Dædalus

Reimagining Justice: The Challenges of Violence & Punitive Excess

Bruce Western, guest editor

with Sukyi McMahon
Kellie Carter Jackson · Paul Butler
Daniel W. Webster · David M. Hureau
Micere Keels · Beth E. Richie
Barbara L. Jones · Khalil Gibran Muhammad
Jennifer M. Chacón · Nicole Gonzalez Van Cleve
Geoff K. Ward · Jonathan Simon

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Inside front cover : Wheelchairs and walkers sit outside prison cells at California Medical Facility on December 17, 2013, in Vacaville, California. Between 1995 and 2010, the total number of state and federal prisoners increasased by 42 percent, while the number of prisoners aged fifty-five and older jumped by 282 percent. Photo © 2013 by Andrew Burton/Getty Images.

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The labyrinth designed by Dædalus for King Minos of Crete, on a silver tetradrachma from Cnossos, Crete, c. 350–300 BC (35 mm, Cabinet des Médailles, Bibliothèque Nationale, Paris). "Such was the work, so intricate the place, / That scarce the workman all its turns cou'd trace ; / And Dædalus was puzzled how to find / The secret ways of what himself design'd." –Ovid, *Metamorphoses*, Book 8

Dædalus was founded in 1955 and established as a quarterly in 1958. The journal's namesake was renowned in ancient Greece as an inventor, scientist, and unriddler of riddles. Its emblem, a maze seen from above, symbolizes the aspiration of its founders to "lift each of us above his cell in the labyrinth of learning in order that he may see the entire structure as if from above, where each separate part loses its comfortable separateness."

The American Academy of Arts & Sciences, like its journal, brings together distinguished individuals from every field of human endeavor. It was chartered in 1780 as a forum "to cultivate every art and science which may tend to advance the interest, honour, dignity, and happiness of a free, independent, and virtuous people." Now in its third century, the Academy, with its more than five thousand members, continues to provide intellectual leadership to meet the critical challenges facing our world.

Violence, Criminalization
& Punitive Excess

Bruce Western & Sukyi McMahon

How can police, courts, and prisons in the United States be transformed to eliminate mass incarceration and produce a new kind of community safety that strengthens social bonds and reckons with a history of racial injustice? Over the last three years, from 2018 to 2021, the Justice Lab at Columbia University hosted a series of meetings for the Square One Project. Square One brings together leading scholars, community advocates, policy-makers, and practitioners to consider the question of justice in America.

This issue of *Dædalus* includes essays from two of the Square One roundtable meetings. The first, "Examining Criminalization, Punitive Excess, and the Courts in the United States : Implications for Justice Policy and Practice," was held in partnership with Merritt College in Oakland, California, in the spring of 2019. The second, "Examining Violence in the United States : Implications for Justice Policy and Practice," was cohosted by the Damon J. Keith Center for Civil Rights at Wayne State University in Detroit, Michigan, in the fall of 2019. At each roundtable, a diverse group of twenty-five to thirty experts from academia, advocacy, and the justice system worked to develop ideas, generate writing and research,[1] and design policies to build a new model of justice that helps heal the wounds of racism and poverty that lie at the heart of much of the contemporary criminal justice system.

We have brought the essays together here in the hope of contributing to a new kind of conversation about how communities can be safe : safe from the interpersonal violence that roils America's most disinvested and impoverished neighborhoods, and safe from the state violence of aggressive policing and overincarceration. We begin with the topic of violence that provides the context for many developments in U.S. criminal justice policy before examining how conduct comes to be criminalized, the role of the courts, and punishment.

American history is marked by collective and political violence. Kellie Carter Jackson, in her contribution to this volume, "The Story of Violence in America," looks to violent events to track social change and identify

turning points in history. Jackson argues that the historic meaning of violence has depended on who is deploying it, and who is victimized. The violence committed by white men has often been interpreted as necessary or heroic. Upstart violence by oppressed people, from John Brown to the Black Panthers, on the other hand, is seen to threaten the social order and thus demands state repression.

Paul Butler's essay "The Problem of State Violence" takes on the challenge of reckoning with structural violence and the overt state violence inherent in policing and incarceration. Butler asks to what extent is the state itself responsible for the harm it causes, how has it attempted to and succeeded in doing this, and to what degree is anti-Blackness an obstacle to controlling state violence. The essay considers what harm reduction programs might look like, and the state's role in mounting such efforts either alone or in partnership with community organizations. Efforts to reduce the harms of state violence might also be mounted entirely by local communities, without state involvement.

Challenging the usual criminal justice perspective, Daniel Webster explores a public health perspective on gun violence. In "Public Health Approaches to Reducing Community Gun Violence," Webster reviews gun policy initiatives that have significantly reduced gun violence in the United States. Although news narratives suggest that the growth of gun ownership has caused enormous violence, Webster focuses on data-driven public health efforts that aim to increase safety and health, address risky behaviors, and reform systems. Webster shows that rigorous licensing, street outreach directed at those who are at greatest risk of being shot and of shooting others, and reducing concentrated poverty and urban blight have all successfully reduced gun violence around the country.

Much of the serious interpersonal violence that comes to be labeled as "the crime problem" in America revolves around firearms. David Hureau describes the central significance of guns to violence in "Seeing Guns to See Urban Violence: Racial Inequality & Neighborhood Context." Hureau argues that guns are central to understanding racial inequalities in neighborhood violence. Guns in low-income neighborhoods of color are not a measure of criminality. Instead, they are *mechanisms* of lethality that become accessible and sometimes desired in contexts of poverty and racial exclusion where safety is elusive and police are unreliable defenders of the well-being of Black youth. Gun policy is likewise a marker of racial injustice, made outside the neighborhoods that bear the brunt of gun violence, and threatening harsh penalties for Black but not white America.

History is lived as the succession of generations through families and communities. Micere Keels writes about the lived experience of violence, discussing how trauma echoes over the life course and is passed from one generation to the next. Her essay, "Developmental & Ecological Perspective on the Intergenerational Transmission of Trauma & Violence," considers how growing up with a prevalent and chronic lack of safety changes brain chemistry, behavior, and subjective

experience. Her analysis suggests points of prevention and intervention for the intergenerational transmission of unhealed trauma and violence. For Keels, the response to violence should go beyond the punishment of offending to attend to the harms of victimization.

Criminal justice policy-makers generally focus on young men as perpetrators of harm. Beth Richie, in "The Effects of Violence on Communities : The Violence Matrix as a Tool for Advancing More Just Policies," shifts this convention, examining victimization and the harms experienced by African American women. The violent victimization of Black women provides a case study of the failings of conventional criminal justice policies. Richie proposes a conceptual matrix for understanding the factors that influence violent victimization of African American women. Such a matrix forms the basis for a justice policy that acknowledges the intersectional nature of violence that is both racialized and gendered.

Barbara Jones explores these issues in her essay "Faces of the Aftermath of Visible & Invisible Violence & Loss : Radical Resiliency of Justice & Healing." Drawing from her own experience as a community dispute resolution specialist who is also a survivor of a homicide that took the life of her child, Jones suggests that the healing process is not linear and prescriptive but begins with confronting harm. This powerful essay describes a restorative justice process that offers a pathway to victims of crime, rather than a process of punishment for those that have harmed others. The pathway taken by those who have been victimized supports the repair from violence and aims to prevent the risk of violence for others.

American violence often happens in a context of racial exclusion and deep economic disadvantage. Police, courts, and prisons are charged with the work of responding to interpersonal violence, but they too are part of a landscape that includes centuries of white supremacy and a harsh kind of poverty that is largely unknown in other developed economies. Over the last four decades, the U.S. incarceration rate has grown dramatically. Aggressive – and often deadly – police tactics have been deployed in poor neighborhoods and communities of color. The essays in this section consider the history of criminalization, punitive excess, and the courts in the United States. The authors consider how criminalization is applied on the ground, and its implications for current practice and the politics of reform. They analyze the political drivers and the consequences of punitive excess and its codification as public policy. Finally, the authors turn to the future of policy and practice with an overview of efforts in reconciliation and remedies, and the value foundations for a new, radically less-punitive kind of justice.

Criminalization is the process by which conduct becomes classified by authorities as criminal and thus deserving of punishment. Khalil Gibran Muhammad considers the history of criminalization in his essay, "The Foundational Lawlessness of the Law Itself : Racial Criminalization & the Punitive Roots of Punishment

in America." In a sweeping historical discussion, Muhammad shows how defining "criminals" and punishing them has been closely connected to the projects of white settlement, maintaining white supremacy after emancipation, and quelling the prospect of full Black citizenship in the wake of the civil rights movement. "The criminal justice system has been producing racism, inequality, and insecurity; it could not (and cannot) fix itself," he concludes.

This historical examination is followed by Jennifer Chacón's essay, "Criminal Law & Migration Control: Recent History & Future Possibilities." Chacón goes beyond the usual discussion of criminal justice to consider how immigration and immigrants have been rendered as suspect and threatening, and deserving of punishment. The essay describes the connections of immigration enforcement to crime control policies and practices at all levels of government. Advocacy, the law, and social mobilization also provide room for resistance that has protected residents from unjust detainments, deportations, and removals.

Most of the essays in this issue document the close connections between crime, criminal justice, and racial injustice. Nicole Gonzalez Van Cleve, in "Due Process & the Theater of Racial Degradation: The Evolving Notion of Pretrial Punishment in the Criminal Courts," underlines the leading role of culture that saturates criminal justice agencies and courts in particular. Relying on fieldwork in a criminal court in Chicago, Van Cleve describes what she calls *racial degradation ceremonies* in which court discretion, used by mostly white courtroom professionals, is often dehumanizing both for defendants navigating the court process and for family and friends. The essay confronts the resistance to cultural change in the courts and suggests how accountability and oversight might be developed.

In "Recognition, Repair & the Reconstruction of 'Square One,'" Geoff Ward asks us to take account of the history of criminalization and punitive excess and the ways these are deployed by the state, and to grapple with the daunting undertaking of reimagining and reorganizing justice in order to reconstruct society. The essay recounts a history punctuated by missed opportunities to achieve transformative justice and the need for reparative interventions to break the cycle of injustice and achieve a new "square one."

The final essay in the collection, Jonathan Simon's "Knowing What We Want: A Decent Society, A Civilized System of Justice & A Condition of Dignity," offers a three-part values-based framework for reshaping society, so we do not miss the present opportunity for reckoning and repair. Simon nominates human dignity as a central value that can guide criminal justice reform. He proposes that through 1) a body of laws that restores a decent society and 2) efforts to civilize our justice and security systems, we can produce "a condition of dignity" in our justice system.

Taken together, these essays show how violence, criminalization, and punitive excess have been shaped by the deep contours of racial inequality and poverty in America. Just as violence has been closely connected to the marginalization of

low-income Black and brown communities, the public policy response is deeply racialized as well. Because the process of criminalization has overwhelmingly presumed punishment as the appropriate response, interpersonal violence in communities has been met with the state violence of policing and incarceration. None of this history has contributed substantially to promoting racial justice or reducing poverty. Indeed, much of the evidence in this volume indicates that criminal justice policy has sustained racial exclusion and added to the harsh conditions of American poverty. Meeting community violence with state violence in a way that deepens the divisions of race and class is one of the distinctive ways in which racism and economic injustice operate in American society.

This collection demands that we imagine a different kind of public safety that relies not on police and prisons, but on a rich community life that has eliminated racism, poverty, and their myriad accompanying social problems. Many of the solutions will lie well beyond the boundaries of the criminal justice system. Indeed, many solutions will lie beyond public policy, grounded in the social bonds and networks of families and neighborhood life. Much of the work for this reimagined safety is already being done in communities around the country. And these efforts share, as the essays in this issue suggest, a common commitment to the values of healing, reconciliation, and human dignity.

ABOUT THE AUTHORS

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ENDNOTES

[1] *Du Bois Review* 16 (1) (2019): 177–277, https://www.cambridge.org/core/journals/du-bois-review-social-science-research-on-race/issue/EBE868A4DF8F6C4986365CC783AD95E7.

The Story of Violence in America

Kellie Carter Jackson

American history is characterized by its exceptional levels of violence. It was founded by colonial occupation and sustained by an economy of enslaved people who were emancipated by a Civil War with casualties rivaling any conflict of nineteenth-century Western Europe. Collective violence continued against African Americans following Reconstruction, and high levels of lethal violence emerged in American cities in the twentieth-century postwar period. What explains America's violent exceptionalism? How has structural violence against African Americans become ingrained in American culture and society? How has it been codified by law, or supported politically? Can we rectify and heal from our violent past?

The Slave is not, theoretically, considered as a Person; he is only a Thing, as so much as an axe or a spade; accordingly, he is wholly subject to his master, and has no Rights – which are an attribute of Persons only, not of Things. All that he enjoys therefore is but a privilege. He may be damaged but not wronged.... The relation of master and slave begins in violence; it must be sustained by violence – the systematic violence of general laws, or the irregular violence of individual caprice. There is no other mode of conquering and subjugating a man.

> —Theodore Parker[1]

Our white brethren cannot understand us unless we speak to them in their own language; they recognize only the philosophy of force.

> —James McCune Smith[2]

We benchmark history with violence. Consider the pinpoints along a historical timeline. The watershed moments of historical record are draped in violence. Classes are taught from conquest to slavery, from slavery to the Civil War, from the Civil War to the Iraq War, from World War I to World War II. We teach about Vietnam and the Cold War. We have classes for the time "in between the wars." We teach colonialism and postcolonial classes, which often are nothing more than a study on the uses, consequences, and lessons of violence. We not only study wars between countries, but wars declared on

poverty, drugs, and crime. Even when we teach about the civil rights movement, we are not necessarily teaching about nonviolence, but an orchestrated response to violence. Violence at the voting booth. Violence at the lunch counter. Violence that bombed churches killing four little girls. Violence that left a bloated boy in an open casket. Violence that left a husband and father murdered in his driveway.[3]

In America, the relationship between Black people and White supremacy is the story of violence. Violence was committed against Black people's ability to accumulate wealth. Violence was enacted against Black neighborhoods and environments. The attempt to perfect women's reproductive health was developed in violence. The attempt to integrate schools was met with violence.[4] In Black America, we measure our oppression and even our progress with violence. Indeed, violence has become the fluid that propels us along from moments to movements, from funerals to fury.

In America, White supremacy and violence are their own form of patriotism. We can wax poetic about football, baseball, and apple pie, but these are superficial aspects of our nationalism. When our founding fathers fought for independence, violence was the clarion call. Phrases such as "live free or die," "give me liberty or give me death," and "he who would be free must strike the blow" echoed throughout the nation. Force and violence have always been weapons to defend liberty, because – as John Adams once said in reference to the colonists' treatment by the British – "we won't be their Negroes."[5] White supremacy fears subjugation more than eradication. It hates losing more than it loves winning. How do you overturn a system that believes to the point of death that Black people are a "thing?" Or in the words of White abolitionist Theodore Parker, a thing that "may be damaged but not wronged"?

This essay is an attempt to create meaningful discussion around how we ought to think about violence and its utility on the path to freedom and progress, both in the past and in the present. For Black Americans, the American Civil War was revolutionary. Through radical violence, Black abolitionists prophesied the war, prepared for the war, and eventually fought in the war that freed millions. Though many abolitionists preached nonviolence and nonresistance for decades, force and violence became the most successful responses to combatting the institution of slavery. This essay poses ideas about how Americans today might also dismantle racism and combat racial violence and White supremacy. For Black Americans, it distinguishes the use of protective violence, an act to protect individuals and collective communities from White supremacist violence. It also makes clear that while violence is always forceful, force is not necessarily violent. A boycott is force. A murder is violent. More often than not, Black Americans found themselves straddling the spectrum of force and violence to preserve and protect their humanity.

In the history of the movement to abolish slavery, scholars have given little attention to the shift toward violence among Black abolitionists and the rising influence of this perspective in the abolitionist movement. But Black re-

sistance and, in particular, violent resistance was central to emancipation. My recently published book *Force and Freedom: Black Abolitionists and the Politics of Violence* examines one of the perennial questions in political thought: is violence a valid means of producing social change? Specifically, I address how Black abolitionists in the decades before the Civil War answered this question. Too often historians have minimized or neglected altogether the role that violence played in the coming of the war. At some level, this is because Americans do not like to imagine that the war's moral compass – abolitionists – could have embraced violence as a necessary and justified means toward their goals. At another level, too, there is a propensity among Americans to privilege the performance of nonviolence and deny the possibility and utility of violence as the great accelerator in American emancipation. Reflecting this disinclination, scholars have largely examined the abolitionist movement in the United States as a nonviolent moral endeavor.

Throughout history there is an unfair expectation that White men can employ violence to "defend democracy," but Black Americans, people of color, and women should always be nonviolent. Many historians discuss the Underground Railroad solely in terms of heroic acts of escape; but fleeing often required fighting. Not talking about the embrace of force by Black abolitionists can feel dishonest. It can make it seem like the Civil War was a spontaneous and unfortunate outcome. But human bondage is warfare. The enslaved have been at war ever since they were placed in bondage. I hope the field will explore the agonizing decisions and strategies of those charged with the grueling task of creating political and social reform without an official (or recognized) political voice. A retreat from engaging in a complex understanding of the political purposes of violence limits both how we see and make use of the past.

The question remains: how should oppressed people respond to their oppression? During the antebellum period, Black abolitionists believed violence was required to overthrow slavery. Black abolitionist, physician, dentist, and lawyer James McCune Smith remarked, "Our white brethren cannot understand us unless we speak to them in their own language; they recognize only the philosophy of force." By their actions and their rhetoric, they accelerated sectional tensions between the North and the South. Black abolitionist leaders embraced violence as the only means of shocking Northerners out of their apathy and instigating an antislavery war. Through rousing public speeches, the burgeoning Black press, and the formation of militia groups, Black abolitionist leaders mobilized their communities, compelled national action, and drew international attention. African American abolitionists used violence as a political language and a means of provoking social change. Through tactical violence, Black abolitionist leaders accomplished what White nonviolent abolitionists could not: they created the conditions that necessitated the Civil War.

How Black abolitionists used violence has long deserved a more sustained and nuanced analysis. I contend that Frederick Douglass was correct when he argued that "the American public…discovered and accepted more truth in our four years of Civil War than they learned in forty years of peace." The truth held in violence is an invaluable lesson, one that Black people have learned many times over.

Black abolitionist leaders offered more than just a strategy for eradicating slavery. In 1837, activist Joshua Easton declared that "abolitionists may attack slaveholding, but there is a danger still that the spirit of slavery will survive, in the form of prejudice, after the system is overturned." Easton appealed to all Americans: "our warfare ought not to be against slavery alone, but against the spirit which makes color a mark of degradation." Black abolitionists were committed to the two-fold mission of emancipation and equality. Freedom meant little if you could not obtain citizenship, the vote, or access to public facilities and services.

Today, Easton's words feel timely. Too many Americans are content to offer freedom without equality. Tensions over access to the ballot have only increased in recent years. History shows us that when traditional avenues for change such as the ballot are blocked, violence becomes a political language, both a way of communicating grievances and a way of casting a ballot. However, we are no longer combatting slavery but rather the spirit that makes color a mark of degradation. In the nineteenth century, Black abolitionists understood that slavery was violence. In the twentieth century, Black activists understood that Jim Crow segregation was violence. In the twenty-first century, the Black Lives Matter movement understands that anti-Blackness is violence. Easton was right. The spirit of slavery persists, in the form of anti-Blackness. And until the system of prejudice is overturned, we will all be caught in a violent political, social, and economic wheelhouse.

Not a single era of U.S. political history has gone by without violence employed to maintain the status quo. Both in slavery and freedom, violence is a form of social, political, and economic control. In the 1870s, after Reconstruction, White Democrats used vigilante militia groups to suppress and terrorize Black Republican voters. Historian Rayford Logan called the early twentieth century "the nadir" of American race relations. For about thirty years, two Black people were lynched per week as part of a wave of political and economic violence. During the "Red Summer" of 1919, post–World War I tensions over labor and housing set off riots and racial terrorism in cities across the country. In Chicago, the death of a young Black boy at a segregated swimming area on the shores of Lake Michigan was met with riots that killed thirty-eight people, though the true cause of the unrest was industrialists' use of Black workers to undermine efforts of White labor to unionize factories. In Elaine, Arkansas, more than one hundred people were killed in one of the most violent riots in U.S. history, when Black sharecroppers

attempted to negotiate for better pay and working conditions. In 1921, the prosperous Black community in Tulsa, Oklahoma, known as "Black Wall Street," was destroyed through violence and arson by mobs of White Americans. After World War II, Black veterans returned from fighting only to be met again by violence from White people who had to compete with them for jobs and housing.

In many ways, the 1960s mirrored the unrest of the 1920s. The civil rights movement brought images of Black bodies being belted with fire hoses, attacked by dogs, murdered by the Klan, and yes, carried out on stretchers to America's television screens, hearkening back to the early-century nadir. The year 1968 was rife with political violence: between April and August of that year, Martin Luther King Jr.'s assassination ignited riots in more than one hundred cities; Senator Robert Kennedy's assassination occurred moments after he won the California presidential primary; and antiwar demonstrations at the Democratic National Convention were broadcast live as ten thousand protestors collided with more than twenty-three thousand police in Chicago. This list is far from exhaustive.

However, too often we forget that violence is a conversant language. It is not just from the powerful to the weak that violence is conferred. The oppressed can respond fluently with violence against powerful entities. History is filled with acts of violent resistance to oppression. During the American Revolution, George Washington refused to let Black men enlist to fight in the colonists' efforts. However, the British believed employing Black American troops and promising freedom was a strategic tactic to end the war. In 1775, John Murray, 4th Earl of Dunmore, actively recruited escaped slaves to enlist into what was known as Dunmore's "Ethiopian Regiment." That same year, George Washington wrote, "if that man [Dunmore] is not crushed before spring he will become the most formidable enemy America has." He believed that Dunmore's strength would increase like a rolling snowball. For Washington, victory depended on who could arm Black men the fastest. Historically, Black men's enlistment in military engagements were significant turning points.[6] Armed Black men played transformative roles in shaping and accelerating individual and collective emancipation.

In 1811, Charles Deslondes led the largest slave rebellion in U.S. history. Deslondes, a former overseer and a free mulatto from Saint-Domingue, led hundreds of slaves living in the German Coast (a region located north of New Orleans and on the east side of the Mississippi River) to revolt. Donning their planter's military uniforms, leaders of the rebellion mounted horses and marched militia-style to convey authority. Between two hundred and five hundred slaves were involved in the German Coast rebellion.[7] Though unsuccessful, their actions were clear.

More than 250,000 Black soldiers fought courageously in the Civil War, and President Abraham Lincoln credited their service with changing the tide of the war into a Union victory. Post Reconstruction, with racial violence and lynchings rampant, Black men and women continued to fight back and defend their commu-

nities. In 1887, a White man named Manse Waldrop raped and assaulted an eleven-year-old Black girl named Lula Sherman. Shortly after the assault, Lula died as a result of her injuries. Her community was outraged and planned to do something about it. When the all-Black town discovered the White man who committed the crime, they lynched Waldrop without apology.[8] In 1919, during Chicago's infamous race riot, Black soldiers returning from World War I did not stand idly by as White mobs terrorized their communities. Black veterans raided the city's armory and gathered as many arms as possible to fight back. By their efforts, the mob was quelled.[9] Later in the twentieth century, the Deacons for Defense and Justice also defended their communities with armed resistance.[10] In 1965, the Deacons protected civil rights groups facing violence and intimidation from the Klan. When angry White protesters confronted Black activists, the Deacons intervened and defended them when the mob refused to relent. On one occasion, Deacon Henry Austin pulled out his gun and shot a White man who was threatening Black children. Immediately, the crowd dispersed. While no one died that day, including the White man who was shot, Austin proved a valuable point: protective violence worked in the face of a mob. When the Klan realized their own lives could be at risk when terrorizing Black communities, racial violence came to a halt.[11]

I am never surprised by Black Americans' relationship to the Second Amendment. The history of Black Americans and the gun is old and powerful. From the origins of this country, Black people have taken up arms in self-defense and collective defense of their communities. Virtually every American war has had Black participation. In the nineteenth century, Black abolitionists such as William Parker, Lewis Hayden, Robert Purvis, and even Frederick Douglass armed themselves with pistols to defend against slave catchers or anyone who sought to harm them. In the twentieth century, journalist Ida B. Wells, activist Fannie Lou Hamer, and even Rosa Parks owned guns to protect themselves from the Klan. Martin Luther King Jr.'s home was referred to as "an arsenal" for the number of guns he kept to protect his family. Nonviolence and self-defense are not mutually exclusive.

Recalling her experience during the civil rights movement, former field secretary of the Student Nonviolent Coordinating Committee (SNCC) Cynthia Washington claimed, "I never was a true believer in nonviolence, but was willing to go along [with it] for the sake of the strategy and goals." She explained that the deaths of the three civil rights workers – James Chaney, Andrew Goodman, and Michael Schwerner – was a turning point for her, especially when she heard that Chaney had been brutally beaten before he was shot to death. Washington acknowledged, "the thought of being beaten to death without being able to fight back put the fear of God in me." She also explained that she was her mother's only child and that it would be an "unforgivable sin" for her to be endangered by White supremacists and go down without a fight. From then on, Washington carried a handgun in her

handbag. And though she never fired it, she made it clear that she was willing to do so. Even in her advanced age, she expressed the willingness to protect her son, his wife, and her grandson, if necessary.[12]

On a personal note, I can remember cleaning out my grandmother's apartment after she died. We found a pistol in her nightstand. She was in her late seventies. Raised on a farm in Louisiana, I have no doubt she would have been unafraid to use it. And when I married my husband and we moved into our first house in North Dakota, we had a gun safe; it held numerous rifles. My husband was in the military, but he is also an avid hunter. Too often we only associate African Americans and the gun with gang violence or nefarious purposes. Few consider that gun ownership for Black Americans throughout the nineteenth and twentieth centuries was for two principal reasons: provision and protection. Provision meant supplying additional food sources through hunting, while protection was primarily from the terrorism of White supremacy.

Protective violence played an integral role in winning political and social gains for the long freedom struggle of the twentieth century. Historian Lance Hill has contended that groups like the Deacons for Defense and Justice and others laid bare "the myth of nonviolence." And Charles Cobb, former SNCC activist and author of *This Nonviolent Stuff 'll Get You Killed*, has argued quite convincingly that gun ownership in the Black community made the civil rights movement possible. By illustrating the crucial role of defensive violence, we can see several prominent cases in which the federal government was compelled to intervene against the Klan. Violence or even the appearance of violence by Black people produced effective social and legislative change.

Consider this: Today, the National Rifle Association (NRA) leads the charge in protecting the Second Amendment, but during the 1960s, when the Black Panther Party used the right to gun ownership as part of their own platform, the NRA played a different tune. Journalist Thad Morgan has argued, "In contrast to the NRA's rigid opposition to gun control in today's America, the organization fought alongside the government for stricter gun regulations in the 1960s. This was part of an effort to keep guns out of the hands of African-Americans as racial tensions in the nation grew."[13] Many would argue that the NRA is specifically, if not solely, interested in protecting the rights of White people to gun ownership. When the Black Panthers carried weapons in public spaces, it was entirely legal in the state of California. However, with the help of the NRA, California passed some of the most restrictive gun laws in the country. It is nearly impossible to untether gun ownership and race in America. Gun ownership was intended to protect the interests, well-being, property, and sanctity of White supremacy. For many White Americans, guns in the hands of Black people were not necessarily about the ability to do harm, but the ability to obtain power. Gun ownership was an extension of power.

Thus, returning to my original question, I remain at a quandary: how should oppressed people respond to their own oppression? The paradox is that while protective violence is effective, it is also a racial taboo. How can we have honest conversations and plans of action going forward if we are too timid to face the fact that racism is violence? How do we reconcile the historical precedents that illustrate and require a forceful and even violent protective measure to suppress such oppression?

Ours is a bloodied history, particularly during political campaigns. Indeed, the Civil War began during an election year. By the time of Abraham Lincoln's inauguration, seven states had seceded from the Union, and the war that would ultimately cost more than 750,000 Americans their lives soon followed. Fast forward to 2008, another election year, with Americans facing the prospect of a Barack Obama presidency. During the campaign, violent political rhetoric dominated national conversations. Vice presidential candidate Sarah Palin rallied her supporters with bumper sticker slogans like "don't retreat, reload!" Even during the Obama presidency, Palin referred to the controversial statement again and continually used gun metaphors to describe the stance the Republican Party should take.[14] Moreover, during Obama's presidency, gun sales hit all-time highs, as White conservatives feared the Obama administration's first order of business would be to take their Second Amendment rights away. Race, violence, gun ownership, and White supremacy have always made interesting bedfellows.

In subsequent elections, rhetorical violence became actual violence. In the summer of 2015, a twenty-one-year-old White supremacist named Dylann Roof entered a weeknight prayer service at the historic Emanuel African Methodist Episcopal Church, affectionately known as Mother Emanuel to the community. Roof opened fire and shot and killed nine Black parishioners, including the senior pastor, Clementa C. Pinckney. Twenty-six-year-old Tywanza Sanders tried to talk Roof down and asked him why he wanted to kill them. Roof responded, "I have to do it. You rape our women and you're taking over our country. And you have to go."[15] Roof expressed no remorse and reloaded his weapon five times while shouting racial epithets.

In 2016, Donald Trump's campaign rallies often spurred violence among the attendees. In early February, a protester was thrown out of a rally in Cedar Rapids, Iowa. Trump responded by saying, "If you see somebody with a tomato, knock the crap out of them."[16] About three weeks later at a Monday night rally in Las Vegas, the eve of the Nevada caucuses, another protester was thrown out. In response, Trump began reminiscing about the good old days from the podium. "I love the old days," he said. "You know what they used to do to guys like that when they were in a place like this? They'd be carried out in a stretcher, folks." The crowd went wild. "I'd like to punch him in the face," the candidate declared. Since then, of course,

several supporters have acted on his desires, and videos of Trump rallies erupting in physical violence became a centerpiece of coverage of the 2016 election.

In August of 2017, the nation was gripped by images out of Charlottesville, Virginia, when thousands of White nationalists gathered in the streets for the "Unite the Right" rally. Twenty-year-old James Alex Fields Jr., who espoused neo-Nazi, White supremacist beliefs, deliberately drove his vehicle into a crowd of peaceful protestors who were opposing the rally. As Fields plowed through the crowd, he killed thirty-two-year-old Heather Heyer and wounded twenty-eight other people.

In August of 2019, two mass shootings took place within thirteen hours in Texas and Ohio, both of which appeared racially motivated. Twenty-one people were killed in El Paso, Texas, and nine people were killed in Dayton, Ohio. At a Walmart in El Paso, a White male shooter unloaded his weapon at shoppers whom he believed were of Hispanic descent. Witnesses claimed the shooter was upset about Hispanic people, who he believed were "invading" the country. In Dayton, the motivations are less clear, but the White male shooter armed himself with body armor and over one hundred rounds of ammunition. These examples of racially motivated violence are far from exhaustive.

For Black Americans, a worthy response to such violence is required: not one that is based on vengeance, but protection and justice. Accordingly, I return to Black abolitionists and their ability to achieve reform. Throughout the nineteenth century, enslaved and free Black Americans raised their fists and their finances to make themselves seen and heard. They employed both the pen and the pistol to accelerate the road to abolition. They used fear and intimidation in their speeches. They stole themselves away or aided and abetted the stealing of others. They defended themselves and each other. They utilized all necessary means and discarded what failed. They fled and fought and continued to fight. In short, Black Americans have always had to force their own freedoms, and forcing freedom is what they will continue to do until White resistance to Black humanity ceases. The lessons of the lingering spirit of slavery have not been learned. We have continually underestimated both Black resistance to oppression and, perhaps more important, White resistance to equality and enfranchisement.

Ideologically, it is easy to see how slavery is problematic morally, politically, socially, and economically. Contemporary audiences can readily concede that U.S. slavery was wrong. They can even concede that violence was necessary to overthrow the institution. But it remains difficult for White Americans to separate it from the institutional advantages of anti-Blackness. Opposing the slaveholding South and White supremacy nationally was not just difficult, it was deadly. In overthrowing the spirit of slavery, it is not violence that is required, but sacrifice. Advantage and inequality cannot share the same space. Likewise, one cannot end inequality without sacrifice. The larger lessons of abolitionism must

include the commitment to emancipation and enfranchisement. Frederick Douglass contended,

> Until it is safe to leave the lamb in the hold of the lion, the laborer in the power of the capitalist, the poor in the hands of the rich, it will not be safe to leave a newly emancipated people completely in the power of their former masters, especially when such masters have ceased to be such not from enlightened moral convictions but irresistible force.[17]

It is impossible to bring about change and transformation without the forfeiture of power. The real bondage was not the chains of the enslaved, but the political, economic, social, and psychological stronghold of White supremacy. Today, many White Americans romanticize the Civil War era and even the civil rights movement for its leaders' radical ideas regarding nonviolence. But until America reckons with the disturbing fact that freedom for Black Americans has been largely achieved through violence, these invaluable lessons will remain largely untaught and wholly unlearned.

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The Problem of State Violence

Paul Butler

When violence occurs, the state has an obligation to respond to and reduce the impacts of it; yet often the state originates, or at least contributes to, the violence. This may occur in a variety of ways, including through the use of force by police, pretrial incarceration at local jails, long periods of incarceration in prisons, or abuse and neglect of people who are incarcerated. This essay explores the role of the state in responding to violence and how it should contribute to reducing violence in communities, as well as in its own operations. Finally, it explores what the future of collaboration between state actors and the community looks like and offers examples of successful power-sharing and co-producing of safety between the state and the public.

Here are some of the things that police did to African American people during the time of the country's first Black[1] president: In Ferguson, Missouri, arrested a man named Michael for filing a false report because he told them his name was "Mike." Locked up a woman in Ferguson for "occupancy permit violation" when she called 911 to report she was being beat up by her boyfriend and the police learned the man was not legally entitled to live in the house. Killed a seven-year-old girl in Detroit while looking for drugs at her father's house. Shot Walter Scott in the back in North Charleston after stopping him for a traffic infraction. Severed Freddie Gray's spinal cord in Baltimore. Unloaded sixteen bullets into seventeen-year-old Laquan McDonald while he lay cowering on a Chicago street. Pushed a teenage girl in a bikini to the ground in McKinney, Texas. Shot twelve-year-old Tamir Rice in Cleveland within two seconds of seeing him in a public park. Pumped bullets into Philando Castile during a traffic stop in Falcon Heights while his girlfriend livestreamed it on Facebook, with her four-year-old daughter in the back seat.[2]

Here are some of the things that police did to African American people during Donald Trump's presidency: Arrested a six-year-old girl in Orlando for misdemeanor battery when she kicked during a tantrum at school. Put her in handcuffs, drove her to a juvenile detention center, took her mugshot.[3] Fired twenty rounds at Stephon Clark in his grandmother's backyard in Sacramento after they mistook his cell phone for a gun.[4] In Phoenix, stopped a family at gunpoint when they thought a four-year-old girl had stolen a doll from a dollar store. Told Dravon Ames, the girl's father, "I'm going to fucking put a cap in your fucking head," then kicked and

Figure 1
Las Vegas Metropolitan Police Department Use of Force Continuum

Source: The Las Vegas Metropolitan Police Department, "Use of Force Policies," https://www .lvmpd.com/en-us/InternalOversightConstitutionalPolicing/Pages/ForceRelatedPolicies.aspx.

pushed him to the ground. When Iesha Harper, the girl's mother, refused an order to put her one-year-old toddler on the ground, said "I could have shot you in front of your fucking kids."[5] In Vallejo, California, shot fifty-five bullets, in less than four seconds, into the body of Willy McCoy, who had been sleeping in his car.[6]

But those are not the main ways that the government hurts the bodies and extinguishes the lives of people of color and low-income people. The most insidious forms of state violence are not gory.

Figures 1 and 2 document forms of state violence. The first – the "use of force continuum" of the Las Vegas Police Department – will seem to many readers more violent than the second – U.S. life expectancy rates, from the National Center for Health Statistics.

When people think about violence, they usually think of physical violence, including assaults, beatings, and shootings. While those are some of the ways in

Figure 2
Life Expectancy at Birth, by Hispanic Origin, Race, and Sex:
United States, 2006 – 2017
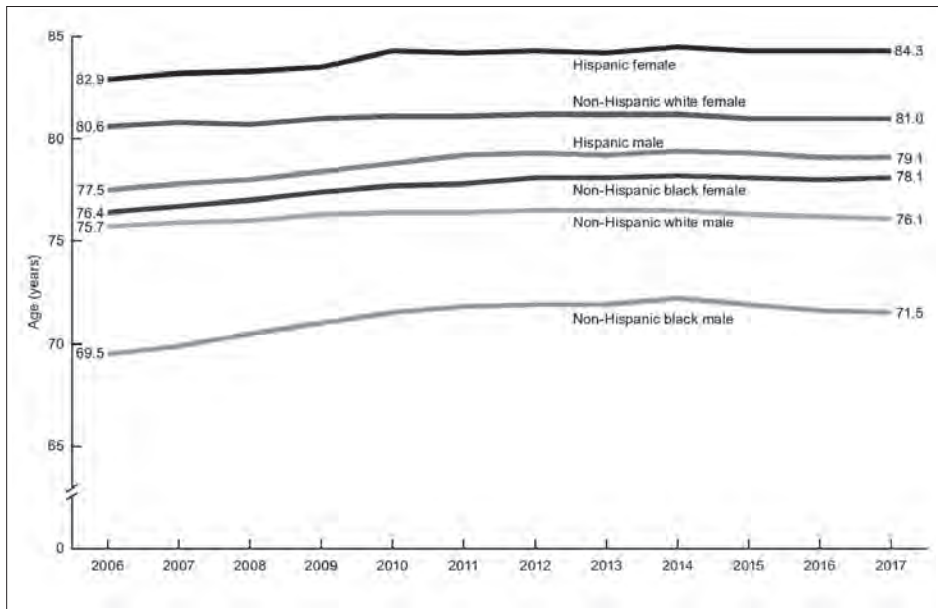
Source: Elizabeth Arias and Jiaquan Xu, "United States Life Tables, 2017," *National Vital Statistics Reports* 68 (7) (2021).

which the government enacts violence upon individuals and communities, it is important to expand the analytic lens beyond physical pain and injury.[7] Violence is not always an "event," but rather a process or ongoing social condition embedded in our everyday lives.[8] As such, state violence can take many different forms. As one team of researchers put it:

> Structural violence…describes social structures – economic, political, legal, religious, and cultural – that stop individuals, groups, and societies from reaching their full potential. . . . Structural violence is often embedded in longstanding "ubiquitous social structures, normalized by stable institutions and regular experience."…Because they seem so ordinary in our ways of understanding the world, they appear almost invisible. Disparate access to resources, political power, education, health care, and legal standing are just a few examples.[9]

The poisoned waters in Flint, Newark, and Pittsburgh are violent.[10] It is violent that, because they lack access to health care, African Americans are twice as likely

as Whites to die from hypertension, the flu, and diabetes.[11] It is violent that anyone who has undergone a gender transition is not allowed to enlist in the U.S. military.[12] It is violent that the median net worth of a White household, \$144,200, is ten times the median net worth of a Hispanic household, \$14,000, and thirteen times the median net worth of an African American household, \$11,200.[13] It is violent that African American and Native American children, as well as Hispanic males, are more likely to be suspended and expelled from school than their White counterparts.[14] It is violent that for every \$1 that a White man earns, an African American woman earns \$0.61 and a Latina earns \$0.54.[15]

It is easy to see state violence in the U.S. Department of Defense "1033 Program," which provides "surplus" military equipment like armored tanks, grenade launchers, and bayonets for local police departments to use against civilians.[16] Likewise, many recognize state violence in the facts that police use of force is the sixth leading cause of death of men between the ages of twenty-five and twenty-nine, and that one in one thousand African American men are killed by the police.[17]

It is harder for some people to see state violence in *Shelby County v. Holder*, the United States Supreme Court case that, in 2013, gutted the Voting Rights Act of 1965, one of the nation's most effective civil rights laws.[18] It is less familiar to categorize as violent that African American and Native American women are three times more likely to die of causes related to pregnancy than White women.[19]

Both structural violence and overt state violence, including legal use of force and police "abuse," cause suffering and death. Any effective analysis of, and reckoning with, state violence must include both.

Some of the ways that violence is conceptualized are premised on anti-Black bias. For example, "Black on Black" crime is a more familiar construct than "White on White" crime, even though most crime is intraracial.

Another example is the way that gun violence is perceived as a particular problem of Black males. But gun violence is also a huge issue for White males. African American men are uniquely at risk for homicide. But White men face a similar risk of violence by suicide, which is committed most frequently using firearms.

Two-thirds of all gun deaths are suicide.[20] Many more White men die by suicide than Black men die by homicide. We correctly recognize the problem of suicide as one requiring a public health intervention. Although public health approaches to homicide have been proposed, punishment remains the primary government intervention. One reason might be that bias against Black men makes punitive approaches to their issues seem natural or appropriate.

It is crucial to acknowledge the role of anti-Black bias in shaping both the construct of "private" violence and the state response to it. At the same time, it is necessary to acknowledge the extraordinary toll of violence by nonstate actors in the

United States, and the vastly disproportionate burden of this violence on specific communities.

People, especially Black and Indigenous people in the United States, experience epidemic levels of violence from nonstate actors. The homicide victimization rate for the White population is three per one hundred thousand; for Black men between fifteen and thirty-four years old, it is eighty per one hundred thousand.[21]

The African American community is particularly susceptible to violent crime: as harm doers, in the case of men, and victims, in the case of men and women, including transgender women. Homicide is the leading cause of death for African American men between the ages of fifteen and thirty-four.[22] Black men are about 6.5 percent of the population but are responsible for approximately half of all murders in the United States.[23] Black men commit more murders, in absolute numbers, than Latino men, who slightly outnumber them, and White men, who greatly outnumber them.[24] Because violent crime is mainly intraracial, Black men also account for about 50 percent of murder victims.[25]

Black Americans, and especially Black men, are also overrepresented among violent felons who are not murderers. According to U.S. Department of Justice statistics, African Americans committed 54 percent of robberies and 39 percent of assaults.[26] Overall, Blacks are responsible for 41 percent of all violent felonies.[27]

Sometimes we think of Black victimization by other Blacks as a new thing, a consequence of the woes of deindustrialization or even integration. Most African Americans have listened to an elder wax romantic about a gentler time in Black history when people treated each other with more kindness out of a shared sense of kinship. But the reality is that there never has been a golden age for Black people in the United States. There are bad times, and there are worse times. In 1950, Black men were about eleven times more likely to be a victim of homicide than White men. In 2013, Black men were about eight times more likely to be a victim of homicide than White men. The good old days were actually more dangerous for Black men than now. And now is still quite bad.

The bottom line is that African American men commit a disproportionate share of certain serious crimes, including homicide, assault, and robbery, and are disproportionately victims of those same crimes.

Some people have tried to blame police violence on Black male violence, or to suggest that the former problem pales in comparison to the latter. Another version of this move is to blame Black performances of masculinity or African American women. For example, hip-hop artist and business mogul Jay-Z stated:

> You think about the idea of growing up in a single parent house, which I grew up in . . . and having an adverse feeling for authority, right? Your father's gone, so you're

like, "I hate my dad. Don't nobody tell me what to do. I'm the man of the house." And then you hit the streets and run into a police officer and he says, "Put your hands up. Freeze. Shut up." And you're like, "Fuck you!" That interaction causes people to lose lives.[28]

Kendrick Lamar, Pulitzer Prize–winning rap star, made this comment:

But when we don't have respect for ourselves, how do we expect them to respect us? It starts from within. Don't start with just a rally, don't start from looting – it starts from within.[29]

Rudy Giuliani, former mayor of New York City, explained in a televised conversation with scholar Michael Eric Dyson:

Ninety-three percent of Blacks are killed by other Blacks. . . . I would like to see the attention paid to that that you are paying to [Ferguson]. . . . What about the poor Black child that was killed by another Black child? . . . Why aren't you protesting that? . . . Why don't you cut it down so that so many White police officers don't have to be in Black areas? . . . White police officers wouldn't be there if [African Americans] weren't killing each other.[30]

Historian Khalil Gibran Muhammad has called this move "playing the violence card."[31]

The problem with the violence card is that it misunderstands both African American history and culture and the problem that African Americans experience with the police. African Americans have always been concerned about violent crime. But there are crucial differences between the violence that the police do to Black people versus the harm that African Americans do to each other.

Police officers are agents of the state. When they shoot and/or kill Black people, including unarmed Black people, they rarely suffer legal consequences. Between 2005 and 2014, only forty-seven cops were prosecuted for unlawful shootings. Of those forty-seven, only eleven were convicted.[32]

On the other hand, when African Americans commit homicide, they are frequently prosecuted, convicted, and sentenced to long years in prison (if not execution). This is one of the main reasons U.S. prisons disproportionately warehouse Black men. There was a period in U.S. history when crimes that victimized African Americans were largely not prosecuted. There is evidence that even now police do not take those crimes as seriously as they do crimes with White victims.[33] But even so, African American men do not get the same kind of pass that police officers get when they kill – even when the cops kill unarmed people. There is a categorical moral difference between antisocial conduct that is harshly punished, on the one hand, and authorized violence by the state committed with impunity, on the other hand.

What white Americans have never fully understood –
but what the Negro can never forget –
is that white society is deeply implicated in the ghetto.
White institutions created it, white institutions maintain it,
and white society condones it.[34]

The kind of violence that is made "criminal" is the kind that the most marginalized members of society are disproportionately at risk of committing (with some notable exceptions like rape). Indeed, the recognition that race-based structural deprivation was the most important explanation of Black criminality used to be commonplace. Thinking about crime in Black communities, President Truman in 1947 and President Johnson in 1965 both blamed racism.

But as the United States has become, since the 1970s, the most punitive nation in the world, many people have ceased to take racism into account when thinking about the causes of crime. Our harsh sentencing laws are premised on myths about personal responsibility and free choice. But a young Black man in South Central Los Angeles does not have the same kinds of choices as a young White man in either Beverly Hills or Appalachia.

The bad news and the good news is that none of these vast differences in racial outcomes is an accident. All are the result of government policies. It is bad news because the fact that the government created high-poverty communities demonstrates its antipathy to its citizens of color. It is good news because government policies can also now contribute to making things better.

We know this because African Americans are not the only group in U.S. history that has had some of its members turn to crime because they were shut out of other ways to achieve the American dream. Immigrant communities in the late nineteenth and early twentieth centuries were often involved in criminal activity. For example, according to historian Daniel Bell in his classic 1953 essay "Crime as an American Way of Life," Irish Americans, Jewish Americans, and Italian Americans represented "a distinct ethnic sequence in ways of obtaining illicit wealth." Yet as they were afforded a wider array of economic choices, each of these groups assimilated and their participation in crime went down (at least the kind of crime most often targeted by law enforcement). As legal scholar David Wade has written, "as each group acquired the wealth and social position accompanying the profits of illicit activity, they invested in legitimate businesses and assumed a greater political role in the dominant, legitimate society."[35]

Political scientist and historian Ira Katznelson points out in his book *When Affirmative Action Was White* that White ethnic groups were also aided in their economic rise by "Social Security, key labor legislation, the GI Bill, and other landmark laws that helped create a modern white middle class."[36]

By contrast, African Americans were locked out of these social programs. For example, farmworkers and maids – who made up "more than 60 percent of the Black labor force in the 1930s" – were "excluded from the legislation that created modern unions, from laws that set minimum wages and regulated the hours of work, and from Social Security until the 1950s."[37]

Compounding this lack of a social safety net for many African Americans, the government subsequently implemented harsh criminal justice policies that led to mass incarceration, turned a blind eye to housing discrimination, and failed to invest seriously in education and effective job training in low-income communities.

How much should we expect the state to reform its own violence? We should first acknowledge that "the state" is made up of human actors who might have competing or inconsistent goals or values. One's expectations of what people of good will, working within or with the state, can possibly accomplish might depend on how one would answer two other questions.

Question 1: To what extent is anti-Blackness at the core of the state? In his National Book Award–winning *Between the World and Me*, Ta-Nehisi Coates writes that "the plunder of black life was drilled into this country in its infancy and reinforced across its history, so that plunder has become an heirloom, an intelligence, a sentience, a default setting to which, likely to the end of our days, we must invariably return." Coates also observes "that white supremacy was so foundational to this country that it would not be defeated in my lifetime, my child's lifetime, or perhaps ever."[38]

From this point of view, sometimes described as "racial realism" or "Afro-pessimism," African Americans will never be "safe" without a radical transformation of current law, politics, and wealth distribution arrangements.

Question 2: Are there examples of the state successfully reducing its own violence? Here I think the answer is "yes," with qualifications.

As part of the Violent Crime Control and Law Enforcement Act of 1994, Congress included a provision that made it illegal for police departments to engage in "a pattern or practice" of unconstitutional conduct.[39] This statute allows the Department of Justice to "seek injunctive or equitable relief to force police agencies to accept reforms aimed at curbing misconduct."[40] The Department of Justice selects its cases by monitoring existing civil litigation, media reports, and research studies that indicate widespread misconduct within a police department.[41] The Department then engages in a preliminary inquiry, followed by a formal investigation.[42] This investigation has the potential to lead to a negotiated settlement in the form of a consent decree, a kind of road map a police department can take toward change; there is also the possibility of an appointed monitor to supervise the department's implementation of required reforms.[43]

The Washington Post looked at available data about use of force after Department of Justice interventions. It found that use of force decreased in half of the departments and stayed the same or increased in the other half.[44]

The Department of Justice investigation of the Los Angeles Police Department is often presented as a success story. In the aftermath of high-profile incidents of police brutality, Los Angeles entered into a consent decree with the Department of Justice. A study conducted from 2002 to 2008 (the consent decree was lifted in 2009) revealed lower crime rates and fewer use-of-force incidents.[45] Both property crimes (down 53 percent) and violent crimes (down 48 percent) decreased in Los Angeles more than in several adjacent communities.[46]

Yet during this time, the level of law enforcement increased. Stops increased by 49 percent from 2002 to 2008.[47] Pedestrian stops nearly doubled and motor-vehicle stops increased almost 40 percent.[48] And there was a dramatic increase in the proportion of stops resulting in arrests, suggesting that police officers "stopped people for good reasons and were willing to have the District Attorney scrutinize those reasons."[49]

An extensive survey of Los Angeles residents conducted after the decree found that "public satisfaction is up, with 83 percent of residents saying the LAPD is doing a good or excellent job."[50] The number of satisfied residents included more than two-thirds of Hispanic and African American residents.[51]

Over the course of the consent decree period, "the incidence of categorical force used against Blacks and Hispanics decreased more than such force used against Whites."[52] At the same time, Black residents remained a disproportionate share of individuals arrested and injured in the course of use-of-force incidents.[53]

Justice Department investigations are very expensive. The Los Angeles investigation is estimated to have cost $300 million. The difficulty of achieving meaningful reform raises doubts about whether this success is sustainable and can be reproduced in other cities. For example, because the Department of Justice investigates only a few departments per year, it may be difficult for pattern and practice investigations to produce large-scale change.[54] Even in cities where there have been reduced disparities in arrests and use-of-force incidents, institutionalizing reform has been a challenge.[55]

While focusing on use-of-force policies and community engagement strategies is important, federal investigations do not directly address issues like over-criminalization, prosecutorial discretion, and sentencing disparities.

To summarize, federal investigations work, some of the time, to reduce police violence and to improve community perceptions about the police. They are expensive and the benefits may only be short term. But in the jurisdictions where the federal intervention is successful, fewer people are killed or beat up by the police, and that is a good thing.

I n 2014, the U.S. Department of Justice Office of Justice Programs launched the National Initiative for Building Community Trust and Justice.[56] Spanning six cities, the initiative consisted of officer training, departmental policy changes, and community engagement designed to repair and strengthen police-community relationships by addressing the deep historical roots of distrust in the police among people of color and other marginalized populations.[57]

The Urban Institute's Justice Policy Center has evaluated the National Initiative and its impact. Findings show promise for the National Initiative model, suggesting that it was moderately successful in achieving its intended goals of training officers to be more equitable and respectful of community members and improving police practices and police-community relations.[58]

Local governments have also attempted to reduce overt police violence by implementing reforms like body cameras, de-escalation training, and improved hiring criteria. In revealing language, President Obama's Task Force on 21st Century Policing recommended that "law enforcement culture should embrace a guardian – rather than a warrior – mindset to build trust and legitimacy both within agencies and with the public."[59]

T he main response of the state to private violence is more violence, especially policing and punishment. Violent crimes are responsible for the majority of long prison stays, and thus, in addition to the profound human suffering they cause, are significant drivers of mass incarceration.

Some community-based programs have worked with the government to reduce violence. These programs seem focused mainly on violence by nonstate actors. Two examples are the National Network for Safe Communities and Common Justice.

The National Network for Safe Communities (NNSC) was founded and is directed by David M. Kennedy, a professor of criminal justice at John Jay College of Criminal Justice. It supports strategic interventions to reduce violence, minimize arrest and incarceration, enhance police legitimacy, and strengthen relationships between law enforcement and communities.[60]

The NNSC claims that by shifting the paradigm in which they analyze violence, they have been able to demonstrate conclusively that within communities, the overwhelming majority of residents are not dangerous, and the small number of chronic violent offenders are also at the most risk of victimization themselves.[61] Thus, the organization is committed to utilizing evidence-based strategies as well as support and outreach resources to protect the most vulnerable people in the most vulnerable places.

The NNSC uses myriad techniques to achieve their goals, including strengthening community norms, communicating directly with high-risk people to deter violence, using a minimum of law enforcement, helping group members succeed

in their lives, and enhancing the legitimacy of law enforcement, especially police, to make communities safer.[62] It collaborates closely with city governments, law enforcement agencies, and community representatives to realign policy and practice with community priorities and available evidence.

Studies have indicated that in cities across the United States, projects implementing the strategies endorsed by the NNSC have found success in reducing private violence.[63] These have included a

- 37 percent reduction in homicide in Chicago through Project Safe Neighborhoods;[64]

- 44 percent reduction in gun assaults in Lowell, Massachusetts, through Project Safe Neighborhoods;[65]

- 42 percent reduction in gun homicide in Stockton, California, through Stockton Operation Peacekeeper;[66]

- 34 percent reduction in homicide in Indianapolis through the Indianapolis Violence Reduction Partnership;[67] and

- 41 percent reduction in street group member–related homicides in Cincinnati through the Cincinnati Initiative to Reduce Violence.[68]

Common Justice is a New York City–based organization that is the first alternative-to-incarceration and victim-service program in the United States that focuses on violent felonies. Its guiding principles emphasize responses to violence that are "survivor centered," "accountability based," "safety driven," and "racially equitable." In agreements with prosecutors in Brooklyn and the Bronx, some persons charged with serious and violent felonies are diverted to Common Justice programs, which use a restorative justice approach. Critically, victims must consent to the diversion. Participants who successfully complete a twelve-to-fifteen-month violence intervention program and honor commitments made in restorative justice circles can avoid the incarceration they would have faced through the criminal legal process.

In addition to state responses and community-state collaborations, there are also community-based organizations and programs working to reduce violence that do not seek formal alliances with the state. Examples include She Safe, We Safe and the Movement for Black Lives.

The Black Youth Project's She Safe, We Safe campaign launched in April 2019, guided by "a dual strategy approach, which means that we will work to both shift culture and establish new ways of keeping each other safe within our communities AND work to fight against the violence of the state, particularly the patriarchal violence of the police."[69] The goals of She Safe, We Safe are to:

1. Increase interventions to gender-based violence available to Black women, girls, gender non-conforming people, and communities that do not rely on contact with the police.

2. Reallocate funding from the police to community-determined programs that address gender-based violence in Black communities.[70]

The Movement for Black Lives is "a collective of 50 organizations representing thousands of Black people from across the country." The Movement states on its website:

Neither our grievances nor our solutions are limited to the police killing of our people. State violence takes many forms – it includes the systemic underinvestment in our communities, the caging of our people, predatory state and corporate practices targeting our neighborhoods, government policies that result in the poisoning of our water and the theft of our land, failing schools that criminalize rather than educate our children, economic practices that extract our labor, and wars on our Trans and Queer family that deny them their humanity.[71]

Its platform contains a large number of demands, including "direct democratic community control of local, state, and federal law enforcement agencies," eliminating money bail, and ending surveillance technologies like IMSI (international mobile subscriber identity) catchers, drones, body cameras, and predictive policing software. Outside of the criminal legal process, the platform calls for reparations and "a progressive restricting of tax codes at the local, state, and federal levels to ensure a radical and sustainable redistribution of wealth."[72]

It is likely that the United States will continue to experience extreme violence by state and private actors as long as the country is marked by gross racial and economic inequality. Eliminating these disparities would be the most effective way of reducing the victimization of people of color and ending mass incarceration. To the extent that violence reduction projects "work," they perform vital services. We might think of these efforts as "harm reduction." As the state maintains law and policy that heighten the risk of victimization for people in marginalized communities, effective violence reduction projects place some people within those communities at less risk. The profound result is that lives are saved and human suffering is reduced.

ABOUT THE AUTHOR

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Public Health Approaches to Reducing Community Gun Violence

Daniel W. Webster

Successful public health efforts are data-driven, focused on unhealthy or unsafe environments as well as risky behaviors, and often intentional about reforming systems that are unjust and harm public safety. While laws and their enforcement can be important to advance public health and safety, including reducing gun violence, minimizing harms of exposure to the criminal justice system is also important. Research demonstrates that appropriately targeted efforts that invest in and support individuals and neighborhoods at greatest risk for involvement in gun violence can be successful in saving lives and reaping impressive return on investment.

Gun violence is the number one public safety priority for many U.S. cities. It extracts extraordinary human and economic costs: firearms were used in 14,414 homicides committed in the United States in 2019, accounting for 75 percent of all homicides.[1] There were 283,503 nonfatal crimes of violence committed with firearms reported to the police in 2019, and many more gun crimes go unreported.[2] Firearm homicides are the third-leading cause of death for persons twenty-five to thirty-four years old and the leading cause of death for Black males aged fifteen to thirty-four.[3] One study estimated that costs related to medical treatment, disability, lost productivity, and criminal justice responses to gun violence totaled $229 billion annually.[4] The impacts of gun violence go well beyond the people most directly involved in it. Fear of gun violence and the things we do to respond to that fear result in enormous costs to individuals and local governments. Economists at the Urban Institute found that surges in gun violence reduced neighborhood home values by 4 percent and decreased credit scores and home ownership in affected communities. A single gun homicide in a census tract in a year resulted in decreases in home values the following year of $22,000 in Minneapolis and $24,621 in Oakland, and decreases in home ownership by 3 percent in Washington, D.C., and 1 percent in Baton Rouge.[5]

Useful frameworks for addressing violence from a public health lens include efforts to advance policies that create environments that are less conducive to violence or that facilitate social conditions that constrain violence.[6] Because of the wide availability of firearms and alcohol as well as blight characterized by vacant

buildings and pervasive signs of physical decay and social disorder, public health scholars and advocates have sought to reduce community violence through policies that impact these conditions. Ineffective and unjust policing practices harm Black and brown individuals and communities not only with respect to over-incarceration and police violence, but also by creating environments in which law enforcement infrequently brings shooters to justice and victims' needs go unmet. I contend that efforts to empower impacted communities to advocate successfully for needed reforms in policing and prosecution to promote more focused and balanced approaches to violence prevention – such as highly focused criminal justice deterrence coupled with services and supports for individuals most at risk for gun violence – is wholly in keeping with the public health tradition of improving the health and safety of communities by promoting systemic changes to correct prior injustices.[7] Successful public health models for violence prevention also seek to support those at greatest risk of violence by addressing factors that elevate the risk of violence.

Most U.S. firearm policies are designed to reduce the availability of firearms to individuals who have been convicted of serious crimes or who the courts have deemed dangerous through the issuance of restraining orders or involuntary commitments for mental health treatment. The type of gun policy that is most strongly and consistently associated with reductions in homicides is mandatory licensing of handgun purchasers.[8] This sort of licensing typically involves more robust systems for screening out prohibited purchasers, and studies indicate that these laws deter the diversion of guns for criminal use.[9] Connecticut's adoption of handgun purchaser licensing and Missouri's repeal of its licensing law resulted in substantial changes in firearm homicide rates relative to forecasted counterfactuals.[10]

Restrictive licensing laws for the concealed carry of firearms, typically requiring applicants to have special reasons to justify the need to carry a firearm and no evidence of violence or law-breaking by the applicant, are also protective against violent crime, including homicides with firearms. The evidence of the protective effects comes from studies of laws that remove restrictions on the issuance of licenses to carry concealed guns, showing subsequent increases in violent crime relative to counterfactuals.[11]

I n his book *Bleeding Out: The Devastating Consequences of Urban Violence – and a Bold New Plan for Peace in the Streets,* crime researcher Thomas Abt provides sage advice for tackling urban gun violence with evidence-based solutions and the keys to the most efficacious interventions.[12] Abt underscores that approaches to urban gun violence should be focused, balanced, and fair. Focus is necessary because gun violence is highly concentrated among a very small percentage of the population and highly concentrated spatially even within neighborhoods with high rates of shootings. Balance refers to the use of social services and job oppor-

tunities along with effective enforcement that can deter gun violence. Fairness is important not only as a matter of justice, but research shows that compliance with laws and cooperation with law enforcement are highly dependent upon whether individuals view police and prosecutors as legitimate and fair.

Abt's emphasis on strategies being highly focused, fair, and balanced should be applied to the enforcement of laws restricting gun possession and carrying. The enforcement of laws against carrying concealed firearms without a license and possession by a prohibited person pose challenges for balancing the desire to prevent the harms associated with unchecked concealed gun carrying – such as loss of life, serious injuries, and psychological trauma – against the harms resulting from often racially biased stop-and-search practices, arrests, and incarceration for illegal gun possession. The frequency and manner with which stop and search is used by police determines whether the tactic results in fewer shootings or promotes racially biased policing that threatens the safety of Black and brown people directly and indirectly through reducing residents' trust in the police. The New York Police Department's broadscale stop-and-search practices were found to be unconstitutional and detrimental to police-community relations while having a questionable impact on gun violence.[13] But in cities with much higher rates of gun violence, there is some evidence that arrests for illegal gun possession can reduce shootings.[14] Evaluations of specialized police units focused on deterring illegal gun possession in city "hot spots" for shootings have consistently shown that such efforts significantly reduce shootings, at least in the short term.[15] Units that focused more on the small number of high-risk individuals than on high-risk places generally were most effective. To minimize harms and achieve the public safety benefits of the proactive enforcement of gun laws, it must be highly focused, not only with respect to place (hot spots), but with respect to individuals for whom there is good evidence indicating illegal gun possession and a history of violence.

Given the potential for abuse in proactive gun-law enforcement, police must have strong systems of internal and external accountability to ensure that practices are not only legal, but minimize harms and are acceptable to community members. Officers must be properly trained and incentivized to make only clearly justifiable stops and searches. Systems of accountability should be in place to identify and deter unconstitutional or otherwise unprofessional practices that can harm those who are subjected to the searches. Law enforcement leaders should track officers' patterns for stopping and searching individuals, complaints, cases dismissed due to illegal searches, and whether evidence from gun-related arrests leads to convictions or guilty pleas. Aggregate data on these metrics should be shared with the public to promote accountability. Finally, there is great need to develop and evaluate alternatives to incarceration for those who are arrested for illegal gun possession, programs that offer social supports to reduce subsequent gun offending and have components similar to some of the successful interventions described below.

Abt's ingredients of successful gun violence prevention can be seen in Oakland's efforts to reduce gun violence in a manner that promotes safety and justice. A cornerstone of Oakland's programs is its Ceasefire Strategy, which applies an approach known as Group Violence Intervention (GVI) – championed by the National Network for Safer Communities (NNSC) – that has an impressive track record of success.[16] GVI begins with an extensive data collection process by law enforcement to identify the small number of individuals and groups within a community that are most at risk for involvement in gun violence, and to track ongoing conflicts and other activities involving these individuals that may contribute to the violence. In group meetings with these high-risk individuals, known as "call ins," law enforcement officials, community members, and social service providers communicate that gun violence must stop. While early iterations of the program model focused on law enforcement leaders warning individuals about the prospect of harsh sanctions against gun crime, the current program model focuses on "the moral voice of the community" to persuade those engaged in gun violence to turn away from it and on fairness in the application of the law. City officials make promises to provide immediate assistance to those individuals who need help turning away from violence (such as intensive mentoring, employment and training services, housing, and drug treatment). Street outreach workers engage those who are the focus of the intervention to support them in their efforts to turn away from violence. Law enforcement leaders promise to bring to justice those who perpetrate gun violence, dedicating a special unit to carry out this task. Importantly, the GVI approach also involves considerable engagement by police with the impacted communities, reconciliation for past injustices, and a commitment to police reforms demanded by the communities. This process generally results in fewer arrests for minor infractions and greater police focus on gun violence and the individuals perpetrating it.

The legitimacy of the effort to promote positive change is evidenced by swift and relevant assistance to address key determinants of violence, including lack of jobs and insecurity about immediate needs for housing and food among those at highest risk. The outreach and case management challenges are considerable but manageable under a city agency responsible for violence prevention within a mayor's office or health department. Researchers have estimated that Oakland's Ceasefire Strategy has contributed to a citywide 31 percent drop in gun homicides and a 20 percent drop in nonfatal shootings.[17] These findings are consistent with those from other studies of GVIs across a broad range of cities.[18] Unfortunately, with rare exceptions,[19] GVI evaluations have not reported the impact of the program on arrests and incarceration. As the NNSC has elevated the importance of policing and criminal justice reforms in its approach, future evaluations of GVI should measure the program's impacts on incarceration.

The New York City's Mayor's Office for Gun Violence Prevention (MOGVP) builds upon the Cure Violence model that attempts to prevent gun violence with-

out the direct involvement of law enforcement. Violence interrupters and outreach workers who are credible messengers are hired by community-based organizations from impacted communities to build trust with those at highest risk, mediate disputes, promote nonviolent alternatives to conflicts, and facilitate connections to social services and job opportunities. New York's MOGVP established a crisis management system to ensure that necessary resources and services are delivered to high-risk individuals in a timely and supportive manner. Research that contrasted trends in gun violence in New York City's intervention neighborhoods with those of similar neighborhoods indicates that New York's program has reduced gun violence where it has been implemented.[20] The program was also associated with a significant reduction in the degree to which youth report that gun violence is justified under various scenarios.[21] Cure Violence interventions have also yielded some success in reducing gun violence in selected neighborhoods in Chicago and Philadelphia.[22] In Baltimore, the program's effects on gun violence have been inconsistent, with most sites failing to reduce gun violence.[23]

Other promising models for community gun violence prevention include Los Angeles's Gang Reduction and Youth Development (GRYD) program, which invests in efforts to promote alternatives to gangs and established a system for coordinated and timely responses to prevent retaliatory gang violence by street outreach peacemakers and law enforcement. GRYD's incident response system has greatly reduced retaliatory shootings involving gang members.[24] Implementation of Operation Peacemaker Fellowship, now known as Advance Peace – a highly targeted program that invests in the health, well-being, and personal development of those involved in violence, including modest stipends to participants who meet program objectives – has contributed to a 55 percent decrease in gun violence in Richmond, California.

Alcohol abuse is an important contributor to interpersonal violence and specifically violence involving firearms.[25] One study found that an individual's history of alcohol-related offenses predicted both future crime committed with firearms and prior violent offending.[26] Studies have consistently shown that the density of alcohol outlets is positively associated with violent crime after controlling for other neighborhood conditions.[27] Thus, alcohol abuse is an appropriate target for interventions to reduce gun violence. There is a robust research literature on the effects of alcohol-focused interventions on violence; unfortunately, these studies rarely isolate violent incidents involving firearms.

Local restrictions on the number and density of alcohol outlets in neighborhoods as well as enhanced regulatory oversight of alcohol outlets have been shown to reduce violence.[28] Shootings sometimes occur in response to altercations at bars and nightclubs. Restrictions on alcohol serving hours have been found to reduce violence, including lethal gun violence.[29] While increased taxes on alco-

hol reduce violence, they must be substantial to achieve moderate protective effects.[30] There are, of course, considerable political challenges to enacting tighter regulation over alcohol sales, yet the public health benefits of these actions extend beyond violence into fewer injuries and fatalities due to motor vehicle injuries. Indeed, a community intervention based on successful advocacy for changing alcohol laws and enhanced enforcement of alcohol laws that was primarily aimed at preventing deaths and injuries from drunk driving also had a strong protective effect in reducing injuries from assaults.[31]

Gun violence in cities is most common in areas with concentrated disadvantage, blight (vacant buildings and lots), and other signs of physical and social disorder. The connections between physical disorder, social disorder, and gun violence are both direct and indirect. Vacant buildings and lots filled with trash and overgrown with weeds are used to stash illegal guns and drugs. More indirectly, physical and social disorder sends signals that illegal behavior is tolerated and instills fear that prevents positive engagement to protect against violence.

Observational research has shown that demolition of vacant homes in blighted neighborhoods is associated with reductions in gun violence.[32] Recent research using random assignment of dwellings and lots to treatment and control conditions has demonstrated that so-called cleaning and greening of vacant lots in low-income urban areas and making modest investments to maintain the revamped lots leads to a variety of public health benefits, including reducing violent crime and gun violence without displacement of the crime.[33] Philadelphia began enforcing a "doors and windows ordinance" in 2011 that required property owners of abandoned buildings to install working doors and windows in all structural openings. Noncompliant owners can face significant fines. Researchers estimated the impact of this ordinance enforcement by comparing crime trends around buildings that were remediated as a result of the ordinance (n = 676 or 29 percent of cited buildings) and randomly matched control buildings that were not remediated (n = 676) or permitted for renovation (n = 964). Building remediations were associated with a 39 percent reduction in assaults with guns and a 13 percent reduction in nonfirearm assaults.[34] This same study also assessed the effects of cleaning and greening vacant lots and estimated that those activities were associated with a 4.5 percent reduction in gun violence. Because the costs of gun violence to taxpayers and to society at large are substantial, these interventions in Philadelphia had impressive return on investment. Researchers estimated that over a forty-six-month follow-up period, each dollar devoted to remediating an abandoned building yielded a $20 return to taxpayers due to lower rates of violence and a $256 savings from a societal perspective. Over that same period, for every $1 spent on vacant lot cleaning and greening, there were $77 in returns to taxpayers and $968 in

returns from a societal perspective. Critically, these blight abatement interventions have been shown to have benefits beyond reducing gun violence, including increased perceptions of safety, greater use of outdoor space for socializing, and reduced stress.[35]

Successful public health efforts are data-driven, focused on unhealthy or unsafe environments as well as risky behaviors, and often intentional about reforming systems that are unjust and harm public safety. While laws and their enforcement can be important to advance public health and safety, including reducing gun violence, minimizing harms of exposure to the criminal justice system is also important. Research demonstrates that appropriately targeted efforts that invest in and support individuals and neighborhoods at greatest risk for involvement in gun violence can be successful in saving lives and reaping impressive return on investment.

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Seeing Guns to See Urban Violence: Racial Inequality & Neighborhood Context

David M. Hureau

Guns are central to the comprehension of the racial inequalities in neighborhood violence. This may sound simple when presented so plainly. However, its significance derives from the limited consideration that the neighborhood research paradigm has given guns: they are typically conceived of as a background condition of disadvantaged neighborhoods where violence is concentrated. Instead, I argue that guns belong at the forefront of neighborhood analyses of violence. Employing the logic and language of the ecological approach, I maintain that guns must be considered as mechanisms of neighborhood violence, with the unequal distribution of guns serving as a critical link between neighborhood structural conditions and rates of violence. Furthermore, I make the case that American gun policy should be understood as a set of macrostructural forces that represent a historic and persistent source of disadvantage in poor Black neighborhoods.

The ecological approach to the study of crime and violence represents one of the most distinctive, enduring, and empirically supported paradigms of criminological research. At its heart, this approach promotes understanding the unequal distribution of violence across neighborhoods as a function not of essentialist qualities of their residents, but rather of spatially patterned inequalities that influence community capacity to control violence. Drawing inspiration from the theoretic development of sociologists Robert Sampson and William Julius Wilson's classic article "Toward a Theory of Race, Crime, and Urban Inequality," researchers working in the ecological tradition over the last two decades have wrestled with two key problems in the study of neighborhood violence.[1] First, what are the links that connect the structural features of neighborhoods – like poverty and racial composition – to violence? These links have come to be referred to as the mechanisms of neighborhood violence. And second, how do factors originating outside of the confines of neighborhoods – such as large economic shifts and discriminatory housing policies – concentrate within specif-

ic neighborhoods in ways that influence disadvantage and violence? These factors have typically been called macrostructural forces.

Guns are central to the comprehension of the racial inequalities in neighborhood violence. This may sound simple when presented so plainly. However, its significance derives from the limited consideration that the neighborhood research paradigm has given guns, typically conceiving of them as a background condition of disadvantaged neighborhoods where violence is concentrated. Instead, I argue that guns belong at the forefront of neighborhood analyses of violence. Employing the logic and language of the ecological approach, I maintain that guns must be considered as mechanisms of neighborhood violence, with the unequal distribution of guns serving as a critical link between neighborhood structural conditions and rates of violence. Furthermore, I make the case that American gun policy should be understood as a set of macrostructural forces that represent a historic and persistent source of disadvantage in poor Black neighborhoods.

The stakes that interest me are how scholars see – or do not see – the problem of urban violence. Scholarly theories are powerful because they provide ways of seeing the world, and – as any researcher working in the domain of criminal justice can ill afford to forget – these theories are consequential for how they resonate in the domains of policy and public discourse. In this case, it is the ecological paradigm's difficulty in seeing guns in neighborhood context that has led to three intellectual and practical problems of representing urban violence to ourselves and our publics. The first is a lack of clarity regarding the very character of urban violence itself: the rates of violent crime analyzed as outcome, the harms estimated as following from exposure to violence, the palpable neighborhood fear and stigma generated by violence, and the actual damage to human flesh and bone – all are overwhelmingly produced by guns. The second is a misrecognition of the prevalence of guns in disadvantaged neighborhoods as a product principally of criminal demand – even if such demand is structured by multiple inequalities – rather than patterned by racialized gun policies with historic and contemporary roots. And third, without a clear accounting for guns in neighborhood context, the leading mechanisms of the ecological paradigm – such as neighborhood codes of violence – risk implying that those in disadvantaged neighborhoods are dispositionally inclined toward violence, seamlessly attaching to long-standing stereotypes of Black criminality.[2] In contrast, an analytic image of the neighborhood context of violence that makes guns visible as a source of structural inequality can help the ecological paradigm better elaborate its core proposition: the primacy of social context over people in explaining violence.

I n 1995, shortly after gun violence had peaked in many major American cities, Sampson and Wilson put forward one of the most transformative practical and intellectual contributions in a long line of ecological research investigating the connection between community structure and rates of crime.[3] They first

challenged readers to accept that the violence in disadvantaged Black neighborhoods was a real phenomenon.[4] This was, in many ways, a radical proposition. At a time when academics and practitioners rightly worried about drawing conclusions from overall crime statistics that could represent biases in policing and criminal justice processing – and thus (re)stigmatizing disadvantaged minority communities – Sampson and Wilson showed that racial inequality in involvement in serious violence was beyond dispute. Following a moment of pause to reconsider the veracity of race-specific homicide statistics, Sampson and Wilson upended the contemporary "statistical discourse"[5] surrounding urban violence that described such statistics as products of "black-on-black violence"[6] driven by a demographic boom of young Black superpredators.[7] Instead of attributing intense racial disparities in homicide to Black cultural pathology or manipulated police statistics, or simply choosing to ignore them altogether, Sampson and Wilson insisted that racial inequalities in violence were products of the vastly different social circumstances in which Blacks and Whites lived. Thus, it made little sense to search for the cause of surging "Black violence"; the causes of crime were invariant by race and could be found by exploring structural differences in community context – differences that were animated by a historical legacy of residential segregation.

Ultimately, the power of Sampson and Wilson's ecological-contextual approach was not simply that it offered a satisfying alternative to the typical racialized discourse on violent crime but that it was – and continues to be – fundamentally correct.[8] Over the past two decades, a sizable research literature has emerged that has generally confirmed Sampson and Wilson's theoretical perspective. In the broadest strokes, this research has shown that: 1) neighborhood structural disadvantage consistently predicts violence;[9] 2) the relationship between neighborhood structural disadvantage and violence holds for predominantly Black, White, and Latino neighborhoods;[10] 3) there is extreme inequality in neighborhood context by race that makes comparison practically impossible – in fact, the most disadvantaged White neighborhoods are typically better off than the least disadvantaged Black neighborhoods;[11] and 4) enduring race-based disadvantage in neighborhood context – in terms of exposure to violence, poverty, and prospects for upward mobility – has persisted over the last two decades in spite of large structural shifts that have influenced American cities, such as the great crime decline and concentrated immigration from Latin America.[12]

Although supported by a powerful empirical base, there is still unfinished business in the evolution of the neighborhood research paradigm. The foremost unsolved problem is the identification of *mechanisms* that help to explain the association between unequal neighborhood conditions and violence.[13] Empirical research has generally identified and tested (with support) cultural codes of violence and informal social control as key mechanisms that link neighborhood racial inequality to violence, but many more have been hypothesized or are log-

ically implied by observed ecological dissimilarities in residential context.[14] Research developments have especially prompted reconsideration of how the criminal justice system influences neighborhood racial inequality, as well as how the long-standing historic and political character of neighborhood inequalities might be implicated in violence.

The position I advance is that research into neighborhood gun use, access, and control can help to resolve some of the long-standing and emerging puzzles in ecological research. Guns can play a key role in facilitating the continued development of the research into neighborhood violence by better specifying its mechanisms, through generating powerful examples of how local violence is patterned by higher-order macrostructural forces and, ultimately, in helping to realize the potential of a theory of contextual causality in the study of violence.[15]

How are guns mechanisms for neighborhood violence? One line of argument flows from thinking of guns as the principal tool used for creating the anomalous violence problem that is concentrated in America's Black and brown disadvantaged neighborhoods. This instrumental perspective regards the comparatively high rates of deadly American violence as unattainable without the mechanical advantage afforded by guns. The second line of argument explored here trades thinking of how guns serve as concrete mechanisms for thinking of how guns are implicated in the theoretical mechanisms of community violence, especially the exercise of informal neighborhood social control.

Criminological and public health researchers have long drawn attention to the outsized role that guns play in shaping the character of American violence. More than two-thirds of homicides in the United States are committed by gun, and more gun homicides are committed each year in the United States than in all other high-income Organisation for Economic Co-operation and Development (OECD) nations combined.[16] In 2017, there were more than 14,000 victims of gun homicide and more than 107,000 people nonfatally wounded in gun assaults in the United States.[17]

That this exposure to serious violence is sharply stratified by race is a social fact of contemporary American society. Although American Blacks make up approximately 13 percent of the population, they consistently account for more than half of homicide victims, producing a simple Black-White homicide ratio that typically exceeds 7:1, despite recent historic declines in violence. This inequality in exposure to homicide is so significant that it accounts for more than 18 percent (more than one year of life) of the 5.44-year Black-White life expectancy gap among men.[18] What has been underappreciated is the role that guns play in underpinning these inequalities in life chances; between 2013 and 2017, 82.3 percent of the 44,523 Black homicide victims were killed by guns compared with 58.6 percent of the 26,465 non-Hispanic White victims. For young Black men – the modal catego-

ry of homicide victims – well over 90 percent are killed by guns.[19] Yet these Centers for Disease Control and Prevention (CDC) figures only understate the extent of Black homicide as well as the role that guns play in it because they are known to substantially undercount fatal police shootings.

What should be made of this brutal association between guns and lethal violence? Medical professionals and public health researchers have long accepted the link between the kind of weapon used in an assault and the probability of death,[20] but policy consensus has lagged behind, held up by the subterfuge debate over murderous intent embodied in the shibboleth "guns don't kill people, people kill people." In a series of papers dating back a half-century, criminologist Franklin Zimring compared Chicago gun attacks with knife attacks to show that though murderous intent was difficult to ascertain, it was at least as present in knife attacks as gun attacks. Still, guns produced a fatal outcome five times more often than knives.[21] In a follow-up study focused on shootings, Zimring further addressed the ambivalent nature of intent. He found that fatal and nonfatal shootings resembled one another in virtually all observable ways; whether the victim lived or died appeared to be mostly a matter of luck. In this stochastic process, the key systematic factor that influenced shooting fatality was the caliber of the gun used, with larger-caliber guns associated with greater likelihood of fatality.[22] Criminologists Anthony Braga and Philip Cook recently produced a functional replication of Zimring's study using improved shooting data from Boston and more sophisticated analytic techniques; this study too found that shootings with larger-caliber guns were associated with lethality, even though they were no more accurate or likely to result in multiple shooting wounds than their smaller-caliber counterparts.[23]

This research forcefully emphasizes that the type of weapon used – and even the type of gun used – is a critical matter of concern for scholars and practitioners in the area of urban violence. It further suggests that the distribution of different types of weapons across ecological context is important for shaping overall rates of violence. From this perspective, the concentration of guns at the neighborhood level can be understood as a form of structural inequality, with the neighborhood serving as a mediator of extralocal factors known to influence the prevalence of guns, such as social and geographic proximity to gun-dense contexts.

For a research paradigm that has generally focused on violence as an outcome, rather than a process in its own right, thinking of guns as a mechanism of violence can be theoretically generative. In analyzing the doing of violence, insights from microsociology – the branch of sociology most concerned with analyzing face-to-face interactions and intimate social situations – align nicely with the population-based findings of public health research in ways that provide useful clues for neighborhood-level researchers regarding the importance of guns. Drawing upon a wide array of data sources – especially video footage, military research, and first-

hand accounts of violent situations – the overarching finding of the microsociological investigation into violence is that interpersonal violence is rare and difficult to perform, even among conflictual situations in which a violent outcome seems predestined. Most people are unwilling combatants who fail at performing violence, and those who succeed must find situational advantages they can use to overcome the confrontational tension and fear inherent in conflict.[24] And one critical source of advantage is a gun. Especially because of their ability to increase the distance between combatants – as well as create opportunities for surprise and domination – guns provide a technological adaptation to overcoming the situational forces that keep violence in check.[25] For unwilling combatants – and it requires reminding that most people engaged in urban violence probably fit in this category – guns make the doing of violence easier as well as deadlier.[26]

What do these observations mean – in terms of theory and practice – for an ecological research tradition that prides itself on focusing on community conditions rather than the criminal propensity of individuals? Most simply, they imply that the distribution of guns across ecological contexts should be understood as a measurable structural property of neighborhoods, and one that is influenced by spatial, network, macrostructural, and historic forces. This way of seeing how guns serve as concrete mechanisms in the doing of violence, however, raises further questions regarding how guns might influence the neighborhood paradigm's foremost theoretical mechanisms used to explain the social processes that link neighborhood structural conditions to rates of violence. For example, how might the neighborhood concentration of guns influence the enactment of social control, long understood as the key community brake upon violence? It seems intuitive that tools that make violence easier will, all else being equal, make the control of violence more difficult. In neighborhood context, then, the ability to recognize and intervene in each potentially conflictual situation becomes more consequential. Yet neighborhood researchers have recently problematized the doing of social control, questioning the conditions under which neighbors intervene in crime and highlighting how it is often stressful and costly to those who – often reluctantly – get involved.[27] This burden weighs heaviest in historically marginalized neighborhoods, where even the most engaged and committed citizenry can be overcome by the sheer volume and seriousness of challenges to safety.[28] Guns thus not only raise the stakes of violence, but also complicate the process of intervention into behavior in public space, the factor most central to contemporary understanding of neighborhood social control.

Guns further influence other theoretical mechanisms of neighborhood violence, such as neighborhood codes of violence. These codes are theorized to legitimize the use of violence in disadvantaged neighborhoods as part of a cultural response to alienation from the formal justice system and structural conditions of exclusion and deprivation.[29] In this model, neighborhood-level acceptance of

the code serves to explain the connection between structural disadvantage and violence, an idea that has found support in the empirical literature.[30] Yet because guns are so critical to the accomplishment of serious violence, it is likely that the neighborhood availability of guns mediates the relationship between the code and rates of serious violence in that neighborhood. More fundamentally, a theory of cultural codes of violence without guns at its center leaves the door open to the belief that high rates of homicide in poor, Black neighborhoods – even after accounting for structural forces – are driven principally by the distribution of murderous intent rather than the distribution of deadly tools that make possible the vast majority of homicides in such contexts. A focus on gun use and concentration could sharpen understanding of many theoretical mechanisms of neighborhood violence, from legal cynicism and legal estrangement through analysis of spatial and network processes.[31] However, this would require ecological researchers to recognize guns as relevant to the study of violence, not merely in some generic sense, but as a crucial matter of analysis.

William Julius Wilson deployed the concept of macrostructural forces to describe how large societal changes (especially deindustrialization and the out-migration of the Black middle class in the post–civil rights era) remade American inner cities, leading to a historically novel form of concentrated poverty and social isolation that resulted in a distinct Black underclass.[32] Sampson and Wilson's ecological approach expanded this framing of macrostructural forces to include deliberate policy decisions such as urban renewal, redlining, and the siting of public housing in segregated areas.[33] These decisions further concentrated poverty, exacerbated segregation, and increased the ecological dissimilarity in the residential contexts of Black and White Americans with predictable results for violent outcomes. Here I employ Sampson and Wilson's logic to argue that the basic patterns of American gun policy represent textbook examples of macrostructural forces that have systematically determined the amount and character of serious urban violence. Furthermore, these policy forces, while rooted in history, continue to shift in ways that disproportionately stress poor and Black neighborhoods striving to control violence. I first discuss the contours of these recent shifts and follow with a brief discussion of the racialized character of contemporary American gun policy.

Recent macrostructural shifts in gun ownership and gun technology. Even after accounting for the changes flowing from the great crime decline, the essential elements of urban violence may not appear appreciably different than those of the 1990s. The overarching story seems to be one of persistence: young men of color in disadvantaged areas being harmed by gun violence stemming from interpersonal, group, and drug disputes in contexts of unreliable police protection. And while policy and media discourse has centered on gun access among those with

mental illness and changes in military-inspired weapons technology that make for deadlier mass shootings, the most important shifts in gun access and gun technology – and certainly those most likely to influence urban violence – have gone mostly unnoticed and undebated. Stated simply, the patterns of everyday American guns have shifted radically in recent decades.

Virtually all guns used in illegal violence originate legally (via import or manufacture), entering the market through sale by federally licensed gun dealers. Activity in this "primary" market – and the civilian stock of guns that it generates – is consequential because federal firearms commerce is notoriously porous, with guns involved in crime being diverted by unregulated sales of used guns, straw purchases, and theft. What is more, recent research suggests that illegal guns proximate to violence in cities like Chicago and Boston follow the patterns of the primary market, but with some delay; such guns are approximately ten years old and most likely illegally diverted by a series of undocumented transactions.[34] Because guns are not registered in most jurisdictions, the best evidence for the stock and flow of American guns has been generated by survey estimates. And the most recent survey evidence suggests a dramatic increase in the stock of civilian guns since the mid-1990s.[35] Specifically, over the last two decades, the civilian stock of firearms is estimated to have grown from 192 million to 265 million guns, with the handgun stock almost doubling over this period (65 million in 1994 to 113 million in 2015). Semiautomatic pistols, which in 1994 made up approximately 40 percent of a much smaller handgun stock, now make up the majority (62 percent) of American handguns. Consistent with other recent survey evidence, firearm owners' primary motivation for owning guns is to protect themselves from people; this is especially true among handgun owners (76 percent) and represents a shift from the 1990s when the most common reason for ownership was recreation.

This substantial increase in handgun stock, and especially the increase in semiautomatic pistols, has interacted with technological changes that have reshaped the basic profile of the semiautomatic pistol in just two decades. In short, as semiautomatic pistols have proliferated – and if trends continue, they will soon eclipse rifles as the most common type of firearm in the United States – they have generally become smaller and capable of firing larger-caliber ammunition that had previously been the domain of larger-frame pistols.[36] This evolution was not produced by market forces alone, however, but was advanced by policy intervention in the form of widespread implementation of "concealed carry" laws in the 1980s and 1990s. The concealed carrying of guns was generally prohibited for most of U.S. history,[37] and into the 1980s, nineteen states maintained an outright ban on the practice.[38] Concerted lobbying efforts by the National Rifle Association, especially during the 1990s and 2000s, produced the present policy landscape, in which concealed carry is permitted in all fifty states.

This concealed carry policy wave generated a new market segment for gun manufacturers, particularly among gun enthusiasts eager to exercise their new-found right to carry in public space. These guns further needed sufficient "stopping power" to be perceived as suitable for self-defense. Between 1990 and 2017, American gun manufacturers increased production of "medium" (.380-caliber and 9mm) semiautomatic pistols by a factor of five. "Large" caliber semiautomatic pistols (.40, .45, and .50) increased by a factor of three, while production of the once-prominent .22 pistol increased just 16 percent.[39] Unsurprisingly, this shift in the population of American guns has already influenced the types of guns used in crime. Among guns used in crimes traced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) between 2012 and 2017, the proportion of medium-caliber guns nearly doubled, large-caliber guns increased by 40 percent, and smaller-caliber guns demonstrated no meaningful increase.[40] More important, recent research has shown that gun caliber is associated with fatality and that change in the composition of guns used in violence is capable of meaningfully influencing crime rates at the metropolitan level. For example, Braga and Cook estimated that if shooters in Boston had all used small-caliber guns – rather than medium and large ones – the city's homicide rate would have been reduced by nearly 40 percent.[41]

The upshot of what might be perceived to be technical gunspeak is that broad shifts in the composition and technical sophistication of common American guns are negatively influencing the life chances of (especially Black) Americans. Quietly, and with little public deliberation, a new class of handgun has emerged – the concealed carry – that is better adapted to street use due to its portable and concealable properties. After all, the typical illegal gun possession case simply represents concealed carry without the permission of the state. And because shootings are spatially and demographically concentrated among Black Americans, the nation's experiment with concealed carry and the new class of weapon it has produced is being felt more on urban street corners and in emergency rooms than in other contested public spaces (such as university campuses and coffee shops). Social scientists are only just now beginning to detect the general effects of these shifts. After long debates over whether concealed carry would produce more or less crime, the evidence is now clear that permissive "right to carry" concealed carry laws (adopted by thirty-three states) are associated with 13 – 15 percent increases in violent crime over the span of a decade.[42] What is more, owing to increased severity of gunshot wounds, longitudinal analyses of trauma center admissions have shown that case fatality rates for gunshot wounds are increasing, even as they have been stable or decreasing for all other types of injury.[43]

It would be tempting to predict the impending doom likely to result from these macrostructural shifts in guns, but such predictions often fare poorly for both the predictor and the society upon which the prediction is leveled. Instead of considering how changes in weapon stock might serve to undo the great crime decline –

or worse yet, bring about a new homicide epidemic – social scientists might consider what might have been if the great decline in American violence had been accompanied by a corresponding great gun decline, or more modestly, a counterfactual world where the distribution of handgun calibers remained at 1990 levels. Braga and Cook's research provides a clue that America, by direct means of its policy choices, likely sacrificed a substantial share of Black life that would have otherwise been saved by the great crime decline.[44] These are questions worthy of future research. In the meantime, scholars and practitioners would do well to consider not just how these shifts are shaping outcomes, but how they are likely to shape underlying community processes and the efficacy of available policy options to prevent violence. For example, if it is indeed true that homicide is contagious,[45] then small changes in the probability of a shooting being lethal have dramatic consequences for the success of street outreach practitioners tasked with interrupting cycles of retaliatory violence.

Racial disadvantage produced by American gun policy. Alongside the regulation of militias, hunting laws, and carry laws, one of the most common categories of early American gun laws – laws that were in many ways more robust than those of the present day – were those that prohibited Native Americans, slaves, and Black free people from possessing guns.[46] Although a full treatment of the role of race in shaping American gun laws is beyond the scope of this section, it must be recognized that the historical record of Blacks' access to guns and their rights to self-defense has been marked by a profound current of doubt regarding African American humanity and citizenship. Over the last half-century, however, the racialized impacts of American gun regulation have been generated by ostensibly race-neutral policies. Yet race is inextricably woven into contemporary American gun policy's core fact: in a space of heated debate over the balance between collective security and individual gun rights, the achievement of gun policy has been reached by means of consensus that guns should be regulated through the criminal justice system.[47] Of course, one of the main insights of sociological scholarship of the last two decades is that the criminal justice system – particularly through policing strategies and incarceration – has become a key source of social stratification that has uniquely disadvantaged African Americans.[48] The policing and punishment of guns is a part of this story.[49]

By many accounts, the 1968 Gun Control Act (GCA) – the cornerstone of contemporary gun policy – was a relative of the civil rights legislation of its time. Because the law was born from civil rights concerns (spurred by the assassinations of Martin Luther King Jr. and Robert F. Kennedy) as well as general anxiety over urban crime, it can be understood within a broader historical analysis of federal crime legislation that purported to address racial inequality by means of crime control – with disastrous consequences for disadvantaged Black neighborhoods in urban America.[50] At its heart, the GCA "essentially protects strong-law states

from states that prefer to see guns only lightly regulated."[51] The law established the use of a gun in a felony as a federal crime, created new rules for federal gun dealers, expanded bans on interstate shipments of guns, and added to the disqualifying conditions for prohibited possessors.[52]

Although the GCA established much of the regulatory framework for a new American gun policy, the enforcement of these regulations was made possible by the 1968 Omnibus Crime Control and Safe Streets Act; this act created the modern ATF by mandating that the Alcohol and Tobacco Tax Division of the Treasury Department regulate gun sales and further established the Law Enforcement Assistance Administration (LEAA) to provide administrative support to the Johnson administration's nascent war on crime. Historian Elizabeth Hinton has argued that the creation of the LEAA represented two important turns in American social policy. First, it marked a shift in the Johnson administration away from great society programs and toward addressing urban social problems through policing and penal control. And second, the LEAA provided a historically novel mechanism by which the federal government could shape the agenda for local crime control and criminal justice operations.[53]

And in the new era of American gun regulation, an agenda needed setting. For the restructured ATF, a hybrid law enforcement and regulatory agency, the central question of the period – and one that endures to the present day – was where to focus its efforts. At the site of gun sales (regulation)? Or at the site of illegal gun use (law enforcement)? By the mid-1970s, the matter was settled: the federal government and its local partners should curb rising street crime in the segregated inner city by focusing on the enforcement of illegal gun possession. The Ford administration, via its 1975 "Operation Disarm the Criminal," aggressively pursued a place-based gun control strategy that openly targeted the inner city, selectively banning small concealable handguns in Black disadvantaged areas, while doubling the number of ATF agents engaged in urban street investigation. Although the ATF had already generated evidence of widespread gun trafficking from Southern states in major cities like New York, the focus on gun possession among urban Blacks was justified on two grounds. First, while the GCA established rules that barred gun sales to prohibited persons, enforcement was practically impossible due to the lack of a background check system; punishing possessors was simpler by contrast. And second, applying newfound federal law and resources to the problem of gun possession multiplied the effect of existing LEAA federal/local partnership efforts in the segregated inner city – especially career criminal programs – that facilitated crime control through the removal of repeat criminals. As Hinton has noted, one enduring feature of these 1970s place-based gun punishment efforts was that they generated statistical evidence for the prevalence of illegal gun carrying among disadvantaged young Black people, evidence that would be used as a warrant for future enforcement efforts.[54]

Just as the segregated inner city had been established as the site of gun punishment, repeated political attacks on the ATF beginning in the 1970s sought to ensure that the fledgling agency did not stray far beyond the ecological setting where "real crime" occurred. In a series of congressional hearings in the late 1970s and into the early 1980s, the ATF was repeatedly excoriated for its overreach – not into the segregated inner city – but into the business of predominantly White gun retailers and gun collectors, who were given the platform to testify to the ATF's excess in the investigation of illegal sales and the seizure of weapons. Summarizing the tenor and content of these hearings, Senator Orrin Hatch wrote in a 1982 report of the Senate Judiciary Committee:

> Based upon these hearings it is apparent that enforcement tactics made possible by current federal firearms laws are constitutionally, legally, and practically reprehensible. Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and high-risk groups to firearms, the overbreadth of the law has led to neglect of precisely this area of enforcement….To be sure, genuine criminals are sometimes prosecuted under other sections of the law. Yet, subsequent to these hearings, BATF stated that 55 percent of its gun law prosecutions overall involve persons with no record of a felony conviction, and a third involve citizens with no prior police contact at all. The Subcommittee received evidence that BATF has primarily devoted its firearms enforcement efforts to the apprehension, upon technical malum prohibitum charges, of individuals who lack all criminal intent and knowledge.[55]

The short-term result of such calls to adjust the site of ATF attention was the passage of the 1986 Firearm Owners Protection Act, which drastically reduced the oversight exposure of gun dealers, limited ATF inspections to one per dealer per year, permitted interstate gun purchases, and preemptively banned any federal registry of firearms, owners, or gun transfers.[56] But the long-term result of such sustained political pressure and increasing practical barriers to meaningful oversight has been a gradual shift in ATF's limited resources away from its regulatory function and toward its law enforcement function.[57] After decades of intentional underfunding, the contemporary ATF now inspects fewer than 10 percent of the more than 130,000 licensed gun dealers in a typical year (8 percent in 2017) and devotes less than one-fifth of its 5,100 person staff to such inspections.[58] In contrast, the agency's investigation capacity has proportionally increased in recent years (about 2,600 agents in 2017), but ATF agents have generally come to specialize in the suppression of urban violent crime, a trend that accelerated after the ATF moved from the Treasury to become part of the Department of Justice in 2002.[59] Due to staffing limitations, these ATF field agents typically partner with urban law enforcement to address violent street crime through multijurisdictional initiatives such as Project Exile, Project Safe Neighborhoods, and the Violent Crime Impact Team, all of which make extensive use of harsh federal penalties for end

users of guns. In many respects, then, the contemporary situation resembles that of the early 1970s, wherein federal resources allocated to the general regulation of guns have instead been disproportionately directed to enforcement efforts that result in the punishment of urban minority citizens.

In coarsened form, the central tendency of contemporary American gun policy has been the development of robust infrastructure for the punishment of illegal gun possession in the inner city while ensuring practical immunity for upstream gun sellers and manufacturers. This discussion has not even scratched the surface of the remarkable range of these protections enshrined in policy, including criminal liability (such as the Firearms Owners Protection Act of 1986), civil liability (such as the Protection of Lawful Commerce in Arms Act of 2005),[60] and even harms to firearm dealer reputation (such as the Tiahardt Amendments of 2003 and 2004).[61] Nor has sufficient attention been provided to the inequalities in gun punishment, a topic that I take on elsewhere.[62] Instead, I have sought to draw attention to the ecological underpinnings of contemporary American gun policy, emphasizing how this policy has been spatialized and racialized from its inception. Understood as a macrostructural force, contemporary American gun policy has thus played a historic role in broadening the ecological dissimilarity and inequality between predominantly Black and White residential contexts in ways that directly shape neighborhood violence. For segregated urban neighborhoods, the disadvantage resulting from concentrated violence and punishment is not an artifact of history but represents a legacy of inequality that has influenced the developmental trajectories of neighborhoods themselves.

In late 2016, *The Baltimore Sun* released "Shoot to Kill," a multipart long-form investigation of the lethality of violence in Baltimore. In highlighting changes in case fatality rates of shootings as well as technological shifts in commonly available handguns, the article revealed something important about the dynamics of the city's street violence at the ground level. But the main thrust of the piece was given away by its title. After nodding to the links between racial segregation and the spatial concentration of violence, the story's author reached the conclusion that "more shooters are aiming for the head."[63] Drawing from interviews with police chiefs, outreach workers, and young people, the article's overarching story was of a Baltimore that had produced more young men who were groomed to be better at violence, a cohort that had come to possess more murderous intent than its predecessors.

By one way of thinking, such an article represents little more than an extension of a long line of public and social scientific discourse that serves to frame the problem of concentrated violence as one stemming from racialized cultural pathology. The piece made little attempt to situate the shifts in Baltimore's violence in an ecological context and its attending structural inequality, the social organization

of its neighborhoods, and its historic legacies of disadvantage. But even if it had made such efforts, how would the author's proximate insights about the role of guns in violence be woven into an expansive narrative of intergenerational neighborhood inequality? How could gun policy fit into a story of neighborhood trajectories? Or is it possible that a neighborhood-based framing would have led to the discussion of guns being scrapped altogether? Before issuing condemnation, we as scholars might do well to ask ourselves what other ways of seeing have we been able to offer our publics.

Herein lies the challenge for contemporary neighborhood-level research into violence. As this essay has argued, the ecological approach – and its insistence on the primacy of context over people – is still vitally important to a social policy area that has consistently explained racial disparities in violence as a function of enduring traits or bad values. But a key step in the neighborhood approach's continued vitality and relevance is dependent on the creation of an analytic frame expansive enough to consider guns as objects of analysis and, indeed, as sources of structural inequality. Simply put, neighborhood violence research must find a way to see guns. Doing so would represent a crucial step toward solving one of the hardest unsolved problems facing both society and the science of it.

ABOUT THE AUTHOR

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ENDNOTES

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Developmental & Ecological Perspective on the Intergenerational Transmission of Trauma & Violence

Micere Keels

The focus of this essay is on understanding the development and maintenance of patterns of violent behavior for the purpose of identifying points of prevention and intervention. Close attention is paid to using person-centered language that does not conflate exhibiting violent behaviors with being a violent person. There is a meaningful perceptual difference between discussing the behaviors of a violent person versus discussing a person who engaged in violent behaviors: the former is more likely to be associated with immutable characteristics of a person and the latter is more likely to be associated with attempts at understanding social and contextual causes of the behavior.

When it comes to the intergenerational transmission of trauma and violence, the imagination of American policy-makers has largely remained stuck on what to do after victims become victimizers. This focus underutilizes the wealth of research detailing the host of risk and protective factors that determine the likelihood that any given child growing up with traumatic levels of adversity will become an adolescent with violent patterns of behavior.[1] The importance of shifting our gaze to the long lead-up to violent offending is highlighted by research showing that early experiences of victimization are a stronger predictor of later involvement in violence than is early involvement in violence.[2] From this vantage point, prevention can be conceptualized first as prevention of victimization and second as resilience supports for victims. To advance this framing, throughout this essay, I use the term *intergenerational transmission of trauma and violence* rather than *transmission of violence*. It is when the trauma of violence – cultural, economic, and interpersonal violence – in one generation goes unhealed that it is passed down to the next, in one form or another.[3]

Because the focus of this essay is on understanding the development and maintenance of violent behavior patterns for the purpose of identifying points of prevention and intervention, close attention is paid to using person-centered language that does not conflate exhibiting violent behaviors with being a violent

person. There is a meaningful perceptual difference between discussing the behaviors of a violent person and discussing a person who engaged in violent behaviors; the former is more likely to be associated with immutable characteristics of a person, and the latter is more likely to be associated with attempts at understanding social and contextual causes of the behavior.

The combination of chronic exposure to traumatic events and limited access to coping supports describes the life contexts of many children growing up in low-income families residing in low-income neighborhoods. Despite this, research consistently shows that the overwhelming majority of these children do not engage in outward displays of violence: only 20 to 30 percent of abused and neglected children engage in violent behaviors as adolescents.[4] Essentially, victims of abuse and neglect are at significantly elevated risk for engaging in violent behaviors, *but the overwhelming majority do not develop violent patterns of behavior as adolescents*.

Events capable of causing trauma span a wide range of situations including mental, physical, verbal, and sexual abuse; exposure to community and domestic violence; food and housing insecurity; and many other adverse life events. Trauma is not the event itself, but the psychological and emotional wounds that persist after the traumatic event has passed.[5] Almost everyone experiences at least one potentially traumatic event, and most of those events, instead of being traumatic, spur the development of new competencies. Stress becomes traumatic when it is accompanied with the loss of physical, psychological, and/or emotional safety in ways that overwhelm an individual's or community's ability to cope.[6] An individual or community becomes traumatized when those psychological and emotional wounds persist without adequate coping supports, or they are repeatedly exposed to new traumatic experiences without the time needed to recover from the previous trauma.

Especially for population health issues like interpersonal violence, racial and ethnic inequality in ecological context cannot be ignored. In 2016, approximately thirty-seven of every one hundred thousand Black men died from homicide; for White men, it was approximately four of every one hundred thousand.[7] This gaping disproportionality can only be understood through the lens of the intergenerational transmission of the trauma of the racial and ethnic violence on which the United States was founded.[8]

The complexity of the intergenerational transmission of trauma and violence is best understood by integrating developmental ecological theories of behavior with research that highlights racial and ethnic inequalities in ecological context.[9] Behavior is developmental and ecological, which means that violent behavior patterns observed in adolescence and young adulthood did not suddenly emerge but were built over time by ecological risk factors (society, community, school, family, and peer) and individual risk factors (psychological

and biological vulnerabilities).[10] These risk factors also identify numerous points across the life course for prevention and intervention.

This brief review highlights three developmental ecological theories that together aid our understanding of the processes that underlie the intergenerational transmission of trauma and violence.[11] First, social learning theory illustrates how behavior patterns, including violent behavior, are learned and maintained through modeling and reinforcement contingencies in the context of one's previous and current social interactions.[12] When applied to understanding the caregiving environment, children learn violence by experiencing it from their caregivers and/or witnessing it among the adults in their lives. Experiencing and witnessing these interactions teaches techniques for violence and teaches approval for the use of violence to manage one's emotional states and interpersonal interactions.[13]

Second, social information processing theories detail how the development of biased perceptions, such as the likelihood of attributing hostile intent to other's actions, increases the likelihood of exhibiting aggressive behaviors.[14] Children who have a history of experiencing and witnessing violence in their homes, community, and/or school may develop a social information processing bias toward interpreting ambiguous social interactions as threatening. They may also come to believe that interpersonal difficulties are best responded to with aggression.[15] Because this tendency toward aggressive responses alienates prosocial peers, these children tend to have peer groups that are concentrated with other hostile and aggressive individuals, thereby reinforcing violent patterns of behavior.[16]

Third, theories of differential neurobiological susceptibility to context detail how individual differences in sensitivity to one's developmental context increases the likelihood of emotional dysregulation and externalizing behaviors in response to chronic exposure to traumatic stressors.[17] Theoretical and empirical studies of differences in neurobiological responsivity to environmental context help us understand the large variation in youth resiliency to growing up in adverse environments.[18] Research on the biology of adversity provides concrete evidence that chronic activation of the neurobiological stress response system compromises the biological mechanisms responsible for adaptive coping and management of arousal.[19] What must not be overlooked in these theories is that it is the *interaction* of nature and nurture: a child who is vulnerable to developing antisocial behaviors in response to harsh parenting is also the child who is primed for developing prosocial behaviors in response to nurturing parenting.[20] Essentially, genetically determined neurobiological susceptibility to the environment is beneficial when the environment is supportive and exceptionally harmful when the environment is deleterious.

Many criminal justice questions about the intergenerational transmission of trauma and violence begin too late in the cycle by focusing on whether and how abuse and neglect from one's biological family leads

to adolescent perpetration of violence. We need to expand the lens to questioning the nested ecological systems that place children at risk for abuse and neglect.[21] Without this perspective, it is easy to overlook the fact that most of the factors that increase the likelihood that abused and neglected children will develop violent behavior patterns as adolescents are the same factors that increase the likelihood that parents will abuse and neglect their children.[22] The search for direct pathways from experiencing abuse to perpetuating violence also runs contrary to research showing that experiencing neglect appears to be as much of a pathway to adolescent violence as experiencing abuse, suggesting that the pathways are complex and contextual.[23]

The intergenerational transmission of trauma and violence is determined by the accumulation of risk factors across one's life course coupled with the lack of protective factors. This accumulation of exposure to violence and other traumatic experiences is more than additive: it has an exponential relationship with the likelihood of poor developmental outcomes.[24] The effects of exposure to violent, traumatic, and adverse life experiences are also not independent from each other. For example, the effect of exposure to chronic housing and food insecurity and chronic community violence are particularly damaging for the emotional and behavioral development of children who are also growing up in homes with "impaired caregiving system[s]."[25] Especially for children, trauma occurs when high levels of toxic stress are experienced "in the absence of the buffering protection of a supportive adult relationship."[26] Supportive caregivers are pivotal in determining whether potentially traumatic experiences will instead be tolerable.

The inconvenient truth about preventing adolescent violence is that children who experience abuse and neglect early in their childhood are significantly more likely to experience *polyvictimization*: repeated subsequent victimization and trauma throughout their life course.[27] Polyvictimization creates diverging developmental trajectories: some children's developmental trajectories are repeatedly negatively affected by needing to recover from traumatic life experiences, while other children's developmental trajectories are advantaged by having to cope with only a limited number of traumatic events that are discrete from their otherwise developmentally supportive environment. Exposure to these divergent development trajectories is not racially and ethnically neutral. Black, Indigenous, and Latinx children have a significantly higher likelihood of experiencing chronic trauma without coping supports, and White children have a significantly higher likelihood of experiencing a limited number of traumatic events coupled with coping supports.[28]

The risk and protective factors embedded in the nested ecological system in which children live are the greatest early opportunities of both prevention before violent behaviors emerge and intervention at the earliest sign of violent behaviors.[29] This nested set of ecological contexts begins with formal and informal social policies that shape all other ecological contexts. Formal and informal social

policies are large determinants of who gets access to what resources and the extent to which there is a network of preventative social supports.

The second ecological context is the community and the opportunities and constraints afforded by the community in which the family resides, as well as the ability to escape high-risk communities. Community contexts have a large effect on exacerbating or mitigating both the likelihood of exposure to abuse and neglect and the extent to which abuse and neglect will lead to antisocial adolescent behavior. The third ecological context is the schools to which children have access. This is often considered part of the community but is important to highlight separately when considering child and adolescent outcomes. Schools are societally sanctioned and funded contexts that can either reinforce existing oppressions and be sites of retraumatization or provide safe contexts and opportunities for vulnerable children to break intergenerational family trauma and broader oppressions.

The fourth ecological context and the one that has the strongest direct influence on children and youth is the immediate and extended family caregiving environment in which the child develops. Although this nested set of ecological contexts ends with the child's direct exposure to abuse and neglect at home, what the ecological perspective highlights is that the *nesting* of ecological contexts combines to differentially place whole communities of children at risk for abuse and neglect.[30]

T he negative effects of neurobiological sensitivity to one's developmental environment can occur through two stress vulnerability pathways: genetic neurobiological sensitivity to ecological context and compromised neurobiological functioning as a result of chronic trauma. Through research on the biology of adversity, we are beginning to understand how violent behaviors can become a neurobiologically triggered impulsive reaction to emotional agitation that is engaged before the rational decision-making areas of the brain can process the experience and suppress action.

The first pathway, genetic neurobiological sensitivity to ecological context, is based on theory and evidence showing that some children are born with higher levels of sensitivity to both the helpful and harmful aspects of the contexts in which they live.[31] In developmentally adverse home and community environments, sensitive children's exaggerated neurobiological stress arousal systems result in maladaptive cognitive, emotional, and behavioral functioning that over time solidifies into anxious, impulsive, and externalizing patterns of behavior.[32]

The second pathway, compromised neurobiological functioning of the stress response system, begins after birth and is initially caused by chronic exposure to traumatic stressors that becomes biologically embedded as a changed neurobiological sensitivity to one's environment.[33] These neurobiological changes include heightened attentional vigilance and bias to threat and compromised ability to experience, tolerate, and manage emotional arousal.[34] These are not determin-

istic outcomes. Because our neurobiological systems are continuously developing in response to input, children who have been neurobiologically "changed" in response to their developing environment can be supported in "resetting" their neurobiological stress response systems to enable more adaptive coping.[35]

O nly by integrating a range of developmental theories and in relation to the ecological context can something as complex as violent patterns of behavior be understood, especially if the goal is identifying points of prevention and intervention.[36] Reviews of developmentally based interventions point to several time periods and contexts across an individual's life course, from the prenatal period to late adolescence, for evidence-based interventions that decrease the likelihood that children placed at risk will develop violent patterns of behavior as adolescents. A few examples of those time periods and categories of intervention are listed below.

Prenatal months. There are numerous known targets for prevention long before children are placed at risk for abuse and neglect. This includes parents' need for healing from their own abuse and neglect to ensure they have the psychological and emotional capacities to engage in supportive parenting as well as ensuring parents have the socioeconomic and community resources that are associated with reducing the likelihood of abuse and neglect.

Postnatal months. Prevention efforts can continue immediately after birth for families with known risk factors. These interventions can be delivered through proven home visiting programs that target parent-infant attachment and parent-infant stress regulation.

Early childhood. For children who have experienced abuse and neglect, parent development interventions can be delivered for parents and foster parents to ensure that children's home environments improve and that any initial learning of violent behaviors is mitigated. Effective interventions can be delivered in as few as ten to twelve weeks.

School-going years. The school-going years are an opportune time for direct teaching of the social and emotional skills and the problem-solving and decision-making skills that have been shown to reduce the likelihood that children who have experienced abuse and neglect will be rejected by prosocial peers. This peer rejection increases the likelihood that abused and neglected children's social interactions become concentrated with children exhibiting aggressive and deviant behaviors, which escalates and reinforces those behaviors.

The school-going years are also the best opportunity for identifying and accessing children placed at risk and delivering mental health supports to help

them cope with the cognitive and emotional effects of abuse, neglect, and other traumatic stressors.

First contact with the juvenile justice system. If the goal of the juvenile justice system is desistance, the focus should be on anything but detention. This could include implementing evidence-based interventions such as community supervision and apprenticeship diversion programs, coupled with interventions targeting psychological and emotional health and adaptive coping skills.

American society has by decision and default largely deferred paying the costs of supporting children who have experienced abuse and neglect until those abused and neglected children enter the juvenile and eventually adult criminal justice system. National estimates of the direct cost of incarcerating youth are about $401 per day. There are also broader juvenile justice system costs and collateral individual and social costs that result from victimization experienced during confinement that are much higher than the direct cost of confinement.[37] In contrast, evaluations routinely show positive financial returns to investing in preventative interventions.[38] However, the current system of family, community, and school interventions repeatedly fails most children placed at risk during the years when prevention and intervention would be most effective. Instead, American society pours money and resources into punishment when victims become perpetrators: "aggression, substance abuse, and other symptoms targeted as problematic behaviors by the legal system are often coping strategies to increase safety and security in individuals with histories of trauma."[39]

The intergenerational transmission of historical trauma is essential to understanding contemporary racial and ethnic group differences in both victimization and the perpetration of violence. Historical trauma includes three successive phases: 1) a dominant group perpetrating mass traumas on a subgroup of the population, resulting in cultural, familial, societal, and economic devastation; 2) the initial generations that directly experienced these traumas develop negative biological, cultural, psychological, and behavioral symptoms; and 3) unhealed traumas are conveyed to successive generations through a host of societal, contextual, interpersonal, and biological processes.[40]

Given the critical role of the family caregiving environment, one highly relevant example of the intergenerational transmission of historical trauma is the extent to which Black children are not raised by their biological parents, children for whom abuse and neglect do not necessarily cease once they are placed in another home.[41] In 2016, approximately 23 percent of children in foster care were Black, though Black children made up only 14 percent of the total child population; in comparison, 44 percent of children in foster care were White, while White children make up 50 percent of the child population.[42] This racial and ethnic dispar-

ity is directly due to the ways that slavery created and necessitated the insecure parent-child attachment that has been passed down through generations.[43] It also owes to the ways that Jim Crow, segregation, mass incarceration, and other social policies have made it disproportionately difficult for Black families to create the conditions that are conducive to secure and supportive parenting.[44]

Below is an incomplete accounting of the perpetuation of historical trauma through racial and ethnic disparities in present-day ecological factors that affect the likelihood that an adolescent will engage in violent behaviors.[45]

Historical and contemporary social policies and practices
- Colonization, slavery, Jim Crow
- Housing segregation, economic discrimination, disproportionate incarceration
- Popularization of negative stereotypes through mainstream media
- Disrupted cultural transmission of history and heritage

Community
- Exposure to daily neighborhood activities and social interactions that increase risk
- Experiencing and/or witnessing chronic violence and assault
- Unconcealed alcohol and drug abuse
- Low levels of social capital and social cohesion
- Low quality of public institutions, from school to health care, that promote healthy development and buffer against abuse and neglect at home

School
- High concentration of socioeconomically disadvantaged peers
- Lower per-pupil spending, larger class sizes, and less experienced teachers
- Increased behavioral sanctioning with harsh and exclusionary discipline
- Lower levels of safety at school

Family
- Poverty and associated housing and food insecurity
- Alcohol and other substance abuse
- Parental incarceration
- Low or lack of emotional bonding among family members
- Chronic or episodic family violence
- Child abuse and neglect

The negative effects of historical trauma are maintained through state sponsored (that is, institutional) retraumatization through the foster care, juvenile justice, educational, and other state systems. As noted above, one

factor associated with whether abused and neglected children will go on to develop violent patterns of behavior is the extent to which they experience continued victimization and other traumatic stressors throughout childhood and adolescence. Institutional retraumatization occurs in juvenile justice and educational settings when those institutions use punitive and coercive sanctions rather than supportive interventions in response to children exhibiting behavioral dysregulation that is the direct result of their inability to cope with traumatic life experiences.[46] Holding the state accountable does not absolve communities and families from the responsibility of contributing to the healthy development of children, but state institutions must be resourced and organized in ways that enable them to meet children where they are.

According to the National Survey of Children's Exposure to Violence, about four million children in the United States are exposed to violence each year, and about half of those children experience lasting trauma.[47] National studies estimate that over 70 percent of children in need of mental health treatment do not receive services, and this is especially true of children in economically disadvantaged families.[48] Because of the self-regulation demands, schools are one of the primary places where children's mental health challenges become detectable, and schools have, by default, become mental health assessment and service delivery institutions.[49] However, without a model for meeting this need, when poor mental health is displayed in the form of challenging classroom behaviors, children are often responded to with practices that retraumatize and decrease, rather than increase, the likelihood of school success.[50] When schools fail, dysregulated children show up in the juvenile justice system, and as numerous studies estimate, mental illness is two to three times more prevalent among incarcerated juveniles.[51]

How we think about and respond to children and youth involved in gangs should be intimately connected with our understanding of early and continued trauma throughout one's development; however, it is often dismissed as immaterial. Gang membership peaks between the ages of fourteen and fifteen and is disproportionately high among Black and Latinx youth coping with trauma and adversity.[52] These are the ages when adult social control is low *and* youth decision-making capacities are still developing. Additionally, the neurobiological underpinnings of planful decision-making among the youth placed at highest risk for gang membership has often been negatively affected by exposure to abuse, neglect, and other traumas.[53]

There are three parts to the connection between trauma and gang involvement: 1) precursor traumatic experiences that increase the likelihood of gang involvement; 2) exposure to traumatic violence during the period of gang involvement; and 3) lingering trauma that is a consequence of both the precursors and gang involvement.[54]

Traumatic precursors that have been associated with an increased likelihood of gang membership among youth growing up in adverse environments
- Physical and sexual victimization at home and/or in the community
- Post-traumatic dissociation and emotional numbing
- Chronic stress of poverty and associated housing and food insecurity
- Self-medicating through substance abuse

Traumatic experiences during a youth's gang-involved years
- Violent victimization by own and rival gang members
- Witnessing of traumatic violence
- Perpetration induced trauma from feeling compelled/forced to commit violent acts that violate one's personal moral code

Traumatic consequences that persist after desisting in gang involvement
- Biased perception of the world as dangerous and threatening
- Depression, general anxiety, and annihilation anxiety
- Self-medicating through substance abuse
- Inability to engage in the adaptive coping needed to establish economic self-sufficiency

In the United States, the connections between victimization, trauma, and gang membership are overlooked in favor of labeling children and youth involved in gangs as criminals and reacting to their behaviors according to that criminal status. In sharp contrast, when similar outcomes are observed among children and youth recruited into armed resistance groups in other countries, we call them child soldiers and respond to them based on that victimization status.[55] Researchers suggest that this difference in perception is partly due to the belief that gang membership is motivated by individual factors such as financial gain, social status, and social inclusion.[56] This belies the reality that gang membership is often based on an attempt to obtain protection from victimization.[57] The American criminal justice system insists on ignoring the ways that violent patterns of behavior are learned and maintained by the ecological context in which the individual lives and is especially blind to racial and ethnic differences in ecological context.

Nowhere is this more evident than in the divergent approaches to intervention based on the perception of child soldiers as victims and youth gang members as criminals. There is clear American advocacy for the reintegration and rehabilitation of international child soldiers. This includes recognition of the fact that if child soldiers are to be successfully rehabilitated, there needs to be large-scale disarmament and collective healing to demilitarize the environment and create a sense of safety. This is coupled with psychosocial interventions to successfully reintegrate them into family and community life and mental health interventions to aid them in coping with the lingering symptoms of post-traumatic stress

disorder.[58] In contrast, little is done to aid former youth gang members in the United States. They are left to themselves to identify the need for assistance and seek out coping supports. As developmental psychologist Patricia Kerig and colleagues have noted, "for [American] youth growing up in violent and gun-ridden inner-city environments, giving up gang life might seem to be the equivalent of being individually disarmed in a still heavily militarized zone."[59]

Exposure to assault and gun violence is an ever-present threat in too many economically disadvantaged and mostly minority neighborhoods, and in the wake of youth assaults, shootings, and homicides are traumatized siblings, friends, and schoolmates.[60] Predictably, many of these children arrive at school displaying varying levels of dysregulation. However, very few enter schools that teach them how to regulate the complex cognitive, emotional, and behavioral dysregulation caused by trauma. Many schools instead respond with punitive and exclusionary discipline when these students are unable to meet behavioral expectations.

Because chronic exposure to traumatic stressors compromises children's abilities to regulate their emotions and behaviors, they often react to even the smallest classroom frustrations with defiant, escalating, or avoidant behaviors. Punitive and exclusionary disciplines are often mistakenly thought of as consequences that will motivate behavior change; however, they have been proven ineffective largely because they do not teach new behavioral competencies and have collateral damages.[61] Instead, such discipline increases the likelihood of academic failure, grade retention, and dropping out as students often miss important educational opportunities and become stigmatized by staff and peers. Additionally, schools with higher levels of punitive and exclusionary discipline have a more negative school climate that has been shown to harm the educational experiences of all the students in the building.[62]

Given the many negative effects of punitive and exclusionary discipline, it is particularly disturbing that it is primarily used for perceived insubordination and disrespect rather than being used as intended: for behaviors that threaten the safety of peers and staff.[63] Furthermore, because racially and ethnically marginalized students, and Black students in particular, are subject to greater punishment than their White peers, even though evidence shows that Black students do not misbehave at higher rates, school disciplinary systems compound existing societal oppressions.[64] As many researchers and policy-makers conclude, punitive and exclusionary discipline are "disproportionately severe and uniquely far-reaching" for Black and Latinx students.[65]

Much has been written to link punitive and exclusionary discipline with the school-to-prison pipeline. The strongest manifestation of this is the presence of police offices in schools along with other authoritarian social control policies such

as random locker and bag searches and metal detectors.[66] These practices are primarily in schools attended by racially and ethnically marginalized urban students and work against their developing a strong sense of school belonging because they foster antagonistic relationships between and among students and staff, and incite emotional distress and lowered self-esteem.[67]

When police are in schools, student misbehavior becomes criminalized, and discipline problems that were previously handled by school staff are delegated to the school police officer.[68] This creates a pathway from the school to the juvenile justice system, rather than a pathway that directs students exhibiting dysregulated behaviors to the social and emotional health counselor and then back into the classroom. This alternative pathway is trauma-responsive discipline, which focuses on building students' capacities to manage dysregulated behaviors, replace them with regulated behaviors, and ultimately cultivate resiliency.[69]

I have focused on traumas that are passed from one generation to the next and from one victim to the next via interpersonal violence: one individual or group of individuals doing harm to another. This means that *relational damage is created that can only be healed through relational repair*. Once we understand that the behaviors of adolescents who are violent offenders were developed and are maintained through the accumulation of interpersonal traumas, it becomes clear that *the criminal justice system, a system designed to inflict relational harm by removing the individual from their family and community, cannot be the primary source of intervention*.

As American society is waking up to the need to hold police officers and the criminal justice system accountable for their roles in state-sponsored violence, we must similarly hold all our public institutions accountable for state-sponsored retraumatization of children. Because of their access to and time with children, schools are uniquely positioned to provide children placed at risk for developing violent patterns of behavior with preventative and rehabilitative interventions.[70] From kindergarten to twelfth grade, a student spends more than fifteen thousand hours in school. How those hours are used has a significant effect on breaking versus reinforcing the intergenerational transmission of trauma and violence.

Schools, our largest state sponsored socializing agent, must change if they are to be transformative in the lives of children coping with abuse and neglect at home and violence in their neighborhoods and social networks. To this end, there are new frameworks and models for schools that intentionally build resilience: the capacity to engage in adaptive coping that enables one to be functional in the short and long term despite acute or chronic experiences of trauma and adversity.[71] Schools can intervene for effective violence prevention in two critical areas: 1) decreased exposure to risk factors such as community violence and contact with antisocial peers by increasing attendance and sense of school belonging and 2) increased exposure to protective factors such as strengthening emotional and

behavioral regulation and the intentional development of planful decision-making through the provision of psychological interventions at school.[72]

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The Effects of Violence on Communities: The Violence Matrix as a Tool for Advancing More Just Policies

Beth E. Richie

In this essay, I illustrate how discussions of the effects of violence on communities are enhanced by the use of a critical framework that links various microvariables with macro-institutional processes. Drawing upon my work on the issue of violent victimization toward African American women and how conventional justice policies have failed to bring effective remedy in situations of extreme danger and degradation, I argue that a broader conceptual framework is required to fully understand the profound and persistent impact that violence has on individuals embedded in communities that are experiencing the most adverse social injustices. I use my work as a case in point to illustrate how complex community dynamics, ineffective institutional responses, and broader societal forces of systemic violence intersect to further the impact of individual victimization. In the end, I argue that understanding the impact of all forms of violence would be better served by a more intersectional and critical interdisciplinary framework.

Rigorous interdisciplinary scholarship, public policy analyses, and the most conscientious popular discourse on the impact of violence point to the deleterious effects that violence has on both individual health and safety and community well-being. Comprehensive justice policy research on topics ranging from gun violence to intimate abuse support the premise that the physical injury, psychological distress, and fear that are typically associated with individual victimization are directly linked to subsequent social isolation, economic instability, erosion of neighborhood networks, group alienation, and mistrust of justice and other institutions. This literature also points to the ways that structural inequality, persistent disadvantages, and structural abandonment are some of the root causes of microlevel violent interactions and at the same time influence how effective macro-level justice policies are at responding to or preventing violent victimization.[1]

The most exciting of these analyses have emerged from the subfields of feminist criminology, critical race theory, critical criminology, sociolegal theory, and other social science research that take seriously questions of race and culture, gen-

der and sexuality, ethnic identity and class position, exploring with great interest how these factors influence the prevailing questions upon which practitioners in our field base their practice; questions such as how to increase access to justice, the role of punishment in desistance, the factors that lead to a disproportionate impact of institutional practices, and the perceptions about, and possibilities for, violence prevention and abolitionist practices.[2] Discussions about the future of justice policy would be well served by attending to this growing literature and the critical frameworks that are advanced from within it.

In this essay, I will attempt to illustrate how discussions of the effects of violence on communities are enhanced by the use of a critical framework that links various microvariables with macro-institutional processes. Drawing upon my work on the issue of violent victimization toward African American women and how conventional justice policies have failed to bring effective remedy in situations of extreme danger and degradation, I argue that a broader conceptual framework is required to fully understand the profound and persistent impact that violence has on individuals embedded in communities that are experiencing the most adverse social injustices. I use my work as a case in point to illustrate how complex community dynamics, ineffective institutional responses, and broader societal forces of systemic violence intersect to further the impact of individual victimization. In the end, I argue that understanding the impact of all forms of violence would be better served by a more intersectional and critical interdisciplinary framework.

Following a review of the data on violent victimization against African American women, I describe the *violence matrix*, a conceptual framework that I developed from analyzing data from several research projects on the topic.[3] I do so as a way to make concrete my earlier claim: that the effect of violence on communities must be understood from a critical intersectional framework. That is, my central argument here is an epistemological one, suggesting that in the future, the most effective and indeed "just" policies in response to violence necessitate the development of critical far-reaching systemic analysis and social change at multiple levels.

V iolent victimization has been established as a major problem in contemporary society, resulting in long-term physical, social, emotional, and economic consequences for people of different racial/ethnic, class, religious, regional, and age groups and identities.[4] However, like most social problems, the impact is not equally felt across all subgroups, and even though the rates may be similar, the consequences of violent victimization follow other patterns of social inequality and disproportionately affect racial/ethnic minority groups.[5] When impact and consequences are taken into account, it becomes clear that African American women fare among the worst, in part because of the ways that individual experiences are impacted by negative institutional processes.[6]

While qualitative data suggest that there is a link between social position in a racial hierarchy and Black women's subsequent vulnerability to violence, the specific mechanism of that relationship has yet to be described or tested.[7] However, despite new research that examines the effects of race/ethnicity and gender in combination, there has been a lack of systematic analysis of the intersection of race and gender with a specific focus on the situational factors, cultural dynamics, and neighborhood variables that lead to higher rates and/or more problematic outcomes of violent victimization in the lives of African American women.[8]

These unanswered questions led to the years of fieldwork that informed the development of the violence matrix. I was interested in broadening the understanding of violence by analyzing the contextual and situational factors that correlate with multiple forms of violent victimization for African American women, incorporating the racial and community dynamics that influence their experiences. I was also concerned about the ways that state-sanctioned violence and systemic oppression contributed to the experience and impact of intimate partner abuse and looked for a way to incorporate "ordinary violence" and "the injustices of everyday life" into an analytic model. I offer this conceptual approach as a potential epistemological model because it proposes to enhance the scientific understanding of violent victimization of African American women by looking at gender and race, micro and macro, individual, community, and societal issues in the same analysis, whereas in most other research, rates of victimization are described either by gender or race, and typically not from within the contexts of household, neighborhood, and society.

More specifically, domestic violence, sexual abuse, and other forms of violence typically understood to be associated with household or familiar relationships are usually studied as a separate phenomenon constituting a gender violence subfield distinct from other forms of victimization that are captured in more general crime statistics.[9] The more general research that documents crimes of assault, homicide, and so on does not typically isolate analyses of the nature of the relationship between the perpetrator and the victim, even if it is noted. As a result, gender violence and other forms of violent victimization against women are studied separately, and their causes and consequences, the intervention and prevention strategies, and the needs for policy change are not linked analytically to each other. This leaves unexamined the significant influence of situational factors (such as intimacy) or contextual factors (such as negative images of African American women) on victimization, and on violence more generally.

P rior to describing the violence matrix, readers may benefit from a brief overview of the problems that it was designed to account for. African American women experience disproportionate impacts of violent victimization.[10] As the following review of the literature shows, the rates are high and

the consequences are severe, firmly establishing the need to focus on this vulnerable group. The goal is not to suggest it is the only population group at risk or that racial/ethnic identity has a causal influence on victimization, but rather to look specifically at how race/ethnicity and gender interact to create significant disproportionality in rates of, perceptions about, and consequences of violence, and to develop an instrument to collect data that can be analyzed conceptually and discussed in terms of contextual particularities.

Assault. According to the Bureau of Justice Statistics, in 2005, Black women reported experiencing violent victimization at a rate of 25 per 1,000 persons aged twelve years or older.[11] In an earlier report, Black women reported experiencing simple assaults at 28.8 per 1,000 persons and serious violent crimes at 22.5 per 1,000 persons, twelve years or older. Black women are also more likely (53 percent) to report violent victimization to the police than their White or male counterparts.[12] Situational factors such as income, urban versus suburban residence, perception of street gang membership, and presence of a weapon influence Black women's violent victimization. Other variables are known to complicate this disproportionality, most notably income, age, neighborhood density, and other crimes in the community like gang-related events. However, few studies note or analyze their covariance. Additionally, reports after 2007 detail statistics on violent victimization for race or gender, but not race and gender; therefore, numbers regarding Black women's experiences are largely unknown.

Intimate partner violence. Intimate partner violence is a significant and persistent social problem with serious consequences for individual women, their families, and society as a whole.[13] The 1996 National Violence Against Women Survey suggested that 1.5 million women in the United States were physically assaulted by an intimate partner each year, while other studies provide much higher estimates.[14] For example, the Department of Justice estimates that 5.3 million incidents of violence against a current or former spouse or girlfriend occur annually. Estimates of violence against women in same sex partnerships indicate a similar rate of victimization.[15]

According to most national studies, African American women are disproportionately represented in the data on physical violence against intimate partners.[16] In the Violence Against Women Survey, 25 percent of Black women had experienced abuse from their intimate partner, including "physical violence, sexual violence, threats of violence, economic exploitation, confinement and isolation from social activities, stalking, property destruction, burglary, theft, and homicide." Rates of severe battering help to spotlight the disproportionate impact of direct physical assaults on Black women by intimate partners: homicide by an intimate partner is the second-leading cause of death for Black women between the ages of fifteen and twenty-five.[17] Black women are killed by a spouse at a rate twice that of White women. However, when the intimate partner is a boyfriend or girlfriend,

this statistic increases to four times the rate of their White counterparts.[18] While the numbers are convincing, they are typically not embedded in an understanding of how situational factors like relationship history, religiosity, or availability of services impact these rates.[19]

Sexual victimization. When race is considered a variable in some community samples, 7 to 30 percent of all Black women report having been raped as adults, and 14 percent report sexual abuse during their childhood.[20] This unusually wide range results from differences in definitions and sampling methods. However, as is true in most research on sexual victimization, it is widely accepted that rape, when self-reported, is underreported, and that Black women tend to underutilize crisis intervention and other supportive services that collect data.[21] Even though Black women from all segments of the African American community experience sexual violence, the pattern of vulnerability to rape and sexual assault mirrors that of direct physical assault by intimate partners. The data show that Black women from low-income communities, those with substance abuse problems or mental health concerns, and those in otherwise compromised social positions are most vulnerable to sexual violence from their intimate partners.[22] Not only is the incidence of rape higher, but a review of the qualitative research on Black women's experiences of rape also suggests that Black women are assaulted in more brutal and degrading ways than other women.[23] Weapons or objects are more often used, so Black women's injuries are typically worse than those of other groups of women. Black women are more likely to be raped repeatedly and to experience assaults that involve multiple perpetrators.[24]

Beyond the physical, and sometimes lethal, consequences, the psychological literature documents the very serious mental health impact of sexual assault by intimate partners. For instance, 31 percent of all rape victims develop rape-related post-traumatic stress disorder.[25] Rape victims are three times more likely than nonvictims to experience a major depressive episode in their lives, and they attempt suicide at a rate thirteen times higher than nonvictims. Women who have been raped by a member of their household are ten times more likely to abuse illegal substances or alcohol than women who have not been raped. Black women experience the trauma of sexual abuse and aggression from their intimate partners in particular ways, as studies conducted by psychologists Victoria Banyard, Sandra Graham-Bermann, Carolyn West, and others have discussed.[26] It is also important to note the extent to which Black women are exposed to or coerced into participating in sexually exploitative intimate relationships with older men and men who violate commitments of fidelity by having multiple sexual partners.[27] Far from infrequent or benign, it can be hypothesized that these experiences serve to socialize young women into relationships characterized by unequal power, and they normalize subservient gender roles for women, although very little empirical research has been done to make this analytical case.

Community harassment. In addition to direct physical and sexual assaults, Black women experience a disproportionate number of unwanted comments, uninvited physical advances, and undesired exposure to pornography in their communities. Almost 75 percent of Black women sampled report some form of sexual harassment in their lifetime, including being forced to live in, work in, attend school in, and even worship in degrading, dangerous, and hostile environments, where the threat of rape, public humiliation, and embarrassment is a defining aspect of their social environment.[28] They also experience trauma as a result of witnessing violence in their communities.[29]

For some women, this sexual harassment escalates to rape. Even when it does not, community harassment creates an environment of fear, apprehension, shame, and anxiety that can be linked to women's vulnerability to violent victimization. It is important to understand this link because herein lie some of the most significant situational and contextual factors, like the diminished use of support services and reduced social capital on the part of African American women.

Social disenfranchisement. Less well-documented or quantified in the criminological data is the disproportionate harm caused to African American women because of the ways that violent victimization is linked to social disenfranchisement and the discrimination they face in the social sphere. Included here is what other researchers have called coercive control or structural violence.[30] The notion of social disenfranchisement goes beyond emotional abuse and psychological manipulation to include the regulation of emotional and social life in the private sphere in ways that are consistent with normative values about gender, race, and class.[31] These aspects of violence against African American women in particular are conceptualized in the violence matrix, and include being disrespected by microracial slurs from community members and agency officials, and having their experience of violent victimization denied by community leaders.[32] African American women are also disproportionately likely to be poor, rely on public services like welfare, and be under the control of state institutions like prisons, which means that they face discrimination and degradation in these settings at higher rates.[33] These situational and contextual factors that cause harm are indirectly related to violent victimization and must be considered part of the environment that disadvantages African American women. From this vantage point, it could be argued that when women experience disadvantages associated with racial and ethnic discrimination, dangerous and degrading situations, and social disenfranchisement, they are more at risk of victimization.[34]

The violence matrix (Table 1) is informed by the data reviewed above and by my interest in bringing a critical feminist criminological approach to the understanding of violent victimization of African American women. It asserts that intimate partner violence is worsened by some of the contextual

Table 1
The Violence Matrix

The Violence Matrix	Physical Assault	Sexual Assault	Social Disenfranchisement
Intimate Households	1. Direct physical assaults by intimate partners or household members, victim retaliation	2. Sexual aggression by intimate partners or household members	3. Emotional abuse and manipulation by intimate partners or household members, forced use of drugs and alcohol, isolation, economic abuse
Community	4. Assaults by neighbors, lack of bystander intervention, availability of weapons	5. Sexual harassment, acquaintance rape, gang rape, trafficking into the sex industry	6. Degrading comments, hostile neighborhood conditions, hostile or unresponsive school and work environments, residential segregation, lack of social capital, threat of violence
Social Sphere	7. Stranger assault, state violence (such as police), lack of gun control policies	8. Stranger rape, coerced sterilization, unwanted exposure to pornography	9. Negative media images, denial of significance of victimization, degrading encounters with religious institutions and public agencies, victim blaming, lack of affordable housing, lack of employment and health care, mistrust of public agencies, poverty

variables and situational dynamics in their households, communities, and broader social sphere, and vice versa. The tool is not intended to infer causation, but rather to broaden the understanding of the factors that influence violence in order to create justice policy in the future.

The violence matrix conceptualizes the forms of violent victimization that women experience as fitting into three overlapping categories, reflecting a sense that the forms are co-constituted and exist within a larger context and in multi-

ple arenas:[35] 1) direct physical assault against women; 2) sexual aggressions that range from harassment to rape; and 3) the emotional and structural dimensions of social disenfranchisement that characterize the lives of some African American women and leave them vulnerable to abuse. Embedded in the discussion of social disenfranchisement are issues related to social inequality, systemic abuse, and state violence.

Consistent with ecological models of other social problems, the violence matrix shows that various forms of violent victimization happen in several contexts and are influenced by several variables.[36] First, violence occurs within households, including abuse from intimate partners as well as other family members and co-residents. Dynamics associated with household composition, relationship history, and patterns of household functioning can be isolated for consideration in this context. The second sphere is the community in which women live: the neighborhoods, schools, workplaces, and public spaces where women routinely interact with peers and other people. This context has both a geographic and a cultural meaning. Community, in this context, is where women share a sense of belonging and physical space. An analysis of the community context focuses attention on issues like neighborhood social class, degree of social cohesion, and presence or absence of social services. The third is the social sphere, where legal processes, institutional policies, ineffective justice policies, and the nature of social conditions (such as population density, neighborhood disorder, patterns of incarceration, and other macrovariables) create conditions that cause harm to women and other victims of violence.[37] The harm caused by victimization in this context happens either through passive victimization (as in the case of bystanders not responding to calls for help because of the low priority put on women's safety) or active aggression (as in police use of excessive force in certain neighborhoods) that create structural disadvantage.[38]

The analytic advantage of using a tool like the violence matrix to explain violent victimization is that it offers a way to move beyond statistical analyses of disproportionality to focus on a more nuanced understanding of the relationship between contextual factors that disadvantage African American women and the situational variables leading to violent victimization. Two important features of this conceptual framework allow for this. First, the violence matrix theoretical model considers both the forms and the contexts as dialectical and reinforcing (as opposed to discrete) categories of experience. Boundaries overlap, relationships shift over time, and situations change. It helps to show how gender violence and other forms of violent victimization intersect and reinforce each other. For example, sexual abuse has a physical component, community members move in and become intimate partners, and sexual harassment is sometimes a part of how institutions respond to victims. This theoretical model examines the simultaneity of forms and contexts, a feature that most paradigms do not have.[39] The possibility that gender violence (like marital rape) could be correlated with violence at

the community level (like assault by a neighbor) holds important potential for a deeper understanding of violent victimization of vulnerable groups and therefore informs the future of justice policy.

A second distinguishing feature of this conceptual model is that it broadens the discussion about violent victimization beyond direct assaults within the household (Table 1, cells 1 and 2) and sexual assaults by acquaintances and strangers (cells 5 and 8), which are the focus of the majority of the research on violence against women. It includes social disenfranchisement as a form of violence and social sphere as a context (cells 3, 6, 7, 8, and 9). In this way, the violence matrix focuses specific attention on contextual and situational vulnerabilities in addition to the physical ones. More generally, this advantages research and justice praxis. This approach responds to the entrenched problem of gender violence as it relates to issues of structural racism and other forms of systematic advantage. Models like this therefore hold the potential to inform justice policy that is more comprehensive, more effective, and, ultimately, more "just."

My hope is that the violence matrix will deepen the understanding of the specific problem of violence in the lives of Black women and serve as a model for intersectional analyses of other groups and their experiences of violence. I hope it points to the utility of moving beyond quantitative studies and single-dimension qualitative analyses of the impact of violence and instead encourages designing conceptual models that consider root causes and the ways that systemic factors complicate its impact. This would offer an opportunity for a deeper discussion around violence policy, one that would include attention to individual harm, and how it is created by, reinforced by, or worsened by structural forms of violence. It would bring neighborhood dynamics into the analytical framework and engage issues of improving community efficacy and reversing structural abandonment in considerations of potential options. Questions about where strategies of community development and how the politics of prison abolition might appear would become relevant. And in the end, it would advance critical justice frameworks that answer questions about what 1) we might invest in to keep individuals safe; 2) how we might help neighborhoods thrive; and 3) how we might create structural changes that shift power in our society such that violence and victimization are minimized. More than rhetorical questions and naively optimistic strategies, these are real issues that must inform any discussion of the future of justice policy. A model like the violence matrix, modified and improved upon by discussions at convenings like those hosted by the Square One Project, offer some insights into both the *what* and the *how* of future justice policy. I hope that this essay is helpful in moving that discussion forward.

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Faces of the Aftermath of Visible & Invisible Violence & Loss: Radical Resiliency of Justice & Healing

Barbara L. Jones

As a victim/cosurvivor, my experiences with the criminal justice system have called me to confront hard truths and the brutal facts of coming to terms with death, life, meaning, responsibility, and healing in innumerable ways. The real and tangible balance as a practitioner, victim, and healer are oftentimes disconnected from theory, practice, and life and death experiences. What does it mean to be human in the processes of restoration and reconciliation while hosting complexities, contradictions, and complacencies that all too often reduce victims/cosurvivors to being forgotten, dismissed, and neglected within the criminal justice system? Why do communities of people who long for and deserve trauma-informed interconnectedness, restoration, healing, and reconciliation continue to suffer from the absence of them? My multidimensional perspective as a victim and advocate grapples with my role as a practitioner as it relates to bodies of evidence, theories, best practices, and justice policies.

Proximity to violent death and the aftermath of visible and invisible loss make for such a painful, disorienting implicit ugliness of trauma and vulnerability, a time that begs for a clarifying set of steps toward healing from grief. The disappointing news is that grief and loss encountered by and with violence neither follow models nor clear pathways toward healing. Grief is neither transformational nor redemptive. As a Community Dispute Resolution Specialist and Faculty Instructor at Wayne State University's Center for Peace and Conflict Studies and as a survivor of acts of terrible violence, I come to you at once as a professional and as an individual with deep personal experience in facing the aftermath of visible and invisible violence and loss. I come to you with an authentic, vulnerable, and conflicted heart, and with a story of grief as it sits inside a story of love. This complicated and complex grief is not a path to self-betterment; rather, it is a choice to find meaning and growth despite tremendous loss – an act of personal sovereignty and self-knowledge – as I learn to continue to carry grief, loss, death, my purpose, and a deep-rooted love in a fragile state. To date, I have

not had a good cry. I have not cried to the extent of a deep release that even comes close to the radical cleansing tears that are required to minimize the fear that I and a collective host of Black women who are mothers have of the length of time it takes to come to terms with a violent death. I would like to invite you to explore this with me, not in ways of persuasion or influence, but rather with your respect and agency.

In 2007, I became a front-line antibullying parent advocate for my youngest child. My only son possessed unique learning abilities and was a part of the cognitive impairment community. During his freshman year at a public high school in Detroit, he experienced a violent bullying attack during which he was pistol whipped. He sustained a severe concussion and received twenty-two stitches to his head as a result.

As a mother and the first and only teacher in my family, I would not tolerate bullying against my daughter and son, and I would not let them feel helpless and victimized. I created strong messages and tools necessary to become an effective mediator within my household, within the school that my children attended, and within my community. My aim was to somehow figure out how to transition from a long career in media to one in mediation, utilizing decades' worth of communication skills to help my children, so I obtained my master's degree in dispute resolution and a graduate certificate in peace and security studies from Wayne State University. I learned various ways to mitigate conflict and antiyouth violence practicalities, adding these to an already well-established skill set in conflict resolution simply from being a mother.

After my son's high school graduation in 2011, we decided to relocate him from Detroit to Colorado Springs, Colorado. My daughter had moved there a year prior, and she and I agreed that it would be a beneficial experience for my son to be in an environment that was less violent and to have more opportunity for growth and maturity. Although the transition from Detroit was tough for me and my son, my daughter and I motivated him to see another part of the country, away from one of the most violent cities in the United States.

I removed my son from this environment so he would no longer experience the extremes of violence that pervaded his life. Despite my intention to expose my son to a new, safer community, we soon discovered that violence is too common across the United States.

Although this is the most difficult writing I've done to date, this type of academic writing is beneficial in understanding my personal grief process, traumatic cognitive performance, and my grief journey, and in connecting the experiences of a mother of a murdered son and a crime victim survivor/covictim to other individuals with similar experiences, to local communities, to the larger community of country, and to the future of justice – a victim-centered justice – for all.[1]

The following is my victim impact statement – one of three victim impact statements that I've given. I read this one on June 28, 2019, to the judge, officers of the court, Colorado Springs Police Department, District Attorney's office of El Paso County, and, more important, to the communities of Colorado Springs, Colorado, and Detroit, Michigan.

I'm the mother of two children, Charmaine El-Jones and Conte Emanuel Smith-El. I've been a mother since I was 16 years old. I'm 55 years old. Collectively, I've been a mother longer than I've been an actual human being. I don't know any other life except for being a loving, responsible, nurturing provider and protector, and I raised my children to respect themselves, to respect me, and to respect humanity. My life has not been my own.

I'm the mother of a murdered son. For the past 23 months, I've lived a life of physical, emotional, and psychological turmoil, trauma, and unspeakably complex and complicated grief.

I am not the only one who walks this journey and I need for you to hold space for each and every mother that has lost a child. The planned demise and murder of my only son, Conte, has caused a reordering of my life in such a way that no one will be able to understand, except for the mothers who have lost their children due to homicide, gun violence, lethal violence, and murder. You have destroyed my family.

Let me tell you a little bit about my son, Conte. Conte was a kind, respectable, loving, and affectionate young man with unique – very unique abilities. My son always spoke to everyone and greeted you with a smile that made you feel special, valued, and important. Conte did that without fail because he did not want others to feel the pain of never, ever being loved, valued, and respected. He wasn't treated kindly by others and he didn't want anybody else to experience that. My son's unique ability to value everyone and everything was exhibited by his persona.

Driving down the streets in Detroit, my son's unique ability to value everything arose in conversations when he would shout out, "Momma, watch out for that squirrel!" I would put on the brakes to avoid hitting that squirrel. This happened often because whether it was in Detroit or Colorado, we were always in a hurry to get somewhere. "Momma, don't hit that squirrel! Momma, don't hit that squirrel!"

I would press my brake, we would both look back, and the squirrel would make it across that street in whatever direction that that squirrel was going. Conte would turn to me and smile, and I would smile back because I was just proud that I didn't hit that squirrel. He'd said, "Whew! Okay, momma, we didn't hit the squirrel," and then he would continuously smile.

That smile, that smile, that smile. Conte valued life. Even the squirrel's life.

I had just seen my son 26 days – *26 days* – before his tragic death on an unexpected trip that my daughter facilitated. My last visit with my son was full of love, laughter, and immediate plans for me to finally leave Detroit and relocate to be with my children. I was going to continue my work in Colorado Springs in advocacy for young people and anti-youth violence and restorative justice. In fact, I had just had a job interview the day before my last visit with my son. We held hands, we talked about my moving, and he was so happy. Conte told me he was in a good space and that he was a little bit more comfortable being in Colorado Springs after almost six years. His words brought me such immense joy.

I got that phone call – that dreaded unexpected phone call – from my daughter on the morning of October 31, 2017, at 3:35 a.m. her time, which was 5:35 a.m. my time. The ringing of my phone at that time wasn't anything startling because my daughter is a night owl. I really thought it was her or my granddaughter calling me because my granddaughter got ahold of my daughter's phone often and knew how to dial her Grammy.

I heard many voices when I picked up and answered the phone, and the many voices on the other end weren't talking directly to me. But amidst all of these voices, I heard my daughter wailing in the background. This was a wail that I had never heard before, not even when she was born. My daughter was unable to formulate the words to let me know about my son – her only brother who she'd been a second mother to because she's 11 and a half years older than him. It was one of the detectives from the Colorado Springs Police Department who had to tell me that my son was dead.

My entire family has had to wrestle with the facts that were caught on multiple surveillance cameras and two Ring cameras inside the business where my son was employed. I viewed twelve and a half minutes during which my son gave service with a smile, during which I watched my son cover his mouth in horror, shocked that one of his peers – a 23 year old whom he did not know – bolted in with an AR-15 semi automatic rifle, and during which my son was shot seven times.

I watched my son tied up. I watched my son brutalized. I heard my son scream for help. I watched my son attempting to fight and flee, something that I never taught him. I taught him either you fight *or* you run. My son did both at the same time. I watched my son endure twelve and a half minutes of torture, exploitation, bullying, and execution. I watched and heard my son scream out in pain. I watched my son and heard my son crawl on the floor to an exit. I watched my son take his last breaths before he gurgled and died.

You laid next to my son, pretending to be a victim, and then ultimately helped to tie him up. You advanced his demise without shame and when he witnessed your contri-

bution to this horrific act…I could not think of what was going on through my son's mind, but I watched it.

Don't think for a minute that I haven't thought about you and your family, and if I was in that same exact position as you and your mother and your entire family. If my son had done this to you. I've thought about you. I think about you and I will never forget you for the rest of my life. You and your family will always be tied to me and my family, nothing will ever change that. The impact of your actions will forever be intertwined in my life and the community of Colorado Springs.

My son has a face; he has a name. My son's life will never be restored so I must honor his legacy. I created Conte's annual memorial scholarship[2] for young people like you – for sons and daughters who are not even my own kids because I'm committed to helping and guiding young people. This is my ministry.

You must realize that you must admit your accountability in your actions against my son, eventually. The facts and evidence speak for themselves. There is no hearsay, speculation, or third parties' stories. You know and we all see your exact, specific, and undeniable role and responsibility in my son's death. If you make it through this program, this YOS program, you will approximately be 24 years old, the same age my son was when his life was deliberately stolen from him.

As a Restorative Justice Practitioner and the mother of a murdered son, I'm asking the Judge David Miller, the DA's office, the entire judicial system, your probation officer, Larissa Perea, the Department of Corrections Colorado Springs, the YOS officials of Colorado Springs, and CSPD law enforcement to set up and implement a formal and comprehensive Victim Offender Dialogue session involving me, you, and your mother, as well as with organizations who have the expertise right here in Colorado. This is my request and I pray it will be honored by the above-mentioned parties for me!

The victim often is silenced for the duration of a murder/criminal trial, except when the victim impact statement is given; yet victims and offenders can benefit from a victim's survivor impact story in a face-to-face, mediated setting with victim-offender professional facilitators within prisons and juvenile correction facilities. Currently, the State of Colorado offers restorative practices under the Colorado Victim Rights Act, statute 24-4.1-302.5, "Rights Afforded to Victims": "The right to be informed about the possibility of restorative practices, as defined in section 18-1-901(3)(0.5), C.R.S.," which include victim-offender conferences.[3] Parties are invited, but not compelled, to participate in making decisions about how to respond to the offense. The process allows the offender to take accountability for their actions, to offer amends to the victim (something not often seen in our traditional punitive, retributive criminal justice model for violent crimes), to repair harm to the extent possible for justice to occur, and to prevent future harm.

We cannot heal what we are not willing to confront, and my request for a victim-offender dialogue was a key step toward my and my family's personal healing, as well as for the person who killed my son and for his family. The goal of this dialogue and of healing is not to patch up, cover up, or conceal the waves of grief resulting from the harms caused by violence in an effort to preserve, promote, or present as normal. It is to acknowledge your changed circumstances – your new life – with courage. We must be willing to confront the truth before we can even think about healing. Reconciliation and restorative justice seek redress for victims, recompense by offenders, and reintegration of both within the community.

> Relatives of Smith-El railed against Daugherty's lack of accountability, saying it bars any hope of "restoration." The dead man's mother, Barbara Jones, a Detroit-based anti-violence advocate, said in court she would like to meet with Daugherty in prison for a "dialogue." The judge encouraged Daugherty to accept, saying he must confront his role in Smith-El's death before he can be fully rehabilitated.[4]

The necessity for criminal justice reform to reflect victim-offender dialogue and restorative justice and to normalize these opportunities for healing are paramount for victims' families and cosurvivors. Restorative justice is a social justice model that focuses not only on rule of law issues (as in our traditional criminal justice system), but also on the rules of relationship. The tenets of the restorative justice model are relationship, respect and honoring dignity, repair and reconciliation, accountability, reintegration versus recidivism, radical resiliency toward justice and healing (we cannot heal what we cannot confront), and peace-making, peace-building, and peace-keeping.[5]

There is ongoing work in Michigan, which I am involved in, to amend the state's constitution to address crime victims' rights and add restorative justice practices. In the Michigan Crime Victim Rights Act, this includes an effort to enact a victim-offender conferences statute that improves rights afforded to victims, providing reconciliation and restorative justice as a participatory status for crime victims and for the offender victims and survivors who request it.[6] I assert that there are levels of personal accountability for offenders to their victims or their families, which is otherwise not afforded to them. This guidance and trained facilitators are available according to "Victim-Centered Victim Offender Dialogue in Crimes of Severe Violence," published by the National Association of Victim Service Professionals in Corrections and guidelines published by the State of Colorado for Victim Offender Mediation.

At the National Association of Community and Restorative Justice Law and Policy Working Group, of which I am a member, we are developing model legislation that may be used by legislators to develop statutes and policies supportive

of restorative community justice applications, and we are creating advocacy materials to assist policy-makers with enacting these changes in law.[7] We champion a restorative justice framework and practices that seek to repair harm, and restore and promote healing in communities; actionable priorities that are not victim-led but victim-centered. When confronting violence, the long, hard journey toward healing should compel us to examine the qualities and conditions of being human. We must explicitly grieve for those we have loved and lost, not to prolong and sustain our connection to suffering, pain, hurt, revenge, and retaliation, but to sustain love, peace-making, peace-keeping, and peace-building. No transformative redemption in the aftermath of visible and invisible grief can occur unless we all understand how to acknowledge those we grieve in all we do. Radical and redeeming social values are at the forefront that demands the reduction and elimination of barriers for victim survivors/cosurvivors to participate at every stage of the justice process, systemically, structurally, and collaboratively across agencies and service providers. Victims must be given a more active role and voice not only in their individual experiences, but also in the broader conversations about criminal justice system improvement.[8]

To transform the world, it takes people willing to face the reality of how violence affects their lives, and to insert their own morality and mortality into social values that serve humanity from an absolute place of common good, genuine support, forgiveness, compassion, and empathy. Moving from crisis to hope must be rooted in love. In regard to Joshua Daugherty, one of the two young men responsible for the murder of my son, whose humanity will not be considered in the current state of the criminal justice system and who may not experience the benefit of restorative justice-centered legislation during his incarceration, it will be up to the community to help this juvenile convicted of second-degree murder, who received a seven-year sentence in a youth offender program, succeed once he successfully completes his sentence and is released.

The harm of murder or homicide ripples beyond the victim, their families, and cosurvivors, and into the broader community. Crime is seen as a tear in the community fabric. Therefore, the victim, offender, and community members should have a voice in how harm can be reconciled and repaired. This collective approach generates distinctive roles and shared responsibilities for stakeholders, including victims, offenders, justice professionals, and community members.[9]

Victims and offenders are helped to become contributing members of their communities in the aftermath of the murder/homicide by reinforcing moral education and the values and norms of community standards. Moreover, it is a victim-centered, offender-sensitive response by the community to address not only the harmful incident, but the underlying causes often rooted in the community, and its ability to help the offender repair the harm caused to the victim, the victim's family, cosurvivors, and the community.

Few events are more seismically traumatizing than the loss of a loved one to homicide. However, homicide survivors quickly learn that the dominant social narrative makes the state the surrogate victim: harm done by offenders to victims is handled as if it is harm done by offenders to the state. Homicide survivors become invisible as the agenda of the criminal justice system, the media's interpretation of the facts, and the community's response construct the public meaning given to the tragedy. Too often, survivors are cruelly left alone to face the abject grief, rage, and sense of violation that accompany the abhorrent act of killing another person. As their meaning systems implode, they enter a netherworld where they fight to find footing in a world that no longer fits. As we collectively continue to shed light on these challenges, I pause and reflect on a quote by Audre Lorde, "Without community, there is no liberation…but community must not mean a shedding of our differences, nor the pathetic pretense that these differences do not exist."

Homicide survivors are forced into interactions with the public that rob them of important rights and deprive them of their justifiable privilege to define and control their realities. What they demand underscores what matters to them. The convictions they act on are fueled by moral indignation and passion for what is theirs to hold onto, correct, or take back. Fighting is a form of self-preservation to minimize more losses. Asserting their needs makes who they are visible to others.

Efforts, policies, practices, resources, and approaches designed to mitigate violence in the United States are stagnant, limited, uncoordinated, and governed by an extreme, outdated, and neglected disarrangement of authorities who prioritize immediate reactionary responses over inclusive creative options geared toward providing long-term relief, answers, and solutions. Violence is not an intractable social problem or an inevitable part of the human condition. In their analysis of emerging restorative justice legal doctrine, Shannon Sliva and Carolyn Lambert explain:

> While many states' criminal and juvenile codes contain references to restorative justice generally or specific restorative justice practices, few provide detailed support and structure to ensure implementation. According to our findings, only Colorado, Minnesota, Missouri, Montana, New Hampshire, Texas, and Vermont have structured support for a restorative justice practice within their code. It should be noted that even these seven states – which have structured support for some aspects of restorative justice in some settings – do not mandate restorative justice as a system-wide criminal justice response. Nationally, restorative justice remains a marginally supported justice practice at the level of state policy.[10]

We can do much to address and prevent it; however, the United States has not yet fully measured the size of the task and has not designed and utilized all the

tools to carry it out. Bearing witness to the aftermath of visible and invisible violence results in survivors connecting these to larger issues of systemic dynamics and to the adoption of appropriate prevention strategies rooted in conscious values of equity and justice.

A key component of these tools is incorporating victims into the dialogue and solution-building. My son is the data. I am walking, breathing data. This new perspective of the criminal justice system as the survivor and the exclusion of voices and involvement of victims and survivors has resulted in my long-term personal goal to set restorative justice/victim-offender dialogue as a mandatory part of the offenders' session in homicide cases. Interconnection and intersectionality function at the foundational roots of collectively healing due to identities, systems, and structures.

Resiliency frameworks resulting from the layers of violence incorporate greater reconciliation efforts and instill restorative practices. As someone who has experienced a life shattering crisis, I have put a system of individual, community, and collective healing in place, based on what role restorative justice can play toward healing for victims, victim survivors, covictims, and the community, and the work to end violence. Such a framework aids in un-normalizing visible and invisible violence to ensure that no portion of the human experience will be unacknowledged. Of course, violence, trauma, and healing are nuanced, and this is a call for alternatives that recognize the intricacies and delicate differences in the way we handle violence, and, notably, to recognize that everybody hurts. Violence is pervasive and a part of that is because we, as a nation, address violence with violence and must actively and necessarily heal as a whole. This is my lifetime commitment toward structural, systemic, institutional change as a lifelong victim cosurvivor.

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ENDNOTES

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The Foundational Lawlessness of the Law Itself: Racial Criminalization & the Punitive Roots of Punishment in America

Khalil Gibran Muhammad

Empirical researchers and criminal justice practitioners have generally set aside history in exchange for behavioral models and methodologies that focus primarily on crime itself as the most measurable and verifiable driver of American punitiveness. There are innumerable legal and political questions that have arisen out of these approaches. Everything from the social construction of illegality to the politicization of punishment to the stigmatization of physical identities and social statuses have long called into question the legal structures that underpin what counts as crime and how punishment is distributed. And yet, until quite recently, the question of what history has to offer has mostly been left to historians, historically minded social scientists, critical race and ethnic studies scholars, community and prison-based activists, investigative journalists, and rights advocates. What is at stake is precisely the foundational lawlessness of the law itself. At all times, a White outlaw culture that rewarded brute force and strength of arms against racialized others unsettles basic assumptions about how we are to understand criminalization and punitiveness over time: that is, who has counted as a criminal and to what end has the state used violence or punishment?

The United States is the most punitive country in the world. By population, by per capita rates, and by expenditures, the United States exceeds all other nations in how many of its citizens, asylum seekers, and undocumented immigrants are under some form of criminal justice supervision. Over the past two decades, there has been an explosion of reports by government agencies, nonprofits, and international advocacy organizations exploring the dimensions of this peculiar form of American exceptionalism. While empirical and comparative data on the size and scope of the American system and its many "clients" will continue to lie at the heart of many of these reports, only within the past decade has research on the historical roots of American punitiveness gained increasing attention.

Why the United States is so punitive may be the most relevant question to answer. But it is also among the most difficult. The challenge is not the lack of various historical drivers or causes or even the range of possible philosophical expla-

nations for how Americans have imagined crime, sin, human nature, and the utility of punishment going back to the Enlightenment period. The problem is that historical and philosophical explanations have been the least credible or authoritative in explaining mass incarceration among policy-makers.

Empirical researchers and criminal justice practitioners have generally set aside history in exchange for behavioral models and methodologies that focus primarily on crime itself as the most measurable and verifiable driver of American punitiveness. Innumerable legal and political questions have arisen out of these approaches. Everything from the social construction of illegality to the politicization of punishment to the stigmatization of physical identities and social statuses have long called into question the legal structures that underpin what counts as crime and how punishment is distributed. And yet, until quite recently, the question of what history has to offer has mostly been considered by historians, historically minded social scientists, critical race and ethnic studies scholars, community and prison-based activists, investigative journalists, and civil and human rights advocates.

The disconnect between the primary knowledge-producers of criminal justice data and interpretation and everyone else is striking. One of the legacies of the federal explosion in crime legislation and crime-control spending in the 1960s was the gradual collapsing of academic research into technocratic-based and practitioner-centric research communities.[1] To put it simply, over the last fifty years, empirical researchers have focused on the needs and interests of law enforcement and corrections officials and vice versa, limiting the impact of other forms of knowledge. The fact that historically informed research has often buttressed critiques of, and political resistance to, police, prisons, and the courts demonstrates just how fraught the politics of knowledge has been.

This raises a first-order problem in any effort to use history to reimagine how to make America less punitive today. To what extent can the targets of reform – practitioners and policy-makers – be moved by the past if they think it is immaterial to the present? What imaginary line do people draw in the chronological sands of time that makes history "ancient" or irrelevant to them, no matter how compelling the historical evidence is? Without taking into account how often history is discounted in policy circles, much of what proceeds in this essay may not matter to those whose need to understand the past is greatest. This may be the biggest challenge, rather than the simple recovery and teaching of these founding historical problems of our punitive nation.

From the beginning, the United States has been what historian Dan Berger calls a "captive nation." In summer 2019, Americans commemorated the four hundredth anniversary of the dawn of chattel slavery and the arrival of African captives in Jamestown, Virginia. There is no American history in which

European-descended people did not use racialized forms of punishment, war, or containment against Indigenous tribes, immigrants, or enslaved people of African descent. Settler-colonists first used the logic of elimination then turned to ideas of exploitation to make way for their permanent residency. Two-and-half centuries before the nation was founded and for nearly a century after, the core institutions of American democracy and the economy were built on the land of the Indigenous and the backs of the enslaved. Berger writes,

> Race, especially anti-black racism, has been the primary modality through which this pairing of colonization and confinement has transpired in the United States. Forcible confinement haunted black life from capture in Africa through the Middle Passage and sale in the Americas. Chattel slavery initiated a racial regime rooted in confinement: plantation slavery was as much a carceral force as the early penitentiary.[2]

The historical institutions of Native reservations and African American slavery were the most durable legacies of a number of ideas and ideologies that helped forge the punitive foundations of American society. The frontier myth of a virgin land, waiting to be tamed and cultivated by a "master race," animated much of the colonial justification for Native displacement and genocide. As generation after generation of White colonists and later citizens moved West, the choice to define Native populations and Mexicans as savages or criminals by law, custom, and practice rationalized the eventual creation of the nation from sea to sea. That Europeans did not encounter the legal restrictions and physical constraints of the Old World and turned to religion to justify conquest gave them a sense of legitimacy to what they called "manifest destiny."[3] Philosophers and political theorists – from Adam Smith to John Locke and Thomas Hobbes – helped by justifying conquest as the march of civilization. By the nineteenth century, a system of federalism had evolved, which maximized various states' monopolies on violence to ensure conquered Indigenous and Mexican land would be converted to private property by Whites and capitalized by enslaved Black people.[4]

What is at stake in this brief sketch of the early history of the United States is precisely the foundational lawlessness of the law itself. At all times, a White outlaw culture that rewarded brute force and strength of arms against racialized others unsettles basic assumptions about how we are to understand criminalization and punitiveness over time: that is, who has counted as a criminal and to what end has the state used violence or punishment?

In historian Kelly Lytle Hernández's recent study *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771 – 1965*, she finds a remarkably stable pattern of criminalization and incarceration going back to a single carceral site on the Tongva Basin, once part of Mexico and named for the Native community that originally occupied the land for seven millennia. What is modern-day Los Angeles. "Crime and punishment, in other words, emerged as the platform for

the racialized inequities established during the colonial era to flourish in the Republic of Mexico. By the end of the 1820s, the new nation's jails, prisons, and convict labor crews were overcrowded with the historically marginalized of the old colonial order, largely a population of Natives, Africans, mulattos and mestizos."[5] As displaced or landless people, they were arrested on public order charges, such as "vagrancy, disorderly conduct, and drunkenness." She notes that in order for manifest destiny to have become more than a "proclamation" or "simple fact of conquest by treaty," the law needed an infrastructure.[6] "The local jail, therefore, represented the foundational structure of U.S. conquest in Los Angeles," Hernández writes. It was how the rule of law was established. By 1850, the city passed an ordinance that deputized all Whites – "on complaint of any reasonable citizen" – and established racialized municipal chain gangs and convict leasing nearly a generation before the end of slavery.[7]

What happened next when slavery ended is one of the most examined chapters in American history. Within months of the end of the Civil War, the former Confederate states began passing new criminal legislation, known as Black Codes, targeting African Americans with the goal of limiting their newly gained rights as citizens. New vagrancy laws, felony enhancements, statutes against interracial socializing, and a newly expansive definition of parental neglect, rending children from their parents to be sold at auction to former masters, demonstrate how quickly Southerners turned to the apparatus of the law to simply criminalize Black freedom. Or, as Hernández describes Natives in Los Angeles, Whites criminalized Blacks' "right to be." Although mass criminalization first awaited mass freedom for African Americans, seemingly overnight, scenes of sheriff's auctions replaced slave auctions.

The Thirteenth Amendment abolished slavery and indentured servitude in 1865. But it contained a loophole or an exemption clause: "except as punishment for crime whereof the party shall have been duly convicted." While prison and community activists have long pointed to the slavery loophole in the Constitution – still the law of the land – as the reason for the enduring racial disparities in the system, historians had not paid as much attention until fairly recently. Scholars have traced the loophole to the Northwest Ordinance of 1787 and to antebellum laws in which the condition of free Blacks rested precariously against the backdrop of fugitive slave laws and 90 percent of African Americans still in bondage.[8] In this, both precedents prefigured the failure of the abolitionist movement and the Union defeat of the Confederacy to extinguish the flame of human bondage forever.

Literature scholar Dennis Childs has called the Thirteenth Amendment one of the "most devastating documents of liberal legal sorcery" ever created in Western modernity. He notes that the loophole was not only deliberately carried forward,

but some Republican leaders and former Union officers understood exactly what the loophole intended. It was to ensure permanent racial subordination. In Senate testimony of the 39th Congress, Union Major General Carl Schurz stated: "But although the freedman is no longer considered the property of the individual master, he is considered the slave of society, and all the independent state legislation will share the tendency to make him such." The amendment legalized racial criminalization at the second founding or rebirth of American democracy.[9]

The loophole also made possible Southern redemption, even as the Black Codes were outlawed by the Fourteenth Amendment and new civil rights laws during Reconstruction. Criminal legislation passed the new constitutional hurdle with color-blind language and an 1871 court ruling in *Ruff inv. Commonwealth*. The Virginia Supreme Court officially sealed the fate of African Americans by ruling that a convict was indeed a "slave of the State." No other group had been enslaved in the United States and as such the criminal law itself rendered meaningless any distinction between Blackness and new conditions of state-sanctioned servitude. That Whites experienced hard labor (slavery-like work) regimes in the North and South did not change the legal or juridical meaning of the law.[10] From then until now, some Whites have also paid dearly, at times, for the racialized nature of punishment since the Civil War.

The punitive excesses that Whites experience in the system might be called anti-Black criminalization by proxy and proximity. In her Inside-Out teaching at Putnamville Correctional Facility in Indiana over the past several years, historian Micol Seigel has observed firsthand how incarcerated White men saw themselves as Black-adjacent. "Some even identify themselves as marked by that history of racial discrimination in recognizing that anti-black lawmaking is behind the sweeping legislative changes that widened the net of the criminal justice system, eventually catching them," she writes. "Racism is much more than the hatred of Afro-descended people; it is one of the most capacious tools of state power." As with food stamps, welfare, and health care, Whites often equate the stigma of poverty and punishment with the natural condition of Black people, even as Whites are the largest beneficiaries of state provisions. Provisions like punishment are still marked as things Black people take and receive.[11]

Some of the most revealing and essential new historical scholarship on American punitiveness is on the gendered dimensions of punishment. Two recent studies return to the well-studied Georgia convict lease camps and chain gangs of the postbellum South to map the unique punitive pathways for Black women, defined in opposition to White womanhood and feminine notions of deviance. From the end of slavery until 1908, African American women made up 3 percent of leased felons in the state, but 98 percent of female prisoners. They were marked for hard labor and punishment, according to historian Talitha Le-

Flouria. "They were scattered in railroad camps, prison mines, lumber mills, brickyards, turpentine camps, plantations, kitchens, stockades, washhouses, and chain gangs."[12] African American studies scholar Sarah Haley describes Black women's convict work as a "double burden." They did the backbreaking work of men in lease camps plus they cooked, cleaned, and washed the clothes of fellow prisoners and guards alike. "Black female labor continued to be conscripted for both production and reproduction," Haley finds, including rape and sexualized violence by White male guards.[13] Indeed, sexual access to Black women's bodies was institutionalized in camps as an employee benefit. "They were caught in double binds, double burdens, and double jeopardy when it came to both labor and violence."[14]

The gendered criminalization of Black women and the extreme punishment they faced lay in what historian Kali Gross calls the legacies of "an exclusionary politics of protection."[15] From the colonial period to the present, laws governing the protective status of womanhood either did not legally apply to Black women or were selectively nullified so as to exclude them. Scientific experts racialized women's bodies to justify the laws' exemptions. "Criminal anthropologists assessed female deviance, in part, by subjects' proximity to, or distance from, Western ideals of femininity, morality, and virtue – standards against which black women failed to measure up."[16]

Across time, space, and region, Black women were subjected to greater rates of conviction and incarceration. At the extremes, as in Tennessee in 1868, Black women represented 100 percent of the state's female prisoners, whereas Black men accounted for 60 percent of the male prisoners. Gross found that in late-nineteenth-century Philadelphia, Black women served 14.1 months on average per sentence compared with 8.5 months for White women for similar offenses. At the height of the war on drugs in the 1980s and 1990s, drug-related arrests of Black women skyrocketed by 828 percent, triple the rate of White women and double that of Black men.[17]

The lack of protection extends to domestic violence and intraracial sexual violence today. Nearly nine out of ten Black women incarcerated presently report a history of such violence as compared with less than one-quarter of White women nationally. Gross writes, "Exclusionary notions of protection have created a need for black women to trade in extralegal violence for personal security."[18] In the recent high-profile Florida case of Marissa Alexander, who fired a warning shot when her husband threatened to kill her, Alexander was not allowed to stand her ground. By contrast to George Zimmerman, acquitted on murder charges after claiming self-defense when he stalked and killed Trayvon Martin in July 2013, Alexander was originally sentenced to twenty years in prison for aggravated assault. After protests against what activists called a double standard, an appellate court ordered a new trial in September 2013. After a plea deal, Alexander served two additional years under house arrest.

Racist stereotypes of Black women as sexually promiscuous and overly mascu-line start early. For trans women and girls, such stereotypes are lethal.[19] Historians have only just begun to trace how gender nonconformity within LGBTQ communities elicited state violence in the past.[20] However, all Black cis and trans women, according to historian Cynthia Blair, have been subjected to violent media caricatures going back to the late nineteenth and early twentieth centuries. They are described frequently as women who are "extraordinarily large in height and girth and possessing brutish strength and cunning." Gross found ubiquitous depictions of "colored Amazons" in the Philadelphia press during the same period.[21]

These stereotypes also shaped how courts punished Black girls. They were more likely to be remanded to custodial institutions than their White counterparts and less likely to end up in gender-specific reformatories or cottages.[22] Historian Tera Agyepong studied the first half-century of Chicago's juvenile justice system. "Staff members masculinized African American girls and constructed them as the most violent and aggressive residents," Agyepong found at one of the large institutions she examined. "In spite of the reality that African American girls were typically younger than white girls and the fact that a disproportionate number of them were sent to Geneva not because they had committed any crimes but because there were no institutions available for dependent African American children." She found that the purported rehabilitative ideal of the court generally did not apply to Black girls.[23]

While the gendered dimensions of criminalization and punishment for Black and brown boys were different than for girls, they were similarly subjected to stereotypes and scientific racism. In her research on California's early reformatories for boys, historian Miroslava Chavez-Garcia shows how notions of deviance were mapped onto the physical bodies of Mexican, Mexican American, and African American youth. "Eugenic fieldworkers at the California Bureau of Juvenile Research invoked long-held assumptions about biological differences" and crafted typologies of a "Mexican type" or "big coon type." Dysgenic traits were outer signs of an inner inferiority, eugenicists claimed, which were reflected in the poor quality of their homes. "There is a relation between the social quality of homes and the social quality of the people who live in them," wrote a fieldworker in the 1920s. As such, they treated delinquency as a social contagion in need of eradication. Hundreds of thousands of California youths, Chavez-Garcia writes, were labeled "defective" and sterilized.[24]

In juvenile court systems around the country between the 1930s and 1960s, system actors focused on providing a "protective buffer for white youths" to keep them out of adult prisons. Historian Carl Suddler found that Black youths, by contrast, "encountered a 'Jim Crow juvenile justice system' that refused to extend rehabilitative ideals and resources; regularly committed them to adult prisons; and

sentenced them to the convict-lease system, prolonged periods of detention, and higher rates of corporal punishment and execution." The denial of the special protections of the juvenile court, Suddler discovered, reflected a pervasive view that Black youth were "presumed criminal."[25]

The presumptions of Black youth criminality were fortified in the mid-twentieth century by the creation of the model minority myth. Chinese immigrants had long been subjected to xenophobic violence, moral panics, and racial criminalization as a drug-infested and prostitute-riddled community. "Yellow peril" journalism and social science stoked the flames of nativists who successfully closed immigration to them in the 1882 Chinese Exclusion Act. The precarious status of those immigrants and their children living in segregated Chinatowns was partly reflected in community anxieties about juvenile delinquency. In 1941, Lim P. Lee, a probation officer, described in the press a growing problem of delinquency in San Francisco's Chinese community of "misguided youth" and "dead end kids." And yet, historian Ellen Wu found that shortly thereafter, during the postwar years, Chinese community elites and White liberals conspired to craft a false narrative of "nondelinquency," which became an assimilation wedge for Chinese Americans and against African Americans. Media narratives shifted 180 degrees from the "yellow peril" of old to describe "Americans without a delinquency problem," as *Look* magazine did in 1958. The myth of their universal success was meant to show that racism was no barrier to achievement for all minorities, especially Blacks. "Chineseness worked to define blackness while blackness worked to define Chineseness," Wu writes.[26]

N o aspect of caging, confinement, or corrections, from home arrest to school detention to local jails, penitentiaries, and detention centers, works without policing. More so than the prison itself, law enforcement is the greatest source of criminalization.[27] Policing spreads the reach of the carceral state in every nook and cranny of society. No home, no street, no neighborhood, especially in communities of color, can escape the reach of law enforcement's foot soldiers and technology.

Historians have written for decades about the class and racial biases of police officers based on the experiences of various European groups who competed for civil service work and the spoils of urban political machines.[28] Anti-red squads were also deployed to infiltrate and destroy radical and reformist labor groups. Much of this historical work was written before any full accounting of the racialized wars on crime and drugs caught the attention of a new cohort of historians. Here and there, historians of the Jim Crow South and the Great Migration North described how police regulated the boundaries of Black citizenship, housing, social mobility, and political organizing.[29] But it was really Heather Thompson's groundbreaking call for historians to revisit policing and punishment's direct

impact on urban space, labor organizing, and political-party realignment in the post–civil rights era that spurred new research.[30]

Police contact among Black youth has been a particularly ripe area of scholarship. Suddler describes "heightened surveillance" tactics in New York City dating back to the 1930s. Not only did these encounters inflate crime rates, they also "triggered racial antagonisms" and led Black youth to view police as a "repressive, unworthy authority." Suddler's important contribution was to push the timeline back from the Kerner era of urban uprisings to the 1930s and 1940s, when Harlem's Black youth first rebelled against systemic police brutality. Local White officials responded by investing in Police Athletic Leagues, which amounted to a form of surveillance and classification, tracking kids by their attendance and behavior, and rewarding the dutiful ones with field trips to baseball games, the zoo, and swimming pools. With more contact came more labeling of "potential delinquents," blurring the line between innocence and guilt. When Black youth protested discrimination or racial violence in the city, especially by the early 1960s, police used their long catalog of surveillance records to target activists, not criminals, for arrest.[31]

Historian Donna Murch similarly found that postwar Black migrants to Los Angeles and Oakland faced intense police scrutiny, abuse, and surveillance. Indeed, law enforcement, Murch writes, helped pave "the way for a new and more repressive postwar racial order."[32] By midcentury, the Golden State led the nation in youth incarceration. The California Youth Authority "combined forces with other state and local agencies to extend its reach into all domains of young people's lives from education to recreation, from schools to street."[33] Many of the young people who would later found the Black Panther Party for Self Defense in Oakland had come of age cycling in and out of the Youth Authority and forging an activist identity in the process. Some of these men would become activist prisoners and contribute to decades-long struggles for human rights from inside.[34]

What emerges with a long view of the deep end of the criminal justice pool is how much Black citizenship in the twentieth century was forged by police, who were, in the words of historian Simon Balto, the most "visible agents" of the state.[35] For youth and adults alike, police officers were the most common representation of the state's presence in Black people's daily lives. "Too often the policeman's club is the only instrument of law with which the Negro comes into contact," wrote Kelly Miller in 1935, a Howard University Black sociologist and antiracist reformer. Miller's observations were confirmed by a growing body of research led by National Urban League researchers in the 1920s and early 1930s.[36]

Balto's *Occupied Territory: Policing Black Chicago from Red Summer to Black Power* is the first major longitudinal study of racialized policing in a single Northern city. Like so much of the latest historical scholarship, its principal concern is understanding policing outside of the Jim Crow South. It challenges earlier Southern-centric research that fails to account for Northern-style stop-and-frisk policing,

which started to show up in the Great Migration North and evolved into more formal policy in the 1960s. As far as "the mechanisms and strategies of policing on the ground in urban America," he argues, "neither the War on Crime nor the War on Drugs actually constituted dramatic reinventions of the wheel." Such an insight is only possible by paying close attention to what came before in the same Northern cities known for consent decrees today.[37]

Elizabeth Hinton was the first historian to show overwhelming evidence of the profound criminogenic nature of federal crime legislation. Her work is now the baseline for how future scholarship will frame national crime policy from Lyndon Johnson to Ronald Reagan across multiple disciplines, especially in applied fields in which policy research matters. To describe how big a deal this is: Twenty years ago, criminal justice researchers began challenging the conventional wisdom that the historic crime drop of the 1990s and 2000s was due to massive prison growth. Ten years later, they debated the actual amount by which prisons reduced crime. Was it 25 percent or 5 percent? Then a few years ago, in 2014, a National Academy of Sciences' report determined that the most important finding was not how much prisons reduced crime, but that crime policy itself had created a massive prison problem. Now we know because of Hinton's work that prisons and policing also drove crime in a dynamic process. Contrary to popular understandings, Great Society legislation like the Economic Opportunity Act of 1964 was accompanied by Big Crime legislation, such as the Law Enforcement Assistance Administration (LEAA) passed under Johnson in 1965. The LEAA blurred the distinction between poverty and crime in such a way to redefine Black poverty as criminality.[38]

The expansion of policing powers, surveillance, and labeling of "future criminals" led to two outcomes. First, this early policy led to diversion from, and divestment in, Great Society antipoverty initiatives. Second, the legislation increased financing of federally funded social service work under the control and auspices of federally funded local law enforcement agencies. Not only did actual crime go up as a result, which Hinton interprets as a predictable consequence of the tepid "root cause" response, but Hinton says liberal policy-makers also doubled-down on more policing.[39]

By the time Nixon took office, the federal response to treating unemployment and segregation as crime problems rather than the enduring consequences of structural racism had already been built. The fact that crime was going up was not seen as a failure of liberal investments in a nascent war on crime, but instead was interpreted as proof of an insufficient investment in punitive measures and a foolish focus on antipoverty policy. That is, crime-control dollars under Johnson meant fewer dollars for dealing with "industrial decline, mass unemployment, and police brutality." And more money, Hinton found, went to "police-commu-

nity relations programs during the War on Crime." Future rises in crime in the 1970s through the 1980s only reinforced what became an ironclad belief: "cultural pathologies" and bad parenting ensured delinquency and crime, to which policing and incarceration were the most appropriate responses.[40]

Political scientist Naomi Murakawa finds that the basic wiring of the federal carceral machinery had been in place since the Truman administration. Twenty years before Johnson and Nixon took the reins, civil rights leaders had worked with President Truman on a federal "law and order" mandate focused on anti-Black racial terror. Murakawa explains how proceduralism sought to "decrease discretionary decisions and insulate the system from arbitrary bias." In her telling, the "history of federal crime politics inverts the conventional wisdom: the United States did not face a crime problem that was racialized; it faced a race problem that was criminalized."[41] At the dawn of the post–civil rights era, a number of punitive trends converged at every level of government and in every sector of society. Social policy itself, and welfare in particular, became criminalized, as historian Julilly Kohler-Hausmann has found. As welfare rights activists sought to hold the federal government accountable for addressing the historical neglect of poor communities of color, public officials of both parties increasingly defined dependency as criminality.

Kohler-Hausmann's research reveals the enduring pattern of punitive American exceptionalism: of settler-colonists who increasingly turned to the Los Angeles jail as an infrastructure to establish the rule of law and to enforce racial domination. "Just as the penal system used welfare programs to constrain felons' economic and social citizenship, the welfare system often enlisted the penal system and its rituals to signal the suspect position of recipients," she writes. "Increasingly, policies helped produce the political reality they purported to reflect, erecting barriers to the civic and economic participation of poor people, particularly in urban African American and Latino communities."[42] In other words, yet again, Black and brown people had little or no "right to be."[43]

The criminogenic impact of public policies created a real crisis of crime in Black urban communities. But such problems were never unique to those residents. White Americans had and continue to experience similar problems.[44] The difference has long been the ascription of racist notions of an inescapable biological or cultural pathology. Indeed, what has been unique, we know now, is the role the state has played directly in creating the conditions of lawlessness among police, public officials, and individual residents. As Seigel writes of Putnamville's incarcerated White men: "Anti-blackness has shortened and fouled their lives."[45]

That some African Americans embraced the punitive turn themselves, as political scientist Michael Fortner found, did not make the historical context (of how things came to be) any less relevant to how to get out of the mess.[46] A popular solution among an increasing number of Black first-time office holders and

agency heads in charge of urban police departments and city governments was to deliver public safety to their constituents as a civil rights promise, as legal scholar James Forman observes in his Pulitzer Prize–winning study *Locking Up Our Own*.[47] But the promise was an impossible mandate. The criminal justice system produces racism, inequality, and insecurity; it could not (and cannot) fix itself.[48] After all, America's carceral infrastructure is older than American democracy itself and may even be stronger and sturdier in the Trump era and beyond.

ABOUT THE AUTHOR

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Criminal Law & Migration Control: Recent History & Future Possibilities

Jennifer M. Chacón

Immigration enforcement in the United States has undergone a revolutionary trans-formation over the past three decades. Once episodic, border-focused, and generally confined to the efforts of a relatively small federal agency, immigration enforcement is now exceedingly well-funded and integrated deeply into the everyday policing of the interior United States. Not only are federal immigration agents more numerous and ubiquitous in the interior, but immigration enforcement has been integrated into the policing practices of state and local officials who once saw their purview as large-ly distinct from that of federal immigration enforcement agents. This essay briefly explains these developments, from shortly before the passage of the Immigration Re-form and Control Act of 1986 through the present day, and assesses their consequenc-es. It includes a brief discussion of the ways states and localities have responded to federal enforcement trends, whether through amplification or constraint.

Even before the British colonies along the Atlantic Coast of North America openly rebelled against Great Britain in the 1770s, colonists like Benjamin Franklin were bemoaning the quality of incoming immigrants, and in par-ticular, their criminality. Franklin famously warned about the "thieves" and "vil-lains" transported from the jails of England to the colonies.[1] These concerns iron-ically ran alongside complaints that the Crown was unfairly restricting productive migrants from coming to the colonies.[2]

The notions of immigrant inferiority and criminality run through the story of this self-styled "nation of immigrants," always in tension with market systems that benefited from more robust immigrant flows. The desire for low-cost labor-ers to fuel capitalist expansion across North America existed alongside racialized fears of immigrant workers. Strong economic and political forces impelled mi-gration into the United States even as residents who had arrived in the country a mere generation before decried succeeding waves of immigrants as unassimila-ble, racially "other," and morally degenerate. Immigration restrictions and crim-inal laws stood as twin methods to regulate these incoming immigrant groups, with the latter serving as a useful mechanism for controlling and containing pop-ulations that were often desired as workers, and therefore not barred from entry,

but also not seen as political and social equals. These were the regulatory methods by which the new settler society strove to "block, erase, or remove racialized outsiders from their claimed territories," taken simultaneously with actions to eliminate the land's native nations and peoples and to contain the growing populations of Blacks descended from the enslaved Africans whom English settlers brought to the colonies in the early 1600s.[3]

The dual and selective use of immigration control and criminal law to optimize settler colonial goals while preserving racial hierarchy has been told in many ways, and with attention to many periods of U.S. history. This essay does not seek to cover the tremendous geographic and historical terrain already charted by many excellent, existing accounts. Instead, the focus here is on the last thirty years of immigration history, a period in which intertwined immigration and criminal law systems functioned to optimize the deportability of low-wage immigrants, disproportionately those from Mexico and Central America.[4]

It would not be an overstatement to claim that immigration enforcement in the United States has undergone a revolutionary transformation over the past three decades. Once episodic, border-focused, and generally confined to the efforts of a relatively small federal agency, immigration enforcement is now exceedingly well-funded and integrated deeply into the everyday policing of the interior United States. Not only are federal immigration agents more numerous and ubiquitous in the interior, but immigration enforcement has been integrated into the policing practices of state and local officials who once saw their purview as largely distinct from that of federal immigration enforcement agents.

This essay briefly explains these developments and assesses their consequences. The first section explores developments from shortly before the passage of the Immigration Reform and Control Act of 1986 through the early 2000s. This legislation and the budding war on crime laid the building blocks for the current approach to immigration policy. For the first time since the restrictionist 1920s, the criminal enforcement system was invoked not as an occasional adjunct to immigration enforcement, but as a central feature of the nation's immigration policy.[5] The second section explores the period from the early 2000s through 2014 – a period of immigration enforcement characterized by massive expansion, systematic devolution, and largely unalleviated severity. The final section covers the past seven years of immigration enforcement. It explores the moderating policies enacted near the end of President Barack Obama's second term. It explains how those moderating policies, which were themselves developed against a backdrop of criminalized migration, were reversed aggressively by the Trump administration, and describes the Biden administration's decidedly mixed record in fulfilling President Joe Biden's campaign promises to break from Trump-era policy. This discussion includes attention to the increasingly significant ways that states and localities have responded with efforts to either constrain or amplify federal enforcement trends.

T he last year during which the U.S. Congress passed legislation to normalize the legal status of a large group of unauthorized migrants was 1986. The Immigration Reform and Control Act (IRCA) was a compromise legislative package.[6] There was the legalization component of the law, which allowed nearly three million residents present without legal authorization to regularize their immigration status and, eventually, to apply for citizenship. And on the other side of the compromise was the employer sanctions component of the law, which was conceptualized as a mechanism for ending the job magnet that was seen as the key "pull factor" driving migration, mostly from Mexico, into the United States.[7] The bill had the intended effect of regularizing the status of many – but not all – long-time immigrant residents.[8] It did not, however, demagnetize the border. This was partly due to the fact that the federal government did little to enforce the law's employer sanctions provisions.[9] Perhaps this was the inevitable outcome of a law that ignored the practical realities of labor migration in the United States.

From the nation's founding until shortly before the enactment of the IRCA, migration from Mexico into the United States was unrestricted numerically.[10] Indeed, from 1942 through 1964, the United States actively promoted labor migration from Mexico with a program designed to facilitate the immigration of temporary agricultural workers from Mexico known as the Bracero program.[11] But that program was phased out in the mid-1960s, and numerical quotas were imposed on Mexican migrants in the decade that followed. If members of Congress thought that the end of the guest worker program and the newly imposed quotas would dramatically change the labor market, they were wrong. As the U.S. economy hummed along, workers continued to come to the United States, but under different legal circumstances. Now subject to quotas, many came outside of regular channels. The nature of migration did not change, but changes in the law had changed the status of the incoming migrants from authorized to unauthorized.[12]

Increasingly, the presence of these migrants came to be viewed not simply as a competitive threat to domestic workers and a racialized threat to the White majority, but also a criminal threat. The 1986 turn to criminal law to regulate the employment of unauthorized workers (albeit through the criminalization of employers) and to regulate "marriage fraud" provided early warnings that the problem of migration outside of accepted channels would be increasingly managed through criminal enforcement.[13] In 1994, and again in 1996, Congress enacted significant legislation tethering immigration law to increasingly harsh criminal laws.[14] As I have written elsewhere:

> Age-old fears of migrants as the vectors of substance abuse found new manifestations in the laws of the mid-1990s. Almost any drug crime – no matter how minor – became a deportable offense. Congress expanded the list of other criminal offenses that came to be defined as "aggravated felonies": crimes that resulted in mandatory detention

during proceedings, mandatory removal, and a lifetime bar on return. The list grew to include not simply crimes like rape and murder, but also relatively minor theft offenses and the like, and the new deportability provisions applied retroactively.[15]

In fiscal year 2000, the total number of noncitizens removed from the United States was 188,467; in 2013, it was 432,000.[16] In fiscal year 2000, only about 17 percent of federal criminal prosecutions were for immigration crimes.[17] In December 2018, they made up 65 percent of federal prosecutions.[18] These dramatic changes were driven by changes in immigration enforcement policies at the federal level, of course, but also by changes in enforcement practices by state and local law enforcement agents throughout the nation.

The events of September 11, 2001, had a significant effect upon immigration enforcement. For a time, the discourse of national security subsumed many aspects of the immigration policy discussion. Detention and removal provisions that Congress had enacted during the previous decade facilitated the arrests, indefinite detentions, and relatively streamlined removals of thousands of immigrants under the guise of national security.[19] But the billions of dollars that Congress directed to the newly created Department of Homeland Security in the wake of September 11, purportedly in response to those security concerns, gave rise to a substantial federal enforcement effort aimed at a broad swath of immigrant residents.[20]

Record-breaking removal rates ran alongside legal strategies that increasingly criminalized immigrants whose only offenses were crimes of migration. After September 11, the administration of George W. Bush took a particular interest in ending unlawful border entries along the U.S. border with Mexico. To accomplish this goal, the administration ramped up prosecutions for misdemeanor illegal entry, revitalizing reliance on the misdemeanor provision enacted in the 1920s with the goal of preserving White racial purity against Mexican immigrants while leaving the doors open for workers to satisfy labor market demands.[21] The Bush-era strategy included the mass prosecution of illegal entrants along the Southern Border, in which detained migrants pled guilty, as a group, to the misdemeanor crime of illegal entry.[22] While the sentences were light, they carried severe consequences. Reentrants faced felony charges with potential sentences of up to twenty years,[23] and the record of a misdemeanor illegal entry prosecution complicates immigrants' future efforts to enter the United States lawfully.[24]

Thus, federal immigration policy during this period accomplished a dual criminalization of migrants. Long-time lawful permanent residents became removable on criminal grounds for a wide range of offenses, including many that would not have been deportable offenses at the time of commission. At the same time, individuals crossing the border without authorization became misdemeanants

and felons as a consequence of the very act of crossing the border. These changes to policy were both driven by and reified age-old notions of the racialized migrant as a criminal threat. Now, indeed, border crossers were criminals, though, circularly, their crime was crossing the border. And immigrants were increasingly seen as criminals at the very time the immigration system was being built up to detain them like criminals as a precursor to removing them, including for minor offenses.[25]

As a matter of constitutional law, immigration regulation is an exclusively federal concern. But while shifts in federal law and policy drove these developments, changing state and local law enforcement policies were key drivers of the ballooning removal rates during this period. State criminal law prosecutions had been on the rise since the 1970s, and the resulting state law convictions provided a basis for the potential removal of many noncitizens on the newly expanded list of criminal removal grounds.[26] The role played by states and localities in immigration enforcement also was not limited to these indirect effects. The federal government was incorporating state and local law enforcement directly into their immigration enforcement efforts at the very same time that some states and localities were adjusting their own policies and practices to further facilitate federal immigration enforcement efforts.

One provision of the immigration legislation that Congress passed in 1996 outlined a process whereby state and local governments could contract with the federal government to gain immigration enforcement authority.[27] Known as 287(g) agreements, named after the section of the Immigration and Nationality Act that outlines their legal authority, memoranda of understanding enacted pursuant to this provision allow state and local law enforcement agents trained and supervised by federal agents to perform immigration enforcement functions.[28] Although there was clearly some congressional enthusiasm for such collaborations, the executive branch did not enter into its first 287(g) agreement until 2002.[29]

But governmental reluctance to embrace the program changed after the terrorist attacks on the United States on September 11, 2001. Spurred in part by a push from states and localities and in part by increased federal interest in and capacity for immigration enforcement, the largely dormant 287(g) program took off. At the peak of the program in 2011, there were seventy-two 287(g) agreements.[30]

Many states and localities also maintained that they had the inherent authority, as part of their police powers, to engage in certain immigration enforcement activities even without the supervision of the federal government. Cities enacted laws that created local penalties for employers and landlords who hired or rented homes to undocumented immigrants.[31] Some states required state and local law enforcement agents to inquire into immigration status in the course of their

routine policing activities, and attempted to create state penalties for employers who hired unauthorized workers.[32] While courts found some of these laws preempted – that is, that states and localities could not engage in some of these efforts without overstepping their jurisdictional authority and usurping powers entrusted solely to the federal government – courts also left many of these practices intact. States were empowered to take away the state business licenses of employers who hired unauthorized workers, or to require their own police to inquire into immigration status during routine police stops.[33] These legal changes heralded a cultural shift in state and local policing. For some "state and local law enforcement officials and agents, the policing of immigration status changed from something that was solely within the purview of federal agents to something that was a legitimate – and sometimes a leading – aspect of their own policing mission."[34]

Not every jurisdiction, however, leapt into immigration enforcement efforts. Many states and localities adopted policies intended to signal their independence from and lack of involvement in federal immigration enforcement efforts. Some entities, like the Los Angeles Police Department (LAPD) – which had adopted a policy in 1979 prohibiting its officers from inquiring into the immigration status of those they stopped – continued or created prohibitions on immigration investigation notwithstanding the changes at the federal level.[35] Indeed, as federal enforcement efforts increased, some jurisdictions explored and adopted noncooperation policies for the first time. The rollout of the federal Secure Communities program complicated these efforts.

Many immigrants and their allies had hoped that the administration of President Barack Obama would reverse the trends that had increasingly criminalized their communities and encouraged the hyperpolicing of their neighborhoods. That did not happen. Throughout his first term and part of his second term, President Obama continued the policies and practices of the Bush administration : mass prosecutions continued on the border, long-time lawful permanent residents continued to be removed for relatively minor offenses, government lawyers continued to push for expansive judicial interpretations of crime-related grounds for removal, and the administration continued to expand its reliance on immigration detention.[36]

Indeed, the Obama administration actually tightened the linkage between criminal law enforcement and immigration enforcement with the nationwide rollout of the so-called Secure Communities program. Under this program, all state and local arrest data were automatically screened by the Department of Homeland Security (DHS) to determine whether to pursue the arrestees for immigration offenses. This was true regardless of whether the state or locality wanted to engage in this joint effort and whether the arrest that led to the screening ultimately resulted in charges, much less convictions.[37] Police officers' decisions to

arrest thus became the critical determinant of whether an immigrant would be screened by DHS.

Reaction to the Secure Communities program varied. Some jurisdictions unsuccessfully sought to opt out of the program.[38] Others, however, embraced their new role in immigration enforcement, "stepping up their policing and arrest efforts in immigrant communities, and holding individuals upon DHS or U.S. Immigration and Customs Enforcement (ICE) request, even in the absence of probable cause or a judicial warrant."[39]

Against the backdrop of these massive expansions in immigration enforcement capacity, the federal government exercised prosecutorial discretion to shield some immigrants from removal. Under President Bush, enforcement agents were purportedly guided by a series of enforcement priority memoranda.[40] The Obama administration used expanded and more explicit guidance on enforcement priorities to attempt to shield more immigrants from enforcement for humanitarian reasons.[41] The administration also developed more creative programs to shield immigrants deemed meritorious from removal. Over the past twelve years, more than 825,000 young immigrants have been temporarily deprioritized for deportation and granted work authorization under the Deferred Action for Childhood Arrivals (DACA) program.[42] The pairing of aggressive detention and removal policies on the one hand with protective policies for some immigrants on the other reinforced an age-old and powerful discourse that sorts immigrants into two categories: the immigrants worthy of mercy and those who are dangerous and deportable. These problematic and oversimplified categories have dominated recent immigration policy discussion.

With the DACA program in 2012, and more expansively in 2014, the Obama administration began to scale-back and critically rethink the evolving linkage between immigration efforts and routine policing. First, the administration revamped the Secure Communities program, calling it the Priority Enforcement Program (PEP). Under this program, fingerprint screening introduced through Secure Communities would no longer be used as an indiscriminate funnel into immigration enforcement, but as a means of identifying individuals who the administration labeled as high priority. State and local government officials were given a cooperative role in identifying enforcement priorities.[43]

Immigrants' rights advocates were skeptical of the change, since the screening mechanism – fingerprints run through databases at the time of arrest – remained unchanged and the priority system relied on DHS discretion. The number of individuals removed who lacked a criminal record or any other priority indicator began to fall decisively during this period, but it still seemed incongruous that

an administration so cognizant of the unfairness of the nation's criminal law enforcement systems as a sorting mechanism placed such uncritical reliance on using criminal justice contact as a reliable means of sorting migrants.[44]

In late 2014, in a move that would have further narrowed the enforcement discretion for line agents, DHS announced the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. DAPA would have extended work authorization to qualifying unlawfully present parents of U.S. citizens and lawful permanent residents, potentially covering millions of unauthorized residents.[45] But the program was never implemented. It was enjoined by a federal district court judge in February of 2015, a mere day before the program was scheduled to go into effect. The injunction was upheld by the Fifth Circuit and stayed in place when the Supreme Court split four-to-four on the question.[46] (Notably, even if it had gone into effect, that program also offered no relief to most immigrants who had contact with the criminal enforcement system.)[47]

Once President Obama left office, the Trump administration restored the Secure Communities program, re-expanded the number of 287(g) agreements, and attempted to rescind many of the discretionary policies that the Obama administration used to shield immigrants from removal. The racialized trope of migrant criminality was deployed by the Trump administration again and again to justify its harsh immigration policy choices, including its attempted revocations of DACA[48] and temporary protected status for certain Central American, Haitian, and Sudanese migrants,[49] and its orchestration of massive, spectacular workplace immigration raids.[50]

Jurisdictions interested in enforcing immigration law without federal oversight were able to engage in such efforts without friction from the federal government.[51] In those jurisdictions, the harsh effects of the Trump administration's federal enforcement policies were amplified.[52] On the other hand, many jurisdictions enacted or expanded upon noncooperative immigration enforcement policies during Trump's presidency. Even before Trump assumed office, but at a greatly accelerated pace after, many jurisdictions began to think more creatively about how they could protect their residents from unjust deportations and removals. Some jurisdictions responded by revamping arrest policies and limiting detainer cooperation.[53] Others engaged in more far-reaching noncooperation measures, such as working to reduce or eliminate federal immigration detention in their jurisdictions.[54]

In recent years, as jurisdictions searched for ways to decouple their own resources from federal immigration enforcement efforts, they found that decriminalization and criminal sentencing reform were important policy levers. During the Obama administration, California revised its laws to give undocumented residents access to state-issued driver's licenses, effectively decriminalizing the act of driving for individuals lacking legal authorization.[55] The state also amended

its criminal code to cap the maximum sentence for misdemeanor offenses at 364 rather than 365 days in an effort to ensure that misdemeanor offenses would never count as "aggravated felonies" for purposes of federal immigration law.[56] Such reforms of the state criminal codes benefit many communities, but they have significant immigration consequences. These efforts highlight the centrality of criminal law and policing reforms in the quest for fair and equitable immigration policies.[57] As federal immigration reform efforts stalled, and as the federal government rolled out increasingly harsh enforcement measures, the levers of state and local law quickly became the most important tools for immigration lenity.

Under President Biden, there are some small signs that the federal government may inject a degree of lenity back into the immigration system. DHS Secretary Alejandro Mayorkas has announced a ban on workplace raids.[58] He also issued guidelines for immigration enforcement that focus on the equities of individual cases and prohibit the invidious use of race, national origin, ethnicity, gender, gender identity, sexual orientation, religion, or political associations in enforcement decisions.[59]

Still, despite promises of a more humane immigration policy, the Biden administration has pushed back on sub-federal efforts to limit federal enforcement[60] and has argued in favor of restrictive interpretations of immigration law in federal courts.[61] The new administration also continued the Trump administration's harshest exclusionary policies at the Southern Border for months. The public health bar on entry, enacted by the U.S. Center for Disease Control under Title 42, purportedly in response to concerns about COVID-19 but lacking any real public health justification, remains in effect as of November 2021.[62] These policies, which dehumanize arriving immigrants at the border, continue to fuel restrictive enforcement policies against immigrants within the borders. Despite a change in tone in the White House, severity continues to define U.S. immigration policy.

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1 Aristede R. Zolberg, *A Nation by Design : Immigration Policy in the Fashioning of America* (Cambridge, Mass. : Harvard University Press, 2008), 40–41.

2 Thomas Jefferson et al., *Declaration of Independence*, July 4, 1776. ("He has endeavoured to prevent the population of these States ; for that purpose obstructing the Laws for Naturalization of Foreigners ; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.")

3 Kelly Lytle Hernández, *City of Inmates : Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771 – 1965* (Chapel Hill : The University of North Carolina Press, 2017).

4 On the concept and production of deportability, see, generally, Nick de Genova, "Migrant 'Illegality' and Deportability in Everyday Life," *Annual Review of Anthropology* 31 (1) (2002) : 419–447.

5 In 1929, Congress passed a law that made it a misdemeanor offense to enter the country without inspection and a felony to return after deportation, for the first time criminalizing at the federal level the act of migration outside of lawful channels. These measures were introduced by Senator Coleman Livingston Blease, an avowed racist and immigration restrictionist from South Carolina. In a short period of time, the enforcement of these laws required the construction of new federal penitentiaries to hold those who were prosecuted and incarcerated. Hernández, *City of Inmates*, 137–140.

6 The Immigration Reform and Control Act (IRCA), Public Law 99-603, 100 Stat. 3445 (1986).

7 Michael J. Wishnie, "Prohibiting the Employment of Unauthorized Immigrants : The Experiment Fails," *University of Chicago Legal Forum* 193 (1) (2007) : 200–204.

8 The family members of many IRCA beneficiaries were not covered by the program. To avoid the harsh effects of this reality, the Reagan administration deferred the removal of many of these individuals. Gene McNary, "Memorandum from Comm'r, Immigration & Naturalization Serv., to Reg'l Comm'rs," February 2, 1990, and "INS Reverses Family Fairness Policy," *Interpreter Releases* 67 (153) (1990). But these and other exclusions of the law and shortcomings in implementation ensured the continued presence of a substantial unauthorized migrant population, even immediately after the legalization agreement took effect.

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[18] American Immigration Council, "Fact Sheet : Prosecuting People for Coming to the United States," August 23, 2021.

[19] For a discussion of the evolution and effects of these discursive and policy shifts, see generally Jennifer M. Chacón, "Unsecured Borders : Immigration Restriction, Crime Control and National Security," *Connecticut Law Review* 39 (2007).

[20] Meissner et al., *Immigration Enforcement in the United States*.

[21] Hernández, *City of Inmates*, 132–140. This paragraph draws from my chapter "Race and Immigration" in the *Oxford Handbook on Race and the Law in the United States*.

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[23] 8 U.S.C. § 1326.

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[47] Johnson, "Memorandum: Exercising Prosecutorial Discretion."

[48] *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1917 (2020) (Sotomayor, dissenting in part, recounting President Trump's racist statements in explaining why she disagreed with the majority's dismissal of petitioners' equal protection claim).

[49] *Ramos et al. v. Wolf et al.*, 336 F. Supp.3d 1074, 1100-01 (N.D. Cal. 2018) (elaborating upon the President's contemporaneous racist statements). The Ninth Circuit ultimately rejected the petitioners' equal protection claims, citing the Supreme Court's decision in *DHS v. Regents* and *Ramos v. Wolf*, 975 F.3d 872, 897 (9th Cir. 2020).

[50] See, for example, Richard Gonzalez, "Mississippi Immigration Raids Lead to Arrests of Hundreds of Workers," NPR, August 7, 2019, https://www.npr.org/2019/08/07/749243985/mississippi-immigration-raids-net-hundreds-of-workers.

[51] This contrasts with the Obama administration's lawsuits and investigations of jurisdictions that enacted immigration enforcement policies more stringent than the federal government's. The U.S. government sued to prevent states' purportedly cooperative enforcement bills, as in *U.S. v. Arizona*, 567 U.S. 387 (2012), and also investigated departments accused of racial profiling in the service of immigration enforcement. See, for example, U.S. Department of Justice Office of Public Affairs, "Department of Justice Releases Investigative Findings on the Maricopa County Sheriff's Office – Findings Show Pattern or Practice of Wide-Ranging Discrimination Against Latinos and Retaliatory Actions against Individuals Who Criticized MCSO Activities," December 15, 2011.

[52] Randy Capps, Muzaffar Chishti, Julia Gelatt, et al., *Revving Up the Deportation Machinery: Enforcement under Trump and the Pushback* (Washington, D.C.: Migration Policy Institute, 2018).

[53] Ibid.

[54] The city of Santa Ana, California, voted to end its contract with ICE, which had permitted the agency to detain immigrants in its jail bedspace. Nick Gerda, "Immigration Agency Cancels Santa Ana Jail Contract," *Voice of OC*, February 24, 2017 (reporting that ICE announced its decision to end its contract after the city counsel had voted to "phase out the contract entirely by 2020" and to immediately reduce available beds for ICE). The state of California enacted legislation to bar private immigration detention facilities in the state, an effort that is currently being litigated in federal court. See *GEO Group v. Newsom*, ___ F. 4th ___, 2021 WL 4538668 (9th Cir. Oct. 5, 2021) (enjoining the ban, reversing the district court's dismissal of GEO Group's suit, and remanding to the district court for further adjudication).

[55] Assembly Bill (AB) No. 60 (Chapter 524, Statutes of 2013) (requiring the department to issue an original driver's license to an applicant who is unable to submit satisfactory proof of legal presence in the United States).

[56] Ingrid V. Eagly, "Criminal Justice in an Era of Mass Deportation," *New Criminal Law Review* 20 (1) (2017).

[57] On the various forms of "sanctuary" policies, see Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, et al., "Understanding 'Sanctuary Cities,'" *Boston College Law Review* 59 (5) (2018). On state criminal law reforms in California designed to mitigate immigration consequences, see Eagly, "Criminal Justice in an Era of Mass Deportation."

[58] DHS Secretary Alejandro N. Mayorkas, "Memorandum to Tae D. Johnson, et al., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Condition of

the American Worksite, and the Dignity of the Individual," Policy Statement 065-06, October 12, 2021.

59 DHS Secretary Alejandro N. Mayorkas, "Memorandum to Tae D. Johnson, et al., Guidelines for Enforcement of Civil Immigration Law," September 30, 2021.

60 The Biden administration supported the GEO Group in its challenge to California's ban on private detention facilities. *GEO Group v. Newsom*, ___ F. 4th ___, 2021 WL 4538668 (9th Cir. Oct. 5, 2021). The Biden administration has also defended vigorously in court President Trump's migrant ban under Title 42. Joel Rose, "The Biden Administration is Fighting in Court to Keep a Trump-Era Immigration Policy," *All Things Considered*, NPR, September 20, 2021.

61 See, for example, *Sanchez v. Mayorkas*, 593 U.S. __ (2021) (holding that federal immigration law unambiguously precluded treating a grant of TPS as an admission for purposes of immigration law, thus barring one potential path by which some TPS holders might gain a path to citizenship without facing lengthy bars to entry).

62 Sarah Sherman-Stokes and Lindsay Harris, "Despite Promises, Biden Looks a Lot Like Trump on Border Issues," *Bloomberg Law*, October 20, 2021.

Due Process & the Theater of Racial Degradation : The Evolving Notion of Pretrial Punishment in the Criminal Courts

Nicole Gonzalez Van Cleve

Most theorists assume that the criminal courts are neutral arbiters of justice, protected by the Constitution, the rule of law, and court records. This essay challenges those assumptions and examines the courts as a place of punitive excess and the normalization of racial abuse and punishment. The essay explains the historic origins of these trends and examines how the categories of "hardened" and "marginal" defendants began to assume racialized meanings with the emergence of mass incarceration. This transformed the criminal courts into a type of public theater for racial degradation. These public performances or "racial degradation ceremonies" occur within the discretionary practices and cultural norms of mostly White courtroom professionals as they efficiently manage the disposition of cases in the everyday practice of law. I link these historical findings to a recent study of the largest unified criminal court system in the United States – Cook County, Chicago – and discuss court watching programs as an intervention for accountability and oversight of our courts and its legal professionals.

Illinois Supreme Court Justice Anne Burke takes "field trips" from Illinois's highest court to its circuit courts to do "court watching." She dresses in plain clothes to blend into the public and sits undetected in the public gallery. There, she observes the everyday practice of law, a dramatic difference from the type of work that she does for Illinois's highest court. In 2016, Justice Burke went to Cook County, Chicago's Leighton Criminal Courthouse – the largest unified court system in the nation – to watch an average bond court call.[1] The usual parade of defendants came through for bond hearings with most cases lasting under four minutes.[2]

Four minutes is an improvement from ten years ago when bond court was not an in-person hearing but televised from the depths of the Cook County Jail. Like an Orwellian nightmare, defendants would stare into a camera and their image

would be projected into a courtroom where desperate relatives gasped and cried at the sight of their loved ones on that small, pathetic screen. The defendant could only see the judge and their attorney on a tiny screen in the jail as they talked about their fate and the monetary cost of their freedom. One public defender was present in court and another was next to the defendant to push him out of view once the bond was determined, usually in less than two minutes.[3] Bond court reform moved these hearings in front of a judge in a courtroom so that defendants and court personnel could speak face-to-face.

One would expect that ten years later, when Justice Burke walked into bond court, such reform would have improved the appearance of justice, perhaps even improved its quality and dignity for those involved.[4] Justice Burke watched as the steady stream of defendants came through the court. They wore the standard-issued jail jumper or D.O.C.s, as the defendants called them. Then, among this consistent stream of homogeneously presented defendants, Cook County Sheriff's officers paraded in a female defendant suffering from mental illness. Police had arrested this defendant in her underwear and, while in the transport between police arrest to the local precinct and then to the Cook County Jail and courthouse, it was determined that a garbage bag was sufficient for her modesty and dignity. There, in open court, the defendant faced the judge and a full gallery dressed in a garbage bag.[5]

It is impossible to know how many police, public defenders, prosecutors, sheriff's officers, social workers, and staff saw her in the garbage bag, but what is clear is that not one person came to her aid or protested. In fact, it was so normalized that these professionals knew that the judge would also find it acceptable because, as Justice Burke described, the bond hearing continued without any recognition that they had dressed this defendant as "trash." Had Justice Burke not been in the court that day, this case would not have attracted any attention. In fact, what may be most alarming is the extent to which this degradation was normalized in their court culture, one that was supposedly reformed years prior.

Most theorists assume that the criminal courts are neutral arbiters of justice, protected by the Constitution, the rule of law, and court records. This essay challenges those assumptions and examines the courts as a place of punitive excess and the normalization of racial abuse and punishment. I argue that the criminal courts have transformed into a type of public theater for racial degradation. This public performance occurs through the discretionary practices and cultural norms of mostly White courtroom professionals as they efficiently manage the disposition of cases in the everyday practice of law.

I n 1956, Harold Garfinkel published a classic sociological article on the "Conditions of Successful Degradation Ceremonies." There, he elaborated the sociology of moral indignation, in which the "ritual destruction of a person be-

ing denounced . . . is intended literally."[6] The degradation ceremony transforms the social actor (like the defendant wearing a garbage bag) and diminishes her social status until she is separated from the social body. Performance is central to this ceremony and allows for public distinctions between "us" (the mostly White professionals) and "them" (the mostly poor people of color held accountable by the system). Overall, degradation in everyday legal practices amounts to pretrial punishment prior to adjudication, and to state-sanctioned abuse and humiliation of people of color under the guise of due process.

In 1977, legal scholar Malcolm Feeley described pretrial punishment as the arduous nature of our court system that commences upon arrest.[7] Certainly, there are still high costs to arrest and pretrial detainment and due process.[8] However, in addition to these types of pretrial punishments, there is also punishment through cultural practices that are enacted by discretionary actors – judges, prosecutors, and defense attorneys – as they process cases and people through the system. The character and quality of these practices enact a type of ritual punishment beyond what we once understood and theorized as pretrial costs. In effect, court practices are a legal forum to degrade and parade defendants in an expressive manner that reaffirms the division between "us" (professionals) and "them" (defendants). In the era of mass incarceration, this divide is inherently a racial one: the professionals holding court are primarily White and the defendants held accountable in these courts are primarily poor people of color.

Sociologist David Garland notes that the field of criminal justice often falls victim to a "presentist" view of criminology.[9] Policy analysts and academic criminologists regularly fail to interrogate the cultural and historical links that influence or sustain present-day practices.[10] As such, I begin with an examination of the 1960s criminal court reform era as a seminal turning point for the start of mass incarceration.[11] In particular, I focus on *The Challenge of a Crime in a Free Society*, a report from the President's Commission on Law Enforcement and Administration of Justice.[12] I analyze the historic links between this reform era and show how cultural tropes about "worthy" and "unworthy" defendants became intertwined with racial meanings and stigmas. These racial stigmas are mobilized in the criminal courts to help efficiently sort and process cases, but they also transcend criminal justice institutions and jurisdictions.

I use the term "criminal justice adjacencies," which highlights the shared culture between loosely coupled criminal justice institutions like police, courts, and local jails. They share structural codependencies in case management despite their unique organizational objectives. Criminal justice adjacencies also share culture logics and structural resources that exert influence on each other.[13] As this framework suggests, the cultural shifts in due process have a lasting impact on other parts of the criminal justice system. In effect, cultural stigmas and the practices they create are contagious and shared across institutions and jurisdictions,

as we saw in the first case study in which a stream of discretionary actors – from police to lawyers to sheriffs – rationalized the presentation of the defendant in a degraded state. I address the consequences of these cultural changes that lead to punitive court practices, the skirting of due process procedures, and the types of public racial degradation ceremonies that Garfinkel elaborated in his sociology of indignation.

In this essay, I review the core findings in my decade-long research on the criminal court system in Chicago. This is the first study in forty years to take a system-wide approach to understanding pretrial punishment in terms of court process-es, which are a product of culture, discretion, and racial stigma. The research includes twelve months of observations in both the Office of the Illinois State's Attorney and the Office of the Public Defender. I used a multimethod approach to incorporate multiple vantage points on the same field site over an extended peri-od of time. In addition to ethnography, I interviewed 104 attorneys (prosecutors, public and private defenders, and judges). I also conducted a large-scale qualitative effort with the assistance of 130 researchers. Overall, I collected more than one thousand hours of observation across all twenty-five courtrooms in the main courthouse in Chicago. The research assistants were from varying racial back-grounds and dressed in plain clothes (rather than professional attire) to blend in with the general public while they observed the courts. These "court watch-ers" collected observational data in a semistructured manner using the National Center for State Courts and the Bureau of Justice Assistance's "Trial Court Perfor-mance Standards" regarding "access to justice."[14]

Rather than focus on the high costs of pretrial punishment and the escalating costs of exercising rights as Feeley does, my research investigates how discretion, racial stigma, and the coding of defendants in terms of their supposed moral fail-ings creates a tinderbox for racial punishment in our courts.[15]

Contradictory organizational demands influence criminal courts in America; courts are expected to manage efficiently the case volume of the entire criminal justice system while ensuring that justice is done.[16] The criminal courts are not merely an "operating system" of state power; they are expected to protect the rights of individuals such that the "innocent and the unfortunate are not oppressed."[17] Hence, the courts serve an important educational and symbolic role in the criminal justice system and society, at large.

However, generations of legal scholars have documented a large divide be-tween the normative "law on the books" and the criminal courts "in practice." One of the most famous academic works was Malcolm Feeley's award-winning book *The Process Is the Punishment,* which documented the arduous nature of the lower courts and the high cost of pretrial punishment in New Haven, Connecti-cut. Feeley notes that at a time when myriad new procedural guarantees were ex-

tended to defendants, many were still without attorneys and no one in his sample (n=1,600) chose to have a jury trial.[18]

However, despite this work's lasting impact, Feeley acknowledges the overlooked historical context of his findings. In the 1920s, American legal scholar Roscoe Pound studied the criminal court system, and his description of urban criminal courts was still accurate fifty years later when Feeley conducted his study. In Pound's words, the courts were defined by "confusion, the want of decorum, the undignified offhand disposition of cases at high speed, [and] the frequent suggestion of something working behind the scenes, [that] . . . characterize the petty criminal court in almost all of our cities."[19]

When Feeley revisited New Haven in 1992 for his book's second edition, he observed that the Court of Common Pleas was restructured as a unified trial court to improve the administration of justice. However, he noted that the culture, attitudes, and processes that he first observed after the "due process revolution" remained the same.[20]

Each generation of scholars and policy-makers is astounded that the court system has little resemblance to the dignity of the law and has a cultural resistance to systemic change. Some have theorized that the organizational structure of criminal courts may be to blame for the cultural similarities between courts across different jurisdictions.[21] While criminal courts may vary from jurisdiction to jurisdiction, there are many organizational features that create parallels between all courts. Courtrooms are workgroups comprising judges, prosecutors, and defense attorneys who are familiar with each other's specialized roles, but who have their own unique vantage points on processing cases and doing justice.[22] As such, places like Cook County, Chicago, are "ordinary in their dysfunction": facing the same challenges and case burdens that mass incarceration has created for frontline practitioners throughout the nation.[23] Finally, as Feeley noted in 1992, our criminal courts have shown little change since Pound's studies in the 1920s; however, what has changed is the rise in mass incarceration.[24]

Historian Elizabeth Hinton's work *From the War on Poverty to the War on Crime* examines the origins of mass incarceration and shows how it was a bipartisan effort that extended from the administration of John F. Kennedy to Ronald Reagan and beyond. Collectively, Congress, the executive branch, and the courts built the state's capacity for the racist criminalization of people of color. This shift was a reaction to racist assumptions about African American "inferiority" and cultural "pathology." For instance, Kennedy's Juvenile Delinquency and Youth Offenses Control Act of 1961 conceptualized Black youth as needing repair rather than opportunity or justice, while Lyndon B. Johnson transformed this clampdown on Black youth into an all-out "war on crime." From this time, we have seen a rise in the militarization of police, law and order rhetoric and policy, increased surveillance of Black communities, and the use of labels like "delinquent" and "potentially delinquent."[25]

However, there is a paradox to this account: at a time when mass incarceration was gaining punitive momentum, the criminal courts were entering a supposed reform revolution. A core objective of Lyndon Johnson's commission was eliminating unfairness in the criminal justice system. While the police, courts, and correctional agencies had a mandate to enforce the law, it had an equally important responsibility to "provide fair and dignified treatment for all."[26] Beyond fair treatment of every individual, the perceptions of those affected by the justice system mattered for its legitimacy and the willingness of people to trust the system and its values. In their view, it was a centerpiece of the criminal justice system, the institution to which the "rest of the system has developed and to which the rest of the system is in large measure responsible."[27] In essence, the commission reaffirmed the U.S. Supreme Court's ruling that "justice must satisfy the appearance of justice."[28]

Despite these normative expectations, Roscoe Pound, Malcolm Feeley, and the commission detailed an overburdened court system that was lacking in both dignity and decorum. The commission described being shocked by the conditions of the lower courts: the noisy cramped spaces, the often undignified and perfunctory compliance with due process procedures, and poorly trained court personnel. Court employees were overwhelmed by the caseload, their inability to address the social problems of their defendants, and that their high case volume impeded their ability to examine cases carefully.

Given the gross disparity between the number of cases in the lower courts and the court personnel and facilities able to handle these cases, there was a total preoccupation with moving cases (and people) toward disposition by any means necessary. Speed was a substitute for care. Compromise and negotiation almost entirely substituted for adjudication. Most important, individual defendants received inadequate attention to the detriment of their rights, the accurate evaluation of their social or criminal risk, and their postconviction future. The commission described this confluence of problems as "futility and failure" in the court system.[29]

As Dean Edward Barrett noted in the commission report,

> Whenever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials.... Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on the docket, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous.... Very little such observation of the administration of criminal justice in operation is required to reach the conclusion that it suffers from basic ills.[30]

In a sense, the commission acknowledged that the gap between the "law on the books" and the "law in practice" is not just enormous, it is obvious. It is in

the everyday injustices hidden in plain sight in the structural arrangements of the courts and the norms and practices that define court culture.

Perhaps exacerbating the issue of case volume was the commission's concern that the density of populations in large urban jurisdictions along with myriad social problems made it difficult to discern the potentially dangerous defendants from those who posed no violent threat to society.[31] At that time, they noted that an improved criminal code was a means to that end but clarified that, ultimately, it was court professionals who had a significant responsibility in exercising discretion to distinguish between "hardened" or habitually dangerous offenders from "marginal" offenders who may be guilty but were neither habitual nor dangerous. They clarified that such nuance was difficult to capture in the criminal code, but the latitude or discretion given to police and prosecutors (in arresting and charging) and judges (in sentencing) was essential to the proper functioning of effective law enforcement.[32] Because the system punished these "marginal" offenders (who made up almost half of all arrests), criminal justice professionals created the case volume that burdened them and the system.[33] In a sense, the criminal justice system was overburden by those offenders violating "moral norms" rather than those engaging in dangerous behavior. This was problematic even prior to mass incarceration.

In addition to creating cases that criminalized people, the commission noted that enforcing these crimes of "immorality" was "degrading for the police and raises troublesome legal issues for the courts."[34] They also observed that in many cities, the enforcement of these laws led to corruption in policing and in the courts, which resulted in a general "decline in respect for the law" and concern for the system's overall legitimacy.[35]

Despite the important role of discretionary actors, the commission had significant misgivings about court professionals and their ethics, ideologies, and practices. As the report states, "courts can only be as effective and just as the judges and prosecutors, counsel, and jurors who man them."[36] The commission noted that court professionals were often an obstacle to that end. Professionals and defendants had "little understanding" of each other. The law and court procedures seemed "threatening" and confusing to those held accountable to the law. Likewise, many defendants were "not understood by, and seem threatening to, the court and its officers."[37] The commission questioned whether prosecutors and judges from middle-class backgrounds and attitudes had the capacity to empathize with poor defendants who lacked education. As the report states:

> A prosecutor or judge with a middle-class background and attitude, confronted with a poor, uneducated defendant, may often have no way of judging how the defendant fits into his own society or culture. He can easily mistake a certain manner of dress or of speech, alien or repugnant to him, but ordinary enough in the defendant's world,

as an index of moral worthlessness. He can mistake ignorance or fear of the law as indifference to it.[38]

This may be the most astounding observation that foreshadows the future to come: the great racial divide between court professionals and defendants and victims.

Two major macrostructural changes have impacted our courts since the publication of the commission report. First is the rise of mass incarceration. It is doubtful that the commission – lamenting the problem of case volume in the 1960s – anticipated the seven-fold growth in incarceration that would come over the next forty years. They could not have foreseen the strikingly disproportionate impact on Blacks and Latinos,[39] which has transformed our social and political landscape, including the racial composition of our courts. Hence, the racial disparity that defines mass incarceration impacts our criminal courts whereby the racial divides between court professionals and defendants and their families are more pronounced. One only has to walk into a large, urban courthouse to see the segregated divide between the minority consumers of justice from the White purveyors of justice.[40]

Second, there has been a retraction of the welfare state. This has resulted in an increased reliance on the criminal justice system for social service provision. Social services previously obtained through traditional welfare agencies are now obtained through contact with the criminal justice system.[41]

These two larger, structural changes – the racialized nature of mass incarceration and the use of the criminal justice system for social service provision – have amplified the pressures on the criminal justice system. There is an increase in case volume in addition to changes in how court professionals make sense of this caseload of people. The designations identified by the commission – "marginal" and "hardened" – are still prominent in how professionals categorize defendants.

In Chicago, professionals called these defendants either "mopes" or "monsters," and in jails, sheriffs called these inmates "lazy criminals" or "real criminals."[42] What is consistent is the need to label and mark offenders as either "social burdens" to be managed or "criminal threats" to be punished. Those marked as "marginal" or "mopes" are all but required to have their case disposed of with minimal time, effort, and litigation resource. Hence, the labeling serves the function of resource allocation in the courts where time is scarce and due process can be costly.

However, in an era of mass incarceration, when courthouse roles are racially segregated, additional racialized narratives become associated with these categories of "marginal" or "hardened" offenders. These narratives harken to readily available, racist ideology about the supposed cultural failings of Blacks and Lati-

nos. For instance, in Chicago, a probation officer in my study (who worked with the prosecuting team) described "mopes" as having a "childlike" mentality and then proceeded to imitate a "mope" by using a bastardization of Black English Vernacular within earshot of the defendant and the public gallery:

> See this guy…He's like, "oh man dat ain't right…dis shit ain't right. Why da judge be like dat, man?" If all I had to do was just show up every day and report to probation, pay $25 fines, and do some community service, just to stay out of lock-up…I would. Is there a choice? Putting some of these guys on probation is like throwing trash in the ocean…it just comes back to you. This guy's a piece of shit…he'll be back.

Rather than discuss the defendant's criminal offense, this probation officer describes the defendant as a social burden. His real crime is being guilty of the moral failing of being a "mope," a defendant that is akin to "trash" in the ocean.

While the commission originally noted professionals having a lack of understanding for the people whose lives were impacted by the justice system, they did not specifically study how stereotypes and racial stigmas associated with the categories of defendants gained organizational utility within the court organizations.

In Chicago, once defendants are labeled as "mopes," their moral failings make them "unworthy" of due process. To professionals, due process is not a right extended to all defendants, but a privilege reserved for "true" criminals. This belief system, which, at its core, is rooted in racialized assumptions about the moral failings of people of color, becomes particularly useful for court professionals. If defendants are marked as unworthy "mopes," then court professionals can strip down due process procedures to the minimal compliance required by law in order to achieve disposed cases or "disposes." Note that this vernacular for a closed case is another term that sounds like "throwing trash in the ocean."

Because of these ideologies, due process procedures become a type of ceremony without substance, or a "ceremonial charade," in which covert evasions of due process allow professionals to expend the least amount of effort on cases. Files are barely opened. Discovery material is sloppily reproduced and almost in violation of Brady obligations of evidence disclosure. Legal admonishments are nearly incomprehensible as judges race to read rights into the record rather than explain them to defendants. The great irony and perhaps hypocrisy about this efficiency is that the race to convict "mopes" through the ceremonial charade rewards the more violent defendants categorized as "monsters": those violent defendants are represented by attorneys from specialized task forces, warrant investigations, and use the lion's share of time on the court docket.[43]

Labeling offenders as "unworthy" social burdens appears race-neutral on the surface. Professionals rationalized their disdain for defendants as a disdain for the immorality of their crimes. Once race is coded out of the picture, a host of abuses are allowable against defendants and even their families. Because courts are divid-

ed along racial lines, this is tantamount to Whites abusing Blacks and Latinos with impunity in our American criminal courts.

Racial abuse in the criminal courts is a patterned exchange between White professionals and defendants of color, but it is decidedly one-sided in its power and violence. Garfinkel's construct of "degradation ceremonies"[44] is useful in describing encounters of racial abuse or degradation as they occur in the courtroom workgroup. Criminal courts and the professionals who maintain them are tasked with making moral distinctions between defendants. Some may be "monsters" and charged with violent crimes and the vast majority are "mopes" charged with crimes associated with social ills; regardless, the courts are the perfect theater for moral indignation, which is central to Garfinkel's degradation ceremony. It is a place where moral distinction and racial distinctions collide, where the moral failure of the defendant (the decision to steal, deal drugs, or even possess drugs) is both a racial offense and a criminal offense.

However, the racial disparity of mass incarceration transforms the court into a theater of racial degradation: a dramaturgical model of law in which prejudice and power are reenacted in everyday life for other White attorneys to gaze upon. In the sociology of moral indignation, the "ritual destruction of a person being denounced . . . is intended literally,"[45] and the ceremonial aspect withers the social status of the actor (the defendant) until she is separated from the workgroup itself. This allows for the public enactment of the "us" versus "them" distinctions that are crucial to organizational efficiency in the courts. As Garfinkel describes, the ceremony involves a denunciation in which social actors "publicly deliver the curse: 'I call upon all men to bear witness that he is not as he appears but is otherwise and in essence of a lower species.'"[46] One can imagine the case study of the woman wearing a garbage bag in court. In the context of a degradation ceremony, the defendant is not sick or suffering from mental illness. She is not a victim of police abuse. She is not to be sympathized with nor indulged with respect and decency. In fact, in this most egregious case, the defendant is literally costumed as garbage or presented as the "essence of a lower species."

These ceremonies are communicative in that the status degradation is meant to be performed. There are denouncers, perpetrators, and witnesses with the goal of reconstituting "the 'other' as a social object."[47] The denouncer must get the witnesses to appreciate the perpetrator, as well as the blameworthy event and blameworthy being. In the case of the criminal courts, those witnesses are often fellow courtroom colleagues and White professionals. Finally, the denouncer must publicly claim and manage their status as a bona fide representative of the group in front of the witnesses. From this position, she must name the perpetrator an outsider. This social ceremony is like a separate evidentiary hearing for the social standing of poor people of color. With the participation of armed sheriffs, these ceremonies can be violent.

In my research, a defendant's request for basic due process was enough to commence a racial degradation ceremony. For instance, one defendant who was charged with a nonviolent felony maintained his innocence and would not accept a plea bargain to easily "dispose" his case. Instead, he asked for a jury trial. By law, the attorneys had to honor this request. However, they could enact a degradation ceremony to perform this defendant's "unworthiness" for a trial. As a "joke," sheriff's officers wrapped an extension cord around the defendant's chair to simulate his execution. This occurred after the torture at Abu Ghraib was revealed and seemed inspired by those events. Note the undertone of actual violence. The sheriffs dramatized an execution for other White witnesses in the courtroom.

In another instance, a defendant who was HIV positive and had contracted tuberculosis (TB) while in jail was brought into court, and his public defender requested that he be released in order to save him from dying in jail. This request for leniency initiated a racial degradation ceremony. When his HIV and TB statuses were discussed in court, the sheriffs guarding him stepped back from the defendant in unison. The defendant was mocked as a contaminating object. One sheriff pantomimed, "HELP ME!" to the prosecutor as she laughed. The judge smiled and acknowledged the joke as the public defender continued to speak. All of these exchanges occurred as the defendant was watching, which signified that his presence was inconsequential to those initiating the ceremony. Thus, the defendant's social status was withered to the point of invisibility. Like a separate social hearing on his moral (rather than legal) standing, the request to humanize the defendant was met with an immediate response to cast him as "not as what he seems." He is not to be sympathized with nor is he vulnerable. He is a contaminant. He is cast as the "essence of a lower species." This ceremony occurs undetected by the courtroom record.

What is most disconcerting about these racial degradation ceremonies is that there are people of color also watching in the public galleries of the courtroom. Some are defendants waiting for cases. Some are victims waiting for closure. Others are family members supporting their loved ones. Regardless, the spectacle of abuse created by these ceremonial encounters disciplined and punished other outsiders into silence, subordination, and fear. It was common to see elderly women, for instance, walking gingerly toward professionals with their hands raised in the surrender or "don't shoot" position to ask a simple question. The power of the degradation ceremony and its measure of punitive excess is its capacity to exert fear, discipline, and intimidation beyond the subjects of the ceremony and onto all people of color in the courthouse.

Are the cultural tropes and ceremonies enacted in the courts generalizable to other jurisdictions and criminal justice adjacencies?[48] The increased reliance on the criminal justice system as a social service provider for

the poor has created new cultural logics and shifted how the court practitioners view the criminal justice system and understand their role within it. "The number of appearances in court, legal motions, trials, jail beds, food, showers, safe haven from the streets, and in-custody medical services is interpreted as part of the many criminal justice 'benefits' that arrested individuals seek to access and abuse."[49] As a result, court professionals act as institutional gatekeepers who are tasked with thwarting access to due process rather than granting it. This institutional role requires decision-makers to reimagine defendants that make up their caseload as welfare abusers rather than as true criminal threats.

Consistent with the racialized "mope trope" of a defendant as a social burden, court professionals mobilize "welfare stigma" or stereotypes about poor people's overreliance on and abuse of public aid to allocate criminal justice resources, including due process in our criminal courts. These stereotypes are intersectional and center around the belief that poor people – especially poor people of color – will tend toward abusing public aid.[50] Welfare stigma allows court professionals to create stricter eligibility criteria for due process in criminal courts and even occupancy in jails. In my study with sociologist Armando Lara-Millán, a prosecutor elaborated on this view of defendants by using a welfare trope: "I'm just sick and tired of them living off my back.…As long as there is a McDonald's 'Help Wanted' sign in the window, there's a job for them."[51]

What is most striking about these cultural dynamics in the court is that they transcend jurisdiction and even criminal justice institution. Our study shows how welfare stigma is used in both courts and jails with interorganizational effects on efficiency and case management. Welfare stigma in the courts helps rationalize pushing people through the adjudicative process with as little time and effort as possible. These stigmas are also used to rationalize pulling people out of jail to reduce the inmate population. But do these cultural categories manifest in distinct racial degradation ceremonies in jail and other criminal justice locations?

In jails, the rationale to deny medical treatment to inmates and even engage in gross violations of human rights are often normalized by these tropes. Inmates are "faking" their ailments. They are complaining about their pain or about not getting their medicines like it is a "hospital." In the worst cases, the degradation crosses the line into overt assault and abuse. In my recent research for my book *The Waiting Room*, a sheriff detailed a technique called the "lawn mower," in which inmates were shackled and stripped naked by sheriffs in the Cook County Jail. They would shower them by hosing them down in their cells and yank the chain laced between the inmate's arms and legs to make them fall to the ground on their faces. The racial degradation ceremony transformed any jailhouse "handout" to an opportunity for the violation of human rights and dignity. Furthermore, with no oversight, these encounters seem to begin in the courthouse and end in the jail through violence. Like the woman in the garbage bag, professionals across multi-

ple criminal justice locations and institutions share the cultural understandings that underpin these ceremonies and can enact them within their contexts.

If, as the commission states, courts are indeed a reflection of our society's "most deeply held and most cherished views about the relationship of the individual and society,"[52] then these findings are particularly troubling. We must interrogate which values our courts reflect in practice because that is the true experience of justice for defendants and victims. We must admit that the categorical distinctions between types of offenders – whether "marginal" or "hardened" – have become riddled with racial stigmas that allow our criminal courts to operate efficiently. These narratives simplify the enormous case docket into dichotomous categories that make for expedient justice. As I write in *Crook County*, these categories have long histories rooted in American racism:

> Professionals simplify the court docket into two racialized categories; defendants are either monsters or mopes. As Kipling conceived, the white man's burden is managing a racialized underclass that is "half-devil and half-child." If mopes are the archetype of the "half-child," then this rarer offender represents the "half-devil" or as prosecutors call them, "monsters."[53]

This style of justice comes at a high cost. It legitimizes racist tropes about defendants, it degrades the status of victims (many of whom are people of color), and it degrades the legitimacy of the system as a moral authority representing the rule of law. At the heart of our policy concerns and reforms is addressing the system's legitimacy in the eyes of the communities it serves.

Jonathan Casper's 1972 book *The Defendant's Perspective* captured the "consumer" perspective of justice: appraising the criminal justice system from the vantage point of the system's consumers. He noted that the defendants viewed the system as having the same lack of integrity as a hustle that went down on the streets. Defendants saw police, attorneys, and judges playing the same immoral games as a common criminal.

In the present day, Chicagoans call their justice system "Crook County" (rather than Cook County) to mock the legitimacy of the police and the courts. Perhaps appraising the system by the consumers it serves is how we develop the standards by which we measure the success of our courts. We must ask: are our courts satisfying the appearance of justice or are they instead normalizing the mistreatment of people of color? Do our courts appear fair, accessible, and just as the National Center for State Courts spells out in their "Trial Court Performance Standards"? How do these practices appear to defendants and victims? The answer is clear: we can and must do better.

One defense attorney in Chicago lamented the difficulty of achieving systemic change. Even in the shadow of one of the largest federal investigation scandals in the nation's history, Operation Greylord, the repeat players in Chicago's court

community were still resistant to change. Prosecutors used the word "nigger" in their offices and in court (which transformed into the word "mope"), played games while convicting defendants, and showed disregard for their duty to see that justice shall be done. As this defense attorney explained, even with federal scrutiny, there was no internal motivation to change practices in the courts:

> You didn't have an internal motivation to change; you had external motivations to change in the form of indictments. That's not really a cultural change … that's "oh my god, I got caught." … So, that didn't really affect that much culturally. That was like the difference between general and specific deterrence. There is certainly some specific deterrence: guys [attorneys and judges] were going to the joint. But, generally speaking, the culture persisted in a less obvious way. The culture continued to be an "us and them" culture with defendants. The defendants are outside of us.[54]

Astoundingly, this attorney talks about achieving cultural change by using the language of criminal deterrence for court professionals. With such resistance, how can we reform our courts and these cultural practices that have sustained themselves over generations of practitioners and the scholars that study them? One answer comes from a surprising finding from my research. When conducting the anonymous court watching portion of my data collection, some court watchers (despite dressing in casual attire to blend in with the public) were found out by professionals. In one case, a judge instructed the sheriff to make the court watchers identify themselves, put their hands up, and relinquish their pencils in order to stop them from writing notes. In another instance, a judge became particularly offended by a court watcher who was also a summer associate at a law firm. The judge yelled, "Do they pay you so much at your firm that you have time to watch me do my job?"

I noticed that the presence of court watchers was greeted with particular hostility because they represented oversight and accountability, and *that* incensed professionals. It occurred to me that anonymous court watching was more than just a research technique to gather data. It had the potential to be a deterrence-based program or intervention to inject accountability and oversight into a court system that tends to exclude outsiders from meddling in their work. Perhaps Justice Anne Burke's presence in court is even more evidence for the need for such oversight.

The court watching that I designed for research purposes is a method of collecting data on the practice of law and evaluating whether professionals adhere to the National Center for State Courts' "Trial Court Performance Standards." These standards prioritize "access to justice" and allow for oversight of how "justice is satisfying the appearance of justice."[55] Beyond holding all professionals accountable, a court watching program has the potential to evaluate judges and those evaluations can be used to educate voters. Would judges engage in racial degradation ceremonies if they knew the broader public was watching? Would prosecutors

mock defendants in Black English Vernacular if they knew their behavior would be reported? How would these court professionals act if they knew that the public, higher courts, and the media cared about how justice was being served? My prediction is that they would act with the level of professionalism and dignity that is required of their ethical commitments as lawyers and their roles as judges, prosecutors, and defense attorneys in our justice system.

ABOUT THE AUTHOR

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ENDNOTES

[1] "Court call" is the daily business of the court, which includes bond determination, status hearings, the exchange of discovery material, and setting dates for trials.

[2] See Andy Grimm, "New Bond Court Rules Take Effect, but Not Much of an Effect," *Chicago Sun-Times*, September 18, 2017, https://chicago.suntimes.com/news/new-bond-court-rules-take-effect-but-not-much-of-an-effect/.

[3] See "Criminal Injustice in Cook County," *Conscious Choice Magazine*, May 2007.

[4] *Offutt v. United States*, 348 U.S. 11, 14 (1954).

[5] "Lester: Illinois Supreme Court Justice Goes Undercover in Bond Court," *Daily Herald*, August 22, 2016, https://www.dailyherald.com/article/20160822/news/160829822/.

[6] Harold Garfinkel, "Conditions of Successful Degradation Ceremonies," *American Journal of Sociology* 61 (5) (1956): 420–421.

[7] Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979).

[8] Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (New York: Russell Sage Foundation, 2016); and Mikaela Rabinowitz, "Holding Cells: Understanding the Collateral Consequences of Pretrial Detentions" (Ph.D. diss., Northwestern University, 2010).

[9] David Garland, *Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2002), 14.

[10] Nicole Gonzalez Van Cleve and Lauren Mayes, "Criminal Justice through 'Color-Blind' Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice," *Law & Social Inquiry* 40 (2) (2015): 406–432.

[11] Elizabeth Hinton, *From the War on Poverty to the War on Crime* (Cambridge, Mass.: Harvard University Press, 2016).

[12] The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: U.S. Government Printing Office, 1967), https://www.ncjrs.gov/pdffiles1/nij/42.pdf.

[13] In large jurisdictions, pressure from one institution on issues like jail overcrowding exerts consequences on efficient case management in the courts. Likewise, the number of pretrial detainees and convicted inmates exerts pressure on jail capacity.

[14] Armando Lara-Millán and Nicole Gonzalez Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System," *Criminology* 55 (1) (2017): 59–84.

[15] My comprehensive findings were published in Nicole Gonzalez Van Cleve, *Crook County: Racism and Injustice in America's Largest Criminal Court* (Stanford, Calif.: Stanford University Press, 2016); as well as in a comparative study of courts and jails in Lara-Millán and Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System."

[16] James Eisenstein and Herbert Jacob, *Felony Justice* (Boston: Little, Brown and Company, 1977).

[17] The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 125.

[18] Jennifer Earl, "The Process Is the Punishment: Thirty Years Later," *Law and Social Inquiry* 33 (3) (2008): 737–778.

[19] Roscoe Pound, *Criminal Justice in America* (Piscataway, N.J.: Transaction Publishers, 1997), quoted in Feeley, *The Process Is the Punishment*, 6.

[20] "Due process revolution" refers to the eruption of court decisions that extended or defined procedural guarantees for defendants. (For more, see Van Cleve, *Crook County*.) This inspired an empirical and sociolegal revolution of sorts as scholars attempted to measure whether these rulings affected the experience of justice in practice. See, for example, Brenda Sims Blackwell and Clark D. Cunningham, "Taking the Punishment Out of the Process: From Substantive Criminal Justice through Procedural Justice to Restorative Justice," *Law & Contemporary Problems* 67 (4) (2004): 59; Feeley, *The Process Is the Punishment*; David Sudnow, "Normal Crimes: Sociological Features of the Penal Code in Public Defender Office," *Social Problems* 12 (3) (1965): 255–276; Abraham S. Blumberg, "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession," *Law & Society Review* 1 (2) (1967): 15–40; Jonathan D. Casper, *American Criminal Justice: A Defendant's Perspective* (Englewood Cliffs, N.J.: Prentice-Hall, 1972); and Eisenstein and Jacob, *Felony Justice*.

[21] Van Cleve, *Crook County*; and Eisenstein and Jacob, *Felony Justice*.

[22] Eisenstein and Jacob, *Felony Justice*.

[23] Van Cleve, *Crook County*, 22.

[24] Ibid.

25 Hinton, *From the War on Poverty to the War on Crime*.

26 The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, viii.

27 Ibid., 125.

28 *Offutt v. United States*, 348 U.S. 11, 14 (1954).

29 The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 128.

30 Ibid.

31 At that time, about thirty states and the federal government examined the criminal code for a revision. The product of this work resulted in the "Model Penal Code" as a sound guide to criminal code reform in order to distinguish between greater and lesser offenses in a more accurate way.

32 The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 127.

33 Half of all arrests were crimes from these "marginal" offenders and comprised charges like disorderly conduct, vagrancy, gambling, and drunkenness.

34 The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 126.

35 Ibid.

36 Ibid., 127.

37 Ibid.

38 Ibid.

39 Garland, *Culture of Control*; and Bruce Western and Christopher Wildeman, "The Black Family and Mass Incarceration," *The ANNALS of the American Academy of Political and Social Sciences* 621 (2009): 221–242.

40 Van Cleve, *Crook County*.

41 Megan Comfort, "Punishment beyond the Legal Offender," *Annual Review of Law and Social Science* 3 (1) (2007): 271–296; Kaaryn Gustafson, *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (New York: New York University Press, 2011); and Alexandra Natapoff, "Gideon's Servants and the Criminalization of Poverty," *Ohio State Journal of Criminal Law* 44 (2015): 445–464.

42 Lara-Millán and Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System." Please note that the jail studied in this article is on the West Coast, and not in Chicago. The jurisdiction cannot be identified due to the human subject agreement with the correctional institution.

43 Ibid.; and Van Cleve, *Crook County*.

44 Garfinkel, "Conditions of Successful Degradation Ceremonies."

45 Ibid.

46 Ibid.

47 Ibid.

48 Lara-Millán and Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System."

49 Ibid., 61.

50 Michael B. Katz, *The Undeserving Poor : American's Enduring Confrontation with Poverty* (New York : Oxford University Press, 2013) ; and Lara-Millán and Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System."

51 Lara-Millán and Van Cleve, "The Interorganizational Utility of Welfare Stigma in the Criminal Justice System."

52 Ibid., 125.

53 Van Cleve, *Crook County*, 69.

54 Ibid., 79.

55 For information on creating a court watching program in your jurisdiction, see "Delving Deeper : A Discussion Video," Stanford University Press, http ://www.sup.org/crook countyresources/. There, you will find training videos, PowerPoint presentations, research instruments, and information on how court watching can be used for research and deterrence of unethical behavior in our courts.

Recognition, Repair &
the Reconstruction of "Square One"

Geoff K. Ward

The concept of a "square one" in societal organization is a curious thing, and challenging analytic, given the stubborn presence of the past. Even if not meant literally, the Square One Project, like much of the polity, envisions a new starting point, where social policy and practice might turn in a more equitable and inclusive direction. Yet we must grapple with what this restarting point is, in a sociological rather than political sense, and how the present can reasonably be conceived – and actively reconfigured – as an opportunity to start over. I argue that the Square One Project imagines yet another societal reconstruction, in which attending to old and more recent histories of racial violence remains critical to achieving a sustainable vision and practice of equal and legitimate justice. To that end, I encourage a wide-ranging array of efforts under the banner of monumental antiracism to prepare the ground for square one justice.

> History is not the past. It is the present.
>
> —James Baldwin

The concept of a "square one" in societal organization is a curious thing, and challenging analytic, particularly from the vantage of our embodiment of the past. This is an important problem to consider within the organizing query of the Square One Project: "if we start over from 'square one,' how would justice policy be different?"[1] Even if the phrase is not meant literally, the project, like much of the polity, envisions a new starting point, where social policy and practice might turn in a more equitable and inclusive direction. Yet we must grapple with what this restarting point is, in a sociological rather than political sense, and how the present moment can reasonably be conceived as an opportunity to start over.

There is a palimpsest problem with the idea of square one; our restarting point is an overlay on what has come before, with visible traces of that past remaining ever present. How do we reimagine and transform justice *while* other ideas and practices of justice continue to shape the organization of the society in ways that

reproduce centuries of inequality? We surely cannot literally recreate or return to societal square one, since we cannot undo this past and its presence, including such definitive American histories of settler colonialism, genocide, enslavement, apartheid, and mass incarceration. We also cannot easily escape their haunting shadows in contemporary social relations. Therefore, we must face their legacies today, as problems at square one, turning this record of atrocity into a kind of light, and resource in repair.[2]

The Square One Project is a lively site of democratic deliberation over the future of justice. There is likely nothing comparable in scope and scale in the world today, as this specific and critical question – the future of justice – is concerned. It is therefore an important opportunity to achieve a more *transformative* transitional justice process, in our postconflict society that is not past conflict.[3] Freeing our political culture from the trappings of this past, including racialized penchants for punitive excess and unequal protection under law, is among the greatest challenges for square one justice.[4]

We are at a historically familiar crossroad, a familiar moment of national reflection on the past, present, and future of social (in)justice. We have been here before, of course, and failed to make the turn toward an open society substantively organized by mutual respect, equality of opportunity, and protection in law. Though such opportunities have typically been lost, often sabotaged or otherwise squandered, they remain vital to articulating, building, and maintaining the society we want for ourselves and others.

The Square One Project imagines (another) societal reconstruction, in which attending to legacies of historical racial violence remains critical to achieving a sustainable vision and practice of equal justice. As Danielle Sered, founder of Common Justice, writes in *Until We Reckon*, "[we'll] be tempted to look only forward because what is behind us is so hard to face," but failure to confront this difficult past will deprive us of transformative change, as it has so often before.[5]

These challenges are not new, nor is the sense that an opportunity for transformative justice might again be near. Contradictions of American democratic proclamations, including the unjust rule of law and flaunting of vaunted freedoms, have long been clear to see and have always been contested. This historical pattern includes a relatively constant longing for transformative social change, a cyclical sense that this new day draws near and, finally, lament over opportunity lost, resetting the routine. Even before White settler colonialism took firm root as the orienting principle of these lands, rationalizing genocide, enslavement, and an explicitly White democracy, the people faced a similar choice of whether to institutionalize freedom and equality, or exploitation and exclusion. W. E. B. Du Bois wrote of this early period of American history that "the opportunity for real and new democracy in America was broad," as investments in liberty were substan-

tial, and the choice of White racial tyranny was not a foregone conclusion.[6] That opportunity was lost, and has been ever since, at subsequent crossroads, where there was something like a mirage of square one.

The nation reached a similar fork in the mid-to-late 1800s, when brief interludes of emancipation and Reconstruction would turn out merely to bridge eras of chattel slavery and reconstituted apartheid. Then, too, questions of ambition and organization of social change were paramount. Radical abolitionists warned in the 1840s that the nation could not easily transition from a society built on enslavement to a dignified civilization committed to freedom. The U.S. Constitution that Garrisonians plainly characterized as "a covenant with death" would have to be reconstructed, having been explicitly designed as a bulwark of racial slavery, rationalizing and institutionalizing America's democratic contradictions. Instead, of course, the Constitution was merely amended and, as Ava DuVernay's film *13th* dramatically portrays, continued to facilitate racist exploitation and exclusion, including Black Codes, convict leasing, and more contemporary regimes of racialized social control.

At each turn, the nation has proved unwilling to reconstruct law and society transformatively. Rather than prioritize or fashion that "square one," where a genuinely open society might grow anew, the nation has opted instead for more reformist transitions, limited in commitments to equal opportunity and protection, with predictable results. Several of my Black ancestors lived in Wilmington, North Carolina, in the 1880s, a place that was for a fleeting moment regarded as the most progressive city in the post-emancipation South, owing to its integrated neighborhoods and relative economic and political equality. These ancestors owned their own businesses and considerable property in Wilmington. They held public offices, serving in the state legislature and municipal government, including fire and police services, and were leaders in city schools. That experiment in racial democracy ended violently in 1898 when Black political and economic competition inflamed White rage, leading to a racial massacre and coup whose legacies linger today. Uncommitted as they were to radical Reconstruction, state and federal government turned a blind eye to the atrocities, enabling coup conspirators to remove the democratically elected government, installing their leader as mayor and many of the paramilitaries who had carried out the massacre as a new city police force.[7] Their racial terror would continue, now under the color of law, contributing to legal estrangement and cynicism that still endure.[8] What was for a brief slice in time the most progressive Southern city was thus rebranded the capital of White supremacy, inspiring a reign of racial terror and Jim Crow over the ensuing half-century and more.

We blew past another fork in the road during and after World War II, when the fight against fascism abroad cast a critical light on American racial tyranny. The "Double V" campaign of Black soldiers – fighting for victory abroad and de-

manding it at home – envisioned a democratic transition that was not to come, including in policing and other realms of the American legal system. One of the demands then, as now, was representative systems of social control, which required a dismantling of the White supremacist legal system built on the ashes of Reconstruction. "To extinguish the memories of black jurors, judges, police and legislators during Reconstruction was to make clear the undisputed and permanent authority of whites," writes historian Leon Litwack.[9] In the subsequent build-out of American apartheid, "The entire machinery of justice – the lawyers, the judges, the juries, the legal profession, the police – was assigned a pivotal role in enforcing these imperatives . . . underscoring in every possible way the subordination of black men and women of all classes and ages."[10] Many city police forces only began to reintroduce non-White officers in the aftermath of World War II, yet these officers were incorporated in ways that reflected and reinforced the entrenched White supremacist political system, or the imprint of the past.[11] Black soldiers were particular targets of White supremacist violence, given the distinct threat and outrage of their status, coupled with their emboldened challenges to American apartheid.[12] That history still rings, ironically and traumatically, amid contemporary complaints that antiracist protests – such as kneeling during the national anthem – disrespect "our troops."

Freedom movements of the mid-twentieth century carved another fork in the road of American history, again drawing scrutiny to racist police violence and otherwise undemocratic policing. There were familiar calls to end police occupation of poor communities, dismantle the police state, extend and enforce constitutional rights to due process and equal protection, and otherwise increase the democratic accountability of government. Despite important legal gains, these were soon overshadowed by racialized wars on crime and drugs, with poor youth of color defined as enemies within. As a high school student in Los Angeles in the late 1980s, I grew used to the harassment and threats of police authorities, who routinely used a pretext of "gang investigation" to train their guns on us, to physically and verbally abuse us, and to deprive us of constitutional rights that no one seemed to take seriously, notwithstanding all of the progress promised over the preceding century, at all those earlier crossroads.

I f the past is prelude, prospects for truly transformative change still look dim today. Yet we are in a unique historical moment in terms of strategies and resources. Technological and societal changes have created new forms of political capital, such as camera footage challenging White norms of willful ignorance, coordinated protest actions spanning virtual and physical spaces, and grievance areas fueling movement alliances and pressures that did not exist in earlier moments (for example, resisting "toxic prisons"). There are also new ideas, including growing and compelling calls for a society *without* police or prisons, born of

recognition that police often violently escalate situations, especially in encounters with non-White and otherwise marginalized populations, and that there are better options for social problem-solving than policing or imprisonment. This latest wave of critical analysis and political mobilization has clearly pushed us to this point of reckoning, another fork in the road of our national story, where the plot just might turn toward a realization of racial justice, or so we want to believe.

There is another important reason to be encouraged about the potential to build a movement advancing transformative justice. That is, we know more about this palimpsest problem, including how it might be countered, than we ever have before. This work informs my emphasis on specific challenges of recognition, and discussion of repair.

S quare one is haunted ground. That is, the living history of racial violence, or the problem of the presence of the past, is perhaps the greatest challenge to the concept of square one. Racist violence has been perpetrated regularly under the color of law, typically with civil and criminal impunity for its perpetrators, the aiding and abetting of legislators and executives, and the willful ignorance and indifference, explicit endorsement, and active involvement of the polity. Besides the spectacular violence of police and vigilante killings, there is the subtler state violence of criminalization and incarceration, and dispossession and dislocation, including deportation, which has played out over centuries, exacting immeasurable economic, political, and cultural tolls on generations of Americans. Even if this were all to end today, this toll would remain unresolved, the haunting shadow of historical racial violence.

Long histories of racialized violence affecting Native American, Black, Latino, Asian, and Pacific Islander populations are not merely losses of well-being, opportunity, or standing for immediately impacted populations, but are conveyed intergenerationally as inheritances of historical trauma and dispossession. Further, these harms have correspondingly advantaged generations of White Americans, materially and otherwise, in what amounts to a continuous transaction, often through extraction, congealing in the structural and cultural sinew of "durable inequality."[13] This matrix of social opportunity and closure, of White opportunity hoarding and accumulation reliant on disinvestment and decumulation, is not bound by the present borders of the United States. Rather, these relations of extraction must ultimately be viewed from a transnational perspective, in the relationship between the Global South and North, for instance, and in relation to the formation of the U.S. nation-state itself, within a much larger racist world system. If not always plain to see, mechanisms and legacies of these relations of racial dominance continue to circulate the globe, and it is questionable whether the United States can transform justice policy and practice without corresponding changes in this interconnected world system.

Setting that global question aside, and recalling Frederick Douglass's 1852 speech reflecting critically on the meaning of American Independence Day to the enslaved, we might productively ask, "what to the Black or brown American is square one?"[14] The answer is clearly complicated by centuries of racialized violence – direct, cultural, and structural – that remain bound up with group identities, experiences, and prospects today. As African American literature scholar Saidiya Hartman reflects on the legacies of enslavement,

> Slavery established a measure of man and a ranking of life and worth that has yet to be undone. If slavery persists as an issue in the political life of black America, it is not because of an antiquarian obsession with bygone days or the burden of a too-long memory, but because black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago. This is the afterlife of slavery – skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment.[15]

This entrenched racial calculus and its peril do not originate in the era of enslavement. This legacy draws on other atrocities throughout the history of this settler society, and links to others around the world, in its dynamic imprint on the present and future.

There is a broad and deep body of scholarly work charting these intergenerational impacts of historical racial violence. In *City of Inmates,* for example, historian Kelly Lytle Hernández traces historical linkages between the White racial project of conquest, rationalized as "manifest destiny," and a series of "eliminatory" measures on lands reconstructed as California, including ethnic cleansing, settlement through displacement, and mass imprisonment.[16] Historian Monica Martinez traces similar histories and legacies in *The Injustice Never Leaves You: Anti-Mexican Violence in Texas,* showing how atrocities of the Texas Rangers (such as massacres and dispossession), and subsequent denials of recognition and recourse by politicians, courts, historians, and journalists, sustain the traumatic stress of this state violence for descendants today.[17] Similar research examining historical trauma in American Indian and Black community contexts, such as genocide and forced relocation, suggests its legacies are literally embodied by descendants, contributing to health disparities, loss of collective efficacy, and other adverse outcomes.[18]

Social ecological dimensions of embodied trauma, and implications for redress, are also clarified in a series of empirical studies relating histories of genocide, enslavement, lynching, and other race-based violence and repression with heightened conflict, violence, and inequality in the same places today.[19] These statistical studies find that racial animus and political conservatism are consistently heightened among Whites living in U.S. counties with more pronounced histories of enslavement, in comparison with Whites in neighboring counties, historically and today; they have shown that contemporary support for punitive crime

policy, including capital punishment, is greater among White Americans in counties marked by histories of lynching.[20] Area histories of enslavement and lynching correspond with many other contemporary patterns of conflict, violence, and inequality as well, including Black victim homicide rates, hate crime law enforcement, White supremacist mobilization, heart disease mortality, infant death rates, and the use of corporal punishment in public schools.[21]

There is an urgent need for greater recognition of these legacies and reparative interventions that might break these cycles of repetition. These are problems of reconstruction for square one, where more direct challenges of these embodiments of past injustice – confronting their cultural and structural dimensions – are key to redefining ideas and practices of justice.

What Hartman has called the "racist ranking of human worth" continues to trivialize Black and other lives relative to those of Whites.[22] The Black Lives Matter (BLM) movement and White reactionary opposition to it are illustrative here. Opposition to the trivialization of Black lives (as by Black Lives Matter) has been met with considerable resentment, including the durable challenge countering that blue (police) lives matter more. This weighting of racially defined lives, including equations between police and anti-Blackness, and Whiteness itself, is a critical challenge for the square one agenda. To turn away from a history of justice policy and practice in the service of White racial dominance, and associated anxieties and entitlements of White supremacism (explicit or implicit), interventions cannot focus on the circumstances and interests of the non-White population alone; we must reckon with the square one problem of Whiteness in U.S. and global political culture and behavior.

We might broadly conceive of one of square one's "grand challenges" as abolishing the "racial contract," that racially violent "rider" on the social contract defining Whites alone as full persons, entitled to its provisions of trust and cooperation.[23] We cannot reasonably envision a new direction in justice policy without an end to this privileging of White bodies and their putative interests. Reconstructing square one requires disabusing White Americans of the incredibly deep-seated if often unconscious sense of their being "masters of national space," constantly threatened, and deserving of their social dominance.[24] This identity and associated roleplay, rooted in noted histories of White settler colonialism, and manifest in slave patrols, White citizens councils, and all-White police forces, juries, and court and legislative bodies, to name a few forms, has recently been animated by the likes of "Barbeque Becky" and "Permit Patty," whose individualized and playful memes distort the historically persistent threat of collective racist actions.[25] This is perhaps the heart of the White supremacist social body, the lifeblood of its collective violence, contributing to premature deaths of the masses at the hands of Whiteness, historically and today.

It will be incredibly challenging to center the violence of Whiteness in re-imagining justice policy, given routine denials that it exists. This is precisely why truth-telling and bearing witness, through remedies of recognition, are essential to what I characterize as the reconstruction of square one. Political philosopher Charles Mills argues that moral and political dimensions of the racial contract, wherein non-Whites are diminished relative to Whites in terms of their moral and political standing, are facilitated by an epistemological dimension, involving "agreement to misinterpret the world." He explains,

> White misunderstanding, misrepresentation, evasion and self-deception on matters related to race are among the most pervasive mental phenomena of the past few hundred years, a cognitive and moral economy psychically required for conquest, colonization, and enslavement.[26]

This problem of "motivated ignorance" has to be anticipated and overcome in reckoning with the violence of Whiteness central to square one, given its historically long-standing role in obstructing movements for freedom and equality, and rationalizing racism.[27]

Vitriolic retorts to the antiracist recalibration claim that "Black lives matter" are again instructive. Rejoinders to BLM protests, including that blue lives matter (more, or instead, it would seem), belie an oppositional and relational orientation to the valuation of Black life. The demand of equal regard for Black life registers as a threat to, or unjust imposition upon, racially defined others (including putatively White police), within our political culture. This zero-sum orientation toward White standing (where White freedom is equated with dominance) is clearly evident, historically and today, and is a primary driver of the cultural, structural, and direct violence of racism.[28]

Juxtapositions of Black and police lives are particularly important in the context of the Square One Project, and relevant to my argument here, since they draw to the case of policing the noted abolitionist warnings that the Constitution cannot be revised to ensure freedom and equality but must be reimagined and reconstructed instead. Is American policing a "covenant" with Black death? Or, if it has been so historically, why should the public believe that it is not still today? Can American policing be *reformed* if explicitly and implicitly understood to exist for the service and protection of White society? If policing has long been integrated with White nationalism in the United States, and continues to be today (for example, blue lives are not Black), what is square one in police policy or "police-community relations"?

An extreme but telling example of this enduring association is the cultural production and consumption – and thus the political imprint – of an image that bends time and place to convey the legitimacy of racist police violence. This design sorcery, a "thin blue line" rendering of the battle flag of the Confederate States of America (Figure 1), both embodies and actively sustains the contested

Figure 1
Confederate Blue Line Flag
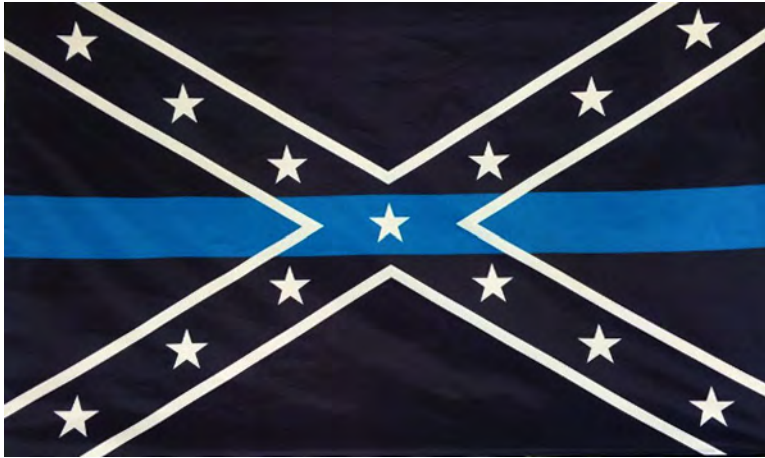
Source: "Blue Line on Navy Confederate Flag," Hawkins Footwear, https://hawkinsfootwear
.com/products/thin-blue-line-on-navy-confederate-flag-3x5 (accessed March 6, 2019).

(and threatened) cultural-political logic of White supremacist policing.[29] One store pitches the flag as a great way to "back the blue," encouraging its (presumably White) customers to "support Southern police," adding that this bestseller "makes a perfect gift for your favorite [presumably White] peace officer."[30] The flag design, a twenty-first-century emblem of the lasting compromise of freedom, explicitly trades in the White supremacist politics of the culturally integrated rather than the expelled Confederacy, wielding these in opposition to an existential threat in the Movement for Black Lives. Indeed, consumers on another site appreciated utilities of the flag itself for enduring fantasies of conquest. A reviewer going by "KKK supporter" commented that the flag is "great choking supply for BLM scum." A reviewer named "Racist Guy" writes, sarcastically perhaps, "I mean, how are people going to know that I support white supremacy and police brutality against minorities without a flag? Oh yeah, my Trump bumper sticker does it. But a flag is nice."[31] Sales of the flag are reportedly brisk, and historical connections between confederate symbols and racist violence are significant. It is noteworthy that the largely online vendor of the flag discussed here has operated out of a location in Brunswick, Georgia, just ten miles from the neighborhood where three White vigilantes – including a former police officer – were convicted

of murdering Black jogger Ahmaud Arbery in 2020.[32] Those suspects were only arrested and charged after months of protest.[33]

There are myriad examples of the relationship between White supremacism and policing, historically and today. Generally, these involve police themselves engaged in White supremacist violence or withholding protection from White supremacist threats.[34] These relationships are not limited to police officers, of course, but may involve any formal and informal operative of social control. A formerly incarcerated student recently shared that he was incarcerated in a Midwestern state prison when President Obama was elected to office. He explained that although he had not been able to vote, he and other Black prisoners responded with joy to the news of the outcome of the national election. That celebration was construed by generally White conservative prison guards as "causing a disturbance," who further abused their incredible discretion by placing Obama celebrants in solitary confinement. As recent revelations of police corruption rooted in alliances with White nationalists illustrate, White supremacism continues to course through the veins of U.S. legal and law enforcement institutions, limiting the prospects of starting over from square one or, perhaps, keeping us where we began.[35]

The square one problem of Whiteness is not only the long history of associated racist violence and its legacy today, but that antiracist policy will be framed and countered as "anti-White" measures, rational interests be damned. Many White Americans remain unwilling to relinquish a social status and perceived advantages rooted in non-White subordination and disadvantage, even as this sustained "covenant with death" – manifesting as educational divestment, limited health care access, increased gun ownership and lethal gun violence, war mongering, and so on – yields a growing toll of Americans and others around the world who are "dying of whiteness."[36]

Problems of justice can be too narrowly framed in relation to policing, courts, and prisons, as it is clear that these systems interface with numerous other sites of punitive excess (such as labor markets, schools, and the environment), and that these relationships are themselves key in bridging histories of racial injustice with legacies today. This web struck me while participating in a dialogue in Birmingham, Alabama, where police and community leaders gathered to discuss how that city might address its long and traumatic history of racist police violence, and the role of police in denials of human and civil rights. The aim of the conversation was police-community "reconciliation," a term related to the noted mirage of square one, alluding to a prior conciliatory relation that has never really existed.[37]

Yet it remains the case that many people in this community and many others are deeply invested in more legitimate and democratic policing, most of all for

its apparent promise to improve the quality of life (including public safety), increase trust and cooperation, and enhance group (including youth) prospects, by countering attitudes and practices of racialized criminalization and control. This determination to institutionalize and routinely experience dignity, equality of opportunity, and protection under law raises a vast complex of cultural and institutional forces, involving many areas of law and policy, various branches of government and realms of the private sector, and nearly infinite endogenous determinations of legal meaning in everyday life. Transforming municipal policing would be a start, but even this impact would be limited by the narrow way we tend to conceive of the justice workforce, law enforcement roles, or "public safety" personnel, excluding such decisive actors as teachers, curators, librarians, public health professionals, and custodians of the environment, all of whom manage exposures to "punitive excess."

At the Birmingham meeting, I grew fixated on the reality that improving police-community relations, or emptying prisons, or revising criminal codes would be unlikely to stop this cascade of punitive excess. I have already stressed the more complex and compounding array of injustice this better future would have to negate, not only in the sense of a cessation, but in terms of the already embodied trauma we must also somehow resolve. There are other challenges as well, such as the punishing toll of environmental racism, a problem of public safety reflecting profound injustices of underprotection in law, policy, and practice, contributing to disproportionately Black and brown deaths of neglect and despair.

Square one is not only figuratively contaminated by past use, but often literally a "brownfield," with complex justice implications.[38] Before heading to Alabama, I scanned the recent news, hoping to get some bearings on the kinds of issues local residents and police might be working through. I was struck by this headline, "On a Hot Day, It's Horrific: Alabama Kicks Up a Stink Over Shipments of New York Poo." Indeed, human waste from New York and New Jersey, no longer permitted to be dumped into the rivers and sea, was being shipped to hazardous waste sites in Alabama. The state has become a leading recipient of various types of toxic waste.[39] One of the largest of these sites is in the Black settlement of Uniontown, Alabama, where the population is nearly 90 percent Black, where the median income is less than $14,000 per year, and where garbage from thirty-three states is dumped, along with four million tons of coal ash generated from a coal mine in a 90 percent White community in Tennessee.[40]

The Uniontown landfill occupies a former plantation, around which generations of enslaved people were buried in unmarked graves, and now under this hazardous waste. "If this had been a rich, white neighborhood, the landfill would never have gotten here," one Black resident protested, noting that a county commission had continuously granted permits to the site over the objections of Black Uniontown residents. This complainant, whose sharecropper and enslaved an-

cestors toiled on local plantations, reasoned the punishing waste was located there because state and county officials who are tasked with policing these sorts of threats to public safety "knew we couldn't fight back."[41] This is but one of the many disproportionately poor and non-White populations residing amidst stews of "toxic oppression and oppressive toxins" across the United States, including scores of prisoners and workers toiling in toxic prisons, penal institutions sited in areas of environmental contamination.[42]

Communities are fighting back by opposing additional exposure and challenging that decisions to expose them selectively to hazardous waste violate civil rights law. Meanwhile, residents in Uniontown and similar places experience adverse health effects and incur associated costs of this environment of racism (such as in cognitive development, chronic illness, and present and future education and employment outcomes), many of which correlate with criminal justice system contact. The ordeal signals the vast scale of the square one problem, in which a complex circulatory system of historical and contemporary injustice – histories of enslavement and other exploitation, of lynching and other racial terror, of hyper segregation, surveillance, criminalization, and control – course through human and social bodies, keeping the "covenant with death." If justice policy and practice are indeed to take root in a new square one, this historical system of recirculated racial violence, sustaining cycles of racial violence, conflict, and inequality, poses an incredible challenge of reconstruction.

In a recent interaction at a bar on the Upper East Side of New York, after I had explained that my scholarly work engages the problem of racial (in)justice, a retired White executive sitting by my side turned to me and asked, earnestly, "is there *really* bias in the criminal justice system?" This is the fairly common performance of motivated ignorance I referenced above, which often involves outright erasure of the history and presence of White racism or diminution of its societal toll. During the 2016 presidential election, the Democratic candidate surprised me with her claim that we must "restore trust between police and Black communities," as if it were once widespread. This is a common refrain, at once reflective and regenerative of a political culture of nonresponse, or compromise, through diagnoses and treatments that are not transformative.

President Obama perpetuated the illusion when he declared late in his presidency that "our systems for maintaining the peace and our criminal justice systems generally work, *except for this huge swath of the population that is incarcerated at rates that are unprecedented in world history.*"[43] This incredible and telling exception to a claim that "all is well, otherwise" not only downplays the punitive excess of mass incarceration but interrelated problems of impunity for economic and political elites in our criminal and civil justice systems. Of course, our systems of justice have never worked for everyone, so they have never worked for anyone, in an

ethical and sociological sense. These failures are catastrophic, relating directly to the atrocities I have emphasized here.

Unless we create a political culture actively disavowing the histories and legacies of White supremacism and associated injustice, these compromises are likely to continue. As with emancipation, Reconstruction, and civil rights reforms, we will keep patching up the most atrocious evidence of our enduring "covenant with death," rather than build a just society. One wonders if we can fully imagine a just society without first or simultaneously disembodying the trauma of White supremacist violence: cultural, symbolic, and direct. The epistemological dimensions of White supremacism and racial hierarchy – the routinized delusions and falsehoods – prevent the transformation we can only achieve through truth-telling, and by building new norms and institutions on the foundations of those truths.[44]

This challenge seems to require monumental antiracist contestation, in a figurate and literal sense, reshaping the landscape of remembrance in ways that actively contribute to repair. This is not merely or primarily a problem for law and policy, but rather it calls on a number of fields to engage in uncompromising contestation of the legacies of racist violence through acts of recognition and reparation. That reconstruction of square one would draw on disparate fields such as education, art and design, and computer science, and their platforms for this monumental effort, both in the sense of "massive resistance" and in the sense of building the durable cultural and institutional infrastructure needed to sustain new norms of equal justice. The potential interventions include early childhood through advanced education, in which new approaches to truth-telling and bearing witness can have lasting impacts on political culture and behavior, breaking the current of racial violence we have so far carried across generations.[45]

Other interventions could leverage art and design to engage in various types of "visual redress," both by contesting art and design elements of racialized social control, and by advancing art and design aspects of transformative racial justice.[46] The recent exhibit of painter Kehinde Whiley, *St. Louis Portraits*, is a useful example here. The collection uses massive and compassionately detailed paintings of Black St. Louisans to simultaneously bear witness to White supremacist ideologies embodied in art and employ art as a reparative resource, using the fine art portrait style to valorize this "despised collectivity," leveraging the ritual of art consumption in museums to literally mount antiracism.

In its plan to release "spores of memorium" across the U.S. landscape, physically building collective remembrance of racial terror and lynchings into the land, the Equal Justice Initiative also practices what I have characterized as monumental antiracism. These markers, as durable sites of recognition, promise to facilitate other acts of repair. As such, the active contestation of racial violence on the commemorative landscape, pressing for removal and recontextualization of White supremacist cultural markers and mounting of antiracist commemorative

measures, is another illustration of education, art, and design being used to reconstruct square one.

To be sure, our reconstruction cannot be achieved through commemorative interventions alone. The revolution will not be a children's book, college course, provocative painting, historical marker, or other work of curation, but all of these are still relevant to the transformation of political culture needed to reimagine and reorganize justice. The nature and extent of their impact is an empirical question warranting closer consideration, and yet it is clear that these are relevant sites of repair, where we might be weaned from the "covenant with death" and truly prepare to embody the principle of equal justice.

"We must reimagine a new country," writer Ta-Nehisi Coates instructs in "The Case for Reparations," echoing the Garrisonians and many others since.[47] Imagination is not enough, yet it is clearly indispensable to the task of preparing our sick and disfigured social body to appreciate and receive the kind of life-supporting transplant imagined by square one justice. Without that preparation, the political culture is likely to reject that intervention, as it has at all earlier crossroads. "Reparations – the full acceptance of our collective biography and its consequences," Coates writes, "is the price we must pay to see ourselves squarely."[48] That foundation of repair offers the closest possible approximation of square one, replacing the mirage with a more literal restarting point and realistic basis for a just future.

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Knowing What We Want:
A Decent Society, A Civilized System
of Justice & A Condition of Dignity

Jonathan Simon

Human dignity as a value to guide criminal justice reform emerged strikingly in the 2011 Supreme Court decision in Brown v. Plata. *But with Justice Kennedy retired and courts generally reluctant to go far down the road to practical reforms, its future lies in the political realm shaping policy at the local, state, and national levels. For human dignity to be effective politically and in forming policy, we need a vocabulary robust enough to convey a positive vision for the penal state. In this essay, I discuss three concepts that can provide more precision to the potential abstractness of human dignity, two of which the Supreme Court has regularly used in decisions regarding punishment: the idea of a "decent society," the idea of a "civilized system of justice," and the idea of a "condition of dignity." In brief, without a much broader commitment to restoring a decent society, and to civilizing our justice and security systems, there is little hope that our police stations, courts, jails, and prisons will provide a condition of dignity to those unfortunate enough to end up in them.*

In 2011, in the historic *Brown v. Plata* decision ordering a major population reduction in California's mammoth, overcrowded, and medically incompetent prison system, Supreme Court Associate Justice Anthony Kennedy wrote that "prisoners retain the essence of human dignity inherent in all persons," and bluntly described California's prisons as "incompatible with the concept of human dignity" and having "no place in civilized society."[1] This strong language, none of which was necessary to the highly technical legal analysis of the rest of the opinion, identifies a cluster of values related to human dignity that reside at the very center of a number of constitutional provisions (the Eighth Amendment for sure, but also the Fourth and Fifth Amendments, and arguably the Bill of Rights as a whole). Justice Kennedy suggested, as no one with the authority of the Supreme Court had in a long time, that the nation's forty-year experiment in extending security against crime as the supreme public value, what we can call "the war on crime," could not be allowed to supersede these profound values enshrined in the Due Process Clause of the Fourteenth Amendment.[2]

Justice Kennedy has retired from the Court and, in the hands of his successors, the fate of his constitutional dignity jurisprudence is unclear. This essay is devoted to the view that reimagining our institutions and practices of security through the concept of human dignity remains not only possible but a more urgent priority than ever. As significant reforms happen in state legislatures (California's flawed bail reform law, for example), it becomes more vital than ever to define what values we want to see affirmed in what will undoubtedly, for some time to come, be seen as reformed and dignified institutions of security (whatever the truth or their practice). Just as vitally, that conversation must come from the bottom as well as the top of the American power structure: from the communities most criminalized and punished during the war on crime, from city and county governments, and from lower courts. It will have to be a movement in what is sometimes called "civil society," as well as within the institutions themselves that make up the system of justice.

Whatever I may have written in some of the exuberant passages in *Mass Incarceration on Trial*, my book on *Brown v. Plata*, it was never realistic to believe that the U.S. Supreme Court would end mass incarceration root and branch any more than it did slavery or Jim Crow, let alone Northern-style urban segregation.[3] Supreme Court decisions are but signals in complex systems of politics and policy-making. If there is a reason for optimism, it is because hunger for the dignity that Justice Kennedy spoke of is radiating through our society, both from its young and its newly old. It has infused the transformation in social attitudes and laws regarding same sex marriage and parenting. It is visible in every new building in the United States in the form of ADA-compliant bathrooms and access that make it possible for people with disabilities to live whole and fully integrated lives. We hear it today at the top of the political structure in the dramatic calls for "Medicare for All" and a "Green New Deal" in Congress.

The *system of justice*, the term I use in this essay for the agencies through which the state exercises its authority to police and punish crime, what we commonly call "criminal justice," must become part of this dignity revolution. The demand for security that respects human dignity is, in fact, loud and clear today in the social movements emerging against mass incarceration and the forms of security it comprises. This includes the Black Lives Matter movement, the organized work of the formerly incarcerated, All of Us or None, and the astounding hunger strike movement in the California prisons that helped break the back of long-term solitary confinement in California.

But if the Supreme Court will not likely grant us security with a dignity-compatible security and justice system, we will have to learn to demand it from the democratic branches of our political system.[4] To do so, we will need a vocabulary robust enough to convey our affirmative desires for security. In this essay, I want to connect three ideas with roots in the Supreme Court's dignity jurispru-

dence that can help illustrate the lateral relations between social relations and institutions (like the labor market), the system of justice in all its prolix complexity (not a system), and the dignity of individuals whom we too often place alone at the center of the concept of dignity, as if they were demigods.

When Justice Kennedy talked about dignity in prisons, he also invoked the concept of a *civilized society*. The modern Court has also invoked society as the source of "evolving standards of decency" in other Eighth Amendment decisions and "legitimate expectations of privacy" in its Fourth Amendment jurisprudence. I will say more about the meaning of these concepts in the legal realm, and how to cash them out in the currency of politics, but let me begin by stating them.

One cannot assure that prisons (and police custody and other sites of security) preserve the essential human dignity of the people in their jurisdiction at the point of delivery alone. It takes a complex and sustained commitment that begins well before custody: it is achieved (if it is at all) in the mission definition, training, and evaluation of the workers who make up the system of justice.

It starts with a *decent society*, one that is already generally committed to preserving human dignity and does so affirmatively through such institutions as the labor market (as a source not simply of income but rights), the welfare system, public education, and public health care. A society ready to abandon human dignity for security at any price is not one that can sustain the profound reworking of the system of justice that we need. Without a revival of a broader commitment to a decent society (of which Obamacare is a striking example), there are not enough federal judges in the country to protect human dignity at the point of custody.

A decent society demands what legal scholars Ian Loader and Neil Walker have called *civilized security*.[5] But how can such a society know what kind of security it is getting? And how can a state that, even in good faith, seeks to deliver civilized security organize itself to incorporate the many people who now live outside the institutions of the decent society (and sometimes literally outside)? I borrow the phrase *condition of dignity* from an interview with a brave French mayor who has responded to the flow of mostly African immigrants through his town, a flow that he has no political control over and that was creating homelessness on the streets of his city, by creating a dormitory and resource center in which, for as long as the migrants remain in his city, they will be in a "condition of dignity." Most of our system of justice in the United States is based at the state and local levels and is funded and organized by a patchwork of different agencies answering to different bits of democratic accountability. Thus, the work of civilizing security will have to come from the bottom and rely on local agencies under local political pressure to use its resources and powers creatively to assure that anyone passing through their cities and towns can be assured they will be in a condition of dignity.

S ince Jeremy Bentham articulated his principle of "least eligibility," students of security have recognized that the conditions of prisoners and other people in custody are inevitably tied to and limited by the least good conditions outside of custody.[6] Otherwise, Bentham noted, the whole logic of deterrence would be reversed for those "least eligible" outside of custody. This was observed in Dublin's main jail at the height of the mid-nineteenth-century famine, when some committed crimes in order to be sent to jail for its guarantee of food.[7]

For many in the public, to the extent they know the case at all, the premise of the Supreme Court in *Brown v. Plata* that prisoners have a right to adequate medical care seems perverse or paradoxical in a society that fails to provide health coverage to all of its free citizens. The legal basis of the state's obligation to provide for those it segregates is clear enough – public isolation of the prisoner incurs public responsibility to provide what otherwise would be available (or close enough) – but the threat of least eligibility remains. Although it never appears by name in *Brown v. Plata*, it is not hard to imagine that the justices were aware of the controversial package of health insurance expansions and regulations that was already making its way toward the Supreme Court (which would grant certiorari in a relevant case at the beginning of the fall term following *Plata*). Whether coincidental or not, the Supreme Court's highlighting of the problem of prison health care at a moment when the government had just enacted the largest expansion of the welfare state in general, and health care in particular, in a generation is highly fitting. Many of the people who would have gone to medically incompetent prisons before *Plata* passed through local jails where they signed up for community-based health care under the Affordable Care Act, saving the person from incarceration and the system from unsustainable costs of delivering health care in highly overcrowded prisons.

It is not alone through least eligibility that the condition of the poor and disadvantaged in society more broadly relates to the well-being of people in the custody of the system of justice. By creating rights consciousness and facilitating organization, the social institutions of the good society – labor markets (including the rights and protections that come with advanced regulated labor markets), welfare entitlements, and health care – insulate people from being identified as security threats and allow those who have left the custody of the system of justice to reintegrate. This is what, borrowing from two great books,[8] I term the *decent society*, by which I mean, specifically, societies that value the dignity of their members and act on that through regulated labor markets, civil rights laws, and welfare institutions. Only a decent society would value civilized security over that which might be as effective but for its negative effects on outsider groups. Only a civilized security institution can reliably deliver a dignified condition in custody.

It is no secret that America's decent society, and those labor market and welfare institutions I have referenced, has been reduced by a complex of bipartisan

policies that could be described as neoliberal in tenure but have led directly to less regulated labor markets, less civil rights enforcement, and reduced welfare benefits. In the final stages of World War II, President Roosevelt promised to spend his fourth and presumably final term delivering a second Bill of Rights to Americans at home, one that included an enhanced set of welfare and labor market protections. In the mid-1960s, at the height of U.S. economic growth, President Johnson envisioned a "Great Society" that would use its enormous economic strength to drain the deep pockets of poverty remaining in American society. His successor, Richard Nixon, promised a more economically responsible model of welfare, but one just as deeply committed to creating a decent floor under American families (through a guaranteed annual income).

The story is familiar. The disorienting combination of high inflation and unemployment in the 1970s brought an end to visions of growing labor regulations, civil rights, or welfare. Under Ronald Reagan's version of populism, both welfare and labor regulations got turned into enemies of the common worker, who would thrive more in an unregulated economy, no longer burdened by sustaining the unproductive. President Clinton made it bipartisan in the 1990s, signing laws toughening sentences, subsidizing police forces, and reducing civil rights access to the courts for prisoners, while at the same time ending income support for poor families as a national entitlement.

Few doubt the relationship between this general reshaping of welfare and work, on the one hand, and new aggressive policing and prison policies, sometimes shorthanded as neoliberal penalty, on the other. Harsh punishment has been part of a larger makeover of the social world of the poor in which the (never generous) reach of labor laws, civil rights laws, and welfare benefits has been diminished, severely limiting access to those caught up in the system of justice or leaving it.[9]

But, critically, the declines in the decent society have now been recognized by activists, researchers, and an increasing number of policy-makers and members of the public and, in some cases, are starting to be reversed.[10] We have already mentioned the Affordable Care Act, which, in those states that have expanded Medicaid under its provisions, touches on virtually everyone incarcerated, and many of those arrested, on an annual basis. The health care crisis inside prisons will continue to grow as the stock of prisoners ages and the prevalence of chronic illnesses among them increases. The availability of meaningful health care on the outside will ultimately help states move people out of incarceration. Similar societal fixes for contemporary housing and income insecurity are imaginable, as is support for extending those benefits to those who have had contact with the system of justice and especially the formerly incarcerated, who face high risks of homelessness and unemployment.

Another area in which health care institutions of the decent society can diminish the likelihood of being in custody is mental health care. While there may have

been no direct demographic transfer of people from asylums to prisons (different populations in many respects), the loss of confidence in the treatment of mental illness or social denial of its existence (the latter being an extreme version of the former) went along with the incarceration of large numbers of people with symptomatic mental illness. There are plenty of signs today of a rich revitalization of interest and innovation in delivering more-effective community-based mental health care. Again, few today doubt that finding stable housing options in the community is both more dignified and less costly than cycles of jailing, let alone long-term imprisonment for people living with chronic mental illness. And once again, breaking out of the correctional cycle of failure in treating mental and other chronic illnesses will take an enhancement of decent society's efforts to address homelessness more generally on the streets of our largest cities. Outdoor encampments are unsustainable and the opposite of what I call a *condition of dignity*. The Bay Area – with its liberal social policies and high-tech economy as a source of tax revenue – is an ideal place to see what these strategies can amount to.

In short, the decent society never went away. But it shrunk and was stigmatized, and too often its growth was replaced by a system of justice with little commitment to civilized security or assuring the conditions of dignity. Our efforts to reimagine the organs of justice or security need to complement efforts to reestablish and expand access to the decent society – including the labor market, public schools (school closure is a major issue), health care, welfare, and housing – for whole communities whose populations are regularly touched by the system of justice, such as the formerly incarcerated, arrested, and stopped.

We may also need to imagine new forms of welfare targeted to those most disabled by mass incarceration (such as geriatric prisoners who served long incapacitating sentences). Or some kind of prison pension designed to make sure the formerly incarcerated are not homeless and have the resources to sustain their own dignified stay in the community. In the absence of that, we may find a least-eligibility problem with aged former prisoners coming back, as they do in Japan, due to food insecurity and a lack of the rudiments of human life.

> The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of criminal law.[11]

In trying to name what we should most want from the system of justice, conserving human dignity is not enough and comes too late. Only a system of justice that already strives to deliver its services in ways that accord equal dignity to all can conserve dignity once people are in its custody. This is what I call, following a frequently cited passage from the Supreme Court's decision in *Miller v. Fenton*, a *civilized system of justice*.[12] This phrase also draws on Loader and Walker

who, in their book *Civilizing Security*, begin with two points often overlooked in discussions of security or criminal justice. First, that at its broadest level, security is a thick public good that is vital to a dignified life in society and that actually civilizes people. Second, that too often, security and its agents, such as the police, act in ways that diminish the security and dignity of some people. Loader and Walker suggest we should imagine the role of the state in security as civilizing it, "taming private violence by redirecting the passions that security and threats to it arouse into and through political and legal institutions."[13] Loader and Walker argue for a primary role for public security, as opposed to private security, that aims at civilizing the security that it produces.

Civilized state actions also resonate with the Supreme Court's efforts to conserve dignity in prisons. In the first important precedent recognizing both dignity and civilized standards as implicit in the Constitution (and decided in 1958, a mere decade after the Universal Declaration of Human Rights was drafted), the Court explained that the constitutionality of a sentence that involved stripping a person of their U.S. citizenship (for wartime desertion of the military) must be answered by asking "whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."[14]

In *Estelle v. Gamble* (1983), an important prison conditions case, the Supreme Court reaffirmed that the Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'" They did not rely on dignity per se to find that "denial of medical care is surely not part of the punishment which civilized nations may impose for crime."[15]

This suggests that civilized security must be considered against what the Court in other Eighth Amendment contexts has called an "evolving standard of decency," one that takes into account the progress made in this and other democracies. The kind of policing, for example, that was tolerable when London-style policing was brought to big East Coast cities in the 1840s and 1850s no longer accords with what a society without slavery and with equal citizenship should aspire to. Yet, a century later, when sociologists studied American policing in the 1960s, they found a reliance on overwhelming and situationally governed force to still be central to policing. Now, another half-century later, too little has changed.

We need only to look at the canon of Supreme Court cases we teach law students to appreciate how uncivilized American policing has become in the era of mass incarceration. For example, take a tactic I witnessed as a "ride-along" participant-observer with Oakland police officers in the 1980s. Police may pull up to and chase residents on the chance that they will reveal criminal activity (by dropping drugs or a gun they are carrying). Until they actually physically contact someone (in the instance I witnessed, by tackling a teenager), the Court held that chasing requires no particularized reason at all: no reasonable suspicion, no probable cause, and no problem.[16] Police may also arrest a person for a nonjailable offense, as was the

case, in *Atwater v. City of Lago Vista* (2010), when a woman with two children in her car was arrested for not having assured that their seat belts were fastened, even though the majority opinion acknowledged the arrest was a pointless indignity.[17] Once at jail, even a person arrested for a minor offense may be subject to strip searches that include close examination of the genital and rectal regions.[18] In a remarkable dissent to the Supreme Court's decision in *Utah v. Strieff* (2016), Justice Sonia Sotomayor stated that these and other cases send the message to Americans that "you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[19]

Cases that reach the Supreme Court are hardly a random sample of police behavior (and police are only one part of our system of justice), but if they establish norms of reasonableness for America's thousands of local law enforcement agencies, we can only take these decisions to be warnings of how uncivilized security may be for millions of Americans.

To civilize security in America will take concerted action by local criminal justice leaders, frontline workers, and social movement–awakened democratic political bodies. *The New York Times* recently highlighted one inspiring example.[20] Jean-René Etchegaray, mayor of Bayonne, a French city near the Spanish border, was concerned about the growing population of migrants in his city who were crossing from Spain, hoping to find work in the bigger northern economies of Europe. Most of them were just passing through this town, but they gathered in the town's square to rest while planning their next moves, appearing as a growing problem of homelessness. Rather than join the increasing political demands across Europe to tighten the border and cut off the flow of migrants, this mayor of the political center-right cobbled together different resources, including a former military barracks, some temporary bedding, and donated clothes, and created a hostel-like dormitory and resource center for the migrants to escape the growing cold of winter. The mayor has come under plenty of criticism for allegedly attracting migrants to come or stay in Bayonne, including from a national government that wants to appear tough enough against migrants to head off losses to explicitly anti-immigrant parties of the far right. To the mayor, however, it is a humanitarian obligation that for as long as the migrants remain in his town, they remain in a "condition of dignity." "I don't think I can do less."[21]

What do we mean by a *condition of dignity*? Let me share a personal story about the first time I heard a demand for dignity and appreciated its urgency and specificity. It was the recorded voice of my father, speaking with his oncologist about an extremely grim prognosis for his metastatic lung cancer. I was actually listening some months after his death, which had come so quickly after the tape was made that I had not used it for its intended purpose of enabling me to advise my father and his wife from afar on how to interpret the medical news they were getting. On

the tape, my father, who once gave vivid lectures on the sociology of sex and gender to classrooms of college students, was uniformly monotonic and passive. The doctor was asking him whether he wanted more chemotherapy, none of which was very promising. "I want," my father said, his voice suddenly filling out to his old self, "my dignity." And as I heard it, I knew exactly what he meant and felt. He wanted to make sure that his doctors would still value him as a patient and use their skills not to cure him but to sustain him for as long as possible in a condition of dignity as his body failed.

As a sociologist, he would have appreciated that it was a demand that not just he but tens of thousands of people facing the end of life were making, leading to a revolution in hospice care in the United States in the nearly two decades since my father died in 2000. Dignity is too often treated as a kind of mystical property, but as Mayor Etchegaray aptly put it, a condition of dignity for as long as a person is in your jurisdiction is a very concrete, practical framework that includes housing, bedding, medical care, and hope.

Studies of the formerly incarcerated, including Bruce Western's recent study of reentry, underscore the extreme precarity that faces people returning from prison.[22] Assuring conditions of dignity for reentering citizens is a key priority, but it will not be sustainable if it is not aligned with the effort to revitalize the decent society discussed above.

An inside-out effort will be needed to civilize security in the United States. In our highly fragmented system, police, parole, courts, and corrections cannot generally control the inputs that determine who ends up in their custody (although police can more than most of the rest of the system actors). What they should be able to control is the ability to provide those in the custody of the state with a condition of dignity, and if not, they should consider forms of loyal rebellion.

Reimagining criminal justice institutions and practices in the United States through the lens of human dignity is a task that will fall to state and local governments, state courts, and social movements. That scale and location of change suggest leveraging the relationship between three different streams of policy and politics : a decent society, a civilized system of justice, and a condition of dignity. Meaningful reform to the landscape of security institutions after mass incarceration will require continued revitalization of the decent society and institutions of modern governance, like regulated labor markets with rights, civil rights law enforcement, and broad welfare institutions. Those seeking legislation for a more civilized security should consider specific reforms designed to diminish some of the barriers that "hidden sentences" and discrimination of other kinds often place in front of people who have arrests, convictions, or incarcerations on their record in accessing labor markets and welfare benefits.

The system of justice itself is one of those welfare institutions. Being secure against physical and emotional violence is a precondition for a life of equal dignity,

but the current system of justice achieves security gains for some at the expense of insecurity for others. A decent society should achieve security through civilized means and institutions that prioritize civility. Taking our identity as a decent society seriously may require abolishing (or at least transforming) parts of our historically accumulated systems of justice and security because they simply are not civilized according to contemporary standards, including racialized automobile stops, aggressive stop-and-frisk tactics, routine strip searches in jails and prisons, long-term solitary confinement, and the death penalty, whether by lethal injection or through old age or untreated illness in prison. Finally, at the level where it really matters, inside the custody of the system of justice, the question must be what is necessary to assure the "condition of dignity" during a person's stay of whatever length, from a few minutes in a Terry stop to decades in prison.

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ENDNOTES

[1] *Brown v. Plata*, 563 U.S. 493 (2011), https://supreme.justia.com/cases/federal/us/563/493/.

[2] The Fourteenth Amendment is America's human rights charter. Like all such modern charters, it came only after the most horrendous bloodletting humans had seen, for the first time photographically: the U.S. Civil War. Beginning in the mid-twentieth century, the Supreme Court used its "incorporation" doctrine to hold the criminal procedure provisions of the Bill of Rights (the Fourth, Fifth, and Sixth Amendments) applicable to the states through their incorporation into the ideal of due process guaranteed against the states by the Fourteenth Amendment. During its 2018–2019 term, the Supreme Court added to the specificity of that charter by "incorporating" the "excessive fines" clause of the Eighth Amendment in *Timbs v. Indiana* 586 U.S. ___, 139 S. Ct. 682; 203 L. Ed. 2d 11 (2019).

[3] Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (New York: New Press, 2014).

[4] We could keep asking, but as I will sketch below, the Supreme Court will first have to undo a great deal of bad case law that authorizes uncivilized policing incompatible with respect for human dignity.

5 Ian Loader and Neil Walker, *Civilizing Security* (Cambridge : Cambridge University Press, 2007).

6 Jeremy Bentham, *The Works of Jeremy Bentham, Volume 4 : Panopticon, Constitution, Colonies, Codification*, ed. John Browning (Edinburgh : William Tait, 1843).

7 Niamh O'Sullivan, *Every Dark Hour : A History of Kilmainham Jail* (Dublin : Liberties Press, 2007).

8 Avishai Margalit, *The Decent Society* (Cambridge, Mass. : Harvard University Press, 1996) ; and Robert Bellah, Richard Madsen, William M. Sullivan, et al., *The Good Society* (New York : Random House, 1991).

9 Loïc Wacquant, *Punishing the Poor : The Neoliberal Government of Social Insecurity* (Durham, N.C. : Duke University Press, 2009).

10 The massive wave of federal spending under both Presidents Trump and Biden in response to the COVID-19 pandemic and the likelihood of some further entitlement expansion during the Biden administration are all consistent with this reversal.

11 *Miranda v. Arizona*, 384 U.S. 486 (1966), https://supreme.justia.com/cases/federal/us/384/436/.

12 *Miller v. Fenton*, 474 U.S. 104 (1985), https://supreme.justia.com/cases/federal/us/474/104/.

13 Loader and Walker, *Civilizing Security*, 17 n. 4.

14 *Trop v. Dulles*, 356 U.S. 86 (1958), https://supreme.justia.com/cases/federal/us/356/86/.

15 *Estelle v. Gamble*, 429 U.S. 97 (1983), https://supreme.justia.com/cases/federal/us/429/97/.

16 *California v. Hodari D.*, 499 U.S. 621 (1991), https://supreme.justia.com/cases/federal/us/499/621/.

17 *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), https://supreme.justia.com/cases/federal/us/532/318/.

18 *Florence v. Board of Chosen Freeholders*, 566 U.S. 318 (2012), https://supreme.justia.com/cases/federal/us/566/318/.

19 *Utah v. Strieff*, 579 U.S. ___ (2016), https://supreme.justia.com/cases/federal/us/579/14-1373/.

20 Adam Nossiter, "France Dispatch : French Mayor Offers Shelter to Migrants Despite the Government's Objections," *The New York Times*, February 12, 2019, https://nyti.ms/2URYsZH.

21 Ibid.

22 Bruce Western, *Homeward : Life in the Year After Prison* (New York : Russell Sage Foundation, 2018).

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