subtle" than individual racism and "originat[ing] in the operation of established and respected forces in the society").

447 *See, e.g.*, CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018) (describing the history of black disenfranchisement); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA, at x (2005); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA vii–viii (2017) (explaining how U.S. government policies explicitly segregated major cities in the United States for much of the twentieth century); Lee, *supra* note 370 (describing how the Civil War and subsequent policies of segregation and exclusion drove disparity in wealth between white and black Americans).

448 *See* DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 1–11 (2014).

449 *See* Gregory S. Parks et al., *Complex Civil Rights Organizations: Alpha Kappa Alpha Sorority, an Exemplar*, 6 ALA. C.R. & C.L.L. REV. 125, 163 (2014) ("[N]eighborhood segregation leads to the profiling and criminalization of Blacks."); *see also* Coates, *supra* note 419 (describing how racist housing policies and business practices drove segregation and made black communities more vulnerable to predatory loans).

450 *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1380 (1988) (noting that "equal opportunity mythology" contributes to "a rationalization for racial oppression" that "mak[es] it difficult for whites to see the Black situation as illegitimate or unnecessary"); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978) ("[A]s surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, [all] without any violation of antidiscrimination law.").

(a) Colorblindness. — Colorblindness is a conservative strategy that shields white privilege through a rationalization that appears race-neutral on its face.[451] It emerged after the civil rights movement formally ended Jim Crow in the South and de jure segregation in the North.[452] In response, "[a new] white backlash movement intent on crushing black empowerment and preserving white dominance latched on to the concept of colorblindness as an ideological tool of retrenchment."[453] As sociologist Eduardo Bonilla-Silva notes in his classic *Racism Without Racists*, "[m]uch as Jim Crow racism served as the glue for defending a brutal and overt system of racial oppression in the pre–Civil Rights era, color-blind racism serves today as the ideological armor for a covert and institutionalized system in the post–Civil Rights era."[454] Colorblind theory argues that because society has conquered racism and people of color and white people have full equality, social policies should not take account of race.[455]

Over the last several decades, the majority on the Supreme Court came to embrace a colorblind political ideology.[456] Instead of inquiring whether a state's policy supports white supremacy, as it did in *Loving v. Virginia*[457] to strike down antimiscegenation laws,[458] the Court has applied strict scrutiny to invalidate race-based government efforts aimed at eliminating the vestiges of slavery and Jim Crow.[459] A series of Court

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451 *See, e.g.*, ALEXANDER, *supra* note 52, at 2 ("In the era of colorblindness . . . [r]ather than rely on race, we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind.").

452 BONILLA-SILVA, *supra* note 446, at 3; MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 1–2 (2003); KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 51–61 (2016).

453 Dorothy E. Roberts, Loving v. Virginia *as a Civil Rights Decision*, 59 N.Y.L. SCH. L. REV. 175, 204 (2014–2015); *see* TAYLOR, *supra* note 452, at 51–61.

454 BONILLA-SILVA, *supra* note 446, at 3.

455 *See id.* at 1–2.

456 Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 811 (2011); *see also* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 177–78 (1996) (analyzing the cases in which the Supreme Court has adopted a colorblind approach); OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND 150–55 (2014); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1120 (2001) (arguing that there is "a troubling asymmetry latent in current equal protection doctrine" because "the Court has recently and repeatedly proclaimed the importance of colorblind equal protection standards in employment, education, and contracting," but has not "appl[ied] those standards to policing and criminal justice"); Gotanda, *supra* note 101, at 2–3. *See generally* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES (Kimberlé Williams Crenshaw et al. eds., 2019) (exploring the harmful effects of colorblind ideologies in the law and in other disciplines around the world).

457 388 U.S. 1 (1967).

458 *Id.* at 6, 11–12 (holding that Virginia's Racial Integrity Act violated the Fourteenth Amendment because antimiscegenation originated as "an incident to slavery," *id.* at 6, and was "designed to maintain [w]hite [s]upremacy," *id.* at 11).

459 *See* cases cited *infra* notes 460–462.

decisions struck down race-conscious measures to desegregate schools,[460] implement affirmative action programs,[461] and enforce voting rights[462] as violations of the Fourteenth Amendment. Justice Thomas has articulated the colorblind perspective, which equates official Jim Crow segregation with state efforts to end its legacy. In *Adarand Constructors, Inc. v. Peña*,[463] concurring with the majority's holding that a government incentive program to diversify federal contracts was subject to strict scrutiny,[464] Justice Thomas described a "'moral [and] constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[465] He concluded that "[i]n each instance, it is racial discrimination, plain and simple."[466] A decade later, in a 5-4 decision striking down voluntary plans to desegregate elementary schools in Seattle, Washington, and Jefferson County, Kentucky, the Court reiterated the position that the Fourteenth Amendment requires the government to be colorblind by paying no attention to race.[467] "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," Chief Justice Roberts declared.[468]

According to this view, both white supremacist and antisegregationist racial classifications must be subject to strict scrutiny because of the equally inherent invidiousness of both forms of state action and the importance of the Court's consistency in addressing them. In addition, the Court's scrutiny is based on an assumption that the problem the Equal Protection Clause is concerned with is state attention to race rather than state support for racism.[469] Based on this flawed reasoning, the Court

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460 *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) (plurality opinion).

461 *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 270, 275 (2003) (finding that whether racial classifications are subject to strict scrutiny under the Equal Protection Clause "is not dependent on the race of those burdened or benefited by a particular classification," *id.* at 270 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995))); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (holding city's minority set-aside program unconstitutional); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 (1986) (plurality opinion); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319–20 (1978) (opinion of Powell, J.).

462 *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 927–28 (1995); Shaw v. Reno, 509 U.S. 630, 649 (1993).

463 515 U.S. 200.

464 *Id.* at 237–39.

465 *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment) (citation omitted) (quoting *id.* at 243 (Stevens, J., dissenting) (alteration in original)).

466 *Id.* at 241.

467 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) (plurality opinion); *see also id.* at 758 (Thomas, J., concurring) ("We have made it unusually clear that strict scrutiny applies to *every* racial classification.").

468 *Id.* at 748 (plurality opinion).

469 *Id.* at 736 ("The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations.").

concludes that the proper way to enforce the Fourteenth Amendment is to subject any racial classification by the government to strict scrutiny, regardless of the objective — that is, that the state should remain colorblind.[470] By appealing to formal racial equality, the Justices issue rulings that appear to be neutral and fair when they actually not only ignore the material harms inflicted by systems that are structured by white supremacy, but also shield those systems from efforts to dismantle them. The colorblind approach to the Fourteenth Amendment profoundly contravenes the abolitionist meaning that animated the Amendment's enactment. The antislavery activists who inspired the Equal Protection Clause affirmatively sought to eradicate the Slave Power — the system of chattel slavery and the private and public structures that maintained it.[471] It is inconsistent with the abolitionist intent of the Fourteenth Amendment to equate efforts to end white supremacy with efforts to preserve white supremacy.

Moreover, by equating "invidious" and "benign" racial classifications,[472] the Court badly misconstrues the relevance of racial categories to institutionalized racism. Racial categories were invented to construct and maintain a white supremacist regime built on racial slavery and capitalism, and those categories continue to help govern systems in which racism has become embedded.[473] It is how racial categories are used — whether to support racism or contest it — that matters to their political significance. Colorblind logic only makes sense in an alternate reality where the history of racialized slavery, the structures that were put in place after the Civil War to reinstate white rule, and the persistence of institutionalized racism since Reconstruction never happened. As Justice Ginsburg noted, dissenting in the affirmative action case *Gratz v. Bollinger*[474]:

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[470] *Id.* at 743 ("Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.").

[471] *See* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 988 (2012) (arguing that Justice Scalia's and Justice Thomas's interpretations of the Equal Protection Clause to require colorblindness neglect the original understanding of the Fourteenth Amendment); West, *supra* note 408, at 132 (arguing that abolitionists intended the Fourteenth Amendment "to abolish not only slavery *per se*, but also the 'dual sovereignty' . . . engendered by a state's refusal to grant to one group of its citizens protection of the law against private violence, economic isolation, and violation") (footnote omitted); *see also supra* p. 60.

[472] *See Parents Involved*, 551 U.S. at 758 (Thomas, J., concurring).

[473] *See* ROBERTS, FATAL INVENTION, *supra* note 292, at 7–12, 309; *see also* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2016) (discussing the history of racist ideology that helped support slavery and later racist systems).

[474] 539 U.S. 244 (2003).

> "[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppressio[n] is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in [*Bakke*] was the same issue in [*Brown*] is to pretend that history never happened and that the present doesn't exist."[475]

Colorblindness depends on the delusion of baseline racial equality, making any distinction on the basis of race inherently inequitable.

The Court has extended its anti-abolitionist colorblind approach beyond school desegregation, affirmative action, and voting rights to ignore the role of policing in subjugating black communities.[476] Despite nationwide protests against police violence; reams of empirical studies demonstrating stark racial disparities in police stops, arrests, harassment, and killings; and constant displays of police abuse captured on bystanders' cameras and circulated widely on social media,[477] the Supreme Court continues to issue decisions that are completely oblivious to this reality.[478] This reality of racialized policing entails more than a race-based statistical difference in how police treat people. Rather, police enforce a carceral grip on entire communities that impinges on residents' everyday lives, imposing a perpetual threat of physical assault and degradation, jeopardizing their opportunities to participate in the political economy, and suffocating their freedom.[479] As Professor Ekow N. Yankah recently commented: "The Court's studied indifference has led to one of the more bizarre tensions in modern American political life: we are all aware of how deeply race infuses our criminal justice system, and yet, the law gives us few ways to properly recognize and contextualize its impact."[480] Colorblindness in cases involving police is not just

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[475] *Id.* at 301 (Ginsburg, J., dissenting) (first and second alterations in original) (citations omitted) (quoting Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 433–34 (1988)).

[476] *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1505–08 (2016); Carbado, *From Stopping Black People*, *supra* note 212, at 141–42; Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1604 (2015) ("[T]he Court's more recent decisions document several explicit refusals to treat racial bias in the criminal justice system as a problem of constitutional significance."); Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1591 (2019).

[477] *See* sources cited *supra* notes 136–147.

[478] *See, e.g.*, Nieves v. Bartlett, 139 S. Ct. 1715 (2019); Kisela v. Hughes, 138 S. Ct. 1148 (2018); Utah v. Strieff, 136 S. Ct. 2056 (2016); Heien v. North Carolina, 135 S. Ct. 530 (2014).

[479] *See* Yankah, *supra* note 476, at 1558–59.

[480] *Id.* at 1550; *see also* BUTLER, *supra* note 59, at 56–61 ("In a series of cases, the conservatives on the Court have given the police unprecedented power, with everybody understanding that these powers will mainly be used against African Americans and Latinos." *Id.* at 57.); *cf. Strieff*, 136 S. Ct. at 2064 (limiting the scope of the Fourth Amendment's exclusionary rule with no acknowledgment of racial impacts); *Heien*, 135 S. Ct. at 536–40 (conducting Fourth Amendment analysis of a warrantless arrest without mention of race); Herring v. United States, 555 U.S. 135, 147–48 (2009) (holding that good faith exception applies where officer makes an arrest based on incorrect warrant

a matter of overlooking numerical disparities; it is a matter of ignoring, and thereby supporting, monumental racial subjugation whose eradication was the very object of the abolitionist activism that drove constitutional change.

Two recent Supreme Court cases involving police surveillance illustrate the Court's practice of loosening constitutional limits on policing practices and insulating police from constitutional redress without taking account of devastating impact this practice has on black and brown communities.[481] Although these cases were decided under the Fourth Amendment and did not consider Reconstruction Amendment concerns, they reflect a colorblind disregard of the effect gutting Fourth Amendment protections will have as police gain ever-greater power to reign over marginalized communities. Thus, colorblind jurisprudence regarding the role of police in maintaining the racial order helps to obscure the Thirteenth and Fourteenth Amendment's freedom objective and requirement that the state equally protect people from the very kinds of enslaving violence and degradation that police inflict.

The Court's 2014 decision in *Heien v. North Carolina*[482] involved the constitutionality of a technique police routinely use to stop cars in order to search them. In *Heien*, an officer on patrol noticed Maynor Javier Vasquez driving and observed that he "looked 'very stiff and nervous'";[483] he then began following Vasquez and eventually pulled him over for driving with a broken tail light.[484] The Court had already permitted such pretextual car stops in *Whren v. United States*,[485] holding that police do not violate the Fourth Amendment when they stop cars — regardless of their motivation — as long as they have a legal right to pull the car over.[486] The officer in *Heien* became suspicious when he saw another man, Nicholas Heien, lying in the backseat.[487] In

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information, without mentioning race); Devenpeck v. Alford, 543 U.S. 146, 152–56 (2004) (conducting Fourth Amendment analysis of a warrantless arrest without mentioning race); Whren v. United States, 517 U.S. 806, 813 (1996) (reasoning that "subjective intentions" that may be racially discriminatory "play no role in ordinary, probable-cause Fourth Amendment analysis"); Tennessee v. Garner, 471 U.S. 1, 9–20 (1985) (analyzing when apprehension of a suspect by use of deadly force is appropriate without mention of racial profiling); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding that police officer may not stop and search motorists without reasonable suspicion, but without addressing race at all); Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that officer may stop and frisk an individual if the officer has "reasonable" suspicions about the individual, without addressing racial profiling).

[481] *See* Yankah, *supra* note 476, at 1580–91 (critiquing the Court for ignoring "the social and racial context" of policing in their recent cases, *id.* at 1591).

[482] 135 S. Ct. 530.

[483] *Id.* at 534. Police disproportionately use pretexts like the one in *Heien* to stop and search cars driven by black and brown men. *See* BUTLER, *supra* note 59, at 60.

[484] *Heien*, 135 S. Ct. at 534.

[485] 517 U.S. 806.

[486] *See id.* at 810–19.

[487] *Heien*, 135 S. Ct. at 534.

the course of searching the car, the officer found a bag containing cocaine.[488] The North Carolina Court of Appeals agreed with Heien that the evidence seized from his car should be suppressed because state law only required one working tail light, making the officer's stop invalid.[489] The North Carolina Supreme Court reversed, reasoning that the good faith exception for police stops applied to mistakes of law as well.[490] The U.S. Supreme Court affirmed.[491] Writing for the Court, Chief Justice Roberts equated mistake of fact with mistake of law to reach a seemingly logical ruling.[492] In so doing, he failed to consider the effect on people of color of stretching police officers' ability to stop and search people to situations where there is no legal right to make the stop in the first place.[493]

Justice Sotomayor, the lone dissenter, castigated the majority for "further eroding the Fourth Amendment's protection of civil liberties in a context where that protection has already been worn down."[494] Describing traffic stops as "invasive, frightening, and humiliating encounters,"[495] she warned: "Giving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation) that suggests a law has been violated significantly expands [their] authority."[496] While Justice Sotomayor's dissent did not explicitly invoke the disparate racial impacts facilitated by the Court's doctrine, her deep-seated distrust of excessive police authority resonates with the realities of racial inequity she discusses in her future jurisprudence.

In another Fourth Amendment case decided two years later, Justice Sotomayor directly confronted and condemned the Court's avoidance of racism in policing. *Utah v. Strieff*[497] involved a Salt Lake City police officer who conducted surveillance of a house he suspected was the site of drug activity.[498] He followed respondent Edward Strieff from the house, stopped him, and requested to see his identification, which revealed an outstanding warrant for a traffic violation.[499] When the officer arrested and searched Strieff, he discovered "methamphetamine

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488 *Id.*

489 *Id.* at 535.

490 *Id.*

491 *Id.* at 540.

492 *See id.* at 536–40.

493 *See* Yankah, *supra* note 476, at 1587 (noting the *Heien* Court's "willingness to grant police a freer hand with the full knowledge that police power will remain disproportionately focused on persons of color").

494 *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting).

495 *Id.* at 544.

496 *Id.* at 543.

497 136 S. Ct. 2056 (2016).

498 *Id.* at 2059.

499 *Id.* at 2060.

and drug paraphernalia."[500] The Utah Supreme Court ruled that the Fourth Amendment required the evidence seized to be suppressed because the officer had no legal justification for stopping Strieff and thus the search was illegal.[501] But the U.S. Supreme Court reversed, allowing the evidence's admission despite the unlawfulness of the initial stop, reasoning that "the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest."[502] The Court's opinion showed no awareness of what yet another constitutional license for police to make unlawful stops "on a whim or hunch"[503] would mean for black and brown people already systematically subjected to discriminatory stops.[504] Indeed, the Court took pains to portray the circumstances as "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct."[505]

Justice Sotomayor launched into a searing indictment of the Court's colorblindness. As in her *Heien* dissent, she contested the Court's nonchalant treatment of police stops, noting the power police can exert over individuals and the ubiquity of outstanding warrants that now can serve as excuses for that power's unlawful imposition.[506] She highlighted the outlandish amount of discretion the Court granted an officer "to stop you for whatever reason he wants — so long as he can point to a pretextual justification after the fact. That justification . . . may factor in your ethnicity, where you live, what you were wearing, and how you behaved";[507] in other words, if in the officer's mind "you look like a criminal."[508] Justice Sotomayor excoriated the Court for minimizing the potential harms this discretion to discriminate could cause: "Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check."[509]

Then Justice Sotomayor moved to the most remarkable part of her dissent: her explication of why the Court's widening grant of power to police to make pretextual stops systematically dealt the greatest blow to

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[500] *Id.*

[501] *Id.*

[502] *Id.* at 2059.

[503] *Id.* at 2067 (Sotomayor, J., dissenting).

[504] *See id.* at 2069–71 (discussing the racial impact of the Court's holding).

[505] *Id.* at 2063 (majority opinion).

[506] *See id.* at 2068 (Sotomayor, J., dissenting) (noting that government databases contain more than 7.8 million outstanding warrants).

[507] *Id.* at 2069 (citations omitted).

[508] *Id.* at 2070.

[509] *Id.* at 2070 (citing Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1805 (2012)).

the freedom of people of color. Citing influential and poignant analyses of racial oppression by Michelle Alexander, W.E.B. Du Bois, James Baldwin, and Ta-Nehisi Coates,[510] Justice Sotomayor discussed the importance of judicial recognition of the pervasive repression black and brown people experience in their encounters with the police:

> For generations, black and brown parents have given their children "the talk" — instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger — all out of fear of how an officer with a gun will react to them . . . . By legitimizing the conduct that produces this double consciousness, this case tells everyone . . . that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. *It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.*[511]

Justice Sotomayor admonished the Court, insisting that confronting racialized carceral control is crucial for freedom and democracy: "We must not pretend that the countless people who are routinely targeted by police are 'isolated.' . . . They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will . . . be anything but."[512]

The contrast between the majority's jurisprudence and Justice Sotomayor's dissenting voice in both *Heien* and *Strieff* highlights the anti-abolitionist repercussions of the dominant colorblind approach and offers brilliant insight into the difference abolition constitutionalism makes. The Court's decisions in these cases disregard the unequal and repressive effects of broadening police officers' power to stop and search people without constitutional restraint. In contrast, Justice Sotomayor frames her reasoning around a recognition that police currently prop up a racialized carceral regime that unjustly controls life in black and brown communities; she focuses on the severe harms this repression inflicts on people residing there; and she bases her decision on the constitutional objective of advancing freedom and democracy. Because pretextual stops give police greater ability to impose their antifreedom and antidemocratic rule over black and brown people, an abolition constitutionalism requires that courts interpret the Fourth Amendment in light of the Fourteenth Amendment's purpose and history to eliminate such practices, not to expand police officers' power to engage in them. In contrast to the Court's anti-abolitionist stance, Justice Sotomayor's understanding that the carceral state subjects people to a form of racialized control that denies their freedom and democratic citizenship — and

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[510] *Id.* (citing ALEXANDER, *supra* note 52; JAMES BALDWIN, THE FIRE NEXT TIME (1963); TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015); W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1903)).

[511] *Id.* at 2070–71 (emphasis added).

[512] *Id.* at 2071.

therefore must be curtailed — reflects the values of antislavery abolitionists that undergird the Reconstruction Amendments.

(b) Discriminatory Purpose Requirement. — Related to the Court's colorblind approach is its individualized understanding of racism. The Court requires that plaintiffs seeking to prevail on Fourteenth Amendment claims prove that state agents treated them differently on account of their race, and did so with an intent to discriminate. The Court's 1976 decision in *Washington v. Davis*[513] held that a law's disparate impact on different races cannot by itself establish an equal protection violation.[514] Instead, there must be evidence of discriminatory purpose — a smoking gun that reveals the racial animus the offending police officer, prison guard, or legislator harbored.[515]

Both aspects of this framing of racism — biased perpetrators discriminating against individual victims — mischaracterize how institutionalized racism, including carceral punishment, works to uphold the racial order.[516] First, the Court's focus on the rights of individual victims of racial discrimination obscures the systemic control the prison industrial complex exercises over entire marginalized communities.[517] Constitutional wrongs are framed with regard to a "rights-bearing individual, not . . . a member of a racialized community that has been subjected to conditions that make him/her a prime candidate for legal repression," writes Angela Y. Davis.[518] Adjudicating an individual rights violation — either by dismissing it or redressing it — still leaves the carceral system to operate unscathed while giving a false sense of judicial fairness.

Second, requiring proof of discriminatory purpose treats racial bias as a system *malfunction*. As discussed in Part I, the criminal punishment system has functioned since the slavery era to keep black people in a subordinated political status. Because the system is structured to

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[513] 426 U.S. 229 (1976).

[514] *Id.* at 242 ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

[515] *Id.* at 239–46 (holding that a "law or other official act" must "reflect[] a racially discriminatory purpose" to be unconstitutional under the Fourteenth Amendment, *id.* at 239).

[516] *See* Yankah, *supra* note 476, at 1597–600.

[517] *See* DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 37 (discussing how the law's emphasis on individual rights rather than systemic disproportionate impact masks the racism of the practice of capital punishment).

[518] *Id.*; *see id.* at 93 ("Because the person that stands before the law is an abstract, rights-bearing subject, the law is unable to apprehend the unjust social realities in which many people live."); *see also* BELL, RACE, RACISM, *supra* note 388, at 62 ("Th[e] belief in eventual racial justice, and the litigation and legislation based on that belief, was always dependent on the ability of its advocates to adhere to equality ideology while rejecting discriminatory experience.").

target and disadvantage black people, its oppressive impact does not require its agents deliberately to harm black people out of prejudice against them. Moreover, requiring black defendants to demonstrate discriminatory intent assumes discrimination against them is exceptional rather than the normal way carceral punishment operates. For instance, despite overwhelming evidence presented in *McCleskey v. Kemp*[519] that race affects the administration of capital punishment, the Court refused to strike down McCleskey's death sentence.[520] Instead, the question the Justices posed was whether sentencing McCleskey *himself* to death constituted a discriminatory misuse of the death penalty — an aberrational abuse of discretion, unexplained discrepancy, or explicit animus against him.[521] The problem with this approach is that discriminatory death sentencing is not a system malfunction. The death penalty survives as a legacy of slavery and Jim Crow because it still helps to preserve an unequal racial order. Even when claims of individual rights violations are won, these victories do more to make it appear that the system has been fixed than to move toward its eradication.

Moreover, the Court's constitutional jurisprudence imposes inconsistent burdens of proof with respect to white plaintiffs' reverse discrimination claims and nonwhite plaintiffs' race-based police profiling claims. The Court first articulated the strict scrutiny standard for discrimination based on race and national origin in *Korematsu v. United States*,[522] upholding the constitutionality of the U.S. government's forcible internment of Japanese Americans during World War II,[523] and signaling the potentially repressive nature of its Fourteenth Amendment jurisprudence.[524] Since then, the Court has imposed a high burden of proof on government efforts to redress historical racism, requiring that the government prove a compelling interest in order to defeat plaintiffs' claims. In its affirmative action opinions, a majority of the Court has applied the exacting strict scrutiny test on behalf of white complainants to overturn race-conscious measures designed to overcome past discrimination in employment, schools, and government contracts.[525] By contrast, the Supreme Court has required that victims of state segregation,

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519 481 U.S. 279 (1987).

520 *See id.* at 282–92; *infra* pp. 91–92.

521 *See McCleskey*, 481 U.S. at 292 ("[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose.").

522 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

523 *See id.* at 216–19.

524 *See* CHEMERINSKY, *supra* note 300, at 761–62.

525 *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291, 320 (1978) (holding that race-conscious admissions policies must survive strict scrutiny); Harris, *Whiteness as Property*, *supra* note 445, at 1766–77.

profiling, or punishment on the basis of race prove discriminatory government purpose — in other words, shifting the burden of proof onto the plaintiffs of color.[526]

In her Supreme Court Foreword, Professor Reva Siegel traced the Court's anti-abolitionist evolution with a comparative history of discrimination claims in affirmative action and racial profiling cases.[527] According to Siegel, "the Court has restricted judicial oversight of minority claims as it intensified judicial oversight of majority claims."[528] This shift in standards radically transformed Fourteenth Amendment jurisprudence from the traditional *United States v. Carolene Products Co.*[529] framework, based on a recognition of the disempowerment of racial minorities,[530] into "a form of judicial review that cares more about protecting members of majority groups from actions of representative government that promote minority opportunities than it cares about protecting 'discrete and insular minorities' from actions of representative government that reflect 'prejudice.'"[531] Thus, the Court typically strikes down race-conscious affirmative action measures as racially biased while upholding ostensibly race-neutral law enforcement practices that repress communities of color.[532]

It should be obvious that a constitutional jurisprudence that denies marginalized communities protection from state violence while affirmatively shielding white people from antidiscrimination measures is diametrically opposed to the equal protection values abolitionists advance. The smoking gun test replicates the same disregard of institutionalized racism reflected in colorblindness doctrine. The Court fails to see that tackling racism head-on requires explicit attention to race, and that institutionalized racism can proceed without any need for expressions of racist intent. To make matters worse, conflating racial discrimination with racial bias gives states a ploy to easily evade constitutional or civil rights scrutiny: the Court has held that proof of race-neutral reasons can excuse state action that has a discriminatory

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526 *See McCleskey*, 481 U.S. at 292; Washington v. Davis, 426 U.S. 229, 239–46 (1976); *cf.* Pers. Adm'r v. Feeney, 442 U.S. 256, 276 (1979) (requiring female plaintiff to prove "gender-based discriminatory purpose").

527 *See* Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013).

528 *Id.* at 7.

529 304 U.S. 144 (1938).

530 *See id.* at 152 n.4.

531 Siegel, *supra* note 527, at 7 (quoting *Carolene Prods.*, 304 U.S. at 153 n.4).

532 *See id.* at 44–51 (discussing how the Court's application of strict scrutiny in affirmative action cases diverges from its discriminatory purpose requirement in challenges to race-based law enforcement practices). *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978), *with* McCleskey v. Kemp, 481 U.S. 279, 292 (1987).

impact.[533] As with colorblindness, the Court's misunderstanding of the relationship between race and racism produces a jurisprudential standard that is anti-abolitionist.

Two voting rights cases decided in the 2017 Term illustrate how requiring proof of discriminatory purpose sanctions state efforts to maintain white rule and denies democratic citizenship to people of color. *Husted v. A. Philip Randolph Institute*[534] considered the statutory validity of Ohio's practice of purging certain voters from the state's voting list.[535] After mailing a verification card to voters who had not voted for two years and thus may have moved out of state, Ohio removed from the voting rolls those who did not return the card and did not vote in the next four years.[536] The Court held the scheme to be in line with the National Voter Registration Act[537] (NVRA) and the Help America Vote Act[538] (HAVA), which restrain states from removing voters because they failed to vote. The Court considered the failure to vote to be acceptable under the NVRA as a proxy for whether a voter had moved away and thus could be removed from the voter rolls, as long as failure to vote was not the only factor considered.[539] Justice Breyer argued in dissent that using failure to vote as a means to identify voters to purge was in fact exactly what the NVRA prohibited.[540] In protecting the Ohio purging plan, the Court remained totally unconcerned about the history of racist voter suppression that states achieved with similar ploys and the discriminatory impact Ohio's plan would have by depressing voter turnout among already-marginalized groups.[541]

As she did in *Strieff*,[542] Justice Sotomayor condemned the Court's decision for contravening the Constitution's democratic values by ignoring structural racism. Noting that "[c]oncerted state efforts to prevent minorities from voting and to undermine the efficacy of their votes are an unfortunate feature of our country's history," Justice Sotomayor reminded the Court of Jim Crow tactics, strikingly similar to Ohio's

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[533] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 101 (1986) (White, J., concurring) ("The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry . . . . The judge may not require the prosecutor to respond at all. If he does, the prosecutor . . . will have an opportunity to give trial-related reasons for his strikes . . . ."); Washington v. Davis, 426 U.S. 229, 241 (1976).

[534] 138 S. Ct. 1833 (2018).

[535] *Id.* at 1838, 1841.

[536] *Id.* at 1840–41.

[537] 52 U.S.C. §§ 20501–20511 (Supp. IV 2016).

[538] Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified in scattered sections of 2, 5, 10, 36, and 52 U.S.C.).

[539] *Husted*, 138 S. Ct. at 1842–43.

[540] *Id.* at 1854 (Breyer, J., dissenting).

[541] *See id.* at 1863–64 (Sotomayor, J., dissenting) (citing ALEXANDER KEYSSAR, THE RIGHT TO VOTE 124 (rev. ed. 2009)).

[542] *See supra* pp. 83–84.

procedure, to disenfranchise eligible voters by expelling them from registration lists.[543] Justice Sotomayor also castigated the Court for ignoring the disempowering consequences Ohio's purge had already had for "minority, low-income, disabled, and veteran voters."[544] Justice Sotomayor relied on amicus briefs filed by a number of social justice organizations to detail the disproportionate impact the Ohio procedure had on these voters and the ramifications for diluting their political influence.[545] She cited findings from one county that "'African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity' since 2012, as 'compared to only 4% of voters in a suburban, majority-white neighborhood.'"[546]

Justice Sotomayor concluded with a call to political activism to end discriminatory state interference in the vote: "Communities that are disproportionately affected by unnecessarily harsh registration laws should not tolerate efforts to marginalize their influence in the political process, nor should allies who recognize blatant unfairness stand idly by," she declared.[547] "Today's decision forces these communities and their allies to be even more proactive and vigilant in holding their States accountable and working to dismantle the obstacles they face in exercising the fundamental right to vote."[548]

The Justices in the majority dismissed Justice Sotomayor's argument as "say[ing] nothing about what is relevant in [the] case" and "misconceived."[549] But this dismissal rested on their own misconception of racism as individualized racial bias.[550] For the Court, the undeniable historical and empirical evidence that Ohio's voter purge continued a longstanding pattern of discriminatory disenfranchisement was unimportant because "Justice Sotomayor [did] not point[] to any evidence in the record that Ohio instituted or . . . carried out its program with discriminatory intent."[551]

Justice Sotomayor's disagreement with the Court's majority continued in *Abbott v. Perez*,[552] a case involving a Texas redistricting plan challenged as a racial gerrymander.[553] The Court upheld the parts of

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543 *Husted*, 138 S. Ct. at 1863 (Sotomayor, J., dissenting).

544 *Id.* at 1864.

545 *Id.* at 1864–65.

546 *Id.* at 1864 (quoting Brief of Amici Curiae NAACP and the Ohio State Conference of the NAACP in Support of Respondents at 18–19, *Husted*, 138 S. Ct. 1833 (No. 16-980)).

547 *Id.* at 1865.

548 *Id.*

549 *Id.* at 1848 (majority opinion).

550 *See id.*

551 *Id.*

552 138 S. Ct. 2305 (2018).

553 *Id.* at 2314–16.

the plan that harmed minority voters because there was insufficient evidence of the legislators' discriminatory motivation,[554] while striking down the plan in one district where the Court found that it unconstitutionally used race to benefit Latinx voters.[555] Here, we see the anti-abolitionist pattern Siegel identified: the Court strikes down as unconstitutional race-conscious remedies for past institutional racism as it affirms the constitutionality of racialized state repression by requiring proof of biased intent.[556] Justice Sotomayor criticized the majority for ignoring "overwhelming"[557] evidence of discrimination and mischaracterizing the lower court's analysis of the state's history of minority disenfranchisement.[558] And she stressed that the Court's anti-abolitionist doctrine that shields state mechanisms to preserve white domination is the antithesis of Fourteenth Amendment democratic objectives:

> The Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act secure for all voters in our country, regardless of race, the right to equal participation in our political processes. Those guarantees mean little, however, if courts do not remain vigilant in curbing States' efforts to undermine the ability of minority voters to meaningfully exercise that right. . . . The Court today does great damage to that right of equal opportunity. Not because it denies the existence of that right, but because it refuses its enforcement.[559]

The Reconstruction Amendments impose a constitutional duty on the Court to abolish systems that reinstate slavery, to protect citizens equally from private and state incursions on their basic freedoms, and to support democratic citizenship for everyone. Justice Sotomayor's dissents powerfully spotlight how the Court's colorblind and discriminatory intent doctrines breach that duty, while simultaneously offering insights on what an alternative jurisprudence guided by abolition constitutionalism might look like.

(c) Fear of Too Much Justice. — The Supreme Court's anti-abolitionist jurisprudence is also animated by a desire to avoid the radical change an abolition constitutionalism would require. Suppose, instead of being colorblind, the Court took account of pervasive racism in criminal law enforcement? Suppose, instead of requiring evidence of

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554 *See id.* at 2326–30.

555 *Id.* at 2334–35.

556 *See* Siegel, *supra* note 527, at 2–3 ("When minorities challenge laws of general application and argue that government has segregated or profiled on the basis of race, plaintiffs must show that government acted for a discriminatory purpose, a standard that doctrine has made extraordinarily difficult to satisfy. . . . By contrast, when members of majority groups challenge state action that classifies by race — affirmative action has become the paradigmatic example — plaintiffs do not need to demonstrate, as a predicate for judicial intervention, that government has acted for an illegitimate purpose.").

557 *Perez*, 138 S. Ct. at 2360 (Sotomayor, J., dissenting).

558 *See id.* at 2352–54.

559 *Id.* at 2360.

racial motivation, it confronted the devastating impact of carceral institutions on communities of color? Suppose a majority of Justices not only ruled in line with Justice Sotomayor's dissenting opinions in *Heien*, *Strieff*, *Husted*, and *Perez*, but also applied this reasoning to other claims of constitutional violations in policing, surveillance, sentencing, and prison conditions? Such a series of Supreme Court decisions would deliver a tremendous blow to the prison industrial complex. Although Court decisions alone will not abolish prisons, they can weaken many of the practices, such as discriminatory police stops, that help to reinforce and expand them. But the Court has shied away from this type of systemic change, going so far as to deny constitutional relief based in part on the potential repercussions such relief would have on the stability of the criminal punishment system.[560] In other words, the Justices sometimes refuse to find that specific carceral practices are unconstitutional because they fear such a ruling would require "too much justice."[561]

Fear of too much justice is patently visible in the Court's death penalty decision *McCleskey v. Kemp*. In that case, Warren McCleskey challenged his death sentence for armed robbery and murder on the grounds that capital punishment in Georgia violated the Eighth and Fourteenth Amendments because it was administered in a racially discriminatory manner.[562] To back up this claim, McCleskey presented rigorous empirical evidence that race affected the risk of being sentenced to death in Georgia.[563] He relied on the Baldus Study, a statistical analysis of over 2000 Georgia murder cases in the 1970s that found that defendants convicted of killing whites were more than four times as likely to receive the death penalty as defendants convicted of killing blacks, and that black defendants accused of killing whites had the highest risk of receiving the death penalty.[564]

The Court, in an opinion by Justice Powell, held that statistical evidence that race significantly affected capital punishment in Georgia was irrelevant to the constitutionality of McCleskey's sentence.[565] Reversing McCleskey's sentence would require proof that it resulted from conscious, deliberate "discriminatory purpose" on the part of government

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[560] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 314–15 (1987) (rejecting claim of racial discrimination in capital punishment sentencing in part because the "claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system," *id.* at 314–15, and the Court "could soon be faced with similar claims as to other types of penalty," *id.* at 315).

[561] *Id.* at 339 (Brennan, J., dissenting).

[562] *Id.* at 279, 286 (majority opinion).

[563] *Id.* at 286–87.

[564] *Id.* at 286–87, 320; *see* Baldus et al., *supra* note 252, at 708–10.

[565] *McCleskey*, 481 U.S. at 294–97.

decisionmakers involved in the case.[566] Thus, the Court employed the anti-abolitionist doctrines discussed above: it remained colorblind, dismissing empirical evidence that race mattered significantly to the administration of the death penalty — both in the greater value placed on white victims' lives and the higher risk of execution imposed on black men whose victims were white — and it required proof of discriminatory intent instead of relying on the irrefutable evidence of the decisive impact institutionalized racism had on capital punishment in Georgia.

The opinions in *McCleskey* reveal another salient aspect of the Court's anti-abolitionist jurisprudence, for both majority and dissenting Justices acknowledged that the race of victims and defendants mattered to capital punishment.[567] The Court declined to endorse the anti-abolitionist suggestion of some scholars that the death penalty's racial disparity could be corrected by executing more killers of black victims.[568] Instead, the Court had a different anti-abolitionist perspective: the Justices worried that finding unconstitutional discrimination in McCleskey's case would require abolishing the death penalty altogether and would threaten other criminal punishment practices with similar evidence of racial disparities. As Justice Powell reasoned, "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[569] Thus, the Court recognized that stark racial disparities were so prevalent in criminal punishment that, if proof of disparate racial impact sufficed to prove a constitutional violation, nearly all aspects of criminal punishment might be challenged as unconstitutional.

Justice Powell feared that the Court's recognition of racially disparate impact as a constitutional violation "would undermine the presumption of legitimacy that maintained the state criminal apparatus."[570] As

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[566] *Id.* at 297.

[567] *See id.* at 287; *id.* at 321 (Brennan, J., dissenting).

[568] *See* Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391–95, 1436–39 (1988); Evan Tsen Lee & Ashutosh Bhagwat, *The* McCleskey *Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 149 (noting that a disinclination to impose the death penalty in cases with black victims may fail to deter future murders of black people or to deliver justice for families of black victims); *see also* Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1354–58 (2018) (discussing the Court's consideration and rejection of approaches that would apply the death penalty more frequently in cases with black victims). *But see* Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 33 (2002) (disagreeing with Professor Randall Kennedy's argument that the remedy to racial disparities in the death penalty is "executing *more* people").

[569] *McCleskey*, 481 U.S. at 314–15; *see* Gruber, *supra* note 568, at 1358 ("Throughout the process of preparing the majority opinion, Powell made clear his belief that the 'petitioner's challenge is no less than to our entire criminal justice system.'" (quoting Memorandum from Lewis F. Powell, Jr., Assoc. Justice, Supreme Court of the United States, to Leslie & Ronald 6 (Nov. 3, 1986) (on file with the Washington & Lee University School of Law Library))).

[570] Gruber, *supra* note 568, at 1362.

Professor Aya Gruber points out, Justice Powell previously had expressed this fear in his dissenting opinion in *Furman v. Georgia*,[571] which temporarily struck down the death penalty:

> The root causes of the higher incidence of criminal penalties on "minorities and the poor" will not be cured by abolishing the system of penalties. Nor, indeed, could any society have a viable system of criminal justice if sanctions were abolished or ameliorated because most of those who commit crimes happen to be underprivileged.[572]

Justice Powell recognized that a constitutional jurisprudence that addressed the disparate impact of carceral punishment on marginalized groups would require abolishing those punishments, but he rejected abolition by attributing the disparities to those groups' criminal propensities resulting from social disadvantage rather than to the way the state structures carceral systems to punish them disproportionately.[573] As the *McCleskey* decision illustrates, the Court's anti-abolition doctrines work to preserve the legitimacy of racialized state systems whose repressive impact on marginalized communities would otherwise call for their abolition.

E. Flowers v. Mississippi

Flowers v. Mississippi, the Supreme Court's most recent application of the Fourteenth Amendment to a criminal procedure issue, provides an apt context for further examining the contemporary significance of abolition constitutionalism. When his case reached the Supreme Court, Flowers had been tried for capital murder six times by the same white prosecutor, Doug Evans.[574] Over the course of six trials, Evans used peremptory challenges to strike forty-one of forty-two prospective black jurors.[575] The Mississippi Supreme Court reversed the first two of Flowers's convictions for prosecutorial misconduct and reversed his

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[571] 408 U.S. 238 (1972).

[572] Gruber, *supra* note 568, at 1362 (quoting *Furman*, 408 U.S. at 447 (Powell, J., dissenting)). Justice Powell joined the majority a few years later in a case that restricted the scope of disparate impact claims. *See* Washington v. Davis, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").

[573] *See* HINTON, *supra* note 52, at 20–22 (discussing the understanding among liberal and conservative policymakers during the Kennedy, Johnson, and Nixon Administrations of "black cultural pathology, rather than poverty, as the root cause of crime" and "crime and violence as somehow innate among African Americans," *id.* at 21).

[574] Flowers v. Mississippi, 139 S. Ct. 2228, 2236 (2019); Flowers v. State, 240 So. 3d 1082, 1091, 1117 (Miss. 2017).

[575] *Flowers*, 139 S. Ct. at 2251.

third conviction on the basis of a *Batson* violation.[576] In the next two trials, jurors were unable to reach a verdict.[577] The Mississippi Supreme Court upheld Flowers's conviction in the sixth trial.[578]

The U.S. Supreme Court's decision hinged on a single issue: whether Evans violated Flowers's Fourteenth Amendment rights by excluding a black woman from the jury in the sixth trial.[579] More than two decades after Flowers entered death row,[580] the Court overturned his conviction in a 7-2 decision.[581]

Although the Court ruled in Flowers's favor, analyzing its reasoning from an abolitionist perspective reveals that its interpretation of the Equal Protection Clause nevertheless adopted the anti-abolitionist doctrines discussed above. In what ways did the Court fail to apply the abolition constitutionalism that generated the Fourteenth Amendment and what difference would the Court's adherence to that paradigm have made to Flowers's fate and to the carceral practices that led to his convictions?

1. Justice Kavanaugh's Compromise. — Justice Kavanaugh's discussion about whether Evans violated Flowers's rights got off to a promising start by reviewing the historical origins of the Fourteenth Amendment's prohibition of racial discrimination in jury selection.[582] Noting that the Equal Protection Clause was "[r]atified in 1868 in the wake of the Civil War," Justice Kavanaugh quoted the *Slaughter-House Cases*' statement of the Clause's abolitionist objectives — "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[583] The opinion pointed also to the Civil Rights Act of 1875,[584] which "made it a criminal offense for state officials to exclude individuals from jury service on account of their race,"[585] as well as the Court's decision in *Strauder v. West Virginia*[586] striking down a West Virginia statute declaring only whites could serve on juries.[587] Justice Kavanaugh reiterated the importance of jury service to black people's citizenship: "Other than voting, serving on a jury is the most substantial

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576 *Id.* at 2236–37.
577 *Id.* at 2237.
578 *Id.*
579 *Id.* at 2235.
580 Flowers v. State, 240 So. 3d 1082, 1093 (Miss. 2017).
581 *Flowers*, 139 S. Ct. at 2234–35.
582 *Id.* at 2238–41.
583 *Id.* at 2238 (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873)).
584 Ch. 114, 18 Stat. 335.
585 *Flowers*, 139 S. Ct. at 2238–39.
586 100 U.S. 303 (1880).
587 *Flowers*, 139 S. Ct. at 2239.

opportunity that most citizens have to participate in the democratic process."[588]

Next, Justice Kavanaugh described how prosecutors have used the peremptory challenge as a covert device to deny black citizens the right to be jurors and recognized the "cold reality of jury selection" that peremptory challenges help prosecutors more than they do black defendants.[589] The leading case *Batson v. Kentucky*,[590] which guided Justice Kavanaugh's opinion, affirmed protections against racial discrimination in jury selection by placing constitutional limits on prosecutors' use of peremptory strikes to exclude African Americans from juries.[591] *Batson* retained the *Washington v. Davis* discriminatory intent requirement, but pronounced a new standard for meeting it with circumstantial evidence of a discriminatory pattern, holding that a defendant "may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."[592] The burden then shifts to the prosecutor to demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result."[593]

While *Batson*'s expansion of ways to prove discriminatory purpose to include a prosecutor's discriminatory pattern may seem "revolutionary,"[594] it has proven "toothless"[595] at preventing discriminatory jury strikes because judges routinely accept prosecutors' pretextual race-neutral excuses for them.[596] Justice Kavanaugh saw through Evans's transparent ploys to evade *Batson* by selecting one black juror as subterfuge and questioning prospective black jurors more than whites to build a false case for nondiscriminatory reasons for striking them.[597] Taking account of "[t]he State's relentless, determined effort to rid the jury of black individuals," the Court found sufficient evidence to suggest that "the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury," adding: "We

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[588] *Id.* at 2238.

[589] *Id.* at 2242.

[590] 476 U.S. 79 (1986).

[591] *Id.* at 89.

[592] *Id.* at 93–94.

[593] *Id.* at 94 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

[594] James J. Tomkovicz, *Twenty-Five Years of* Batson*: An Introduction to Equal Protection Regulation of Peremptory Jury Challenges*, 97 IOWA L. REV. 1393, 1403 (2012).

[595] Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1978 (2016).

[596] *Id.* at 1978–79; *see also* Garrett Epps, *A Racial Pattern So Obvious, Even the Supreme Court Might See It*, THE ATLANTIC (Mar. 18, 2019), https://www.theatlantic.com/ideas/archive/2019/03/flowers-v-mississippi-jurors-removed-because-race/585094 [https://perma.cc/UQ2V-LMUE].

[597] *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2246–48 (2019).

cannot ignore that history."[598] The majority opinion made it clear that the freedom to serve on juries has been important to black citizenship since Reconstruction and that white-controlled legislatures and legal systems have been intent on thwarting it.

The Court reversed Flowers's conviction based on its acknowledgment of a history of racial discrimination in jury selection and of the Fourteenth Amendment's objective to protect black people's right to jury service. In this regard, the *Flowers* opinion is less anti-abolitionist than the opinions regarding police stops,[599] voting rights,[600] and the death penalty[601] discussed above. Yet the Court's reasoning falls far short of embracing abolition constitutionalism.

Although the *Flowers* Court explicitly acknowledged that discriminatory jury selection violates the Fourteenth Amendment,[602] its opinion lacked the features of the abolition constitutionalism that animated the Equal Protection Clause.[603] Missing from the Court's opinion is any discussion of the white supremacist logic behind keeping black people off juries, including the reason why West Virginia enacted the 1873 law at issue in *Strauder* allowing only white people to be jurors, and why prosecutors so routinely and relentlessly exclude black jurors from capital trials of black defendants.[604] While attending to black people's individual right to serve on juries and acknowledging that the ultimate goal of Evans's relentless exclusion of black individuals from the jury was to create an all-white jury,[605] the Court did not address the systemic role of all-white juries in preserving white domination of criminal punishment. Justice Kavanaugh recognized that all-white juries are problematic, but characterized the problem as the harm that individual rogue prosecutors inflict on individual black citizens whom they wrongfully exclude from juries. This formulation ignores the way all-white juries

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598 *Id.* at 2246.

599 *See supra* pp. 81–84.

600 *See supra* pp. 88–90.

601 *See supra* pp. 91–93.

602 *Flowers*, 139 S. Ct. at 2238–39.

603 *See supra* pp. 54–62, 63–64.

604 *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (invalidating 1873 law); *see also* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 9–13 (2010); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 62 (2000) (explaining that the preservation of all-white juries was critical to "the perpetuation of white supremacy within the legal system"); Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 76–84 (2009) (discussing the persistence of racially discriminatory peremptory challenges in the context of jury selection in capital trials); Dax Devlon-Ross, *Bias in the Box*, VQR (Fall 2014), https://www.vqronline.org/reporting-articles/2014/10/bias-box [https://perma.cc/G2QL-PNNW] (discussing rampant racial bias in jury selection and capital trials).

605 *Flowers*, 139 S. Ct. at 2246.

have historically functioned as a legal institution to perpetuate racial subordination.

Examining the background of Flowers's conviction beyond jury selection helps to illuminate Evans's determination to empanel an all-white jury. A stunning investigative podcast, *In the Dark*, uncovered numerous problems in the police investigation and subsequent trials. Even though there was no evidence directly linking Flowers to the crimes,[606] the white police investigator singled him out as the only main suspect after a few months of investigation and set about building a case against him.[607] The podcast also highlighted misstatements made by Evans to the jury,[608] state witnesses who were clearly not credible,[609] forensic science that called into question the expert testimony of the State's ballistics analysts,[610] a gun near the crime scene that went missing,[611] and testimony from two jailhouse informants who said they lied under oath because of deals made with Evans.[612] With an all-white jury, Evans had a far better chance of convicting a black man accused of killing three white people, despite the lack of evidence against him. The racial danger inherent in jury selection isn't that black jurors will side with guilty black defendants. The danger is that white jurors will convict black defendants regardless of their guilt or innocence and refuse to convict white people who inflict violence on blacks.[613] The

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[606] *See In the Dark Source Notes*, APM REP., https://www.apmreports.org/in-the-dark/season-two/source-notes [https://perma.cc/B9WY-XQFS] (noting that testimony by an informant who came forward five years after the crime "provided the only direct evidence against Flowers").

[607] *See In the Dark: July 16, 1996*, *supra* note 5, at 14:38; *In the Dark: The Gun*, at 23:53, APM REP. (May 8, 2018), https://www.apmreports.org/story/2018/05/08/in-the-dark-s2e3 [https://perma.cc/26UM-CES7]; Parker Yesko, *John Johnson: The Investigator in His Own Words*, APM REP. (June 19, 2018), https://www.apmreports.org/story/2018/06/19/john-johnson-investigator [https://perma.cc/9PB5-4WME].

[608] *See In the Dark Source Notes*, *supra* note 606 ("In the first two appeals, the Court found Evans had misstated the facts and asked improper questions not in good faith.").

[609] *Id.*; *see* Parker Yesko, *What Exactly Are Prosecutors Allowed to Do?*, APM REP. (May 15, 2018), https://www.apmreports.org/story/2018/05/15/what-exactly-are-prosecutors-allowed-to-do [https://perma.cc/7HNN-VRBX] ("[State witness in the *Flowers* trial] Frederick Veal was, by his own admission, not credible. In 1997, he had three prior convictions for uttering forgery — essentially lying with an intent to defraud.").

[610] *See In the Dark, Season 2 Episode 3: The Gun*, *supra* note 607, at 34:05 (explaining that the expert's claim that a gun will produce a unique mark is "largely subjective").

[611] *See id.* at 2:06.

[612] *See In the Dark: The Confessions*, at 19:34, APM REP. (May 15, 2018), https://www.apmreports.org/story/2018/05/15/in-the-dark-s2e4 [https://perma.cc/6WHF-TTAL]; *see also In the Dark Source Notes*, *supra* note 606 ("Three jailhouse informants have testified that Flowers confessed to committing the Tardy murders. All three have since recanted."). However, it is important to note that some abolitionists caution that "[p]opularizing prison/police abuses through books and reports, television series and podcasts appears to deflect from off-continuum resistance." James, *7 Lessons*, *supra* note 42.

[613] *See, e.g.*, William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PENN. J. CONST. L. 171, 259 (2001) (summarizing empirical findings that show "make-up of the jury" is "integral to" "white racial

violence the Equal Protection Clause protects against is the violence against black people that is furthered or excused by the all-white jury.

By misidentifying the relationship between jury selection and white supremacy, the Court in *Flowers* went off track. Justice Kavanaugh's opinion did nothing to invalidate all-white juries as violations of the Fourteenth Amendment's antislavery ideals. To the contrary, Justice Kavanaugh made it clear that the Court's aim was the opposite — to maintain the current jury selection system. First, Justice Kavanaugh stressed repeatedly that the Court's intervention in jury selection was exceptional and limited by the egregious pattern of racial discrimination in Flowers's particular case.[614] He emphasized the extraordinary extent of racial discrimination in the trials, stating that it was only the accumulation of Evans's multiple instances of misconduct that sufficed for a constitutional violation. "We need not and do not decide that any one of [the] four facts [showing discrimination] alone would require reversal," Justice Kavanaugh wrote.[615]

Justice Alito wrote a brief concurring opinion simply to underscore that the only reason he disagreed with the Mississippi Supreme Court's affirmance of Flowers's conviction was that "this is a highly unusual case."[616] The message sent by both the majority and concurring opinions is that prosecutors may continue to create all-white juries using peremptory challenges and excuse them with race-neutral pretexts as long as they don't do it as blatantly as Evans did. Indeed, as Justice Thomas noted in dissent, Evans himself (or a substitute prosecutor) is free to try Flowers a seventh time[617] — and to assemble an all-white jury in order to secure a death sentence.

Second, Justice Kavanaugh implied that the decision to intervene in this extraordinary case was based on the need to make the system appear legitimate. Discussing *Batson*, Justice Kavanaugh pointed out that a significant motivation for that decision was to "enhance public confidence in the fairness of the criminal justice system."[618] In other

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dominance" in death penalty cases); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 110–15 (1990) (discussing empirical evidence demonstrating the partiality of the all-white jury); James Forman, Jr., Essay, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 909–10 (2004) (explaining the decades-long practice in which "[a]ll-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites"); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616–49 (1985) (summarizing data demonstrating persistent biases of white jurors and all-white juries). The racial composition of the jury did make a difference to Flowers's fate. *See* Epps, *supra* note 596 (noting that in one of Flowers's trials, an African American juror was the "lone holdout," causing a mistrial).

614 *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2251 (2019).

615 *Id.* at 2235.

616 *Id.* at 2251 (Alito, J., concurring).

617 *Id.* at 2274 (Thomas, J., dissenting).

618 *Id.* at 2242 (majority opinion).

words, in applying *Batson* to Flowers's case, the Court merely fixed an exceptional glitch in the system that allowed a wayward prosecutor to veer too far from the norm and required a correction so that the system could proceed as usual.

Finally, by affirming *Batson*'s focus on discriminatory intent,[619] the Court permitted the continued prosecutorial use of race-neutral pretexts for peremptory challenges in order to produce all-white juries. Justice Kavanaugh insisted that the Court's decision made no change in the legal standard: "[W]e break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case."[620] Thus, aware of the persistent constitutional problem posed by all-white juries, the Court took no new steps to solve it.

The Court's opinion bears all the anti-abolitionist methods that characterize post–Civil Rights Era constitutional jurisprudence.[621] By focusing on black people's individual civil right to serve on juries, the Court ignored the systematic use of all-white juries in preserving white-dominated carceral punishment. By requiring proof of discriminatory intent on the part of prosecutors, it upheld their ability to assert race-neutral pretexts for striking black prospective jurors. By reversing Flowers's conviction because the prosecutor's extraordinary discrimination amounted to a system malfunction, it appeared to have solved the problem peremptory challenges posed in Flowers's case without any need to change the jury selection system. The majority compromised abolitionist ideals for fear of the justice those ideals demanded — abolishing the state's use of all-white juries to condemn black defendants to death. Despite alluding to the Reconstruction Amendments' abolitionist objectives, the Court's opinion is actually anti-abolitionist.

2. Applying Abolition Constitutionalism to Flowers. — We should applaud the reversal of Flowers's unjust conviction. But we should ask why it took six trials and a divided Supreme Court decision to halt, at least temporarily, such an egregious pattern of prosecutorial abuse. How could a majority of justices on the Mississippi Supreme Court and two U.S. Supreme Court Justices have determined there was no constitutional violation in the face of such glaring discrimination? Why, despite the Court's finding of blatant bias, hasn't Curtis Flowers been released from Parchman State Prison?[622] Why is Doug Evans free to try Flowers again for capital murder and to continue to use peremptory challenges to exclude black jurors? An abolition constitutionalism would address all these questions.

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[619] *Id.* at 2251 ("All that we need to decide [under *Batson*] . . . is that all of the relevant facts and circumstances taken together establish . . . discriminatory intent.").

[620] *Id.* at 2235.

[621] *See supra* section II.D, pp. 71–93.

[622] *See* Zhu, *supra* note 15.

Abolition constitutionalism would dig deeper into the historical relationship of jury selection, race, and white supremacy to understand the significance of juries for antebellum abolitionists. As an initial matter, abolishing slavery was entwined with the question of juries and jury selection because abolition meant ending enslavers' juries. Under the slavery system, only white people were entitled to serve on juries.[623] Enslaved people had no legal rights at all: they were denied the ability to bring legal claims, to testify in court against white people, or to be jurors.[624] Slavery thus eliminated the authority of black people to judge criminal culpability and simultaneously stripped them of the right to have their culpability fairly judged. In short, the all-white juries of the slavery system were a mechanism used by whites to uphold the system of slavery. An abolition constitutionalism would therefore view all-white juries as potential violations of the Thirteenth Amendment's eradication of slavery.[625]

Next, an abolition constitutionalism would pay careful attention to how abolitionists and Radical Republicans viewed juries and where juries fit in the Fourteenth Amendment's protections. Although the right to a jury trial had been a central aspect of citizenship since the colonial era, the federal fugitive slave laws made juries especially salient to abolitionists.[626] Specifically, juries were critical to abolitionists' efforts to thwart the threat fugitive slave laws posed to free blacks and formerly enslaved blacks who escaped to freedom.[627] For example, black people who were accused of being fugitives had no right to contest the allegation in court and prove they were born free or had been emancipated.[628] A large number of abolitionists therefore hoped to sabotage the laws' general implementation, and all at least endeavored to "protect free blacks from being kidnapped and falsely claimed as fugitives."[629]

A major battle over the Fugitive Slave Act of 1850 centered on an unsuccessful abolitionist campaign to include a provision requiring jury trials in cases where alleged fugitive slaves were returned to slaveholders.[630] On October 3, 1850, the abolitionist paper the *Emancipator & Republican* condemned the first "slave catching" proceeding in New York that returned an alleged fugitive slave to bondage without a jury trial: "It is the first arrest under the new law. The poor slave was not allowed to open his mouth. The proceedings were summary and quick,

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623 *See* Colbert, *supra* note 613, at 21–22.

624 *See id.* at 18–22.

625 *See id.* at 108 ("There is a link between the all-white jury and the badge of slavery that denied African-Americans recourse to legal justice. . . . The all-white jury's origins are clearly traceable to the institutionalization of slavery . . . .").

626 *See* Forman, *supra* note 613, at 899–909.

627 *See id.* at 899.

628 *Id.* at 900.

629 *See id.* at 899.

630 *See id.* at 902–09.

and a freed man once more became a slave. There is a cold hearted cruelty about this proceeding that chills the blood."[631] For many abolitionists, the failure to require a jury trial in fugitive slave cases represented the encroachment of the Slave Power into northern states and a violation of states' rights.[632]

Some abolitionists responded by calling for northern juries to nullify the law by refusing to convict both northerners charged with crimes for protecting fugitives and fugitives charged with crimes for resisting enslavement.[633] At an abolitionist meeting at Boston's Faneuil Hall, William Spooner declared: "The law will be resisted, and if the fugitive resists, and if he slay the slave hunter, or even the marshal, and if he therefor be brought before a jury of Massachusetts men, that jury will not convict him."[634] For abolitionists, then, juries were critical to efforts to resist enslavement and stop the expansion of the slavery system.

During the Reconstruction period, juries embodied another crucial dimension of abolitionist work. With the reinstatement of the white supremacist regime in the South, all-white juries became an instrument of white terror.[635] Maintaining the slavery-era rule that only white people were entitled to serve on juries was a way for the Jim Crow state to reenslave newly freed blacks. As Professor James Forman summarizes: "All-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans."[636] Rather than abandon juries, congressional Republicans responded to their repressive use in the South by providing for full participation by black citizens on juries. Congress passed legislation to guarantee the rights of blacks to serve on juries and barred from eligibility for jury service anyone who had conspired to deny black persons their civil rights.[637] The concern of abolitionists and Radical Republicans with the role all-white juries played in supporting the racial order they sought to abolish should also

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631 *Id.* at 907 (quoting *Slave Catching in New York*, EMANCIPATOR & REPUBLICAN, Oct. 3, 1850, at 3).

632 *Id.* at 908.

633 *Id.* at 909.

634 *Id.* (citing *Speech of William Spooner, on Taking the Chair in Faneuil Hall, Nov. 6th, 1850*, EMANCIPATOR & REPUBLICAN, Nov. 14, 1850, at 4); *see also* Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 702–03 (1995).

635 *See* Forman, *supra* note 613, at 914–16.

636 *Id.* at 909–10.

637 *See* Civil Rights Act (Ku Klux Klan Act) of 1871, ch. 22, § 5, 17 Stat. 13, 15 (codified as amended in 42 U.S.C. § 1985 (2012)) (requiring prospective jurors take an oath, under threat of perjury, that they have never conspired to deprive other citizens of their civil rights); Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336–37 (providing that no citizen may be disqualified from jury service "on account of race, color, or previous condition of servitude," *id.* at 336).

shape our interpretation of the Fourteenth Amendment's mandate for equal protection.[638]

The history of abolitionists' approach to the jury as both an anti-slavery and proslavery entity suggests that abolition constitutionalism is attentive to the relationship juries continue to play in either dismantling or promoting white supremacy. At issue in *Flowers* was the prosecutorial use of all-white juries as a systematic instrument of racist carceral punishment.[639] An abolitionist approach to the Equal Protection Clause would protect black defendants like Flowers from the unequal imposition of capital punishment by all-white juries.

At a minimum, this approach would rescind the *Washington v. Davis* requirement that defendants produce evidence of discriminatory intent.[640] The institutionalized practice of empaneling all-white juries to deny black people equal protection does not rely on the prejudiced motivations of individual prosecutors, and contesting this denial of equal protection should not depend on proving prosecutors' motivations. Ending the discriminatory intent rule would also do away with validating peremptory challenges that have a discriminatory impact as long as

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[638] *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017) (describing the threat historically posed by all-white juries to "the promise of the [Fourteenth] Amendment and to the integrity of the jury trial"); Forman, *supra* note 613, at 909–10.

[639] *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2238–41 (2019). In his dissenting opinion, Justice Thomas pointed to the defense attorney's conduct during voir dire, noting she used exclusionary techniques similar to Evans. *See id.* at 2260–61 (Thomas, J., dissenting). Justice Thomas also noted the mistakes made by Flowers's counsel and emphasized the fact that the defense and prosecution asked a "similar number of questions to the jurors they peremptorily struck." *Id.* at 261. During oral argument, Justice Thomas asked a question for the first time in three years: whether Flowers's lawyer struck any potential jurors and what race they were. *See* Transcript of Oral Argument at 57, *Flowers*, 139 S. Ct. 2228 (No. 17-9572); Adam Liptak, *Clarence Thomas Breaks a Three-Year Silence at Supreme Court*, N.Y. TIMES (Mar. 20, 2019), https://nyti.ms/2UMRRQC [https://perma.cc/UD5W-5VPW]. Justice Sotomayor pointed out there was only one black juror remaining after Evans struck all the rest. Transcript of Oral Argument, *supra*, at 57. Just as Justice Thomas has wrongly equated government race-conscious efforts to address institutionalized racism with Jim Crow laws to maintain white supremacy, *see* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment), he has failed to see the distinction between state exclusion of black jurors aimed at creating all-white juries and individual defendants' attempts to counter jury discrimination. Last Term, Justice Thomas asserted yet another false equation in his concurring opinion in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780 (2019). *See id.* at 1784, 1792–93 (Thomas, J., concurring). Justice Thomas suggested that states may be constitutionally permitted to ban abortions sought because of the race, sex, or disability of a fetus because such bans "promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Id.* at 1783. By equating abortion rights with eugenics, Justice Thomas ignored how abortion bans and eugenicist policies both seek to control reproductive decisionmaking for repressive political ends. *See* ROBERTS, KILLING THE BLACK BODY, *supra* note 77, at 3–7.

[640] *See* 426 U.S. 229, 239 (1976).

prosecutors can provide race-neutral reasons.[641] Changing the meaning of discrimination from racial bias to racist impact would stop the charade *Batson* generated in allowing prosecutors to continue to empanel all-white juries based on pretextual race-neutral explanations.[642] In addition, an abolition constitutionalism would develop alternative doctrines for testing the constitutionality of jury composition based on evidence of systemic discrimination rather than individual prosecutorial intent.[643]

This analysis suggests, moreover, that an abolition constitutionalism would consider ending peremptory challenges altogether. In dissent, Justice Thomas correctly pointed out that black defendants can use peremptory challenges to "strik[e] potentially hostile white jurors,"[644] so *Batson* may inevitably deprive black defendants of this tool against prejudiced deliberations. But, as shown in Flowers's six trials and in countless other criminal trials of black defendants, prosecutors' ability to use peremptory challenges to rig juries against black defendants far outweighs black defendants' use of juror strikes to create a fair trial.[645] The main threat to black defendants is not the "bad apple" visibly hostile juror but the way juries made up of ordinary white people tend to reach unjust convictions.[646] Both the majority and dissenting Justices

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641 *See id.* at 241. By finding race-neutral excuses for striking blacks from the jury, Justice Thomas erased the overwhelming evidence from Flowers's trials that Evans wanted to generate an all-white jury and was very successful at it. *Flowers*, 139 S. Ct. at 2261–63 (Thomas, J., dissenting).

642 Batson v. Kentucky, 476 U.S. 79, 94 (1986).

643 Devlon-Ross, *supra* note 604 (describing the Racial Justice Act passed in North Carolina in 2009 as "a radical approach to ending discriminatory jury selection by allowing defendants to use statistical evidence of racial bias in capital-murder trials throughout North Carolina and the region in order to claim racial bias in their own particular capital-murder trials"); *see* Editorial, *They Were Freed from Death Row. Republicans Put Them Back.*, N.Y. TIMES (Aug. 23, 2019) https://nyti.ms/2Pbt1vt [https://perma.cc/2M4T-JAUV] (criticizing North Carolina's Republican legislature for repealing the Racial Justice Act in 2013); *see also* Colbert, *supra* note 613, at 32–39 (underscoring how the Thirteenth Amendment's framers intended "the amendment's guarantee of freedom [to mean] more than merely freeing the slaves from bondage," *id.* at 36).

644 *See Flowers*, 139 S. Ct. at 2274 (Thomas, J., dissenting).

645 *See, e.g.*, David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 96–100 (2001) (conducting a study of comparative effectiveness of prosecutors and defense counsel in the use of peremptories in capital trials in Philadelphia and documenting the "greater effectiveness of the Commonwealth in excluding its prime targets [young black men and women] from the juries that were finally seated," *id.* at 100). For a discussion of abolitionist organizing strategies to shrink the resources and power of the prosecuting office, see *Abolitionist Principles & Campaign Strategies for Prosecutor Organizing*, COMMUNITY JUST. EXCHANGE, https://www.communityjusticeexchange.org [https://perma.cc/U6PE-BWF4].

646 The Court recently considered a case involving a "bad apple" juror who made racist comments about the defendant's Mexican heritage during jury deliberation. *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017). In a 5-3 decision, the Court held the Sixth Amendment right to a fair trial requires an exception to the rule against impeaching jurors "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." *Id.* at 869. The Court limited the exception to statements showing that the racial stereotype or racial animus was "a significant motivating factor" in a juror's decision to convict,

in *Flowers* examined the prosecutor's actions only for conduct indicating a belief that black jurors would be "partial to the defendant because of their shared race"[647] — a false assumption rejected by *Batson*. They did not consider the reality that white jurors historically have presumed the guilt of black defendants because of racism.[648]

Finally, an abolition constitutionalism would recognize that Evans's interest in an all-white jury was to secure the execution of Flowers regardless of his culpability for the crime.[649] An abolitionist reading of the Constitution would not permit the Court to allow Flowers to undergo another capital trial after reversing his conviction. Rather, the state's dogged campaign to obtain and uphold Flowers's death sentence is an opportunity to revisit the constitutionality of capital punishment and to abolish it.[650] As discussed in section I.B.1(c), the death penalty can be traced back to the gruesome punishments inflicted on enslaved people and the spectacle lynchings carried out during the Jim Crow era. State executions only survive today because they continue to represent white domination over black people. Even if the Supreme Court invalidated all-white juries, the death penalty would still function as a form of racialized subjugation. Prison abolitionists understand capital punishment as a key aspect of the prison industrial complex that contributes to the enforcement of racial subordination and support for racial capitalism.[651] This understanding helps clarify why state executions should cease altogether. Abolitionists would link the prosecutor's use of

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noting "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." *Id.*

647 *Batson*, 476 U.S. at 97; *see Flowers*, 139 S. Ct. at 2241; *id.* at 2269 (Thomas, J., dissenting).

648 *See, e.g.*, Colbert, *supra* note 613, at 22 (explaining how white juries were inclined to convict black defendants because they were black); *see also* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1048–49 (2012) (finding that while "conviction rates for black and white defendants are similar when there is at least some representation of blacks in the jury pool . . . in the absence of such representation, black defendants are substantially more likely to be convicted," *id.* at 1048).

649 The Court found that Evans intentionally sought to empanel an all-white jury. *Flowers*, 139 S. Ct. at 2246 ("The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury.") Though it is theoretically possible that Evans himself cared about Flowers's culpability, all-white juries have been historically used as a tool of racial violence and racial intimidation to such an extent that commentators have explored "the inherent injustice of the all-white jury." Colbert, *supra* note 613, at 4 & n.6; *see also* Forman, *supra* note 613, at 915–16 (discussing the historical importance of securing the right for black people to sit on juries). It seems exceedingly unlikely, then, that Evans sought an all-white jury for any other purpose.

650 The Court has questioned the constitutionality of capital punishment in the past and should do so again. *See* Coker v. Georgia, 433 U.S. 584, 599–600 (1977) (holding that the death penalty for rape violated the Eighth Amendment prohibition on cruel and unusual punishment); Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (striking down the death penalty as unconstitutional as applied).

651 *See* McLeod, *Grounded Justice*, *supra* note 91, at 1216–17 (describing a "death-sentencing regime that impacts African Americans and white defendants differently on the basis of their race"); *supra* pp. 40–42.

unscrupulous tactics, including convening all-white juries to condemn Flowers to death for killing three white people, to the slave executions and lynching that were the death penalty's predecessors. In addition to reversing Flowers's conviction and requiring states to take steps to dismantle the all-white jury system, an abolition constitutionalism would abolish the death penalty.

III. TOWARD A NEW ABOLITION CONSTITUTIONALISM

We can see constitutional history after the Reconstruction Amendments as a contest — in legislatures, courts, and the streets — over interpreting the Amendments as either moving toward or retreating from slavery's eradication. Because we can read the Reconstruction Constitution as incorporating the abolition constitutionalism of antislavery activists,[652] we should reciprocally interrogate both the Constitution's relevance to today's prison abolition movement and the movement's relevance to interpreting the Constitution's provisions. Just as antebellum abolitionists broke from the dominant interpretation of the Constitution as a proslavery document,[653] so too prison abolitionists need not be shackled to the prevailing constitutional jurisprudence in advancing the unfinished freedom struggle.

Engaging the relationship between prison abolition and the Reconstruction Amendments, as well as the abolition constitutionalism that inspired them, raises several generative questions. Can we apply prison abolitionist theories to the Constitution's text not only to condemn it but also to use it instrumentally to achieve abolitionist objectives? Can we advocate for a reading of the Constitution that both aligns with the abolition constitutionalism advanced by antislavery activists and attends to contemporary forms of white supremacy and racial capitalism? In the process, might today's abolitionists imagine a new abolition constitutionalism that helps to chart the path toward a society without prisons?

A. Approaching the Constitution Instrumentally

One reason some prison abolitionists eschew any reliance on the Reconstruction Constitution to make claims or envision change is that they see the text itself as accommodating slavery. Many abolitionists explicitly condemn the Thirteenth Amendment's Punishment Clause for allowing the reenslavement of black people by incarcerating them for committing crimes.[654] "One of the big reforms that sold us out was the

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[652] *See supra* pp. 54–64.
[653] *See supra* pp. 54–55.
[654] *See* sources cited *supra* note 396.

Thirteenth Amendment" is a common accusation among prison abolitionists.[655] The Reconstruction Constitution "just modified" slavery; it did not abolish it.[656]

According to this view, the Thirteenth Amendment was part and parcel of the white supremacist backlash against Emancipation. Its very text contained the seeds of reinstating the formerly enslaved to servitude from the moment Congress enacted it. Congress gave the impression of radically incorporating black people into citizenship when in fact it was preparing a way to legally deny them their rights. "The Thirteenth Amendment ensnares as it emancipates," Professor Joy James writes.[657] "In fact, it functions as an enslaving anti-enslavement narrative."[658] The symbolic power of the Reconstruction Constitution as an abolitionist text that installed freedom thus adds to the Constitution's ability to sustain a false narrative of the United States as a bastion of freedom and equality.[659] Embracing such a document would therefore only contribute to its anti-abolitionist performance. Thus, although many prison abolitionists describe their work as continuing the struggle antebellum freedom fighters and abolitionists began, they frame it in opposition to the Reconstruction Constitution.[660]

A second reason some prison abolitionists reject the Constitution is that they view the entire U.S. legal system as subordinating black people and preserving the racial capitalist order.[661] This position relies not so much on the Amendments' precise language as on the political role the Constitution, as a central part of the state's legal apparatus, plays in upholding the carceral regime. According to these theorists, states use the law to perpetuate their own institutions, and constitutional change within formal legal processes occurs only to maintain the look of legitimacy.[662] If abolition work can only be completely effective "without involving the state,"[663] there may be no role for the Constitution to play. Indeed, the very project of abolition constitutionalism could be anti-abolitionist.

James combines both these points by explaining how the Reconstruction Amendments helped to place the state in opposition to

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655 *Profiles in Abolition*, *supra* note 19, at 5:05.

656 *Id.* at 5:16.

657 James, *Democracy and Captivity*, *supra* note 37, at xxii.

658 *Id.*

659 *See, e.g.*, Rana, *supra* note 343, at 267 (arguing that the Constitution's powerful symbolism has prevented Americans from appreciating the country's colonial origins).

660 *See* sources cited *supra* note 37.

661 Muntaqim, *supra* note 37, at 7 (arguing for a view of the "judicial process as part of a governmental pogrom to repress dissent to racism . . . [that] continues a long process of racial injustice built into our nation's [C]onstitution through the original sanctioning of slavery").

662 Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 476–79 (2018).

663 Meiners, *supra* note 37.

the abolition of white supremacy.[664] She contrasts the abolition democracy advanced by black radicals with the "advocacy democracy" promoted by a "U.S. conservative-centrist-progressive" political system that "works for reforms with an anti-black racism that structured democracy's evolution."[665] James connects the founding of the nation to the Reconstruction Amendments, understanding both as part of a continuum of anti-abolitionist developments: "an *anti-abolitionist* revolutionary war that blocked the expansion of the 1772 Somerset ruling (emancipating a black slave brought to Britain from colonial America); an *anti-abolitionist* 13th [A]mendment that codifies slavery to prison; an *anti-abolitionist* 14th [A]mendment that transfers black political personhood (and social standing) to corporations."[666]

Moreover, the courts, which have been the traditional venue for making constitutional claims, are the very state agents that have eviscerated efforts to install a more radical Constitution and have been hostile to an abolitionist approach.[667] Radicals of color have criticized the presumption in constitutional theory that "minorities are best protected with national oversight, rights-based frameworks, and judicial solicitude."[668] For this reason, many abolitionists have repudiated U.S. constitutional rights altogether and instead contest U.S. carceral policies without reference to rights or as violations of international human rights.[669] Even claims that rested in part on the U.S. Constitution have primarily relied on international human rights law, such as the petition

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664 *See* James, *Democracy and Captivity*, *supra* note 37, at xxviii–xxix.

665 James, *7 Lessons*, *supra* note 42.

666 *Id.*

667 *See supra* section II.D, pp. 71–93; *cf.* Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591, 1594 (2016) (noting the practical reasons, including the Court's skepticism of certain constitutional interpretations, the labor movement has retreated from making arguments based on the U.S. Constitution).

668 Blackhawk, *supra* note 290, at 1797 (arguing that "[i]ntegrationist, rights-based frameworks" threaten Native tribal sovereignty, *id.* at 1798). *See generally* KEISHA N. BLAIN, SET THE WORLD ON FIRE: BLACK NATIONALIST WOMEN AND THE GLOBAL STRUGGLE FOR FREEDOM (2018); NELSON A. DENIS, WAR AGAINST ALL PUERTO RICANS: REVOLUTION AND TERROR IN AMERICA'S COLONY (2015); PENIEL E. JOSEPH, STOKELY: A LIFE (2014); PENIEL E. JOSEPH, WAITING 'TIL THE MIDNIGHT HOUR: A NARRATIVE HISTORY OF BLACK POWER IN AMERICA (2007); DONNA JEAN MURCH, LIVING FOR THE CITY: MIGRATION, EDUCATION, AND THE RISE OF THE BLACK PANTHER PARTY IN OAKLAND, CALIFORNIA (2010) (all discussing radical black and Puerto Rican political theory and activism that did not rely on national oversight).

669 *See* Akbar, *supra* note 662, at 447; Ajamu Baraka, *Malcolm X and Human Rights in the Time of Trumpism: Transcending the Master's Tools*, THE ABOLITIONIST, Spring 2017, at 15, https://abolitionistpaper.files.wordpress.com/2017/12/abby-27-english-final.pdf [https://perma.cc/LB45-DWXJ] (arguing that human rights are a "de-colonial fighting instrument"); Isaac Onitveros, *Not Without a Fight: The San Francisco 8*, THE ABOLITIONIST, Spring 2007, at 5, 10, https://abolitionistpaper.files.wordpress.com/2011/01/abolitionist-issue-6-spring-2007-english.pdf [https://perma.cc/6SER-CY4Z] (noting that Black Panthers contextualized U.S. human rights violations within a larger international human rights context).

brought to the United Nations by the Civil Rights Congress in 1951 that charged the U.S. government with racism and genocide.[670]

This Foreword takes seriously the question whether engaging with the Constitution, which from its installation has served settler-colonialism, slavery, and racial capitalism, can be useful to an abolitionist movement. As discussed in Part II, the dominant reading of both the original Constitution and Reconstruction Amendments has been anti-abolitionist.[671] There are good reasons, however, for prison abolitionists to engage abolition constitutionalism. First, it is significant that the original Constitution that incorporated slavery was rewritten to abolish it in response to a hard-fought freedom struggle. Many antislavery activists, like Frederick Douglass, professed an alternative reading of the Constitution — an abolition constitutionalism.[672] We can see the Reconstruction Amendments as a compromised embodiment of the unfinished revolution for which abolitionists today continue to fight. Like antebellum abolitionist theorizing, prison abolitionism can craft an approach to engaging with the Constitution that furthers radical change.

Second, prison abolitionists acknowledge that building a prisonless society is a long-term project involving incremental achievements. As Critical Resistance puts it, abolition "means developing practical strategies for taking small steps that move us toward making our dreams real and that lead us all to believe that things really could be different."[673] Some of those steps will entail engaging with the state.[674] In demanding state action that promotes prison abolition, abolition activists can use constitutional provisions instrumentally to assert and sometimes win their claims.

Finally, prison abolitionists need not let the Constitution compromise their principles or aspirations. While taking inspiration from antislavery abolitionists, we can approach the Constitution differently. For example, although the Radical Republicans opposed chattel slavery and convict leasing, they did not abolish imprisonment as a punishment for crimes. Today's prison abolitionists are dealing with a different beast — the prison industrial complex and other modern carceral logics, supported by advanced forms of racial capitalism. There are also new

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670 CIVIL RIGHTS CONG., WE CHARGE GENOCIDE vii (William L. Patterson ed., Int'l Publishers 1970) (1951); *see* DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 79 (discussing lawsuits brought by the Center for Constitutional Rights, which relied on human rights doctrine to contest the detention of so-called enemy combatants, as an "example of the resistance to the Bush Administration's policies and practices").

671 *See supra* Part II, pp. 49–105.

672 *See* Moses, *supra* note 338, at 76–77; *supra* pp. 50–51 (discussing the existence and influence of early abolitionist constitutional interpretations).

673 *What Is the PIC? What Is Abolition?*, *supra* note 21.

674 Harsha Walia & Andrew Dilts, *Dismantle and Transform: On Abolition, Decolonization, and Insurgent Politics*, 1 ABOLITION 12, 14–15 (2018).

theories that explain and contest modern modes of carceral punishment, including black radical philosophy, critical race theory, black feminist theory, and intersectionality.[675] Davis frames prison abolition as a continuation of the antislavery movement, but she notes an important distinction between the two: "[T]he abolition of slavery was accomplished only in the negative sense," she writes.[676] "In order to achieve the *comprehensive* abolition of slavery — after the institution was rendered illegal and black people were released from their chains — new institutions should have been created to incorporate black people into the social order."[677] Prison abolitionists can affirm the aim of antebellum abolitionists to radically dismantle the institution of slavery and also demonstrate, with the benefit of historical hindsight and sustained abolitionist theorizing, that this objective requires abolishing prisons altogether by replacing them with new institutions that incorporate black people fully into a free society.

The goals of freedom and equal citizenship have been "the heart of black Americans' fidelity to the Constitution."[678] In a previous analysis of black people's approach to the Constitution, I distinguished between a presumption of inherent loyalty to the Constitution and the instrumental use of the Constitution to achieve a more important objective.[679] I argued that black people have historically expressed fidelity to the Constitution because it offers "practical advantages" to their struggle for equal citizenship.[680] Under this instrumental approach, equal citizenship does not arise from the Constitution; it precedes it. The Constitution is not the standard of justice we should faithfully uphold; equal citizenship is. We know what democracy means not by immersing ourselves in the Constitution's language but by imagining what it would mean for black people to be treated like free and equal human beings. The purpose of constitutional fidelity is to insist that constitutional interpretations abide by this higher standard of justice. "In short, fidelity is a means, not an end, and it is a means to an end that is more fundamental than the Constitution."[681] Abolition constitutionalism, unlike

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[675] *See, e.g.*, CARRUTHERS, *supra* note 26, at 8–12 (discussing black queer feminist theory); DELGADO & STEFANCIC, *supra* note 445, at 3–11 (discussing critical race theory); Akbar, *supra* note 662, at 412–13 (discussing radical racial justice movements); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991) (discussing the intersectionality of racism and sexism); *see also* sources cited *supra* note 32.

[676] DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 95.

[677] *Id.*; *cf. supra* pp. 62–63 (discussing the unsuccessful Freedmen's Bureau).

[678] Roberts, *Blacks' Fidelity*, *supra* note 38, at 1762.

[679] *Id.*

[680] *Id.*

[681] *Id.*; *cf.* Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379, 388 (1994) (advocating for "[l]egal instrumentalism," an approach that treats law as "a tool that is useful for certain purposes and at certain times").

other constitutional fidelities, aims not at shoring up the prevailing constitutional reading but at abolishing it and remaking a polity that is radically different.

Prison abolitionists can follow this tradition by instrumentally using the Constitution to build a society based on principles of freedom, equal humanity, and democracy — a society that has no need for prisons. In this section, I explore how prison abolitionists might instrumentally use the Constitution to make persuasive arguments for change and to achieve nonreformist abolitionist reforms that would eradicate or shrink discrete components of the carceral punishment system, mitigate the suffering caused by carceral conditions, and create the conditions needed for a society without prisons. I also consider the possibility that, in the process, prison abolitionists might imagine a new constitutionalism based on the society they are working to create. In other words, a new abolition constitutionalism would not serve to sustain and improve the U.S. state and its carceral systems. Rather, it would serve to guide and govern a society in the making where prisons are obsolete.

1. Holding Courts and Legislatures to an Abolitionist Reading. — Black Panther Party activist and author George Jackson, a leading figure in the prison abolition movement,[682] called for "the gracious, sensitive, brainy types . . . to hold the legal pigs to the strictest interpretation of the Constitution possible."[683] Surely Jackson wasn't upholding the U.S. Constitution as a beacon for a radical movement or expressing faith in judges to apply it for the sake of black freedom. Indeed, he was forced into the courtroom he then used as a platform to put American justice on trial.[684] But Jackson didn't throw out the Constitution either. Rather, Jackson was deploying it strategically as a legal, ideological, and rhetorical tactic to expose the hypocrisy of his imprisonment and the

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[682] *See* BERGER, CAPTIVE NATION, *supra* note 18, at 91–95; DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 21.

[683] Letter from George Jackson to Fay Stender (Mar. 31, 1970), *in* JACKSON, *supra* note 18, at 231. The Black Panthers similarly emphasized legal accountability by confronting police officers harassing a black man and demanding, law books in hand, that the "pigs" abide by the letter of the law. David Ray Papke, *The Black Panther Party's Narratives of Resistance*, 18 VT. L. REV. 645, 674–75 (1994).

[684] *See* BERGER, CAPTIVE NATION, *supra* note 18, at 92; *see also* Haywood Burns, *Can a Black Man Get a Fair Trial in this Country?*, N.Y. TIMES MAG., July 12, 1970, at 46, https://nyti.ms/1Glxvi4 [https://perma.cc/6GL9-SDPN] ("[M]any revolutionary defendants have ceased to look upon the courtroom as an arena in which a contest for and against their exoneration is waged, but rather as a platform to expose the failings of the legal system, to educate and politicize a larger public — to indict the system."); Joyce M. Bell, Kangaroo Court: The Black Power Movement and the Courtroom as a Site of Resistance (unpublished manuscript) (on file with the Harvard Law School Library) (arguing that in the 1970s Black Power defendants and their lawyers used courtrooms as sites of resistance to expose and condemn the normative legitimacy of the political order and legal system).

prison system's reenslavement of black people.[685] Jackson's demand for the "strictest interpretation of the Constitution possible"[686] might be seen as holding courts to the abolitionist reading of the Constitution envisioned by the antislavery activists who inspired the Reconstruction Amendments.[687]

Beginning in the 1960s, prisoners have asserted legal claims based on the Constitution to challenge their incarceration and the conditions of their confinement.[688] The 1964 case *Cooper v. Pate*,[689] which held that prisoners could bring constitutional challenges against prison officials in federal court,[690] fueled a prisoners' rights movement that relied largely on civil rights lawsuits.[691] According to Professor Robert T. Chase, incarcerated people immediately took advantage of the opportunity to bring constitutional claims: "[T]he number of prisoners' rights suits dramatically increased from 218 in 1966 to almost 18,477 in 1984. Between 1970 and 1996 the number of prisoner civil rights lawsuits leaped an astonishing 400 percent."[692] Prison activists in the 1960s and 1970s mobilized around the prisons-as-slavery metaphor, but did not see it as reason to reject using constitutional provisions as a means to advance their activism.[693]

The prisoners' rights movement achieved a major victory in the class action lawsuit *Ruiz v. Estelle*,[694] filed in 1972, which sought numerous changes in the Texas prison system, including alleviating overcrowding, improving health care, increasing access to attorneys, and ending the practice of having prisoners act as guards, which had created a system of sexual violence within prisons.[695] In 1980, two years after the trial

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685 On the concept of prisons as slavery in black prison radicalism, see BERGER, CAPTIVE NATION, *supra* note 18, at 177–222.

686 Letter from George Jackson to Fay Stender (Mar. 31, 1970), *in* JACKSON, *supra* note 18, at 231.

687 *See* Bell, *supra* note 684, at 10–12 (describing the courtroom strategy of "righteous contempt" that Black Power defendants and their lawyers used to "challenge[] the legitimacy of the court and court officers," *id.* at 10). In 1970, defendants in *People v. Shakur*, popularly known as the Panther 21, wrote a memo to presiding Judge Murtagh contesting his threat to hold them in contempt and asking: "How can we be in contempt of a court that is in contempt of its own laws? How can you be responsible for 'maintaining respect and dispersing justice' when you have dispensed with justice, and you do not maintain respect for your own Constitution?" Letter from the Panther 21 to Judge Murtagh (Mar. 7–21, 1970), *in* THE BLACK PANTHERS SPEAK 210 (Philip S. Foner ed., 1970).

688 *See* Robert T. Chase, *We Are Not Slaves: Rethinking the Rise of Carceral States Through the Lens of the Prisoners' Rights Movement*, 102 J. AM. HIST. 73, 73–74 (2015). For additional sources on the prisoners' rights movement, see sources cited *supra* note 18.

689 378 U.S. 546 (1964) (per curiam).

690 *Id.* at 546.

691 Chase, *supra* note 688, at 77.

692 *Id.*

693 *See id.* (describing prisoners' use of the First, Fifth, Eighth, and Fourteenth Amendments); *id.* at 80–83 (describing the prisons-as-slavery organizing principle).

694 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, vacated in part*, 679 F.2d 1115 (5th Cir. 1982), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982).

695 *Id.* at 1275–77, 1292, 1295–97, 1297 n.64, 1307, 1367.

began — making it "at that time the largest and longest civil rights case in the history of American jurisprudence"[696] — Chief Judge Justice found the Texas prison system unconstitutional.[697] However, in the decades since *Ruiz*, the Texas prison system has continued to cage increasing numbers of people under conditions that have not changed dramatically.[698] The history of instrumental litigation of constitutional claims by the prisoners' rights movement demonstrates both the utility of making constitutional law part of abolitionist activism and the inadequacy of relying on legal institutions to create and enforce effective remedies.

Prison abolitionists still frequently make constitutional arguments from behind bars.[699] Many prisoners writing in the publications of Critical Resistance, including its journal, *The Abolitionist*, state their claims in the language of constitutional rights. They have argued, for instance, that the parole system violates the Due Process Clause,[700] or that prosecutors' exclusion of black people from juries violates the Sixth

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[696] Chase, *supra* note 688, at 79.

[697] *Ruiz*, 503 F. Supp. at 1383–84; *see also* JONATHAN SIMON, MASS INCARCERATION ON TRIAL 7–9 (2014) (discussing the 2011 Supreme Court case *Brown v. Plata*, 563 U.S. 493 (2011), which declared conditions in California prisons unconstitutional and imposed a population cap on the state prison system).

[698] PERKINSON, *supra* note 52, at 4; *id.* at 325–26 (describing how conditions within the prison at issue in *Ruiz* "remained abysmal" nearly twenty years after Judge Justice's ruling, *id.* at 326). In 1999, *Ruiz* came before the court again, and Judge Justice found that the prison's practices still amounted to "systemic constitutional violations." Ruiz v. Johnson, 37 F. Supp. 2d 855, 888 (S.D. Tex. 1999), *rev'd and remanded sub nom.* Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001).

[699] *See generally, e.g.*, MUMIA ABU-JAMAL, JAILHOUSE LAWYERS (2009) (compiling writings from individuals incarcerated in the twentieth and twenty-first centuries describing resistance from within the carceral system, including through civil rights suits). On contemporary prison writings, see MUMIA ABU-JAMAL, WRITING ON THE WALL: SELECTED PRISON WRITINGS OF MUMIA ABU-JAMAL (Johanna Fernández ed., 2015) (collecting the extensive writings of a death row prisoner on the carceral system's effects within and outside of prison); FOURTH CITY: ESSAYS FROM THE PRISON IN AMERICA 1 (Doran Larson ed., 2013) (presenting "the widest sampling to date of first-person, frontline witness to the human experience of mass incarceration in the United States"); FROM THE PLANTATION TO THE PRISON: AFRICAN-AMERICAN CONFINEMENT LITERATURE (Tara T. Green ed., 2008) (collecting essays that examine African American confinement literature); IMPRISONED INTELLECTUALS: AMERICA'S POLITICAL PRISONERS WRITE ON LIFE, LIBERATION, AND REBELLION (Joy James ed., 2003) (compiling letters from prison and other writings critiquing the carceral system); PRISON WRITING IN 20TH-CENTURY AMERICA (H. Bruce Franklin ed., 1998) (sampling writings by twentieth-century American prisoners describing the oppressive nature of the prison experience); THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS, *supra* note 37, at xiii (collecting "writings by modern and contemporary imprisoned authors" critiquing the violent and exploitative carceral system).

[700] *See* Pablo Agrio, *Attainder in California: Alive and Well*, THE ABOLITIONIST, Summer 2006, at 4, https://abolitionistpaper.files.wordpress.com/2011/01/abolitionist-issue-4-summer-2006-english.pdf [https://perma.cc/7T3X-K9XU] (arguing that California's practice of categorically withholding parole violates due process rights).

Amendment.[701] They have encouraged citizens to learn and understand their full rights under the Constitution,[702] and have supported suing prison officials for constitutional violations.[703] For these prison activists, asserting their constitutional rights constitutes both a pragmatic use of legal tools to win release or change carceral conditions and an empowering rhetorical demand for legal recognition.[704] As George Jackson's appeal to "brainy types"[705] suggests, lawyers and legal scholars can play an important role in helping to articulate and present the demands of people subjected to carceral punishment for strict adherence to the Constitution's abolitionist directives — even when they anticipate failure.[706]

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[701] *See* Demontrell Miller, *Juries and "Justice,"* THE ABOLITIONIST, Spring 2017, at 13, https://abolitionistpaper.files.wordpress.com/2017/12/abby-27-english-final.pdf [https://perma.cc/9FBE-E4CV] (arguing that the exclusion of black people from juries violates the Sixth Amendment right to an impartial jury).

[702] *See* Letter to the Editor, THE ABOLITIONIST, Winter 2006, at 11, https://abolitionistpaper.files.wordpress.com/2011/01/abolitionist-issue-5-winter-2006-english.pdf [https://perma.cc/YL8S-RME6] (calling for activists to "read and understand the State and Federal Constitutions" so that people know their rights). In 1970, the striking prisoners at California's Folsom State Prison issued a "Manifesto of Demands and Anti-Oppression Platform" that declared: "In our peaceful efforts to assemble in dissent as provided under the nation's United States Constitution, we are in turn murdered, brutalized, and framed on various criminal charges because we seek the rights and privileges of *all American people*." BERGER, CAPTIVE NATION, *supra* note 18, at 1 (quoting *The Folsom Prisoners Manifesto of Demands and Anti-Oppression Platform*, *in* IF THEY COME IN THE MORNING . . . : VOICES OF RESISTANCE 74 (1971); *see also* Miller, *supra* note 701 (arguing that the Black Panther Party was correct that "[i]f the [C]onstitution was applied 'honestly' . . . the prisons would not be so filled with Black bodies and Black suffering").

[703] *See, e.g.*, Sitawa Nantambu Jamaa et al., *Statement of California Prisoner Representatives on Second Anniversary of* Ashker v. Brown *Settlement*, THE ABOLITIONIST, Winter 2018, at 2, https://abolitionistpaper.files.wordpress.com/2018/07/abby_issue_28_eng_color-web.pdf [https://perma.cc/RAH4-7ANW] (celebrating civil rights suit settlement and calling for ongoing work); Quinnell Avery Johnson III, *An Interface for Politically Minded Prisoners*, THE ABOLITIONIST, Fall 2018, at 14, https://abolitionistpaper.files.wordpress.com/2018/12/abby_30_eng-reduced.pdf [https://perma.cc/4FY7-7NGT] (discussing his pro se § 1983 lawsuit and the utility of using shared constitutional violations as a way to unite and politicize prisoners).

[704] *Cf.* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 6–8 (1991) (discussing how constitutional law can be used to highlight unnoticed aspects of racially complex problems); Crenshaw, *supra* note 450, at 1364–66 (arguing that rights rhetoric was politically effective as an "organizing feature of the civil rights movement," *id.* at 1365).

[705] Letter from George Jackson to Fay Stender (Mar. 31, 1970), *in* JACKSON, *supra* note 18, at 231.

[706] For example, in the 1970s, the National Conference of Black Lawyers (NCBL) served as the "legal arm of the revolution" by representing radical black defendants such as Angela Davis, Assata Shakur, and prisoners in the Attica Rebellion. Bell, *supra* note 684, at 1. NCBL attorneys also participated in amicus briefs filed in the Supreme Court in the landmark affirmative action case, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Id.* NCBL explained its role in the preamble to its 1968 constitution: "Where the Black revolution requires the development of unique and unorthodox legal remedies to insure the effective implementation of the just demands of Black people for legal, economic and social security and protection, we must aid it." *Declaration of Commitment and Concern*, NAT'L CONF. BLACK LAW., https://www.ncbl.org/?page_id=1377 [https://perma.cc/A6K6-T2RT]; *cf.* ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 146–47, 160 (2019) (blaming the emergence of the prison industrial complex in part on the failure of lawyers to vigorously defend the constitutional rights of criminal defendants). On the significance of failure to abolitionist struggle, see

2. Nonreformist Abolitionist Reforms. — Prison abolition is a long-term project that requires strategically working toward the complete elimination of carceral punishment. No abolitionist expects all prison walls to come tumbling down at once. Yet abolitionist philosophy is defined in contradistinction to reform: reforming prisons is diametrically opposed to abolishing them.[707] Efforts to improve the fairness of carceral systems and to increase their efficiency or legitimacy only strengthen those systems and divert attention from eradicating them. How can abolitionists take incremental steps toward dismantling prisons without falling into reformist traps? Prison abolitionists resolved this quandary with the concept of "non-reformist reforms — those measures that reduce the power of an oppressive system while illuminating the system's inability to solve the crises it creates."[708] By engaging in nonreformist reforms, abolitionists strive to make transformative changes in carceral systems with the objective of demolishing those systems rather than fixing them.[709] They recognize that these reforms alone are inadequate; indeed, achieving these piecemeal changes in the prison industrial complex reveals the necessity of its total eradication. To be abolitionist, reforms must shrink rather than strengthen "the state's capacity for violence."[710]

In addition, nonreformist reforms must facilitate the goal of building a society without prisons. As migrant justice activist Harsha Walia explains, "[a]rguably every reform entrenches the power of the state because it gives the state the power to implement that reform. But from an ethical orientation towards emancipation, I think a guiding question on non-reformist reforms is: Is it increasing the possibility of freedom?"[711] A critical test for engaging with the U.S. Constitution is whether there are particular ways an abolition constitutionalism facilitates — rather than constrains — imagining a society where prisons are obsolete.

In using the Constitution to support legal changes that move toward abolition, prison abolitionists can consider a variety of forums. Courts are not the only venues where abolitionists can make constitutional

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Andrew Dilts, *Justice as Failure*, 13 LAW CULTURE & HUMAN. 184, 190 (2017) (describing justice "as failure and as an ongoing practice of freedom conditioned by that failure").

707 *See* sources cited *supra* note 17.

708 Berger, Kaba & Stein, *supra* note 45.

709 *See* Walia & Dilts, *supra* note 674, at 15; *see also* McLeod, *Envisioning Abolition Democracy*, *supra* note 30, at 1616; McLeod, *Grounded Justice*, *supra* note 91, at 1207–18.

710 Berger, Kaba & Stein, *supra* note 45; *see also* Mariame Kaba, Opinion, *Police "Reforms" You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), https://truthout.org/articles/police-reforms-you-should-always-oppose [https://perma.cc/XL8K-HR58].

711 Walia & Dilts, *supra* note 674, at 15.

claims and forge an abolition constitutionalism.[712] Like the judiciary, Congress and state governments are bound by the Constitution,[713] and, should those bodies adopt an abolitionist reading of the Constitution, they would have substantial power to enact the changes that interpretation would require.[714] Indeed, the Thirteenth Amendment itself empowers Congress to enforce its provisions, anticipating the inadequacy of case-by-case judicial eradication of slavery.[715]

Abolition constitutionalism could support many of the nonreformist reforms in which prison abolitionists and other activists are already engaged, including efforts to stop prison expansion by opposing prison construction or shutting down prisons that already exist;[716] end police

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712 *Cf.* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT 3–5 (2014) (examining the role of administrative agencies as venues for constitutional civil rights activism); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 7 (2000) (exploring whether and how the locus of constitutional interpretation should be shifted away from the courts); Sotirios A. Barber & James E. Fleming, *The Canon and the Constitution Outside the Courts*, 17 CONST. COMMENT. 267, 268 (2000) (arguing that, rightfully, "the canon of the Constitution is broader than the canon of the judicially enforceable Constitution"); Blackhawk, *supra* note 290, at 1799 (noting that the judiciary has as yet refused to enshrine Indian law into the constitutional canon, and that Indian law has instead been defended by Congress and the Executive, although it may someday "find a more natural fit within [that] canon").

713 *See* U.S. CONST. art. VI, cl. 2 (making the Constitution "the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding"); *id.* cl. 3 (requiring "Senators and Representatives . . . and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States" to "be bound by Oath or Affirmation, to support this Constitution"); *see also* 5 U.S.C. § 3331 (2012) (requiring members of Congress to "swear (or affirm) that [they] will support and defend the Constitution of the United States").

714 *See* U.S. CONST. art. I, § 1 (vesting "[a]ll legislative Powers" in Congress); *id.* art. I, § 8 (enumerating many of the powers of Congress); *id.* amend. XIII, § 2 (granting Congress "power to enforce [the Thirteenth Amendment] by appropriate legislation); *id.* amend. XIV, § 5 (granting Congress similar power to enforce the Fourteenth Amendment); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("The States . . . retain substantial sovereign authority under our constitutional system."); THE FEDERALIST NO. 45, at 285, 289 (James Madison) (Clinton Rossiter ed., 2003) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . ."); Amar, *supra* note 414, at 155 ("[S]tate lawmakers typically may support the Constitution's mandates using their general police power under their state constitutions, and in keeping with a specific invitation in Article VI's Supremacy Clause and Supremacy Oath.").

715 *See* Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811, 1835, 1841 (2012); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."); Tsesis, *Civil Rights Approach*, *supra* note 288, at 1777 ("[T]he [Thirteenth A]mendment permits Congress to protect persons against arbitrary treatment that intrudes on liberty interests."); Tsesis, *Furthering American Freedom*, *supra* note 414, at 310–11 ("[T]he Amendment's second section enables Congress to pass federal legislation that is rationally related to ending any remaining badges and incidents of servitude, such as present-day trafficking of foreign workers as sex slaves and coerced domestic servants." *Id.* at 310).

716 *See* Berger, Kaba & Stein, *supra* note 45; *see also, e.g.*, *About Us*, NO NEW JAILS NYC, https://nonewjails.nyc [https://perma.cc/BTY4-5FTF]; *Shut Down Berks Campaign*, JUNTOS,

stop-and-frisk practices;[717] eliminate the requirement of money bail to release people charged with crimes;[718] repeal harsh mandatory minimums, even for violent crimes;[719] give amnesty to individual prisoners, including political prisoners and prisoners believed to have killed in self-defense;[720] and decriminalize drug use and possession and other nonviolent conduct.[721] To the extent that such practices perpetuate slavery in violation of the Thirteenth Amendment, Congress, state

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http://vamosjuntos.org/Shut-Down-Berks [https://perma.cc/4CV2-FLCS] (advocating for the closure of Berks County Detention Center, which holds immigrants); *Stop Neighborhood Jail Expansion in NYC*, CRITICAL RESISTANCE, http://criticalresistance.org/stop-neighborhood-jail-expansion-in-nyc [https://perma.cc/VAU7-2Q6B].

717 *See, e.g.*, Daniel Bergner, *Is Stop-and-Frisk Worth It?*, THE ATLANTIC (Apr. 2014), https://www.theatlantic.com/magazine/archive/2014/04/is-stop-and-frisk-worth-it/358644 [https://perma.cc/H9TN-8GGR] (reflecting on the history of stop-and-frisk and describing current activism to end the practice); Phillip Atiba Goff, Opinion, *On Stop-and-Frisk, We Can't Celebrate Just Yet*, N.Y. TIMES (Jan. 7, 2018), https://nyti.ms/2FbWgFj [https://perma.cc/3KKQ-S4BX] (calling for efforts to "discover the full scope of [the] consequences [of stop-and-frisk]"); Abraham Gutman, Opinion, *The Solution to Stopping Stop-and-Frisk Problems in Philly: Abolish It*, PHILA. INQUIRER (June 8, 2018, 2:21 PM), https://www.inquirer.com/philly/opinion/commentary/stop-and-frisk-philadelphia-abolish-terry-v-ohio-anniversary-20180608.html [https://perma.cc/JT37-6UTP] (advocating for the abolition of stop-and-frisk).

718 *See* Berger, Kaba & Stein, *supra* note 45 (noting abolitionist efforts to "eradicate cash bail"); *see also, e.g.*, Jesse McKinley & Ashley Southall, *Kalief Browder's Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal.*, N.Y. TIMES (Mar. 29, 2019), https://nyti.ms/2YHoaD8 [https://perma.cc/T6SW-WP9C]; Samantha Melamed, *Philly DA Larry Krasner Stopped Seeking Bail for Low-Level Crimes. Here's What Happened Next.*, PHILA. INQUIRER (Feb. 19, 2019), https://www.inquirer.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform-incarceration-20190219.html [https://perma.cc/SAL5-H9R8]; *Abolishing Bail*, PRISON CULTURE (Aug. 9, 2017), http://www.usprisonculture.com/blog/2017/08/09/abolishing-bail [https://perma.cc/DR62-R39H] (excerpting from a speech on the efforts of the National United Committee to Free Angela Davis to advocate for the abolition of the bail system); *Host Teach-Ins About Bail and Pretrial Detention this Fall*, PRISON CULTURE (Sept. 20, 2017), http://www.usprisonculture.com/blog/2017/09/20/host-teach-ins-about-bail-and-pretrial-detention-this-fall [https://perma.cc/C5LE-QFPV].

719 *See, e.g.*, *The Coalition to Abolish Death by Incarceration*, DECARCERATE PA, https://decarceratepa.info/CADBI [https://perma.cc/Q7EJ-FA59] (describing a coalition of organizations dedicated to abolishing "death by incarceration," or mandatory life without parole sentences); *see also* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/8VLA-BNM5] (noting that "at the state and local levels, far more people are locked up for violent and property offenses than for drug offenses alone" and that "[t]o end mass incarceration, reforms will have to go further than the 'low hanging fruit' of nonviolent drug offenses").

720 *See, e.g.*, Berger, Kaba & Stein, *supra* note 45 (noting popular campaigns to release individual prisoners); Owen Daugherty, *Cyntoia Brown Granted Clemency by Tennessee Governor*, THE HILL (Jan. 7, 2019, 12:33 PM), https://thehill.com/blogs/blog-briefing-room/news/424171-cyntoia-brown-granted-clemency-by-tennessee-governor [https://perma.cc/NQA6-EB5Y] (highlighting the role that activists played in pressuring the governor to grant clemency); *Hundreds March in Philly to "Free Mumia Now!,"* WORKERS WORLD (Apr. 30, 2019), https://www.workers.org/2019/04/30/hundreds-march-in-philly-to-free-mumia-now [https://perma.cc/D7V8-7T83] (describing a rally celebrating court victory for incarcerated prison abolition activist Mumia Abu-Jamal).

721 *See* Berger, Kaba & Stein, *supra* note 45 ("[A]bolitionists have been at the forefront of the [campaign for] decriminalization of drug use."); *see also, e.g.*, Jasmine Garsd, *Should Sex Work Be*

legislatures, and city assemblies, as well as courts, are empowered by the Federal Constitution[722] and state constitutions[723] to enact these non-reformist reforms.

Prison abolitionists have also organized to hold police and other law enforcement agents accountable for violence and rights violations. One of their major victories is the Reparations Ordinance, passed by the Chicago City Council on May 6, 2015.[724] The ordinance was a long-delayed response to the Chicago Police Department's systematic infliction of torture and other forms of violence against African American suspects under the command of Jon Burge.[725] After decades of agitation, the activists won a package of measures, including monetary compensation for the living survivors, tuition-free education at the City Colleges for survivors and their families, and a public memorial.[726] Mariame Kaba calls the Reparations Ordinance "an abolitionist document" because it "did not rely on the court, prison, and punishment system[s] to try to envision a more expansive view of justice."[727] The activists deliberately refused to seek criminal prosecution of the officers involved or civil damages against the City of Chicago.[728] Instead, they pressured the City Council to redress their claims through a radically democratic process, led by survivors and grassroots organizers and occurring outside formal legal institutions, that included street protest,

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Decriminalized? Some Activists Say It's Time, NPR (Mar. 22, 2019, 2:43 PM), https://www.npr.org/2019/03/22/705354179/should-sex-work-be-decriminalized-some-activists-say-its-time [https://perma.cc/P4MH-S7X7] (highlighting activists' efforts to decriminalize sex work); *Invest-Divest*, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/invest-divest [https://perma.cc/4SGA-L35X] (calling for decriminalization of drug offenses and prostitution offenses as a racial justice issue).

[722] *See* sources cited *supra* notes 713–714 and accompanying text.

[723] *See* Goodwin, *Thirteenth Amendment*, *supra* note 174, at 983–87 (discussing the potential enactment of state "legislation to ban slavery, including for conviction of a crime," *id.* at 983).

[724] Chicago, Ill., Substitute Resolution R2015-256 (May 6, 2015); *see also* Natalie Y. Moore, *Payback*, MARSHALL PROJECT (Oct. 30, 2018, 6:00 AM), https://www.themarshallproject.org/2018/10/30/payback [https://perma.cc/S8C4-ZBVM].

[725] *See supra* p. 24.

[726] Chicago, Ill., Substitute Resolution R2015-256 (May 6, 2015); *see* McLeod, *Envisioning Abolition Democracy*, *supra* note 30, at 1627 (discussing the five million dollars in reparations for survivors); Roberts, *Torture*, *supra* note 86, at 243–44 (discussing the ways in which police torture has been used to reinforce racial hierarchies); CHI. TORTURE JUST. MEMORIALS, https://www.chicagotorture.org [https://perma.cc/J24W-QDWK].

[727] Dan Sloan, *A World Without Prisons: A Conversation with Mariame Kaba*, LUMPEN MAG. (Apr. 7, 2016), http://www.lumpenmagazine.org/a-world-without-prisons-a-conversation-with-mariame-kaba [https://perma.cc/J33M-YTHU].

[728] *See* McLeod, *Envisioning Abolition Democracy*, *supra* note 30, at 1613. Some survivors did file civil lawsuits against Burge. *See, e.g.*, Sam Roberts, *Jon Burge, Ex-Commander in Chicago Police Torture Cases, Dies*, N.Y. TIMES (Sept. 20, 2018), https://nyti.ms/2OGhZK7 [https://perma.cc/SF2Y-9ADB].

partnership with international human rights organizations, and media education.[729]

3. Treating the Symptoms While Ending the Disease. — While complete prison eradication is the ultimate goal of the abolitionist project, before that aim comes to fruition abolitionists might consider invoking the Constitution instrumentally to mitigate the harms inflicted by carceral punishment. As law student, activist, and former prisoner Angel Sanchez puts it, abolitionists must treat prison like a "social cancer: we should fight to eradicate it but never stop treating those affected by it."[730]

The Thirteenth Amendment could facilitate a number of nonreformist reforms. For example, abolitionists might consider taking up the constitutional arguments put forth by numerous scholars who have posited that the Thirteenth Amendment prohibits exploitative treatment of incarcerated people.[731] Legal scholars have also made strong constitutional arguments against the shackling of incarcerated people during labor and delivery[732] and against solitary

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[729] *See* McLeod, *Envisioning Abolition Democracy*, *supra* note 30, at 1624–26; G. Flint Taylor, *The Long Path to Reparations for the Survivors of Chicago Police Torture*, 11 NW. J. L. & SOC. POL'Y 330, 341–47 (2016); Joey L. Mogul, *The Struggle for Reparations in the Burge Torture Cases*, RACE RACISM & L., https://racism.org/index.php/articles/law-and-justice/criminal-justice-and-racism/134-police-brutality-and-lynchings/2005-the-struggle-for-reparations-in-the-burge-torture-cases [https://perma.cc/J2X5-HWHY].

[730] Angel E. Sanchez, *In Spite of Prison, in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1650, 1652 (2019).

[731] *See, e.g.*, Ghali, *supra* note 170, at 610 (arguing that the Thirteenth Amendment, properly interpreted, does not preclude prisoners from litigating claims of sexual slavery); Raghunath, *supra* note 412, at 398 (arguing that consistency with Fifth and Eighth Amendment jurisprudence requires interpretation of the Thirteenth Amendment to prohibit involuntary servitude for all but "those inmates who . . . have been . . . *sentenced*" to forced labor); Marion, Note, *supra* note 412, at 215 (arguing that the current "system of private, unpaid use of labor [in private prisons] too closely resembles the slave system that the Thirteenth Amendment sought to abolish" to be constitutionally permissible, despite the Amendment's exception for criminal punishments). Numerous legal scholars have applied the Thirteenth Amendment to contest a variety of unjust state and private institutions and practices, including abortion restrictions, domestic violence, worker exploitation, and racial gerrymandering, on the grounds that they constitute prohibited forms of involuntary servitude or badges of slavery. *See, e.g.*, Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 483–84, 486–93 (1990); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 251–53 (1992); Patricia Okonta, Note, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 257 (2018); *see also* Pope, *supra* note 286 (manuscript at 2).

[732] *See* Ocen, *supra* note 187, at 1287–310; *see also* CAROLYN SUFRIN, JAILCARE: FINDING THE SAFETY NET FOR WOMEN BEHIND BARS 7–8, 51–54, 234 (2017) (relating the constitutional history of access to medical treatment in prisons); Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women's Reproductive Rights*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 117, 155–67 (2013) (arguing that the Thirteenth Amendment protects incarcerated women's right to abortion).

confinement.[733] Efforts to end the collateral consequences of incarceration, such as restrictions on voting rights, exclusion from public housing and other government benefits, and imposition of monetary sanctions, can also find support in the Thirteenth Amendment's abolition of slavery.[734] Professor William Carter lays out a framework for defining modern badges and incidents of slavery that looks to "the connection the group to which the plaintiff belongs or that Congress seeks to protect has to the institution of chattel slavery" and "the connection the complained of injury or proscribed condition has to the institution of chattel slavery."[735] Thus, when numerous "racialized policies," including those inflicted as a result of a criminal conviction, create "a permanent caste distinction of . . . magnitude and impermeability . . . [they] amount to a badge or incident of slavery."[736] Systematic exclusion of former prisoners from labor and housing markets,[737] for example, deprives them of full rights of citizenship, amounting to an incident of slavery.[738] Notably, Congress has the authority to pass legislation under the Thirteenth Amendment to end practices that were instituted after the Civil War to reinstall white supremacy, such as monetary sanctions, forced prison labor, and felon disenfranchisement.[739]

4. Creating the Conditions for a Society Without Prisons. — Finally, prison abolitionists are dedicated to working within carceral society to "build models today that can represent how we want to live in the future" and to start creating a radically different society where prisons are unimaginable.[740] We can use constitutional support to demand the building blocks needed for this construction project — for example, legislation that transfers funds currently devoted to carceral systems, such as police, prisons, detention centers, and foster care, to community-

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[733] *See, e.g.*, Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 116–17 (2008) (arguing that prolonged solitary confinement "constitutes cruel and unusual punishment and violates the due process rights of prisoners," *id.* at 117).

[734] *See* William M. Carter, Jr., *Class as Caste: The Thirteenth Amendment's Applicability to Class-Based Subordination*, 39 SEATTLE U. L. REV. 813, 825–27 (2016); Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1173–77 (2013). *See generally* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT (Alexander Tsesis ed., 2010) (collecting essays about the Thirteenth Amendment's historical foundations and its relevance to contemporary legal landscapes).

[735] Carter, *supra* note 734, at 825.

[736] *Id.*

[737] *See* Ifeoma Ajunwa & Angela Onwuachi-Willig, *Combating Discrimination Against the Formerly Incarcerated in the Labor Market*, 112 NW. U. L. REV. 1385, 1394 (2018).

[738] *Cf.* Henderson, *supra* note 734, at 1173–77.

[739] *See id.* at 1173; *see also, e.g.*, *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (May 31, 2019), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida [https://perma.cc/A2UU-T7PP] (describing Florida's constitutional amendment to restore voting rights to citizens with former felony convictions).

[740] *What Is the PIC? What Is Abolition?*, *supra* note 21.

based efforts to meet people's needs and resolve social conflicts nonviolently. Alexander Lee, founder and director of the Transgender, Gender Variant & Intersex Justice Project, argues that prison abolitionists will have to form "prickly coalitions" with people outside the movement who are engaged in providing "housing, healthcare, and other essentials [that] are the basis from which a world without prisons will be made possible."[741] Such coalitions that help to build a new society can be guided by abolitionist constitutional principles and requirements.[742]

B. Imagining a Freedom Constitutionalism

Abolitionists always have their eyes set on a future they are in the process of creating. At the very same time they are deconstructing structures inherited from the past, they are constructing new ones to support the future society they envision. Abolitionists are engaged in a collective project of radical speculative imagination — what Rodríguez calls "[i]nsurgent abolitionist futurity."[743] If anything, it is the innovative rather than the destructive that marks abolitionist thinking. We should understand abolition not as the "elimination of anything but . . . as the founding of a new society."[744] The relationship between prison abolition and the Constitution, then, should be seen less as the condemnation of our existing abolition constitutionalism and more as the genesis of a new one.

A new abolition constitutionalism could seek to abolish historical forms of oppression beyond slavery, including settler colonialism, patriarchy, heteronormativity, ableism, and capitalism, and strive to dismantle systems beyond police and prisons, including foster care, regulation of pregnancy, and poverty.[745] It could extend beyond the United States' borders to challenge U.S. deportation policies and U.S. imperialism and to connect to freedom struggles around the world.[746] The purpose of a

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741 Lee, *supra* note 260, at 112.

742 *See, e.g.*, West, *supra* note 408, at 146, 154–55 (arguing that the abolitionist history of the Equal Protection Clause includes the "subsidiary" right "to be free of those conditions which, if unchecked by the state, generate separate sovereignties, including, at least, a right to be free of private violence and extreme material deprivation" and that "the state has an affirmative duty to protect our natural rights to physical security and economic participation," *id.* at 146).

743 Rodríguez, *supra* note 29, at 1607.

744 Moten & Harney, *supra* note 258, at 114.

745 *See, e.g.*, DAVIS, ABOLITION DEMOCRACY, *supra* note 17, at 41 (linking the growing female incarceration rate to the "disestablishment of the welfare system"); Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, THE APPEAL (Mar. 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e [https://perma.cc/VP2F-AEF3] (discussing foster care abolition).

746 *See* BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 1–15 (Jenna M. Loyd et al. eds., 2012) (highlighting the connections between immigration and penal policies); MARTHA D. ESCOBAR, CAPTIVITY BEYOND PRISONS: CRIMINALIZATION EXPERIENCES OF

new abolition constitutionalism would not be to improve the U.S. state but to guide and govern a future society where prisons are unimaginable. Its objective could extend beyond abolishing particular systems to establishing freedom for all — a new freedom constitutionalism.

As antebellum abolitionists and civil rights activists showed, constitutional meaning is shaped by social and political action outside of traditional forums and separate from Supreme Court decisions.[747] Prison abolitionist praxis emphasizes the need to decentralize power currently residing in privileged institutions in order to empower communities most vulnerable to state violence to make change in nontraditional forums and spaces.[748] How that vision will be made real — as a transformed interpretation of the U.S. Constitution, as an amendment

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LATINA (IM)MIGRANTS 4 (2016) (describing the "expansion of the carceral society beyond the territorial boundaries of the U.S. nation-state"); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 246 (2017) (arguing that immigration imprisonment should be abolished); Wolff, *supra* note 181, at 1008–21 (arguing that the Thirteenth Amendment prohibits U.S. firms from exploiting slave labor in the global economy). I have argued that prison abolition will envision a radically different relationship between technology and politics, one that ends prediction as a way of foreclosing social change by collapsing the future into past inequality. *See* Roberts, *Digitizing*, *supra* note 78, at 1727 ("Abolitionist forecasting technologies must facilitate envisioning a future that doesn't replicate the past.").

747 *See, e.g.*, Andrias, *supra* note 667, at 1620 (noting that the "Fight for $15" movement "highlights the centrality of social and political action to constitutional law"); *see also* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 1–16 (2011); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 7 (2011) ("What would the story of the mid-twentieth-century struggle for civil rights look like if legal historians de-centered the U.S. Supreme Court . . . and instead considered the movement from the bottom up? The answer . . . [is] a picture . . . in which local black community members acted as agents of change — law shapers, law interpreters, and even law makers."); MARK ENGLER & PAUL ENGLER, THIS IS AN UPRISING: HOW NONVIOLENT REVOLT IS SHAPING THE TWENTY-FIRST CENTURY xvii (2016) (explaining the potential power of nonviolence "as a method of political conflict, disruption, and escalation"); JONES, *supra* note 327, at 12 (describing how free black people in Baltimore "secured [constitutional] rights through their performance"); Mark Tushnet, *Social Movements and the Constitution*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 241, 241 (Mark Tushnet et al. eds., 2015) (examining how "social movements have affected the Constitution's development and interpretation").

748 *See* Joy James, *Preface: American Archipelago*, *in* WARFARE IN THE AMERICAN HOMELAND: POLICING AND PRISON IN A PENAL DEMOCRACY xii (Joy James ed., 2007) (referring to the search for "'home' — a democratic enclave, communities of resistance, a maroon camp"); James, *7 Lessons*, *supra* note 42 (criticizing reforms that "do not decentralize power or custodial care" and instead rely on "privileged structures[] that historically create, manage, tabulate, or ameliorate crises"); *see also* Blackhawk, *supra* note 290, at 1798 (noting that "public law scholars have begun to identify non-rights-based or structural forms of protection for minorities like federalism, unions, and petitioning"); Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1291 (2012) (defining structural forms of representation to include "not just ballots but also any form of representation or direct participation in processes of collective decisionmaking").

to the existing text,[749] or as an alternative charter for freedom that extends beyond the bounds of the U.S. state[750] — is yet to be seen.

CONCLUSION

This Foreword makes the case for revitalizing abolition constitutionalism by engaging the ideas and activism of antebellum slavery abolitionists with those of twenty-first-century prison abolitionists. I argue that, despite the dominant anti-abolition constitutionalism, scholars and activists should consider the abolitionist history of the Reconstruction Amendments as a usable past to help move toward a radical future. Today's activists can deploy the Constitution's abolition provisions instrumentally to further their aims and, in the process, construct a new abolition constitutionalism on the path to building a society without prisons. In this way, the prison abolition movement can reinvigorate abolition constitutionalism. In turn, prison abolitionists' rethinking of constitutional meaning can further the struggle to create a more humane, free, and democratic world.

In arriving at this conclusion, I grappled with the tension between two approaches to abolition constitutionalism. On the one hand, there is good reason to renounce the Constitution because constitutional law has been critical to upholding the interests of the racial capitalist regime while advancing legal theories that justify its inhumanity. On the other hand, there is utility in demanding that the Reconstruction Constitution live up to the liberation ideals fought for by abolitionists, revolutionaries, and generations of ordinary black people. As they must with respect to so many aspects of abolition consciousness, those who are building a society without prisons must engage dynamically with this tension. Abolitionists can craft an abolition constitutionalism that both condemns the dominant jurisprudence that legitimizes the carceral state and makes constitutional claims strategically to help dismantle carceral systems. In the process, abolitionists might imagine a new freedom constitutionalism to guide and govern the radically different society they are creating.

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[749] *See, e.g.*, Goodwin, *Thirteenth Amendment*, *supra* note 174, at 982–83 (discussing an amendment which would strike the Punishment Clause from the Thirteenth Amendment); Jeannie Alexander, *Abolition Statement*, ABOLITION (June 18, 2015), https://abolitionjournal.org/jeannie-alexander-abolition-statement [https://perma.cc/UFJ5-P28F] (proposing that the Thirteenth Amendment should be amended to read: "Neither slavery nor involuntary servitude, shall exist within the United States . . . .").

[750] Black radicals have already directly engaged in constructing an alternative constitutionalism. *See* Akbar, *supra* note 662, at 421–22, 426–27 (discussing the Movement for Black Lives' "A Vision for Black Lives: Policy Demands for Black Power, Freedom, and Justice," including demands for "economic justice, community control, and political power," *id.* at 427 (footnotes omitted)); Rana, *supra* note 343, at 284–85 (describing the Revolutionary People's Constitutional Convention, organized by the Black Panther Party and held in Philadelphia in 1970 with the goal of devising a "competing constitution" that included expanded socioeconomic rights, reparations, wealth transfers, and changes in police power, *id.* at 284); *Freedom Papers*, DREAM DEFENDERS, https://www.dreamdefenders.org/freedompapers [https://perma.cc/E5PK-7KYJ] (outlining a set of rights and freedoms not explicitly established in the Constitution).