

Rioting By A Different Name: The Voice of the Unheard in the Age of George Floyd,  
and The History of the Laws, Policies, and Legislation of Systemic Racism

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## 1. INTRODUCTION

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

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<sup>1</sup> See Generally, Shapiro, Thomas M. and Oliver, Melvin L. *Black Wealth/ White Wealth: A New Perspective on Racial Inequality*. New York: Routledge Publishing 2006 (showing specific data comparing black wealth and white wealth); Quadagno, Jill. *The Color of Welfare*. New York: Oxford University Press 1994. Roback Morse, Jennifer, Yale Professor of Economics, “Exploitation in the Jim Crow South: The Market or the Law?” Cato Institute, The Brookings Institute, AEI Journal on Government and Society: available at <https://www.cato.org/sites/cato.org/files/serials/files/regulation/1984/12/v8n5-6.pdf> (1984) (last accessed January 2020).

<sup>2</sup> Caliendo, Stephen M., *Inequality in America: Race, Poverty, and Fulfilling Democracy’s Promise*. Boulder, CO: Westview Press/ Perseus Books Group, 2015 at pp. 39-51. (originally published 1971).

<sup>3</sup> See Generally Douglas S. Massey & Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass*, Cambridge: Harvard University Press, 1993. Taylor, Keeanga-Yamahtta, *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership*. Chapel Hill, North Carolina: University of North Carolina Press, 2019 at pp. 79.

<sup>4</sup> Desmond, Matthew. “In Order to Understand American Capitalism, you have to start on the plantation” The 1619 Project, New York Times Magazine. (August 14, 2019). Danyelle Solomon, Connor Maxwell, and Abril Castro, “Systemic Inequality and Economic Opportunity”, The Center for American Progress Report, August 2019, at page 2. <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html>. Last accessed 6.6.2020.

<sup>5</sup> Douglas S. Massey, “American Apartheid: Segregation and the Making of the Underclass” *American Journal of Sociology*, 96 (1990) 113-125.

and punishment.<sup>6</sup> This article, written after the murder of George Floyd,<sup>7</sup> follows a more holistic model of justice, one more in line with a model of restorative justice.<sup>8</sup> As such, this article takes

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<sup>6</sup> The lineage of crime, punishment and the wide-ranging inequality of mass imprisonment on minority communities and their social effects have been well-articulated in: Bruce Western's *Crime and Inequality in America*, 2006, Russell Sage Foundation, introduction, available here: <https://scholar.harvard.edu/files/brucewestern/files/intro1.pdf>; See Bruce Western, "Mass Imprisonment and Economic Inequality in America" *Social Research*, Summer 2007, Vol. 74, No. 2, Punishment: The US Record, The John Hopkins University Press, at pp. 509-532. See also, the argument for more modern egal regimes of systemic inequity resulting in *re-segregation* post-emancipation and post-Jim Crow as articulated by Michelle Alexander in *The New Jim Crow, Mass Incarceration in the Age of Colorblindness*, New York: The New Press (2010) (stating, "What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather we rely on race, we use our criminal justice system to label people of color 'criminal' then engage in all the practices we supposedly left behind.") at pp. 2, introduction.

For more on the values-system and the different notions of Justice that focuses instead on the status and power implicated in criminal justice transgressions and their place in systemic inequity, See Michael Wenzel; Tyler G. Okimoto; Norman T. Feather; Michael J. Platow, "Retributive and Restorative Justice," *Law and Human Behavior*, Vol.32, No. 5 (Oct. 2008) pp. 375-389. For more on the values-system and the different notions of Justice that focuses instead on the status-and-power implicated in moments of transgression, rather than penalizing and treating the individual harm as a "one-off" transgressions instead of as a place in the entirety of the communities relation to systemic inequity, See Michael Wenzel, Tyler G. Okimoto, Norman T. Feather and Michael J. Platow, *Law and Human Behavior*, at pp. 375 (stating in the abstract, that "the emergence of restorative justice as an alternative model to Western, court-based criminal justice may have important implications for the psychology of justice. It is proposed that two different notions of justice affect responses to rule-breaking: restorative and retributive justice. Retributive justice essentially refers to the repair of justice through unilateral imposition of punishment, whereas restorative justice means the repair of justice through reaffirming a shared value-consensus in a bilateral process. Among the symbolic implications of transgressions, concerns about status and power are primarily related to restorative justice. At the core of these processes, however, lies the parties' construal of their identity relation, specifically whether or not respondents perceive to share an identity with the offender... restoring a sense of justice after rule-breaking."); For more on the individual identity-participation of restorative justice see, John Braithwaite, *A Kind of Mending: Restorative Justice in the Pacific Islands*, ANU Press (2010) (standing for the conception of restorative justice as a community-based model that sees the community as part of the restorative justice process and not solely focused on individual harmed and offender - with the goal of healing, and non-domination as a part of empowerment process of the systemic harms that injustice and transgression causes on a community as a whole).

<sup>7</sup> Brian Dakks (May 26, 2020), "Video shows Minneapolis cop with knee on neck of motionless, moaning man who later died." CBS News. <https://www.cbsnews.com/news/minneapolis-police-george-floyd-died-officer-kneeling-neck-arrest/> last accessed 5.31.2020. See also, Hauser, Christine, (May 26, 2020). "F.B.I. to investigate Arrest of Black Man Who Died after Being Pinned by Officer," *The New York N.Y. Times*, May 26, 2020, <https://www.nytimes.com/2020/05/29/us/derek-chauvin-george-floyd-worked-together.html>. (last visited accessed May 5.31, .2020).; See also Evan Hill, Drew Jordan, Robin Stein, Ainara Tiefenthaler, Christiaan Triebert, & Haley Willis, *8 Eight Minutes 46 Seconds: How George Floyd was Killed in Police Custody*, May 31, 2020, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (last visited Jun. 2, 2020).

<sup>8</sup> Compare FN 6 against articles on the history of economic, housing, and the resulting "social death" born out of these legal regimes on Black America, such as: Ta-Nehisi Coates, "Reparations in America," *The Atlantic Monthly*, June 2014, (presenting an overview of the laws, policy and legislation that has resulted in discriminatory impact on Black America after the 13th Amendment's freedom from slavery. These include The Fair Housing Act, Red Lining and Black Isolation or "ghettoization", inter-generational poverty and its impact on Black and minority families since 1980s to today, and the overall consequences of 250 years of enslavement on Black Americans access to home ownership, wealth, education and the limits of an educational equality system focused on only affirmative actions and less on holistic visions of educational equity as a whole, and other social health and community infrastructural equity.)

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

This necessary transformation shifts the orientation of the reader (prosecutor, law student, and lawyer) and the object of representation (the history of mass policing, structural inequity, and over-incarceration). This article posits this shift as the critical race theory vision of today's BIPOC<sup>10</sup> analysis, which considers the law not just by weighing caselaw and precedent. This analysis takes as its core mission a more holistic attempt at digesting the "long" U.S. history of systemic inequity that led up to today's carceral state (mass policing, imprisonment, etc.) for BIPOC America. This analysis also urges the legal academy and its framework to synthesize and prioritize BIPOC experience, and the cultural and historical trauma in the American moment of Breanna Taylor, George Floyd, and recently Jacob Blake<sup>11</sup>. By presenting the discrete modules of New York history detailing laws, policy, and legislation that produced systemic inequity during Slavery, Jim Crow, the New Deal, to the present, this work encourages the proximity with historical legal discomfort, and experience a transformational orientation change to legal history, resulting

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<sup>9</sup> Structural Inequity, can most easily be defined by in opposition to cultural inequality, which focuses on the individual decisions associated with these imbalances of roles, functions, decisions rights and opportunities -most prominently featured in anti-racist principles and equity work on implicit bias, racial anxiety and stereotype threat. (See the work of Rachel Godsil in *Science of Equality (Volume 1): Implicit Bias, Racial Anxiety, and Stereotype Threat in Education and Health Care* (Perception Institute, 2014)(co-authored with Linda R. Tropp, Phillip Atiba Goff, John A. Powell); *Telling Our Own Story: The Role of Narrative in Racial Healing* (Kellogg Foundation, 2013)(co-authored with Brianna Goodale). Whereas, structural inequality refers specifically to the inequalities like residential segregation or healthcare, employment and educational discrimination. See Royce, Edward Cary. *Poverty and Power: the Problem of Structural Inequality*. Lanham: Rowman & Littlefield, 2009 at 217.

<sup>10</sup> B.I.P.O.C. is an acronym that stands-in for "persons of color" as there has been productive cultural conversations recently on the pejorative racial history of "colored" as an appellation, often historically-localized within the twin term, "negroes" which . Butterly, Amelia, *Warning: Why using the term 'coloured' is offensive*. B.B.C., Newsbeat (Jan. 27, 2015), <http://www.bbc.co.uk/newsbeat/article/30999175/warning-why-using-the-term-coloured-is-offensive> (arguing that color, as a term, recalls casual racism at a time when that remained part of everyday-life. Even more specifically, the color-categorization terminology harkens back to the Jim Crow era of segregation).

<sup>11</sup> "ACLU Calls for Kenosha Police Chief and Sheriff to Resign After Jacob Blake Shooting," *ABC News*, (August 30, 2020). <https://www.msn.com/en-us/news/us/aclu-calls-for-kenosha-police-chief-and-sheriff-to-resign-after-jacob-blake-shooting/ar-BB18v29k>

in one's own role in the carceral state. The end of the article proposes an anti-racist curriculum and legal educational framework that gives hope for the future of equity in law schools, and proposes a more integrated and socially conscious method for approaching the law.

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

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<sup>12</sup> See Generally, Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Color Blindness*. New York: The New Press, 2010 revised 2012; Western, Bruce, “Mass Imprisonment and Economic Inequality,” *Social Research- Johns Hopkins University Press* 74, No. 2 (2007): 509-532. McKinsey & Company, “COVID-19: Investing in black lives and livelihoods”, April 2020, a report. Available here: < <https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-investing-in-black-lives-and-livelihoods>> . (A McKinsey study on black lives in light of COVID-19 and the need to invest, black communities) See The American Bar Foundation, Dr. Traci Burch’s Study, [The Old Jim Crow: Racial Residential Segregation and Neighborhood Imprisonment](https://inequality.stanford.edu/sites/default/files/media/media/working_papers/Burch_Old_Jim%20Crow.pdf).

[https://inequality.stanford.edu/sites/default/files/media/media/working\\_papers/Burch\\_Old\\_Jim%20Crow.pdf](https://inequality.stanford.edu/sites/default/files/media/media/working_papers/Burch_Old_Jim%20Crow.pdf).

<sup>13</sup> Lossin, R.H., “In Defense of Destroying Property.” *The Nation*: June 10, 2020. <https://www.thenation.com/article/activism/blm-looting-protest-vandalism/> (last accessed 7.6.2020). See also, Raymond, Adam K. “Looters Hit Luxury Retailers in Soho After a Day of Peaceful Protest. *New York Magazine: Intelligencer*: June 1, 2020. <https://nymag.com/intelligencer/2020/06/looters-hit-luxury-retailers-in-lower-manhattan.html> (last accessed 7.6.2020).

<sup>14</sup> See *infra* FN 6.

<sup>15</sup> Another way to understand this distinction is implicated in the title of this piece, “rioting by a different name” See *Supra* FN 84-88, namely that rioting is the language and voice of the unheard, from Martin Luther King, and to take this American moment of George Floyd and reductively limit it to the concept of single acts of looting would be to “appropriate” the act and undercut the real harms that have afflicted minority communities leading up to this moment of being “unheard” and witnessing the trauma of George Floyd and the state violence on BIPOC America.

<sup>16</sup> Dalrymple, William, “The Original Evil Corporation.” *New York Times: Opinion*: Sept. 4, 2020. <https://www.nytimes.com/2019/09/04/opinion/east-india-company.html> (last accessed July 6, 2020).

impossible to deny that poverty, and subsequently inter-generational poverty, in America disproportionately effects Black and other minority communities.<sup>17</sup> The question is why?

While we have had significant advances in equality under the law, nearly 50 years after the passage of the landmark Civil Rights Act, there is still a racial gap in nearly all areas of structural equity such as in economics, housing, education, and access to quality healthcare. As law scholars, students and practitioners, “we” need to examine the ways that race, class, and historical inequity is related to both criminal justice and economic inequality. Indeed, it is absolutely critical now because the world has recognized the importance of revisiting systemic inequity toward a reformed structural emphasis on Black Lives and resource equity,<sup>18</sup> that legal scholars, practitioners, and the next generation of law students broaden the legal framework and lexicon to a more comprehensive understanding of systemic inequity.

Historically, activists and public officials from across the ideological spectrum have recognized systemic inadequacies that give tremendous advantages to some Americans while deeply disadvantaging others.<sup>19</sup> This article offers insight into the nature of those problems and highlights just a few of the structural inequities, not as an adjunct to but aligned with the traditional studies and progressive interventions of a new criminal justice system,<sup>20</sup> has aggravated America’s

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<sup>17</sup> See *Supra* FN 1-5, listing different economic policies that have impacted inter-generational wealth on BIPOC America.

<sup>18</sup> Blankenship, Mary and Reeves, Richard V., “From the George Floyd Moment to a Black Lives Matter Movement, in Tweets.” Brookings Institute (July 10, 2020). <https://www.brookings.edu/blog/up-front/2020/07/10/from-the-george-floyd-moment-to-a-black-lives-matter-movement-in-tweets/>: “The name of George Floyd looks set to enter the history books along with Rosa Parks and Emmett Till, as the face of a moment that fueled a movement.”

<sup>19</sup> See Senator Robert F. Kennedy’s speeches and actions in the 1960s speaking on the “aspirations” of Black Americans to “build their own communities” while simultaneously developing housing comparable of white America, as evidence of a readiness for an “open society”. Taylor, Keeanga-Yamahtta, *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership*. Chapel Hill, North Carolina: University of North Carolina Press, 2019 at pp. 78-79.

<sup>20</sup> Here, see, the recent development of progressive prosecutor offices, and its attendant cultural-theoretical work that such an institution represents for BIPOC America; i.e., The Kings County District Attorney’s Office, policies of fairness, justice, and community empowerment, from diverting cases to instituting cultural change within the office – Justice 2020 Policy, available at: <http://brooklynda.org/justice2020/> (specifically, “considering non-jail resolutions at every juncture of a case and shifting toward community-based responses to crime; Establishing early release as the default position –

fault lines by race, racial violence, and displacement. The central thesis of “Rioting by a Different Name” stems from the work of prominent Critical Race theorists [CRT].<sup>21</sup> Their call to a narrative-shifting exercise should remain as central today, just as it was in 1995,<sup>22</sup> wherein CRT scholars and their minority visionary inheritors (hereinafter, “BIPOC analysis”) created a critique of the actual framework of law and policy, based as much on positionality as on the contemporary moment of injustices, at the hands of mass-policing and the state.<sup>23</sup> BIPOC analysis of justice is one rooted in a historical framework of a distinctly American history of systemic inequity.<sup>24</sup> Thus,

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not the exception – in most parole proceedings; Prioritizing collaboration with neighborhood leaders and community-based organizations to provide more diversion opportunities and engage stakeholders as partners; Implementing updated data and analytics systems to drive reform and ensure accountability and transparency”); see the office of Philadelphia D.A.’s Larry Krasner (in particular his work on Criminal Justice review task-forces to ensure no one has been unjustly arrested, *see* most recently, the Charging Review Task Force (during COVID-19 as an added layer of protection to unjust prosecutions - <https://medium.com/philadelphia-justice/district-attorney-krasner-announces-dao-review-effort-to-address-growing-case-load-protect-public-22599ea87509>), and other such public statements, with other offices such as the office of the San Francisco District Attorney’s office (*See* the establishment of the Truth, Justice, and Reconciliation Commissions aimed as a community-centered way to address localized efforts at repairing the harm of unaccountable, unjust and racist policing and prosecution, alongside Suffolk County District Attorney Rachael Rollins, and SF District Attorney Chesa Boudin, <https://medium.com/philadelphia-justice/district-attorneys-krasner-rollins-boudin-announce-truth-justice-and-reconciliation-67b776da7c45> . Lastly, consider the work of think-tanks such as John Jay College’s Institute for Innovation in Prosecution, or the “IIP” – website: <https://www.prosecution.org/our-mission> (an inter-office academic, and practical collaboration to promote community-centered standards of safety, fairness, and dignity.)

<sup>21</sup> *See* Kimberlé Williams Crenshaw, et. al., *Critical Race Theory: The Key Writings That Formed the Movement* (Kimberlé Crenshaw et al, eds., 1995); *See also*, Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 Conn. L. Rev. (2011) ; Patricia Williams, *The Alchemy of Race and Rights* 3 (1991); Derrick Bell, *The Derrick Bell Reader* (Richard Delgado & Hean Stefancic eds., 2005); and later iterations of CRT such as LatCrit Scholar Richard Delgado draw inspiration from the central premise that the “subject position is everything in my analysis of law” (Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (3d ed. 2017); *See also* Patricia J. Williams, *The Alchemy of Race and Rights* 3(1991) (arguing that, the study of law from the perspective of “BIPOC analysis” – black and indigenous people of color theorists– is primarily first situated in the personal experience, namely “subject position is everything in my analysis of the law.”)

<sup>22</sup> This, of course, corresponded to the date of publication of two seminal texts; the first, Kimberlé Crenshaw et al. *Critical Race Theory: The Key Writings that Formed the Movement* (Kimberlé Crenshaw et al, eds., 1995).; the second, Patricia J. Williams, *The Alchemy of Race and Rights* 3 (1991).

<sup>23</sup> Bennett Capers, “Afrofuturism, Critical Race Theory, and Policing in the year 2044,” *New York University Law Review*, Vol. 94, No. 1 April 2010, specifically, Part III, 30-58 (productively positing the positional difference when in the future policing and its attendant legal framework might change, relying on subjective changes in the experience of minority populations to majority populations, stating, “How might policing – from what constitutes a crime, to what technologies are deployed by police, to what constitutional restraints are brought to bear on law enforcement, to what sentences and punishments are deemed appropriate – change in the year 2044 and beyond when people of color make up the majority of the country and become the country’s decisionmakers?”) and in that same section a discussion of reparations (“And there might be some discussion of reparations, but the discussions will likely be symbolic, since in a future informed by Afrofuturism and Critical Race Theory, economic parity will already be the norm”) at pp. 38.

<sup>24</sup> *See Id.* at pp. 45, stating that the “criminalizing” and surveillance, i.e., mass policing of black and brown violence and their attendant racial harms is particularly rooted in American history which includes not permitting minority

this article proposes a Justiceology<sup>25</sup> inter-disciplinary framework as much rooted in understanding the law and its functions of producing systemic inequity for BIPOC America in history, as it focuses on expanding positionality<sup>26</sup> in law and criminal legal studies, by shifting the narrative to the experience of America looking backwards from George Floyd, as a means of moving forward.

In many ways the notion of a Justiceology are deconstructive<sup>26</sup> as they are re-constructive, imagining a future of racial justice healing, equity and design of how the law is taught and practiced

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individuals to testify against whites, and subsequent history of undercutting credibility, or not believing them, when black and brown witnesses did testify. When taken as a whole, this structural inequity in access to justice can be seen on the same scale and imbalance of power as that of the systemic inequity of racial residential segregation (*See* Traci Burch's "The Old Jim Crow: Racial Residential Segregation and Neighborhood Imprisonment" The American Bar Foundation) available here:

[https://inequality.stanford.edu/sites/default/files/media/media/working\\_papers/Burch\\_Old\\_Jim%20Crow.pdf](https://inequality.stanford.edu/sites/default/files/media/media/working_papers/Burch_Old_Jim%20Crow.pdf);

access to capital and inter-generational financial equity, *see* Ta-Nehisi Coates article *Supra* FN 8 and the "Case for Reparations" with its attendant systemic inequities of homeownership and exclusion from access to sufficient loans via the Fair Housing Act; and the most recent exposure of America's fault-lines and racial disparities in access to adequate healthcare as exposed by the COVID-19 pandemic -*See* Linda Villarosa, "'A Terrible Price': The Deadly Racial Disparities in COVID-19 America" *N.Y. Times Magazine* May 1, 2020.

<sup>25</sup> A term coined by this author, owing to the work done in the social justice bureau at the Kings County District Attorney's Office, as a Senior Prosecutor, as well as the work in private consulting designing a renewed curriculum, titled Justiceology-by-Design, owned by this author, that outline and design the four steps of transformational pedagogical change for Revisioning American Law in our current American Climate post George Floyd.

<sup>26</sup> As Patricia Williams has said, as a black woman, and legal scholar – "subject position is everything in my analysis of the law" in Patricia J. Williams, *The Alchemy of Race and Rights* 3 (1991). As well as, the argument that as a critical race scholar writing in the era of George Floyd, as this article is arguing, a return to CRT's emphasis on race and subjectivity in light of this "long shadow of slavery" history of systemic inequity and the law's impact on BIPOC America, turning to subjectivity "both in terms of nonneutrality and in terms of embracing 'the linguistic position of subject rather than object'" remains crucial to how law and race can understand each other. *See* Bennett Caper's FN 16 (in *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*) quoting Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. Cal. L. Rev. 2231, 2252 (1992). Another way to describe this interaction, though this article does not have room to plumb the depths of the concept here – is that of narrative-shifting, and de-centering the framework by which we, as legal scholars, lawyers, and advocates for justice frame the conversation of law, power, and race to better restore communities that have been historically marginalized.

<sup>26</sup> Borrowing from Derrida's notion of "deconstruction" in philosophy, or, the advent of the word "equality" and "difference" as both subject-specific positions that have an inherent conflict with the institution and the discourse position of the person who is under the weight of the history of systemic inequity. *See, for example*, "'What It Is We Could Call Equal': Cultural Politics, Language, and the Law, *American Literary History*, Vol. 5, No. 4 (Winter, 1993) pp. 735-749 (stating, "The centrality of discourse as a terrain for political struggle is a commonplace of recent critical theory, which tells us that the crucial contests of the postmodern age... [are] in the realms of signification using images and words. [ . . . ]The critical race theorists we are concerned with here have chosen to apply their theoretical weapons to the workings of the law as text and institution, and especially to such keywords as 'right', 'justice', and 'democracy'. Each of the writers... is concerned with the way the law as an order of discourse positions its subjects and constrains the range of significations available to them. Drucilla Cornell, Anne Phillips, and Patricia Williams examine the tendency of legal discourse to neutralize *difference* and so reproduce *inequality* – a well-established area of debate in critical legal studies and feminist political theory"). At pp. 735.

that does not neglect the “voices of the unheard.” As this issue of *The Journal of Gender, Race and Justice* has framed for its readers, this is an innovative, and culturally-responsive positional-shifting response of the moment, that seeks to expand the boundaries of legal justice studies to not neglect critical consciousness in poetry, art, activism, and other forms of experiential expression.<sup>27</sup> Central to this reconstructive work are some key building blocks of critical consciousness, which Fordham Law Scholar Bennett Capers, and critical-race-theory-interventionist of criminal law and consciousness has outlined in his article, “Afrofuturism, Critical Race Theory and Policing in the Year 2044”<sup>28</sup>, as key lineage-foundations that are relevant here.

Based on this expansion of critical consciousness, and building off the important creative-analytical critical foundation of CRT, this article’s BIPOC imaginings considers 1) the origins of policing as one rooted in American slavery that is mainly a form of economic surveillance; 2) reimagines the current discourse around the brutal murder of George Floyd and the structural inequity that has led to this point in history, in laws, in policies, and in legislation, as culled from the discourse between “protest” and “looting”; and 3) turns to instances of white supremacy that has historically infiltrated law enforcement in the 20<sup>th</sup> century, and posits that a new order of justice and equitable “protection” must be implemented to disrupt the disparities and violence that the criminal justice system has had on Black America.

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<sup>27</sup> See this issue of *The Iowa Journal of Gender, Race and Justice*’s inter-disciplinary focus and its call-to-arms, as a necessary intervention to expand academic notions of public safety, justice, and ways to reform Criminal Law as responsive to BIPOC American historical systemic inequity.

<sup>28</sup> Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L.Rev. 1, 4-5(April 2019)(arguing that, the central inheritance of CRT for our current minority visionary moment remains to “confronting the ‘historical centrality and complicity of law in upholding white supremacy’ [and] transforming the relationship between white supremacy to reshape American jurisprudence in a project of racial emancipation and anti-subordination.”)

## II. LOOTING ECONOMIC EQUITY FROM BLACK AMERICA

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

Since 1970, the number of persons who have been imprisoned for committing crimes in the United States has grown exponentially.<sup>29</sup> Every year overall, there are 10.6 million jail admissions in the U.S.<sup>30</sup> The Prison Policy Initiative estimates at least 4.9 million individuals cycle through jail each year.<sup>31</sup> Of those being admitted, there remains a disproportionate percentage of Black inmates compared to non-black inmates.<sup>32</sup> In 2019, 33% of the U.S. prison population is Black, while only 12% of the adult U.S. population is Black.<sup>33</sup> As of 2018, the federal and state imprisonment rate for Black males was 5.8 times that of white male counterparts, and the imprisonment rate of Black females was 1.8 times the rate of white females.<sup>34</sup>

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<sup>29</sup> See The American Bar Foundation, Dr. Traci Burch's Study, [The Old Jim Crow: Racial Residential Segregation and Neighborhood Imprisonment](https://inequality.stanford.edu/sites/default/files/media/media/working_papers/Burch_Old_Jim%20Crow.pdf). Available here: <[https://inequality.stanford.edu/sites/default/files/media/media/working\\_papers/Burch\\_Old\\_Jim%20Crow.pdf](https://inequality.stanford.edu/sites/default/files/media/media/working_papers/Burch_Old_Jim%20Crow.pdf)> .

: “Since 1970, the number of people imprisoned for committing crimes in the United States has grown exponentially. Although the number of prisoners declined slightly in 2010, 1.6 million people, or 1 in 200 adults, in the U.S. are in prison today (Guerino, Harrison, and Sabol 2011). The racial disparity in imprisonment is well known: Blacks and Hispanics each make up about 13 percent of the U.S. population, but are 37 percent and 22 percent of the nation’s prisoners, respectively. This disparity is particularly burdensome for Blacks: non-Hispanic Black males had an imprisonment rate of 3.1 percent, a rate that is more than seven times that of non-Hispanic white males. [...] Observers have referred to the advent of mass imprisonment as ‘The New Jim Crow’ because of its devastating racially disparate impact (Michelle Alexander 2011). However, old elements of Jim Crow, particularly racial residential segregation, are also implicated in the mass imprisonment phenomenon.”

<sup>30</sup> 10.6 million jail admissions includes multiple admissions, and thus does not mean that 10.6 million unique individuals cycle through jails in a year. Prison Policy Initiative. According to a 2017 National Survey of on Drug Use and Health, which included questions about whether respondents have been booked into jail, The Prison Policy Initiative estimates that at least 4.9 million unique individuals were arrested and booked in jails in 2017. *Prison Policy Initiative*, “Arrest, Release, Repeat: How Police and Jails Are Misused to Respond To Social Problems.” Alexi Jones and Wendy Sawyer. August 2019. Available here: <<https://www.prisonpolicy.org/reports/repeatarrests.html>> .

<sup>31</sup> *Id.*

<sup>32</sup> Gramlich, John, “The Gap between the numbers of blacks and whites in prison is shrinking, Pew Research, April 30, [pewresearch.org](http://pewresearch.org);

<sup>33</sup> See *Id.* McKinsey’s article citing Pew Research, April 30, 2019, [pewresearch.org](http://pewresearch.org) stating that though the gap is shrinking between blacks and whites, it is still quite a large gap. Article by John Gramlich.

<sup>34</sup> See *Pew Research supra*; see also The Department of Justice, Bureau of Justice Statistics, “Prisoners in 2018” Summary, NCJ253516, April 2020. Available here: <[https://www.bjs.gov/content/pub/pdf/p18\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/p18_sum.pdf)> .

Let's turn first to arrest statistics and the over-representation of Black Americans. Despite constituting only 13% of the general population, Black men and women account for 21% of all people who were arrested just once, and 28% of all people arrested multiple times in 2017.<sup>35</sup> The same is true of incarceration. Turning now to incarceration statistics, a similar trend can be found in the over-representation of Black Americans. Incarceration statistics show that in the U.S., among persons jailed three or more times ("frequent utilizers"), those individuals face severe economic and educational disadvantages. Looking at national data, 42% of all those arrested and booked in 2017 were Black.<sup>36</sup> Sentencing outcomes, too, in large urban courts have shown statistically significant disparities between white, and minority defendants.<sup>37</sup>

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

The clear overrepresentation of Black America in the criminal justice system has created long-lasting effects on Black neighborhoods.<sup>38</sup> Social science research has shown that high arrest and imprisonment rates at the neighborhood level can have devastating collateral effects on

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<sup>35</sup> The Prison Policy Initiative: Arrest, Release, Repeat: How Police Jails Are Misused to Respond to Social Problems. Jones, Alexi and Sawyer, Wendy. August 2019. Available here:

<https://www.prisonpolicy.org/reports/repeatarrests.html#appendix>

<sup>36</sup> *Id.*

<sup>37</sup> Demuth, Stephen, and Steffensmeier, Darrell. 2004. "Ethnicity Effects on Sentence Outcomes in Large Urban Courts: Comparisons among White, Black, and Hispanic Defendants." *Social Science Quarterly* 85:994-1011.

<sup>38</sup> *Prison Policy Initiative*, "Arrest, Release, Repeat: How Police and Jails Are Misused to Respond To Social Problems." Alexi Jones and Wendy Sawyer. August 2019. Available here:

<<https://www.prisonpolicy.org/reports/repeatarrests.html>>. - standing for the data that in 2017, Black Americans are overrepresented among people who were arrested and 42% of people arrested and booked 3 or more times were black. , See also The American Bar Foundation, Dr. Traci Burch's Study, [The Old Jim Crow: Racial Residential Segregation and Neighborhood Imprisonment](https://inequality.stanford.edu/sites/default/files/media/media/working_papers/Burch_Old_Jim_%20Crow.pdf). Available here: <

[https://inequality.stanford.edu/sites/default/files/media/media/working\\_papers/Burch\\_Old\\_Jim\\_%20Crow.pdf](https://inequality.stanford.edu/sites/default/files/media/media/working_papers/Burch_Old_Jim_%20Crow.pdf)> . Alexander, Michelle, "The Injustice of This Moment is Not an 'Aberration: From Mass Incarceration to Mass Deportation, our Nation Remains in Deep Denial." *New York Times- Opinion*. Jan. 17, 2020. Web. <<https://www.nytimes.com/2020/01/17/opinion/sunday/michelle-alexander-new-jim-crow.html>>

last accessed 1.22.2020. Loury, Glenn C., *Race, Incarceration, and American Values*. Cambridge, MA: MIT Press, 2008, commentary by Pam Karlan.

economic stability,<sup>39</sup> marriage opportunities<sup>40</sup>, public health,<sup>41</sup> more crime,<sup>42</sup> and other phenomena within the community.<sup>43</sup> These effects make it difficult or impossible to advocate for their own health and well-being because they are outside of conventional social systems.<sup>44</sup> Examples of these systems include homelessness, socioeconomic disadvantage, and other disruptions resulting from over-policing.<sup>45</sup>

The cultural and social consequences of disproportionate of those touched by the criminal justice “footprint” – both in arrest and incarceration – cannot be overstated. Indeed, subjected to life-altering imprisonment, individuals who were “frequent utilizers” or those imprisoned three or

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<sup>39</sup> See Travis, Jeremy. 2004 “Reentry and Reintegration: New Perspectives on the Challenges of Mass Incarceration.” In *Imprisoning America: The social Effects of Mass Incarceration*, edited by M. Pattillo, D. Weiman, and B. Western. New York: Sage.

<sup>40</sup> On the Familial Consequences of Over-Policing and Over-Incarceration: See Donald Braman, “Families and Incarceration” in *Invisible Punishment* (2002) Ed. By M. Mauer and M. Chesney-Lind. New York: New Press; Bruce Western and Christopher Wildeman “The Black Family and Mass Incarceration.” *The ANNALS of the American Academy of Political and Social Science* 621: 221-242 (2009). See more generally, Robert J Sampson, “The neighborhood context of well-being.” *Perspectives in Biology and Medicine* (2010), 46:53; and Clea A. Sucoff, and Dawn M. Upchurch. “Neighborhood Context and the risk of childbearing among metropolitan-area black adolescents.” *American Sociological Review* (1998) 571-585.

<sup>41</sup> 10.6 million jail admissions includes multiple admissions, and thus does not mean that 10.6 million unique individuals cycle through jails in a year. Prison Policy Initiative. According to a 2017 National Survey of on Drug Use and Health, which included questions about whether respondents have been booked into jail, The Prison Policy Initiative estimates that at least 4.9 million unique individuals were arrested and booked in jails in 2017. Prison Policy Initiative, “Arrest, Release, Repeat: How Police and Jails Are Misused to Respond To Social Problems.” Alexi Jones and Wendy Sawyer. August 2019. Available here: <https://www.prisonpolicy.org/reports/repeatarrests.html> .

<sup>42</sup> On the Criminal Consequences of Over-Policing and Over-Incarceration: See Edward S. Shihadeh and Nicole Flynn. “Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence.” *Social Forces* (1996) 74:1325-1352; See also Robert J. Sampson and Stephen W. Raudenbush and Felton Earls. “Neighborhoods and violent crime: A Multilevel study of Collective Efficacy. *Science* (1997). 277:918; See also James Lynch and William Sabol, “Assessing the Effects of Mass Incarceration on Informal Social Control in Communities.” *Criminology and Public Policy* (2004) 3:267-294.

<sup>43</sup> Traci Burch, The American Bar Foundation, The Old Jim Crow: Racial Residential Segregation and Neighborhood Imprisonment. Available here: [https://inequality.stanford.edu/sites/default/files/media/media/working\\_papers/Burch\\_Old\\_Jim%20Crow.pdf](https://inequality.stanford.edu/sites/default/files/media/media/working_papers/Burch_Old_Jim%20Crow.pdf) (stating, “...research has shown that high imprisonment at the neighborhood level can have devastating collateral consequences for economic stability, marriage opportunities, public health, crime, and other phenomena at the neighborhood level.”) See also Demuth, Stephen, and Steffensmeier, Darrell. 2004. “Ethnicity Effects on Sentence Outcomes in Large Urban Courts: Comparisons among White, Black, and Hispanic Defendants.” *Social Science Quarterly* 85: 994-1011.

<sup>44</sup> McKinsey & Company, “COVID-19: Investing in black lives and livelihoods”, April 2020, a report. Available here: <<https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-investing-in-black-lives-and-livelihoods>> at pg. 7.

<sup>45</sup> *Id.* See also: Joy Moses, National Alliance to End Homelessness, “demographic data project: Race, ethnicity, and homelessness,” Homeless research Institute, August 2019. Available here: <https://endhomelessness.org/new-data-on-race-ethnicity-and-homelessness/>. Last accessed 6.2.2020.

more times, were found to have a number of collateral issues resulting in serious social and collective consequences.<sup>46</sup> Additionally, a majority of “frequent utilizers” surveyed suffered from substance abuse disorders, economic instability (a majority of frequent utilizers attaining an annual income of only below \$10,000),<sup>47</sup> many had harms associated with schooling,<sup>48</sup> and a majority attaining only less than a high school education.<sup>49</sup> Finally, taking as an initial premise that communities that are over-incarcerated and over-arrested experience a higher likelihood of segregation, there are a host of social-ills that arise from segregated and isolated communities,<sup>50</sup>

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<sup>46</sup> The Prison Policy Initiative: Arrest, Release, Repeat: How Police Jails Are Misused to Respond to Social Problems. Jones, Alexi and Sawyer, Wendy. August 2019. Available here:

<https://www.prisonpolicy.org/reports/repeatarrests.html#appendix>: The PPI in 2017 took a study of a test group and found that of the population jailed the frequent utilizers were less likely to gain stability and experienced a higher rate of structural inequity. PPI states, out of the test group the percentage of persons jailed 3 or more times within 12 months were over three times more likely to be unemployed, over three times more likely to have received less than a high school education, and more than twice the number had an annual income below \$10,000. Other correlations found were:

- About half (50%) of those frequently arrested had annual incomes below \$10,000 and 85% had incomes below \$20,000.
- Educational attainment was lowest among people with 3 or more arrests in a year. Three-quarters (74%) had a high school education or less – with 38% without a high school diploma.
- People with 3 or more arrests were **more likely to have been diagnosed with chronic health conditions** compared to those with no arrests, including heart conditions (15% vs. 10%), HIV (4.12% vs. 0.15%), cirrhosis (3.47% vs. 0.21%), and hepatitis B or C (2.43% vs. 1.04%).
- Frequent utilizers were **more likely to use emergency rooms multiple times in the past year**. 36% of frequent utilizers had used the emergency room 2 or more times in the past year, compared to 11% of people with no arrests.

<sup>47</sup> *Id.*

<sup>48</sup> On the Educational Consequences of Over-Policing and Over-Incarceration *See also*, Jeffrey M. Timberlake, “Racial and ethnic inequality in the duration of children’s exposure to neighborhood poverty and affluence.” *Social Problems* 54:319-342.; *See also* Jeffrey M. Timberlake, “Effects of household and neighborhood characteristics on children’s exposure to neighborhood poverty and affluence.” *Social Science Research* (2009) 38: 458-476; Sean F. Reardon and John T. Yun. “Integrating neighborhoods, segregating schools: the retreat from school desegregation in the South, 1999-2000.” (2002) *NCL Rev.*, 81:1563. Patrick Sharkey, Robert J. Sampson, and Stephen W. Raudenbush, “Durable effects of concentrated disadvantage on verbal ability among African-American children.” (2008) *Proceedings of the National Academy of Sciences* 105:845; *See also* Douglas S. Massey and Mary J. Fischer, “The effect of childhood segregation on minority academic performance at selective colleges.” (2006) *Ethnic and Racial Studies* 29:1-26; *See also* Douglas S. Massey, Andrew B. Gross and Mitchell L. Eggers, “Segregation, the concentration of poverty, and the life chances of individuals.” (1991) *Social Science Research* 20:397-42.

<sup>49</sup> The Prison Policy Initiative: Arrest, Release, Repeat: How Police Jails Are Misused to Respond to Social Problems. Jones, Alexi and Sawyer, Wendy. August 2019. Available here: <

<https://www.prisonpolicy.org/reports/repeatarrests.html#appendix>>

<sup>50</sup> Traci Burch, The American Bar Foundation, *The Old Jim Crow: Racial Residential Segregation and Neighborhood Imprisonment*. Available here:

[https://inequality.stanford.edu/sites/default/files/media/media/working\\_papers/Burch\\_Old\\_Jim%20Crow.pdf](https://inequality.stanford.edu/sites/default/files/media/media/working_papers/Burch_Old_Jim%20Crow.pdf)

(stating, “...research has shown that high imprisonment at the neighborhood level can have devastating collateral consequences for economic stability, marriage opportunities, public health, crime, and other phenomena at the neighborhood level.”)

including, disparate effects on the educational,<sup>51</sup> economic,<sup>52</sup> housing instability,<sup>53</sup> and negative health outcomes.<sup>54</sup> These negative outcomes include a statistically significant majority facing severe health disadvantages, more likely to have been diagnosed with a chronic illness, compared to persons incarcerated once, or twice.

The U.S. income gap is most pronounced among Black Americans, but its growth is notable among all segments of the population.<sup>55</sup> In 2009, the highest quintile of earners collected 50 percent of the total income in the United States. In contrast, the bottom three quintiles combined brought in just 26.7 percent of the total income that year (with the second-highest quintile earning 23.3 percent).<sup>56</sup> In terms of the disparate ratio on black and Latinx families, the median wealth for U.S. households in 2009 was \$113,149 compared with \$6,325 for Hispanics and \$5,677 for Black Americans.<sup>57</sup> Indeed, at the time of that study, the white-black gap had grown to the widest it had

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<sup>51</sup> See FN. 50

<sup>52</sup> On the Economic Consequences of Over-Policing and Over-Incarceration See Jonathan Rothwell and Douglas S. Massey. "Density Zoning and Class Segregation in U.S. Metropolitan areas." *Social Science Quarterly* 91:1123-1143; William Julius Wilson, *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy*. Chicago: University of Chicago Press 1987; See also William Julius Wilson, "The Political and Economic Forces Shaping Concentrated Poverty." *Political Science Quarterly* (2009) 123: 555-571; See also Douglass S Massey and Mary J Fischer, "How Segregation Concentrates Poverty." (2000) *Ethnic and Racial Studies*. 23:670-691.

<sup>53</sup> On the Housing Consequences of Over-Policing and Over-Incarceration See Douglas S. Massey and Nancy A Denton, "The Dimensions of Residential Segregation." *Social Forces* (1998) 67:281-315; See also: Douglas S. Massey and Nancy A Denton. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge: Harvard University Press (1993); See also Douglas S. Massey and Zoltan J. Hajnal, "The Changing Geographic Structure of Black-White segregation in the United States." (1995) *Social Science Quarterly*.

<sup>54</sup> On the Health Consequences of Over-Policing and Over-Incarceration See Michael Massoglia, "Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses." *Journal of Health and Social Behavior*. 49:56-71. See also, Anthony Polednak, "Poverty, residential segregation and black/white mortality ratios in urban areas." *Journal of health care for the poor and underserved*. 4:363-373; See also Loic Wacquant, "Deadly Symbiosis", *Punishment & Society* (2001) 3:95-134; See also David R. Williams and Chiquita A. Collins, "Racial Residential Segregation: a Fundamental Cause of Racial Disparities in Health." *Public Health Reports* (2001) 116:404; See also Anthony Polednak, "Poverty, Residential Segregation, and Black/White Mortality Ratios in Urban Areas." *Journal of Healthcare for the Poor and Underserved* (1993) 4:363-373.

<sup>54</sup> Caliendo, Stephen M., *Inequality in America: Race, Poverty, and Fulfilling Democracy's Promise*. Boulder, CO: Westview Press/Perseus Books Group, 2015 at pp. 41. (originally published 1971).

<sup>55</sup> Caliendo, Stephen M., *Inequality in America: Race, Poverty, and Fulfilling Democracy's Promise*. Boulder, CO: Westview Press/Perseus Books Group, 2015 at pp. 41.

<sup>56</sup> Id. at 41-3.

<sup>57</sup> Id. at 52.

been since the census began tracking such data in 1984.<sup>58</sup> Another report found in 2010 that non-housing assets for white families are typically around \$100,000 while for Black American families' assets averaged about \$5,0000, with 25 percent of black families having no assets at all.<sup>59</sup> All in all, there has been a steady increase in this trend over the past forty years, such that the top 5 percent of earners in 1970 pulled in 16.6 percent.<sup>60</sup> That number was stable a decade later but rose to 18.5 percent in 1990 and to 22.1 percent in 2000.<sup>61</sup> In 2011, the top 5 percent of households earned 21.5 percent of the total income. (Numbers as of 2015).<sup>62</sup>

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

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

The COVID-19 pandemic amplified these trends in communities of color and low-income communities, which were already historically structurally marginalized.<sup>63</sup> In April 2020, Black Americans made up a statistically-significant percentage of the U.S. workforce in nine of the ten lowest-wage jobs considered most high-contact essential services.<sup>64</sup> Black Americans have a

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<sup>58</sup> *Id.*

<sup>59</sup> Thomas M. Shapiro Tatjana Meschede, and Laura Sullivan, "The Racial Wealth Gap Increases Fourfold," DEMOS, via the Heller School's Institute on Assets and Social Policy at Brandeis University, May 2010, <https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/racial-wealth-gap-why-policy-matters.pdf>

<sup>60</sup> *Id.* at 41-3.

<sup>61</sup> *Id.* at 41-3.

<sup>62</sup> *Id.*

<sup>63</sup> Serwer, Adam, "The Coronavirus Was An Emergency Until Trump Found out Who Was Dying." The Atlantic. <<https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389/>>. See also: Linda Villarosa, " 'A Terrible Price': The Deadly Racial Disparities in COVID-19 America" *N.Y. Times Magazine* May 1, 2020. New York University's Furman Center Report, April 10, 2020. "COVID-19 Cases in New York City, a Neighborhood-Level Analysis." Available here on the blog post The Stoop: <https://furmancenter.org/thestoop/entry/covid-19-cases-in-new-york-city-a-neighborhood-level-analysis> last accessed 6.2.2020.

<sup>64</sup> McKinsey & Company, "COVID-19: Investing in black lives and livelihoods", April 2020, a report. Available here: <<https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-investing-in-black-lives-and-livelihoods>> . (A McKinsey study on black lives in light of COVID-19 and the need to invest, black communities); (stating, psychiatric

higher probability of being uninsured, specifically where non-elderly Black people are 1.5 times more likely to be uninsured than white counterparts, despite the availability of the Affordable Care Act.<sup>65</sup> Black Americans were more likely to live in a neighborhood or location that had fewer adequate health and social services.<sup>66</sup> Black Americans, on average from birth have a life expectancy of about 3.5 years lower than white life expectancy,<sup>67</sup> whose health outcomes are on par with poorer countries in the world. According to a recent McKinsey report, Black Americans are 1.4-1.8 times more likely to live in counties where there is a higher risk of contagion.<sup>68</sup> According to another study from the National Health Interview Survey, the historical systemic inequity that undergirds these counties, create the possibility that secondary effects of the COVID-19 virus, such as economic disruption, community instability, and structural barriers to medical care will disproportionately effect Black Americans.<sup>69</sup> The top five indicators that were contributing factors to the lasting effects of the pandemic on Black America were: (1) the underlying health conditions of the community, (2) the poverty rate of the community, (3) the number of hospital beds in the local community healthcare facilities, (4) the percentage of people in severe housing conditions, and (5) population density.<sup>70</sup>

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aides (39%); orderlies (38%); nursing assistants (38%); cooks, restaurant workers (16%); pharmacy aides (15%); food prep supervisors and servers (15%); childcare workers (15%); pharmacy technicians (14%); medical assistants (14%); funeral attendants (11%)

<sup>65</sup> “Health disparities experienced by black or African Americans – United States,” *Morbidity and Mortality Weekly Report*, Centers for Disease Control and Prevention (CDC), January 2005, Volume 54, Number 1, pp. 1-3, cdc.gov, cited in McKinsey.

<sup>66</sup> McKinsey & Company, “COVID-19: Investing in black lives and livelihoods”, April 2020, a report. Available here: <<https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-investing-in-black-lives-and-livelihoods>> . (A McKinsey study on black lives in light of COVID-19 and the need to invest, black communities)

<sup>67</sup> Linda Villarosa, “‘A Terrible Price’: The Deadly Racial Disparities in COVID-19 America” *N.Y. Times Magazine* May 1, 2020.

<sup>68</sup> McKinsey & Company, “COVID-19: Investing in black lives and livelihoods”, April 2020, a report. Available here: <<https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-investing-in-black-lives-and-livelihoods>> . (A McKinsey study on black lives in light of COVID-19 and the need to invest, black communities)

<sup>69</sup> Summary Health Statistics: National Health Interview Survey, 2018, cited in McKinsey’s Study on “COVID 19: Investing in Black Lives and Livelihoods” (“Even Black Americans who do not need care for COVID-19 are likelier than white Americans to suffer from the pandemic’s secondary effects on our overloaded medical system, including delayed-but necessary – medical procedures.”)

<sup>70</sup> See McKinsey & Company, “COVID-19: Investing in black lives and livelihoods”, April 2020, a report.

The COVID-19 pandemic has only exposed America’s giant fault-lines that have pre-existed from over a century of structural inequality from Slavery, the post-emancipation Racial Terror<sup>71</sup> associated with lynching and segregation during Jim Crow, the mass displacement of Black Americans in the Great Migration to northern cities, urban housing policies that harmed BIPOC communities, and finally the current carceral state of mass incarceration and mass policing that led to the murder of George Floyd.

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

On May 25, 2020, just as America was preparing for a reopening from COVID-19, an Black American man named George Floyd, presented a phony 20 dollar bill at a local deli.<sup>72</sup> Following the recognition of the \$20 bill as counterfeit, a worker at the deli followed protocol by calling the police.<sup>73</sup> Officer Derek Chauvin attempted to arrest Mr. Floyd by placing his knee directly on Mr. Floyd’s throat.<sup>74</sup> Mr. Floyd was groaning, sobbing, and repeatedly pleaded, “Please!” and “I can’t breath!”<sup>75</sup> A bystander is heard stating, “you got him down. Let him

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<sup>71</sup> A term used most often by Bryan Stevenson, and his work involved in the Equal Justice Initiative. Capehart, Jonathan, “Bryan Stevenson wants us to confront our country’s racial terrorism and then say, ‘Never again.’” *The Washington Post*. Opinion. (April 24, 2018). <https://www.washingtonpost.com/blogs/post-partisan/wp/2018/04/24/bryan-stevenson-wants-us-to-confront-our-countrys-racial-terrorism-and-then-say-never-again/>.

<sup>72</sup> Nelson, David “George Floyd: How a suspected counterfeit \$20 bill led to protests across the U.S.” A.S. U.S.A. [https://en.as.com/en/2020/05/31/other\\_sports/1590954856\\_526126.html](https://en.as.com/en/2020/05/31/other_sports/1590954856_526126.html).

<sup>73</sup> *Id.*

<sup>74</sup> See Dakss, Brian (May 26, 2020), “Video shows Minneapolis cop with knee on neck of motionless, moaning man who later died.” CBS News. <https://www.cbsnews.com/news/minneapolis-police-george-floyd-died-officer-kneeling-neck-arrest/> last accessed 5.31.2020. Hauser, Christine (May 26, 2020). “F.B.I. to investigate Arrest of Black Man Who Died after Being Pinned by Officer. N.Y. Times , <https://www.nytimes.com/2020/05/29/us/derek-chauvin-george-floyd-worked-together.html>. last accessed 5.31.2020; *See also*: Jany, Libor (May 26, 2020). “Minneapolis police, protesters clash almost 24 hours after George Floyd’s death in custody.” Star Tribune. <https://www.startribune.com/minneapolis-police-marchers-clash-over-death-of-george-floyd-in-custody/570763352/> last accessed 5.31.2020

<sup>75</sup> Hauser, Christine (May 26, 2020). “F.B.I. to investigate Arrest of Black Man Who Died after Being Pinned by Officer. N.Y. Times , <https://www.nytimes.com/2020/05/29/us/derek-chauvin-george-floyd-worked-together.html>.

breath!”<sup>76</sup> Another employee of the deli-grocer cried out at the execution unfolding before his eyes, to the store owner.<sup>77</sup> That employee recounts yelling out to the owner as he witnessed a death, crying and yelling “What should I do? The guy can’t breathe. They’re killing him.”<sup>78</sup> The response was simply to record it live, and call the police again.<sup>79</sup> He later died in custody, setting off nationwide protests and demonstrations.<sup>80</sup>

That deli owner, Mike Abumayyaleh, was later seen by the American public standing shoulder-to-shoulder with George Floyd’s family members.<sup>81</sup> This action was an expression of solidarity for the tragedy, and a powerful reminder that the nightmare of being Black and over-policed in America in city neighborhoods happens everyday.<sup>82</sup> The deli owner spoke out directly against the “abuse of power and racial injustice” that was on exhibit here by concluding, “we stand for Black Lives Matter.”<sup>83</sup> One of the most critical parts of this brutality – and one which we must all turn toward as legal, historical, and scholars in pursuit of equity – is the origins of the call for help to the Minneapolis police, and the officer’s response. An individual presented a suspected

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<sup>76</sup> Nawaz, Amna (May 26, 2020). “What we know about George Floyd’s death in Minneapolis police custody.” PBS Newshour.

<sup>77</sup> Burke, Minyvonne “Owner of Minneapolis grocery store says he told employee ‘call the police on the police’ she witnessed George Floyd Death’. NBC News (May 28, 2020). <https://www.nbcnews.com/news/us-news/owner-minneapolis-grocery-store-says-he-told-employee-call-police-n1216461>. Last accessed 6.6.2020.

<sup>78</sup> Burke, Minyvonne “Owner of Minneapolis grocery store says he told employee ‘call the police on the police’ she witnessed George Floyd Death’. NBC News (May 28, 2020). <https://www.nbcnews.com/news/us-news/owner-minneapolis-grocery-store-says-he-told-employee-call-police-n1216461>..

<sup>79</sup> *Id.*

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

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

<sup>82</sup> “Owner of Cup Foods Condemns Policy Killing of George Floyd.” (May 28, 2020) Sahan Journal.

<https://sahanjournal.com/news/owner-of-cup-foods-condemns-police-killing-of-george-floyd/> (stating that members of their own store came out to yell and stop the police from going further and that the community must understand that Hussein, the store’s own considers the police the real threat).

<sup>83</sup> “Owner of Cup Foods Condemns Policy Killing of George Floyd.” (May 28, 2020) Sahan Journal.

<https://sahanjournal.com/news/owner-of-cup-foods-condemns-police-killing-of-george-floyd/> last accessed 5.31.2020.

counterfeit-20 dollar bill, and in response, the Minneapolis police brutally murdered that individual *against* the wishes of the victim, in front of the store where it occurred.<sup>84</sup>

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

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

What had gone unrecognized in the justifiable protests after the murder of George Floyd, was the underlying history of silence that had suffered through structural inequity, and been the victim of increasingly aggressive and poverty-focused mass policing tactics, were finally rising up to make their voices heard. During the protests, the media had been in a frenzy interviewing Cornell West, Don Lemon on CNN had no words the night of May 30th as protests continued, on the one hand justifiably enraged by the lineage of modern “lynching” as he, and many in the community called it, the criminal justice complex, and the killing of another unarmed Black American man through the use of force.<sup>85</sup> What appeared to most of the American public was Don Lemon “calling out” the wealthy power community of actors, actresses, and politicians – most

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<sup>84</sup> Nelson, David “George Floyd: How a suspected counterfeit \$20 bill led to protests across the U.S.” A.S. U.S.A. [https://en.as.com/en/2020/05/31/other\\_sports/1590954856\\_526126.html](https://en.as.com/en/2020/05/31/other_sports/1590954856_526126.html). Last accessed 6.6.2020.

<sup>85</sup> See: Haring, Bruce (May 31, 2020) “CNN’s Don Lemon Takes Sour View of Hollywood’s ‘Strangely Quiet’ Stance on Protests. Yahoo! Entertainment. <https://www.yahoo.com/entertainment/cnn-don-lemon-takes-sour-170223923.html>

prominently the President of The United States, the Tweeter-in-Chief – who up until this point had become silent instead choosing to activate a lexicon of race-baiting.<sup>86</sup>

*A. Unheard Again: The Bait-and-Switch of Focusing on Policing Violence that led to Protest*

Six nights from the date of George Floyd’s murder,<sup>87</sup> CNN host Don Lemon stated the following: “What about Hollywood? Why aren’t they helping these young people? These young people are out there standing on a platform on the edge of an abyss by themselves.”<sup>88</sup> Don Lemon continued to ask these series of questions why there are not more politicians responding, and why the moment of racial unrest, and collective multi-racial protest in the full view of this American moment of injustice remained unheard.<sup>89</sup>

At this time in America, the prevalence of the acknowledgement of the unheard is never more clear: from the unheard who have died at the hands of police brutality, to the unheard who have fallen to COVID-19 across communities of color, to unheard leadership who have failed to act. Most pertinent to this article is the lineage of being unheard from George Floyd and Eric Garner to the historical context of systemic inequity on the persons who have been stamped out of history by police brutality and continued laws, policy, that propagate inhumanity (“I can’t breathe”).<sup>90</sup>

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<sup>86</sup> Tweet. CNN Tonight. May 31, 2020, 12:44 AM. (featuring a video clip of CNN’s Don Lemon Tonight). Haring, Bruce (May 31, 2020) “CNN’s Don Lemon Takes Sour View of Hollywood’s ‘Strangely Quiet’ Stance on Protests. Yahoo! Entertainment. <https://www.yahoo.com/entertainment/cnn-don-lemon-takes-sour-170223923.html>

<sup>87</sup> George Floyd died in police custody on May 25<sup>th</sup>, 2020. For a timeline, *See* Derrick Bryson Taylor, “George Floyd Protests: A Timeline” (June 2, 2020) *The New York Times* <https://web.archive.org/web/20200602235547/https://www.nytimes.com/article/george-floyd-protests-timeline.html>

<sup>88</sup> Haring, Bruce (May 31, 2020) “CNN’s Don Lemon Takes Sour View of Hollywood’s ‘Strangely Quiet’ Stance on Protests. Yahoo! Entertainment. <https://www.yahoo.com/entertainment/cnn-don-lemon-takes-sour-170223923.html>

<sup>89</sup> Haring, Bruce (May 31, 2020) “CNN’s Don Lemon Takes Sour View of Hollywood’s ‘Strangely Quiet’ Stance on Protests. Yahoo! Entertainment. <https://www.yahoo.com/entertainment/cnn-don-lemon-takes-sour-170223923.html> (It bears mentioning that Don Lemon did state, per the article above, that no one wanted to hear from the White House at that time. It also bears mentioning though this article does not consider these issues, a number of “counter-shows-of-force from federal agents, across the country began, with many around the white house in reaction to subduing the George Floyd collective protest). Among the many commenters were Governor Cuomo’s brother, Chris Cuomo, who markedly announced that he would not distance the justifiable anger and frustration of the riots from that of the

Indeed, not just Don Lemon, but many commentators drew the distinction between the base-economic criminal acts that were associated with the looting were not the same as those communities exercising their First Amendment rights as protesters.<sup>91</sup> Conservative commentators turned to distinctions in light of perceived misinterpretations of the law, rather than understanding the nature of the context of the moment of collective expressions for justice.<sup>92</sup> However, this pathologizing of the reaction to George, focuses on the collective frustration by criminalizing the riots as “looting” and continues to disrupt and de-center any discourse on structural inequity to transformational change from understanding the true narratives that caused George Floyd’s death in U.S. history to avoiding engaging with the systemic inequity at the root of the inequity.<sup>93</sup>

Lastly, while many politicians answered Don Lemon’s call for addressing the voices of the unheard, politicians such as Mayor Bill DeBlasio distanced the protestors’ righteous anger from the criminal acts of looters and rioting.<sup>94</sup> Mayor of New York City Bill DeBlasio, adamantly

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protestors. CNN Live’s Chris Cuomo states: “Too many see the protesters as the problem, the problem is what forced your fellow citizens to take to the streets – persistent, and poisonous inequities and injustice. And please, show me where it says that protests are supposed to be polite and peaceful.”

<https://twitter.com/i/status/1267987525198585856>.

<sup>90</sup> Hauser, Christine (May 26, 2020). “F.B.I. to investigate Arrest of Black Man Who Died after Being Pinned by Officer. N.Y. Times , <https://www.nytimes.com/2020/05/29/us/derek-chauvin-george-floyd-worked-together.html>. Dianis, Judith Browne “Eric Garner was killed by more than just a chokehold”. MSNBC (August 5, 2014).

<http://www.msnbc.com/msnbc/what-killed-eric-garner>.

<sup>91</sup> *infra* FN 100.

<sup>92</sup> Conservative commentators jumped on the opportunity as “going to bat for looting thugs.” *See* Baumann, Beth, “Watch: CNN’s Chris Cuomo Goes to Bat for Looting thugs By Insisting Protesters Don’t Have To Be ‘Polite and Peaceful’”, The Townhall (June 3, 2020) <https://townhall.com/tipsheet/bethbaumann/2020/06/03/watch-cnns-chris-cuomo-goes-to-bat-for-looting-thugs-by-insisting-protesters-do-n2569962>. *See also* White House Press Secretary Kayleigh McEnany Shreds CNN’s Don Lemon and Chris Cuomo For Encouraging Violent Riots, Drew Berquist. Drewberquist.com (June 9, 2020). <https://www.drewberquist.com/2020/06/kayleigh-mcenany-shreds-cnns-don-lemon-and-chris-cuomo-for-encouraging-violent-riots/>; LaChance, Mike, “Chris Cuomo Unaware The First Amendment Only Protects Peaceful Protest.” Legal Insurrection (June 4, 2020). <https://legalinsurrection.com/2020/06/cnns-chris-cuomo-unaware-the-first-amendment-protects-only-peaceful-protest/>. Wulfsohn, Joseph A. “CNN’s Chris Cuomo Blasted for Suggesting Protesters Don’t Have To be ‘Peaceful’”. Fox News. (June 3, 2020) <https://www.foxnews.com/media/cnns-chris-cuomo-blasted-for-suggesting-protesters-dont-have-to-be-peaceful>.

<sup>93</sup> Which remains the purpose of this article.

<sup>94</sup> *Supra* FN 103

announced that “anarchists” were responsible for the rioting, in isolating groups, that infiltrated the protests amid his defense of the New York Police Department.<sup>95</sup> Mayor DeBlasio continued to distance the racialized struggle for basic human rights with the so-called rioters as alien, and isolated: he called them as coming from “outside the city” and as “out of town demonstrators” and most poignantly “not from communities of color.”<sup>96</sup>

However, this very act of pacifying the justified fury of all Americans, and distancing the cause of racial equity in the U.S. is one that stands in contrast to many in the civil rights movement as an erasure.<sup>97</sup> Erasure is often explored in “equity-consciousness” in the trap of conceding to a post-racial America, and yet not acknowledging the particular populations that have been historically marginalized and systemic harmed.<sup>98</sup>

What came as a surprise was Martin Luther King III on the Today Show on June 1, 2020, and did not condemn the rioting and looting.<sup>99</sup> He specifically pointed to the cross-racial coalitions protesting the brutality of George Floyd’s murder.<sup>100</sup> King III said in that interview: “We are seeing and feeling the frustration, the humiliation, the insensitivity . . . Fifty years later, people are asking just for dignity and respect in terms of arresting a human being . . . We see a variety of people

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<sup>95</sup> Bocanegra, Michelle, “De Blasio now Says Some ‘Anarchist’ Protesters Are Local Amid Continued Defense of NYPD.” Politico (May 31, 2020). <https://www.politico.com/states/new-york/albany/story/2020/05/31/de-blasio-now-says-some-anarchist-protesters-are-local-amid-continued-defense-of-nypd-1289520>. Last accessed 6.6.2020.

<sup>96</sup> *Id.*

<sup>97</sup> Erasure, more formally, is considered in cultural studies, and education studies, as the moment that “post-racial America” disregards the intricacies and struggle that undergird racial identity. Indeed the historical context of structural inequity continually requires vigilance such that the actual pain and struggle of predecessors in the goal of equality and equity is not lost. *See* McKenzie Bell, Kathryn & Phillips, Glenn Allen. “Equity traps then and now: deficit thinking, racial erasure and naïve acceptance of meritocracy.” *Whiteness and Education*, (2016) Vol 1, Issue 1.

<sup>98</sup> *Id.* In *Whiteness and Education*.

<sup>99</sup> Hohman, Maura. “Martin Luther King III reflects on father’s legacy amid George Floyd protests.” *The Today Show* (May 31, 2020). <https://www.today.com/news/martin-luther-king-iii-reflects-father-s-legacy-amid-george-t182807>

<sup>100</sup> *See* Marfice, Christina, “MLK Jr’s Son Thinks Things Would be Different If His Father Had Lived”, *Yahoo!Life*. (June 1, 2020) <https://www.yahoo.com/lifestyle/mlk-jr-son-thinks-things-143216411.html>. Last accessed 6.6.2020.

[protesting] . . . Its not just black people. Its black and white, its old and young.”<sup>101</sup> King III continues by quoting a famous line from his father, that “rioting is the language of the unheard.”<sup>102</sup>

In Dr. MLK’s “Other America” speech, Dr. King says: “In the final analysis a riot is the language of the unheard. And what is it that America has failed to hear?”<sup>103</sup> This statement addresses the direct connection between the economically disenfranchised who have been subjected to structural inequities, and quantified by the criminal justice system, for a value of a Black life. Dr. King’s quote essentially argues that the erasure of lives of Black Americans are not quantifiable, and looting is the culmination of generational systemic inequality. Looting is not as much the problem, in comparison to the century-long institution, the police, was created to enforce enslavement and protect private property.<sup>104</sup> Capitalism was built on centuries of generational enslavement that was propagated by violence.<sup>105</sup> Protestors are destroying private property to demonstrate the hypocrisy of people caring more about objects than about state-sanctioned murder of its own citizens.

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

The very origins of the word, “looting” arise out of a form of multinational-state domination embedded in America’s slave history. Originally, “looting” has its etymological origin from Hindi - “Lut” - which literally translates “to plunder” of an overtaken community by the

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* In the same interview, MLK III goes on to clarify that people’s actions are not the approach to take but... “how do you rebuild a human life when a life is gone. You can’t.”

<sup>103</sup> Bote, Joshua, “ ‘ A riot is the language of the unheard’: MLK’s powerful quote resonates amid George Floyd protests.” USA Today (May 29,2020)

<https://www.usatoday.com/story/news/nation/2020/05/29/minneapolis-protest-martin-luther-king-quote-riot-george-floyd/5282486002/>

<sup>104</sup> Rothman, Lily, “What Martin Luther King Jr. Really Thought About Riots.” Time Magazine (April 28, 2015).

<https://time.com/3838515/baltimore-riots-language-unheard-quote/>.

<sup>105</sup> Desmond, Matthew. “In Order to Understand American Capitalism, you have to start on the plantation” The 1619 Project, New York Times Magazine. (August 14, 2019).

<https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html>.

warring empire.<sup>106</sup> Whereas this article points out, in the U.S. the connotations have consistently denoted a racialized term that connotes perceived or implied threats to white supremacy and racial capitalism<sup>107</sup> The word was first adopted into English to describe how senior executives at the British West India Company, the first multinational corporation, built their fortunes from the decaying Mughal empire.<sup>108</sup> After looting the Mughal empire, the Mughal society was forced into a form of “involuntary privatization” that required revenue and taxes to be paid to English traders in the British West India Company.<sup>109</sup> The company utilized this new wealth as a means of trafficking opium from impoverished Indian territories to China.<sup>110</sup> As John Dickinson, a colonial lawyer, politician and ultimately, “penman of the American revolution” would write, the British West India Company would turn to America as a new theater whereon they could “exercise their talents of rapine, oppression, and cruelty.”<sup>111</sup> Thus, the appropriation of the discourse of looting is one that historically has been of a nation-state profiteering on the oppression of poor communities, to whom by law, policy, and legislation, they would levy taxes and “loot.”

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

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<sup>106</sup> Anna Purna Kambhampaty, “How American Power Dynamics Have Shaped Perceptions of Looting, From the Boston Tea Party to Today.” June 11, 2020. <https://time.com/5851111/protests-looting/> (stating that the etymology of the word for looting is from the 1700s crossed over into the English language from Hindi “lut” in reference to prizes plundered from wartime enemies. However, unlike today, the word itself did not have lawless connotations but that of a military slang word used during the British Rule of India and during the time of the British West India Company to refer to artistic and historical artifacts plundered during wartime.) Thus, the derivation of the word has some connotations in the monopolistic state’s plunder of communities that were overtaken during war, and for that matter, connotes the State actors over communities harmed. . See also Dalrymple, William, “The Original Evil Corporation” New York Times Opinion (September 4, 2019). <https://www.nytimes.com/2019/09/04/opinion/east-india-company.html>. (“Using the looted wealth of Mughal Bengal, the Company started ferrying opium east to China, then fought the Opium Wars to seize an offshore base at Hong Kong and safeguard its profitable monopoly in narcotics. To the west, it shipped Chinese tea to Massachusetts.”)

<sup>107</sup> Anna Purna Kambhampaty, “How American Power Dynamics Have Shaped Perceptions of Looting, From the Boston Tea Party to Today.” June 11, 2020. Time Magazine.

<sup>108</sup> Dalrymple, William, “The Original Evil Corporation” New York Times Opinion (September 4, 2019). <https://www.nytimes.com/2019/09/04/opinion/east-india-company.html>. Last accessed 6.6.2020.

<sup>109</sup> *Id.*

<sup>110</sup> *Supra* at footnote 77.

<sup>111</sup> *Id.*

Laws from American slavery have always treated the personal dignity of Black Americans as only equal to the value of capitalist property that is to be protected.<sup>112</sup> Such laws of human (in) dignity included in 1788, the New York State Legislature passage of several laws that governed Slavery that purported to condemn the act of enslavement.<sup>113</sup> For example, one of these laws stated, that the purchase of a person into slavery with the intent to export and sell is prohibited.<sup>114</sup> This carried with it a fine: The punishment for a violation of the law was a fine of 100 pounds and the enslaved person was to be freed.<sup>115</sup> Yet, the same law that manumitted enslaved persons, declared that those in slavery could not be a witness in any civil case - as in not interfere with “white” property – continuing the dehumanizing effects of the laws framework; whereas, in criminal cases, one enslaved person could be a witness for, or against another enslaved person, in furtherance of the laws racializing goal of excluding black America from justice, and only recognizing the voice of the unheard in discrete instances when the law’s effect is that of propagating black social exclusion.<sup>116</sup> Selling strong liquor to an enslaved person is punishable by a fine of forty shillings, half of which is to go to the master.<sup>117</sup> And most prominently, the punishment for petit larceny in New York State was “such corporal punishment, not extending to life or limb, as the same (sic) court... shall think proper.”<sup>118</sup> If the punishment is whipping, not more than 39 lashes shall be

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<sup>112</sup> Desmond, Matthew. “In Order to Understand American Capitalism, you have to start on the plantation” The 1619 Project, New York Times Magazine. (August 14, 2019).

<sup>113</sup> *Laws of New York*, 10<sup>th</sup> Sess., Chap. 65 cited in Slavery in New York New York Historical Society: 2005 Ira Berlin and Leslie M. Harris, at pp 76.

<sup>114</sup> *Primary Source*: “An Act for the more effectual preventing and punishing the Conspiracy of Negro and other slaves, for the better regulating them and for repealing the Acts here in mentioned relating hereto.” *Col. Laws of N.Y.*, 2:679-88; “A Law for Regulating Negro’s & Slaves in the Night Time,” *Minutes of the Common Council of the City of New York*, 167501776 (New York Dodd, Mead, 1905), 4:51-52 [hereafter *MCC*]; “A Law for the Observation of the Lords Day Called Sunday,” *MCC*, 4:79; “A Law for Punishing Slaves who Shall Ride Disorderly through the Streets,” *MCC*, 4:89-90; “A Law to Prohibit Negroes and Other Slaves Vending Indian Corn peaches or any other Fruit with this City,” *MCC*, 4:497-98. Cited in Slavery in New York New York Historical Society: 2005 boy Ira Berlin and Leslie M. Harris, at pp 76.

<sup>115</sup> *Id.*

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

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

<sup>118</sup> *Id.*

given in one day.<sup>119</sup> Thus, the early laws of New York exemplify that the very institution of slavery was built on racial capitalism, and immediately punished property violations *disproportionately* on Black America, during the same time that Manumission and abolition became culturally relevant. As Matthew Desmond states, “in order to understand the brutality of American capitalism, you have to start on the plantation.”<sup>120</sup>

Desmond points to the structural inequities in the laws and social institutions that perpetuate structural racism as a continuation from the seeds of slavery.<sup>121</sup> The very structure of slavery and early abolition (manumission) was built on a capitalist and structurally racist system that devalued the lives of Black America.<sup>122</sup> New York’s Law of 1788 repeats the provision of the 1785 law regarding Manumission, which authorizes manumission of slaves,<sup>123</sup> provided that a bond of 200 pounds is posted, “to keep and save such slave from becoming being a charge” to his locality; however, it warns that ex-slaves should not become a *public charge* when freed.<sup>124</sup>

In a more recent example, Matthew Desmond considers the wide-reaching effects of capitalism’s exclusion and segregation, with Martin Shkreli, the CEO of a pharmaceutical company, which acquired the rights to a lifesaving drug, Daraprim. That drug had previously cost \$13.50 per pill but in Shkreli’s hands the price increased over 50 fold, to \$750 per pill.<sup>125</sup> When

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<sup>119</sup> *Laws of New York*, 10<sup>th</sup> Sess., Chap. 65.

<sup>120</sup> Desmond, Matthew. “In Order to Understand American Capitalism, you have to start on the plantation” The 1619 Project, New York Times Magazine. (August 14, 2019). <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html>. Last accessed 6.6.2020.

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

<sup>122</sup> *Id.*

<sup>123</sup> The central difference between Manumission and Emancipation has been defined as the following. Manumission is the giving of freedom to a person who was slaved. Emancipation is the abolishment of the system of slavery. As Jamaican historian Verene Shepherd states “the conferment of freedom on the enslaved by enslavers before the end of the slave system.” Shepherd, Verene A. :Freedom in the era of slavery: The case of the Barclay brothers in Jamaica. (February 24, 2008). <http://old.jamaica-gleaner.com/gleaner/20080224/news/news3.html>

<sup>124</sup> Wheeler, Jacob. *A Practical Treatise on the Law of Slavery: Being a Compilation of All the Decisions Made on the Subject in the Several Courts of the U.S.*, Kessinger Legacy Reprints, 190. Accessed with great assistance from the New York Public Library’s Research Collection, Articles and Database.

<sup>125</sup> *Id.*

asked at a health conference about the tremendous price increase, he admitted that while no one is proud of it, “this is a capitalist society, a capitalist system and capitalist rules.”<sup>126</sup> This analogue in modern history is one that traces the continued contours of a racial system of capitalism that has been in development since Slavery and has yet to acknowledge, or reckon with, the racialized underpinnings of a system of profit that ultimately began from profiteering off of Black America and excluded access from systemic equity.

Indeed, Slavery, as a precursor to Abolition, Manumission, bears the bonds of capitalist racial structural inequity, “All . . . slaves become the property of the people of this state, by attainder or conviction of any person whomsoever, and now in possession of the Commissioners of forfeitures, be, and they are hereby manumitted.”<sup>127</sup> The Cotton plantation, too, holds reinforcing principles of profit on the labor of human dignity, with Wall Street.<sup>128</sup> Desmond writes, “An origin of American money exerting its will on the earth, spoiling the environment for profit, is found in the cotton plantation.”<sup>129</sup> Here the voice of the unheard is built on the profiteering principles that regard safety and property as a public threat – erasing whose public must be protected.

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

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<sup>126</sup> *Id.*

<sup>127</sup> *Laws of New York*, 9<sup>th</sup> Sess., Chap. 58.

<sup>128</sup> Desmond, Matthew. “In Order to Understand American Capitalism, you have to start on the plantation” The 1619 Project, New York Times Magazine. (August 14, 2019).

<https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html>.

<sup>129</sup> Desmond, Matthew. “In Order to Understand American Capitalism, you have to start on the plantation” The 1619 Project, New York Times Magazine. (August 14, 2019).

<https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html>. Last accessed 6.6.2020.

Wall Street itself, was built as a well-known slave market on Manhattan Island.<sup>130</sup> In 1711, Wall Street's location was notorious for the influx of slave ships that transported enslaved persons.<sup>131</sup> In fact, enslaved Africans built the original Wall Street and the subsequent Chambers Street Wall, which became the Northern Outpost of the city during the American Revolution.<sup>132</sup> Trinity Church, near Wall Street, has since established that enslaved labor was used to build the original church.<sup>133</sup>

Thus, the very infrastructure of Manhattan – including Wall Street – was always premised on the labor of Black America.<sup>134</sup> The early 18th century saw numerous Africans pass through Manhattan ports to be auctioned off and sent to cotton plantations in the South, as a means of looting their labor into making profit for the early nation.<sup>135</sup> Early numbers of African slaves rose with the power of the British West India Company over time colonizing a number of African countries straight to the Wall Street ports for profiteering.

### **Enslaved African Brought to New York Ports<sup>136</sup>**

#### **Table 2. Enslaved Africans Imported to the Province of New York, 1701-1725**

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<sup>130</sup> Singer, Alan, "Represent New York, Interview with Prof. Singer, Hofstra University" Manhattan Neighborhood Network (MNN), The History News Network, Feb. 9, 2020, webpage available: [<http://hnn.us/article/174246>] (last accessed February 2020).

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

<sup>132</sup> Singer, Alan, "Represent New York, Interview with Prof. Singer, Hofstra University" Manhattan Neighborhood Network (MNN), The History News Network, Feb. 9, 2020, webpage available: [<http://hnn.us/article/174246>] (last accessed February 2020).

<sup>133</sup> Singer, Alan, "Represent New York, Interview with Prof. Singer, Hofstra University" Manhattan Neighborhood Network (MNN), The History News Network, Feb. 9, 2020, webpage available: [<http://hnn.us/article/174246>] (last accessed February 2020).

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

<sup>135</sup> See infra fn 139.

<sup>136</sup> Table 2.3 on Wilder, Craig Steven, *A Covenant with Color: Race and Social Power in Brooklyn*, Columbia History of Urban Life, Columbia University Press 2000 at pp 17. From the Primary Source "Number of Negroes Uprooted from 1701-1726, in E.B. Callaghan, MD, *The Documentary History of the State of New York; Arranged Under the Direction of the Hon. Christopher Morgan, Secretary of State, 4 Vols.* (Albany: Weed, Parsons, 1849), I: 707.

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

Brooklyn was regarded as a “Slaveholding Capital.”<sup>137</sup> Brooklyn was one of six towns in Kings County, from its Dutch inception in 1634 to its incorporation as a city in 1834. Kings County had a larger concentration of enslaved people than any other county in New York State.<sup>138</sup> New York State was only 7% African in 1790, while Brooklyn was 33%.<sup>139</sup> Between 1750- 1790, nearly 1/3 of all Kings County residents consisted of enslaved Africans, who were agricultural and domestic workers, and laborers.<sup>140</sup> According to the first official federal census taken in 1790, the population of Kings County was 4,495.<sup>141</sup> 1/3 of the population was African descent, and virtually all enslaved.<sup>142</sup> On average, 60% of Dutch families were slaveholders in Kings County; in outer areas such as Flatbush, the percentages were as high as 74%.<sup>143</sup> Brooklyn’s slaveholding

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<sup>137</sup> Brooklyn Historical Society, “In Pursuit of Freedom” Section A Gradual Emancipation (1783-1827)

<http://pursuitoffreedom.org/gradual-emancipation/>.

<sup>138</sup> *Id.* Kanakamedala, Prithi. *In Pursuit of Freedom: A Public History Project Exploring the Anti-Slavery Movement in Brooklyn*. Teacher’s Manual. Brooklyn Historical Society, at pp. 9 (Brooklyn’s slaveholding percentages exceeded that of South Carolina and neighboring Manhattan where 40% of families were slaveholders)

<sup>139</sup> *Id.*

<sup>140</sup> Flateau, John Louis. *Black Brooklyn: The Politics of Ethnicity, Class, and Gender*. Bloomington, Indiana: AuthorHouse, 2016 at 32.

<sup>141</sup> Evarts B. Greene, *American Population Before the Federal Census of 1790* (1932; Gloucester, Massachusetts: P. Smith, 1966), 92-105. Taken from, Wilder, Steven Craig, *A Covenant with Color: Race and Social Power in Brooklyn*, at pp. 23.

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

<sup>143</sup> % of Population of Enslaved Africans in Kings County, 1698-1790 (from Federal Census, 1790) cited in Evarts B. Greene, *American Population Before the Federal Census of 1790* (1932; Gloucester, Massachusetts: P. Smith, 1966), 92-105. Taken from, Wilder, Steven Craig, *A Covenant with Color: Race and Social Power in Brooklyn*, at pp. 23.

percentages exceeded those of South Carolina and neighboring Manhattan, where 40% of families were slaveholders.<sup>144</sup>

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

The very laws of New York that regulated Black America during slavery, from the provincial records of New York, are those that by and large are economic-in-substance. New York's major provincial slave codes include:

1702 ("An Act for Regulating of Slave," *Col. Laws of N.Y.*, 1:519-21),

1712 ("An Act for preventing Suppressing and punishing the Conspiracy and Insurrection of Negroes and other Slaves," *Col. Laws of N.Y.*, 1:519-21),

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

"A Law Appointing a Place for the More Convenient Hiring of Slaves,"

"A Law Restraining Slaves, Negroes, & Indians from Gaming with Moneys or For Moneys,"

"A Law Giving a Reward to Any Person or Persons who shall Apprehend any Negro, Mulatto or Indian Slaves Offending Against any of the Acts of General Assembly of this Colony,"

"A Law for Regulating Negro's & Slaves in the Night Time" in *MCC*, 4:85-90, 51-52.

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<sup>144</sup> Kanakamedala, Prithi. *In Pursuit of Freedom: A Public History Project Exploring the Anti-Slavery Movement in Brooklyn*. Teacher's Manual. Brooklyn Historical Society, at pp. 9 (Brooklyn's slaveholding percentages exceeded that of South Carolina and neighboring Manhattan where 40% of families were slaveholders)

“A Law to Prohibit Negroes and Other Slaves Vending Indian Corn Peaches or any other Fruit with this City,” was passed in 1740 (*MCC*, 4:497-98)<sup>145</sup>.

The last law was one that specifically disenfranchised any economic advancement of enslaved persons: passed in August 1740 to prohibit “Negroes and Other Slaves Vending Indian Corn Peaches or any other Fruit within this City” it focused on Wall Street, and the Old Slip or Broadway Market, they had tried to buy or sell, they would have broken a law.<sup>146</sup>

A 1730 New York Act stipulated that it shall “not hereafter be lawful for above three Slaves to meet together at any other time, nor ay any other place, than when it shall happen they meet in some servile Employment for their Master’s or Mistress’s profit, and by their Master or Mistress consent, upon penalty of being whipped upon the naked back, at discretion of any Justice of the peace, not exceeding forty Lashes.”<sup>147</sup> A year later there were laws that stipulated in 1731 “No Negro, Mulatto, or Indian slaves, above the Number of three, do Assemble or meet together on the Lords Day called Sunday, and Sport, Play or make any Noise or Disturbance, or at any Other time at any place from their Master’s service, within this city.”<sup>148</sup>

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<sup>145</sup> On city slave codes, see also Oscar R. Williams “The Regimentation of Black’s on the Urban Frontier in Colonial Albany, New York City and Philadelphia,” *Journal of Negro History* 63 (October 1978): 329-38; and Bernard Bush, comp. *Laws of the Royal Colony of New Jersey* (Trenton, N.J.: New Jersey State Library, Archives and History Bureau, 1977-1986), 2:28-30; See also Robert Hunter to the Lords of Trade, 23 June 1712 *Docs. Col. N.Y.*, 5:342.

<sup>146</sup> *Primary Source*: “An Act for the more effectual preventing and punishing the Conspiracy of Negro and other slaves, for the better regulating them and for repealing the Acts here in mentioned relating hereto.” *Col. Laws of N.Y.*, 2:679-88; “A Law for Regulating Negro’s & Slaves in the Night Time,” *Minutes of the Common Council of the City of New York*, 167501776 (New York Dodd, Mead, 1905), 4:51-52 [hereafter *MCC*]; “A Law for the Observation of the Lords Day Called Sunday,” *MCC*, 4:79; “A Law for Punishing Slaves who Shall Ride Disorderly through the Streets,” *MCC*, 4:89-90; “A Law to Prohibit Negroes and Other Slaves Vending Indian Corn peaches or any other Fruit with this City,” *MCC*, 4:497-98. Cited in *Slavery in New York* New York Historical Society: 2005 boy Ira Berlin and Leslie M. Harris, at pp 76.

<sup>147</sup> *Primary Source*: “An Act for the more effectual preventing and punishing the Conspiracy of Negro and other slaves, for the better regulating them and for repealing the Acts here in mentioned relating hereto.” *Col. Laws of N.Y.*, 2:679-88; “A Law for Regulating Negro’s & Slaves in the Night Time,” *Minutes of the Common Council of the City of New York*, 167501776 (New York Dodd, Mead, 1905), 4:51-52 [hereafter *MCC*]; “A Law for the Observation of the Lords Day Called Sunday,” *MCC*, 4:79; “A Law for Punishing Slaves who Shall Ride Disorderly through the Streets,” *MCC*, 4:89-90; “A Law to Prohibit Negroes and Other Slaves Vending Indian Corn peaches or any other Fruit with this City,” *MCC*, 4:497-98. Cited in *Slavery in New York* New York Historical Society: 2005 boy Ira Berlin and Leslie M. Harris, at pp 76.

<sup>148</sup> *Id.*

This law of the Dutch Colony stipulated, if any Black American was riding a horse, and rode it “Swiftly, Hastily, Precipately, or disorderly, and Otherwise than softly Orderly Patiently without Passing Swiftly, Trotting fast or Galloping,” they would have been guilty of breaking a city law for “Punishing Slaves who Shall Ride Disorderly Through the Streets.”<sup>149</sup> And if at the Old Slip or Broadway Market, they had tried to buy or sell fruit, they would have broken a law, passed in August 1740 to prohibit “Negroes and Other Slaves Vending Indian Corn Peaches or any other Fruit within this City.”<sup>150</sup> These laws themselves were New York laws link that controlled spatial movements and bear some connection to modern-day Vagrancy and Loitering Statutes in New York, as well as the later laws controlling black and brown “runaway” bodies by slave patrols and the policing of economic interests in Northern cities that protected economic interests.<sup>151</sup> Indeed, it is the loitering and vagrancy laws that had been developed since 17<sup>th</sup> century England and later in the U.S. and in New York, during slavery, as shown above, since the early 18<sup>th</sup> century that grant American policing the ability to arrest and control literal movements of Black and Brown bodies.<sup>152</sup>

If taken literally, if policing, and by extension, criminal law, historically hinged on criminalizing and the policing of the spatial movement of black and brown bodies *i.e.*, to protect

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<sup>149</sup> *Id.*

<sup>150</sup> *Primary Source*: “An Act for the more effectual preventing and punishing the Conspiracy of Negro and other slaves, for the better regulating them and for repealing the Acts here in mentioned relating hereto.” *Col. Laws of N.Y.*, 2:679-88; “A Law for Regulating Negro’s & Slaves in the Night Time,” *Minutes of the Common Council of the City of New York*, 167501776 (New York Dodd, Mead, 1905), 4:51-52 [hereafter *MCC*]; “A Law for the Observation of the Lords Day Called Sunday,” *MCC*, 4:79; “A Law for Punishing Slaves who Shall Ride Disorderly through the Streets,” *MCC*, 4:89-90; “A Law to Prohibit Negroes and Other Slaves Vending Indian Corn peaches or any other Fruit with this City,” *MCC*, 4:497-98.

<sup>151</sup> *See Infra* pp 43 of this article.

<sup>152</sup> Risa Goluboff, “The Law That Gave Police Nearly Unlimited Power” *Time Magazine*, (February 1, 2016) <https://time.com/4199924/vagrancy-law-history/> (stating “armed with roving license to arrest, officials employed vagrancy laws for a breath-taking array of purposes: to force the local poor to work or suffer for their support; to keep out suspicious strangers; to suppress differences that might be dangerous; to stop crimes before they were committed;

private interests, as *pre-textual* stops for other social interests such as slum clearance and maintaining order closely tied with capitalist interests,<sup>153</sup> preventing slavery insurrection, and non-conforming acts of protests, or *Stop-and-Frisk* practices,<sup>154</sup> just to name a few – then these laws described above engender rules and regulations that limit Black Americans from certain ownership over public spaces. Another way of seeing this dynamic is that of rioting and public acts of protests, as another form of black America inhabiting spaces made either legal or illegal by dominant social structures embedded in protecting (white) interests in capitalist society – i.e., protest and allegations of “runaways” cast as capturing illegal bodies, but more specifically, that of kidnapping Black and Brown bodies from American spaces. As mentioned another way to describe spatial surveillance of Black America comes to us in the form of looting, Riots, themselves, which tend to form out of racial fear and anxiety driven by structural domination over class and economic insurrection just as 18<sup>th</sup> century laws exemplified regulating the physical movement, spatial permissiveness, and economic profitability of enslaved persons.<sup>155</sup>

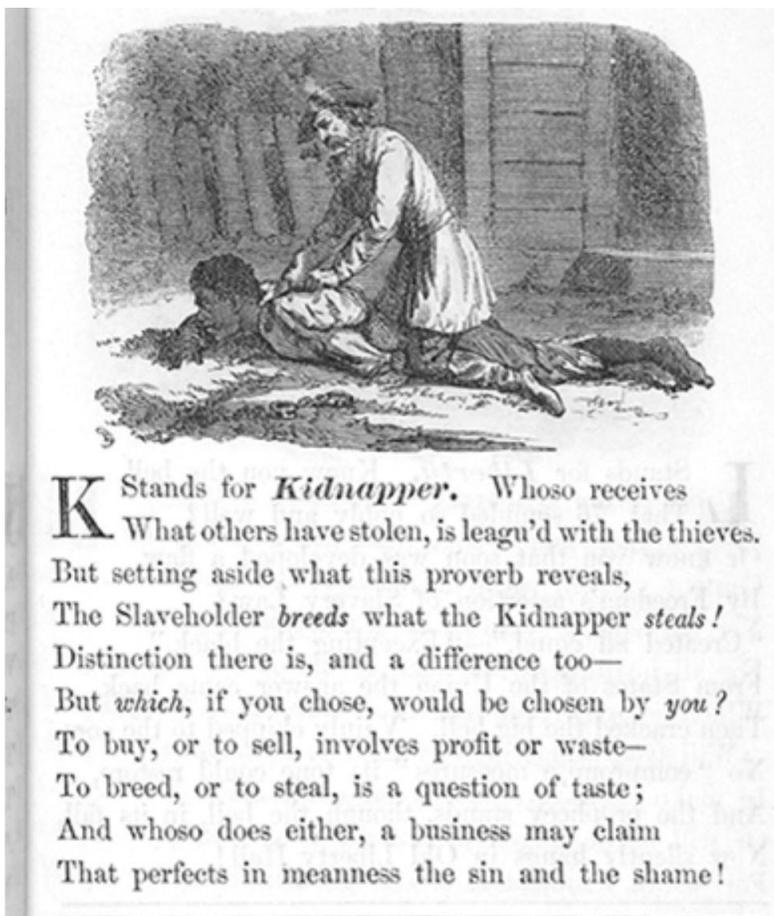
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<sup>153</sup> One can reasonably infer Gentrification as a modern day example where the policing of spatial movement of black and brown bodies could be a continuation of this logic.

<sup>154</sup> Stop-and-frisk, typically, refers to the NYPD practice of routinely stopping and searching people, especially young black and Latinx men (often times without probable cause, protected by the Fourth Amendment) – under the regime of NYC Mayor Giuliani and Mayor Bloomberg, causing an overcriminalization of black and Latinx individuals. See Reverend Al Sharpton, National Action Network, “‘Stop-and-Frisk’ Is the New Racial Profiling” *Huffington Post* June 4, 2012. [https://www.huffpost.com/entry/stop-frisk-is-the-new-rac\\_b\\_1569201](https://www.huffpost.com/entry/stop-frisk-is-the-new-rac_b_1569201) (stating that in 2011 alone, the NYPD stopped 685,724 people, out of which nearly 87% were black and Latinx, and constituted the most clear example of an institutionalized violation of the Constitutional rights). See discussion of *Terry* stops in criminal law in the case of *Terry v. Ohio*, 392 U.S. 1 (1968), with later Supreme Court evaluations of the constitutionality of such searches against the guarantees of the Fourth Amendment’s Constitutional Guarantee of the rights against Search and Seizure in *Rodriguez v. United States*, 575 U.S. (2015) (holding a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.) and *Utah v. Strieff*, 579, U.S. (2016) (finding that when a police officer finds there is a ‘valid, pre-existing, and untainted arrest warrant’ for an individual, then any evidence obtained from a stop of that individual will be admissible in court, even if the stop would otherwise violate the Fourth Amendment) referencing the three-part balancing test for such stops in *Brown v. Illinois*, 422 U.S. 590 (1975).

<sup>155</sup> See pg. 43 of this paper on the First Police in the U.S. – “In 1838, in the city of Boston, the first American police force was established, soon after followed by New York City in 1845, and by the 1880s all major U.S. Cities had municipal police forces in place. Boston in 1838 was a large shipping commercial center, and business had required the protection of economic interests and property.” Citing to Waxman, Olivia B. “How the U.S. Got Its Police Force.” *Time Magazine* (May 18, 2017) . <https://time.com/4779112/police-history-origins/>.

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



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

Brooklyn Historical Society, “In Pursuit of Freedom” “K is For Kidnapping” stating that by the 1840s, as Brooklyn expanded, many white Brooklynites pushed for greater police protection.<sup>156</sup>

<sup>156</sup> Brooklyn Historical Society, “In Pursuit of Freedom: The Crisis Decade” <http://pursuitoffreedom.org/crisis-decade/>

The first formal slave patrol had been created in the Carolina colonies in 1704.<sup>157</sup> These slave patrols before the Civil War led to the first police forces in the U.S. that started in service of larger economic interests, and were often private protection of economic and property interests from the underclass.<sup>158</sup> In the Civil War, the military became the primary form of law enforcement in the South;<sup>159</sup> however, during Reconstruction, many local sheriffs functioned in a way analogous to earlier slave patrols,<sup>160</sup> enforcing segregation and the disenfranchisement of freed slaves.<sup>161</sup> Later in the mid-19<sup>th</sup> century, the police played a dominant role in protecting and serving the stability of the status quo financial and property interests.

Arguably the definition of public order and safety, throughout the 19<sup>th</sup> century is mostly the status quo. It is not a historical coincidence that in the late 1880s, that all major police forces were in U.S. cities.<sup>162</sup> The preservation of law and order at the time was driven by fears of labor-union organizers and new waves of white ethnic immigrants from Catholic, Irish, Italian, German and Eastern European immigrants.<sup>163</sup> In the south, economics that drove the creation of police

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<sup>157</sup> Hansen, Chelsea, "Slave Patrols: An Early Form of American Policing." National Law Enforcement Museum. Blog (July 10, 2019). <https://lawenforcementmuseum.org/2019/07/10/slave-patrols-an-early-form-of-american-policing/>. See Waxman, Olivia B. "How the U.S. Got Its Police Force" Time Magazine (May 18, 2017) <https://time.com/4779112/police-history-origins/> Quoting Professor Gary Potter, a crime historian at Eastern Kentucky University: prior to slave patrols "policing in Colonial America had been very informal, based on a for-profit privately funded system that employed people part-time. Towns also commonly relied on a 'night watch' in which volunteers signed up for a certain day and time, mostly to look out for fellow colonists engaging in prostitution or gambling. (Boston started one in 1636, New York followed in 1658 and Philadelphia created one in 1700)."

<sup>158</sup> Waxman, Olivia B. "How the U.S. Got Its Police Force." Time Magazine (May 18, 2017) . <https://time.com/4779112/police-history-origins/>.

<sup>159</sup> On city slave codes, see also Oscar R. Williams "The Regimentation of Black's on the Urban Frontier in Colonial Albany, New York City and Philadelphia," *Journal of Negro History* 63 (October 1978): 329-38; and Bernard Bush, comp. *Laws of the Royal Colony of New Jersey* (Trenton, N.J.: New Jersey State Library, Archives and History Bureau, 1977-1986), 2:28-30; See also Robert Hunter to the Lords of Trade, 23 June 1712 *Docs. Col. N.Y.*, 5:342.

<sup>160</sup> *Id.*

<sup>161</sup> Waxman, Olivia. "How the U.S. Got Its Police Force" (May 18, 2017). <https://time.com/4779112/police-history-origins/> last accessed 6.2.2020.

<sup>162</sup> Waxman, Olivia B. "How the U.S. Got Its Police Force." Time Magazine (May 18, 2017) . <https://time.com/4779112/police-history-origins/>.

<sup>163</sup> *Id.* (One example, was the idea that people drinking at taverns and living in smaller homes were somehow more "dangerous", however as Historian Gary Potter, in Olivia Waxman's article "How the U.S. Got Its Police Force" points out those people, who profited off the commercial sale of alcohol in public were businessmen).

forces were centered not solely on protecting shipping interests but on the preservation of slavery.<sup>164</sup>

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

There is a long and troubling history of white supremacist or racially-driven violence in the United States that takes advantage of moments of Black equality and civil rights. One of the most pertinent and explicit examples was in July of 1834 in New York City, when riots between pro-slavery mobs and abolitionists erupted in racial violence.<sup>165</sup> For three days in July, mobs attacked Black Americans and European American abolitionists, destroying, among other places, Arthur and Lewis Tappan's home on Rose Street and St. Phillips's African Episcopal Church on Center Street.<sup>166</sup> The Tappan brothers left their house unrepaired, as a "silent Anti-Slavery preacher."<sup>167</sup> Mob action increased in the mid-1830s throughout the Northeast, in proportion to abolitionist organizing.<sup>168</sup> The increase in violence across New York, but also across the United States, was due to the fear of abolition and eventual emancipation.<sup>169</sup>

Two years prior to the Thirteenth Amendment, The Enrollment Act – The Federal Conscription Act of 1863 – was America's first federal Conscription Act that led to the week-long Draft Riot in July of that year in New York.<sup>170</sup> During this time more than 15,000 infuriated men,

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<sup>165</sup> Wellman, Judith, *Brooklyn's Promised Land: The Free Black Community of Weeksville, New York*. New York: New York University, 2014, at pp 42.

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

<sup>167</sup> *Id.*

<sup>168</sup> Wellman, Judith, *Brooklyn's Promised Land: The Free Black Community of Weeksville, New York*. New York: New York University, 2014, at pp 42.

<sup>169</sup> *Id.*

<sup>170</sup> See Claude B. Mickelwait, "Legal Basis for Conscription" *American Bar Association Journal*, (September 1940) Vol. 26, No. 9, pp. 701-705. See also Ali, Zaheer, Brooklyn Historical Society, Flatbush + Main. Episode 28: The New York City Draft Riots. Podcast. Encyclopedia.com, "Enrollment Act (1863)(The Conscription Act)", webpage: [<https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/enrollment-act-1863-conscription-act>] (. See also, Bernstein, Iver, *The New York City Draft Riots: Their Significance for American Society and Politics in the Age of the Civil War*. University of Nebraska Press, 2010.

largely Irish, ransacked New York City in the largest incident of civil disorder in U.S. history.<sup>171</sup> The targeted destruction of property and life were of a visceral hatred of the rich and powerful, and against Blacks, who were viewed as the “cause” of the Civil War troubles.<sup>172</sup> The Union Army eventually occupies the city.<sup>173</sup> In the end, at least 119 people are killed officially, but historians say nearly 300.<sup>174</sup> In its creation, the Federal Conscription Act, otherwise known as, the Enrollment Act required the of every male citizen and those who had filed for citizenship between ages twenty and forty-five.<sup>175</sup> White Draftees were not excused could pay a fee of \$300 (more than a year’s working-class salary) and be exempted.<sup>176</sup> No Black Americans were considered in the lottery as they were not deemed citizens.<sup>177</sup> Thus, the racialized response that instigated the race riots in New York was one of jealousy and outrage that the very laws that disenfranchised Black Americans from full citizenship also excused their participation in the draft.

The difference in violence against Black America versus Black America’s justified fury over the death of George Floyd is stark. The riots fill an expression of political voices and as Dr. King has mentioned “are the voices of the unheard.”<sup>178</sup> Lincoln had no choice but to tamp down

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<sup>171</sup> Ali, Zaheer, Brooklyn Historical Sociey, Flatbush + Main. Episode 28: The New York City Draft Riots. Podcast. Encyclopedia.com, “Enrollment Act (1863)(The Conscription Act)”, webpage: [ <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/enrollment-act-1863-conscription-act>] (. See also, Bernstein, Iver, *The New York City Draft Riots: Their Significance for American Society and Politics in the Age of the Civil War*. University of Nebraska Press, 2010.

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

<sup>173</sup> *Id.*

<sup>174</sup> The New York Riots of 1863, by Gertrude Lefferts Vanderbilt in an unpublished manuscript; account of a sympathetic view of the violence on African American victims during the Draft Riots of 1863, cited in <sup>174</sup> Ali, Zaheer, Brooklyn Historical Sociey, Flatbush + Main. Episode 28: The New York City Draft Riots. Podcast. Encyclopedia.com, “Enrollment Act (1863)(The Conscription Act)”, webpage: [ <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/enrollment-act-1863-conscription-act>.

<sup>175</sup> *Id.*

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

<sup>177</sup> Wellman, Judith, *Brooklyn’s Promised Land: The Free Black Community of Weeksville, New York*. New York: New York University, 2014 at pp. 115. See also Encyclopedia.com, “Enrollment Act (1863)(The Conscription Act)”, webpage: [ <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/enrollment-act-1863-conscription-act>] (last accessed Jan. 28, 2020).

<sup>178</sup> Twitter, The Martin Luther King, Jr. Center, “In the final analysis, a riot is the language of the unheard. And what is it that America has failed to hear?” <https://twitter.com/TheKingCenter/status/1266008254984982529>

the Un-American insurgence against Blacks.<sup>179</sup> Here, the violence is nominally driven by a climate of political action and voices for structural change. The 1863 racially-motivated attacks would send some white men in empathetic and sympathetic fear of their property, such as Gertrude Lefferts Vanderbilt, of a prominent slave-holding family in Brooklyn.<sup>180</sup> In an unpublished manuscript he writes:

“The loaded farm wagon stood in the barnyard ready for the morning market and Tom who was to drive the team in, was in the hayloft trying to get to sleep before midnight which he would love before dawn / when he was aroused by a neighbor who warned him against going into town, telling him there was a fearful riot in the streets that hardly a [Black American] who had been caught by the mob had escaped with his life.” “The vindictive and malignant spirit of the mob reaped its fury upon the most helpless class in the community/ The burning of the asylum for the colored orphans was a despicable act/ the poor and unoffending race of [Black American] were selected as the most desirable victims for its vengeance”.<sup>181</sup>

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<sup>179</sup> The Editors, “The Hysterical Debate Over Federal Troops”. National Review. (June 6, 2020)

<https://www.nationalreview.com/2020/06/the-hysterical-debate-over-federal-troops/>

<sup>180</sup> Unpublished Manuscript by Gertrude Lefferts Vanderbilt, written 1890s, titled “The New York Riots of 1863” at the Brooklyn Historical Society Archive.

*Hear also*, “Flatbush+ Main Episode 28: the New York City Draft Riots” posted August 30, 2018, webcast available on Soundcloud: [<https://www.brooklynhistory.org/podcasts/flatbush-main-episode-28-the-new-york-city-draft-riots/>] (accessed January 2020); “New York: A Documentary Film”, Directed by Ric Burns, Funded by the Foundation, Thirteen WNET New York, New York Timeline 1609-2001.

<sup>181</sup> Unpublished Manuscript by Gertrude Lefferts Vanderbilt, written 1890s, titled “The New York Riots of 1863” at the Brooklyn Historical Society Archive.

*Hear also*, “Flatbush+ Main Episode 28: the New York City Draft Riots” posted August 30, 2018, webcast available on Soundcloud: [<https://www.brooklynhistory.org/podcasts/flatbush-main-episode-28-the-new-york-city-draft-riots/>] (accessed January 2020); “New York: A Documentary Film”, Directed by Ric Burns, Funded by the Foundation, Thirteen WNET New York, New York Timeline 1609-2001.

What resulted were burned down homes, churches, benevolent societies, the colored orphan's society was burned down on 44<sup>th</sup> and 5<sup>th</sup> Ave. in Manhattan, lynchings were taking place on lampposts driven into the river.<sup>182</sup> Black Americans and abolitionists were attacked.

Nearly half of the entire Black American population in Manhattan fled across to nearby counties, such as Brooklyn, and a good number came to Weeksville,<sup>183</sup> as it was considered the place of refuge for Black American refugees during the draft riots.<sup>184</sup> “Many men were killed and thrown into the river, a great number hung to trees and lamp-posts, numbers shot down; no black person could show their heads but what they were hunted like wolves. These scenes continued for four days. Hundreds of our people are in station houses, in the woods. and on Blackwell's island.”<sup>185</sup>

One observer stated that the riots left thousands penniless, indiscriminately victimized the entire class of the community, and pauperized whole families for four days.<sup>186</sup> Junius C. Morel writes, “what crimes have we, unoffending people, committed, that we should suffer these

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<sup>182</sup> Wellman, Judith, *Brooklyn's Promised Land: The Free Black Community of Weeksville, New York*. New York: New York University, 2014 at pp 117; primary source: “Junius” *Christian Recorder*, July 25, 1863.

<sup>183</sup> Weeksville was one of the two largest independent free black communities in the United States. Today it is a historical site in Brooklyn through the efforts of the Pratt Institute and New York City. Today, the land sits next to Kingsborough Houses in Bedford Stuyvesant. (Weeksville Heritage Center: <https://www.weeksvillesociety.org/>) Only a portion of its original land remains, but for four houses on Hunterfly Road

In 1827, following the abolition of slavery in New York, many moved into the semirural area of Brooklyn named Weeksville, wedged between the towns of Bedford and Flatbush. By mid-century Weeksville's residents had launched one of the country's first black newspapers *the Freedman's Torchlight*, and funded a variety of community institutions, including the Colored School No. 2, the Howard Colored Orphanage Asylum, the Zion Home for Aged Relief, and the Berean Baptist Church. A second free-black settlement, Carrsville, sprouted up nearby, *See* Woodsworth, Michael, *The Battle for Bed-Stuy: The Long War on Poverty in New York City* (Cambridge: Harvard University Press, 2016) at pp 50.

<sup>184</sup> Brooklyn Historical Society, Podcast: “Flatbush+ Main Episode 28: the New York City Draft Riots” posted August 30, 2018, webcast available on Soundcloud: [ <https://www.brooklynhistory.org/podcasts/flatbush-main-episode-28-the-new-york-city-draft-riots/>] (accessed January 2020). On the free black community in weeksville, *see* Wellman, Judith, *Brooklyn's Promised Land: The Free Black Community of Weeksville, New York*. New York: New York University, 2014. Indeed, beyond Weeksville, Williamsburg, Brooklyn, was the second place of refuge for fleeing families from the riots. There was a Mill in Flatbush that became a refugee space.

<sup>185</sup> Wellman, Judith, *Brooklyn's Promised Land: The Free Black Community of Weeksville, New York*. New York: New York University, 2014 at pp 117; primary source: “Junius” *Christian Recorder*, July 25, 1863.

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

cruelties?”<sup>187</sup> About hundreds of Black Americans were killed and thousands more were driven from their homes. Irish-American rioters destroyed and burned down Weeksville’s Colored Orphan Asylum, according to the New York Sun.<sup>188</sup>

The 1863’s draft riots was one of the only times when Abraham Lincoln used the federal army to send in troops to restore order in New York’s draft riots, in fact, dispatching troops from the battlefield in Gettysburg to New York to tamp down riots.<sup>189</sup> One of the connections with modern-day events is the President Trump revisiting the potential use of the Insurrection Act of 1807, in June 2020.<sup>190</sup> The Insurrection Act’s use during the Black Lives Matter protests in response to the death of George Floyd was also introduced by U.S. Senator Tom Cotton in an Opinion Piece,<sup>191</sup> detailing the Senator’s call to arms in the aftermath<sup>192</sup> - namely, that the Insurrection Act will grant the President the authority to use military force against domestic disorder.<sup>193</sup> Following the President’s own threats to use the Insurrection Act at a time of strife *toward* racial equity and ending mass policing that harm low income and marginalized communities, a bill introduced by Senator Richard Blumentahl (D-Conn.) seeks to curb the President’s use of the Act, by requiring a consultation with Congress and limit the use to 14 days

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<sup>187</sup> Wellman, Judith, *Brooklyn’s Promised Land: The Free Black Community of Weeksville, New York*. New York: New York University, 2014 at pp 117.

<sup>188</sup> *Id.* At 115-16.

<sup>189</sup> The Editors, “The Hysterical Debate Over Federal Troops”. National Review. (June 6, 2020) <https://www.nationalreview.com/2020/06/the-hysterical-debate-over-federal-troops/>. Last accessed 6.6.2020.

<sup>190</sup> Christina Wilkie and Amanda Macias, “Trump Threatens to Deploy As George Floyd Protests Continue to Shake the U.S.” CNBC – Politics (June 1, 2020). <https://www.cnn.com/2020/06/01/trump-threatens-to-deploy-military-as-george-floyd-protests-continue-to-shake-the-us.html>.

<sup>191</sup> Tom Cotton, “Send in the Troops: The nation must restore order. The military stands ready.” NY Times Opinion, June 3, 2020 (<https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html>) (following the publication of this piece, there was a large outrage among readership resulting in the firing of the Editor at the New York Times who permitted the piece to be published).

<sup>192</sup> Cotton, Tom. “Tom Cotton: Send in the Troops”. New York Times, Opinion. June 3, 2020. <https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html> 6.6.2020.

<sup>193</sup> The Editors, “The Hysterical Debate Over Federal Troops”. National Review. (June 6, 2020) <https://www.nationalreview.com/2020/06/the-hysterical-debate-over-federal-troops/>. Last accessed 6.6.2020.

unless lawmakers pass a resolution.<sup>194</sup> In sum, these examples racially-charged white led riots were a form of looting, focused on erasure of the collective community of Black citizens, causing racial terror, as another derivation of “looting”. Then, turning to the birth of the U.S. Police force, it is important to keep in mind this historical backdrop of Black and Brown policing of movement and citizenship.

*G. White Supremacist Infiltration in US Police, or, Looting by Mass Policing after George Floyd*

The idea of a police force to “protect and serve” the entire population was put most prominently on display in the proclamation from John F. Kennedy when he dedicated May 15 to “National Police Week” as “peace officers memorial day.”<sup>195</sup> President Kennedy noted that officers have been protecting America since the nation’s birth.<sup>196</sup> However, the U.S. police force is both a modern invention, but also sparked by “changing notions of public order” and driven by economics and politics.<sup>197</sup>

It was not until the 1830’s when the idea of a centralized municipal police department first emerged in the United States.<sup>198</sup> As mentioned, before that during the colonies, the history of policing was that of slavery policing, and enforcement against fugitive enslaved Blacks.<sup>199</sup> However, in 1838, in the city of Boston, the first American police force was established, soon after followed by New York City in 1845, and by the 1880s all major U.S. Cities had municipal police

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<sup>194</sup> Carney, Jordain, “Democrats introduce bill to rein in Trump’s power under the Insurrection Act.” The Hill (June 4, 2020). <https://thehill.com/homenews/senate/501274-democrats-introduce-bill-to-rein-in-trumps-power-under-insurrection-act> . last accessed 6.6.2020.

<sup>195</sup> “National Police Week” <https://policeweek.org/index.html>.

<sup>196</sup> *Id.*

<sup>197</sup> Binkowski, Brooke, “The Origins of Policing in the United States.” Snopes. (September 26, 2016).

<https://www.snopes.com/fact-check/the-origins-of-policing-in-the-united-states/>. Last accessed 6.6.2020.

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

<sup>199</sup> Waxman, Olivia. “How the U.S. Got Its Police Force” (May 18, 2017). <https://time.com/4779112/police-history-origins/> last accessed 6.2.2020.

forces in place.<sup>200</sup> It is no surprise that Boston in 1838 was a large shipping commercial center, and business had required police protection of economic interests and property.<sup>201</sup> As crime historian Garry Potter at the Eastern Kentucky University suggests, these merchants came up with a way to save money by transferring to the cost of maintaining a police force to citizens by arguing that it was for the “collective good.”<sup>202</sup> What ultimately was the South’s formal slave patrols, became the North’s disenfranchising economic patrols that perpetuated structural inequity driven by the anxiety of “looting” of merchant interests.<sup>203</sup>

It is of interest, that turning to what many see as White Supremacy led “looting” following the George Floyd protests, the Mayor St. Paul, mimicking the same speech by Mayor Bill DeBlasio, said that many of the arrests made for looting came from were defined as “outside groups” who seem to be “using Mr. Floyd’s death as a cover to create havoc.”<sup>204</sup> The Twin Cities Department of Safety Commissioner John Harrington stated that an investigation was underway but some 40 arrests made in the Twin Cities on May 29 were linked to white supremacist groups and organized crime, largely from outside the city.<sup>205</sup>

On Sunday May 28, 2020, in an interview with CNN, Jake Tapper asked Robert O’Brien, President Trump’s National Security Advisor, whether he thinks “systemic racism” is a problem with law enforcement agencies in the United States; to which Mr. O’Brien responded: “I don’t think there is systemic racism. I think 99.0 percent of our law enforcement officers are great

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<sup>200</sup> *Id.*

<sup>201</sup> Waxman, Olivia B. “How the U.S. Got Its Police Force.” *Time Magazine* (May 18, 2017) . <https://time.com/4779112/police-history-origins/>. Last accessed 6.6.2020.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Parton, Jon, “Minnesota Official Link Arrested Looters to ‘White Supremacist’ Groups.” *Courthouse News Service* (May 30, 2020). <https://www.courthousenews.com/minnesota-officials-link-arrested-looters-to-white-supremacist-groups/>. Last accessed 6.6.2020.

<sup>205</sup> *Id.*

Americans.”<sup>206</sup> However O’Brien appears to ignore, or at least not know of, a 2006 FBI intelligence assessment published during the administration of President George W. Bush titled “White Supremacist Infiltration of Law Enforcement”, raised alarms over white supremacist groups infiltration – and appears to ignore the history of U.S. Slave Patrols that stood as a precursor to modern-day policing, in terms of the systemic inequity that were the foundations of the white property value protection.<sup>207</sup> This assessment found that a neo-Nazi gang formed within the Los Angeles County Sheriff’s Department<sup>208</sup> had harassed Black and minority communities. Similar investigations revealed other officers tied to hate groups in Illinois, Ohio, and Texas.<sup>209</sup>

White Supremacy has also infiltrated other police departments across the country in modern times. On June 20, 2001, two law enforcement officers were fired from the police for their involvement with the Ku Klux Klan (K.K.K.) in Williamson County Texas.<sup>210</sup> Officials investigating Deputy David Gay, and Sergeant Greg Palm found that they were involved in the K.K.K. after they had approached another officer in the same department to ask if he would join.<sup>211</sup>

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<sup>206</sup> Schulkin, Danielle. “White Supremacist Infiltration of U.S. Police Forces: fact-checking National Security Advisor” Just Security (June 1, 2020). <https://www.justsecurity.org/70507/white-supremacist-infiltration-of-us-police-forces-fact-checking-national-security-advisor-obrien/> last accessed 6.6.2020.

<sup>207</sup> *Id.* See also: <http://s3.documentcloud.org/documents/402521/doc-26-white-supremacist-infiltration.pdf>

<sup>208</sup> Tobar, Hector, “Deputies in ‘Neo-Nazi’ Gang, Judge Found: Sheriff’s Department: Many in Lynwood Office Have Engaged in Motivated Violence Against Blacks and Latinos, Jurist wrote.” (October 12, 1991) Los Angeles Times. <https://www.latimes.com/archives/la-xpm-1991-10-12-me-107-story.html> last accessed 6.2.2020.

<sup>209</sup> Palma, Bethania, “FBI Warned About White Supremacist Infiltrating Police Departments.” Snopes (Sept. 27, 2016) <https://www.snopes.com/fact-check/fbi-warned-about-white-supremacists/> stating: “Several key events preceded the report. A federal court found that members of a Los Angeles sheriffs department formed a Neo Nazi gang and habitually terrorized the black community. Later, the Chicago police department fired Jon Burge, a detective with reputed ties to the Ku Klux Klan, after discovering he tortured over 100 black male suspects. Thereafter, the Mayor of Cleveland discovered that many of the city police locker rooms were infested with “White Power” graffiti. Years later, a Texas sheriff department discovered that two of its deputies were recruiters for the Klan.” See also Gray, Emma, “American Policing Has Always Been About White Supremacy”. Huffington Post (June 4, 2020) citing to Brooklyn College Professor Alex S. Vitale’s books, “The End of Policing.”

[https://www.huffpost.com/entry/alex-s-vitale-american-policing-has-always-been-about-enforcing-white-supremacy\\_n\\_5ed934c2c5b69dee016ed79e](https://www.huffpost.com/entry/alex-s-vitale-american-policing-has-always-been-about-enforcing-white-supremacy_n_5ed934c2c5b69dee016ed79e)

<sup>210</sup> “Texas Officers Fired for Membership in KKK.” ABC News (January 7, 2006). <https://abcnews.go.com/US/story?id=93046&page=1> last accessed 6.6.2020

<sup>211</sup> *Id.*

In June of 2019, a study by the Center for Investigative Reporting identified hundreds of police officers across the country who were members of closed racist, Islamophobic, misogynistic, or anti-government militia groups on Facebook.<sup>212</sup> Out of these many identified (over 150 law enforcement departments nationwide) only one has taken a public stand, the Harris Sheriff's Office, which fired a detective for racist posts.<sup>213</sup> As Georgetown Law Professor Christy Lopez, who oversaw the Department of Justice's Civil Rights investigation into the Ferguson Police Department, has stated "it is hard when you get out here as a new officer, you're from a sheltered community somewhere, and you start to see a lot of pain and harm that is often happening in poor communities of color."<sup>214</sup> She continues, "it is easy for officers who are trying to deal with emotional impact of that to start to dehumanize people."<sup>215</sup> In 1999, in Cleveland, an unknown number of police officers in three of the department's six districts scrawled racist or Nazi graffiti throughout their quarters, the Mayor at the time announced.<sup>216</sup> Most recently, in New York City as well, there were discussions of potential white power signaling of officers during the protest, known as the "OK" gesture deemed by the Anti-Defamation League as a white power signal of "w" and "p".<sup>217</sup>

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<sup>212</sup> Carless, Will, "Hundreds of Cops Are in Extremist Facebook Groups. Why Haven't Their Departments Done Anything About It?" Nation of Change, *Source*: The Center for Investigative Reporting. (October 1, 2019).

<https://www.nationofchange.org/2019/10/01/hundreds-of-cops-are-in-extremist-facebook-groups-why-havent-their-departments-done-anything-about-it/>. Last accessed 6.6.2020.

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

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

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

<sup>216</sup> Scholz, Karin; Wendling, Ted. "Racist Graffiti in the Cleveland PD." (July 22, 1999).

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<sup>217</sup> Janelle Griffith and Matteo Moschella, "NYPD Officer Appears To Make White Power Sign At Protest, Prompting Probe" NBC News, June 4, 2020 <https://www.nbcnews.com/news/us-news/nypd-officer-appears-make-white-power-sign-protest-prompting-probe-n1224141> ("The video showing the officer making the apparent 'OK' hand gesture—touching the thumb and index finger to make a circle, with the remaining three fingers held outstretched—was posted to

Even in 1960, the nature of social protest and unrest has focused on the criminalizing of black communities and the voice of the unheard following a moment of racial unrest was the end the segregation and systemic inequity of black American through laws, policy and legislation that criminalize blackness, through the lens of a white supremacist view of threats to stability. As James Baldwin once noted in a 1960 essay in *Esquire* magazine, when speaking about police, “Fifth Avenue, Uptown” on unrest in Harlem, the discontent was not the sole intention and heart of the Black community’s protests but instead, “represent the force of the white world, and the world’s real intentions are simply for that world’s criminal profit and ease, to keep the Black man corralled up here in his place.”<sup>218</sup> There are reverse-instances where what is purportedly a “race riot” is in fact, a white supremacist attack on black America, such as the moment commonly known as the burning of Black Wall Street in Tulsa.

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

One has only to turn to the events, on May 31, 1921, in Greenwood section of Tulsa, Oklahoma.<sup>219</sup> The racial riots and looting that occurred to destabilize the site of Black mobility, in what is commonly known as “black wall street” began with racial anxiety.<sup>220</sup> Tulsa in the oil boom of the 1900s was a place that had Black-owned businesses, such as hotels, cafés, clothiers, and

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social media over the weekend... The ‘OK gesture has been used by people around the world for centuries, typically to signal consent, according to the Anti-Defamation League. Recently, the hand signal has also been appropriated to represent the letters w and p to signify ‘white power’, ... the ADL says.” See also Marina Pitofsky “NYPD Probing of Alleged Use of White Power Sign at Protest: report” *The Hill* (June 4, 2020). <https://thehill.com/blogs/blog-briefing-room/news/501266-nypd-probing-officers-alleged-use-of-white-power-sign-at>

<sup>218</sup> Baldwin, James. “Fifth Avenue, Uptown.” *Esquire Magazine* (October 16, 2007) .

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<sup>219</sup> Pickens, Josie. “Black Wall Street and the Destruction of an Institution.” *Ebony* (May 31, 2013).

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movie theaters.<sup>221</sup> The residents of this community of “Greenwood” were largely segregated from whites, but enjoyed the same luxuries.<sup>222</sup> Crime and racial anxiety set off the white supremacist destruction masked as looting and “race riot” – in 1921, when a white woman accused a young Black man of sexual assault.<sup>223</sup> During the night of the “race riot” deputized whites killed more than 300 Black Americans, burned to the ground more than 40 square blocks of 1,265 Black American homes, including hospitals, schools, churches and businesses.<sup>224</sup> White Deputies and the National Guard arrested and detained more than 6,000 Black Tulsans who were only released after being vouched for by whites.<sup>225</sup> Nearly nine thousand Black Americans homes were destroyed and were forced to line the streets in tents.<sup>226</sup>

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Pickens, Josie. “Black Wall Street and the Destruction of an Institution.” *Ebony* (May 31, 2013). <https://www.ebony.com/black-history/destruction-of-black-wall-street/>. Last accessed 6.6.2020.; *see also*, Christensen, Linda, “Burning Tulsa: The Legacy of Black Dispossession.” Zinn Education Project (May 28, 2013). <https://www.zinnedproject.org/if-we-knew-our-history/burning-tulsa-the-legacy-of-black-dispossession/> last accessed 6.6.2020.

<sup>224</sup> *Id.*

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

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



### Section V. Conclusion

The moment of George Floyd is not an “aberration.”<sup>227</sup> This moment stems from a long history of U.S. structural inequity resulting from laws, policies, and legislation that criminalize the subject-position of Black America. This structural inequity includes mass imprisonment, mass policing, and an attenuated lack of social equity in the ways in which the nation has responded to moments of social equity (as exemplified in the discourse after George Floyd on rioting and the voices of the unheard). Likewise, Critical Race Theory has more “work to do” for us – as legal scholars, lawyers, and law students – in terms of the laws adaptation to a

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<sup>227</sup> See Michelle Alexander, “The Injustice of This Moment Is Not an ‘Aberration’” *New York Times*, Opinion, January 17, 2020. (<https://www.nytimes.com/2020/01/17/opinion/sunday/michelle-alexander-new-jim-crow.html>)

series of Black and Brown bodies who have been historically unacknowledged, and for whom, the law has continued to control their movement, their rights in public spaces, and which has had a disproportionate effect on their livelihoods by way of the criminal justice systems emphasis on incarceration. An appendix like this one included in this article is one that focuses on critical race theory, expanding how the law should be read, and looking into the future of equity and justice.

If we are to take the N.Y.P.D. and other police departments motto of “to protect and to serve” the entire community, likewise we might now collectively take a deep breath and ask whom Justice and Service of Rights and Equity we are protecting - whose public and whose protection.<sup>228</sup> As Jamelle Bouie asks why are the police not accountable to black America?<sup>229</sup> In a frightening but plausible gesture, Bouie posits the following question, and bluntly answers in the following way – “the simplest answer to the question ‘Why don’t the American police forces act as if they are accountable to black Americans’, *they were never intended to be.*”<sup>230</sup>

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

The future will come soon. But not soon enough.

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<sup>228</sup> Waxman, Olivia. “How the U.S. Got Its Police Force” (May 18, 2017). <https://time.com/4779112/police-history-origins/> last accessed 6.2.2020.

<sup>229</sup> Bouie, Jamelle, “The Police Are Rioting. We Need to Talk About It.” New York Times Opinion (June 5, 2020). <https://www.nytimes.com/2020/06/05/opinion/sunday/police-riots.html>. Last accessed 6.6.2020.

<sup>230</sup> Bouie, Jamelle, “The Police Are Rioting. We Need to Talk About It.” New York Times Opinion (June 5, 2020). <https://www.nytimes.com/2020/06/05/opinion/sunday/police-riots.html>. Last accessed 6.6.2020.



**Suggested Reading List to Disrupting Structural Inequity, Shifting the Narrative from Black America Victims and Mass Policing**

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