Courts and the Abolition Movement

Matthew Clair & Amanda Woog*

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Abstract

This Essay theorizes and reimagines the place of courts in the contemporary struggle for the abolition of racialized punitive systems of legal control and exploitation. In the spring and summer of 2020, the killings of George Floyd, Breonna Taylor, and many other Black people sparked continuous protests against racist police violence and other forms of oppression. Meanwhile, abolitionist organizers and scholars have long critiqued the "prison-industrial complex," or the constellation of corporations, media entities, governmental actors, and racist and capitalist ideologies that have driven mass incarceration. But between the police and the prison cell sits the criminal court. Criminal courts are the legal pathway from an arrest to a prison sentence—with myriad systems of control in between, including ones branded as "off-ramps"—and we cannot understand the present crisis without understanding how the criminal courts not only function to legitimate police and funnel people into carceral spaces but also contribute unique forms of social control and exploitation all their own, revealing the machinations of mass criminalization and injustice operating between the police encounter and the prison cell. Our central argument is that courts—with a focus here on the criminal trial courts and the workgroup of actors within them—function as an unjust social institution; we should therefore work toward abolishing criminal courts and replacing them with other institutions that do not inherently legitimate police (as currently constituted), rely on prisons (as currently constituted), or themselves operate as tools for racial and economic oppression.

Drawing on legal scholarship and empirical social scientific research, Part I describes myriad injustices perpetrated by criminal courts, detailing their role in the present crisis of mass criminalization through legal doctrine, racialized social control, and economic exploitation. In Part II, we describe the contemporary abolition movement, briefly laying out its genesis and three guiding principles that are typically considered in relation to policing and prisons: (1) power shifting, (2) defunding and reinvesting, and (3) transformation. Part III explores how these principles could operate in relation to the courts, drawing on analysis of existing grassroots efforts as well as new possibilities. In the short term, non-reformist reforms could make criminal courts a venue to unmask, and therefore aid in dismantling, police and prisons. Such reforms could complement the broader abolition movement and reduce the churn of people through the system. Ultimately, the goal would be to abolish criminal courts as systems of coercion, violence, and exploitation, and to replace them with other social institutions, such as community-based restorative justice and peacemaking programs while at the same time investing in the robust provision of social, political, and economic resources in marginalized communities.

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* Matthew Clair is Assistant Professor of Sociology and (by courtesy) Law at Stanford University. Amanda Woog is the Executive Director of the Texas Fair Defense Project. For their helpful comments on this Essay, we thank Alec Karakatsanis, Janet Moore, and graduate students in the Autumn 2020 course Ethnographies of Race, Crime, and Justice at Stanford University. For research assistance, we thank Maria de Lourdes Ortiz.

Introduction

Just after midnight on March 13, 2020, Breonna Taylor, a 26-year-old Black woman and health care worker, was shot and killed by three Louisville, Kentucky, police officers who had forced their way into her apartment.[1] When the officers barged through her door that night, Ms. Taylor and her boyfriend, Kenneth Walker, were awaken from their sleep.[2] Afraid they were being robbed, Mr. Walker shot once at the plainclothes officers in self-defense. The officers returned fire with 32 bullets.[3] Some of those bullets went through walls of the apartment to neighboring homes, where families with children lay awake, terrified for their lives. Six hit Ms. Taylor, killing her.[4]

The officers were executing one of several "no-knock" warrants related to a drug trafficking case against Taylor's ex-boyfriend, who lived across town.[5] Louisville Detective Joshua Jaynes claimed the no-knock warrant, which authorizes police to enter and search a place without announcing themselves, was necessary because, he alleged, a drug dealer was receiving packages containing drugs or drug proceeds at Ms. Taylor's apartment, though media later reported that Jaynes knew the packages were "Amazon or mail."[6] To justify the warrant be "no-knock," the language in the affidavit to support the warrant was boilerplate, below the legal standard requiring facts related to the particular circumstances of the warrant the Supreme Court has said is necessary to permit such intrusion.[7] A state circuit court judge signed the five warrants in 12 minutes.[8]

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[1] Darcy Costello & Tessa Duvall, *Who are the Louisville Officers Involved in the Breonna Taylor Shooting? What We Know*, LOUISVILLE COURIER J. (May 16, 2020, 8:01 AM), https://www.courier-journal.com/story/news/politics/metro-government/2020/05/16/breonna-taylor-shooting-what-we-know-louisville-police-officers-involved/5200879002.

[2] Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/article/breonna-taylor-police.html.

[3] Malachy Browne, Anjali Singhvi, Natalie Renau & Drew Jordan, *How the Police Killed Breonna Taylor*, N.Y. TIMES (Dec. 28, 2020), https://www.nytimes.com/video/us/100000007348445/breonna-taylor-death-cops.html?action=click&module=Top%20Stories&pgtype=Homepage.

[4] *Id.*

[5] *Id.*

[6] Tessa Duvall & Ben Tobin, *Louisville Detective Who Obtained No-nock Search Warrant for Breonna Taylor Reassigned*, LOUISVILLE COURIER J. (June 10, 2020, 1:47 PM), https://www.courier-journal.com/story/news/local/2020/06/10/breonna-taylor-louisville-detective-joshua-jaynes-no-knock-warrant-reassigned/5333604002/?_ga=2.246644292.1731185841.1597684423-767844262.1597684423. Later reporting cast doubt on officers' claims, stating "according to newly released transcripts of interviews with Louisville police officers, they knew a month before they invaded Taylor's home that Glover's packages contained neither [narcotics nor proceeds from the sales of narcotics]." Jacob Sullum, *A Month Before Louisville Drug Warriors Killed Breonna Taylor, They Knew the "Suspicious Packages" She Supposedly Was Receiving Came from Amazon*, REASON (Oct. 9, 2020, 2:10 PM), https://reason.com/2020/10/09/a-month-before-louisville-drug-warriors-killed-breonna-taylor-they-knew-the-suspicious-packages-she-supposedly-was-receiving-came-from-amazon.

[7] *See* Richards v. Wisconsin, 520 U.S. 385 (1987); Radley Balko, Opinion, *The no-knock warrant for Breonna Taylor was illegal*, WASH. POST (June 3, 2020, 3:35 PM) https://www.washingtonpost.com/opinions/2020/06/03/no-knock-warrant-breonna-taylor-was-illegal.

[8] Jacob Sullum, *Was the Search Warrant for the Drug Raid that Killed Breonna Taylor Illegal?*, REASON (June 21, 2020, 6:00 PM), https://reason.com/2020/06/21/was-the-search-warrant-for-the-drug-raid-that-killed-breonna-taylor-illegal.

Breonna Taylor's killing by police—along with those of so many other Black people in the spring and summer of 2020 including George Floyd, Tony McDade, and Rayshard Brooks—has sparked continuous protests against racist police violence and other forms of oppression on a level not before seen in today's Black Lives Matter movement. Protesters from Portland to New York have demanded more than police reform; many are demanding abolition of the police alongside robust investments in employment, housing, and healthcare in marginalized communities.[9] A dollar spent on police is a dollar taken from a library.[10] But the criminal justice crisis extends beyond police.

As much as Breonna Taylor's death reveals about the crisis of policing, it also reveals the central role judges and other court actors play in sanctioning killing by the state and perpetuating and maintaining racial and economic hierarchies. Abolitionist organizers and scholars have long critiqued what has been referred to as the "prison-industrial complex," or the constellation of corporations, media entities, governmental actors, and racist and capitalist ideologies that have driven mass incarceration,[11] and calls for abolishing the police reached a fever pitch in 2020. Much has been written and said by abolitionists scrutinizing the tail ends of punitive legal social control—police and prisons. This Essay contributes to abolitionist theorizing by dissecting how courts—defined here as the assemblage of legal actors, practices, precedents, and incentives that make up the courtroom workgroup[12]—are an essential component of the carceral state.[13] Courts legitimate the activities of police and prisons—even

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[9] *See, e.g.*, Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. BOOKS: DAILY (June 15, 2020) https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands; Keeanga-Yamahtta Taylor, *We Should Still Defund the Police*, THE NEW YORKER (Aug. 14, 2020), https://www.newyorker.com/news/our-columnists/defund-the-police; Josie Duffy Rice, *The Abolition Movement*, VANITY FAIR, Sept. 2020 (Aug. 25, 2020), https://www.vanityfair.com/culture/2020/08/the-abolition-movement.

[10] For example, it was reported that, after Breonna Taylor's killing, the Louisville City Council voted to increase the "police budget by $750,000 and to cut $775,000 from local libraries." Alec Karakatsanis (@equalityAlec), TWITTER (June 29, 2020, 10:41 AM), https://twitter.com/equalityAlec/status/1277628248768331777. *See also* ERIC KLINENBERG, PALACES FOR THE PEOPLE: HOW SOCIAL INFRASTRUCTURE CAN HELP FIGHT INEQUALITY, POLARIZATION, AND THE DECLINE OF CIVIC LIFE (2018) (showing how investments in libraries and other forms of "social infrastructure" are critical for social health and well-being).

[11] ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84 (Seven Stories Press ed. 2003).

[12] Decades of ethnographic research in sociology and criminology has revealed how court routines emerge through the relational actions of various courtroom actors and authorities, who are constrained by the broader environment of laws, judicial precedent, and norms. Thus, our reference to "courts" should not be understood as a reference to the actions or preferences of judges alone, but rather to the collaborative outcome of the actions and preferences of myriad legal authorities and court actors, within and beyond the courtroom. For more on the "courtroom workgroup," see generally JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (Little, Brown & Co. 1st ed. 1977).

[13] The term "carceral state" has been useful in describing the shift of government priorities over the last four decades from a modest mid-twentieth century commitment to social welfare provision and toward an immense commitment to the building up of carceral spaces, sites, and logics in the latter part of the twentieth century and into the twenty-first. As we describe below, we refer to the crisis as one of "mass criminalization" as a way to more precisely indicate how this build up has operated beyond the prison and how social control and exploitation can operate beyond and alongside "carceral" logics. *See infra* note 30. *See also* Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCI. 235 (2008) (addressing the rise of the carceral state);

legalizing violent and otherwise illegal activities through the creation of legal fictions[14]—while mythologizing themselves as institutions that afford justice. Moreover, criminal courts contribute to unique forms of social control and exploitation all their own, revealing the machinations of mass criminalization and injustice that operate between the police encounter and the prison cell. Although much of the recent media and scholarly attention around the abolition movement has focused on police abolition and defunding, organizers and activists on the ground are increasingly scrutinizing the courtroom workgroup, questioning prosecutorial practices and the use of court-imposed pretrial detention, fines, and fees and, more broadly, indicting the courts as an unjust institution.[15]

Courts are a particularly important institutional component of the prison industrial complex to scrutinize because they are a site that is popularly thought to hold potential for justice. After the police kill a person, protesters and family members often look to the courts for a modicum of justice, demanding accountability through criminal prosecution of police or through civil remedies.[16] Turning to the courts is understandable given the few tools available to people seeking justice under our current system and the oft-recited rhetoric of "justice" by powerful court players like prosecutors and judges.[17] But prosecuting police violence or misconduct is exceedingly rare, and charges filed rarely result in a conviction, as recently witnessed in Ms. Taylor's killing.[18] Criminal courts, as we will detail, far more often serve as an institution that

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Jonathan Simon, *Rise of the Carceral State*, 74 SOC. RES. 471 (2007) (same); Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817 (2007) (same).

[14] *See*, *e.g.*, Nathaniel Sobel, *What is Qualified Immunity, and What Does It Have to Do With Police Reform?*, LAWFARE (June 6, 2020, 12:16 PM), https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform ("Qualified immunity is a judicially created doctrine that shields government officials from being held personally liable for constitutional violations—like the right to be free from excessive police force—for money damages under federal law so long as the officials did not violate 'clearly established' law."). An already permissive legal fiction, courts have interpreted "clearly-established" in such a way to require the same basic fact patterns in the established law and pertinent case to find qualified immunity does not apply. *Id.*

[15] *See, e.g.*, *2020 Policy Platform*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/end-pretrial-and-money-bail (last visited Nov. 2, 2020) (describing part of the platform as seeking an end to "pretrial detention and money bail").

[16] Abolitionists have pointed out a contradiction in advocating for police and prison abolition and at the same time demanding the arrest, conviction and imprisonment of police officers, reiterating that the criminal legal system is no site for justice. *See, e.g.*, Mariame Kaba, *Prosecuting Cops. Does Not Equal Justice*, TRUTHOUT (May 6, 2015), https://truthout.org/articles/prosecuting-cops-does-not-equal-justice.

[17] Browsing local "crime" stories and district attorney websites will inevitably turn up appeals to justice from law enforcement. *E.g.* Associated Press, *Philadelphia Man Charged in New Jersey Fatal Shooting*, U.S. NEWS (Nov. 10, 2020), https://www.usnews.com/news/best-states/pennsylvania/articles/2020-11-10/philadelphia-man-charged-in-new-jersey-fatal-shooting; Harris *County District Attorney's Office*, OFF. OF DIST. ATT'Y, HARRIS CTY, TEX., https://app.dao.hctx.net (last visited Jan. 15, 2021) Jose Garza Campaign, *Jose Garza For District Attorney*, JOSE GARZA FOR DISTRICT ATTORNEY, https://www.joseforda.com (last visited Jan. 15, 2021) (promising "a new vision for justice and safety for all"). Institutions and powerful court actors are branded with the word "justice," it being reserved as a title for judges on the highest courts and used in bureaucratic titles like the "Department of Justice."

[18] The only officer charged in connection with Breonna Taylor's case was "indicted by a grand jury . . . on three counts of wanton endangerment because shots he fired entered a neighboring apartment."

bolsters police legitimacy and enables police abuse and violence through, for example, the issuance of warrants and deference to police testimony despite persistent patterns of police fabrication. And court actors themselves—from prosecutors, probation officers, and court officers to judges and even defense attorneys—silence, oppress, surveil, and further criminalize marginalized communities through practices such as cash bail, probation supervision, coercive plea bargaining, inadequate counsel, and harsh sentencing. Thus, in the movement to abolish police and prisons, the courts must also be critiqued using an abolitionist framework, as the court system largely legitimizes and perpetuates the racialized violence and control of police and prisons widely criticized by abolitionists.

In this Essay, we theorize and reimagine the place of courts in the contemporary struggle for the abolition of racialized punitive systems of legal control and exploitation. Our central argument is that courts—with a focus here on the criminal trial courts and the workgroup of actors within them—function as an unjust social institution; we should therefore work toward abolishing criminal courts and replacing them with other institutions that do not inherently legitimate police (as currently constituted), rely on prisons (as currently constituted), or themselves operate as tools for racial and economic oppression. Drawing on legal scholarship and empirical social scientific research, Part I describes myriad injustices perpetrated by criminal courts, detailing their role in the present crisis of mass criminalization through legal doctrine, racialized social control, and economic exploitation. In Part II, we describe the contemporary abolition movement, briefly laying out its genesis and three guiding principles that emerge in the movement to abolish police and prisons: (1) power shifting, (2) defunding and reinvesting, and (3) transformation. Part III explores how these principles could operate in relation to the courts, drawing on analysis of existing grassroots efforts as well as new possibilities. In the short term, non-reformist reforms could make criminal courts a venue to unmask, and therefore aid in dismantling, the carceral state. Such reforms could complement the broader abolition movement and reduce the churn of people through the system. Ultimately, the goal would be to abolish criminal courts as systems of coercion, violence, and exploitation, and to replace them with other social institutions, such as community-based restorative justice and peacemaking programs while at the same time investing in the robust provision of social, political, and economic resources in marginalized communities.

Part I: Criminal Courts as an Unjust Social Institution

Much research and activism has focused on the twin crises of policing and prisons, which lie on the front end and back end of the criminal legal system, respectively. Police in the United States fatally shoot about 1,000 or more people a year[19] and kill

Nicholas Bogel-Borroughs, *Louisville Officer Who Shot Breonna Taylor Will Be Fired*, N.Y. TIMES (Dec. 29, 2020), https://www.nytimes.com/2020/12/29/us/louisville-officer-fired-jaynes-breonna-taylor.html.

[19] Mark Berman, John Sullivan, Julie Tate, & Jennifer Jenkins, *Protests Spread over Police Shootings. Police Promised Reforms. Every Year, They Still Shoot and Kill Nearly 1000 People*, WASH. POST (June 8, 2020, 7:44 AM), https://www.washingtonpost.com/investigations/protests-spread-over-police-shootings-police-promised-reforms-every-year-they-still-shoot-nearly-1000-people/2020/06/08/5c204f0c-a67c-11ea-b473-04905b1af82b_story.html.

even more through physical force or negligence that does not involve firearms.[20] The victims of police violence are disproportionately Black, Native American, and Latinx.[21] Beyond killings, police officers physically and sexually assault countless more, especially marginalized women of color.[22] And even beyond these extreme (though all too common) abuses, the most banal police activities are racialized, targeting marginalized communities, whether one is looking at traffic stops,[23] outstanding warrants,[24] civil asset forfeitures,[25] or jail booking data. Meanwhile, on the other end of the criminal legal process, the prison system similarly reveals itself as a system of racial control. The sheer number of people incarcerated over the past several decades constitutes a crisis of mass incarceration.[26] Today, about 2.3 million people are incarcerated in jails, prisons, and immigrant detention centers[27]—a sharp increase from

[20] In 2016, the Guardian recorded 1093 people killed by the police while the Washington Post recorded 962 shot and killed by the police that same year. The Guardian dataset includes killings not by shooting; for example, their methodology would include George Floyd's killing from a knee held to his neck for over eight minutes or Eric Garner's by chokehold. *The Counted*, THE GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (last visited Jan. 15, 2021); *Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016 (last visited Jan. 15, 2021).

[21] Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCI. 16793 (2019).

[22] *See*, *e.g.*, ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017); Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39 (2017); Shannon Malone Gonzalez, *Black Girls and the Talk? Policing, Parenting, and the Politics of Protection*. SOC. PROBS. (forthcoming 2021), https://doi.org/10.1093/socpro/spaa032.

[23] *See* JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2020); Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736 (2020); Rob Voigt, Nicholas P. Camp, Vinodkumar Prabhakaran, William L. Hamilton, Rebecca C. Hetey, Camilla M. Griffiths, David Jurgens, Dan Jurafsky & Jennifer L. Eberhardt, *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 PROC. NAT'L ACAD. SCI. 6521 (2017).

[24] *See e.g.*, Shytierra Gaston, *Producing Race Disparities: A Study of Drug Arrests Across Place and Race*, 57 CRIMINOLOGY 424 (2019) (showing how police use outstanding warrants in ways that disproportionately impact black people).

[25] *See* Christopher Ingram, *Law Enforcement Took More Stuff from People than Burglars Did Last Year*, WASH. POST (Nov. 23, 2015, 5:00 AM), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year.

[26] *See generally* Lawrence Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice, and Punishment*, *in* DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY 322–55 (Hazel R. Markus & Paula Moya, eds. 2010); DAVID GARLAND, MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (2001).

[27] DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEPARTMENT OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015 1(2016).

the late 1970s.[28] Like policing, mass incarceration targets young men of color, particularly those with low levels of education.[29]

Between the police and the prison cell sits the criminal court. Criminal courts are the legal pathway from an arrest to a prison sentence, with myriad systems of control in between. They are sites where the cruel minutiae of the carceral system is legalized, allowing the millions of stops, searches and arrests by police each year to become 2.3 million people imprisoned and separated from their families and 4.5 million people on probation and parole. Thus, we cannot understand the present crisis without understanding how the criminal courts function to both legitimate police while also funneling people into carceral spaces and other systems of control.

In this Part, we detail how criminal courts operate as an unjust social institution through their legitimation and use of police, jails, and prisons as well as through their own unique techniques of mass criminalization. *Mass criminalization* speaks to the way the legal system as a whole entraps millions of Americans into coercive social control and may be useful as a unifying concept for why the various points in the criminal legal process must be scrutinized in an abolitionist project.[30] Defined as the historically unprecedented "use of an array of punitive legal techniques and institutions—from

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[28] In 1978, 131 of every 100,000 residents in the country were incarcerated in state or federal prisons, compared to 450 per 100,000 in 2016. *Corrections Statistical Analysis Tool*, BUREAU OF JUST. STAT, http://www.bjs.gov/index.cfm?ty=nps (last visited Oct. 9, 2018). These rates include only individuals sentenced to a year or more of incarceration.

[29] In 2005, the white incarceration rate was 412 per 100,000 residents, which was far lower than the incarceration rates of Black people and Hispanic people. Their rates were 2,290 per 100,000 and 742 per 100,000, respectively. MARK MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 4 (2007). The likelihood of incarceration is highest among people of color with lower levels of education. For example, among Black men born in the 1970s, the cumulative risk of incarceration by their mid-thirties was 68 percent for high school dropouts, but only 6.6 percent for black men with some college education. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8, 11 tbl. 1 (2010).

[30] *See* Matthew Kevin Clair, Privilege and Punishment: Unequal Experiences of Criminal Justice (Apr. 2018) (unpublished Ph.D. dissertation, Harvard University), http://nrs.harvard.edu/urn-3:HUL.InstRepos:41128495 (comparing the use of the term "mass criminalization" to the term "mass incarceration"). *See also* Deborah Small, *Cause for Trepidation: Libertarians' Newfound Concern for Prison Reform*, SALON (Mar. 22, 2014, 4:30 PM) https://www.salon.com/2014/03/22/cause_for_trepidation_libertarians_newfound_concern_for_prison_reform (same). The use of the modifier "mass" in the term "mass criminalization" indicates a normative critique of the unjust power dynamics that are a part of the massive scale of criminalization. *See* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 263 (2018) ("The mass frame, on the other hand, focuses on the criminal system as a sociocultural phenomenon. The issue is not a miscalibration; rather, it is that criminal law is doing ill by marginalizing populations and exacerbating troubling power dynamics and distributional inequities."). In addition, the term "mass criminalization" speaks to the expansion of punishment beyond the criminal legal system, as techniques of punitive social control have infused into other institutions supposedly unrelated to the criminal legal system, such as schools and social welfare agencies. *See* Subini Ancy Annamma, Yolanda Anyon, Nicole M. Joseph, Jordan Farrar, Eldridge Greer, Barbara Downing & John Simmons, *Black Girls and School Discipline: The Complexities of Being Overrepresented and Understudied*, 54 URB. EDUC. 211 (2019) (addressing racism and criminalization in schools); Francis A. Pearman, F. Chris Curran, Benjamin Fisher & Joseph Gardella, *Are Achievement Gaps Related to Discipline Gaps? Evidence from National Data*, 5 AERA OPEN 1 (Oct.-Dec. 2019) (same). Alec Karakatsanis has used the term "punishment bureaucracy" to describe the way the criminal legal system functions as it is meant to: "If the function of the modern punishment system is to preserve racial and economic hierarchy through brutality and control, then its bureaucracy is performing well." ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 16 (2019).

policing to court-manded probation and parole to incarceration—that have affected a broad swath of Americans,"[31] mass criminalization includes the court-mandated tools of probation conditions, fines, and fees, which enable social control and exploitation of marginalized populations.

Part A details how legal doctrine and court practices contribute to mass criminalization by legitimating police through judicial deference to police searches and testimony, and by creating barriers to accountability for wrongdoing or misconduct through judicial and prosecutorial practices. Courts are therefore complicit not only in granting police largely unchecked authority, but also in actively protecting and legitimizing policing as an institution. Parts B and C, drawing on social scientific research, show how the courts—through the laws, norms, and actions of courtroom workgroups—create their own abusive conditions. Part B describes how criminal courts control marginalized groups. Part C shows how criminal courts financially exploit marginalized communities through cash bail, "user-pay" schemes, fines, and fees. In sum, the criminal courts operate as a social institution that picks up the mantle to worsen racial and class-based injustices in American society.

Part A: Deference to Police

Judges defer to police accounts and actions through legal doctrine and court practices. Legal doctrine—or, judge-made law that creates a framework for future decision-making[32]—overwhelmingly favors not just police but also law enforcement[33] actors more generally, like prosecutors and correctional officers, over people who are criminalized. Here, we focus on how courts defer to police in ways that allow for immeasurable police-perpetrated harm in marginalized communities and that have propped up mass criminalization.

Courts have crafted Fourth Amendment jurisprudence, for example, to defer to police interpretations of reasonableness and acceptable conduct. The Fourth Amendment ostensibly protects people from unreasonable searches and seizures as well as from the use of evidence obtained through illegal search and seizure practices.[34] Yet, the Supreme Court has granted police broad authority and discretion in the interpretation of what counts as a reasonable search. In the seminal case *Terry v. Ohio*,[35] the Court approved the controversial and racially discriminatory practice of "stop and frisk" when it affirmed police authority to frisk two Black men a police officer thought were planning to shoplift. Even though the officer did not have probable cause to arrest Terry and his companion, the court upheld the search of the two men as "necessarily swift action predicated upon the on-the-spot observations of the officer

[31] MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 10 (2020).
[32] Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517 (2016).
[33] The term law enforcement could be placed in scare quotes because when white college students are not policed for their drug use, but poor Black people are sentenced to life in prison for it, it is not the law that is being enforced, but existing race, class and other social hierarchies. See, for example, A. RAFIK MOHAMED & ERIK D. FRITSVOLD, DORM ROOM DEALERS: DRUGS AND THE PRIVILEGES OF RACE AND CLASS (2010), for a discussion of the non-policing of white college student drug dealers.
[34] *See* Mapp v. Ohio, 367 U.S. 643 (1961) (holding evidence obtained in violation of the Fourth Amendment is inadmissible in state court).
[35] Terry v. Ohio, 392 U.S. 1 (1968).

on the beat;"[36] in other words, determining reasonableness by deferring to the officer's account and not, for instance, the perspective of the people subject to the search or bystanders. This deference greatly expanded police power to intervene in individuals' lives.

Devon Carbado has argued that Fourth Amendment jurisprudence de facto legalized racial profiling.[37] Where Fourth Amendment doctrine is mostly developed–through individual challenges of searches and not class actions–courts virtually never consider whether a person was racially profiled, limiting analysis to the isolated search, deferring to police accounts, and leaving one of the most invidious aspects of policing beyond legal scrutiny and outside doctrinal development.[38] Thus, in the decades following *Terry*, police departments across the country used "stop and frisk" practices to harass and assault mostly Black and brown residents. The New York Police Department is a notorious example; in 2011 alone, the NYPD stopped close to 700,000 people,[39] including children: "Though they account for only 4.7 percent of the city's population, black and Latino males between the ages of 14 and 24 accounted for 41.6 percent of stops in 2011."[40] As this example shows, the consequence of this jurisprudence is not just that these police actions evade legal scrutiny retrospectively; rather, it shapes police behavior. Carbado has argued that this deference creates the very conditions for police violence towards Black people.[41]

This doctrinal deference to police is reinforced through everyday court practices. Anna Lvovsky describes a "judicial presumption of police expertise"—a presumption that police officers have greater insight into crime and are therefore reliable authorities whom judges should generally defer to as expert witnesses, in their evaluations of probable cause, and in their criminological knowledge about how vague statutes—such as loitering laws—should be interpreted and enforced on the ground.[42] What the average police officer may understand as reasonable could stand in sharp contrast to what the average defendant, or even the average resident, considers reasonable.[43] This is especially true given the pressure to make arrest and ticketing

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[36] *Id.* at 20.

[37] Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017).

[38] *See id.* (presenting a series of hypotheticals showing how Fourth Amendment jurisprudence legalizes racial profiling).

[39] NYCLU, STOP-AND-FRISK 2011 3 (2012), https://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

[40] New York City's stop and frisk policy was found unconstitutional in 2013. Floyd v. City of New York, 959 F. Supp. 2d 540 (2013). After this decision, public pressure, and an administration change, the number of stops decreased significantly—by 98%— but still numbered in the tens of thousands each year, continuing in every precinct and with similar racial disparities. NYCLU, STOP-AND-FRISK IN THE DE BLASIO ERA 4 (2019), https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf.

[41] Carbado, *supra* note 37, at 131–32, 138–39, 158, 163–64 (describing the evolution of Fourth Amendment jurisprudence as a way of facilitating police violence against Black people).

[42] Anna Lvovsky, *The judicial presumption of police expertise*, 130 HARV. L. REV. 1995 (2016).

[43] *See generally* Richard H. McAdams, Dhammika Dharmapala & Nuno Garoupa, *The Law of Police*, 82 U. CHI. L. REV. 135, 135–58 (2015) (discussing the likely "lower threshold of doubt" that police, compared to the average person, have in relation to probable cause and reasonable suspicion and the need to have greater scrutiny for police interpretations of reasonableness).

quotas, which likely incentivize officers to be liberal in their searching practices,[44] as well as widely documented racial bias imbued in almost all aspects of policing. In routine cases in trial courts, judges defer to officers' sworn testimony, taking officers at their word despite the well-known practice of officer "testilying."[45] Courtroom deference also extends to the treatment of evidence gathered by police; courts are extremely deferential in admitting scientific evidence from prosecutors (derived from police investigations)[46] despite serious questions about the scientific validity of the methods used and thus the reliability of such evidence, such as with bite marks[47] or fingerprints.[48] Defense attorneys, given their scant resources and the power of police in criminal courtrooms, often do not pursue suppression hearings,[49] and when they do, they rarely prevail.[50]

This deference extends beyond the day-to-day activities of police; it is also afforded when police are accused of serious misconduct. When people harmed by police abuse turn to courts for accountability, they rarely find the outcomes they are looking for because police are shielded by legal doctrine and other protective scaffolding. Prosecutors and judges defer to officers' accounts of fearing for their lives, rarely challenging an officer's self-defense claim. Doing so effectively shields police from criminal prosecution, as we have seen in high profile police-perpetrated deaths when prosecutors rely on officers' accounts of what constitutes "reasonable" use of force in the face of a claimed fear for safety.[51] Beyond doctrine, prosecutors find themselves in a co-dependent institutional relationship with police, whereby they share "norms, resources, and goals."[52] Thus, prosecutors are "unwilling to jeopardize the flow of criminal cases and helpful testimony that police officers provide, proactively deploy[ing] their legal discretion and extralegal power to cover for police" through

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[44] Police officers admit quotas exist in their departments, even though they are against the law. Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, NPR (Apr. 4, 2015, 4:47 AM), https://www.npr.org/2015/04/04/395061810/despite-laws-and-lawsuits-quota-based-policing-lingers.

[45] Joseph Goldstein, TESTIYLING BY POLICE: A STUBBORN PROBLEM, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html. *See* Eve L. Ewing, *Blue Bloods: America's Brotherhood of Police Officers*, VANITY FAIR, Sept. 2020 (Aug. 25, 2020), https://www.vanityfair.com/culture/2020/08/americas-brotherhood-of-police-officers (describing ways that police protect themselves above and beyond their duty and obligation to serve and protect the public).

[46] NAT. ACAD. OF SCI., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 11 (2009) ("[T]rial judges rarely exclude or restrict expert testimony offered by prosecutors . . . "). The report specifically disavowed judges of being able to be effective gatekeepers for junk science, putting the onus on the forensic scientific community to improve itself. *Id.* at 110.

[47] *Id.* at 176 ("No scientific studies support [the assessment that bite marks can demonstrate sufficient detail for positive identification.").

[48] *Id.* at 136–45.

[49] CLAIR, *supra* note 31.

[50] Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405 (2012).

[51] Rick Rojas & Richard Fausset, *Police Killings Prompt Reassessment of Laws Allowing Deadly Force*, N.Y. TIMES (June 14, 2020), https://www.nytimes.com/2020/06/14/us/rayshard-brooks-Garrett-Rolfe-atlanta.html.

[52] Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*. 100 B.U. L. REV. 895, 901 (2020). *See also* David Sklansky, *The Problems with Prosecutors,* 1 ANNUAL REVIEW OF CRIMINOLOGY (2018).

charge manipulation, withholding evidence, and political lobbying.[53] This co-dependence makes it professionally costly for prosecutors to bring charges against police. And even when they do, judges often rely on the same reasonableness standard to acquit officers—a standard that, again, defers to police officers' subjective beliefs about fear, danger, and justified use of force.[54] Meanwhile, in civil cases, police are also rarely held accountable for their actions because of "qualified immunity," court-created legal protections for government officials gone haywire that shields most officers from civil liability for their violent acts.[55] And even if a court finds that an officer engaged in wrongdoing, insurers and municipalities are more likely to compensate harmed parties with little effect on police budgets.[56]

The "deference" we have described should not be understood as passive. In fact, courts affirm police activities through legal action. Courts routinely sign home search warrants without scrutinizing the probable cause affidavits submitted in support; as mentioned earlier, they create legal doctrine to protect police officers and other members of the executive branch, such as qualified immunity; and they admit questionable forensic evidence against defendants. Each of these examples are opportunities for courts to act as a check on executive power; instead, courts become arms of the executive, using their coequal status to actively concentrate governmental power, legitimizing state violence on marginalized communities.

Part B: Social Control

Beyond legitimizing police, criminal courts themselves function as institutions of punitive social control. Their social control function today has a white supremacist history. After the Civil War, Black people were routinely denied due process rights, especially in Southern courtrooms, where they were tortured to compel self-incriminating testimony, sentenced to death *en masse* on frivolous charges, and excluded from serving on juries.[57] Although the Supreme Court eventually intervened

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[53] *Id.*

[54] *See*, *e.g.*, Jennifer Carlson, *Police warriors and police guardians: race, masculinity, and the construction of gun violence*, 67 SOC. PROBS. 399 (2020) (discussing the centrality of danger and fear in the everyday work of police); Michael Sierra-Arévalo, *American policing and the danger imperative*, LAW SOC'Y REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2864104 (same); Seth Stoughton, *Law Enforcement's Warrior Problem*, 128 HARV. L. REV. F. 225 (2015) (same).

[55] For example, the doctrine has been used to shield from liability police officers who tased a seven-month-pregnant woman in three different parts of her body in front of her child after she was pulled over for a traffic ticket; police officers who shot 17 times and killed a mentally impaired person riding a bike and carrying a toy gun who did not match the description of the suspect being sought; and government officials who conspired to hold people in solitary confinement based on their race, religion and national origin. Amir H. Ali & Emily Clark, *Qualified Immunity, Explained*, THE APPEAL (June 19, 2019), https://theappeal.org/qualified-immunity-explained. *See also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46 (2018) ("The doctrine of qualified immunity prevents government agents from being held personally liable for constitutional violations unless the violation was of 'clearly established law.'").

[56] *E.g.*, John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. 369; Joanna C. Schwartz, *How governments pay: Lawsuits, budgets, and police reform*, 63 UCLA L. REV. 1144 (2016).

[57] *See*, *e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (New Press ed. 2012) (2010); W. E. B. DU BOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY (U. Pa. Press ed. 1996) (1899); NEIL R. MCMILLEN, DARK JOURNEY: BLACK

in extreme cases of Jim Crow injustices, the Court's decisions had only a modest and in some ways legitimizing impact—invalidating the most egregious instances of racism but authorizing more routine practices that produced racially disparate outcomes and further entrenched existing racial hierarchies.[58] In the 1940s, federal efforts to standardize criminal rules and procedures further entrenched racist procedural norms through a cloak of race-neutrality. Ion Meyn shows how reformers (many of whom were explicitly racist) adopted separate rules for criminal courts and civil courts. In civil courts, where litigants were disproportionately white, reformers expanded the ability to participate in the legal process, discover information, and interrogate witnesses. In criminal courts, where defendants were disproportionately Black and poor, reformers implemented rules that expanded state power and diminished defendants' rights, thereby reinforcing "the racial ordering of the period within the criminal law arena."[59]

In the middle of the twentieth century, social scientists began collecting data on state-level criminal courts, offering systematic evidence of routine, and often unwritten, court practices.[60] Today, scholars have shown how twenty-first century criminal court practices operate to control poor people and marginalized racial groups, all the while maintaining a veneer of neutrality.[61] In *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing*, Issa Kohler-Hausmann documents how legal officials in New York City misdemeanor courts use various techniques to mark, test, and monitor the defendants before them such as keeping cases open to see if a defendant will comply with court mandates to return to monthly hearings or requiring various performances with drug programs to demonstrate compliance.[62] These practices constitute a new, managerial model of control, whereby officials seek to determine not whether a defendant is innocent or guilty but whether the defendant is "a manageable person."[63] These techniques emerged from a particularly racialized phenomenon: the rise of Broken Windows policing in New York City in the 1990s. Consequently, the costs of social control in misdemeanor courts fall disproportionately on communities of color.[64]

Other ethnographic research has shown how court practices are differentially applied along race and class lines,[65] complementing statistical analyses that show a

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MISSISSIPPIANS IN THE AGE OF JIM CROW (1989); Michael J. Klarman, *The racial origins of modern criminal procedure*, 99 MICH. L. REV. 48 (2000).

[58] Klarman, *supra* note 56; *see also* Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161 (2019) (arguing that race and racism were central to the expansion of indigent defense systems).

[59] Ion Meyn, *Constructing Separate and Unequal Courtrooms*, ARIZ. L. REV. (forthcoming 2020), https://papers.ssrn.com/abstract=3657250. *See also* Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 706–07 (2017).

[60] *E.g.*, ABRAHAM S. BLUMBERG, CRIMINAL JUSTICE (1967); EISENSTEIN & JACOB, *supra* note 12; MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT (Russell Sage Found. ed. 1992) (1979).

[61] *E.g.*, AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT (2009); KARAKATSANIS, *supra* note 30; MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT (2016).

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

[63] *Id.* at 72.

[64] *Id.* at 267.

[65] *E.g.*, Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision Making in the Criminal Justice System*, 54 CRIMINOLOGY 322 (2016); Jeffrey Rachlinski, J., Sheri Lynn

meaningful proportion of such disparities emerge during court processing rather than simply as a result of differential sorting into the courts.[66] In *Crook County: Racism and Injustice in America's Largest Criminal Court*, Nicole Gonzalez Van Cleve shows how judges, prosecutors, and defense attorneys in the Cook County, Illinois, court system code "racial difference as moral difference."[67] Racialized moral labels become ingrained into court routines, such that defendants of color—stereotyped as "degenerate, lazy, and undeserving"—are not afforded due process protections.[68] In *Privilege and Punishment: How Race and Class Matter in Criminal Court*, Matthew Clair documents how the attorney-client relationship at once constitutes and reproduces racial and class-based injustices in the Boston-area courts.[69] Working-class defendants of color and poor defendants are rarely able to establish trusting relationships with their lawyers, making them more susceptible to coercion, shaming, and silencing and also less likely to receive opportunities for rehabilitation and future legal assistance. Because the quality of the attorney-client relationship is rooted in inequalities in racist police practices as well as the lack of resources afforded to court-appointed defense attorneys, the consequences of the relationship "can be understood as a covert, and often unintentional, form of racial and class discrimination" within courtrooms.[70]

Social control tools that are ordered by courts severely constrict defendants' lives outside court.[71] While awaiting trial, various restrictions on liberty can be attached to a defendant through their bail conditions. Pretrial incarceration, GPS monitoring, mandatory drug testing, and stayaway orders can severely constrain the freedom of people charged with crimes despite their formal designation as presumed innocent under the law.[72] If convicted, a person may face incarceration or, if returned to the community, may be forced to abide by terms of probation, which can include conditions similar to bail conditions. Release on parole similarly triggers punishing restrictions on freedom. And once a person has served their time, various attendant consequences can impact their lives—from housing and employment discrimination to voter disenfranchisement and jury exclusion.[73] Sociologist Sarah Brayne has documented how people who have had contact with the criminal legal system avoid

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Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2008); Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. Legis. & Pub. Pol'y 999 (2013); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626 (2012).

[66] *E.g.*, Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 JUST. Q. 231 (2013); Ojmarrh Mitchell, *A Meta-analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 J. OF QUANTITATIVE CRIMINOLOGY 439 (2005); Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427 (2000).

[67] NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 4 (2016).

[68] *Id.* at 65.

[69] CLAIR, *supra* note 48. *See also* Matthew Clair, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in Attorney-Client Interactions*, SOCIAL FORCES (forthcoming 2021).

[70] CLAIR, *supra* note 48, at 141.

[71] *See* MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME (2020) (detailing state tools of social control that are branded as alternatives to incarceration).

[72] Alix S. Winter & Matthew Clair, Between Punishment and Welfare: Liminal Guilt and Social Control in the Bail Process (2020) (unpublished working paper) (on file with author).

[73] *E.g.,* David S. Kirk & Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward*, 1 ANN. REV. CRIMINOLOGY 171 (2018); Brian Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences* 49 U. RICH. L. REV. 1139 (2015).

other surveilling systems, including medical, financial and educational institutions.[74] These consequences affect the lives of not only individuals who have had direct experiences with the criminal legal system, but also their family, friends, and neighbors, who may experience the spillover effects.[75] Such collateral consequences, and their spillover effects, disproportionately harm Black and Latinx people in comparison to white people.[76]

Part C: Predation and Profit

In addition to controlling marginalized groups, criminal courts also impose sanctions that exploit and profit from these very groups.[77] The for-profit bail industry and legal financial obligations (such as court fines and fees) are state-sanctioned forms of predatory extraction that uniquely target poor and marginalized communities. Social scientific research confirms various ways the criminal courts profit from poor communities of color in unconstitutional and unjust ways.

Criminal courts impose legal financial obligations (LFOs) on defendants that provide revenue to local and state governments and profits to businesses: "[F]ines and fees can be seen not just as burdens imposed as sanctions but as elements of a variegated palette of extractive relations and practices associated with the criminal justice system […] convert[ing] the needs, vulnerabilities, and aspirations of subjugated populations into revenue opportunities for state and market actors."[78] LFOs include "fines, fees, surcharges, [and] restitution" that courts directly impose as punishment for an offense (such as a traffic violation), restoration of an alleged harm or violation (such as payment to victims), or requested payment for services provided by the court (such as fees for court-appointed legal representation).[79] LFOs disproportionately burden communities of color, given racialized police practices, such as traffic stops and arrests,[80] as well as court practices that uniquely burden the poor, such as late fees,

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[74] Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOC. REV. 367 (2014).

[75] *E.g.*, John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME JUST. 121 (1999); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital and Crime: Examining the Unintended Consequences of Incarceration*, 36 CRIMINOLOGY 441 (1998).

[76] Asad L. Asad & Matthew Clair, *Racialized legal status as a social determinant of health*, 199 SOC. SCI. MED. 19 (2018).

[77] *See generally* Armando Lara-Millan, *Theorizing Financial Extraction: The Curious Case of Telephone Profits in the Los Angeles County Jails*, 23 PUNISHMENT SOC'Y 107 (2020) (addressing exploitation and criminal justice contact); Joshua Page, Victoria Piehowski & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 150 (2019) (same); Sandra Susan Smith & Jonathan Simon, *Exclusion and Extraction: Criminal Justice Contact and the Reallocation of Labor*, 6 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 1 (2021) (same).

[78] Page et al., *supra* note 76, at 152. *See also* Lara-Millan, *supra* note 76 (contrasting social control functions to exploitation and profiteering functions).

[79] Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 ANN. REV. CRIMINOLOGY 471, 471 (2018).

[80] *E.g.*, CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014); Allison P. Harris, Elliott Ash & Jeffrey Fagan, *Fiscal Pressures and Discriminatory Policing: Evidence from Traffic Stops in Missouri*, 5 J. RACE, ETHNICITY & POL. 1 (2020); Brenden Beck & Adam Goldstein, *Governing Through Police? Housing Market Reliance, Welfare Retrenchment, and Police Budgeting in an Era of Declining Crime*, 96 SOCIAL FORCES 1183 (2018).

additional fees for entering a payment plan, and warrants issued for nonpayment.[81] In theory low-income people have constitutional protections to keep courts from enforcing obligations that a person cannot afford; in reality judges rarely waive LFO debt, and it is common practice for judges to issue warrants and keep people in jail because they are unable to pay.[82]

When a person cannot pay their LFOs, courts use the punitive tools of the state, such as warrants and incarceration, to coerce payment or punish people for nonpayment, routinely violating the constitutional rights of poor people charged with crimes. Despite the Supreme Court having long held that "the State … may not … imprison a person solely because he lacked the resources to pay [a fine or restitution],"[83] courts across the country, and every day, jail people if they are deemed able (but unwilling) to pay a traffic ticket or other court fine or fee,[84] forcing families to skip rent or meals to come up with payment, or have their loved one languish in jail. A person who insists they cannot pay might find an attorney to represent them free of cost, but this is rare. Many courts do not provide lawyers to people charged with "fine-only" crimes even if the court jails the person for not paying.[85]

State and local governments, including court systems, have used LFOs to boost revenue. In the wake of the police killing of Michael Brown in 2014 in Ferguson, Missouri, and the subsequent protests and unrest, the Department of Justice (DOJ) investigated the city's courts and police. The DOJ investigation concluded that "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs."[86] City officials explicitly asked police to increase ticket enforcement to make up for tax shortfalls. Moreover, the city's municipal court routinely issued arrest warrants for failures to pay fines in relation to minor offenses, such as traffic violations. These practices overwhelmingly targeted Black residents; the DOJ reported, "African Americans are 68% less likely than others to have their cases dismissed by the court, and are more likely to have their cases last longer and result in more required court encounters. African Americans are at least 50% more likely to have their cases lead to an arrest warrant, and accounted for 92% of cases in which an arrest warrant was issued by the Ferguson Municipal Court in 2013." A separate report by Arch City Defenders found that in one year, the Ferguson municipal courts

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[81] TEX. APPLESEED & TEX. FAIR DEF. PROJECT, PAY OR STAY: THE HIGH COST OF JAILING TEXANS FOR FINES & FEES 4 (2017), https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf

[82] *Id.* at 9; *see also* ARTHUR LIMAN CTR. FOR PUB. INT. L. AT YALE L. SCH., FINES & FEES JUST. CTR. & POL'Y ADVOC. CLINIC AT U.C. BERKELEY SCH. OF L., MONEY AND PUNISHMENT, CIRCA 2020 (Anna VanCleave, Brian Highsmith, Judith Resnik, Jeff Selbin & Lisa Foster, eds., 2020).

[83] Bearden v. Georgia, 461 U.S. 660, 667–68 (1983).

[84] These violations are "simultaneously illegal and the norm." KARAKATSANIS, *supra* note 30, at 15.

[85] For example, in the past month, attorneys at Texas Fair Defense Project have filed and obtained relief on four writs of habeas corpus in Amarillo, Texas, challenging the municipal court's practice of forcing people who are too poor to pay their traffic tickets "sit out" their debt at a rate of $100/day, as well as represented clients who were charged the costs of their court-appointed attorneys after being found indigent (documents on file with author). Courts in Texas and the United States routinely ignore constitutional mandates that have been settled law for decades.

[86] U.S. DEPT. OF JUST., C.R. DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

disposed of three warrants per resident.[87] People were routinely jailed for failing to pay fines and fees. In New Orleans, fines and fees issued and enforced by courts in turn feed and prop up the courts, funding 99% of the traffic court budget.[88] These exploitative and punitive practices targeted these cities' Black residents.[89] They are also hardly unique to these jurisdictions: in 2018, Texas courts issued warrants for unresolved Class C misdemeanors, mostly traffic tickets, and more than 500,000 people used jail time to resolve their tickets.[90]

Bail practices within courts, and the for-profit bail industry that depends on such practices, are another notable example of courts' exploitation of poor and marginalized communities. Judges across the country routinely set bail amounts above what defendants can afford to pay, and as a result, at any given moment, hundreds of thousands of people languish in local jails because they cannot pay their way out.[91] Cash bail creates a three-tiered, wealth-based system: The wealthy pay the full bail amount for their freedom, which is held by the court and returned to them after making the required court appearances; those who can gather money for a bail bondsman fee, which is typically around 10% of the bail amount and nonrefundable, pay for their release but never see that money again as it becomes profit for the bail bondsman;[92] and those who cannot afford to pay the bondsman fee remain in jail simply because of their inability to access cash. With the median felony bail amount at $10,000[93] and close to half of Americans without access to $400 in an emergency,[94] the price judges charge for pretrial freedom is inaccessible to most. Even if a person does have access to the cash to pay a bondsman fee, it results in enormous amounts of

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[87] ARCHCITY DEFENDERS, ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 35 (2014), https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf.

[88] MATHILDE LAISNE, JON WOOL & CHRISTINA HENRICHSON, VERA INSTITUTE OF JUSTICE, PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW Orleans 26 (2017), https://finesandfeesjusticecenter.org/articles/past-due-costs-consequences-charging-justice-new-orleans.

[89] *Id.* at 18–22.

[90] Jacob Rosenberg, *Texas Asked Judges to Stop Throwing People in Jail for Unpaid Parking Tickets. They Didn't Listen*, MOTHER JONES (Apr. 11, 2019), https://www.motherjones.com/crime-justice/2019/04/texas-asked-judges-to-stop-throwing-people-in-jail-for-unpaid-parking-tickets-they-didnt-listen.

[91] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

[92] Rauby & Kopf describe:

> "Surety" options allow defendants to pay a portion of the bail bond amount as a nonrefundable fee to a bail bondsman or agency. The fee is typically 10%, although it can be more or less than that. Even if the defendant shows up for all of his court dates, he will not get the fee back.

BERNARDETTE RABUY & DANIEL KOPF, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 3 (2016), https://www.prisonpolicy.org/reports/incomejails.html. *See generally* CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM (2019).

[93] Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX: FUTURE PERFECT (Oct. 17, 2018, 7:30 AM), https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality.

[94] Neal Gabler, *My Secret Shame*, THE ATLANTIC, May 2016, at 54, https://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415.

money being extracted from already marginalized communities: people charged with crimes and their families across the country pay more than $1 billion to the for-profit bail industry every year.[95] Finally, as noted above in Part IB, judges have discretion to apply conditions of release beyond monetary bail amounts, which typically involve even more fees, invasive surveillance, and onerous conditions and supervision. In some jurisdictions, a for-profit probation services industry has grown up around pretrial and post-trial probation services that "allow probation companies to profit by extracting fees directly from probationers, and then fail to exercise the kind of oversight needed to protect probationers from abusive and extortionate practices."[96] As a result, industries have grown around supervision and conditions, with bailbondsmen and for-profit probation services maneuvering their businesses to profit off this growing demand.[97]

The infrastructures described in this Section, in which courts extract wealth from marginalized communities and punish them when they cannot pay are largely court-created and entirely court-perpetrated.

Part II: The Abolition Movement: Three Guiding Principles

The criminal courts, as should now be clear, are central to the crisis of mass criminalization; yet, there has been far more analysis of police and prisons in abolitionist theorizing than there has been in relation to courts.[98] Meanwhile, court reformers over the last few decades have proposed various, and sometimes contradictory, reformist solutions to make the courts more equitable: mandatory sentencing guidelines, advisory sentencing guidelines, the implementation of mandatory minimum sentences, the repeal of mandatory sentences, greater resources to indigent defense systems, implicit bias training among judges and prosecutors, cash bail reform, drug and veterans courts, and more. The list is long, but the results have been modest: criminal courts continue to control and exploit millions of people, suggesting that such problematic features are better understood as core functions.

In this Part, we briefly overview the current movement to abolish police and prions, drawing out three core principles we see in organizers' demands—principles that could guide legal scholars, social scientists, policymakers, and others who are seeking to engage with abolitionist theorizing and striving to work alongside the movement by reimagining the courts. We view this kind of scholarly analysis as an exercise in "movement law," whereby we "take seriously the epistemological universe of today's left social movements, and their experiments, tactics, and strategies for legal and social change […and cogenerate] legal meaning and frameworks for critique

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[95] JUSTICE POLICY INSTITUTE, THE HIGH PRICE OF BAIL, http://www.justicepolicy.org/uploads/justicepolicy/documents/high_price_of_bail_-_final.pdf.

[96] HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 1 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf.

[97] For example, bailbondsmen in Hays County, Texas, recently submitted a proposal to the County to run their "pretrial services" office (on file with author).

[98] *But see* Matthew Clair, *Getting Judges on the Side of Abolition*, BOS. REV. (July 1, 2020), http://bostonreview.net/law-justice/matthew-clair-getting-judges-side-abolition; Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 3 (2019).

alongside social movements, their organizing, and their visions."[99] In doing so, we identify three guiding principles as central to the police and prison abolitionist movement: (1) power shifting; (2) defunding and reinvesting; and (3) transformation.

Abolition constitutes a theory and a practice that strives toward a society where racialized punitive systems of legal control and exploitation are no longer a component of the way we deal with criminalized social harms and problems, such as substance use disorders, mental illness, theft, assault, and even murder. For decades, scholars and activists have articulated and organized around abolitionist principles, focusing mostly on either the police, prisons, or both as specific institutional components to be dismantled. In the 1960s, the Black Panther Party articulated abolitionist demands rooted in a broader critique of capitalism. Points seven and eight of Huey P. Newton and Bobby Seale's Ten-Point Program demanded "an immediate end to POLICE BRUTALITY and MURDER of Black people" and "freedom for all Black men held in federal, state, county and city prisons and jails." Halfway around the world, Thomas Mathiesen, a Norwegian sociologist and prison abolitionist in the 1960s, defined abolition as "political work geared toward what I call 'abolition' of a repressive social system or part of a system."[100] In 1998, in the United States, activists and scholars including Angela Y. Davis and Ruth Wilson Gilmore—many of whom went on to establish the organization Critical Resistance—met at a conference in Berkeley, California, to diagnose the problem of the "prison-industrial complex" and imagine alternatives.[101] For these thinkers, the critique of prisons and police in the U.S. centers on the way these two institutions have historical ties to slavery and continue to perpetuate racial and class-based oppression.[102]

Abolition offers not just a critique but also a set of alternatives; the phrase "abolition democracy"—first articulated by W. E. B. Du Bois in *Black Reconstruction in America, 1860-1880*—is meant to indicate that abolition of a system of oppression, like slavery, necessitates positive investments seeking to incorporate those who have been oppressed.[103] Abolitionist politics strives to at once *contradict* the existing police and prison systems and be in *competition* with them. The latter requirement—competition—necessitates imagining concrete alternatives rather than offering only modest tweaks to existing arrangements. Abolitionists "must work concretely, not with reforms of improvement as links in a long-range policy of abolition, but with *concrete, direct, and*

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[99] Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. (forthcoming 2021), https://papers.ssrn.com/abstract=3735538.

[100] THOMAS MATHIESEN, THE POLITICS OF ABOLITION 9 (1974).

[101] *See* DAVIS, *supra* note 11, at 7–8.

[102] *Id.* at 22–39; RUTH WILSON GILMORE, GOLDEN GULAG (2007); Roberts, *supra* note 97; Dorothy Roberts, *Constructing a Criminal Justice System Free of Bias*, 39 COLUM. HUM. RTS. L. REV. 261 (2007).

[103] Du Bois writes:

> . . . there arose in the United States a clear and definite program for the freedom and uplift of the Negro, and for the extension of the realization of democracy . . . . The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States.

W. E. B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 169–70 (Transaction Publishers ed., 2014). *See also* ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE (2011).

down-to-earth partial abolitions as links in the long-range policy."[104] Thus, the work of abolition may require short-term, and sometimes even modest, efforts that remove components of systems, but always with the goal of facilitating their eventual abolition and replacement by democratic and capacity-building institutions of care and robust social provision.[105] Abolitionists often refer to "non-reformist reforms" as partial abolitions—reforms that reduce the capacity of police and prisons and refuse to contribute to their legitimacy even if they do not yet fully abolish these systems. Unlike standard reforms, non-reformist reforms can seek to "reduce the power of an oppressive system while illuminating the system's inability to solve the crises it creates."[106]

After witnessing the limits of liberal reform visions as well as liberals' political miscalculations in relation to intransigent conservative lawmakers under the Obama Administration, the Black Lives Movement has taken up the mantle in articulating and building alternatives to police and prisons.[107] Since 2013, in the wake of the killing with impunity of Trayvon Martin, the movement—diverse yet collaborative in its visions and organizing strategies—has been at the forefront of demands for racial justice. In the early 2010s, demands to abolish police and prisons tended to be on the periphery of the movement, which centered more reformist strategies such as training of police officers and reducing the scale of mass incarceration. In 2020, however, abolitionist demands have become more central, and the continued protests throughout 2020 have renewed commitments to the politics and possibilities of abolition among many movement activists and increasingly among lawyers and scholars.[108] Specifically, organizers have articulated alternatives and strategies that we view as guided by the principles of power shifting, defunding and reinvesting, and transformation.

Power shifting is the underlying principle that the power to define and manage social harm should be democratic. As Jocelyn Simonson writes, "the movement focus on governance and policymaking in police reform […] surface[s] the specific role that policing plays in denying people in highly policed neighborhoods their democratic

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[104] *Supra* note 99, at 28.

[105] This is central to abolitionist thinking of other systems of oppression and exploitation, including capitalism. *See*, *e.g.*, Erik Olin Wright, *Transforming Capitalism through Real Utopias*, 78 AM. SOC. REV. 1 (2013). Indeed, social scientists—sociologists in particular—have articulated a need for radical investments in what Michelle Jackson refers to as "webs of high-quality institutions" in order to eradicate economic, educational, and other forms of inequality. *See* MICHELLE JACKSON, MANIFESTO FOR A DREAM: INEQUALITY, CONSTRAINT, AND RADICAL REFORM 21 (2020).

[106] Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration. *See also* Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2018).

[107] Alex Vitale, *The Answer to Police Violence Is Not 'Reform.' It's Defunding. Here's Why.* THE GUARDIAN (May 31, 2020, 5:13 PM), https://www.theguardian.com/commentisfree/2020/may/31/the-answer-to-police-violence-is-not-reform-its-defunding-heres-why; Leila Raven, Mom Mohapatra & Rachel Kuo, *8 to Abolition is Advocating to Abolish Police to Keep Us All Safe*, TEEN VOGUE (June 25, 2020), https://www.teenvogue.com/story/8-to-abolition-abolish-police-keep-us-safe-op-ed.

[108] Amna Akbar, *The Left is Remaking the World*, N. Y. TIMES (July 11, 2020), https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html. Establishment Democrats' reactionary response to the phrase "defund the police" in the run up to the 2020 presidential election reveals the centrality of such abolitionist discourse in the political atmosphere. *See* D. Watkins, *No, Obama, We Do Mean "Defund the Police": It's Not a Snappy Slogan, It's a Demand for Justice*, SALON (Dec. 13, 2020, 1:00 PM), https://www.salon.com/2020/12/13/no-obama-we-do-mean-defund-the-police-its-not-a-snappy-slogan-its-a-demand-for-justice.

standing and collective political impact."[109] Currently, political and corporate elites, not ordinary people, overwhelmingly define what constitutes crime, what kinds of people should be criminalized, and how we should punish those deemed criminal.[110] Corporations and privileged communities disproportionately benefit from, and invest in, the policing of major cities[111] and the building of prisons.[112] With little input from their constituents, and much input from moneyed interests, politicians determine both city spending on police and state and federal spending on prisons. In seeking to contradict and critique the existing system, many abolitionists seek to shift power away from elites and toward ordinary people and communities,[113] especially those who now occupy a growing and disempowered group of "second-class citizens" locked out of the democratic process by felony disenfranchisement laws and other practices that delimit their claims to citizenship.[114]

Such power shifting has material and cultural dimensions.[115] Cultural power shifting involves marginalized populations exposing and rearticulating the way crime

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[109] Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L. J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731173.

[110] Alec Karakatsanis, *Why "Crime" Isn't the Question and Police Aren't the Answer*, CURRENT AFFAIRS (Aug. 10, 2020), https://www.currentaffairs.org/2020/08/why-crime-isnt-the-question-and-police-arent-the-answer.

[111] Corporations donate to police foundations and rely on private security forces, securing racial capitalism through the use of police forces. Saritha Ramakrishna, *Giving Back to Themselves*, THE BAFFLER (June 22, 2020), https://thebaffler.com/latest/giving-back-to-themselves-ramakrishna.

[112] DAVIS, *supra* note 11. *See also* JOHN M. EASON, BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION (2017) (showing that even though prison siting and building can stem the tide of economic losses in working-class and poor communities and towns of color, there are also economic and social drawbacks to prison siting in these very same communities); MEGAN MUMFORD, DIANE WHITMORE SCHANZENBACH & RYAN NUNN, THE HAMILTON PROJECT, THE ECONOMICS OF PRIVATE PRISONS (2016), https://www.hamiltonproject.org/papers/the_economics_of_private_prisons (same).

[113] For example, activists in Austin, Texas launched #wefund, a community budgeting tool to solicit feedback from community on how the City should prioritize city spending. More than 95% of people supported cutting the police budget, with the average cut approximately half of the budget. *WeFUND-Community Budgeting Tool Results*, AUSTIN JUSTICE COALITION (August 2020), https://austinjustice.org/wefund-community-budgeting-tool-results. Others are theorizing and launching participatory budgeting processes. *E.g.*, PARTICIPATORY BUDGETING PROJECT, https://www.participatorybudgeting.org (last visited Jan. 15, 2021).

[114] *E.g.*, AMY E. LERMAN & VESLA WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL (2014); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2008); Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291 (2015).

[115] A long line of scholarship has theorized material and cultural (or symbolic) forms of power, and how they are interrelated. For more recent theories on power and inequality in American politics and broader society, see STEVEN LUKES, Power: A Radical View (Blackwell 1st ed., 1974); Michèle Lamont, Stefan Beljean & Matthew Clair. "*What Is Missing? Cultural Processes and Causal Pathways to Inequality.*" 12 SOCIO-ECON. REV. 573 (2014); William H. Sewell, Jr., *A Theory of Structure: Duality, Agency, and Transformation*, 98 Am. J. Soc. 1 (1992); CHARLES TILLY, DURABLE INEQUALITY (1998). In the history of penal changes in the United States, power struggles have been central, and "symbolic" (or cultural) struggles have been central to such contestation. In their analysis of the history of penal reform in the United States, Phillip Goodman, Joshua Page, and Michelle Phelps write: "Penal development is the product of struggle between actors with different types and amounts of power." PHILLIP GOODMAN, JOSHUA PAGE & MICHELLE PHELPS, BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE 8 (2017).

is constructed in the public imagination and in their own communities,[116] which may have internalized elite definitions.[117] Cultural struggles can reduce the ideological power of police and prisons as necessary institutions in society[118] and inspire people to join social movements.[119] Cultural contestation can also result in a material shift, for example through the elimination of laws that criminalize drugs.[120] In addition, direct resistance in the face of legal authority can constitute both cultural and material shifts in relations. "Copwatching," for instance, can provide community narratives of police abuse, resist abusive tactics in the moment of an encounter, and be used to counter police testimony in court.[121] More systemic forms of power shifting can also change material realities. For instance, Olúfẹ́mi O. Táíwò argues that community control over police departments—in the form of randomly-selected, and rotating, local boards with the power to hire, fire, defund, or abolish police departments—complements abolitionist aims.[122] Shifting authority away from government representatives places power in the hands of local communities—communities that could have political disagreements about abolition, but who would have the ability to more directly come to a collective determination of their fates.[123] At root, expanding democratic participation for marginalized people, which has been diminished in large part by mass criminalization, undergirds abolitionist thinking and necessitates a principle of power shifting.[124]

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[116] *See* Matthew Clair, Caitlin Daniel & Michèle Lamont, *Destigmatization and Health: Cultural Constructions and the Long-term Reduction of Stigma*, 165 SOC. SCI. & MED. 223 (2016) (discussing cultural power); Michèle Lamont, Addressing Recognition Gaps: Destigmatization and the Reduction of *Inequality*, 83 AM. SOC. REV. 419 (2018) (same); Michael Schudson, *How Culture Works*, 18 THEORY AND SOC'Y 153 (1989) (same).

[117] *See* ROBIN KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS (1996); Cathy Cohen, *Deviance as Resistance*, 1 DU BOIS REV.: SOC. SCI. RES. ON RACE 27 (2004); Matthew Clair, Criminalized Subjectivity: Du Boisian Sociology and Visions for Change Among Criminal Defendants (2021) (unpublished working paper) (on file with authors).

[118] DAVIS, *supra* note 11, at chapters 1, 6.

[119] *See* Francesca Polletta, *"It was like a fever…" narrative and identity in social protest*, 45 SOC. PROBS. 137 (1998) (discussing how the narratives around the spontaneity of student sit-in in the 1960s inspired people to become student activists during the Civil Rights Movement).

[120] Karakatsanis, *supra* note 109.

[121] *See* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016) (discussing the practice of copwatching). *See also* FORREST STUART, DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW (2016) (describing how copwatching operates on the ground empirically and how people have used it to counter police practices in the moment and in court).

[122] Olúfẹ́mi O. Táíwò, *Power Over the Police*, DISSENT (June 12, 2020), https://www.dissentmagazine.org/online_articles/power-over-the-police. *See also* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679 (2020).

[123] Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV.: SOC. SCI. RES. ON RACE 197 (2019). Simonson similarly writes:

> The idea of power-shifting is not inherently abolitionist, or even left-leaning; community control, for instance, could be an institution that people who want more policing take up in the name of public safety. But a power-shifting analysis does open up the terrain of police reform to contestation and exploration of ideas that are excluded from other kinds of reform efforts. It makes abolition possible . . . .

Simonson, *supra* note 108.

[124] *See* DAVIS, *supra* note 102; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2017); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017).

The paired acts of *defunding and reinvesting* constitute the second principle. Abolitionists see defunding of police and prisons as inseparable from investing in alternative ways of preventing and dealing with social harm. A common criticism of abolition is the question: what do we do about violence?[125] The principle of defunding and reinvesting provides at least three responses. First, police and prisons are themselves violent institutions; therefore, defunding these institutions is a way to reduce certain forms of routine violence. Second, police and prisons are largely ineffective at preventing or reducing much violence.[126] Third, reinvesting resources in social institutions outside the criminal legal system can reduce community violence as well as increase the capacity of alternative forms of violence prevention and accountability.[127] Social scientists have long examined how investments in social supports such as housing, healthcare, and education appear to reduce the prevalence of criminalized behaviors. Recent studies have also shown that interventions, such as summer jobs programs or extending the school day, can be effective in reducing crime rates in certain communities.[128] Drawing on data from hundreds of cities, one study found that the establishment of nonprofit organizations reduces violent crime rates.[129] Despite investments in social supports, people may still harm others, and most abolitionists understand that perpetrators should still be held accountable, albeit through nonpunitive means that do not cause further harm.[130] Indeed, as we discuss in greater detail in the next Part, the need for accountability is precisely why

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[125] *See*, *e.g.*, Gabriela Paiella, *How Would Prison Abolition Actually Work*, GQ MAGAZINE (June 11, 2020), https://www.gq.com/story/what-is-prison-abolition (interviewing Woods Ervin, an organizer with Critical Resistance).

[126] DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO Repair (2019); Mariame Kaba, *So You're Thinking About Becoming an Abolitionist*, MEDIUM (Oct. 30, 2020), https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894. While police have been shown to reduce some forms of violence in the absence of robust social investments in communities, these studies rarely account for the harm done to communities by such policing. *Compare*, e.*g.*, Anthony A. Braga, Brandon S. Turchan, Andrew V. Papachristos & David M. Hureau, *Hot Spots Policing and Crime Reduction: An Update of an Ongoing Systematic Review and Meta-analysis*, 15 J. EXPERIMENTAL CRIMINOLOGY 289 (2019), *with* Karakatsanis, *supra* note 109.

[127] Marisol LeBrón, POLICING LIFE AND DEATH: RACE, VIOLENCE, AND RESISTANCE IN PUERTO RICO (2019).

[128] *E.g.*, Matias E. Berthelon & Diana I. Kruger, *Risky Behavior Among Youth: Incapacitation Effects of School on Adolescent Motherhood and Crime in Chile*, 95 J. PUB. ECON. 41 (2011); Jonathan M.V. Davis & Sara B. Heller, *Rethinking the Benefits of Youth Employment Programs: The Heterogeneous Effects of Summer Jobs*, 102 Rev. Econ. & Stat. 664 (2020); Sara B. Heller, *Summer Jobs Reduce Violence Among Disadvantaged Youth*, 346 SCI. 1219 (2014).

[129] Patrick Sharkey, Gerard Torrats-Espinosa & Delaram Takyar, *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 Am. Soc. Rev. 1214 (2017). *See also* PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE (2018).

[130] *See*, *e.g.*, Duffy Rice, *supra* note 9 ("Certainly you would still need professionals responsible with holding accountable those who violate the social contract in the extreme—rape or murder—and an improved investigative system to catch the perpetrators."). In her article in *The Atlantic*, Derecka Purnell writes: "we should expand restorative and transformative processes for accountability." Derecka Purnell, *How I Became a Police Abolitionist*, THE ATLANTIC (July 6, 2020), https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540. *See also* Clint Smith, *There Is No Justice in Killing Dylann Roof*, THE NEW YORKER (June 4, 2016), https://www.newyorker.com/news/news-desk/there-is-no-justice-in-killing-dylann-roof (discussing the importance of extending mercy even to those who commit racist acts of violence, such as mass murder).

reimagining the place of the courts—often assumed to provide accountability and justice—is critical to abolitionist work.

On the road toward abolition, many activists recognize the practical necessity of partial abolitions, or non-reformist reforms that transform existing, punitive state institutions in ways that reduce their power and harm. *Transformation* of police and prisons in this way is the third guiding principle. Such transformation of practices can occur within—and rely on the tools of—broader legal institutions. In the Article "Abolition Constitutionalism," Dorothy Roberts draws inspiration from the slavery abolitionist Frederick Douglass, who, despite grappling with whether the Constitution was fundamentally a proslavery or antislavery document, ultimately chose to interpret the document through an abolitionist lens.[131] Roberts refers to this strategy as one of "holding courts and legislatures to an abolitionist reading." Today, despite current interpretations of legal doctrine to the contrary, we can similarly engage in an abolitionist reading of the Constitution with respect to the crisis of policing, courts, and prisons. Roberts writes, "Like antebellum abolitionist theorizing, prison abolitionism can craft an approach to engaging with the Constitution that furthers radical change"[132] by "instrumentally using the Constitution."[133] Abolitionists can at once deploy legal tools "strategically as a legal, ideological, rhetorical tactic to expose the hypocrisy" all the while recognizing that existing legal systems will not bring about "black freedom."[134]

Transformation, as we will discuss in greater detail in the next Part, often depends on existing legal, political, and social tools to dismantle uniquely oppressive components of the law (e.g., leveraging prosecutorial power to decline to pursue certain charges brought by police). Consequently, transformation is a complex principle that requires careful attention to unintended consequences and ways that such strategies may legitimate existing punitive power structures. The principle compels organizers, scholars, and policymakers to consider how other institutions beyond police and prisons are—or are not—amenable to transformation (versus abolition). In doing so, theorizing around transformation opens up space for interrogating institutions like criminal courts, where prosecutors' offices, judicial norms, and legal doctrine hold significant power. Criminal courts are structured within broader legal frameworks such as state and federal constitutions, laws, and electoral systems, thereby inviting critique, transformation, and even calls for abolition. Specifying the components of the legal system that contain potential for transformation and justice and articulating the degree to which they are separable from those which are beyond repair is critical. Some institutions that contribute to the problems of mass criminalization may nevertheless have more potential for justice than injustice, such as problem-solving courts, restorative justice programs, and schools. For these institutions, the goal then may not be abolition but rather transformation from the punitive arrangements and logics that distort their broader, just purposes.

Part III: Toward the Abolition of Criminal Courts

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131 Roberts, *supra* note 97, at 58–62.

132 *Id.* at 108.

133 *Id.* at 110.

134 *See id.* (referring to the thinking of the Black Panther Party activist George Jackson).

Applying these three abolitionist principles to the criminal courts, this Part draws on existing efforts of grassroots organizers, lawyers, and policymakers and frames these efforts as complementary components of a more coherent movement toward *criminal court* abolition. As we note in the Introduction, scholars and organizers have often referred to the problems of the "prison-industrial complex," which incorporates implicit scrutiny of courts along the path from policing to prisons. Yet, we take the step of naming these strategies and tactics under the umbrella of *criminal court abolition* as a way to underscore how existing activism targeted at the courts fits into the broader movement to abolish racialized systems of punitive legal control, which has tended to focus on police and prisons. In doing so, we make explicit the connections that are often left implicit, and we detail alternative possibilities that could supplant criminal courts as our go-to institution for adjudicating wrongdoing and holding people accountable for harm.

The power shifting principle applied to the courts requires imagining ways to wrest the authority over accountability for harm from court authorities and into the hands of local communities in a democratic and just way. Truly democratic deliberation should take account of all people's perspectives within a community as well as take into account moral concerns about justice and equity—concerns that, at the very least, value the fundamental dignity of every person and strive toward an equitable distribution of resources and obligations.[135] Of course, historically, in the United States, community forms of "accountability," such as lynching, have been violent, racist and oppressive, and concepts of "community" can be hijacked to further oppress already marginalized groups. An abolitionist imaginary, however, seeks to remove both state-sanctioned and community-derived forms of oppression. Therefore, power shifting is not an end state but a continual process[136] whereby we are always working to ensure power is distributed equitably and community deliberation about how to handle wrongdoing and harm centers the conditions of the most vulnerable. Centering the most vulnerable is critical, particularly in diverse communities that may come to divergent conclusions about local expressions of legal violence.[137] As Jeremy Levine argues, community participation should focus not so much on consensus but rather on "amplifying the political voice of marginalized residents."[138]

Organizers have been engaging in myriad power shifting tactics that are reducing the power of the criminal courts to define and manage crime, and should

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[135] *See* Tommie Shelby, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM (2016); Larry Diamond & Leonardo Morlino. *The quality of democracy: An overview*, 15 JOURNAL OF DEMOCRACY 20 (2004).

[136] *See* Angela Y. Davis, *Freedom is a Constant Struggle: Ferguson, Palestine, and the Foundations of a Movement* (2016).

[137] For instance, research has shown that people's perceptions of police killings of Black people—and the ways they make sense of and seek information about these killings—varies by racial group membership rooted in "identity-based motivated reasoning." Hakeem J. Jefferson, Fabian G. Neuner & Josh Pasek, *Seeing Blue in Black and White: Race and Perceptions of Officer-Involved Shootings*, PERSPECTIVES ON POLITICS (forthcoming 2021).

[138] Jeremy Levine, *It's Time to Move on from Community Consensus*, SHELTER FORCE (Sept. 3, 2020), https://shelterforce.org/2020/09/04/community-consensus. *See also* Jeremy R. Levine, *The Privatization of Political Representation: Community-based Organizations as Nonelected Neighborhood Representatives*, 81 AM. SOC. REV. 1251 (2016); Mary Pattillo, *Black on the Block: The Politics of Race and Class in the City* (2010).

therefore be understood as part of the broader abolition movement. "Court watching," in which ordinary people observe court proceedings to show support for community members in the courtroom as well as collect information and data on judges and prosecutors, has sought to hold courts accountable to the public with respect to the court system's contribution to violence and harm.[139] Court watching can expose injustices and pressure legal officials to "shift courtroom policies, practices, and culture."[140] Much of the work of power shifting is cultural: exposing injustice for the community to see and circulating new articulations of "crime" or harm by revealing the crimes committed by authorities. Media reporting, academic writings, town halls, and everyday conversations are sites for such cultural work,[141] which can complement material shifts to power relations.

Material forms of power shifting arise from cultural work, and are often the aim of cultural efforts. For instance, after spending months watching felony bail hearings and bearing witness, members of Silicon Valley De-Bug—a community organizing hub in San Jose, California—devised tactics to slow down the bail hearing, with the ultimate aim of securing release of those arraigned in felony court. Assisting public defenders, "they created a form to tap and translate care and support offered by people filling the courtroom benches into pretrial freedom for their loved ones."[142] Community bail funds across the country are another example of how community members have shifted power away from judges and prosecutors in determining whether a person is incarcerated pretrial. Community bail funds, or organizations that post bail for people who cannot otherwise pay for their release, received a surge in donations in the wake of the killing of George Floyd and media attention surrounding subsequent arrests of protesters.[143] Bail funds not only enable protesters and other people arrested to avoid incarceration while awaiting trial but also afford the community (rather than a prosecutor or a judge) the power (through cash) to decide who should be allowed to remain free prior to formal adjudication by the court. Jocelyn Simonson argues that strategies like court watching and community bail funds collectively represent a bottom-up form of "resistance and […] agonistic participation—forms of direct participation that engage with powerful state institutions in a respectful but adversarial manner."[144]

Defunding and reinvesting, which has been a common tactic in relation to policing and city budgets, could also hasten criminal court abolition. Organizers and activists across the country have exposed the amount of money cities spend on police forces;[145] community leaders and organizers could engage in similar efforts to shed

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[139] COURT WATCH NYC, https://www.courtwatchnyc.org (last visited Feb. 1, 2020). *See also* BACH, *supra* note 60 (explaining the concept of "court monitoring," whereby communities keep track of the processes and outcomes in their local courts).

[140] COURT WATCH NYC, *supra* note 138.

[141] *See* Clair, Daniel & Lamont, *supra* note 115; Schudson, *supra* note 115.

[142] Raj Jayadev, Janet Moore & Marla Sandys, *Participatory Defense as an Abolitionist Strategy*, *in* TRANSFORMING CRIMINAL JUSTICE: AN EVIDENCE-BASED AGENDA FOR REFORM, 17 (Jon B. Gould & Pamela Metzger, eds., forthcoming 2021) (on file with authors).

[143] Jia Tolentino, *Where Bail Funds Go from Here*, THE NEW YORKER (June 23, 2020), https://www.newyorker.com/news/annals-of-activism/where-bail-funds-go-from-here. *See also* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017).

[144] Jocelyn Simonson, *The Place Of "The People" In Criminal Procedure*, 119 COLUM. L. REV. 249, 256. (2019).

[145] *E.g.*, *supra* note 112.

light on government spending on criminal courts. The federal judiciary budget request for FY 2020 was $8.29 billion, which funds the salaries and benefits of court personnel (including prosecutors, judges, and court officers), maintenance of buildings, as well as indigent defense.[146] State judiciaries also request their own funding from state legislatures; in California, the state judiciary's budget for FY 2020-2021 was $4 billion.[147] Local criminal courts also occupy significant real estate in county budgets. Defunding criminal court systems could comprise two complementary strategies. The first strategy is reallocating funds within budgets to increase resources for indigent defense representation and decrease resources spent on prosecutors and judges. The second is defunding components of the budget that pay for the upkeep of criminal courtrooms, the number of judges hearing criminal cases, and the number of prosecutors pursuing criminal charges, and reallocating that funding outside the criminal court system.

In addition to taking aim at local budgets as targets for defunding, organizers and advocates have recently brought much attention to the "feeding the beast" structure of court fines and fees, which we touched on in Part 1C. One way to defund criminal courts would be to end the "user-pay" structures that most rely upon. This idea is nothing new, and in fact the "user-pay" system has been criticized by court administrators and organizers alike for many years as being ineffective, inefficient, and most importantly, unjust.[148]

The money saved from defunding would thus either remain in the communities targeted by the criminal legal system – in the case of ending user-pay systems – or could be reinvested in alternative forms of conflict resolution and accountability – in the case of reductions in local budgets. Disputes between two parties who have a relative "moral balance"[149] may be better handled through mediation processes than through arrest and charging in misdemeanor courts. These could include trespassing or loitering—criminalized conduct that has not harmed other people but where neighbors, small local businesses, and other community members are in conflict. Of course, many of these instances may involve disputes between people who are not of equal social status in the community. In such instances, social programs, such as subsidized housing, could be afforded alongside mediation as a better way to solve problems often rooted in poverty and desires to control

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146 CONGRESSIONAL RESEARCH SERVICE, JUDICIARY BUDGET REQUEST, FY2020 1 (2019), https://fas.org/sgp/crs/misc/IF11168.pdf.

147 DEPT. OF FINANCE, STATE OF CAL., CALIFORNIA STATE BUDGET 2020–2021 75 (2020), (http://www.ebudget.ca.gov/2020-21/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf

148 *See* CARL REYNOLDS & JEFF HALL, CONFERENCE OF STATE COURT ADMINISTRATORS, COURTS ARE NOT REVENUE CENTERS 7 (2011), https://cosca.ncsc.org/__data/assets/pdf_file/0019/23446/courtsarenotrevenuecenters-final.pdf (recommending courts "be substantially funded from general governmental revenue sources"). *See generally* Mary Fainsod Katzenstein & Maureen Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPECTIVES ON POL. 638, 638–39 (2015) (describing an "'inverted' welfare system [which] taxes poor families to help fund the state's project of poverty governance . . . to subsidize the carceral state.").

149 The phrase "moral balance" comes from Aaron Lyons, who references Zehr in a blogpost for Just Outcomes. Aaron Lyons, *Restorative Justice vs. Conflict Resolution: Assessing Intervention*, JUST OUTCOMES (Mar. 14, 2016), https://www.justoutcomesconsulting.com/restorative-justice-vs-conflict-resolution-assessing-for-intervention (citing Howard Zehr, *Restorative Justice, Mediation, and ADR*, ZEHR INST. RESTORATIVE JUST. (Aug. 13, 2010), https://zehr-institute.org/resources/restorative-justice-mediation-and-adr.html).

marginalized communities. In addition, many harms currently adjudicated in criminal courts, such as physical assault or sexual violence, exhibit a grave imbalance between parties by virtue of the harm done (rather than by virtue of an a priori social status imbalance) thereby requiring accountability for harm; such harms would not be appropriately adjudicated through conflict resolution processes. Instead, as Aaron Lyons writes, this is where restorative justice approaches are more appropriate.[150]

Restorative justice programs, such as Common Justice or the Center for Court Innovation's peacemaking programs, can provide nonpunitive ways to hold people accountable for the harms they have caused as well as to work toward healing for survivors and communities.[151] Danielle Sered, executive director of Common Justice, an alternative-to-incarceration and victim-service program in Brooklyn, New York, has written that restorative justice is more effective at keeping those who commit harm accountable than carceral techniques. Common Justice offers "a survivor-centered accountability process that gives those directly impacted by acts of violence the opportunity to shape what repair will look like, and, in the case of the responsible party, to carry out that repair instead of going to prison."[152] Indeed, studies show that victims report greater satisfaction from similar restorative programs, which often draw on indigenous methods from around the world that have been used for centuries to make communities whole.[153] But responsibility does not rest with the perpetrator alone; in addition, community members and broader society must recognize, acknowledge, and work toward healing the racial and class-based injustices that make such acts of harm more likely. Sered writes: "That will mean a concentration of resources in communities of color. The repair must go to where the damage—and therefore the debt incurred—has been greatest, and we white people will need to be prepared for a substantial redistribution of resources toward communities of color throughout the country."[154]

Given the power shifting principle, however, abolitionists may be wary of some of the details of actually existing mediation and restorative justice programs, especially when they are tied to state-sanctioned systems of social control. As currently constituted, such programs often rely on prosecutors making exceptions to divert alleged offenders. Moreover, some restorative justice philosophies expressly articulate a continued and central role for the state, especially the police and prisons, in defining and punishing crime.[155] Some Black organizers, even those who have engaged in

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150 *See id.* (explaining a "framing" approach to identify opportunities for restorative justice).

151 SERED, *supra* note 125. The Center for Court Innovation in New York runs its own peacemaking programs. *Peacemaking Program*, CTR. FOR CT. INNOVATION https://www.courtinnovation.org/programs/peacemaking-program#:~:text=The%20Center%20for%20Court%20Innovation,agreement%20about%20restitution%20and%20repair (last visited Feb. 1, 2020).

152 SERED, *supra* note 125, at 133.

153 *See* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME JUST. 1 (1999) (reviewing restorative justice accounts).

154 SERED, *supra* note 125, at 246.

155 For instance, John Braithwaite, who has done much to theorize restorative justice, writes that "unlike the most radical versions of abolitionism, restorative justice sees promise in preserving a state role as a watchdog of rights and concedes that for a tiny fraction of the people in our prison, it may actually be necessary to protect the community from them by incarceration." John Braithwaite, *Restorative Justice*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT 323 (Michael Tonry ed., 1998). He also advocates for reforming police and other state actors through a restorative justice lens; rather

restorative justice approaches for years, have worried that the dominant vision and framing of restorative justice has often failed to directly engage with mass criminalization's state-sanctioned racialized and exploitative nature. As Fania E. Davis, co-creator of Restorative Justice for Oakland Youth (RJOY), writes, "I have observed that we are generally perceived as—and too often behave as—a white movement. This is an enormous challenge, raising grave questions about our ability to fulfill [restorative justice's] extraordinary promise."[156] Consequently, some in the abolition movement prefer the concept of transformative justice, which focuses on building a world where harms do not occur and, if they do, placing the community (rather than the state) in charge of democratically working toward accountability.

In an interview in *GQ Magazine*, Woods Ervin, an organizer who is part of Critical Resistance, contrasts restorative and transformative justice: "Restorative justice is to try and restore relationships to how they were prior to a harm being done. Transformative justice, the purpose is to try and transform communities so that the harm cannot happen again."[157] Thus, money saved could be reinvested in other social supports such as parks, libraries, a mutual aid fund, or organizations that continually work to transform conditions in their communities for the better.[158] Unlike investing in restorative justice, investing in such transformative justice programs and community groups focuses on harm prevention rather than accountability after the fact. In Boston, Massachusetts, Families for Justice as Healing is a women-led organization working to diagnose and transform harm among neighbors in Roxbury, Dorchester, and Mattapan. They specifically envision their mission as developing "alternatives to police, courts, and incarceration" by drawing on "the solutions and expertise" of formerly incarcerated women "to address the root causes of incarceration."[159] Similarly, the Louis D. Brown Peace Institute in Dorchester, Massachusetts, engages in community efforts to prevent harm. They provide "services that are consistent and compassionate for families of murdered loved ones and families of incarcerated loved ones to prevent cycles of retaliatory violence."[160] Although transformative and restorative justice are distinct, they serve two unique and important purposes: prevention and accountability. We therefore view them as complementary and recognize the importance of community-led restorative justice initiatives that draw on indigenous principles and "remind us of the centrality of race in any effective U.S. social transformation movement."[161]

In working to defund the criminal courts and reinvest in alternatives, questions about the place of the *civil* courts in an abolitionist vision arise. Many may view civil

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than abolishing them, Braithwaite refers to "restorative police officer[s]" in contrast to "retributive police officer[s]." *Id.* at 334.

156 Fania E. Davis, *What's Love Got to Do with It?*, 27 TIKKUN 30, 32 (2012).

157 Paiella, *supra* note 124.

158 After a campaign led by grassroots organizers to provide city-funded mutual aid, Austin created the RISE fund, allocating $7.5 million for direct cash assistance. *Victory! Austin City Council Votes in Favor of Providing Direct Cash Assistance to the Most Vulnerable Austinites*, GRASSROOTS LEADERSHIP (Apr. 9, 2020), http://grassrootsleadership.org/releases/2020/04/victory-austin-city-council-votes-favor-providing-direct-cash-assistance-most.

159 *Mission/Our Work*, FAMILIES FOR JUST. AS HEALING, https://justiceashealing.org/our-work (last visited Dec. 14, 2020).

160 *Services*, LOUIS D. BROWN PEACE INST., https://www.ldbpeaceinstitute.org/services (last visited Dec. 14, 2020).

161 Davis, *supra* note 155, at 68.

courts as unsalvageable components of the legal system. To be sure, civil courts and other non-criminal components of the legal system in the United States function to uphold systems of control and exploitation including and beyond criminal punishment, such as capitalism, white supremacy, immigrant exclusion, hetero-patriarchy, and family regulation and separation.[162] Some, however, have identified civil courts as an institution that could serve as an alternative site for adjudication between an alleged perpetrator and a victim that does not involve the possibility of incarceration.[163] Indeed, among the wealthy and corporations, criminalizable behavior has historically been adjudicated in civil proceedings for precisely this reason.[164] Herman Bianchi argues that the criminal law in the United States is uniquely at odds with the rest of our law, which is built on the "settlement of disputes, regulation of conflicts, and the construction of society."[165] For him, an abolitionist vision would focus on bringing our pathological criminal system back in line with the more just and prosocial aims of our broader legal system. Theorizing about the potential of civil legal concepts such as reparative law and liability is increasingly necessary to engage head on, as it forces clarification about whether the goal is to ultimately abolish the broader legal system or instead to work to transform its practices in ways that abolish police, prisons, and the criminal court while keeping other aspects of the judiciary intact.[166] Ryan Doerfler and Samuel Moyn, for instance, question the value of keeping the existing judiciary intact if the fundamental goal is to expand democratic participation. They argue that progressive reformers should be seeking to diminish the power of the Supreme Court (and by extension, the judicial branch) in democratic life rather than simply seeking to change the political composition of the Court: "For saving it is not a desirable goal; getting it out of the way of progressive reform is."[167]

Transformation—the third abolitionist principle—can at once guide in this clarification of ultimate ends with respect to other components of the judicial branch while working toward a clear and settled imperative to abolish police, prisons, and, we argue, criminal courts. Transformation could hasten abolition in myriad ways. Within the criminal courts, lawyers could work to support and complement organizing efforts

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[162] *See* JENNIFER A. REICH, FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM (2005) (discussing the social control mechanisms of foster care and Child Protective Services); Asad L. Asad, *On the Radar: System Embeddedness and Latin American Immigrants' Perceived Risk of Deportation*, 54 L. & SOC'Y REV. 133 (2020) (addressing the social control mechanisms of immigration law); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOC. REV. 610 (2020) (discussing the social control mechanisms of foster care and Child Protective Services); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2011) (same); *See generally* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HAV. L. REV. 1331 (1988); Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

[163] Herman Bianchi, Abolition: *Assensus and Sanctuary* 1 JUST. POWER & RESISTANCE 47, 54, 57 (2017).

[164] Edwin H. Sutherland, *Is "White Collar Crime" Crime?*, 10 AM. SOC. REV. 132 (1945).

[165] Bianchi, *supra* note 162, at 49.

[166] *See*, *e.g.*, Keeanga Yamahtta-Taylor's recent piece in the New Yorker questioning whether the Supreme Court should continue to exist as it is currently constituted, given that it has, more of than not, served as a regressive institution. Keeanga Yamahtta-Taylor, *The Case for Ending the Supreme Court as We Know It*, THE NEW YORKER (Sept. 25, 2020), https://www.newyorker.com/news/our-columnists/the-case-for-ending-the-supreme-court-as-we-know-it.

[167] Ryan Doerfler & Samule Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. (forthcoming 2021).

outside the courts, for example by pushing for expanded public access to bail hearings to enable organized court watching. Through resistance lawyering, which has historically been central to efforts to undermine and dismantle unjust legal systems,[168] lawyers can work to frustrate the "punishment bureaucracy."[169] This could look like hundreds of motions filed in one day challenging illegal pretrial confinement on unaffordable bail – such a tactic has strong legal grounds for immediate individual relief and would also frustrate the normal court and jail operations. Progressively-minded judges can take the lead from organizers as "fellow advocates,"[170] pushing legal doctrine in an abolitionist direction[171] and sharing institutional knowledge of systemic police practices.[172] Residents can also pressure elected officials to pass laws that decriminalize certain behaviors, such as substance use, or abolish unjust standards that expand police authority, such as qualified immunity or no-knock warrants. Through strategic work around prosecutorial and judicial elections (judges are elected in many states), organizers could leverage the power of electoral politics to pressure officials to change their courtroom practices. The movement to elect so-called progressive prosecutors who commit to reducing the imprint of their offices—by refusing to charge certain offenses, for instance—can bring about partial abolitions. But as the Community Justice Exchange articulates in its framework for "prosecutorial organizing," electing prosecutors—and by extension, judges—cannot be the end goal; rather, it is a means toward abolition of prosecutor's offices as they currently exist. As they write, "As abolitionists, our job does not end with the election of any prosecutor […instead] Our organizing focuses on how a prosecuting office's policies and practice result in decriminalization, decarceration, and shrinking the resources and power of the office of the prosecutor."[173] Thus, in all their efforts—especially when working toward transformation of criminal courts—organizers remind us that the ultimate goal is abolition not institutional legitimacy.

Conclusion

The protests last year have underscored the crisis of mass criminalization in the United States, most notably with respect to the racialized harms and violence of policing. Criminal courts—which legitimate police authority, funnel people into jails and

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168 Daniel Farbman, *Resistance Lawyering*, 107 Calif. L. Rev. 1877 (2019). Some scholars also refer to this as "cause lawyering." *See*, *e.g.*, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat, Stuart A. Scheingold & Stuart Scheingold, eds., 1998).

169 *See supra* note 30.

170 Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L. J. 1473 (2020) (citing Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740, 2749 (2014)).

171 Clair, *supra* note 97. *See also* Clair & Winter, *supra* note 64. As Monica C. Bell, Stephanie Garlock, and Alexander Nabavi-Noori write, "Judging is not merely the rendering of decisions based on preexisting legal rules; it can also encompass the articulation of legal values, the management of courtrooms, the making of rules about broader judicial operation, and the representation of the ethical principles of the legal system." Bell, Garlock & Nabavi-Nori, *supra* note 169, at 1507.

172 Crespo, Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2015).

173 *Abolitionist Principles & Campaign Strategies for Prosecutor Organizing*, COMMUNITY JUSTICE EXCHANGE, https://www.communityjusticeexchange.org/abolitionist-principles (last visited July 15, 2020).

prisons, and engage in their own forms of social control and exploitation—are central to the crisis. The Black Lives Matter movement has made bold demands to abolish police and prisons and invest in community safety and well-being. Alongside the abolition of police and prisons, we highlight the complex and necessary task of transforming our criminal courts—a task that organizers have engaged in for years and that can be articulated as strategies toward criminal court abolition. Drawing on the abolitionist principles of power shifting, defunding and reinvesting, and transforming practices, this Essay has articulated how scholars and policymakers, working alongside activists and organizers, can conceptualize the courts—and the broader legal system—in relation to the abolition movement and continue to take immediate steps to realize criminal court abolition.