

Legal Methods II: Social Justice Advocacy
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Course Reader - Volume 2

Wednesday, January 15th

- Pendergrass & Marton, *How Progressive Prosecutors Can Transform the Criminal Justice System*, Boston Globe, July 15, 2019
- Justice 2020 Report, Kings County District Attorney's Office
- Amna Akbar, *Toward a Radical Imagination of Law*, 94 NYU L.Rev. 405 (2018) excerpts, skim section I.

Thursday, January 16th

- Martin Luther King, Jr. [Letter from a Birmingham Jail](#)
- *Amicus Brief*, U.S. v. Warren
- The State of Black Immigrants Parts I and II: A Statistical Portrait of Black Immigrants in the United States, BAJI & NYU Law Immigrant Rights Clinic
- Joe Penney, *Cameroonian Asylum-Seekers at the Border Are Fleeing a U.S.-Backed Military Force*

The Boston Globe

Opinion

How progressive prosecutors can transform the criminal justice system

Taylor Pendergrass; Janos Marton

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The district attorney primary race in Queens, New York, went down to the wire last month, pitting a more typical candidate, Melinda Katz, against Tiffany Cabán — a public defender who campaigned on decarceration and other reform policies, like ending cash bail and decriminalizing sex work, drugs, and other crimes of poverty. This nail-biter is the latest proof that people around the country are starting to understand the important role prosecutors have played in causing mass incarceration and racial injustice and the power they possess to start fixing those harms.

Cabán's strong showing (the election is in the midst of a recount) proves just how far and how fast the movement has come. Cabán's run builds off of a number of self-proclaimed "progressive prosecutors" who have swept into office — among them Kim Foxx in Chicago, Wesley Bell in St. Louis, Rachael Rollins in Boston, and Larry Krasner in Philadelphia.

But the policy differences among these prosecutors is often vast. The three dozen or so prosecutors who now claim the "progressive prosecutor" mantle are often bound by little more than a commitment to do slightly better than severely punitive and ineffective predecessors.

As the reform movement gains traction, it can be hard to decipher which candidates are actually walking the walk — taking steps to meaningfully drive down incarceration and tackle racism in the criminal legal system — and which are merely talking the talk with new words to describe the same old behavior.

With that in mind, there are four commitments from prosecutor candidates the ACLU will be encouraging voters to look for in the 2020 elections.

First, the willingness to set a specific decarceration goal — and the ability to design and implement a comprehensive plan to safely achieve that goal — is a baseline commitment that every voter should be looking for in their next elected prosecutor. For example, in Dallas, District Attorney John Creuzot pledged to slash incarceration 15-20 percent by the end of his first term. Prosecutor candidates have made similar commitments in California, Pennsylvania, and Virginia.

We have seen from past elections that only committing to a vague policy change — "bail reform," for example — is insufficient. Complexity around implementing such changes allows prosecutors far too much wiggle room to make hollow promises, and makes it hard for voters to hold them accountable. Specific decarceration goals are more effective.

Second, progressive prosecutors must pledge radical transparency. Prosecutors' unparalleled lack of transparency is no accident — it hides gross racial injustice and masks the role prosecutors have in driving mass incarceration. It shields prosecutors from being evaluated by whether they have accomplished anything to improve long-term community health, and instead allows them to skate by simply touting meaningless conviction rates.

The unfortunate result is that communities have no reason to trust anything prosecutors say, and for good reason, after years and decades of prosecutors decimating neighborhoods of color with no measurable benefits for public

safety. Truly progressive prosecutors are taking new approaches, like State Attorney Kim Foxx in Chicago and District Attorney George Gascón in San Francisco, who have both made substantial moves to open up the books, radically transforming the office, top to bottom. Their acts here can and should be replicated. After all, this is public, taxpayer-funded information.

Third, prosecutors truly committed to ending mass incarceration must be a vocal force for legislation. We are engaged in legislative battles aimed at decarceration in nearly every state in the country, where local prosecutors and their associations are almost always our biggest hurdle to even modest reforms. Time and time again, the ACLU has seen local prosecutors pay lip service to supporting reform with local voters, all the while working behind the scenes individually or with prosecutor associations to lobby for more punitive laws and stymie reform efforts behind the scenes.

2020 should be remembered as the year that voters start holding prosecutors accountable at the ballot box, not only for what they do within their offices but also for what they do at state and local legislatures. Candidates should be visible champions of legislative change. Meanwhile, state DA associations should be recognized for what they are: special interest groups that peddle regressive and punitive laws that are aligned with their outdated tough-on-crime philosophy but are vastly out-of-step with the needs of communities and the desires of voters.

Fourth, voters should be looking for prosecutors who see their primary role as safely downsizing a bloated and ineffective criminal legal system. In the debate about whether “progressive prosecutor” is fundamentally an oxymoron, our experience suggests that — at least in the near term — there is indeed a legitimate role for a progressive prosecutor who is not a benevolent dictator, but rather someone who has a clear vision and steady hand for transferring power and resources away from the prosecutor’s office and into community investments like mental health, addiction treatment, wrap-around housing, and schools.

Prosecutors have a critical role to play in the state and municipal budget process by publicly presenting the evidence that such investments would truly improve public safety far better than severe punishment and mass incarceration. And while prosecutors cannot single-handedly dismantle a racist legal system, they are uniquely positioned to name and address the system’s structural biases and harms.

A new generation of candidates is poised to run for their county’s top prosecutor jobs in the next few years, including some who are challenging incumbents who were previously branded as “reformers.” The Queens DA race is a timely reminder that now is a good time to set a new, higher bar for what constitutes real leadership and reform from elected prosecutors — if we ever hope to end our national nightmare of mass incarceration.

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Caption:

Public defender Tiffany Cabán declares victory in the Queens District Attorney Democratic Primary election at her campaign watch party at La Boom nightclub, June 25, in New York.

Scott Heins/Getty Images

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2020 **Justice**

**An Action Plan
for Brooklyn**

**Eric Gonzalez,
Brooklyn District Attorney**

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Justice
2020

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Introduction

Justice
2020

The job of a District Attorney—a prosecutor—is to promote community safety. This means more than simply punishing people who commit crimes. It requires engaging with communities to determine what safety and justice mean for them, identifying the most effective ways to hold accountable those who do harm, giving victims a sense of justice and healing, and promoting strong, healthy communities.

In the past, the actions of prosecutors did not always serve these goals. In fact, prosecutors contributed to problems like mass incarceration, which has disproportionately affected communities of color. While these actions may have been guided by good intentions and a commitment to public safety, they had the effect of destabilizing families and communities, while failing to make us safer.

At this moment in history, prosecutors across the country face new scrutiny: the past actions of their offices are being rightly examined. At the same time, the public has shown keen interest in electing prosecutors who will break from the failed policies of the past, and look for different—and smarter—ways to carry out their responsibilities.

In Brooklyn, District Attorney Eric Gonzalez was elected after promising to make the Brooklyn DA's office a national model of what a progressive prosecutor's office can be. DA Gonzalez convened the Justice 2020 Committee to give him guidance in how to achieve that goal.

Executive Summary

“In every case we must be asking ourselves, ‘what resolution is best for this particular defendant, for the victim and for the community? Would this intervention keep us safer or not? Would it strengthen community trust or potentially undermine it?’”

Eric Gonzalez, Brooklyn District Attorney

The actions of prosecutors have enormous and far-reaching impact on accused individuals, on victims and witnesses, and on communities as a whole. From the determination of which charges to bring in a case, to how much bail to request, to case processing decisions like when to turn over evidence to the defense, to how investigations and trials are conducted, to what sentences to recommend and even how to respond to parole applications, prosecutors wield tremendous power in our criminal justice system.

Justice 2020 is about the appropriate uses of prosecutorial power; each of the seventeen recommendations of the Justice 2020 Committee points the Brooklyn District Attorney's office in the direction of more thoughtful use of that power.

In keeping with the vision of Justice 2020 and the Brooklyn DA's office, which is *to keep Brooklyn safe and strengthen community trust by ensuring fairness and equal justice for all*, Justice 2020 directs Assistant District Attorneys in Brooklyn not to take a cookie-cutter approach to cases, but to look at each accused person as an individual and determine the best way to hold that person accountable for their actions. Accountability is not synonymous with punishment; ADAs should determine in each

case the extent of the harm caused, what intervention would result in the accused party taking responsibility and making amends for the harm they have caused, and most importantly, deterring future criminal behavior. The Justice 2020 Committee believes that this “restorative” approach will increase both public safety and community trust.

The Brooklyn DA’s office has long enjoyed a well-deserved reputation as a progressive prosecutor’s office, but there is more work to be done. Justice 2020 provides a roadmap for focusing resources on identifying and removing from the community those who cause the most harm—the “drivers of crime”—while diverting out of the criminal justice system or into community-based services those who don’t pose a threat to public safety.

We know that certain crimes have historically been under-prosecuted: crimes of sexual violence, especially those in which the victim and the perpetrator know each other. Such cases are notoriously difficult to prosecute. Yet a prosecutor’s job is to protect the most vulnerable among us and to hold people accountable for predatory behavior. Justice 2020 directs the DA’s office to look for ways to enhance the prosecution of these kinds of crimes.

Doing justice in a 21st Century prosecutor’s office requires new tools, and Justice 2020 provides guidance on how the Brooklyn DA’s office can do its work better, from recommending the establishment of an Office of Professional Responsibility and Ethics, to conducting a top-to-bottom overhaul of the office’s data and analytics capacity.

Strengthening trust in law enforcement requires that the community be included in the work we do as prosecutors. With Justice 2020, the Brooklyn DA's office will have a level of community involvement that is far more robust than has existed previously in Brooklyn or in any other jurisdiction. Communities must be part of any determination of what public safety and justice require, not only in theory, but also in ways that impact the daily practice of the DA's office.

The recommendations of Justice 2020, taken together, represent an enormous culture shift for the Brooklyn DA's office, one that DA Gonzalez is eager to undertake. Successful implementation will require dedication to training and ongoing engagement with ADAs about the decisions they make at every stage of a case.

Finally, a progressive prosecutor's office must value transparency and accountability. The publication of this plan represents a down payment on DA Gonzalez's promise to increase the transparency of his office. He intends to be held accountable by the residents of Brooklyn for the implementation of this plan, and to report out regularly to the public on the work of the office.

Justice 2020 is an exciting new effort that, when fully implemented, will make the Brooklyn DA's office a national model of what a progressive prosecutor's office can be.

Launch Committee

70+

Members of the
Launch Committee

The Justice 2020 Launch Committee included more than 70 people: community members, criminal justice reform experts and advocates, faith leaders, formerly incarcerated people, and the NYPD. Divided into a dozen sub-committees who met over nearly six months, these individuals collectively created the plan you see here.

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Sub-committees

By listening to the people of Brooklyn—youth and seniors, victims and justice-involved people, those with multi-generational Brooklyn roots and those newly arrived—and by scouring the nation for new ideas and best practices, the Committee analyzed hundreds of ideas and prioritized a handful of recommendations that they believe will best realize the Justice 2020 vision.

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Months of planning

Alongside this planning process, the DA's own team looked at internal practices and laid the groundwork for implementation of innovative new ideas. Some of the Justice 2020 recommendations are already underway. And before this plan was released, the DA instructed the leaders of his office to develop plans for the rest.

This is not merely a report. It is an action plan.

The following policy initiatives are described in the plan. Success requires commitment from the DA's entire staff, partners in government and the community, and all of the residents of Brooklyn.

Reduce incarceration— make jail the “alternative”

Change the office culture so that ADAs consider non-jail resolutions at every juncture of a case.

Offer pre-plea alternatives for all drug possession charges and reduce barriers to participation in alternative programs.

Seal or expunge marijuana convictions.

Consider recommending parole when the minimum sentence is complete.

Engage communities as partners in justice

Empower community residents and leaders through neighborhood safety partnerships, to give those most impacted by the criminal justice system a say in how laws are enforced.

Partner with neighborhood organizations and service providers to create and expand community-based justice options to reduce incarceration and criminal convictions.

Reduce prosecution of school-based offenses and divert youth from the criminal justice system.

Develop protocols for charges resulting from police misconduct to improve accountability and transparency.

Focus resources on the drivers of crime

Identify high-risk individuals early and explore early interventions to deter violent behavior.

Interrupt gun violence and gang affiliation by working with community groups to intervene after a gang takedown.

Enhance prosecution of cases of gender-based violence, including acquaintance rape and sexual assault cases.

Create a single point of contact for hate crime charges.

Invest in the DA's people and data to drive the mission of Justice 2020

Establish a transformation office and data/analytics team to drive metrics, best practices, and reform.

Train all staff in cultural competency.

Realign staffing so that each case is the responsibility of a single ADA (vertical prosecution).

Promote accountability by establishing an office of professional responsibility and ethics.

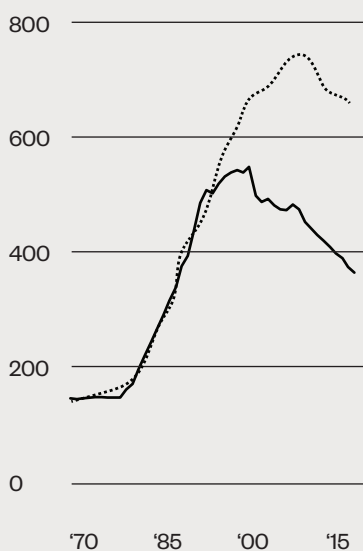
Streamline case handling and enhance fairness and transparency with e-discovery.

Reduce Incarceration – Make Jail the “Alternative”

The DA's office should consistently seek to resolve cases through community-based interventions — which need not always include a criminal justice sanction—making incarceration and conviction options of last resort.

Fig. 1 Incarceration rate
1970–2016 (per 100,000
Residents)

--- United States
— New York



Historically, our justice system has over-relied on incarceration as the default response to those convicted of crimes. Through the 1980s and 1990s, the rate of incarceration of New Yorkers nearly quadrupled. While we have since made progress, the justice system still relies too frequently on incarceration as the only means to hold people accountable for criminal behavior.

Overincarceration disproportionately affects people and communities of color. The disparities affect not only the individuals but also the families of those arrested—their children, siblings, and parents, as well as their communities. This erodes community trust in the justice system and makes us all less safe.

Prison can be appropriate for dangerous individuals who engage in predatory behavior or pose a threat to public safety. However, we also know that, in many cases, there are better ways to hold people accountable than locking them up. We also know that having a criminal conviction can create barriers to education and employment—the very things that can be most helpful in reducing someone's likelihood of continuing to engage in criminal behavior. The vision of Justice 2020 is for every ADA in every case to first seek out non-conviction, non-jail resolutions, and to think through all the available options before reaching a determination that a conviction or incarceration is necessary.

Another decision point for ADAs is whether to ask a judge to set bail on a case at the first court date (as of this writing, the New York state Legislature is considering changes to the state's bail law). The Brooklyn DA's office already sends a smaller percentage of people to Riker's Island (where pre-trial detainees are held) than any other DA's office in the city. In 2017 DA Gonzalez changed the Office's bail policy in misdemeanor cases, requiring ADAs to state their reasons for asking for bail rather than consent to a person's release. In the past, it was the default position to ask for bail and ADAs would have to justify when they did not ask for bail.

As a result of this change, the number of people being held in on bail pre-trial in Brooklyn has declined 58%, with a 43% decline in 2018 alone.

Cases of drug possession present another opportunity for new and creative thinking and approaches—especially when faced with a serious health crisis like the current opioid overdose epidemic. Overdose has eclipsed deaths by all other accidental causes combined. Every six hours, someone dies of a drug overdose in New York City.

Traditional criminal justice approaches to opioid misuse and overdose cannot solve the problem; we cannot arrest or jail our way out of it. Drug misuse is more appropriately treated as a health issue rather than as a criminal issue.

In the past, people who were arrested with a small amount of narcotics were criminalized for their drug use, frequently ending up with a criminal record, even if they never went to jail. The underlying issues related to drug misuse were not addressed. The risk of overdose was not diminished.

✓ 58%

Decline in number
of people being
held on bail pre-trial
in Brooklyn misdemeanors
since change in bail policy

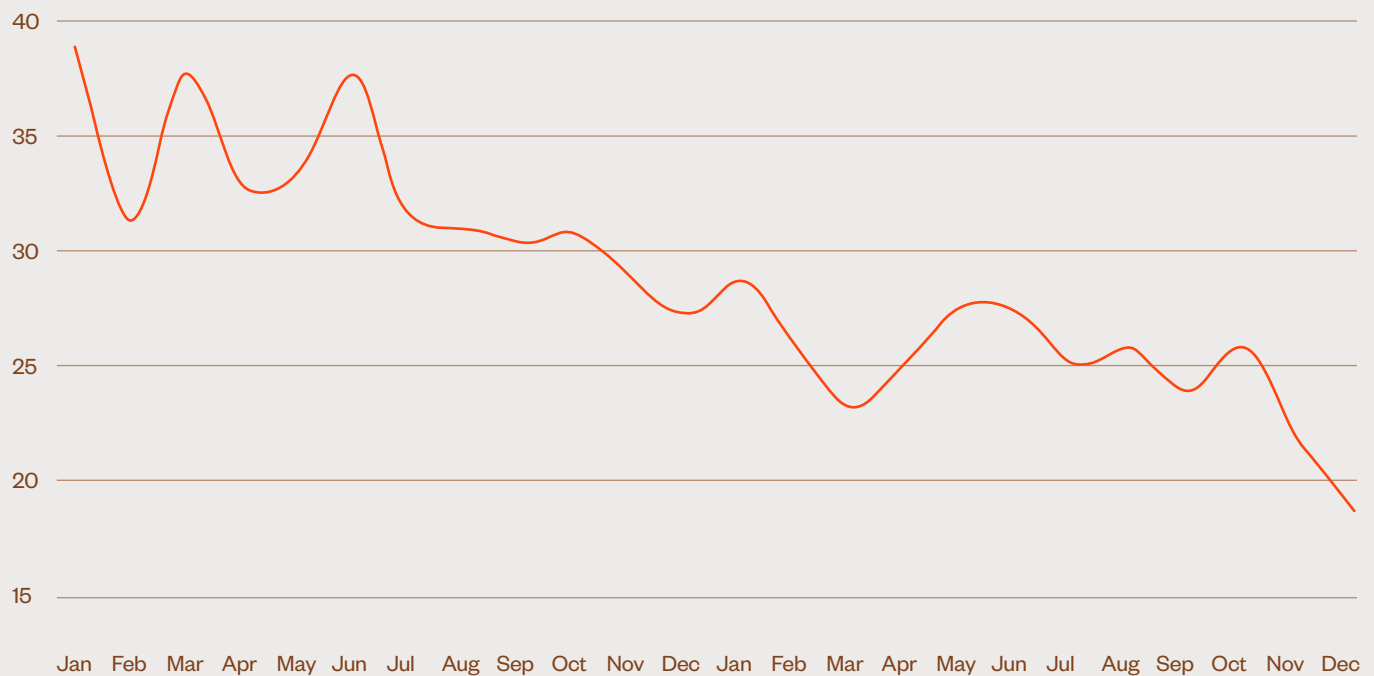
✓ 43%

2018 alone

In the spring of 2018, the Brooklyn DA's office began the Collaborative Legal Engagement Assistance Response (CLEAR) program, which takes people who are arrested for small amounts of drugs out of the criminal justice system before a charge is brought and directs them to treatment or other services. Successful engagement with the CLEAR program results in the case being dismissed so the person never winds up in court or with a criminal record. Every person who comes through the program gets trained in overdose prevention.

These new policies are a start. The Committee recommends that the DA move even more forcefully to reduce convictions and incarceration. New guidelines, training, and mindset are needed to sustain these reforms.

Fig. 2 / Average Daily Admissions to NYC jails from Brooklyn, 2017–2018



Action Plan

“I don’t believe punishment is the most important purpose of our criminal justice system. People must be held accountable for their actions when they hurt someone else, but accountability can take many forms.”

Eric Gonzalez, Brooklyn District Attorney

Change the Office culture so that ADAs consider non-jail resolutions at every juncture of a case.

The Committee recommends creating a new presumption within the Office, making community-based responses the default and incarceration the “alternative.”

143,000

Warrants vacated
by the DA in a single
day as part of the
Begin Again policy

Policies like Begin Again, in which the DA vacated more than 143,000 warrants in Brooklyn in a single day, are just a start.

The Office should develop new guidelines across the stages of a case. Pre-arraignment, the DA may decline to prosecute certain charges through diversion programs, or even with no intervention at all. Before trial, instead of detention, ADAs should consider consenting to supervised release in a larger number of cases, including some felonies. Instead of incarceration, ADAs should favor the least restrictive sentences and rely on community-based interventions whenever possible.

Equally important as the policies will be the values, mindset, and training for ADAs, in short, the office culture. Instead of viewing themselves as case processors, with convictions as the main measure of success, prosecutors should think about what they’re trying to achieve and why.

All prosecutors should participate in ongoing training, including hearing from people most impacted by the criminal justice system, to better understand the effects their decisions have on individuals, families, and communities. This is, of course, in addition to hearing the perspectives of victims of crimes. Hearing directly from the people they are sworn to serve will help ADAs appreciate their priorities and understand how to talk about alternatives to incarceration, including in their conversations with victims.

Offer pre-plea alternatives for all drug possession charges, and reduce barriers to participation.

The Brooklyn Treatment Court already offers court-monitored substance-abuse treatment as an alternative to incarceration. If a person successfully completes the program, charges will be dismissed. In the past, however, the program required an individual to plead guilty before beginning treatment, and the program could last up to 24 months. People who were unable to remain abstinent were set up for failure, and substantial percentages of them ended up going to prison because of their drug use.

Recognizing the difficulty of overcoming substance abuse, the Committee recommends that the DA employ a harm reduction approach, seeking outcomes that can help put someone on the path to stability, while ending the practice of incarcerating people who are unable to achieve complete abstinence from substance use.

By referring defendants to treatment and other services pre-plea, the DA should prioritize community accountability over court monitoring. By providing people with services and activities that help stabilize them, and making requirements less onerous, the DA can encourage more successful completion of these programs.

Seal or expunge past marijuana convictions.

A marijuana conviction on a person's record can limit opportunities for employment, education, housing and other needs throughout their lifetime. These burdens have disproportionately fallen on young men of color, who make up the vast majority of those arrested for marijuana possession. The Brooklyn District Attorney's office no longer prosecutes most possession cases, and possession of marijuana is now legal in eight states and the District of Columbia, with more states, including New York, likely to join them.

Under these circumstances, fairness and justice require that the DA make every effort to scrub the records of people who currently have convictions for an offense that would not be prosecuted today. The Committee recommends that the DA set up a system for vacating and sealing past marijuana convictions, as well as clearing any outstanding warrants for these offenses.

Consider recommending parole when the minimum sentence is complete.

In the past, the Brooklyn DA's office, like most prosecutor's offices, presumptively opposed early release in nearly every case. In keeping with the vision of Justice 2020, the Committee recommends that the DA consider the purpose of continued confinement and support early release in appropriate cases. In making these determinations, the DA should consider the nature of the crime, the original sentence, the perspective of the victim, and the record of the convicted person while incarcerated, including any opportunities they have taken to acknowledge and make amends for the harm they caused.

Impact and Success

The paradigm shift of these actions will enhance safety and fairness while reducing the use and impact of confinement and criminal conviction. Moreover, we will see greater community trust in the criminal justice system because criminal justice responses will be more proportionate, effective, appropriate to victims and community, and meaningful to defendants.

Communities most affected by crime, violence, and incarceration urgently want solutions that meet the interlocking demands of fairness and safety while improving the relationship between law enforcement and the people they serve. These values are reflected in the vision of Justice 2020.

Engage Communities as Partners in Justice

Law enforcement must work hand-in-hand with community members and leaders to enhance public safety and build trust. Decision-making by prosecutors should be grounded in the needs and values of the community's definition of safety and justice for their neighborhoods. In partnership with the community, prosecutors can reduce crime and strengthen community trust.

Historic inequities and longstanding policies and practices have resulted in the overcriminalization of communities of color: people of color are more likely to be arrested, prosecuted, and incarcerated than their white peers, even when committing similar offenses. These disparities are often worse for the young. The disparate and more punitive treatment of people of color undermines public confidence in law enforcement and in the larger criminal justice system.

Community input and engagement is at the heart of Justice 2020. As the DA seeks to reduce the impact of past practices and overincarceration in communities of color while maintaining his commitment to public safety, the Office must partner with the communities to determine what safety and justice require. As the DA seeks to rely less on incarceration and refer more cases to community-based programs, he must work with the community to develop new systems of accountability for behavior that causes harm. The voices of victims of crime must always be

heard, and we must recognize that someone accused of a crime today can become a victim of crime tomorrow, and vice versa.

Many people who commit violent crime have been victims of violence themselves. To break the cycle of discriminatory and inequitable practices and the cycle of violence, the DA should promote accountability and healing by working to repair the harm, while also working to address the underlying conditions that give rise to violence in our communities.

Diversion programs should be in the community whenever possible—at schools, churches, and nonprofits, so that the full resources of the community can help rebuild the lives of people who are at risk. The DA must continue to work with the Police Department to make sure that no one who poses a danger to others or to themselves is allowed to fall through the cracks of our system.

Community-based alternatives can be especially important for immigrants, for whom a minor arrest could lead to deportation or other disproportionate consequences.

Justice 2020 creates a framework to engage and empower community participation in setting the priorities and the policy of the Brooklyn DA's office. Every policy should be consistent with the community's needs and definitions of safety. By working with communities, particularly those most affected by the criminal justice system, the DA can enhance safety, reduce crime, and strengthen community trust.

Action Plan

“I am eager to actively engage with the people most impacted by the criminal justice system in thinking and problem-solving about what safety and justice require in their communities.”

Eric Gonzalez, Brooklyn District Attorney

Empower community residents and leaders through neighborhood safety partnerships

Together with the DA, community members can co-create systems of accountability that avoid convictions and incarceration, which too often has been the default response for both misdemeanors and felonies.

The Committee recommends that the DA work with community members to establish affinity groups around neighborhood, identity, and expertise. The DA should turn to these groups to help define safety, equity, and wellness, which the Office can then translate into policies and practices. The DA should develop metrics to ensure the implementation as well as the efficacy of these community-driven practices.

Partner with community-based organizations and service providers to expand community justice options to reduce incarceration and criminal convictions.

Implementing the Justice 2020 vision will require sufficient capacity of high-quality, community-based programs that are available at every juncture of a case. The Committee recommends that the DA work with the community and NYPD to expand pre-arrest diversion, precinct-based diversion, and pre-arraignment diversion.

Community-based sentences can offer a criminal justice response that holds individuals accountable without relying on a conviction, jail, or prison. In this vein, let us reframe our language from “alternatives to incarceration” to community justice. With existing and new partners, the DA can identify more community-based, family-focused services, as well as create new programs, when necessary, to address unmet needs.

Community members can help define these programs, deliver them, and track their outcomes.

Reduce prosecution of school-based offenses and divert youth from the criminal justice system

70%

Cases resolved in
young adult court with
no criminal record

Young people are developmentally different from older adults. Normal adolescent behavior should be treated as such, with the opportunity to get back on track and avoid the devastating, lifelong consequences of a criminal record. Since 2016, young people between the ages of 16 and 24 accused of a misdemeanor have gone through Young Adult Court, which offers age-specific services such as anger management, substance-abuse therapy, and internships (as a result of recent legislation, most cases involving 16 and 17 year-olds will be sent to Family Court).

Building on this success, the Committee recommends that the DA find new ways to divert misdemeanor and non-violent felony arrests pre-filing. A key part of this should be a partnership with the NYC Department of Education, so that school-based offenses can be dealt with in ways that allow young people to take responsibility for their actions, make amends to the people

they've harmed, and avoid prosecution entirely—a process known as “restorative justice.”

To ensure that all young people are treated fairly and consistently across the borough and to seek the minimal possible justice system response, the DA should consolidate all adolescent, youth, and young adult practices into one unit in the DA's office.

Develop protocols for charges resulting from police misconduct to improve accountability and transparency

Faith in law enforcement is a pillar of trust in the justice system. Misconduct must be taken seriously and handled transparently. No one is above the law.

The Committee recommends that the DA develop protocols to ensure independent investigations with no special treatment for police officers suspected of misconduct. Improved data and analytics can enable the office to identify patterns of misconduct.

The DA must be committed to transparency at every stage of the process and should develop protocols for informing family members and the public in these cases.

Impact and success

Community-based responses to crime have the potential to reduce incarceration, minimize the long-term negative impact of incarceration on individuals, families, and communities, improve safety and accountability through community partnership, and strengthen trust in the justice system.

Focus Resources on the Drivers of Crime

Brooklyn has experienced dramatic reductions in shootings during the past two decades. Still, Brooklyn accounts for the highest number of shootings in the city. Evidence shows that the population of shooters is a relatively small group of individuals who can to some extent be identified and tracked, and that interrupting the cycles of violence and retaliation requires creative solutions.

Additionally, gender-based crimes of violence continue to be under-reported and difficult to prosecute. Justice requires that perpetrators of these crimes be held accountable, which may require enhanced investigation techniques.

Thanks to the strict gun laws in New York, it is more difficult here than in other parts of the country for someone to stockpile weapons. The NYPD and Brooklyn DA work together diligently to disrupt the trafficking of illegal guns. But there remain a steady number of shootings, often gang-related, and we must continue to be laser-focused on identifying and incapacitating the drivers of crime. Public safety usually requires that these individuals be convicted and imprisoned. But interrupting cycles of violence, preventing future shootings, and deterring those not yet fully

drawn into gang activity and violent behavior require us to use other tools, and to try and address the underlying causes of violent behavior.

In recent years, increased reliance on data and analytics have enabled police forces to be much more precise in their efforts to prevent gun violence. This increased precision has allowed us to drive down shootings and homicides while at the same time reducing the numbers of people stopped and frisked by the police.

Thanks to an increasing level of inter-agency coordination, law enforcement has become more effective at identifying and prosecuting gang leaders. As gang leaders are prosecuted, the DA should partner with communities to engage those who are likely to be next in line to assume control of the gangs and work to direct them to better outcomes.

Additionally, the data analysis methods that are increasingly used in the prosecution of gang activity, weapons trafficking, and organized crime can be employed against gender-based violence—connecting accomplices in drug-rape cases, tracking defendants’ activity on the dark web, or identifying locations where more than one victim has reported a sexual assault. These enhanced techniques will increase the DA’s ability to hold sexual predators accountable.

Hate crimes strike at the heart of a community, sending a message that because of who we are, we are not safe. The DA’s stated commitment to ensuring the safety of all communities, especially those that are the most vulnerable, means that hate crimes should continue to receive the office’s focused attention.

Action Plan

“Evidence tells us that there is a very small number of individuals who are responsible for the vast majority of violent crimes. This is where our focus should be.”

Eric Gonzalez, Brooklyn District Attorney

Identify high-risk individuals early and explore early interventions to deter violent behavior.

As the science of violence prevention has developed, it has become increasingly clear that a very small subset of people commits premeditated violence, and that these individuals have a wide array of risk factors, among which are: trauma and mental health issues, poverty and lack of economic opportunity, low educational attainment, and poor housing conditions.

The Committee recommends that the DA work with communities to identify such individuals early and refer them to appropriate community-based services. By doing so, the DA can interrupt cycles of violence and achieve better outcomes for both the individuals and the community.

Interrupt gun violence and gang affiliation by intervening after a gang takedown.

When the DA collaborates with other law enforcement agencies on a large-scale enforcement action in which high-level gang members are arrested, these prosecutions often result in a vacuum in gang leadership.

To prevent other young people from continuing the cycle of gun violence, the DA should work with community partners and others to reach out and provide other options. Providing targeted, community-based services will help the community heal and take steps to prevent future gang violence.

Enhance prosecution of cases of gender-based violence, including acquaintance rape and sexual assault cases.

Perpetrators target victims they know in almost all sexual assaults. Yet in many jurisdictions, due to various factors, including difficulties in making the cases, acquaintance rapes are less likely to be investigated thoroughly than stranger rapes.

To deal most effectively with these cases, the Committee recommends that the DA apply enhanced evidence gathering techniques early on in sexual assault cases, including acquaintance cases. The labor-intensive nature of sexual assault prosecutions makes it essential to ensure that the Special Victims Bureau is fully resourced.

The DA should adopt innovative strategies for prosecuting drug-facilitated and alcohol-facilitated sexual assault, consulting toxicologists and drug recognition experts, using hair testing and other technologies as appropriate, and investigating online behavior.

We can only achieve the best outcomes for survivors when prosecutors include them in the handling of their cases. Keeping survivors informed about the status of their cases, regularly consulting them, and taking into account their views about case dispositions can help establish a dynamic that is victim-centered and promotes their recovery.

Create a single point of contact for hate crime charges.

The Committee recommends that a senior member of the DA's staff be designated to assist police officers in determining whether a criminal offense is a hate crime and to serve as a contact for the community.

The Hate Crimes Unit should include multi-lingual and diverse staff with ongoing culturally-specific trainings and ongoing connections to vulnerable populations including Brooklyn's religious, immigrant, and LGBTQ communities.

The elevated rate of homicides against transgender and gender non-conforming individuals requires the DA's focused attention, and that starts by recognizing them as hate crimes.

Impact and success

These policies will increase public safety by interrupting the cycle of gun violence, by ensuring that deserving individuals are held accountable, and by sending a deterrence message to offenders and the community.

The DA's support of vulnerable individuals such as survivors of sexual assault and hate crimes will increase trust in the DA's office and encourage other survivors to come forward to report crimes.

Invest in the DA's People and Data to Drive Innovation and Reform

Achieving the vision of Justice 2020 involves dramatic changes in the way the DA's office does its work. To achieve this, new tools are needed to train staff, track progress, measure success and increase transparency.

Pursuing the dramatic reorientation of Justice 2020 will require more than policy directives, memoranda, and guidance from leadership. This reorientation requires the transformation of the DA's office, which in itself must be executed by the people within it. Supporting and carrying out the vision of Justice 2020 will require new systems of data, training and accountability, and may also necessitate re-allocating resources to ensure that they are in alignment with the Office's new vision.

The performance measures of nearly every local prosecutor's office in the country are limited to gross measures of punishment, including dismissals and trial convictions. By establishing goals that encourage alternatives to prosecution rather than more punitive responses, and rewarding ADAs who meet these goals, the culture of the DA's office will continue to change in line with the vision of Justice 2020.

The DA should develop new metrics, aligned with the goals of Justice 2020, to measure the work of both individual ADAs and the Office as whole.

External reporting facilitates a culture of transparency throughout the Office. Since few prosecutors' offices produce data reports, external reporting will demonstrate the reform leadership of Justice 2020 and strengthen community trust.

Action Plan

**“A progressive, 21st century
prosecutor’s office must
be innovative, data driven
and transparent.”**

Eric Gonzalez, Brooklyn District Attorney

Establish a transformation office and data/analytics team to drive metrics, best practices, and reform.

To help overcome bureaucratic inertia and understandable fear of change, the Committee recommends that the DA create a new executive role dedicated to planning, designing, and overseeing the Justice 2020 changes called for in this plan. The new team should have the analytics capabilities needed to support the rest of the Office in implementing and monitoring the plan.

The DA should work with experts to develop a new performance measurement and management system to track progress toward key goals and enable him to hold his staff accountable for advancing them. This system should be directly tied to the goals and objectives of the Justice 2020 plan and should include regular public reports.

As an early effort, the Committee recommends that the transformation office complete an office-wide data diagnostic: current data and collection methods, data systems, data integration and sharing, and how staff use data for policy analysis and to improve practice.

38%

Brooklyn residents born
in another country

Train all staff in cultural competency

Given the diversity of Brooklyn, prosecutors need to understand the special needs and cultures of those they serve. The Committee recommends that the DA train all staff in cultural competency, and that the training include both traditional and experiential components. For example, an instructor could share the basics of mental health: symptoms of mental illness displayed during interactions with police or in court; the relationship (or lack

thereof) between mental illness and crime or violence; and evidence-based supports for reducing crime and aiding recovery.

Roundtable discussions could enable community members to engage with prosecutors about their cultures and how they want to be treated and spoken to. Conducted by community members, these forums can holistically address issues regarding religious practices, gender, language barriers, family dynamics, and communities' interactions with law enforcement.

47%

Brooklyn residents who speak a language other than English at home

Realign staffing so that each case is the responsibility of a single ADA (vertical prosecution).

The Committee believes that procedural justice for both victims and defendants—as well as community trust in the criminal justice system—would be enhanced by ADAs having more familiarity with the facts of each case they handle.

The Committee therefore recommends that the DA assign one prosecutor to handle each case from inception through disposition or trial, a structure known as “vertical prosecution.”

In implementing this approach, the DA should consider whether cases should be assigned in the complaint room, arraignment or some other point. It will be important to balance case load, area of expertise, and other factors.

Promote accountability by establishing an office of professional responsibility and ethics.

The Committee recommends that the DA establish a full-time, permanent ethics position. This person should be tasked with designing an Office of Professional Responsibility.

The OPR should work to incentivize ethical practices throughout the lifecycle of a case, serve as a confidential contact for internal and external complaints, offer case-specific support, and ensure that all prosecutors participate in ethics training.

Streamline case handling and enhance fairness and transparency with e-discovery.

Open and early discovery, already in practice in Brooklyn, is enhanced in many other jurisdictions by internet technology. The Committee recommends that the DA work with the Police Department to bring discovery materials online and implement a program of electronic discovery. Implementing such a program will require the DA to put into place safeguards against potential misuse or mishandling of discovery materials, including guarding against witness intimidation and protecting the safety of witnesses and victims.

Impact and Success

These actions will increase community trust by improving ADAs' ability to advocate effectively on behalf of victims and witnesses from the diverse communities of Brooklyn. Increasing the efficiency of the Office's practice will result in greater procedural justice for both victims and people accused of crime and reduce the risk of wrongful convictions. Improved data systems will allow the Office to track progress toward the goals of Justice 2020 and increase transparency and accountability with the public.

Conclusion

Justice 2020 represents a commitment on the part of Brooklyn District Attorney Eric Gonzalez to fundamentally change how his office does its work, in ways that are meant to decrease incarceration and increase the trust of Brooklynites in their District Attorney's office. The successful implantation of this plan will lead to safer and healthier neighborhoods in Brooklyn and create a national model for reform that can be adopted by other DA's offices in New York City and State, and around the country.

Implementing the Plan

An Action Plan
for Brooklyn

The Justice 2020 Launch Committee included community leaders and criminal justice reform experts, service providers, prosecutors and defense attorneys, representatives from the NYPD, and formerly incarcerated people.

194

Brooklyn DA staff
members serving
on Justice 2020
implementation
committees

The Committee worked over several months to analyze best practices nationally, understand the specific needs and views of Brooklyn communities, research different approaches to implementation, and produce the recommendations which have now been incorporated into this plan. These recommendations were then handed off to DA Gonzalez and his staff for implementation.

Senior staff from the DA's office are individually responsible for each action item in this plan. Milestones will be closely monitored by the transformation office, the senior staff, and personally by the DA.

The release of this plan to the public represents a down payment on the DA's commitment to transparency, accountability, and community engagement. Going forward, the DA will report progress on this plan annually.

DA Gonzalez welcomes feedback on the plan. To submit feedback, go to **justice2020@brooklynda.org**

Acknowledgments

An Action Plan
for Brooklyn

The District Attorney expresses his deep appreciation to every person who contributed to this plan.

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ARTICLES

TOWARD A RADICAL IMAGINATION OF LAW

AMNA A. AKBAR*

In this Article, I consider the contemporary law reform project of a radical social movement seeking to transform the state: specifically, that of the Movement for Black Lives as articulated in its policy platform “A Vision for Black Lives: Policy Demands for Black Power, Freedom, and Justice.” The Movement for Black Lives is the leading example of a contemporary racial justice movement with an intersectional politics including feminist and anti-capitalist commitments. The visions of such radical social movements offer an alternative epistemology for understanding and addressing structural inequality. By studying not only the critiques offered by radical social movements, but also their visions for transformative change, the edges of law scholarship can be expanded, a deeper set of critiques and a longer set of histories—of colonialism and settler colonialism, the Atlantic slave trade and mass incarceration—centered, and a bolder project of transformation forwarded. These visions should push legal scholars toward a broader frame for understanding how law, the market, and the state co-produce intersectional structural inequality, and toward agendas that focus not on building the power of law and the police, but on building the power of marginalized communities and transforming the state. This shift would invigorate the social movement’s literature and bring new energy to scholarship on substantive areas of law, from criminal and immigration law to property and contract law.

To illustrate the creative potential of studying radical social movements, this Article contrasts the Vision for Black Lives with the Department of Justice’s (DOJ) Ferguson and Baltimore reports. The Vision and the DOJ reports offer alternate conceptualizations of the problem of policing and the appropriate approach to law

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reform. Reflective of liberal law reform projects on police, the DOJ reports identify policing as a fundamental tool of law and order that serves the collective interests of society, and locate the problems of police in their failure to adhere to constitutional law. As a corrective, the DOJ reports advocate for investing more resources in police: more trainings, better supervision, community policing. In contrast, the Vision identifies policing as a historical and violent force in Black communities underpinning a system of racial capitalism and limiting the possibilities of Black life. Law is central to the shape and legitimization of this racialized violence and inequality. As such, policing as we now know it cannot be fixed. Thus, the Vision’s reimagination of policing—rooted in Black history and Black intellectual traditions—transforms mainstream approaches to reform. In forwarding a decarceral agenda rooted in an abolitionist imagination, the Vision demands shrinking the large footprint of policing, surveillance, and incarceration and shifting resources into housing, health care, jobs, and schools. The Vision focuses on building power in Black communities and transforming the relationship between state, market, and society. In so doing, the movement offers transformative, affirmative visions for change designed to address the structures of inequality—something legal scholarship has lacked for far too long.

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INTRODUCTION

James Hayes sat on a stool amid a semi-circle of desks inside a law school classroom. I’d first met Hayes at an Ohio vigil for Mike Brown during the Ferguson uprising.¹ At the time, he was organizing with the Ohio Student Association. I came to know him as a radical intellectual, an inspired local racial justice organizer, and a national voice in the Black Lives Matter ecosystem. On the streets and in

¹ I choose the terms “rebellion” and “uprising” over the term “riot” deliberately, as the term riot suggests chaos, and the terms rebellion and uprising suggest political resistance to political problems. JAMES AND GRACE LEE BOGGS, *REVOLUTION AND EVOLUTION IN THE TWENTIETH CENTURY* 16–17 (1974) (explaining that a rebellion “represents ‘standing up,’ the assertion of their humanity on the part of the oppressed . . . inform[ing] both the oppressed and everybody else that a situation has become intolerable”); Juliet Hooker, *Black Lives Matter and the Paradoxes of U.S. Black Politics: From Democratic Sacrifice to Democratic Repair*, 44 *POL. THEORY* 448, 449 (2016) (contrasting “unlawful ‘riots’” with “justified ‘uprisings’”).

meetings, he was easy to spot: always in the middle of the action in his red-hooded sweatshirt, skinny pants, and goatee.

Around the same time, I had begun teaching a law and social movements seminar. We studied the Black Panthers and Young Lords, Len Holt, Assata Shakur, and Ella Baker. I worried my students found the questions faced by these movements to be abstract and far-away. I wanted them to understand that contemporary movements struggled with questions similar to those in the texts we labored over. That's how an organizer found himself surrounded by future lawyers. Hayes, along with his comrades in the contemporary Black liberation and immigrant justice movements, confronted many of the same strategic and tactical choices every day. As I had hoped, his presence transformed our conversation.

Our intellectual distance from the texts vanished, and our lively conversation ended with a question: What is the proper role of lawyers within the movement? After a short pause, Hayes praised the technical chops and procedural expertise lawyers bring to the table. But that is not enough, he said. "Most lawyers see a problem and think, 'How can I fix this law?'" This view is too narrow: it obscures the stakes and concedes to status quo arrangements. "The role of the law is to protect the state," Hayes reasoned. "Lawyers must work with movements to imagine with us the kind of state we want to live in. Only from there can we work together to think about the laws we need."²

In conversations with intellectuals and organizers around the country, I realized the Movement for Black Lives (M4BL or Movement)³—the larger movement configuration in which the chapter-

² James Hayes, Visit to Law, Lawyers, and Social Movements Seminar, Moritz College of Law, The Ohio State University (Feb. 3, 2016).

³ When I capitalize "Movement" I am referring to M4BL; when I lowercase "movement" I am referring to the many movement formations that emerged as described in Part I. M4BL is made up of sixty-plus organizations, including Black Lives Matter, the now well-known chapter-based organization that many partially credit with launching the movement with the hashtag #BlackLivesMatter. See Alicia Garza, *Foreword* in WHO DO YOU SERVE, WHO DO YOU PROTECT?, at vii, ix (Maya Schenwar et al. eds., 2016) (discussing the origin of the #BlackLivesMatter organizing network); *About Us*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/about/> (last visited Jan. 1, 2018) [hereinafter MOVEMENT FOR BLACK LIVES, *About Us*] (listing the organizations that came together to articulate the Vision for Black Lives and endorsing organizations); BLACK LIVES MATTER, <http://blacklivesmatter.com/> (last visited Jan. 1, 2018) (providing a map with chapter locations throughout the United States); Alicia Garza, *A Herstory of the #BlackLivesMatter Movement*, FEMINIST WIRE (Oct. 7, 2014), <http://www.thefeministwire.com/2014/10/blacklivesmatter-2/> (explaining that Patrisse Cullors, Opal Tometi, and Alicia Garza authored the hashtag in the wake of George Zimmerman's acquittal for the murder of Trayvon Martin, and later founded the Black Lives Matter network).

based Black Lives Matter network functions—was having a far richer and more imaginative conversation about law reform than lawyers and law faculty. The Movement for Black Lives was situating their critique in Black history and intellectual traditions, and their imagination of alternate futures in Black freedom movements. Their critique was more expansive at the same time as it was more grounded, and their imagination more radical.⁴

Legal scholars often assume the movement's fight is over policing: indictments for police killings, independent prosecutors to investigate police shootings, better training and supervision for police, more diverse police forces, and so on.⁵ But, as Hayes suggested, the most imaginative voices within contemporary racial justice movements are fighting for much more than body cameras and police convictions.⁶

The movement is focused on shifting power into Black and other marginalized communities;⁷ shrinking the space of governance now reserved for policing, surveillance, and mass incarceration; and fundamentally transforming the relationship among state, market, and society.⁸ Movement actors have made policy proposals and engaged in law reform campaigns at the same time they have prominently contested law and politics as usual.⁹ In the few years after Ferguson police

⁴ On the duality, see Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 333 (1987) (discussing how “combining deep criticism of law with an aspirational vision of law is part of the experience of people of color”).

⁵ Indeed, organizations and individuals functioning in the movement ecosystem have pushed for such reforms. See, e.g., TERRANCE LANEY & JANAÉ BONSU, BLACK YOUTH PROJECT 100 (BYP100), AGENDA TO KEEP US SAFE 13–14 (2014), <http://agendatobuildblackfutures.org/wp-content/uploads/2016/01/BYP100-Agenda-to-Keep-Us-Safe-AKTUS.pdf> [hereinafter BYP100, AGENDA TO KEEP US SAFE] (suggesting, without taking an ultimate position on body cameras, best practices for those police departments who adopt body camera programs).

⁶ Marbre Stahly-Butts, Deputy Director of Racial Justice, Ctr. for Popular Democracy, Remarks at the New York University Review of Law & Social Change Symposium: Beyond “Criminal Justice Reform”: Conversations on Police and Prison Abolition (Oct. 14, 2016), <https://www.youtube.com/watch?v=GT-lqw6ON2k> (discussing how movement actors challenged her, as a lawyer, to think beyond the usual reforms and to come up with policy demands that advance the ultimate goal of abolishing the police).

⁷ See, e.g., *End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/end-war-on-black-people/> (last visited Jan. 1, 2018) [hereinafter MOVEMENT FOR BLACK LIVES, *End the War on Black People*] (explaining that the Ban the Box campaign was reaching for “the larger goal . . . [of] get[ting] people with criminal records to exercise their self-determination to become organized and active in the fight against mass criminalization”).

⁸ See *id.*; *Platform*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform/> (last visited Jan. 14, 2018) [hereinafter MOVEMENT FOR BLACK LIVES, *Platform*].

⁹ Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 358 (2015) [hereinafter Akbar, *Law's Exposure*].

officer Darren Wilson's killing of Michael Brown, there were shut-downs of bridges and highways; die-ins at courthouses and state-houses; occupations of police stations, police unions, and universities; arrests and curfews; tear gas and riot gear.¹⁰ But the movement's high-profile campaigns have not been waged by lawyers or via litigation.¹¹ Indeed, the movement has largely refrained from fighting to strengthen preexisting rights or demanding legal recognition of new ones.¹² The focus is not on investing even-handedness to law or the police, not on restoring criminal justice to some imaginary constitutional or pre-raced status quo, and not on increasing resources for community policing.¹³ But it would be wrong to think the movement has given up on law. The movement is not attempting to operate outside of law, but rather to reimagine its possibilities within a broader attempt to reimagine the state. Law is fundamental to what movement actors are fighting against and for.¹⁴

To illustrate how the movement approach reorients traditional criminal law reform conversations, I examine the 2016 policy platform of the Movement for Black Lives, "A Vision for Black Lives: Policy Demands for Black Power, Freedom, and Justice" (the Vision).¹⁵ I put the Vision in conversation with the Ferguson and Baltimore reports by

¹⁰ *Id.* at 358. Such tactics have also been deployed by undocumented immigrant justice organizers. See, e.g., Michael May, *Los Infiltradores*, AM. PROSPECT (June 21, 2013), <http://prospect.org/article/los-infiltradores>.

¹¹ Lawyers have launched litigation campaigns on the criminalization of race and poverty, feeding on and building energy around the movement's campaigns. Much of this work has focused on challenging money bail. The work of ArchCity Defenders, the Civil Advocacy Clinic of St. Louis University School of Law, Equal Justice Under Law, and Civil Rights Corps, has been most visible. See, e.g., Complaint, O'Donnell v. Harris County, No. 4:16-cv-01414 (S.D. Tex. May 19, 2016) (class action); Complaint, Powell v. City of St. Ann, No. 15-cv-00840 (E.D. Mo. May 27, 2015) (class action); Complaint, Pierce v. City of Velda City, 4:15-cv-00570 (E.D. Mo. Apr. 2, 2015) (class action); Complaint, Fant v. City of Ferguson, No. 4:15-cv-00253 (E.D. Mo. Feb. 8, 2015) (class action); Complaint, Jenkins v. City of Jennings, No. 4:15-cv-00252-CEJ (E.D. Mo. Feb. 8, 2015) (class action); Complaint, Templeton v. Dotson, No. 4:14-cv-02019-CEJ (E.D. Mo. Dec. 8, 2014); see also Complaint, Color of Change v. U.S. Dep't of Homeland Sec., No. 1:16-cv-08215-WHP (S.D.N.Y. Oct. 20, 2016) (FOIA suit for declaratory and injunctive relief seeking records of government surveillance of movement activity); Shaila Dewan, *Court by Court, Lawyers Fight Policies That Fall Heavily on the Poor*, N.Y. TIMES (Oct. 23, 2015), https://www.nytimes.com/2015/10/24/us/court-by-court-lawyers-fight-practices-that-punish-the-poor.html?_r=0; Press Release, Civil Rights Corps, Statement of Civil Rights Corps on Decision Declaring Harris County, Texas, Money Bail System Unconstitutional (May 2, 2017).

¹² For further discussion, see *infra* Parts II and III.

¹³ Akbar, *Law's Exposure*, *supra* note 9, at 357–60 (explaining in brief the movement's critiques of law and the state); see also *infra* Parts II and III.

¹⁴ On the impossibility of operating outside the law, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

¹⁵ MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8.

the Department of Justice¹⁶—which represent more traditional liberal approaches to criminal law reform. The Vision and the DOJ reports offer some of the most damning critiques of policing in recent memory, but differ fundamentally in their analysis and conclusions. The contrast reflects the limitations of liberal law reform at the same time that it opens up a more imaginative set of possibilities about reorganizing the very structure of our society. By studying the convergences and divergences between these texts, this Article highlights how radical social movements reimagine the very same social problems with which significant bodies of legal scholarship engage.

The Vision and DOJ reports offer alternate conceptualizations of the problem of policing and the appropriate approach to law reform. Reflective of liberal law reform projects on police, the DOJ reports identify policing as a fundamental tool of law and order that serves the collective interests of society, and locate the problems of police in a failure to adhere to constitutional law. As a corrective, the DOJ reports advocate for investing more resources in police: more trainings, better supervision, community policing. In contrast, the Vision identifies policing as a historical and violent force in Black communities, underpinning a system of racial capitalism and limiting the possibilities of Black life. As such, policing as we now know it cannot be fixed. Thus, the Vision's reimagination of policing—rooted in Black history and Black intellectual traditions—transforms mainstream approaches to reform. In forwarding a decarceral agenda rooted in an abolitionist imagination, the Vision demands shrinking the large footprint of policing, surveillance, and incarceration, and shifting resources into social programs in Black communities: housing, health care, jobs, and schools. The Vision focuses on building power in Black communities, and fundamentally transforming the relationships among state, market, and society. In so doing, the movement offers transformative, affirmative visions for change designed to address the structures of inequality—something legal scholarship has lacked for far too long.

The DOJ reports document the problems endemic to policing. While presenting a critical view of Ferguson's and Baltimore's police departments, the reports are committed to the legal status quo, to a mode of governance that relies on criminal law enforcement to deal with a broad set of deep-seated social problems, and to rules and authorities that are historically and functionally oppressive. As a

¹⁶ U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016) [hereinafter DOJ BALTIMORE REPORT]; U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter DOJ FERGUSON REPORT].

result, the reports double down on traditional reforms that reinvest in law and police.¹⁷ This approach cedes more legitimacy—not to mention more resources—to the police and the legal frameworks in which they operate without a meaningful consideration of alternatives.

Of course, the reports emerge from a particular time and social location: a prosecutorial agency, the Civil Rights Division, embedded within the executive branch during the Obama administration.¹⁸ As with any social location, there are possibilities, pressures, and constraints on what the DOJ may say or do as a law enforcement agency under a particular administration. But framed in a different understanding, accountable to different constituencies, the DOJ could have taken an approach to reform more aligned with the Vision, suggesting a realignment of resources from policing to the underlying social problems stemming from structural inequality in Ferguson and Baltimore. The additional importance of the DOJ reports lies in how they reflect how legal institutions—and, in turn, law scholarship—approach long-standing structural problems while firmly committed to the status quo and restoring legitimacy thereto. In this way, the DOJ reports expose a central dilemma of liberal law reform projects, caught between a commitment to the rule of law and status quo arrangements on the one hand, and the desire for substantive justice and social, economic, and political transformation on the other.¹⁹

¹⁷ For another example, see PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015).

¹⁸ Central to the work of courts and other legal institutions is, in essence, a performance of their own legitimacy and authority, and, in turn, that of the law. See Inés Valdez, Mat Coleman & Amna Akbar, *Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement*, 21 CITIZENSHIP STUD. 547 (2017) (emphasizing the “legally generative aspects” of “paralegal” law enforcement practices in the context of immigration enforcement). This is one likely reason why courts go to great lengths to assume that law and policing are neutral and fair—why courts turn the other way from the inequality and violence in which law participates every day. See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 226–56 (1975) (accounting for why antislavery judges upheld the legal architecture of enslavement).

¹⁹ See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 514 (1976) (“The problem of unjust laws . . . is almost invariably a problem of distribution of political and economic power.”); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013) (“[I]n the American criminal justice system . . . [p]rison is designed for [poor people]. This is the real crisis of indigent defense. *Gideon* obscures this reality, and in this sense stands in the way of the political mobilization that will be required to transform criminal justice.”); Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1887–88 (1981) (book review) [hereinafter Freeman, *Race and Class*] (stating that to avoid the “myths of liberal reform” and work towards more meaningful change one must “consider civil rights doctrine as immersed in social and historical reality”). For a foundational work putting the strong “myth of rights” in American political thinking in conversation with the “politics of rights” see STUART A. SCHEINGOLD, THE

But our political moment is defined by crisis and polarization, with insurgencies on the left and right calling for reform, transformation, and even revolution.²⁰ Amid the electoral triumph of Trump, protest and people-of-color-led anti-capitalist movements have surged in activity.²¹ These radical movements mark the revival of anti-capitalist racial justice politics in the United States in a way that we have not seen since the civil rights, Black power, and Chicano movements of the 1960s and 1970s. Contemporary racial justice movements are not simply arguing the state has created a fundamentally unequal criminal legal system. They are identifying policing, jail, and prison as the primary mode of governing Black, poor, and other communities of color in the United States, and pointing to law as the scaffolding. They are working to build another state—another world even—organized differently than the one we have inherited. They are aiming to use the law as a tool to build that alternative future. We can ignore their deep critiques and visionary alternatives, or we can embrace the possibilities of a more searching inquiry. This is a moment calling for a radical imagination, where the scale of deep critique is matched with a scale of grand vision.²²

While many progressive and left legal scholars reach for meaningful change, most of us lack alternative frameworks.²³ Like the DOJ reports, even when the scale of our critique is large, our visions for change are often too small. We have focused on a narrow picture of law and law reform while sidestepping questions about the structure of the society, the state, and the market. These movements make

POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 14–21 (Univ. of Mich. 2d ed. 2004) (1974).

²⁰ See SARAH JAFFE, *NECESSARY TROUBLE: AMERICANS IN REVOLT* (2016) (discussing the rise of the Tea Party, Occupy Wall Street, Black Lives Matter, and other grassroots networks).

²¹ On the ongoing relevance and vitality of the movement in the Trump era, see, for example, Aaron Morrison, *Exclusive: Black Lives Matter Issues a Statement on Trump's Election*, MIC (Nov. 15, 2016); Dani McClain, *Can Black Lives Matter Win in the Age of Trump?*, NATION (Sept. 19, 2017). Patrisse Cullors, one of the co-founders of Black Lives Matter, recently published a memoir, to great acclaim. PATRISSE KHAN-CULLORS, *WHEN THEY CALL YOU A TERRORIST: A BLACK LIVES MATTER MEMOIR* (2018); Lovia Gyarkye, *Arrested at 12, She's Now an Activist Fighting for Social Justice*, N.Y. TIMES (Feb. 15, 2018), <http://www.nytimes.com/2018/02/15/books/review/when-they-call-you-a-terrorist-patrisse-khan-cullors-memoir.html>.

²² For a definition of deep critique, see Sameer Ashar, *Deep Critique and Democratic Lawyering*, 104 CALIF. L. REV. 201, 217–19 (2016) (defining deep critique as “thinking beneath and beyond liberal legalist approaches to social problems”).

²³ See Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 12 (1983) (emphasizing the importance of the “system of meaning” that law imposes to justify its force). See generally ROBIN WEST, *NORMATIVE JURISPRUDENCE: AN INTRODUCTION* (2011) (calling for a rejuvenated commitment to normative jurisprudence and exploration of concepts of justice).

these questions central to their work.²⁴ They do not have it all worked out. But they are making powerful sketches of much-needed alternative frameworks.

Imagining with social movements seeking to transform the state would invest law scholarship in a project of reconstruction and transformation.²⁵ For radical racial justice movements, the primary commitment is not to law, its legitimacy, rationality, or stability: It is to people.²⁶ The motivations are to protest an enduring set of social structures rooted in European and settler colonialism and the Atlantic slave trade; to fight for transformative change, justice, and liberation; and to invest in a redistributive and transformative project, one demanding a more equal distribution of resources and life chances,²⁷ with a focus on the most intersectionally marginalized people.²⁸

²⁴ Indeed, framing is an important aspect of what movements do, and law is often an important, if conservative-making, frame. Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 892–96 (2013).

²⁵ Studying social movements or radical visions for change is not without precedent in law scholarship. There is a growing scholarship on social movements. See *infra* Part IV. There is also a rich body of work in critical legal scholarship, including critical legal studies, critical race theory, feminist legal scholarship, LatCrit, and ClassCrits. See, e.g., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (critical race theory); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE (1989) (feminist legal scholarship); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982) (critical legal studies).

²⁶ This is in contrapose to legal liberalism. See Matsuda, *supra* note 4, at 362 n.159 (defining legal liberalism as “both the ideology of liberalism (exemplified by individual rights, procedural fairness, equality and liberty) and the correlative commitment to legalism (an appeal to legal reasoning and the rule of law as somehow logical, coherent, determinant)”).

²⁷ See RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 28 (2007) (arguing that the state produces “group-differentiated vulnerabilities to premature death”); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 154–55 (2014) (arguing that Gilmore’s framework “forces us to evaluate the carceral state as adjudicator and perpetrator of racial violence”); see also ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 20–21 (2003) [hereinafter DAVIS, ARE PRISONS OBSOLETE?] (calling for transformation of “the social and economic conditions that track so many children from poor communities, and especially communities of color, into the juvenile system and then on to prison”).

²⁸ The accounts of the most marginalized are understood through the lens of Kimberlé Crenshaw’s intersectionality. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 150–52 (describing legal doctrine’s inability to account for Black women’s experiences as Black women); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (building out the concepts of “structural intersectionality,” “political intersectionality,” and “representational intersectionality”). For a longer intellectual history of intersectionality, see Brittney Cooper, *Intersectionality*, in THE OXFORD HANDBOOK OF FEMINIST THEORY (Lisa Disch & Mary Hawkesworth eds., 2015); KEEANGA-YAMAHTTA TAYLOR, HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE 1–14 (2017).

Imagining with social movements acknowledges how social change occurs beyond the courts. Social change happens on the streets and in formal and informal domains where power and legitimacy circulate. Most law scholarship is invested in centering rationality and reason as the terrain for decision-making, and courts, executives, and legislatures as the places where reform happens. Law scholarship generates a world that relies on law-making and enforcing bodies as the repositories of understanding law's functioning and meaning, and as the central targets for change.²⁹ The way to reform law, law scholarship suggests in form and substance, is to convince these legal institutions through superior argumentation and appeals to rationality. This comports with the predominant marketplace-of-ideas metaphor, which in turn borrows from capitalism's ideological commitments to the superiority of the market in producing optimal results: The best arguments will rise to the top. In this way, law scholarship minimizes the relationship between power and the ideas that govern;³⁰ erases how power circulates through and benefits from formal law-making and law-executing channels; and ignores the disconnect between legal institutions and the public, from which power and legitimacy should flow in a democratic society. Moreover, it is this framework that propels the law professor as a legitimate, free-standing expert. Imagining with social movements creates an alternative practice of contestation and solidarity, pointing to the different vectors through which ideas are formulated, and the terrain on and means through which they are fought over.³¹

The Article proceeds as follows. Part I provides a brief sketch of the Ferguson and Baltimore rebellions, the movements they spawned, and the DOJ reports they provoked. Part II explains how the Vision for Black Lives reorients violence and inequality as a constitutive

²⁹ See Valdez et al., *supra* note 18, at 550–53 (identifying the limited understanding of law's operations that emerge from legal text alone).

³⁰ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507–08 (2001) (suggesting that criminal law scholarship is at odds with how criminal law actually works, because it assumes lawmakers care about merits and that the better argument will win out).

³¹ There are a variety of theories of social change. See, e.g., SAUL D. ALINSKY, *RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS* (Vintage Books 1989) (1971) (arguing that social change happens through the long, consistent, and often less visible work of local community organizing); MARK ENGLER & PAUL ENGLER, *THIS IS AN UPRISING: HOW NONVIOLENT REVOLT IS SHAPING THE TWENTY-FIRST CENTURY* (2016) (arguing that social change happens through the combination of the slow hum of local organizing and large public mobilizations); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977) (arguing that social change happens when people pour into the streets to disrupt the daily life of the public).

aspect of policing that cannot be fixed through traditional approaches to law reform. First, the Vision expands the frame for police violence beyond criminal process, to the interlocking systems that propel and draw from anti-Black racism, and forwards a vision for addressing the material realities of Black communities, and building power therein. Second, the Vision centers how law and the police enact and sanction—now and in the past—concentrated violence and inequality in Black communities. Third, it forwards an account of police violence accounting for intersectional violence and inequality, with a focus on the enduring structures of racial capitalism. Part III shifts to the Vision's imaginative project, laying out its transformative, abolitionist ethic. The Vision seeks fundamental, structural reform that moves beyond constitutional rights, reconceiving the proper relationship between state, market, and society. Instead of striving to improve the police and criminal law, the Vision focuses on reducing its large social and fiscal footprint, and shifting resources elsewhere.³² While Parts II and III touch on how the Vision contributes to criminal law and critical legal scholarship, Part IV explains how radical social movement visions enrich the social movement's scholarship. Studying movement visions complicates our study of social movements, the social problems they address, the law, and the state; and invests us in a creative, imaginative project missing from law scholarship.

Before wading further into my argument that law scholars have much to learn from the Movement for Black Lives, a few notes are in order. Just like any political project, movements are complicated and messy, ever changing and full of contradictions. I've made a choice to focus on a particular movement formation—the Movement for Black Lives—and a particular articulation of its political project—as embodied in the Vision for Black Lives. While the Vision is the most comprehensive, collectively authored and widely endorsed articulation of movement demands, it is not the only articulation of movement demands, and it tells more than one story. In making my argument, I am grounded in the Vision's text at the same time that I am providing one read on the text. My read is not meant to be authoritative or final—it is my read, designed to pay homage to a brilliant political project, and to provoke study and conversation. There is

³² See, e.g., Rachel Herzing, *Big Dreams and Bold Steps Toward a Police-Free Future*, TRUTHOUT (Sept. 16, 2015), <http://www.truth-out.org/opinion/item/32813-big-dreams-and-bold-steps-toward-a-police-free-future> [hereinafter Herzing, *Big Dreams and Bold Steps*]; Rachel Herzing, *Let's Reduce, Not Reform, Policing in America*, OPEN SOCIETY FOUNDATIONS (Oct. 6, 2016), <https://www.opensocietyfoundations.org/voices/let-s-reduce-not-reform-policing-america> [hereinafter Herzing, *Let's Reduce, Not Reform, Policing in America*].

much more to say and to learn. The Vision's substantial feminist commitments, for example, go altogether underexplored here, as do the demands for economic justice or reparations, and much, much more.

As a non-Black woman of color, I approach this effort with love and respect for a long freedom struggle, in which I am implicated, but not centered.

I

THE PROBLEM OF POLICING

A. *The Rebellions*

The rebellions in Ferguson and Baltimore brought to the center of public discourse the violence that police, prosecutors, and the courts exercise in and against Black communities every day.³³ The rebellions, and the accompanying swell of Black-led organizing, forced hard-charging conversations about law, the police, and the state—routine conversations in communities of color that are relatively absent in legal scholarship³⁴—onto the national stage, changing the debate over race in the United States.³⁵ The rebellions posed a challenge to common conceptions of law and the police within legal

³³ See Gene Demby, *The Birth of a New Civil Rights Movement*, POLITICO (Dec. 31, 2014) (stating that broad national attention, in 2014, to a “new civil rights movement” “was due in large part to the work of a loose but increasingly coordinated network of millennial activists”); Trymaine Lee, *2014: The Year of Michael Brown*, MSNBC (Dec. 29, 2014, 2:09 PM), <http://www.msnbc.com/msnbc/2014-michael-brown-ferguson> (describing the “massive” response to recent killings of young, black men by police). For an argument that “racial policing [of Black people] is as much a structural repetition of American democracy as are capitalism and liberalism,” see Barnor Hesse, *White Sovereignty* (. . .), *Black Life Politics: “The N****r They Couldn’t Kill,”* 116 S. ATLANTIC Q. 581, 581 (2017).

³⁴ But see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (advocating that Black jurors vote to acquit Black nonviolent lawbreakers on the grounds of the structural anti-Black bias baked into the criminal system); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945 (1993) (charging the criminal system as a deliberate form of racial subordination for Blacks).

³⁵ See, e.g., *Developments in the Law: Policing (Introduction)*, 128 HARV. L. REV. 1706, 1707–13 (2015) (discussing the bounds of, and the actors involved in, the emerging conversation on policing that grew out of the protests responding to the non-prosecutions of the officers who killed Michael Brown and Eric Garner). On the divide, see TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 20–21 (2015); Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 381–84 (2015); see also Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1100 (2008) (proposing that the “two different Americas” concept extends beyond physical racial segregation to include “perceptual segregation”—the idea that “Black and white people tend to perceive allegations of racial discrimination through fundamentally different cognitive frameworks”).

institutions.³⁶ Courts, legislatures, and executives tend to assume that law and the state are designed to be fair, neutral, and just.³⁷ From within the ongoing waves of protest and organizing, Black communities framed violence as endemic to the state, and tolerance for it as a long-standing aspect of American law.³⁸

With roots in Occupy,³⁹ the movement began to form in response to George Zimmerman's killing in 2012 of 17-year-old Trayvon Martin in Sanford, Florida, and Zimmerman's 2013 acquittal.⁴⁰ A year later, in August 2014, Darren Wilson, a white police officer, killed 18-year-old Mike Brown in Ferguson, Missouri.⁴¹ The killing, the manner in which police handled Brown's body, and the militarized police response to protest, fueled the rebellion night after night, which in

³⁶ For an extraordinary take on the meaning of the rebellions and other protests by Black people, see Hooker, *supra* note 1. See also Barnor Hesse & Juliet Hooker, *Introduction: On Black Political Thought Inside Global Black Protest*, 116 S. ATLANTIC Q. 443, 448–51 (2017) (discussing how the Black Lives Matter protests and other global Black protest movements have exposed the “strategic limitations of formal modes of black politics”).

³⁷ See, e.g., Marianne Schnall, *My Exclusive Interview with Justice Sandra Day O'Connor*, HUFFINGTON POST (updated Dec. 6, 2017), https://www.huffingtonpost.com/marianne-schnall/exclusive-interview-with_b_188581.html (“The law provides necessary continuity amidst our constantly shifting political landscape. It is an assurance that the rules of the game apply equally to everybody, whether they are in today's or yesterday's majority.”).

³⁸ See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2100–17 (2017) (theorizing the estrangement and statelessness that Black communities experience in interactions with the police). Bell writes in counter-pose to the procedural justice literature. See, e.g., TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS, at xiv–xv (2002) (arguing that trust in the law is correlated with whether people view the law as procedurally just); see also Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 255–56 (2008) (concluding, on the basis of an empirical study, that perceptions of police legitimacy depend in part on lived experiences with police).

³⁹ *Asia Pacific Forum: Phillip Agnew on #BlackLivesMatter: From Dreams Deferred to Dream Defenders* (WBAI radio broadcast Dec. 29, 2014), http://www.asiapacificforum.org/show-detail.php?show_id=375 (explaining relationships between Occupy and racial justice organizing, including that one of the founders of Dream Defenders came out of Occupy). Occupy Wall Street was a protest movement without leaders, demands, or policy recommendations. Bernard E. Harcourt, *Political Disobedience*, in OCCUPY: THREE INQUIRIES IN DISOBEDIENCE 45 (2013). Occupy began September 17, 2011, in Zuccotti Park near Wall Street in New York City and spread all across the country from there. W.J.T. Mitchell, *Preface*, in OCCUPY: THREE INQUIRIES IN DISOBEDIENCE, *supra*, at vii, xi.

⁴⁰ Mychal Denzel Smith, *How Trayvon Martin's Death Launched a New Generation of Black Activism*, NATION (Aug. 27, 2014), <http://www.thenation.com/article/181404/how-trayvon-martins-death-launched-new-generation-black-activism>; see also CATHY J. COHEN, DEMOCRACY REMIXED (2010) (exploring the politics of young Black people in the United States).

⁴¹ Jake Halpern, *The Cop*, NEW YORKER (Aug. 10 & 17, 2015).

turn spread as protest across the country.⁴² The protests continued after the prosecutor's unusual handling of the grand jury, resulting in no indictment.⁴³

Then, less than six months later, in 2015, Baltimore police officers shackled 25-year-old Freddie Gray to the floor of a police van after a foot chase through his Black working-poor neighborhood.⁴⁴ Gray arrived at the police station unresponsive, having suffered severe spinal cord injuries.⁴⁵ A week later, Gray died. His death and burial—and the related police response—provoked uprisings throughout Baltimore.⁴⁶ The State's Attorney precipitously announced criminal charges against all six police officers.⁴⁷ In the end, none of the officers were found guilty of any crimes.⁴⁸

B. *The Reports*

Like the 1960s' rebellions in Watts and Detroit provoked by police violence and economic inequality,⁴⁹ the Ferguson and Baltimore rebellions brought attention to systematic police violence, creating a crisis of confidence in American criminal justice and

⁴² Jay Caspian Kang, "Our Demand Is Simple: Stop Killing Us," N.Y. TIMES (May 4, 2015), <http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html>.

⁴³ See *The Results Are in: An Open Letter from Protestors on the Grand Jury Decision*, SCRIBD (Nov. 24, 2014), <http://www.scribd.com/doc/248115932/The-Results-Are-in-Open-Letter-11-24-14>.

⁴⁴ Peter Hermann & John Woodrow Cox, *A Freddie Gray Primer: Who Was He, How Did He Die, Why Is There So Much Anger?*, WASH. POST (April 28, 2015), <https://www.washingtonpost.com/news/local/wp/2015/04/28/a-freddie-gray-primer-who-was-he-how-did-he-why-is-there-so-much-anger/>; see Anjali Kamat, *The Baltimore Uprising*, in *POLICING THE PLANET* 73, 74–76 (Jordan T. Camp & Christina Heatherton eds., 2016); see also Robin D.G. Kelley, *Thug Nation: On State Violence and Disposability*, in *POLICING THE PLANET*, *supra*, at 15, 18.

⁴⁵ Hermann & Cox, *supra* note 44.

⁴⁶ Kamat, *supra* note 44, at 75–76.

⁴⁷ Alan Blinder & Richard Pérez-Peña, *Six Baltimore Police Officers Charged in Freddie Gray Death*, N.Y. TIMES (May 1, 2015), <https://www.nytimes.com/2015/05/02/us/freddie-gray-autopsy-report-given-to-baltimore-prosecutors.html>.

⁴⁸ Wil S. Hylton, *Baltimore vs. Marilyn Mosby*, N.Y. TIMES MAG. (Sept. 26, 2016).

⁴⁹ For the Kerner Commission report's discussion of the rebellion in Detroit, see NAT'L CRIMINAL JUSTICE REFERENCE SERV., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 47–61 (1968). For the McCone Commission's report on the rebellion in Watts, see GOVERNOR'S COMM'N ON THE L.A. RIOTS, VIOLENCE IN THE CITY—AN END OR A BEGINNING? (1965). See also Adam Serwer, *Eighty Years of Fergusons*, BUZZFEED (Aug. 25, 2014, 6:32 PM), <http://www.buzzfeed.com/adamserwer/eighty-years-of-fergusons#.kmGOvV79a5> (noting that Ferguson police responded to the protest "with rubber bullets, pellets filled with pepper spray, wooden slugs, and tear gas" and concluding that "[e]ven if no one was thinking about Watts, or Detroit, or Birmingham, those nights long past were present").

beyond.⁵⁰ While the Department of Justice refused to bring civil rights charges against the police involved in the killings of Mike Brown and Freddie Gray,⁵¹ the Civil Rights Division launched pattern and practice investigations of each city's police department.⁵² The resultant reports document the targeting of African Americans by police as a systematic practice that overrode constitutional restraints on police power in two very different cities.⁵³ Both reports are punctuated by stories of police violence and discretion.⁵⁴

Both police departments treated poor Black residents, especially those living in predominantly Black areas, less responsively and with more impunity and brutality than wealthier, white residents.⁵⁵ Police disproportionately and without justification subjected Black residents to stops, searches, and arrests.⁵⁶ Use of force was essentially reserved for African Americans—including women, young people, and those

⁵⁰ In response, President Obama issued an Executive Order limiting the military's sharing of equipment with police departments. Eyder Peralta, *Obama to Limit Police Acquisition of Some Military-Style Equipment*, NPR (May 18, 2015, 6:21 PM), <http://www.npr.org/sections/l-way/2015/05/18/4076114redd/obama-to-limit-police-acquisition-of-some-military-style-equipment>. Many localities adopted body cameras and set up commissions studying criminal law reform. See Mya Frazier, *A Camera on Every Cop*, HARPER'S MAG. (Aug. 2015), https://harpers.org/wp-content/uploads/2015/08/HA062_06650-2.png (discussing the LAPD's purchase of cameras after the Ferguson rebellions).

⁵¹ U.S. DEP'T OF JUSTICE, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 4 (2015) [hereinafter DOJ REPORT ON THE SHOOTING DEATH OF MICHAEL BROWN]; Press Release, Dep't of Justice, Office of Pub. Affairs, Federal Officials Decline Prosecution in the Death of Freddie Gray (Sept. 12, 2017), <https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray>.

⁵² DOJ BALTIMORE REPORT, *supra* note 16, at 3; DOJ FERGUSON REPORT, *supra* note 16, at 1. For accountings of pattern and practice investigations see Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1458–66 (2016) (noting that sometimes “federal investigations work . . . to reduce police violence and improve community perceptions of police” but “[t]hey are expensive and the benefits may be only short term”); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014) (examining federal enforcement of 42 U.S.C. § 14141).

⁵³ DOJ BALTIMORE REPORT, *supra* note 16, at 3; DOJ FERGUSON REPORT, *supra* note 16, at 1–6.

⁵⁴ E.g., DOJ BALTIMORE REPORT, *supra* note 16, at 34 (describing Baltimore officers publicly strip searching a Black man after searching his car without cause or consent, finding no contraband, and pocketing \$500 of his cash); DOJ FERGUSON REPORT, *supra* note 16, at 29–30 (describing Ferguson police tasing a Black woman in county jail for refusing to remove her bracelets).

⁵⁵ DOJ BALTIMORE REPORT, *supra* note 16, at 4–5, 7–8; DOJ FERGUSON REPORT, *supra* note 16, at 4–6.

⁵⁶ DOJ BALTIMORE REPORT, *supra* note 16, at 5–8, 47–62; DOJ FERGUSON REPORT, *supra* note 16, at 4–5, 62–67.

living with mental health conditions.⁵⁷ Frisks were often excessive by constitutional standards, with Baltimore police conducting “degrading strip searches in public” without cause.⁵⁸ Police levied the charges invested with the most discretion—failure to comply, manner of walking, disorderly conduct, trespassing, making a false statement to an officer—almost exclusively against African Americans.⁵⁹ Police regularly arrested city residents for lawful protest, recording police, and talking back or requests to officers to explain their conduct.⁶⁰ These racially-biased policing practices sowed distrust among city residents of police.⁶¹ The DOJ attributed all of this violence and disproportionate treatment to racial bias.⁶²

Moreover, the DOJ identified the fundamental relationship among wealth, poverty, and criminalization to these constitutional violations in both police departments. At the direction of the city, Ferguson’s police and courts extracted money from poor Black residents, padding the municipal budget.⁶³ The police saw African Americans not “as constituents to be protected” but as “potential offenders and sources of revenue.”⁶⁴ In Baltimore, a 1990s turn to zero-tolerance policing drove stops, searches, arrests, and uses of force “even for minor offenses and with minimal or no suspicion.”⁶⁵ While the DOJ does not explicitly frame zero-tolerance as targeting people based on class, it documents the focus of all this police activity

⁵⁷ DOJ BALTIMORE REPORT, *supra* note 16, at 7–9, 80–87; DOJ FERGUSON REPORT, *supra* note 16, at 5, 35–41.

⁵⁸ DOJ BALTIMORE REPORT, *supra* note 16, at 6, 30–34.

⁵⁹ DOJ FERGUSON REPORT, *supra* note 16, at 4, 19–22 (“[F]rom 2011 to 2013, African Americans accounted for 95% of Manner of Walking in Roadway charges, and 94% of all Failure to Comply charges.”); *see* DOJ BALTIMORE REPORT, *supra* note 16, at 7–8 (noting that failure to obey, trespassing, making a false statement to an officer, and disorderly conduct are used disproportionately against African Americans).

⁶⁰ Officers rely on a “belief that arrest is an appropriate response to disrespect” and “a police culture that relies on . . . police power . . . to stifle unwelcome criticism.” DOJ FERGUSON REPORT, *supra* note 16, at 2–3, 24–28; *see also* DOJ BALTIMORE REPORT, *supra* note 16, at 3, 9, 116–21.

⁶¹ DOJ BALTIMORE REPORT, *supra* note 16, at 62–63; DOJ FERGUSON REPORT, *supra* note 16, at 79–81.

⁶² *E.g.*, DOJ BALTIMORE REPORT, *supra* note 16, at 47–62; DOJ FERGUSON REPORT, *supra* note 16, at 62–79.

⁶³ DOJ FERGUSON REPORT, *supra* note 16, at 2, 3, 9–15, 42–62.

⁶⁴ *Id.* at 2.

⁶⁵ DOJ BALTIMORE REPORT, *supra* note 16, at 5–6. On this general turn, *see* DAVID GRAEBER, *THE UTOPIA OF RULES: ON TECHNOLOGY, STUPIDITY, AND THE SECRET JOYS OF BUREAUCRACY* 73 (2015) (“[Police] spend most of their time enforcing all those endless rules and regulations about who can buy or smoke or sell or build or eat or drink what where.”); David Graeber, *Ferguson and the Criminalization of American Life*, GAWKER (Mar. 19, 2015), <http://gawker.com/ferguson-and-the-criminalization-of-american-life-1692392051> (noting that ninety percent of police time “is spent dealing with infractions of various administrative codes and regulations”).

on Baltimore's poorest Black neighborhoods.⁶⁶ Equally important, the DOJ recognized historic government-sponsored discrimination in the form of segregation and redlining as relevant to the shape of contemporary policing in Baltimore.⁶⁷

The Ferguson report includes a whole section on reforms,⁶⁸ while the Baltimore report is scant on suggestions.⁶⁹ But both reports converge on a range of standard fare criminal law reform proposals, including: increasing community policing and transparency, changing priorities from revenue generation to community protection, updating use of force policies and trainings, improving ways of relating to young people, reducing racial bias, and developing better avenues to respond to allegations of misconduct.⁷⁰

II

RADICAL REORIENTATIONS

All the while, the movement continued to grow. In July 2015, two thousand people met in Cleveland for a national gathering of Black organizers: The Movement for Black Lives was born.⁷¹ After a year-long process undertaken by the M4BL Policy Table, the Movement released a policy platform in August 2016, drafted by a range of Black-led organizations both new and long-standing.⁷² The Vision is

⁶⁶ DOJ BALTIMORE REPORT, *supra* note 16, at 6–7, 26 (noting that stops were concentrated geographically “in two small, predominantly African-American districts that contain only 11 percent of the City’s population” such that “hundreds of individuals—nearly all of them African American—were stopped on at least 10 separate occasions from 2010–2015”).

⁶⁷ *Id.* at 12–15.

⁶⁸ DOJ FERGUSON REPORT, *supra* note 16, at 90–102.

⁶⁹ Many sections end with gestures toward possible remedies. *E.g.*, DOJ BALTIMORE REPORT, *supra* note 16, at 87 (“BPD needs to provide detailed and comprehensive policy guidance and training for interactions involving juveniles, and to hold officers accountable if they fail to abide by their training and guidelines.”).

⁷⁰ *See id.* at 87, 128–62; DOJ FERGUSON REPORT, *supra* note 16, at 90–96 (police), 97–102 (municipal court).

⁷¹ MOVEMENT FOR BLACK LIVES, *About Us*, *supra* note 3; Deva Woodly, *Black Lives Matter: The Politics of Race and Movement in the 21st Century*, PUB. SEMINAR (Jan. 18, 2016), <http://www.publicseminar.org/2016/01/black-lives-matter-the-politics-of-race-and-movement-in-the-21st-century/>. For more on the movement, see ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT* (2016); CHRISTOPHER J. LEBRON, *THE MAKING OF BLACK LIVES MATTER: A BRIEF HISTORY OF AN IDEA* (2017); KEEANGA YAMAHTTA-TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* (2016).

⁷² MOVEMENT FOR BLACK LIVES, *About Us*, *supra* note 3. The Vision received considerable media coverage. *See, e.g.*, Yamiche Alcindor, *Black Lives Matter Coalition Makes Demands as Campaign Heats Up*, N.Y. TIMES (Aug. 1, 2016); McWhirter et al., *Black Lives Matter Ponders Its Next Steps*, WALL STREET J. (Aug. 15, 2016), <http://www.wsj.com/articles/black-lives-matter-ponders-its-next-steps-1471303289/>; Vann R. Newkirk II, *The Permanence of Black Lives Matter*, ATLANTIC (Aug. 3, 2016).

credited to almost 50 organizations—including Black Lives Matter (BLM), Black Youth Project 100 (BYP100), Black Alliance for Just Immigration (BAJI), Dream Defenders, Blackbird, the National Conference of Black Lawyers (NCBL), and Southerners On New Ground (SONG)—and endorsed by almost 500 additional organizations.⁷³ While there have been other policy proposals and demands,⁷⁴ the Vision is the most comprehensive, collectively authored, and widely endorsed articulation of movement demands.⁷⁵

⁷³ MOVEMENT FOR BLACK LIVES, *About Us*, *supra* note 3; *Endorsing Organizations*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/more-endorsers> (last visited Jan. 2, 2018).

⁷⁴ For other sets of demands, see, for example, CAMPAIGN ZERO, <http://www.joincampaignzero.org/#vision> (last visited Jan. 2, 2018) (proposing policy solutions to end police killings of civilians, including community oversight, demilitarization, independent investigation and prosecution of police misconduct, and body cameras, among others); *Demands*, FERGUSON ACTION, <http://fergusonaction.com/demands> (last visited Jan. 2, 2018) (calling for justice for Michael Brown, listing demands such as decent housing for all, an end to the school-to-prison pipeline, and freedom from mass incarceration, and calling for actions such as Department of Justice review of police departments and the adoption of legislation addressing racial justice issues); *Demands*, WE THE PROTESTERS (Feb. 2, 2015), <http://www.thedemands.org/nationaldemands/> (providing an interactive map that lists the national and local demands of protestors across the country).

⁷⁵ Of course, there are precursors. See Jordan T. Camp & Christina Heatherton, *Asset Stripping and Broken Windows Policing on LA's Skid Row: An Interview with Becky Dennison and Pete White*, in *POLICING THE PLANET*, *supra* note 44, at 141, 149 (organizing on Skid Row against the Safer Cities initiative “creat[ed] a body of knowledge [that] has actually helped seed the field for some of the #BlackLivesMatter movement”). Other sources include two major policy reports by Black Youth Project 100, Trayvon’s Law from the Dream Defenders, detailed reports by the African American Policy Forum, books and reports by the Los Angeles-based Youth Justice Coalition and Los Angeles Community Action Network on policing and gentrification, and a recently edited volume authored by a cross-section of movement actors and intellectuals on policing. BLACK YOUTH PROJECT 100 (BYP100), *AGENDA TO BUILD BLACK FUTURES* 18–21 (2016) [hereinafter *BYP100*, *AGENDA TO BUILD BLACK FUTURES*] (forwarding a police agenda including reparations and the adoption of a workers’ bill of rights); *BYP100, AGENDA TO KEEP US SAFE*, *supra* note 5 (advocating for a slate of policy changes, including decriminalization, demilitarization of the police, increased community accountability of law enforcement, and an end to the war on drugs); KIMBERLÉ WILLIAMS CRENSHAW, with PRISCILLA OCEN & JYOTI NANDA, *BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED, AND UNDERPROTECTED* (2015) (describing the gendered and raced consequences of harsh school disciplinary policies on girls of color); KIMBERLÉ WILLIAMS CRENSHAW & ANDREA J. RITCHIE, with Rachel Anspach, Rachel Gilmer & Luke Harris, *AFRICAN AM. POLICY FORUM & CTR. FOR INTERSECTIONALITY & SOC. POLICY STUDIES, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN* (2015) (arguing that attention to police violence against Black women has been largely absent from recent mass-protest and documenting the police violence Black women face); *DOWNTOWN BLUES: A SKID ROW READER* (Christina Heatherton ed., 2011) (exploring the struggles against displacement and misrepresentation on Skid Row); *FREEDOM NOW! STRUGGLES FOR THE HUMAN RIGHT TO HOUSING IN LOS ANGELES AND BEYOND* (Jordan T. Camp & Christina Heatherton eds., 2012) (documenting organizing for housing as a human right); *POLICING THE PLANET*, *supra* note 44 (tracing the global spread of broken windows policing and the resistance thereto); *WHO DO YOU SERVE, WHO DO YOU PROTECT?*, *supra* note 3

In remarkable ways, the DOJ's articulation of the problem with the Ferguson and Baltimore police departments is convergent with accounts of police violence that emerge from the Vision—more so than most accounts by courts, legislatures, or agencies.⁷⁶ The DOJ reports document with acuity deep problems in the Ferguson and Baltimore police departments, in cities that have struggled in this age of austerity.⁷⁷ The cross-cutting critiques include the police departments' violence and impunity in dealing with Black communities, especially poor, young, queer, trans, and otherwise intersectionally-vulnerable people.⁷⁸ These problems are described as wide reaching and top-down, historic and systematic, rather than limited to an individual bad officer or a particularly bad historical moment.⁷⁹ The reports make clear that law has not held police accountable to Black communities.⁸⁰ In some instances, the reports even rely on an inter-

(examining the purpose of police power and abolitionist organizing strategies); Dream Defenders, Dismantling the School-to-Prison Pipeline (unpublished fact sheet) (on file with author) (describing a proposed package of bills responding to the underlying realities that allowed George Zimmerman to kill Trayvon Martin); Dream Defenders, Florida's School-to-Prison Pipeline: A Statewide Crisis (unpublished fact sheet) (on file with author) (describing how Trayvon's Law would address the school-to-prison pipeline); Dream Defenders, The Problem with "Stand Your Ground" (unpublished fact sheet) (on file with author) (describing how Trayvon's Law would impact Florida's "Stand Your Ground" laws); Dream Defenders, Racial Profiling (unpublished fact sheet) (on file with author) (describing how Trayvon's Law would impact racial profiling by police); Youth Justice Coalition, Land Grab 1 (Mar. 2016) (unpublished manuscript) (on file with author) (documenting the role of gang injunctions in displacing poor people of color in Los Angeles); see also CTR. FOR POPULAR DEMOCRACY & POLICYLINK, BUILDING MOMENTUM FROM THE GROUND UP: A TOOLKIT FOR PROMOTING JUSTICE IN POLICING (2015) (discussing fifteen potential policy reforms "aimed at transforming the policies and practices of local law enforcement" and sharing information, resources, and precautions about the various reforms).

⁷⁶ Though the tone is arguably more righteous, the problems documented by the DOJ in Ferguson and Baltimore are consistent with other roughly contemporaneous DOJ investigations of police departments elsewhere. See, e.g., U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017) (documenting a pattern of unconstitutional police practices); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011) (same); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT (2014) (same). For another serious critique by a legal institution, see Judge Shira Scheindlin's decision finding the NYPD's stop and frisk program unconstitutional. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 658–67 (S.D.N.Y. 2013).

⁷⁷ DOJ BALTIMORE REPORT, *supra* note 16, at 4–5; DOJ FERGUSON REPORT, *supra* note 16, at 2.

⁷⁸ DOJ BALTIMORE REPORT, *supra* note 16, at 80–87, 123–24; DOJ FERGUSON REPORT, *supra* note 16, at 28.

⁷⁹ DOJ BALTIMORE REPORT, *supra* note 16, at 3–5, 12–19; DOJ FERGUSON REPORT, *supra* note 16, at 4–5, 76–77.

⁸⁰ See, e.g., DOJ BALTIMORE REPORT, *supra* note 16, at 47–73, 139–54; DOJ FERGUSON REPORT, *supra* note 16, at 73, 82–86.

sectional analysis of race, gender, and poverty.⁸¹ For example, the Baltimore report documented gender bias in how the BPD handled sexual assault cases, which officers do not investigate, “particularly for assaults involving women with additional vulnerabilities, such as those who are involved in the sex trade.”⁸² Even the reports’ framing of racially-biased policing as the cause of distrust among city residents for police is striking in view of the common narrative of miscommunication and misunderstanding as the source of problems in policing; the latter narrative strikes a morally-ambivalent pose, placing equal blame on the police and the policed for police violence, and thereby excusing police conduct or responsibility for the violence they enact in dispensing their public duties.⁸³

But in the end, the DOJ and the Vision depart in fundamental ways. In this Part, I lay out those differences as a way to understand how the Vision for Black Lives reorients more mainstream understandings of the problem of, and solutions to, racialized police violence. First, the Vision expands the frame beyond police violence, and even criminal justice institutions, to the interlocking set of current and historical systems that propel and draw from anti-Black racism. It emphasizes reforms that address the material realities of Black life, and that aim to build power in Black communities. Second, the Vision centers how, now and in the past, law and the police enact and sanction concentrated violence and inequality in Black communities. The Movement centralizes racialized violence and inequality in its understanding of the law. Third, the Movement integrates its concerns with white supremacy (and patriarchy) with a critique of capitalism. Moving beyond bias, the Movement advances an understanding of American history and our contemporary reality with racial capitalism as the analytic lens for racial inequality.

The core disagreement between the DOJ and the Movement is over whether policing can be divorced from its entanglements with anti-Black racism. The Movement’s account of police violence shifts the point of reference from law’s legitimacy to the Black experience. The movement accepts and centers much of what critical race theory and feminist law scholarship have argued for: the voices, the experience, and the expertise of Black and other people of color, immigrants, women, LGBTQ, trans, and gender-nonconforming people.⁸⁴ In

⁸¹ See, e.g., DOJ BALTIMORE REPORT, *supra* note 16, at 9–10.

⁸² *Id.*

⁸³ See DOJ BALTIMORE REPORT, *supra* note 16, at 62–63; DOJ FERGUSON REPORT, *supra* note 16, at 79–81.

⁸⁴ See MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8; see also Stahly-Butts, *supra* note 6 (speaking on police and prison abolition).

other words, the movement strives to learn about inequality and violence from those who suffer their conditions and to develop a vision rooted in and committed to addressing those experiences. This is a political vision as much as it is an ethical commitment. The Vision consistently asks within its very text how its interventions impact the most marginalized Black people: “How does this solution address the specific needs of some of the most marginalized Black people?”⁸⁵ Many of the organizations and movement spaces emphasize that these spaces are constituted of, or led by, individuals who share the group identity on behalf of which the movement is mobilizing.⁸⁶ Black-only and Black-led spaces and organizations are the norm.⁸⁷ These interventions are meant to be important at a discursive and material level, recognizing how the voices we hear, what they say, and how they speak, constitute how we think, what we tolerate, and what we think is possible.⁸⁸ This, too, is about a vision to imagine expertise very differently than law scholarship, and yet another reason to imagine with social movements, and invest in their creative potential to transform the state.

Of course, the Vision is not *the voice* of Black people or of Black experience. Rather, the Vision, as an example of one voice rooted in Black intellectual traditions, reveals the narrow parameters of mainstream legal debates and points to how past and present movements have channeled the potent visions of marginalized communities to reorganize the world. The Vision is meant not simply to address the hemorrhaging brought about by police and state violence, but to imagine a world in which Black and other communities of color can thrive. But the depth of critique is matched by an audacity of transformative vision—one law scholars can and should learn from.⁸⁹

⁸⁵ See, e.g., MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7.

⁸⁶ This is reflected in the names of many organizations—take for example, Black Youth Project 100, Blackbird, Black Lives Matter, Black Alliance for Just Immigration, Black Organizing for Leadership and Dignity, and Blackout Collective.

⁸⁷ See, e.g., Julie Shaw, *BLM Philly: Black-Only Spaces Are a Gathering Place to ‘Organize, Heal,’* PHILA. INQUIRER (Apr. 5, 2017, 5:21 PM), <http://www.philly.com/philly/blogs/real-time/Breitbart-calls-out-Black-Lives-Matter-Philly-for-blacks-only-meetings.html> (describing the use of Black-only organizing spaces in Philadelphia).

⁸⁸ On radical visions, see, e.g., ROBIN D.G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* (2013); ERIK OLIN WRIGHT, *ENVISIONING REAL UTOPIAS* (2010).

⁸⁹ “Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming a phenomenology of law and defining the elements of justice.” Matsuda, *supra* note 4, at 324.

Despite its critique of law, the movement has not rejected reform. The Vision is a blueprint for precisely that.⁹⁰ The approach to reform, however, is rooted in a decarceral agenda rooted in an abolitionist imagination. Instead of striving to improve the police and criminal law, the Vision focuses on reducing its large social and fiscal footprint, and shifting resources—and therefore modes of governance—elsewhere.

A. Transformative Demands

The Vision explains the Movement's overarching goal: "a complete transformation of the current systems, which place profit over people and make it impossible for many of us to breathe."⁹¹ This long-term aspiration is grounded in the practical need to "address the immediate suffering of Black people."⁹² The Movement grounds itself in addressing the "material conditions" and "immediate suffering" of Black people.⁹³ This elevates the lived realities of people, and the concrete changes made therein, over changes in law itself.⁹⁴ Thus, the Vision includes policies that "while less transformational, are necessary to address the current material conditions of our people and will better equip us to win the world we demand and deserve."⁹⁵

To this end, the Movement makes six major demands: an end to the war on Black people;⁹⁶ reparations;⁹⁷ invest-divest;⁹⁸ economic

⁹⁰ Bernard Harcourt has framed Occupy, on the other hand, as "political disobedience" in its refusal to make policy demands: Occupy "disobeys not only our civil structure of laws and political institutions, but politics *writ large*." Harcourt, *supra* note 39.

⁹¹ MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8; see Minkah Makalani, *Black Lives Matter and the Limits of Formal Black Politics*, 116 S. ATLANTIC Q. 529, 532 (2017) (describing the Movement for Black Lives Policy Platform as "exceed[ing] the realm of possibility within established political norms").

⁹² MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8. This orientation echoes Erik Olin Wright's push for "real utopias." See WRIGHT, *supra* note 88, at 8 (espousing "plausible visions of radical alternatives, with firm theoretical foundations, [as] an important condition for emancipatory social change").

⁹³ *Id.*

⁹⁴ On the long-standing tension between commitments to legal equality and material realities, as experienced in the school desegregation litigation, see Bell, *supra* note 19. See also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that the *Brown* decision was in part the result of a brief moment of "interest-convergence" between Blacks and whites, but that today the interests of Blacks in quality education might be better served improving the quality of existing schools, regardless of whether those schools are integrated).

⁹⁵ MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8.

⁹⁶ "Since this country's inception there have been named and unnamed wars on our communities. We demand an end to the criminalization, incarceration, and killing of our people." MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7. The Vision's demands include an end to capital punishment, money bail, "the use of past criminal history to determine eligibility for housing, education, licenses, voting, loans,

justice;⁹⁹ community control;¹⁰⁰ and political power.¹⁰¹ Each of the

employment, and other services and needs”; an end to the war on Black immigrants, trans, queer, and gender-nonconforming people; an end to the mass surveillance of Black communities; and “the demilitarization of law enforcement . . . the privatization of police, prisons, jails, probation, parole, food, and all other criminal justice related services . . . [and] all jails, detention centers, youth facilities and prisons as we know them.” *Id.*; see also CTR. FOR POPULAR DEMOCRACY & POLICYLINK, *supra* note 75, at 4 (proposing policy reforms for ending mass criminalization).

⁹⁷ Reparations from “government, responsible corporations and other institutions that have profited off the harm they have inflicted on Black people—from colonialism to slavery through food and housing redlines, mass incarceration and surveillance.” *Reparations*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/reparations> (last visited Jan. 2, 2018) [hereinafter MOVEMENT FOR BLACK LIVES, *Reparations*]. The Vision demands reparations in the form of “a guaranteed minimum livable income for all Black people,” as well as “reparations focused on healing ongoing physical and mental trauma, and ensuring our access and control of food sources, housing and land”; “reparations for the systemic denial of access to high quality educational opportunities in the form of full and free access (including undocumented and currently and formerly incarcerated people) to lifetime education”; and “[r]eparations for the cultural and education exploitation, erasure, and extraction of our communities . . . and funding to support, build, preserve, and restore cultural assets and sacred sites to ensure recognition and honoring of our collective struggles and triumphs.” *Id.*; see also BYP100, AGENDA TO BUILD BLACK FUTURES, *supra* note 75, at 13 (advancing the need for reparations).

⁹⁸ “We demand investments in the education, health, and safety of Black people, instead of investments in the criminalizing, caging, and harming of Black people.” *Invest-Divest*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/invest-divest> (last visited Jan. 2, 2018) [hereinafter MOVEMENT FOR BLACK LIVES, *Invest-Divest*]. “We want investments in Black communities, determined by Black communities, and divestment from exploitative forces including prisons, fossil fuels, police, surveillance and exploitative corporations,” including a “reallocation of funds at the federal, state and local level from policing and incarceration . . . to long-term safety strategies such as education, local restorative justice services, and employment programs,” “retroactive decriminalization, immediate release and record expungement of all drug related offenses and prostitution, and reparations for . . . the ‘war on drugs’ and criminalization of prostitution.” “[r]eal, meaningful, and equitable universal health care,” a “constitutional right at the state and federal level to a fully-funded education,” and a “cut in military expenditures and a reallocation of those funds to invest in domestic infrastructure and community well-being.” *Id.*

⁹⁹ “We demand economic justice for all and a reconstruction of the economy to ensure Black communities have collective ownership, not merely access,” including “progressive restructuring of tax codes . . . to ensure a radical and sustainable redistribution of wealth” and “federal and state job programs [that provide a living wage and] that specifically target the most economically marginalized Black people . . . and encourage support for local workers centers, unions, and Black-owned businesses which are accountable to the community”; “[t]he right for workers to organize in public and private sectors especially in ‘On Demand Economy’ jobs”; restoration of “the Glass-Steagall Act to break up the large banks,” with policies to “allow for the continuation and creation of black banks, small and community development credit unions”; and worker protections for “domestic workers, farm workers, and tipped workers, and for workers—many of whom are Black women and incarcerated people—who have been exploited and remain unprotected.” *Economic Justice*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/economic-justice> (last visited Jan. 2, 2018) [hereinafter MOVEMENT FOR BLACK LIVES, *Economic Justice*].

¹⁰⁰ “We demand a world where those most impacted in our communities control the laws, institutions, and policies that are meant to serve us.” *Community Control*,

demands includes templates and suggestions for federal, state, and local action based on ongoing campaigns.¹⁰²

The Vision's six demands telegraph a broad view on the nature of police violence and the appropriate agenda for reform, with a deep and expansive focus on the centrality of anti-Black racism to the development and organization of the United States. The demands seek to transform the interlocking systems that make police violence possible; the demands straddle economic and racial justice, market and state, private and public.¹⁰³ They address current *and* historical structures of violence and inequality, and harm in individual and collective forms. The Vision unequivocally announces that ending routine police brutality and the killing of Black people cannot succeed on narrow terms of police reform. At the same time, it articulates a focus on the material realities of Black people, and a commitment to building power in Black communities as essential to redressing the violence and inequality that Black communities face.

MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/community-control> (last visited Jan. 2, 2018) [hereinafter MOVEMENT FOR BLACK LIVES, *Community Control*].

¹⁰¹ “We demand independent Black political power and Black self-determination in all areas of society. We envision a remaking of the current U.S. political system in order to create a real democracy where Black people and all marginalized people can effectively exercise full political power”; including “immediate release of all political prisoners”; “[p]ublic financing of elections and an end of money controlling politics through ending super PACs and unchecked corporate donations”; “full access, guarantees, and protections of the right to vote for all people . . . [including] enfranchisement of formerly and presently incarcerated people, local and state resident voting for undocumented people, and a ban on any disenfranchisement laws”; “[p]rotection and increased funding for Black institutions including Historically Black Colleges and Universities (HBCU’s).” *Political Power*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/political-power> (last visited Jan. 2, 2018) [hereinafter MOVEMENT FOR BLACK LIVES, *Political Power*]; see also BYP100, AGENDA TO KEEP US SAFE, *supra* note 5, at 9 (laying out policies to hold police accountable for the safety of Black communities).

¹⁰² The Movement for Black Lives has published thirty-two policy briefs and forty constituent demands. *Downloads*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/downloads/> (last visited Jan. 12, 2018) (providing briefs on topics discussed in the demands, each of which includes resources such as suggested state and federal law reforms and model legislation); MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8.

¹⁰³ MOVEMENT FOR BLACK LIVES, *About Us*, *supra* note 3. For more on this, see PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 277 (2000) (noting that “[a]n impressive array of U.S. social institutions lie[] at the heart of the structural domain of power” and are “organized to reproduce Black women’s subordination over time”); Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 222 (2012) (examining how the “shadow carceral state . . . operates in opaque, entangling ways, ensnaring an ever-larger share of the population through civil injunctions, legal financial obligations, and violations of administrative law” along with the accompanying “surveillance that comes with institutional enmeshment”).

To appreciate how the Vision expands the frame on policing and forwards solutions very different than those in the DOJ reports, consider four of the six demands directly related to the question of police violence: end the war on Black people, invest-divest, political power, and community control.¹⁰⁴

The first demand is to “end the war on Black people . . . the criminalization, incarceration, and killing of our people.”¹⁰⁵ The supporting policy briefs tie the war on Black people to police in a broad set of contexts.¹⁰⁶ In framing criminal justice as a war on Black people, the Vision is concerned less with a particular mode of government regulation—say, policing or police killing—and more with a larger set of interconnected practices and processes that dehumanize, surveil, control, repress, cage, devalue, and end Black life.¹⁰⁷ This is not a demand for police reform or even criminal law reform, rather it is an expansive view about the legal processes and regimes of control that constrain, limit, and criminalize Black life, and then double back as justification.¹⁰⁸ The language of war is strong, signifying a level of

¹⁰⁴ While these four may in some obvious way most directly speak to traditional criminal law reform conversations, the other two demands—economic justice and reparations—are equally probative of the Movement’s reframing. I focus on four as opposed to six for the sake of space.

¹⁰⁵ MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7.

¹⁰⁶ See, e.g., MYA HUNTER ET AL., DEMOCRATIC COMMUNITY CONTROL OF LOCAL, STATE, AND FEDERAL LAW ENFORCEMENT AGENCIES, ENSURING THAT COMMUNITIES MOST HARMED BY DESTRUCTIVE POLICING HAVE THE POWER TO HIRE AND FIRE OFFICERS, DETERMINE DISCIPLINARY ACTION, CONTROL BUDGETS AND POLICIES, AND SUBPEONA RELEVANT AGENCY INFORMATION, <https://policy.m4bl.org/wp-content/uploads/2016/07/CommControlofLawEnforcement-OnePager.pdf> (last visited Jan. 12, 2018); CHINYERE TUTASHINDA & MALKIA CYRIL, END MASS SURVEILLANCE – POLICY BRIEF, <https://policy.m4bl.org/wp-content/uploads/2016/07/End-Mass-Surveillance-Policy-Brief.pdf> (last visited Feb. 10, 2018) (calling for the end of mass surveillance of Black communities, including by demanding the right to record the police, passing legislation requiring a warrant before police can use surveillance equipment to monitor individuals, and urging the adoption of the Civil Rights Principles on Worn Body Cameras).

¹⁰⁷ See Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 115 (2017) (noting that there is an “expanding net of legal, social, and economic consequences of misdemeanor arrests and convictions”).

¹⁰⁸ The Movement framing ignores the so-called “civil-criminal divide” on which courts and considerable legal scholarship focus. E.g., Donald Dripps, *The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199 (1996) (discussing the longstanding scholarly debate over how to articulate a principled distinction between civil and criminal law and suggesting that criminal sanctions may be distinct because they offer special temptations to an abusive political regime); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992) (using the term “middleground” to describe punitive civil sanctions that test the distinction between civil and criminal law, and discussing reasons for the accelerated growth of these sanctions and the implications of their use); Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to*

intentionality and human devastation not typically faced in legal institutions or by legal analysis.¹⁰⁹

The call is repeatedly to “end” these regimes, rather than to ameliorate their harms.¹¹⁰ For example, the Vision calls for an end to the school-to-prison pipeline;¹¹¹ demilitarization of the police; “an end to all jails, detention centers, youth facilities and prisons as we know them”;¹¹² an end to mass surveillance and to privatization of police and prisons;¹¹³ and “an [e]nd to [a]ll [d]eportations, [i]mmigrant [d]etention, and Immigration and Custom Enforcement (ICE) [r]aids.”¹¹⁴ These calls—to end the war on Black people—reflect the Vision’s decarceral, abolitionist framework, which Part III explores.

The second demand—invest-divest—reflects the Vision’s abolitionist commitments and embodies the practical aspiration of transformation. The Vision demands “investments in the education, health and safety of Black people” and divestments from “criminalizing,

Sexually Violent Predator Laws, 7 J. CONTEMP. LEGAL ISSUES 69 (1996) (discussing “sexually violent predator” statutes in the context of the civil-criminal distinction); Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 777 (1997) (discussing how two Supreme Court cases from the 1996–97 term raise questions about the criminal-civil divide).

¹⁰⁹ The 1951 U.N. petition authored by W.E.B. DuBois, among others, lodged against the United States a charge for genocide of its Black population. See WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (William L. Patterson ed., Int’l Publishers 1970) (1951). In Chicago, there has been a more contemporary We Charge Genocide campaign, inspired by the 1951 petition. See Asha Rosa, Monica Trinidad & Page May, *We Charge Genocide: The Emergence of a Movement*, in WHO DO YOU SERVE, WHO DO YOU PROTECT?, *supra* note 3, at 119; Noah Berlatsky, *Reimagining Justice: An Interview with Mariame Kaba*, URBAN FAITH (Mar. 2015), <https://urbanfaith.com/2015/03/reimagining-justice-an-interview-with-mariame-kaba/>; 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/>. For the shadow report the contemporary project filed with the UN Committee Against Torture when the U.S. was up for periodic review, see WE CHARGE GENOCIDE, POLICE VIOLENCE AGAINST CHICAGO’S YOUTH OF COLOR (2014), <http://report.wechargegenocide.org>.

¹¹⁰ MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7. For further discussion of the Vision’s abolitionist ethic, see *infra* Part III.

¹¹¹ MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8; see also BYP100, AGENDA TO KEEP US SAFE, *supra* note 5, at 11–12.

¹¹² MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7.

¹¹³ *Id.*; see also BYP100, AGENDA TO KEEP US SAFE, *supra* note 5, at 17–18 (discussing demilitarization of police).

¹¹⁴ MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7. For more on the concern about how criminalization and immigration co-produce vulnerability for Black immigrants, see JULIANA MORGAN-TROSTLE ET AL., BLACK ALLIANCE FOR JUST IMMIGRATION & N.Y.U. LAW IMMIGRANT RIGHTS CLINIC, *Part II: Black Immigrants in the Mass Criminalization System*, in THE STATE OF BLACK IMMIGRANTS (2017), <http://www.stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf>.

caging, and harming of Black people.”¹¹⁵ In making the demand, the Vision is laying bare the state’s current investments in criminalization as a choice. At the same time, the Vision calls for a new direction: The demand is for the immense sums of money spent on prisons, police, surveillance, and corporations to be directed instead toward reparations and reinvestments in restorative services, including mental health services and job programs for those harmed by the sex and drug trade.¹¹⁶

At the same time, the Vision forces a broader frame: the interconnectedness of the state and the market, of investment and divestment in Black communities.¹¹⁷ The very structure of the demand scrambles the public-private divide, bringing attention to how these spheres co-constitute each other. State and private action are co-constitutive: one cannot be understood without the other.¹¹⁸ The problems facing Black communities cross the public-private divide, and so must the solutions. Criminal and racial justice are intertwined with economic justice.¹¹⁹ This holistic view considerably widens the institutions typically suggested as targets within law reform conversations. Prosecutors and police are only the starting point: Schools, health care, and jobs must also be targets for reform. Otherwise, the reforms will not translate into meaningful difference in the lived realities of Black communities.

¹¹⁵ MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98.

¹¹⁶ *Id.* Similar invest-divest demands have been made by movement actors seeking to end the over-policing of the homeless on LA’s Skid Row. See George Lipsitz, *Policing Place and Taxing Time on Skid Row*, in *POLICING THE PLANET*, *supra* note 44, at 137 (noting that LA CAN and allied grassroots organizations argue that funds expended on law enforcement should instead be used to build safe, clean, and affordable housing and mental and physical health care).

¹¹⁷ For a similar understanding, see BYP100, *AGENDA TO BUILD BLACK FUTURES*, *supra* note 75 (arguing that “[f]unding Black [f]utures is [p]ossible by [d]efunding [s]ystems of [p]unishment”). See also David Singh Grewal & Jedidiah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 8 (2014) (“[T]he opposition between ‘market’ and ‘state’ as conventionally posed is nonsensical.”); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1565 (2006) (recognizing that law preserves inequality through marking borders between public and private, state and market).

¹¹⁸ See, e.g., Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1427 (2012) (speaking of “intersectional subordination” as occurring between the crosshairs of “private institutional configurations such as the housing market or neighborhood watches and the police power of state actors”).

¹¹⁹ E.g., Kali Akuno, *Until We Win: Black Labor and Liberation in the Disposable Era*, COUNTERPUNCH (Sept. 4, 2015), <http://www.counterpunch.org/2015/09/04/until-we-win-black-labor-and-liberation-in-the-disposable-era> (arguing that the war on drugs and other “tough on crime” campaigns that dominated from the late 1960s through the early 2000s were the ruling class’s response to “Black labor redundancy and mass resistance”).

The Vision is oriented towards shifting power into Black organizing and communities, to fight for policies that are designed to “equip [the movement] to win” over the long haul.¹²⁰ There is a focus on building power for the movement and for Black communities more broadly. The focus on building power suggests a distinct account of anti-Black racism and routine police killing. The Vision’s account is not about bias or bad apples, or even just about better or different laws. The Vision points to power and powerlessness as the life blood of anti-Black racism.¹²¹ Black people’s relative powerlessness to self-determine the shape of their lives and communities is core to anti-Black racism. As a result, if powerless is not addressed, if real power is not built in Black communities, there will be no meaningful change. That is why, in addition to the emphasis on policy fights that will build power for the movement in the long run, one of the six major demands is for “independent Black political power and Black self-determination” to create “a real democracy where Black people and all marginalized people can effectively exercise full political power.”¹²²

In aiming to build power in Black communities and movements, the Movement is looking to transform the state and its commitment to the market, and the relationships between governing and governed. Thus, the Vision aims for something much broader than police reform: Black freedom, liberation, and self-determination. Indeed, the demands echo past movements, rooting the Movement’s vision in a long tradition of Black radical thought and Black freedom struggles.¹²³

¹²⁰ MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8. For example, regarding the campaign to oust State Attorney Anita Alvarez in Chicago in response to her handling of the police killing of seventeen-year-old Laquan McDonald, Mariame Kaba explained the purpose was decidedly not to lend support to the other candidates. “[W]e’re going to be protesting [the new prosecutor] the next day. It’s the role. This person is the chief incarcerator.” *Mariame Kaba: Interview*, CHI. DISPATCH (May 2016). Instead the campaign was about building the power of the collective to negotiate with the new prosecutor and for the long-term battle to shift power away from prosecutors. *Id.*

¹²¹ For an earlier analogue, see Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 789–90 (comparing Black nationalism and power with integrationism, and arguing that the Black Power movement’s centering of power in explaining “the distribution of social resources and opportunities, rather than reason or merit” troubled integrationists).

¹²² MOVEMENT FOR BLACK LIVES, *Political Power*, *supra* note 101; *see also* BYP100, AGENDA TO KEEP US SAFE, *supra* note 5, at 9 (arguing that a “strong democratic, representative, autonomous entity should exist” to broker the relationship between Black communities and the police).

¹²³ The Vision, for example, echoes earlier platforms of the Black Panther Party and the Chicano Young Lords. *See, e.g.*, HUEY P. NEWTON & BOBBY SEALE, BLACK PANTHER PARTY, TEN POINT PROGRAM (1966), *reprinted in* DONNA JEAN MURCH, LIVING FOR THE CITY: MIGRATION, EDUCATION, AND THE RISE OF THE BLACK PANTHER PARTY IN

Here, consider the demand for community control of “laws, institutions, and policies that are meant to serve us—from our schools to our local budgets, economies, police departments, and our land.”¹²⁴ This includes “democratic community control” of police, so that “communities most harmed by destructive policing have the power to hire and fire officers, determine disciplinary action, control budgets and policies, and subpoena relevant agency information.”¹²⁵ This is a response to the lack of meaningful civilian oversight of police departments nationwide.¹²⁶ Even where civilian review boards exist, they typically do not exercise real power over police departments, nor do they include directly impacted communities or system-involved people.¹²⁷

Equally important, the emphasis on community *control*, rather than simply on community *input*, challenges how the concept of community is conventionally deployed in criminal law reform conversations.¹²⁸ Typically, community policing, where police attempt to

OAKLAND, CALIFORNIA 128–29 (2011); Young Lords, *Young Lords Party Thirteen-Point Program and Platform*, PALANTE (Nov. 1970), reprinted in *THE YOUNG LORDS: A READER* 11–13 (Darrel Enck-Wanzer ed., 2010). The Black Panther Party’s Ten-Point Platform in turn borrowed from the Nation of Islam’s *Muhammad Speaks*. MURCH, *supra*, at 127–31; see also Juan Gonzalez, Minister of Defense, Young Lords Party, Speech (Nov. 16, 1971), in *THE YOUNG LORDS: A READER*, *supra*, at 60–61 (“[W]e don’t want abstract equality rights, we want material equality.”).

¹²⁴ MOVEMENT FOR BLACK LIVES, *Community Control*, *supra* note 100; see also M Adams & Max Rameau, *Black Community Control over Police*, 2016 WIS. L. REV. 515, 538 (explaining that the call for community control is a call for “shifting power, enforcing democracy, [and] deconstructing the historic relationship between the police and the Black community”).

¹²⁵ MOVEMENT FOR BLACK LIVES, *Community Control*, *supra* note 100.

¹²⁶ For a critical take on New York City’s Civilian Complaint Review Board, see ROBERT A. PERRY, N.Y. CIVIL LIBERTIES UNION, *MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY: 1994–2006* (2007), https://www.nyclu.org/sites/default/files/publications/nyclu_pub_mission_failure.pdf. See also ANN ARBOR HUMAN RIGHTS COMM’N, *CIVILIAN POLICE REVIEW: RECOMMENDATIONS FOR STRENGTHENING POLICE-COMMUNITY RELATIONS IN ANN ARBOR* 6, 11–13 (2015) (finding Ann Arbor, Michigan’s, police department’s complaint procedure to be characterized by a lack of transparency and external review process, and suggesting the creation of a civil review board); Simone Weichselbaum, *The Problems with Policing the Police*, MARSHALL PROJECT (May 2015), <https://www.themarshallproject.org/2015/04/23/policing-the-police> (describing the challenges faced by the Department of Justice, Office of Civil Rights, in reforming local police departments through “pattern or practice” investigations and lawsuits).

¹²⁷ See, e.g., PERRY, *supra* note 126, at 45–46 (noting that “[r]esidents living in communities that are most vulnerable to acts of police misconduct have long expressed cynicism regarding the CCRB,” including at public hearings held by the U.S. Commission on Civil Rights in 1999, and in a 2004 study of New York City students).

¹²⁸ Jocelyn Simonson’s work, examining how communities organize in opposition to the criminal legal system as a way to exercise a form of accountability that intra-system efforts cannot provide is an important intervention in the criminal law scholarship. See, e.g., Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016) (theorizing and

develop closer relationships with directly impacted communities, is forwarded as the salve for mistrust between police and communities of color.¹²⁹ A push for community policing posits the problem between police and communities as a lack of familiarity, understanding, and contact, obscuring the realities of aggressive and routine policing in communities of color.¹³⁰ It forwards the solution as more contact and greater understanding between police and communities.¹³¹ It invisibilizes police violence and brutality as the cause of that distrust.

Community policing is a concept spurned far and wide by movement voices as a faux-alternative to ordinary policing.¹³² The demand for community control is a rejection of the community policing frame. Community control instead posits the problem as one of power and accountability: that Black communities do not have meaningful power or input in how the police forces that govern them operate.¹³³

documenting copwatching); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014) (theorizing and documenting organizers' pack-the-courtroom strategies for pre-trial court dates). For a summary of scholarly debates around community policing, see Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834, 871–75 (2015) [hereinafter Akbar, *National Security's Broken Windows*].

¹²⁹ See Akbar, *National Security's Broken Windows*, *supra* note 128, at 871–74; DAVID ALAN SKLANSKY, HARVARD KENNEDY SCHOOL: NEW PERSPECTIVES IN POLICING, THE PERSISTENT PULL OF POLICE PROFESSIONALISM 1–2 (2011), <https://www.ncjrs.gov/pdffiles1/nij/232676.pdf> (listing the key elements of community policing).

¹³⁰ See Akbar, *National Security's Broken Windows*, *supra* note 128, at 871; see also SKLANSKY, *supra* note 129, at 6 (“Police forces today are much more diverse . . . making departments less cohesive in some ways, but also more vibrant, more open and better connected to the communities they serve.”).

¹³¹ See Akbar, *National Security's Broken Windows*, *supra* note 128, at 871–72 (noting that the community policing advocates call for “more interaction and flexibility” between police and communities); SKLANSKY, *supra* note 129, at 1–2 (noting that a key element of community policing is to “select[] and pursue[] . . . goals in consultation . . . with the public”).

¹³² E.g., *Kaba*, *supra* note 120 (rejecting the notion that community policing can end police violence by promoting relationships between police and community because the interests of cops “are with the state, and . . . the state does not value its most marginalized members”); Sloan, *supra* note 109 (explaining that public meetings between “community members” and police often provide an opportunity for older members of the community, who are homeowners, or new, gentrifying community members, to draw the police’s attention to certain activities they want controlled). Community policing is only mentioned in the Vision to propose that the DOJ require meaningful civilian oversight before doling out millions of dollars each year through its Community Oriented Policing Services program. See MOVEMENT FOR BLACK LIVES, *Community Control*, *supra* note 100.

¹³³ Adams & Rameau, *supra* note 124, at 539 (explicitly rejecting community policing as a way to understand the community control demand).

B. Law's Violence

The Vision's skeptical orientation toward the state arises by centering people long excluded from the benefits of American law and disproportionately burdened with its harms.¹³⁴ Centering the experiences of Black people—chattel slavery, mass incarceration, devastating economic inequality, and regular police brutality and lethality—in reading the history of American law, a bleak portrait of the American project emerges.¹³⁵ The law and the state are deeply implicated in, and significantly responsible for, historic and present violence and inequality.¹³⁶ Wins have been hard fought, incremental, and curtailed, while the underlying systems have remained intact.

In the movement's analysis, violence is endemic to police. All police departments participate in the enforcement of racialized, gendered, and classed inequality and violence.¹³⁷ The stories of brutality and impunity documented in the DOJ reports conform to widespread reports—via community testimony, lawsuits, and the press—of police violence in Black, poor, and other communities of color across the country.¹³⁸ While legal institutions are likely to read these

¹³⁴ Mari Matsuda spoke of a people of color jurisprudential method which is “consciously both historical and revisionist, attempting to know history from the bottom” and which “rejects presentist, androcentric, Eurocentric, and false-universalist descriptions of social phenomenon.” Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323–24 (1989).

¹³⁵ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (connecting slavery with mass incarceration); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2009) (documenting how slavery and servitude persisted after the Civil War through the practice of convict leasing); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (historicizing the rise of the conflation between Blackness and criminality).

¹³⁶ A number of essays in this recent anthology by law faculty make these historical connections as well. *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (Angela J. Davis ed., 2017).

¹³⁷ See Butler, *supra* note 52, at 1426–27 (arguing that the Supreme Court “has sanctioned racially unjust criminal justice practices, creating a system where racially unjust police conduct is both lawful and how the system is supposed to work”).

¹³⁸ See, e.g., Kiara Hayes, Letter, *Police Officers Abuse Their Power*, CHI. TRIBUNE (Nov. 6, 2015), <http://www.chicagotribune.com/news/opinion/letters/ct-police-officers-abuse-their-power-20151106-story.html> (recounting an incident of police violence against a sixteen-year-old girl in school, allegedly for her refusal to put her cellphone away or leave the room); Redditt Hudson, *Being a Cop Showed Me Just How Racist and Violent the Police Are. There's Only One Fix*, WASH. POST (Dec. 6, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/12/06/i-was-a-st-louis-cop-my-peers-were-racist-and-violent-and-theres-only-one-fix> (reflecting on blatantly racist comments and attitudes in the St. Louis Police Department); John Kendall, *Action Demanded on Police Misconduct*, L.A. TIMES (Apr. 20, 1989), http://articles.latimes.com/1989-04-20/news/mn-2292_1_police-misconduct-excessive-force-attacks-by-police-dogs (reporting on a

instances as remarkable, out of place, or justifiable, they represent the reality that in cities big and small, rich and poor, north and south, police violence is routine.¹³⁹

Thus, Movement actors transform debate on police reform by arguing racialized police violence is not an aberration. Rachel Herzing—cofounder of Critical Resistance, a prison abolitionist group, and a co-drafter of the Vision—explains that the police function is to provide “armed protection of state interests.”¹⁴⁰ This framing provides “clarity about what policing is meant to protect and whom it serves. . . . Police forces tend to be very accountable to the interests they were designed to serve, and those interests frequently clash with the interests of the communities targeted most aggressively by policing.”¹⁴¹ Herzing suggests that when reformers locate police brutality in a problem of police unaccountability, they miss the point

steep increase in complaints of police misconduct in Los Angeles); Aaron Paxton Arnold, *The Real Whistle-Blower in Police Brutality*, CNN (Aug. 7, 2015), <http://www.cnn.com/2015/08/07/opi130reddiarnold-police-shootings> (crediting technology and social media for shedding light on police brutality against black Americans); TIME: THE KALIEF BROWDER STORY (Spike TV documentary mini-series 2017) (recounting the story of Kalief Browder, who was held at Riker’s Island for three years without being convicted of a crime after police accused him of stealing a backpack); see also David Packman, *2010 NPMSRP Police Misconduct Statistical Report (Draft)*, CATO INST. (Apr. 5, 2011) (reporting that in 2010, the Cato Institute’s National Police Misconduct Statistics and Reporting Project recorded 4861 unique reports of police misconduct involving 6613 sworn law enforcement officers). The Obama DOJ’s reports on several police departments also document these patterns. See *supra* note 76.

¹³⁹ See Fagan & Ash, *supra* note 107 (arguing that police violence and other policing problems often associated with big cities also occur in smaller localities). On how courts erroneously use factual predicates about policing to regulate police, see Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847 (2014). See also Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013) (addressing problems with court-found facts generally).

¹⁴⁰ Herzing, *Big Dreams and Bold Steps*, *supra* note 32; see also Kaba, *supra* note 120 (deconstructing the idea of community policing: If you build relationships with people, they are less likely to harm you, but police interests are with the state, and the state’s interests are not with marginalized people).

¹⁴¹ Herzing, *Big Dreams and Bold Steps*, *supra* note 32; see also BYP100, AGENDA TO KEEP US SAFE, *supra* note 5, at 16 (arguing that while potentially effective in holding police accountable, Department of Justice controls are woefully underutilized); BREAKING THE SILENCE: CIVIL AND HUMAN RIGHTS VIOLATIONS RESULTING FROM MEDICAL NEGLIGENCE AND ABUSE OF WOMEN OF COLOR IN LOS ANGELES COUNTY JAILS, DIGNITY & POWER NOW (Aug. 4, 2015), http://dignityandpowernow.org/wp-content/uploads/2015/07/breaking_silence_report_2015.pdf; *Guiding Principles: What We Believe*, BLACK LIVES MATTER (Dec. 27, 2017), <https://blacklivesmatter.com/about/what-we-believe/> (discussing the origins of Black Lives Matter in response to state-sanctioned violence); DIGNITY & POWER NOW ET AL., IMPACT OF DISPROPORTIONATE INCARCERATION OF & VIOLENCE AGAINST BLACK PEOPLE WITH MENTAL HEALTH CONDITIONS IN THE WORLD’S LARGEST JAIL SYSTEM (Aug. 12, 2014), http://dignityandpowernow.org/wp-content/uploads/2014/11/CERD_Report_2014.8.pdf.

altogether: that police are accountable, just not to poor, Black people.¹⁴²

What is law's relationship to this racialized police violence?¹⁴³ In the DOJ's account, the brutality lies in the failure of Ferguson's and Baltimore's police departments to adhere to their constitutional mandates.¹⁴⁴ If these police departments followed the letter of the law, such brutality and inequality would not happen. The remedies that

¹⁴² See *Black Liberation and the Abolition of the Prison Industrial Complex: An Interview with Rachel Herzing*, 1 PROPTER NOS 62, 65 (2016) (theorizing the difference between abolitionists and reformers as this: Reformers "see the system as broken—something that can be fixed with some tweaks or some changes. Whereas abolitionists think that the system works really well. . . . [It is] efficient in containing, controlling, killing, and disappearing the people that it is meant to."); Rachel Herzing, Commentary, "Tweaking Armageddon": The Potential and Limits of Conditions of Confinement Campaigns, 41 SOC. JUST. 190, 193–94 (2014) [hereinafter Herzing, *Tweaking Armageddon*] (arguing that in contrast to liberal reformers' beliefs, the system is very successful at achieving its objectives); Rachel Herzing, *What Is the Prison Industrial Complex?*, DEFENDING JUSTICE (2005), http://www.publiceye.org/defendingjustice/overview/herzing_pic.html (same).

¹⁴³ On the violence of law and law enforcement, see FREDERICK SCHAUER, *THE FORCE OF LAW* (2015) (returning law's violence to the center of the inquiry on the nature of law in legal philosophy); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("Legal interpretation takes place in a field of pain and death."); Jacques Derrida, *Force de Loi: Le "Fondement Mystique De L'Autorité"* [*Force of Law: The "Mystical Foundation of Authority"*], 11 CARDOZO L. REV. 920, 925 (Mary Quaintance trans., 1990) ("[L]aw is always an authorized force, a force that justifies itself or is justified in applying itself."); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1189–90 (2017) (describing the law of police violence as setting the rules for the (racialized) distribution of state violence); Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1019 (2014) (critiquing punishment theory for failing to grapple with the violence entailed in criminal punishment); Jonathan Simon, *Law's Violence, the Strong State, and the Crisis of Mass Imprisonment (for Stuart Hall)*, 49 WAKE FOREST L. REV. 649, 655 (2014) ("[V]iolence has played a complex role in state building as both a reason for state power and a tool of that power."); see also Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 149 (1935) ("The State . . . has at its disposal certain sanctions for enforcing obedience to its decrees, which it does not permit private persons to impose—such as the infliction of death, imprisonment, or the seizure of property."); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 327 (1991) (examining "the role of law in the reproduction of social injustice in late capitalist societies"); Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 109 (2013) (arguing that confronting criminal law's violence requires openness to "displace conventional criminal law administration as a primary mechanism for social order maintenance"); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011) (surveying conceptions of violence in criminal law, and finding that inconsistent understandings of the term have led to more punitive criminal law).

¹⁴⁴ E.g., DOJ FERGUSON REPORT, *supra* note 16, at 90–92. Of course in some sense this is the frame for the DOJ, since it is empowered to conduct this investigation precisely as a way to identify and correct unconstitutional patterns and practices within police departments. See 42 U.S.C. § 14141(a) (2012) ("It shall be unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of [constitutional or federal] rights.").

emerge from this analysis include better training, better internal accountability mechanisms, and greater compliance with law.¹⁴⁵ The DOJ suggests that the true purpose of policing is to enforce the law without resort to prejudice, abuse of authority, or unnecessary force. As such, the DOJ's analysis implies that neutral and fair policing is possible or obtainable, and that routine violence and abuse of power are not constitutive of the police function. In turn, the DOJ assumes that the law aims to produce a policing free of prejudice, abuse of authority, or routine violence. That is how the DOJ lands on more laws and greater resources for police as the solution for racialized police violence. The DOJ considers no question about alternative modes of governance, and offers no real analysis about disenfranchisement or powerlessness of policed communities in holding police accountable.

Based on the reports, one might imagine that racial profiling is both unlawful and unusual. This suggestion, and the DOJ's findings, rests on a reading of case law that is much more rights protective and race conscious than the Supreme Court's reading of its own jurisprudence, or even how the DOJ reads these cases in other contexts.¹⁴⁶ Indeed, the DOJ took a very different view of the law and of the propriety of police action in its report examining Darren Wilson's killing of Mike Brown.¹⁴⁷ The Ferguson and Wilson reports make clear that police can "selectively invoke their powers against African-American[s]" and still "act consistently with the law."¹⁴⁸ From a Fourth

¹⁴⁵ The Ferguson Report does briefly mention that the police should "implement a system that incorporates civilian input," publicly share information about its policies and practices, and that the courts should stop using arrest warrants as a way to collect fines and fees. DOJ FERGUSON REPORT, *supra* note 16, at 95–96, 99. The first two recommendations are significant for contemplating the importance of public accountability, and the third for asking the courts to stop using a particular punitive practice.

¹⁴⁶ See Butler, *supra* note 52, at 1463–64 ("[T]he consent decree provides Ferguson residents far more protection than does the Constitution. The consent decree can be read as an implicit critique of the Supreme Court's race project."); Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 SUP. CT. REV. 157, 157–59 (2017) (describing Justice Sotomayor's critique of Supreme Court jurisprudence in this area).

¹⁴⁷ See DOJ REPORT ON THE SHOOTING DEATH OF MICHAEL BROWN, *supra* note 51, at 78–86 (finding that Wilson's conduct did not violate the Fourth Amendment or federal civil rights laws).

¹⁴⁸ Butler, *supra* note 52, at 1424. As Professor Butler explains, reading the two reports together reveals that "[i]t is possible that even in a prejudiced and brutal police department a shooting of an unarmed African-American man could be justified." Compare DOJ REPORT ON THE SHOOTING DEATH OF MICHAEL BROWN, *supra* note 51, at 10–11 (finding that Ferguson Police Officer Wilson's actions did not violate Michael Brown's constitutional rights), with DOJ FERGUSON REPORT, *supra* note 16, at 4–5 (finding that the Ferguson Police Department systematically discriminated against African-Americans in violation of federal law and the Fourteenth Amendment).

Amendment perspective, it does not matter if an officer is actually racially profiling someone—say, stopping them because they are Black—so long as there exists some “race-neutral” reason that the officer can use as justification for the stop, regardless of the officer’s actual motivation.¹⁴⁹ In ignoring this abiding dimension of criminal procedure, the DOJ minimizes and obscures the law’s role in creating the problems the reports so painstakingly document.

Or consider police killing, the brutal show of force at the center of the movement’s critique of the state and our system of laws. In theory, law forbids police from turning to lethal force except when necessary in the particular circumstances.¹⁵⁰ But police turn to deadly violence once a day or more.¹⁵¹ This deadly violence is disproportionately directed against Black people.¹⁵² Such violence is almost never found unjustified as a matter of law or internal police policy.¹⁵³ Police are rarely indicted, prosecuted, or sentenced for killing civilians, let

¹⁴⁹ See *Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129–30 (2017) (arguing that the “Supreme Court’s legalization of racial profiling is embedded in the very structure of Fourth Amendment doctrine”); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 390 (1998) (explaining how the Supreme Court’s Fourth Amendment jurisprudence authorizes pretextual traffic stops against people of color). Cf. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 961 (1999) (arguing the Supreme Court should correct its Fourth Amendment jurisprudence to provide relief from racially-motivated searches and seizures).

¹⁵⁰ See *Graham v. Connor*, 490 U.S. 386, 388 (1989); see also *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (holding that officers may only use lethal force to prevent the escape of an apparently unarmed felon if officers have “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others”).

¹⁵¹ *Police Shootings 2017 Database*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2017/> (last visited Jan. 15, 2018) (reporting that 987 people were shot by police in 2017).

¹⁵² See AMNESTY INT’L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 1, 10–11 (2015), http://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf; 2015 *Washington Post Database of Police Shootings*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings/> (last visited Dec. 26, 2017); *Police Violence Map*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/> (last visited Dec. 26, 2017) (finding that in 2017, Black people were twenty-five percent of those killed despite being only thirteen percent of the population).

¹⁵³ E.g., Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 853 (2016) (“The ability of officers to commit violent acts with impunity is due in no small part to internal review systems that routinely turn their backs to police misconduct.”); Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?tid=A_inl&utm_term=.78e0c2bc49c9 (“Only in rare cases do prosecutors and grand juries decide that the killing cannot be justified.”).

alone Black civilians.¹⁵⁴ The persistent findings of justification or propriety—whether through internal reviews by police departments, grand jury proceedings or criminal trials¹⁵⁵—show that police have wide latitude under the law to exercise lethal violence. In effect, the law allows police to kill.¹⁵⁶

Paul Butler recently forwarded a radical critique of the criminal legal system's "race problem": that the law is working as it is intended to, racial injustice and all.¹⁵⁷ On a close read of criminal procedure jurisprudence, Butler shows that cases often celebrated as establishing limits on police power actually create police "super powers"—to kill, profile, and arrest.¹⁵⁸ He concludes that "[t]he most far-reaching racial subordination stems not from illegal police misconduct, but rather from legal police conduct."¹⁵⁹ That these powers are disproportionately used against Black men and other marginalized people are constitutive of—rather than anathema to—the powers.¹⁶⁰

¹⁵⁴ See Kindy & Kelly, *supra* note 153 (identifying, in 2015, fifty-four officers charged out of the thousands who have fatally shot people since 2005).

¹⁵⁵ E.g., David Chanen & Liz Sawyer, *Officers in Jamar Clark Shooting Will Not Face Discipline*, STAR TRIB. (Oct. 22, 2016), <http://www.startribun134reddie134134isapolis-police-to-discuss-internal-investigation-into-jamar-clark-shooting/397952111/> (internal reviews); *No Charges Against Darren Wilson, Grand Jury Decides*, ST. LOUIS POST-DISPATCH (Nov. 24, 2014), http://www.stltoday.com/news/local/crime-and-courts/no-charges-against-darren-wilson-grand-jury-decides/article_9afe71c9-a858-5f37-aba3-faba3fe12dfe.html (grand jury proceedings); Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (Jul. 27, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html> (criminal trials).

¹⁵⁶ In the realm of policing, the jurisprudence is so deferential to police that it is fair to say that the law follows police rather than that police follow law. See Valdez et al., *supra* note 18 (making this argument in the immigration context). This of course turns conventional wisdom upside down. Akbar, *Law's Exposure*, *supra* note 9, at 360 (arguing that the claim that "law is instrumental in the devaluation of black life in the United States . . . challenge American mythologies about our democratic constitutional order").

¹⁵⁷ Butler, *supra* note 52. For another radical critique by Butler, this time of the right to counsel, see Butler, *supra* note 19, at 2178.

¹⁵⁸ Butler, *supra* note 52, at 1451–57 (super power to kill, *Scott v. Harris*, 550 U.S. 372 (2007); super power to profile, *Whren v. United States*, 517 U.S. 806 (1996); super power to arrest, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)). For another critique that the Supreme Court has baked permission for racial profiling into the Fourth Amendment, see Carbado, *supra* note 149, at 129–30.

¹⁵⁹ Butler, *supra* note 52, at 1425; see also Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (examining arrests as a regulatory tool, used as poor proxies by non-criminal justice actors, with immigration enforcement and housing as examples).

¹⁶⁰ Butler, *supra* note 52, at 1447–52. For another structural critique, see Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 166–67 (2016) (casting the drivers of police violence "beyond the 'bad cop' frame to a structural understanding of the problem").

In other words, constitutional policing—an idea commonly forwarded in agendas for police reform¹⁶¹—is still sufficiently deferential to police to allow wide latitude to, and even encourage, police brutality and, police killing, and racial profiling in everyday policing.¹⁶² In fact, this stark idea that the system is working as it is supposed to, including racial inequality, police brutality and, mass incarceration, is regularly articulated in poor communities and communities of color.¹⁶³ But it is almost invisible in law scholarship.

Of course, there is a long-standing body of critique in criminal law scholarship,¹⁶⁴ including in the form of a race critique.¹⁶⁵ The rise of Black Lives Matter has emboldened and enriched engagement with police violence,¹⁶⁶ and the difficulty of holding police accountable for

¹⁶¹ See, e.g., Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters*, 54 WM. & MARY L. REV. 1865, 1865–66 (2013) (advancing the paradigm of “rightful policing,” not focused on lawfulness or efficacy in crime-fighting, but on the procedural justice of police conduct).

¹⁶² See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 785 (2006) (“Current constitutional law makes the politics of criminal justice worse: more punitive, more racist, and less protective of individual liberty.”). Stuntz counseled for solutions to come from the realm of politics rather than constitutional law, though he was not optimistic about the possibility of such solutions emerging. See Stuntz, *supra* note 30, at 600.

¹⁶³ E.g., Mariame Kaba, Founder and Director, Project NIA, Remarks at the New York University Review of Law & Social Change Symposium: Beyond “Criminal Justice Reform”: Conversations on Police and Prison Abolition (Oct. 14, 2016), <https://www.youtube.com/watch?v=NXH9JQckHLY> (talking about the work of Critical Resistance, a grassroots prison abolition organization, in laying out this conceptual framework).

¹⁶⁴ For a recent volume of critique pushing for a more expansive understanding of criminal justice and its problems, see THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoff eds., 2017).

¹⁶⁵ E.g., Devon W. Carbado, (*E*)racing the Fourth Amendment, 100 MICH. L. REV. 946, 969 (2002). A whole issue of the *UCLA Law Review* was dedicated to marking the anniversary of Kimberlé Crenshaw’s path-building work on intersectionality. Symposium, *Overpoliced and Underprotected: Women, Race and Criminalization*, 59 UCLA L. REV. 1418 (2012) [hereinafter Symposium, *Overpoliced and Underprotected*]. A number of the pieces dealt with how the criminal legal system regulates Black women. E.g., Crenshaw, *supra* note 118, at 1428 (highlighting “the multiple ways in which racially marginalized women experience discipline and punishment”). On how and why poverty has been criminalized, see Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317 (2014); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009). See also Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1545 (2012) (deploying “an intersectional approach to interrogate the ways in which Black women’s identities serve as a critical link between the welfare and criminal justice systems”).

¹⁶⁶ See, e.g., PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017) (arguing that U.S. legal and political systems are designed to subordinate African-Americans while simultaneously blaming them for their own subordination); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (proposing a model to account for how African Americans are vulnerable to police

their violence.¹⁶⁷ The more recent turns in the literature—pointing to the tentacles of criminal law, for example, in misdemeanors¹⁶⁸ and collateral consequences¹⁶⁹—shore up movement accounts of a sprawling system devastating Black and poor communities.

While the critique grows in depth and breadth, criminal law scholars can learn from the Vision both in terms of critique and the generative project.¹⁷⁰ For example, law scholarship points to the violence inherent in law, with criminal law as the most obvious example.¹⁷¹ But the violence of police, prison, and criminal law is

surveillance, brutality, and killing); Carbado, *supra* note 149 (demonstrating how Fourth Amendment jurisprudence facilitates police killings of Black people during traffic stops). For a recent anthology examining the way Black men are policed, prosecuted, and imprisoned, and the history of these practices, see *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT*, *supra* note 136.

¹⁶⁷ E.g., Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016) (documenting the special procedural protections for police suspects and arguing these special protections should apply to all criminal suspects); Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) (examining the conflict of interests that arise when local prosecutors are tasked to investigate the local police with whom they regularly work); Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL'Y 137 (2015) (advancing criminal prosecutions by independent prosecutors as an important tool in holding police accountable). Some of this work also responds to Rachel Harmon's call to expand criminal law scholarship on policing beyond federal constitutional law, to more fully account for the efficacies and harms of policing. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 790 (2012); see John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017) (examining the role police liability insurance could play in regulating the police); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 936–37 (2014) (finding that police officers are virtually never financially responsible for paying damages awards in civil suits and considering the implications of this fact).

¹⁶⁸ See, e.g., Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614 (2014) (presenting the results of a study of New York City courts' processing of misdemeanors, and arguing that the jurisdiction has "largely abandoned . . . adjudicating guilt and punishment in specific cases" and is instead "concerned with managing people over time through engagement with the criminal justice system"); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) (reevaluating the criminal process through the lens of the ten million misdemeanor cases filed annually rather than through the prevailing "felony-centric view").

¹⁶⁹ See, e.g., Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL'Y 313 (2006) (arguing that aggressive child support enforcement against incarcerated parents should be understood as a collateral consequence of incarceration); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670 (2008) (arguing for a reasonableness standard in determining whether defendants should be warned of consequences, penal or otherwise, collateral or direct, of a guilty plea).

¹⁷⁰ See Gayatri Chakravorty Spivak, *Scattered Speculations on the Subaltern and the Popular*, 8 POSTCOLONIAL STUD. 475, 482 (2005) (arguing that scholars should "learn from below, from the subaltern, rather than only study him(her)").

¹⁷¹ See *supra* note 143 and accompanying text.

often framed as a problem of contemporary excess: The problem is located in *mass-* and *over-* criminalization.¹⁷² This dehistoricizes the long arc of criminalization as a method of control and suppression of Black people in the United States.¹⁷³ Much scholarship holds up the ideals of criminal law—individualized guilt, fairness and impartiality, due process.¹⁷⁴ It situates the contradictions of criminal law—that it is constructed as a neutral tool through which to sanction law breaking, but it comes down harder and more systematically on people who are poor and of color—as if they are not central to the project’s operations and legitimacy.

Taking the movement’s intellectual project seriously inverts baseline assumptions from which we study policing and criminal law, and thereby transforms the resulting account of the social function and meaning of criminal law enforcement. Policing works differently for differently situated people.¹⁷⁵ Police play a function of social control and regulation along gender, sex, race, and class. The police mean (and do) very different things to the white and Black people of Ferguson, Baltimore, and beyond.¹⁷⁶ If we take seriously the claim that the police defend the interests of the white propertied class to the exclusion of Black, poor and working-class people, we cannot advance a singular theory of the meaning of the police, of how they function, and what they do.¹⁷⁷ The DOJ’s Baltimore report shows how a police

¹⁷² See also *supra* note 142 and accompanying text (discussing views of “reformers”).

¹⁷³ But see POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, *supra* note 136 (including numerous essays that make linkages between historical practices of racial subjugation, from slavery onward, to the current racialized practices of criminal law).

¹⁷⁴ E.g., Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 265–66 (2003).

¹⁷⁵ See, e.g., Carbadó, *supra* note 165, at 969 (demonstrating how “people of color are burdened more by, and benefit less from, the Fourth Amendment than whites”). There is, of course, also a geographic dimension. See, e.g., NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER, at xi–xiv (1994); DAVID DELANEY, RACE, PLACE, AND THE LAW 1836–1948, at 6–10 (1998); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844–45 (1994) (arguing that de facto, spatial segregation continues to dictate political power and treatment under the law); Steve Herbert, *The Geopolitics of the Police: Foucault, Disciplinary Power and the Tactics of the Los Angeles Police Department*, 15 POL. GEOGRAPHY 47, 48–50 (1996) (analyzing the use of police surveillance and geopolitical dominance as a mechanism of social control).

¹⁷⁶ See *infra* Section I.B; see also PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 17, at 9.

¹⁷⁷ Take for example, Seth Stoughton, Commentary, *Law Enforcement’s ‘Warrior’ Problem*, 128 HARV. L. REV. F. 225 (2015). Stoughton critiques the warrior model of policing and argues for greater adoption of the guardian model. In so doing, he overlooks the different meanings and roles of the police to different communities. As the DOJ reports make clear, the same police department can adopt a fundamentally distinct approach to policing different communities: as guardians vis a vis Black and poor

department can be responsive to the needs of one community—white, wealthy, propertied—at the same time that it is brutalizing another—Black, poor, precarious.¹⁷⁸ The Vision argues that this is not the exception; it is the rule across geography and history. This—raced, classed, gendered, sexed social control and regulation—is, in itself, the core function of police, to which the law systematically defers and thereby legitimates.

The idea that law is political, constructed and subjective, dedicated to the status quo and subject to manipulation, has been prominently articulated in various guises in law scholarship, most recently in the height of the critical legal studies, critical race theory, and feminist law scholarship movements.¹⁷⁹ One of the key contributions of critical theory has been to center the idea that the law is not the neutral rational force courts and legislatures purport it to be.¹⁸⁰ Critical race and feminist scholarship have demonstrated how a core function of law is to make raced and gendered power distribution and social domination look rational, neutral, and just—to make it seem outside of and before politics, and therefore objectively valid.¹⁸¹

communities and as guardians to white and wealthier communities. *See infra* note 55 and accompanying text.

¹⁷⁸ DOJ BALTIMORE REPORT, *supra* note 16, at 5 (noting that residents of the “City’s wealthier and largely white neighborhoods” described officers as largely “respectful and responsive to their needs,” in contrast to residents of “largely African-American communities” who “informed us that officers tend to be disrespectful and do not respond promptly to their calls for service”).

¹⁷⁹ *E.g.*, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 25. For a precursor work identifying the law-politics divide as central to American self-conceptualization of government, see SCHEINGOLD, *supra* note 19, at 14, 20–21 (putting the strong “myth of rights” in American political thinking in conversation with the “politics of rights”).

¹⁸⁰ *See* Devon W. Carbado & Daria Roithmayr, *Critical Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 156–57 (2014) (articulating critical race theory’s neutrality critique); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 529 (1982) (“Feminist inquiry into [many issues, including abortion, domestic battery, rape, sexual harassment, prostitution, among others] began with a broad unmasking of the attitudes that legitimize and hide women’s issues.”); Matsuda, *supra* note 4, at 326–30 (describing critical legal studies’ contributions and its appeal for minority scholars); Matsuda, *supra* note 134, at 2323–24 (“[L]aw is essentially political.”).

¹⁸¹ *See, e.g.*, MACKINNON, *supra* note 25, at 237 (“Liberal legalism . . . mak[es] male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view in society.”); Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1377 (1986) (“[Abstract neutrality] made maleness the norm of what is human, and did so sub rosa, all in the name of neutrality.”); *cf.* Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981) (arguing that law scholars’ commitment to law’s objectivity is what makes legal scholarship marginal to other disciplines).

But perhaps due to the timing or context in which these theories developed, on the terrain of rights a fault line emerged between critical legal studies and critical race theory.¹⁸² Critical legal scholars situated rights within their critique of law; rights, like law, are indeterminate and subject to manipulation.¹⁸³ Because power gives access to courts, and courts enforce rights, rights are used against the powerless more than for them; rights justify and solidify status quo arrangements and coopt radical social movements seeking transformation.¹⁸⁴ Critical race scholars lodged a critique against critical legal studies for being nihilistic when it came to rights, a product of the white and wealth privilege critical legal scholars held compared to the life experiences of communities of color.¹⁸⁵ Critical race scholars pointed to the history of people of color in the United States as a historical and moral basis from which to fight for rights and formal protections,¹⁸⁶ even if at the same time critical race scholars remained skeptical of meaningful change.¹⁸⁷ This created a racialized fault line

¹⁸² E.g., Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343 (2002) (historicizing the rise of critical race theory in the face of critical legal studies' race politics); see also Francisco Valdes, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265, 1270–71 (1999) (situating LatCrit within the history of Critical Race Theory with its emphases on antisubordination, antiessentialism, and coalition building).

¹⁸³ See Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178, 196 (Wendy Brown & Janet Halley eds., 2002) (describing a "series of contexts for the loss of faith in rights"); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978) ("[The Supreme Court] has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools . . . and have very little political power, without any violation of antidiscrimination law."); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1563 (1983–84) (placing "special emphasis on the meaning for alienated consciousness of believing in rights"); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364–71 (1983–84) (critiquing rights as inherently unstable abstractions); see also Freeman, *Race and Class*, *supra* note 19, at 1894 ("[T]he goal of civil rights law is to offer a credible measure of tangible progress without in any way disturbing class structure.").

¹⁸⁴ See Gabel, *supra* note 183, at 1586–97; Tushnet, *supra* note 183, at 1384–92.

¹⁸⁵ See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1349–69 (1988); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303–07 (1987); Matsuda, *supra* note 4, at 332–42; Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. REV. 401, 403–06 (1987).

¹⁸⁶ See Matsuda, *supra* note 134, at 2325–26 (emphasizing the importance of formal legal rules because "informality and oppression are frequent fellow-travelers").

¹⁸⁷ See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 198–200 (1992) [hereinafter BELL, *FACES AT THE BOTTOM OF THE WELL*] ("We must first recognize and acknowledge (at least to ourselves) that our actions are not likely

along the discourse of rights, one with shared ground to be sure, but grounds for difference, as well.¹⁸⁸

The contemporary wave of radical social movements, and even interdisciplinary scholarship on policing and mass incarceration, revisits and complicates the terrain of rights.¹⁸⁹ Indeed, the Vision is altogether skeptical about rights:¹⁹⁰ mass incarceration and the policing on which it depends came after the civil rights movement and the Warren Court's so-called criminal procedure revolution, not before.¹⁹¹ Formalization has been accompanied by a scaling up of

to lead to transcendent change.”); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 376–77 (1992) [hereinafter Bell, *Racial Realism*] (“[H]istory should also trigger civil rights advocates to question the efficacy of equality theory.”); Crenshaw, *supra* note 182, at 1335 (describing the victories of antidiscrimination law as “ephemeral”); *see also* Harris, *supra* note 117 (telling a story about *Brown*, *Goodridge*, and *Lawrence* through a political economy lens); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129–46 (1997) (utilizing a dynamic model to analyze the evolution of enforcement of contested status relationships, in contrast to the static “discrimination model”).

¹⁸⁸ *See* Matsuda, *supra* note 4 (discussing what critical legal studies has to offer people of color, discussing standard critiques, and suggesting that it could and should be strengthened by engaging in a “consciousness-raising dialogue” with people of color to address these critiques); Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 715–17 (2011) (noting that one explanation for the disappearance of the rights critique is that it “collapsed under the weight of responses from feminists and minority scholars”).

¹⁸⁹ *E.g.*, Dean Spade, *Intersectional Resistance and Law Reform*, 38 SIGNS 1031, 1042–43 (2013) (describing critical scholars and movements that “examine not what the law says about itself but how its operations distribute life chances”). Naomi Murakawa has written powerfully about how liberal constructs of law and order “occlude[] the larger system of racial violence.” MURAKAWA, *supra* note 27, at 11, 29 (“[L]iberal law-and-order agendas flowed from an underlying assumption of racism: racism was an individual whim, an irrationality, and therefore racism could be corrected with ‘state-building’ in the Weberian sense—that is, the replacement of the personalized power of government officials with codified, standardized, and formalized authority.”). For a contemporary critique of rights in the criminal context, *see* Butler, *supra* note 19, at 2178 (“The reason why prisons are filled with poor people, and that rich people rarely go to prison, is not because the rich have better lawyers than the poor. It is because prison is for the poor, and not the rich.”).

¹⁹⁰ The Vision makes a few mentions of rights, though not many. For example, under “End the War on Black People,” the Vision calls for “anti-discrimination civil rights protections” for “trans, queer and gender nonconforming people.” MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7. Under the “Invest-Divest” demand, it calls for “[a] constitutional right at the state and federal level to a fully-funded education.” MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98. Under the “Economic Justice” demand, it calls for a “right for workers to organize in public and private sectors, especially in ‘On-Demand Economy’ jobs.” MOVEMENT FOR BLACK LIVES, *Economic Justice*, *supra* note 99. And under the “Political Power” demand, it calls for “full access, guarantees, and protections of the right to vote for all people.” MOVEMENT FOR BLACK LIVES, *Political Power*, *supra* note 101.

¹⁹¹ *See* NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (noting that the rate of incarceration in the United States began a period of sustained growth in 1973, following fifty years of relative stability); *cf.* Liat

punitive systems, rather than a scaling down. Indeed, even before the rise of Black Lives Matter, Dean Spade wrote about how feminist and antiracist organizing campaigns rejected legal equality and rights strategies.¹⁹² Seeking recourse from the state would only “shore up and expand systems of violence in control.”¹⁹³ Instead, these campaigns focused on redistribution of resources and shrinking the role of the state in communities of color.¹⁹⁴

Movement groups have largely refrained from fighting to strengthen preexisting rights, or to demand legal recognition of new ones.¹⁹⁵ But they have not given up on law.¹⁹⁶ Instead, they use law in more creative ways—to bail out Black mothers for Mother’s Day or as a theater for direct action (say, in front of a court), and to lay out a vision for another future.¹⁹⁷ They are seeking to address Black suffering and build power to transform society.

Ben-Moshe, *The Tension Between Abolition and Reform*, in *THE END OF PRISONS: REFLECTIONS FROM THE DECARCERATION MOVEMENT* 83, 85 (Mechthild E. Nagel & Anthony J. Nocella II, eds. 2013) (situating the rise of prisons as possible in part because abolition of slavery “was only successful on the negative aspect” without the necessary corresponding rise of “new institutions” to “successfully incorporate black people into the existing social order”).

¹⁹² Spade, *supra* note 189, at 1032.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1033.

¹⁹⁵ To be sure, there has been some litigation. *See supra* note 11 and accompanying text.

¹⁹⁶ Left legalism is so suspicious of power as to disavow it altogether. *See* Wendy Brown & Janet Halley, *Introduction*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 183, at 1, 5–16.

¹⁹⁷ *See, e.g., No Charges in Ohio Police Killing of John Crawford as Wal-Mart Video Contradicts 911 Caller Account*, DEMOCRACY NOW! (Sept. 25, 2014), https://www.democracynow.org/2014/9/25/no_charges_in_ohio_police_killing (referring to a “pilgrimage” from the Wal-Mart where John Crawford was killed to the courthouse where the grand jury deliberated about whether to bring charges against the officer that killed him); *On Black Mama’s Bail Out Day, “Goal Is to Free Our People from These Cages” Before Mother’s Day*, DEMOCRACY NOW! (May 12, 2017), https://www.democracynow.org/2017/5/12/on_black_mamas_bail_out_day.

III AN ABOLITIONIST ETHIC

In the Vision, policing emerges as a fundamentally raced, classed, and gendered project: there is no neutral *a priori* in which to return. It is in this context that the calls to “end” rather than reform these regimes of governance start to make sense.²⁵⁴ Building on W.E.B. DuBois’s writings on the abolition of slavery, and Angela Davis’s on the abolition of prison, this is a call for abolition of police and other punitive systems of social control, at the same time that it is a call to replace these systems with alternative systems.

The basic tenets of the Vision are straightforward: Given their historical and contemporary entanglements with anti-Black racism, police cannot be reformed or fixed. The state must be transformed, the law must be transformed, the police must be eliminated, or at least their social and fiscal footprint of police must be considerably diminished, if not eliminated.²⁵⁵ Law reform projects should address the material harms of white supremacy, capitalism, and patriarchy, and at the same time undermine these structures.²⁵⁶ A core part of this program must be to shift resources from the primary mode of governance of Black people—criminalization—into other social programs, including housing, health care, education, and jobs.²⁵⁷ All of this must be driven by the voices and experiences of Black people, especially those who are directly impacted and multiply marginalized.²⁵⁸ Nothing will change without a change in the power and resources available within, to, and for Black communities.²⁵⁹

As Rachel Herzing explains:

If one sees policing for what it is—a set of practices empowered by the state to enforce law and maintain social control and cultural

²⁵⁴ Here, too, the movement is borrowing from Black intellectual traditions: from the abolitionists of slavery to Angela Davis’s call for prison abolition. DAVIS, *ARE PRISONS OBSOLETE?*, *supra* note 27 (arguing that abolitionist, rather than reformist, responses to prisons should be centered); W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 11 (Transaction Publishers 2013) (1935) (arguing that Black abolitionists understood that they were not free unless all Black people were free); Dukmasova, *supra* note 203 (“The idea of police abolition can’t be understood separately from the wider prison abolition movement, the intellectual seeds of which were sown by radical feminists in the 60s and 70s, including academic and early Black Panther Party member Angela Davis.”).

²⁵⁵ See, e.g., MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7.

²⁵⁶ See *supra* note 245 and accompanying text.

²⁵⁷ MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98.

²⁵⁸ MOVEMENT FOR BLACK LIVES, *Political Power*, *supra* note 101.

²⁵⁹ See MOVEMENT FOR BLACK LIVES, *Community Control*, *supra* note 100 (calling for community control of law enforcement, government budgets, and education); MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98 (advocating the transfer of resources to Black communities).

hegemony through the use of force—one may more easily recognize that perhaps the goal should not be to improve how policing functions but to reduce its role in our lives.²⁶⁰

Herzing makes the basic claim for police abolition and decarceration. The abolitionist ethic permeates the Vision, which calls for an “end” to various punitive and exploitative practices. To take but a few examples, the Vision calls for an end to police in schools; mass surveillance by police; privatization of police; capital punishment; money bail, fines, and fees; the use of criminal history as relevant to determining access to housing, education, voting and other rights and benefits; immigration detention and deportation and ICE raids.²⁶¹ Simultaneously, the Vision calls for divestment from federal policing programs and military equipment for local police, and decriminalization of drug crimes and prostitution.²⁶²

The Vision echoes what Allegra McLeod recently championed as a “prison abolitionist ethic.”²⁶³ The Vision does not conceptualize abolition as an immediate and total end of physical incarceration and does not call for the outright abolition of police.²⁶⁴ Mariame Kaba—a long-time organizer who started Project NIA, an organization to end youth incarceration²⁶⁵—explained: We need “steps between where we are and . . . an abolitionist future. Focusing on decarceration as a strategy of reform makes sense on the way to abolition.”²⁶⁶ The Vision espouses “a gradual project of decarceration, in which radically different and institutional regulatory forms supplement criminal law enforcement.”²⁶⁷ In other words, this is both a deconstructive and imaginative project, aligned with earlier abolitionist projects and writ-

²⁶⁰ Herzing, *Big Dreams and Bold Steps*, *supra* note 32; *see also* Adams & Rameau, *supra* note 124, at 529 (“The fundamental function of the police . . . is to enforce the will and mores of those in charge—the ruling class.”).

²⁶¹ MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7.

²⁶² MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98.

²⁶³ Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015).

²⁶⁴ *See* MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7 (“Until we achieve a world where cages are no longer used against our people we demand an immediate change in conditions.”).

²⁶⁵ Mariame Kaba, *About Me*, BEING MK, <https://www.mariamekaba.com> (last visited Feb. 10, 2018).

²⁶⁶ Kaba, *supra* note 120; *see* Kaba, *supra* note 275 (noting that abolitionists “understand that as a society we will always need to ensure accountability for people who repeatedly cause harm”).

²⁶⁷ McLeod, *supra* note 263, at 1161–62 (defining a “prison abolitionist framework” as “a set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement”). McLeod roots the current concept of abolition in the idea of abolition of slavery, and specifically the writings of W.E.B. DuBois: “The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body

ings.²⁶⁸ This is the unfinished project of abolishing slavery. An abolitionist approach rejects “the moral legitimacy of confining people in cages” and, therefore, does not sanction related alternatives like “punitive policing, noncustodial criminal supervision, probation, civil institutionalization, and parole.”²⁶⁹ Instead the focus is on the “transformative goal of gradual decarceration and positive regulatory substitution.”²⁷⁰ The alternatives are investments that transform the political and social order, including “meaningful justice reinvestment to strengthen the social arm of the state and human welfare,” decriminalization, and restorative justice projects.²⁷¹ Under the invest-divest demand, the Vision calls for divestment from prisons, police, and surveillance, and for those same resources to be invested instead to restorative services, mental health services, job programs, health care, and education.²⁷²

Typically associated with prison abolition, the contemporary call for abolition includes police.²⁷³ This reinvigorated abolitionist call recognizes that policing and mass incarceration co-constitute each other. Mass incarceration’s footprint will not get smaller without shrinkage of policing. Abolition makes a number of demands: the end of mass incarceration by shifting the methods through which law and norms are enforced away from policing and other violence-backed threats, redirecting money from policing, jails, and prisons into social programs for directly impacted communities, and creating community accountability mechanisms for harm.²⁷⁴ Movement organizations like

civil, politic, and social, of the United States.” *Id.* at 1162–64 (citing DuBois, *supra* note 254, at 170).

²⁶⁸ See *id.* at 1162 (citing Ben-Moshe, *supra* note 191, at 85, and DuBois, *supra* note 254) (explaining the influence of DuBois’s view of abolition as a process of creation as well as destruction of existing institutions, and the impact of that view on prison abolitionists); see also DAVIS, ARE PRISONS OBSOLETE?, *supra* note 27, at 20–21 (calling on alternatives to incarceration that “involve both transformation of the techniques for addressing ‘crime’ and of the social and economic conditions” and stating that “[t]he most difficult and urgent challenge today is that of creatively exploring new terrains of justice, where the prison no longer serves as our major anchor”).

²⁶⁹ McLeod, *supra* note 263, at 1164.

²⁷⁰ *Id.* at 1161.

²⁷¹ *Id.*

²⁷² MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98.

²⁷³ I first heard Rachel Herzing explain this necessary corollary in a talk at the 2014 American Studies Association Annual Meeting. Rachel Herzing, Caucus at the 2014 Annual Meeting of the American Studies Association: Critical Prison Studies: Keywords in Critical Prison Studies II (Nov. 8, 2014). For the most recent book-length articulation of an argument for abolition of police, see ALEX S. VITALE, *THE END OF POLICING* (2017).

²⁷⁴ Directly impacted people are calling for abolition to “dismantle,” “starve,” and “reimagine” the system. Stahly-Butts, *supra* note 6; see Kaba, *supra* note 163 (stating that abolition requires minimizing police contact, reducing police power, and redressing harm caused by policing); see also McLeod, *supra* note 263, at 1207–18 (describing the demands

Critical Resistance, Black & Pink, We Charge Genocide, Project NIA, and the Audre Lorde project are “practicing abolition every day . . . by creating local projects and initiatives that offer alternative ideas and structures for mediating conflicts and addressing harms without relying on police or prisons.”²⁷⁵

The Vision is in line with the abolitionist politics resurgent in left spaces, which call for the end of prisons and policing as interrelated phenomena.²⁷⁶ It shifts the police reform frame from adherence to law and accountability to lesser reliance on criminal law enforcement: fewer police, prosecutions, prosecutors, jails, and prisons. This creates an imperative to push for reforms that shrink the footprint of police, prisons, and jails.

To illustrate the basic distinction between a traditional approach to reform and a decarceral one, take the presence of police in schools.²⁷⁷ In Ferguson, the DOJ documented how the police respond to student misconduct with arrest and force.²⁷⁸ The report documents officers shoving, arresting, charging, and tasing students (for not following an order to walk to the principal’s office, for example).²⁷⁹ The DOJ recommends better training, evaluation, and policies so that the

of, and transformations made possible by, an abolitionist—as opposed to reformist—ethic).

²⁷⁵ Mariame Kaba, *Take No Prisoners*, VICE (Oct. 5, 2015, 12:00 AM). For abolitionist alternatives to police, see Candice Bernd, *Community Groups Work to Provide Emergency Medical Alternatives, Separate from Police*, in WHO DO YOU SERVE, WHO DO YOU PROTECT?, *supra* note 3, at 151; Ejeris Dixon, *Building Community Safety: Practical Steps Toward Liberatory Transformation*, in WHO DO YOU SERVE, WHO DO YOU PROTECT?, *supra* note 3, at 161; Herzing, *Big Dreams and Bold Steps*, *supra* note 32. For collective models of abolition, Kaba points to places where social conflict is dealt without recourse to police, including schools without police stationed within them, and neighborhoods without police on every corner. Dukmasova, *supra* note 203 (quoting Mariame Kaba).

²⁷⁶ See, e.g., Heatherton, *supra* note 201, at 35 (“[C]all[s] for special prosecutors or indictments . . . actually reify the state rather than insisting that the state should not be a part of this process. There’s a much larger conversation to be had, which is ultimately about abolishing the police. Therein lies the necessary intervention.”); 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/> (“This isn’t about getting ‘better’ police . . . but getting away from ‘needing’ police altogether.”). Smith quotes a 1966 article by James Baldwin about police: “[T]he police are simply the hired enemies of this population. They are present to keep the Negro in his place and to protect white business interests, and they have no other function.” *Id.* (citing James Baldwin, *A Report From Occupied Territory*, THE NATION (July 11, 1966), <https://www.thenation.com/article/report-occupied-territory>).

²⁷⁷ On the distinction between reformist and transformative demands, see Marbre Stahly-Butts & Amna A. Akbar, *The Transformative Reforms of the Movement for Black Lives*, 2018 MICH. ST. L. REV. (forthcoming).

²⁷⁸ “School Resource Officers” are stationed in an eighty percent African American school district. DOJ FERGUSON REPORT, *supra* note 16, at 37–38.

²⁷⁹ *Id.*

school police program “can be used as a way to build positive relationships with youth from a young age and to support strategies to keep students in school and learning.”²⁸⁰

This amelioration approach stands in strong contrast to the Vision’s demand. In its call to end the war on Black people, the *first* constituent demand is for an “end to the criminalization” of Black youth, including ending zero-tolerance school policies and arrests of students, removing police from schools, and reallocating funds from police to restorative services.²⁸¹ The approach is not to improve the police, but to remove and to disinvest from them altogether.²⁸² Police turn schools into the entryway into the school-to-prison pipeline, pushing students out of school and into jails and prisons.²⁸³ This is what police in schools do; it is their symbolic and material function. Their presence cannot be fixed.²⁸⁴

Here it is worth unpacking the movement’s critique of traditional criminal law reforms. The Vision critiques traditional criminal law reforms for “not address[ing] the root causes of the killing, dehumanization, and torture of our people.”²⁸⁵ These reforms “increase police budgets and diagnos[e] the problem as one of ‘implicit bias’ or ‘bad apples.’” They are “[a]t best . . . band aids on gaping bullet wounds, and at wors[t] . . . interventions that simply increase corporate and state power and make it easier for the state to devalue and destroy our communities.”²⁸⁶ Two moves are essential to understand. First, the traditional police reforms that have been put forward—training, body cameras, better policies, more diverse police forces²⁸⁷—do not address the underlying structural issues that manifest from and through white supremacy and capitalism.²⁸⁸ These reforms address superficial symptoms and perpetuate a system committed to anti-black racism. Second,

²⁸⁰ *Id.* at 94. Baltimore’s public schools have their own police force, with “all the powers of law enforcement officers.” DOJ BALTIMORE REPORT, *supra* note 16, at 16.

²⁸¹ MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7.

²⁸² MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98; *see also* BYP100, AGENDA TO KEEP US SAFE, *supra* note 5, at 11–12 (“Police interactions with minors should be positive and limited . . . [Police] should not have a constant presence in the school environment.”).

²⁸³ MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7.

²⁸⁴ For a classic on the criminalization of Black youth, see VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* 57–63 (2011).

²⁸⁵ MOVEMENT FOR BLACK LIVES, *About Us*, *supra* note 3.

²⁸⁶ *Id.* Devon Carbado and Patrick Rock have recently advanced an alternative to the “bad apple” account that articulates the systemic and structural aspects of racialized police violence. Carbado & Rock, *supra* note 160, at 161–62.

²⁸⁷ *E.g.*, PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 17; *see also* VITALE, *supra* note 273, at 4–24 (describing and critiquing the traditional police reforms).

²⁸⁸ For a contemporary argument by a movement organizer advancing the idea, popular among the Black Power Movement, that “Black communities are effectively domestic

the traditional reforms *may make the problem worse*.²⁸⁹ They advance a discursive universe that maintains confusion around the nature of the problem. They increase resources and legitimacy to the institutions that maintain inequality and systematic suffering.

Consider the example of body cameras—probably the most visible reform to emerge in response to the movement, even if it was never a primary demand²⁹⁰—through the lens of the movement critique. Under “end the war on Black people,” the demand is to “end . . . mass surveillance of Black communities” and “technologies that criminalize and target our communities,” including body cameras.²⁹¹ In other words, the call is against body cameras.

First, while advocates of various stripes have pointed out a range of concerns implicated by police adoption of body cameras, the movement concern has been that body cameras do not meaningfully address the power differential between police and policed.²⁹² That the video footage of New York City police strangling Eric Garner to death led to no indictment and no firing confirmed this skepticism.²⁹³ It is a technology that remains in the hands of police and at the mercy

colonies in the United States” with police as an “occupying army,” see Adams & Rameau, *supra* note 124, at 521–24.

²⁸⁹ “[M]ost prison reforms tend to actually entrench the prison system and expand its reach.” Mariame Kaba, *Free Us All: Participatory Defense Campaigns as Abolitionist Organizing*, NEW INQUIRY (May 8, 2017), <https://thenewinquiry.com/free-us-all/> (citing the 19th-century push by reformers for the creation of women’s prisons as a way to ameliorate conditions, which led to exponentially greater incarceration of women).

²⁹⁰ See Frazier, *supra* note 50 (discussing President Obama and Hillary Clinton’s support for body cameras following the deaths of Michael Brown and Freddie Gray); see also BYP100, AGENDA TO KEEP US SAFE, *supra* note 5, at 14 (discussing the dangers body cameras pose to civil rights, but outlining best practices for police departments that do adopt body cameras); People’s Justice Project et al., *Body Cameras Are Not the Answer* (draft op-ed on file with author) (arguing against the city of Columbus’s plan to purchase body cameras).

²⁹¹ MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7.

²⁹² There are questions about how the body camera’s line of sight, starting with the police officer’s upper body, embeds the police’s point of view; the rules and realities around when police turn on and off the cameras and to what end; who maintains the footage; and the privacy implications for those filmed. See Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1566–69 (2016); Frazier, *supra* note 50.

²⁹³ See, e.g., Justin Hansford, *Body Cameras Won’t Stop Police Brutality. Eric Garner Is Only One of Several Reasons Why*, WASH. POST: POSTEVERYTHING (Dec. 4, 2014), https://www.washingtonpost.com/posteverything/wp/2014/12/04/body-cameras-wont-stop-police-brutality-eric-garner-is-only-one-of-several-reasons-why/?utm_term=.bb8770ebc0cf; Nia-Malika Henderson, *With Eric Garner, Obama’s Body Camera Argument Just Took a Big Hit*, WASH. POST: THE FIX (Dec. 3, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/12/03/obamas-body-camera-argument-just-took-a-big-hit/?utm_term=.d99e81919bba; Elliott C. McLaughlin, *After Eric Garner: What’s Point of Police Body Cameras?*, CNN (Dec. 8, 2014), <http://www.cnn.com/2014/12/04/us/eric-garner-ferguson-body-cameras-debate/index.html>.

of the prosecutor; the technology remains embedded in a criminal system bureaucracy that has more interest in protecting itself than in accountability for its violence against Black people.²⁹⁴ Federal, state, and city governments have pushed body cameras as a substitute for more meaningful reforms that would shift power and accountability into Black communities. Body cameras legitimate the system without shifting serious power into Black communities.

Second, the move to body cameras invests police and prosecutors with yet another tool, more power, and more resources. Herzing explains that an “orientation toward police reform [that] imagines that documentation, training or oversight might protect us” misses the point.²⁹⁵ Adopting body cameras requires considerable capital investment in and for police and corporate technologies, increasing police budgets and private profit from policing. (Note, too, this is money that could be invested instead in social programs like schools or job programs.) The reform suggests police are capable of policing themselves—that documentation will lead to more accountability and less violence—and undermines a broader analysis of the whole set of interlocking governmental and private processes that perpetuate police violence against Black communities. The reform claims that underlying problems are individual in nature: A single police officer who killed is bad or harbors internal bias. Or it locates the problem in tiny junctures, for example, the lack of video footage that could establish the facts. It posits the problem as one of transparency rather than power. By obscuring how the system actually works, by rendering the problem exceptional or able to be remedied by another tool of internal oversight, the wrong diagnosis further preserves the system.²⁹⁶

Where the Vision comes in most direct conflict with traditional law reform projects is in its opposition to reforms that “simply increase corporate and state power and make it easier for the state to devalue and destroy our communities.”²⁹⁷ Such reforms provide

²⁹⁴ See Mariame Kaba, *Police “Reforms” You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), <http://www.truth-out.org/opinion/item/27852-police-reforms-you-should-always-oppose> (arguing against technology-focused reforms because they give more money to the police; technology is more likely to be used against the public than the police; and technological advances won’t end police violence).

²⁹⁵ Herzing, *Big Dreams and Bold Steps*, *supra* note 32; see also Adams & Rameau, *supra* note 124, at 529 (arguing that the function of police “is to enforce the will and mores of those in charge—the ruling class”).

²⁹⁶ See Herzing, *Tweaking Armageddon*, *supra* note 142, at 194 (arguing that traditional reform efforts “run the risk of exceptionalizing or isolating negative elements of the system while normalizing its overall operation and underwriting its future”).

²⁹⁷ MOVEMENT FOR BLACK LIVES, *About Us*, *supra* note 3.

police or the criminal legal system more money and resources, undermining the movement's goals. I have heard organizers describe this idea as "not one more dollar." In other words, any reform that would translate into an additional dollar for policing or prisons is a loss for the movement and its cause.²⁹⁸ This is in stark contrast to the DOJ reports, where the reforms are inward facing, providing more resources and investment in police as a remedy to its ills.²⁹⁹

The call for abolition and decarceration may seem like an audacious claim, especially in view of the debate over the role of under-enforcement of criminal law in Black communities as a cause of inequality.³⁰⁰ Protests and rebellions around the country have called on prosecutors to indict and prosecute police to the fullest extent of the law,³⁰¹ invoking the under-enforcement argument: *Prosecute the cops the way you prosecute us*. Such a demand illuminates the double standards of the criminal system; it criminalizes minor crimes in Black communities while letting cops walk for murder. It also reveals debate and disagreement within the movement. These calls stand in contrast to the Vision and the less reactive facets of the Movement's work, sparking debate and division.³⁰² Some in the movement ecosystem

²⁹⁸ See also Kaba, *supra* note 294 ("Are the proposed reforms allocating more money to the police? If yes, you should oppose them."); *World Without Prisons?*, YOUTH JUSTICE COALITION, <http://www.youth4justice.org/wp-content/uploads/2011/04/World-without-prisons.jpg> (last visited Feb. 3, 2018) (describing the coalition's "starve the beast" campaign, which emphasizes that "[p]risons—and the police and court systems that feed them—make up a multi-billion dollar a year industry").

²⁹⁹ See *infra* Section I.B.

³⁰⁰ See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 11–12 (1997) (arguing that under, not over, enforcement is a primary injury suffered by African Americans); see also Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1717 (2006) (arguing for more focus on underenforcement in evaluating the "evenhandedness and democratic legitimacy of the criminal system," because, as much as enforcement, it "embodies concrete relationships and experiences, often of violence or insecurity").

³⁰¹ See, e.g., *Louisiana Protesters Demand Prosecution of Police in Fatal Shooting*, WIS. GAZETTE (July 7, 2016), http://www.wisconsin gazette.com/news/louisiana-protesters-demand-prosecution-of-police-in-fatal-shooting/article_42a4c289-e45a-5bae-be76-cc8fed9a7fe8.html; Greg Moore, *Protesters Call for Prosecution of Police in Fatal Shooting*, KAN. CITY STAR (Nov. 21, 2015), <http://www.kansascity.com/news/nation-world/national/article45795855.html>; Jane Morice, *Tamir Rice's Mother Continues to Demand Justice Two Years After Son's Fatal Shooting by Cleveland Police*, CLEVELAND.COM (Nov. 22, 2016), http://www.cleveland.com/metro/index.ssf/2016/11/tamir_rices_mother_continues_t.html.

³⁰² Heatherton, *supra* note 201, at 36 ("Instead of a mass movement saying 'No, we don't want them,' the mass movement is saying, 'How do we reform them? How do we hold a couple of them accountable?'"); *Black Liberation and the Abolition of the Prison Industrial Complex: An Interview with Rachel Herzog*, *supra* note 142, at 66 (noting that people working within Black Lives Matter and the Movement for Black Lives have a variety of perspectives regarding abolition).

believe calls to prosecute the police are appropriate.³⁰³ Others reject them for the same reasons they reject body cameras.³⁰⁴

The prospect of shrinking the criminal state raises the question of what emerges in its stead. Pushing for creative alternatives to punitive criminal punishment as a way to redress harm, Mariame Kaba argues abolitionist strategies create “an expansive potential vision of what justice could look like when people are harmed.”³⁰⁵ She frames the successful campaign to pass Chicago’s torture reparations ordinance to redress the victims of Chicago Police Department commander John Burge as such an example.³⁰⁶ As an alternative to indictments and prosecutions for police wrongdoing, the reparations work “sets a precedent for other people to think about justice too in different and expansive ways.”³⁰⁷ In part, the critique questions the good that police and incarceration do, for Black people in particular.³⁰⁸ At the same time, it points to imaginative new possibilities to acknowledge and redress harm.

Journalist and public intellectual—often commenting on movement politics—Mychal Denzel Smith writes:

When I say, “abolish the police,” I’m usually asked what I would have us replace them with. My answer is always full social, economic, and political equality, but that’s not what’s actually being asked. What people mean is “who is going to protect us?” Who protects us now? If you’re white and well-off, perhaps the police protect you. The rest of us, not so much. What use do I have for an institution that routinely kills people who look like me, and make it so I’m afraid to walk out of my home?³⁰⁹

³⁰³ See, e.g., India Thusi, *Failure to Prosecute Cops Undermines Public Trust*, THE HILL (Dec. 4, 2016), <http://thehill.com/blogs/pundits-blog/crime/308684-failure-to-prosecute-cops-undermines-public-trust>.

³⁰⁴ See, e.g., Mariame Kaba, *Prosecuting Cops Does Not Equal Justice*, TRUTHOUT (May 6, 2015), <http://www.truth-out.org/opinion/item/30630-prosecuting-cops-does-not-equal-justice> (critiquing celebrations of the State Attorney’s indictments of the police officers who killed Freddie Gray).

³⁰⁵ Berlatsky, *supra* note 109; see also, Sloan, *supra* note 109 (describing the use of small projects to find ways of addressing “harm to give people options other than thinking of prison or punishment as the main way we get accountability”).

³⁰⁶ Berlatsky, *supra* note 109; Sloan, *supra* note 109; Kaba, *supra* note 163.

³⁰⁷ Berlatsky, *supra* note 109; see also Herzing, *Tweaking Armageddon*, *supra* note 142, at 194 (arguing that abolitionist campaigns generate “the ability to make demands based on what is necessary rather than what is presented as possible” and to “develop the opportunity and political space to confront an inherently inhumane system with the clear long-term objective of its elimination”).

³⁰⁸ See Herzing, *Tweaking Armageddon*, *supra* note 142 at 5 (“Questioning the very legitimacy of the prison takes the opportunity to denounce prisons as a ‘natural’ feature of advanced democratic societies.”).

³⁰⁹ Smith, *supra* note 276.

Smith affirms that the police do more harm than good in Black communities, not only doing violence to Black communities but failing to protect them; they never have, and they never will. That is not their function. He denaturalizes the good that police produce. He forces a question of what they do produce, and for whom. *Police may protect you, but they do not protect me and people like me. In fact, they harm me.* At the same time, he argues that police are a substitute for social, economic, and political equality—suggesting the problems police respond to are functions of social, economic, and political inequality.

At the heart of the Vision is the reorganization of the state through the redistribution of power and resources into Black communities, as self-determined by Black communities. This requires a reimagination of the criminal legal system and the problems it poses. As part of this larger project, the movement demands criminal law reforms that do more than delimit the fiscal, social, and governance footprint of incarceration and policing, but challenge and undermine capitalism, white supremacy, and patriarchy. This has created some unexpected tensions and what could be read as contradictory political positions. Consider the campaign in Colorado to decriminalize marijuana, viewed by some in the movement as hollow reform.³¹⁰ The campaign neither meaningfully reflected Black leadership nor accounted for the racial injustice wrought by decades of the war on crime. Legalization campaigns, driven by a desire for profits from newly legalized markets and divorced from racial justice campaigns, centralize power in the hands of a few authorized—typically white—growers and dealers.³¹¹ They continue to criminalize unauthorized

³¹⁰ See Darren Sands, *The Black Lives Matter Movement Is About to Jump into the 2016 Marijuana Battle*, BUZZFEED (Nov. 15, 2015), https://www.buzzfeed.com/darrensands/the-black-lives-matter-movement-is-about-to-jump-into-the-20?utm_term=.RyAeg8WyPw#.ghV9QWEXpL (discussing organizers' concerns that Black Americans who have been criminalized for selling marijuana will be closed out of the legal marijuana market, while white people reap the benefits). Calls for decriminalization have been included in sets of demands put forward by movement actors. See, e.g., BYP100, AGENDA TO KEEP US SAFE, *supra* note 5, at 19–20 (calling for the decriminalization of marijuana as a part of a larger set of reforms). The campaign in California was more focused on racial justice. *Marijuana and the Golden State*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/about-us/departments-and-state-offices/california/marijuana-and-golden-state> (last visited Feb. 10, 2018).

³¹¹ See Sands, *supra* note 310; April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men Stay in Prison*, ALTERNET (Mar. 16, 2014, 8:36 AM); see also Michelle Alexander, FACEBOOK (Nov. 2, 2015), https://www.facebook.com/permalink.php?story_fbid=896778757076749&id=168304409924191 (“[I]t’s a sickening spectacle to see privileged white men rushing to get rich quick selling weed without any sense of irony that they will be making their fortune doing precisely what millions of impoverished people, especially black men, have been caged and shamed for doing for the past 40 years.”).

(cheaper) sales by Black dealers, and do not involve reparations provisions or expungement of drug records.³¹² Such campaigns do not meaningfully redress harm in Black communities or shift power into those communities. They merely strengthen the grip of capitalism.

As an illustration of how resources might be shifted from one form of governance to another, take the L.A. for Youth campaign.³¹³ The ongoing campaign calls for at least five percent of Los Angeles's law enforcement budget to be reinvested in youth.³¹⁴ The money would go towards creating a "Youth Development Department" with a youth leadership board, a network of youth centers with youth services, 15,000 jobs and paid internships for youth, and jobs for 350 community-based peacebuilders and interventionists.³¹⁵ An ad for the campaign features a pair of shackled wrists, with opened-palmed hands releasing a bright multicolored butterfly.³¹⁶ The text reads: "Will we continue to be the county that locks up more youth than any other place in the world? Or will we build a different future? 25,000 Youth Jobs. 500 Peacebuilders. 50 Youth Centers."³¹⁷ This is a starkly different approach to reform than those espoused by traditional criminal law reforms or liberal legalists.³¹⁸ This is invest-divest alive.

The *Freedom to Thrive* report highlights other abolitionist invest-divest organizing campaigns around the country.³¹⁹ Examples include campaigns to close local jails and youth detention centers; to repeal low-level and traffic offenses; to end collaboration between ICE and local police; to develop restorative justice approaches for trauma for school-age students in community schools; to push for an elected civilian accountability board with "mandated inclusion of survivors and families of victims of police violence"; to bail out incarcerated mothers for Mother's Day; and to demand to take money out of police

³¹² But see *Marijuana and the Golden State*, *supra* note 310 (describing California's Proposition 64, which eliminated criminal penalties for many marijuana offenses and allowed many people with convictions to expunge their records).

³¹³ LA FOR YOUTH, <http://www.laforyouth.org> (last visited Jan. 12, 2018). For discussion of other invest-divest campaigns, see Herzing, *Big Dreams and Bold Steps*, *supra* note 32. Herzing names a number of abolitionist efforts: Youth Justice Coalition's and Los Angeles Community Action Network's (LA CAN) campaigns to divert resources from Los Angeles police to heavily policed neighborhoods, as well as Harm Free Zone (Durham, North Carolina), Safe Neighborhood Campaign (Brooklyn, NY) and Audre Lorde Project (New York City) which all develop community response infrastructure that allows community members to avoid calling the police. *Id.* Spade also discusses similar campaigns at length. Spade, *supra* note 189, at 1033, 1047–50.

³¹⁴ LA FOR YOUTH, *supra* note 313.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ See *supra* notes 17, 285–89 and accompanying text.

³¹⁹ CTR. FOR POPULAR DEMOCRACY ET AL., *supra* note 217.

budgets and into programs for better health care, early education and afterschool programs, jobs, and housing.³²⁰

As movement voices suggest, the abolitionist project is not only negative, it is imaginative; solutions involve social organizations and the reallocation of resources, with investments in jobs, health care, and schools as alternative frameworks for existing investments in policing and incarceration. Even in the short term the abolition of a police force may be eminently useful, freeing up resources for other sorts of investments. As Mychal Denzel Smith argues, police do not serve the needs of Black people as is³²¹—communities of color and immigrants already hesitate to call the police for fear of violence, brutality, arrest, and deportation.³²² One might disagree with the argument to abolish police, but having the debate is itself productive, as it forces conversations about the otherwise taken-for-granted value of police and incarceration.

The Vision reflects a commitment to shrinking the carceral state, decreasing the hold of police and prisons, and shifting resources and power into alternative forms of governance. It's a call for an end to exclusion and punishment (e.g., deportation and incarceration), and demands investments in Black communities' thriving through education, housing, health care, and jobs. While the Vision is clear in its anti-capitalist orientation, what comes in its stead in the long haul remains opaque. It will be more collective and shared, it will involve redistribution, and it will put people before profit. It will also require experimentation.³²³

But agreement on gradual decarceration may conceal a range of commitments to the total abolition of policing and prison as a method of governance. The Vision may paper over differences between anarchist impulses on the one hand, and socialist, Marxist, progressive democratic impulses on the other. In the anarchist gloss, the abolitionist call is to get the state out of the lives of Black communities. This gloss poses contradictions with the aspects of the Vision that call

³²⁰ *Id.* at 12, 17–18, 22, 27, 30, 32–34, 42. For discussion of additional abolitionist campaigns, including community bail funds, participatory defense campaigns that frame the individual's conditions as emblematic rather than exceptional, community bail funds, and moves to disarm the police, see Dukmasova, *supra* note 203; Kaba, *supra* note 289; Kaba, *supra* note 294.

³²¹ Smith, *supra* note 276.

³²² See, e.g., Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, THE GUARDIAN (Mar. 23, 2017 6:30 AM), <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation>.

³²³ See McLeod, *supra* note 143, at 113 (arguing that the unfinished and partial aspects of abolitionist reform “should be embraced as a source of critical strength and possibility”).

for a reinvestment of those resources.³²⁴ In the socialist gloss, the abolitionist call is to deny the state punishment as the primary mode of governance, and redirect its involvement into other spheres of governance (schools, housing, health care, jobs). Here lies another tension. The Vision rests on a distrust of how the state criminalizes and has criminalized Black people at every juncture in every guise since its founding. Schools, for example, create a pathway to prison in poor Black communities.³²⁵ How can any long-standing institution or social program be trusted to remain unentangled in criminalization rooted in anti-Black racism?

The Vision does not address these contradictions directly. One can imagine, however, that shifting resources from governance by criminal law into social programs defined and directed by Black people would require a process through which power is built by and shifted into Black communities. To sustain itself, racial capitalism requires Black people to remain relatively powerless in terms of capital, land, and political power.³²⁶ A shift of the sort imagined by the Vision would require serious power-building in Black communities; in turn, that process would transform the dynamics of governance. Shifting away from criminal governance would also start to demonstrate a different set of possibilities of relationships and governance in a way that would undermine racial capitalism and lead to more transformative possibilities.

This may strike some readers as naïve. But critical law scholarship often refrains from the realm of solutions³²⁷ or remains in a predictable box: community policing or greater constitutional enforcement. In other words, even the most radical critiques often return to the same reforms, reinvesting in law and the police in the same way the DOJ reports do. There is little attempt to fundamentally

³²⁴ See MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98.

³²⁵ E.g., Casey Quinlan, *New Data Shows the School-to-Prison Pipeline Starts as Early as Preschool*, THINK PROGRESS (June 7, 2016, 1:50 PM), <https://thinkprogress.org/new-data-shows-the-school-to-prison-pipeline-starts-as-early-as-preschool-80fc1c3e85be/>; see also MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7 (“Black children attend under-resourced schools where they are often pushed off of an academic track onto a track to prison.”).

³²⁶ See Kelley, *supra* note 198 (explaining, that in Cedric Robinson’s view, “‘racial capitalism’ [is] dependent on slavery, violence, imperialism, and genocide”).

³²⁷ See, e.g., Akbar, *National Security’s Broken Windows*, *supra* note 128; Amna Akbar, *Policing “Radicalization”*, 3 U.C. IRVINE L. REV. 809 (2013); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); see also Mariana Valverde, *Analyzing Punishment: Scope and Scale*, 16 THEORETICAL CRIMINOLOGY 245, 247 (2012) (arguing that left criminology has succeeded at critique but failed at reimagining alternatives and policy proposals).

reframe the debate, or any concerted efforts at imaginative alternatives. With some important exceptions,³²⁸ the scholarship rests on critique, without proposing alternatives or fixes. And when it does offer fixes, they are wholly inadequate, in that they do not come close to matching the scale of critique.

Imagining with the Movement for Black Lives would expand our debate over criminal law reform, because it forces a confrontation with criminal law's entanglement with governing Black, poor, and other communities of color, and it invests the questions with a broader imagination of possibilities. The Vision is not altogether worked out, and inherently experimental, but undoubtedly represents a serious and meaningful effort to think beyond the current horizon of law reform debates. The Vision takes on criminal law reform with a commitment to understand how white supremacy, patriarchy, and capitalism organize our society; it prioritizes freedom and equality over status quo arrangements; it aims to shift away from a society governed by crime and capitalism, to a different logic.

Without a new radical imagination, the current system of laws is the only baseline for values and commitments of legal critique. This means, in part, that our projects become more statist, conventional, and engaged in the realm of conservative governance than we may otherwise like or care to admit. Social movements offer another way forward.

³²⁸ E.g., McLeod, *supra* note 263 (offering “grounded preventive justice” as a positive, abolitionist substitute to criminal law enforcement, and describing what it would entail).

CONCLUSION

The Movement for Black Lives wants more than a few less police killings of Black people. It wants those killings to end. It wants to build another world, organized very differently than the one we have inherited. It is not just deconstructive and critical; it is reconstructive and visionary, pushing for a radical reimagination of the state and the law that serves it. It is here that legal scholars may have the most to learn from, and the most to contribute, if we imagine collaboratively with these movements.

What if law reform was not targeted towards seeing what kind of improvements we can make to the current system, but was instead geared toward building a state governed by different logics, as Hayes suggested? As legal scholars, we are too often unwitting volunteers in a project of law reform that addresses racial capitalism's brutal excesses, effectively extending its lifespan. These movements, and the histories they point to, suggest this is a fool's errand. It is time to turn to something new, time for a radical reimagination of the state and of law—time to imagine with social movements.

AUGUST 1963

Letter from Birmingham Jail

by Martin Luther King, Jr.

From the Birmingham jail, where he was imprisoned as a participant in nonviolent demonstrations against segregation, Dr. Martin Luther King, Jr., wrote in longhand the letter which follows. It was his response to a public statement of concern and caution issued by eight white religious leaders of the South. Dr. King, who was born in 1929, did his undergraduate work at Morehouse College; attended the integrated Crozer Theological Seminary in Chester, Pennsylvania, one of six black pupils among a hundred students, and the president of his class; and won a fellowship to Boston University for his Ph.D.

WHILE confined here in the Birmingham city jail, I came across your recent statement calling our present activities "unwise and untimely." Seldom, if ever, do I pause to answer criticism of my work and ideas. If I sought to answer all of the criticisms that cross my desk, my secretaries would be engaged in little else in the course of the day, and I would have no time for constructive work. But since I feel that you are men of genuine good will and your criticisms are sincerely set forth, I would like to answer your statement in what I hope will be patient and reasonable terms.

I think I should give the reason for my being in Birmingham, since you have been influenced by the argument of "outsiders coming in." I have the honor of serving as president of the Southern Christian Leadership Conference, an organization operating in every Southern state, with headquarters in Atlanta, Georgia. We have some eighty-five affiliate organizations all across the South, one being the Alabama Christian Movement for Human Rights. Whenever necessary and possible, we share staff, educational and financial resources with our affiliates. Several months ago our local affiliate here in Birmingham invited us to be on call to engage in a nonviolent direct-action program if such were deemed necessary. We readily consented, and when the hour came we lived up to our promises. So I am here, along with several members of my staff, because we were invited here. I am here because I have basic organizational ties here.

Beyond this, I am in Birmingham because injustice is here. Just as the eighth-century prophets left their little villages and carried their "thus saith the Lord" far beyond the boundaries of their hometowns; and just as the Apostle Paul left his little village of Tarsus and carried the gospel of Jesus Christ to practically every hamlet and city of the Greco-Roman world, I too am compelled to carry the gospel of freedom beyond my particular hometown. Like Paul, I must constantly respond to the Macedonian call for aid.

Moreover, I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives inside the United States can never be considered an outsider.

You deplore the demonstrations that are presently taking place in Birmingham. But I am sorry that your statement did not express a similar concern for the conditions that brought the demonstrations into being. I am sure that each of you would want to go beyond the superficial social analyst who looks merely at effects and does not grapple with underlying causes. I would not hesitate to say that it is unfortunate that so-called demonstrations are taking place in Birmingham at this time, but I would say in more emphatic terms that it is even more unfortunate that the white power structure of this city left the Negro community with no other alternative.

IN ANY nonviolent campaign there are four basic steps: collection of the facts to determine whether injustices are alive, negotiation, self-purification, and direct action. We have gone through all of these steps in Birmingham. There can be no gainsaying of the fact that racial injustice engulfs this community. Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of police brutality is known in every section of this country. Its unjust treatment of Negroes in the courts is a notorious reality. There have been more unsolved bombings of Negro homes and churches in Birmingham than in any other city in this nation. These are the hard, brutal, and unbelievable facts. On the basis of them, Negro leaders sought to negotiate with the city fathers. But the political leaders consistently refused to engage in good-faith negotiation.

Then came the opportunity last September to talk with some of the leaders of the economic community. In these negotiating sessions certain promises were made by the merchants, such as the promise to remove the humiliating racial signs from the stores. On the basis of these promises, Reverend Shuttlesworth and the leaders of the Alabama Christian Movement for Human Rights agreed to call a moratorium on any type of demonstration. As the weeks and months unfolded, we realized that we were the victims of a broken promise. The signs remained. As in so many experiences of the past, we were confronted with blasted hopes, and the dark shadow of a deep disappointment settled upon us. So we had no alternative except that of preparing for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and national community. We were not unmindful of the difficulties involved. So we decided to go through a process of self-purification. We

started having workshops on nonviolence and repeatedly asked ourselves the questions, "Are you able to accept blows without retaliating?" and "Are you able to endure the ordeals of jail?" We decided to set our direct-action program around the Easter season, realizing that, with exception of Christmas, this was the largest shopping period of the year. Knowing that a strong economic withdrawal program would be the by-product of direct action, we felt that this was the best time to bring pressure on the merchants for the needed changes. Then it occurred to us that the March election was ahead, and so we speedily decided to postpone action until after election day. When we discovered that Mr. Conner was in the runoff, we decided again to postpone action so that the demonstration could not be used to cloud the issues. At this time we agreed to begin our nonviolent witness the day after the runoff.

This reveals that we did not move irresponsibly into direct action. We, too, wanted to see Mr. Conner defeated, so we went through postponement after postponement to aid in this community need. After this we felt that direct action could be delayed no longer.

You may well ask, "Why direct action, why sit-ins, marches, and so forth? Isn't negotiation a better path?" You are exactly right in your call for negotiation. Indeed, this is the purpose of direct action. Nonviolent direct action seeks to create such a crisis and establish such creative tension that a community that has consistently refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored. I just referred to the creation of tension as a part of the work of the nonviolent resister. This may sound rather shocking. But I must confess that I am not afraid of the word "tension." I have earnestly worked and preached against violent tension, but there is a type of constructive nonviolent tension that is necessary for growth. Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, we must see the need of having nonviolent gadflies to create the kind of tension in society that will help men to rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood. So, the purpose of direct action is to create a situation so crisis-packed that it will inevitably open the door to negotiation. We therefore concur with you in your call for negotiation. Too long has our beloved Southland been bogged down in the tragic attempt to live in monologue rather than dialogue.

One of the basic points in your statement is that our acts are untimely. Some have asked, "Why didn't you give the new administration time to act?" The only answer that I can give to this inquiry is that the new administration must be prodded about as much as the outgoing one before it acts. We will be sadly mistaken if we feel that the election of Mr. Boutwell will bring the millennium to Birmingham. While Mr. Boutwell is much more articulate and gentle than Mr. Conner, they are both segregationists, dedicated to the task of maintaining the status quo. The hope I see in Mr. Boutwell is that he will be reasonable enough to see the futility of massive resistance to desegregation. But he will not see this without pressure from the devotees of civil rights. My friends, I must say to you that we have not made a single gain in civil rights without determined legal and nonviolent pressure. History is the long and tragic story of the fact that privileged groups seldom give up their privileges voluntarily. Individuals may see the moral light and voluntarily give up their unjust posture; but, as Reinhold Niebuhr has reminded us, groups are more immoral than individuals.

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have never yet engaged in a direct-action movement that was "well timed" according to the timetable of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "wait." It rings in the ear of every Negro with a piercing familiarity. This "wait" has almost always meant "never." It has been a tranquilizing thalidomide, relieving the emotional stress for a moment, only to give birth to an ill-formed infant of frustration. We must come to see with the distinguished jurist of yesterday that "justice too long delayed is justice denied." We have waited for more than three hundred and forty years for our God-given and constitutional rights. The nations of Asia and Africa are moving with jetlike speed toward the goal of political independence, and we still creep at horse-and-buggy pace toward the gaining of a cup of coffee at a lunch counter. I guess it is easy for those who have never felt the stinging darts of segregation to say "wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, brutalize, and even kill your black brothers and sisters with impunity; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she cannot go to the public amusement park that has just been advertised on television, and see tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky, and see her begin to distort her little personality by unconsciously developing a bitterness toward white people; when you have to concoct an answer for a five-year-old son asking in agonizing pathos, "Daddy, why do white people treat colored people so mean?"; when you take a cross-country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored"; when your first name becomes "nigger" and your middle name becomes "boy" (however old you are) and your last name becomes "John," and when your wife and mother are never given the respected title "Mrs."; when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never knowing what to expect next, and plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of "nobodiness" -- then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over and men are no longer willing to be plunged into an abyss of injustice where they experience the bleakness of corroding despair. I hope, sirs, you can understand our legitimate and unavoidable impatience.

YOU express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, it is rather strange and paradoxical to find us consciously breaking laws. One may well ask, "How can you advocate breaking some laws and obeying others?" The answer is found in the fact that there are two types of laws: there are just laws, and there are unjust laws. I would agree with St. Augustine that "An unjust law is no law at all."

Now, what is the difference between the two? How does one determine when a law is just or unjust? A just law is a man-made code that squares with the moral law, or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. To use the words of Martin Buber, the great Jewish philosopher, segregation substitutes an "I - it" relationship for the "I - thou" relationship and ends up relegating persons to the status of things. So segregation is not only politically, economically, and sociologically unsound, but it is morally wrong and sinful. Paul Tillich has said that sin is separation. Isn't segregation an existential expression of man's tragic separation, an expression of his awful estrangement, his terrible sinfulness? So I can urge men to obey the 1954 decision of the Supreme Court because it is morally right, and I can urge them to disobey segregation ordinances because they are morally wrong.

Let us turn to a more concrete example of just and unjust laws. An unjust law is a code that a majority inflicts on a minority that is not binding on itself. This is difference made legal. On the other hand, a just law is a code that a majority compels a minority to follow, and that it is willing to follow itself. This is sameness made legal.

Let me give another explanation. An unjust law is a code inflicted upon a minority which that minority had no part in enacting or creating because it did not have the unhampered right to vote. Who can say that the legislature of Alabama which set up the segregation laws was democratically elected? Throughout the state of Alabama all types of conniving methods are used to prevent Negroes from becoming registered voters, and there are some counties without a single Negro registered to vote, despite the fact that the Negroes constitute a majority of the population. Can any law set up in such a state be considered democratically structured?

These are just a few examples of unjust and just laws. There are some instances when a law is just on its face and unjust in its application. For instance, I was arrested Friday on a charge of parading without a permit. Now, there is nothing wrong with an ordinance which requires a permit for a parade, but when the ordinance is used to preserve segregation and to deny citizens the First Amendment privilege of peaceful assembly and peaceful protest, then it becomes unjust.

Of course, there is nothing new about this kind of civil disobedience. It was seen sublimely in the refusal of Shadrach, Meshach, and Abednego to obey the laws of Nebuchadnezzar because a higher moral law was involved. It was practiced superbly by the early Christians, who were willing to face hungry lions and the excruciating pain of chopping blocks before submitting to certain unjust laws of the Roman Empire. To a degree, academic freedom is a reality today because Socrates practiced civil disobedience.

We can never forget that everything Hitler did in Germany was "legal" and everything the Hungarian freedom fighters did in Hungary was "illegal." It was "illegal" to aid and comfort a Jew in Hitler's Germany. But I am sure that if I had lived in Germany during that time, I would have aided and comforted my Jewish brothers even though it was illegal. If I lived in a Communist country today where certain principles dear to the Christian faith are suppressed, I believe I would openly advocate disobeying these anti-religious laws.

IMUST make two honest confessions to you, my Christian and Jewish brothers. First, I must confess that over the last few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizens Councillor or the Ku Klux Klanner but the white moderate who is more devoted to order than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, "I agree with you in the goal you seek, but I can't agree with your methods of direct action"; who paternalistically feels that he can set the timetable for another man's freedom; who lives by the myth of time; and who constantly advises the Negro to wait until a "more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.

In your statement you asserted that our actions, even though peaceful, must be condemned because they precipitate violence. But can this assertion be logically made? Isn't this like condemning the robbed man because his possession of money precipitated the evil act of robbery? Isn't this like condemning Socrates because his unswerving commitment to truth and his philosophical delvings precipitated the misguided popular mind to make him drink the hemlock? Isn't this like condemning Jesus because His unique God-consciousness and never-ceasing devotion to His will precipitated the evil act of crucifixion? We must come to see, as federal courts have consistently affirmed, that it is immoral to urge an individual to withdraw his efforts to gain his basic constitutional rights because the quest precipitates violence. Society must protect the robbed and punish the robber.

I had also hoped that the white moderate would reject the myth of time. I received a letter this morning from a white brother in Texas which said, "All Christians know that the colored people will receive equal rights eventually, but is it possible that you are in too great of a religious hurry? It has taken Christianity almost 2000 years to accomplish what it has. The teachings of Christ take time to come to earth." All that is said here grows out of a tragic misconception of time. It is the strangely irrational notion that there is something in the very flow of time that will inevitably cure all ills. Actually, time is neutral. It can be used either destructively or constructively. I am coming to feel that the people of ill will have used time much more effectively than the people of good will. We will have to repent in this generation not merely for the vitriolic words and actions of the bad people but for the appalling silence of the good people. We must come to see that human progress never rolls in on wheels of inevitability. It comes through the tireless efforts and persistent work of men willing to be coworkers with God, and without this hard work time itself becomes an ally of the forces of social stagnation.

YOU spoke of our activity in Birmingham as extreme. At first I was rather disappointed that fellow clergymen would see my nonviolent efforts as those of an extremist. I started thinking about the fact that I stand in the middle of two opposing forces in the Negro community. One is a force of complacency made up of Negroes who, as a result of long years of oppression, have been so completely drained of self-respect and a sense of "somebodiness" that they have adjusted to segregation, and, on the other hand, of a few Negroes in the middle class who, because of a degree of academic and economic security and because at points they profit by segregation, have unconsciously become insensitive to the problems of the masses. The other force is one of bitterness and hatred and comes perilously close to advocating violence. It is expressed in the various black nationalist groups that are springing up over the nation, the largest and best known being Elijah Muhammad's Muslim movement. This movement is nourished by the contemporary frustration over the continued existence of racial discrimination. It is made up of people who have lost faith in America, who have absolutely repudiated Christianity, and who have concluded that the white man is an incurable devil. I have tried to stand between these two forces, saying that we need not follow the do-nothingism of the complacent or the hatred and despair of the black nationalist. There is a more excellent way, of love and nonviolent protest. I'm grateful to God that, through the Negro church, the dimension of nonviolence entered our struggle. If this philosophy had not emerged, I am convinced that by now many streets of the South would be flowing with floods of blood. And I am further convinced that if our white brothers dismiss as "rabble-rousers" and "outside agitators" those of us who are working through the channels of nonviolent direct action and refuse to support our nonviolent efforts, millions of Negroes, out of frustration and despair, will seek solace and security in black nationalist ideologies, a development that will lead inevitably to a frightening racial nightmare.

Oppressed people cannot remain oppressed forever. The urge for freedom will eventually come. This is what has happened to the American Negro. Something within has reminded him of his birthright of freedom; something without has reminded him that he can gain it. Consciously and unconsciously, he has been swept in by what the Germans call the *Zeitgeist*, and with his black brothers of Africa and his brown and yellow brothers of Asia, South America, and the Caribbean, he is moving with a sense of cosmic urgency toward the promised land of racial justice. Recognizing this vital urge that has engulfed the Negro community, one should readily understand public demonstrations. The Negro has many pent-up resentments and latent frustrations. He has to get them out. So let him march sometime; let him have his prayer pilgrimages to the city hall; understand why he must have sit-ins and freedom rides. If his repressed emotions do not come out in these nonviolent ways, they will come out in ominous expressions of violence. This is not a threat; it is a fact of history. So I have not said to my people, "Get rid of your discontent." But I have tried to say that this normal and healthy discontent can be channeled through the creative outlet of nonviolent direct action. Now this approach is being dismissed as extremist. I must admit that I was initially disappointed in being so categorized.

But as I continued to think about the matter, I gradually gained a bit of satisfaction from being considered an extremist. Was not Jesus an extremist in love? -- "Love your enemies, bless them that curse you, pray for them that despitefully use you." Was not Amos an extremist for justice? -- "Let justice roll down like waters and righteousness like a mighty stream." Was not Paul an extremist for the gospel of Jesus Christ? -- "I bear in my body the marks of the Lord Jesus." Was not Martin Luther an extremist? -- "Here I stand; I can do no other so help me God." Was not John Bunyan an extremist? -- "I will stay in jail to the end of my days before I make a mockery of my conscience." Was not Abraham Lincoln an extremist? -- "This nation cannot survive half slave and half free." Was not Thomas Jefferson an extremist? -- "We hold these truths to be self-evident, that all men are created equal." So the question is not whether we will be extremist, but what kind of extremists we will be. Will we be extremists for hate, or will we be extremists for love? Will we be extremists for the preservation of injustice, or will we be extremists for the cause of justice?

I had hoped that the white moderate would see this. Maybe I was too optimistic. Maybe I expected too much. I guess I should have realized that few members of a race that has oppressed another race can understand or appreciate the deep groans and passionate yearnings of those that have been oppressed, and still fewer have the vision to see that injustice must be rooted out by strong, persistent, and determined action. I am thankful, however, that some of our white brothers have grasped the meaning of this social revolution and committed themselves to it. They are still all too small in quantity, but they are big in quality. Some, like Ralph McGill, Lillian Smith, Harry Golden, and James Dabbs, have written about our struggle in eloquent, prophetic, and understanding terms. Others have marched with us down nameless streets of the South. They sat in with us at lunch counters and rode in with us on the freedom rides. They have languished in filthy roach-infested jails, suffering the abuse and brutality of angry policemen who see them as "dirty nigger lovers." They, unlike many of their moderate brothers, have recognized the urgency of the moment and sensed the need for powerful "action" antidotes to combat the disease of segregation.

LET me rush on to mention my other disappointment. I have been disappointed with the white church and its leadership. Of course, there are some notable exceptions. I am not unmindful of the fact that each of you has taken some significant stands on this issue. I commend you, Reverend Stallings, for your Christian stand this past Sunday in welcoming Negroes to your Baptist Church worship service on a nonsegregated basis. I commend the Catholic leaders of this state for integrating Springhill College several years ago.

But despite these notable exceptions, I must honestly reiterate that I have been disappointed with the church. I do not say that as one of those negative critics who can always find something wrong with the church. I say it as a minister of the gospel who loves the church, who was nurtured in its bosom, who has been sustained by its Spiritual blessings, and who will remain true to it as long as the cord of life shall lengthen.

I had the strange feeling when I was suddenly catapulted into the leadership of the bus protest in Montgomery several years ago that we would have the support of the white church. I felt that the white ministers, priests, and rabbis of the South would be some of our strongest allies. Instead, some few have been outright opponents, refusing to understand the freedom movement and misrepresenting its leaders; all too many others have been more cautious than courageous and have remained silent behind the anesthetizing security of stained-glass windows.

In spite of my shattered dreams of the past, I came to Birmingham with the hope that the white religious leadership of this community would see the justice of our cause and with deep moral concern serve as the channel through which our just grievances could get to the power structure. I had hoped that each of you would understand. But again I have been disappointed.

I have heard numerous religious leaders of the South call upon their worshipers to comply with a desegregation decision because it is the law, but I have longed to hear white ministers say, follow this decree because integration is morally right and the Negro is your brother. In the midst of blatant injustices inflicted upon the Negro, I have watched white churches stand on the sidelines and merely mouth pious irrelevancies and sanctimonious trivialities. In the midst of a mighty struggle to rid our nation of racial and economic injustice, I have heard so many ministers say, "Those are social issues which the gospel has nothing to do with," and I have watched so many churches commit themselves to a completely otherworldly religion which made a strange distinction between bodies and souls, the sacred and the secular.

There was a time when the church was very powerful. It was during that period that the early Christians rejoiced when they were deemed worthy to suffer for what they believed. In those days the church was not merely a thermometer that recorded the ideas and principles of popular opinion; it was the thermostat that transformed the mores of society. Wherever the early Christians entered a town the power structure got disturbed and immediately sought to convict them for being "disturbers of the peace" and "outside agitators." But they went on with the conviction that they were "a colony of heaven" and had to obey God rather than man. They were small in number but big in commitment. They were too God-intoxicated to be "astronomically intimidated." They brought an end to such ancient evils as infanticide and gladiatorial contest.

Things are different now. The contemporary church is so often a weak, ineffectual voice with an uncertain sound. It is so often the arch supporter of the status quo. Far from being disturbed by the presence of the church, the power structure of the average community is consoled by the church's often vocal sanction of things as they are.

But the judgment of God is upon the church as never before. If the church of today does not recapture the sacrificial spirit of the early church, it will lose its authentic ring, forfeit the loyalty of millions, and be dismissed as an irrelevant social club with no meaning for the twentieth century. I meet young people every day whose disappointment with the church has risen to outright disgust.

I hope the church as a whole will meet the challenge of this decisive hour. But even if the church does not come to the aid of justice, I have no despair about the future. I have no fear about the outcome of our struggle in Birmingham, even if our motives are presently misunderstood. We will reach the goal of freedom in Birmingham and all over the nation, because the goal of America is freedom. Abused and scorned though we may be, our destiny is tied up with the destiny of America. Before the Pilgrims landed at Plymouth, we were here. Before the pen of Jefferson scratched across the pages of history the majestic word of the Declaration of Independence, we were here. For more than two centuries our foreparents labored here without wages; they made cotton king; and they built the homes of their masters in the midst of brutal injustice and shameful humiliation -- and yet out of a bottomless vitality our people continue to thrive and develop. If the inexpressible cruelties of slavery could not stop us, the opposition we now face will surely fail. We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands.

I must close now. But before closing I am impelled to mention one other point in your statement that troubled me profoundly. You warmly commended the Birmingham police force for keeping "order" and "preventing violence." I don't believe you would have so warmly commended the police force if you had seen its angry violent dogs literally biting six unarmed, nonviolent Negroes. I don't believe you would so quickly commend the policemen if you would observe their ugly and inhuman treatment of Negroes here in the city jail; if you would watch them push and curse old Negro women and young Negro girls; if you would see them slap and kick old Negro men and young boys, if you would observe them, as they did on two occasions, refusing to give us food because we wanted to sing our grace together. I'm sorry that I can't join you in your praise for the police department.

It is true that they have been rather disciplined in their public handling of the demonstrators. In this sense they have been publicly "nonviolent." But for what purpose? To preserve the evil system of segregation. Over the last few years I have consistently preached that nonviolence demands that the means we use must be as pure as the ends we seek. So I have tried to make it clear that it is wrong to use immoral means to attain moral ends. But now I must affirm that it is just as wrong, or even more, to use moral means to preserve immoral ends.

I wish you had commended the Negro demonstrators of Birmingham for their sublime courage, their willingness to suffer, and their amazing discipline in the midst of the most inhuman provocation. One day the South will recognize its real heroes. They will be the James Merediths, courageously and with a majestic sense of purpose facing jeering and hostile mobs and the agonizing loneliness that characterizes the life of the pioneer. They will be old, oppressed, battered Negro women, symbolized in a seventy-two-year-old woman of Montgomery, Alabama, who rose up with a sense of dignity and with her people decided not to ride the segregated buses, and responded to one who inquired about her tiredness with ungrammatical profundity, "My feet is tired, but my soul is rested." They will be young high school and college students, young ministers of the gospel and a host of their elders courageously and nonviolently sitting in at lunch counters and willingly going to jail for conscience's sake. One day the South will know that when these disinherited children of God sat down at lunch counters they were in reality standing up for the best in the American dream and the most sacred values in our Judeo-Christian heritage.

Never before have I written a letter this long -- or should I say a book? I'm afraid that it is much too long to take your precious time. I can assure you that it would have been much shorter if I had been writing from a comfortable desk, but what else is there to do when you are alone for days in the dull monotony of a narrow jail cell other than write long letters, think strange thoughts, and pray long prayers?

If I have said anything in this letter that is an understatement of the truth and is indicative of an unreasonable impatience, I beg you to forgive me. If I have said anything in this letter that is an overstatement of the truth and is indicative of my having a patience that makes me patient with anything less than brotherhood, I beg God to forgive me.

Yours for the cause of Peace and Brotherhood,

MARTIN LUTHER KING, JR.

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America,)	
)	No.CR-18-00223-001-TUC-RCC
Plaintiff,)	
)	
vs.)	BRIEF OF AND BY PROFESSORS OF
)	RELIGIOUS LIBERTY AS AMICUS
SCOTT DANIEL WARREN,)	CURIAE IN SUPPORT OF
)	DEFENDANT’S MOTION TO
Defendant.)	DISMISS
)	

Amici Law Professors, all considered to be experts in constitutional law and specifically the law of religious liberty, seek to provide the court with the proper framework

1 within which to consider Dr. Warren’s motion to dismiss grounded in the Religious
2 Freedom Restoration Act, 42 U.S.C. § 2000bb–1 (hereinafter “RFRA”).

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4 This case represents one of the first instances in which a court has had to adjudicate
5 the application of RFRA as a defense to a criminal prosecution under federal immigration
6 law, specifically 8 U.S.C. § 1324(a)(1)(A)(iii) which prohibits harboring and is a criminal
7 law of general application. Given that the issues involved—the enforcement of federal
8 immigration law and the fundamental right to religious liberty—are significant, and that
9 the case presents a question of first impression, it is imperative that the court structure its
10 ruling on the RFRA motion to dismiss in a way that will provide clear guidance to the
11 parties here and to other parties and courts in the future. Particularly because a wide range
12 of religious institutions currently operate homeless shelters, soup kitchens, or other
13 charitable services that provide basic needs such as food, water, shelter, or clean clothes to
14 persons who may be undocumented, it is particularly important that this court provide clear
15 guidance on this matter.
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19 Congress enacted RFRA in 1993 in response to the Supreme Court’s holding in
20 *Employment Division v. Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause of the
21 First Amendment “does not relieve an individual of the obligation to comply with a valid
22 and neutral law of general applicability.” *Id.* at 879 (internal quotation marks omitted).
23 With RFRA, Congress sought “to restore the compelling interest test as set forth in *Sherbert*
24 *v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972),” that had
25 been altered by the Court in *Smith*. 42 U.S.C. § 2000bb(b)(1). By reinstating as a statutory
26 matter the pre-*Smith* free exercise standard, Congress recognized the fact that laws of
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1 general applicability may, in some cases, impose a substantial burden on the religious
2 exercise of some persons, and when they do, the government must justify such burden on
3 religious exercise as furthering a compelling interest through narrowly tailored means.
4 RFRA aims to provide substantial protection to the free exercise of religion while
5 recognizing that these rights are not absolute, insofar as they must yield where necessary
6 for the government to implement a compelling public interest, or where the rights of third
7 parties, for instance other citizens, are burdened by the overly solicitous accommodation
8 of an individual's religious belief. Further, the First Amendment's Establishment Clause
9 imposes a limit on the extent to which the government may accommodate the religious
10 beliefs of citizens, as the government must ensure that an "accommodation [is] measured
11 so that it does not override other significant interests" and does not "differentiate among
12 bona fide faiths." *Cutter v. Wilkinson*, 544 U.S. 709, 722-23 (2005).

16 RFRA is a careful balancing test intended to provide discrete religious exemptions
17 to those whose religious activities are inadvertently constrained by neutral laws of general
18 applicability. To receive an exemption under RFRA, a claimant need not demonstrate that
19 the challenged law or policy singles out any particular group for special harm—such a law
20 would be unconstitutional under the Free Exercise and Establishment Clauses of the First
21 Amendment, making a RFRA exemption unnecessary. *See Church of Lukumi Babalu Aye,*
22 *Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Nor need a defendant show that he
23 believes the challenged law cannot exist *at all*. RFRA is not a means of challenging the
24 application of a law or policy generally, but of challenging a particular application to the
25 extent that it conflicts with a particular person's specific religious practices.

Under RFRA, the federal government may not “substantially burden” a person’s religious exercise, even where the burden results from a religiously neutral, generally applicable law that might be constitutionally valid under *Smith*, unless the imposition of such a burden is the least restrictive means to serve a compelling governmental interest. The person claiming a RFRA defense, in this case Dr. Warren, must show i) that he holds a belief that is religious in nature; ii) that that belief is sincerely held; iii) that his exercise of religious belief was substantially burdened by a federal law or policy. Once the person claiming a RFRA defense has made out this showing, the burden shifts to the government to show that i) it has a compelling governmental interest; and ii) that interest is being accomplished through the least restrictive means. 42 U. S. C. §§2000bb–1(a), (b).

In this case the government has addressed only three issues in connection with the RFRA motion: it argues that the defendant’s religious beliefs were not substantially burdened, that the government has shown a compelling state interest to enforce the law in this case, and that the law is narrowly tailored to accomplish that compelling interest.

The RFRA Prima Facie Case

With respect to the showing required by the party claiming a RFRA exemption, the claimant must first show by a preponderance of the evidence that he holds a belief that is *religious* in nature. This showing requires courts to consider the mixed question of whether, objectively, the claimant’s beliefs are “religious” and whether, subjectively, the claimant himself understood the beliefs to be religious. RFRA covers “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S.Ct. 2751, 2762 (2014). RFRA provides protection to a wide

1 diversity of religious practices, including those that differ significantly from the Abrahamic
2 traditions. Thus, a RFRA claimant need not show that they believe in a singular deity, that
3 their faith includes a house of worship, or that they are a member of a recognizable
4 congregation.¹ “This [] inquiry reflects our society’s abiding acceptance and tolerance of
5 the unorthodox belief. Indeed, the blessings of our democracy are ensconced in the first
6 amendment’s unflinching pledge to allow our citizenry to explore diverse religious beliefs
7 in accordance with the dictates of their conscience.” *Patrick v. LeFevre*, 745 F.2d 153, 157
8 (2d Cir. 1984). “[W]e are a cosmopolitan nation made up of people of almost every
9 conceivable religious preference.” *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). “Our
10 nation recognizes and protects the expression of a great range of religious beliefs.” *Navajo*
11 *Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1064 (9th Cir. 2008).

12 In considering whether a system of values or beliefs counts as religious for the
13 purposes of RFRA and similar federal statutes, courts have looked to several key indicia
14 of “religiosity” that implicate “‘deep and imponderable matters’ ... includ[ing] existential
15 matters, such as humankind’s sense of being; teleological matters, such as humankind’s
16 purpose in life; and cosmological matters, such as humankind’s place in the universe.”
17 *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 829 (D. Neb. 2016), aff’d (8th Cir. Sept. 7,
18 2016).

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¹ In this respect the Government’s questioning of the defendant’s father during the
evidentiary hearing on whether the defendant attended “church” was irrelevant. Doc. 45,
Transcript of Proceedings, May 11, 2018 at 27-28. Similarly, the government’s
questioning of the defendant about whether he belonged to the Jewish, Mormon, Catholic,
Muslim or Bahai faiths was irrelevant. *Id.* at 53.

1 While the objective question of differentiating religious from other kinds of belief
2 systems may be challenging in some cases, this is not a hard question in this case. Dr.
3 Warren’s testimony and that of his father demonstrate that the beliefs that compelled Dr.
4 Warren to provide aid to persons in and around Ajo, Arizona clearly implicated “‘deep and
5 imponderable matters,’ includ[ing] existential matters, such as humankind’s sense of
6 being; teleological matters, such as humankind’s purpose in life; and cosmological matters,
7 such as humankind’s place in the universe.” *Id.*
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10 There remains a subjective factual component to the question of whether a particular
11 RFRA claimant’s belief system should be treated as religious: were they considered by the
12 claimant to be religious in nature? The central factual question is “whether they are, *in his*
13 *own scheme of things*, religious.” *Id.* at 157 (quoting *United States v. Seeger*, 380 U.S. 163,
14 185 (1965) (emphasis added)), with the aim of “differentiating between those beliefs that
15 are held as a matter of conscience and those that are animated by motives of deception and
16 fraud.” *Isbell v. Ryan*, 2011 WL 6050337 (D. Ariz., December 6, 2011), citing *Patrick v.*
17 *LeFevre*, 745 F.2d 153, 157.
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20 In this case the factual question of whether the defendant’s beliefs were religious in
21 nature is not disputed by the government, nor is it a difficult question to resolve in Dr.
22 Warren’s favor given the testimony presented at the evidentiary hearing. Therefore, this
23 element can be resolved in the defendant’s favor at this juncture.²
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26
27 ² At the evidentiary hearing Dr. Warren’s father testified that his son’s belief system
28 was not simply ethical, secular belief, and that that “Church of the Natural World” involves
a “life force, a soul.” Doc. 45, Transcript of Proceedings, May 11, 2018 at 20-21, 33. Dr.
Warren testified to his belief that the desert had a soul and a life force, and that providing

Second, the RFRA claimant must show that his religious beliefs are *sincerely held*. *Hobby Lobby*, 134 S.Ct. at 2774 n. 28 (“To qualify for RFRA's protection, an asserted belief must be ‘sincere’....”). This element is a question of fact, proven by the credibility of the party asserting a religion-based defense. *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007) (stating that sincerity is “a question of fact”); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2nd Cir. 1984) (the sincerity analysis “demands a full exposition of facts and the opportunity for the factfinder to observe the claimant’s demeanor during direct and cross- examination”); *United States v. Quaintance*, 608 F.3d 717, 721 (10th Cir. 2010) (“[S]incerity of religious beliefs ‘is a factual matter.’”). See generally Kara Loewentheil and Elizabeth Reiner Platt, *In Defense of the Sincerity Test*, in Religious Exemptions 247 (Kevin Vallier & Michael Weber eds., 2018).

Rather than merely reducing this element to a matter of pleading and accepting the RFRA claimant’s mere assertion of sincerity, the court must undertake a meaningful assessment of the factual basis for the claim to sincerity, including examination of the claimant’s demeanor. At the evidentiary hearing Dr. Warren and his father presented ample credible testimony demonstrating that his religious beliefs were sincere in nature, and the government has not contested the truth of this assertion. Therefore this element can be resolved by the court in the defendant’s favor on a motion to dismiss.

Next, the party seeking a RFRA-based exemption must show that the *exercise* of a humanitarian aid is a “sacred act” *Id.* at 36-38, 55. Finally, Dr. Warren testified that he considered his belief system religious. *Id.* at 37. Nothing in the record contradicts or draws into question the conclusion that Dr. Warren’s belief system is religious in nature.

1 sincerely held religious belief was *substantially burdened* by government action. This
2 element contains two components: that the government *substantially burdened* the *exercise*
3 of religious belief. Both aspects of this element are questions of law for the court to decide.
4 *See Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (stating that judicial inquiry
5 into the substantiality of the burden “prevent[s] RFRA claims from being reduced into
6 questions of fact, proven by the credibility of the claimant”); *Kaemmerling v. Lappin*, 553
7 F.3d 669, 679 (D.C. Cir. 2008) (“[a]ccepting as true the factual allegations that
8 Kaemmerling’s beliefs are sincere and of a religious nature—but not the legal conclusion,
9 cast as a factual allegation, that his religious exercise is substantially burdened”); *Eternal*
10 *Word Television Network, Inc. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 818 F.3d
11 1122, 1144–45 (11th Cir. 2016); *Priests For Life v. U.S. Dept. of Health and Human*
12 *Services*, 772 F.3d 229, 247 (D.C. Cir. 2014), vacated on other grounds and remanded sub
13 nom. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (noting that eight circuits have held that
14 “the question of substantial burden also presents “a question of law for courts to decide.”).
15 As Professor Frederick Mark Gedicks has argued persuasively, “[t]he rule of law demands
16 that the determination whether religious costs are substantial should be made by impartial
17 courts.” Frederick Mark Gedicks, “*Substantial*” *Burdens: How Courts May (and Why*
18 *They Must) Judge Burdens on Religion Under RFRA*, 85 Geo. Wash. L. Rev. 94, 150–51
19 (2017).

20 A substantial burden exists when government action puts “substantial pressure on
21 an adherent to modify his behavior and to violate his beliefs.” *Thomas v. Review Bd.*, 450
22 U.S. 707, 718 (1981). The Ninth Circuit has recognized two ways to understand the notion
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1 of substantial burden in the RFRA context: (1) *forcing* a person to choose between the
 2 tenets of their religion and a government benefit, and (2) being *coerced* to act contrary to
 3 religious belief by threat of civil or criminal sanctions. *Navajo Nation v. U.S. Forest Serv.*,
 4 535 F.3d 1058, 1069–70 (9th Cir. 2008). The second formulation applies most
 5 appropriately in this case, where the threat of imprisonment and significant financial
 6 penalties will coerce the defendant to act in a way that is contrary to his religious beliefs.
 7 This standard was elaborated upon further by the Ninth Circuit in *Snoqualmie Indian Tribe*
 8 *v. F.E.R.C.*, 545 F.3d 1207, 1214 (9th Cir. 2008) where the court described the problem of
 9 burden as “a Catch–22 situation: exercise of their religion under fear of civil or criminal
 10 sanction.”

14 **The Government’s Burden in Opposing the RFRA Motion**

15 If the claimant demonstrates a substantial burden on his ability to exercise his
 16 sincerely-held religious beliefs, he is entitled to a RFRA exemption unless the government
 17 can show that the burden is the least restrictive means of advancing a compelling
 18 government interest. A compelling interest must be clearly articulated and specific;
 19 “broadly formulated interests justifying the general applicability of government mandates”
 20 are not considered compelling. *Gonzales v. O Centro Espirita Beneficente Uniao do*
 21 *Vegetal*, 546 U.S. 418, 430–31 (2006). Courts should take into account not only the interests
 22 of the government itself, but of third parties who stand to be impacted by an
 23 exemption. *Cutter v. Wilkinson*, 544 U.S. 709, 720, (2005) (“courts must take adequate
 24 account of the burdens a requested accommodation may impose on nonbeneficiaries”).

28 To demonstrate that the application of the challenged law or policy is narrowly

1 tailored, the government must show that it could not achieve its compelling interest to the
2 same degree while exempting the [party asserting the RFRA claim] from complying in full
3 with the [law]” *U.S. v. Christie*, 825 F.3d 1048, 1061 (9th Cir. 2016). *See also O Centro*,
4 546 U.S. at 431. This “focused inquiry” requires the government to justify why providing
5 an exemption would be unworkable. *Id.* at 431-32.

7 Both the compelling interest and least restrictive means analyses are questions of
8 law that can properly be addressed on a motion to dismiss. *See United States v. Friday*, 525
9 F.3d 938, 949 (10th Cir. 2008) (“We now conclude, as other circuits have, that both prongs
10 of RFRA's strict scrutiny test are legal questions.”); *United States v. Christie*, 825 F.3d
11 1048, 1056 (9th Cir. 2016) (“We review the district court's compelling-interest and least-
12 restrictive-means conclusions de novo”). In our view, the government has not carried its
13 burden on either of these elements.

14
15
16 **Objections to the Magistrate’s Treatment of Dr. Warren’s RFRA Motion:**

17 Our concerns lie largely with the Magistrate’s misapplication of RFRA’s
18 “substantial burden” test. First, the Magistrate Judge noted “No testimony was presented
19 that the statutes at issue compelled the Defendant to do anything in violation of his religious
20 beliefs. The laws at issue are of a general nature that apply to all and do not single him or
21 any identifiable group into acting in conflict with their religious beliefs. The Defendant is
22 at best told not to violate the laws that apply equally to all.” Magistrate’s Report and
23 Recommendation (hereinafter R&R) (Doc. 81) at 3.

24 This characterization of the substantial burden test misstates its meaning in the
25 RFRA context. In noting that the laws “apply to all,” the Magistrate Judge overlooked that
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1 this is precisely the context in which RFRA was meant to apply: to laws of general
2 application that impose a substantial burden on the sincerely held religious beliefs of some
3 people. The Magistrate Judge’s reading of the legal standard of burden may reflect the
4 constitutional standard of protection for religious liberty recognized by the Supreme Court
5 in *Employment Division v. Smith* (the Free Exercise Clause of the First Amendment “does
6 not relieve an individual of the obligation to comply with a valid and neutral law of general
7 applicability,” 494 U.S. 872, 879 (internal quotation marks omitted)). However, RFRA was
8 enacted specifically to provide greater statutory protection for religious liberty than is now
9 recognized under the First Amendment. *See generally Ruiz-Diaz v. U.S.*, 703 F.3d 483
10 (9th Circ. 2012) (“RFRA requires the federal government to show that it is advancing a
11 compelling interest through the least restrictive means possible where the government
12 ‘substantially burden [s] a person’s exercise of religion,’ *even where, as here, the burden*
13 *results from a rule of general applicability.* 42 U.S.C. § 2000bb–1.”) (emphasis supplied).
14 Any suggestion that Dr. Warren’s RFRA claim is weakened because the law he is charged
15 with violating does not target religion and applies equally to all fundamentally
16 misconstrues RFRA, which expressly applies to and was intended to restrict burdens on
17 religion “even if the burden results from a rule of general applicability” 42 U.S.C. §
18 2000bb–1(a).

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24 Second, the Magistrate Judge reasoned that “[a]t no time during the Defendant’s
25 testimony did he claim that his religious beliefs necessitated he aid undocumented
26 migrants, only that he was compelled to aid persons in distress ... Nor has he asserted or
27 testified that his beliefs require he assist people illegally in this country to evade
28

1 apprehension or reach their ultimate destination.” R&R at 4. Based on this reasoning, the
2 Magistrate Judge concludes that the defendant’s religious beliefs have not been
3 substantially burdened. This too misstates RFRA doctrine.
4

5 The question is not whether defendant’s religious beliefs commit him to violate the
6 law, but whether his beliefs commit him to undertake acts that are otherwise treated as
7 illegal by a federal law or by federal agents. For instance, in *Hobby Lobby* the issue was
8 not whether the company’s owners’ religious beliefs required them to violate the
9 Affordable Care Act, but rather whether their beliefs committed them to offering health
10 insurance to employees but prohibited them from including contraception in that coverage.
11 134 S. Ct. 2751, 2775-77. Similarly, in *O Centro*, the issue was not whether the beliefs of
12 a religious group with origins in the Amazon rainforest included the violation of the
13 Controlled Substances Act, but rather whether the exercise of their sincere religious beliefs
14 included ingestion of substances otherwise regulated by federal law. 546 U.S. at 425-26,
15 436.
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19 The mistake that lies at the heart of the Magistrate Judge’s reasoning on this issue
20 is insisting that the acts entailed in the exercise of religion be defined in secular legal terms.
21 It is to confuse the *actus reus* for the alleged crime itself. It is as if the government were
22 reading a specific *scienter* requirement into RFRA, that is, that the person seeking an
23 exemption be required to show that they intended to violate the law as an article of their
24 faith, rather than that they intended to engage in faith-based acts that so happened to risk
25 prosecution under the law. RFRA requires that the person requesting an exemption show
26 that their actions were motivated by a religious purpose, not that they were motivated by a
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1 desire to violate the law. To require the latter would undermine the very purpose of RFRA:
2 to provide individualized exemptions from the application of generally applicable laws to
3 persons whose good faith religious exercise presents a conflict with the requirements of the
4 law.
5

6 Relatedly, the government's reliance on *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir.
7 2002), and *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996), is misplaced. In both of
8 these cases the Ninth Circuit found as a matter of fact that only certain acts otherwise
9 prohibited by federal drug laws were included in the defendants' Rastafarian belief system
10 (i.e. smoking marijuana), while other acts for which the defendants were also prosecuted
11 (i.e. selling or importing marijuana) were not shown to be part of the defendants' system
12 of beliefs at all. The Ninth Circuit's analyses did not turn on whether the defendants were
13 motivated by an intent to violate the relevant statutory provisions. Instead, the focus of the
14 inquiry in those cases was properly on whether the underlying *acts*—smoking, selling, or
15 importing of marijuana—were elements of the defendants' religious exercise [on the
16 defendants' own terms].
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20 Dr. Warren's religiously motivated activities form the foundation of the
21 government's prosecution under the harboring law. The basis for the charge against
22 Warren as described in the criminal complaint include providing food, water, shelter, and
23 clean clothes to, as well as talking to, two undocumented migrants. (Doc. 1). These
24 activities were clearly motivated by Dr. Warren's religious faith, which requires him to
25 care for people that he believes are in distress. During the evidentiary hearing, Dr. Warren
26 explained "Based on my spiritual beliefs, I am compelled to act. I'm drawn to act. I have
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28

1 to act when someone is in need.” Doc. 45, Transcript of Proceedings, May 11, 2018 at 44.
2 The Magistrate acknowledged this duty, describing his beliefs as “a somewhat modified
3 Golden Rule, in that he has a compulsion to help those in their immediate need, i.e. food,
4 water, and medical aid.” R&R at 2.
5

6 Despite this, the Magistrate Judge found no substantial burden because Dr. Warren
7 had not “asserted or testified that his beliefs require he assist people illegally in this country
8 to evade apprehension or reach their ultimate destination.” R&R at 3. The fact that Dr.
9 Warren did not articulate a religious belief in concealing undocumented people, however,
10 is irrelevant; nothing in the criminal charge includes any mention of Dr. Warren attempting
11 to conceal the migrants from law enforcement. The bases for Dr. Warren’s charge are
12 entirely RFRA-protected activities, and his prosecution therefore puts him in the position
13 of violating his religious beliefs or risking criminal prosecution—undoubtedly a substantial
14 burden.
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18 Properly understood, a key element of Dr. Warren’s sincerely held religious beliefs
19 included a commitment to help others in distress to the point of being a duty or compulsion
20 to provide them aid even though there was a risk of violating federal law. This is precisely
21 the kind of “Catch-22 situation” that RFRA’s notion of substantial burden was intended to
22 capture.
23

24 **Conclusion.**
25

26 For the foregoing reasons we believe that Dr. Warren’s RFRA motion for dismissal
27 should be granted because all of the elements of the claim case be resolved in his favor
28 either as a matter of law or as a matter of fact based on the facts adduced at the evidentiary

1 hearing.

2
3 RESPECTFULLY SUBMITTED June 21, 2018.

4 Katherine Franke (*pro hac vice pending*)
5 and
6 JBELANGER LAW PLLC

7
8 By /s/ James J. Belanger
James J. Belanger

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13 *and Nelson Tebbe*

14
15 CERTIFICATE OF SERVICE

16 I certify that on June 21st, 2018, I, James J. Belanger, electronically transmitted a PDF
17 version of this document to the Clerk of Court using the CM/ECF System for filing and
18 for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

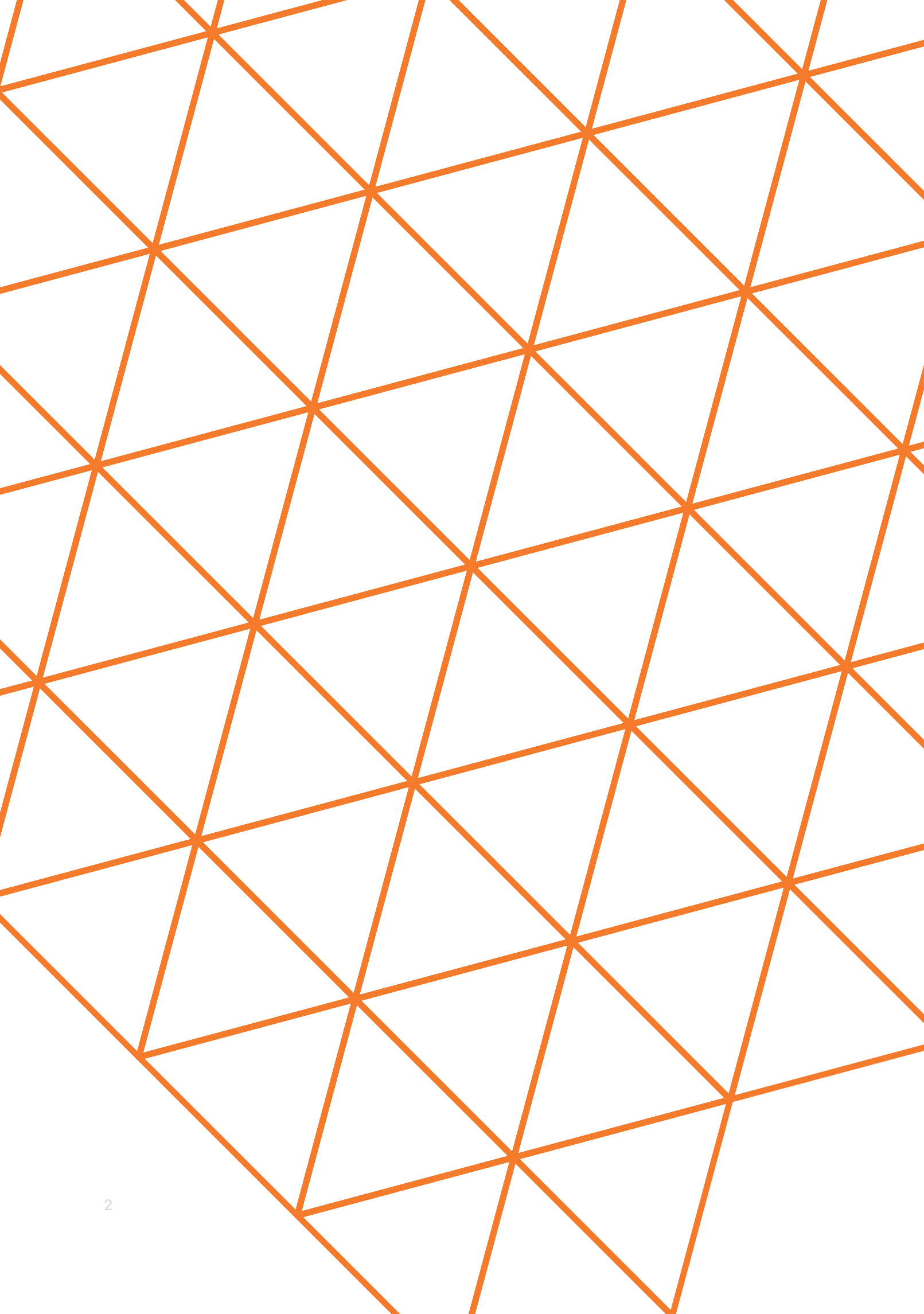
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THE STATE OF BLACK IMMIGRANTS

PART I: A STATISTICAL PORTRAIT OF
BLACK IMMIGRANTS IN THE UNITED STATES





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about

Black Alliance for Just Immigration

The Black Alliance for Just Immigration (BAJI) is a racial justice and migrants' rights organization that engages in education, advocacy, and cross-cultural alliance-building in order to end racism, mass criminalization, and economic disenfranchisement of African American and Black Immigrant communities. BAJI's headquarters are in Brooklyn, NY with additional offices in Oakland, CA, Atlanta, GA, and Los Angeles, CA.

NYU School of Law Immigrant Rights Clinic

The Immigrant Rights Clinic is a leading institution in both local and national struggles for immigrant rights. Students engage in direct legal representation of immigrants and community organizations as well as in immigrant rights campaigns at the local, state and national levels. Students have direct responsibility for all aspects of their cases and projects and the opportunity to build their understanding of legal practice in the field of immigrant rights law and organizing.



methodology

This background report aims to provide basic descriptive statistics regarding Black or African American immigrants based on the American Community Survey (ACS), the 2014 Yearbook of Immigration Statistics published by the U.S. Department of Homeland Security (DHS), and immigration data available on the Transactional Records Access Clearinghouse (TRAC) website developed by Syracuse University.

ACS 2014 1-year Public Use Microdata Sample (PUMS) data was used to conduct the research on specific information of the immigrant communities in the U.S. and the untabulated data was downloaded from the U.S. Census Bureau website¹ and then analyzed in Stata and R programs. Information about immigrants' population, education, poverty rate, citizenship status, place of birth, geographic location and other demographics were analyzed. Since the PUMS data represents about 1% of the American population, results on the total population estimates were calculated by replicating the weight variable within the dataset, subject to standard errors of inferential statistics.²

Other conclusions on Black immigrants were analyzed based on the DHS Yearbook and TRAC data, which were both categorized by regions and/or nationalities. All data on Black immigrants from the DHS source was calculated based on immigrants from African and Caribbean countries. Since the data on immigration courts available on TRAC was obtained through a Freedom of Information Act (FOIA) request to the Executive Office for Immigration Review (EOIR) under the Department of Justice, the data was similarly organized by nationalities and the results on Black immigrants were calculated based on all African and Caribbean countries.



definitions

A-C

Affirmative Asylum

The process in which asylum-seekers in the U.S. voluntarily present themselves to the U.S. Government to ask for asylum. The affirmative application for asylum is made to the Asylum Office of the Citizenship and Immigration Services (CIS) division of the U.S. Department of Homeland Security (DHS).

African Countries

Includes Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde (Cape Verde), Cameroon, Central African Republic, Chad, Comoros (Comoros Islands), Congo, Cote d'Ivoire (Ivory Coast), Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-

Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Réunion, Rwanda, Saint Helena, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Western Sahara, Zambia, and Zimbabwe.

Black Immigrants

Black Immigrants, unless otherwise specified in this report, refers to any person who was born outside the United States, Puerto Rico or other U.S. territories and whose country of origin is located in Africa or the Caribbean. Where Census data is available, the definition of "Black immigrant" is any person who was born outside

the United States, Puerto Rico or other U.S. territories and self-identified as "Black or African American alone" in 2000 and later U.S. Census Bureau surveys. Immigrant population estimates include all immigrants regardless of current citizenship or legal status.

Caribbean Countries

Caribbean Countries include Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados, Bonaire, British Virgin Islands, Cayman Islands, Cuba, Dominica, Dominican Republic, Grenada, Guadeloupe, Haiti, Jamaica, Martinique, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and Turks and Caicos Islands.



definitions

D-N

Defensive Asylum

Defensive Asylum refers to the process in which asylum-seekers who are in removal proceedings before EOIR of the Department of Justice submit an application for asylum.

Deferred Action for Childhood Arrivals (DACA)

DACA is a U.S. immigration policy that allows certain undocumented immigrants who entered the country before their 16th birthday and before June 2007 to receive a renewable two-year work permit and exemption from deportation. Diversity Visa

Diversity Visa

Diversity visa is a United States congressionally-mandated lottery program for receiving a United States Permanent Resident Card. Each fiscal year, the Diversity Visa Program makes 55,000

immigrant visas available to people from countries that have low rates of immigration to the United States. Applicants who meet the eligibility requirements are entered into a random drawing.

Foreign-Born

Foreign-born refers to people in the U.S. born outside the U.S., Puerto Rico or other U.S. territories. The terms “foreign-born” and “immigrant” are used interchangeably.

Immigration Court

Immigration court is an administrative court responsible for adjudicating immigration cases in the U.S. Cases involve non-citizens who generally have been charged by DHS with being in violation of immigration law. The court is part of EOIR. Appeals of Immigration Judge decisions can be made to the Board of Immigration Appeals (BIA), which is also part of EOIR. Some BIA decisions can be appealed further, to the federal courts.

Immigration Judge

Immigration judge is an attorney appointed by the Attorney General to act as an administrative judge within EOIR. Immigration Judges conduct formal court proceedings in determining whether an alien should be allowed to enter or remain in the U.S., in considering bond amounts in certain situations, and in considering various forms of relief from removal.

Lawful Permanent Resident

Lawful permanent residents (LPRs) are persons who have been granted lawful permanent residence in the United States. They are also known as “green card” recipients.

Naturalizations

Naturalizations refers to the process by which immigrants become U.S. citizens. To be



N-T

naturalized under U.S. laws, a person generally must be 18 and older, have been a green card holder for at least five years and possess an acceptable background with regard to criminal and national security concerns.

Non-Citizen

Non-citizen refers to people born outside the U.S., Puerto Rico or other U.S. territories, excluding people who are U.S. citizens.

Refugees and Asylees

Refugees and asylees are persons who sought residence in the United States in order to avoid persecution in their country of origin. Persons granted refugee status applied for admission while outside the United States. Persons granted asylum applied either at a port of entry or at some point after their entry into the United States.

Relief Granted

Relief granted refers to cases in which an Immigration Court judge finds the original charges are sustained but finds provisions in the immigration law entitle the individual to relief from removal, allowing them to remain in this country.

Removal

Removal refers to the expulsion of a person from the U.S. who is not a U.S. citizen. The more common term is "deportation." The process may be non-adversarial and led by an immigration officer, or it may involve an adversarial hearing before an Immigration Judge who also may determine whether any exceptions to deportation should be applied. An individual who is removed may have administrative or criminal consequences placed on subsequent re-entry.

Temporary Protection Status

Temporary Protection Status (TPS) is a temporary immigration status granted to eligible nationals of certain countries (or parts of countries) who are already in the United States. The Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately.

Termination (No Grounds for Removal)

Termination (no grounds for removal) refers to cases in which an Immigration Court judge finds the charges against the individual are not sustained and terminates the case. Situations where the alien has established eligibility for naturalization can be grounds for termination.



CURRENT STATE OF BLACK IMMIGRANTS IN THE U.S.

The last four decades have represented a period of significant demographic change in the United States. Now more than ever, Black immigrants compose a significant percentage of both immigrant and Black populations in the U.S. overall. This report presents a statistical snapshot of the Black immigrant population, drawing upon recent studies and original analysis.

I. Size and Growth of Black Immigrant Population

Size and growth of the overall population. The number of Black immigrants in the United States has increased remarkably in recent decades. Population data on Black immigrants is difficult to ascertain, as the U.S. Citizenship and Immigration Services does not track immigration data by race. **Some studies suggest that there are as many as 5 million Black immigrants in the U.S.** According to our analysis of the 2014 American Community Survey (ACS) data, a record estimate of 3.7 million Black immigrants live in the United States.³ While this analysis is conservative, it still represents a four-fold increase when compared to the number of Black immigrants who lived in the U.S. in 1980 (which was only about 800,000) and a 54% increase from 2000 (roughly 2.8 million).⁴

Percentage of Black population. The overall growth of the Black immigrant population represents a significant change in the demographics of both the Black population and the immigrant population more broadly in the United States. First, Black immigrants represent an increasing percentage of Black people in the United States as a whole. The ACS data shows that while

Black immigrants accounted for only 3.1% of the Black population in the U.S. in 1980,⁵ Black immigrants now account for nearly 10% of the nation's Black population.⁶ This growth is particularly significant in states with the largest number of Black immigrants. For example in New York, Black immigrants make up almost 30% of the total Black population in the state, making it the top state for Black immigrants in the U.S. Florida seconds the list with over 20% of its Black population being foreign-born.⁷ The Census Bureau projects that by 2060, 16.5% of America's Black population will be foreign-born.⁸

Percentage of the foreign-born population. Second, Black immigrants make up a significant portion of the overall immigrant and non-citizen population in the U.S. According to the 2014 one-year estimates from ACS, the estimated total of foreign-born population in the U.S. was 42 million, within which 8.7% were Black immigrants.⁹ In addition, about 22 million of the U.S. foreign-born population were non-citizens, among whom 7.2% were Black.¹⁰

II. Characteristics of the Black Immigrant Population

Diversity based on country or region of origin. While Black immigrants in the U.S. come from diverse backgrounds and regions of the world, immigrants from African and Caribbean countries comprise the majority of the foreign-born Black population. According to the 2014 ACS data, Jamaica was the top country of origin in 2014 with 665,628 Black immigrants in the U.S., accounting for 18% of the national total.¹¹ Haiti seconds the list with 598,000 Black immigrants, making up 16% of the U.S. Black immigrant population.¹²

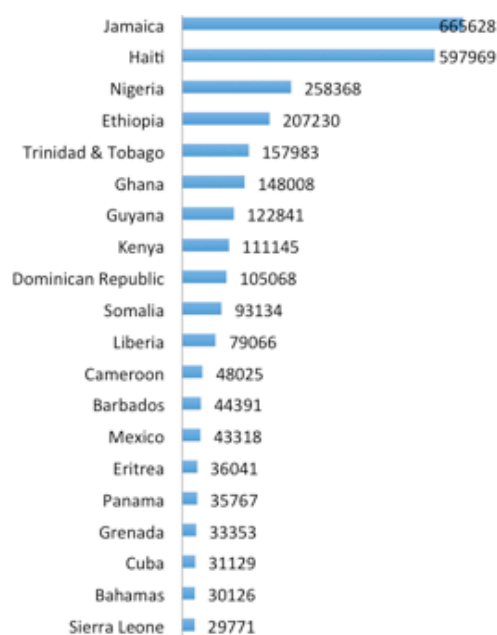
Although half of Black immigrants are from the Caribbean region alone, African immigrants drove much of the recent growth of the Black immigrant population and made up 39% of the total foreign-born Black population in 2014.¹³ The number of African immigrants in the U.S. increased 153%, from 574,000 in 2000 to 1.5 million in 2014, with Nigeria and Ethiopia as the two leading countries of origin.¹⁴

Besides African and Caribbean regions, an estimated 4% of Black immigrants are from South America, another 4% are from Central America, 2% are from Europe and 1% from Asia.¹⁵

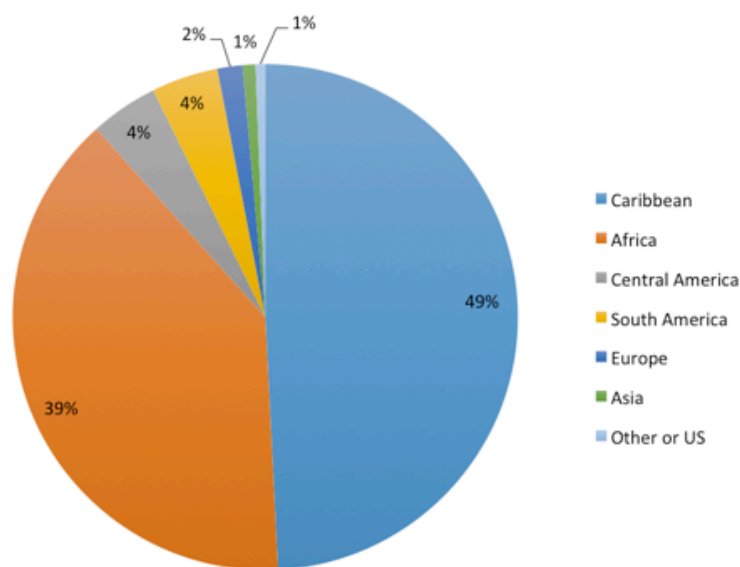
Length of residency in the U.S. Black immigrants tend to have lived in the U.S. for long periods of time, although there are some regional differences in length of residency. As more African immigrants are recent arrivals, those from the Caribbean have generally lived in the U.S. longer. According to a Pew study of 2013 and prior ACS data, more than half (63%) of Black African immigrants arrived in the U.S. in 2000 or later, and more than one-third (36%) arrived in 2006 or later. By contrast, 42% of Caribbean immigrants arrived in the U.S. before 1990, while only 18% arrived in 2006 or later. Black immigrants from Jamaica, Haiti and the Dominican Republic increasingly began moving to the U.S. in the 1960s.¹⁶

Geographic dispersion in the U.S. The geographic dispersion of Black immigrants is highly concentrated. New York State is home to 846,730 (23%) Black immigrants, making it the top state of residence. Florida has the second largest foreign-born Black population (18%), followed by Texas (6%) and Maryland (6%).¹⁷ Some Black immigrant communities tend to cluster together around certain metropolitan areas. For example, according to the Pew study of 2013 ACS data, New York City is home to nearly 40% of all foreign-born black Jamaicans in the U.S.; Miami has the nation's largest Haitian immigrant community; Washington D.C. has the largest Ethiopian immigrant community; and Somali immigrants concentrate in metropolitan areas of Minnesota and Wisconsin.¹⁸

**Top Birth Countries for
Black Immigrants in 2014**



**Regions of Birth for
Black Immigrants**



III. Educational Background of Black Immigrants

A significant percentage of Black immigrants have obtained degrees through higher education, but the percentage remains lower than the U.S. population as a whole. According to the ACS 2014 data, more than a quarter (27%) of Black immigrants age 25 and older have a bachelor's degree or higher, three points below the percentage of the overall U.S. population.¹⁹ However, the proportion with an advanced degree is similar among all Americans (11%) and Black immigrants (10%).²⁰ When comparing Black immigrants with Asian and Hispanic immigrants, the differences are more apparent. About 30% of Asian immigrants age 25 and older have completed at least a four-year degree, whereas only 11% of Hispanic immigrants have done so. Within Black immigrants, educational attainment also varies among different regions of birth.²¹ About 34% of African immigrants age 25 and older have at least a bachelor's degree, including 14% with an advanced degree. In comparison, only 6.2% of Caribbean immigrants age 25 and older have an advanced degree. Nonetheless, education attainment for Black immigrants from Africa is still lower than those from Europe and Asia, with 16.7% and 18.6% of them have an advanced degree respectively.²²

IV. Economic Snapshot of Black Immigrants

Household income. Black immigrants have a lower median annual household income than the median U.S. household and all immigrants in the U.S. Based on the Pew study of ACS 2013 data, the median annual household income for foreign-born blacks was \$43,800. That's roughly \$8,000 less than the \$52,000 median for American households and \$4,200 less than that of all U.S. immigrants. While the median household income for Black immigrants is higher than it is for Hispanic immigrants (\$38,000), both groups' numbers are substantially below that of Asian immigrants, whose median household income is \$70,600.²³ Additionally, poverty rate among Black immigrants is higher than it is among all Americans but similar to that for all U.S. immigrants. One-in-five

(20%) Black immigrants live below the poverty line, according to the Pew Research Center analysis of Census Bureau data, a rate that falls between that of Asian immigrants (13%) and Hispanic immigrants (24%).

Black women across the board earn lower wages than U.S.-born non-Hispanic white women.

According to a 2011 study by the Economic Policy Institute, Caribbean women earn 8.3% less than U.S. born non-Hispanic white women; African women earn 10.1% less. When we consider subsets of Black immigrants, the differences become even more dramatic.²⁴ For example, Haitian women earn 18.6% less than U.S. born non-Hispanic white women.²⁵

Similarly, Black immigrant men earn lower wages than U.S. born non-Hispanic white men. Caribbean men earn 20.7% less than U.S. born non-Hispanic white men and African men 34.7%.²⁶ Notably, as of 2011 Black immigrant men also earned lower wages than African American males. While earnings for Caribbean men were just 1% less than those of African-Americans, African men earned nearly 15% less than US Born Black men.²⁷

Black Immigrants in the Workforce. Black immigrants are more likely to participate in the labor force than the overall immigrant population. The Bureau of Labor Statistics reports that 70.8% of Black immigrants participate in the civilian labor force.²⁸

Despite their participation rates in the workforce, Black immigrants have the highest unemployment rates amongst all immigrant groups.²⁹



Black immigrants also reported a joblessness rate of 9.9% - the highest among all immigrant groups.³⁰

Black immigrants maintain higher rates of employment in service and sales positions than their counterparts of other immigrant backgrounds.³¹⁻³² Other areas of employment for Black immigrants include management, finance, and construction.

Unionization. The percentage of unionized Black immigrants has nearly doubled over the last 20 years from 7% in 1994 to 15.4% in 2015.³³ Black immigrants are more likely than Black Americans to be unionized. 16.9% of Black immigrants are union members, compared to 13.8% of Black Americans.³⁴ Unionization has proven to have a positive impact on the livelihood of Black workers. On average Black union members, earn nearly \$7 more per hour than non-union Black workers.³⁵ 71.4% of Black union members have employer-provided health care, compared to 47.7% of non-union Black workers.³⁶ 61.6% of Black union members have employer-sponsored retirement plans, compared to 38.2% of non-union Black workers.³⁷

V. Immigration Status and Means of Entry

The majority of Black immigrants are living in the U.S. with formal immigration authorization. According to a Pew study, about 84% of the Black immigrant population are living in the U.S. with authorization.³⁸ This section of the report presents details about Black immigrants by immigration status.

A. Undocumented Community Members

When compared with the overall share of undocumented immigrants in the country—about a quarter of the total immigrant population—Black immigrants are less likely to be in the U.S. unlawfully. An estimated 575,000 Black immigrants were living in the U.S. without authorization in 2013, according to the Pew Research Center study, making up 16% of all Black immigrants population. Among Black immigrants from the Caribbean, 16% are undocumented immigrants and as are 13% of Black immigrants from Africa.³⁹ Despite the smaller percentage of unauthorized Black immigrants relative to the national share, the number of undocumented immigrants from Africa and the Caribbean is rising more quickly than the overall foreign-born Black population. Between 2000 and 2013, the total number of unauthorized African and Caribbean immigrant population climbed from 389,000 to 602,000, an increase of 162% (although the Caribbean immigrant population only contributed to 1% of the increase).⁴⁰ During the same period, the total number of foreign-born Black immigrants increased by only 56%.

When compared with the increase of undocumented immigrant population from other regions of the world, African and Caribbean unauthorized immigrants are growing at a lower rate since 2000 than those from Central America (194% without Mexico) and Asia (202%), but faster than those from South America (39%) and Europe (62%).⁴¹

B. Lawful Permanent Resident and Naturalized Population

In FY 2014, according to the U.S. Department of Homeland Security yearbook, 232,290 Black immigrants in the U.S. obtained lawful permanent resident (LPR) status. They represented 23% of all individuals who became lawful permanent residents in FY 2014.⁴² The basis for obtaining lawful permanent resident status was diverse itself. Among the African and Caribbean immigrants who obtained LPR status, a majority of them were immediate relatives of U.S. citizens (36%) or otherwise family-sponsored (23%); 27.3% obtained their status through refugee and asylee adjustment; 10.2% were based on “diversity visas” (see below); and 2.7% were employment-based.⁴³

A similar percentage of African and Caribbean immigrants were naturalized in 2014. According to the DHS statistics, out of the 653,416 persons naturalized, 145,530 or 22.3% were immigrants from African or Caribbean countries.⁴⁴ The ACS data also show that the proportion of foreign-born Black immigrants who are naturalized U.S. citizens has increased from 44% in 2000 to 55% in 2014 (total number of Black naturalized citizens is about 2 million), a higher share than among immigrants in the U.S. (47%).⁴⁷ Black immigrants from South America and the Caribbean have the highest citizenship rates among all Black immigrants, 67% and 61% respectively. About half of Black immigrants from Africa are U.S. citizens, possibly because they generally arrived more recently than other Black immigrants.⁴⁶

C. Diversity Visas

Many Black immigrants, primarily from Africa, arrive through the “diversity visa,” a lottery system designed to increase immigration from underrepresented nations. The diversity immigrant category was added to the Immigration and Nationality Act (INA) by the Immigration Act of 1990 to stimulate “new seed” immigration.⁴⁷ The yearly number of permanent resident “green cards” offered through the program is capped at 55,000, with 5,000 of those going to beneficiaries of the Nicaraguan Adjustment and Central American Relief Act (NACARA). Nonetheless, in FY 2005-2014, Africa saw an allotment of nearly 46% of all diversity visas. In contrast, only 0.02% of diversity visas were issued to Caribbean immigrants during the same period.⁴⁸ As mentioned above, 10.2% of African and Caribbean immigrants gained LPR status in 2014 through this program. And between 2000 and 2013, about one-in-five sub-Saharan African immigrants who obtained LPR entered the country on a diversity visa, whereas a higher percentage of Caribbean immigrants entered through family-sponsored visa.⁴⁹

The diversity visa is believed to have contributed to the high educational background of Black immigrants in the U.S. as applicants of the diversity visa program must have at least a high school degree or two year’s work experience in a career that requires vocational training. Many Sub-Saharan African immigrants have considerably more education: about 38% have a bachelor’s degree or higher, compared to 28% of the total U.S. foreign-born population and 30% of the U.S.-born population, according to the MPI.⁵⁰

D. Temporary Protected Status

Temporary Protected Status (TPS) also contributed to more status granted to Black immigrants, especially nationals from several African countries. The U.S. Secretary of Homeland Security currently designates countries, which due to a temporary condition such as an ongoing armed conflict or an environmental disaster, are unsafe for their nationals to return from the U.S. The current list of 11 countries includes one Caribbean country, Haiti (designated with TPS, set to expire in July 2017 unless renewed), and six African countries, namely Guinea, Liberia, and Sierra Leone (designated with TPS in connection with Ebola, set to expire in May 2016 unless renewed), Sudan and South Sudan (TPS also set to expire in November 2017 unless renewed), and Somalia (TPS set to expire in March 2017 unless renewed).⁵¹





E. Asylee or Refugee Status

A significant percentage of Black immigrants arrived in the U.S. as refugees or asylees, primarily from Africa. Between 2000 and 2013, about three-in-ten (28%) Sub-Saharan African immigrants entered as refugees or asylees, compared to only 5% for Caribbean immigrants and 13% for the overall immigrant population.⁵² In 2014 alone, DHS documented 17,501 refugee arrivals from Africa and 4 from the Caribbean (all of whom were from Haiti), constituting 25% of the total 69,975 refugees arrived in the U.S.⁵³ Immigrants who are physically present in the United States without a removal order, including arrivals at points of entry, may apply for affirmative asylum regardless of immigration status. In 2014, DHS granted 14,758 affirmative asylum applications, within which 33% were granted to Black immigrants (4,296 to African immigrants and 533 to Caribbean immigrants).⁵⁴

VI. Access to Relief from Deportation

A. Discretionary Relief or Termination in Removal Proceedings

Relief and termination generally. Immigrants who are charged with deportability or inadmissibility in removal proceedings in immigration court with the Executive Office for Immigration Review (EOIR) may request several forms of discretionary relief or termination of proceedings as defenses against deportation. A significant percentage of Black immigrants were granted such relief.⁵⁵ While Black immigrants made up 5.5% of the cases completed in immigration courts in 2015, they made up 16.2% of all cases in which relief was granted by immigration courts across the U.S. Among all Black immigrants who were in removal proceedings, about 23% were granted relief in 2015, which was 13 points higher than the percentage of people in removal proceedings who were granted relief. In addition, Black immigrants made up 10.9% of all cases in which immigration courts terminated proceedings in 2015 because there were no grounds for removal.⁵⁶ The percentage of Black immigrants whose case was terminated (24%) was 10 points higher than the percentage of termination among all people in removal proceedings in 2015.

Defensive asylum applications. While data is not disaggregated by all of the different forms of discretionary relief in removal proceedings, EOIR does track defensive asylum claims (asylum applications that are adjudicated by an immigration judge as part of removal proceedings). In 2014, EOIR received a total number of 41,920 defensive asylum applications, out of which 8.5% are from Black immigrants. For asylum granted by EOIR, Black immigrants make up 17.7% of the 8,775 total, and among those, virtually all grants went to African immigrants.⁵⁷

B. DACA Eligibility, Applications and Grants

On June 15, 2012, the Obama Administration created a new policy calling for deferred action for certain undocumented young people who came to the U.S. as children. The program, called Deferred Action for Childhood Arrivals (DACA), does not provide lawful status but allows individuals who meet several criteria to apply deferral from removal for a period of two years, subject to renewal.⁵⁸

Eligibility. Mexican immigrants made up an overwhelming majority of all DACA categories according to eligibility estimates by MPI and DHS application and approval data, including 65% of the immediately eligible candidates⁵⁹ and 62% applications rates⁶⁰ and 78% of DACA approvals.⁶¹ By stark contrast, according to MPI, African immigrants constituted only 3% (or about 36,000) of the population who were immediately eligible for DACA (total 1.2 million eligible), and Caribbean immigrants constituted 2% of the immediate eligible pool.⁶² The total percentage of African and Caribbean immigrants eligible for DACA corresponds exactly with their proportion within the unauthorized immigrant population.

Nonetheless, Mexican immigrants are over-represented among the DACA-eligible population (65% v. 56% of all unauthorized immigrants and just 29% of the total foreign-born population).

Applications. USCIS generally reports quarterly data on the top 25 countries of origin of DACA applications. Since the program's launch in August 2012 until the first quarterly report in 2016, among all African and Caribbean countries, only Jamaica, Nigeria, Trinidad and Tobago and the Dominican Republic have ever made the top 25 list for applications. Taken together, USCIS accepted a total number of 11,844 initial applications from these four countries, or 1.5% of the total initial applications accepted among the top 25 countries.⁶³ (The top 25 countries represent approximately 96.5% of all initial DACA applications accepted.)

Approvals. Similarly, USCIS generally reports quarterly data on the top 25 countries of origin of DACA approvals. Since the program's launch in August 2012 until the first quarterly report in 2016, among all African and Caribbean countries, only Jamaica, Nigeria, Trinidad and Tobago and the Dominican Republic have ever made the top 25 list for approvals. Up to the first quarter of 2016, Jamaican nationals had 5,302 total approvals, including both initial and renewal applications, or 84% of Jamaican nationals' applications; Nigeria had 2,095 total approvals, or 88% of applications; Trinidad and Tobago had 4,077 total approvals, or 89% of applications; and the Dominican Republic had 4,580 total approvals, or 87% of applications. While approximately 87% of applications from these four countries were approved, about 91% of DACA applications from all of the top 25 countries tracked by USCIS were approved. (The approvals listed in the top 25 countries list represent 97% of the 1,198,605 approvals to date.)⁶⁴

Although African and Caribbean immigrants constituted only a small percentage of the immediately eligible population for DACA, the rates of application accepted and status approved for Black immigrants are lower when compared to all top 25 countries listed by USCIS. While using the numbers of the four African and Caribbean countries that have appeared on the top 25 list may not be the most accurate calculation, all other countries of origin whose nationals have submitted a DACA request but do not appear on the list only make up less than 4% of the total.⁶⁵ The authors have also submitted a FOIA application to USCIS requesting the full list of countries of origin, but final response has not been produced by the agency yet.

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THE STATE OF BLACK IMMIGRANTS

PART II: BLACK IMMIGRANTS IN THE
MASS CRIMINALIZATION SYSTEM



NYU | LAW

IMMIGRANT RIGHTS CLINIC

BAJI
BLACK ALLIANCE
FOR JUST IMMIGRATION



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authors

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about

Black Alliance for Just Immigration

The Black Alliance for Just Immigration (BAJI) is a racial justice and migrants' rights organization that engages in education, advocacy, and cross-cultural alliance-building in order to end racism, mass criminalization, and economic disenfranchisement of African American and Black Immigrant communities. BAJI's headquarters are in Brooklyn, NY with additional offices in Oakland, CA, Atlanta, GA, and Los Angeles, CA.

NYU School of Law Immigrant Rights Clinic

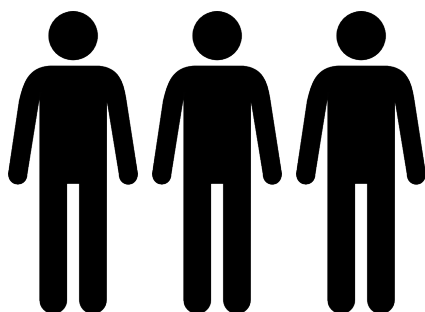
The Immigrant Rights Clinic is a leading institution in both local and national struggles for immigrant rights. Students engage in direct legal representation of immigrants and community organizations as well as in immigrant rights campaigns at the local, state and national levels. Students have direct responsibility for all aspects of their cases and projects and the opportunity to build their understanding of legal practice in the field of immigrant rights law and organizing.



executive summary

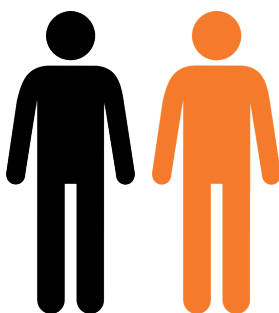
Black immigrants are one of the fastest growing demographics in the United States. Nonetheless, this group remains a novelty in the broader immigration discourse. This report aims to elevate the conditions facing Black immigrants in the United States, drawing particular attention to their experience in the criminal law and immigration systems. This report argues that like African-Americans, Black immigrants experience disparate, often negative, outcomes within various social and economic structures in the U.S., including the country's mass criminalization and immigration enforcement regimes.

This report focuses on policing, mass incarceration, immigrant detention, and deportations, as these issues are most pertinent in our current political and social context. Due to racial discrimination, over-policing of Black communities, and invisibility within the public consciousness, Black immigrants face egregious conditions in the U.S., particularly within the nation's immigration enforcement system. Some of our key findings include:



- **More than one out of every five noncitizens facing deportation on criminal grounds before the Executive Office for Immigration Review is Black.**

- Black immigrants are more likely to be detained for criminal convictions than the immigrant population overall.
- Black immigrants in removal proceedings for a criminal conviction often have lived in the U.S. for a long time and established strong community ties; many are apprehended and placed in deportation proceedings long after the triggering criminal conviction occurred.
- Black immigrants are much more likely than nationals from other regions to be deported due to a criminal conviction.



It is imperative that the U.S. adopt policies that end the mass criminalization of Black and other marginalized communities, provide a safety net for Black immigrants, and address racial disparities in the immigration enforcement system.



introduction

In an era where #BlackLivesMatter and #Not1More have become rallying cries for racial justice and immigrants' rights activists respectively, it's important that we uplift the common challenges that cross both movements - mass incarceration, policing, immigrant detention, deportations, deprivation of civil rights and civil liberties, economic inequality, and the destruction of families and communities. These problems are prevalent in all communities of color in the U.S. But unlike Black Americans and immigrants of other backgrounds, Black immigrants face the aforementioned challenges in ways that are unique and consequential.

For over a decade, the Black Alliance for Just Immigration (BAJI) has sought to raise the public consciousness around issues impacting Black immigrants through education, advocacy, grassroots organizing, and storytelling. Despite our successes, which include consolidating Black immigrant power and mobilizing the Black diaspora around the human rights issues that transcend our communities, Black Americans and Black immigrants remain at the margins of society.

When it comes to Black immigrants, terms such as "marginalization" and "oppression" understate the difficulties faced by this community. Simply put, Black immigrants are invisible. They are absent from the mainstream and media representation of immigrants. Their narratives are merged with the stories of other communities of color in the United States. Research and readily available data on Black immigrants is scant. Even the notion of "Black immigrants" as an identity group is foreign to most.

For this reason, we recognized that any research report about Black immigrants – and this report in particular – must serve two purposes: (1) to provide basic demographic information about Black immigrants and (2) to highlight the unique social and economic challenges facing this immigrant group.

This report confirms our hypothesis: Black immigrants, one of the fastest growing demographic groups in the U.S., face a myriad of challenges that parallel those of Black Americans. While this report is substantive, it is only the beginning. Our hope is that we will be able to build on the body of research available on the Black immigrant experience in the U.S. and that this report, in particular the recommendations toward the end, will lay the groundwork for a Black immigrant policy agenda over the coming years.



methodology

The background information on Black immigrants in the U.S. came primarily from the 2014 American Community Survey (ACS) one-year Public Use Microdata Sample (PUMS) data and the 2014 Yearbook of Immigration Statistics published by the U.S. Department of Homeland Security (DHS). The report analyzes the ACS and DHS data and calculated the results regarding Black immigrants based on either self-identification or country of origin. Since the PUMS data represents about one percent of the American population, results based on the total population estimates were calculated by replicating the weight variable within the dataset, subject to standard errors of inferential statistics.¹

Other conclusions on Black immigrants were analyzed based on data included in the DHS Yearbook and the Transactional Records Clearing House (TRAC), which were both categorized by region and/or nationality. All data regarding Black immigrants from the DHS source was calculated based on immigrants from African and Caribbean countries. Since the data on immigration courts available on TRAC was obtained through a Freedom of Information Act (FOIA) request to the Executive Office for Immigration Review (EOIR) within the Department of Justice, the data was similarly organized by nationality, and the results regarding Black immigrants were calculated based on all African and Caribbean countries.

Information on immigration detention was collected primarily from the Case Access System for EOIR (CASE) database, which was originally obtained by BuzzFeed News through a Freedom of Information Act (FOIA) request. The authors analyzed the raw data with the support of a Python analyst to derive conclusions on immigrants from different regions of the world.

The authors used the 2014 ICE Enforcement and Removal Operations Report published by the U.S. Immigration and Customs Enforcement, as well as various TRAC data tools on immigration court proceedings, to calculate numbers regarding removals and deportations based on country of origin. The authors also cite to reports from organizations including the Pew Research Center, the Migration Policy Institute, and others listed in the bibliography, and spoke with several professors and experts in the relevant fields.



definitions

A

Affirmative Asylum

Affirmative Asylum refers to the process in which asylum-seekers in the U.S. voluntarily present themselves to the U.S. Government to ask for asylum. The affirmative application for asylum is made to the Asylum Office of the Citizenship and Immigration Services (CIS) division of the U.S. Department of Homeland Security (DHS).

African Countries

African Countries includes Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde (Cape Verde), Cameroon, Central African Republic, Chad, Comoros (Comoros Islands), Congo, Cote d'Ivoire (Ivory Coast), Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Réunion, Rwanda, Saint Helena, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Western Sahara, Zambia, and Zimbabwe.

Apprehension

Apprehension is an immigration term that refers to the administrative arrest of an individual whom DHS believes is in violation of civil immigration laws. Administrative arrests made at or near land borders or at "interior border checkpoints" are generally made by Border Patrol agents with the Customs and Border Protection (CBP) of DHS. In addition, agents within the Immigration and Customs Enforcement (ICE) division of DHS apprehend persons in the "interior" of the U.S., usually further from the border.



B

Black Immigrant

Black Immigrant, unless otherwise specified in this report, refers to any person who was born outside the United States, Puerto Rico or other U.S. territories and whose country of origin is located in Africa or the Caribbean. Immigrant population estimates include all immigrants regardless of current citizenship or legal status.

This definition is used because federal immigration enforcement data is categorized by country of origin rather than by race. While the U.S. Census Bureau collects some data on individual's racial self-identification and immigration status, most of the government sources relied upon in the report—including the U.S. Department of Justice Executive Office for Immigration Review and the U.S. Department of Homeland Security, both of which track data on deportation and detention rates—categorize individuals by their country of origin.

Because of these limitations, the definition of “Black immigrant” used in this report is both over-inclusive and under-inclusive. It is over-inclusive because not every immigrant in the United States from a country in Africa or the Caribbean is of African heritage, nor does every individual of African heritage self-identify as Black. This is particularly true for immigrants from Cuba and the Dominican Republic, where 9.3%² and 18.3%³ of the population identifies as Black, respectively.

The definition is under-inclusive because it fails to include Black immigrants in the United States from countries outside of Africa and the Caribbean. People of African heritage make up a significant percentage of the population of many countries outside Africa and the Caribbean, including Guyana (30.2%, or 227,062),⁴ Nicaragua (9%, or 532,000)⁵, Brazil (7.6%, or 15 million)⁶, and Honduras (2%, or

175,000)⁷, as well as within the indigenous groups in countries like Belize and Guatemala. These percentages are even higher when accounting for mixed heritage.

Where possible, this report uses self-identification Census data in order to avoid the over- and under-inclusivity problems described above. Where Census data is available, “Black immigrant” is defined as any person who was born outside the United States, Puerto Rico or other U.S. territories and self-identified as “Black or African American alone” in 2000 and later U.S. Census Bureau surveys. Reliance on Census data is specified in the report (primarily in the demographic discussion in Part I). However, because the analysis of deportation and detention data throughout the report relies on data from federal immigration agencies, the majority of data in the report is limited to country of origin categories.

definitions, cont'd.

Caribbean Countries

Caribbean Countries include Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados, Bonaire, British Virgin Islands, Cayman Islands, Cuba, Dominica, Dominican Republic, Grenada, Guadeloupe, Haiti, Jamaica, Martinique, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and Turks and Caicos Islands.

Diversity Visa

Diversity visa is a United States congressionally-mandated lottery program for receiving a United States Permanent Resident Card. Each fiscal year, the Diversity Visa Program makes 55,000 immigrant visas available to people from countries that have low rates of immigration to the United States. Applicants who meet the eligibility requirements are entered into a random drawing.

Inadmissible

Inadmissible refers to the immigration status of someone who federal immigration officials believe is subject to bars to entry or admission to the U.S. because of a prohibited status or activity. U.S. law contains a list of “grounds of inadmissibility”, including those based on criminal convictions, violations of immigration laws and national security.

Interior Removal

Interior Removal happens when an individual, who is identified or apprehended inside the United States by an ICE officer or agent, is deported.

Immigration Court

Immigration court is an administrative court responsible for adjudicating immigration cases in the U.S. Cases involve non-citizens who generally have been charged by DHS with being in violation of immigration law.

The court is part of the Executive Office for Immigration Review (EOIR). Appeals of Immigration Judge decisions can be made to the Board of Immigration Appeals (BIA), which is also part of EOIR. Some BIA decisions can be appealed further, to the federal courts.

Immigration Judge

Immigration judge is an attorney appointed by the Attorney General to act as an administrative judge within EOIR. Immigration Judges conduct adversarial proceedings in deciding whether a noncitizen should be allowed to enter or remain in the U.S., in determining bond amounts in certain situations, and in considering various forms of relief from removal.

Lawful Permanent Residents

Lawful permanent residents (LPRs) are persons who have been granted lawful permanent residence in the United States. They are also known as “green card” holders.

Naturalization

Naturalization refers to the process by which immigrants become U.S. citizens. To be naturalized under U.S. laws, a person generally must be 18 and older, have been a green card holder for at least five years, possess “good moral character,” and meet additional requirements.

Foreign-Born

Foreign-born refers to people in the U.S. born outside the U.S., Puerto Rico or other U.S. territories. The terms “foreign-born” and “immigrant” are used interchangeably.

Non-Citizen

Non-citizen refers to people born outside the U.S., Puerto Rico or other U.S. territories, excluding people who are U.S. citizens.

Refugees and Asylees

Refugees and asylees are persons who sought residence in the United States in order to avoid persecution in their country of origin. Persons granted refugee status applied for admission

while outside the United States. Persons granted asylum applied either at a port of entry or at some point after their entry into the United States.

Removal

Removal refers to the expulsion of a person from the U.S. who is not a U.S. citizen. The more common term is “deportation.” The process may be non-adversarial and led by an immigration officer, or it may involve an adversarial hearing before an Immigration Judge who also may determine whether any exceptions to deportation should be applied. An individual who is removed may have administrative or criminal consequences placed on subsequent re-entry.

Temporary Protected Status

Temporary Protected Status (TPS) is a temporary immigration status granted to eligible nationals of certain countries (or parts of countries) who are already in the United States. The Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that

temporarily prevent the country’s nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately. The current list of 11 countries includes one Caribbean country, Haiti (designated with TPS, set to expire in July 2017 unless renewed), and six African countries, namely Guinea, Liberia, and Sierra Leone (designated with TPS in connection with Ebola, set to expire in March 2017 unless renewed), Sudan and South Sudan (TPS also set to expire in November 2017 unless renewed), and Somalia (TPS set to expire in March 2017 unless renewed).

i. targeting immigrants with criminal convictions



“Good” vs. “Bad” Migrants

In creating a “good” versus “bad” migrant binary, President Obama sought to justify a detention and removal campaign that oversaw the deportation of a record 438,421 immigrants in fiscal year 2013¹⁰ —an increase that has led some to refer to President Obama as “deporter-in-chief.”¹¹ Since the start of Obama’s administration in 2008, 2.9 million immigrants have been deported from the United States, a majority of whom (58%) have a criminal record.¹²

“Felons” vs. “Families”

In a national address in November 2014, President Obama announced that he would focus immigration enforcement resources on individuals with criminal records—“felons, not families.”⁸ This phrase has been widely criticized as devaluing and dehumanizing individuals with criminal convictions.⁹ After all, “felons” have families, too.





Anti-Blackness

The government's increasing focus on immigrants with criminal records disproportionately impacts Black immigrants, who are more likely than immigrants from other regions to have criminal convictions, or at least to be identified through interactions with local law enforcement, because of rampant racial profiling.



Tougher Enforcement

President Obama's address to the nation coincided with the Department of Homeland Security's release of a memo outlining new immigration enforcement priorities. DHS noted that it would continue to prioritize national security, border security, and public safety¹³, and went on to rank certain classes of immigrants in order of enforcement priority, with a significant focus on targeting people with criminal records.



Intensification of ICE Removals

Following the November 2014 DHS memo, ICE implemented the revised Civil Immigration Enforcement Priorities (CIEP) in FY 2015, which intensified the focus on removing people with criminal convictions and recent entrants. The highest priority for enforcement resources, known as “Priority 1,” groups together immigrants “engaged in or suspected of terrorism or espionage” along with individuals “apprehended at the border while attempting to unlawfully enter the United States.” This includes asylum seekers, immigrants convicted of a felony offense and immigrants convicted of an “aggravated felony” as defined in section 101(a) (43) of the Immigration and Nationality Act. The term “aggravated felony” includes offenses that are neither aggravated nor felonies and has been expanded over time to include, for example, a single theft offense with a suspended one-year sentence involving no actual jail time. The memo’s second-highest priority for detention and deportation, “Priority 2,” includes immigrants convicted of three or more misdemeanor offenses, individuals with a “significant misdemeanor” including drug “distribution” offenses, and people who entered the United States unlawfully after January 1, 2014. The final category, “Priority 3,” includes immigrants who were ordered deported after January 1, 2014. ICE continues to remove individuals who do not fall under these revised categories if their removal would serve an important “federal interest.”

Removals by CIEP Priority: Fiscal Year 2015

CIEP Priority	“Convicted Criminal” Removals	Total Removals	% of Total “Convicted Criminal” Removals
Priority 1	113,385	202,152	81%
Priority 2	14,869	18,536	11%
Priority 3	7,770	9,960	6%
Federal Interest	32	67	0%
Unknown	3,312	4,698	2%
Total	139,368	230,715	100%

Source: U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (Dec. 22, 2015), available at <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf>

Blacks are Disproportionately Represented in the Criminal Enforcement System

Black people are far more likely than any other population to be arrested, convicted, and imprisoned in the U.S. criminal enforcement system—the system upon which immigration enforcement increasingly relies.¹⁴ Black people are arrested at 2.5 times the rate of whites.¹⁵ They are more likely than whites to be sentenced to prison, and less likely to be sentenced to probation.¹⁶ According to the FBI Criminal Justice Information Services Division, of the total individuals arrested in 2014, 69.4% were white, 27.8% were Black or African American, and 3% were of another race.¹⁷ These arrest rates demonstrate that Black and African American individuals are arrested at a higher rate than their overall percentage in the population. These disparities exist even when crime rates are the same; for example, although Blacks and whites use marijuana at roughly equal rates, Black people are 3.7 times more likely than whites to be arrested for marijuana possession.¹⁸

Representation by Gender

Black men and boys in particular are criminalized in disproportionate numbers. Imprisonment rates for Black males at year-end 2014 were 3.8 to 10.5 times greater at every age group than white males, and 1.4 to 3.1 times greater than rates for Hispanic males.¹⁹

At that time, Black men accounted for 37% of the male prison population.²⁰ Black youth, as well, are disproportionately punished in school; according to data collected by the Department of Education, Black males were suspended more than three times as often as their white peers during the 2011-2012 school year.²¹

Black women and girls also face significant criminalization. Black women, for example, are imprisoned at more than twice the rate of white women.²² Black girls were the fastest growing segment of the juvenile population in secure confinement between 1985 and 1997.²³ Although confinement rates for youth have been dropping since 1997, the rate has declined less for African American girls than white girls.²⁴ Racial disparities are also evident in education; during the 2011-2012 school year, Black girls were suspended six times as often as their white counterparts.²⁵



TARGETING IMMIGRANTS WITH CRIMINAL RECORDS



Despite racial disparities in criminal enforcement, the federal government prioritizes the deportation and detention of individuals with criminal records. In FY 2015, ICE deported 139,368 people with criminal convictions, which represented 59% of all ICE removals.²⁶ The percentage of people targeted for deportation by ICE based on their criminal records rose from 82% in FY 2013 to 91% in FY 2015.²⁷ Many of their records involved drug-related convictions. In FY 2003-2013, drug offenses, including simple drug possession, accounted for almost a quarter of all criminal removals.²⁸

Three federal agencies are tasked with enforcing immigration laws: U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Patrol (CBP), and U.S. Citizenship and Immigration Services (USCIS).

Although immigration law is federal, the U.S. government has instructed state and local law enforcement agencies to assist with immigration enforcement.

In 2009, the “Criminal Alien Program” was responsible for about half (48%) of immigrants detained and deported by ICE; “287(g)” accounted for an additional 12%.²⁹ Both of these programs are explained in the next section. Notably, however, not every immigrant detained through these programs has a criminal conviction.³⁰

The high proportion of immigrants with criminal records who are targeted for immigration enforcement is the result on an intentional and pervasive reliance on the machinery of the criminal enforcement system to identify people for deportation. The criminal enforcement system—each stage of which has been shown to target Black people disproportionately—has become a funnel into the immigration detention and deportation system.

STOPS

Immigrants are exposed to more risks and vulnerability when they are stopped by the police for minor offenses, such as broken taillights and traffic violations. When the police decide to take on the duties of federal immigration enforcement, they often use these stops to question people about their immigration status and to turn immigrants over to ICE. Several federal programs have made it easier for police to expose immigrants with past criminal records.

Section 287(g) of the Immigration and Nationality Act authorizes the Department of Homeland Security to partner with state and local law enforcement agencies. The 287(g) Program’s Jail Enforcement Teams interview arrestees regarding their immigration status. A review of the 287(g) program by the DHS Office of the Inspector General (OIG), published in March 2010 and updated several times since then, found that 287(g) resources had not focused on immigrants who fell within the purported highest risk categories; just 9% of immigrants identified through the 287(g) program at four sites that the OIG visited were within Level 1 (the highest priority).³¹

The National Fugitive Operations Program (NFOP) was established on January 25, 2002. Immediately following the events of September 11, 2001, the Justice Department increased efforts to deport immigrants with old removal orders.³² These individuals, deemed “fugitive aliens,” had their names entered into the National

Crime Information Center (NCIC) database—a system created for criminal dispositions and warrants. This commingling of the criminal and immigration enforcement systems would allow, for example, an individual stopped on the street by a police officer to be turned over to ICE and deported if his or her name appeared in the NCIC.³³ Many individuals identified and deported through this program lived in the United States for many years and have significant family and community ties. NFOP also dispatches Fugitive Operations Teams (FOTs) across the country to arrest “**fugitives**” and specifically focuses on “residential operations.”³⁴ In late 2006, FOTs began conducting raids more aggressively and demanding document checks on long-distance buses and trains. They also arrest people on the streets, in their homes, and at their workplaces if they cannot produce status documents. FOT practices have been challenged, especially for home raids, based on the lack of judicial warrants or probable cause.³⁵ The program was still in effect at the time of this report’s publication.

ARRESTS

When an individual is arrested and booked by a police officer, his or her fingerprints are sent to the FBI. Through the **Priority Enforcement Program (PEP)**, state and local law enforcement agencies share data with immigration enforcement. PEP replaced its predecessor program, Secure Communities, in July 2015. Under PEP, this same information is sent to the Department of Homeland Security, which checks its own databases to determine whether the individual is a “priority for removal” as described in Secretary Jeh Johnson’s November 20, 2014 memorandum.³⁶ ICE will then ask the law enforcement agency to notify ICE of the individual’s release—or detain the individual past the time that he or she otherwise would have been released—so ICE may pick the individual up, resulting in his or her immediate transfer to ICE custody. Because fingerprints are sent to DHS during booking, this program ensures that ICE identifies individuals even when their charges are eventually dismissed.

Many jails and prisons also participate in the **Criminal Alien Program (CAP)**, which seeks to identify, arrest, and deport individuals who are incarcerated in federal, state, and local prisons and jails, as well as “at-large criminal aliens that have circumvented identification.”³⁷ Law enforcement agencies notify ICE’s office of Detention and Removal Operations, which administers CAP, of foreign-born detainees in their custody. ICE then attempts to secure their final orders of removal before they are released from criminal custody.

The programs described in this section employ the use of “**detainers**,” also known as “immigration holds,” to facilitate ICE’s capture of the immigrants that the agency identifies. Detainer use peaked in March 2011 and then fell steadily; however, it stabilized as of October 2015, with ICE issuing approximately 7,000 detainers per month.³⁸ About half of detainers are sent to county jails; 8% are sent to city and local jails; and federal law enforcement agencies and state prisons each receive about 15%.³⁹ Though these programs purportedly enable ICE to fulfill its mandate and focus efforts on immigrations with criminal convictions, a recent study found that individuals with criminal convictions become significantly less common among detainers issued during April 2015 than they were between FY 2012 and 2013.⁴⁰

CRIMINAL CHARGES AND DISPOSITION

Immigration enforcement is increasingly present in local jails. Often, an ICE officer will try to interview noncitizens while in custody and then initiate paperwork for the removal process if an individual is determined to be deportable. After an individual or person charged with a crime, he or she may be confronted with a choice to plead guilty to a lesser offense. Immigrants are particularly vulnerable to guilty pleas that may later lead to removal proceedings. In 2010, the Supreme Court held in *Padilla v. Kentucky* that the Constitution requires criminal defense attorneys to advise their clients of the immigration consequences of their criminal charges.⁴¹ However, this does not always happen, and noncitizens are still sometimes pressured to sign plea bargains that may damage a subsequent immigration case.

A criminal conviction could trigger mandatory detention, deportation and ineligibility to reenter the United States. It may also serve as a bar to U.S. citizenship, eligibility to obtain a green card, and various forms of relief from deportation, such as asylum or withholding of removal. A conviction will remain permanently in an individual's immigration file unless it can be "vacated," that is removed, by a judge on the basis of some error in the underlying criminal proceeding.⁴²

POST-CONVICTION

Serving a sentence may result in further immigration scrutiny or even removal prior to release. **The Institutional Removal Program (IRP)** is a nationwide Department of Homeland Security initiative that purports to identify removable immigrants who are incarcerated, ensure they are not released into the community, and remove them upon completion of sentences.⁴³ IRP has the effect of forcing incarcerated noncitizens into deportation proceedings from within the very prisons to which they are confined, often in the form of "video hearings" that take place from a room within prison. As a result, inmates are isolated from all other parties, including the judge, the prosecutor, the interpreter, witnesses, and sometimes even their own lawyer. In 2011, IRP was responsible for placing 221,122 immigrants in removal proceedings—six times more than the arrests enforced by the 287(g) and NFOP programs.⁴⁴

The release from jail or prison often triggers a notification request or immigration detainer, and noncitizens are transferred directly into ICE custody and immigration detention. Immigrants may also be sent to ICE following drug rehabilitation or another alternative program. ICE officers are increasingly coordinating with probation and parole departments to identify immigrants who are on parole or serving a sentence of probation.

Individuals who are not placed in removal proceedings while in jail or prison or upon release may still face deportation later based on their criminal record. Traveling or applying for immigration status or citizenship can trigger a background check and placement in removal proceedings months or years following a criminal conviction.

by the numbers

Black immigrants are disproportionately represented among immigrants facing deportation in immigration court on criminal grounds.

Unauthorized
Population in the U.S.

BLACK
5.4%



More than one out of every five people facing deportation on criminal grounds before the EOIR is Black.



Facing Detention
on Criminal Grounds

BLACK
20.3%



Nearly one in every three Black immigrants in deportation proceedings in FY 2015 had a criminal ground of removability.





ii. black immigrants & deportation

Deportation Proceedings

Immigrants face deportation, also known as “removal,” through a series of different processes. The data from the Executive Office for Immigration Review (EOIR) that is included in this section reflects individuals who are deported through a removal hearing process. However, the data does not include individuals who are deported through reinstatement of removal or expedited removal. Demographic data on country of origin is not currently available for these forms of administrative removal.

According to ICE’s 2015 Enforcement and Removal Operations statistics, 235,413 people were removed in 2015, 59% of whom had a criminal conviction.⁴⁵ Of the 235,413 individuals removed in FY 2015, 3,448 were from the Caribbean and 937 from Africa.⁴⁶

Although Black immigrants comprise just 5.4% of the unauthorized population in the United States⁴⁷, and 7.2% of the total noncitizen population⁴⁸, they made up a striking 10.6% of all immigrants in removal proceedings between 2003 and 2015.⁴⁹

Black immigrants are disproportionately represented among immigrants facing deportation in immigration court on criminal grounds.⁵⁰ There is no evidence that Black immigrants commit crime at greater rates than other immigrants. **Yet while Black immigrants make up only 7.2% of the noncitizen population in the U.S., they make up 20.3% of immigrants facing deportation before the EOIR on criminal grounds.** That’s compared to 10% of all immigrants in deportation proceedings before EOIR who have criminal grounds of removability.⁵¹ **More than one out of every five people facing deportation on criminal grounds before the EOIR is Black.⁵²**

A person who is placed in immigration deportation proceedings does not have the right to free legal representation. As a result, immigrants often have no other choice but to represent themselves in court, and are left to navigate a notoriously complex and bureaucratic system on their own. Immigrants are afforded few procedural protections, and are often detained during these proceedings.

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Deportation Outcomes

Of all the cases that were completed in immigration court in 2015—meaning that the individual in question was either ordered deported, granted relief, or their case was terminated or closed—Black immigrants comprised 7.5% of the total, or 14,945 individuals.⁵³ Ultimately, 35.7% of these Black immigrants (4,180) were ordered deported.⁵⁴ As noted below, one of the driving factors of deportability appears to be the connection between criminal and immigration enforcement.

Criminal Records and the Basis of Removal

Black immigrants are more likely than immigrants overall to be deported on criminal versus immigration grounds of removability. **In FY 2013, more than three quarters of Black immigrants were removed on criminal grounds⁵⁵, in contrast to less than half of immigrants overall.⁵⁶** Table 1 details the percentage of individuals deported on criminal grounds of removability as compared to the total number removed overall, by region of origin.

In FY 2015, three times as many African immigrants were removed for an immigration charge as for a criminal charge.⁵⁷ Notably, the reverse was true for Caribbean immigrants: that same year, twice as many Caribbean immigrants were removed for a criminal charge than for an immigration charge.

TABLE 1 (FY 2013)

Region of Origin	Total Removed	Total Removed for Criminal Grounds	Percent Removed for Criminal Grounds
Africa	1,164	592	51%
Asia	2,933	1,110	38%
Caribbean	4,345	3,588	83%
Europe	2,009	1,074	54%
North America (excluding the Caribbean)	421, 925	189,116	45%
Oceania	237	193	81%
South America	5,775	2,705	47%
Black Immigrants	5,509	4,180	76%
Total	438,388	198,378	45%



Black immigrants placed in removal proceedings on criminal grounds of removability often have lived in the United States for a long time and established strong community ties prior to their arrest. Many are apprehended and placed in deportation proceedings long after the triggering criminal conviction occurred. Between 2003 and 2013, the median timing for immigration apprehensions for criminal record-based removals was over a year following a criminal conviction.⁵⁸

Studies of Black immigrant deportees with criminal records demonstrate longstanding ties to the United States. One study found that among Jamaican deportees with criminal records, the average time living in the United States was 12 years.⁵⁸ Another study found that three-quarters of Dominicans deported on criminal grounds were lawful permanent residents of the United States, and about 80 percent had spent over five years in the United States before their first arrest.⁶⁰

Criminal Records in the Context of Returns versus Removals

The Department of Homeland Security defines “returns” as the “confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.”⁶¹ Immigrants who are returned can reapply to enter the United States but may face additional bars when they are present in the U.S. A removal, on the other hand, is defined as the “compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal.”⁶² Being deported based on a removal order subjects a person to bars to reentry ranging from five years to a permanent bar, depending on the basis of the order, and can subject an individual to enhanced criminal penalties (including up to twenty years in jail if previously deported on the basis of an aggravated felony) if he or she reenters the country without authorization.⁶³ An individual who is deported based on a removal order and reenters the country again can also be deported without any new immigration court proceedings.

There are additional consequences for individuals who are removed subsequent to certain criminal convictions who reenter the country unlawfully. A person with a felony conviction, or with three or more misdemeanors convictions involving drugs or crimes against the person, faces ten years in prison.⁶⁴ And an individual who was removed after a conviction that was deemed to be an “aggravated felony” faces twenty years in prison.⁶⁵



In FY 2013, Black immigrants were much more likely to be removed than returned. Table 1 demonstrates that Black immigrants were also more likely than immigrants from other regions to be removed—an outcome that has harsher consequences than returns. The increase in removals is part of a nationwide trend; in 2011, for the first time since 1941, the United States removed more people than it returned.⁶⁶

In FY 2013, 1,496 immigrants from Africa, and 1,909 from the Caribbean, were returned.⁶⁷ Immigrants from every other region, with the exception of Oceania, saw a greater percentage of immigrants returned that year. About twice as many Black immigrants were removed as were returned. The inverse was true for immigrants from other regions, who were much more likely to be returned than removed. For example, in FY 2013 there were 15 Asian immigrants returned for every one removed. The ratio was similar for European immigrants: more than 13 were returned for every one removed. Table 2 includes the FY 2013 ratios of removals to returns for immigrants from every region.

TABLE 2 (FY 2013)

Region	Total Removed	Total Returned	Ratio Removed to Returned
Africa	1,164	1,496	1:1.3
Asia	2,933	44,520	1:15.2
Caribbean	4,345	1,909	1:0.4
Europe	2,009	12,387	1:6.2
North America (excluding the Caribbean)	421, 925	115,168	1:0.27
Oceania	237	609	1:2.6
South America	5,775	2,201	1:0.38
Black Immigrants	5,509	3,405	1:0.62
Total	438,388	178,290	



iii. black immigrants in immigration detention

The detention of thousands of immigrants per year is a phenomenon that takes place within the context of mass incarceration, which disproportionately affects Black communities. Although skyrocketing imprisonment rates have done little to decrease crime, they have resulted in the imprisonment of one in four Black males born since the late 1970s.⁶⁸ Immigration detention centers do not differ in any significant way from criminal correctional facilities.

In fact, many detention contracts are given to local jails or private prisons. ICE's standards of command and control are based on those of correctional organizations.⁶⁹ As a result, immigrants living in detention facilities often endure subpar conditions.



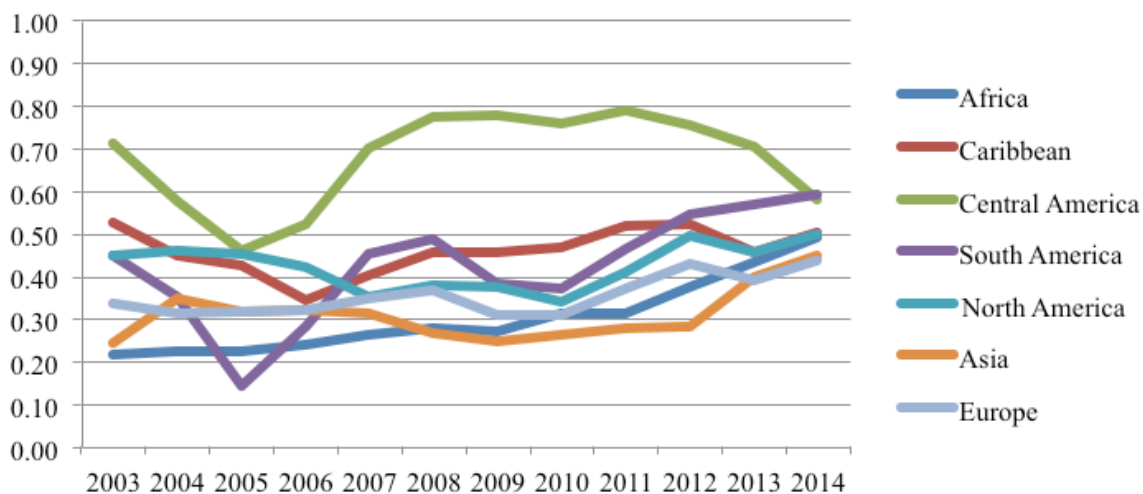
According to data from the Executive Office of Immigration Review's "CASE" database, which was originally obtained by BuzzFeed News through a Freedom of Information Act request, between January 1, 2003 and January 1, 2015, more than 2.6 million immigrants were in removal proceedings in the United States, and 1.5 million were detained at some point during those proceedings.⁷⁰



Black immigrants are disproportionately represented among detained immigrants facing deportation in immigration court on criminal grounds.



Graph 1 demonstrates that the percent of immigrants in removal proceedings who are detained each year has increased, on average, for every single region since 2003:



The data further reveals that Black immigrants are more likely than the overall immigrant population to be detained for criminal convictions than immigration violations.⁷¹ **While within the immigrant population, individuals are 3.5 times more likely to be detained for an immigration violation than a criminal conviction, the reverse is true for Caribbean immigrants in particular, who are almost twice as likely to be detained for a criminal conviction than an immigration violation.**

African immigrants, a greater percentage of whom are recent arrivals than Caribbean immigrants,⁷² are twice as likely to be detained for an immigration violation than a criminal conviction.⁷³

In 2014, according to the CASE database, there were 226,404 immigrants in removal proceedings. More than half (128,872) of these individuals were detained at some point during those proceedings; about 5 percent of those detained (6,223) were Black immigrants.⁷⁴

Black immigrants are disproportionately represented among detained immigrants facing deportation in immigration court on criminal grounds. While Black immigrants make up only 4.8% of detained immigrants facing deportation before the EOIR, they make up 17.4% of detained immigrants facing deportation before the EOIR on criminal grounds.⁷⁵ Nearly one out of every five people detained while facing deportation on criminal grounds before the EOIR is Black.⁷⁶

While 14% of immigrants detained while facing deportation proceedings before EOIR have criminal grounds of removability, a full half of all Black immigrants detained during removal proceedings have criminal grounds of removability.⁷⁷



iv. recommendations

We have concluded from the overwhelming amount of data that the racialized criminalization evident in the immigration enforcement system has an acute impact on the state of Black immigrants in the U.S.. This result is partially due to discriminatory policing practices and criminal penalties that adversely affect all Black people. Simultaneously, our analysis of the data suggests that racial inequities, evidenced by disproportionate, negative outcomes for Black people, in removal proceedings, also persist in the immigration enforcement system.

It is the Black Alliance for Just Immigration's view that the immigration system must be upended and redesigned to ensure that those entering the U.S. seeking work, refuge or reunification with their families and communities, are treated fairly and with dignity. This transformation can begin by divorcing the U.S. mass criminalization and immigration enforcement regimes. For this reason, the repeal of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIR-IRA") and Anti-terrorism and Effective Death Penalty Act ("AEDPA"), commonly known as the "1996 immigration laws," in favor of policies that shift the focus away from criminal contact as the deciding factor as it pertains to one's immigration status in the US by Congress, is BAJI's primary policy recommendation.

The 1996 immigration laws expanded the grounds for deportation, broadened classes of mandatory detention, stripped away judicial discretion and the right to due process and retroactively punished those who already served time for their offenses. As this report has highlighted, Black immigrants have been disproportionately affected by these laws. The 20th anniversary of IIR-IRA and AEDPA, along with the current political climate, presents an opportunity to reinvigorate the movement to upend the nation's immigration enforcement system.

An initial step toward this goal involves rolling back the 1996 Immigration Laws. BAJI and fellow advocates have articulated a set of demands which include:

- ✓ Removing convictions as grounds for deportation and/or exclusion, including aggravated felonies and drug offenses.
- ✓ Ending the retroactive application of the 1996 laws.
- ✓ Restoring judicial discretion and due process for all individuals who come into contact with the criminal law and immigration systems.
- ✓ Ending permanent deportation.
- ✓ Ending mandatory detention.
- ✓ Ending police/ICE collaboration programs such as 287g.
- ✓ Eliminating the three and ten year bars, which prohibit return to the U.S. and create barriers to obtaining status.
- ✓ Providing a "right to counsel" in immigration proceedings.

Additional Federal Recommendations



- As Congress works to end the criminalization of Black immigrants through the rollback of punitive deportation and detention policies, Congress should also enact and expand positive immigration programs specifically aimed at protecting all Black immigrants escaping war, egregious social, political, and economic conditions, public health and infrastructure crises, and domestic violence. In doing so, Congress should eliminate the criminal bars that prevent individuals from seeking access to these kinds of programs.
- The President should create and expand executive action programs that will provide relief for Black immigrants. This includes providing an additional 18-month renewal of Temporary Protected Status (TPS) for Guinea, Haiti, Liberia, Sierra Leone, Somalia, Sudan and South Sudan.
- The President should extend the number of visa petitions expedited under the Haitian Families Reunification Parole program.
- The President should eliminate the criminal bars to executive action programs such as Deferred Action for Childhood Arrivals.

State Recommendations



- Where relevant, states should amend criminal laws such that the maximum sentence for certain criminal offenses is less than one year, so that those offenses no longer constitute grounds for deportability.
- States should legalize acts that the broader public no longer believes should constitute a crime or violation, including marijuana possession, and implement pre-plea diversion programs for a wide range of offenses so that individuals do not face harsh immigration consequences as a result of their involvement in the criminal system.
- States should also cancel contracts with ICE that allow ICE officials to have access to state prisons.

Local Recommendations



- Municipalities should move away from the Broken Windows Policing Model, in favor of real community-controlled policing, which prioritizes restorative justice and rehabilitation.
- Municipalities should also divest from traditional uniformed policing and invest in programs that have been shown to produce real public safety including jobs, vocational training, mental health and harm reduction services, and education.
- Local law enforcement agencies should cancel contracts with ICE that allow immigration detention centers to be housed within local jails.
- Municipalities should pass laws prohibiting local law enforcement agencies from collaborating and sharing information with ICE.

v. conclusion

Just as African-Americans suffer disproportionately high arrest, prosecution and incarceration rates, so too are Black immigrants. This occurs despite no evidence that they engage in more criminalized activities in comparison to any other racial group. Black immigrants are also disproportionately impacted by the compounding impact of the immigration enforcement system. Numerous federal agencies and programs work in conjunction with local law enforcement to criminalize, detain and deport immigrants. The racism present in the criminal legal system spills over and informs the immigration enforcement system, and thus it naturally and unjustly targets Black immigrants at all stages of the process. As the number of Black immigrants living in the United States continues to rise, debates around immigration must acknowledge and rectify the injustice inherent in these enforcement and deportation systems.

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Joe Penney

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African migrants march in Tapachula, Mexico, demanding humanitarian visas that would enable them to cross Mexico on their way to the U.S., on Sept. 30, 2019. Photo: Isaac Guzman/AFP via Getty Images

When 37-year-old Cameroonian asylum-seeker Nebane Abienwi died after hospital workers pulled him off life support against his family's wishes at Sharp Chula Vista Medical Center outside San Diego, he

became the first black person, and the ninth person in a year, to die in the custody of U.S. Immigration and Customs Enforcement. Like many other Africans who have crossed South and Central America to seek asylum in the U.S. and Canada, by the time Abienwi arrived at the border and had the hypertensive incident that reportedly led to his hospitalization, he had already dealt with racist discrimination and physical threats to his safety across eight Latin American countries.

But Abienwi's reason for fleeing Cameroon is just as wrapped up in U.S. policy as his death. He fled his hometown of Bafut in the Anglophone Northwest Province when it was attacked multiple times by the Rapid Intervention Battalion, known by its French acronym BIR, according to family members. The best-equipped and most thoroughly trained unit of Cameroon's military, the BIR is an elite group of soldiers that the U.S. has instructed and worked closely with since at least 2010. In 2015, President Barack Obama [sent 300 Green Berets](#) to Cameroon to train and assist the BIR in the fight against Boko Haram.

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Cameroon is divided between two primarily Anglophone provinces to the west, bordering Nigeria, and the rest of the country, which is Francophone. This division began after World War I when Britain and France split territory that was at that point occupied by German colonizers, creating separate Anglophone and Francophone colonies. Those entities would vote to join a union upon independence, which was secured in the Francophone region in 1960 and in the Anglophone region one year later.

The union has been shaky at times. In 2016, peaceful protests began forming in the Anglophone regions against the appointment of

Francophone judges and the encroachment of the French language in regional administration, which would threaten their regional autonomy. Cameroonian authorities violently repressed those protests, and a year later the armed separatist group Ambazonia Defence Forces attacked Cameroonian military positions, setting off an active armed conflict that has displaced [at least half a million people](#) and caused tens of thousands to seek refuge in other countries.

Some 10,000 Cameroonians have fled to ask for asylum in the U.S. since 2016, according to Sylvie Bello, CEO of the Cameroon American Council, and Cameroonian American immigration lawyer Pryde Ndingwan. Some of them have been held in ICE's Otay Mesa detention facility outside San Diego, where Abienwi was before he died.

In Tapachula, Mexico, Cameroonians form the vast majority of African asylum-seekers.

Over 2,000 miles south, in Tapachula, Mexico, where thousands have had their movement north constrained by Mexican authorities at the insistence of the United States, Cameroonians form “the vast majority of African asylum-seekers,” said Elise Keppler, associate director of the International Justice Program at Human Rights Watch, who was recently in Tapachula for a research trip.

Since the outbreak of the conflict, the Cameroonian government under Paul Biya, a repressive dictatorship that has endured for 37 years, has regularly deployed the BIR to the Anglophone regions. There, they have repeatedly engaged in [horrific human rights abuses](#), including burning down homes and entire villages, arbitrary detention, torture,

indiscriminate [killings of civilians](#), and more, according to local and international human rights groups. In 2017, The Intercept and Forensic Architecture [revealed](#), based on research from Amnesty International, that BIR soldiers fighting Boko Haram “tortured prisoners at a remote military base that is also used by U.S. personnel and private contractors.” Separatist Anglophone rebels have also been accused of similarly grave abuses, and regular citizens find themselves terrorized by both sides.

A [2018 human rights report](#) done by the U.S. Embassy in Yaoundé noted that “increasingly in the Anglophone regions, responsibility for security in the rural areas is left to another security force, the BIR,” signifying that the embassy was well aware that the soldiers it trained and supplied were among the ones responsible for rights abuses in the Anglophone regions.

Paul, whose name has been changed over safety concerns, left his Anglophone town earlier this year after his uncle, a prominent businessman, was kidnapped by unknown gunmen. Paul’s uncle urgently needed medication and managed to negotiate with his kidnappers to have Paul deliver it to him. Paul met the kidnappers and traveled blindfolded with them to bring the medication to his uncle.

When his uncle was freed, he called Paul to warn him that “maybe the military or the police” might come to him for information about the kidnappers. His uncle, he said, feared that “I can be intimidated and forced to say something that I don’t know.” Paul’s uncle gave him money to flee Cameroon, and he left that night to see his wife and children in a different city.

After consulting with his wife and children, Paul took a bus to Nigeria and then boarded a flight to Ecuador, as [thousands of Africans](#) seeking asylum in the U.S. have done over the past few years. In the first seven months of 2019 alone, 4,779 Africans were apprehended by local

authorities while traveling through Mexico to seek asylum or otherwise enter the U.S., [according to the Los Angeles Times](#). In addition to the physical dangers they face while traveling through the Amazon and the notorious Darién Gap between Colombia and Panama, African migrants face racist discrimination from governments and citizens of Latin American countries. Women, transgender, and nonbinary Africans face even more challenges.

“I’ve been carrying somebody like me in my backpack for more than five months now.”

In Ecuador, Paul met up with other Cameroonians who had made the journey, and they headed north together. While hiking through a section of Colombia, one of the men he was with had a heart attack and died. “He died in my arms,” Paul said via WhatsApp call from Mexico. He and other Cameroonians

buried the man where he died.

“As the African tradition holds, when somebody dies, if you cannot transfer the corpse back home. What you do is that when you bury the person, you have to take soil from the person’s grave and send it back to his family,” he said. Postal services in Costa Rica and Mexico were unwilling to send the soil back to Cameroon, so Paul has kept it with him. “The soil will help him. I’ve been carrying somebody like me in my backpack for more than five months now.”

Today, Paul is stuck in Tapachula, a Mexican town along the border with Guatemala that has become an open-air prison for migrants coming from all over Latin America, but especially for Africans and Haitians.

Mexico began detaining people who crossed the southern border with Guatemala en masse in May, after President Donald Trump [threatened Mexico with tariffs](#). Whereas it used to grant people visas that allowed them to travel to the American border, Mexico has rescinded that policy and encouraged people to apply for asylum in Mexico. Most Africans have resisted doing so because they don't want to stay in Mexico, where they experience heightened racism and have few job opportunities. Applying for asylum in Mexico also significantly reduces their chance of receiving it in the U.S.



People from Cameroon wait with others from Africa and Haiti to enter the Siglo XXI immigrant detention center in Tapachula, Mexico, to request humanitarian visas to cross the country on June 27, 2019. Photo: Jose Torres/Reuters

African asylum-seekers have staged protests on multiple occasions to demand better treatment from Mexico and permission to travel north. As it stands now, people looking to leave Tapachula are stopped at the city limits and brought back to the detention center.

Those who can afford it stay in hotels, but according to Keppler of Human Rights Watch, hundreds of people are living in tents on the street.

“It’s really hot. There’s very little shade. There’s a lot of rain as well, and there’s no place to go to the bathroom, there’s no organized bathroom situation. There’s no organized shower situation. There’s no food made available. People have developed skin rashes, urinary tract infections, intestinal infections, respiratory infections,” said Keppler.

In October, a group of Cameroonians [tried to leave Tapachula by boat](#) along Mexico’s Pacific coast and capsized, killing at least two people and drawing comparisons to the deadly boat journeys that Africans have taken across the Mediterranean Sea. One reason that more African migrants are attempting to reach the U.S. via Latin America is the [European Union’s clampdown](#) on migrants trying to [reach Europe by sea](#).



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Keppler’s colleague at Human Rights Watch, Ariana Sawyer, said that a number of Cameroonians she spoke to were scared that Mexico was sharing their information with Cameroonian government officials in the U.S., which would put them and their families back home in danger. Francophone men who identified themselves as a delegation sent from the Cameroonian Embassy in Washington, D.C., had reportedly visited Tapachula and discussed the situation there with Mexican officials. “Anglophone asylum-seekers were really very alarmed because those Francophone Cameroonian delegates already knew all of their

information. They were bringing up their names, their villages,” Sawyer said.

Those who do make it past Tapachula now face new U.S. policies that make it much harder to cross the southern border and apply for asylum. Most African asylum-seekers are subject to a corrupt “metering” system limiting access to U.S. ports of entry, according to Nicole Ramos, who heads the Border Rights Project of the nonprofit Al Otro Lado. The document requirements are always shifting, she said, and many people are pushed to pay bribes to Mexican officials to move their cases forward. A more recent change requires asylum-seekers to [apply in the first country](#) they passed through before trying their luck in the U.S. – effectively eliminating the option for anyone who arrives via Mexico.

In response to the numerous abuse allegations against the BIR and other Cameroonian security forces, in February, the [U.S. suspended some military aid](#) to the country. This drawback of support was conducted “in order to limit the chance that U.S. assistance would indirectly support military operations in the Northwest and Southwest Regions, and in response to a failure of the Cameroonian government to cooperate with us on human rights concerns,” a State Department official told The Intercept. But some cooperation continues.

Bello, head of the Cameroon American Council, argued that besides granting asylum to those in need and treating them with dignity and respect, the U.S. government should completely stop its support for the Cameroonian

“If you go to the different military academies in America, you are still going to find

Cameroonian military officials.”

military. “They still have equipment, they still have trainings. If you go to West Point, if you go to the War College at Carlisle,

[Pennsylvania], if you go to the different military academies in America, you are still going to find Cameroonian military officials. If you’re really going to [solve the issue], kick them out of those programs,” Bello said.

Bello is also involved in lobbying members of Congress to help Abienwi’s family to retrieve his body, which has been blocked by ICE.

“ICE doesn’t have a process for next of kin who are not based in America,” Bello explained. “The family and the community has no physical access. We’ve not been given the opportunity to physically identify his body. We’ve not been given the opportunity for several weeks to perform all the cultural and traditional rites that go with the dead and burials,” she said.

In late November, California Rep. Karen Bass led a Congressional Black Caucus trip to the border to investigate Abienwi’s death and the conditions of other black asylum-seekers. In the meantime, the Anglophone conflict rages on. It has “been going on now for three to four years. That is what has really pushed a whole lot of Cameroonians to migrate out of the country and head for the United States,” said Ndingwan, the immigration lawyer.

Like others forced from his country, Paul is now praying that his situation will change. “I have said to myself, if not that it is God who brought me here, I have prayed that I should go back home. There are so many people who have said no, home is better, but they don’t have a choice. Because at this juncture now, if they should get home, it’s death.”

At the same time, Paul has marched against the Mexican government's discriminatory policies in Tapachula, while other Cameroonians [have done the same in Tijuana](#), calling on their experience fighting for their rights back home to form, in the words of Ramos, "the most organized" community of asylum-seekers at the border.

Update, December 3, 2019:

This story has been updated to include Amnesty International's role in the investigation into torture by BIR at a base also used by the U.S. military.

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