ARTICLES

THE CRIMINALIZATION OF BLACK RESISTANCE TO CAPTURE AND POLICING

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ABSTRACT

The antiblack dimensions of antiresisting laws, that is, criminal proscriptions against physically resisting law enforcement, harden white social dominance and deepen black racial subordination. This Article contributes to the field by identifying and examining the relationship between black resistance to racial subordination and the development of antiresisting laws. This examination reveals three antiblack dimensions of these laws. First, they dissimulatively reinscribe fraught antebellum racial relations of power. Second, they were broadened to criminalize resisting unlawful arrest as part of the punitive frontlash against the Great Migration, the Civil Rights Movement, and the black-led urban uprisings of the 1960s. Third, they require black people to surrender their bodies to modern racially subordinating policing.

This Article provides a race-informed conceptual framework interrogating the normative assumption that physical resistance to law enforcement and the capture of arrest violates a sacrosanct social contract and is thus rightfully punishable. Ultimately, this Article calls for a shift in the response to black resistance to the capture of arrest and racially subordinating policing—away from punitive criminalization and toward transformative instigation to eradicate the harms animating said resistance.

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The feeling of being captured . . . this slave can never adjust to it, it's a thing that I just don't favor, then, now, never.

—George Jackson[1]

Wherever there is oppression, there will be resistance, and from the lessons of struggle will flower the hopes for a better life.

—Manning Marable[2]

INTRODUCTION

George Floyd, the black man whose murder at the hands of a white police officer sparked a global uprising,[3] was not killed solely because he was black; instead, he was killed as punishment for his black *resistance* to the capture of arrest.

Had Floyd successfully thwarted the deadly police assault against him—and survived to tell the tale—then he could have been prosecuted for the criminal offense of resisting arrest, which is punishable by up to five years' imprisonment in Minnesota, where he was murdered.[4] Other highly publicized police killings of black people, such as the killings of Korryn Gaines,[5] Eric Garner,[6] Patrick

[1] Letter from George Jackson to Greg (June 10, 1970), *in* GEORGE JACKSON, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON 4 (Lawrence Hill Books 1994) (1970) (omission in original).

[2] MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA, at xlvi (Haymarket Books 2015) (1983).

[3] *Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020, 3:22 PM), https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html [https://perma.cc/9G5U-DFN4] (compiling photographs from police reform and racial equality protests worldwide).

[4] *See* MINN. STAT. ANN. § 609.50 (West 2022) (criminalizing intentionally obstructing legal process, arrest, or firefighting).

[5] Police attempted to serve Korryn Gaines with a warrant related to a traffic stop, but after police broke down her door, and a six-hour armed standoff, Gaines was killed by Baltimore County police officer Royce Ruby. *See* Alison Knezevich & Kevin Rector, *Korryn Gaines: The 6-Hour Police Standoff*, BALT. SUN, http://data.baltimoresun.com/news/korryn-gaines/ (last visited Jan. 18, 2023). Her estate was awarded $38 million. Tre Ward, *Appeals Court Judge Reinstates $38M Jury Verdict in 2016 Death of Korryn Gaines*, WBALTV11 (July 1, 2020, 10:22 PM), https://www.wbaltv.com/article/judge-reinstates-dollor-38-million-jury-verdict-in-2016-death-of-korryn-gaines/33032248 [https://perma.cc/YZ3L-8D2N].

[6] Then-New York Police Department police officer Daniel Pantaleo used a banned chokehold to kill Eric Garner, who, at the time, was resisting being arrested for selling loose cigarettes. *See* Carlie Porterfield, *Police Officer Says He Falsely Charged Eric Garner After His Death*, FORBES (Apr. 21, 2022, 8:13 AM), https://www.forbes.com/sites/carlieporterfield/2021/10/26/police-officer-says-he-falsely-charged-eric-garner-after-his-death/; Marlene Lenthang & Aaron Katersky, *Former NYPD Officer Who Put Eric Garner in Lethal Chokehold Loses Bid To Get Job Back*, ABC NEWS (Mar. 25, 2021, 5:24 PM), https://abcnews.go.com/US/nypd-officer-put-eric-garner-lethal-chokehold-loses/story?id=76683871 [https://perma.cc/R63K-NHWA]; Mark Berman, *Investigations, Outrage Follow Police Chokehold and Eric Garner's Death*, WASH. POST (July 21, 2014,

Lyoya,[7] and Tyre Nichols,[8] similarly involved acts of resistance that could have been the subject of criminal resisting arrest charges—had they not ended in the tragic loss of life. Moreover, black people are charged, prosecuted, and punished daily for resisting arrest during nonfatal police encounters that do not make their way to the headlines.[9] And yet, in the yearslong, race-conscious postmortem of the fatal tragedies mentioned above, the criminalization of resistance to arrest has not been adequately contextualized in the black experience.

In light of the broad consensus that the criminal punishment system is racially subordinating,[10] black dissenting violence against policing—and the criminalization thereof—must be meaningfully engaged with in order to more fully understand the antiblack dimensions of policing. Further, this deeper understanding should inform how these antiblack dimensions are eradicated.

Criminal antiresisting laws generally proscribe physical resistance to law enforcement officers attempting to make an arrest. For example, New York's antiresisting law provides, "A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest."[11] Antiresisting laws such as this are remarkable, in part, because they punish people for defending their bodies from

5:02 PM), https://www.washingtonpost.com/news/post-nation/wp/2014/07/21/investigations-outrage-follow-police-chokehold-and-eric-garners-death/ (describing circumstances of Garner's death at hands of police and an initiative to prioritize studying police use of chokeholds).

[7] After a foot chase and struggle, then-Grand Rapids police officer Christopher Schurr pinned Patrick Lyoya to the ground and fatally shot him in the back of the head. Ramon Antonio Vargas, *Patrick Lyoya Shooting: Michigan Officer Who Killed Black Man Fired from His Job*, GUARDIAN (June 15, 2022, 3:55 PM), https://www.theguardian.com/us-news/2022/jun/15/patrick-lyoya-christopher-shurr-fired-latest [https://perma.cc/6PZ4-6VB5]; Mitch Smith, *Videos Show Police Officer Fatally Shooting Black Man in Michigan*, N.Y. TIMES (Apr. 13, 2022), https://www.nytimes.com/2022/04/13/us/grand-rapids-police-shooting-michigan-patrick-lyoya.html.

[8] On January 7, 2023, multiple Memphis Police Department officers pulled Tyre Nichols, a black man, out of the car he was driving and forced him to the ground. Christina Maxouris, *A Brutal Beating. Cries for His Mom. 23-Minute Delay in Aid. Here Are the Key Revelations from the Tyre Nichols Police Videos*, CNN (Jan. 28, 2023, 2:22 PM), https://www.cnn.com/2023/01/28/us/tyre-nichols-beating-video-takeaways/index.html [https://perma.cc/34AH-ZKA7]. Shortly thereafter, an officer pepper sprayed Nichols, who then fled from the officers. *Id.* Moments later, the officers captured and savagely beat Nichols, who died from his injuries three days later. *Id.*

[9] *See* Scott Holmes, *Resisting Arrest and Racism—The Crime of "Disrespect*,*"* 85 UMKC L. REV. 625, 632, 640-48 (2017).

[10] Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America 2019: Public Has Negative Views of the Country's Racial Progress; More than Half Say Trump Has Made Race Relations Worse*, PEW RSCH. CTR. (Apr. 9, 2019), https://www.pewsocialtrends.org/2019/04/09/race-in-america-2019/ [https://perma.cc/QDG5-BQM7] (reporting data showing majorities of black and white adults say black people are treated less fairly than white people by police officers and the criminal punishment system).

[11] N.Y. PENAL LAW § 205.30 (McKinney 2022).

capture, provided a reasonable person would think the capturer is a law enforcement officer[12] using "reasonable force" to effectuate an arrest.[13] They exclude physical defense against capture from the realm of reasonableness and bring it into the sphere of criminality. Put differently, they, with very little exception, demand submission when faced with the ostensibly "reasonable" force of law enforcement. In most jurisdictions, even someone who resists an unquestionably unlawful arrest can be arrested and convicted for resisting arrest; in other words, the unlawfulness of the arrest neither justifies nor excuses the resistance thereto.[14]

This Article provides a conceptual framework that interrogates the normative assumption that resisting arrest and policing violates a sacrosanct social contract and is thus rightfully punishable. In doing so, this Article disrupts the mental image of the atomized individual resisting law enforcement in a vacuum. It does this, in part, by centering a particular genre of resistance: *black people's ongoing physical rejection of slavers' and state actors' attempts to capture, arrest, and exert control over black bodies*. Specifically, attention is drawn to the black experience of being subjected to capture and antiresisting laws during the time of chattel slavery and in the current era of racially subordinating policing. This racial contextualization suggests that black resistance to the capture of arrest constitutes, in part, dissenting violence against racial subordination.

Moreover, this contextualization illuminates how the state's punitive response to this black dissenting violence deepens black racial subordination and hardens white social dominance. By drawing attention to the antiblack dimensions of past and present antiresisting laws, this Article contributes to the collective project of illuminating "criminal law's role as a mechanism for social control and provides a specific context to illustrate how that social control takes place."[15]

For instance, during the Colonial and Antebellum Eras, legislatures empowered white people to use force against black people who physically resisted their attempts to investigate or capture them on suspicion of being runaways.[16] Much later, most states adopted laws criminalizing resistance to

[12] *See, e.g.*, LA. STAT. ANN. § 14:108 (2022) (prohibiting resistance "when the offender knows or has reason to know that the person arresting, detaining, seizing property, or serving process is acting in his official capacity").

[13] *See, e.g.*, State v. Anderson, 253 S.E.2d 48, 51 (N.C. Ct. App. 1979) (recognizing a right to resist unreasonable force during an arrest); State v. Williams, 624 S.E.2d 443, 446 (S.C. Ct. App. 2005) (same); McCracken v. Commonwealth, 572 S.E.2d 493, 497 (Va. Ct. App. 2002) (same).

[14] *See infra* note 251-253 (collecting laws criminalizing resisting unlawful arrest).

[15] Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1702 (2021).

[16] *See, e.g.*, An Act for Preventing Suppressing and Punishing the Conspiracy and Insurrection of Negroes and Other Slaves, 1712 N.Y. Laws, *reprinted in* 1 CHARLES Z. LINCOLN, WILLIAM H. JOHNSON & A. JUDD NORTHRUP, THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 761-67 (1896) (requiring nonenslaved people to report runaway enslaved people); *"An Act for Suppressing Outlying Slaves" (1691)*, ENCYC.

even *unlawful* arrests after masses of black people violently rebelled against racially subordinating policing during the mid-to-late 1960s.[17] The historical account detailed herein uncovers how the perceived rupture presented by the repeal of antiresisting slave codes masks the continuity of racially subordinating antiresisting laws and enforcement.

The focus on enslaved black captives and their descendants is not meant to discount the use of antiresisting charges to criminalize and punish myriad marginalized populations (such as the neurodivergent, indigene, brown, and black people whose forebears were not enslaved in the Americas). Rather, the intention is to consider the terms in which a particular history of domination rooted in the conquest of black bodies becomes meaningful today.

The case of enslaved black captives and their descendants is singular in that the capture of black bodies was constitutive of both their group identity (i.e., blackness) and of the United States itself. The continuity of dominative capture and the resistance thereto may, in fact, mark a unique contestation over the legitimacy of the United States' claim of sovereignty over black bodies *and* the content of blackness. Put differently, whether blackness should be determinative of submission or resistance. Each act of resistance may be read as a challenge to the dominant, and thus a disruptive, refigured articulation of blackness "in terms other than abjection."[18]

Ultimately, this Article calls for a shift away from the state's punitive responses to black resistance to policing, and toward remedial, nonpunitive responses. Such transformative responses range from reducing resisters' social alienation to guaranteeing housing, healthcare, and a universal basic income.

This Article proceeds in three Parts. Part I discusses the need to comprehensively contextualize the criminalization of resistance in the experience of enslaved black captives and their descendants. Part II examines three antiblack dimensions of antiresisting laws, namely, their reinscription of fraught antebellum racial relations of power; their expansion as part of the frontlash against the Great Migration, the Civil Rights Movement, and black-led urban uprisings against racial subordination; and their requirement that black people surrender their bodies to modern racially subordinating policing. Ultimately, Part III argues that there is a need to shift society's response to black resistance away from punitive criminalization and toward transformative instigation to eradicate the harms animating said resistance.

VA., https://encyclopediavirginia.org/entries/an-act-for-suppressing-outlying-slaves-1691/ [https://perma.cc/H6DR-ZNQA] (last visited Jan. 18, 2023) (empowering local sheriffs to deputize civilians to capture runaways).

[17] *See infra* notes 251-53.

[18] SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 58 (1997).

I. THE NEED TO CONTEXTUALIZE THE CRIMINALIZATION OF RESISTANCE TO CAPTURE AND POLICING IN THE BLACK EXPERIENCE

A racial contextualization of antiresisting laws is needed to understand the relationship between antiresisting laws, white social dominance, and black racial subordination. This Part first provides an overview of modern antiresisting laws. Next, it discusses previous attempts to racially contextualize the criminalization of resistance to arrest and the need to build on these previous attempts by broadening the focus of the contextualization to extend beyond issues of discriminatory enforcement.

A. *Modern Antiresisting Laws*

All fifty states and the District of Columbia criminalize resistance to an arrest supported by probable cause or an arrest warrant, provided the resister in question knew or should have known that they were resisting a law enforcement officer.[19] No state's antiresisting laws prohibit resistance to an arrest conducted by a civilian not actively assisting law enforcement.[20] In most states, it is a crime for people to resist even unlawful arrest, that is, warrantless arrests not supported by probable cause.[21] Still, self-defense against an arresting officer's imminent or actual use of "excessive" or "unreasonable" force is generally an affirmative

[19] ALA. CODE § 13A-10-41 (2022); ALASKA STAT. ANN. § 11.56.700 (West 2022); ARIZ. REV. STAT. ANN. § 13-2508 (2022); ARK. CODE ANN. §§ 5-2-612, 5-54-103 (West 2022); CAL. PENAL CODE § 148 (West 2022); COLO. REV. STAT. ANN. §§ 16-3-102, 18-8-103 (West 2022); CONN. GEN. STAT. ANN. § 53a-23 (West 2022); DEL. CODE ANN. tit. 11, § 1257 (West 2022); D.C. CODE ANN. § 22-405.01 (West 2022); FLA. STAT. ANN. § 843.01-.02 (West 2022); GA. CODE ANN. § 16-10-24 (West 2022); HAW. REV. STAT. ANN. § 710-1026 (West 2022); IDAHO CODE ANN. § 18-705 (West 2022); 720 ILL. COMP. STAT. ANN. 5/31-1 (West 2022); IND. CODE ANN. § 35-44.1-3-1 (West 2022); IOWA CODE ANN. § 804.12 (West 2022); KAN. STAT. ANN. § 21-5229 (West 2022); KY. REV. STAT. ANN. § 520.090 (West 2022); LA. STAT. ANN. § 14:108 (2022); ME. REV. STAT. ANN. tit. 17-A, § 751-B (2022); MD. CODE ANN., CRIM. LAW § 9-408 (West 2022); MASS. GEN. LAWS ANN. ch. 268, § 32B (West 2022); MICH. COMP. LAWS ANN. § 750.479 (West 2022); MINN. STAT. ANN. § 609.50 (West 2022); MISS. CODE ANN. § 97-9-73 (West 2022); MO. ANN. STAT. § 575.150 (West 2022); MONT. CODE ANN. § 45-7-301 (West 2021); NEB. REV. STAT. ANN. § 28-904 (West 2022); NEV. REV. STAT. ANN. § 199.280 (West 2021); N.H. REV. STAT. ANN. § 594:5 (2022); N.J. STAT. ANN. § 2C:29-2 (West 2022); N.M. STAT. ANN. § 30-22-1 (West 2022); N.Y. PENAL LAW § 205.30 (McKinney 2022); N.C. GEN. STAT. ANN. § 14-223 (West 2022); N.D. CENT. CODE ANN. § 12.1-08-02 (West 2021); OHIO REV. CODE ANN. § 2921.33 (West 2022); OKLA. STAT. ANN. tit. 21, § 268 (West 2022); OR. REV. STAT. ANN. § 162.315 (West 2022); 18 PA. STAT. AND CONS. STAT. ANN. § 5104 (West 2022); 12 R.I. GEN. LAWS ANN. § 12-7-10 (West 2022); S.C. CODE ANN. § 16-9-320 (2022); S.D. CODIFIED LAWS § 22-11-4 (2022); TENN. CODE ANN. § 39-16-602 (West 2022); TEX. PENAL CODE ANN. § 38.03 (West 2021); UTAH CODE ANN. § 76-8-305 (West 2022); VT. STAT. ANN. tit. 13, § 3017 (West 2022); VA. CODE ANN. § 18.2-460 (West 2022); WASH. REV. CODE ANN. § 9A.76.040 (West 2022); W. VA. CODE ANN. § 61-5-17 (West 2022); WIS. STAT. ANN. § 946.41 (West 2022); WYO. STAT. ANN. § 6-5-204 (West 2022).

[20] *But see* Williams v. State, 79 A.3d 931, 946 (Md. 2013) (affirming conviction of a man convicted of resisting arrest because he resisted a civilian bystander who had tackled him as police officers were chasing him).

[21] *See infra* notes 251-53.

defense against antiresisting charges so long as the resister uses a proportionate amount of force in defending themselves.[22]

The threshold of physical force needed for an act to fit under the ambit of an antiresisting law is minimal.[23] In some states, like Maryland, the threshold level of force needed to constitute resisting arrest is the undefined "offensive physical contact," which does not necessarily entail inflicting physical harm.[24] Other states, like Arkansas, have set an even lower threshold by criminalizing passive, nonoffensive acts of nonsubmission, such as going limp during an arrest.[25] Acts of resistance resulting in injuries to an arresting officer tend to carry enhanced penalties.[26] For example, in Ohio, any physical resistance to arrest is punishable by a sentence of up to ninety days' incarceration, but resistance that results in "physical harm" to an officer is punishable by up to 180 days' incarceration.[27]

The phrase "resisting arrest" may automatically conjure images of a police officer attempting to arrest a civilian. But myriad antiresisting laws have a much broader scope. In addition to applying to resistance against police officers,

[22] *See, e.g.*, TEX. PENAL CODE ANN. § 9.31(c)(1) (West 2021) (permitting resisting arrest if (1) the arrester uses or attempts to use "greater force than necessary to make the arrest" prior to the arrestee's resistance and (2) the arrestee believes force necessary to protect themselves from the arrester's actual or attempted use of force); Jackson v. State, 463 So. 2d 372, 374 (Fla. Dist. Ct. App. 1985) (permitting civilians to forcibly resist excessive force accompanying an arrest).

[23] *See, e.g.*, State v. Womack, 847 P.2d 609, 613 (Ariz. Ct. App. 1992) (holding a defendant resists arrest when, through "actual opposition or resistance, [he makes necessary], under the circumstances, the use of force" (quoting State v. Avnayim, 185 A.2d 295, 298-99 (Conn. Cir. Ct. 1962)); State v. Brannon, 842 A.2d 148, 152-53 (N.J. 2004) (holding "physical force or violence" required for an upgraded charge of resisting arrest need not include substantial risk of physical injury, but "even minimal force or violence" against the officer is sufficient).

[24] Nicolas v. State, 44 A.3d 396, 409 (Md. 2012) ("The 'force' that is required to find a defendant guilty of resisting arrest is the same as the 'offensive physical contact' that is required to find a defendant guilty of the battery variety of second degree assault."); *id.* at 407 (distinguishing "offensive physical contact" from "harm"); *see also* City of Eugene v. Kruk, 875 P.2d 1190, 1193 (Or. Ct. App. 1994) (noting passive resistance is excluded from the crime of resisting arrest); Sheehan v. State, 201 S.W.3d 820, 823 (Tex. Ct. App. 2006) (holding passive noncooperation does not constitute resisting arrest).

[25] *See* ARK. CODE ANN. § 5-54-103 (West 2022); *see also, e.g.*, M.R. v. State, 198 So. 3d 1023, 1025 (Fla. Dist. Ct. App. 2016) (affirming conviction of resisting arrest where the person convicted merely fled from a law enforcement officer in contravention of said officer's command to stop).

[26] *See, e.g.*, DEL. CODE ANN. tit. 11, § 1257 (West 2022); 720 ILL. COMP. STAT. ANN. 5/31-1 (West 2022); MICH. COMP. LAWS ANN.§ 750.479 (West 2022).

[27] OHIO REV. CODE ANN. §§ 2921.33, 2929.24 (West 2022).

antiresisting laws may also apply to resistance against probation officers[28] or carceral facility employees.[29]

Having provided a general overview of modern antiresisting laws, the next Section will discuss the need to contextualize these laws in the experience of enslaved black captives and their descendants.

B. *The Need for a Comprehensive Racial Contextualization of Antiresisting Laws*

While antiresisting laws are not race-specific, they have unique meaning when contextualized in the experience of enslaved black captives and their descendants. At first, such a contextualization may seem gratuitous. There are a host of purported race-neutral justifications for criminalizing resisting arrest. One state court judge offered the following reprimand of a man who resisted arrest:

> [He] threatened that time-tested yet fragile social balance whereby our elected representatives provide laws for the good of society, and public officers to execute and enforce them, and under which respect and obedience shown to officers discharging their lawful duties are as essential to the orderly administration of justice as the laws themselves.[30]

This reprimand evinces a normative assumption that arrests are necessary to ensure safety and respond to harm, and that criminal prohibitions against resisting arrest inure to the benefit of all. But this assumption fails to account for the racially disparate harms caused by policing and the capture of arrest. Specifically, black people have historically been more likely to be captured and charged with resisting arrest than white people.[31] If criminal law and enforcement has continuously "operate[d] in a manner that preserves whites' social dominance,"[32] could laws mandating blacks to submit to the capture of arrest be tantamount to a command for blacks to obediently acquiesce to a practice of white social domination, namely their capture for the purpose of criminal adjudication?

The salience of a race-informed contextualization and examination of antiresisting laws can be inferred from Kimberlé Crenshaw's observation that the "belief in color-blindness and equal process . . . would make no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into

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[28] *See, e.g.*, *In re* Eddie D., 286 Cal. Rptr. 684, 686-87 (Cal. Ct. App. 1991) (finding an incarcerated juvenile who resisted a probation officer's attempt to handcuff him resisted a peace officer for purposes of California's anti-resisting statute).

[29] *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/31-1 (West 2022) (criminalizing resisting or obstructing a peace officer, firefighter, or correctional institution employee).

[30] Commonwealth v. Williams, 496 A.2d 31, 50 (Pa. Super. Ct. 1985).

[31] *See infra* Section II.C.

[32] Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 76 (2014).

the present."[33] Antiresisting charges are a species of criminality, and "[n]otions of criminality and criminal threat can only be understood as deeply historical cultural-political productions."[34] Absent proper contextualization, black resisters to arrest are cast as atomized individuals deserving of punishment for not submitting to law enforcement. Such a conception ignores the racially subordinating aspects of the criminalization of resistance and the possible race-conscious drivers of said resistance. Thus, "[t]he imagined context often directly contradicts the context that would be described by the stories of individuals who are actually involved."[35] Once properly contextualized, the criminalization of black people for resisting arrest reveals itself to be part of "the still-unfolding narrative of captivity, dispossession, and domination that engenders the black subject in the Americas."[36]

In his article *Resisting Arrest and Racism—The Crime of "Disrespect*,*"* Scott Holmes develops part of this needed contextualization, but key aspects of the criminalization of resisting arrest, its racial backdrop, and its implications are missing from his analysis.[37] Holmes "explores how police use the charge of resisting arrest as a form of racial oppression rather than keeping communities safe."[38] He places particular emphasis on his finding that black people in Durham, North Carolina, are disproportionately arrested and prosecuted for often spurious charges of resisting arrest.[39] Mindful of historical context, Holmes argues that police officers use antiresisting charges as a form of racial and social control in the vein of antebellum slave patrols.[40] In practice, resisting arrest is, as another commentator describes it, a "contempt-of-cop" crime that "give[s] the police the opportunity to arrest people who challenge police authority."[41]

Resisting Arrest and Racism reveals much about the racially discriminatory *enforcement* of antiresisting laws, but it does not interrogate the validity of these laws in light of their antiblack dimensions. The problem for Holmes is not that blacks may be punished for resisting capture in a country whose constitutive violence includes the capture, recapture, and criminalization of blacks. Rather,

[33] Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1345 (1988).

[34] Dylan Rodríguez, *"Mass Incarceration" as Misnomer: Chattel/Domestic War and the Problem of Narrativity*, *in* ANTIBLACKNESS 171, 176 (Moon-Kie Jung & João H. Costa Vargas eds., 2021).

[35] Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2282 (1992).

[36] HARTMAN, *supra* note 18, at 51.

[37] Holmes, *supra* note 9, at 626.

[38] *Id.*

[39] *Id.* at 632, 637.

[40] *Id.* at 628-29, 633-36.

[41] ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 60 (2018).

the problem is that law enforcement disproportionately, and at times maliciously, arrests black people for resisting, often without merit.[42]

To his credit, Holmes suggests—albeit briefly—that black resistance to arrest may be animated, in some instances, by resisters' perceptions of law enforcement's illegitimacy.[43] Still, Holmes narrowly focuses on the "illegitimate use of authority,"[44] and not the logic of legitimacy underpinning police authority itself. Holmes argues, "Police training in procedural due process and fairness will help police explain the use of their authority in a way that helps build trust and legitimize the authority," and that, "[t]raining in de-escalation techniques will also assist police in reducing the risk of resistance or violence."[45] This argument assumes that the docility of the black body facing the capture of arrest is a desirable goal and that said docility may be attained by training the police to be kinder in the way they capture black bodies.

Holmes's narrow critique reveals a fraught presumption. As Michel Foucault would argue, "The citizen is presumed to have accepted once and for all . . . the very law by which he may be punished."[46] This presumption is worthy of scrutiny, in part, because white dominion over enslaved black captives and their descendants is not rooted in putative acceptance of domination, but, instead, in capture, enslavement, and exclusion from the society that punishes them.

Contextualizing the criminalization of resistance in the experience of enslaved black people and their descendants therefore entails scrutinizing the assumptions underpinning the criminalization of resistance and discerning how antiblackness may be constitutive of antiresisting laws. By primarily focusing on discriminatory enforcement, Holmes's analysis leaves undisturbed the "legitimizing myths" that justify the unequal racial distribution of the power to define what is criminal and the circumstances in which resistance to law enforcement is justified.[47]

In *Respect and Resistance in Punishment Theory*, Alice Ristroph, unlike Holmes, calls into question the propriety of punishing resisting arrest.[48] Ristroph utilizes Thomas Hobbes's version of social contract theory in advancing her interrogation.[49] This theory provides that individuals give their power to a single sovereign in exchange for security and self-preservation.[50] As a result, the sovereign assumes various rights, including a right to punish.[51] Nevertheless, individuals do not give up their interest in resisting harm, even if said harm is in

[42] Holmes, *supra* note 9, at 632.

[43] *Id.* at 628.

[44] *Id.* at 627.

[45] *Id.* at 664.

[46] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 89-90 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

[47] *See* Hutchinson, *supra* note 32, at 32-33.

[48] Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 628 (2009).

[49] *See id.*

[50] *See id.* at 608-09 (citing THOMAS HOBBES, LEVIATHAN 120 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651)).

[51] *See id.* at 613 (citing HOBBES, *supra* note 50, at 214).

the form of punishment meted out by the sovereign.[52] Ristroph concludes that Hobbes's insights on resistance should compel us to "tak[e] seriously the right to resist" in light of the reality that, "from the criminal's perspective, [criminal punishment] remains a violent threat to safety and freedom."[53] In *The Constitution of Police Violence*, Ristroph questions "ostensibly race-neutral explanations for the disapproval of resistance in Fourth Amendment doctrine" and suggests how this doctrine may be amended to reduce obtrusive police powers.[54]

This Article builds on Ristroph's contributions in three ways. First, it moves beyond Hobbes's theoretical formulation by detailing how the ongoing history of state-sanctioned antiblack violence—and black resistance thereto—give lie to social contract theory itself.[55] Second, it illuminates the antiblack dimensions of antiresisting laws, which differs from Ristroph's more specific inquiry into how constitutional doctrine empowers police to use violence.[56] Third, it issues a broader call to remedy the antiblack maleffects of antiresisting laws by eradicating the root causes of black resistance to policing.

To be sure, the inquiry presented herein could easily morph into an assessment of criminal law itself. But the purpose here is not to create a totalizing theory regarding criminal law. Instead, this Article is a discrete contribution to a broader, ongoing conversation about how society can best provide protection from, and respond to, harm without relying on police and prisons.

The decades-long ascent of calls for prison-industrial-complex abolition and related calls to abolish police have created room to problematize ostensibly race-neutral safety-making strategies, such as capturing people suspected of engaging in criminalized behavior and punishing them for resisting said capture. Theorists, organizers, and community members are developing safety-making strategies that do not rely on the criminal punishment system's techniques of capturing alleged wrongdoers off the street, holding them captive as punishment, and marking them for discrimination with degrading labels like "felon," "convict," or "inmate."[57] If there is room in the legal scholarship for

[52] *See id.* at 617 (citing HOBBES, *supra* note 50, at 93).

[53] *Id.* at 604, 619.

[54] Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1228 (2017).

[55] *See infra* Section II.A.

[56] *See infra* Section II.A.

[57] *See generally* MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME (2020); PROJECT NIA, https://project-nia.org/ [https://perma.cc/9MQT-RQ5U] (last visited Jan. 18, 2023) (compiling community-based safety plans for various localities across the country); INTERRUPTING CRIMINALIZATION, https://www.interruptingcriminalization.com/ [https://perma.cc/9L77-E459] (last visited Jan. 18, 2023) (same).

deconstructing the legitimacy of police—and there is[58]—then there is also room for scrutinizing the criminalization of black people for resisting police. The ongoing conversations about whether the criminal punishment system should be reformed or abolished, and whether it eradicates or compounds harms, are worthy discussions that are enriched by this Article.

In the tradition of critical theorists, the intention here is to move beyond an analysis designed to troubleshoot criminal law and enforcement so as to make each less discriminatory. Instead the intention is to help reveal part of "the allegedly scandalous dysfunction, brokenness, irrationality, and cruelty of the antiblack, racial-colonial state as its paradigmatic form," and to help us "understand[] white multiculturalist civil society's vacillating tolerance, vindication, and reform of this fatal and miserable statecraft as the historical rhythm of U.S. nation building."[59] The next Part engages in racial contextualization to uncover and examine three antiblack dimensions of antiresisting laws.

II. EXAMINATION OF THE ANTIBLACK DIMENSIONS OF ANTIRESISTING LAWS

When considering seemingly universal, commonsensical laws like antiresisting laws, "[t]he struggle," as Kimberlé Crenshaw describes it, "is to maintain a contextualized, specified world view that reflects the experience of Blacks."[60] Accordingly, a racial contextualization of antiresisting laws must, in part, reflect the black experience, defined in large part by white social domination, black resistance to such domination, and criminal punishment of black resistance.

This Part engages in racial contextualization to reveal three antiblack dimensions of antiresisting laws: (1) their reinscription of chattel slavery's fraught racial power relations; (2) their expansion as part of the frontlash against racial change and black-led urban uprisings; and (3) their demand that black people surrender their bodies to racially subordinating policing.

A. *Antiresisting Laws Reinscribe Chattel Slavery's Fraught Racial Relations of Power*

In order to contextualize antiresisting laws in the experience of enslaved black captives and their descendants, we first have to understand the originary relationship between black resistance, policing, and punishment in the thirteen colonies and the United States. If not for the capture and enslavement of

[58] *See, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1802-23 (2020) (analyzing incompatibility between contemporary recognition of police violence and increased investments in policing); Alexis Hoag, *Abolition as the Solution: Redress for Victims of Excessive Police Force*, 48 FORDHAM URB. L.J. 721, 738-42 (2021) (promoting abolition as an alternative to historically fraught legal procedures for asserting civil rights of black people); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1623 (2019) (advocating for dismantling current carceral systems while creating more equitable means of achieving justice).

[59] Rodríguez, *supra* note 34, at 185.

[60] Crenshaw, *supra* note 33, at 1349.

indigenous Africans, the federal and state governments would have neither the opportunity nor the presumed authority to capture and punish the descendants of enslaved blacks today. By recovering the historical context that informs the criminalization of black resistance, we uncover how antiresisting laws reinscribe the fraught racial power relations of chattel slavery.

Here, we follow in the path of Darren Hutchinson, who has employed social dominance theory to illustrate how criminal law and enforcement facilitates racial subordination.[61] Social dominance theory "recogni[zes] group hierarchy and the reproduction of unequal social relations through a set of culturally dominant legitimizing myths."[62] These legitimizing myths consist of "'attitudes, values, beliefs, stereotypes, and ideologies that provide moral and intellectual justification' for group-based inequality."[63]

The originary legitimizing myth undergirding the criminalization of black resistance was perhaps most famously articulated by the Supreme Court majority in *Dred Scott v. Sandford*,[64] which found that blacks were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect."[65] The white social dominance evinced by this legitimizing myth was sustained by a largely complicit white demos. Charles Mills described the tacit compact between antebellum slavers, state actors, and the largely complicit white demos as the "Racial Contract," as opposed to the supposedly race-neutral social contract.[66] As Mills explains, "[T]he Racial Contract is not a contract to which the nonwhite subset of humans can be a genuinely consenting party. . . . Rather, it is a contract between those categorized as white over the nonwhites, who are thus the objects rather than the subjects of the agreement."[67] Racial Contract theory complements social dominance theory in discerning the state of antebellum racial relations of power and the continuities thereof today.

In addition to engaging in furtive forms of resistance—like singing coded songs and stealing away to worship or frolic with each other[68]—some enslaved black captives engaged in dissenting violence against their slavers and the state, including by physically resisting state-sanctioned racial violence and recapture. In anticipation of and response to this resistance, antiresisting slave codes were

[61] Hutchinson, *supra* note 32, at 46-56.

[62] *Id.* at 56.

[63] *Id.* at 47 (quoting JAMES SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE 45 (2001)).

[64] 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[65] *Id.* at 407.

[66] *See generally* CHARLES W. MILLS, THE RACIAL CONTRACT (25th anniversary ed. 2022).

[67] *Id.* at 11-12. While I find Mills's Racial Contract theory useful and credible, I do not rely on Mills's position that the subordination of black people is "the central injustice on which the state rests." *Id.* at 39.

[68] HARTMAN, *supra* note 18, at 50 ("Within the confines of surveillance and nonautonomy, the resistance to subjugation proceeded by stealth . . . furtively, secretly, and imperceptibly, and the enslaved seized any and every opportunity to slip off the yoke.").

promulgated to maintain white social dominance over great numbers of enslaved black people.

For instance, in 1669, the Virginia Assembly passed "An act about the casual killing of slaves," which provided, in part,

> [I]f any slave resists his master (or other by his master's order correcting him) and by the extremity of the correction should chance to die, that his death shall not be accompted felony, but the master (or that other person appointed by the master to punish him) be acquitted from molestation.[69]

Therefore, private slavers were empowered to summarily punish violations of self-made codes of conduct that enslaved captives were bound to obey—and to kill those who dared resist punishment. While not an explicit criminal proscription against enslaved captives resisting their slavers, this statute effectively sanctioned the punishment of such resistance.

Moreover, the architects of the juridical codes of slavery sought to compel black people to submit to the authority of not only their respective slavers, but all whites. As potential runaways, enslaved black people were subjected to being policed by not only slave patrols,[70] 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.

For example, a 1712 New York slave code punished people for *not* participating in the policing of the enslaved population.[71] Specifically, this code required all nonenslaved people to notify slavers or a justice of the peace of the whereabouts of any enslaved person who was being unlawfully harbored, concealed, or entertained outside of their slaver's domain; failing to do so was punishable by a fine of two pounds.[72] Elsewhere, a 1755 Georgia slave code allowed "any white person" to unconditionally interrogate and capture any enslaved person found to be in public without a white accompaniment.[73] Hence

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[69] An Act About the Casual Killing of Slaves, 1669 Va. Acts, *reprinted in* 2 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 270 (New York, R. & W. & G. Bartow 1823). I have modernized spelling, punctuation, and capitalization for quotations from this text.

[70] For example, a 1734 South Carolina slave code established special patrols to periodically search for and whip runaways, search enslaved black people's living quarters, and seize weapons and other forbidden items. Act of Apr. 9, 1734, 1734 S.C. Acts, *reprinted in* 3 THOMAS COOPER, THE STATUTES AT LARGE OF SOUTH CAROLINA 395-99 (Columbia, A.S. Johnston 1838).

[71] Act of Dec. 10, 1712, ch. 250, 1712 N.Y. Laws, *reprinted in* 1 THE COLONIAL LAWS OF NEW YORK: FROM THE YEAR 1664 TO THE REVOLUTION 761 (Albany, James B. Lyon, State Printer 1894).

[72] *Id.*; *see also* Act of Dec. 21, 1865, no. 16, 1865 La. Acts 24 (punishing anyone who enticed away, fed, harbored, or concealed enslaved people without their slaver's permission with a fine between $10 and $500 or imprisonment between ten days to twelve months).

[73] Act of Feb. 14, 1755, 1755 Ga. Laws, *reprinted in* 18 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 102, 105-06 (Atlanta, Chas P. Byrd 1910) (allowing white people to also kill those enslaved people that had assaulted them); *see also* Act of May 10, 1740, no. 695, § 5, 1790 S.C. Acts, *reprinted in* JOHN FAUCHERAUD GRIMKÉ, THE PUBLIC LAWS OF THE STATE

enslaved black people were relegated to being policed by potentially all of white society. As Saidiya Hartman explains, "Since the subjection of the slave to all whites defined his condition in civil society, effectively this made the enslaved an object of property to be potentially used and abused by all whites."[74]

As it repealed all of its colonial laws, the Virginia General Assembly passed a series of statutes in 1792, including a slave code that made it a criminal offense for any black person to "lift his or her hand in opposition to any person not being a negro or mulatto."[75] This offense was punishable by up to "thirty lashes on his or her bare back well laid on."[76] The only exception to this prohibition against lifting a hand to non-black people (read: white people) was if the black person "*was wantonly* assaulted" and "lifted his or her hand" in self-defense.[77]

By creating a legally recognized justification for enslaved black people's resistance to wanton violence at the hand of their slavers or other whites, this carveout—this reform—may appear to constitute a form of paltry progress. But this law may actually have broadened the net of violence against blacks by making all blacks—enslaved and nonenslaved—duty-bound to wait until they were wantonly assaulted before being permitted to resist assaults upon their person by whites. If they physically resisted *before* they were wantonly assaulted, black people ran the risk of a criminal conviction and a lashing.

The line between wanton and nonwanton is undefined in this statute, thereby depriving blacks of the requisite level of certitude needed regarding the conditions under which they could resist assaults upon their person by whites without being whipped in turn. And the only relief provided to black people who proved that their resistance was legally justified was *not* getting a lashing. Under these circumstances, a black person could not defend themselves against any white person without running the risk of being criminally prosecuted and whipped. Thus, what at first may appear to be a progressive reform reveals itself to be another means of licensing further, violent racial subordination.

Amid the reinscription of colonial white social dominance,[78] antebellum jurists were left to resolve the contradiction of antiblackness in the United States,

OF SOUTH CAROLINA 163-65 (Philadelphia, Aitkan & Son 1790) (providing the same permissions to white people in South Carolina).

[74] HARTMAN, *supra* note 18, at 24.

[75] Act of Dec. 17, 1792, ch. 41, § 17, 1792 Va. Acts, *reprinted in* 1 SAMUEL SHEPHERD, STATUTES AT LARGE OF VIRGINIA, FROM OCTOBER SESSION 1792, TO DECEMBER SESSION 1806, at 125 (Richmond, Samuel Shepherd 1835).

[76] *Id.*

[77] *Id.* (emphasis added).

[78] The American Revolution and the founding of the United States did not eradicate despotic, elite, white social domination as shown by its partial codification in various antiresisting slave codes. Speaking in 1785, Thomas Jefferson remarked, "The American states hav[e] on their first establishment adopted the system of British laws." ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW: 1776-1836, at 24 n.4 (1964) (quoting 9 THE PAPERS OF THOMAS JEFFERSON: 1 NOVEMBER 1785-22 JUNE 1786 (Boyd ed., 1954)). Indeed, all the thirteen original states eventually adopted a direct or indirect provision for the

that is, the dissonance between a foundational recognition that "all men are created equal" with inalienable rights of "life liberty, and the pursuit of happiness" secured by governments "deriving their just powers from the consent of the governed,"[79] on one hand, and, on the other, said governments' exercise of dominion over an enslaved black population treated as racially inferior and less than human.

While there were rare instances in which enslaved black resistance to white people was deemed justified in court,[80] court opinions related to black enslaved captives' resistance to white people mostly demonstrate that antiresisting slave codes were effective in racially subordinating black captives.

For instance, black women who repelled their slavers' sexual assaults were among the enslaved black captives punished for resisting white violence. *Missouri v. Celia, a Slave*[81] was a criminal case involving an enslaved black woman, Celia, who killed her slaver.[82] Prior to the killing, Celia's sixty-five-year-old white slaver had repeatedly raped the teenaged Celia for years.[83] On the day of the killing, Celia told her slaver that she would hurt him if he did not stop raping her; the slaver went to Celia's cabin that night anyway.[84] Once cornered in her cabin, Celia grabbed a large stick with which she struck her slaver repeatedly on the head, killing him in the process.[85] Eventually, Celia was coerced into confessing to the killing.[86] She was then tried, convicted, sentenced to death, and, tragically, hanged.[87] Speaking of the paradox illuminated by cases such as Celia's, Hartman observes, "[T]he enslaved could neither give nor refuse consent, nor offer reasonable resistance, yet they were criminally responsible and liable."[88] This paradox loomed large over the lives of enslaved black girls and women (and likely some boys, men, and genderqueer people) who were subjected to the rapaciousness of white slavers.

Other cases also reveal how "the law's selective recognition of slave humanity nullified the captive's ability to give consent or act as agent and, at the same time, acknowledged the intentionality and agency of the slave but only as

use of colonial and common law. *Id.* at 24. As a result, the colonial-era slave codes, unlike British rule, survived the American Revolution, although many colonial laws were eventually repealed or amended.

[79] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[80] *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 111 (1975) ("[M]utiny by one wrongfully enslaved was not cognizable as a crime in an American court.").

[81] No commercial database contains this case. An original (handwritten) copy is available online. *State of Missouri vs. Ceila, a Slave*, MO. DIGIT. HERITAGE (Mar. 31, 2009), https://mdh.contentdm.oclc.org/digital/collection/mocases/id/68 [https://perma.cc/5SJW-GYRR].

[82] MELTON A. MCLAURIN, CELIA, A SLAVE 24 (1999).

[83] *Id.* at 20.

[84] *Id.* at 29.

[85] *Id.* at 30.

[86] *Id.* at 39.

[87] *Id. passim*.

[88] HARTMAN, *supra* note 18, at 82.

it assumed the form of criminality."[89] Such was the case in *Jeff v. State*.[90] *Jeff* was an appeal from a trial of an enslaved captive named Jeff who had been convicted of attempting to murder his slaver.[91] At issue in *Jeff* was whether there was sufficient evidence to sustain a finding that Jeff intended to kill.[92]

On the day of the underlying incident, Jeff was working when his slaver approached him and said "he wanted to have some talk with him."[93] After Jeff told his slaver he had done nothing to be whipped, his slaver grabbed Jeff by his collar and pulled him out of a pen, where Jeff was working, in order to whip him.[94] The reason, if any, why Jeff's slaver wanted to whip him is not recorded in the opinion. Jeff began physically resisting his slaver, who began beating Jeff with a walking-cane.[95] When Jeff put his hand in his pocket to grab a knife, his slaver drew a gun and threatened to shoot him.[96] For the moment, Jeff decided not to pull his knife.[97] But when the slaver's wife was ordered to tie Jeff up with a rope, Jeff pulled his knife, cut the slaver "slightly" a few times, and ran away.[98] Jeff was subsequently tried and convicted of assault and battery on his slaver with intent to kill.[99]

On appeal, Jeff argued that there was insufficient evidence for a finding that he intended to kill his slaver. Specifically, Jeff argued that he was merely trying to evade being tied up, whipped, and possibly shot, as was evidenced by his running away from his slaver rather than slaying him.[100] The court, however, found that Jeff's actions constituted assault, in part, because Jeff resisted the "legal chastisement" of his slaver.[101] Accordingly, since Jeff's use of a knife during his resistance constituted "*prima facie* evidence that he intended to kill," Jeff's conviction was affirmed.[102] In Mississippi, the punishment for enslaved captives convicted of assaulting a white person with intent to kill—where, as in Jeff's case, intent was implied—was up to one hundred lashes each day for three consecutive days.[103] The court recognized Jeff's defense of his own body, his

[89] *Id.* at 80.

[90] 39 Miss. 593 (1860) (enslaved party).

[91] *Id.* at 594.

[92] *Id.* at 597.

[93] *Id.* at 594.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 594-95.

[99] *Id.* at 594.

[100] *Id.* at 598-600.

[101] *Id.* at 612.

[102] *Id.*

[103] Act of Jan. 28, 1829, ch. 37, art. 8, § 2, *reprinted in* ANDERSON HUTCHINSON, CODE OF MISSISSIPPI: BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE, WITH TABULAR REFERENCES TO THE LOCAL AND PRIVATE ACTS, FROM 1798 TO 1848, at 532 (Jackson, Price and Fall 1848).

black body, as criminal agency rather than human survival; as Hartman may put it, the court's "recognition and/or stipulation of [the enslaved black captive's] agency as criminality served to identify personhood with punishment."[104]

In sum, through legislation and by judicial decree, white social dominance was established, in part, by the misrecognition of black agency (such as, resistance to subordinating punishment at the hands of slavers) as criminality.

Even after the abolition of chattel slavery, putatively emancipated black people were subjected to imposed legislative, executive, and juridical frameworks designed to preserve white social dominance. Instead of engaging in a diplomatic process in which black people could decide whether and by what terms to enter into the body politic of the United States, a group of white male politicians determined the conditions of black citizenship.

In his seminal work, *Slavery and Social Death*, Orlando Patterson notes, "[N]o slaveholding class ever lost in the process of disenslavement or manumission . . . the slave was made over into another, even more loyal and efficient retainer."[105] After emancipation, "[t]he black self, the generous gift of the master, is never proper to itself because it still belongs to another—in this instance the state assumes absolute mastery."[106]

While emancipation brought the end of private ownership of black bodies as chattel, it did not bring an end to white domination of black people. Perhaps this is what the South Carolina legislature alluded to in 1865 when it proclaimed, "[t]he Statutes and regulations concerning slaves are now inapplicable . . . and although such persons are not entitled to political equality with white persons, they have . . . protection under the law in their persons and property."[107]

Indeed, emancipation left relatively undisturbed the relations of power between formerly enslaved blacks and white elites who retained the ability to capture blacks and subject them to involuntary labor. As Khalil Gibran Muhammad notes, "Within months of the end of the Civil War, the former Confederate states began passing new criminal legislation . . . with the goal of limiting [black people's] newly gained rights as citizens. . . . [Q]uickly[,]

[104] HARTMAN, *supra* note 18, at 80.

[105] ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 341 (1982).

[106] CALVIN L. WARREN, ONTOLOGICAL TERROR: BLACKNESS, NIHILISM, AND EMANCIPATION 98 (2018); *see also id.* at 96 ("The free black never obtains freedom because emancipation simply transfers property rights to the state."); ERIC FONER, RECONSTRUCTION: AMERICAS UNFINISHED REVOLUTION, 1863-1877, at 198 (Henry Steele Commager & Richard B. Harris eds., Harper Perennial Modern Classics 2014) (1988) ("[P]lanters turned to the state to reestablish labor discipline.").

[107] An Act Preliminary to the Legislation Induced by the Emancipation of Slaves, 1865 S.C. Acts, *reprinted in* 13 THE STATUTES AT LARGE OF SOUTH CAROLINA: CONTAINING THE ACTS FROM DECEMBER, 1861 TO DECEMBER, 1866, at 245 (Columbia, Republican Printing Co. 1875) (emphasis added).

Southerners turned to the apparatus of the law to simply criminalize black freedom."[108]

While explicit invocations of race in criminal prohibitions against resisting law enforcement dissipated, Darren Hutchinson reminds us, "In light of legitimizing myths that justify racial inequality[,] . . . socially-dominant white decision makers need not account for any racial dimensions of their preferences."[109] The capture of black bodies and punishment of black resistance to both capture and law enforcement has withstood the test of time in what Mills calls "the present period of de facto white supremacy."[110]

Some may find the current iteration of the capture and punishment of black bodies to be excusable—or even desirable—because obedience to law enforcement is commonly held to be one of the axiomatic responsibilities of the governed.[111] But the United States has failed to fulfill its responsibility to adhere to the abolitionist conviction that "government shall be fixed on its only rightful foundation, the consent of the governed."[112] Eric Foner reminds us that "[t]he entire complex of labor regulations and criminal laws" that emerged in the wake of the Civil War "was enforced by a police apparatus and judicial system in which blacks enjoyed virtually no voice whatever."[113] As a result, the governing, policing, and punishing of black people remained—and remains—fixed on a foundation of capture and white social dominance. Thus the criminalization of enslaved black captives' progeny for resisting racially subordinating policing reinscribes the fraught racial power relations of chattel slavery, as it entails the punishment of black people for resisting punitive white domination.

The next Section will examine how antiresisting laws were broadened to prohibit even resistance to unlawful arrests as great numbers of black people simultaneously migrated to northern industrial centers and continued to—sometimes violently—resist white social domination.

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[108] Khalil Gibran Muhammad, *The Foundational Lawlessness of the Law Itself: Racial Criminalization & the Punitive Roots of Punishment in America*, DAEDALUS, Winter 2022, at 107, 110.

[109] Hutchinson, *supra* note 32, at 48.

[110] *See* MILLS, *supra* note 66, at 73, 84-85.

[111] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 477-78 (1966) ("It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."); California v. Hodari D., 499 U.S. 621, 627 (1991) ("Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we presume, will be without adequate basis . . . ."); *see also* I. Bennett Capers, Essay, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 662-66 (2018) (discussing the pervasiveness of "good citizenship" and obedience in criminal law jurisprudence).

[112] Charles Sumner, The Equal Rights of All, Speech in the Senate on the Proposed Amendment Fixing the Basis of Representation (Feb. 5-6, 1866), *in* 10 THE WORKS OF CHARLES SUMNER 115, 129 (Boston, Lee and Shepard 1874).

[113] FONER, *supra* note 106, at 203; *see also* HARTMAN, *supra* note 18, at 120 (discussing how debt-peonage, indebtedness, and obligation relegated the laboring black body to being a medium for others' power and representation during Reconstruction).

B. *Antiresisting Laws Were Broadened To Criminalize Resisting Unlawful Arrest as Part of the Punitive Frontlash Against Racial Change and Black-Led Uprisings of the 1960s*

This Section utilizes political scientist Vesla Weaver's "frontlash" theory to examine the dominative, elite-led project of criminalizing resistance to unlawful arrest amid the Great Migration, the Civil Rights Movement, and the largely black-led urban uprisings of the 1960s.[114] It also illuminates how legitimizing myths about black criminality were implicated in elites' early calls to criminalize resistance to unlawful arrest. In short, implicit biases against black people worked in tandem with opportunistic social-dominance-oriented advocates and policymakers to realize this novel proscription. This partial racial contextualization reveals how antiblackness has played a role in the formation of antiresisting laws.

In her article, *Frontlash: Race and the Development of Punitive Crime Policy*, Weaver provides a framework for understanding the rapid, policy-driven increases in incarceration and policing in the mid-to-late twentieth century.[115] Specifically, Weaver troubles the contention that crime came to dominate the domestic political agenda solely as a result of populist backlash against urban uprisings and perceptions of exceptionally high black crime rates.[116] Instead, Weaver argues that, well before this populist backlash, various elites had been proactively, preemptively, and strategically formulating a political and social discourse connecting crime to racial change; hence, "frontlash."[117]

Conservative issue entrepreneurs—smarting from the loss of northern white neighborhoods to southern black migrants and the expansion of civil rights protections afforded to black people—connected urban crime to the end of de jure racial segregation and the intensification of black people's demands for an end to white social dominance.[118] As great numbers of black people engaged in urban uprisings amid artificially inflated perceptions of urban crime, these issue entrepreneurs successfully framed racial disorder as a crime problem.[119] This reframing was pivotal in the passage of myriad punitive pieces of legislation that resulted in larger, more militarized police forces and ballooning,

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[114] *See generally* Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230 (2007).

[115] *See id.* at 236-37.

[116] *See id.* at 232 (discussing popular sociology theories on crime and drug policy that came to prominence as a result of the upheaval of race relations in the 1960s).

[117] *See id.* at 236.

[118] *See id.* at 242 (recounting that cities like Philadelphia and Rochester were considered "victims of their own generosity" for opening their neighborhoods to southern blacks). Weaver does not factor the Great Migration into her analysis, but I do here, in part, because the idea of "southern migrants as troublesome" was instrumental in the ascendency of racial criminalization. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS 206-21 (2019) (discussing how the scapegoating of black migrants helped fuel white mob attacks and the disparate criminalization of black people in Philadelphia following World War I).

[119] *See* Weaver, *supra* note 114, at 244 ("A *U.S. News and World Report* headline captured well the contention that emerged with force: 'Race Friction-Now a Crime Problem?'").

disproportionately black incarcerated populations serving lengthy prison sentences.[120]

Among the policy changes that came out of this frontlash were statutes and judicial decisions that, for perhaps the first time in Anglo-American law, criminalized resistance to unlawful arrests.[121] The concerted, collaborative project to criminalize resisting unlawful arrest likely began in the 1940s, as masses of southern black migrants poured into northern cities.[122] But this project did not gain serious traction until after the largely black-led urban uprisings of the mid-to-late 1960s.[123] These uprisings, along with inflated perceptions of black criminality, primed vast swaths of civil society to accept or encourage an escalation of policing and the persecution of resistance thereto.[124]

1. Origins of the Right To Resist Unlawful Arrest

Before examining this policy shift, we must first understand the origins of the right to resist an unlawful arrest. One of the earliest known cases at common law regarding resistance to capture and policing is *The Queen v. Tooley*[125] (1710). This case arose out of an altercation in London between three men, a constable, and the constable's assistant.[126] After the constable arrested a woman, Anne Dekins, on suspicions of her being a "disorderly person," he was accosted by three men armed with swords.[127] In response, the constable showed his credentials to the men, who then permitted the constable to take the woman to a carceral facility in the area.[128] The men then endeavored to free the woman from the carceral facility.[129] As they assaulted the constable, the constable's assistant came to the constable's aid, at which point one of the men fatally wounded the constable's assistant.[130] Importantly, the constable had neither a warrant for the

[120] *See id.* at 234 & fig.1 (looking at historical carceral trends); *id.* at 243-44 (discussing increasing federal funding of local police); *id.* at 249 (discussing the emergence of federal crime policy and abandonment of pro-state sentiments from conservatives following their lost fight against civil rights legislation); *id.* at 260 (noting three-strike rule and mandatory minimums).

[121] *See infra* notes 200-31 and accompanying text.

[122] *See infra* Section II.B.2.

[123] *See infra* Section II.B.3.

[124] *See infra* Section II.B.3.

[125] (1710) 92 Eng. Rep. 349; 2 Ld. Raym. 1296; *see also* Andrew P. Wright, *Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?*, 46 DRAKE L. REV. 383, 385 (1997) (discussing the origins of the common-law right to resist an unlawful arrest); Kindaka Sanders, *A Reason to Resist: The Use of Deadly Force in Aiding Victims of Unlawful Police Aggression*, 52 SAN DIEGO L. REV. 695, 717-18 (2015) (discussing the history of the "provocation justification").

[126] *Tooley*, 92 Eng. Rep. at 349-50.

[127] *Id.*

[128] *Id.* at 350.

[129] *Id.*

[130] *Id.*

woman's arrest nor jurisdiction in the municipality where he arrested her.[131] The question on appeal was whether the three men acted with the malice required for them to be found guilty of murder, or were instead sufficiently provoked by the constable's unlawful arrest for them to be only guilty of manslaughter.[132] The court found that the unlawfulness of the arrest was sufficient provocation to mitigate the homicide to manslaughter.[133]

After the Revolutionary War, jurists in the United States continued to recognize the common law right to resist an unlawful arrest. Many antebellum judicial opinions regarding resistance to arrests are similar to *Tooley* in that they focus on whether the arrest in question was unlawful, and the resistance thereto justified. Indeed, these cases show a surprising amount of accommodation for resistance to arrest. For instance, in *State v. Curtis*[134] (1797), a man who "beat" a law enforcement officer was acquitted of any criminal wrongdoing because the arresting officer did not inform him as to why the officer was arresting him, and the warrant for his arrest did not have the requisite seal.[135]

In *State v. Hooker*[136] (1845), a man who was convicted of "beat[ing] wound[ing] and ill-treat[ing]" an arresting officer was granted a new trial because the officer unlawfully broke into the man's home.[137] The accused person in *Drennan v. People*[138] (1862) actually drew his pistol on the officer who tried to arrest him and thereafter was convicted of assault.[139] But, nonetheless, the accused person was granted a new trial because the officer did not inform him of the facts or offense for which he was being arrested and, as a result, the accused person may have believed that he was resisting an unlawful arrest.[140] None of the accused people in these cases are described as "slaves" or "blacks," which supports an inference that they were all white people; although it is within the realm of possibility that some were not white.

2. Early Calls To Criminalize Resisting Unlawful Arrest Amid the Great Migration and Civil Rights Movement

From 1916 through 1929, nearly 1.5 million black southerners migrated to northern cities.[141] According to historian James R. Grossman, "New York's black population grew from 91,709 in 1910 to 152,467 in 1920; Chicago's, from

[131] *Id.* at 351.

[132] *Id.* at 352.

[133] *Id.* ("[I]f one be imprisoned upon an unlawful authority, it is sufficient provocation . . . , and where liberty of the subject is invaded, it is a provocation to all the subjects of England.").

[134] 2 N.C. (1 Hayw.) 471 (1797).

[135] *Id.* at 471.

[136] 17 Vt. 658 (1845).

[137] *See id.* at 660, 664-65.

[138] 10 Mich. 169 (1862).

[139] *Id.* at 171.

[140] *Id.* at 177 ("[D]efendant . . . might well believe he was resisting an illegal arrest, and lawfully defending his liberty.").

[141] JAMES R. GROSSMAN, LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION 3-4 (1989).

44,103 to 109,458; Detroit's small black community of 5,741 in 1910 mushroomed to 40,838 in a decade."[142] W.E.B. Du Bois provided three reasons for this mass migration.[143] First, black agricultural workers moved north to seek economic opportunities amid the devastation the boll weevil caused southern crop yields.[144] Second, northern industry needed black migrant labor to take jobs that would have otherwise gone to European immigrants who were not allowed to immigrate due to World War I.[145] And third, southern black people were fleeing white mob violence.[146] Indeed, terror lynchings peaked between 1880 and 1940, with at least 4,084 such lynchings occurring in twelve southern states from 1877 to 1950.[147]

Despite northern industry needing black labor, many southern black arrivals faced new forms of precarity in the North.[148] Federal and state governments colluded with the banking and real estate industries to confine black people to crowded, segregated neighborhoods.[149] White vigilantes also enforced racial residential borders. For example, from 1917 to 1921, there were fifty-eight firebombings of black-owned homes in and around white Chicago neighborhoods.[150]

While many blacks in white neighborhoods were subjected to criminal acts of violence, blacks in segregated black neighborhoods were being cast as incorrigible criminals. As Khalil Gibran Muhammad observes, "[B]lack crime statistics and migration trends in the 1890s, 1900s, and 1910s were woven together into a cautionary tale about the exceptional threat black people posed to modern society."[151]

Subsequently, racial justice advocates raised awareness of police brutality, racial disparities in arrest and incarceration, and the dubiousness of black crime statistics.[152] But the "civil rights critique of racial criminalization did not dissolve the link between race and crime" in the 1920s and 1930s.[153] The

[142] *Id.* at 4.

[143] W.E.B. Du Bois, *The Migration of Negroes*, CRISIS, June 1917, at 63, 63-65.

[144] *Id.* at 63.

[145] *Id.* at 63-64.

[146] *Id.* at 65.

[147] *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE (2017), https://lynchinginamerica.eji.org/report/ [https://perma.cc/MMX9-KJM2].

[148] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

[149] *See id.* at 59-67 (describing how the federal government insured bank mortgages in white suburbs but not urban black neighborhoods); *id.* at 44 (describing local racial zoning ordinances designed to separate or expel black families).

[150] *Id.* at 144.

[151] MUHAMMAD, *supra* note 118, at 7.

[152] *See id.* at 12.

[153] *Id.*

pathologization of blackness was a potent tool for the excluding blacks from—and controlling blacks in—Great Migration destinations.

In her article, *The Constitution of Police Violence*, Alice Ristroph notes, "Like almost every aspect of the American criminal justice system, the right to resist unlawful arrest was shadowed by race."[154] Ristroph cites two cases involving black people who violently resisted unlawful arrests.[155] In *State v. Francis*[156] (1929), six black men were convicted of murder for killing a white police officer who was attempting to make an unlawful arrest; their conviction was affirmed on appeal based on the factfinder's conclusion that the men had used disproportionate force in thwarting the unlawful arrest at issue.[157]

Conversely, in *Jones v. State*[158] (1934), the appellate court reversed the murder conviction of a black man named Robert Jones and remanded for a new trial.[159] At the trial court, Jones had been convicted of murder for killing a constable.[160] Prior to the killing, the constable had detained Jones's siblings, threatened to kill them, and unlawfully searched Jones's house.[161] The appellate court held that Jones was entitled to a new trial and a jury instruction on the right to resist an unlawful arrest.[162] Alluding to this case, Ristroph remarks, "[I]t is striking to see, in southern states during the era of Jim Crow, that courts at least sometimes recognized and accommodated violent resistance by black Americans against law enforcement officers."[163]

While Ristroph briefly describes—and rightfully impugns—the subsequent proliferation of laws prohibiting resistance to unlawful arrest, she does not detail how antiblackness informed this wave of prohibitions against resistance—or how the effort to criminalize resistance to unlawful arrest arguably began in 1935, a year after Jones was granted a new trial.[164]

That year, the Interstate Crime Commission ("ICC") was established by the federal and state governments with the mandate of "overcoming loopholes in criminal laws which worked to the advantage of the criminal and against the interest of our society."[165] Courts still generally recognized the right to resist an unlawful arrest when, in 1940, a study conducted by Harvard Law Professor

[154] Ristroph, *supra* note 54, at 1232.

[155] *Id.* at 1232 n.204.

[156] 149 S.E. 348 (S.C. 1929).

[157] *See id.* at 355-56.

[158] 155 So. 430 (Miss. 1934).

[159] *Id.* at 430.

[160] *Id.*

[161] *Id.*

[162] *Id.* at 432.

[163] Ristroph, *supra* note 54, at 1232 & n.203.

[164] *See id.* at 1232-35.

[165] INTERSTATE COMM'N ON CRIME, THE HANDBOOK ON INTERSTATE CRIME CONTROL 12 (4th prtg. 1942).

Sam Bass Warner, under the auspices of the ICC, urged states to criminalize such resistance.[166]

The Handbook on Interstate Crime Control ("Handbook"), produced by the ICC in 1942, contains two references to black people, both of which reveal how antiblackness informed the ICC project.[167] First, in the section recommending stricter gun laws, the author, Sam Bass Warner, traces the history of punitive gun control back to legal authorities from the nineteenth century, including "early statutes against slaves and negroes having firearms."[168] Hence, Warner knew that punitive gun laws—that is, criminal laws that punish gun possession—had previously been used as a means of fortifying white social dominance over black people.

Specifically, Warner cites *State v. Hannibal*,[169] a case in which two enslaved black people were found guilty of unlawfully possessing guns.[170] Despite being provided said guns by their slaver for the purpose of protecting his property, the men were sentenced to receive twenty lashes.[171] Warner's explicit invocation of gun control slave codes suggests that part of Warner and the ICC's intention in recommending punitive gun control may have been to erode the defensive or offensive capacity of blacks qua blacks, in the tradition of antebellum legislatures and judiciaries that prevented blacks from carrying arms and postbellum whites who stripped black people, including black Union veterans, of their arms.[172]

Second, the ICC suggests that black southern migrant families are inadequate to the point of being criminogenic. In a section of the Handbook discussing crime prevention measures, the ICC details what it believes to be the drivers of crime in the United States.[173] Here, the ICC states that "those who work with

[166] *See* Sam Bass Warner, *Investigating the Law of Arrest*, 26 A.B.A. J. 151, 154 (1940) [hereinafter Warner, *Investigating the Law of Arrest*].

[167] *See generally* INTERSTATE COMM'N ON CRIME, *supra* note 165.

[168] Sam Bass Warner, *The Uniform Pistol Act*, 29 J. CRIM. L. & CRIMINOLOGY 529 (1938) [hereinafter Warner, *The Uniform Pistol Act*], *reprinted in* INTERSTATE COMM'N ON CRIME, *supra* note 165, at 115-25, 126 n.4 (1942) (discussing suggested changes to pistol laws, including a presumption of criminality in those carrying pistols).

[169] 51 N.C. 57 (1858).

[170] *Id.* at 58-60; Warner, *The Uniform Pistol Act*, *supra* note 168, at 115 n.4.

[171] *Hannibal*, 51 N.C. at 58-59.

[172] *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880, at 689 (The Free Press 1998) (1935) (discussing white militias "disarming the Negroes" during Reconstruction); Nicholas Johnson, *The Arming and Disarming of Black America*, SLATE (Feb. 10, 2018, 7:00 AM), https://slate.com/human-interest/2018/02/what-reconstruction-and-its-end-meant-for-black-americans-who-had-fought-for-the-right-to-keep-and-bear-arms.html [https://perma.cc/AM25-86HC] (listing various post-Civil War statutes disarming black Americans).

[173] INTERSTATE COMM'N ON CRIME, *supra* note 165, at 150-53 ("Generally speaking, delinquency and crime result from [a child's]: (1) lack of proper environment conducive to a healthy development of the individual; (2) lack of proper parental care; (3) lack of satisfactory education; (4) idleness; (5) lack of religious training.").

large groups of children in our urban communities, even in small agricultural communities, are well aware of the inadequacies of negro parents, particularly those who are transplanted from rural areas to our large cities."[174] In other words, the ICC posits that black southern migrant parents are categorically unfit, and that their children resort to crime due, in part, to the cultural depravity of black migrants. The claim that black migrant families are categorically incorrigible constitutes a legitimizing myth. Specifically, this myth is crafted in a manner that undergirds the white social dominance facilitated by the ICC's punitive recommendations.[175]

Warner also led the ICC committee that crafted the Uniform Arrest Act ("UAA"), which, inter alia, calls for the elimination of the centuries-old right to resist an unlawful arrest.[176] Warner's article, *Investigating the Law of Arrest* (1940), prefigures the ICC's recommendation to criminalize resisting unlawful arrest.[177] In his article, Warner candidly states that during his time accompanying law enforcement officers on patrol in Boston, Chicago, Los Angeles, San Francisco, and Portland, he found that "[p]olice officers often make illegal arrests."[178] But Warner's prescription for remedying this problem is not to reduce contact between police and potential victims of unlawful arrest. Instead, Warner advocates for liberalizing the laws of arrest so that much of police officers' then-unlawful actions (such as stopping and frisking people without probable cause to arrest) would be permitted as lawful police practices.[179]

A real-life example of the theretofore unlawful police practices Warner sought to legalize is revelatory of the racially dominative motivations of Warner and the ICC. Warner explains that during one of his ride-alongs with law enforcement, "[W]e got a radio call that a negro with a gun was in a certain saloon. We lined up all the negro customers, 'frisked' them and arrested those whom we found illegally armed."[180] At the time, the law permitted a police officer to conduct such searches, or "frisks," only pursuant to a search warrant or incident to an arrest supported by probable cause.[181] While Warner notes that the search of the black people at the bar—which was neither pursuant to a search warrant nor supported by probable cause—was contrary to the legal rule limiting police searches, he frames this law as antiquated, in part, because "[t]he legal rule antedates hoodlums with four-inch pistols."[182]

The reader is left to infer that the "hoodlums" Warner references are the blacks at the bar with guns, even though Warner does not say that any of the

[174] *Id.* at 152.

[175] *See id.*

[176] *See* INTERSTATE COMM'N ON CRIME, *supra* note 165, at 86-87.

[177] Warner, *Investigating the Law of Arrest*, *supra* note 166, at 154.

[178] *Id.* at 153-54 ("I observed very few police practices that did not seem to have a good deal of practical justification, but a large number that were illegal.").

[179] *See id.* at 153, 155.

[180] *Id.* at 153.

[181] *Id.*

[182] *Id.*

blacks searched by the officers were suspected of committing a property or violent crime prior to the searches. The only putative crime reported was being a black person with a gun at a bar. On this basis alone, the police officers subjected all of the bar's black patrons to searches, and arrested those whose possession of a gun was deemed unlawful for some unstated reason. Having recognized the unlawfulness of these specific searches, Warner says the police officers "did the decent thing" by not arresting the "unarmed negroes."[183] But he also says that a court could find circumstances surrounding the unlawful searches to be "sufficient[ly] suspicious . . . to justify an arrest."[184] Warner argues that police officers should be able to conduct searches, even when they do not have probable cause to believe that the person searched is committing or has committed a crime, because police officers "cannot both follow [the law] and protect the public" so long as such searches are prohibited.[185]

Not only does Warner seek to legalize theretofore unlawful police practices, but he also recommends that people subjected to said practices be stripped of their right to resist unlawful arrests. In his article, *The Uniform Arrest Act* (1942), Warner again evokes the racially coded "hoodlum" trope to justify his and the ICC's recommendation to eradicate the right to resist an unlawful arrest.[186] Specifically, Warner argues that, in light of the fact that police officers at the time were known to be armed with guns, as opposed to "staves and swords," the only people likely to resist unlawful arrests are "gun-toting hoodlum[s] or gangster[s,] . . . the enemies of society."[187] No empirical evidence is offered in support of this argument. Instead, Warner ostensibly relies on the reader's commonsense and deference to his apparent expertise. Tellingly, Warner makes no mention of having seen a single act of resistance during his ride-alongs with various law enforcement officers.

Warner also argues that "an officer encountering resistance is foolhardy to wait and weigh nicely [an act of resistance's] exact nature and extent."[188] But the same is not said of the black bar patrons unlawfully detained and searched by gun-toting police officers. Unlawfully detained black people are expected to surrender their bodies to a police officer who, according to Warner, "will not desist from attempting to make an arrest, if he thinks he is in the right, and, as

[183] *Id.*

[184] *Id.*

[185] *Id.* at 155. In 1968, the Supreme Court cited Warner in its decision permitting law enforcement officers to frisk people under investigation without probable cause for an arrest, provided the officers have a reasonable apprehension that the person frisked poses a dangerous threat. Terry v. Ohio, 392 U.S. 1, 11 n.3 (1968) (citing Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 333 (1942) [hereinafter Warner, *The Uniform Arrest Act*]).

[186] Warner, *The Uniform Arrest Act*, *supra* note 185, at 333.

[187] *Id.* at 330-31 (arguing that resistance to unlawful arrest may rightfully be permitted when the arrester is a civilian, but not when the arrester is a police officer).

[188] Warner, *Investigating the Law of Arrest*, *supra* note 166, at 154.

he always carries a pistol, he is in a position to make his will effective."[189] Warner gives no consideration to the frighteningly vulnerable position of a black person being racially profiled and unlawfully searched or captured by an armed agent of the state.

Warner's invocation of armed black bar patrons in service of his argument against the right to resist unlawful arrests reveals the antiblack, socially dominative motivation of his argument. Warner's invocation of race tacitly invokes the racial hierarchy of white-over-black. Warner's overwhelmingly white audience is thereby reminded of the need to reproduce the white social dominance of blacks, especially armed blacks, partly through racially subordinating policing. The "gun-toting hoodlum" trope offered in close proximity to the invocation of race forms a myth legitimizing white social dominance reinscribed by punishing black people for resisting even unlawful arrest.

Some details about Warner's background reveal how his positionality may have informed his recommendations and the weight given to them by the ICC and, decades later, policymakers around the nation. In 1889, Warner was born to a white family in Chicago, where the black population more than doubled during his young adulthood.[190] Warner received undergraduate and law degrees from Harvard, where he eventually joined the law faculty and wrote mostly on criminal law.[191] Harvard is located in the Boston metropolitan area, which, like Chicago, was a destination for southern black migrants.[192]

Warner came of age in Chicago and Boston during a time in which black migrants were increasingly perceived as inherently criminal. For example, in 1914, John Daniels—Harvard fellow and Secretary of the Baltimore Social Service Corporation[193]—described the migration of southern black people as "the cumulative influx into [Boston] of great migrations of raw and uncouth Negro[es]."[194] Further, Daniels opined, "The Negro's disproportionate

[189] *Id.*

[190] *See Sam Bass Warner, 1945-1951*, COPYRIGHT.GOV, https://www.copyright.gov/about/registers/warner/warner.html [https://perma.cc/4A57-JMBZ] (last visited Jan. 18, 2023); *see also* GROSSMAN, *supra* note 141, at 3-4.

[191] *Sam Bass Warner, 1945-1951*, *supra* note 190; *see, e.g.*, SAM BASS WARNER, CRIME AND CRIMINAL STATISTICS IN BOSTON 3-18 (1934) (reporting on the prevalence of crime in Boston in the 1920s and 1930s, broken down by crime type and Boston neighborhood); Warner, *The Uniform Arrest Act*, *supra* note 185, at 324-26 (arguing that the laws dictating police search and arrest procedures should be loosened to protect police officers in modern society); Sam Bass Warner, *Crimes Known to the Police—An Index of Crime?*, 45 HARV. L. REV. 307, 327-31 (1931) (describing the prevalence of incorrect crime statistics and the historical and political reasons for artificially lowering crime reporting numbers).

[192] ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 182 (2010).

[193] JOHN DANIELS, IN FREEDOM'S BIRTHPLACE: A STUDY OF THE BOSTON NEGROES, title page (1914).

[194] *Id.* at 407 (arguing that the behaviors of Boston's black migrants caused white people in Boston to view black people negatively); *see also* MUHAMMAD, *supra* note 118, at 136 (criticizing the attitudes of white people toward black migrants and pointing out that these assertions are based on prejudice and blatant racism).

commission of crime and his flagrant sexual laxity are but two of the most obvious outcroppings of a generally discernible moral and ethical undevelopment, by which he is characterized."[195] Meanwhile, according to one historian, "white people generalized that all blacks were vicious and criminal" during Warner's youth.[196] Chicago law enforcement officers and courts were likely to "arrest Negroes more freely than whites, to book them on more serious charges, to convict them more readily, and to give them longer sentences."[197]

While some prominent experts and policymakers attributed crime among white ethnic immigrants to socioeconomic factors, crime in black urban neighborhoods was cast as a pathological defect of character.[198] Hence, Warner may have been steeped in antiblack myths of inherent, exceptional black criminality. These racist beliefs that black people were inveterate criminals may have informed Warner's recommendations to expand police powers and eliminate the right to resist unlawful arrests.

Warner and the ICC's racially tinged recommendations are emblematic of the frontlash against racial change. Specifically, these recommendations illustrate how disgruntled white elites were "formulating discourse or strategizing" on how to maintain white social dominance and black subordination well before the punitive measures they proposed had a groundswell of white populist support.[199]

Regardless of Warner and the ICC's intent, states did not readily adopt their recommendation to criminalize resisting unlawful arrest. In the seventeen years after the ICC first called for prohibiting such resistance, only four states criminalized resisting unlawful arrest: California (1957), Delaware (1951), New Hampshire (1955), and Rhode Island (1956).[200] In the following decade, no other legislature voted to prohibit this resistance. Thus, the drive to criminalize resisting unlawful arrest did not initially appear to have a groundswell of popular support. Still, the elite proponents of criminalizing such resistance were undeterred.

Seismic racial changes continued to occur during the years following the publication of the Handbook.[201] As black southerners continued to migrate to industrial cities in large numbers, the Supreme Court rendered its decision in *Shelley v. Kraemer*[202] (1948), holding that state courts could not enforce racially restrictive covenants.[203] Up to that point, real estate developers—insured by the

[195] DANIELS, *supra* note 193, at 403.

[196] FLORETTE HENRI, BLACK MIGRATION: MOVEMENT NORTH, 1900-1920, at 261 (1975).

[197] MUHAMMAD, *supra* note 118, at 240 (quoting CHI. COMM'N ON RACE RELS., THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT 329 (1922)) (explaining how black crime data was more voluminous than white crime data, partly due to police officers' and courts' racial animus toward black people).

[198] MUHAMMAD, *supra* note 118, at 19.

[199] Weaver, *supra* note 114, at 238.

[200] *See* sourced cited *infra* note 251.

[201] *See generally* INTERSTATE COMM'N ON CRIME, *supra* note 165.

[202] 334 U.S. 1 (1948).

[203] *Id.* at 22-23.

Federal Housing Authority—often placed racially restrictive covenants on their properties, which effectively excluded black people from certain neighborhoods.[204] Later, in 1954, the Court delivered a fatal blow to de jure segregation in *Brown v. Board of Education*,[205] declaring that, "in the field of public education the doctrine of 'separate but equal' has no place."[206]

It was in this context that the American Law Institute ("ALI") published the proposed official draft of the Model Penal Code ("MPC") in 1962, two decades after the publication of the ICC's Handbook.[207] Like the ICC's Handbook, the ALI's MPC was the product of an endeavor by elites to influence the administration and execution of criminal laws. The ALI was founded by a group of elite judges, lawyers, and law professors "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work."[208] The MPC's chief reporters, Herbert Wechsler and Louis B. Schwartz, were both, like Warner, white law professors at Ivy League law schools who were born in northern destinations of southern black migrants.[209] Wechsler, born in New York in 1909, was a professor at Columbia Law School; Schwartz, born in Philadelphia in 1913, was a professor at the University of Pennsylvania Law School.[210] Wechsler "had become 'conservative' on constitutional criminal procedure by the time he served as the Director of the ALI, perhaps because of civil disorders and student demonstrations."[211]

Under Wechsler and Schwartz's tutelage, the MPC adopted the ICC's recommendation to criminalize resisting unlawful arrest. Specifically, the MPC proscribes "resist[ing] an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful."[212] While there is no commentary in the 1962 MPC draft, the drafters were undoubtedly aware of Warner's prior recommendation to criminalize resisting unlawful arrest, as they cited him in their 1958 commentary on the general principles of justification.[213] The authors

[204] ROTHSTEIN, *supra* note 148, at 90.

[205] 347 U.S. 483 (1954).

[206] *Id.* at 495.

[207] MODEL PENAL CODE ii-xii (AM. L. INST., Proposed Official Draft 1962).

[208] REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR THE IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF AN AMERICAN LAW INSTITUTE 41 (1923); *see The Story of ALI*, AM. L. INST., https://www.ali.org/about-ali/story-line/ [https://perma.cc/RYU6-BLTM] (last visited Jan. 18, 2023) (describing the formation of the ALI and its activities throughout the years).

[209] MODEL PENAL CODE, *supra* note 207, at v; Tamar Lewin, *Herbert Wechsler, Legal Giant, Is Dead at 90*, N.Y. TIMES (Apr. 28, 2000), https://www.nytimes.com/2000/04/28/us/herbert-wechsler-legal-giant-is-dead-at-90.html; Paul Lewis, *Louis B. Schwartz, Legal Scholar, Dies at 89*, N.Y. TIMES (Feb. 9, 2003), https://www.nytimes.com/2003/02/09/us/louis-b-schwartz-legal-scholar-dies-at-89.html.

[210] Lewin, *supra* note 209; Lewis, *supra* note 209.

[211] Marc Spindelman, *Yale*, 102 MICH. L. REV. 1747, 1748 n.11 (2004).

[212] MODEL PENAL CODE, *supra* note 207, § 3.04(2)(a)(i).

[213] MODEL PENAL CODE § 3.04(2) n.9 (AM. L. INST., Tentative Draft No. 8, 1958).

of this tentative draft also knew that the overwhelming majority of states had not criminalized resisting unlawful arrest as of 1958.[214] Whereas Warner had failed in gaining mass state legislative support for criminalizing resistance to unlawful arrest, he had succeeded in persuading his fellow northern-born, white legal elites, as is evidenced by the MPC's call to prohibit such resistance.

Conditions on the ground soon became more favorable for the decades-long, elite-led initiative to criminalize resisting unlawful arrest. Large numbers of white people fled northern cities for suburban areas, leaving behind ever-growing black populations that faced diminished employment opportunities, extreme segregation, and poverty.[215] During this time, black residents were subjected to what historian Elizabeth Hinton describes as "exhaustive and often antagonistic patrol on a daily basis, [and the constant threat of] police violence."[216] During the 1960s, masses of black people decided they could no longer countenance such racially subordinating policing.

3. The Proliferation of Prohibitions Against Resisting Unlawful Arrest During and After Black-Led Uprisings

As Hinton explains, "With Jim Crow's 'separate but equal' principle destabilized, the African American protest movement flourished, using direct-action tactics, petitions, and class-action lawsuits to demand an end to racial inequality."[217] Black people's discontent with their subordinated plight and police violence boiled over into the many black-led urban uprisings of the mid-to-late 1960s.[218]

In 1964, a New York police officer's murder of a high school student sparked an uprising in Harlem that lasted for six nights.[219] A year later, in the Los Angeles neighborhood of Watts, a days-long, black-led uprising was sparked by California Highway patrolmen's beating of Rena Price, a black woman, and her two sons.[220] In all, mass uprisings occurred in over 250 cities during the 1960s, including Philadelphia, Chicago, and New York.[221]

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[214] *Id.* (mentioning only New Hampshire and Rhode Island as abolishing the right to resist unlawful arrest).

[215] ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 29, 67 (2016) [hereinafter HINTON, FROM THE WAR ON POVERTY].

[216] *Id.* at 110.

[217] *Id.* at 11.

[218] *Id.* at 12.

[219] *Id.* at 55 (explaining that the murder occurred just weeks after the Civil Rights Act of 1964 was signed into law).

[220] *Id.* at 67-70 (recounting the governor of California's response to the black uprising as "guerrilla fighting with gangsters").

[221] ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S, at 313-28 (2021) [hereinafter HINTON, AMERICA ON FIRE] (listing location and duration of black rebellions in 1964 or later).

With anxiety about urban collective violence at a feverish pitch, the conditions were ripe for the ascension of an elite-led frontlash, in which, as Weaver puts it, "formerly defeated groups . . . bec[a]me dominant issue entrepreneurs in light of the development of a new issue campaign."[222] That is, northern and southern conservatives who lost the battle to preserve de jure racial segregation came to dominate the domestic policy agenda, in part, by "attach[ing] civil rights to lawlessness by arguing that civil disobedience flouted laws and would inevitably lead to more lawless behavior."[223] In doing so, they capitalized on the racial resentment harbored by white masses who were "offended by claims of racism and racial discrimination" and felt that "attempts to present race as a rationale for social problems, inequality, or celebration [were] invalid and unfair."[224]

Liberals largely responded to widespread anxiety about—and resentment of—the uprisings by falling in line with proponents of intensified policing and harsher criminal punishment.[225] According to Hinton, a consensus was forged between "liberals and conservatives who privileged punitive responses to urban problems as a reaction to the civil rights movement."[226] This bipartisan, punitive campaign was wildly successful in passing a series of legislative acts that dramatically increased federal funding for more local police officers, militarization of police forces, and novel police operations designed to increase arrests in disproportionately black, resource-deprived communities.[227]

Amid this frontlash, the elite-led push to criminalize resisting unlawful arrest gained tremendous momentum. Calls to criminalize resisting unlawful arrest spread from the legal academy and found support in state legislatures and courts across the country.[228] Elites in various fora repeatedly invoked various legitimizing myths that undergird white social dominance; namely, that crime in black communities is rooted in pathology rather than structural antiblackness, and that post hoc judicial remedies are capable of remedying the harms of racially subordinating policing, which include the lawless capture of black bodies.[229]

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[222] Weaver, *supra* note 114, at 230.

[223] *Id.* at 247.

[224] Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 400-01 (2022) (quoting David C. Wilson & Darren W. Davis, *Reexamining Racial Resentment: Conceptualization and Content*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 121 (2011)).

[225] *See* HINTON, FROM THE WAR ON POVERTY, *supra* note 215, at 7-8.

[226] *Id.* at 8.

[227] *See, e.g.*, *id.* at 18-26.

[228] *See id.* at 82, 90-93.

[229] *See, e.g.*, Max Hochanadel & Harry W. Stege, Note, *Criminal Law: The Right To Resist an Unlawful Arrest: An Out-Dated Concept?*, 3 TULSA L.J. 40, 40, 49 (1966) (arguing for criminalizing resistance to unlawful arrest, in part, by eliciting images of civil rights protesters and black-led urban rebellions).

A year after the 1964 Harlem uprising, a state appellate court in nearby New Jersey took the extraordinary step of criminalizing resistance to unlawful arrest by judicial decree. In doing so, the court in *State v. Koonce*[230] stated,

> [I]t seems to us that an appropriate accommodation of society's interests in securing the right of individual liberty, maintenance of law enforcement, and prevention of death or serious injury not only of the participants in an arrest fracas but of innocent third persons, precludes tolerance of any formulation which validates an arrestee's resistance of a police officer with force merely because the arrest is ultimately adjudged to have been illegal.[231]

The court's allusion to an "arrest fracas" conjures images of both the 1964 Harlem uprising and the 1965 Watts uprising, which occurred a month before *Koonce* was decided. During the Watts uprising, police arrested over 4,000 people in connection with curfew violations alone.[232]

Such images are also conjured by the court's finding that "[t]he concept of self-help is in decline. It is antisocial in an urbanized society. It is potentially dangerous to all involved. It is no longer necessary because of the legal remedies available."[233] Here, the implication is that complete subservience to even unlawful acts of law enforcement is necessary to preserve the social fabric of the nation.

The acknowledged practice of police conducting unlawful arrests is not cast by the court as antisocial, but the "urban" (read: black) resistance thereto is.[234] The context surrounding the *Koonce* decision reveals its subtext: in light of black-led uprisings, police should be given free rein to capture whomever they will, regardless of the lawlessness of the capture. White-dominated elites' interest in controlling restive black populations took priority over black people's interest in being free from unlawful capture. In *Koonce*, the elite-led project to criminalize resisting unlawful arrest gained a significant victory.[235] Having scored victories in the academy and a few state legislatures, the project had now found success in a state appellate court.

A year after the *Koonce* decision was rendered, Max Hochanadel and Harry W. Stege called for criminalizing resistance to unlawful arrest in their 1966 law review article *Criminal Law: The Right To Resist an Unlawful Arrest: An Out-*

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[230] 214 A.2d 428 (N.J. Super. Ct. App. Div. 1965).

[231] *Id.* at 435-36.

[232] HINTON, FROM THE WAR ON POVERTY, *supra* note 215, at 70.

[233] *Koonce*, 214 A.2d at 436.

[234] *See. id.*

[235] *See id.*; *see also supra* notes 186-91 and accompanying text (discussing academic support for criminalizing resistance to unlawful arrests); *infra* notes 251-53 and accompanying text (discussing state laws criminalizing resistance to unlawful arrests).

Dated Concept?[236] They did so, in part, by attempting to draw a connection between black people's demands for civil rights and urban crime.[237]

Hochanadel and Stege begin the article by referencing black-led urban uprisings sparked by unlawful arrests:

> The recent "civil rights" demonstrations have brought into sharp focus some of the problems inherent in the law of arrest.In Los Angeles, in August, 1965, resistance to what the arrestee contended was an unlawful arrest triggered a three-day riot which cost the lives of 34 persons and loss of property estimated at 200 millions of dollars.In Rochester, New York, in 1964, rioting touched off by a purported unlawful arrest ended after full police authority had been brought to bear.[238]

Here, Hochanadel and Stege simultaneously call into question the sincerity of the participants in the unrest and connect said participants' actions to crime generally: "The 'civil rights' demonstrators are not alone in resistance to what they believe is unlawful arrest."[239] Placing civil rights in quotation marks calls into question the sincerity of the demonstrators' demands; it implies that demonstrators seek to cause havoc and disorder under the guise of civil rights.

The phrase "what they believe is unlawful arrest," however, tacitly concedes that participants in uprisings sincerely believe arrests precipitating the uprisings are unlawful.[240] Still, by not describing the arrests in question as simply "unlawful arrests," and instead calling them "purported unlawful arrest[s]," the reader is left to infer that demonstrators' claims of injustice are questionable.[241] There is no mention of race, racial profiling, or segregation in the article.[242] Thus, Hochanadel and Stege attempt to create the impression that the unrest was not a justifiable practice of resistance to racially subordinating conditions and policing, but is instead pure criminality under the guise of civil rights.

Instead of arguing for eradicating the harms animating the resistance by, inter alia, reducing contact between black communities and police officers who are wont to conduct unlawful arrest, Hochanadel and Stege argue for criminalizing resistance to unlawful arrest as a means of "protect[ing] both the individual and the officer from injury or even death."[243] Further, they argue that criminalizing

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[236] Hochanadel & Stege, *supra* note 229, at 40. Hochanadel and Stege were law students when they published this note. *See id.* Notably, Hochanadel would go on to become a prosecutor and Stege a police chief. *Harry Stege*, TULSA POLICE OFFICERS' MEM'L, http://www.tpdmemorial.com/index.php?option=com_content&view=article&id=93:harry-stege&catid=36:trustees&Itemid=61 [https://perma.cc/A9S5-PA78] (last visited Jan. 18, 2023); *Maximilian Duane Hochanadel*, TRIBUTE ARCHIVE, https://www.tributearchive.com/obituaries/12611759/Maximilian-Duane-Hochanadel [https://perma.cc/5Z8U-LAEG] (last visited Jan. 18, 2023) (noting that Hochanadel worked as a prosecutor for two years at the Tulsa District Attorney's Office).

[237] Hochanadel & Stege, *supra* note 229, at 40.

[238] *Id.*

[239] *Id.*

[240] *See id.*

[241] *See id.*

[242] *See generally id.*

[243] *Id.* at 49.

resistance to unlawful arrest would not be unduly injurious if the person unlawfully arrested were afforded adequate procedural remedies after they are unlawfully arrested.[244]

Having acknowledged the role of unlawful arrests (or at least perceptions thereof) in precipitating black-led urban unrest, Hochanadel and Stege argue in favor of punishing people who resist unlawful arrests.[245] The inference to be drawn from their article is that black bodies seeking "civil rights" are to be dominated at the moment of capture and relegated to seeking relief on terms set by the white-dominated political and legal elites who control the post hoc legal process. Hochanadel and Stege's argument for criminalizing resistance to unlawful arrest is emblematic of the frontlash that Weaver posits.[246]

At a time in which the overwhelming majority of states still permitted resisting unlawful arrest, elites set on criminalizing such resistance seized on anxieties regarding black-led urban unrest, tied the unrest to black people's demands for civil rights, and used this purported connection to advance a host of punitive criminal reforms, including eliminating the right to resist unlawful arrest.

This strategy proved effective. After black-led uprisings in Chicagoland in 1965 and 1966, Illinois criminalized resisting unlawful arrest by 1968.[247] Similarly, the State of New York did so in March 1968, after black-led uprisings in 1964 and 1967.[248] Thus, before the wave of black-led urban uprisings sparked by the murder of Martin Luther King Jr. on April 4, 1968,[249] three of the top destinations for black southern migrants during the Great Migration—California, Illinois, and New York—had already criminalized resisting unlawful arrest.[250] Prior to 1969, only eight states had criminalized resisting unlawful

[244] *Id.*

[245] *See id.*

[246] *See supra* Section II.B.

[247] *See* HINTON, AMERICA ON FIRE, *supra* note 221, at 313; People v. Royer, 242 N.E.2d 288, 291 (Ill. App. Ct. 1968) (applying 720 ILL. COMP. STAT. ANN. 5/7-7); Linda Gartz, *Fatal Fire Truck Accident Sparked Riot in 1965*, CHI. TRIB. (Aug. 18, 2015, 12:12 PM), https://www.chicagotribune.com/news/ct-1965-firetruck-riot-watts-chicago-kerner-commission-flashback-per-0816-jm-20150814-story.html; 720 ILL. COMP. STAT. ANN. 5/7-7 (West 2022) (criminalizing resisting unlawful arrest).

[248] N.Y. PENAL LAW § 35.27 (McKinney 2022); *see also* REVOLTING NEW YORK: HOW 400 YEARS OF RIOT, REBELLION, UPRISING, AND REVOLUTION SHAPED A CITY 177, 182 (Erin Siodmak, JenJoy Roybal, Marnie Brady & Brendan P. O'Malley eds., 2018).

[249] In 1968 alone, there were 250 such uprisings. HINTON, FROM THE WAR ON POVERTY, *supra* note 215, at 14.

[250] *See* GROSSMAN, *supra* note 141, at 3-4; *see also* 1957 Cal. Stat. 3805-07 (criminalizing all forms of resisting arrest); 720 ILL. COMP. STAT. ANN. 5/7-7 (West 2022); N.Y. PENAL LAW § 35.27 (McKinney 2022); *Royer*, 242 N.E.2d at 291.

arrest.[251] But by the end of 1983, most other states had done so.[252] Today, thirty-three states and Washington, D.C., have criminalized resisting unlawful arrest.[253]

The successful campaign to criminalize resistance to unlawful arrest was not solely a part of the larger punitive response to the Civil Rights Movement and black-led urban uprisings. It was also the culmination of a decades-long, elite-led effort to maintain, if not increase, white social dominance of segregated urban communities by punishing people who resist unlawful arrests. Policymakers "opt[ed] to deploy militarized police forces in urban neighborhoods and to build more prisons instead of seeking to resolve the problems that caused the unrest in the first place."[254] Amid this milieu, the criminalization of resisting unlawful arrest became more attractive to policymakers and jurists around the nation, many of whom utilized legitimizing myths about black criminality to push measures designed to preserve white social dominance.

The prominent role of the legal academy in criminalizing resistance to unlawful arrest brings to mind what Fred Moten calls the "ubiquity of policy making, the constant deputisation of academic laborers into the apparatuses of

[251] *See* 1957 Cal. Stat. 3805-07; COLO. REV. STAT. ANN. § 18-8-103 (West 2022) (bill passed 1963); DEL. CODE ANN. tit. 11, § 1905 (West 2022) (bill passed 1951); 720 ILL. COMP. STAT. ANN. 5/7-7 (bill passed 1961); *Royer*, 242 N.E.2d at 291 (noting the criminalization of unlawful arrest in Illinois in 1968); N.H. REV. STAT. ANN. § 594:5 (2022) (bill passed 1941); United States v. Heliczer, 373 F.2d 241, 247 n.3 (2d Cir. 1967) (citing 1955 amendment to N.H. REV. STAT. ANN. § 594:5, which criminalized resisting unlawful arrest); State v. Koonce, 214 A.2d 428, 435-36 (N.J. Super. Ct. App. Div. 1965); N.Y. PENAL LAW § 35.27 (bill passed 1968); 12 R.I. GEN. LAWS ANN. § 12-7-10 (West 2022) (bill passed in 1956).

[252] *See* ARIZ. REV. STAT. ANN. § 13-404 (2022) (effective Oct. 1, 1978); ARK. CODE ANN. § 5-54-103 (West 2022) (bill passed 1975); CONN. GEN. STAT. ANN. § 53a-23 (West 2022) (effective Oct. 1, 1971); IOWA CODE ANN. § 804.12 (West 2022) (effective Jan. 1, 1978); KY. REV. STAT. ANN. § 520.090 (West 2022) (effective Jan. 1, 1975); MO. ANN. STAT. § 575.150 (West 2022) (effective Jan. 1, 1979); MONT. CODE ANN. § 45-7-301 (West 2022) (law enacted 1973); NEB. REV. STAT. ANN. § 28-1409 (West 2022) (codified 1975); N.D. CENT. CODE ANN. § 12.1-05-03 (West 2022) (bill passed 1973); OR. REV. STAT. ANN. § 162.315 (West 2022) (bill passed 1971); 18 PA. STAT. AND CONS. STAT. ANN. § 5104 (West 2022) (effective June 6, 1973); S.D. CODIFIED LAWS § 22-11-4 (2022) (bill passed 1976); TEX. PENAL CODE ANN. § 38.03 (West 2022) (effective Jan. 1, 1974); Miller v. State, 462 P.2d 421, 427 (Alaska 1969); Williams v. State, 311 N.E.2d 619, 621 (Ind. 1974); Commonwealth v. Moreira, 447 N.E.2d 1224, 1226-27 (Mass. 1983); State v. Hoagland, 270 N.W.2d 778, 780 (Minn. 1978); State v. Doe, 583 P.2d 464, 466-67 (N.M. 1978); State v. Peters, 450 A.2d 332, 335 (Vt. 1982); *see also supra* note 251.

[253] *See* D.C. CODE ANN. § 22-405.01 (West 2022) (effective June 30, 2016); KAN. STAT. ANN. § 21-5229 (West 2022) (effective July 1, 2011); ME. STAT. ANN. tit. 17-A, § 751-B (2022) (approved June 19, 2009); TENN. CODE ANN. § 39-16-602 (West 2022) (bill passed 1989); State v. Gardiner, 814 P.2d 568, 576 (Utah 1991); State v. Valentine, 935 P.2d 1294, 1303-04 (Wash. 1997); State v. Hobson, 577 N.W.2d 825, 838 (Wis. 1998) (noting it is lawful to resist unreasonable force); *see also* sources cited *supra* notes 251-52.

[254] HINTON, FROM THE WAR ON POVERTY, *supra* note 215, at 337.

police power."[255] Warner, Wechsler, and Schwartz all exerted academic labor to increase police power by advocating for punishing those who resist even unlawful capture at the hands of law enforcement.[256] In doing so, Warner invoked the specter of the inveterate black criminal, flooding cities and causing disorder in the name of civil rights.[257] The subtext of this invocation is that black bodies must be dominated. Moten describes these academic laborers as being "like night riders, paddy rollers, everybody's on patrol, trying to capture the ones who are trying to get out."[258] Warner went on patrol with police officers who racially profiled black people and committed unlawful arrests.[259] His response was to call for shielding said officers from the resistance of people being profiled and unlawfully arrested.[260] In turn, Warner was treated as an authority by later proponents of criminalizing resistance to unlawful arrests.[261]

The empowerment of police officers to arrest people for resisting unlawful arrest gives credence to Paul Butler's contention that "[t]he most far-reaching racial subordination stems not from illegal police misconduct, but rather from legal police conduct."[262] Today, most black people are still subjected to antiresisting laws rooted directly or indirectly in Warner's dominative reasoning. As a result, black people in most states are mandated to surrender their bodies to unlawful arrests and wait to seek relief in court.[263] Nevertheless, some black people still resist arrest. As Martin Luther King Jr. explained, "[W]hen you have seen hate filled policemen curse, kick, brutalize and even kill your black brothers and sisters with impunity[,] . . . then you will understand why we find it difficult to wait."[264]

This Section has used Weaver's theory of frontlash to illustrate how antiblackness informs the form of the antiresisting laws that criminalize resistance to unlawful arrest. The risk in highlighting the punishment of resisting enslaved black captives in Section II.A and resisting black people subjected to unlawful arrests in Section II.B is that the effect may be to merely evoke sympathy for innocent enslaved black captives and innocent black victims of

[255] STEFANO HARNEY & FRED MOTEN, THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY 120 (2013).

[256] *See supra* Section II.B.2.

[257] *See supra* notes 188-91 and accompanying text (discussing Warner's work).

[258] HARNEY & MOTEN, *supra* note 255, at 120.

[259] Warner, *Investigating the Law of Arrest*, *supra* note 166, at 153.

[260] *Id.* at 153, 155.

[261] INTERSTATE COMM'N ON CRIME, *supra* note 165, at 86 (noting Warner led the ICC).

[262] Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016).

[263] *See supra* notes 251-53 (cataloging state laws criminalizing resistance to unlawful arrests).

[264] Letter from Martin Luther King, Jr., to C.C.J. Carpenter, Bishop, Joseph A. Durick, Bishop, Milton L. Grafman, Rabbi, Nolan B. Harmon, Bishop, George H. Murray, Reverend, Edward V. Ramage, Reverend, Earl Stallings, Reverend 6-7 (Apr. 16, 1963) (Letter from Birmingham Jail).

unlawful arrests. The intention, however, is to reveal the fraught, racially dominative dimensions of antiresisting laws and enforcement, not to paint a picture of a sympathetic, innocent people in need of redress.

As Ruth Wilson Gilmore explains, "[T]o prove the innocence of those who have been or are enslaved for any purpose ought to play no role in the redress of slavery."[265] The same applies to those who have been subjected to criminogenic, structural racism and racially subordinating policing. The inquiry should not center on innocence or guilt, but instead on how law enforcement and the criminal punishment system compounds harms rather than eradicates them.

Further, regardless of race, people who commit crimes may be unlawfully arrested for crimes they did not commit. On the other hand, people who have not committed any crime may nevertheless be lawfully arrested if a police officer has probable cause to believe they committed or even attempted to commit a crime.[266] Hence the guilt/innocence dichotomy has diminished currency in the assessment of antiresisting laws. The next Section will reveal a final antiblack dimension of antiresisting laws, one that does not depend on claims to innocence: they require black people to surrender their bodies to modern racially subordinating policing.

C. *Antiresisting Laws Require Black People To Surrender Their Bodies to Racially Subordinating Policing*

Punishing black people for not surrendering their bodies to racially subordinating policing and criminal punishment is antiblack. Resisting arrest constitutes a practice of rebuffing racially subordinating policing, and antiresisting laws reinforce white social dominance by punishing this practice. Put differently, antiresisting laws require near-obsequiousness in the face of manifest, pervasive racial injustices meted out by the criminal punishment system and its law enforcement agents.

There is a bounty of research demonstrating that the criminal punishment system is—and has always been—a means of antiblack racial subordination.[267] Legislators have specifically fabricated crimes designed to incarcerate and

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[265] Ruth Wilson Gilmore, *Abolition Geography and the Problem of Innocence*, *in* FUTURES OF BLACK RADICALISM 235 (Gaye Theresa Johnson & Alex Lubin eds., 2017).

[266] *See* U.S. CONST. amend. IV.

[267] *See generally* IDA B. WELLS, A RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHINGS IN THE UNITED STATES, 1892-1893-1894 (1st ed., Outlook Verlag 2018) (1895) (discussing use of criminal punishment system to subordinate black Americans); W.E.B. DU BOIS, SOME NOTES ON NEGRO CRIME PARTICULARLY IN GEORGIA (1904) (same); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978) (same); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006) (same); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (same); MICHELLE ALEXANDER & CORNEL WEST, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (same); MUHAMMAD, *supra* note 118 (same); Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74 (same).

punish blacks.[268] Law enforcement has disproportionately targeted blacks.[269] Prosecutors have charged blacks more severely than similarly situated whites.[270] Judges have sentenced blacks to harsher sentences than similarly situated whites.[271] Parole judges have made incarcerated blacks serve more time than similarly situated whites.[272] And blacks with criminal records have harder times finding employment and housing than similarly situated whites.[273]

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[268] ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 2 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/TE8M-GKSW]; THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 3 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

[269] THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 2 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ [https://perma.cc/6HJE-3XRB] ("In 2016, black Americans comprised 27% of all individuals arrested in the United States—double their share of the total population."); MICOL SEIGEL, VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE 21 (2018) ("Any analysis of US policing must consider its constitutive relationship to the racialization of Black and brown subjects, not only theoretically but also in history, with the US police's structural formation as an antiblack force.").

[270] M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1320, 1322 fig.1 (2014) (finding "blacks receive sentences that are almost 10 percent longer than those of comparable whites arrested for the same crimes" and that "[m]ost of this disparity [is] explained by prosecutors' initial charging decisions, particularly the filing of charges carrying mandatory minimum sentences"); Lynn Lu, *Former U.S. Attorneys Reflect on Racial Disparities in the Federal Criminal Justice System*, *in* BRENNAN CTR. FOR JUST. & NAT'L INST. ON L. & EQUITY, RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 10 (2010) ("The federal criminal sentencing system is notorious both for its overall severity and for its disproportionate impact on people of color.").

[271] *See* Darrell Steffensmeier & Chester L. Britt, *Judge's Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 749, 759-60 (2001) (discussing the "abundance of research on the effects of defendant's race on judges' decisions to impose punishment" with "most studies show[ing] that black offenders receive somewhat harsher sanctions than whites"); *see also* Katherine A. Durante, *County-Level Context and Sentence Lengths for Black, Latinx, and White Individuals Sentenced to Prison: A Multi-Level Assessment*, 32 CRIM. JUST. POL'Y REV. 915, 918 (2021).

[272] WILLIAM J. SABOL, THADDEUS L. JOHNSON & ALEXANDER CACCAVALE, COUNCIL ON CRIM. JUST., TRENDS IN CORRECTIONAL CONTROL BY RACE AND SEX 21 (2019), https://counciloncj.org/wp-content/uploads/2021/09/Trends-in-Correctional-Control-FINAL.pdf [https://perma.cc/N9BS-LDZA] (finding that "[g]rowth in the length of stay in prison for blacks increased" due, in part, to "release decisions made by paroling authorities").

[273] BRUCE WESTERN & CATHERINE SIROIS, RACIAL INEQUALITY IN EMPLOYMENT AND EARNINGS AFTER INCARCERATION 1, 28-31 (2017), https://scholar.harvard.edu/files/brucewestern/files/racial_inequality_in_employment_and_earnings_after_incarceration.pdf [https://perma.cc/5KLR-PRXS]. *See generally* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010).

Despite the myriad antiblack effects of the criminal punishment system, black people are legally bound to deliver their bodies to its agents on the ground: law enforcement officers. This is true even as the federal government repeatedly acknowledges the antiblack police practices of various law enforcement agencies and the concerted effort by white supremacist groups to infiltrate law enforcement.

Myriad reports produced by the federal government have shed light on various law enforcement agencies' racially subordinating police practices. For instance, in 2011 the U.S. Department of Justice, Civil Rights Division ("DOJ-CRD") found "troubling racial disparities in arrest rates" in New Orleans.[274] These disparities formed part of the basis for DOJ-CRD finding "reasonable cause to believe that there is a pattern or practice of unconstitutional conduct . . . with respect to discriminatory policing" being carried out by the New Orleans Police Department ("NOPD").[275] Similarly, a 2016 DOJ-CRD report concerning the Baltimore Police Department found "the [d]epartment intrudes disproportionately upon the lives of African Americans at every stage of its enforcement activities."[276] And in 2017, the DOJ-CRD and the United States Attorney's Office for the Northern District of Illinois found that Chicago's black and brown communities experience more police abuse than whites in the city.[277] The report cautioned, "We have serious concerns about the prevalence of racially discriminatory conduct by some [Chicago Police Department] officers and the degree to which that conduct is tolerated."[278]

As Scott Holmes aptly observes, the racially subordinating effects of policing are partially revealed in the racial disparities in antiresisting arrests.[279] For instance, in finding that the Ferguson Police Department ("FPD") had engaged in intentional, racially discriminatory police practices, DOJ-CRD noted in 2015 that "on 14 occasions FPD listed the only reason for an arrest following a traffic stop as 'resisting arrest.' In all 14 of those cases, the person arrested was black."[280] DOJ-CRD went on explain that "disparities in the outcomes that result from traffic stops remain even after regression analysis is used to control for non-race-based variables, including driver age; gender; the assignment of the officer making the stop; disparities in officer behavior; and the stated reason the stop was initiated."[281]

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[274] C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, at ix (2011) [hereinafter DOJ-CRD, INVESTIGATION OF NOPD].

[275] *Id.* at 34.

[276] C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 47 (2016).

[277] C.R. DIV. & U.S. ATT'Y'S OFF. N. DIST. OF ILL., U.S. DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 1-4 (2017) [hereinafter DOJ-CRD-USA, INVESTIGATION OF CPD].

[278] *Id.* at 15.

[279] Holmes, *supra* note 9, at 638.

[280] C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 65 (2015).

[281] *Id.*

After reviewing NOPD resisting arrest reports, DOJ-CRD found that eighty-four percent of the people subjected to police uses of force in New Orleans over a seventeen month period were black.[282] From 2009 to 2013, 836 black people in Greensboro, North Carolina, were arrested with "resisting, delaying, or obstructing" listed as their only charged, as compared to 209 white people.[283] In 2020, a team of investigative journalists found that black people in San Diego, California, had a likelihood of being arrested for resisting arrest that was ten times that of white people.[284] A 2022 Minnesota Department of Human Rights ("MDHR") report found that, despite black people consisting of only nineteen percent of Minneapolis's population, sixty-six percent of all disorderly conduct, obstruction, and resisting citations issued by the Minneapolis Police Department were issued to black people.[285]

Further, it is important to note that black people who do not resist may also be arrested for resisting arrest. While there are no readily available means of gauging how many black people have been wrongfully convicted of resisting arrest, data regarding acquittals are telling. Holmes notes that, from August 2014 to April 2016, only twenty-three percent of the cases in Durham, North Carolina, involving a single charge of resisting or a charge of resisting in connection with a misdemeanor offense ended in a conviction.[286] Similarly, the MDHR found that such citations issued to black people in Minneapolis were more likely to be deemed unjustified due to insufficient evidence or a lack of probable cause.[287]

Admittedly, these examples from the South, Midwest, and Eastern Seaboard do not constitute a comprehensive study of all law enforcement agencies in the nation. But in the absence of a nationwide audit akin to these federal investigations, these reports are some of the best evidence of the various modes of racially subordinating policing black people are subjected to.

Implicit bias, that is, "nonconscious racial attitudes and stereotypes," play a key role in producing the racial disparities detailed above.[288] Many law enforcement officers who engage in the racially subordinating police practices

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[282] DOJ-CRD, INVESTIGATION OF NOPD, *supra* note 274, at 39.

[283] Lisa Cacho & Jodi Melamed, *How Police Abuse the Charge of Resisting Arrest*, BOS. REV. (June 29, 2020), https://bostonreview.net/articles/lisa-cacho-jodi-melamed-resisting-arrest/ [https://perma.cc/N5EC-PSHN] (quoting Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html).

[284] *Id.* (citing Mari Payton & Dorian Hargrove, *African-Americans Arrested for Resisting Arrest at a Larger Rate in San Diego*, NBC 7 SAN DIEGO (Feb. 9, 2020, 7:31 PM), https://www.nbcsandiego.com/news/local/african-americans-arrested-for-resisting-arrest-at-a-larger-rate-in-san-diego/2260289/ [https://perma.cc/ZD64-9PNC]).

[285] MINN. DEP'T OF HUM. RTS., INVESTIGATION INTO THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT 28, 31 (2022), https://mn.gov/mdhr/assets/Investigation%20into%20the%20City%20of%20Minneapolis%20and%20the%20Minneapolis%20Police%20Department_tcm1061-526417.pdf [https://perma.cc/AE43-XTRK].

[286] Holmes, *supra* note 9, at 632.

[287] MINN. DEP'T OF HUM. RTS., *supra* note 285, at 32.

[288] Hutchinson, *supra* note 32, at 57.

described above may not have any conscious antiblack animus or desire to preserve white social dominance. But their ostensible lack of discriminatory intent does not diminish the racially subordinating effects of their police practices. Moreover, the implicit bias of some law enforcement officers does not provide license to disregard the conscious biases of others.

As recently as 2015, the Federal Bureau of Investigation ("FBI") noted that "[d]omestic terrorism investigations focused on militia extremists, white supremacist extremists, and sovereign citizen extremists have identified active links to law enforcement officers."[289] Before that, the FBI noted in 2006 that "white supremacist groups have historically engaged in strategic efforts to infiltrate and recruit from law enforcement communities" and "[w]hite supremacist presence among law enforcement personnel is a concern," in part, because it "can result in [] abuses of authority."[290]

Certainly the FBI is not alone in its awareness of the antiblack sentiments among the ranks of law enforcement. Black people subject to capture at the hands of law enforcement have also called out antiblack law enforcement officers. In 2021, a team of research psychologists noted that "Black Americans are reportedly more distrusting of members of law enforcement, perceive higher levels of racial bias, and are more prone to report negative encounters characterized by discrimination and injustice."[291] For example, in 2016, black youth in Chicago told DOJ-CRD investigators that they were "routinely called 'nigger,' 'animal,' or 'pieces of shit' by [Chicago Police Department] officers."[292] And yet, these youth could be prosecuted if they resist an attempt by these prejudiced officers to manacle their hands and capture them.

In short, blacks are punished for resisting capture at the hands of law enforcement officers with conscious or implicit biases against blacks. They are thus compelled by the law to surrender their bodies to said officers, in some instances even if the capture is patently unlawful. This an antiblack effect of antiresisting laws.

This contention may ring hollow or seem hyperbolic to scholars, practitioners, and jurists who have never been arrested or battered by a law enforcement officer hurling racial epithets at them or, perhaps worse, garnering a clandestine racial animus that manifests in handcuffs put on too tightly, an exceptionally

[289] FED. BUREAU OF INVESTIGATION, COUNTERTERRORISM POLICY DIRECTIVE AND POLICY GUIDE 89 (2015), https://archive.org/details/CounterterrorismPolicyDirectiveAndPolicyGuide/page/n35/mode/2up.

[290] COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 3 (2006), [https://perma.cc/R2BP-UZ8H]. Antiblack prejudice among law enforcement officers cannot be avoided merely by replacing white officers with blacks. *See* Hutchinson, *supra* note 32, at 38 (citing Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 435-37 (2007)) ("[M]embers of marginalized social groups tend to disfavor members of their own group in higher rates than people in dominant classes.").

[291] Leslie A. Anderson, Margaret O'Brien Caughy & Margaret T. Owen, *"The Talk" and Parenting While Black in America: Centering Race, Resistance, and Refuge*, 48 J. BLACK PSYCH. 475, 476 (2022).

[292] DOJ-CRD-USA, INVESTIGATION OF CPD, *supra* note 277, at 146.

forceful shove into the back of a patrol car, or fabricated evidence. Conversely, this contention may have a particular resonance with black people who have either had such experiences or heard stories of family members, friends, or neighbors who have had such experiences.

Consider Sylvia Perkins, whose black fifteen-year-old son, Bobby Moore, was fatally shot to death by Joshua Hastings, a white law enforcement officer hired by the Little Rock Police Department despite having admitted to attending a Ku Klux Klan meeting.[293] After fatally shooting Bobby in 2012, Hastings was tried criminally for manslaughter.[294] But the jury failed to reach a unanimous verdict, a mistrial was declared, and Hastings did not receive any criminal punishment.[295] In 2017, a civil jury found that the killing violated Moore's civil rights and rewarded Moore's estate $415,000.[296] But Hastings filed for bankruptcy, the City of Little Rock did not indemnify Hastings, and after years of bankruptcy proceedings the estate was awarded $12,500, which was likely enough to cover only a fraction of the estate's legal expenses.[297]

What does it mean for the state of Arkansas to expect black people in Moore's community to surrender their bodies to white law enforcement officers who may have connections to white supremacist groups and could literally kill them and leave their families bereaved and undercompensated for their incalculable loss? This, in the land of their forebears' enslavement, where their forebears were subjected to the perpetual white supremacist violence and intensified policing of chattel slavery. In this context, what does it mean to punish their resistance?

Put simply, the answer, in part, is that white social dominance is privileged over black freedom from racial subordination. To expect black people not to resist the capture of arrest under such circumstances recalls what Charles Mills describes as the "depersonalizing conceptual apparatus" through which enslaved black captives were forced to see themselves as subpersons.[298] This apparatus, according to Mills, is "the intellectual equivalent of the physical process of

[293] Radley Balko, Opinion, *'If You Don't Get at That Rot, You Just Get More Officers Like Josh Hastings,'* WASH. POST (Nov. 2, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/11/02/feature/if-you-dont-get-at-that-rot-you-just-get-more-officers-like-josh-hastings/.

[294] *Id.*

[295] John Lynch, *Ex-LR Officer's Case Ends in Mistrial; New Date Set*, ARK. DEMOCRAT GAZETTE (June 24, 2013, 12:40 AM), https://www.arkansasonline.com/news/2013/jun/24/ex-lr-officers-case-ends-mistrial-new-dat-20130624/ [https://perma.cc/6XGQ-L7P3].

[296] Max Brantley, *Jury Awards $415,000 in Suit Against Josh Hastings over Suspect's Fatal Shooting*, ARK. TIMES (Apr. 13, 2017, 11:05 PM), https://arktimes.com/arkansas-blog/2017/04/13/jury-awards-415000-in-suit-against-josh-hastings-over-suspects-fatal-shooting [https://perma.cc/6XU9-VQT6].

[297] Final Order, Perkins v. Hastings, No. 4:18-bk-11333 (E.D. Ark. Sept. 18, 2020), ECF No. 47.

[298] MILLS, *supra* note 66, at 87-88.

'seasoning,' 'slave breaking,' the aim being to produce an entity who accepts subpersonhood."[299]

Antiresisting laws serve a similar function. In addition to capturing blacks via racially subordinating policing, the state takes the additional step of punishing blacks for resisting the capture of arrest. If successful, antiresisting laws aid the state in producing docile black subjects who either believe that resistance to racially subordinating policing is a blameworthy act or that resistance is not worth the harm that would come from a conviction for resisting arrest, an escalation of police violence, or both. But the black practice of resistance to racially subordinating policing and the capture of arrest continues.

The question then becomes, How should society respond to this centuries-old black practice of physically resisting racially subordinating policing, if not by criminalizing and punishing it? This question is explored in the next Part.

III. THE NEED TO SHIFT SOCIETY'S RESPONSE TO BLACK RESISTANCE TO ARREST AND POLICING

This Part argues that, instead of criminalizing and punishing black resistance to racially subordinating policing, society should identify and eradicate the harms animating said resistance. The racial context revealed above demonstrates how antiresisting laws harden white social dominance and deepen black racial subordination. By resisting arrest, black people—knowingly or unknowingly—resist racially subordinating policing and criminal punishment. Hence, the punishment of blacks for resisting arrest is tantamount to punishing blacks for resisting a violent practice of racial subordination.

To eradicate antiresisting laws without also eradicating the fraught racial relations of power they reinscribe would be akin to treating symptoms while ignoring the underlying disease. (To extend the metaphor, the body politic of the United States has several comorbidities, including antiblackness, patriarchy, cis-heteronormativity, racial capitalism, xenophobia, militarism, ableism, and settler colonialism.) Accordingly, from a harm-reduction perspective, this Part argues that time, energy, and resources currently spent quelling and punishing black resistance would be better spent eradicating the fraught racial relations of power revealed by this resistance.

To be sure, there are discrete, less sweeping interventions that could be offered in light of the fraught racial context of antiresisting laws. But these discrete interventions would also leave white dominance and black subordination intact. For example, police departments could require procedural justice trainings to improve law enforcement interactions with civilians. According to the Justice Collaboratory at Yale Law School, "The theory of procedural justice is grounded in the idea that people's perceptions of police legitimacy will be influenced more by their experience of interacting with officers than by the end result of those interactions."[300] To put it crudely, this

[299] *Id.*

[300] THE JUST. COLLABORATORY AT YALE L. SCH., PRINCIPLES OF PROCEDURALLY JUST POLICING 6 (2018), https://law.yale.edu/sites/default/files/area/center/justice/principles_of_procedurally_just_policing_report.pdf [https://perma.cc/2ERP-JB67].

theory posits that if police officers are nice to civilians, then civilians are less likely to resist officers' attempts to capture their bodies. According to this theory, measures such as requiring body-worn cameras, encouraging community involvement in police policymaking, and mandating de-escalation trainings would create more amenable relationships between law enforcement and civilians.[301] This theory is valuable in that it discourages some brutish law enforcement practices (such as unlawfully arresting civilians) and provides for public transparency regarding certain law enforcement operations.[302]

But procedural justice also dissimulates racial subordination in good manners, transparency, and community input. Paul Butler describes the problem with procedural justice reforms as "cloak[ing] aggressive policing in enhanced legitimacy, and [thereby having] the potential to blunt the momentum for rising up against overcriminalization, wealth inequality, and white supremacy."[303] Such pacification, which borders on complicity, may be desirable to those who seek domestic tranquility, but odious to those who are discontented with the dispossession, displacement, and disenfranchisement of resource-deprived black communities. As Dorothy Roberts puts it, "Developing a norm of trust in repressive agencies would be pathetic and self-defeating."[304]

Another possible discrete intervention would be to reinstate the right to resist unlawful arrests nationwide or jurisdiction-by-jurisdiction. Such a reinstatement would reduce the criminal exposure of black people in heavily policed communities where antiresisting arrests, or the threat thereof, are disparately enforced. But even if armed with a right to resist unlawful arrest, black people in these communities could still face antiresisting charges if they resist lawful arrests for even trivial offenses, such as not wearing a seatbelt or engaging in the catchall disorderly conduct. The neurodivergent could still face antiresisting charges for resisting lawful arrests, even if their neurodivergence adversely impacts their ability to repress their impulse to defend their bodies while being captured by law enforcement.[305] Further, what may appear to many black communities as an unlawful arrest warranting resistance (such as an arrest for selling loose cigarettes) may nonetheless be lawful in the eyes of legislatures and judiciaries dominated by whites.[306] Thus, reinstating the right to resist an unlawful arrest, without more, is no panacea to the adverse effects of the racial subordination reinscribed by antiresisting laws.

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[301] *Id.* at 14 & nn.15-16, 18-20.

[302] *Id.*

[303] Butler, *supra* note 262, at 1468.

[304] Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1295 (2004).

[305] *See* Morgan, *supra* note 15, at 1676 ("[P]olicing for signs of disorder reinforces associations between disability and criminality . . . .").

[306] *See State Legislator Demographics*, NAT'L CONF. OF ST. LEGISLATURES (Dec. 1, 2020), https://www.ncsl.org/research/about-state-legislatures/state-legislator-demographics.aspx [https://perma.cc/YB67-VUML] (showing all state legislatures consisting of mostly white people, except Hawai'i (fifty-seven percent Asian/Pacific Islander)).

One alternative would be to repeal antiresisting laws altogether. Advocates for repeal could argue that, in the absence of antiresisting laws, criminal assault and battery laws could be brought against the resisters who harm officers making lawful arrests. The only actions covered by antiresisting laws that are not covered by other criminal assault and battery laws are de minimis acts of resistance that do not constitute offensive contact and would not evoke the apprehension thereof. In this sense, antiresisting laws are duplicative and thus gratuitous. Highlighting the gratuitousness of antiresisting laws may be a successful strategy for advocating for their repeal. A repeal of antiresisting laws is urgently needed and valuable in preventing the criminalization of nonoffensive, de minimis resistance.

But even if antiresisting laws were repealed, resisters to racially subordinating policing could still be prosecuted for assault and battery. In the absence of antiresisting laws, resisters could still face criminal assault and battery charges. Thus, the repeal of antiresisting laws alone would be an insufficient response to the demands couched in black dissenting violence against racially subordinating policing.

Policing entails, in great part, the protection of private property interests against the claims of economically disadvantaged black people whose enslaved forebears were prohibited from accumulating property, whose putatively emancipated forebears were excluded from many opportunities to build wealth, and who themselves are relegated to serving a white-dominated class of business elites—or servicing those who do—in order to obtain the material wherewithal to survive.[307] Law enforcement aims to preserve a particular order manufactured by white-dominated groups of political and business elites; this order is commensurate with gross racial disparities in wealth and political power.[308] In turn, political elites provide law enforcement cover to carry out their mandate, in part, by criminalizing resistance to arrest and empowering police to exert control over black bodies.

Black resistance to racially subordinating policing—as practiced by fugitive enslaved black people in the past or their descendants today—does not call for slight modifications of the means by which white-dominated elites exert control over black bodies. Instead, such resistance is a rejection of social domination, a

[307] *See* JOHN HOPE FRANKLIN, RACIAL EQUALITY IN AMERICA 78-82 (Univ. Mo. Press 1993) (1976) ("The new property laws designed to establish greater equality were not meant for [black people], and they derived little if any benefit from these legal innovations."); ROTHSTEIN, *supra* note 148, at 125-26 (describing 1969 incident where white suburban community passed zoning ordinance prohibiting construction of "federally subsidized, racially integrated complex for moderate- and low-income families," effectively barring blacks' "access to jobs that were increasingly suburban"). *See generally* WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY (2020) (describing history of policies creating economic divide between black and white Americans).

[308] *See State Legislator Demographics*, *supra* note 306. *See generally* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001) (challenging "broken windows" theory of crime, a theory which posits if small crimes are left unpunished people will commit major crimes).

refusal of subordination. This brings to mind Ruth Wilson Gilmore's observation regarding incarcerated resisters:

> A negation of violence through violence is possible . . . . The regime—its intellectual authors and social agents, its buildings and rules—tortures captives one by one. They can turn on the regime through shifting the object of torture into the subject of history by way of hunger strikes. Participating individuals turn the violence of torture against itself, not by making it not-violent but rather by intentionally repurposing vulnerability to premature death as a totality to be reckoned with, held together by skin.[309]

Black resistance to arrest has a similar function to the incarcerated persons' hunger strikes Gilmore alludes to. Specifically, black resisters use their bodies to negate the violent capture of arrest—risking their lives in the process—thereby becoming a totality that must be responded to, or reckoned with, either by escalated violence or by removing the conditions fostering the resistance.

What are these conditions? The social science literature contains telling findings that bear on this questions. For example, sociologists Corey Whichard and Richard B. Felson compiled data from over 17,000 incarcerated people who self-reported resisting arrest.[310] Whichard and Felson found, in part, that people were more likely to resist arrest when they were "more heavily influenced by their fear of loss than by their hope for gain."[311] Put differently, some respondents resisted arrest despite having very little chance of successfully thwarting arrest. Hence, resisters may anticipate experiencing great harm if they are captured, held captive, and adjudicated by the criminal punishment system. Perhaps this is why the formerly incarcerated George Floyd yelled, "I don't wanna go back!" and "I'm scared!" as he resisted arrest on the day of his murder.[312] Great fears of capture and criminal punishment may induce people like Floyd to resist despite the prospect of "more severe punishment [such as a conviction for resisting arrest], and . . . the possibility they may be injured or killed by the police."[313] Thus, one condition that may animate resistance is the acute punitiveness of criminal punishment, which compels some to risk death rather than submit to capture and criminal punishment.

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[309] Gilmore, *supra* note 265, at 239.

[310] Corey Whichard & Richard B. Felson, *Are Suspects Who Resist Arrest Defiant, Desperate, or Disoriented?*, 53 J. RSCH. CRIME & DELINQUENCY 564, 570-74 (2016).

[311] *See id.* at 568 (describing loss aversion in prospect theory from behavioral economics); *id.* at 576 (finding loss aversion hypothesis holds for those resisting arrest).

[312] 10 Tampa Bay, *RAW: George Floyd Minneapolis Police Body Camera Footage*, YOUTUBE 03:50-:59, 06:20-:30 (Aug. 10, 2020), https://www.youtube.com/watch?v=0gQYMBALDXc; *see* Whichard & Felson, *supra* note 310, at 580.

[313] Whichard & Felson, *supra* note 310, at 568; *see also* Nico H. Frijda, K. Richard Ridderinkhof & Erik Rietveld, *Impulsive Action: Emotional Impulses and Their Control*, FRONTIERS IN PSYCH., June 2014, at 1, 3 ("Impulsive action is situation- or event-elicited. That is: it is triggered by how the object or event is appraised.").

Defiance theory may also shed some light on the causal factors for resistance. This theory provides a framework to explain what causes defiance, that is, why people subjected to criminal punishment may continue to engage in criminalized behaviors (that is, reoffend).[314] According to defiance theory, defiance is determined by the following factors: (1) the subject perceives the sanction as unfair, (2) the subject does not acknowledge the shame associated with the sanction, (3) the subject perceives the sanction as stigmatizing, and (4) the subject is poorly bonded to "the sanctioning agent [and] community."[315] Whichard and Felson cite defiance theory for the possibility that "it may be that alienation from conventional society leads suspects to resist arrest, regardless of their social status."[316]

Placing defiance theory in the racial context laid out above is revelatory. Regarding the first factor, past research indicates that large majorities of black people have negative opinions about police and the criminal punishment system.[317] For example, a 2019 Pew Research Center survey found that eighty-four percent of blacks surveyed believed that blacks are treated less fairly than whites in dealing with the police; similarly, eighty-seven percent of blacks believed that blacks were treated less fairly than whites in the criminal punishment system.[318] Notably, as George Floyd resisted the white police officer who eventually murdered him, Floyd exclaimed, "God, y'all do me bad!"[319] This common perception of antiblackness in the criminal punishment system ties into the second factor: it is possible that the criminal punishment system does not invoke shame in some black people precisely because of the system's racially subordinating nature.

Regarding the third factor, the stigma of criminal punishment is not only perceived but felt. For example, many people with criminal records are discriminated against in the housing and labor markets.[320] This alienation is amplified for black people. Devah Pager has found that "[n]ot only are blacks much more likely to be incarcerated than whites[,] . . . they may also be more strongly affected by the impact of a criminal record."[321] Furthermore, Pager found that black people without a criminal conviction had less success in obtaining employment than white participants with felony convictions.[322] Floyd,

[314] Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RSCH. CRIME & DELINQUENCY 445, 448-49 (1993) (describing three existing theories that comprise defiance theory). While Sherman aptly identifies possible root cases of defiance, his prescriptions for how to respond to defiance—namely, evidence-based policing and procedural justice—harmfully re-entrench racially subordinating policing. *Id.* at 459, 460 & fig.1.

[315] *Id.* at 460.

[316] Whichard & Felson, *supra* note 310, at 580.

[317] *See id.* at 567; Horowitz et al., *supra* note 10.

[318] Horowitz et al., *supra* note 10.

[319] 10 Tampa Bay, *supra* note 312, at 09:30-:35.

[320] Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 960-61 (2003); *see also* Pinard, *supra* note 273, at 501-02.

[321] Pager, *supra* note 320, at 961.

[322] *Id.* at 958.

who had previously been convicted of multiple felony offenses, was unemployed and houseless when he was confronted by law enforcement on the day of his murder.[323]

Regarding the fourth factor, the sanctioning agents resisters could be alienated from include the federal and state legislatures. None of the state legislatures in the United States have a black majority and, with the lone exception of Hawai'i, all state legislatures are dominated by whites.[324] This disparity between white political dominance and black subordination alone may be enough to render marginalized black people poorly bonded to white-dominated sanctioning agents. In addition, laws prohibiting people with felony convictions from voting disproportionately impact black people like Floyd.[325]

The argument here is not that the foregoing are the definitive causal factors for black resistance to the capture of arrest. Indeed, any claims to definitive knowledge of black resisters' motivations are suspicious because they would necessarily disregard the possibility that certain aspects of black life are inarticulable, especially given the indescribable harms inflicted on enslaved black captives and their descendants.[326]

Rather, the causal factors of resistance posited above—namely, fear of great loss, perceptions of injustice in the criminal punishment system, alienation, stigma, and shamelessness—help uncover subordinating forces that are consciously or effectively rebuffed during instances of black resistance to the capture of arrest. For example, the fear of great loss illuminates the harms caused by incarceration and criminal convictions, such as loss of housing, loss of child custody, loss of romantic relationships, and loss of employment.[327] Perceptions of injustice bring to mind the racially subordinating dimensions of policing. Alienation conjures images of millions of black incarcerated people who have been forcibly separated from their loved ones, after already having been alienated from high-quality educational resources, accessible jobs with

[323] Maya Rao, *George Floyd's Search for Salvation*, STAR TRIB. (Dec. 27, 2020), https://www.startribune.com/george-floyd-hoped-moving-to-minnesota-would-save-him-what-he-faced-here-killed-him/573417181/ [https://perma.cc/34MN-PE7F].

[324] *State Legislator Demographics*, *supra* note 306.

[325] *See generally* CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, SENT'G PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016 (2016), https://www.sentencingproject.org/app/uploads/2022/08/6-Million-Lost-Voters.pdf [https://perma.cc/MXL6-E6BF].

[326] *See* ÉDOUARD GLISSANT, POETICS OF RELATION 120 (Betsy Wing trans., 1997) ("Opacities must be preserved; an appetite for opportune obscurity in translation must be created; and falsely convenient vehicular sabirs must be relentlessly refuted."); *id.* at 194 ("Widespread consent to specific opacities is the most straightforward equivalent of nonbarbarism. We clamor for the right to opacity for everyone.").

[327] *See generally* Pinard, *supra* note 273 (detailing consequences of criminal convictions and distinguishing unduly punitive scheme in United States from comparable countries).

opportunities for career growth, and meaningful political agency.[328] Stigma is found in the scarlet letter of a criminal record, which marks people for discrimination or, in the case of black people, intensified discrimination.[329] Finally, some resisters' shamelessness evinces a recognition of the criminal punishment system's dubious moral foundation. Put simply, black resistance to the capture of arrest reveals myriad fundamental harms that likely animate the resistance.

These fundamental harms call for fundamental solutions.[330] As Angela Davis argues, "If reform approaches have tended to bolster the permanence of the prison in the past, they certainly will not suffice to challenge the economic and political relationships that sustain the prison today."[331]

Prison Industrial Complex ("PIC") abolitionists have provided language and conceptual frameworks with which solutions to the intractable problems revealed in black resistance to arrest may be discerned. For Mariame Kaba, a leading PIC abolitionist organizer, and Kelly Hayes, abolition entails a transformative transition to a means of responding to harm and ensuring justice that does not rely on police or prisons.[332] The abolitionist future envisioned by Kaba, Hayes, and others entails communities engaging in processes of "build[ing] support and more safety for [people] harmed, figur[ing] out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again."[333]

Moreover, Dorothy Roberts describes the PIC abolitionist project as

> working to dismantle a wide range of systems, institutions, and practices beyond criminal punishment (such as "the wage system, animal and earth exploitation, [and] racialized, gendered, and sexualized violence") and forms of oppression beyond white supremacy (such as "patriarchy, capitalism, heteronormativity, ableism, colonialism," imperialism, and militarism).[334]

As compared to reformist interventions, PIC abolition is more responsive to the tacit demands of black resisters who violently combat racially subordinating policing.

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[328] *See generally* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) (tying development of penal practices in United States to neoliberal policies).

[329] *See generally* Pinard, *supra* note 273.

[330] Butler, *supra* note 262, at 1436-37 ("Acknowledging both that the problems are complex and interrelated should cause advocates to understand that piecemeal solutions to the race and criminal justice crisis are unlikely to succeed.").

[331] ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 100 (2003).

[332] Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not "Transformative Justice." Here's Why.*, APPEAL (Feb. 5, 2018), https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/ [https://perma.cc/NQ3T-Z44L].

[333] *Id.*

[334] Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7 (2019) (quoting *Manifesto for Abolition*, ABOLITION, https://abolitionjournal.org/frontpage [https://perma.cc/3SYY-PZVP] (last visited Jan. 18, 2023)).

Although there is no definitive consensus on the particulars of a just transition to an abolitionist future, PIC abolitionist organizers, theorists, and even legal scholars are actively engaged in putting abolitionist theories into practice in communities around the nation. As Maya Schenwar and Victoria Law observe, "[N]one of these [abolitionist] goals must be approached from scratch. Abolition is not a theoretical wish for the future . . . . [P]eople are already building toward transformation."[335] Schenwar and Law profile several community-based abolitionist safety-making efforts that do not rely on the police or the criminal punishment system.[336] Similarly, dozens of community-based safety initiatives have been profiled by One Million Experiments, an initiative of abolitionist organizations Project Nia and Interrupting Criminalization.[337]

Importantly, the abolition of the criminal punishment system would not entail an end to violence interruption, nor would it necessitate a collective failure to protect communities from the harmful actions of those with violent or even homicidal compulsions. Society may deploy violence interrupters who are nonetheless not tasked with capturing hapless people who use drugs, jobless people who sell drugs, or impoverished people who steal. Instead of negatively deterring such behaviors, society can positively deter them by guaranteeing housing, food, healthcare, and a basic income. Similarly, society may eliminate opportunities for the relatively small number of compulsively violent people to mete out harm without placing them in criminogenic, stultifying conditions of incarceration and alienating them from their loved ones, professional lives, and communities. Abolition is centered on eradicating harm, not ignoring or enabling it. In this way, it differs from policing, which is marred by the indelible stains of punitiveness and dominative violence.

Instead of criminally punishing people who physically resist violence interrupters, society could investigate the root causes of the resistance, implement nonpunitive interventions to reduce the likelihood of the resistance occurring again, and invite resisters to engage in a collective process of repairing any harm their resistance may have caused—all without deepening the resisters' subordination. Remedial interventions responsive to such resistance may include creating opportunities for resisters to develop strong community bonds (that is, to reduce their social alienation), eliminating any stigma associated with coming into contact with violence interrupters, and ensuring that reparation to victims is equitable and practicable.

In sum, black resisters to the capture of arrest compel society to respond to black dissenting violence against racial subordination as it never has before in the United States: by eradicating racial subordination and all of its punitive effects.

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[335] SCHENWAR & LAW, *supra* note 57, at 237.

[336] *Id.*

[337] *See* ONE MILLION EXPERIMENTS, https://millionexperiments.com/ [https://perma.cc/GE3M-GKSS] (last visited Jan. 18, 2023); PROJECT NIA, *supra* note 57; INTERRUPTING CRIMINALIZATION, *supra* note 57.

CONCLUSION

The American story of enslaved black people's descendants begins with the capture of enslavement. For many victims of police violence, such as Eric Garner, Korryn Gaines, and George Floyd, this story ends with a police officer's fatal attempt to capture their black bodies. Throughout the American story of enslaved black people and their descendants, racial subordination and white social dominance have defined the racial power relation of white-over-black. Criminal law and enforcement has been a potent means of inscribing and reinscribing this fraught power relation. The central practice of law enforcement is the capture of people for fabricated, suspected, and actual violations of criminal laws that are designed by white-dominated federal and state governments. Thus antiresisting laws amplify white social domination of black bodies and deepen black subordination.

This conclusion raises several questions beyond the scope of this Article: What are the antiblack dimensions of criminal laws prohibiting collective, as opposed to individual, black dissenting violence? How should the antiblack dimensions of antiresisting laws inform affirmative defenses thereto? Is there a constitutional doctrinal fix to the antiblack maleffects of antiresisting laws? These questions evince the fertileness of this area of inquiry.

The durability of the black practice of resistance to the capture of arrest demonstrates that enslaved black captives and their descendants have never uniformly surrendered to white social dominance. Black dissenting violence against racial subordination antedates the Constitution of the United States and lives on through ongoing resistance to racially subordinating policing. This resistance can only be eradicated if its impetuses are abolished. Until then, white-dominated federal and state governments will continue to deploy law enforcement on the fool's errand of quashing black resistance by deepening black resisters' subordination.