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The Right to Violence

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THE RIGHT TO VIOLENCE

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Abstract

Scholars have long contended that the state has a monopoly on the use of violence. This monopoly is considered essential for the state to assure the safety and security of its citizens. Whereas public officers have the broadest authority to deploy violence, in order to make arrests or to inflict punishment, private citizens allegedly have severe restrictions on their use of force. Specifically, the state is said to only authorize private violence when civilians face an imminent threat of unlawful force or when civilians are attempting to prevent a crime.

Yet the state explicitly authorized private violence against enslaved people during the colonial and antebellum eras in order to exploit their labor. And from Reconstruction through the civil rights movement, state officials persistently declined to enforce criminal laws when persons classified as white engaged in violence against Black communities, regardless of whether the perpetrator was a public or private actor. Although legal scholars have occasionally acknowledged these historical incidents, they have not sufficiently interrogated how race dictates access to safety and how race influences when the state will surrender its monopoly on violence.

This Article is the first in a series to use criminal law and policy to explore how Black people are excluded from safety guarantees traditionally associated with the social contract. Drawing from antebellum and postbellum case law, the Article illuminates how the state has relinquished its monopoly on violence in order to sustain race- and labor-based hierarchies. As a result, violence has assumed the shape of a legal right. This right can be stated as follows: violence that enables and enforces the dominant position of persons classified as white shall evade punishment, subject to limited exceptions; if punishment is inflicted, such punishment shall be less severe than the punishment that is customarily imposed for the underlying criminal offense.

Conceptualizing violence as a legal right has two distinct advantages. First, the right illuminates the potential benefits and pitfalls of securing safety for Black communities through traditional legal channels. Second,

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the right can help guide the strategic decisions of stakeholders that are pursuing legal interventions grounded in critical theory and abolitionist philosophy.

INTRODUCTION

In March of 1871, the Black residents of Frankfort, Kentucky delivered a petition to both houses of the federal Congress.[1] That petition recounted 116 incidents of violence, committed by former Confederate soldiers and Ku Klux Klan members against Black residents and white Republicans, between November of 1867 and February of 1871.[2] Because their own governor, John Stevenson, denied the severity of the violence unfolding within the state, and their state representatives refused to enact laws to disband white supremacist groups, the petitioners sought the direct intervention of the federal government to assure the protection of their legal rights.[3]

The residents of Frankfort were not alone in unearthing evidence that individual and collective acts of white violence routinely went unpunished. Late-nineteenth century Black journalists like T. Thomas Fortune and John Mitchell Jr. used their newspapers to challenge mainstream accounts that framed the physical assaults and lynchings committed by white citizens as a justifiable response to Black criminality.[4] In 1899, their colleague and prominent anti-lynching activist, Ida B. Wells, circulated her own pamphlet, which described a series of brutal lynchings carried

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[1] *See* Petition from Kentucky Negroes (Mar. 25, 1871), *reprinted in* 2 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 594 (Herbert Aptheker ed., 1951) [hereinafter Kentucky Petition].

[2] This was not the first time that members of Congress had heard about white-led mobs attacking formerly enslaved people; just days after the Memphis Massacre of 1866, in which a white mob killed forty-six Black people and caused approximately $130,000 in property damage, Congress formed a special committee to directly investigate the atrocity and collect witness testimony. *See* Bernice Bouie Donald, *When the Rule of Law Breaks Down: Implications of the 1866 Memphis Massacre for the Passage of the Fourteenth Amendment*, 98 B.U. L. REV. 1607, 1638, 1645–46 (2018). The committee's subsequent report not only confirmed the scale of the violence, but also decried the lack of response from local government officials during and after the massacre. *See generally* H.R. Rep. No. 39-101 (1866).

[3] Kentucky Petition, *supra* note 1, at 595.

[4] *See* CHRISTOPHER WALDREP, AFRICAN AMERICANS CONFRONT LYNCHING: STRATEGIES OF RESISTANCE FROM THE CIVIL WAR TO THE CIVIL RIGHTS ERA 13–35 (Jacqueline M. Moore & Nina Mjagkij eds., 2009). Fortune specifically criticized the country's federal system, which he believed enabled racial violence by leaving matters of criminal punishment exclusively within the purview of state and local officials, who both participated in acts of mob violence and actively assisted the perpetrators in evading arrest and imprisonment. *Id.* at 23.

out over just two months in Georgia.[5] She not only sought to bring attention to the atrocities, she also made appeals in and outside of the country for federal and international intervention.[6]

Claims that state and local officials were unresponsive to racial violence persisted into the twentieth century, as did demands for protection. Black people who fled to the North during the early stages of the Great Migration emphasized how northern police officers, like their southern counterparts, refused to arrest or otherwise respond to acts of violence by white mobs and rioters.[7] The National Association for the Advancement of Colored People, or NAACP, was itself formed "as a direct result of efforts to combat racially motivated mob violence."[8] The organization spent its first four decades publicizing and denouncing lynchings, while also lobbying "on behalf of over two hundred antilynching bills" during that same period.[9]

From Reconstruction through the 1950s, Black thought leaders and Black-led organizations persistently emphasized how "private" crimes of racial terror were, in fact, enabled by public officials and the state.[10] They sought to unearth the state's perpetual role in authorizing racial violence, regardless of whether that violence was

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[5] *See generally* IDA B. WELLS-BARNETT, LYNCH LAW IN GEORGIA (1899), https://tile.loc.gov/storage-services/service/rbc/lcrbmrp/t1612/t1612.pdf [https://perma.cc/2H9D-CKK9].

[6] *See* EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 52 (2017), https://eji.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-110121.pdf [https://perma.cc/Z8FW-8EDN] [hereinafter EJI REPORT].

[7] ELY AARONSON, FROM SLAVE ABUSE TO HATE CRIME: THE CRIMINALIZATION OF RACIAL VIOLENCE IN AMERICAN HISTORY 134 (Christopher Tomlins ed., 2014).

[8] RANDALL KENNEDY, RACE, CRIME, AND THE LAW 47 (1997).

[9] *Id.* at 48. Although the first anti-lynching legislation was introduced in 1900, it took over 120 years for such legislation to pass both houses of Congress and finally be signed into law. *See* Eric McDaniel & Elena Moore, *Lynching Is Now a Federal Hate Crime After a Century of Blocked Efforts*, NPR (Mar. 29, 2022, 4:36 PM), https://www.npr.org/2022/03/29/1086720579/lynching-is-now-a-federal-hate-crime-after-a-century-of-blocked-efforts [https://perma.cc/B6ET-3FAX].

[10] *Compare* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860–1880 699 (1998) (explaining how, in the era of Reconstruction, police were unresponsive to sexual violence committed by white men against Black women, and how police were prone to arrest Black people victimized by white perpetrators rather than the perpetrator themselves) *and* Verena Erlenbusch-Anderson, *Historicizing White Supremacist Terrorism with Ida B. Wells*, 50 POL. THEORY 275, 286–90 (2022) (confirming Black people in the late nineteenth century and early twentieth century used the language of terrorism in order to capture how lynchings were sanctioned by the state and were intended to enforce the unstated law of white supremacy) *with* C.R. CONG., WE CHARGE GENOCIDE 4 (William L. Patterson ed., 1951), https://depts.washington.edu/moves/images/cp/WeChargeGenocide.pdf [https://perma.cc/P8XE-L6XV] (contending that the Ku Klux Klan represents "a semi-official arm of government and [is] even granted the tax exemptions of a benevolent society.").

committed by state agents or private citizens.[11] The violent response of white law enforcement to Freedom Riders in the 1960s, along with officers' unresponsiveness to the physical assaults committed by white civilians against protesters,[12] only served to substantiate their claims. The historical record shows that this unresponsiveness was not exclusively a state-level phenomenon. Rather, Black activists and organizations repeatedly pleaded for federal protection against the violence of state officers and civilians, yet federal officials simply deferred to the very prosecutors and judges who were obstructing the prosecution of white citizens.[13]

In the decades since the civil rights movement, racial justice organizations have continued to decry the federal government's disinterest in prosecuting crimes of racial violence[14] while also emphasizing how seemingly private acts of white violence are sanctioned by the state.[15] Simultaneously, legal scholars have sought to

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[11] *See* NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 29 (2014) (explaining how organizations like the National Negro Congress and the Civil Rights Congress adopted a "structural law-and-order" perspective in the 1940s that emphasized how "white violence spanned 'private' crimes such as lynching and state punishments such as execution . . . ."). Further, Ida B. Wells specifically sought to illuminate the economic motives underlying much of this violence. *See, e.g.*, IDA B. WELLS, CRUSADE FOR JUSTICE 56 (Alfreda M. Duster ed., Univ. Chi. Press 2020) (1970) (describing lynchings as "[a]n excuse to get rid of Negroes who were acquiring wealth and property and thus keep the race terrorized . . . .").

[12] *See infra* Part II.C.

[13] *See generally* MICHAEL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-*BROWN* SOUTH 106–27 (2d ed. 1995).

[14] In 1984, the National Anti-Klan Network joined eight hate crime survivors in a lawsuit against both the Federal Bureau of Investigation and the Department of Justice, in which they claimed that neither state agency was enforcing federal laws that prohibited racially motivated violence. *See* McCollum v. Smith, 596 F. Supp. 165, 166–67 (D.D.C. 1984). Specifically, they contended that the Department's erroneous construction of federal hate crime statutes "resulted in a deprivation of plaintiffs' rights to be free from race discrimination and from the badges and incidents of slavery under the thirteenth amendment . . . ." *Id.* at 167. The District Court proceeded to dismiss the suit, finding that the "plaintiffs have failed to demonstrate that they have been injured in fact by defendants' statutory construction . . . ." *Id.* at 169.

[15] *See, e.g.*, *Black Lives Matter Statement on Kyle Rittenhouse Verdict*, BLACK LIVES MATTER (Nov. 19, 2021), https://blacklivesmatter.com/black-lives-matter-statement-on-kyle-rittenhouse-verdict/ [https://perma.cc/3522-KE93] (contending that white teenager, Kyle Rittenhouse, was acquitted for killing racial justice protesters because "our legal systems are deeply rooted in white supremacy"); Leah Watson, *Kyle Rittenhouse Didn't Act Alone: Law Enforcement Must Be Held Accountable*, ACLU (Nov. 19, 2021), https://www.aclu.org/news/criminal-law-reform/kyle-rittenhouse-didnt-act-alone-law-enforcement-must-be-held-accountable [https://perma.cc/46N5-TW9Z] (uncovering how, on the same evening that Kyle Rittenhouse attacked racial justice protesters, the Kenosha Police Department and Kenosha County Sherrif's Department "not only failed to protect protesters

investigate the state's relationship to violence, including its possible safety obligations. Some have invoked social contract theory to contend that the government has a duty to protect citizens from the violence of their peers,[16] while others have drawn from the work of specific theorists to examine exactly when the state can respond to violent conduct.[17] Some have invoked the monopoly of violence theory when assessing whether the state has the exclusive authority to inflict violence or must relinquish such authority to individual citizens.[18] Still others have eschewed both theories to focus upon the phenomenon of underenforcement, or the state's weak response to certain lawbreaking and victimization.[19]

. . . but actively put them in harm's way"). *See also* Nancy E. Dowd, *Black Lives Matter: Trayvon Martin, the Abolition of Juvenile Justice and #BlackYouthMatter*, 31 U. FLA. J.L. & PUB. POL'Y 43, 43 (2020) ("The Black Lives Matter Movement reminds us that the threat to Black lives is not limited to police, but rather is connected to private citizens as well; is not limited to the criminal justice system, but to the web of systems implicated by systemic racism[.]").

[16] *See, e.g.*, Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 514–16 (1991) (contending that the government's obligation to protect citizens can be traced, in part, to social contract theory); James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 TULSA L. REV. 901, 903 (2004) (explaining how, under the social contract, each person surrenders the right of self-defense to the state, which in turn assures collective safety through its criminal laws).

[17] *See, e.g.*, Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 613–14 (2009) (explaining how, under Thomas Hobbes' interpretation of the social contract, citizens surrender their natural right to use violence preemptively because only the state retains the broad discretion to use force).

[18] Robert Leider explains how ongoing disputes about civilians' right to bear firearms arise from conflicting interpretations of the monopoly of violence theory. *See generally* Robert Leider, *The State's Monopoly of Force and the Right to Bear Arms*, 116 NW. U.L. REV. 35, 39–41 (2021). Scholars who believe that private citizens have primarily been authorized to use guns, or force generally, when acting in self-defense are engaged in a "strong" interpretation of the monopoly of violence theory. *Compare id.* at 45 ("Under the strong view . . . [p]rivate citizens are restricted to acting only in individual self-defense against immediate danger.") *with* Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CAL. L. REV. 63, 90 (2020) ("Justifiable self-defense operates as an exception to general proscriptions on violent conduct. . . .") [herinafter Ruben, *An Unstable Core*] *and* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1188 (1999) (explaining how the state traditionally assumes responsibility for protecting individuals and their property, subject to limited exceptions like the right to defend oneself). Scholars who believe that the state can authorize private violence in multiple circumstances beyond self-defense, in contrast, adopt a "weak" interpretation of the theory. Leider, *supra*, at 41 (explaining how, under the weak interpretation, the government can authorize private civilians to use force to make arrests for public crimes and to keep the public peace). This Article adopts Leider's framework of a "strong" and "weak" interpretation of the monopoly of violence theory but does not endorse any one interpretation over the other.

[19] *See generally* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1722–39 (2006).

Although the aforementioned scholars have occasionally incorporated race into their analyses, there has been no sustained inquiry into how the state authorizes violence by persons classified as white regardless of whether the perpetrator is a state actor or civilian.[20] And while scholars may acknowledge that the state will underenforce the law based on the racial identities of the parties, recent discourse has often focused upon the state's alleged failure to respond to intra-racial violence[21]

[20] I do not intend to discredit the extensive work that legal scholars and historians have done to illuminate how criminal laws and private violence have sustained the subordinated status of enslaved and formerly enslaved people, alike. *See, e.g.*, A. Leon Higginbotham Jr. & Anne F. Jacobs, *The Law Only as an Enemy: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969 (1992) (exploring how colonial and antebellum criminal laws were deployed to oppress both free and enslaved Black people); Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371 (2022) (tracing the myriad ways criminal justice policies have been used to subjugate people of color, particularly during the era of slavery and Reconstruction); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1511 (2017) (contending that "the U.S. Supreme Court has interpreted Fourth Amendment law in ways that allow police officers to force engagements with African Americans with little or no justification," which "overexposes African Americans to the possibility of police violence."); FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (collecting an assortment of writings on how the death penalty has been used to oppress racial minorities, particularly African Americans); SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY (2016) (exploring state-sanctioned violence and gendered forms of labor exploitation through the postbellum experiences of black women imprisoned in convict lease camps and chain gangs); GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION (1984) (supplying an extensive analysis of the race riots that unfolded during the era of Reconstruction). Rather, I draw on these legal and historical accounts to illuminate gaps in contemporary discourse about the state's monopoly on violence and its alleged security obligations. *See infra* Part I.

[21] Elliot Currie, for example, exclusively focuses on intra-racial violence when discussing the government's "peculiar indifference" to violence against Black people. *See* ELLIOT CURRIE, A PECULIAR INDIFFERENCE: THE NEGLECTED TOLL OF VIOLENCE ON BLACK AMERICA 8 (2020) (contending that there has been too little outrage "over the ongoing emergency of everyday interpersonal violence in black communities" because of the outrage directed towards police killings of Black Americans). He reserves scant attention for slavery and Reconstruction, despite both eras being especially representative of the state's indifference to violence against African Americans. *See, e.g.*, *id*. at 89–90 (contending that the abolition of slavery upended a "relatively stable social order," but making no mention of the state-sanctioned violence that African Americans were subjected to prior to their emancipation); *id*. at 93–94 (reserving just two pages for discussion of the state-sanctioned violence of the Reconstruction era). Similarly, when Natapoff addresses modern manifestations of underenforcement, she emphasizes how homicides and drug crimes routinely go unpunished in low-income communities of color. *See* Natapoff, *supra* note 19, at 1724–27. There is no discussion of how infrequently police are prosecuted for violence against nonwhite communities and how this could also be conceived as a modern form of

or to racial justice protests.[22] Even when underenforcement is scrutinized in relation to incidents of white violence, there is no concomitant inquiry into how this violence has been integral to labor exploitation and the preservation of racial distinctions.[23]

Drawing from antebellum and postbellum case law, this Article contends that the state's response to violence—whether it outright authorizes violent conduct or adopts a strategy of underenforcement—has turned upon the race of the perpetrator and prevailing labor arrangements.[24] As a consequence, violence has effectively assumed the shape of a legal right, guaranteeing specific state responses, like

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underenforcement. *See 2022 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolencereport.org/ [https://perma.cc/92E3-QPJ4] (last visited Nov. 3, 2023) [hereinafter *2022 Police Violence Report*] (finding that police have disproportionately killed Black people every year since 2018, yet less than three percent of killings by police result in officers being charged with a crime).

[22] *See, e.g.*, Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. U. L. REV. 81, 8–85 (2021) (claiming that America has experienced "an extraordinary plague of violent political unrest" connected to allegations of police conduct, and that state and local governments "were visibly tolerant of the rioters"); David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J.L. & PUB. POL'Y 177, 185–202 (2021) (focusing exclusively on the racial justice protests that unfolded in the wake of the police killing of George Floyd as examples of underenforcement of the law); Leider, *supra* note 18, at 37–39 (drawing connections between the upticks in violent crime in 2020 and the alleged refusal of police officers to arrest or otherwise respond to violent demonstrators who participated in the protests against the police killing of George Floyd). *But see* Jill I. Goldenziel, *"Revolution" at the Capitol: How Law Hindered the Response to the Events of January 6, 2021*, 81 MD. L. REV. 335 (2022) (acknowledging that there was no coherent response by the Department of Defense, National Guard, and law enforcement to the attack on the U.S. Capitol, but tracing this lack of response to the opacity of federal statutes like the Posse Comitatus Act and Insurrection Act); Ken Dilanian & Ryan J. Reilly, *Top Jan. 6 Investigator Says FBI, Other Agencies Could Have Done More to Repel Capitol Mob Had They Acted on Intel*, NBC NEWS (Jan. 31, 2023, 5:36 PM), https://www.nbcnews.com/politics/congress/fbi-stopped-jan-6-capitol-mob-acted-intelligence-rcna68155 [https://perma.cc/M9LA-846J] (reporting that, even though the House January 6th committee found that the FBI and other security agencies could have prevented the Capitol insurrection, they left these findings out of their televised hearings and final report).

[23] Randall Kennedy has supplied valuable insights into the underenforcement of criminal laws across the antebellum and postbellum eras, as have Professors Cottrol and Diamond. *See, e.g.*, KENNEDY, *supra* note 8, at 29–75 (describing the myriad ways that the government failed to respond to crimes against Black people, from the antebellum era through the era of Jim Crow); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 349–58 (1991) (describing incidents of white violence against Black communities over the twentieth century, and how Black people used firearms to protect their rights when the state refused to do so). However, the scholars do not discuss how underenforcement served to distinguish racial groups nor is there an extended discussion of the relationship between white violence and the exploitation of Black labor.

[24] *See infra* Part II.

acquittal, while simultaneously establishing sites beyond the reach of criminal punishment.[25]

The right to violence was first exercised against indigenous populations residing outside of Europe. Specifically, the Catholic Church articulated a right to dominate non-Christians, a right that monarchs and settlers in turn used to justify violence against people residing in Africa and the Americas.[26] And as the institution of slavery was established in the United States, classification as white rendered a person ineligible for enslavement and permitted them to commit violent acts against nonwhite persons, specifically African Americans, subject to limited exceptions.[27] Not only did legal institutions generate and enforce a right to violence against enslaved people, the state also took affirmative steps—such as conditioning enslavement on the status of the mother or prohibiting the testimony of enslaved victims—to shield white perpetrators from prosecution and punishment.[28] During and after Reconstruction, the Supreme Court severely restricted the federal government's authority to prosecute racially motivated crimes, thus allowing the

[25] Two critical theories inform this conception of violence. The first, advanced by Cheryl Harris, captures the nexus between law and the persistence of race-based hierarchies: the law has been deployed, since the country's founding, to not only distinguish racial groups, but to exclude nonwhite people from the privileges and benefits reserved for person's classified as white. *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1737–45 (1993). This has not only generated a property interest in whiteness, but that property interest "now forms the background against which legal disputes are framed, argued, and adjudicated." *Id*. at 1713–14. The second theory, articulated by Robert Cover, pertains to the nexus between legal reasoning and violence: "Legal interpretation takes place in a field of pain and death . . . [n]either legal interpretation nor the violence it occasions may be properly understood apart from one another." Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986). This Article extends these two insights to the realm of racially motivated crimes: persons classified as white were explicitly vested with the legal right to assault and kill enslaved people during the antebellum era; a series of Supreme Court cases ensured that this right—a distinct privilege reserved for white persons—would continue to be exercised following the Civil War; and this right is the backdrop against which legal institutions and state actors now formulate and enforce criminal policies.

[26] Throughout the Middle Ages, the Catholic Church generated laws and meticulous legal arguments that justified invading non-Christian regions and that authorized forcibly subjecting non-Christian people to the authority of the Pope, regardless of whether they consented to such authority. *See* Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CALIF. L. REV. 1, 22–25 (1983). Monarchs, along with the people that they funded to invade the Americas, then invoked these laws to justify the violence necessary for enslaving and securing tributes from native people. *Id.* at 36–38.

[27] *See* ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH 19 (1992) ("The law served a legitimizing function in slave society; it permitted, encouraged, and, when necessary, regulated the domination of the master over the slave.").

[28] *See infra* Part II.A.

right to remain intact.[29] And while social movements have persistently emphasized African American's vulnerability to state-sanctioned violence, governmental responses—including an exclusive focus on alleged rates of crime within Black communities and renewed investments in the carceral system—have assured the right's persistence.

Part I critiques popular accounts of the state's relationship to safety and violence. Scholars have rightfully deployed the monopoly of violence theory[30] when assessing whether the state must protect citizens from private violence and whether the state possesses the exclusive authority to use force against wrongdoers. Simultaneously, the phenomenon of underenforcement has supplied new insights into whether, and how, the state fulfills its safety obligations. However, scholars have not reserved sufficient attention for, nor sought to uncover the commonalities across, antebellum and postbellum criminal cases involving Black victims. This inattention has impeded a comprehensive understanding of violence; the state did not extend safety guarantees to people classified as Black before nor immediately after their emancipation, nor has the state exclusively, or primarily, conditioned the authority to inflict violence on whether an actor is a private or public agent. Rather, state and federal court opinions illuminate how violence has been authorized in order to reify racial distinctions and to assure the exploitation of Black labor.

Part II sets forth the origins and terms of what I label a "right to violence." The right can be stated, in its simplest terms, as follows: *violence*[31] *that enables and*

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[29] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 531 (1988) (noting that the Supreme Court's 1876 decision in *United States v. Cruikshank* "rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green light to acts of terror where local officials either could not or would not enforce the law." (citation omitted)). *See also infra* Part II.B.

[30] Scholars speak of the state possessing either a 'monopoly of *force*' or a 'monopoly of *violence*.' For examples of the former, see Leider, *supra* note 18, at 44 (describing a "monopoly-of-force approach"); Sklansky, *supra* note 18, at 1188 (referring to the government's monopoly on the coercive use of force); Cottrol & Diamond, *supra* note 23, at 314 (describing the government as holding a monopoly of force). For examples of the latter, see Jacob D. Charles & Darrell A.H. Miller, *Violence and Nondelegation*, 135 HARV. L. REV. F. 463, 464 (2022) (explaining how "the state holds the monopoly on legitimate violence"); Darrell A.H. Miller, *Self-Defense, Defense of Others, and the State*, 80 L. & CONTEMP. PROBS. 85, 97 (2017) (referencing the Weberian theory of a monopoly on the legitimate use of violence). Since both phrases are used to refer to the state's authority to use coercive force against citizens—inclusive of fatal force—I will use them interchangeably throughout the remainder of the Article. Specifically, when assessing or critiquing a particular scholar's conceptions of the monopoly thesis, I will adopt the phrasing that they, themselves, use. *See also* Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 887–88 (2004) (describing the elements of the "monopoly thesis" and defining force as "physical coercion, or violence").

[31] For the sake of clarity, this Article will adopt the World Health Organization's definition of violence: "The intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has

enforces the dominant position of persons classified as white shall evade punishment, subject to limited exceptions; if punishment is inflicted, such punishment shall be less severe than the punishment that is customarily imposed for the underlying criminal offense. While the methods for enforcing this right have changed over the course of the country's history, the right itself has remained intact, and its persistence explains the continued vulnerability of nonwhite communities to violence by law enforcement and civilians, alike. Part II first identifies the conditions that made a right to violence necessary: the need to exploit the labor of persons classified as Black and the equally urgent need to prevent collaboration between poor whites and enslaved persons. These conditions required the formation of a legal regime dependent on race, where subsets of the population would not merely be classified as "white," but would also derive distinct privileges by way of that classification.[32] Amongst those privileges was a right of violence, available to white civilians and white state agents and occasionally assigned to enslaved people. This right generated cohesion around a collective white identity and incentivized poor whites to align themselves with wealthy, white elites.[33] Profit and labor needs, rather

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a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation." LINDA L. DAHLBERG & ETIENNE G. KRUG, WHO, WORLD REPORT ON VIOLENCE AND HEALTH 4 (Etienne G. Krug et al. eds., 2002). However, scholars have long emphasized the need for a more expansive definition that can capture both the roots, and various manifestations, of violence. Allegra McLeod, for example, offers an abolitionist critique of violence not only because it can supply a more accurate and expansive account of the material realities of violence, but because such a critique also shifts attention away from the individual acts of interpersonal harm that are the primary focus of popular and legal discourse. *See generally* Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525 (2022); s*ee also* Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RSCH. 167, 168 (1969) (redefining violence as those circumstances wherein "human beings are being influenced so that their actual somatic and mental realizations are below their potential realizations"); BANDY X. LEE, VIOLENCE: AN INTERDISCIPLINARY APPROACH TO CAUSES, CONSEQUENCES, AND CURES 6 (2019) (defining violence as "intentional or threatened human action, either direct or through structural neglect and diminution of others, that results in or has a high likelihood of resulting in human deprivation, injury, or death, or contributes to the extinction of the human species." (citation omitted)).

[32] Racial categories are legally constructed, with courts playing an essential role in defining the ancestry, phenotype, and nationality necessary for classification as 'white.' *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th anniversary ed. 2006). Classification as white gives rise to select privileges that the legal system protects from encroachment. *See* Harris, *supra* note 25, at 1714 (addressing how "white identity became the basis of racialized privilege that was ratified and legitimated in law as a type of status property."). The right to violence can be conceived as just one of these privileges, enabling persons classified as white—and occasionally nonwhite individuals—to assault and brutalize victims so long as the violence contributes to the exploitation and subjugation of nonwhite communities.

[33] In explaining how 'whiteness' manifests as a property right, Harris uncovers how the "material benefits of racial exclusion and subjugation functioned, in the labor context, to stifle class tensions among whites." Harris, *supra* note 25, at 1741. The right of violence

than public safety, came to define the circumstances where the state would classify and respond to conduct as violent. Examining institutions like slavery and Jim Crow can supply valuable insights into how the state enforces the right to violence: positively, through laws that condition enslavement on racial classification or laws that exclude the testimony of Black witnesses, and negatively, by declining to respond to violence that cements the inferior status of nonwhite communities.[34]

The contention that violence manifests as a legal right may incite several responses from scholars and political stakeholders. Part III reserves attention for two such responses—the formalist response and the critical response. The formalist response would favor nullifying the right through legal interventions grounded in the Fourteenth Amendment. The critical response, in contrast, would disfavor dislodging the right to violence through traditional legal channels alone.

Regardless of which framework stakeholders choose to adopt, the right to violence can illuminate the potential advantages and disadvantages of pursuing racially inclusive safety within or outside of the legal system.

I. AN INCOMPLETE ANALYSIS OF VIOLENCE

The monopoly of violence theory supplies one pathway for analyzing the state's safety obligations and, concomitantly, private citizens' authority to use force against one another.[35] This theory holds that "[t]he state has, must have, or should have a

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should therefore be understood as one of many racialized privileges that convinces working class whites to align their interests with ruling class elites. *See also* Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1372 (1988) (explaining how "racism has identified the interests of subordinated whites with those of society's white elite . . . [and] creates a bond, a burgeoning common identity of all non-stigmatized parties—whose identity and interests are defined in opposition to the other." (citation omitted)).

[34] *See generally* CHARLES FRIED, RIGHT AND WRONG 110 (1978) (defining a positive right as "a claim to something," and a negative right as a right "not to be interfered with in forbidden ways").

[35] Scholars have occasionally blended social contract theory and monopoly of force theory when interrogating the use of force by the state and its agents. *See, e.g.*, Leider, *supra* note 18, at 44–45 (tracing the state's monopoly on force to the social contract, which requires citizens to surrender their personal right to violence to the state except when confronted with imminent use of force); Rosky, *supra* note 30, at 883–85 (contending that the state's monopoly on violence is a by-product of the social contract, specifically citizens' decision to depart the state-of-nature and to vest a sovereign with the authority to use force to enforce the law). However, Whitman contends that the theories have real and significant distinctions; social contract theory emphasizes the natural right of self-defense whereas the monopoly of violence theory emphasizes the natural right to do vengeance. *See* Whitman, *supra* note 16, at 903. This Part will not interrogate the accuracy of Whitman's distinction but, rather, will emphasize the consequences of ignoring race and class when deploying the monopoly of violence theory.

monopoly of force."[36] Scholars have deployed the theory to investigate how violence is (or should be) regulated,[37] and to determine what, if any, restrictions should be placed on civilian access to firearms.[38]

Eric Ruben, for example, has deployed a "strong" interpretation of the monopoly of force theory.[39] In his estimation, new laws that prohibit prosecuting a person simply because they advance a claim of self-defense break with tradition, and such laws can also erode the state's legitimate monopoly on force.[40] He specifically criticizes the legislation that has been introduced following the acquittal of Kyle Rittenhouse[41]—legislation that would allow defendants to evade trial altogether if a

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[36] Rosky, *supra* note 30, at 885 (internal citations omitted). *See also* Andreas Anter, *The Modern State and Its Monopoly on Violence*, *in* THE OXFORD HANDBOOK OF MAX WEBER 227–29 (Edith Hanke, Lawrence A. Schaff & Sam Whimster eds., 2019) (crediting Max Weber for the monopoly of force theory, which defines the state as a political institution that has successfully claimed the monopoly on legitimate physical force).

[37] *See, e.g.*, Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1236–37 (2017) (explaining how the Supreme Court has imposed a duty upon people of color to comply with the commands of police, in part because state officers are thought to have an exclusive monopoly on legitimate violence); Charles & Miller, *supra* note 30, at 466 (contending that constitutional limits can be placed on private violence in part because of the state's monopoly on force). For more general discussions of Black communities' unique vulnerability to state violence, see DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT 140–76 (2022) (explaining how the Supreme Court's interpretations of the Fourth Amendment have contributed to Black women's vulnerability to sexual violence at the hands of law enforcement); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 47–79 (2017) (describing how the law authorizes law enforcement to beat and kill Black men).

[38] *Compare* Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1377–78 (1993) (arguing against an interpretation of the Second Amendment that would allow private civilians to exercise force to the same degree as the state) *with* Cottrol & Diamond, *supra* note 23 (contending that the Second Amendment protects the right to self-defense and arguing against the state's exclusive monopoly on the use of force).

[39] *Compare* Leider, *supra* note 18, at 47 (explaining how scholars who deploy a "strong" interpretation disfavor civilians assuming government responsibilities like law enforcement and also believe that "the traditional limitations on individual self defense . . . should inform the types of arms that individuals may possess") *with* Ruben, *An Unstable Core*, *supra* note 18, at 90 ("Infusing such self-defense requirements [like necessity and proportionality] into Second Amendment doctrine can help evaluate regulations on when a person can carry a weapon on their person for use in self-defense.").

[40] *Compare* Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. CAL. L. REV. 509, 524 (2023) ("[P]rosecutorial immunities are a remarkable departure from the ordinary criminal process. . . .") [hereinafter Ruben, *Self-Defense Exceptionalism*] *with id*. at 526 (explaining how laws that allow self-defense claimants to wholly evade trial can erode the state's monopoly on force, by allowing individual citizens to assume the state's responsibility for punishing and condemning wrongdoers).

[41] On August 25, 2020, seventeen-year-old Kyle Rittenhouse brought a rifle and medical kit from his home in rural Illinois to Kenosha, Wisconsin, where he subsequently

district attorney cannot prove, pretrial, that the defendant's use of force was unlawful[42]—and he concludes that such legislation would extend criminal immunity beyond the confines established under the common law.[43] According to Ruben, self-defense claims should continue to be resolved at trial. The alternative—resolution of the claims at pretrial hearings—ultimately deprives communities of the opportunity to determine whether the defendant's conduct is worthy of moral condemnation.[44]

Unlike Ruben, Robert Leider advances a "weak" interpretation of the monopoly of force theory, an interpretation that he believes actually aligns with Anglo-American law.[45] He contends that the Framers of the Constitution decentralized force out of necessity: the government did not have sufficient resources for policing and national defense at the country's founding, and private citizens were expected to protect themselves if the country's own police forces proved unable (or unwilling) to fulfill their duties.[46] And while he acknowledges that police and courts underenforced the law against white murderers during Reconstruction, and against perpetrators of domestic violence in the 1970s, he emphasizes law enforcement's alleged inaction during Black-led protests and riots as modern manifestations of underenforcement.[47] For these reasons, he concludes that the state should not possess an exclusive monopoly on force. Rather, civilians should retain the power to arrest wrongdoers and should have access to various weapons, whether semiautomatic rifles or otherwise, to protect themselves and their property.[48]

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killed two men and wounded another, all of whom had participated in protests against the police murder of George Floyd. In November of 2021, Rittenhouse was found not guilty of homicide and related charges for their deaths and injuries. *See* Julie Bosman, *Kyle Rittenhouse Acquitted on All Counts*, N.Y. TIMES (Jan. 27, 2022), https://www.nytimes.com/live/2021/11/19/us/kyle-rittenhouse-trial [https://perma.cc/E75Z-WR8P].

[42] *See* Andrew F. Branca, *Why Kyle's Law Matters*, THE L. OF SELF DEFENSE (Nov. 21, 2021), https://losd.ubpages.com/kyleslaw/ [https://perma.cc/LHP2-ERPX] (explaining how, under the proposed legislation, "if the prosecution can't disprove self-defense by a preponderance of the evidence at [the] pretrial hearing, the matter is dismissed without prejudice . . .").

[43] *See generally* Ruben, *Self-Defense Exceptionalism*, *supra* note 40, at 524–25 (describing classes of people traditionally immunized from criminal prosecution, including foreign diplomats and persons who enter into plea agreements).

[44] *Id.* at 546.

[45] Under the weak interpretation, the government can delegate its preventative policing and law enforcement authority to private citizens. *See* Leider, *supra* note 18, at 45.

[46] *Id.* at 49–55.

[47] *Id.* at 57–58. Although Leider acknowledges that the January 6th insurrection could qualify as a modern manifestation of underenforcement, the lack of response from law enforcement is framed as a mere delay rather than an explicit decision not to enforce the law, which Leider contends happened during the racial justice protests of 2020. *Id.* at 58.

[48] *Id.* at 59–63.

Neither Ruben nor Leider incorporate antebellum or postbellum case law involving Black victims into their analyses. This affects the accuracy of their claims and leads to an incomplete analysis of the state's relationship to violence.[49]

Contemporary efforts to immunize private violence from punishment should not be framed as a break with the past, but rather, can be interpreted as evidence that the state continues to authorize select forms of racially motivated violence. Ruben, for example, contends that private violence has traditionally been subject to criminal prosecution and trial; it is on this basis that he argues that self-defense claims should not be resolved before trial.[50] However, statutes and case law from the antebellum era show that the state explicitly authorized, if not required, private violence against enslaved people.[51] After the Civil War, white people who lynched or otherwise assaulted Black people evaded arrest and prosecution, regardless of whether they were a private citizen or public officer.[52] This was not just a local- or state-level phenomenon: the Supreme Court heavily circumscribed the federal government's authority to prosecute racially motivated crimes that were otherwise ignored by local law enforcement, and the national government wholly abandoned its commitment to prosecuting white racial violence against formerly enslaved people by 1876.[53]

Leider, in contrast, recognizes that the state does not possess an exclusive monopoly on force and has allowed citizens to exercise force for reasons beyond self-defense.[54] Based on his review of the historical record, citizens retained the right to violence as a security measure—to aid the state in fulfilling its safety obligations and to enforce the law should professionally trained soldiers turn against the public.[55] But Leider overlooks how enslaved people were considered among the most severe threats to the personal and economic security of persons classified as white.[56] While he is right to conclude that colonial and antebellum legislators

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[49] *See generally* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 5 (2010) ("Only by interrogating the historical inter-connection between internal freedom and external subordination can we understand the development of our political and legal institutions and thus recognize both the difficulties and possibilities implicit in the contemporary moment.").

[50] *See generally* Ruben, *Self-Defense Exceptionalism*, *supra* note 40, at 536–40 (criticizing the rationales that have been advanced for resolving self-defense claims pretrial and emphasizing how private citizens have traditionally had to litigate their self-defense claims at trial in order to evade liability for violent conduct).

[51] *See infra* Part II.A.

[52] *See infra* Part II.B.2.

[53] *See infra* Part II.B.2.

[54] *See generally* Leider, *supra* note 18, at 50–55.

[55] *Id.* at 55 (confirming that the Framers vested citizens with the authority to use force so that they could defend themselves against oppressive governmental actors and so that those same citizens could "supplement government officers in preventing and punishing crimes[.]").

[56] *See* Bogus, *supra* note 38, at 1369–74 (explaining how militias were formed in the colonial era because of white settlers' persistent fears about slave insurrections and attacks from Native Americans); Cottrol & Diamond, *supra* note 23, at 335–38 (exploring how state legislatures began prohibiting Black people's access to firearms and service in militias in the nineteenth century, as concerns grew about slave revolts).

conceived private violence as integral to security, he fails to appreciate how this security was defined according to the subordination and exploitation of persons classified as Black. Legislators, in other words, did not think of all persons residing within the country's borders as equal contributors to security. Rather, white citizens—regardless of whether they were civilians or public agents—were vested with the distinct right to use force against enslaved people, a right that was considered essential for preserving the racial order.

While Leider pays only passing attention to Reconstruction, this period of American history can supply valuable insight into the relationship between underenforcement and the state's alleged monopoly on violence. It is true that state agents can underenforce the law and that such underenforcement can jeopardize people's safety. However, it is nonwhite people who have been the most vulnerable to collective acts of violence,[57] and Black people in particular who have been the victims of underenforcement during slavery, Jim Crow, and the civil rights movement.[58] These historical phenomena indicate that the state relinquishes its monopoly on violence based on the race of the perpetrator and that of their victim, rather than on the basis of the perpetrator being a private or public actor. Underenforcement, in turn, proceeds along racial and class lines, with the state under enforcing criminal laws in order to assure the subordination and exploitation of enslaved and formerly enslaved people, alike. As a result, violence has assumed the shape of a legal right, which the state will enforce or suspend based on the race of the parties and their labor relationship.

II. VIOLENCE AS LEGAL RIGHT

Rights have been prominent when discussing the state's monopoly on violence.[59] Rights can be expressed in a negative or positive fashion. Negative rights impose a negative duty on others—an obligation not to interfere with a person's activities under select circumstances—while positive rights impose a positive duty—entitling the holder to the positive assistance of others.[60] They are customarily

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[57] "The 1960s produced an image of 'riots' as fundamentally Black. Yet historically, most instances of mass criminality have been perpetrated by white vigilantes hostile to integration and who joined together in roving mobs taking 'justice' into their own hands, often with the support of local police. The Jim Crow era was defined by riots." ELIZABETH HINTON, AMERICA ON FIRE 4–5 (2021).

[58] *See infra* Part II.

[59] *See generally* Whitman, *supra* note 16, at 903 (juxtaposing the right to self-defense, which is the focus of social contract theory, with the "right to do vengeance," which has been the focus of monopoly of violence theory); Bogus, *supra* note 38 (contending that the right to bear arms, contained within the Second Amendment, should not be read as a personal right but a state right, given the state's monopoly on violence).

[60] *See, e.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1392 (1984) ("Part of the conventional wisdom about rights distinguishes between negative rights—to be free from interference—and positive rights to have various things." (citation omitted)); Ran

interpreted and enforced by the judiciary.[61] They are not absolute;[62] they can be subject to restrictions or suspended altogether.[63] The possessor of a right is typically entitled to legal remedies if the right is infringed upon.[64] Civil governments can affirmatively enforce rights, as happens when state or local agencies assign counsel to indigent persons, or safeguard rights through inaction, as happens when the government does not interfere in public protest.

The purchase and transportation of enslaved Africans, as well as their subsequent detention and labor on plantations, required that persons classified as 'Negro' be excluded from those rights that correlated with security, especially rights guaranteeing due process before the deprivation of liberty.[65] Similarly, the project

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Hirschl, *"Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order*, 22 HUM. RTS. Q. 1060, 1071 (2000) (explaining how a negative right is understood as a freedom from interference, while a positive right includes a freedom to act in a positive way); Manuel Velasquez, Claire Andre, Thomas Shanks, S.J. & Michael J. Meyer, *Rights*, MARKKULA CTR. APPLIED ETHICS (Aug. 8, 2014), https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/rights/ [https://perma.cc/4N3Q-GZF2] (explaining how negative rights "claim for reach person a zone of non-interference from others" while positive rights "claim for each person the positive assistance of others").

[61] Legal scholars have long criticized the Supreme Court for framing the Constitution as a document containing a series of negative rather than positive liberties, such that the government is only obligated to refrain from acts that deprive citizens of protected rights. *See, e.g.*, Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 447 (1992) (explaining how the Bill of Rights is mistakenly interpreted to create a regime of negative rights rather than positive rights, "liberty or freedom from, not liberty or freedom to . . ."); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (recommending that the rhetoric of negative rights be abandoned and that the Constitution be interpreted as imposing affirmative duties on the government); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990) (contending that the Supreme Court has adopted a negative rights view of the Fourteenth Amendment, which has legitimized state inaction in the face of private violence).

[62] Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 30 (2018) ("Rights are more than mere interests, but they are not absolute.").

[63] According to Tushnet, rights suffer from two forms of indeterminacy: technical and fundamental. Because of their technical indeterminacy, rights can be created, acknowledged, or denied based on the circumstances of a given conflict. *See* Tushnet, *supra* note 60, at 1371.

[64] *See generally* FRIED, *supra* note 34, at 138–39 (contending that legal rights represent a guarantee to protect select interests and are to be honored through legal judgments until modifications are made by the legislature). *See also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 188 (1977) ("In most cases when we say that someone has 'right' to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference.").

[65] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 404 (1856) (concluding that Black enslaved people "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which

of settler colonialism could not proceed if indigenous people were entitled to the same security safeguards as those classified as white.[66] Such protections would undermine a legal scheme premised on Native Americans having a limited right of occupancy to land, and would ultimately interfere with the broader displacement efforts of the government.

Assuring the exploitation of nonwhite labor, as well as the displacement of Native Americans, required a racially contingent right to violence. The right can be stated as follows: *violence that enables and enforces the dominant position of persons classified as white shall evade punishment; if punishment is inflicted, such punishment shall be less severe than the punishment that is customarily imposed for the underlying criminal offense*. This right was an essential element of settler-colonialism, emerged during the global slave trade and prior to the American Revolution, and was enforced via colonial and antebellum statutes. The right generally prohibited the prosecution of racially motivated crimes, while violation of the right entitled the possessor to legal relief, namely: acquittal.[67] Historical incidents and case law indicate that the right has persisted despite the abolition of slavery, with legal institutions adopting a constellation of strategies for its continued enforcement.

First, Section A will address how and why violence emerged as a racially contingent right prior to America's independence from Britain. This right responded to the inherent insecurity of a society dependent on the enslavement of Africans and the displacement of indigenous people. Constitutional clauses that assured the persistence of slavery[68] should ultimately be conceived as enshrining the right to violence. This right was explicitly referenced in antebellum cases and statutes, and

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that instrument provides for and secures to citizens of the United States."); George v. State, 37 Miss. 316, 318 (Miss. 1859) (confirming that enslaved people are "absolutely deprived" of "three great absolute rights guaranteed to every citizen by the common law, viz., the right of personal security, the right of personal liberty, and the right of private property . . .").

[66] *See generally* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387 (explaining that settler colonialism not only entails targeting select racial groups, but it also relies upon a "logic of elimination," wherein native societies are dissolved and a new colonial society is erected on the expropriated land); *see also* Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 26 (2014) ("Viewing the occupied lands as the site of their own reproduction, settlers see Indigenous people as obstacles to be overcome. . . . [A]rmed conflict results not from the aggression of Native peoples, but from their mere existence.").

[67] *See*, *e.g.*, State v. Mann, 13 N.C. (2 Dev.) 263, 266 (N.C. 1829) (explaining that a white defendant would have to be acquitted for an assault on an enslaved woman because the court "cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master. . . ."); Commonwealth v. Turner, 26 Va. (5 Rand.) 678, 684–86 (Va. 1827) (finding that the Virginia legislature had never made assaults on enslaved people punishable, and consequently dismissing the indictment against a white slaver for lack of jurisdiction).

[68] Article I of the Constitution made enslaved people three-fifths of a person for purposes of political representation. U.S. CONST., art. I, § 2. Separate clauses of that same article prohibited legislative interference in the slave trade until 1808. *Id.* art. I, § 9, cl. 1.

it was essential for the success of slavery and, in turn, the national economy.[69] Following ratification of the Constitution, case law and statutes confirm the ubiquity of the right as well as the judiciary's role in its enforcement. Second, Section B will address how the right remained salient after the abolition of slavery, from Reconstruction through the Jim Crow era, despite alleged guarantees of equal protection. Reconstruction merely represented a temporary suspension of the right; the eventual withdrawal of federal forces from the South, and the prevalence of state-sanctioned lynchings, are historical incidents representing its reinstatement. Finally, Section C will address how the right remained intact even in the wake of the civil rights movement and the proliferation of hate crime laws.

A. Establishing the Right: Colonization to the Abolition of Slavery

The authority of Europeans to dominate, and thus commit violence against, non-European people was well-recognized before the first British colony was established in North America.[70] However, in its earliest iterations, this authority was premised on religious affiliation as opposed to race.[71] The Pope specifically proclaimed that Catholic nations and their citizens bore a responsibility to not only spread the gospel to non-Christian nations, but to also conquer and, if necessary, eliminate, those infidels and savages that were resistant to or ignorant of Christian dogma.[72] The responsibility of Christian nations to forcibly impose their norms and

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[69] By 1860, eighty percent of the nation's gross national product was tied to slavery. *See* CAROL ANDERSON, WHITE RAGE 11 (2017). When the Civil War began, two-thirds of the wealthiest Americans lived in the slaveholding South, and in South Carolina, eighty-one percent of the state's wealth was tied to the enslavement of human beings. *Id*. at 10.

[70] *See* GERALD HORNE, THE DAWNING OF THE APOCALYPSE: THE ROOTS OF SLAVERY, WHITE SUPREMACY, SETTLER COLONIALISM, AND CAPITALISM IN THE LONG SIXTEENTH CENTURY 12 (2020) (explaining how enslaved Africans "were present in northern Florida as early as 1565[,]" and even prior to that year, Portuguese and Dutch elites had been engaged in the transatlantic trade of captive Africans).

[71] *See* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 72 (2d ed. 2018) (explaining how "Christianity was to provide institutional support and religious authority for the advanced slave systems of medieval Europe and of the modern Americas."); *see also* Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51, 53–54 (1991) (explaining how discrimination against African Americans has been justified on the basis of perceived biological and genetic differences, whereas "[p]erceived deficiencies in culture . . . served primarily to justify the denial of equal rights of self-determination to indigenous peoples in the New World.").

[72] *See* Kim Benita Vera, *From Papal Bull to Racial Rule: Indians of the Americas, Race, and the Foundations of International Law*, 42 CAL. W. INT'L L.J. 453, 455 (2012) (describing the bull Romanus Pontifex, issued by Pope Nicholas V in 1455, which contended that the colonization of Africa was necessary for "universal salvation"); *see also* Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 8 (2005) (explaining how the Doctrine of Discovery, which European countries used to justify and

theology on non-Christians found expression as a right and can be conceived as the precursor to a racially-contingent right of violence.

Notably, the right of Christian Europeans—who would eventually be classified as white—to dominate non-Christians was memorialized in writing by the Catholic Church.[73] Pope Innocent IV published the *Commenturia Doctrissima* in 1245, which set forth the legal status and rights of non-Christian societies.[74] According to Innocent, indigenous peoples possessed a natural right to lead their own societies, yet Christian nations had no obligation to observe this right where non-Christians were in violation of natural law.[75] A failure to observe the norms and practices of a Eurocentrically conceived God amounted to just such a violation, thereby vesting Christian invaders with a cosmically ordained right to enslave and exterminate the indigenous communities that they encountered.[76] This reasoning persisted into the seventeenth century, with English courts formally recognizing the right of Christians to conquer and subjugate non-Christian societies as late as 1608.[77]

Innocent's articulation of the right, and its subsequent adoption by his successors, had dramatic consequences for those persons and societies that would eventually be classified as nonwhite. In the decades following Columbus' 1492 voyage, for example, "an estimated 650,000 indigenous people were enslaved . . . ."[78] Indigenous people residing in the Americas were not only forced

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negotiate their conquest of Africa and the Americas, emerged from the Church's claims of universal jurisdiction over Christian and non-Christian people alike).

[73] *See, e.g.*, Bull "Romanus Pontifex" of Pope Nicholas V granting the Territories discovered in Africa to Portugal, January 8, 1455, *reprinted in* CHURCH AND STATE THROUGH THE CENTURIES 144, 149 (Sidney Z. Ehler & John B. Morrall eds., 1954) (affirming that the Church granted King Alfonso V of Portugal "full and free permission . . . to invade, search out, capture, conquer and subjugate all Saracens and pagans whatsoever and other enemies of Christ wherever they exist . . . ."); *see also* James Muldoon, *Papal Responsibility for the Infidel: Another Look at Alexander VI's "Inter Caetera,"* 64 CATH. HIST. REV. 168, 170 (1978) (explaining how, between 1140 and 1234, publications confirmed that "the non-Christian world was seen in an essentially adversary relationship to the Christian world.").

[74] *See* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 232 (1986) (asserting that Innocent's "theorizations on the rights and status of normatively divergent peoples provided the necessary regulating principles for the conquest of . . . unregenerate infidel and heathen nations.").

[75] *Id*. at 233–34.

[76] *Id*. at 235 (explaining how "[t]hose who refused to recognize God's papally-revealed plan were irrational and in error . . . According to Innocent his office required him to call upon Christian princes to raise armies to punish serious violations of natural law, and to order those armies to accompany missionaries to heathen lands for purposes of conversion.").

[77] *Id.* at 239–40.

[78] HORNE, *supra* note 70, at 16.

into bondage but decimated by European diseases and warfare.[79] Over a million indigenous people resided in Hispaniola, Spain's first colony in the Americas, when Columbus arrived in 1492.[80] Approximately sixty years later, that number was a mere 250.[81] Colonization and enslavement demanded routine, extreme acts of physical and sexual violence against native people by Europeans.[82] Simultaneously, the rate and scale of indigenous death contributed to a growing demand for enslaved Africans, who were forcefully brought to the Americas as early as 1503.[83]

A right of violence conditioned on religious affiliation directly responded to the imperial and profit interests of the Catholic Church: First, the right justified the mass displacement and labor exploitation necessary for sustaining the wealth (and war power) of Catholic nations. Second, it preserved a pathway for indigenous and African converts to fight on behalf of the Catholic Church, regardless of their race.[84] Conditioning the authority to inflict violence on race would have ultimately jeopardized the wealth of Catholic countries, which relied on African and indigenous converts to settle land in the Americas and to wage war against those indigenous populations resistant to the authority of the Catholic Church.[85]

Profit similarly explains the transition to a racially contingent right of violence. The authority of white Europeans to enslave persons of African descent, specifically,

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[79] *See* Alexander Koch, Chris Brierly, Mark M. Maslin & Simon L. Lewis, *Earth System Impacts of the European Arrival and Great Dying in the Americas After 1492*, 207 QUATERNARY SCI. REV. 13, 20–21 (2019) (confirming that "[e]xisting evidence suggests that the indigenous population collapse was primarily caused by the introduction of pathogens unknown to the American continent ('virgin soil epidemics') together with warfare and slavery.").

[80] *See* PATTERSON, *supra* note 71, at 113.

[81] *Id*. The decimation of Native societies was not limited to Hispaniola; Jamaica's Arawak population was completely wiped out within a decade of Europeans' arrival. *Id*.

[82] *See* HORNE, *supra* note 70, at 81–83 (*quoting* Las Casas, *An Historical and True Account of the Cruel Massacre and Slaughter of 20,000 of People in the West Indies by the Spaniards* (N.Y. Hist. Soc'y, trans., 1620) (describing brutality that ranged from blinding native peoples' eyes with hot irons and "drop[ping] molten lead on their bare flesh[]" to kidnapping and raping indigenous women).

[83] *Id*. at 58.

[84] *Id*. at 96–97 (contending that Africans and indigenous people weren't merely valuable to Spain as slaves but as soldiers, and that England overtook Spain as a colonial power in part by conditioning enslavement on race rather than religion).

[85] This may also explain Queen Isabella's response to the widescale enslavement of indigenous people by Columbus: she eventually had the explorer arrested and stripped of his title. *See* Lucas Barron, Book Review, *A Plea for Isabella*, L.A. REV. BOOKS (Aug. 23, 2020), https://lareviewofbooks.org/article/a-plea-for-isabella/ [https://perma.cc/T44Z-K399]. By pursuing the enslavement of all indigenous people, regardless of religious affiliation, Columbus both violated the terms of the right pronounced by the Catholic Church and interfered with the broader colonization efforts of the Spanish empire. His punishment for enslaving indigenous people, on the basis of their race rather than their religious identities, stood in stark contrast to the immunity colonial governments would eventually supply white slave owners and settlers who attacked and enslaved Africans and Native Americans. *Id.*

was articulated in England across the sixteenth and seventeenth centuries.[86] However, a race-based right of violence remained relatively unstable in early colonial America, when vagrants, convicts, and indentured laborers of various nationalities could all be forced to labor for wealthy settlers.[87] Theology-based justifications for violence persisted during this period, but these justifications suffered from a major flaw: non-Europeans could convert and contest the legitimacy of their domination.[88] The English monarchy distinguished itself from Catholic nations, and eventually surpassed these countries in profits drawn from slavery and settlement, through the creation of "whiteness," which incentivized collaboration amongst those classified as white regardless of religious and class difference.[89]

Statutes and case law in colonial America not only established the ancestry and phenotype necessary for classification as "white";[90] they vested white identities with select privileges, specifically with the authority to torture, sexually assault, and

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[86] *See* Holly Brewer, *Creating a Common Law of Slavery for England and Its New World Empire*, 39 L. & HIST. REV. 765, 769 (explaining how scholars have wrongly concluded that "real" slavery did not exist in England prior to 1772, and uncovering how American slavery "did not emerge 'beyond the line' of English justice, but within it."); *see also* HORNE, *supra* note 70, at 99–100 (explaining how English sea captain, George Best, was the first to use the biblical "Curse of Ham" to justify the enslavement and brutalization of African people, reasoning that accompanied the first use of the term "Negro" in describing Africans in 1555).

[87] *See* Dorothy Roberts, *Race*, *in* THE 1619 PROJECT: A NEW ORIGIN STORY 45, 49 (Nikole Hannah-Jones et al. eds., 1st ed. 2021) (contending that Africans were subjected to a distinct form of servitude, which reduced them to property, only as the slave trade mushroomed, with little distinction existing between European, African, and Indigenous servants when colonies were first established in America); *see also* CEDRIC J. ROBINSON, BLACK MARXISM 78 (3d ed. 2021) (explaining that, as late as the American Revolution, the white servant class resembled the enslaved: "legally chattel to be sold at the discretion of a master, often the subject of cruel punishments, and without the rights to property . . . .").

[88] *See* CHARLES MILLS, THE RACIAL CONTRACT 54 (1997) (explaining how the "politicoeconomic project of conquest, expropriation, and settlement" by European nations could not proceed smoothly where the schedule of rights was religious based, as the conversion of nonwhite people effectively prohibited Christian Europeans from treating them as conquerable heathens).

[89] *See* HORNE, *supra* note 70, at 7–8 (claiming "'whiteness'—effectively, Pan-Europeanism—provided a broader base for colonialism than even the Catholicism that drove Madrid.").

[90] Breaking with English common law, American courts and legislatures conditioned a child's race, and thus their bondage, on the status of their mother as opposed to their father. In this way, white male slave owners were incentivized to increase the number of enslaved people on their plantations (and concomitantly their own profits) through the rape of enslaved Black women. *See* Harris, *supra* note 25, at 1719 (explaining how legal policies tying a child's bondage to the condition of their mother represented a reversal of English common law and "facilitated the reproduction of one's own labor force.").

brutalize those classified as Negro.[91] Whereas poor whites could resort to the law following physical abuse, no such avenues were made available to enslaved people.[92]

The right to violence against enslaved people was available to all persons classified as white, subject to labor-based qualifications.[93] Specifically, through a series of statutes enacted across the seventeenth and early eighteenth centuries, state legislatures clarified that the only white defendants who could evade punishment altogether were those who could demonstrate that their violence was incited by an enslaved person failing to fulfill, or attempting to evade, their labor obligations.[94] Although this technically meant that white slavers who outright murdered their victims could face criminal prosecution, no real inquiries were made into the violence meted out on plantations.[95] In those rare circumstances in which white

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[91] While this section focuses on how the right to violence emerged within the colonies, themselves, the right was exercised as soon as African captives were sold to Europeans. Specifically, 1.8 million people died in Africa as they were transported to slave ships and held in barracoons on the coast, with an additional 1.8 million deaths as enslaved people were transported across the Atlantic to multiple delivery points. *See* MARCUS REDIKER, THE SLAVE SHIP: A HUMAN HISTORY 5 (2007). Physical and sexual acts of violence became even more pronounced aboard the slave ship. *See* Wilma King, *"Prematurely Knowing of Evil Things": The Sexual Abuse of African American Girls and Young Women in Slavery and Freedom*, 99 J. AFR. AM. HIST. 173, 174–76 (2014) (detailing the myriad ways African women were sexually exploited by Europeans aboard slave ships, and the physical punishment inflicted by white ship captains upon the women who resisted).

[92] One explicit example of this phenomenon can be seen in Virginia statutes from the antebellum period. Specifically, the Virginia slave codes prohibited the felony prosecution of a white slaver for killing an enslaved person while "correcting" the victim. The very same statute prohibited masters from inflicting "immoderate correction" on white indentured servants and permitted the servants to file complaints against masters who violated the law. *See* Higginbotham & Jacobs, *supra* note 20, at 1025–27.

[93] As legal historian, Andrew Fede, explains: "A white person's right to legally kill a slave contracted and expanded in conjunction with the patterns of social and economic development. One legal principle remained constant, however; the master's right to kill exceeded the right of a stranger to the slave." FEDE, *supra* note 27, at 62; *see also* KENNEDY, *supra* note 8, at 30 ("[O]fficials decriminalized violence inflicted upon blacks to the extent thought necessary to assert and preserve white supremacy.").

[94] In 1669 and 1705, respectively, the Virginia legislature enacted statutes that not only prohibited punishing white slavers who inadvertently killed their enslaved victim while physically disciplining them for disobedience; but that also authorized all whites to use fatal force against enslaved people thought to be runaways. *See* Higginbotham & Jacobs, *supra* note 20, at 1026–28. Similar policies were enacted in South Carolina. *See* KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA 65 (3d ed. 2015) (explaining how, in 1686, South Carolina passed a law enabling any White person to apprehend and punish runaway slaves).

[95] *See* PHILLIP J. SCHWARZ, TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705–1865 8 (1998) (recounting how white "owners or their surrogates were the first rule-makers, the corrections officers, and even sometimes the executioners" on plantations, answering to no one and permitted to "rule in almost complete privacy.").

defendants were prosecuted, such prosecutions could only proceed where two conditions were met: (1) there was testimony about the killing from a credible white witness and (2) there was sufficient proof that the killing was willful and malicious.[96] Assaults were effectively excluded from punishment, as were killings committed in the heat of passion.[97] Sexual violence against enslaved women by white slavers—a distinct form of exploitation emerging from Black women's ability to produce new forced laborers—was similarly immunized from punishment.[98]

The right of violence was not limited to private plantations, as all white citizens, regardless of whether they served on slave patrols or not, were authorized to police and assault enslaved people.[99] Between 1712 and 1740, South Carolina law "required escalating tortures for captured runaways, from slitting their noses to severing their feet."[100] Eventually this authority could be exercised against any Black person, enslaved or otherwise.[101] The justification for the formation of these patrols, and their routine acts of violence, was the prevention of slave revolts.[102] African ancestry thus marked a person's vulnerability to violence, while simultaneously marking that person as an inherent safety risk. A right of violence, vested in every

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[96] *See* Higginbotham & Jacobs, *supra* note 20, at 1031.

[97] A 1792 law permitted enslaved people to defend themselves against wanton assaults by whites, but this seeming restriction on the right of violence was arguably fictive, given that Black people were excluded from testifying against whites and would therefore have had no real recourse were they subjected to extreme brutality or torture. *Id.* at 1029–30; *see also* KENNEDY, *supra* note 8, at 30 (confirming that both North Carolina and Mississippi prohibited the criminal prosecution of white masters who killed enslaved people that resisted their domination or who killed while "correcting" the victim).

[98] *See generally* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 29–31 (1997).

[99] Williams explains how state control of slave behavior proceeded in three stages: first the activities of enslaved people were restricted, then every white man was vested with the responsibility to enforce these restrictions, and finally the militia or the courts assumed primary responsibility for regulating enforcement. WILLIAMS, *supra* note 94, at 70; *see also* Omavi Shukur, *The Criminalization of Black Resistance to Capture and Policing*, 103 B.U. L. REV. 1, 15 (2023) ("As potential runaways, enslaved black people were subjected to being policed by not only slave patrols, but also an entire nonenslaved population that was often mandated by law to report certain violations of the slave codes and to assist in the recapture of runaways." (citation omitted)).

[100] WILLIAMS, *supra* note 94, at 70 (citation omitted).

[101] As late as 1835, laws were passed instructing white patrollers to "apprehend and correct" any Black person on the streets after curfew, while also authorizing those same patrollers to search the homes of Black people and mete out summary punishment as they saw fit. *Id.* at 63–64.

[102] *See* ALEX S. VITALE, THE END OF POLICING 43 (1st ed. 2017) (confirming that early police forces in Southern cities like New Orleans, Savannah, and Charleston developed to prevent slave revolts, and "played a major role in preventing slaves from escaping to the North, through regular patrols on rural roads."); *see also* WILLIAMS, *supra* note 94, at 74 (confirming that "[w]hatever the faults of these patrols, the White citizens of the American South relied on them to alleviate their anxieties about slave rebellions.").

white person, served to distinguish the races,[103] but it also positioned every Black person, free or otherwise, as a threat to personal and national security. Constitutional clauses guaranteeing the persistence of slavery[104] should be conceived as upholding a racial order wherein every white person had the authority to brutalize Black people. These clauses implicitly affirmed Black people as inherent security risks warranting enslavement and fortified a racially contingent right of violence.[105]

After ratification of the Constitution, state courts assumed a prominent role in enforcing the right to violence while restricting its availability according to prevailing labor arrangements.[106] These tribunals acknowledged violence as essential for the exploitation of enslaved peoples' labor and, concomitantly, the wealth of white plantation owners; criminal sanctions therefore represented unjustified government intrusion upon the property interests of white slavers.[107]

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[103] As scholars have explained in compelling terms, a legal regime premised on a white-nonwhite binary directly served the interests of wealthy white elites, both in terms of neutralizing future uprisings and protecting profits. *See* NIKOLE HANNAH-JONES, *Democracy*, *in* THE 1619 PROJECT: A NEW ORIGIN STORY 7, 18 (Nikole Hannah-Jones et al. eds., 2021) (explaining how, following Bacon's rebellion in 1676, where white indentured servants joined enslaved Africans in a revolt against Virginia's white elite, the colony passed slave codes that were intended to divide "exploited white workers from exploited Black workers by designating people of African descent as 'hereditary slaves' who would serve in bondage for life"). First, excluding persons classified as white from enslavement, while vesting this same class with distinct privileges and advantages, generated a collective white identity across class divides. Poorer whites not only came to identify the interests of wealthy elites as their own; they also received material benefits that disincentivized collaboration with enslaved people and that incentivized investment in the policies and institutions essential for white dominance. *See generally* Crenshaw, *supra* note 33, at 1370–79. Second, labeling and treating a class of people—enslaved Africans and Native Americans, specifically—as subhuman and inferior legitimated forced labor and the seizure of land sans payment, respectively. *See*, *e.g.*, Harris, *supra* note 25, at 1727 (explaining how property laws in colonial America represented acts of violence for Native Americans, while "[a]t the same time, these laws were perceived as custom and 'common sense' by the colonizers." (internal citation omitted)).

[104] *See* U.S. CONST., art. 1, § 2; *id* art. 1, § 9, cl. 1.

[105] Notably, Britain encouraged enslaved Black people to join their military ranks during the American Revolution, with British courts even indicating a willingness to free enslaved African Americans in the years immediately preceding the war. Part of the motive for the Revolution, then, was the threat that the British government posed to the American institution of slavery and, of particular significance, to the profits of American plantation owners. *See* HANNAH-JONES, *supra* note 103, at 14–16.

[106] *See generally* Daniel Farbman, *Plantation Localism*, 50 FORDHAM URB. L.J. 771, 777–78 (2023) (confirming that "the county court system delegated governance authority to planters and men and women who claimed ownership of other human beings" and that courts thus "were vehicles for preserving the existing distributions of power, property, and privilege." (citation omitted)).

[107] State v. Mann, 13 N.C. (2 Dev.) 263, 268 (N.C. 1829) (contending that "full dominion [of the slave master over the enslaved] is essential to the value of slaves as

Profit thus dictated the availability of the right, with those persons directly profiting from the labor of the enslaved person—the white plantation owner, his agents, and those white persons who temporarily hired the enslaved person—having the broadest discretion to brutalize, torture, or kill. In *Commonwealth v. Booth*,[108] decided by Virginia's highest court in 1824, a white defendant was criminally charged for assaulting an enslaved man that he had rented from another white slaver. The General Court ruled that the indictment would have to be dismissed; while a white person who bore no fiscal relationship to the enslaved might be subjected to criminal punishment, Virginia courts had not yet settled whether a white slave owner (or his proxy) could face any such consequence, especially if the violence was not excessive.[109] Three years later, in *Commonwealth v. Turner*,[110] the court resolved the question raised in *Booth*—whether criminal sanctions could, in fact, be imposed upon a white master upon proof of excessive brutality—by ruling that even cruel and malicious assaults could not be punished where the defendant owned the enslaved victim.[111] Identical reasoning appeared in an opinion issued by the North Carolina Supreme Court in 1829, with the court concluding that "[o]ne who has a right to the labor of a slave, has also a right to all the means of controlling his conduct which the owner has."[112] On this basis, the court vacated the criminal conviction of a white defendant who had shot and wounded an enslaved woman that he had hired from a fellow slaver.

Because the right was anchored in the preservation of white supremacy, individuals who committed violent acts against white citizens who threatened the prevailing racial order—through their political affiliations, their opposition to slavery, or their perceived inability to assimilate—could also escape prosecution and

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property," and vacating the criminal conviction of a white slaver on this basis); *see also* State v. Hale, 9 N.C. (2 Hawks) 582, 583–84 (N.C. 1823) (affirming that criminal liability would turn on whether a white defendant owned the enslaved victim, after a white defendant sought dismissal of his indictment on the grounds that the enslaved victim was property and therefore "not protected by the general criminal law of the State[.]").

[108] Commonwealth v. Booth, 4 Va. (2 Va. Cas.) 394 (Va. 1824).

[109] In the court's estimation, the indictment was defective for two reasons: first, it failed to account for the defendant's relationship to the enslaved victim—that of temporary master as opposed to stranger—and second, it misinterpreted the right to violence by implying that the right could be suspended without proof of *excessive* violence by a white master. *Id*. at 395. In the Court's own words: "[T]he Indictment . . . ought to state distinctly, the connection of the parties, and to shew that it is the excess of the punishment which is complained of, and not, that the right to punish at all, is questioned." *Id.* at 395. While Virginia courts abstained from addressing the extent of a white master's authority to punish for another three years, the North Carolina Supreme Court had already resolved the issue: white masters were entitled to the perfect submission of the enslaved person and courts were therefore prohibited from interfering in any manner of private punishment. *See Hale*, 9 N.C. (2 Hawks) at 584.

[110] 26 Va. (5 Rand.) 678 (Va. 1827).

[111] *Id*. at 678 (ruling that an "[i]ndictment cannot be sustained against a Master, for the malicious, cruel, and excessive beating of his own Slave.")

[112] *Mann*, 13 N.C. (2 Dev.) at 263.

punishment.[113] Beginning in the nineteenth century, violence was reserved for three particular groups—the Irish, African Americans, and abolitionists—in an effort to "purge, punish, and terrorize those who were aliens, by virtue of immigrant status, race, or political affiliation."[114] Across the country, enslaved people and white abolitionists were burned and skinned alive, beheaded, castrated, and raped.[115] In Arkansas, white-led mobs murdered Black and white people suspected of abolitionist sympathies and also lynched several Methodist ministers for their critique of slavery.[116] These mobs were regularly organized or aided by state agents.[117] The federal government refused to intervene,[118] and state-level judges explicitly discouraged juries from indicting mob participants.[119] In this way, multiple institutions, at both the federal and state level, assured the persistence of the right and safeguarded it against encroachment.

The right could be assigned to nonwhite people whose conduct fortified the superior status reserved for persons classified as white. Enslaved Africans commanded to serve as plantation overseers, for example, could brutalize and torture

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[113] The term "lynch law" first entered American discourse after militia leader, Colonel Charles Lynch, whipped and hanged several white men during the American Revolution for their support of Britain. *See* ASHRAF H. A. RUSHDY, AMERICAN LYNCHING 23 (2012). While multiple issues contributed to the outbreak of the Revolution, chief among them was Britain's wavering support for slavery. *See supra* text accompanying note 105. Thus, the whippings delivered by Colonel Lynch can be conceived, at least in part, as punishment for aligning with a country that threatened white hegemony through its opposition to slavery. Notably, the Virginia legislature passed an act two years after the lynchings, which prohibited prosecuting and imposing any penalty upon Lynch and his fellow militia members for their unauthorized conduct. *See* RUSHDY, *supra*, at 25. Lynch's conduct arguably represented an early iteration of the right to violence, while the statute represented one of many instances of legislative enforcement of the right.

[114] RUSHDY, *supra* note 113, at 32–33.

[115] *Id*. at 33–34.

[116] *See* L. Scott Stafford, *Slavery and the Arkansas Supreme Court*, 19 U. ARK. LITTLE ROCK L.J. 413, 417 (1997).

[117] RUSHDY, *supra* note 113, at 46 (explaining how "agents of both the state and civil society were involved in the formation of lynch mobs in a way that suggests much more regular organization than is usually ascribed to them.").

[118] Following the attempted assassination of Andrew Jackson in 1835, his secretary of state, along with Congressman James Henry Hammond, expressed their support for mob violence against abolitionists. Thirty-five white-led riots were carried out against abolitionists that year, and the following year saw implementation of a "gag rule" that prohibited discussion of abolition at all levels of government. *Id.* at 33.

[119] After Francis McIntosh, a free Black man, was taken from his jail cell and burned to death by a white mob in April of 1836, a grand jury was convened to investigate the lynching. Judge Luke Lawless advised the jury not to issue an indictment if the murder was carried out by a mob, as it would "be beyond the jury's jurisdiction and 'beyond the reach of human law.'" *Id.* at 34.

other enslaved people in the same fashion as white masters or overseers.[120] The objectives—racially-contingent labor exploitation and capital accumulation—could be realized, regardless of the race of the perpetrator. Further, enslaved men were generally permitted to sexually assault enslaved women without criminal repercussions, mirroring the right vested in white slavers.[121] Vacating the conviction of an enslaved man for the sexual assault of an enslaved woman, Mississippi's highest court confirmed that neither the common law nor legislative act authorized criminal penalties for the rape of an enslaved woman by an enslaved man.[122] Only two eighteenth-century cases in Virginia point to the criminal prosecution of an enslaved man for the rape of an enslaved woman, and neither case ended in the punishment of the perpetrators.[123] The rare cases involving the punishment of enslaved men for sexual assaults upon Black women underscored the profit motive underlying the right and its assignation: where the victim was a free Black woman, whose labor and potential offspring would not contribute to the wealth of a white

[120] Although statutes and social mores disfavored enslaved people serving, or even being labeled, as overseers, Wiethoff confirms that white slavers voluntarily assigned enslaved Africans the duties of overseers in multiple Southern states. *See generally* William E. Wiethoff, *Enslaved Africans' Rivalry with White Overseers in Plantation Culture: An Unconventional Interpretation*, 36 J. BLACK STUD. 429 (2006). In this role, they were responsible for the punishment of fellow slaves, including administering whippings. *Id*. at 439–40.

[121] *See* King, *supra* note 91, at 183–84 (explaining how the criminal punishment of an enslaved man for sexual assault in 1859, along with a Mississippi statute that seemingly prohibited sexual assault regardless of the victim's race, represented "exceptions to the voluminous evidence that slave owners abused enslaved girls and women with impunity [and] black-on-black crimes were ignored . . ."). White slavers were not merely incentivized to commit acts of sexual violence against enslaved women through inheritance laws that conditioned a child's bondage and freedom on the status of their mother. *See* Harris, *supra* note 25, at 1719. Rather, criminal statutes were selectively interpreted and applied to assure the right of violence; white men were acquitted for the sexual assault of enslaved Black women and enslaved women were criminally punished for resisting such assaults. In *State of Tennessee v. James Keyton*, a white slaver accused of sexually assaulting an enslaved girl was found not guilty despite the testimony of six witnesses; his charges were derived from a statute prohibiting the rape of a white female child by a person of color, and given the race of the defendant and victim, the jury concluded that prosecution was impossible. *See* King, *supra* note 91, at 178. In Missouri that same year, an enslaved woman was sentenced to death for defending herself against the sexual abuse of her white captor. Despite two separate statutes affirming a woman's right to defend herself from sexual assault, the judge prohibited a 'not-guilty' plea; as chattel, she did not qualify as a woman nor did she qualify for the rights contained in the statutes. *Id.* at 179.

[122] *See* George v. State, 37 Miss. 316, 319–20 (Miss. 1859).

[123] *See* Higginbotham & Jacobs, *supra* note 20, at 1056.

master, the right to violence was suspended,[124] and where the victim was a pre-pubescent child, unable to reproduce, punishment could also be inflicted.[125]

Profit similarly dictated enforcement or suspension of the right for white defendants. First, white persons who were disconnected from the labor of the enslaved person, who were strangers as opposed to masters or overseers, were subject to punishment. In *Commonwealth v. Carver*,[126] decided by Virginia's highest court in 1827, the court affirmed the conviction of a white defendant accused of shooting an enslaved man. In the court's own words: "Whatever power our laws may give to a master over his slave, it is as important for the interest of the former, as for the safety of the latter, that a *stranger* should not be permitted to exercise an unrestrained and lawless authority over him."[127] Courts often disregarded common law principles that favored punishing white masters for their assaults on enslaved people. Yet when those assaults were committed by white people who stood as strangers to the enslaved victim, courts willingly drew from those same common law principles to justify prosecution and punishment.[128]

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[124] Higginbotham identifies two Virginia cases in the nineteenth century involving the prosecution of an enslaved man for the rape of a Black woman. One case involved the rape of a free Black woman, which resulted in the execution of her attacker, and the other involved the rape of an enslaved woman, resulting in the defendant being transported out of the state. Higginbotham & Jacobs, *supra* note 20, at 1056. Both cases point to limitations on the right to violence when assigned to nonwhite people, while also reflecting the logic attending the right: where an enslaved man's conduct stood to contribute to the profit of his white master—as happened when sex occurred between enslaved people—he stood a better chance of evading physical punishment, as opposed to when his assault occurred outside of the prevailing labor regime.

[125] In *Commonwealth v. Ned*, an enslaved man, accused of sexually assaulting two pre-pubescent girls—one white and one Black—was sentenced to hang for his crimes. As King explains: "One could argue that Eunice Thompson's whiteness was the tipping point in the death sentence. In actuality, whiteness alone did not guarantee the execution of an enslaved man . . . [i]nstead, the girls' ages were of prime importance." King, *supra* note 91, at 183. The aftermath of *George v. State* further points to reproductive capacity as the determining factor in the punishment of an enslaved man for the sexual assault of another enslaved person: after the defendant had his conviction vacated because a female slave did not qualify as a woman for purposes of prosecution, the Mississippi legislature passed a law authorizing the punishment of an enslaved man for the rape of a female child under the age of twelve. *Id*.

[126] Commonwealth v. Carver, 26 Va. (5 Rand.) 660 (Va. 1827).

[127] *Id.* at 665 (emphasis in opinion); *compare with* Gillian v. Senter, 9 Ala. 395 (Ala. 1846) (dismissing a civil suit brought against a white overseer by his employer, on the grounds that the overseer had an equal right to physically punish the enslaved people under his control).

[128] In *Commonwealth v. Turner*, Virginia's highest court acknowledged that English common law authorized punishing a Lord for maiming his villein, precedent which seemingly favored prosecuting a white master for the excessive beating of an enslaved person. *See Turner*, 26 Va. (5 Rand.) at 683. After first contending that slavery was a "wholly new condition" to which the common law did not apply, the court reasoned that even if it

Second, the right was suspended when white defendants murdered enslaved people, thereby obstructing the profit to be drawn from their labor. While courts enforced the right for white defendants accused of assaulting enslaved victims, so long as a labor-based relationship existed between the parties, neither white masters nor white overseers could invoke the right where the enslaved person was killed.[129] Suspension of the right, in these circumstances, generated inconsistencies akin to those seen in cases involving assaults by white strangers upon enslaved people. Namely, defendants were routinely acquitted for *assaults* upon enslaved people because no statutes prohibited the conduct and, according to multiple courts, the common law could not serve as a basis for criminal liability in matters involving enslaved victims. Yet when the accused was charged with murdering the victim, courts refused to adopt or follow this same logic. *Kelly v. State*[130] and *George v. State*,[131] decided by Mississippi's highest court, are demonstrative of this tension.

In the former case, defendants Archibald Kelly and Archibald Little were indicted for the murder of an enslaved man owned by Kelly.[132] Drawing appeals from their manslaughter convictions, the two claimed that they were entitled to acquittal; the legislature prohibited only the excessive punishment of an enslaved person. Manslaughter, in contrast, was a common law offense, which they contended could not be applied to enslaved people.[133] The court rejected this reasoning, however, and invoked both the assault statute and common law to affirm the

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chose to follow precedent pertaining to villenage, a lord was only punished for maiming; less severe forms of violence were excluded, such that the white defendant in the immediate case could not be criminally prosecuted, no matter how excessive or cruel his brutality. *Id.* at 683–84. Just two years later, a white Tennessee defendant attempted to deploy nearly identical reasoning to overturn his manslaughter conviction for murdering an enslaved man that he, himself, did not own. *See* Fields v. State, 9 Tenn. (1 Yer.) 156 (Tenn. 1829). He acknowledged that the state legislature criminalized the murder of a slave but contended that the charge of manslaughter was a common law offense. Because common law principles arguably did not apply to slavery, a point emphasized in *Turner*, he contended that his conviction would have to be vacated. *Id*. at 156. Tennessee's highest court rejected this reasoning, concluding that the position of enslaved people was nearly identical to that of English villeins. And if "by the common law, the villain was protected as to his life and limbs, against the atrocity of the lord or owner," so too must the enslaved person be protected from death at the hands of a white perpetrator, whether master or stranger. *Id.* at 160–61.

[129] *See, e.g.*, State v. Jones, 5 Ala. 666 (Ala. 1843) (affirming the conviction of the defendant for the murder of his slave); *see also* Kelly v. State, 11 Miss. (3 S. & M.) 518 (Miss. 1844) (affirming the convictions of two defendants for murdering an enslaved man, even though one of the defendants owned the victim).

[130] *Kelly*, 11 Miss. (3 S. & M.) at 518.

[131] 37 Miss. 316 (Miss. 1859).

[132] *Kelly*, 11 Miss. (3 S. & M.) at 519.

[133] *Id.* at 525 (explaining that the defendants drew their appeal, in part, because the trial court refused to instruct the jury that "there is nothing in the Common Law on the subject of murder that has strict and complete application to a case of killing as arising from the chastisement of a slave by his master or overseer, or both").

manslaughter convictions.[134] Fifteen years later, in *George v. State*, the court confronted a nearly identical claim, made on behalf of an enslaved man accused of raping an enslaved woman.[135] The defense contended that common law rape could not serve as a basis for criminal liability where the parties were enslaved people, and that statutes prohibiting sexual assault applied only to persons classified as white.[136] Although similar reasoning had been explicitly rejected in *Kelly*, the court declined to follow precedent, instead concluding that the defendants were wholly excluded from common law liability where the victim was an enslaved person.[137]

As with a traditional right, state legislatures delineated who could invoke the right and evade criminal punishment.[138] Legislation that barred the punishment of white defendants, along with statutes mandating violence against enslaved people, represented implicit and explicit articulation of the right, respectively. And like most legal rights, this right to violence was subject to limitations, in that violence disconnected from labor exploitation and profit rendered a person eligible for punishment. Statutes authorized criminal indictments where an enslaved person was maimed or murdered, criminal acts that obstructed the continued exploitation of the victim's labor.[139] Yet even where punishment was authorized, it was unlikely to be inflicted.[140]

The judiciary proceeded to safeguard the right against government infringement, in accordance with prevailing labor arrangements. Courts regularly assured the acquittal of white defendants whose violent conduct was deployed to exploit the labor of the enslaved victim, whether such conduct took the form of physical or sexual violence. Where the violence obstructed profit, in contrast—as happened when the enslaved victim was killed or permanently disabled—courts affirmed that the right of violence would be suspended. So too was the right suspended when the defendant stood as a stranger to the enslaved victim; for

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[134] *Id.* at 526.

[135] 37 Miss. at 317.

[136] *Id*. (crediting the defense argument that the "regulations of law, as to the white race, on the subject of sexual intercourse, do not and cannot, for obvious reasons, apply to slaves," and vacating the defendant's conviction for common law rape).

[137] *Id.* at 319 (concluding that "the common law has no relation to the rights of slaves, and can afford them no protection.").

[138] *See*, *e.g.*, KENNEDY, *supra* note 8; Higginbotham & Jacobs, *supra* note 20, at 1028 ("[There] were limits on the cruelty that the master could impose on the [white] servant, but few, if any, constrained the master's cruelty to a slave. The only explanation for this disparity is that the legislature considered slaves subhuman and not entitled to similar moderation and care.").

[139] *See* DANIEL J. FLANIGAN, THE CRIMINAL LAW OF SLAVERY AND FREEDOM 1800–1868 146–52 (1987) (detailing how southern states began to criminalize the murder of enslaved people in the nineteenth century in part because it benefited the state and slaveholders to do so).

[140] *See* Higginbotham & Jacobs, *supra* note 20, at 1031 (explaining how whites were rarely prosecuted for the murder of enslaved people, even after the legislature withdrew exemption guarantees for manslaughter).

violence, under these circumstances, was divorced from labor exploitation and constituted infringement upon the property interests of the white owner.

B. Adjusting Methods of Enforcement: The Postbellum Period

In the antebellum era, state and federal institutions alike selectively licensed violence to assure the bondage and exploitation of persons classified as Black; this authority was expressed as a legal right and became an essential method for distinguishing racial groups. While Congress, via the Constitution, affirmed the legality of slavery and affirmed the authority of white slavers to recover escaped "property," it was local and state institutions—the bodies responsible for promulgating and enforcing criminal laws—that were especially integral to establishing the terms of the right to violence. Through a series of legislative enactments and criminal proceedings, these institutions constructed a legal regime wherein punishment was contingent upon the race of the parties and their labor relationship.

The postbellum period witnessed passage of the Thirteenth and Fourteenth Amendments; the former prohibited enslavement on the basis of ancestry, while the latter empowered the federal government to intervene in violence committed by white perpetrators. The amendments ushered in new sites for racialized labor exploitation and reflected temporary antagonisms between federal and state governments. However, the amendments should not be conceived as nullifying the right of the antebellum era;[141] because white violence remained integral to labor and racial hierarchies in the postbellum era, it continued to be excluded from prosecution and punishment.

1. The Continued Necessity of Violence

The Thirteenth Amendment neither prohibited white violence nor did it destabilize the nexus between violence and labor exploitation. Rather, the language of the Amendment—prohibiting involuntary servitude except as punishment for a crime[142]—meant that states could no longer explicitly condition forced labor upon a person's ancestry. Instead, labor exploitation would have to be preceded by criminal prosecution. State legislatures swiftly passed Black Codes, which criminalized

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[141] *See generally* SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 116 (1997) (explaining how "emancipatory discourses of rights, liberty, and equality [associated with the Reconstruction Amendments] instigate, transmit, and effect forms of racial domination and liberal narratives of individuality idealize mechanisms of domination and discipline").

[142] *See* U.S. CONST. amend. XIII, § 1 (stating that "[n]either slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

African Americans for failing to sign or fulfill annual labor contracts.[143] Following conviction, Black defendants were forced to serve their sentences "in the coal mines, sawmills, railroad camps, and cotton fields of the emerging New South."[144] The slave patrol and watchmen had been integral to the exploitation and subjugation of African Americans in antebellum America, invading slave quarters to find evidence of planned escapes or insurrections, surveilling enslaved people both on and off of the plantation, and generally brutalizing enslaved people to affirm their inferior status.[145] The Thirteenth Amendment assured law enforcement would continue to fulfill this function, now on behalf of both the state and private corporations. More specifically, the convict-leasing system that emerged after the Civil War entailed sheriffs arresting African Americans for illegitimate or minor violations of criminal codes; prosecutors seeking, and judges imposing, heavy fines; and the convicted person being forced to labor on private plantations and prison work farms in order to pay off their debts.[146] County sheriffs and local judges derived direct profits from this system of convict leasing, as did the states themselves.[147]

Violence remained essential for drawing maximum profits from Black prisoners, whether they toiled for private companies or the state.[148] No one protected

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[143] *See* ANDERSON, *supra* note 69, at 19 (explaining how Black Americans who failed to show proof of gainful employment "would be charged with vagrancy and put on the auction block, with their labor sold to the highest bidder."); s*ee also* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53–54 (1st ed. 2008) (describing how Southern states passed statutes subjecting African Americans to arrest and prosecution for failing to enter labor contracts with white farmers or failing to obtain permission from employers before changing jobs); Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1616 (2015) (explaining how, because every state had a provision in its constitution barring imprisonment for debt, courts premised criminal liability on a formerly enslaved person having fraudulent intent when they first entered into the labor contract).

[144] DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 36 (1996).

[145] *See* WILLIAMS, *supra* note 94, at 64–69 (explaining how white militias and patrollers were responsible for searching the homes of enslaved people, preventing gatherings, and "would often harass Black people whom they felt to be traveling too far or too often.").

[146] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 156 (rev. ed. 2012); s*ee also* Birckhead, *supra* note 143, at 1624.

[147] Convict leasing "poured the equivalent of tens of millions of dollars into the treasuries of Alabama, Mississippi, Louisiana, Georgia, Florida, Texas, North Carolina, and South Carolina[.]" BLACKMON, *supra* note 143, at 7–8. Sheriffs not only received fees from the defendants; they were also permitted to keep "any amount left over from daily feeding fees paid for each prisoner by the state." *Id*. at 65. This created a system wherein "[a]rrests surged and fell, not as acts of crime increased or receded, but in tandem to the varying needs of the buyers of labor." *Id*. at 65–66.

[148] While the financial value of enslaved people had discouraged white slavers and their agents from inflicting violence that would render the victim unable to work, companies participating in the convict-leasing system suffered no financial penalties if the prisoner died while in their custody, as they could easily access new Black laborers through the state or

Black prisoners "from savage beatings, endless workdays, and murderous neglect."[149] Various forms of torture were deployed by whites overseeing their labor, from weighted chains and barbed collars to water torture and steel bracelets.[150] This brutality was not restricted to male convicts; Black women "perceived not to be working hard enough or breaking other rules . . . were brutally whipped by the camp guards."[151] The threat of violent reprisals from white guards discouraged these women from reporting their sexual assaults; yet limited records tracking the pregnancies of female prisoners show that "the rape of black women was an institutionalized form of violence and oppression that pervaded black women's lives and subjected them to the violence of compulsory pregnancy, childbirth, and motherhood."[152]

Although some portion of formerly enslaved people could be surveilled and controlled within jails and prisons, there still remained a class of African Americans who, absent prosecution and conviction, could evade such regulation. No longer bound to a plantation, these African Americans could also reject exploitative contracts and depart the South in search of better wages, both of which threatened the profits of white elites, whether those elites presided over state institutions or private businesses.[153] Simultaneously, the demise of racialized enslavement meant that poor whites no longer derived a clear privilege—freedom—by way of their racial classification, and thus had less reason to conceive their own interests as naturally aligned with the interests of white elites.[154] Expanding the right of violence, regardless of the parties' labor relationship, could solve these distinct issues: whites, through collective acts of violence, could intimidate African Americans into remaining on former plantations and repel outsiders offering better employment opportunities outside of the South. Within such a regime, there was less reason for persons classified as white, regardless of economic status, to collaborate with formerly enslaved people to disturb the social order, while collective acts of violence

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sheriff. This meant that "[t]here was no compelling reason not to tax these convicts to their absolute physiological limits." BLACKMON, *supra* note 143, at 96.

[149] Records from this period show that Black people fed into the convict-leasing system were whipped for failing to meet work quotas, had metal spurs riveted to their feet for attempting to escape, and "dropped from exhaustion, pneumonia, malaria, frostbite, consumption, sunstroke, dysentery, gunshot wounds, and 'shackle poisoning' (the constant rubbing of chains and leg irons against bare flesh)." OSHINSKY, *supra* note 144, at 44–45.

[150] *See* Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1044 (2010).

[151] HALEY, *supra* note 20, at 89.

[152] *Id.* at 115; *see also* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1265 (2012) (explaining how Black women, unlike the Black men and white women detained on labor camps, "were uniquely subject to sexual violence and abuse at the hands of guards as rape was endemic.").

[153] ANDERSON, *supra* note 69, at 42, 46.

[154] *See* RUSHDY, *supra* note 113, at 60 (explaining how Black Codes not only allowed former slaveholders to have unimpeded access to formerly enslaved people's labor, but they also reinforced "the mythology of white supremacy at the moment when it was most imperiled.").

both reified racial difference[155] and discouraged Black communities from actively resisting their continued subordination.[156]

Thus, violence was not exclusively inflicted on the privately- and publicly-owned labor camps that proliferated in the postbellum period.[157] During the first half of Reconstruction, from 1865 to 1873, the Ku Klux Klan and other paramilitary white supremacist organizations "pursued a strategy of mob violence and terrorism meant to control elections and simultaneously to render the federal military presence and black freedom meaningless."[158] The actions of vigilante groups and police were often indistinguishable. In April of 1866, police led white mobs through the streets of Memphis, Tennessee, murdering forty-six Black people and burning down ninety-one houses, twelve schools, and four churches over four days.[159] That same year, in New Orleans, police first led mobs in attacking Black Union loyalists at an assembly hall, before leading rioters in beating and shooting Black residents across the city; thirty-eight people were killed and many more wounded, with the victims overwhelmingly being Black.[160] In St. Landry Parish, Louisiana in 1868, members of a white supremacist group, Knights of the White Camelia, horsewhipped a Black editor who had dared to criticize their intimidation tactics, arrested twelve other African Americans before murdering them that evening, and finally killed another

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[155] To be 'Black,' to be nonwhite, meant perpetual vulnerability to violence, while being white meant, amongst other things, the freedom to commit racially motivated violence.

[156] *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 44 (5th ed. 2004) (explaining how the economic and political suppression of Black communities during the era of Reconstruction "would have been ineffective had it not been for the wholesale and brutal violence that rendered thousands of ex-slaves literally unable to know on which side of emancipation they had fared worst.").

[157] Lynchings and other acts of collective white violence had not merely been unusual prior to the Civil War but altogether unnecessary: the private plantation owner and his agents could punish any acts of disobedience and enslaved people were prohibited from leaving the plantation subject to limited exceptions. *See* BELKNAP, *supra* note 13, at 2 ("Extralegal executions did not become a prominent feature of black-white relations in the South until after the Civil War."). This arguably explains why the right to violence could not be invoked in the antebellum era by whites who stood as strangers to the enslaved victim: white slavers and their proxies could swiftly identify and punish behaviors seen as threats to the labor and racial order, rendering acts of violence by white strangers superfluous (and a direct threat to profits, particularly where their violence temporarily or permanently prevented the enslaved victim from working).

[158] RUSHDY, *supra* note 113, at 61; s*ee also* Christopher Waldrep, *Black Access to Law in Reconstruction: The Case of Warren County, Mississippi*, 70 CHI.-KENT L. REV. 583, 617 (1994) (contending that, during the era of Reconstruction, racism "explains white unwillingness to admit blacks into court and racial violence explains the reluctance of black victims of white violence to step forward.").

[159] WILLIAMS, *supra* note 94, at 122. This violence was explicitly encouraged by city officials, like the city recorder. Both the sheriff and attorney general led the mobs in burning down buildings and churches while also indiscriminately murdering and raping Black residents. *See* Donald, *supra* note 2, at 1635–36, 1658.

[160] WILLIAMS, *supra* note 94, at 122–23.

two hundred freed people throughout the parish.[161] Police-led violence was not exceptional but common, with law enforcement leading riots in Savannah in 1868, Baton Rouge in 1870, and Barbour County in 1874.[162]

As Williams further illuminates: "When Klan-type violence occurred, arrests were unusual, prosecutions rare, and convictions almost unknown."[163] White mobs were not merely incited to assault and murder African Americans by local law enforcement; the common thread uniting white-led riots was the absence of any state intervention or prosecution of the perpetrators.[164] Following the Memphis Massacre of 1866, which brought widespread death and destruction to the local African American community, no white rioters were arrested or prosecuted, despite a military commission collecting "overwhelming testimony and evidence of the Massacre being perpetrated mercilessly by the police force."[165] Reports from the Freedmen's Bureau and investigators regularly confirmed that local authorities

[161] RUSHDY, *supra* note 113, at 61.

[162] WILLIAMS, *supra* note 94, at 124 (explaining that law enforcement attempted to stop only three riots over the course of the entire Reconstruction era but led a third of the riots over this same period) (citation omitted).

[163] *Id*. at 102; *see also* Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 783 (2002) (confirming that "the law as it is traditionally understood did little to stem the tide of klan violence that inundated the South in the years following the Civil War.").

[164] The non-profit, Equal Justice Initiative, documented over 4,000 racial terror lynchings in just twelve Southern states between 1877 and 1950. *See* EJI REPORT, *supra* note 6, at 4. The organization found "few white people were convicted of murder for lynching a Black person" during the Reconstruction era and that only one percent of lynchers were convicted of a criminal offense after 1900. *Id.* at 48. Sherrilyn Ifill, in contrast, found no record of any white person ever having been convicted of murder for lynching a Black person, despite the thousands of white-on-Black lynchings committed across thirty-four states. *See* SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 75 (1st ed. 2007).

[165] Donald, *supra* note 2, at 1638–39. Testifying before a special federal committee, convened to investigate the massacre, a local Memphis judge "expressed doubt that any of the African-American victims would find justice through the courts and believed that the white police responsible for the atrocities were not likely to be penalized through the court system either." *Id*. at 1650.

offered no manner of protection to Black residents,[166] while all-white juries assured the violence would persist by declining to indict any of the mob participants.[167]

Unchecked white violence served to maximize, rather than obstruct, private and public profit in the wake of the Civil War. Regardless of whether a Black person was held within a publicly- or privately-run labor camp, extreme acts of violence were economically sensible: Black convict-lessees were (technically) only obligated to complete hard labor for the duration of their sentences and could be replaced at little to no cost, such that unfettered violence no longer constituted a threat to a long-term investment. Violence beyond the confines of the labor camp was equally sensible, in terms of solving threats to both white hegemony and the economic order. The racially dependent privileges of the Jim Crow era—where employment,

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[166] A report from the Freedmen's Bureau confirmed that the mayor of Memphis did nothing to suppress the riot of 1866 "either through lack of inclination and sympathy with the mob, or on utter want of capacity . . . ." *See* Charles F. Johnson & T.W. Gilbreth, *The Freedmen's Bureau Report on the Memphis Race Riots of 1866* (May 22, 1866), TEACHING AM. HIST., https://teachingamericanhistory.org/document/the-freedmens-bureau-report-on-the-memphis-race-riots-of-1866/ [https://perma.cc/H4M8-4UKG] (last visited November 3, 2023). Following the riot, neither the Mayor nor the Board of Alderman took any steps to hold the rioters accountable, nor did the local courts attempt to prosecute any of the participants. *Id*. Colonel Samuel Thomas, when testifying before Congress in 1865, "explained how murder, rape, and robbery . . . were not seen as crimes at all so long as whites were the perpetrators and blacks the victims." ANDERSON, *supra* note 69, at 13 (citations omitted). Carl Schurz, who toured the South at the request of President Johnson, found that "[l]ocal officials and communities were either 'not willing or not able to enforce peace and order.'" *See* Heyman, *supra* note 16, at 548–49.

[167] Following the New Orleans massacre of July 1866, which resulted in the deaths of at least forty-eight Black residents, a local judge convened a grand jury to investigate the riot. *See* Donald, *supra* note 2, at 1642. After calling only white witnesses, the jury exclusively issued indictments against the victims of the riot, who were overwhelmingly Black. No officers nor any white citizens were indicted. *See* JAMES G. HOLLANDSWORTH, JR., AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866 146 (2001). In Texas, "there were 500 murder prosecutions of whites charged with killing blacks in 1865 and 1866; in the 500 trials, all-white juries acquitted every one of the white defendants." James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 916 (2004). Illegal racial discrimination in jury selection remains widespread, particularly in the South and in capital cases. *See* EJI REPORT, *supra* note 6, at 64. A 2010 report found that eighty percent of African Americans that qualified for jury service in Houston County, Alabama, had been struck by prosecutors in death penalty cases, and that there was no effective representation of Black jurors in eighty percent of criminal trials held in Jefferson Parish, Louisiana. *See* EQUAL JUST. INITIATIVE, ILLEGAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 5 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf. [https://perma.cc/UN6R-CWPY] (last visited Nov. 3, 2023). The authors of the report not only found evidence that district attorney's offices are explicitly training their prosecutors to exclude racial minorities; they ultimately concluded that "[u]nder current law and the absolute disparity standard, it is *impossible* for African Americans to effectively challenge underrepresentation in the jury pool in 75% of the counties in the United States." *Id*. at 6 (emphasis added).

housing, and access to public and private facilities would turn on a person's phenotype and ancestry—incentivized continued cohesion around the state-crafted identity of 'whiteness.'[168] The suspension of state punishment for racialized forms of violence should similarly be conceived as a privilege oriented towards cohesion; whites, regardless of wealth, were extended an exclusive benefit which distinguished them from nonwhite communities and affirmed their dominant status.

2. Assuring the Right's Persistence

The race riots and spectacle lynchings of the Reconstruction era indicate that the state did not assume an exclusive monopoly on violence following the Civil War; rather, both white civilians and white public officers evaded punishment when their violence was directed towards Black communities.[169] Instead of reading Black Codes, legislative restrictions on voting, and judicially sanctioned all-white juries[170] as separate phenomena, they should instead be conceived as a series of interventions assuring that persons classified as white could continue to exercise a right to violence, regardless of whether they were formal state authorities or not. These assorted policies, along with their enforcement, pointed to ongoing collaboration between state legislatures and state courts, mirroring collaborations of the antebellum era.[171] The right to violence, in other words, had never been a creature of statute, alone. Even where antebellum legislatures did not explicitly authorize criminal liability for violence against enslaved people, antebellum courts authorized prosecutions based on the labor relationship between the parties.[172]

The speeches and reports of federal legislators preceding passage of the Fourteenth Amendment and other Reconstruction legislation reveals an acute

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[168] *See* BELL, *supra* note 156, at 40 ("In the resolution of racial issues in America, black interests are often sacrificed so that identifiably different groups of whites may settle a dispute and establish or reestablish their relationship.").

[169] *See generally* Christina Swarns, *"I Can't Breathe!": A Century Old Call for Justice*, 46 SETON HALL L. REV. 1021, 1023–25 (2016) (explaining how law enforcement officers were often involved in the lynchings that took place between 1877 and 1950, with grand juries and the justice system turning a blind eye to acts of violence carried out by white perpetrators).

[170] ANDERSON, *supra* note 69, at 35 (explaining how, in a series of decisions issued in 1880, "the U.S. Supreme Court provided clear guidelines to the states on how to systematically and constitutionally exclude African Americans from juries in favor of white jurors." (citation omitted)).

[171] *See generally* Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817 (1998) (detailing the long history of southern states defying the rule of law on matters of race and criminal justice, and emphasizing the role that federal courts assumed, in the 1960s and 1970s, to end the injustices that state courts had tolerated and promulgated).

[172] *See*, *e.g.* Eskridge v. State, 25 Ala. 30, 35–36 (Ala. 1854) (concluding that a white defendant could be charged with the crime of mayhem even though the contested statute did not explicitly authorize liability for enslaved victims).

awareness that state and local officials regularly participated in violence against formerly enslaved people *and* assured white perpetrators evaded prosecution.[173] The Fourteenth Amendment guaranteed equal protection of the law to African Americans,[174] and it specifically represented a pathway for the federal government to intervene in those states that declined to prosecute white citizens for racially motivated crimes, regardless of whether they acted singularly or collectively.[175] The Civil Rights Act of 1866[176] and the Enforcement Acts of 1870[177] and 1871[178] similarly enabled the federal government to address ongoing discrimination within the states. The Act of 1866 prohibited allotting rights according to a person's race: state statutes that explicitly conditioned criminal charges and punishment on the race of the defendant, or prohibited the testimony of nonwhite witnesses, were arguably illegal.[179] Additionally, all three Acts authorized the federal government to pursue criminal charges against individuals who outright violated, or formed conspiracies to violate, rights guaranteed to all citizens, specifically the formerly enslaved. The legislation was significant. Prior to its passage, and prior to the Civil War, Congress had explicitly and implicitly endorsed white violence against enslaved people, with the Supreme Court issuing decisions that aligned with this mission.[180] The postbellum landscape, in contrast, was marked by a notable fracture—not at the state

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[173] *See generally* Donald, *supra* note 2, at 1645–53 (summarizing the investigations and reports launched by Congress following race riots in Memphis and New Orleans, and before passage of the Fourteenth Amendment).

[174] *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.").

[175] *See* James W. Fox, Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court's Doctrinal Support of Jim Crow*, 34 STETSON L. REV. 293, 298 (explaining how Congress drafted the Fourteenth Amendment with white southern violence in mind, with legislators passing the Enforcement Acts in the early 1870s so that the federal government could intervene in such violence); *see also* Heyman, *supra* note 16, at 546 (confirming that the Fourteenth Amendment and other Reconstruction legislation were intended to "establish the right to protection as part of the federal Constitution and laws . . .").

[176] PUB. L. NO. 39-31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (2012)).

[177] PUB. L. NO. 41-114, 16 Stat. 140 (1870) (codified as amended at 18 U.S.C. § 241 (1996)).

[178] PUB. L. NO. 42-22, 17 Stat. 13 (1871) (codified as amended at 18 U.S.C. § 242 (1996)).

[179] Despite their illegality, states continued to perpetuate these policies; just one year after the Act's passage, the Kentucky Supreme Court vacated the criminal conviction of a white defendant because his conviction arose from the testimony of a Black witness. *See* Bowlin v. Commonwealth, 65 Ky. (2 Bush) 5, 32 (Ky. 1867). The court concluded that the Civil Rights Act exceeded congressional authority, such that Kentucky could continue to prohibit Black witnesses from testifying against whites. *Id.*

[180] *See generally* Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. 651 (2022).

level, where courts and legislatures continued to operate in lockstep, but between state governments and the national legislature. The landscape, in other words, was one wherein federal legislation represented the most salient and direct threat to the persistent, state-level right to violence.[181] Supreme Court cases addressing the scope and constitutionality of the aforementioned Acts should be assessed in light of this phenomenon.

Three cases are of particular significance: *Blyew v. United States*,[182] *United States v. Cruikshank*,[183] and *Screws v. United States*.[184] First and foremost, each case was initiated by federal prosecutors only *after* state courts and officials demonstrated an unwillingness to pursue criminal charges against white assailants. In 1868, John Blyew and George Kennard, wielding axes and hoping to initiate a new Civil War, brutally murdered an entire Black family—Jack and Sallie Foster, along with ninety-year-old Lucy Armstrong and seventeen-year-old Richard Foster.[185] Although the pair were initially arrested by local officials, prosecution, let alone punishment, was highly unlikely: the only witnesses to the incident were Black, and Kentucky's evidence code continued to prohibit Black people from testifying against whites, despite the prohibition directly contravening the Civil Rights Act of 1866.[186] *Cruikshank*, in contrast, arose from the Colfax Massacre of 1873, wherein a white mob killed over sixty people, mostly African Americans, for contesting the legitimacy of a recent election.[187] Although ninety-seven white perpetrators were subsequently indicted by federal prosecutors, no such criminal prosecutions were pursued at the local level.[188] Finally, the 1945 case of *Screws* involved a white

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[181] *See generally* FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION 8–18 (2000) (detailing a host of federal efforts to address southern laws that reinstituted the subordination of formerly enslaved people).

[182] 80 U.S. 581 (1871).

[183] 92 U.S. 542 (1875).

[184] 325 U.S. 91 (1945). These cases, alone, cannot sufficiently capture the assault launched by the Supreme Court on the Reconstruction Amendments and related legislation. *See* ANDERSON, *supra* note 69, at 37 ("[W]ith the *Slaughterhouse Cases, Cruikshank, Plessy, Williams,* and others, the U.S. Supreme Court had systematically dismantled the Thirteenth, Fourteenth, and Fifteenth Amendments and rendered the Enforcement and Force Acts dead on arrival."). However, they all arose from acts of violence committed by white perpetrators, and they exemplify how the Supreme Court obstructed the federal government's attempts to assure the security of formerly enslaved people.

[185] *See Blyew*, 80 U.S. at 584–85.

[186] Benjamin Bristow, the U.S. Attorney who eventually assumed responsibility for prosecuting the case, had these facts in mind when he chose to bring suit in a federal court rather than a Kentucky tribunal. *See* Robert D. Goldstein, Blyew*: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 483–85 (1989).

[187] *See* Wilson R. Huhn, *The Legacy of* Slaughterhouse*,* Bradwell*, and* Cruikshank *in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1071 (2015).

[188] Michael Stolp-Smith, *The Colfax Massacre (1873)*, BLACKPAST (Apr. 7, 2011), https://www.blackpast.org/african-american-history/colfax-massacre-1873/ [https://perma.cc/7K46-KU6Y]; *see* EJI REPORT, *supra* note 6, at 13, 17 (confirming that the "whites who exacted this violence faced no consequences . . .").

sheriff, policeman, and special deputy beating an unarmed Black man to death.[189] In a separate concurrence, Justice Rutledge confirmed that state officials had taken no steps to prosecute the assailants.[190]

Second, following trials at the federal level, guilty verdicts were entered in all three of the cases.[191] The defendants in *Cruikshank* and *Screws* were specifically found to have violated the Enforcement Acts of the 1870s.[192] These facts are notable for two reasons. To start, federal prosecutions under these statutes meant that the actions of the defendants wholly escaped classification as violent crimes; the Acts premise criminal liability on a defendants' interfering in the rights of others, as opposed to creating distinct federal homicide offenses.[193] In addition, these prosecutions represented a direct threat to the right to violence. Affirmative federal prosecutions contravened a strategy of state and local inaction, while the impaneling of impartial jurors and accommodation of Black testimony stood in direct opposition to policies enacted within the individual states.

Third, the opinions issued by the Supreme Court in these cases not only constituted direct obstruction of legislative will (effectively allowing white violence to proceed at the local level), but also ignored how acts of white violence were enabled by, and thus committed on behalf of, the state, regardless of whether law enforcement actively participated or not. *Blyew*, in particular, exemplifies the Court's intentional misinterpretation of federal legislation. The Civil Rights Act of 1866, which supplied the basis for prosecuting the defendants within a federal forum, guaranteed "all persons born in the United States [the right to] . . . sue, be parties, and *give evidence*."[194] Under Section 3 of the same act, criminal matters were to be removed to federal courts, rather than be heard in state tribunals, where there was evidence that a person had been denied any of the aforementioned rights.[195] The conditions necessary for removal were present in the case: Black and mulatto residents were prohibited, under Kentucky law, from testifying against white defendants, such that the dying declaration of one of the victims—Richard Foster—would not be admitted into evidence in a state court, nor would the testimony of his two surviving children.[196] Consequently, the case was removed to the United States Court for the District of Kentucky, where the two white defendants

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[189] *See* Mia Teitelbaum, *Willful Intent:* U.S. v. Screws *and the Legal Strategies of the Department of Justice and NAACP*, 20 U. PA. J.L. & SOC. CHANGE 185, 193 (2017).

[190] *See* Screws v. United States, 325 U.S. 91, 161 n.5 (1945) (Rutledge, J., concurring).

[191] *See, e.g.*, *Blyew*, 80 U.S. at 584; *Cruikshank*, 92 U.S. at 545; *Screws*, 325 U.S. at 94.

[192] *Compare Cruikshank*, 92 U.S. at 544–46 (confirming that the defendants had been indicted and convicted on thirty-two counts under the Enforcement Act of 1870) *with Screws*, 325 U.S. at 93–94, 98–99 (confirming that the defendants had been charged and convicted under 18 U.S.C. § 52, which codified the criminal liability that had first been established under the Enforcement Act of 1871).

[193] Murder was not a federal offense as late as the 1960s. *See* BELKNAP, *supra* note 13, at 163.

[194] 42 U.S.C. § 1981(a) (emphasis added).

[195] *See* Blyew v. United States, 80 U.S. 581, 582–83 (1871).

[196] *See* Goldstein, *supra* note 186, at 483–84.

were successfully prosecuted under Kentucky's homicide laws.[197] On appeal, the defendants asserted that the district court had lacked jurisdiction to hear their case. Although the Civil Rights Act explicitly vested federal courts with the exclusive authority to hear "all causes, civil and criminal, affecting persons who are denied . . . any of the rights secured to them [by the Act]," the defendants claimed that no Black people were, in fact, affected.[198]

The defendants acknowledged that the testimony of three Black witnesses would be excluded in a state tribunal, but they contended that the only people "affected" in a criminal case were the accused and the public.[199] The Supreme Court agreed: although two living witnesses were outright prohibited from testifying against the defendants based exclusively on their race—a policy in direct contravention of both the Civil Rights Act and the Thirteenth Amendment—they were, according to the Court, "not persons affected by the cause."[200] Dissenting Justices Bradley and Swayne emphasized how the Civil Rights Act was specifically intended to provide "a remedy where the State refuses to give one; where the mischief consists in inaction or refusal to act, or refusal to give requisite relief . . . ."[201] Yet accomplishing legislative will was arguably of minimal concern to the majority, as was assuring Black residents would be protected from white violence. Instead, they emphasized how *white* citizens could be negatively impacted were they to actually enforce the plain terms of the Act.[202]

Unable to prosecute white defendants for violating state homicide laws, federal prosecutors allegedly retained the authority to prosecute defendants for violating federal laws under the Enforcement Act. Specifically, Section 6 of the Enforcement Act of 1870 prohibited conspiracies to "injure, oppress, threaten, and intimidate citizens . . . in the exercise of the rights and privileges granted under the Constitution and laws of the United States."[203] The actions taken by white participants in the Colfax Massacre seemed to fall squarely within the provision: angry about recent election results—particularly the appointment of an African American as sheriff—more than one hundred armed whites organized a militia, marched upon the local courthouse, and proceeded to murder the forty African Americans trapped inside

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[197] *Id.* at 474.

[198] *Blyew*, 80 U.S. at 586–87.

[199] *Id.* at 587. This claim is especially telling; although the accused parties were white, the Black witnesses whose testimony would be excluded in this, and similar, cases certainly qualified as members of the public. Counsel for the defendants did not, however, conceive the deceased victims nor the witnesses as the 'public' that federal legislators sought to protect. Nor did the Court for that matter.

[200] *Id.* at 593.

[201] *Id.* at 597.

[202] Specifically, the Court contended that, should they adopt the reasoning of the prosecution—that the exclusion of Black witnesses justified removal of a criminal case to a federal forum—then "in any suit between white citizens, jurisdiction might be taken by the Federal courts whenever it was alleged that a citizen of the African race was or might be an important witness." *Id*. at 592.

[203] 18 U.S.C. § 241.

before continuing their violent rampage in nearby Black neighborhoods.[204] A federal indictment, filed against ninety-eight of the perpetrators, contended that they had conspired to violate the First Amendment rights of Black residents to peaceably assemble, the Second Amendment right of those same residents to bear arms, and their Fourteenth Amendment right to due process of law before the deprivation of life or liberty.[205]

The Court first dismissed the counts premised on the First Amendment.[206] Citizens, the Court contended, only had a right to peaceably assemble and petition *Congress*, and no guaranteed right to petition their local or state legislators. Because the indictment failed to confirm whether the victims had assembled to petition the *national* government, the defendants could not be held liable.[207] Next, the Court dismissed counts premised on the right to bear arms: the Second Amendment, the majority explained, did not technically vest citizens with the right to bear arms.[208] Rather, such right existed prior to formation of the Constitution, with the Second Amendment simply prohibiting Congressional interference.[209] In other words, the ability to carry arms would qualify as a right where the *government* sought to restrict or prohibit firearms, but it allegedly lost its status as a right where *individuals*—here, a white mob—sought to prevent African Americans or their white supporters from possessing weapons.

The Court then turned to four counts that were derived from the Fourteenth Amendment. The third and eleventh counts alleged that the mob participants sought to deprive their victims of life and liberty without due process of law, while the fourth and twelfth counts alleged that the mob's actions effectively denied the victims the breadth of safety and security afforded white citizens.[210] The counts illuminated just how the right to violence remained intact within the states—where local and state actors' refusal to respond to incidents of white violence meant that safety remained conditioned upon the race of the perpetrator and victim—while also reflecting the strategy that the federal government had developed to tackle the specific issue of state-level inaction. Although the speeches and testimony delivered prior to passage of the Fourteenth Amendment emphasized the routine collusion of white government actors and white citizens, and Congress' intent to address this specific problem, the Court in *Cruikshank* wholly ignored how white civilians had been deputized to inflict violence on behalf of the state both before and after the Civil War. Specifically, the third and eleventh counts were to be dismissed because

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[204] *See* Francisco M. Ugarte, *Reconstruction Redux: Rehnquist,* Morrison*, and the* Civil Rights Cases, 41 HARV. C.R.-C.L. L. REV. 481, 487 (2006).

[205] *See* United States v. Cruikshank, 92 U.S. 542, 544–45 (1875).

[206] *Id*. at 551–53.

[207] *Id*. at 552–53; *see also* Huhn, *supra* note 187, at 1072 (explaining how the Court used *Cruikshank* to advance its theory that citizens would have to seek the protection of the state government where the violation of their rights was allegedly derived from their state citizenship).

[208] *See Cruikshank*, 92 U.S. at 553.

[209] *Id*.

[210] *Id.* at 55–54.

the violence carried out by the mob exclusively represented the actions of private citizens as opposed to state action.[211] The fourth and twelfth counts, in contrast, were to be dismissed because federal prosecutors had not explicitly alleged that the mob's actions were, in fact, motivated by race.[212]

The Court's interpretation of the Enforcement Act in *Cruikshank* and subsequent cases left Black people wholly defenseless to white violence unless they were being held as federal prisoners.[213] The "age of lynching"—which lasted from the 1880s into the 1930s—was marked by "the substantial and regular rise of ritual lynchings of African Americans."[214] In Tulsa, Oklahoma in 1921, a white mob, armed and deputized by city officials, destroyed an entire Black district, killing 300 people and injuring thousands more.[215] None of the mob participants were successfully prosecuted for the killings, arson, or looting,[216] while Tulsa Police Chief Gustafson was found guilty of just one count of dereliction of duty.[217] Between 1882 and 1903, at least forty Black women were lynched, as were Native Americans, Mexican-Americans, and Asian Americans.[218] And although the region and actors might change—with violence meted out by white law enforcement, civilians, or some combination thereof, whether in the North or the South—the common thread

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[211] *Id.*; s*ee also* Huhn, *supra* note 187, at 1074–76.

[212] *See Cruikshank*, 92 U.S. at 555–56.

[213] *See*, *e.g.*, United States v. Shipp, 214 U.S. 386 (1909) (reinstating a criminal indictment against a Tennessee sheriff who failed to protect a Black defendant, whose case was pending at the federal level, from a lynch mob); *see also* Martha T. McCluskey, *Facing the Ghost of Cruikshank in Constitutional Law*, 65 J. LEGAL EDUC. 278, 281 (2015) (contending that "the *Cruikshank* decisions cleared the way for violent restoration of a white supremacist legal order that replaced Reconstruction with the Jim Crow system . . ."); Hutchinson, *supra* note 20, at 387 (confirming that, as a result of *Cruikshank*, the Supreme Court "constrained Congress's ability to regulate private racial discrimination and violence by exercising its legislative powers contained in . . . the Fourteenth Amendment.").

[214] RUSHDY, *supra* note 113, at 75; *see also* Daniel P. Mears, Eric A. Stewart, Patricia Y. Warren, Miltonette O. Craig & Ashley N. Arnio, *A Legacy of Lynchings: Perceived Black Criminal Threat Among Whites*, 53 L. & SOC'Y REV. 487, 487 (2019) (describing the "lynching era" as a fifty-year period from around 1880 to the 1930s).

[215] *See* Matt Reynolds, *Tulsa Reckoning: An Ongoing Lawsuit Seeks Justice for Massacre Victims*, 108 A.B.A. J. 48, 50 (2022).

[216] *Id*. at 54.

[217] *See* R. Halliburton, Jr., *The Tulsa Race War of 1921*, 2 J. BLACK STUD. 333, 353 (1972).

[218] *See* Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892–1920*, 3 UCLA WOMEN'S L.J. 1, 6 n.19 (1993); s*ee also* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 36–37 (1996) (explaining how, by the twentieth century, lynchings had taken on a decidedly racial character, and were open affairs attended by scores, and sometimes thousands, of whites).

was the lack of response from state institutions, and leniency if the actors were, in rare circumstances, prosecuted.[219]

Further, the federal legislature's commitment to addressing racial violence within the states was short-lived, obstructed not just by the Supreme Court but by multiple presidential administrations and their executive agencies. President Andrew Johnson vetoed the Civil Rights Act of 1866 and "did everything in his power to stop constitutional recognition of black people's citizenship and voting rights."[220] By 1894, Congress, now controlled by the southern-based Democratic party, repealed laws protecting Black suffrage while simultaneously eroding laws intended to address white terrorism.[221] Inaction and underenforcement—a strategy integral to the right's preservation at the state level—became a policy of the McKinley, Roosevelt, and Taft administrations.[222] Southern states, while no longer leasing convicts directly to coal mines, continued to exploit Black labor through chain gangs, with county sheriffs arresting Black men for petty or illegitimate charges in order to meet the labor needs of local businesses.[223] Federal investigations into cases of involuntary servitude all but stopped by the 1930s, and in the rare

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[219] Following dismissal of the federal charges in *Blyew*, the two defendants—John Blyew and George Kennard—were indicted by state prosecutors. The jury impaneled for Kennard's trial was drawn from an adjoining county, and although they found him guilty, he was sentenced to life rather than the death penalty. Just nine years into his sentence, he was pardoned of the crime by Governor Blackburn and released from prison. *See* Goldstein, *supra* note 186, at 564 n.358. Blyew's first trial, in contrast, ended in a hung jury; he subsequently escaped from police custody and was not re-arrested until thirteen years later. While his subsequent trial ended in conviction and a sentence of life, he was pardoned just six years into his sentence by Governor W.J. Worthington. *Id.* at 564–65; *see also* ANDERSON, *supra* note 69, at 40 (confirming that Southern lynchings carried no consequences, and that there were "no arrests, trials, convictions, or prison sentences for murdering black people, even in broad daylight." (citation omitted)).

[220] ANDERSON, *supra* note 69, at 30–31; *see also* SCATURRO, *supra* note 181, at 8–9 (explaining how Johnson's vetoes represented a major rupture with his party, specifically congressional Republicans).

[221] *See* BELKNAP, *supra* note 13, at 12.

[222] As Belknap further explains: "The deference to southern states which had developed in the decades after Reconstruction survived even the vast increases in the powers and activity of the national government brought about by the Progressive reform movement, the World War I mobilization effort, and Franklin D. Roosevelt's New Deal." *Id.* at 18–19.

[223] *See* BLACKMON, *supra* note 143, at 375 (explaining how "[a]fter a plea for more cotton pickers in August 1932, police in Macon, Georgia scoured the town's streets, arresting sixty black men on 'vagrancy' charges and immediately turning them over to a plantation owner named J.H. Stroud."). Violence was ever-present for Black people forced to labor on chain-gangs; conditions "included whipping, overwork, medical neglect, being housed in cages that were nine-by-nine-feet wide, being hit with rifles, consuming rotten food, and bug infestation." HALEY, *supra* note 20, at 171 (internal citation omitted).

circumstances that a white defendant was prosecuted, punishment was lenient if not suspended altogether.[224]

By the time the Supreme Court heard the *Screws*[225] case in 1944, the federal government retained the authority to prosecute white defendants for racially motivated violence, but this authority was exercised so infrequently, and subject to such severe limitations, that Black people remained wholly unshielded from physical assaults. In both *Blyew* and *Cruikshank*, white defendants had not only sought to vacate their criminal convictions, but had also contended that the federal legislation authorizing their prosecution was unconstitutional, in that it vested federal courts with the authority to hear criminal matters exclusively within the purview of the states.[226] The majority in both cases, however, declined to consider these particular claims, opting instead to vacate the convictions on alternative grounds. This posture was abandoned under *Screws*, despite the fact that the prosecution arose from the same federal legislation underlying *Blyew* and *Cruikshank*.

The defendants in the case—a white sheriff, policeman, and special deputy—were charged under Section 20 of the Criminal Code, prohibiting any person, under color of law, from depriving another person of rights guaranteed by the Constitution and laws of the United States.[227] The case, as in *Blyew* and *Cruikshank*, seemed to fall squarely within the provisions of the Code: the defendants were law enforcement officers, they had arrested the victim (Robert Hall) on a charge of theft, and they had subsequently beaten him to death outside of the jail.[228] The provisions of the Fourteenth Amendment—guaranteeing due process of law before the deprivation of

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[224] In October of 1941, Charles Bledsoe—a white man charged with peonage for holding a Black man against his will—chose to plead guilty to the charge because he "trusted that federal officials and the U.S. District Court judge would not deal harshly with a white man holding slaves." That presumption proved correct: he was given a fine of $100 and just six months of probation. BLACKMON, *supra* note 143, at 377; *see also* Birckhead, *supra* note 143, at 1623 ("By the twentieth century, peonage in the South had developed into a 'confusing mass of customs, legalities, and pseudo-legalities,' which the judicial system had enabled to flourish." (citations omitted)).

[225] Screws v. United States, 325 U.S. 91 (1945).

[226] In *Blyew*, counsel for the defendants contended that the Civil Rights Act of 1866 constituted a "flat breach of the Constitution" in that the Act "dislocated all the machinery of the State courts and rendered them powerless to perform their duty." 80 U.S. 581, 585–87 (1971). In *Cruikshank*, a nearly identical claim was leveled against the Enforcement Act, with counsel for defendants contending that "in so far as [the Act] creates offenses and imposes penalties, [it] is in violation of the Constitution of the United States, and an infringement of the rights of the several States and the people." United States v. Cruikshank, 92 U.S. 542, 546 (1875).

[227] *See Screws*, 325 U.S. at 98–99. This provision was originally part of the Civil Rights Act of 1866 but was subsequently re-enacted as part of the Enforcement Act of 1871.

[228] *Id*. at 92–93.

life[229]—had plainly been violated, and the defendants had engaged in the assault while carrying out their law enforcement duties. According to the majority, however, the judgments of the lower courts would need to be reversed—not because the original trial court lacked jurisdiction (as was alleged in *Blyew*) or because the defendants were merely civilians (as in *Cruikshank*), but because the eighty-year-old legislation now suffered from a fatal flaw. It was too vague.[230] Because courts were actively assessing what qualified as a due process right under the Fourteenth Amendment, and would continue to do so into the future, the Court's majority concluded that there was too great a risk that the federal government would use the ever-expanding list of rights to persistently bring local and state agents into federal forums for prosecution.[231] In order to cure the alleged defect, they continued, the Code would need to be narrowed and the defendants retried; federal prosecutors would have to prove that the officers specifically sought to deprive the victim of a constitutional right.[232] Because this question of defendants' intent had not been submitted to the jury, the defendants were entitled to a new trial.[233]

When *Screws* is read alongside *Blyew* and *Cruikshank*, it becomes evident that the Court did not merely obstruct federal efforts to extend public safety guarantees to formerly enslaved people. Rather, the Court persistently removed white violence from the sphere of criminal liability, mirroring nearly identical moves made by state courts in criminal cases during the antebellum era. Because violence remained

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[229] *See* U.S. CONST. AMEND. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.").

[230] *See Screws*, 325 U.S. at 96 (crediting defendants' claims that, as drafted, the statute failed to provide an ascertainable standard of guilt when liability was conditioned upon the deprivation of another's due process rights).

[231] *Id*. at 97–98 (contending that "[t]hose who enforced local law today might not know for many months . . . whether what they did deprived some one of due process of law.").

[232] *Id*. at 106–07.

[233] Of particular significance, the majority acknowledged that the defendants, themselves, had not raised any claims pertaining to their jury instructions. *Id*. at 107. This meant that the Court was granting relief that had not, in fact, been sought. The retrial of the defendants resulted in their acquittal, and no charges were ever brought within the state's criminal court. *See* Michael J. Pastor, *A Tragedy and a Crime?: Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 171, 178 (2002). Scholars have since emphasized how the specific intent requirement formulated in *Screws* dramatically reduced the efficacy of the statute. *See, e.g.*, Harry H. Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 CORNELL L. REV. 532, 537 (1961) (confirming that the requirements established by the *Screws* decision, including the specific intent requirement, have "proven to be serious obstacles to effective prosecution."); Robert L. Spurrier, *McAlester and After: Section 242, Title 18 of the United States Code and the Protection of Civil Rights*, 11 TULSA L. REV. 347, 353 (1976) (explaining how the rationale advanced in *Screws* has made "prosecutions exceptionally difficult because of the increased burden on the prosecution." (citation omitted)).

essential for white hegemony and the exploitation of Black labor,[234] such violence remained immunized from punishment.

Although white defendants could not explicitly invoke the right to violence as in the antebellum era, a series of state-level interventions—whether Black Codes, evidentiary rules excluding the testimony of nonwhite witnesses, or voting restrictions assuring African Americans would be unable to influence legislation—assured race would continue to dictate criminal liability.[235] The right, in the wake of the Civil War, was extended to whites bearing no direct labor relationship to the victim, but it remained entwined with broader labor arrangements; collective acts of white violence discouraged African Americans from departing the South in greater numbers, ensuring a steady labor supply for the convict leasing system, while also coercing Black people into low-wage work, whether in the North or South.[236] The right continued to be expressed in a positive fashion, in that a white defendant was entitled to a specific response from the state—acquittal or, in rare circumstances, minor punishment—were they prosecuted for violence against a Black victim.

However, violence assumed far greater prominence as a negative right in the postbellum period, in that forced labor camps—whether privately or publicly run—became sites where the government would not interfere in or respond to brutality against Black people. Similarly, where white citizens engaged in collective acts of violence, state agents, whether in law enforcement or the judiciary, outright participated in such violence or declined to hold the perpetrators accountable. In the antebellum era, the acquittal of white defendants by state courts ensured the plantation would remain a site beyond the reach of government interference. In the

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[234] As Alfieri explains, the "violence of the Reconstruction era encompassed economic, legal, and extralegal forms designed to maintain the southern antebellum order through the disenfranchisement of blacks, the enactment of Jim Crow laws, and the threat of sexual violence (e.g. rape) and lynching." Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1200 (1999).

[235] *See, e.g.*, AARONSON, *supra* note 7, at 102 ("Due to the massive expansion of disenfranchisement laws in the last two decades of the nineteenth century, African Americans were deprived of meaningful influence on the legislative agenda at both the state and the national levels."); MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY, AND SOCIETY 106 (2015) (confirming that "beginning with the Great Depression, and especially after 1945, white racists began to rely almost exclusively on the state apparatus to carry out the battle for white supremacy.").

[236] The inherent violence of spectacle lynchings in the South between 1890 and 1930 "propped up Jim Crow segregation laws and helped to ensure the docile labor pools necessary for the nation's entry into corporate-commodity capitalism." KATHLEEN BELEW, BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA 106 (2018). The outright theft of Black people's land also allowed white communities to build personal and collective wealth. *See generally* Lizzie Presser, *Their Family Bought Land One Generation After Slavery. The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It.*, PROPUBLICA & NEW YORKER (July 15, 2019), https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south/ [https://perma.cc/SBU7-CQRE].

postbellum era, in contrast, it was the Supreme Court that assured violence would continue to be expressed as a negative right, by dramatically circumscribing federal legislation intended to punish acts of white violence. The Court was not only able to neutralize federal intervention; its jurisprudence also ensured that state-level institutions could persist in a strategy of underenforcement according to the race of the parties.

C. Inaction & Underenforcement: Civil Rights into the Twenty-First Century

The Republican Party completely abandoned its commitment to racial egalitarianism by the elections of 1876,[237] and by the 1930s, local law enforcement planned or carried out nearly half of all lynchings.[238] In the rare circumstances that whites were prosecuted for racial violence, judges would assist defendants with rulings that were adverse to the prosecution, while all-white juries would nullify the law through acquittals.[239] The National Negro Congress, the NAACP, and the Civil Rights Congress all submitted petitions to the United Nations, between 1946 and 1951, calling on the international body to "indict the U.S. government as propagating genocidal criminal violence."[240] Although these organizations did not describe the criminal immunity of white defendants as a legal right, they did emphasize how incidents of violence by white civilians were indistinguishable from the violence meted out by white state agents; neither form of violence inspired state intervention.[241]

The onset of World War II, rather than altruism, convinced the Roosevelt and Truman administrations to temporarily abandon the longstanding practice of federal inaction. Following the Japanese attack on Pearl Harbor, the Roosevelt administration was acutely aware that African Americans would not be inclined to enlist in the military given their second-class status, most exemplified in their

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[237] AARONSON, *supra* note 7, at 81. This abandonment was not only evident when President Hayes ordered the withdrawal of "federal troops from Louisiana and South Carolina, the last remaining [Southern states] under military control"; it was also reflected in the precipitous drop in federal prosecutions under the Enforcement Acts, from a high of 1,148 in 1873 to a paltry 23 in 1878. *Id.* at 81–82. None of the prosecutions in 1878 resulted in a conviction. *Id.*

[238] BELKNAP, *supra* note 13, at 9.

[239] *Id.*

[240] MURAKAWA, *supra* note 11, at 55.

[241] White violence, they contended, "spanned 'private' crimes such as lynching and state punishments such as execution; inextricably linked, individual and state violence preserved racial hierarchy." *Id.* at 29; *see also* Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 677 (2015) (confirming that "there was often little difference between lynchings carried out by the mob and 'legal lynchings' that took place in courtrooms.").

continued vulnerability to violence.[242] Although the Department of Justice proceeded to temporarily pursue criminal cases against white defendants, such prosecutions were unsuccessful and the Department continued to espouse a commitment to state enforcement of criminal laws.[243] And although the Truman administration and its Department of Justice proved less reticent than their predecessors when it came to the prosecution of white defendants, such prosecutions only proved successful where the victims were white and had been victimized by the Klan for moral and religious reasons.[244]

President Eisenhower resumed the practice of federal inaction, even as incidents of white violence escalated within Southern states in the 1950s to resist integration.[245] The right to violence remained wholly intact within these states: prosecutors declined to bring charges against white men who detonated bombs at the houses of Martin Luther King and other boycott leaders; Southern police officers stood idly by as white supremacist crowds assaulted Black sit-in protestors; and in Birmingham and Montgomery, Alabama, local Klansmen had the "active assistance" of local law enforcement as they terrorized freedom riders.[246] Rather than incentivize the federal government to fully commit to Black safety, the civil rights movement instead exposed the federal government's continued complicity in incidents of white violence within the states. For example, President Kennedy's Justice Department repeatedly declined to pursue criminal cases against known perpetrators of racist violence, and even when its own attorneys expressed a lack of confidence in local prosecutors, the Department continued to defer to local and state institutions.[247] The Federal Bureau of Investigation, under the leadership of J. Edgar Hoover, repeatedly refused to act upon credible reports of pre-planned violence, and

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[242] *See* BLACKMON, *supra* note 143, at 377. The Supreme Court had similar nationalist concerns in mind when it issued its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), years later, reversing its longstanding commitment to segregation; racial equality provided "immediate credibility to America's struggle with Communist countries" while offering "much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home." *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) [hereinafter Bell, Brown v. Board of Education].

[243] BELKNAP, *supra* note 13, at 19.

[244] *Id.* at 20.

[245] Although Eisenhower is often celebrated for deploying federal troops to oversee the integration of public schools, "throughout the remainder of his presidency, [he] remained reluctant to involve federal troops when racial violence surged in other Southern locales." AARONSON, *supra* note 7, at 124.

[246] *Id.* at 127–29.

[247] BELKNAP, *supra* note 13, at 159–60. *See also* WALDREP, *supra* note 4, at 111 (explaining how Kennedy disfavored federal intervention in Southern affairs, and instead "sought to mediate, conciliate, and compromise but not to intervene").

even when such violence took place in the presence of FBI agents, they refused to intervene.[248]

Two Supreme Court cases are thought to reflect a reversal in federal policy and the extension of safety guarantees to African Americans: *United States v. Guest*[249] and *United States v. Price*.[250] The facts underlying the cases resembled those seen in prior federal prosecutions. *Guest* involved three Georgia Klansmen pursuing and then opening fire on a vehicle occupied by three Black miliary officers who were suspected of agitating for civil rights; the gunfire resulted in the death of the driver, Lemuel Penn.[251] *Price*, in contrast, involved Mississippi law enforcement arresting three civil rights workers—two white and one Black—then coordinating with eighteen other white residents to murder the three men.[252] The posture taken by the Court in these cases, both of which were heard in 1966, was certainly less hostile than that seen in prior cases involving white violence. Of particular significance, the Court affirmed the defendants' convictions, derived from the Enforcement Acts, despite vacating such convictions in *Cruikshank* and *Screws*. Yet these cases also demonstrate how and why the right of violence persists.

Specifically, the opinions exemplified how precedent could restrict, if not altogether neutralize, renewed attempts at federal prosecutions. In *Guest*, for example, the District Court addressed whether rights contained within the new Civil Rights Act of 1964 could supply a basis for prosecution under Section 241 of the United States Code.[253] The court first held that the rights contained within the Civil Rights Act did not supply a basis for criminal liability under Section 241.[254] The court also concluded that any indictments premised upon the Civil Rights Act would have to allege that the defendants' actions were specifically motivated by the race of the victims, the very same logic that the Supreme Court had deployed when vacating the indictments in *Cruikshank*.[255]

When the case reached the Supreme Court, the majority upheld the District Court's determination that rights contained within the Civil Rights Act of 1964 could

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[248] BELKNAP, *supra* note 13, at 112–13; *see also* EARL OFARI HUTCHINSON, BETRAYED: A HISTORY OF PRESIDENTIAL FAILURES TO PROTECT BLACK LIVES 105 (1996) (describing how Hoover was openly hostile to the civil rights movement, especially Martin Luther King, Jr., and believed that "civil rights cases were dead-ends and counterproductive since such cases seldom led to arrests, indictments, or convictions.").

[249] United States v. Guest, 383 U.S. 745 (1966).

[250] United States v. Price, 383 U.S. 787 (1966).

[251] BELKNAP, *supra* note 13, at 147–48.

[252] *See* BELL, *supra* note 156, at 380.

[253] Section 241 had formerly been the Enforcement Act of 1870. Both statutes prohibit the formation of conspiracies to interfere in the rights of other citizens. *See* United States v. Guest, 246 F. Supp. 475, 478 (D. Md. 1964).

[254] *Id.* at 485 (holding that "the Civil Rights Act of 1964 did not intend to subject anyone to any possible criminal penalties except those specifically provided for in the Act itself.").

[255] *Id.* at 484 (contending that the indictment was defective on its face, in that the prosecutors failed to allege that the defendants had deprived their victims of their rights on the basis of their race, a requirement established under *Cruikshank*).

not be the basis of prosecution under Section 241.[256] Although the Court claimed that it was precluded from reviewing the trial court's decision because of the Criminal Appeals Act,[257] the decision also reflected the high threshold that the Court had established in *Cruikshank* for indictments under Section 241.[258]

Price, unlike *Guest*, involved charges under both Section 241 and Section 242, the latter of which only authorizes criminal prosecution when a defendant is acting under color of law.[259] As in *Guest*, the District Court held that rights contained within the Fourteenth Amendment simply could not be a basis for liability under Section 241; the charges derived from this section would have to be dismissed.[260] It also dismissed charges under Section 242 by drawing on the reasoning in *Cruikshank*: private citizens did not qualify as state actors and therefore could not be prosecuted if criminal liability was dependent upon state action.[261] The Supreme Court proceeded to overturn both rulings.[262]

The Court explained that Section 241was not subject to the limitations imposed by the District Court but was instead intended to "reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth, and Fifteenth Amendments, and not merely under part of it."[263] Upon reinstating the charges under 242, the Court also rejected the District Court's interpretation of the "under color of law" clause of the statute. The defendants, the majority explained, could be prosecuted even if they were not state officials, given that state agents had assisted them in murdering the victims.[264]

The majority's acknowledgment of collaboration between white civilians and white state agents certainly represented a break with the obstructionist posture adopted by the Court during Reconstruction. However, even here, precedent ensured new avenues of relief would be foreclosed: even though the Court held that the Fourteenth Amendment could be the basis of prosecution under Sections 241 and 242, respectively, it was still bound by the intentionality requirement established in

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[256] *See* United States v. Guest, 383 U.S. 745, 752 (1966).

[257] *Id.* at 751–52

[258] One scholar has argued that the Court had the authority to review the District Court's holding but that it upheld the decision in order to avoid potential conflicts with Congress. *See* BELKNAP, *supra* note 13, at 178. *Cruikshank* could also explain the Court's reticence, in that the majority in that case had only authorized Section 241 prosecutions when legal rights were explicitly granted by the Constitution. *See* United States v. Cruikshank, 92 U.S. 542, 559 (1875).

[259] *See* United States v. Price, 383 U.S. 787 (1966).

[260] *Id.* at 797.

[261] *Id.* at 793.

[262] *Compare id.* at 796 (reversing the lower court's determination that charges under Section 242 were subject to dismissal) *with id.* at 807 (reversing the lower court's determination that charges under Section 241 were subject to dismissal).

[263] *Id.* at 805.

[264] The Court emphasized how law enforcement "participated in every phase of the alleged venture: the release from jail, the interception, the assault and murder. It was a joint activity, from start to finish." *Id.* at 795.

Screws.[265] This meant that only the most egregious, explicit incidents of racially motivated violence would lead to federal intervention and possible liability.[266]

Despite the rulings in *Guest* and *Price*, state officials continued to suspend investigations and prosecutions where violence was committed against Black victims.[267] And despite the passage of a new law, Section 245,[268] which expanded criminal liability for racially motivated violence, the Department of Justice initiated only seventeen prosecutions under this section in the first decade after its passage.[269] Sections 241 through 244 remained available during this period, offering alternative pathways for punishing racial violence. Between 1965 and 1974, however, only 830 cases were initiated by federal prosecutors.[270] Sixty-eight percent of these cases resulted in acquittal, and of the defendants actually convicted, half were placed on probation and fourteen percent received only a fine.[271] These trends continued into the '70s and '80s: between 1979 and 1982, the Department of Justice received between ten and eleven thousand complaints under Sections 241 and 242 each year.[272] In 1979, it prosecuted only fifty cases; in 1980, only forty-two cases; in 1981, forty-two cases; and in 1982, only fifty-six cases.[273] Between 1980 and 1985, the Department brought only forty-six prosecutions for racial violence, and half

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[265] *See id.* 383 U.S. at 792 (confirming that the indictment against law enforcement met the requirements established in *Screws* by stating that the defendants had willfully subjected the victims to the deprivation of their rights).

[266] *See generally Shielded from Justice: Police Brutality and Accountability in the United States*, HUM. RTS. WATCH (June 1998), https://www.hrw.org/legacy/reports98/police/uspo33.htm [https://perma.cc/DMV5-NZ2U] [hereinafter *Shielded from Justice*] (explaining that federal prosecutors' persistent failure to prosecute police officers under the federal civil rights statute can be traced, in part, to their burden to prove officers' specific intent was to deprive an individual of their civil rights).

[267] Belknap contends that that there was a sudden crackdown on racist violence by state officials beginning in the 1960s, and that this explains why the federal government pursued few prosecutions of its own during this period. *See* BELKNAP, *supra* note 13, at 232–33. However, he makes reference to a series of incidents that contradict this claim: after an Alabama sheriff shot and killed a civil rights activist, the local district attorney refused to press charges while the judge obstructed prosecution by the state's attorney general, *id.* at 187; white mobs assaulted Black children in Grenada, Mississippi while local police looked on, *id.* at 231; and as late as 1967, the NAACP continued to decry assaults on Black people by white police officers and civilians, alike, *id.* at 232.

[268] 18 U.S.C. § 245.

[269] BELKNAP, *supra* note 13, at 229. In the three decades following the law's passage, federal prosecutors brought fewer than six prosecutions per year. AARONSON, *supra* note 7, at 146–47.

[270] Spurrier, *supra* note 233, at 357. To underscore the paucity of these prosecutions, Spurrier compares them to the number of drug prosecutions in 1974, alone, which totaled approximately 11,000. *Id.*

[271] *Id.* at 356–58.

[272] *See* Charles H. Jones, Jr., *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689, 702 n.41 (1986).

[273] *Id.*

involved Klan members as opposed to state officials.[274] From 1993 through 1998, the Department pursued only thirty-two prosecutions under Section 245; the section "has never generated more than ten cases per year."[275] Even as the grounds for prosecuting racially motivated violence have expanded in recent years, the Department has not robustly pursued criminal cases: since 2009, of the 2,000 hate crime referrals made to the Department, only fifteen percent resulted in prosecution.[276] And of the 1,878 cases that the Department chose to investigate between 2005 and 2019, U.S. attorneys declined to prosecute eighty-two percent of the suspects.[277]

Similar trends can be observed within the states, which began to pass hate crime laws of their own in the 1980s.[278] Research shows that officers "are the least likely members of the system to be sensitive to the needs of hate crime victims,"[279] and that "most [police] departments have no specialized bias crime unit, no personnel assigned to routinely deal with bias crime incidents, and no formal policy on the definition, identification, and policing of hate crime."[280] Based upon their review of hate crime data in 1998, Jacobs and Potter concluded that hate crime prosecutions were exceptionally low.[281]

The Uniform Crime Report, published annually by the FBI, reflects voluntary disclosures from federal, state, local, tribal, and territorial law enforcement agencies about hate crimes.[282] In 2018, only twelve percent of these agencies reported a hate crime within their jurisdiction, meaning the vast majority report zero incidents to the

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[274] *See* Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 593 n.174 (1998) (citation omitted).

[275] *See* Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1238 (2000). Beale emphasizes how a statutory requirement that Section 245 prosecutions be approved by a Justice Department official further contributes to the dearth of such prosecutions. *Id.*

[276] *See Few Federal Hate Crime Referrals Result in Prosecution*, TRAC REPORTS (Aug. 12, 2019), https://trac.syr.edu/tracreports/crim/569/ [https://perma.cc/CB77-UXKE].

[277] MARK MOTIVANS, BUREAU OF JUST. STATS., NCJ 300952, FEDERAL HATE CRIME PROSECUTIONS, 2005-19 5 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fhcp0519.pdf [https://perma.cc/EA9W-QQWE].

[278] *See* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 13 (1998); *but see* Maroney, *supra* note 274, at 589 (tracing hate crime legislation to the Reconstruction era, when states passed statutes prohibiting certain KKK activity and interference in religious worship).

[279] VALERIE JENNESS & RYKEN GRATTET, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT 131 (2001).

[280] *Id.* at 138.

[281] Only twelve percent of complaints were prosecuted by the Brooklyn District Attorney's Office, and in all of California, only eleven percent of cases were prosecuted. JACOBS & POTTER, *supra* note 278, at 128.

[282] *See* MOTIVANS, *supra* note 277.

federal government.[283] This is despite the fact that the National Crime Victimization Survey—based on direct interviews with individuals and households about crime—shows an average of 250,000 such crimes within a given year.[284] And although anti-Black hate crimes account for approximately fifty percent of all hate crimes reported in the Uniform Crime Report each year, Black people are disproportionately *arrested* for hate crimes.[285] These figures, taken together, indicate that hate crime laws have done little to shield Black victims from racial violence and have, instead, supplied the state with additional grounds to arrest and punish Black people.[286]

Although Black people continue to be disproportionately subjected to fatal police force, officers also overwhelmingly evade arrest or prosecution after killing civilians.[287] Similarly, the probability that a homicide will be ruled justifiable—and therefore not be subjected to criminal punishment—continues to turn on the race of the parties, with white defendants who kill Black victims having the greatest probability of evading prosecution.[288] Neither these figures nor the dearth of arrests

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[283] STAN. L. SCH. POL'Y LAB & BRENNAN CTR. FOR JUST., EXPLORING ALTERNATIVE APPROACHES TO HATE CRIMES 9 (2021), http://law.stanford.edu/wp-content/uploads/2021/06/Alternative-to-Hate-Crimes-Report_v09-final.pdf [https://perma.cc/CJN4-GXXP] [hereinafter HATE CRIME REPORT].

[284] MADELINE MASUCCI & LYNN LANGTON, BUREAU OF JUST. STATS., NCJ 250653, HATE CRIME VICTIMIZATION, 2004-2015 1, 9 (2017).

[285] *See* HATE CRIME REPORT, *supra* note 283, at 13.

[286] *See generally* Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CALIF. L. REV. 489, 512–15 (2022) (explaining how hate crime laws aligned with the conservative backlash to civil rights while simultaneously requiring implementation by law enforcement officials, thus shifting the focus from state violence to private violence); *see also* AARONSON, *supra* note 7, at 174 ("[H]ate crime laws enable politicians to play the 'tough on crime' card and the 'pro-civil rights' cards simultaneously, a rare opportunity in an era in which crime enforcement apparatuses play an increasingly central role in reinforcing racial hierarchies.").

[287] *See 2022 Police Violence Report*, *supra* note 21 (reporting that, each year, fewer than three percent of killings by police result in officers being charged with a crime).

[288] An investigation launched by the Marshall Project, which examined 400,000 homicides committed by civilians between 1980 and 2014, found that in seventeen percent of cases involving a black civilian and a non-Hispanic white civilian, the killing was categorized as justifiable, even though fewer than two percent of all homicides committed by civilians are found justifiable. Daniel Lathrop & Anna Flagg, *Killings of Black Men by Whites Are Far More Likely to Be Ruled "Justifiable,"* THE MARSHALL PROJECT (Aug. 14, 2017, 5:30 AM), https://www.themarshallproject.org/2017/08/14/killings-of-black-men-by-whites-are-far-more-likely-to-be-ruled-justifiable [https://perma.cc/RU7N-HYB8]. A separate study, based on data from the Federal Bureau of Investigations Supplementary Homicide Report between 2005 and 2010, found that "[w]hite-on-black homicides were most likely to be ruled justified (11.4 percent), and black-on-white homicides were least likely to be ruled justified (1.2 percent)." JOHN K. ROMAN, URB. INST., RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA 6, (2013), https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF [https://perma.cc/X359-5B25].

and prosecutions for hate crimes should be framed as anomalous. Rather, they point to a phenomenon that Black communities have perpetually surfaced since the Civil War: that the state relies upon the violence of both private and public actors to sustain the subordinated status of persons classified as Black. The next Part explores the implications of this phenomenon, and the persistence of the right to violence, for those stakeholders concerned about racially inclusive safety.

III. ASSESSING THE IMPLICATIONS

The contention that violence manifests as a legal right may invite a host of reactions from stakeholders in and outside of the legal academy. Some stakeholders, convinced that violence continues to assume the shape of a racially contingent legal right, may endorse a formalist response. This response would entail developing new interpretations of the Fourteenth Amendment in order to better shield Black communities from myriad forms of state violence, whether executed by civilians or public authorities.[289] A second group, in contrast, may conceive the right as evidence that the state is diametrically opposed to the security of persons classified as Black. This may lead them to endorse a critical response, which entails little to no reliance on the legal system as it relates to assuring racially inclusive safety.[290] This Part will address each of these responses and illuminate new lines of inquiry for each group of stakeholders.

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[289] *See, e.g.*, Gerhardt, *supra* note 61, at 429–34 (offering an alternative interpretation of the Fourteenth Amendment that would place an affirmative duty upon state governments to protect their citizens from private violence); *see also* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 11–14 (2011) (arguing that the Supreme Court articulated a theory of "state neglect" when first interpreting the Fourteenth Amendment, which would allow the federal government to punish private individuals whose race-based violence goes unpunished by the states).

[290] Benjamin Levin identifies two competing frameworks as regards critiques of criminal law, which he describes as an "over" frame versus a "mass" frame. *See* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 265–74 (2018). Proponents of the "over" frame seek to reduce the harms of criminalization while leaving the broader criminal legal system intact, whereas proponents of the "mass" frame seek a more radical reimagining of the state and the criminal system. *Id.* The first group of stakeholders that I have identified might be conceived as deploying an "over" frame, whereas this second group might be conceived as deploying the "mass" frame.

A. Assessing the Formalist Response[291]

The formalist response to the right of violence would favor securing safety for Black communities through traditional legal channels. One avenue for dislodging the right may lie, for example, in new, arguably more accurate, interpretations of the Fourteenth Amendment, specifically, and the Constitution, generally.[292]

Beginning with the *Slaughterhouse Cases*,[293] decided just three years before *Cruikshank*, the Court insisted that the Constitution contains a series of negative rights—what the government cannot do—as opposed to a series of positive rights, or duties, that the government must proactively fulfill.[294] The Court deployed this same reasoning in *Cruikshank* when interpreting the reach of the Fourteenth Amendment: because the Bill of Rights only articulated what the federal government could not do, the only effect of the Fourteenth Amendment was to extend this same burden to state governments.[295] This meant that criminal cases premised on the deprivation of rights contained within the Fourteenth Amendment could only

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[291] Proponents of formalism proceed from the presumption that the law is rationally determinate, that judging is mechanical, and that legal reasoning is autonomous from politics. *See, e.g.*, Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145–46 (1999); *see also* Mark V. Tushnet, *Perspectives on Critical Legal Studies*, 52 GEO. WASH. L. REV. 239, 240–41 (1984) (contending that the rule of law is a version of formalism that contends state agents, like judges, interpret the law according to pre-announced rules and holdings).

[292] Although this Section will confine its analysis to the Fourteenth Amendment, scholars have uncovered how other constitutional amendments and doctrines could also be interpreted to better shield Black people from racially motivated violence and the violence that generally attends incarceration. *See, e.g.*, Raymond T. Diamond & Robert J. Cottrol, *Helpless by Law: Enduring Lessons from a Century-Old Tragedy*, 54 CONN. L. REV. ONLINE 1, 5, 22–23 (2022) (speaking favorably of recent Supreme Court decisions holding that the Second Amendment protects the right of individuals to own firearms for self-defense, and pointing to Black communities' historic use of guns to protect themselves from racial violence); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 975–88 (2019) (exploring how the Thirteenth Amendment could be amended and interpreted to abolish prison slavery and the inhumane conditions that it generates); *see also* Charles & Miller, *supra* note 30, at 468–71 (exploring how the private delegation doctrine and state action doctrine could be deployed to reach private incidents of violence).

[293] 83 U.S. 36 (1872).

[294] *See* Gerhardt, *supra* note 61, at 410 (explaining how the Slaughterhouse Cases and the series of cases that have followed it have "reinforced the view that the Constitution in general, and the due process clause of the fourteenth amendment in particular, primarily provide negative rights, which require the government to refrain from certain conduct, as opposed to positive rights, which impose affirmative duties on the government to take actions or expend resources to meet the needs of certain citizens." (citation omitted)).

[295] *See* United States v. Cruikshank, 92 U.S. 542, 553 (1875) (holding that the Fourteenth Amendment "simply furnishes an additional guaranty against any encroachment *by the States* upon the fundamental rights which belong to every citizen as a member of society" (emphasis added)).

proceed upon proof of state involvement.[296] Further, states bore no obligation to affirmatively guarantee the safety of their citizens against private violence.[297] Concomitantly, if the states failed to fulfill this duty, the federal government could not intervene to secure the rights of the wronged party through the Enforcement Acts.[298] This reading of the Constitution, as merely limiting state government rather than establishing affirmative obligations, remains intact today.[299]

In order to shield Black people from racially motivated violence, then, courts would first have to acknowledge that the Framers did, in fact, envision a government that would affirmatively shield citizens from private violence.[300] And while state-level governments were initially responsible for protecting citizens against domestic threats to their lives or property,[301] the Reconstruction Congress intended to extend

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[296] *Id.* ("The fourteenth amendment prohibits *a State* from depriving any person of life, liberty, or property, without due process of law; *but this adds nothing to the rights of one citizen as against another*." (emphasis added)); *but see* Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1372–73 (1964) (contending that the Court left the federal government with the authority to prosecute exclusively private conduct so long as such conduct was racially motivated and involved victims who were exercising their right to assemble to discuss national issues).

[297] *See* James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 388 (2014) ("It was *Cruikshank*, not the far more famous *Civil Rights Cases*, that first limited the Fourteenth Amendment to protect only against specifically identified state violations, and not directly against private action." (citations omitted)).

[298] *See* Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 765–68 (1984) (explaining how the Court concluded that neither the Bill of Rights nor the Fourteenth Amendment vested the federal government with the authority to proactively protect various enumerated rights but, instead, believed such authority remained with state governments).

[299] *See, e.g.*, Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330 (1985) (explaining how rights contained within the Constitution are usually understood "to impose on government only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another's needs."); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987) (contending that "the Constitution is a charter of negative rather than positive liberties").

[300] *See* Heyman, *supra* note 16, at 524–26 (exploring how the Framers conceived the state and federal governments, respectively, as possessing an obligation to protect the life, liberty, and property of their citizens); *see also* Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725, 734 (2022) (affirming Heyman's assessment that the primary responsibility of government was, and remains, assuring the safety of persons and property within its jurisdiction).

[301] Heyman, *supra* note 16, at 525 (explaining how, prior to the Civil War, the federal government was responsible for protecting citizens against foreign dangers whereas state governments "were to provide general protection of life, liberty, and property").

that protection to formerly enslaved people.[302] Specifically, Congress drafted both the Fourteenth Amendment and Enforcement Acts to motivate state governments to protect enslaved people from racial violence and to create a pathway for federal intervention should such protection be withheld.[303] Rather than prioritize state independence in the realm of racially-motivated crimes, the Court should instead conceive the erected barriers to federal prosecutions as misaligned with the will of the Reconstruction Congress.

Removing the barriers to federal prosecution may entail eliminating the intentionality requirements articulated in *Cruikshank* and *Guest*[304] or, of particular significance, reading the Fourteenth Amendment as guaranteeing a fundamental and affirmative right to safety. This latter intervention would allow cases to proceed against civilians who deprive their victims of their property or lives on account of their race, regardless of whether the state is involved or not.[305] Further, when state- and local-level authorities fail to shield Black victims from violent acts by white perpetrators, those authorities could be held civilly liable on the theory that they have an affirmative obligation to protect their citizens from private violence.[306] Such

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[302] *Id.* at 546 ("In establishing a federal right to protection, the Fourteenth Amendment was not creating a new right, but rather incorporating into the Constitution the concept of protection as understood in the classical tradition.").

[303] *See, e.g.*, Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L. J. 1, 36–43 (2021); Huhn, *supra* note 187, at 1074 (explaining that "the Framers of the Fourteenth Amendment were, in fact, primarily concerned with addressing . . . the many acts of private violence being visited upon blacks and their white allies in the South . . . ." (citation omitted)).

[304] *Compare* United States v. Cruikshank, 92 U.S. 542, 556 (1875) (ruling that the indictment was deficient because it failed to allege that the defendants intended to deprive their victims of their rights because of their race) *and* United States v. Guest, 383 U.S. 745, 753–54 (1966) (confirming prosecution could only proceed upon proof that the defendants had the specific intent to interfere in a federal right) *with* Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 958 (1993) (explaining how the discriminatory intent standard "reflects the prevailing ideology of colorblindness and the concomitant failure of whites to scrutinize the whiteness of facially neutral norms." (citation omitted)).

[305] *Compare Guest*, 383 U.S. at 754 (affirming the holding in *Cruikshank* that the Fourteenth Amendment only protects individuals against state action and not wrongs done by individuals) *with* Samantha Trepel, *Prosecuting Color-of-Law Civil Rights Violations: A Legal Overview*, 70 DEP'T JUST. J. FED. L. & PRAC. 21, 32 (2022) (confirming that, when prosecution under Section 241 is premised on an amendment that prohibits some form of state action—like the Fourteenth Amendment—the prosecution must prove the defendant acted under color of law).

[306] *Compare* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989) (affirming a motion for summary judgment in a civil suit under 42 U.S.C. 1983, brought against a local government agency for its failure to protect a child from repeated, known abuse at the hands of his father, because the Fourteenth Amendment does not place an affirmative obligation upon state nor local entities to protect citizens from private violence) *with* Gerhardt, *supra* note 61, at 429–31 (offering an alternative, positive-rights-based

litigation may incentivize local and state officials to improve the identification of, and responses to, inter-racial violent crime, whether through implicit bias trainings of government officials or additional funding for hate crime prosecutions.

While the aforementioned interpretations of the Fourteenth Amendment could diminish existing barriers to federal prosecutions and possibly encourage state prosecutions, proponents have not addressed, nor offered pathways for overcoming, elite capture of the Supreme Court and other state institutions.[307] The ability of Black communities, alone, to leverage political or economic power to convince the Court to reverse its own precedent is questionable; mass incarceration has obstructed Black people's full participation in the democratic process,[308] while the racially motivated violence of the past (and arguably the present) continues to exclude them from both the labor force and from participation in the electoral process.[309] Simultaneously, the right to violence should be conceived as one of several privileges that convinces poor whites to align their interests with wealthy, white elites, such that neither group arguably has an incentive to exert influence upon the Court and expand criminal liability for racially motivated crimes.[310]

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analysis of the Fourteenth Amendment that would allow such suits to proceed upon proof that the state was aware of the private violence and failed to act).

[307] *Compare* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014) (finding, through use of a statistical model, that "economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence."), *and* K. Sabeel Rahman & Kathleen Thelen, *The Role of the Law in the American Political Economy*, *in* THE AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER 76, 96 (2021) (contending that "business interests in the United States have been remarkably successful in winning cases that establish limitations on the very capacities of government itself, effectively precluding more far-reaching regulations or redistributive policies that might arise in the future.") *with* Loic Wacquant, *Marginality, Ethnicity, and Penalty in the Neo-Liberal City: An Analytic Cartography*, 37 ETHNIC & RACIAL STUD. 1687, 1688–89 (2014) (contending that research into the carceral system routinely proceeds within separate and distinct silos, and specifically criticizing criminologists and other criminal specialists for their failure to attend to "shifts in class structure and formation, the deepening of inequalities and the broad revamping of urban poverty . . . .").

[308] *See generally* Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 279–83 (2007) (explaining how mass incarceration bars Black democratic participation in direct ways, like felon disenfranchisement, as well as in indirect ways, by enabling police violence).

[309] *See* Jhacova A. Williams, Trevon D. Logan & Bradley L. Hardy, *The Persistence of Historical Racial Violence and Political Suppression: Implications for Contemporary Regional Inequality*, 694 ANNALS AM. ACAD. POL. & SOC. SCI. 92, 100 (2021) (finding, through a series of empirical models, that "counties with more lynchings [between 1882 and 1930] have lower Black voter registration rates in both the pre- and post-[Voting Rights Act] enactment periods.").

[310] *See generally* Bell, Brown v. Board of Education, *supra* note 242, at 523 (setting forth the principle of "interest convergence," which provides that the "interest of blacks in

Equally significant, an intervention grounded in the reversal of precedent presumes that police and district attorneys have not been inclined to arrest and prosecute white perpetrators of violence because of the high threshold for proving guilt,[311] and that lowering or altogether eliminating these thresholds will lead to an uptick in prosecution and punishment.[312] Yet reports of white supremacists infiltrating police departments and of officers joining far-right militant groups,[313] read alongside the dearth of arrests and prosecutions of hate crimes within the states themselves[314]—where the barriers to federal prosecution do not apply[315]—undermines the presumption that authorities will zealously prosecute people

achieving racial equality will be accommodated only when it converges with the interests of whites.").

[311] *See, e.g.*, *Shielded from Justice*, *supra* note 266 ("As a result of the 'specific intent' requirement and other stringent standards, federal prosecutors - who like their local counterparts are interested in winning cases, not merely trying them - may be less than eager to pursue cases against police officers."); Jones, *supra* note 272, at 702 ("Assistant Attorney General Reynolds and Daniel Rinzel, Chief of the Criminal Section of the Civil Rights Division, have conceded that the Justice Department has not prosecuted many racially motivated violence cases because it concluded that it lacked federal jurisdiction . . . .") (citation omitted); *see also* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 888 (2014) ("A prosecutor's charging decision is subject to a balancing of incentives, and if the burden of proving a hate crime charge outweighs the possible benefit, a prosecutor has no incentive to use hate crime legislation.").

[312] At least one scholar has already expressed skepticism about this presumption. *See* Teitelbaum, *supra* note 189, at 199 ("In the cases following *Screws* it is not entirely clear whether the DOJ, under increasing pressure from the NAACP and other groups to address police brutality, used the willfulness requirement as an excuse *not* to aggressively investigate and prosecute civil rights crimes . . . .").

[313] *Compare* FED. BUREAU INVESTIGATION, WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 4 (2006), https://www.justsecurity.org/wp-content/uploads/2021/06/Jan-6-Clearinghouse-FBI-Intelligence-Assessment-White-Supremacist-Infiltration-of-Law-Enforcement-Oct-17-2006-UNREDACTED.pdf [https://perma.cc/53WN-34XN] (expressing serious concerns that white supremacists' infiltration of police departments has gone undetected, and identifying the risks of such infiltration, including violence against elected officials and other protected persons), *and* Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 217–28 (2019) (describing a multitude of incidents, across the country, wherein white law enforcement were exposed as affiliates of white supremacist groups or caught expressing racist views to one another), *with* Odette Yousef, Tom Dreisbach, George Joseph, Huo Jingnan & Micah Loewinger, *Active-Duty Police in Major U.S. Cities Appear on Purported Oath Keepers Rosters*, NPR (Nov. 5, 2021, 8:05 PM), https://www.npr.org/2021/11/05/1052098059/active-duty-police-in-major-u-s-cities-appear-on-purported-oath-keepers-rosters [https://perma.cc/X3N5-SMVH] (reporting that officers in New York City, Los Angeles, and Chicago were found to be active members of the far-right extremist group, the Oath Keepers).

[314] *See supra* notes 279–81 and accompanying text.

[315] *See* Eisenberg, *supra* note 311, at 892 ("Notably, no state statute or court requires but-for causation in hate crime cases, so a demonstration of substantial motivation would be legally sufficient." (citation omitted)).

suspected of racially motivated crimes following a reversal of precedent. And while recent years have seen an uptick in the number of self-identified progressive prosecutors—who campaign upon and work to adopt "smart" or "reform minded" approaches to prosecution—empirical studies have shown that when they "exercise their discretion to adopt a new vision of prosecution, other criminal legal actors can intervene to prevent the implementation of progressive policies."[316] These trends, taken together, raise serious doubts about the ability and appetite of law enforcement to effectively pursue white perpetrators, even if existing legal standards are modified or reversed.

B. Assessing the Critical Response

Neither the preceding critique nor the assertion that state institutions enforce the right to violence should be interpreted as an outright rejection of legal solutions. Rather, evidence that the Supreme Court impeded federal efforts to assure Black safety, as well as the persistent reticence of institutional actors to pursue perpetrators of racially motivated crimes, is intended to illuminate two specific phenomena. First, legal reasoning and rhetoric are often deployed to reinstate regimes that privilege select groups over others.[317] Second, the state has relied upon the violence of both public agents and private citizens to maintain the subordinated status of persons classified as Black.[318] These phenomena, taken together, may incite some stakeholders to adopt a critical response, marked by little to no reliance on the legal system when securing safety for Black communities.

Critical race theorists and abolitionists alike have been skeptical about the law's ability to eliminate the subordinated status of nonwhite and other marginalized

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[316] I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 802–03 (2022). This resistance is especially acute when the prosecutors are nonwhite and non-male, leading Thusi to conclude that "race and gender constrain prosecutors' ability to be truly progressive." *Id*. at 804.

[317] Reva Siegel labels this phenomenon "preservation through transformation," and has specifically addressed how feminists' successful challenges to chastisement laws in the nineteenth century—laws that outright authorized husbands to use physical force against their wives—inspired new legal rhetoric and policies that allowed domestic violence to persist within the home without state interference. *See generally* Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) [hereinafter *Rule of Love*]; *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–29 (1997) (exploring how the Equal Protection Clause was interpreted and used in a similar fashion after the Civil War to reinstate the subordinated status of Black people).

[318] *See generally supra* Part II; *see also* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1898–1911 (2019) (explaining how the state relied on the hostility and violence of white civilians to not only drive Native Americans from their land throughout the nineteenth century, but to also deter formerly enslaved people from migrating out of the South following the Civil War).

communities.[319] Critical race theorists, in particular, have emphasized how the law functions as a vehicle for preserving the status quo, assuring that Black people will remain a permanent, subordinate class.[320] Rather than wholly reject legal interventions, these theorists have instead acknowledged that the Constitution and rights-based discourses can aid Black communities in eliminating their symbolic oppression and in improving their material conditions.[321]

Abolitionists, in contrast, have not reached a uniform conclusion about what role the state can or should play in addressing the myriad harms arising from the criminal legal system.[322] Although these theorists agree that existing carceral

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[319] *Compare* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 5 (3d ed. 2017) (noting that critical theorists emphasize how precedent favorable to Black and other marginalized people "tends to erode over time, cut back by narrow lower-court interpretation, administrative foot dragging, and delay."), *and* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT XXV (Kimberlé Crenshaw et al. eds., 1995) (explaining how critical race theorists conceive legal institutions as producing, rather than eliminating, racial power by generating rules that "reproduce the structures and practices of racial domination.") *with* Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1548 (2022) (explaining how abolitionist organizers "critique conventional reform efforts for their limited horizon and their failure to fundamentally challenge existing power relations."), *and* MON MOHAPTRA, LEILA RAVEN, NNENNAYA AMUCHIE, REINA SULTAN, K AGBEBIYI, SARAH T. HAMID, MICAH HERSKIND, DERECKA PURNELL, ELI DRU & RACHEL KUO, 8 TO ABOLITION: ABOLITIONIST POLICY CHANGES TO DEMAND FROM YOUR CITY OFFICIALS 1, https://static1.squarespace.com/static/5edbf321b6026b073fef97d4/t/5ee0817c955eaa484011b8fe/1591771519433/8toAbolition_V2.pdf [https://perma.cc/5RHM-XQLP] (last visited Nov. 3, 2023) (explaining how traditional legal interventions like police reform simply create new opportunities to surveil, police, and incarcerate Black and other marginalized people).

[320] *See generally* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373–77 (1992).

[321] *See, e.g.*, Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761, 1763 (1997) ("By asserting rights, dispossessed people rebel against . . . social degradation and demand recognition as full members of society."); *and* Crenshaw, *supra* note 33, at 1381–84; *see generally* Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (contesting critical legal scholars' claim that the law exclusively enables and legitimates the oppression of marginalized people, and showing how Dr. Martin Luther King, Jr. deployed critical theology to successfully organize a movement against *de jure* segregation).

[322] *Compare* Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 107 (2019) (explaining how "many abolitionists have repudiated U.S. constitutional rights altogether and instead contest U.S. carceral policies without reference to rights or as violations of international human rights." (citation omitted)), *and* Aya Gruber, *Do Abolitionism and Constitutionalism Mix?*, JOTWELL (Feb. 11, 2020), https://crim.jotwell.com/do-abolitionism-and-constitutionalism-mix/ [https://perma.cc/763E-4K7M] (explaining how abolitionists disfavor using the criminal legal system against privileged bad actors, like racist cops, and how their critique of the instrumental use of criminalization also lends itself to a critique of using the Constitution to accomplish

institutions should be eliminated in favor of new institutional and regulatory responses to wrongdoing,[323] disagreement remains as to whether the legal system offers the appropriate terrain for accomplishing such objectives.[324] While some endorse the critical project of invoking the Constitution and the rights contained therein to improve the material conditions of Black and other marginalized communities,[325] others emphasize how any reliance on the law or the existing criminal apparatus—including efforts to have perpetrators of racially motivated violence arrested and prosecuted—is inherently at odds with the safety of those same communities.[326]

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abolition), *with* Joy James, *Introduction* to THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS XXI, XXV–XXX (Joy James ed., 2005) (contending that the Constitution has perpetually created a class of socially dead people, excluded from the liberties and rights of citizens, and that this status first turned on a person's race but came to turn on their classification as a criminal following passage of the Thirteenth Amendment).

[323] *See, e.g.*, Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1825 (2020) (explaining how abolitionists "are making demands and running experiments that decrease the power, footprint, and legitimacy of police while building alternative modes of responding to collective needs and interpersonal harm" (citation omitted)); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) (defining abolition as "a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.").

[324] *See, e.g.*, Charmaine Chua, Travis Linnemann, Dean Spade, Jasmine Syedullah & Geo Maher, *An "Against" and a "For": Abolitionist Reckonings with the State*, CONTEMP. POL. THEORY (June 21, 2023), https://link.springer.com/article/10.1057/s41296-023-00640-6 [https://perma.cc/9QY6-UACK] ("Focusing collective organizing energy on maneuvering within the state can, in spite of the best intentions, inadvertently generate recursive investments in the affirmation of institutional legitimacy."); *see also* ANDREA J. RITCHIE & MARIAME KABA, ABOLITION & THE STATE: A DISCUSSION TOOL 24–25, https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/63743b68cd71d319d5229a6f/1668561795501/Abolition+and+the+State.pdf [https://perma.cc/AT9P-VRRL] (last visited Nov. 3, 2023) (explaining how abolitionists must simultaneously work beyond the state, against the state, and within the state, because organizing within existing state apparatuses risks legitimizing harmful practices like surveillance and policing and can also create new bureaucracies that interfere with meeting people's needs directly).

[325] *See* Roberts, *supra* note 322, at 108–20 (exploring the myriad ways that the Constitution can be used to accomplish, rather than obstruct, the abolition of the prison industrial complex); *see generally* Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 142–63 (2022) (exploring new, abolitionist interpretations of the Thirteenth, Fourteenth, and Fifteenth Amendments).

[326] *See, e.g.*, Mariame Kaba & Andrea J. Ritchie, *We Want More Justice for Breonna Taylor than the System that Killed Her Can Deliver*, *in* WE DO THIS 'TIL WE FREE US 63, 65 (Tamara K. Nopper ed., 2021) ("We can't claim the system must be dismantled because it is a danger to Black lives and at the same time legitimize it by turning to it for justice . . . . We need to use our radical imaginations to come up with new structures of accountability beyond

Thus, while critical theorists and some abolitionists might endorse efforts to reinterpret the Fourteenth Amendment so as to dislodge the right to violence, there are abolitionists that would reject any manner of state involvement as regards assuring Black safety.[327] Despite this divide, confronting violence as a legal right can aid both groups in developing more holistic accounts of how the state assures the subordination of Black communities and also in assessing the potential consequences of their respective interventions.

Critical race theorists, for example, have acknowledged that the state is able to reinstate the status quo not just through legal rhetoric but also through coercion.[328] Specifically, the law subjects Black people to non-consensual forms of domination—whether outright bondage, exclusions from public spaces, or the violence of police—that both suppress their political power and convince white communities that Black subjugation is legitimate.[329] However, the right to violence illuminates how this coercion has persistently proceeded along both public and private lines. The state, in other words, has not merely relied on legal rhetoric to legitimate the violence of state authorities or to justify Black people's exclusion from benefits otherwise reserved for whites—whether exclusion from liberty in the era of slavery or exclusion from public spaces during Jim Crow. Rather, that rhetoric has also been deployed to authorize and legitimate myriad forms of private

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the system we are working to dismantle."); *see also* ANGELA Y. DAVIS, GINA DENT, ERICA R. MEINERS & BETH E. RICHIE, ABOLITION. FEMINISM. NOW. 79–80 (2022) (explaining how abolitionists believe that "the root causes of racism, police violence, sexual violence, and gender-based violence are the same and that the work to end gender violence must include attention to how structural oppression and state violence shape and indeed deepen the impact on survivors and others.").

[327] Abolitionists are generally opposed to relying on prosecutors to address racial violence and interpersonal harm. *See, e.g.*, Rachel Foran, Mariame Kaba & Katy Naples-Mitchell, *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. C.R. & C.L. 496, 519 (2021) ("Abolition is opposed to prosecution. A commitment to abolition requires that we think outside the criminal punishment system for what accountability and healing from harm could look like."); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 211 (2022) ("[T]he only way for prosecutors to contribute to a transformed [criminal legal] system is to cede both their influence as political elites and professional experts and their material resources."). However, they do see a role for themselves in supporting directly impacted communities that decide to call for arrests and prosecution following racially motivated violence. *See, e.g.*, Kaba & Ritchie, *supra* note 326, at 65 (acknowledging that there are ways to "support families calling for arrests without legitimizing the system . . ."); Stahly-Butts & Akbar, *supra* note 319, at 1569–71 (describing how abolitionist organizers across the country have launched campaigns against prosecutors who mishandled or obstructed the prosecution of racially motivated crimes). Thus, there are abolitionists who may collaborate with or support those persons who seek to bolster federal prosecutions by way of the Fourteenth Amendment.

[328] *See* Crenshaw, *supra* note 33, at 1356–57 (criticizing critical theorists for their near-exclusive focus on legal ideology as a mechanism for controlling subordinated classes of people and contending that "[c]oercion explains much more about racial domination than does ideologically induced consent.").

[329] *See id*. at 1358–60.

violence.[330] This indicates that coercion proceeds along two overlapping tracks: the state not only actively targets Black people for coercive measures but also relies upon criminal laws to authorize private activity that aligns with or fortifies their subjugation.[331]

Thus, for those critical theorists who might endorse rights-based discourses but who wish to simultaneously diminish the harms that Black communities will experience as a result of reliance on the legal system, greater attention should be reserved for assessing how efforts to shield Black people from visible forms of state coercion—like police brutality or the violence of incarceration—may incite the state to fortify or enlarge spheres of private violence by way of criminal law and policy. *Price* (the 1960s case arising from the murder of three civil rights workers), for example, has been celebrated in part because the Supreme Court finally held that depriving a person of the rights contained within the Fourteenth Amendment could supply a basis for criminal liability under Section 241.[332] On this basis, both law enforcement and the private citizens that they collaborated with could be prosecuted for conspiring to deprive their victims of life without due process of law.

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[330] *See generally supra* Part II.

[331] Feminist scholars have addressed how criminal cases involving domestic violence supply the state with an opportunity to immunize violence that subjugates women. *See, e.g.*, Zanita E. Fenton, *Mirrored Silence: Reflections on Judicial Complicity in Private Violence*, 78 OR. L. REV. 995, 998 (1999) (explaining how the formalistic approaches taken by courts in domestic violence cases—approaches that treat the parties as abstractions and entirely omit context—allow courts to shirk responsibility for the gendered violence that they condone or authorize); *Rule of Love*, *supra* note 317, at 2154–61 (tracing how criminal courts invoked privacy to prohibit the criminal prosecution of male perpetrators of domestic violence, following the elimination of chastisement laws). More recently, Black feminist scholars have alluded to how the state relies upon collaborations between private citizens and public authorities to subjugate Black people, particularly Black women. *See, e.g.*, Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1543–45 (2012) (describing how white communities and their local government officials in Antioch, California, not only relied on law enforcement to exclude Black female recipients of Section 8 from their neighborhoods, but also relied on private citizens who monitored Black households and submitted complaints to the police); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1443 (2012) (explaining how the Black women in Antioch experienced intersectional vulnerability, such that they were "available targets of both public (police) and private (neighborhood watch) mechanisms of surveillance and social control."). The right to violence does not merely align with these analyses; it suggests that additional attention and resources should be reserved for how criminal policies, in particular, have supplied the state with the terrain to authorize both public and private forms of violence oriented towards the subjugation of persons classified as Black.

[332] *See* United States v. Price, 383 U.S. 787, 805 (1966) ("We cannot doubt that the purpose and effect of § 241 was to reach the assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth, and Fifteenth Amendments, and not merely under part of it.").

However, the case is equally notable for its failure to comprehensively explore the nexus between private and public violence and for leaving barriers to federal prosecution of private violence intact. Although the Court concluded that civilians acted under color of law when they coordinated with law enforcement to murder their victims—such that they could be held liable under Section 242[333]—the Court did not account for nor interrogate the prevalence of underenforcement, and how the phenomenon could convert a host of allegedly private activities into state-sanctioned activities justifying federal intervention. Section 242, in other words, was read to primarily reach those incidents where there was evidence of overt collaboration between law enforcement and civilians.[334] However, the strategies that state governments had devised to shield white perpetrators from punishment—whether underenforcement, in a general sense, or the host of policies that excluded Black people from participating in the criminal process—created a climate wherein all white-on-Black violence was arguably sanctioned by the state. Yet the Court declined to adopt this reasoning in both *Price* and *Guest*.

The Court's interpretations of the Enforcement Acts and Fourteenth Amendment indicate that the risks of legal rhetoric and reform are not confined to legitimating the racial order or undermining collective action by Black people.[335] Rather, this rhetoric can also ensure that private violence incited by the state remains shielded from prosecution or shielded from the types of punishment reserved for hate crimes.[336] Stakeholders endorsing rights-based discourses should be sensitive

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[333] *Id.* at 794–96.

[334] The Court indicated in *Guest* that the State's involvement in racial violence need not be exclusive or direct in order for civilians to be prosecuted under Section 242. *See* United States v. Guest, 383 U.S. 745, 755–56 (1966). However, it still emphasized the outright collaboration between law enforcement and civilians when upholding the indictments in both *Guest* and *Price*. *Compare Guest*, 383 U.S. at 756 (emphasizing how officers had arrested the victims on false charges before they were killed by white civilians on the highway) *with Price*, 383 U.S. at 795 (emphasizing how state officers participated in every stage of the plan to murder the victims).

[335] *See* Crenshaw, *supra* note 33, at 1382–84 (explaining how Black people's successful use of rights rhetoric to challenge the formal inequality of Jim Crow not only created the illusion that racism had been eradicated, but also undermined Black solidarity by ensuring social and economic privileges for a small class of Black people).

[336] The criminal cases opened against individuals who stormed the U.S. Capitol on January 6, 2021, shed light upon this phenomenon. According to a database tracking the cases, over 1,200 people have been charged as a consequence of their participation in the insurrection, yet only one—Donald Trump—has been charged under Section 241. *See The Jan. 6 Attack: The Cases Behind the Biggest Criminal Investigation in U.S. History*, NPR (Nov. 3, 2023, 6:27 PM), https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories [https://perma.cc/K7QX-SELH] (input "Conspiracy Against Rights" into the "Text search" field of the database). This is despite the fact that empirical research has shown that the protesters were motivated by the belief that Joe Biden stole the 2020 election and that they overwhelmingly believed in the "great replacement theory," which asserts that white people are being overtaken by minorities. *See generally* Robert A.

to this dynamic if they wish to mitigate the potential harms arising from resorting to the legal system, particularly harms arising from efforts to implement the Enforcement Acts.

The utility of conceptualizing violence as a legal right is not, however, limited to those who envision the state playing some role in alleviating the subjugation of Black communities. In fact, because Black people's vulnerability to racial violence has persisted by way of state action—whether through the laws authorizing human bondage or through interpretations of the Fourteenth Amendment that obstructed federal protection against lynchings and other forms of racial violence—the right to violence may supply abolitionists with additional grounds to reject state involvement in assuring Black safety.

As these stakeholders pursue the elimination of carceral institutions and construct new pathways for meeting the needs of communities currently subjected to criminalization, the right to violence can help guide their strategic decisions. Proponents of abolition have, for example, acknowledged that abolition of the prison industrial complex does not have to take a specific form but can, instead, be achieved through a variety of overlapping strategies and movements.[337] Procedural abolition—which entails securing legal reforms that diminish the size of the carceral state and that will redirect resources towards new infrastructure[338]—has received substantial attention from thought leaders both in and outside of the legal

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Pape, UNDERSTANDING AMERICAN DOMESTIC TERRORISM: MOBILIZATION POTENTIAL AND RISK FACTORS OF A NEW THREAT TRAJECTORY (Apr. 6, 2021), https://d3qi0qp55mx5f5.cloudfront.net/cpost/i/docs/April_6_Presentation_Deck_2021-04-06.pdf?mtime=1665680989 [https://perma.cc/MT5M-HKGB]. The stringent legal requirements imposed by the Supreme Court in *Cruikshank* and *Screws* may have not only deterred federal prosecutors from charging these individuals under the Enforcement Acts, even though they arguably sought to deprive fellow citizens of their voting rights because of their race; but because charges were not pursued under Section 241, the underlying incidents also wholly evaded classification as hate crimes. *See generally* CONG. RSCH. SERV., HATE CRIMES: KEY FEDERAL STATUTES (Feb. 23, 2023), https://sgp.fas.org/crs/misc/IF12333.pdf [https://perma.cc/PHU4-M5DJ] (confirming that charges under Section 241 qualify as federal hate crimes).

[337] *See, e.g.*, DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 274 (2021) ("Robust movements for socialism, decolonization, disability justice, and Earth justice are equally or perhaps more important than a singular movement for abolition."); *Tasting Abolition*, RUSTBELT ABOLITION RADIO (Aug. 12, 2020), https://rustbeltradio.org/2020/08/12/tasting-abolition/ [https://perma.cc/8TG6-HPW8] (explaining how abolition can be pursued through multiple channels, whether developing alternatives to police or securing non-reformist reforms that shrink the size and reach of the carceral state); *see also* RITCHIE & KABA, *supra* note 324, at 24 (explaining how abolition requires not merely using the tools and resources that exist within the state to benefit the many, but simultaneously devising strategies to defend communities against the state and devising strategies to build alternatives beyond the state).

[338] *See generally* Chua et al., *supra* note 324.

academy.[339] Similarly, grassroots organizations have offered a series of non-reformist reforms aimed at diminishing the power and legitimacy of the carceral system and assuring investments in the communities most impacted by incarceration.[340]

Although autonomist and insurrectionary abolition—which reject any reliance on the state and entail proactively building alternatives to existing institutions[341]—have received attention from stakeholders,[342] no specific attention has been reserved for the types of defense networks necessary to combat the racially motivated violence of civilians.[343] This is not to imply that abolitionists have not recommended

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[339] *Compare* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2562–75 (2023) (outlining four fundamental distinctions between non-reformist reforms versus liberal and neoliberal approaches to reform), *and* Stahly-Butts & Akbar, *supra* note 319, at 1552–64 (setting forth a framework of radical reforms to accomplish abolition), *with Reformist Reforms vs. Abolitionist Steps in Policing*, CRITICAL RESISTANCE (May 14, 2020), https://criticalresistance.org/resources/reformist-reforms-vs-abolitionist-steps-in-policing/ [https://perma.cc/5NEM-KKUJ] (distinguishing between reformist reforms that expand the reach of policing and the types of legal reforms that would actually reduce the power and impact of policing), *and* Kaba & Ritchie, *supra* note 326, at 12–13 (setting forth a series of legal interventions for shrinking the police and restructuring responses to harm, from ending cash bail to disarming the police).

[340] *See, e.g.*, *End the War on Black Communities*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/end-the-war-on-black-communities/ [https://perma.cc/8Z7X-VCSG] (last visited Nov. 3, 2023) (setting forth a series of legal interventions to eliminate policing and mass criminalization in Black communities, that would also ensure new investments in housing, education, and health care); *see generally Dismantling the Federal Drug War: A Comprehensive Drug Decriminalization Framework*, DRUG POL'Y ALL. (June 15, 2021), https://drugpolicy.org/wp-content/uploads/2023/05/Federal_Decrim_Framework.pdf [https://perma.cc/35QX-ABHM].

[341] *See* Chua et al., *supra* note 324; *Tasting Abolition*, *supra* note 337.

[342] *See, e.g.*, Setsu Shigematsu, Gwen D'Arcangelis & Melissa Burch, *Prison Abolition in Practice: The LEAD Project, the Politics of Healing and "A New Way of Life*," *in* ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 137 (2008) (describing the formation of A New Way of Life, a group of sober living and transition homes offered as an alternative to conventional recovery programs and intended to support formerly incarcerated women returning from jails and prisons); DAVIS ET AL., *supra* note 326, at 118 (describing the efforts of Black queer feminist organizations to build forms of safety outside of policing).

[343] *See, e.g.*, GEO MAHER, A WORLD WITHOUT POLICE 205–22 (2021) (describing community defense organizations developed by oppressed people around the globe, to combat violence by police and other state authorities and to reduce intra-community violence, but making only brief reference to responses by Black communities to white vigilante violence following Hurricane Katrina); Yaki (James Sayles), *Let's "Gang Up" on Oppression: Youth Organizations and the Struggle for Power in Oppressed Communities*, in THE NEW ABOLITIONISTS, *supra* note 322, at 184–89 (describing how the peace plans formulated by youth organizations in Los Angeles and Chicago challenged police power and

and advanced non-carceral responses to interpersonal violence generally, including violence intervention programs and civilian-led neighborhood patrols.[344] Rather, existing theories and proposals have not sufficiently grappled with the escalation in, and authorization of, private violence that has traditionally accompanied efforts to curtail visible state violence, which is where the right to violence directs attention. This phenomenon—of the state's reliance on both private and public forms of violence to subjugate Black communities—suggests that equivalent resources need to be reserved exploring the types of autonomous organizations necessary to defend against both public *and* private racial violence.[345]

CONCLUSION

Over 150 years ago, Black Kentucky residents decried the state's complicity in racially motivated violence. Although the federal government temporarily sought to ensure their safety through the Reconstruction Amendments and Enforcement Acts, those efforts were eventually abandoned, leaving Black communities at the mercy of white civilians and public authorities, alike. This vulnerability persists today, an indication that the right to violence continues to dictate how criminal laws are interpreted and enforced. And while dislodging this right may prove challenging, stakeholders should account for the cases and historical incidents attending the right if they ultimately wish to secure lasting safety for Black communities.

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the legitimacy of the state, but making no mention of how such plans—including the formation of community patrols—could be extended to protect against the violence of civilians); *compare with* Chanelle Gallant, *When Your Money Counts On It: Sex Work and Transformative Justice, in* BEYOND SURVIVAL: STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT 191, 192–99 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020) (describing how sex workers developed their own investigation techniques and engaged in self-defense training to protect themselves not just from police abuse and violence, but also from the violence of their clients).

[344] *See, e.g.*, MOHAPTRA ET AL., *supra* note 319, at 4 (calling for investments in community-based public safety approaches, including skills-based education on bystander intervention and healthy relationships); MAHER, *supra* note 343.

[345] Jocelyn Simonson, for example, has described how organized copwatching—wherein civilians patrol their neighborhood, monitor police conduct, and create videos of what they see—can deter and deescalate police violence. *See generally* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 407–20 (2016). Because marginalized communities do not exclusively experience violence from public authorities, however—a phenomenon that the right to violence illuminates—organizers and scholars pursuing abolition should begin to account for how these tactics could, or could not, be deployed with equal effect when civilians perpetrate, or attempt to perpetrate, racially motivated crimes.