

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 legitimation 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 statehouses; 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_9afc71c9-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., Carbado, *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.

C. Racial Capitalism¹⁹⁸

In the early 1980s, Cedric Robinson’s *Black Marxism: The Making of the Black Radical Tradition* took Marxism to task for

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.

¹⁹⁸ In this Section, I sketch a picture of the intellectual claims about American policing and history that permeate the movement’s analysis. Many of my citations are to interdisciplinary scholarship. This scholarship, and the scholars who produce it, are in conversation in various ways with movement organizers. Work like that of Ruth Gilmore, Robin Kelley, Angela Davis, and Kim Crenshaw is circulating. E.g., ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* (2005); DAVIS, *ARE PRISONS OBSOLETE?*, *supra* note 27; DAVIS, *supra* note 71; GILMORE, *supra* note 27; Crenshaw, *supra* note 28, at 1244 (“[E]xploring the various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color.”); Robin D.G. Kelley, *Black Study, Black Struggle*, BOS. REV. (Mar. 7,

failing to account for the essentially “racial character” of capitalism’s development.¹⁹⁹ Robinson’s work is having a bit of a renaissance, in part because of the Movement’s embrace of an integrated analysis of how racial subordination, specifically of Black people, has been central to the development of capitalism and the United States.²⁰⁰ In the Movement’s account, influenced by Robinson and Robin D.G. Kelley’s work, the country’s twin commitments to a structure of white supremacy and capitalism go back to the founding of the nation and the history of chattel slavery.²⁰¹ Capitalism is, and has been, central to the devaluation of Black life, before, through, and after the founding.²⁰²

2016). There is a dialectical relationship between the currency of these scholars and the movements with which they are in conversation. These scholars are being published and distributed in more spaces, with bigger audiences. For example, to mark the publication of Angela Davis’s new book *Freedom Is a Constant Struggle*, her publisher Haymarket Books co-sponsored a conversation between Davis and Keeanga-Yamahtta Taylor at Chicago’s Rockefeller Memorial Chapel, and 1800 people attended. Jim Plank, *Angela Davis w/ Keeanga-Yamahtta Taylor: Freedom Is a Constant Struggle*, HAYMARKET BOOKS (Nov. 1, 2016).

¹⁹⁹ Robin D.G. Kelley, *Introduction: What Did Cedric Robinson Mean by Racial Capitalism?*, BOS. REV. (Jan. 12, 2017), <http://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism>; CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (1983); see also Walter Johnson, *To Remake the World: Slavery, Racial Capitalism, and Justice*, BOS. REV. (Oct. 26, 2016), <http://bostonreview.net/race/walter-johnson-slavery-human-rights-racial-capitalism>. Robinson’s concept is quite different than Nancy Leong’s deployment of the term in legal scholarship, explained as “the process of deriving social or economic value from the racial identity of another person.” Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013) (focusing on how white institutions, like universities and corporations, derive social or economic value by associating with non-white peoples in a capitalist society that values diversity).

²⁰⁰ See, e.g., *Forum 1: Race Capitalism Justice*, BOS. REV. (2017) (special issue being offered as a “handbook to racial justice in the age of Trump” that was “inspired by Cedric J. Robinson’s work on racial capitalism, as well as Black Lives Matter and its forebears”). Robinson recently died. Robin D.G. Kelley, *Cedric J. Robinson: The Making of a Black Radical Intellectual*, COUNTERPUNCH (June 17, 2016), <https://www.counterpunch.org/2016/06/17/cedric-j-robinson-the-making-of-a-black-radical-intellectual/>.

²⁰¹ “We also stand with descendants of African people all over the world in an ongoing call and struggle for reparations for the historic and continuing harms of colonialism and slavery.” MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8; see also Christina Heatherton, *#BlackLivesMatter and Global Visions of Abolition: An Interview with Patrisse Cullors*, in *POLICING THE PLANET*, *supra* note 44, at 35, 38 (arguing that the Black Lives Matter movement should focus not just on the United States); BYP100, *AGENDA TO BUILD BLACK FUTURES*, *supra* note 75, at 12 (“From slavery to the present there has been a struggle over Black labor, Black life and the propensity for the society to exploit one and devalue the other.”).

²⁰² See MOVEMENT FOR BLACK LIVES, *Reparations*, *supra* note 97 (“The combination of slavery, America’s deep-rooted system of racial capitalism, and long-lasting discriminatory institutions have for centuries denied Black people equal access to the wealth created through their labor.”). For essential background, see EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* (2014);

Movement actors understand policing through the lens of Black history: Patrisse Cullors, a co-founder of Black Lives Matter, for example, roots policing in the tangled phenomenon of racial capitalism and settler colonialism. She explains the “original task [of police] was to patrol slaves . . . [and] the first sheriff’s departments patrolled the US-Mexico border.”²⁰³ With regard to Black life, the role of police expanded over time: from patrolling slaves and runaway slaves to enforcing of the Black Codes and Jim Crow.²⁰⁴ Cullors ties her concern with police in the settler colonial project to the expanding borders of the United States and its territorial disputes with other nations. In other words, Cullors points to the roots of policing in slave and border patrols: in regulating Black and indigenous life to accrue benefit for the white populations through the extraction of Black labor and the expropriation of indigenous land.²⁰⁵

Over time, police have been central to the agenda of racial capitalism and the devaluation of Black life. The rise of mass incarceration, overcriminalization, and zero-tolerance or broken windows policing is seen as an evolution of the regime of control, exclusion, and exploitation that began with slavery, convict leasing, the Black

MARCUS REDIKER, *THE SLAVE SHIP: A HUMAN HISTORY* (2008); ERIC WILLIAMS, *CAPITALISM & SLAVERY* (1994); *see also* CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997) (offering a raced reading of the social contract to explain the rise of European colonialism and the enduring nature of white supremacy).

²⁰³ Heatherton, *supra* note 201, at 36; *see also* *Abolish Policing*, CRITICAL RESISTANCE, <http://criticalresistance.org/abolish-policing/> (last visited Feb. 10, 2018); Maya Dukmasova, *Abolish the Police? Organizers Say It's Less Crazy Than It Sounds*, CHI. READER (Aug. 25, 2016), <http://www.chicagoreader.com/chicago/police-abolitionist-movement-alternatives-cops-chicago/Content?oid=23289710>; Rachel Herzog, *Let's Reduce, Not Reform, Policing in America*, *supra* note 32. For an historical tracing of the rise of border enforcement with the end of colonialism and the free movement of Brown and Black people to white settler nations, see Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 *YALE J.L. & HUMAN.* 51, 55–57 (2016).

²⁰⁴ *See, e.g.*, SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001); KELLY LYTLE HERNÁNDEZ, *MIGRA!: A HISTORY OF THE U.S. BORDER PATROL* (2010); BRYAN WAGNER, *DISTURBING THE PEACE: BLACK CULTURE AND THE POLICE POWER AFTER SLAVERY* (2009); Philip L. Reichel, *The Misplaced Emphasis on Urbanization in Police Development*, 3 *POLICING & SOC'Y* 1 (1992); Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 *AM. J. POLICE* 51 (1988); K.B. Turner et al., *Ignoring the Past: Coverage of Slavery and Slave Patrols in Criminal Justice Texts*, 17 *J. CRIM. JUST. EDUC.* 181, 184–86 (2006) (studying the coverage of the connection between slave patrols and modern policing in criminal justice literature); Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, E. KY. U. ONLINE: POLICE STUD. (Jan. 7, 2014), <http://plsonline.eku.edu/insideloook/brief-history-slavery-and-origins-american-policing>.

²⁰⁵ *See* *BYP100, AGENDA TO BUILD BLACK FUTURES*, *supra* note 75, at 12 (situating the question of Black labor as central).

Codes, and segregation.²⁰⁶ These systems are read not simply through the lens of white supremacy, but through a commitment to extracting capital from Black labor. The history of criminal law as a method of control and suppression of Black life becomes, rather than an aberration, indicative of its character.²⁰⁷ Conversely, policing and surveillance become constitutive of what it means, and has always meant, to be Black in the United States.²⁰⁸

The movement critique situates the rise of mass incarceration as the latest system of control of Black labor, and as a core aspect of austerity and deregulation under neoliberalism.²⁰⁹ A growing body of interdisciplinary scholarship supports the movement's analysis, documenting a symbiotic relationship between racism, mass incarceration, and neoliberalism.²¹⁰ In this critique, you cannot understand the emergence of mass incarceration without understanding the rise of neoliberalism, the reigning ideological companion to late capi-

²⁰⁶ “[H]uge segments of Black and Latino communities are civically, economically, and socially excluded from participation in society, which is eerily reminiscent to the segregation experienced in the Jim Crow South.” MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7. Scholars have also connected the Black Codes to broken windows, zero-tolerance, and order maintenance policing. *See, e.g.*, Andrea J. Ritchie, *Black Lives over Broken Windows*, NEW POL. (July 14, 2016); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 788 (1999); *see also* Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2261–63 (1998).

²⁰⁷ *E.g.*, MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7 (“The death penalty in the U.S. was designed to bring lynching into the courtroom.”).

²⁰⁸ *See* BYP100, AGENDA TO BUILD BLACK FUTURES, *supra* note 75, at 3, 6, 22–24, 40.

²⁰⁹ *See id.* (“The 21st century version of [slavery] is in the form of a Neoliberal state, a growing prison industry, and ruthless policing.”). For a parallel argument about “mass deportation,” *see* TANYA MARIA GOLASH-BOZA, *DEPORTED: IMMIGRANT POLICING, DISPOSABLE LABOR, AND GLOBAL CAPITALISM* 5–21 (2015).

²¹⁰ *E.g.*, JORDAN T. CAMP, *INCARCERATING THE CRISIS: FREEDOM STRUGGLES AND THE RISE OF THE NEOLIBERAL STATE* 7 (2016) (arguing that the carceral state is “a product of civil rights struggles over policing and law and order in the 1940s and 1950s [and] a response to the prison rebellions of the 1960s and economic crisis of the 1970s”); Nicola Lacey, *Differentiating Among Penal States*, 61 BRIT. J. SOC. 778, 779 (2010) (“The ‘neoliberal’ impetus to economic deregulation, welfare state retraction, and individualization of responsibility . . . has, paradoxically, gone hand in hand with the burgeoning of state powers, state pro-activity, and state spending in the costly and intrusive business of punishment.”); Loïc Wacquant, *Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity*, 25 SOC. F. 197, 198 (2010) (explaining that mass incarceration “is a political response, not to rising *criminal* insecurity, but to the diffuse *social* insecurity” brought about by the decline of the welfare state, “the fragmentation of wage labor and the shakeup of ethnic hierarchy”); *see also* MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2014) (“[N]eoliberalism in penal policy is also failing on its own terms. The state has not retreated. A higher proportion of the population is under its direct control through prison, jail, probation, parole, and community service than at any time in U.S. history.”).

talism.²¹¹ Under a regime of neoliberalism, the primary role of the state is to “set up those military, defence, police, and legal structures” required for the stability of private property, free trade, and markets.²¹²

As the state has deregulated markets and privatized services, leading to a decline in adequately paid work, police and prison have expanded and intensified to deal with all the people made additionally precarious: poor, Black, of color, immigrant, queer, trans, homeless.²¹³ With the decline of the welfare state and social support programs, policing, surveillance, court cases, and incarceration have become fundamental tools in the neoliberal state’s management of “surplus population[s].”²¹⁴ Policing and imprisonment become “catch all” responses

²¹¹ See Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & CONTEMP. PROBS. 71, 83–84 (2014) (rooting the rise of neoliberalism in the tenures of Ronald Reagan and Margaret Thatcher whose platforms emphasized “deregulation, the creation of stable and well-protected private-law systems, and the dismantling of the welfare state—shifting the primary role of government from public law to private law” (citing David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22 (2007)); see also CAMP, *supra* note 210 (taking a longer historical view on the rise of neoliberalism).

²¹² DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005); see Grewal & Purdy, *supra* note 117, at 6 (arguing that neoliberalism sets “presumptive limits on political possibility” through its commitments to key precepts, including that “strong property rights and private contracting rights are the best means to increase overall welfare, with the sole justification for ‘political intervention’ being to ‘correct market failures’” and that “strong property rights best protect the equal freedom and dignity of individuals”); Harris, *supra* note 117, at 1555–56 (explaining that neoliberalism means “fewer social services, more ‘law and order’”); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476–78 (2012) (arguing that neoliberalism “depends on the brutal containment of the nation’s most disenfranchised groups,” wherein “welfare, prison, foster care, and deportation systems [are] extremely punitive mechanisms for regulating residents of the very neighborhoods most devastated by the evisceration of public resources”); Wacquant, *supra* note 210, at 213–17 (naming four institutional logics of neoliberalism: “[e]conomic deregulation . . . reregulation aimed at promoting ‘the market’”; “[w]elfare state devolution, retraction, and recomposition designed to facilitate . . . establishing a quasi-contractual relationship between the state and lower-class recipients, treated not as citizens but as clients or subjects”; “[a]n expansive, intrusive, and proactive penal apparatus”; and “[t]he cultural trope of individual responsibility”). This property-centered view of freedom is also arguably implicit in liberalism. See Johnson, *supra* note 199 (describing the “bourgeois freedoms of classical liberalism” as “the freedom to make choices and to take intended actions”).

²¹³ For a broader critique that “neoliberalism has . . . the consistent purpose of promoting capitalist imperatives against countervailing democratic ones,” see Grewal & Purdy, *supra* note 117, at 2, 5, 6–9 (arguing that neoliberalism is “contested” and “shape-shifting” but essential to study and integrate into legal scholarship).

²¹⁴ Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 105, 109–15 (2001) (discussing prisons and ghettos as sites of surveillance and governance of people of color); see also NAT’L RESEARCH COUNCIL, *supra* note 191 (describing the rise of mass incarceration, particularly among men of color, in the United States, and the racially-inflected policies that led to it); George Lipsitz, *Learning from Los Angeles: Producing Anarchy in the Name of Order*, in FREEDOM NOW!

to social problems like homelessness, mental health crises, drug use, and unemployment, from which the state has otherwise disinvested.²¹⁵ Rather than addressing directly the underlying social, economic, and political problems, we police, cage, and throw away the people who struggle through them. Consider the numerous recently publicized incidents where a Black family called 911 seeking help for a family member in need—presumably for lack of options—only to have the police brutalize or kill their loved one.²¹⁶

The Center for Popular Democracy, Law for Black Lives, and BYP100 recently released a report, *Freedom to Thrive: Reimagining Safety & Security in Our Communities*, building out the Vision’s invest-divest demand.²¹⁷ As a way to deconstruct the heavy hand of criminal law enforcement in local governance approaches, the report analyzes budgets in twelve different localities, from Atlanta and

STRUGGLES FOR THE HUMAN RIGHT TO HOUSING IN LOS ANGELES AND BEYOND, *supra* note 75, at 33, 38 (describing the practice of policing the homeless in Los Angeles as a part of “a national and international pattern that portrays people who *have* problems as people who *are* problems”); Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC’Y 43, 44–45 (2001) (arguing that penal and social welfare are interconnected “policy regimes” for dealing with social problems related to deviance and marginality); Roberts, *supra* note 212, at 1476–78 (noting that while the government has “dismantl[ed] the social safety net” it has “intensified its coercive interventions in poor communities of color”).

²¹⁵ MOVEMENT FOR BLACK LIVES, *End the War on Black People*, *supra* note 7 (arguing that prison and policing are “primary modes of dealing with the issues created by social, political, and economic inequities”); see CTR. FOR POPULAR DEMOCRACY & POLICYLINK, *supra* note 75, at 4–5 (“Police and prisons have become the government’s answer to nearly every social problem in low income communities of color.”); Jordan T. Camp & Christina Heatherton, *Broken Windows, Surveillance, and the New Urban Counterinsurgency: An Interview with Hamid Khan*, in POLICING THE PLANET, *supra* note 44, at 151 (claiming that the “goal” of broken windows theory and the Safer Cities Initiative in Los Angeles is “to get rid of ‘undesirables’”); see also Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030, 1031 (1999) (“U.S. incarceration lowers conventional measures of unemployment in the short run by concealing joblessness among able-bodied, working-age men, but it raises unemployment in the long run by damaging the job prospects of ex-convicts after release.”); Lester Spence, *Policing Class*, JACOBIN (Aug. 16, 2016) (arguing that policing is about “garnering municipal revenue, or policing populations left out of the ‘new economy’ and uncovered by the safety net”).

²¹⁶ E.g., CRENSHAW & RITCHIE, *supra* note 75, at 16–17 (on the killings of Tanisha Anderson, Michelle Cusseaux, Pearlie Golden, Shereese Francis, Kayla Moore, and Tyisha Miller); *San Diego: Police Kill Unarmed Black Man Having Mental Health Breakdown*, DEMOCRACY NOW! (Sept. 28, 2016), http://www.democracynow.org/2016/9/28/headlines/san_diego_police_kill_unarmed_black_man_having_mental_health_breakdown (on the killing of Alfred Olango).

²¹⁷ CTR. FOR POPULAR DEMOCRACY ET AL., FREEDOM TO THRIVE: REIMAGINING SAFETY & SECURITY IN OUR COMMUNITIES (2017), <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf>.

Baltimore to Houston and Orlando.²¹⁸ In a particularly important passage, the report notes:

Over the last 30 years, the US has dramatically increased its investment in policing and incarceration, while drastically cutting investments in basic infrastructure and slowing investment in social safety net programs. Elected officials have stripped funds from mental health services, housing subsidies, youth programs, and food benefits programs, while pouring money into police forces, military grade weapons, high-tech surveillance, jails, and prisons. These investment choices have devastated Black and brown low-income communities Moreover, the choice to invest in *punitive* systems instead of stabilizing and nourishing ones does not make our communities safer. Study after study shows that a living wage, access to holistic health services and treatment, educational opportunity, and stable housing are more successful in reducing crime than more police or prisons.²¹⁹

With this intertwined analysis of racism and capitalism, for the Movement, grievable state violence is understood to exist beyond police killings and even police brutality or stop and frisk.²²⁰ The concern is with a comprehensive set of policies and systems that govern Black life through a lens of criminality and criminal law enforcement. Investments in surveillance, jails, and prisons are constructed as choices in governance—choices with clear alternatives. The demand is for new forms of governance, that stabilize and nourish rather than criminalize Black and Brown low-income communities.

In addition to the racial capitalism frame, intersectional feminist and queer politics are at the heart of the Vision.²²¹ This politic has been vital to the movement's construction of a Black queer and feminist lens through which to understand racial capitalism. Thus, the Vision calls for an end to "wars on our Trans and Queer family that deny them their humanity."²²² This claim has been vital to the movement's construction of a Black queer and feminist lens through which

²¹⁸ *Id.*

²¹⁹ *Id.* at 3.

²²⁰ Judith Butler points to the political and material realities that make certain lives grievable and others not. JUDITH BUTLER, *FRAMES OF WAR: WHEN IS LIFE GRIEVABLE?* (2009).

²²¹ The Combahee River Collective Statement is often a point of reference. See TAYLOR, *supra* note 28, at 15–27.

²²² MOVEMENT FOR BLACK LIVES, *About Us*, *supra* note 3; see also Sarah Jaffe, *Black Poverty Is State Violence, Too: Why Struggles for Criminal Justice and Living Wage Are Uniting*, SALON (Dec. 5, 2014, 2:16 PM), http://www.salon.com/2014/12/05/black_poverty_is_state_violence_too_why_struggles_for_criminal_justice_and_living_wage_are_uniting/ (describing cross-issue activism among Black Lives Matter organizers and those organizing for a living wage).

to view racial capitalism. The Vision repeatedly connects its demands to the lived realities of queer, trans, and gender nonconforming folks.²²³ Policing becomes a method of social control co-constituted by deprivation in the private sphere, a tool of the state to advance dispossession, control, and suppression,²²⁴ and to protect the white propertied classes,²²⁵ to police gender and sexuality.²²⁶ Violence and threat of violence is its method.²²⁷ It is anything but neutral or fair.²²⁸

The idea that policing should be understood as constitutive of a larger project of social control, that criminal enforcement is essentially a form of governance for the poor and dispossessed, has been developed,²²⁹ and percolates in, criminal law scholarship.²³⁰ But despite

²²³ Throughout the Vision there is an inquiry as to how the policy recommendations affect the most marginalized. *See, e.g., supra* note 84 and accompanying text. Before that, the #SayHerName campaign emerged to ensure that the Movement take seriously the deaths of Black women and girls. CRENSHAW & RITCHIE, *supra* note 75; Andrea J. Ritchie, *Say Her Name: What it Means to Center Black Women's Experiences of Police Violence*, in WHO DO YOU SERVE, WHO DO YOU PROTECT?, *supra* note 3, at 79 (describing the rise of #SayHerName to center the unique ways in which Black women and girls are targeted by police brutality). Despite this work, there has been a discrepancy between the Movement's explicitly feminist and queer lens, and the fact that police killings of Black women, queer, and trans folks have not mobilized people in the same way that police killings of Black cis-gendered men have. *See* Shatema Threadcraft, *North American Necropolitics and Gender: On #BlackLivesMatter and Black Femicide*, 116 S. ATLANTIC Q. 553, 559 (2017) (“[A]s the movement also depends on the ability of each dead body to resonate with the wider black community, it has become clear that all black bodies do not produce equal amounts of community outrage.”).

²²⁴ *See* Darryl Pinckney, *Black Lives and the Police*, N.Y. REV. BOOKS (Jan. 8, 2015), <http://www.nybooks.com/articles/2016/08/18/black-lives-and-the-police/> (describing seventeenth century slave patrols made up largely of poor whites, and noting that “[t]o stop, harass, whip, injure, or kill black people was both their duty and their reward” and that “[o]f course their real purpose was to monitor and suppress the capacity for slave rebellion”); *supra* notes 135–36 and accompanying text (discussing the historical connections between policing and slavery and practices like convict leasing).

²²⁵ *See* Herzog, *Big Dreams and Bold Steps*, *supra* note 32 (arguing that the police are “armed protection of state interests”).

²²⁶ CRENSHAW & RITCHIE, *supra* note 75, at 8–29 (detailing incidents of police violence against Black women, and explaining the influence of gender and sexuality on how such is constituted and experienced).

²²⁷ *See generally* SCHAUER, *supra* note 143 (discussing the centrality of force and threat of force to law).

²²⁸ The rise of broken windows policing is seen through the same lens, as a way to remove the poor from the streets into jails. *E.g., Ritchie, supra* note 206; *see* Jordan T. Camp & Christina Heatherton, *Introduction: Policing the Planet*, in POLICING THE PLANET, *supra* note 44, at 1, 5–7 (framing broken windows as “a class project that has displaced the urban multiracial working class worldwide”); *see also* sources cited *supra* note 215 and accompanying text.

²²⁹ *See* KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA (2009) (discussing how strategies to criminalize the presence of the socially marginalized in public space act as a form of modern-day “banishment”); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001) (linking renewed emphasis on crime control to

important effort, criminal law scholarship has not yet had a straightforward confrontation with capitalism. There has been important work on the policing of the poor, and the distributive effects of policing.²³¹ Law scholarship exploring policing as a force for capitalism or neoliberalism is sparse,²³² however, as is law scholarship examining consequences of mass incarceration on the poor and unemployed.²³³

free market ideology and anti-welfare politics); JONATHAN SIMON, GOVERNING THROUGH CRIME 18 (2007) (“No doubt we do govern the poor through crime, but they are far from the only subjects of this practice. Crime . . . actively reshapes how power is exercised throughout hierarchies of class, race, ethnicity, and gender.”); JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990 (1993) (discussing penalty as a means of regulating the socially marginalized, with a particular focus on parole); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 455 (1992) (“The new penology is neither about punishing nor rehabilitating individuals. It is about identifying and managing unruly groups.”); see also BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 1–4 (2006) (describing punitive criminal justice policies as, in part, a reaction to the upheaval in American race relations of the 1960s and the collapse of unskilled labor markets for unskilled men in the 1970s); Jordan T. Camp & Christina Heatherton, *What You Need to Know About Special Order 11: An Interview with Hamid Khan*, in FREEDOM NOW! STRUGGLES FOR THE HUMAN RIGHT TO HOUSING IN LOS ANGELES AND BEYOND, *supra* note 75, at 74, 76 (describing how Arizona’s immigration law, SB 1070, works by way of “attrition through enforcement”).

²³⁰ See Kohler-Hausmann, *supra* note 168, at 614–16 (documenting how “misdemeanor justice in New York City” has abandoned concern “with adjudicating guilt and punishment in specific cases” and adopted a “managerial model—concerned with managing people over time through engagement with the criminal justice system”); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1490 (2005) (“[T]he criminal system is a dominant form of governance in poor black neighborhoods.”); see also Carbado, *supra* note 149, at 129–30 (“African Americans often experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures.”).

²³¹ See Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 171 (2011) (arguing that police departments’ discretion has broad distributive effects that law scholars and courts do not adequately address); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1289 (1999) (discussing the distributive effects of Fourth Amendment doctrine’s focus on privacy, given that “[p]rivacy is not much at stake in street encounters,” where much policing activity takes place because “most suspects are poor”); William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998) (arguing that police disproportionately enforce drug laws in poor neighborhoods because the class dynamics of enforcement make it cheaper to enforce in poor areas). For an argument that prison is designed for the poor, and that this has predictable racialized dimensions, in particular a disproportionate impact on African Americans, see Butler, *supra* note 19, at 2179–87.

²³² On the relationship between the free market and punishment, see BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011).

²³³ For an exception, see James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 31–32, 52–58 (2012) (arguing that class plays a central role in mass incarceration, both within and across races, which distinguishes it from earlier forms of race-based oppression). There has also been legal scholarship on

Critical race scholars have considered the relationship between law and racial capitalism as a structural force, especially in the area of property,²³⁴ but much work remains to be done. The movement has elegantly integrated, updated, and rejuvenated long-standing lines of critique in law scholarship about the role of capitalism, white supremacy, and patriarchy in law through an important move: by centralizing an understanding of how capitalism works alongside white supremacy and patriarchy.²³⁵ Critical legal studies, critical race theory, and feminist law scholarship have brought to the fore criticisms of capitalism, white supremacy, male dominance, and patriarchy. Each has rooted its critique of law and its operations within a structural critique: of how these systems distribute resources and life chances, and then create discursive universes to justify those distributions.²³⁶ While critical legal studies focused on class critique, critical race theory focused on race, and feminist law scholarship focused on sex, gender, and sexuality. More recent scholarship, in particular ClassCrit,

how law and policing has been used to gentrify poor neighborhoods. *See, e.g.,* Linda Goode Bryant, “*Law Is Life!*”: Flag Wars, *Local Government Law, and the Gentrification of Olde Towne East*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 715, 716 (2006) (discussing how law enforcement and court enforcement of housing codes contributed to the gentrification of a particular neighborhood); Bernard E. Harcourt, *Policing L.A.’s Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles [An Experiment in Real Time]*, 2005 U. CHI. LEGAL F. 325, 373–83 (describing how policing was used in the attempt to “clean up” L.A.’s Skid Row for real estate development); Katharyne Mitchell & Katherine Beckett, *Securing the Global City: Crime, Consulting, Risk, and Ratings in the Production of Urban Space*, 15 IND. J. GLOBAL LEGAL STUD. 75, 99 (2008) (discussing how crime consulting encourages “fiscal and social discipline and a general enhancement of the state’s coercive power over those who are poor, homeless, and consigned to the informal sector”); Jeremy Kaplan-Lyman, Note, *A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City*, 15 YALE HUM. RTS. & DEV. L.J. 177 (2012) (describing neoliberal policing’s impact on poor communities in New York City); William Patrick Nicholson, Note, *Just Another Day in the Neighborhood? The Shaping of a Legal (and Social) Consciousness in Harlem*, 64 U. MIAMI L. REV. 267, 270 (2009) (exploring gentrification and “its effects on the lives and personal experiences” of Harlem residents).

²³⁴ The paradigm-shifting piece is Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (tracing the “evolution of whiteness from color to race to status to property as a progression historically rooted in white supremacy and economic hegemony over Black and Native American peoples”). *See also* Anthony Paul Farley, *Accumulation*, 11 MICH. J. RACE & L. 51 (2005) (arguing that the rule of law serves capital accumulation by whites on the backs of Black people).

²³⁵ MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98 (“Until we are able to overturn US imperialism, capitalism, and white supremacy, our brothers and sisters around the world will continue to live in chains.”).

²³⁶ *See, e.g.,* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93–102 (1987) (arguing that rooting the abortion right in the right to privacy fails to create meaningful change for women where private relationships are structured by patriarchy).

LatCrit,²³⁷ and intersectionality work driven by Kimberlé Crenshaw's, has started to bring together these lines of critique.²³⁸

While the winds are now changing,²³⁹ law scholarship has failed to integrate a critique of capitalism or political economy with critiques of how race, gender, sexuality, or even class operate.²⁴⁰ The contemporary movements for Black liberation and immigrant justice, on the other hand, are very much concerned with how to understand capitalism in conversation with white supremacy and patriarchy.²⁴¹ These are not simply movements for inclusion or even to end white supremacy and patriarchy: In formulating visions and pushing for reforms, they also have within their sights an end to capitalism.²⁴²

In the movement's account, racism is rendered as not simply or predominantly about bias, it is about raced and gendered class hierarchy producing concrete financial and property benefits for a rela-

²³⁷ ClassCrit and LatCrit scholars have made it their project to advance an understanding of structural inequality with class, capitalism, and neoliberalism. *E.g.*, Richard Delgado, *Rodrigo's Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87, 94 (2014) (stating that law and capitalism are one and the same); Angela P. Harris, *From Precarity to Positive Freedom: ClassCrits at Seven*, 44 SW. L. REV. 621, 621–22 (2015).

²³⁸ Take for example the *UCLA Law Review* symposium on the 25th anniversary of Crenshaw's intersectionality work. Symposium, *Overpoliced and Underprotected*, *supra* note 165; *see* Crenshaw, *supra* note 118, at 1422 (noting that the symposium “plac[es] women of color at the center of the discussion [which] fundamentally challenges the existing discourse's conventional parameters”); *see also* Devon W. Carbado et al., *Intersectionality: Mapping the Movements of a Theory*, 10 DU BOIS REV. 303 (2013) (describing intersectionality's origins in work regarding Black women's experiences, and detailing how it has since expanded across categories and disciplines). *See also* Sumi Cho, *Post-Intersectionality: The Curious Reception of Intersectionality in Legal Scholarship*, 10 DU BOIS REV. 385 (2013) (deconstructing critiques that argue that intersectionality is not well-equipped to engage with sexuality).

²³⁹ *See, e.g.*, LAW AND POLITICAL ECONOMY BLOG, <https://lpeblog.org> (last visited Mar. 29, 2018) (“Our blog begins from the observation that democratic political processes have lost control over fundamental decisions about how resources are allocated in our society. Legal doctrines enable champions of capital to subordinate democracy to ‘the free market.’”).

²⁴⁰ LatCrit has made important efforts. *See* Francisco Valdes & Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 43 CONN. L. REV. 1513 (2011) (introducing the frame of “critical race materialism” to “interpret the history of how economic and social structures of identity are inextricably linked”).

²⁴¹ *See, e.g.*, Marienna Pope-Weidemann, *On the Right Side of History: An Interview with Mijente*, RED PEPPER (Mar. 17, 2017), <http://www.redpepper.org.uk/on-the-right-side-of-history-an-interview-with-mijente>; MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8 (discussing opposition to patriarchy, capitalism, and white supremacy as central to the Movement).

²⁴² *See, e.g.*, MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98 (connecting the continued existence of global capitalism to the oppression of Black people); MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8 (“We reject false solutions and believe we can achieve a complete transformation of the current systems, which place profit over people and make it impossible for many of us to breathe.”).

tively small group of people at the expense of others. Movement actors centralize intersectionality in their analysis of identities and structures.²⁴³ Their critique is not limited to race, gender, or identity politics.²⁴⁴ They move beyond an identity-based theory of inequality, while still recognizing the importance of identity. They think about structure in thinking about individual material grievance.²⁴⁵ Capitalism is central to the analysis.²⁴⁶

This opens up new ways of seeing and understanding harm—beyond simple state action, bare bias, or naked violence. Take for example gentrification. Recognizing the link between race and capitalism, contemporary organizing campaigns identify police as protagonists in gentrification and the dispossession of communities of color.²⁴⁷ As a city gentrifies a neighborhood, policing and surveillance intensify as a way to criminalize and move Black and other people of color and poor people out, to create space for the white and the wealthy and the businesses that cater to them.

Consider the Youth Justice Coalition’s (YJC) analysis on gang injunctions in Los Angeles.²⁴⁸ Injunctions have been placed not “in

²⁴³ The #SayHerName report, important in movement spaces, was co-authored by Kimberlé Crenshaw and Andrea Ritchie, both legal scholars. CRENSHAW & RITCHIE, *supra* note 75; *see, e.g., #SayHerName*, BYP100 (May 16, 2016), <https://byp100.org/sayhername16/> (publicizing the May 19, 2016 National Day of Action organized by BYP100, Black Lives Matter Network, Project South, Ferguson Action, and other organizers, “to end state violence against ALL Black women (trans and cis), girls and femmes”).

²⁴⁴ Crenshaw’s work has always emphasized structural elements of intersectionality. *See* Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 *SIGNS* 785, 797 (2013) (“Intersectionality is inextricably linked to an analysis of power [It] emphasizes political and structural inequalities.”); Crenshaw, *supra* note 118, at 1424–26 (“[I]ntersectionality transcends an exclusive focus on identity [T]he lived experiences of racially marginalized women and girls are shaped by a range of social and institutional practices that produce and sustain social categories and infuse them with social meanings.”). However, there is considerable work to be done in developing thoroughgoing intersectional accounts of inequality in law.

²⁴⁵ *See* MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8 (articulating a need for transformative demands and immediate reforms that will change material conditions and position Black people to win transformative change in the future).

²⁴⁶ *See supra* note 235 and accompanying text.

²⁴⁷ *E.g., DOWNTOWN BLUES: A SKID ROW READER*, *supra* note 75; FREEDOM NOW! STRUGGLES FOR THE HUMAN RIGHT TO HOUSING IN LOS ANGELES AND BEYOND, *supra* note 75 (discussing broken windows policing on L.A.’s skid row and presenting grassroots’ organizations’ alternatives).

²⁴⁸ YJC is not formally a part of M4BL, but there is an overlapping political analysis in terms of its commitments to an anti-capitalist racial justice project. *See* Youth Justice Coalition, *supra* note 75. The draft report mentions that another report is underway “on the impact of injunctions in displacing residents from public housing and subsidized housing as well contributing to the destruction of public housing, shelter and single room occupancy units.” *Id.* (manuscript at 1).

communities experiencing the highest levels of violence, but in communities that are majority white, that border white communities, or that are experiencing an influx of whiter and wealthier residents.”²⁴⁹ In other words, gang injunctions are prosecutors’ and police’s tools to advance racial segregation, displacement and gentrification for poor people, and capital accumulation for the wealthy.²⁵⁰ YJC’s concern with police violence is rooted not simply in individual or regularized acts of brutality in service of, or facilitated by, anti-Black racism. Their concern is equally rooted in how policing is used to move poor people of color around and out of housing markets where rising home values are then secured for rich white people.²⁵¹ The people who move into those neighborhoods benefit, financially and otherwise, from this policing.²⁵² Gentrification becomes a harm worth recognizing, confronting, and resisting. It is a harm not reducible to racial bias, but constituted by capitalism’s inherent capacity to create, spatialize, entrench, and normalize inequality. The racial capitalism frame links the struggle against gentrification to the one against white supremacy and criminal law reform. It allows for recognition of a broader and deeper account of police violence.

Movement critiques and campaigns reflect the crises provoked by capitalism and neoliberalism, and root them in the larger historical arc of colonialism and settler colonialism: racialized projects that served the material and financial interests of the settler colonists. This renders the crises facing the communities these movements are constituted of and represent as longstanding. These realities undermine the romanticized story of law and progress that has long sustained the law, legal liberalism, and the legitimacy of legal institutions.²⁵³ They force a confrontation about the relationship between the state, the market, and society. They suggest that the problem of police violence is much deeper than our current frameworks allow.

²⁴⁹ *Id.* (manuscript at 2).

²⁵⁰ See Fagan & Ash, *supra* note 107, at 113, 120 (arguing that the new policing is the force for contemporary segregation, to wit, “the maintenance of racial boundaries, both spatial and economic, and the economic disenfranchisement of citizens”).

²⁵¹ See Youth Justice Coalition, *supra* note 75, at 2–3, 9.

²⁵² See *id.* (manuscript at 19) (describing the effects of gentrification after the issuance of injunctions).

²⁵³ See Freeman, *Race and Class*, *supra* note 19, at 1883 (citing Derrick Bell’s critique of the civil rights progress narrative); Peller, *supra* note 121, at 764 (noting that social/racial progress is “neither linear nor inevitable”).

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.wisconsinstate.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 reimagining 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-80f1c3e85be/>; 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.

IV

ON SOCIAL MOVEMENT IMAGINATIONS

This Part returns to the larger claim of this Article: the importance of studying social movement visions, sketching out its implications of this study for our scholarship. Part II discussed how the Vision pushes critical legal theories and criminal law scholarship. Here, I make the case for how studying social movement imaginations productively complicates our study of social movements, the social problems they address, the law, and the state. I argue these movements invest us in a creative, imaginative project sorely missing from law scholarship.

Social movements have always been central to the shape of American law and government, its visions and its practices. From the abolitionists to the suffragettes to those fighting for civil rights, Black Power, labor, and women's rights, a wide range of mass movements have long shaped our polity, our governments, and our laws. A

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).

growing body of scholarship documents and analyzes the influence of social movements on law, and the complex role lawyers play in these movements.³²⁹

Law scholarship on social movements tends to focus on how social movement claims are translated or saturated by law—constitutional law in particular.³³⁰ This scholarship has brought important attention to the role of social movements in informing the evolution of

³²⁹ See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (2014) (describing the role that individual actors, like Martin Luther King, Jr. and Lyndon Johnson, played in shaping the civil rights law of the 1960s); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. REV.* 443 (2001) (reviewing the evolution of law and organizing, and identifying contexts where the law and organizing model has been successfully applied); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *YALE L.J.* 2740, 2743 (2014) (arguing that “the role played by social movement activism is as much a source of law as are statutes and judicial decisions”); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 *YALE L.J.* 256, 263–64 (2005) (calling for a more dynamic understanding of the role of civil rights lawyering and politics, and pointing out that “the terrain of legal contestation, conflict, and cooptation extends far beyond the bounds of formal legal institutions”); see also TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011) (analyzing the civil rights movement by “de-center[ing] the U.S. Supreme Court, the national NAACP, and the NAACP LDF” and focusing on “local black community members . . . as agents of change”); GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (arguing that lawyers should work collaboratively with a wide variety of people, including directly-impacted communities, activists, and community stakeholders, to use the law to affect change); Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 *UCLA L. REV.* 1464 (2017) (discussing how lawyers supported movement-centered organizations of undocumented youth in anti-immigration enforcement campaigns from 2009 to 2012); Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 *UCLA L. REV.* 1235, 1329, 1342 (2010) (challenging the “backlash thesis”—the idea that litigation does more harm than good for social movements by provoking countermobilization efforts—and concluding that movement advocacy around marriage equality is “multidimensional, contextual, and unpredictable”—and thus deserving of a more nuanced understanding); Justin Hansford, *Demosprudence on Trial: Ethics for Movement Lawyers, in Ferguson and Beyond*, 85 *FORDHAM L. REV.* 2057 (2017) (advancing the demosprudence framework as a way to shed new light on the ethics and realities of movement lawyering).

³³⁰ Scott Cummings has identified two strands of scholarship focused on social movements: The first strand focuses on the role of social movements in constitutional theory and law-making; the second strand focuses on social movements in the context of lawyering theory. Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 *UCLA L. REV.* 1552, 1555–56 (2017). For scholarship examining the role of lawyers in movements and organizing, see Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 *U. PA. J. L. & SOC. CHANGE* 25 (2011); Betty Hung, *Essay, Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 *L.A. PUB. INT. L.J.* 4 (2009); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 *OHIO N.U. L. REV.* 455 (1995).

constitutional meaning.³³¹ Constitutional meaning is not simply located in the courts, legislature, and executive, this scholarship has argued; social movements develop new and challenging constitutional meanings, contributing to our working constitutional order. They contest the shape of power, law, and society.

By pointing to the porous relationship between constitutional meaning, law, and social movements, this work has started to expand our study of the relationship and realities of law, social movements, and society. But it is time to go further. When looking back on the celebrated movements of the past, this scholarship conforms to a broader tendency: assuming a liberal narrative about law's tendency to do the right thing, even if it is just enough to quell ongoing resistance.³³² And the scholarship retains an elevated focus on law. It focuses on the reforms that ultimately make their way into legislation,

³³¹ *E.g.*, BROWN-NAGIN, *supra* note 329 (exploring how the work of local Black community members shaped the civil rights struggle and the laws it produced); Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698 (2014) (pushing for inclusion of the histories of grassroots organizers in addition to major public figures like Lyndon Johnson and Martin Luther King, Jr., in accounts of the civil rights movement); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2065 (2002) (“What interests me most is how movement lawyers translated the problems and aspirations of women and minorities into constitutional discourse, and how their arguments fared.”); Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535, 536, 581 (2009) (asking “[h]ow . . . social and political movements facilitate the creation of social meaning and how . . . that meaning [is] reflected in the technical application of the law’s command”); *see also* DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 6 (2016) (characterizing civil society groups as “catalysts of constitutional change—the engines of liberty”); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 30 (2005) (arguing that social movements “influence constitutional interpretation” through “the party system” and by “altering public opinion, . . . particularly elite public opinion.”); Jack M. Balkin & Reva B. Siegel, *Essay, Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928 (2006) (“[P]olitical contestation plays an important role in shaping understandings about the meaning and application of constitutional principles”).

³³² Many critical race theorists challenge this narrative. *See* BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 187, at 12 (asking the reader to consider the proposition that “Black people will never gain full equality in this country,” as a “fact that all history verifies” and calling for its acknowledgement “not as a sign of submission, but as an act of ultimate defiance”); Bell, *Racial Realism*, *supra* note 187, at 373–74, 378 (calling for the embrace of “racial realism” which “requires us to acknowledge the permanence of our subordinate status” but also “frees us to imagine and implement racial strategies that can bring fulfillment and even triumph”); *see also* Crenshaw, *supra* note 185, at 1333–34 (noting that “[c]ommentators on both the Right and the Left” have “begun to cast doubt upon” what Professor Derrick Bell characterized as the view that “‘a long, slow, but always upward pull . . . must . . . eventually end in the full enjoyment by blacks of all rights and privileges of citizenship enjoyed by whites’”); Siegel, *supra* note 187, at 1113 (challenging the notion that law does the right thing, and exploring alternative interpretations of equal protection).

or the constitutional norms that ultimately prove influential to how we understand the constitution and the promises of American democracy.

Radical social movements are important not simply for what changes they effectuate in law, but in what they imagine and where they fail.³³³ They articulate harms so pervasive, structural, or intersectional as to make them difficult for legal institutions to recognize let alone redress.³³⁴ They offer alternative frameworks for the way forward. Social movement imaginations create a benchmark other than the status quo, or law's current commitments, for measuring social change. Their visions for social change, the way they point to the limits of what formal legal channels can handle or hear, can be profound.

We can complicate productively the social movement literature in law by studying movements' visions for the world beyond what law can readily recognize or through the lens of what the state adopts.³³⁵ Studying actually legislated reforms, or even the constitutional visions of movement actors, misses the deeper challenges social movements pose to the way we think about the state, law, and society. Social movements often contest the whole shape of statecraft and governance and, therefore, seek the wholesale transformation of laws. Recognizing these voices forces us to confront the much less copacetic relationship between law and social movements than we often confront in law scholarship. Because as Hayes suggested the law protects the state, and the state is invested in self-perpetuation, the state and the law are invested in the status quo.³³⁶ Law resists social change, and

³³³ On the relationship between bold visions for justice and failure, see Andrew Dilts, *Justice as Failure*, 13 L. CULTURE & HUMAN. 184 (2016).

³³⁴ As Dean Spade explained, social movements are "making demands that are often difficult for legal scholars to comprehend because of the way that they throw US law and the nation-state form into crisis." Spade, *supra* note 189, at 1046–47 (identifying demands to end immigration enforcement and abolish prisons as particularly challenging to legal scholars).

³³⁵ This has been done in other disciplines. See, e.g., LESLIE M. ALEXANDER, *AFRICAN OR AMERICAN? BLACK IDENTITY AND POLITICAL ACTIVISM IN NEW YORK CITY, 1784–1861* (2008); J. CRAIG JENKINS, *THE POLITICS OF INSURGENCY: THE FARM WORKER MOVEMENT OF THE 1960s* (1995); KELLEY, *supra* note 88; DOUG McADAM & KARINA KLOOS, *DEEPLY DIVIDED: RACIAL POLITICS AND SOCIAL MOVEMENTS IN POSTWAR AMERICA* (2014); SIDNEY G. TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* (2011); CHARLES TILLY & LESLEY J. WOOD, *SOCIAL MOVEMENTS, 1768–2004* (2004); see also IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

³³⁶ This syllogism is arguably too facile. See, e.g., RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994* (1995) (discussing the context of apartheid in South Africa); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987) (discussing how the "social practices of the law" are the product of "specific power relations" and "the internal logic of juridical functioning").

it criminalizes and punishes dissent, agitation, and organizing, changing only as much as necessary to keep the status quo alive and maintain legitimacy.³³⁷

Studying social movement visions is especially important when talking about people historically and systematically locked out of channels of power and with whom law often has an antagonistic relationship. Studying social movements and the accounts they bring forward shifts our point of view from the courts, legislatures, and executives to those subject to the law's violence and inequities. Social movements bring attention to the actual state of affairs in the material domain, beyond the ideals of the United States or the text of law.³³⁸ These visions challenge the fundamental commitments of law and order—for example, race neutrality, property, and contract law—and therefore are hardest to see.³³⁹ They also force a more contradictory, nuanced, and real view onto law by exposing its relationship to power.

The visions of radical social movements situate the history of the United States in a global and historical context.³⁴⁰ Understanding these visions, as opposed to these movement's legal wins and losses, call for understanding these distinct histories of the United States and the world. The Movement for Black Lives, for example, centers not the Founding Fathers, but the enslaved and the indigenous.³⁴¹ It understands the law and the United States as constructed political projects, not as neutral, natural, or benevolent forces. It exposes the

³³⁷ See Siegel, *supra* note 187, at 1113 (describing a process called “preservation-through-transformation,” where “[s]tatus-enforcing state action evolves in form as it is contested”).

³³⁸ Indeed, there is a wide field of practice between law on the books—law as text—and law in practice. Valdez et al., *supra* note 18, at 549–53 (identifying the limited understanding of law's operations that emerge from legal text alone).

³³⁹ For examples of how doctrine obscures experiences of people of color in the Fourth Amendment context, see Carbado, *supra* note 165, at 966.

³⁴⁰ “The Black radical tradition has always been rooted in igniting connection across the global south under the recognition that our liberation is intrinsically tied to the liberation of Black and Brown people around the world.” MOVEMENT FOR BLACK LIVES, *Invest-Divest*, *supra* note 98; see also, MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8 (including an internationalist approach because “patriarchy, exploitative capitalism, militarism, and white supremacy know no borders”). This echoes the internationalism of earlier platforms like that of the Young Lords and Black Panthers. See *supra* note 123 and accompanying text. LatCrit articulates this global frame, too. E.g., Valdes & Cho, *supra* note 240 (articulating a global frame as relevant to law scholarship).

³⁴¹ “The Movement for Black Lives respects, supports, and stands in full solidarity with the rights of Indigenous peoples to the lands currently known as the United States.” MOVEMENT FOR BLACK LIVES, *Economic Justice*, *supra* note 99. MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 8 (stating a commitment to the descendants of African people across the world in the ongoing struggle for reparations to redress the harms of colonialism and slavery, and “recogniz[ing] and honor[ing] the rights and struggle of our indigenous family for land and self-determination”).

existing wealth and power of the United States for what it is: a prosperity built with violence and exclusion against enslaved African and indigenous peoples. It frames the history of the United States, not simply through the lens of the Atlantic slave trade, but as a settler colonial project, an expression of, not exception to, European colonialism and conquest.³⁴² The history it would center includes enslavement and expropriation of the indigenous people of this land, all in the context of larger global colonial and capitalist histories.³⁴³

This historicization forces contradictions with many of the stories about law in law scholarship. Consider for a moment histories of policing in law scholarship: They tend to go back no further than about mid-twentieth century.³⁴⁴ These accounts root our understanding of policing in a limited time horizon: in the post-civil rights moment of the Warren Court's jurisprudence, and the rise of the idea of police professionalism.³⁴⁵ Police appear largely ahistoricized and unblemished by their record of violence and abuse. In other disciplines, and certainly in movement accounts, policing and criminalization are phenomena rooted in the surveillance and control of Black people during and after enslavement; and in border patrols that interfaced with indigenous populations and helped expand the settler colonial project.³⁴⁶ Police violence in Black and communities of color may have new guises but it is not a problem newly invented.

Examining the law through these histories, social movement visions paint a picture in tension with prevailing stories about law and the state—what it means and does, how it operates, who it benefits—in opposition to how legal institutions commonly tell that story. Thus, this study of law does not assume law's tendency toward doing good

³⁴² See also AZIZ RANA, *TWO FACES OF AMERICAN FREEDOM* (2010) (arguing that the United States is best understood as a settler-empire, and that this aspect of the U.S. project is central to understanding the limited or exclusionary character of its freedom project).

³⁴³ See *Black Liberation and the Abolition of the Prison Industrial Complex: An Interview with Rachel Herzog*, *supra* note 142, at 68–69 (connecting “war-making at home and war-making abroad,” and including “the first attempts to exterminate Indigenous people from this land” within the history of the domestic war); *MOVEMENT FOR BLACK LIVES*, *Invest-Divest*, *supra* note 98 (“America is an empire that uses war to expand territory and power. American wars are unjust, destructive to Black communities globally and do not keep Black people safe locally.”).

³⁴⁴ See, e.g., SKLANSKY, *supra* note 129; DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* (2008); see also Turner et al., *supra* note 204, at 189 (discussing the “lack of . . . historical perspective” on the subject of slavery in criminal justice textbooks).

³⁴⁵ See, e.g., SKLANSKY, *supra* note 129, at 1 (beginning an analysis of modern policing in the idea of “police professionalism” that was particularly dominant in the 1950s through 1970s).

³⁴⁶ See *supra* notes 203–04 and accompanying text; see also Turner et al., *supra* note 204, at 185 (“[T]he slave patrol has been argued by some scholars to be the precursor to the modern American system of policing.”).

or sustaining linear progress. Centering the experiences of poor people of color creates disruptions and contradictions. It points to law not as a power of stability, fairness, and neutrality, but of exploitation, dispossession, and the concentration of wealth. It telegraphs the enduring and catastrophic violence that law leverages and justifies. It invests us in a more imaginative and transformative project of building and shifting power and resources, one committed to people over the status quo. The social movement narratives suggest not simply that law is not neutral, or that its history of controlling and suppressing Black and indigenous people is long and violent, but that law does not automatically or consistently progress towards something better.³⁴⁷ Progressive wins have been hard fought by social movements—often with more radical visions than what we now see.

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.

³⁴⁷ This back and forth is on display in the early days of the Trump Administration. Jessica Huseman & Annie Waldman, *Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government*, PROPUBLICA (June 15, 2017, 8:00 AM) (discussing the Trump administration's DOJ's move away from the use of civil rights consent decrees in police departments and other agencies and institutions).