

## Rioting by a Different Name: The Voice of the Unheard in the Age of George Floyd, and the History of the Laws, Policies, and Legisla- tion of Systemic Racism

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## I. INTRODUCTION

The linkage between racial inequality and economic disparity in the United States [U.S.] has been well documented in the history of relevant laws, policies, and legislation.<sup>1</sup> These well-documented linkages include the income gap between white American and minority communities, most clearly illustrated by the history of Black America,<sup>2</sup> resulting in inter-generational poverty rooted in segregationist housing policies,<sup>3</sup> economic policies,<sup>4</sup> and the fundamental lack of capital in urban Black and minority neighborhoods.<sup>5</sup> However, the relationship between mass policing and the history of criminal justice has rarely been framed in terms of the history of laws, policy, and legislation that have produced systemic inequity in communities of color, as that relationship has been primarily driven by penal law and caselaw focused

<sup>1</sup> See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2006) (showing specific data comparing black wealth and white wealth); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1995) (showing more data comparing black wealth and white wealth); Jennifer Roback, *Exploitation in the Jim Crow South: The Market or the Law?*, *REGUL.*, Jan.–Feb. 1984 (showing further data comparing black wealth and white wealth).

<sup>2</sup> STEPHEN M. CALIENDO, *INEQUALITY IN AMERICA: RACE, POVERTY, AND FULFILLING DEMOCRACY'S PROMISE* 39–51 (Westview Press 2015).

<sup>3</sup> See DOUGLAS MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* ix (1993) [hereinafter MASSEY & DENTON]; KEEANGA-YAMAHTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* 79 (2019).

<sup>4</sup> DANYELLE SOLOMON ET AL., *SYSTEMIC INEQUALITY AND ECONOMIC OPPORTUNITY* 2 (2019); Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, *N.Y. TIMES MAG.* (Aug. 14, 2019), [https://perma.cc/3UJ8-RN4D].

<sup>5</sup> See MASSEY & DENTON, *supra* note 3, at 66, 107, 217.

on traditional retributive models of crime and punishment.<sup>6</sup> This Article, written after the murder of George Floyd,<sup>7</sup> follows a more holistic model of justice—one more in line with a model of restorative justice.<sup>8</sup> As such, this

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<sup>6</sup> See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 1–11 (2006) (discussing the lineage of crime, punishment, and the wide-ranging inequality of mass imprisonment on minority communities and their social effects); see generally Bruce Western, *Mass Imprisonment and Economic Inequality*, 74 SOC. RSCH.: AN INT'L Q. 509 (2007) [hereinafter Western, *Mass Imprisonment*] (showing the effects of imprisonment on economic inequality). Michelle Alexander also makes the argument for more modern egalitarian regimes of systemic inequity resulting in *re-segregation* post-emancipation and post-Jim Crow. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010) (“[w]hat has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color 'criminals' then engage in all the practices we supposedly left behind.”). Michael Wenzel and others discuss value-systems and the different notions of justice that focus on status and power when implicated in criminal justice transgressions, as well as their place in systemic inequity. See Michael Wenzel et al., *Retributive and Restorative Justice*, 32 L. & HUM. BEHAV. 375 (2007). Wenzel's article also discusses the value-systems and different notions of justice that focus instead on the status and power implicated in *moments* of transgression, where the individual harm is understood in context of the entire community's relation to systemic inequity, rather than penalizing and treating the individual harm as a “one-off” transgression. See *id.* at 375 (“The emergence of restorative justice as an alternative model to Western, court-based criminal justice may have important implications for the psychology of justice. It is proposed that two different notions of justice affect responses to rule-breaking: restorative and retributive justice. Retributive justice essentially refers to the repair of justice through unilateral imposition of punishment, whereas restorative justice means the repair of justice through reaffirming a shared value-consensus in a bilateral process. Among the symbolic implications of transgressions, concerns about status and power are primarily related to restorative justice. At the core of these processes, however, lies the parties' construal of their identity relation, specifically whether or not respondents perceive to share an identity with the offender] . . . restoring a sense of justice after rule-breaking.”). Additionally, Sinclair Dinnen and others discuss the individual identity-participation element of restorative justice in their book, *A Kind of Mending: Restorative Justice in the Pacific Islands*. See Sinclair Dinnen, *Restorative Justice in the Pacific Islands: An Introduction*, in *A KIND OF MENDING: RESTORATIVE JUSTICE IN THE PACIFIC ISLANDS* 22 (ANU E Press pub. 2010) (standing for the conception of restorative justice as a community-based model that sees the community as part of the restorative justice process and not solely focused on the individual harmed and the offender, with the goal of healing and non-domination as part of an empowerment process to rectify the systemic harms that injustice and transgression cause on a community as a whole).

<sup>7</sup> Brian Dakss, *Video Shows Minneapolis Cop With Knee on Neck of Motionless, Moaning Man Who Later Died*, CBS NEWS, [https://perma.cc/H7ZG-2PLF] (last updated May 27, 2020, 10:40 PM). See Christine Hauser et al., *'I Can't Breathe': 4 Minneapolis Officers Fired After Black Man Dies in Custody*, N.Y. TIMES, [https://perma.cc/VW9N-URUB] (last updated June 15, 2020); see also Evan Hill et al., *How George Floyd was Killed in Police Custody*, N.Y. TIMES, [https://perma.cc/6L6K-YTCR] (last updated March 18, 2021).

<sup>8</sup> Compare sources cited *supra* note 6, with articles on the history of economic, housing, and the resulting “social death” born out of these legal regimes on Black America. See Ta-Nehisi Coates, *The Case For Reparations*, THE ATLANTIC (June 2014), [https://perma.cc/96KE-PCWD] (presenting an overview of the laws, policy, and legislation that have resulted in discriminatory impact on Black America after the 13th Amendment's freedom from slavery. These include the Fair Housing Act, redlining, Black Isolation or “ghettoization”, intergenerational

Article takes the first step in looking at a necessary transformational shift in the framework and narrative of criminal law by turning to discrete moments within the history of justice, side-by-side with the history of structural inequity.<sup>9</sup>

This necessary transformation shifts the traditional orientations of the reader (law scholar, law student, and lawyer), as well as the object of representation (the history of mass policing, structural inequity, and over-incarceration). This shift should be viewed as the version of critical race theory in today's BIPOC<sup>10</sup> analysis, which considers the law by not just solely weighing caselaw and precedent. The core mission is to create a more holistic attempt at digesting the long U.S. history of systemic inequity that led up to today's carceral state (mass policing, imprisonment, etc.) for BIPOC America. Furthermore, this Article urges the legal academy and its framework to synthesize and prioritize BIPOC experience, and the cultural and historical trauma reflected in the American moment of Breanna Taylor, George Floyd, and recently Jacob Blake.<sup>11</sup> This work encourages proximity with historical-legal discomfort, and to experience a transformational orientation change to legal history, resulting in considering one's own role in the carceral state, by presenting the discrete modules of New York history detailing the laws, policies, and legislation that produced systemic inequity—ranging from slavery, Jim Crow, the New Deal, and the present. The end of this Article proposes lists

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poverty and its impact on Black and minority families from the 1980s to today, the overall consequences of 250 years of enslavement on Black Americans' access to homeownership, wealth, and education, as well as the limits of an educational equality system focused only on affirmative actions and less on holistic visions of improving educational equity as a whole, along with other social health and community infrastructural equity.).

<sup>9</sup> Structural inequality refers specifically to inequalities like residential segregation or discrimination in healthcare, employment, and education. See EDWARD CARY ROYCE, *POVERTY AND POWER: THE PROBLEM OF STRUCTURAL INEQUALITY* 217 (Lanham: Rowman & Littlefield, 3d ed. 2009). By contrast, cultural inequality focuses on the individual decisions associated with these imbalances of roles, functions, decisions rights, and opportunities—most prominently featured in anti-racist principles and equity work on implicit bias, racial anxiety, and stereotype threat. See generally RACHEL D. GODSIL ET AL., *SCIENCE OF EQUALITY, VOLUME 1: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTH CARE* (2014) (analyzing how individuals need to be “equipped to modify patterns of behavior and persuaded to support policies that will” help deconstruct structural and institutional arrangements); RACHEL D. GODSIL & BRIANNA GOODALE, *TELLING OUR OWN STORY: THE ROLE OF NARRATIVE IN RACIAL HEALING* (2013) (explaining how dominant narratives associated with individual decisions need to be challenged and replaced).

<sup>10</sup> BIPOC is an acronym that stands-in for “black, indigenous, and persons of color”. Sandra E. Garcia, *Where did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), [https://perma.cc/TAP4-2VDU]. There have been productive cultural conversations recently on the pejorative racial history of “colored” as an appellation often historically localized within the twin term “negroes.” Amelia Butterly, *Warning: Why Using the Term ‘Coloured’ Is Offensive*, B.B.C. NEWSBEAT (Jan. 27, 2015), [https://perma.cc/W23N-WKNH] (arguing that color, as a term, “recalls a time when casual racism was a part of everyday life” during the Jim Crow era of segregation).

<sup>11</sup> Erin Schumaker, *ACLU Calls for Kenosha Police Chief and Sheriff to Resign After Jacob Blake Shooting*, ABC NEWS (Aug. 29, 2020, 3:20 PM), [https://perma.cc/TAX3-MZE9].

of suggested readings to help create an anti-racist curriculum and legal educational framework that gives hope for the future of equity in law schools and proposes a more integrated and socially conscious method for approaching the law.

The connections between the criminal justice system and how we police poverty, at a time during COVID-19 and the resurgence of Black Lives Matter protests, have brought national attention to the racial structural inequity that has still not been fully realized.<sup>12</sup> Specifically, the term “looting” has been used in discussing these protests.<sup>13</sup> However, “looting” from a restorative justice perspective<sup>14</sup>—one that does not distinguish between transgressor (and the individual transgressed) from the community that has been harmed by structural inequity—distances the struggle of the poor from the struggle for racial justice and equality by focusing on an individual moment of harm and individual transgression.<sup>15</sup> This Article posits that looting is a form of erasure based on a theory that capitalizes on Black labor and struggle.<sup>16</sup> It is impossible to deny that poverty, and subsequently inter-generational poverty, in America disproportionately affects Black and other minority communities.<sup>17</sup> The question is why?

While we have had significant advances in equality under the law, nearly 60 years after the passage of the landmark Civil Rights Act, there is still a

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<sup>12</sup> See generally ALEXANDER, *supra* note 6 (analyzing how the war on drugs has a similar effect on African-Americans as Jim Crow laws); Western, *Mass Imprisonment*, *supra* note 6 (arguing among other things, how mass imprisonment has become so pervasive in modern American society that some estimates can predict the rate of incarceration among young men of color with lack of access to education who will be incarcerated, and that the resulting diminished chances for young men of color can be traced to incarceration); EARL FITZHUGH ET AL., COVID-19: INVESTING IN BLACK LIVES AND LIVELIHOODS (2020) (discussing the impact of COVID-19 on Black lives and the need to invest in Black communities); Traci Burch, *The Old Jim Crow: Racial Residential Segregation and Neighborhood Imprisonment*, 36 LAW & POL’Y 233 (2014) (describing the intersection of segregation and imprisonment rates).

<sup>13</sup> See R. H. Lossin, *In Defense of Destroying Property*, THE NATION (June 10, 2020), [https://perma.cc/QTE9-3NAF]; see also Adam K. Raymond, *Looters Hit Luxury Retailers in Soho After a Day of Peaceful Protest*, N.Y. MAG.: INTELLIGENCER (June 1, 2020), [https://perma.cc/3BEW-BP35].

<sup>14</sup> See *supra* note 6 and surrounding footnote text.

<sup>15</sup> Another way to understand this distinction is implicated in the title of this piece, “rioting by a different name.” See *infra* notes 101–105 and accompanying text. Namely, that rioting is the language and voice of the unheard—from Martin Luther King, Jr.—and to take this American moment of George Floyd’s death and reductively limit it to the concept of single acts of looting would be to “appropriate” the act. See *infra* notes 101–105 and accompanying text. This undercuts the real harms that have afflicted minority communities leading up to this moment of being “unheard” and witnessing the trauma of George Floyd and the state violence on BIPOC America. See *infra* notes 101–105 and accompanying text.

<sup>16</sup> William Dalrymple, Opinion, *The Original Evil Corporation*, N.Y. TIMES (Sept. 4, 2019), [https://perma.cc/VRU7-9RSY].

<sup>17</sup> See *supra* notes 1–5 and surrounding text (listing different economic policies that have impacted inter-generational wealth on BIPOC America).

racial gap in nearly all areas of structural equity, such as in economics, housing, education, and access to quality healthcare. As law scholars, students, and practitioners, “we” need to examine the ways that race, class, and historical inequity are related to both criminal justice and economic inequality. Indeed, it is absolutely critical now because the world has recognized the importance of revisiting systemic inequity and moving toward a reformed structural emphasis on Black Lives and resource equity.<sup>18</sup> Thus, we must broaden the legal framework and lexicon to a more comprehensive understanding of systemic inequity.

Historically, activists and public officials from across the ideological spectrum have recognized systemic inadequacies that give tremendous advantages to some Americans while deeply disadvantaging others.<sup>19</sup> It is necessary to offer insight into the nature of those problems and highlight just a few of the structural inequities, not as an adjunct to, but aligned with the traditional studies and progressive interventions of a new criminal justice system,<sup>20</sup> which have aggravated America’s fault lines by race, racial violence, and displacement. The central thesis of this Article stems from the work of

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<sup>18</sup> Mary Blankenship & Richard V. Reeves, *From the George Floyd Moment to a Black Lives Matter Movement*, in *Tweets*, BROOKINGS INST. (July 10, 2020), [https://perma.cc/6DNB-WCZX] (“The name of George Floyd looks set to enter the history books along with Rosa Parks and Emmett Till, as the face of a moment that fueled a movement.”).

<sup>19</sup> See TAYLOR, *supra* note 3, at 77–78 (describing Senator Robert F. Kennedy’s speeches and actions in the 1960s speaking on the “aspirations” of Black Americans to “build their own communities” while simultaneously developing housing comparable of white America, as evidence of readiness for an “open society”).

<sup>20</sup> See *Brooklyn District Attorney Eric Gonzalez Unveils Sweeping Reforms His Office is Implementing as Part of the Justice 2020 Initiative, Establishing a National Model of a Progressive Prosecutors Office*, BROOKLYN DISTRICT ATTORNEY’S OFFICE (Mar. 11, 2019) (citing BROOKLYN DISTRICT ATTORNEY’S OFFICE, JUSTICE 2020 REPORT (2019)), [https://perma.cc/UR8L-PXRK] (“Considering non-jail resolutions at every juncture of a case and shifting toward community-based responses to crime. . . . Establishing early release as the default position – not the exception – in most parole proceedings. . . . Prioritizing collaboration with neighborhood leaders and community-based organizations to provide more diversion opportunities and engage stakeholders as partners. . . . Implementing updated data and analytics systems to drive reform and ensure accountability and transparency.”); *District Attorney Krasner Announces DAO Review Effort to Address Growing Case Load, Protect Public from COVID-19*, PHILADELPHIA DISTRICT ATTORNEY’S OFFICE (June. 11, 2020), [https://perma.cc/9EBR-HULQ] (describing Criminal Justice review task-forces that ensure no one has been unjustly arrested, and noting the recent Charging Review Task Force for COVID-19 as an added layer of protection against unjust prosecutions); *District Attorneys Krasner, Rollins, Boudin Announce Truth, Justice, and Reconciliation Commissions to Confront Decades of Unaddressed Intergenerational Trauma*, PHILADELPHIA DISTRICT ATTORNEY’S OFFICE (July 1, 2020), [https://perma.cc/8T9G-Q5TH] (describing a community-centered way to address localized efforts to repair the “harm[] of unaccountable, unjust, and racist policing and prosecution”); *Innovation and Criminal Justice*, INST. FOR INNOVATION IN PROSECUTION, [https://perma.cc/5L36-J2U6] (providing an example of an inter-office academic, and practical collaboration to promote community-centered standards of safety, fairness, and dignity).

prominent Critical Race Theory [CRT] scholars.<sup>21</sup> Their call to a narrative-shifting exercise should remain as central today, just as it was in 1995,<sup>22</sup> wherein CRT scholars and their minority visionary inheritors (hereinafter, “BIPOC analysis”) created a critique of the actual framework of law and policy, based as much on positionality as on the contemporary moment of injustices at the hands of mass-policing and the state.<sup>23</sup> As Critical Race scholar Patricia Williams describes, “subject position is everything in . . . analysis of [the] law”, and that BIPOC perspectives are driven as much by the position of the speaker (in terms of race, gender, and economic-intersectionality) as that of the legal analysis.<sup>24</sup>

The subject position of the speaker and listener in Critical Race Theory takes the person who is speaking as the first point of analysis—including their

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<sup>21</sup> See generally DERRICK BELL, *THE DERRICK BELL READER* (Richard Delgado & Jean Stefancic eds., 2005) (building off the framework of intersectionality and the need for a perspective shift that includes gender, race, and class in the law which has privileged white male experience, Bell proposes the fundamental concept of convergence theory; namely, that civil rights advances for Blacks only occurs in the law when it coincides with the self-interest of white elites, and a more altruistic vision of white America, one rooted in the great tragedy of the legislation of the civil rights movement that its integration into mainstream consciousness was premised on a tragically narrow and conservative picture of goals of racial justice and the domains of racial power) In other words, the fight for true justice must involve more than equality, as shown by the legislation from the Civil Rights Era, but something close to equity. *Id.* See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1261 (2011) (describing that, in light of the post-civil rights movement, in which race and racial equality stemmed from propagating majority-white-normative ideals, that race should be seen as “a verb rather than a noun . . . [something] dynamic rather than a static reference point”); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 3 (1991) (arguing that, the study of law from the perspective of “BIPOC analysis”—Black and indigenous people of color theorists—is primarily first situated in the personal experience, namely that the “subject position is everything in my analysis of the law.”). See generally KIMBERLÉ CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al, eds., 1995) (arguing that the mapping of intersectionality only crucially offers multidimensionality when we see race, gender, and sex and class not as separate but very inseparable pieces of a single “identity politics”); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (Richard Delgado & Jean Stefancic eds., 3d ed. 2017) (describing that later iterations of CRT, such as *Latino/a Critical Theory (LatCrit)* Scholar Richard Delgado, draw inspiration from the central premise that “subject position is everything in my analysis of law” from WILLIAMS, *supra* note 21, at 3).

<sup>22</sup> This, of course, corresponded to the date of publication of two seminal texts; the first, KIMBERLÉ CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al., eds., 1995); the second, PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

<sup>23</sup> See I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 30–58 (2010) (positing the positional difference when in the future policing and its attendant legal framework might change, relying on subjective changes in the experience of minority populations to majority populations). Capers also examines the relationship of economic justice to criminal justice in the form of reparations. *Id.* at 38 (“there might be some discussion of reparations, but the discussions will likely be symbolic, since in a future informed by Afrofuturism and Critical Race Theory, economic parity will already be the norm”).

<sup>24</sup> WILLIAMS, *supra* note 21, at 3.

identity in terms of race, gender, and economics.<sup>25</sup> BIPOC analysis of justice is rooted in a historical framework of a distinctly American history of systemic inequity.<sup>26</sup> Thus, this Article proposes a Justice-Equity Design<sup>27</sup> interdisciplinary framework that is as much rooted in understanding the law and its functions in producing systemic inequity for BIPOC Americans throughout history, as it focuses on expanding positionality<sup>28</sup> in law and criminal legal studies. This framework shifts the narrative to the experience of America looking backwards from the death of George Floyd, as a means of moving forward. In many ways, the notion of a Justiceology is as deconstructive as it

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<sup>25</sup> *Id.*

<sup>26</sup> RICHARD DELGADO & JEAN STEFANCIC, *supra* note 21, at 45–46 (stating that the “criminalizing” and surveillance (i.e. mass policing of Black and Brown violence and their attendant racial harms) is particularly rooted in American history, which includes not permitting minority individuals to testify against whites and the subsequent history of undercutting credibility—or not believing them—when Black and Brown witnesses did testify). When taken as a whole, the structural inequity in access to justice is similar in scale and imbalance of power, as that of the systemic inequity of racial residential segregation. *See* Burch, *supra* note 12, at 244–45. *See also* Coates, *supra* note 8 (discussing access to capital, inter-generational financial equity, and the attendant systemic inequities of homeownership and exclusion, such as access to sufficient loans via the Fair Housing Act and the most recent exposure of America’s fault-lines and racial disparities in access to adequate healthcare as exposed by the COVID-19 pandemic); Linda Villarosa, ‘A Terrible Price’: The Deadly Racial Disparities in COVID-19 America, N.Y. TIMES MAG., [https://perma.cc/7TH2-XELT] (last updated Nov. 18, 2020).

<sup>27</sup> This term was coined by this author, after leaving the D.A.’s office to start out on his own as a racial justice practitioner. As a prosecutor, he did work in the social justice bureau at the Kings County District Attorney’s Office as a Senior Prosecutor, as well as work in private consulting, designing a renewed curriculum—titled Justiceology-by-Design—owned by this author. The curriculum outlines and designs the four steps of transformational pedagogical change for Revisioning American Law in our current American climate after the death of George Floyd. *See JusticeEquityDesign*, [https://perma.cc/6Z3K-V7N8] (last visited May 5, 2021). The author also developed the first Coursera class devoted to combating structural racism, through Wesleyan University after being awarded a grant to build this course. *Designing and Building Institutional Anti-Racist Spaces*, COURSERA, [https://perma.cc/HKU3-YUPM]. The author, as a practicing lawyer and justice advocate, started his own abolition-focused equity training company, after witnessing firsthand what was happening in the courts and the D.A.’s office as a prosecutor (in terms of gaps in equity and narratives of social justice with little true equity), and left to write this Article and impact real change. Dana Brownlee, *If You’re Expecting Diversity & Inclusion Leaders to Fix Workplace Racism, Think Again*, FORBES (Dec. 22, 2020, 7:40 AM), [https://perma.cc/5N95-NTV3].

<sup>28</sup> As Patricia Williams has said, as a Black woman and legal scholar: “subject position is everything in my analysis of the law.” WILLIAMS, *supra* note 21, at 3. Further, as a critical race scholar writing in the era of George Floyd—as this Article is arguing—a return to CRT’s emphasis on race and subjectivity in light of this, to borrow from the concept of the “long shadow of slavery,” history of systemic inequity, and the law’s impact on BIPOC America, turning to subjectivity “both in terms of nonneutrality and in terms of embracing ‘the linguistic position of subject rather than object’” remains crucial to how law and race can understand each other. Capers, *supra* note 23, at 5 n.16 (quoting Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2252 (1992)). Another way to describe this interaction is that of narrative-shifting and de-centering the framework by which we—as legal scholars, lawyers, and advocates for justice—frame the conversation of law, power, and race to better restore communities that have been historically marginalized. *Id.*



is re-constructive<sup>29</sup>—it imagines a future of racial justice, healing, equity, and a design in which the law is taught and practiced in a way that does not neglect the “voices of the unheard.” As this Volume of *The Journal of Gender, Race & Justice* has framed for its readers, this issue is an innovative and culturally-responsive positional-shifting response to a post-George Floyd era that seeks to expand the boundaries of legal justice studies and not neglect critical consciousness in poetry, activism, and other forms of experiential expression.<sup>30</sup> Central to this reconstructive work are some key building blocks of critical consciousness, which Fordham Law scholar of criminal law and consciousness and critical-race-theory-interventionist, Bennett Capers, has outlined in his article, *Afrofuturism, Critical Race Theory and Policing in the Year 2044*.<sup>31</sup>

Based on this expansion of critical consciousness, and building off the important creative-analytical critical foundation of CRT, this Article’s BIPOC imaginings consider: 1) the origins of policing—that is mainly a form of economic surveillance—as one rooted in American slavery; 2) a reimaging of the current discourse around the brutal murder of George Floyd and the structural inequity that has led to this point in our history, laws, policies,

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<sup>29</sup> Borrowing from Derrida’s notion of “deconstruction” in philosophy and the advent of the words, “equality” and “difference,” as both subject-specific positions that have an inherent conflict with the institution and the discourse position of the person who is under the weight of the history of systemic inequity. See JACQUES DERRIDA, SPEECH AND PHENOMENA: INTRODUCTION TO THE PROBLEM OF SIGNS IN HUSSERL’S PHENOMENOLOGY 70–87 (David B. Allison & Newton Garver trans., Nw. Univ. Press 1973). Derrida shows that what is usually critical to writing and speech is the process of “signifiers” and the self-presence of ideas and thoughts that do not make it into language. *Id.* The reader is separated from the author and language itself is signified in a repetitive process. *Id.* The “law” of language is a process that signifies but also has a process of gaining meaning separate from that of the speaker. *Id.* See, e.g., Deborah Cameron, “What It Is We Could Call Equal”: Cultural Politics, Language, and the Law, 5 AM. LITERARY HIST. 735, 735 (1993) (“The centrality of discourse as a terrain for political struggle is a commonplace of recent critical theory, which tells us that the crucial contests of the postmodern age . . . [are] in the realms of signification using images and words. . . . The critical race theorists we are concerned with here have chosen to apply their theoretical weapons to the workings of the law as text and institution, and especially to such keywords as ‘right,’ ‘justice,’ ‘equality,’ and ‘democracy.’ Each of the writers . . . is concerned with the way the law as an order of discourse positions its subjects and constrains the range of significations available to them. Drucilla Cornell, Anne Phillips, and Patricia Williams examine the tendency of legal discourse to neutralize *difference* and so reproduce *inequality*—a well-established area of debate in critical legal studies and feminist political theory.”). This author is proposing a prospect of de-centering the study of the law and criminal justice, by contextualizing the law in structural inequity history that has impacted BIPOC America throughout colonial history, slavery, and the present racial crisis. See *infra* Part IV.

<sup>30</sup> Volume 24.1 of *The Journal of Gender, Race & Justice* has an inter-disciplinary focus and call-to-arms, which serves as a necessary intervention to expand academic notions of public safety, justice, and criminal law reform as a response to historical systemic inequity against BIPOC Americans.

<sup>31</sup> Capers, *supra* note 23, at 23 (arguing that the central inheritance of critical race theory for our current minority visionary moment remains to “confronting the ‘historical centrality and complicity of law in upholding white supremacy’ [and] transforming the relationship between white supremacy to reshape American jurisprudence in a project of racial emancipation and anti-subordination”).

and legislation, as culled from the discourse between “protest” and “looting”; and 3) the instances of white supremacy that have historically infiltrated law enforcement in the 20<sup>th</sup> century, positing that a new order of justice and equitable protection must be implemented to disrupt the disparities and violence that the criminal justice system has imposed on Black America.

## II. LOOTING ECONOMIC EQUITY FROM BLACK AMERICA

This transformative analysis begins by understanding what Black America currently faces. First, this Part addresses Black overrepresentation in the U.S. criminal justice system. Second, this Part discusses how Black overrepresentation in the criminal justice system and its footprint affects minority communities. Lastly, this Part examines how the recurring harms of the criminal justice system on Black communities are amplified in the time of COVID-19.

### *A. The Statistics of Black Overrepresentation in the Criminal Justice System*

Since 1970, the number of persons who have been imprisoned for committing crimes in the U.S. has grown exponentially.<sup>32</sup> Every year, there are 10.6 million jail admissions in the U.S. overall.<sup>33</sup> The Prison Policy Initiative estimates that at least 4.9 million individuals cycle through jail each year.<sup>34</sup>

The disparities of the criminal justice system are also prevalent in arrest statistics and the incarceration of Black Americans. “Despite making up only 13% of the general population, Black men and women account for 21% of all people who were arrested just once, and 28% of all people arrested

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Since 1970, the number of people imprisoned for committing crimes in the United States has grown exponentially. Although the number of prisoners declined slightly in 2010, 1.6 million people, or 1 in 200 adults, in the U.S. are in prison today. The racial disparity in imprisonment is well known: Blacks and Hispanics each make up about 13 percent of the U.S. population, but are 37 percent and 22 percent of the nation’s prisoners, respectively. This disparity is particularly burdensome for Blacks: non-Hispanic Black males had an imprisonment rate of 3.1 percent, a rate that is more than seven times that of non-Hispanic white males. . . . Observers have referred to the advent of mass imprisonment as ‘The New Jim Crow’ because of its devastating racially disparate impact. However, old elements of Jim Crow, particularly racial residential segregation, are also implicated in the mass imprisonment phenomenon.

Burch, *supra* note 12, at 223–24 (internal citations omitted).

<sup>33</sup> The reference to 10.6 million jail admissions includes multiple admissions and does not mean that 10.6 million unique individuals cycle through jails in a year. Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems*, PRISON POL’Y INITIATIVE (Aug. 2019), [<https://perma.cc/XH5K-DGGQ>]. Based on data from the National Survey on Drug Use and Health, the Prison Policy Initiative estimates “that at least 4.9 million unique individuals were arrested and booked in [jails in] 2017.” *Id.*

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

multiple times in 2017.”<sup>35</sup> Black Americans are also overrepresented in incarceration. Incarceration statistics show that in the U.S., persons jailed three or more times (“frequent utilizers”) face severe economic and educational disadvantages.<sup>36</sup> According to national data, “42% of people arrested and booked [three] or more times [in 2017] were Black.”<sup>37</sup> Large urban courts also show statistically significant disparities in sentencing outcomes between white and minority defendants.<sup>38</sup>

*B. How Overrepresentation in the Criminal Justice System Affects Black Communities*

The clear overrepresentation of Black America in the criminal justice system has created long-lasting effects on Black neighborhoods.<sup>39</sup> Of those admitted, there remains a disproportionate percentage of Black inmates compared to non-Black inmates.<sup>40</sup> In 2019, 33% of the U.S. prison population was Black, while only 12% of the adult U.S. population was Black.<sup>41</sup> “The [combined federal and state] imprisonment rate of black males in 2018 was 5.8 times that of white males, while the imprisonment rate of black females was 1.8 times the rate of white females.”<sup>42</sup>

Social science research has shown that high arrest and imprisonment rates at the neighborhood level can have devastating collateral effects on

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<sup>35</sup> *Id.*

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>38</sup> Stephen Demuth & Darrell Steffensmeier, *Ethnicity Effects on Sentence Outcomes in Large Urban Courts: Comparisons Among White, Black, and Hispanic Defendants*, 85 SOC. SCI. Q. 994, 1008 (2004).

<sup>39</sup> *See* Jones & Sawyer, *supra* note 33 (standing for the data that in 2017, “Black Americans [we]re overrepresented among people who were arrested” and “42% of people arrested and booked three or more times were Black”); *see also* Michelle Alexander, Opinion, *The Injustice of This Moment is Not an 'Aberration'*, N.Y. TIMES (Jan. 17, 2020), [https://perma.cc/3KZ8-23PN]; Burch, *supra* note 12, at 244–45; GLENN C. LOURY ET AL., RACE, INCARCERATION, AND AMERICAN VALUES 10 (2008).

<sup>40</sup> John Gramlich, *The Gap Between the Numbers of Blacks and Whites in Prison is Shrinking*, PEW RSCH. CTR. (Apr. 30, 2019), [https://perma.cc/9Q2W-9AG9].

<sup>41</sup> *Id.*

<sup>42</sup> U.S. DEP'T OF JUSTICE, OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS., PRISONERS IN 2018: SUMMARY 1 (2020); *see* Gramlich, *supra* note 35.

economic stability,<sup>43</sup> marriage opportunities,<sup>44</sup> public health,<sup>45</sup> crime,<sup>46</sup> and other phenomena within the community.<sup>47</sup> These effects make it difficult or impossible for Black Americans to advocate for their own health and well-being because they are outside of conventional social systems.<sup>48</sup> Examples of these systems include homelessness, socioeconomic disadvantage, and other disruptions resulting from over-policing.<sup>49</sup>

The disproportionate cultural and social consequences to those touched by the criminal justice “footprint”—both in arrest and incarceration—cannot be overstated. Indeed, subjected to life-altering imprisonment, individuals who were “frequent utilizers” (or those imprisoned three or more times) were found to have a number of collateral issues resulting in serious social and

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<sup>43</sup> See Jeremy Travis, *Reentry and Reintegration: New Perspectives on the Challenges of Mass Incarceration*, in *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* 247, 247 (Mary Pattillo, David Weiman, & Bruce Western eds., 2004) (showing how the steady growth of incarceration in America has created an unprecedented number of social and policy challenges about reintegration for large portions of the populations—and the challenges associated with the increasingly high segment of our society who reckon with these obstacles).

<sup>44</sup> See generally DONALD BRAMAN, *Families and Incarceration*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 117 (Marc Mauer & Meda Chesney-Lind eds., New Press 2002); Robert J. Sampson, *The Neighborhood Context of Well-Being*, 46 *PERSP. BIOLOGY & MED.* S53 (2003); Clea A. Sucoff & Dawn M. Upchurch, *Neighborhood Context and the Risk of Childbearing Among Metropolitan-Area Black Adolescents*, 63 *AM. SOC. REV.* 571 (1998); and Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 *ANNALS AM. ACAD. POL. & SOC. SCI.* 221 (2009) for analysis on the familial consequences of over-policing and over-incarceration.

<sup>45</sup> FITZHUGH ET AL., *supra* note 12, at 7 (“Black Americans are overrepresented among some of the most vulnerable populations in society. These include groups living within systems in which it can be difficult or impossible to advocate for their own health- or they might live entirely outside conventional social systems. . . . The coronavirus is already spreading rapidly in prisons because of close quarters and the lack of precautions. As of April 8, 2020, there are more than 1,300 confirmed cases in prisons and jails across the United States.”) These results do not mention the higher rate of homelessness in jail or touched by the carceral state. *Id.* The same study found that “40 percent of the U.S. homeless population is black, a reflection of the intersecting failures of the healthcare system (including mental health), the economic system, and their effects on a population that operates at a socioeconomic disadvantage.” *Id.* Like prisons, “[h]omeless shelters are also often overcrowded, which can be deadly during the pandemic.” *Id.*

<sup>46</sup> See generally James P. Lynch & William J. Sabol, *Assessing the Effects of Mass Incarceration on Informal Social Control in Communities*, 3 *CRIMINOLOGY & PUB. POL’Y* 267 (2004); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *SCI.* 918 (1997); and Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence*, 74 *SOC. FORCES* 1325 (1996) for analysis on the criminal consequences of over-policing and over-incarceration.

<sup>47</sup> Burch, *supra* note 12, at 225 (“[R]esearch has shown that high imprisonment at the neighborhood level can have devastating collateral consequences for economic stability, marriage opportunities, public health, crime, and other phenomena at the neighborhood level.”). See Demuth & Steffensmeier, *supra* note 41, at 1011.

<sup>48</sup> FITZHUGH ET AL., *supra* note 12, at 7.

<sup>49</sup> *Id.* See Joy Moses, *New Data on Race, Ethnicity and Homelessness*, NAT’L ALL. TO END HOMELESSNESS (Aug. 2, 2019), [<https://perma.cc/SZ5Y-NB6B>].

collective consequences.<sup>50</sup> Additionally, a majority of surveyed frequent utilizers suffered from substance abuse disorders, economic instability (a majority of frequent utilizers only attain an annual income of less than \$10,000),<sup>51</sup> harms associated with schooling,<sup>52</sup> and a majority attaining only below a high school education.<sup>53</sup> Finally, taking as an initial premise that over-incarcerated and over-arrested communities experience a higher likelihood of segregation, there are a host of social-ills that arise from segregated and isolated communities,<sup>54</sup> including disparate effects on educational,<sup>55</sup> economic,<sup>56</sup>

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<sup>50</sup> Jones & Sawyer, *supra* note 33 (describing that the PPI in 2017 took a study of a test group and found that of the population jailed the frequent utilizers were less likely to gain stability and experienced a higher rate of structural inequity). PPI states, out of the test group the percentage of persons jailed 3 or more times within 12 months were over three times more likely to be unemployed, over three times more likely to have received less than a high school education, and more than twice the number had an annual income below \$10,000. *Id.* Other correlations found were: “[a]bout half (50%) of those frequently arrested had annual incomes below \$10,000 and 85% had incomes below \$20,000. Educational attainment was lowest among people with 3 or more arrests in a year. Three-quarters (74%) had a high school education or less—with 38% without a high school diploma. . . . People with 3 or more arrests were *more likely to have been diagnosed with chronic health conditions* compared to those with no arrests, including heart conditions (15% vs. 10%), HIV (4.12% vs. 0.15%), cirrhosis (3.47% vs. 0.21%), and hepatitis B or C (2.43% vs. 1.04%). . . . Frequent utilizers were *more likely to use emergency rooms multiple times in the past year*. 36% of frequent utilizers had used the emergency room 2 or more times in the past year, compared to 11% of people with no arrests.” *Id.*

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

<sup>52</sup> See generally Douglas S. Massey et al., *Segregation, the Concentration of Poverty, and the Life Chances of Individuals*, 20 SOC. SCI. RSCH. 397 (1991); Douglas S. Massey & Mary J. Fischer, *The Effect of Childhood Segregation On Minority Academic Performance at Selective Colleges*, 29 ETHNIC & RACIAL STUD. 1 (2006); Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat From School Desegregation in the South, 1999-2000*, 81 N.C. L. REV. 1563 (2003); Robert J. Sampson et al., *Durable Effects of Concentrated Disadvantage On Verbal Ability Among African-American Children*, 105 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCE 845 (2008); Jeffrey M. Timberlake, *Effects of Household and Neighborhood Characteristics On Children's Exposure to Neighborhood Poverty and Affluence*, 38 SOC. SCI. RSCH. 458 (2009); and Jeffrey M. Timberlake, *Racial and Ethnic Inequality in the Duration of Children's Exposure to Neighborhood Poverty and Affluence*, 54 SOC. PROBS. 319 (2007) for the educational consequences of over-policing and over-incarceration.

<sup>53</sup> Jones & Sawyer, *supra* note 33.

<sup>54</sup> Burch, *supra* note 12, at 225.

<sup>55</sup> See *id.* at 226.

<sup>56</sup> See generally WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (University of Chicago Press 1987); Douglass S. Massey & Mary J. Fischer, *How Segregation Concentrates Poverty*, 23 ETHNIC & RACIAL STUD. 670 (2000); Jonathan Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123 (2010); and William Julius Wilson, *The Political and Economic Forces Shaping Concentrated Poverty*, 123 POL. SCI. Q. 555 (2008) for analysis on how segregation affects economic outcomes.

housing stability,<sup>57</sup> and health outcomes.<sup>58</sup> These negative outcomes also include that a statistically significant majority face severe health disadvantages, and are more likely to have been diagnosed with a chronic illness compared to persons incarcerated once or twice. Likewise, the differences between BIPOC and white-general populations are starkly disproportionate when considering the income earnings by household, due in part to the histories of redlining and segregation—which has been a catalyst for inequity, alongside mass incarceration.

The [U.S.] income gap is most pronounced among Hispanics and [Black] Americans, but its growth is notable among all segments of the population. In 2009, the highest quintile of earners collected 50 percent of the total income in the [U.S.]. In contrast, the bottom three quintiles combined brought in just 26.7 percent of the total income that year (with the second-highest quintile earning 23.3 percent).<sup>59</sup>

In terms of the disparate ratio on Black and Latinx families, “the median wealth for white U.S. households in 2009 was \$113,149, compared with \$6,325 for Hispanics and \$5,677 for [Black Americans].”<sup>60</sup> In 2009, the wealth gap between white and Black Americans was at its widest point since the census began collecting this data in 1984.<sup>61</sup> The U.S. racial wealth gap is substantial and driven by public policy decisions. According to one study in 2011, “the median white household had \$111,146 in wealth holdings, compared to just \$7,113 for the median Black household and \$8,348 for the median Latino household.”<sup>62</sup> The policy implications are the continued lineage of laws and policies from “redlining on American homeownership to the retreat from

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<sup>57</sup> See MASSEY & DENTON, *supra* note 3, at 2 (“No group in the history of the United States has ever experienced the sustained high level of residential segregation that has been imposed on blacks in large American cities for the past fifty years”); see generally Douglas S. Massey & Zoltan J. Hajnal, *The Changing Geographic Structure of Black/White Segregation in the United States*, 76 SOC. SCI. Q. 527 (1995) (discussing the evolving structures around residential segregation); Douglas S. Massey & Nancy A. Denton, *The Dimensions of Residential Segregation*, 67 SOC. FORCES 281 (1998) (discussing the effects of residential segregation).

<sup>58</sup> CALIENDO, *supra* note 2, at 123–38 (describing gaps in accessing health care and nutrition for Black Americans). See generally Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 J. OF HEALTH & SOC. BEHAV. 56 (2008); Anthony P. Polednak, *Poverty, Residential Segregation & Black/White Mortality Ratios in Urban Areas*, 4 J. OF HEALTH CARE FOR THE POOR & UNDERSERVED 363 (1993); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95 (2001); and David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404 (2001) for an analysis of segregation on health outcomes.

<sup>59</sup> CALIENDO, *supra* note 2, at 41–42.

<sup>60</sup> *Id.* at 52.

<sup>61</sup> *Id.*

<sup>62</sup> LAURA SULLIVAN ET AL., THE RACIAL WEALTH GAP: WHY POLICY MATTERS 7 (2015).

[once-vibrant] desegregation [initiatives] in public education,” and other policy decisions across America that did not prioritize racial-awareness.<sup>63</sup>

There has been a steady increase in this trend over the past forty years, such that the top 5 percent of earners in 1970 pulled in 16.6 percent. That number was stable a decade later but rose to 18.5 percent in 1990 and to 22.1 percent in 2000. In 2011, the top 5 percent of households earned 21.5 percent of the total income.<sup>64</sup>

More attention must be done to change these outcomes and disrupt the systemic inequity that has been built into the criminal justice system and protect the health of our communities. This can be done by addressing the larger structural disparities and systemic racism that undergirds the economic laws, policies, and legislation affecting the U.S. justice system.

### *C. COVID-19 Amplifies The Looting of Black America*

The COVID-19 pandemic amplified these trends in communities of color and low-income communities, which were already historically structurally marginalized.<sup>65</sup> In April 2020, Black Americans made up a statistically-significant percentage of the U.S. workforce in nine of the ten lowest-wage jobs considered most high-contact essential services.<sup>66</sup> Black Americans have a higher probability of being uninsured, specifically where “non-elderly Black people are 1.5 times more likely to be uninsured than white counterparts, despite the availability . . . [of] the Affordable Care Act.”<sup>67</sup> Black Americans were more likely to reside in a neighborhood or location that had “fewer adequate health and social services.”<sup>68</sup> Black Americans, on average from birth, have a life expectancy of about 3.5 years lower than white life expectancy, whose health outcomes are on par with poorer countries in the world.<sup>69</sup> According to a recent McKinsey report, “[B]lack Americans are 1.4-1.8 times

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<sup>63</sup> *Id.* at 1.

<sup>64</sup> CALIENDO, *supra* note 2, at 42.

<sup>65</sup> Adam Serwer, *The Coronavirus Was An Emergency Until Trump Found out Who Was Dying*, THE ATLANTIC (May 8, 2020), [https://perma.cc/YQ3A-Z3TD]. See Villarosa, *supra* note 26; *COVID-19 Cases in New York City, a Neighborhood-Level Analysis*, NYU FURMAN CENTER: THE STOOP (Apr. 10, 2020), [https://perma.cc/6CXR-HZ43].

<sup>66</sup> FITZHUGH ET AL., *supra* note 12, at 6 (stating that the lowest wage jobs and high-contact professions that Black Americans occupy in the report are: psychiatric aides (39%), orderlies (39%), nursing assistants (33%), cooks and restaurant workers (16%), pharmacy aides (15%), food prep supervisors and servers (15%), childcare workers (15%), pharmacy technicians (14%), medical assistants (14%), and funeral attendants (11%).

<sup>67</sup> FITZHUGH ET AL., *supra* note 12, at 4

<sup>68</sup> *Id.*

<sup>69</sup> Villarosa, *supra* note 26.

more likely to live in counties” where there is a higher risk of contagion.<sup>70</sup> Another study from the National Health Interview Survey, the historical systemic inequity that undergirds these counties creates the possibility that secondary effects of the COVID-19 virus, such as economic disruption, community instability, and structural barriers to medical care will disproportionately affect Black Americans.<sup>71</sup> The top five indicators that were contributing factors to the lasting effects of the pandemic on Black America were: (1) the underlying health conditions of the community, (2) the poverty rate of the community, (3) the number of hospital beds in the local community healthcare facilities, (4) the percentage of people in severe housing conditions, and (5) population density.<sup>72</sup>

The COVID-19 pandemic has only exposed America’s giant fault-lines that have pre-existed over centuries of structural inequality from slavery, the post-emancipation racial terror<sup>73</sup> associated with lynching and segregation during Jim Crow, the mass displacement of Black Americans in the Great Migration to northern cities, urban housing policies that harmed BIPOC communities, and finally, the current carceral state of mass incarceration and policing that led to the murder of George Floyd.

### III. THE ANXIETY OF A COUNTERFEIT AMERICA: PROTESTS AND THE TRANSACTION AT A GROCERY STORE THAT LED TO THE GEORGE FLOYD PROTESTS

On May 25, 2020, just as America was preparing for a possible reopening from COVID-19, a Black American man named George Floyd presented a phony \$20 bill at a convenience store.<sup>74</sup> Following the recognition of the \$20 bill as counterfeit, a worker followed protocol by calling the police.<sup>75</sup> Officer Derek Chauvin attempted to arrest Mr. Floyd by placing his knee directly on

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<sup>70</sup> FITZHUGH ET AL., *supra* note 12, at 2.

<sup>71</sup> *Id.* at 7; *Health Disparities Experienced by Black or African Americans—United States*, CTR. FOR DISEASE CONTROL & PREVENTION: MORBIDITY AND MORTALITY WEEKLY REPORT (Jan. 14, 2005), [https://perma.cc/6JS6-72VU]. See generally NICK NOEL ET AL., *THE ECONOMIC IMPACT OF CLOSING THE RACIAL WEALTH GAP* (2019) (describing economic barriers for persons of color, specifically Black Americans); *Poverty in America Continues to Affect People of Colour Most*, THE ECONOMIST, (Sept. 26, 2019), [https://perma.cc/263M-7X2J] (discussing the disproportionate effect of poverty on BIPOC).

<sup>72</sup> FITZHUGH ET AL., *supra* note 12, at 2.

<sup>73</sup> A term used most often by Bryan Stevenson and his work involved in the Equal Justice Initiative. Jonathan Capehart, Opinion, *Bryan Stevenson Wants Us to Confront Our Country’s Racial Terrorism and Then Say, ‘Never Again’*, WASH. POST (Apr. 24, 2018 5:01 AM), [https://perma.cc/J7JJ-22D6].

<sup>74</sup> Reg Chapman, *Owner of Cup Foods, Where Police First Encountered George Floyd, Calls for Justice*, CBS MINNESOTA (May 28, 2020, 5:51 PM), [https://perma.cc/X4NY-DWVV].

<sup>75</sup> *Id.*



Mr. Floyd's throat.<sup>76</sup> Mr. Floyd was groaning, sobbing, and repeatedly pleaded: "Please, I can't breathe!"<sup>77</sup> A bystander can be heard stating, "[y]ou got him down. Let him breathe."<sup>78</sup> Another employee cried out to the store owner at the execution unfolding before his eyes.<sup>79</sup> That employee recounts yelling out to the owner as he witnessed a death, crying and yelling: "What should I do? The guy can't breathe. They're killing him."<sup>80</sup> The response was simply to record it live and call the police again.<sup>81</sup> Mr. Floyd later died in custody, setting off nationwide protests and demonstrations.<sup>82</sup>

That owner, Mike Abumayyaleh, was later seen by the American public condemning the police violence from the act, stating that a phony \$20 bill should not amount to a death sentence.<sup>83</sup> This action was an expression of solidarity for the tragedy and a powerful reminder that the nightmare of being Black and over-policed in America in city neighborhoods happens every day.<sup>84</sup> The owner spoke out directly against the "abuse of power and racial injustice" that was on exhibit here by concluding, "[w]e stand for Black Lives Matter."<sup>85</sup> One of the most critical parts of this brutality—and one which we must all turn toward as legal and historical scholars in pursuit of equity—is the origin of the call for help to the Minneapolis police and the officer's response. An individual presented a suspected counterfeit 20 dollar bill and, in response, the Minneapolis police brutally murdered that individual *against* the wishes of the victim—in front of the store where it occurred.<sup>86</sup>

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<sup>76</sup> See Dakss, *supra* note 7; Matt Furber et al., *What Happened in the Chaotic Moments Before George Floyd Died*, N.Y. TIMES, [https://perma.cc/A7SL-BFCX] (last updated June 10, 2020); see also Libor Jany, *Minneapolis Police, Protesters Clash Almost 24 Hours After George Floyd's Death in Custody*, STAR TRIBUNE (May 27, 2020, 12:55 PM), [https://perma.cc/86MF-PMTX].

<sup>77</sup> Hauser et al., *supra* note 7.

<sup>78</sup> Yamiche Alcindor & Amna Nawaz, *What We Know About George Floyd's Death in Minneapolis Police Custody*, PBS NEWSHOUR, [https://perma.cc/LW4J-QWG8] (last updated May 29, 2020, 4:43 PM).

<sup>79</sup> Minyvonne Burke, *Owner of Minneapolis Grocery Store Says He Told Employee 'Call the Police on the Police' as She Witnessed George Floyd Death*, NBC NEWS (May 28, 2020, 1:04 PM), [https://perma.cc/BPX2-5D8F].

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

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

<sup>83</sup> *Owner of Minneapolis Store Says Calling Police "Should Never Equate into a Death Sentence"*, Post to June 3 George Floyd Protest News, CNN (June 3, 2020, 2:58 PM), [https://perma.cc/2M2J-UZYX]; Sheila Regan, *Owner of Cup Foods Condemns Police Killing of George Floyd*, SAHAN JOURNAL (May 28, 2020), [https://perma.cc/BP46-8CXA].

<sup>84</sup> Regan, *supra* note 83.

<sup>85</sup> *Id.* (stating that members of their own store came out to yell and stop the police from going further, and that the community must understand that Hussein, the store's owner, considers the police as the real threat).

<sup>86</sup> *Id.*

In sum, the social conditions of a U.S. system that led up to the George Floyd murder is one in which mass-incarceration and mass policing has unduly caused structural harm to Black and Brown communities across this country. It is only recently, during COVID and the murder of George Floyd, that the fault lines of U.S. systemic inequity—from racial segregation, to healthcare access, to housing stability—and the income inequities associated with segregation laws and policies associated with a history of inequity has been made clear—and the curtains on the stage of Justice pulled.

#### IV. LOOTING AS THE VOICES OF THE UNHEARD

American society did not recognize the underlying history of silence that the victims of increasingly aggressive mass-policing tactics had suffered through, or that those victims were now finally rising up to make their voices heard. What had gone unrecognized in the justifiable protests after the murder of George Floyd was the underlying history of silence that victims had suffered through structural inequity, and that the victims of increasingly aggressive, poverty-focused mass policing tactics were finally rising up to make their voices heard. During the protests, the media had been in a frenzy interviewing and finding various racial and ethnic cultural metaphors to encapsulate the moment. For example, Don Lemon on CNN had no words the night of May 30th as protests continued—justifiably enraged by the lineage of modern lynching, as many in the community called it, the criminal justice complex produced the killing of another unarmed Black American man through the use of force.<sup>87</sup> What appeared to most of the American public as Don Lemon calling out the wealthy and powerful community of actors, actresses, and politicians, most prominently the President of The United States—the Tweeter-in-Chief—who, up until this point, had remained silent instead of choosing to activate a lexicon of race-baiting, as he had done before.<sup>88</sup>

##### *A. Unheard Again: The Bait-and-Switch of Focusing on Riots Instead of the “Persistent and Poisonous Inequities” that Led to Protest*

Six nights from the date of George Floyd’s murder,<sup>89</sup> CNN host Don Lemon stated the following: “What about Hollywood? Why aren’t they helping these young people? These young people are out there standing on a platform on the edge of an abyss by themselves.”<sup>90</sup> Don Lemon continued to ask these questions: why more politicians were not responding, and why this

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<sup>87</sup> See Bruce Haring, *CNN’s Don Lemon Takes Sour View of Hollywood’s “Strangely Quiet” Stance on Protests*, MSN (May 31, 2020), [<https://perma.cc/SR3E-3A7V>].

<sup>88</sup> *Id.*

<sup>89</sup> See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES, [<https://perma.cc/4JWP-AJZV>] (last updated March 28, 2021) (explaining that George Floyd died in police custody on May 25, 2020, and protests occurred thereafter).

<sup>90</sup> Haring, *supra* note 87.

moment of racial unrest and collective multi-racial protest, in the full view of this American moment of injustice, remained unheard.<sup>91</sup>

At this time in America, the prevalence of the acknowledgment of the unheard is never more clear; from the unheard who have died at the hands of police brutality and the unheard who have fallen to COVID-19 across communities of color, to the unheard leadership who have failed to act. Most pertinent to this Article is the lineage of being unheard—from George Floyd and Eric Garner to the historical context of systemic inequity on the people who have been stamped out of history by police brutality and the continued laws and policies that propagate inhumanity (“I can’t breathe”).<sup>92</sup>

Indeed, not just Don Lemon, but many commentators drew the distinction between the base-economic criminal acts that were associated with the looting, saying that they were not the same as those communities exercising their First Amendment rights as protesters.<sup>93</sup> Conservative commentators turned to distinctions in light of perceived misinterpretations of the law, rather than understanding the context of the moment for collective expressions of justice.<sup>94</sup> However, this criminalization of the reaction to George Floyd did not focus on the collective frustration by criminalizing the riots as “looting.” This criminalization continues to do harm by propagating the kind of systemic bias and assumptions about segments of Black America as violent, uncontrolled (criminal retribution, criminalizing identity, and making justified anger a threat) that led to the ultimate murder of George Floyd at the hands

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<sup>91</sup> *Id.* It bears mentioning that Don Lemon did state that no one wanted to hear from the White House at that time. *Id.* It also bears mentioning that though this Article does not consider these issues, a number of counter-shows-of-force from federal agents across the country began, with many around the White House, in reaction to subduing the George Floyd collective protest. Among the many commenters were Governor Cuomo’s brother, Chris Cuomo, who markedly announced that he would not distance the justifiable anger and frustration of the riots from that of the protesters. *Id.* CNN Live’s Chris Cuomo stated: “[t]oo many see the protests as the problem, the problem is what forced your fellow citizens to take to the streets—persistent and poisonous inequities and injustice. And please, show me where it says that protests are supposed to be polite and peaceful.” Steve Guest (@SteveGuest), TWITTER (Jun. 2, 2020, 8:12 PM), [https://perma.cc/MJ55-XCZR].

<sup>92</sup> See Judith Browne Dianis, *Eric Garner was Killed by More Than Just a Chokehold*, MSNBC (last updated Aug. 5, 2014, 8:43 AM), [https://perma.cc/ZSS7-GLRU]; Hauser et al., *supra* note 7.

<sup>93</sup> See, e.g., Beth Baumann, *Watch: CNN’s Chris Cuomo Goes to Bat for Looting Thugs by Insisting Protesters Don’t Have to be ‘Polite and Peaceful’*, TOWNHALL (June 3, 2020, 12:32 AM), [https://perma.cc/7HNM-A6YL].

<sup>94</sup> Conservative commentators jumped on the opportunity as “going to bat for looting thugs.” See Baumann, *supra* note 93; see also Lefezette, *Kayleigh McEnany Shreds CNN’s Don Lemon and Chris Cuomo for Encouraging Violent Riots*, DREWBERQUIST.COM (June 9, 2020, 9:02 AM), [https://perma.cc/X66]-HX2R]; Mike LaChance, *Chris Cuomo Unaware The First Amendment Only Protects Peaceful Protest*, LEGAL INSURRECTION (June 4, 2020, 4:00 PM), [https://perma.cc/K6ZQ-AMDG]; Joseph Wulfsohn, *CNN’s Chris Cuomo Blasted for Suggesting Protesters Don’t Have To be ‘Peaceful’*, FOX NEWS (June 3, 2020), [https://perma.cc/UV4M-TZ7D].

of the police in the first place.<sup>95</sup> What is needed is a collective call to a perspective shift—one that privileges disrupting the underlying root of the problem, and not condemning the reaction.

As a result, Don Lemon’s call for political leaders to speak to the voices of the unheard went unaddressed, as politicians like Mayor of New York City Bill DeBlasio distanced the protestors’ righteous anger from the criminal acts of looters and rioting.<sup>96</sup> Mayor DeBlasio, amid his defense of the New York Police Department, adamantly announced that “anarchists” that infiltrated the protests were responsible for the rioting in isolated groups.<sup>97</sup> Mayor DeBlasio continued to distance the racialized struggle for basic human rights with the so-called rioters as alien and isolated; he said they were coming ‘from outside the city,’ were “out of town’ demonstrators,” and most poignantly, “not from communities of color.”<sup>98</sup>

However, this very act of pacifying the justified fury of all Americans and distancing the cause of racial equity in the U.S. is one that many in the Civil Rights movement term as an erasure.<sup>99</sup> Erasure is often explored in “equity consciousness” as the trap of conceding to a post-racial America and yet not acknowledging the particular populations that have been historically marginalized and systemically harmed.<sup>100</sup>

What came as a surprise was Martin Luther King III’s appearance via the *Today Show* on May 31, 2020, because he did not condemn the rioting and looting.<sup>101</sup> He specifically pointed to the cross-racial coalitions protesting the brutality of George Floyd’s murder.<sup>102</sup> King said in that interview:

We’re seeing and feeling the frustration, the humiliation, the insensitivity. . . . Fifty years later, people are asking just for

<sup>95</sup> Which remains the purpose of this Article. *See supra* Part II; *see also infra* Part IV.

<sup>96</sup> Michelle Bocanegra, *De Blasio Now Says Some ‘Anarchist’ Protesters are Local Amid Continued Defense of NYPD*, POLITICO (May 31, 2020, 1:43 PM), [https://perma.cc/666A-8VFC].

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

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

<sup>99</sup> Erasure, more formally, is considered in cultural studies and education studies as the moment that “post-racial” America disregards the intricacies and struggle that undergird racial identity. Kathryn Bell McKenzie & Glenn Allen Phillips, *Equity Traps Then and Now: Deficit Thinking, Racial Erasure and Naïve Acceptance of Meritocracy*, 1 WHITENESS & EDUCATION 26, 27 (2016). Indeed, the historical context of structural inequity continually requires vigilance such that the actual pain and struggle of predecessors in the goal of equality and equity is not lost. *See id.*

<sup>100</sup> *Id.* at 26.

<sup>101</sup> Maura Hohman, *Martin Luther King III Reflects on Father’s Legacy Amid George Floyd Protests*, TODAY (May 31, 2020, 12:56 PM), [https://perma.cc/Y2X9-LV2D] (“people’s actions are not the approach that I would want us to take. . . . But how do you rebuild a human life when a life is gone? You can’t.”).

<sup>102</sup> *Id.*; *see* Christina Marfice, *MLK Jr’s Son Thinks Things Would Be Different If His Father Had Lived*, YAHOO! LIFE (June 1, 2020), [https://perma.cc/VHA4-KMM6].

dignity and respect in terms of arresting a human being . . .  
 . We see a variety of people [protesting] . . . . It's not just  
 black people. It's black and white, it's old and young.<sup>103</sup>

In Martin Luther King, Jr.'s "Other America" speech, he said, "in the final analysis, a riot is the language of the unheard. And what is it that America has failed to hear?"<sup>104</sup> Looting is not as much the problem, in comparison to the century-long institution of the police department, which was created to enforce enslavement and protect private property.<sup>105</sup> Capitalism was built on centuries of generational enslavement that was propagated by violence.<sup>106</sup> In effect, protestors were seen as destroying private property and not in full view of their justified anger with structural inequitable forces, while others were more suspect of the narrative as informed by America's history of protest—the distinction highlighting the hypocrisy of one American public that cares more about objects than state-sanctioned murder of its own citizens.<sup>107</sup>

### *B. Looting's Colonial Origins and The British West India Company*

The very origin of the word "looting" arises out of a form of multinational-state colonial history that is intertwined with America's slave history: the British West India and East India Company. Originally, "looting" has its etymological origin from Hindi—"Lut"—which literally translates "to plunder" of an overtaken community by the warring empire.<sup>108</sup> Whereas this Article points out, in the U.S., the connotations of "looting" have consistently denoted a racialized term that connotes perceived or implied threats to

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<sup>103</sup> Hohman, *supra* note 101.

<sup>104</sup> Joshua Bote, 'A Riot is the Language of the Unheard': MLK's Powerful Quote Resonates Amid George Floyd Protests, USA TODAY, [https://perma.cc/B8EL-FGPE] (last updated May 29, 2020, 11:14 AM).

<sup>105</sup> Lily Rothman, *What Martin Luther King Jr. Really Thought About Riots*, TIME (Apr. 28, 2015, 2:16 PM), [https://perma.cc/99DR-3LZV].

<sup>106</sup> Desmond, *supra* note 4.

<sup>107</sup> See Jesse A. Myerson and José Martín, 9 *Historical Triumphs to Make You Rethink Property Destruction*, ROLLING STONE (May 29, 2020, 9:30 AM), [https://perma.cc/Z8AE-UQ2U].

<sup>108</sup> Anna Purna Kambhampaty, *How American Power Dynamics Have Shaped Perceptions of Looting, From the Boston Tea Party to Today*, TIME (June 11, 2020, 2:42 PM), [https://perma.cc/PRT5-F8V6] (stating that the etymology of the word for looting is from the 1700s crossed over into the English language from Hindi "lut" in reference to prizes plundered from wartime enemies). However, unlike today, the word itself did not have lawless connotations but that of a military slang word used during the British Rule of India and, during the time of the British West India Company, to refer to artistic and historical artifacts plundered during wartime. See *id.* Thus, the derivation of the word has some connotations in the monopolistic state's plunder of communities that were overtaken during war, and for that matter, connotes the State actors over the communities harmed. See Dalrymple, *supra* note 16 ("Using the looted wealth of Mughal Bengal, the Company started ferrying opium east to China, then fought the Opium Wars to seize an offshore base at Hong Kong and safeguard its profitable monopoly in narcotics. To the west, it shipped Chinese tea to Massachusetts.")

white supremacy and racial capitalism.<sup>109</sup> “Looting” was first adopted into English to describe how senior executives at the British West India Company, the first multinational corporation, built their fortunes from the decaying Mughal empire.<sup>110</sup> After looting the Mughal empire, the Mughal society was forced into a form of “involuntary privatization” that required revenue and taxes to be paid to English traders in the British West India Company.<sup>111</sup> The company utilized this new wealth as a means of trafficking opium from impoverished Indian territories to China.<sup>112</sup> As John Dickinson, a colonial lawyer, politician, and ultimately, “Penman of the [American] Revolution” would write, the British West India Company would turn to America as a new theater whereupon they could “exercise their talents of rapine, oppression and cruelty.”<sup>113</sup> Thus, the appropriation of the discourse of looting is one that historically has been of a nation-state profiteering on the oppression of poor communities to whom—by law, policy, and legislation—they would levy taxes and “loot.”

*C. Looting Black America: Slavery and the Capitalist Origins of Racial Economic Inequity*

Policies from American slavery have always treated the personal dignity of Black Americans as only equal to the value of capitalist property that is to be protected.<sup>114</sup> Such laws of human (in)dignity included in 1788, when the New York State Legislature passed several laws governing slavery that purported to condemn the act of enslavement.<sup>115</sup> For example, one of these laws stated that the purchase of a person into slavery with the intent to export and sell is prohibited.<sup>116</sup> This carried with it a fine; the punishment for a violation of the law was a fine of five pounds and the enslaved person was to be freed.<sup>117</sup> Yet, the same law that manumitted enslaved persons, declared that those in slavery could not be a witness in any civil case—as in not interfere with white property—continuing the dehumanizing effects of the laws framework; whereas, in criminal cases, one enslaved person could be a witness for, or against, another enslaved person, in furtherance of the laws’ racializing goal of excluding Black America from justice, and subsequently only

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<sup>109</sup> Kambhampaty, *supra* note 108.

<sup>110</sup> *See id.* *See also* Dalrymple, *supra* note 16.

<sup>111</sup> Dalrymple, *supra* note 16.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Desmond, *supra* note 4.

<sup>115</sup> IRA BERLIN & LESLIE M. HARRIS, *SLAVERY IN NEW YORK* 76 (2005).

<sup>116</sup> New York State Archives, *New York Slave Code, 1730*, NEW YORK STATE ARCHIVES, [https://perma.cc/N5MN-B29S] (last visited May 5, 2021).

<sup>117</sup> *Id.*

recognizing the voice of the unheard in discrete instances when the law's effect is that of propagating Black social exclusion.<sup>118</sup>

Selling strong liquor to an enslaved person was punishable by a fine of forty shillings—half of which is to go to the master.<sup>119</sup> And most prominently, the punishment for petty larceny in New York State was “such corporal punishment, not extending to life or limb, as the same [sic] court... shall think proper.”<sup>120</sup> If the punishment is whipping, not more than 39 lashes shall be given in one day.<sup>121</sup> Thus, the early laws of New York exemplify that the very institution of slavery was built on racial capitalism, and immediately punished property violations *disproportionately* on Black America, during the same time that manumission and abolition became culturally relevant.

As Matthew Desmond states, “[i]n order to understand the brutality of American capitalism, you have to start on the plantation.”<sup>122</sup> Desmond points to the structural inequities in the laws and social institutions that perpetuate structural racism as a continuation from the seeds of slavery.<sup>123</sup> The very structure of slavery and early abolition (manumission) was built on a capitalist and structurally racist system that devalued the lives of Black America.<sup>124</sup> New York's Law of 1788 repeats the provision of the 1785 law regarding Manumission, which authorizes manumission of slaves,<sup>125</sup> provided that a bond of 200 pounds is posted, “to keep and save such slave from becoming being a charge” to his locality; however, it warns that ex-slaves should not become a *public charge* when freed.<sup>126</sup>

In a more recent example, Matthew Desmond considers the wide-reaching effects of capitalism's exclusion and segregation with Martin Shkreli, the CEO of a pharmaceutical company, who acquired the rights to a lifesaving

<sup>118</sup> BERLIN & HARRIS, *supra* note 115, at 76 (quoting IV MINUTES OF THE COMMON COUNCIL OF THE CITY OF NEW YORK 1675-1776 79 (1905) [hereinafter MINUTES IV]).

<sup>119</sup> *Id.* (quoting MINUTES, *supra* note 118 at 89–90).

<sup>120</sup> *Id.* (quoting MINUTES, *supra* note 118 at 497–498).

<sup>121</sup> *Id.*

<sup>122</sup> Desmond, *supra* note 4.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Verene A. Shepherd, *Freedom in the Era of Slavery: The Case of the Barclay Brothers in Jamaica*, JAMAICA GLEANER (Feb. 24, 2008), [<https://perma.cc/S2HA-7RYK>] (claiming that the central difference between Manumission and Emancipation has been defined as the following: Manumission is the giving of freedom to a person who was slaved while Emancipation is the abolishment of the system of slavery). Jamaican historian Verene Shepherd describes Manumission as “the conferment of freedom on the enslaved by enslavers before the end of the slave system.” *Id.*

<sup>126</sup> JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY: BEING A COMPILATION OF ALL THE DECISIONS MADE ON THAT SUBJECT, IN THE SEVERAL COURTS OF THE UNITED STATES AND STATE COURTS 190 (Allan Pollock, Jr. & Benjamin Levy eds., 1837).

drug, Daraprim. That drug had previously cost \$13.50 per pill, but in Shkreli's hands, the price increased over 50 fold to \$750 per pill.<sup>127</sup> When asked at a health conference about the tremendous price increase, he admitted that while no one is proud of it, "this is a capitalist society, a capitalist system and capitalist rules."<sup>128</sup> This analogue in modern history is one that traces the continued contours of a racialized system of capitalism that has been in development since slavery and has yet to acknowledge, or reckon with, the racial underpinnings of a system of profit, that ultimately began from profiteering off Black America and excluding access from systemic equity.

Slavery, as a precursor to abolition and manumission, bears the bonds of capitalist racial structural inequity: "all . . . slaves, become the property of the people of this State, by the attainder or conviction of any person whomsoever and now in possession of the commissioners of forfeitures be, and they are hereby manumitted."<sup>129</sup> The cotton plantation, too, holds reinforcing principles of profit on the labor of human dignity with Wall Street.<sup>130</sup> Desmond writes, "[a]n origin of American money exerting its will on the earth, spoiling the environment for profit, is found in the cotton plantation."<sup>131</sup> Here the voice of the unheard is built on the profiteering principles that regard safety and property as a public threat—erasing whose public must be protected.

#### *D. White Wall Street and the Foundations of Slavery in the U.S.*

Wall Street itself was built as a well-known slave market on Manhattan Island.<sup>132</sup> In 1711, Wall Street's location was notorious for the influx of slave ships that transported enslaved persons.<sup>133</sup> In fact, enslaved Africans built the original Wall Street and the subsequent Chambers Street Wall, which became the northern outpost of the city during the American Revolution.<sup>134</sup> Trinity Church, near Wall Street, has since established that enslaved labor was used to build the original church.<sup>135</sup>

Thus, the very infrastructure of Manhattan—including Wall Street—was always premised on the labor of Black America.<sup>136</sup> The early 18th century saw

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<sup>127</sup> Desmond, *supra* note 4.

<sup>128</sup> *Id.*

<sup>129</sup> STATE OF NEW YORK, LAWS OF THE STATE OF NEW YORK (1785-1788), reprinted in LAWS OF THE STATE OF NEW YORK 316 (1886).

<sup>130</sup> Desmond, *supra* note 4.

<sup>131</sup> *Id.*

<sup>132</sup> Alan Singer, *The 1619 Project Debate with History of Slavery in New York City*, HIST. NEWS NETWORK (Feb. 9, 2020), [<https://perma.cc/8EGB-B9WP>].

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*



numerous Africans pass through Manhattan ports to be auctioned off and sent to cotton plantations in the South, as a means of looting their labor into making profit for the early nation.<sup>137</sup>

1. Enslaved Africans Brought to New York Ports

**Table 1.1: Enslaved Africans Imported to the Province of New York, 1701-1725**<sup>138</sup>

Year	Indies	West Coast	African Total
1701-1705	225	24	249
1706-1710	—	53	53
1711-1715	70	170	240
1716-1720	719	379	1,098
1721-1725	379	176*	555

Brooklyn was regarded as a “slaveholding capital.”<sup>139</sup> Brooklyn was one of six towns in Kings County, from its Dutch inception in 1634 to its incorporation as a city in 1834.<sup>140</sup> “Kings County had a larger concentration of

<sup>137</sup> See CRAIG STEVEN WILDER, *A COVENANT WITH COLOR: RACE AND SOCIAL POWER IN BROOKLYN* 33–35 (2000) (“But the Caribbean was a frequent destination and point of origin for Manhattan and Brooklyn ships. . . . On the eve of the American Revolution, enslaved Africans were one of the major commodities handled at the port of New York. Ship manifests registered black men, women, and children in lists with casks of rum, pipes of wine, and hogsheads of other liquors. In fact the printed manifest sheets used by New York’s tax inspectors put bondspeople first among ‘the several dutiable Goods and Commodities.’”).

<sup>138</sup> *Id.* (citing E.B. CALLAGHAN, *THE DOCUMENTARY HISTORY OF THE STATE OF NEW YORK*, (1849)).

<sup>139</sup> TRACEE WORLEY ET AL., *IN PURSUIT OF FREEDOM: TEACHER’S MANUAL 9–10* (Jody Polleck et al.)

<sup>140</sup> *Id.* at 11; WILDER, *supra* note 137 at pg. 33–41 (“By the American Revolution, Kings County was the state’s “slaveholding capital.”); *id.* at 35 (“The dominance of Dutch Farmers in Kings County explains, in part, the growth of African slavery in that locale. Kings was by far the most heavily Dutch county in all New York—more than 45 percent of the white population—but daily life was equally influenced by the size and ethnic diversity of its black population.”). See *id.* at pg. 35 (“Kings County’s farmers maintained their provincialism by becoming more dependent upon black labor, and they provide the best example of why it is impossible to disconnect the region’s development from the African presence.”); see also *id.* at 41 (“Perhaps slavery’s lasting effect was not displayed physically in villages and towns but rather appeared in the Dutch and English residents’ insatiable appetite for the fruits of other people’s labor.”).

enslaved people than any other county in New York State.”<sup>141</sup> According to the first federal census taken in 1790, the dominance of slavery is evidenced by the high concentration of Africans in Brooklyn: at the time of the census, 1/3<sup>rd</sup> of Brooklyn’s population was African- virtually all enslaved – more than any other county in New York State.<sup>142</sup> Most of the 1/3 “of all Kings County residents consisted of enslaved Africans, who were agricultural and domestic workers, and laborers.”<sup>143</sup> “According to the first official federal census taken in 1790, the population of Kings County was 4,495.”<sup>144</sup> 1/3 of the population of the county was of African descent, and virtually all of them were enslaved.<sup>145</sup> On average, “60% of Dutch families were slaveholders in Kings County; in outer areas, such as the town of Flatbush, the numbers were as high as 74%.”<sup>146</sup> Notably, Brooklyn’s slaveholding percentages exceeded those of the entire state of South Carolina and neighboring Manhattan.<sup>147</sup> In sum, despite historically underestimated, Brooklyn, and Manhattan were a slave-holding capital as much as some Southern cities.

*E. Pre-Policing Policing: Restricting Movement of Black Bodies from Mass Policing During Slavery to the Birth of the Police*

New York laws that regulated enslaved Black Americans, found in the provincial records of New York, were largely economic in substance. New York’s major provincial slave codes included:

“An Act for Regulateing [sic] of Slaves,”<sup>148</sup>

“An Act for preventing Suppressing and punishing the Conspiracy and Insurrection of Negroes and other Slaves.”<sup>149</sup>

By 1731, a host of Slave Codes were in effect in the City of New York, including—

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<sup>141</sup> WORLEY ET AL., *supra* note 139, at 10.

<sup>142</sup> *Id.* at 9.

<sup>143</sup> John Louis Flateau, *Black Brooklyn: The Politics of Ethnicity, Class, and Gender* (2005) (Ph.D. dissertation, The City University of New York) (ProQuest).

<sup>144</sup> WORLEY ET AL., *supra* note 139, at 9.

<sup>145</sup> *Id.* at 10.

<sup>146</sup> *Id.* at 9.

<sup>147</sup> *Id.* (comparing Kings County’s percentage of slaveholding families to South Carolina and neighboring Manhattan which respectively had only 40% of families as slaveowners).

<sup>148</sup> An Act for Regulateing of Slaves (1702), in 1 COLONIAL LAWS OF NEW YORK 519 (1894). See 1 STEPHEN OSTANDER, A HISTORY OF THE CITY OF BROOKLYN AND KINGS COUNTY 231 (1894) (“The negro’s privileges were circumscribed, and strict laws were enforced concerning his habits and movements.”).

<sup>149</sup> An Act for preventing Suppressing and punishing the Conspiracy and Insurrection of Negroes and other Slaves (1712), in 1 COLONIAL LAWS OF NEW YORK, *supra* note 148, at 761.

“A Law Appointing a Place for the More Convenient Hiring of Slaves,”<sup>150</sup>

“A Law Restraining Slaves, Negroes, & Indians from Gaming with Moneys or For Moneys,”<sup>151</sup>

“A Law Giving a Reward to Any Person or Persons who shall Apprehend any Negro, Mulatto or Indian Slaves Offending Against any of the Acts of General Assembly of this Colony,”<sup>152</sup>

“A Law for Regulating Negro’s & Slaves in the Night Time,”<sup>153</sup>

“A Law to Prohibit Negroes and Other Slaves Vending Indian Corn Peaches or any other Fruit with this City.”<sup>154</sup>

The last law was one that specifically disenfranchised any economic advancement of enslaved persons, passed in August 1740 to prohibit “Negroes and Other Slaves Vending Indian Corn Peaches or any other Fruit within this City,” it focused on Wall Street and the Old Slip or Broadway Market, where if they had tried to buy or sell, they would have broken a law.<sup>155</sup>

In 1730, a New York act stipulated that it shall:

not hereafter be Lawfull [sic] for above three Slaves to meet together at any time or at any other Place then when it Shall happen they meet in some servile employment [sic] for their Master of Mistresses profit and by their Masters or Mistresses Consent upon penalty of being whipt upon the naked Back at the discretion of any one Justice of the Peace not Exceeding forty Lashes for each offence.<sup>156</sup>

A year later in 1731, there were laws that stipulated:

No Negro, Mulatto, or Indian slaves, above the Number of three, do Assemble or meet together on the Lords Day

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<sup>150</sup> See III MINUTES OF THE COMMON COUNCIL OF THE CITY OF NEW YORK 1675-1776 3 (1905)

<sup>151</sup> *Id.* at 277.

<sup>152</sup> *Id.* at 402.

<sup>153</sup> *Id.* at 37.

<sup>154</sup> MINUTES IV, *supra* note 118, at 497–98. See Oscar R. Williams, *The Regimentation of Blacks on the Urban Frontier in Colonial Albany, New York City and Philadelphia*, 63 J. NEGRO HIST. 329, 329–38 (1978) (discussing city slave codes); see also Letter from Robert Hunter to Lords of Trade, (June 23, 1712), in DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 339 (1853) [hereinafter Hunter Letter].

<sup>155</sup> MINUTES IV, *supra* note 118, at 497.

<sup>156</sup> New York State Archives, *supra* note 116.

Called Sunday, and Sport, Play or make any Noise or Disturbance, or at any Other time at any place from their Master's service, within this City.<sup>157</sup>

This law of the Dutch Colony stipulated that, if any Black American was riding a horse, and rode it “Swiftly, Hastily, Precipitately, or disorderly, and Otherwise than softly Orderly Patiently without Passing Swiftly, Trotting fast or Galloping,” they would have been guilty of breaking a city law for “Punishing Slaves who Shall Ride Disorderly Through the Streets.”<sup>158</sup> And if they had tried to buy or sell fruit at the Old Slip or Broadway Market, they would have broken another law, passed in August 1740 to prohibit “Negroes and Other Slaves Vending Indian Corn Peaches or any other Fruit within this City.”<sup>159</sup> These New York laws that controlled spatial movements in the 1700s bear some connection to modern-day vagrancy and loitering statutes in New York, as well as later laws controlling Black and Brown “runaway” bodies by slave patrols and the policing of economic interests in Northern cities.<sup>160</sup> The loitering and vagrancy laws that developed in 17th century England, and later in the U.S. and in New York during slavery (as shown above) since the early 18th century, granted American police the ability to arrest and control the literal movements of Black and Brown bodies.<sup>161</sup>

If taken literally, policing and, by extension, criminal law, historically hinged on criminalizing and policing the spatial movement of Black and Brown bodies, such as to protect private interests as *pre-textual* stops for other social interests like slum clearance and maintaining order closely tied with capitalist interests,<sup>162</sup> prevent slavery insurrection and other non-conforming acts of protests, or implement *Stop-and-Frisk* practices<sup>163</sup> to name a few. Thus,

<sup>157</sup> MINUTES IV, *supra* note 118, at 79.

<sup>158</sup> *Id.* at 89.

<sup>159</sup> JILL LEPORE, *NEW YORK BURNING* 57 n.30 (1st ed. 2007) (listing laws meant to police Black lives, such as “A Law for Regulating Negro's & Slaves in the Night Time” and “A Law for the Observation of the Lords Day Called Sunday.”).

<sup>160</sup> *See infra* Section IV.E.

<sup>161</sup> Risa Goluboff, *The Forgotten Law That Gave Police Nearly Unlimited Power*, TIME MAG. (Feb. 1, 2016, 11:00 AM), <https://time.com/4199924/vagrancy-law-history/> (“Armed with this roving license to arrest, officials employed vagrancy laws for a breath-taking array of purposes: to force the local poor to work or suffer for their support; to keep out poor or suspicious strangers; to suppress differences that might be dangerous; to stop crimes before they were committed.”).

<sup>162</sup> Gentrification, for example, leads to an increased police presence which “create conditions for more potential misconduct.” Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, THE ATLANTIC (Dec. 20, 2017), [<https://perma.cc/XM7H-WG27>].

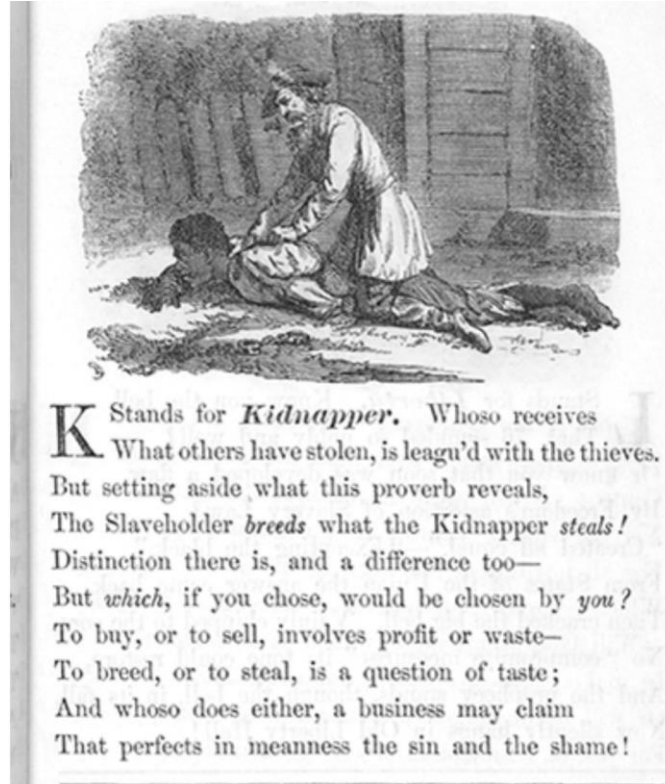
<sup>163</sup> Stop-and-frisk, typically, refers to the NYPD practice of routinely stopping and searching people, especially young Black and Latinx men (oftentimes without probable cause, protected by the Fourth Amendment) under the regime of NYC Mayor Giuliani and Mayor Bloomberg, which causes an overcriminalization of Black and Latinx individuals. Al Sharpton, ‘*Stop-and-*

the laws described above engender rules and regulations that limit Black Americans from certain ownership over public spaces. Another way of seeing this dynamic is through rioting and public acts of protests, as another form of Black America inhabiting spaces made either legal or illegal by dominant social structures embedded in protecting (white) interests in capitalist society—i.e. protest and allegations of “runaways” caste as capturing illegal bodies, but more specifically, that of kidnapping Black and Brown bodies from American spaces. As mentioned, another way to describe spatial surveillance of Black America comes to us in the form of looting, riots themselves, which tend to form out of racial fear and anxiety, driven by structural domination over class and economic insurrection—just as 18th-century laws exemplified regulating the physical movement, spatial permissiveness, and economic profitability of enslaved persons.<sup>164</sup>

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*Frisk’ Is the New Racial Profiling*, HUFFINGTON POST (June 4, 2012, 6:09 PM), [<https://perma.cc/W3UY-CA9K>] (stating that “[i]n 2011 alone, the NYPD stopped 685,724 people, out of which nearly 87 percent were [B]lack or Latin[x,]” and constituted the most clear example of an institutionalized violation of the Constitutional rights). See *Terry v. Ohio*, 392 U.S. 1 (1968), for a discussion on *Terry* stops in the context of criminal law. See also *Rodriguez v. United States*, 575 U.S. 348 (2015), for later Supreme Court evaluations of the constitutionality of such searches against the guarantees of the Fourth Amendment’s Constitutional Guarantee of the rights against Search and Seizure. *Id.* at 350 (holding a police stop exceeding “the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.”); *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (finding that when a police officer finds there is “a valid, pre-existing, and untainted arrest warrant” for an individual, then any evidence obtained from a stop of that individual will be admissible in court, even if the stop would otherwise violate the Fourth Amendment). *Utah v. Strieff* references the three-part balancing test for such stops in *Brown v. Illinois*. *Id.* at 2061–62 (citing *Brown v. Illinois*, 422 U.S. 590 (1975)).

<sup>164</sup> See *infra* Section IV.G on the First Police in the U.S discussing the establishment of the first police force in Boston.

*F. Slavery By Another Name and Modern Mass Policing*

K Stands for Kidnapper from the Gospel of Slavery. Manuscripts, Archives and Rare Books Division, Schomburg Center for Research in Black Culture, The New York Public Library.

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As *K Stands for Kidnapper* depicts, “[b]y the 1840s, as Brooklyn expanded, many white Brooklynites pushed for greater police protection,” but this increased protection “represented a threat to black Brooklynites who were unprotected by local, state and federal laws.”<sup>166</sup>

The first formal slave patrol had been created in the Carolina colonies in 1704.<sup>167</sup> These slave patrols, established before the Civil War, led to the first

<sup>165</sup> *The Crisis Decade (1850–1860)*, IN PURSUIT OF FREEDOM, [https://perma.cc/HMD8-G8YC] (last visited May 5, 2021).

<sup>166</sup> *Id.*

<sup>167</sup> Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, NAT'L L. ENFORCEMENT MUSEUM: BLOG (July 10, 2019), [https://perma.cc/Y7JW-WR4A]. See Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017, 9:45 AM), [https://perma.cc/4Y53-D5JV]

police forces in the U.S. that started in service of larger economic interests and were often used for private protection of economic and property interests from the underclass.<sup>168</sup> During the Civil War, the military became the primary form of law enforcement in the South.<sup>169</sup> However, during Reconstruction, many local sheriffs functioned in a way analogous to earlier slave patrols<sup>170</sup> by enforcing segregation and the disenfranchisement of freed slaves.<sup>171</sup> Later in the mid-19<sup>th</sup> century, the police played a dominant role in protecting and serving the stability of status quo financial and property interests.

The definition of public order and safety, throughout the 19th century, is mostly maintained in the status quo. It is not a historical coincidence that in the late 1880s, that all major police forces were in U.S. cities.<sup>172</sup> The preservation of law and order at the time was driven by fears of labor-union organizers and new waves of white ethnic immigrants with Catholic, Irish, Italian, German, and Eastern European backgrounds.<sup>173</sup> In the South, economics that drove the creation of police forces were centered not solely on protecting shipping interests, but also on the preservation of slavery.<sup>174</sup> Thus, the birth of mass policing had at its root a dominant-perspective, one that protected the financial and merchant interests and sought safety and shelter from an “underclass” cast over as a threat, and not as equal citizens to be protected.

### *G. Looting: White Supremacist-Led Riots and Racial Violence*

There is a long and troubling history of white supremacist or racially-driven violence in the U.S. that takes advantage of moments of Black equality and civil rights. One of the most pertinent and explicit historical examples was in July of 1834 within New York City when riots between pro-slavery mobs and abolitionists erupted in racial violence.<sup>175</sup>

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(“Policing in Colonial America had been very informal, based on a for-profit, privately funded system that employed people part-time. Towns also commonly relied on a ‘night watch’ in which volunteers signed up for a certain day and time, mostly to look out for fellow colonists engaging in prostitution or gambling. (Boston started one in 1636, New York followed in 1658 and Philadelphia created one in 1700).”).

<sup>168</sup> Waxman, *supra* note 167.

<sup>169</sup> See Williams, *supra* note 154; see also Hunter Letter, *supra* note 148.

<sup>170</sup> Williams, *supra* note 154.

<sup>171</sup> Waxman, *supra* note 167.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* (“For example, people who drank at taverns rather than at home were seen as ‘dangerous’ . . . The irony of this logic . . . is that the businessmen who maintained this belief were often the ones who profited off of the commercial sale of alcohol in public spaces.”).

<sup>174</sup> *Id.*

<sup>175</sup> JUDITH WELLMAN, BROOKLYN’S PROMISED LAND: THE FREE BLACK COMMUNITY OF WEEKSVILLE, NEW YORK 42 (2014).

For three days in July, mobs attacked Black Americans and European American abolitionists, destroying, among other places, Arthur and Lewis Tappan's home on Rose Street and St. Phillips's African Episcopal Church on Center Street.<sup>176</sup> The Tappan brothers left their house unrepaired, as a "silent Anti-Slavery preacher."<sup>177</sup> Mob action increased in the mid-1830s throughout the Northeast, in proportion to abolitionist organizing.<sup>178</sup> The increase in violence across New York, but also across the U.S., was due to the fear of abolition and eventual emancipation.<sup>179</sup>

Two years prior to the Thirteenth Amendment, the Enrollment Act of 1863 was America's first federal Conscription Act that led to the week-long Draft Riot in July of that year in New York.<sup>180</sup> During this time, more than 15,000 infuriated men, largely Irish, ransacked New York City in arguably the largest incident of civil disorder in U.S. history.<sup>181</sup> The targeted destruction of property and life was of visceral hatred of the rich and powerful, and against Blacks, who were viewed as the "cause" of the Civil War troubles.<sup>182</sup> The Union Army eventually occupied the city.<sup>183</sup> In the end, at least 119 people were killed officially, but historians say it was nearly 500.<sup>184</sup> In its creation, the Federal Enrollment Act of 1863 required every male citizen, and those who had filed for citizenship between ages twenty and forty-five, to enroll for conscription.<sup>185</sup> White draftees who were not excused could pay a fee of \$300 (more than a year's working-class salary) and be exempted.<sup>186</sup> No Black Americans were considered in the lottery as they were not deemed citizens.<sup>187</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See Claude B. Mickelwait, *Legal Basis for Conscription*, 26 AM. BAR ASS'N J. 701, 701–05 (1940); see also Zaheer Ali, *Flatbush + Main Ep 28: The New York City Draft Riots*, BROOKLYN PUBLIC LIBRARY (Aug. 30, 2018), [<https://perma.cc/M4PK-7BYB>] (discussing the New York Draft Riot, time stamped at 10:30-12:30); see generally IVER BERNSTEIN, *THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE FOR AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR* (1990) (documenting the New York Draft Riot).

<sup>181</sup> Ali, *supra* note 180, at 13:15-13:27; see BERNSTEIN, *supra* note 180, at 3.

<sup>182</sup> BERNSTEIN, *supra* note 180, at 36.

<sup>183</sup> *Id.* at 3.

<sup>184</sup> Ali, *supra* note 180, at 13:15-13:27 (citing an unpublished manuscript by Gertrude Lefferts Vanderbilt titled *The New York Riots of 1863*, an account of a sympathetic view of the violence on African American victims during the Draft Riots of 1863).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> WELLMAN, *supra* note 175, at 115.



Thus, the racialized response that instigated the race riots in New York was one of jealousy and outrage, and the very laws that disenfranchised Black Americans from full citizenship also excused their participation in the draft.<sup>188</sup>

The difference in violence against Black America versus its justified fury over the death of George Floyd is stark. The riots fill an expression of political voices, and as Dr. King has mentioned, are the voices of the unheard.<sup>189</sup> Lincoln had no choice but to tamp down the un-American insurgence against Black Americans.<sup>190</sup> In the post-George Floyd era, the violence is nominally driven by a climate of political protest and calls for structural change—very different than the circumstances around Lincoln to bring in the federal troops. The 1863 racially-motivated attacks would send some white men in empathetic and sympathetic fear of their property, such as Gertrude Lefferts Vanderbilt of a prominent slave-holding family in Brooklyn.<sup>191</sup> In an unpublished manuscript, she writes:

The loaded farm wagon stood in the barnyard ready for the morning market and Tom who was to drive the team in, was in the hayloft trying to get to sleep before midnight which he would love before dawn / when he was aroused by a neighbor who warned him against going into town, telling him there was a fearful riot in the streets that hardly a [Black American] who had been caught by the mob had escaped with his life.” “The vindictive and malignant spirit of the mob reaped its fury upon the most helpless class in the community/ The burning of the asylum for the colored orphans was a despicable act/ the poor and unoffending race of [Black American] were selected as the most desirable victims for its vengeance.<sup>192</sup>

What resulted were burned down homes, churches, benevolent societies—even the colored orphan’s society was burned down on 44th and 5th Ave. in Manhattan.<sup>193</sup> Black Americans and abolitionists were attacked. “Many men were killed and thrown into the river, a great number hung to trees and lamp-posts, numbers shot down; no black person could show their

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<sup>188</sup> *See id.*

<sup>189</sup> The King Center (@TheKingCenter), TWITTER (May 28, 2020, 9:07 AM), [https://perma.cc/X248-WD23].

<sup>190</sup> *The Hysterical Debate Over Federal Troops*, NAT’L REV. (June 6, 2020), [https://perma.cc/Q9AG-NRNQ].

<sup>191</sup> *See* Gertrude Lefferts Vanderbilt, *Account of the Draft Riots of 1863*, BROOKLYN HIST. SOC’Y (1890), [https://perma.cc/6MXC-JTE6] (last visited May 5, 2021); *see also* Ali, *supra* note 174, at 13:15-13:27); *New York: A Documentary Film* (Steeplechase Films 2003).

<sup>192</sup> Vanderbilt, *supra* note 191, at 43.

<sup>193</sup> WELLMAN, *supra* note 175, at 310.

heads but what they were hunted like wolves. These scenes continued for four days. Hundreds of our people are in station houses, in the woods, and on Blackwell's island."<sup>194</sup> Nearly half of the entire Black American population in Manhattan fled across to nearby counties, such as Brooklyn, and a good number came to Weeksville,<sup>195</sup> as it was considered the place of refuge for Black Americans during the Draft Riots.<sup>196</sup>

One observer stated that the riots left thousands penniless, indiscriminately victimized the entire class of the community, and pauperized whole families for four days.<sup>197</sup> Junius C. Morel writes, "what crimes have we, an unoffending people, committed, that we should suffer these cruelties?"<sup>198</sup> About hundreds of Black Americans were killed and thousands more were driven from their homes. Irish-American rioters destroyed and burned down a Colored Orphan Asylum, in Manhattan's midtown<sup>199</sup> according to the *New York Sun*.<sup>200</sup>

The 1863 Draft Riots were one of the only times when Abraham Lincoln used the federal army to send in troops to restore order in New York's draft riots. In fact, he dispatched troops from the battlefield in Gettysburg to New York to tamp down riots.<sup>201</sup> One of the connections with modern-day events is President Trump revisiting the potential use of the Insurrection Act of

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<sup>194</sup> *Id.* at 116.

<sup>195</sup> Ali, *supra* note 180, at 13:50-15:50. Weeksville was one of the two largest independent free Black communities in the United States. Today, it is a historical site in Brooklyn through the efforts of the Pratt Institute and New York City. Today, the land sits next to Kingsborough Houses in Bedford Stuyvesant. See *Generally About Us*, WEEKSVILLE HERITAGE CTR., [https://perma.cc/PFS7-X85Z] (last visited May 5, 2021). Only a portion of its original land remains: four houses on Hunterfly Road. *Id.* In 1827, following the abolition of slavery in New York, many moved into the semirural area of Brooklyn named Weeksville, wedged between the towns of Bedford and Flatbush. MICHAEL WOODSWORTH, *THE BATTLE FOR BED-STUY: THE LONG WAR ON POVERTY IN NEW YORK CITY* 50 (Harvard Univ. Press 2016). By mid-century, Weeksville's residents had launched one of the country's first Black newspapers, *The Freedman's Torchlight*, and funded a variety of community institutions, including the Colored School No. 2, the Howard Colored Orphanage Asylum, the Zion Home for Aged Relief, and the Berean Baptist Church. A second free-Black settlement, Carrsville, sprouted up nearby. *Id.*

<sup>196</sup> Ali, *supra* note 180, at 13:50-15:50. Indeed, beyond Weeksville, Williamsburg was the second place of refuge for fleeing families from the riots. There was also a Mill in Flatbush that became a refugee space. See WELLMAN, *supra* note 175, at 117.

<sup>197</sup> WELLMAN, *supra* note 175, at 117.

<sup>198</sup> *Id.*

<sup>199</sup> WILDER, *supra* note 137, at 100 ("After Monday the New York rioters were distinctly Irish and African Americans were their target. They burned the Colored Orphan Asylum and gangs of thugs randomly assaulted black people, including a nine-year old boy." (citing E.B. CALLAGHAN, *THE DOCUMENTARY HISTORY OF THE STATE OF NEW YORK* (Weed, Parsons & Co. 1849))).

<sup>200</sup> WELLMAN, *supra* note 175, at 115-16.

<sup>201</sup> *The Hysterical Debate Over Federal Troops*, *supra* note 184.

1807, in June 2020.<sup>202</sup> The Insurrection Act's use during the Black Lives Matter protests in response to the death of George Floyd was also introduced by U.S. Senator Tom Cotton (R-Ark.) in an Opinion Piece,<sup>203</sup> detailing the Senator's call to arms in the aftermath<sup>204</sup>—namely, that the Insurrection Act will grant the President the authority to use military force against domestic disorder.<sup>205</sup> Following the President's own threats to use the Insurrection Act at a time of strife *toward* racial equity and ending mass policing that harm low income and marginalized communities, a bill introduced by Senator Richard Blumenthal (D-Conn.) sought to curb the President's use of the Act, by requiring a consultation with Congress and limiting the use to 14 days unless lawmakers passed a resolution.<sup>206</sup> In sum, these examples of racially-charged, white-led riots were a form of looting, focused on erasure of the collective community of Black citizens and causing racial terror as another derivation of “looting”. Then, turning to the birth of the U.S. Police force, it is important to keep this historical backdrop in mind on Black and Brown policing of movement and citizenship.

*H. White Supremacist Infiltration in U.S. Police—Looting by Mass Policing after George Floyd*

The idea of a police force to “protect and serve” the entire population was put most prominently on display in the proclamation from John F. Kennedy when he dedicated May 15 to “Peace Officers Memorial Day” as part of “National Police Week.”<sup>207</sup> President Kennedy noted that “[officers] ha[ve] been protecting Americans since the nation's birth.”<sup>208</sup> However, the

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<sup>202</sup> Christina Wilkie & Amanda Macias, *Trump Threatens to Deploy Military as George Floyd Protests Continue to Shake the U.S.*, CNBC, [https://perma.cc/BB9L-QTQG] (last updated June 2, 2020, 10:22 AM).

<sup>203</sup> Tom Cotton, Opinion, *Tom Cotton: Send in the Troops*, N.Y. TIMES (June 3, 2020), [https://perma.cc/JPZ9-J9PS].

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* Note the Capitol Hill Riots presented a similar situation in the racialized debate about looting vs. rioting. Immediately following the aftermath, a Congressional discussion of whether or not to label what would become a White Domestic Terrorism, centered around if it was at all even relevant to “structural racism” Compare Marty Johnson, *Ron Johnson: ‘No Racism Involved’ in Comments About Capital Riot*, THE HILL (Mar. 15, 2021, 2:38 PM), [https://perma.cc/9FR2-47W7] with Cameron Jenkins, *Black Officer on Capitol Rioters: ‘They Hated Us and They Hated our Skin Color’*, THE HILL (Mar. 18, 2021, 6:35 PM), [https://perma.cc/JFL9-5J83].

<sup>206</sup> Jordain Carney, *Democrats Introduce Bill to Rein in Trump's Power Under the Insurrection Act*, THE HILL (June 4, 2020), [https://perma.cc/9NVR-HWY9].

<sup>207</sup> *National Police Week*, FRATERNAL ORD. OF POLICE, [https://perma.cc/5GV3-6A7K] (last visited May 5, 2021). See Olivia B. Waxman, *The Birth of the U.S. Police Force*, TIME (May 18, 2017, 6:28 AM), [https://perma.cc/77NG-ZJDR].

<sup>208</sup> Waxman, *supra* note 207.

U.S. police force is a modern invention, but it was also sparked by “changing notions of public order” and driven by economics and politics.<sup>209</sup>

“It was not until the 1830[s] when the idea of a centralized municipal police department first emerged in the United States.”<sup>210</sup> As mentioned before, during the colonies, the history of policing was that of slavery policing and enforcement against fugitive enslaved Blacks.<sup>211</sup> In 1838, in the city of Boston, the first American police force was established. Soon after, New York City followed in 1845, and by the 1880s, all major U.S. cities had municipal police forces in place.<sup>212</sup> It is no surprise that Boston in 1838 was a large shipping commercial center, and business had required police protection of economic interests and property.<sup>213</sup> As crime historian Garry Potter at the Eastern Kentucky University suggests, these merchants came up with a way to save money by transferring the cost of maintaining a police force to citizens by arguing that it was for the “collective good.”<sup>214</sup> What ultimately was the South’s formal slave patrols became the North’s disenfranchising economic patrols that perpetuated structural inequity driven by the anxiety of “looting” of merchant interests.<sup>215</sup>

It is of interest, that cities seemed to be providing context to what many see as white supremacy-led “looting” following the George Floyd protests. The Mayor of St. Paul, mimicking the same speech by Mayor Bill DeBlasio, said that many of the arrests made for looting came from “outside groups” who seem to be “using Mr. Floyd’s death as a cover to create havoc.”<sup>216</sup> The Twin Cities Department of Safety Commissioner John Harrington stated that an investigation was underway, but around 40 arrests made in the Twin Cities on May 29 were linked to white supremacist groups and organized crime, largely from outside the city.<sup>217</sup>

On Sunday, May 28, 2020, in an interview with CNN, Jake Tapper asked Robert O’Brien, President Trump’s National Security Advisor, whether he thought “systemic racism” is a problem with law enforcement agencies in the U.S. Mr. O’Brien responded: “I don’t think there is systemic racism. I think

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<sup>209</sup> Brooke Binkowski, *The Origins of Policing in the United States*, SNOPEs (Sept. 26, 2016), [https://perma.cc/69RY-83YP].

<sup>210</sup> *Id.*

<sup>211</sup> Waxman, *supra* note 167.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Jon Parton, *Minnesota Officials Link Arrested Looters to ‘White Supremacist’ Groups*, COURTHOUSE NEWS SERV. (May 30, 2020), [https://perma.cc/XB99-QWJB].

<sup>217</sup> *Id.*

99.9 percent of our law enforcement officers are great Americans.”<sup>218</sup> What Mr. O’Brien appears to ignore, or at least not know of, is the extent of possible white supremacist infiltration in law enforcement departments across the country. In 2006, an FBI intelligence assessment titled “White Supremacist Infiltration of Law Enforcement” published during the President George W. Bush administration raised alarms over white supremacist groups infiltration, but appeared to ignore the history of U.S. slave patrols that stood as a precursor to modern-day policing, in terms of the systemic inequity that served as the foundations of white property value protection.<sup>219</sup> This assessment found that a neo-Nazi gang had formed within the Los Angeles County Sheriff’s Department<sup>220</sup> and had harassed Black and minority communities. Similar investigations revealed other officers tied to hate groups in Illinois, Ohio, and Texas.<sup>221</sup>

White supremacy has also infiltrated other police departments across the country in modern times. On June 20, 2001, two law enforcement officers were fired for their involvement with the Ku Klux Klan (K.K.K.) in Williamson County, Texas.<sup>222</sup> Officials investigating Deputy David Gay and Sergeant Greg Palm found that they were involved in the K.K.K. after they approached another officer in the same department to ask if he would join.<sup>223</sup> In June of 2019, a study by the Center for Investigative Reporting “identified hundreds of police officers across the country who were members of closed racist, Islamophobic, misogynistic, or anti-government militia groups on

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<sup>218</sup> Danielle Schulkin, *White Supremacist Infiltration of U.S. Police Forces: Fact-Checking National Security Advisor O’Brien*, JUST SECURITY (June 1, 2020), [https://perma.cc/W19Y-FHVK].

<sup>219</sup> *Id.* See FBI COUNTERTERRORISM DIVISION, WHITE SUPREMACISTS INFILTRATION OF LAW ENFORCEMENT 2-9 (2006).

<sup>220</sup> Hector Tobar, *Deputies in ‘Neo-Nazi’ Gang, Judge Found: Sheriff’s Department: Many at Lynwood Office Have Engaged in Racially Motivated Violence Against Blacks and Latinos, Jurist Wrote*, L.A. TIMES (Oct. 12, 1991, 12 AM), [https://perma.cc/QT3E-WVUN].

<sup>221</sup> Bethania Palma, *FBI Warned About White Supremacist Infiltrating Police Departments*, SNOPE (Sept. 27, 2016), [https://perma.cc/55BC-DZD6] (“Several key events preceded the report. A federal court found that members of a Los Angeles sheriff’s department formed a Neo Nazi gang and habitually terrorized the black community. Later, the Chicago police department fired Jon Burge, a detective with reputed ties to the Ku Klux Klan, after discovering he tortured over 100 black male suspects. Thereafter, the Mayor of Cleveland discovered that many of the city police locker rooms were infested with “White Power” graffiti. Years later, a Texas sheriff department discovered that two of its deputies were recruiters for the Klan.”). See Emma Gray, *American Policing Has Always Been About White Supremacy*, HUFFINGTON POST (June 4, 2020, 4:33 PM), [https://perma.cc/AR3A-PH54] (discussing the history of police forces, events leading up to police brutality protests, and potential reforms of the American criminal justice system).

<sup>222</sup> *Texas Officers Fired for Membership in KKK*, ABC NEWS (Jan. 7, 2006, 9:18 AM), [https://perma.cc/6EFW-WWUH].

<sup>223</sup> *Id.*

Facebook.”<sup>224</sup> Out of these many identified (over 150 law enforcement departments nationwide), only one has taken a public stand: the Harris County Sheriff’s Office, which fired a detective for racist posts.<sup>225</sup> As Georgetown Law Professor Christy Lopez, who oversaw the Department of Justice’s civil rights investigation into the Ferguson Police Department, has stated, “[i]t’s hard when you get out there as a new officer, you’re from a sheltered community somewhere, and you start to see a lot of pain and harm that is often happening in poor communities of color.”<sup>226</sup> She continues, “it is easy for officers who are trying to deal with the emotional impact of that to start to dehumanize people.”<sup>227</sup> In 1999, the Mayor of Cleveland announced that “an unknown number of . . . police officers in three of the department’s six districts scrawled racist or Nazi graffiti throughout their quarters.”<sup>228</sup> Most recently, in New York City as well, there were discussions of officers potentially using a white power signal during a protest: the “OK” gesture which has a “w” and a “p” and has been deemed by the Anti-Defamation League as a white power signal.<sup>229</sup> The white supremacy that has undergirded and rotted within various ranks of police departments across the country is just one example of the privileging of a loud white voice—one that easily conflates justified anger with rioting—wherein, on the flipside, is the voice of actual protesters dignified in their calls for justice to actualize in America, and yet remain unheard.

Even in 1960, the nature of social protest and unrest has focused on the criminalizing of Black communities and the voices of the unheard. This was following a moment of racial unrest was the end of the segregation and systemic inequity of Black America through laws, policy, and legislation that criminalize blackness, through the lens of a white supremacist view of threats to stability. As James Baldwin once noted in a 1960 essay in *Esquire Magazine* on unrest in Harlem and police, “Fifth Avenue, Uptown,” that discontent

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<sup>224</sup> Will Carless, *Hundreds of Cops Are in Extremist Facebook Groups. Why Haven’t Their Departments Done Anything About It?*, NATION OF CHANGE (Oct. 1, 2019), [https://perma.cc/EK8M-H4ZK].

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Karin Scholz & Ted Wendling, *Racist Graffiti in the Cleveland PD*, CLEVELAND.COM (July 22, 1999), [https://perma.cc/5RKB-7U7R].

<sup>229</sup> Janelle Griffith & Matteo Moschella, *NYPD Officer Appears To Make White Power Sign At Protest, Prompting Probe*, NBC NEWS (June 4, 2020, 11:39 AM), [https://perma.cc/FU3E-SYUE] (“The video showing the officer making the apparent ‘OK’ hand gesture – touching the thumb and index finger to make a circle, with the remaining three fingers held outstretched – was posted to social media over the weekend . . . The ‘OK’ gesture has been used by people around the world for centuries, typically to signal consent, according to the Anti-Defamation League. Recently, the hand signal has also been appropriated to represent the letters w and p to signify ‘white power’, . . . the ADL says.”). See Marina Pitofsky, *NYPD Probing of Alleged Use of White Power Sign at Protest: Report*, THE HILL (June 4, 2020, 8:53 PM), [https://perma.cc/7GXJ-XAAQ].

was not the sole intention and heart of the Black community's protests but instead, "represent the force of the white world, and the world's real intentions are, simply, for that world's criminal profit and ease, to keep the [B]lack man corralled up here, in his place."<sup>230</sup> There are reverse-instances where, what is purportedly a "race riot," is in fact a white supremacist attack on Black America, such as the moment commonly known as the burning of Black Wall Street in Tulsa.

### *I. How Looting Burned Down Black Wall Street*

One has only to turn to the events, on May 31, 1921, in the Greenwood community of Tulsa, Oklahoma.<sup>231</sup> The racial riots and looting that destabilized that site of Black mobility, what was commonly known as "Black Wall Street," began with racial anxiety.<sup>232</sup> Tulsa, during the oil boom of the 1900s, was a place that enjoyed Black-owned businesses, such as hotels, cafés, clothiers, and movie theaters.<sup>233</sup> The residents of the Greenwood community were largely segregated from whites, but enjoyed the same luxuries.<sup>234</sup> Panics and economic envy—a distinct racial anxiety—seemed to set off the white supremacist destruction masked as looting and "race riot" in 1921, when a white woman accused a young Black man of sexual assault.<sup>235</sup> Where today, the spotlight is captured by the justified anger over law enforcement, there seem to be parallels in white envy, akin to the economic envy during Tulsa. Today, one might argue the envy over social programs, and state support causes similar white appropriations. During the night of the "race riot," deputized whites killed more than 300 Black Americans and burned to the ground 40 square blocks of 1,265 Black American homes, as well as hospitals, schools, churches, and businesses.<sup>236</sup> "White deputies and members of the National Guard arrested and detained 6,000 Black Tulsans who were only released after being vouched for by a white employer or other white citizen."<sup>237</sup> Nearly 9,000 Black Americans' homes were destroyed, and they were forced to line the streets in tents.<sup>238</sup>

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<sup>230</sup> Jamelle Bouie, Opinion, *The Police Are Rioting. We Need to Talk About It.*, N.Y. TIMES (June 5, 2020), [https://perma.cc/3EBT-Q8MU] (quoting James Baldwin, *Fifth Avenue, Uptown*, ESQUIRE MAGAZINE (Oct. 16, 2007), [https://perma.cc/8TPG-CYKN]).

<sup>231</sup> Josie Pickens, *Black Wall Street and the Destruction of an Institution*, EBONY (May 31, 2013), [https://perma.cc/QX9B-7SPU].

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* See Linda Christensen, *Burning Tulsa: The Legacy of Black Dispossession*, ZINN EDUC. PROJECT (May 28, 2013), [https://perma.cc/C63D-XVNH].

<sup>236</sup> Christensen, *supra* note 235.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*



A man with a camera looks at iron bed frames rising above the ashes of a burned-out block in Tulsa. (Oklahoma Historical Society/Getty Images)

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## V. CONCLUSION

The moment of George Floyd is not an “aberration.”<sup>240</sup> This moment stems from a long history of U.S. structural inequity resulting from laws, policies, and legislation that criminalize the subject-position of Black America. This structural inequity includes mass imprisonment, mass policing, and an attenuated lack of social equity in the ways in which the nation has responded to moments of social equity (as exemplified in the discourse after George Floyd on rioting and the voices of the unheard). Likewise, Critical Race Theory has more “work to do” for us—as legal scholars, lawyers, and law students—in terms of the law’s adaptation to a series of Black and Brown bodies who have been historically unacknowledged, and for whom the law has continued to control their movement and their rights in public spaces. The law has had a disproportionate effect on their livelihoods by way of the criminal justice system’s emphasis on incarceration. An appendix like the one included in this Article is one that focuses on Critical Race Theory, expanding how the law should be read, and looking into the future of equity and justice.

If we are to take the N.Y.P.D. and other police departments’ motto “to protect and to serve” the entire community, likewise we might now collectively take a deep breath and ask whose Justice and Service of Rights and

<sup>239</sup> Photograph of Aftermath of Tulsa Race Riot, in *Tulsa Race Riot*, OKLA. HIST. SOC’Y (1921), [https://perma.cc/D79S-92UF] (last visited May 5, 2021) (“Photograph of an African-American man with a camera looking at the skeletons of iron beds which rise above the ashes of a burned out block after the Tulsa Race Riot.”).

<sup>240</sup> Alexander, *supra* note 42.



Equity are we protecting—whose public and whose protection?<sup>241</sup> Jamelle Bouie questions why the police are not accountable to Black Americans.<sup>242</sup> In a frightening but plausible gesture, Bouie bluntly answers in the following way: “*they were never intended to be.*”<sup>243</sup>

Is there a world and a future when our collective acknowledgment from history, sitting with the discomfort of the law’s own effect in harming Black America and minority communities can be repaired, restored, and given back human dignity? Where George Floyd does not become another name lost to the violence of the State, and its attendant *law* enforcing arms, but rather, a world where we each can participate in, restore, and build our future in America based on equity, and not threats?

The future will come soon. But not soon enough.

#### VI. APPENDIX: SUGGESTED READING LIST TO DISRUPT STRUCTURAL INEQUITY, SHIFTING THE NARRATIVE FROM BLACK AMERICA VICTIMS AND MASS POLICING

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<sup>241</sup> Waxman, *supra* note 167.

<sup>242</sup> Bouie, *supra* note 230.

<sup>243</sup> *Id.*

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