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Confronting the Carceral State


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INTRODUCTION

Confronting the Carceral State

ALLEGRA M. McLEOD*

In August 2014, Michael Brown, an unarmed African-American teenager, was killed by a white police officer.¹ The young man's body lay for hours at mid-day on a residential street, with multiple gun shot wounds to his head, chest, and arm.² In the months that followed, police choked Eric Garner to death on a sidewalk in Staten Island,³ gunned down Tamir Rice on a playground in Ohio,⁴ shot Walter Scott in the back,⁵ and arrested Sandra Bland, effectively for a minor traffic violation.⁶ Bland died in custody shortly after.⁷ Then, in a vicious in-school arrest weeks later, a white police officer known in the school as "Officer Slam" threw a young African-American girl to the ground, flipped her body over, and dragged her across the floor in front of her stunned classmates.⁸

* Professor of Law, Georgetown University Law Center. © 2016, Allegra M. McLeod. Thank you to the participants in this symposium and to Derin McLeod, Sherally Munshi, and Philomila Tsoukala for their generous feedback. I am also grateful to *The Georgetown Law Journal* editors for their tremendous work on this issue, to Kate Hatheway for excellent research assistance, and especially to V. Noah Gimbel.

1. See Frances Robles & Julie Bosman, *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, N.Y. TIMES (Aug. 17, 2014), <http://nyti.ms/1vZqMeh> [<https://perma.cc/NX8W-2EQM>].

2. See Justin Hansford, *The Whole System Is Guilty as Hell: Interrupting a Legacy of Racist Police Culture Through a Human Rights Lens*, 21 HARV. J. AFR. AM. PUB. POL'Y 13, 13 (2015) ("The picture of Mike Brown's dead body, his blood on the concrete in a long red line. It made me sick to my stomach. My mind started playing the song 'Strange Fruit' by Billie Holliday, 'Blood on the leaves . . . Black bodies swinging in the southern breeze.' . . . Teenager Mike Brown—stopped for jaywalking, unsubmitive, killed, body left on display for over four hours . . . The devaluing of his life was a devaluing of my own life, the offense to his dignity an offense to my own dignity, the attack on him an attack on the entire community. It was a fresh cut in an old wound.").

3. See Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <http://nyti.ms/1QVkJLK> [<https://perma.cc/3J7P-UMZD>].

4. See Maria Gallucci, *Tamir Rice Shooting: Protesters Call for Cleveland Prosecutor to Resign After Grand Jury Declines to Indict Officers*, INT'L BUS. TIMES (Jan. 1, 2016, 4:49 PM), <http://www.ibtimes.com/tamir-rice-shooting-protesters-call-cleveland-prosecutor-resign-after-grand-jury2246699> [<https://perma.cc/2K7N-YUVV>].

5. See Mark Berman, *South Carolina Police Officer in Walter Scott Shooting Indicted on Murder Charge*, WASH. POST (June 8, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/08/police-officer-who-shot-walter-scott-indicted-for-murder/> [<https://perma.cc/QK86-NDTW>].

6. See Tom Dart, *Texas State Trooper Who Arrested Sandra Bland Indicted for Perjury*, GUARDIAN (Jan. 6, 2016, 5:44 PM), <http://www.theguardian.com/us-news/2016/jan/06/texas-state-trooper-arrested-sandra-bland-perjury-charges> [<https://perma.cc/KD2F-RZH5>].

7. See *id.*

8. See Tim Stelloh & Tracy Connor, *Video Shows Cop Body-Slamming High School Girl in S.C. Classroom*, NBC NEWS (Oct. 27, 2015, 9:38 AM), <http://www.nbcnews.com/news/us-news/video-appears-show-cop-body-slamming-student-s-c-classroom-n451896> [<https://perma.cc/EV6M-HSRM>]; WITW Staff, *Violent Arrest of 16-Year-Old Black Girl Leads to Dismissal of School Officer*, N.Y. TIMES: WOMEN IN

In reaction to these and other brutal events, a social movement has taken shape.⁹ Spearheaded by young, queer, black women activists, Black Lives Matter has brought people to the streets by the thousands in cities across the country.¹⁰ Black Lives Matter and the Movement for Black Lives have reshaped public discourse, focused popular solidarity, and issued a powerful call for change.¹¹

The Georgetown Law Journal convened this symposium—*Police/State: Race, Power, and Control*—in the midst of these unfolding events to take stock of the current state of policing in the United States. By exploring these acts of police violence, this symposium seeks to expand our frame of analysis, beyond the isolated conduct of assaultive police, to consider the wider constellation of public choices implicated in police violence. The deaths of Michael Brown, Eric Garner, Tamir Rice, Walter Scott, Sandra Bland, and numerous others are not simply anomalous tragedies that lie at the margins of an otherwise legitimate and well-functioning criminal legal process. Instead, these acts of racialized police violence place into sharp relief the routine reliance on the criminal process in the United States today—a routine involving ten to twelve million arrests per year, less than five percent of which are for violent crimes.¹² Beyond the two million people in jail and prison,¹³ the four-and-a-half million people on probation,¹⁴ and the two hundred thousand people cuffed with ankle monitoring

THE WORLD (Oct. 30, 2015), <http://nytlive.nytimes.com/womenintheworld/2015/10/30/violent-arrest-of-16-year-old-black-girl-leads-to-dismissal-of-school-officer/> [<https://perma.cc/BPZ3-R38V>].

9. See *About Us*, BLACK LIVES MATTER, <http://blacklivesmatter.com/who-we-are/> [<https://perma.cc/BM3U-Y7XH>].

10. See *id.*; see also Alicia Garza, *A Herstory of the #BlackLivesMatter Movement*, FEMINIST WIRE (Oct. 7, 2014), <http://www.thefeministwire.com/2014/10/blacklivesmatter-2/> [<https://perma.cc/4NT8-6MDF>]; Jennifer Steinhauer & Elena Schneider, *Thousands March in Washington to Protest Police Violence*, N.Y. TIMES (Dec. 13, 2014), <http://nyti.ms/1uCoH2j> [<https://perma.cc/B7HM-6TMU>]; *Protests Continue in New York City on Friday*, N.Y. TIMES (Dec. 5, 2014), <http://nyti.ms/1u1qhcG> [<https://perma.cc/6696-2RXN>].

11. See *supra* notes 9–10.

12. See, e.g., CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, CRIME IN THE UNITED STATES 2013 (2014), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/persons-arrested/persons-arrested> [<https://perma.cc/U95T-RGDF>] (“Nationwide, law enforcement made an estimated 11,302,102 arrests in 2013. Of these arrests, 480,360 were for violent crimes The highest number of arrests were for drug abuse violations”); CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, CRIME IN THE UNITED STATES 2012 (2013), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> [<https://perma.cc/2QP3-2Z2L>] (estimated 4.2% of arrests were for violent crimes, with the highest number of arrests for “drug abuse violations”); CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, CRIME IN THE UNITED STATES 2011 (2012), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested> [<https://perma.cc/6A9K-4ACK>] (estimated 4.3% of arrests were for violent crimes, with the highest number of arrests for “drug abuse violations”).

13. See DANIELLE KAEBLE ET AL., BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 1 fig.1 (2015) (revised Jan. 21, 2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf> [<https://perma.cc/48UC-6G89>].

14. See *id.* (using the term “community supervision population”).

bracelets,¹⁵ these recent, brutal events are continuous with daily humiliating pat downs and fines and fees for petty violations—death by a thousand cuts.¹⁶

The studies of policing included in this symposium show that assaultive police practices are, in significant part, the result of a tremendous overreliance on criminal law enforcement. We have come to rely on policing to address social concerns ranging from poverty, inequality, and addiction, to education, mental illness, and violence.¹⁷

The particular racialized brutality of these criminal law enforcement practices is also a product of this country's racial history.¹⁸ Criminal law enforcement in the United States has long served as a means of racial discipline and a manner of enforcing racial subordination—shaping for more than a century the tolerated brutality in criminal law enforcement and rendering U.S. carceral practices particularly severe across the board.¹⁹

Moreover, other forms of state neglect accompany the overenforcement of certain criminal measures in economically depressed communities of color.²⁰ When young people are unable to find remunerative work elsewhere, they turn to underground economies where disputes are frequently resolved by violence, and indeed, as a consequence, thousands of young people have lost their lives.²¹

Because the United States relies on policing to manage social concerns that are themselves often the result of more generalized social abandonment, we now live in a carceral state, characterized by zones of concentrated violence and despair. In our carceral state, as many as one in three (or one hundred million)

15. See James Kilgore, *Electronic Monitoring: Some Causes for Concern*, PRISON LEGAL NEWS (Mar. 15, 2012), <https://www.prisonlegalnews.org/news/2012/mar/15/electronic-monitoring-some-causes-for-concern/> [<https://perma.cc/H7CF-DVC4>].

16. See Paul Butler, *Stop and Frisk: Sex, Torture, Control*, in *LAW AS PUNISHMENT / LAW AS REGULATION* 155, 155 (Austin Sarat et al. eds., 2011).

17. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425–26 (2016); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016); Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 104 GEO. L.J. (forthcoming 2016), <http://georgetownlawjournal.org>.

18. See Butler, *supra* note 17, at 1425; Carbado, *supra* note 17, at 1524.

19. See Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1552–55.

20. See Butler, *supra* note 17, at 1437.

21. See Lisa L. Miller, *Reforming Police and Prisons Will Not Save Us*, BALKINIZATION (Aug. 10, 2015, 3:30 PM), <http://balkin.blogspot.com/2015/08/reforming-police-and-prisons-will-not.html> [<https://perma.cc/T59V-GK3S>] (“I have begun referring to the twin risks of state violence and street violence as *racialized state failure*, but it is difficult to understand this concept unless we widen the lens from the current focus on the pathologies of the criminal justice system The more persistent problem is the failure of the state to act *affirmatively* to reduce the exposure of Blacks, to the same degree as Whites, to a wide range of causes of violent death. This exposure comes both from disproportionate risk of violent victimization and state violence. It is not hyperbole, to say that African-Americans, far more than their white counterparts, experience a *failing state* characterized by the devastating dual problems of under-protection and over-enforcement of the law . . .”).

Americans has a criminal record.²² One in nine African-American children has had a parent in prison or jail,²³ and thousands of Central American refugees, mothers, and children alike have been subject to lock-down confinement in recent months.²⁴ One in thirty-one American adults is presently under criminal or correctional control of some form, and there are more people incarcerated in the United States in jail, prison, and immigration detention than anywhere else on earth, at any time in history.²⁵

* * *

The participants in this symposium explore what accounts for our current carceral crisis and how the associated violence might be redressed. Paul Butler focuses on the role of law in our carceral state. In *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, Butler contends that the most pervasive forms of racially abusive policing in the United States are a product of legal police conduct, not unlawful police abuse.²⁶ Butler examines how certain U.S. Supreme Court cases—most notably *Terry v. Ohio*, *Whren v. United States*, *Atwater v. City of Lago Vista*, and *Scott v. Harris*—are complicit in, and even facilitate, racially predatory policing. *Terry v. Ohio* permits police to stop and frisk a pedestrian on a reduced standard of reasonable suspicion rather than probable cause when they suspect that person has committed a crime.²⁷ Under *Whren v. United States*, police may racially profile and stop a person on a minor pretextual traffic violation without violating the Fourth Amendment’s protections against unreasonable searches and seizures.²⁸ Under *Atwater v. City of Lago Vista*, police may conduct a full custodial arrest of that person for a trivial traffic offense.²⁹ And under *Scott v. Harris*, police may use deadly force to subdue the suspect in certain circumstances if he or she resists.³⁰ As Butler explains, “[i]t is possible for police to selectively invoke their powers

22. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012: A CRIMINAL JUSTICE INFORMATION POLICY REPORT 3 (2014), <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf> [<https://perma.cc/YHA9-23A8>]; SENTENCING PROJECT, AMERICANS WITH CRIMINAL RECORDS (2015), http://www.sentencingproject.org/doc/publications/cc_HiT_Criminal_Records_profile_1.pdf [<https://perma.cc/JR3H-F4NB>].

23. Danielle Paquette, *One in Nine Black Children Has Had a Parent in Prison*, WASH. POST (Oct. 27, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/10/27/one-in-nine-black-children-have-had-a-parent-in-prison/> [<https://perma.cc/ERA4-ZWXR>].

24. See Cindy Carcamo, *Judge Blasts ICE, Says Immigrant Children, Parents in Detention Centers Should be Released*, L.A. TIMES (July 25, 2015, 5:13 PM), <http://www.latimes.com/local/lanow/la-me-ln-judge-orders-release-of-immigrant-children-mothers-from-detention-centers-20150725-story.html> [<https://perma.cc/2C82-4TYX>].

25. See LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> [<https://perma.cc/A39M-X9YF>]; PUB. SAFETY PERFORMANCE PROJECT, PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009).

26. See Butler, *supra* note 17, at 1425.

27. See 392 U.S. 1, 30–31 (1968).

28. See 517 U.S. 806, 813, 819 (1996).

29. See 532 U.S. 318, 324, 354–55 (2001).

30. See 550 U.S. 372, 386 (2007).

against African-American residents, and, at the same time, act consistently with the law.”³¹ As one illustration, the U.S. Department of Justice’s investigation of the fatal shooting of Michael Brown determined that the killing of Brown was legally justified because the officer perceived a threat and could therefore deploy deadly force—even though the officer might readily have sought instead to peaceably de-escalate the encounter.³²

Although legal remedies in the aftermath of police violence, like “pattern and practice” investigations pursued by the U.S. Department of Justice, may bring about certain improvements in police practices, Butler shows why civil rights and procedural remedies are inadequate to realize the more fundamental transformation necessary to redress racial profiling, excessive force, and antiblack racism. For example, Butler underscores that after federal investigations of police practices in Los Angeles, the level of policing actually increased substantially—resulting in more stops and frisks and more arrests.³³

Instead, Butler contends the police should simply “stop it”—stop engaging in racially predatory policing and physical brutality in favor of more affirmative and less oppressive interventions to address significant crime.³⁴ In this regard, Butler aligns his analysis with the Black Lives Matter movement and others who call for a third reconstruction, prison abolition, and effective dismantling of institutional racism and inequality.³⁵ This abolitionist call serves as a framing provocation for this symposium to which we will return soon.³⁶

Devon Carbado introduces another explanatory account of the persistence of police abuse of African-Americans. In *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, Carbado demonstrates how various social factors converge to expose African-Americans to excessive police contact and scrutiny: racial segregation, relative economic disenfranchisement, racial bias, the vast criminalization of minor misconduct, and minimal constraints on policing of petty street-level infractions.³⁷ This increased exposure to police surveillance renders African-Americans more vulnerable to police violence, primarily because they are subject to more frequent police encounters.³⁸ At the same time, the organizational culture of police departments often implicitly encourages the use of force. After police have used force—even deadly force—judges and other legal actors evaluating police conduct frequently regard the use of force as legally justifiable. Legal doctrines such as qualified immunity further inhibit successful legal challenges to police abuse while immunizing police from

31. Butler, *supra* note 17, at 1424.

32. *See id.* at 1422–24.

33. *Id.* at 1459.

34. *See id.* at 1476.

35. *See id.* at 1476–77; *see also* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 64 *UCLA L. REV.* 1156 (2015).

36. *See infra* text accompanying notes 55–59.

37. *See* Carbado, *supra* note 17, at 1485–1505.

38. *Id.* at 1485.

financial consequences for their actions.³⁹ In combination, these barriers to legal sanctions or other remedies communicate to police officers that there will be minimal penalties, if any, for a failure to exercise care in deploying violent force.⁴⁰ Carbado suggests that these features together render blue-on-black violence a structural problem requiring structural reform, rather than measures that address only the behavior of errant officers.⁴¹

Jeffrey Fagan and Elliott Ash attend to the centrality of the criminalization of poverty through “legal financial obligations” in the widening net of social control that characterizes our carceral state. In *New Policing, New Segregation: From Ferguson to New York*, published online as an addendum to this symposium, Fagan and Ash call attention to the role that one prominent model of policing has played in the exploitation of cities’ poorest residents: the so-called “new policing,” which entails aggressive enforcement of minor crimes, advanced statistical metrics, and new forms of organizational accountability.⁴² Fagan and Ash demonstrate that in two radically different municipalities—Ferguson, Missouri and New York, New York—these police tactics are responsible for a web of social control that primarily ensnares economically disenfranchised people of color. Police stops for minor infractions like driving with a suspended license or possession of marijuana and citations for mischief or high grass and weeds violations impose significant burdens on the poor.⁴³ The resulting financial obligations frequently become insurmountable for poor people, exacerbating inequality and entrenching poverty and segregation, particularly in African-American communities, while doing little to redress serious crime.

In *Critical Perspectives on Police, Policing, and Mass Incarceration*, Richard Delgado and Jean Stefancic locate the roots of the problems in U.S. criminal law enforcement in state efforts to forcibly relocate socially marginalized populations.⁴⁴ Delgado and Stefancic suggest that we should understand carceral violence in intersectional terms, not only in terms of black–white male racial dynamics, drawing attention to the way carceral violence impacts Latinos, queer and transgender people of color, immigrants, and others. Killings by border patrol serve as a particularly vivid illustration of how carceral violence affects the lives of other racialized groups, in addition to African-Americans. But apart from these killings, thousands of immigrants suffer from dehydration or die of thirst in their attempts to evade criminal-style immigration enforcement at the border. As in the context of domestic policing, this is not a matter of excessive force on the part of individual officers; instead, these deaths reflect a broader structure of racially and socioeconomically skewed policies associated

39. *Id.* at 1519–22.

40. *See id.* at 1524.

41. *See id.* at 1524.

42. Fagan & Ash, *supra* note 17.

43. *Id.*

44. *See* Delgado & Stefancic, *supra* note 19.

with mass suffering and death, even where no single agent of the state is uniquely to blame. While African-Americans have been forcibly removed from the streets, voting rolls, and job market, often in response to minor criminal offenses, Latinos, who constitute 16.5 percent of the U.S. population, are disproportionately subject to immigration detention and deportation as a means of forcible removal from U.S. public life. Native Americans, Asians, and Muslims have also been subject to forced removal, profiling, and surveillance—each dispossessed of the opportunity to participate fully in public life.⁴⁵ Delgado and Stefancic introduce, by contrast, an account of a more just policing paradigm typified by decentralization, diversification of police forces, local citizen review, and integration of police in local communities.⁴⁶

Another proposal for reform that has received considerable attention involves video recording police. Although most attention has focused on police-worn body cameras, Jocelyn Simonson, in *Beyond Body Cameras: Defending a Robust Right to Record the Police*, reveals the importance of civilian filming of police conduct.⁴⁷ Simonson argues for a robust First Amendment right to record the police.⁴⁸ Although body cameras worn by police officers may deter misconduct and document police activity, only civilian filming, Simonson contends, enables citizens to exercise ownership over their own streets and neighborhoods. Civilian filming allows citizens to retain control over the footage of police conduct, facilitating civilian empowerment and public expression. Civilian recording of police serves, in turn, as an important form of democratic participation, ensuring greater accountability.⁴⁹ Indeed, it is in significant measure citizen recording of police that galvanized mass public and elite attention to the matter of racialized police violence.

Still, capturing police behavior on video, as important as that has been to this moment of wider public interest in change, may be limited as a means of facilitating reform, and may even carry its own dangers. In the final contribution to this symposium, V. Noah Gimbel addresses how police-worn body cameras may be used against criminal defendants, expanding punitive control over vulnerable people facing prosecution even for minor offenses.⁵⁰ In *Body Cameras and Criminal Discovery*, Gimbel argues that criminal defendants—and not just police and prosecutors—should have access through discovery to police-worn body camera footage. Through a case study of legislation and litigation over police-worn camera footage in Washington, D.C.—among the first major cities to move from a limited pilot program to a fully camera-equipped police force—Gimbel explores efforts to strike a fair balance between defendants’

45. *Id.* at 1536–39.

46. *Id.* at 1545–49.

47. See Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559 (2016).

48. See *id.* at 1563.

49. See *id.* at 1568–69.

50. See V. Noah Gimbel, *Body Cameras and Criminal Discovery*, 104 GEO. L.J. 1581 (2016).

access to footage and the safety of witnesses. Without more open access to body camera footage, Gimbel warns that body cameras could “evolve into yet another form of mass surveillance at the state’s disposal to control and punish marginalized communities.”⁵¹

* * *

And yet, all of this may not be enough to bring about change. The visualization of carceral violence fails to address forms of abuse that are perpetrated in ways and places that remain less visible—for instance, the predatory imposition of fees and fines that Fagan and Ash explore or the deaths in the desert produced by the criminalization and militarization of immigration enforcement. Furthermore, rendering police behavior more widely visible does not offer an alternative framework so sorely needed to our general overreliance on criminal law enforcement.

There are other risks, too, that may accompany the increasing circulation of images of police violence directed with particular severity against African-American bodies. More specifically, the terrible spectacle of violence recently revealed to a wider public through video recordings of police poses at least two further dangers. Fred Moten, social theorist and poet, cautions that we must be mindful that in our efforts to seek redress and protection from racial violence we do not reinscribe the very structures we are trying to escape.⁵² Moten cites Saidiya Hartman, who in her own writing on racial violence observes that “[r]ather than inciting indignation,” too often this violence and brutality may “immure us to pain by virtue of their familiarity . . . and especially because they reinforce the spectacular character of black suffering.”⁵³ Of further concern is “the precariousness of empathy and the uncertain line between witness and spectator. Only more obscene than the brutality unleashed . . . is the demand that this suffering be materialized and evidenced by the display of the tortured body or endless recitations of the ghastly and terrible.”⁵⁴ Hartman asks: “In light of this, how does one give expression to these outrages without exacerbating the indifference to suffering that is the consequence of the numbing spectacle or contend with the narcissistic identification that obliterates the other or the prurience that too often is the response to such displays?”⁵⁵

Given these concerns, in trying to convey the routinization of racial violence, Hartman looks not to invocations of the shocking and the terrible, but elsewhere, to those scenes in which terror can hardly be discerned, in order to defamiliarize the familiar rather than to exploit the shocking spectacle. Efforts to confront police violence today should likewise be attentive to manifestations of carceral violence that are less visible, and we should remain cautious of an

51. *See id.* at 1585.

52. FRED MOTEN, *IN THE BREAK: THE AESTHETICS OF THE BLACK RADICAL TRADITION* 3 (2003).

53. *Id.* (quoting SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION* 1–2 (1997)).

54. *Id.*

55. *Id.*

inurement to these awful displays of violence in the face of their increasing circulation and continuous display.

A second related risk of fixation on visually accessible brutality is a presumption that carceral violence is contained predominantly in visible incidents rather than pervading our legal and social arrangements more generally. We might ask then: What activities and forms of human expression do broken windows policing or the new policing aim to eliminate? What value does broken windows policing aim to destroy even where it is conducted with the utmost politeness? Moten suggests it is often the freedom impulse of black youth—what he calls “insurgent black social life,” the expression of youthful exuberance read as disorder—that is the target of broken windows policing.⁵⁶ Perhaps it is the hostility to “broken windows” that also needs to be rethought, not only the conduct of police in executing particular arrest policies.

* * *

Is there a way, then, to reduce carceral violence without exploiting the shocking spectacle to minimal effect, and to confront violence in a manner that changes those structural conditions that engender racially concentrated harm and despair? The demands associated with the Black Lives Matter movement—to which Professor Butler gestures in his call for police to “stop it”⁵⁷—envision an end to police brutality, but also greater opportunities for dignified employment, quality education, decent housing fit for the shelter of human beings, and the unraveling of the prison industrial complex.⁵⁸ Some of the more specific police reforms proposed by Campaign Zero, another affiliated contemporary social movement effort to reduce police violence, include an end to broken windows policing and the implementation of meaningful community oversight.⁵⁹ The studies in this symposium likewise suggest that eliminating carceral violence will require more than recording the effects of carceral violence, diversifying police forces, or bringing a greater measure of procedural justice to the criminal process, as important as those reforms may be. It will also require that we constitute forms of collective life that enable us to break from our carceral state.

We might understand such reform efforts in terms of their common goal—one of eventual abolition.⁶⁰ Abolition, in this account, entails both an aspira-

56. See *Do Black Lives Matter?: Robin D.G. Kelley and Fred Moten in Conversation*, 25 ABOLITION-IST 3 (2016); see also VIMEO (Dec. 13, 2014), <https://vimeo.com/116111740> [<https://perma.cc/VUB3-VZ3W>].

57. Butler, *supra* note 17, at 1476.

58. See, e.g., *Demands*, FERGUSON ACTION, <http://fergusonaction.com/demands/> [<https://perma.cc/DWJ3-KNNS>]; *A Vision for Black Lives: Policy Demands for Black Power, Freedom & Justice*, THE MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org> [<https://perma.cc/GBF2-DPGC>].

59. See CAMPAIGN ZERO, <http://www.joincampaignzero.org> [<https://perma.cc/JAA7-RNNU>].

60. See MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN'T WORK—AND HOW WE CAN DO BETTER 119 (2014); Dan Berger, *Social Movements and Mass Incarceration: What Is to Be Done?*, 15 SOULS: CRITICAL J. BLACK POL., CULTURE, & SOC'Y 3, 14 (2013); McLeod, *supra* note 35, at 1156.

tional ethical horizon and an incremental reform framework that aims to radically reduce reliance on criminal law enforcement to manage shared concerns in favor of other collective social projects. The ultimate goal of an abolitionist ethic is to eliminate practices of caging, shackling, confining, and minutely surveilling human beings in favor of other forms of ensuring collective peace.⁶¹

Our laws could constrain the substance of what police can arrest for without undue disruption to public order. Our laws could require police, in some measure, to “stop it.” And violations like minor theft could be prevented through changed merchandising practices or store design rather than criminal law enforcement, which subjects millions of men, women, and children to stigma and pervasive surveillance that interferes with their employment prospects and other opportunities to improve their lives.⁶²

An abolitionist ethic, however, is not antipolice or even antagonistic to the police. In fact, D.C. Police Chief Cathy Lanier recently suggested that “policing has become the drive-thru 24 hours McDonald’s of services.”⁶³ According to Chief Lanier, it would be better if certain regulations could be addressed by people other than police, by people without guns—if families dealing with a person in mental health crisis could call a mental health support service rather than the police. According to Chief Lanier, “[t]he goal should be to put us out of business,” through “investments before someone gets in the system. More investments in social services, and less in policing and incarceration.”⁶⁴ This is an agenda for reform consistent with the demands of the Movement for Black Lives.

An abolitionist ethic is also resonant with a longstanding black radical vision of liberation from police and state violence that runs from W.E.B. DuBois to the Black Panther Party.⁶⁵ The Black Panther Party’s thirteen-point program, like the calls to action of Black Lives Matter, focused on education, housing fit for the shelter of human beings, community control of the police, and an end to the caging and shackling of men and women in jails and prisons.⁶⁶ This reformist

61. See ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 15, 21 (2003); McLeod, *supra* note 35, at 1156.

62. Fagan & Ash, *supra* note 17.

63. See Perry Stein, *D.C. Police Chief: Policing has Become the ‘Drive-Thru 24 Hours McDonald’s of Services,’* WASH. POST (Nov. 12, 2015), <https://www.washingtonpost.com/news/local/wp/2015/11/12/d-c-police-chief-policing-has-become-the-drive-thru-24-hours-mcdonalds-of-services/> [<https://perma.cc/Y43J-96H6>].

64. See Rachel Kurzius, *D.C. Chief Lanier Tells Ta-Nehisi Coates Policing Has Become ‘McDonalds’ Of Services,* DCIST (Nov. 12, 2015), http://dcist.com/2015/11/_dc_police_chief_cathy.php [<https://perma.cc/P4YM-YYZC>].

65. See, e.g., JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* (2013); Nikhil Pal Singh, *The Black Panthers and the “Undeveloped Country” of the Left,* in *THE BLACK PANTHER PARTY RECONSIDERED* 7 (Charles E. Jones ed., 1998).

66. See *OFF THE PIGS!: THE HISTORY AND LITERATURE OF THE BLACK PANTHER PARTY* (G. Louis Heath ed., 1976); see also ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT* 72–73 (2016) (exploring the Black Panther Party’s program in connection to nineteenth century abolitionist efforts that “recognized that slavery could not be ended by simply

impulse also animated the cross-racial radical movements of the 1960s and 1970s. In 1970, in Washington, D.C. and Philadelphia, the Black Panthers, together with other social movement organizations, including Latinos, Asian-Americans, feminists, and LGBT groups, convened a People's Constitutional Convention.⁶⁷ The workshop reports of the People's Constitutional Convention, drafted by thousands of participants, included, again, an emphasis on security not primarily through policing but through free quality public education, quality affordable housing, dignified employment, and quality healthcare. The workshop reports also envisioned strong local community oversight of the police, who would be chosen by the community to fulfill a relatively minimal role in responding to community needs and concerns.⁶⁸ Although these movement efforts ultimately unraveled, participating groups continued on a small scale to address community security through free breakfast programs, public health clinics, and community schools.⁶⁹

An abolitionist orientation toward police reform continues to inform in part the vision of the Black Lives Matter movement. My concluding provocation in this introduction, then, is that much of the work that criminal law enforcement does today in the United States could be abolished and replaced by other collective social measures along these lines.

Communities can work together to improve shared conditions of economic insecurity, namely by calling attention to common experiences of impoverishment and vulnerability and seeking to change those conditions. For example, the coalition of Black Lives Matter, Brown Work Matters, and the fight for a fifteen-dollar minimum wage addresses the shared experience of economic marginalization by envisioning security in terms other than through policing and criminal law enforcement.⁷⁰ These efforts also involve a form of intersectional coalitional politics contemplated by Delgado and Stefancic in this symposium.⁷¹

When it comes to more serious violent crimes, though, is it possible to imagine prevention and redress without relying primarily on policing and prisons? To address violence otherwise will require other means of prevention and other forms of response.

negatively abolishing slavery but rather that institutions had to be produced that would incorporate former slaves into a new and developing democracy").

67. See *A Convention to Write a New U.S. Constitution*, in OFF THE PIGS! THE HISTORY AND LITERATURE OF THE BLACK PANTHER PARTY, *supra* note 66, at 185.

68. See *id.*

69. The constitution the participants began to draft through working papers was to be revised and ratified in Washington, D.C. shortly after their initial Philadelphia meeting, though that never came to pass. See Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 285–86 (2015).

70. See, e.g., Jana Kasperkevic, *Fight for \$15: Workers Across U.S. Protest to Raise Minimum Wage—As It Happened*, GUARDIAN (Apr. 15, 2015), <http://www.theguardian.com/us-news/live/2015/apr/15/fight-for-15-protest-workers-minimum-wage-live> [<https://perma.cc/Q7HH-HKJX>].

71. See Delgado & Stefancic, *supra* note 18, at 1539–41.

Pursuing alternative means of violence prevention, Violence Interrupters and Cure Violence are community engagement initiatives that seek to address violence through mediation and intervention by formerly gang-involved community members.⁷² These programs take a public-health approach to violence in communities with high levels of homicides by identifying community conflicts likely to escalate and working through ongoing mediation and community organizing to interrupt those cycles of violence.

Urban regeneration projects also promise to reduce violent crime by providing employment, housing, and usable public space. Charles Branas, an epidemiologist at the University of Pennsylvania, has shown that where abandoned and violence-plagued urban spaces are converted to more constructive public uses, as was the case for thousands of acres in Philadelphia and Detroit, these projects create jobs and usable public space, and in so doing are often associated with reduced gun violence.⁷³ Even where gun violence and violent crime did not decline, people felt happier and safer in these communities.⁷⁴ These projects turn the broken windows theory of policing on its head by improving visual orderliness not through criminal law enforcement, but through the collaborative beautification of shared community spaces.

In the aftermath of violence, there are also other efforts that offer more sustainable forms of redress. Common Justice, an organization based in Brooklyn, serves as one example.⁷⁵ Common Justice is an alternative to incarceration program based on restorative justice principles. It works with young people, ages sixteen to twenty-four, who commit violent felonies and with those they have harmed. Victims and those who have perpetrated harm come together to develop respectful and effective forms of accountability and dignified healing in order to break cycles of violence.⁷⁶ Rather than involve criminal law enforcement, the agreements that arise from Common Justice's restorative processes, with the willing consent of the victim, may include restitution to the victim, commitments to attend work and school, and service to the community. The goal is to repair rather than sever ties in the aftermath of serious crime. In 2012, Common Justice was recognized with the Award for Professional Innovation in Victim Services from the Department of Justice as it better serves victims,

72. See, e.g., *The Interrupters*, CURE VIOLENCE, <http://cureviolence.org/resources/the-interrupters/> [<https://perma.cc/XFQ6-8MTL>]; see also WESLEY G. SKOGAN ET AL., EVALUATION OF CEASEFIRE-CHICAGO (2009) (identifying significant reductions in shootings and homicides associated with antiviolence mediation interventions); DANIEL W. WEBSTER ET AL., EVALUATION OF BALTIMORE'S SAFE STREETS PROGRAM (2012) (finding reductions in shootings and homicides associated with antiviolence mediation interventions).

73. Charles C. Branas et al., *A Difference-in-Difference Analysis of Health, Safety, and Greening Vacant Urban Space*, 174 AM. J. EPIDEMIOLOGY 1296, 1296–97 (2011); see also Michaela Krauser, *The Urban Garden as Crime Fighter*, NEXT CITY (Aug. 22, 2012), <https://nextcity.org/daily/entry/the-urban-garden-as-crime-fighter> [<https://perma.cc/WH4G-MMWX>].

74. Branas et al., *supra* note 73, at 1301–02.

75. See *About*, COMMON JUSTICE, <http://www.vera.org/project/common-justice> [<https://perma.cc/2XXX-9QSW>].

76. *Id.*

especially young people of color, who are unlikely to receive services through the conventional criminal process to address their material, emotional, and social needs in the aftermath of serious crime.⁷⁷

It is along these lines that we might begin to confront our current carceral state, though we should bear in mind that we live with risk now and always will. We will never entirely eliminate the risk of harm and violence, but we could approach our efforts to respond to violence, mental illness, unemployment, addiction, and inequality with more humane collective social responses than those that characterize our current carceral state.

77. *Id.*