

# MOVEMENT CONSTITUTIONALISM

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## *Abstract*

*The white supremacy at the heart of the American criminal legal system works to control Black, Brown, and poor people through mass incarceration. Poverty and incarceration act in a vicious circle, with reactionaries mounting a desperate defense against any attempt to mitigate economic exploitation or carceral violence. Ending the cycle will require replacing this inequitable system with the life- and liberty-affirming institutions of abolition democracy. The path to abolition democracy is arduous, but abolitionists can press for change through what I coin “movement constitutionalism.” Movement constitutionalism is the process by which grassroots abolitionist movements shift—through demands and in solidarity with each other—our understanding of constitutional theory and structure and, ultimately, democracy. By reshaping the way politicians, judges, and the public view the Constitution, abolitionists can expand the range of viable legislative and litigation remedies for our country’s history of oppression.*

*I was born by the river, in a little tent / Oh, and just like the river /  
I’ve been running ever since*

– Sam Cooke<sup>1</sup>

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1. SAM COOKE, *A Change Is Gonna Come*, on AIN’T THAT GOOD NEWS (RCA Victor 1964).

*Introduction*

Mass incarceration is the punishment of Black, Brown, and poor people.<sup>2</sup> Indeed, law and order has always meant control—control of Black, Brown, and poor people.<sup>3</sup> Legislatures and presidents didn't even try to hide it. This is why state and federal governments developed and invested in a public safety philosophy of carceral violence—policing, prisons, mandatory minimums, and death—literal at times and, even if a person survived warrior policing, jails, and prisons, they walked away not as a free person but with the collateral shackles of civil death.<sup>4</sup> All of this is to say, America's solution to every problem is punishment and more harm. You're an unhoused person? Punishment. You struggle with a substance-use disorder? Punishment. Your presence makes privileged people uncomfortable? Punishment. The list goes on.

Scholars have proposed many innovative solutions to mass incarceration. One suggestion centers on the action of criminal defendants themselves, rather than institutional actors.<sup>5</sup> For example, Andrew Crespo proposes that defendants establish plea bargaining unions to subvert mass incarceration through defendants' collective action.<sup>6</sup> Because resource constraints only enable the government to prosecute a tiny fraction of crimes each year, if

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2. See, e.g., E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 302776, PRISONERS IN 2020—STATISTICAL TABLES 23 (2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf> (reporting that, in 2020, Black men were 5.7 times as likely to be imprisoned as white men); *id.* (reporting that Black, Hispanic, Native American, and Alaska Native females were imprisoned at higher rates in 2020 than white females); KAREN DOLAN & JODI L. CARR, INST. FOR POL'Y STUD., THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY 5 (2015), <https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf> (reporting that poor people of color “have long been overrepresented in the prison population”).

3. Police brutality notably impacted social movements of the twentieth century, including the civil rights movement. See Angela Dillard, *Law & Order in America*, MICH. ONLINE, <https://online.umich.edu/collections/racism-antiracism/short/law-order/?playlist=racism-legal-justice> (last visited June 24, 2022) (“They use direct physical violence, they use clubs they use fire hoses, and they use dogs who are trained to attack people on command.”) (referencing the police force used against civil rights protesters in 1963 in Birmingham, Alabama).

4. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4 (2010) (“Once they are released, they are often denied the right to vote, excluded from juries, and relegated to a racially segregated and subordinated existence.”).

5. See, e.g., Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 *FORDHAM L. REV.* 1999 (2022).

6. *Id.* at 2003–04.

every defendant insisted on their right to a trial, the system would grind nearly to a halt.<sup>7</sup> But even as it ground slowly, those limited resources would be allocated to continue targeting Black, Brown, and poor people. The system might only work a little, but it would still work as designed.

This Essay argues, however, that a more transformational change will result if all three branches of our government jointly commit to abolition democracy. The pervasive problem of mass incarceration requires an all-hands-on-deck approach. Injustice on the scale of mass incarceration cannot simply be reformed away. The Jim Crow regime grew out of the failure to complete the work of Reconstruction; its continuation in the New Jim Crow will not be remedied without a remaking of our constitutional order. Abolitionists must engage in movement constitutionalism to bring about such a systemic change. Movement constitutionalism is the practice of liberationist movements of promoting—through their legislative and litigation advocacy, organizing, and direct actions—a novel, life- and democracy-affirming constitutional vision.

This Essay proceeds in three parts. Part I exposes mass incarceration for what it is: a means of punishing Blackness. Beginning in the 1970s with the War on Drugs and continuing today, mass incarceration is oppression rooted in a white supremacist vision of public safety. Part II argues that reform of existing institutions is not the answer; the only way to end the discrimination driven by mass incarceration is to abolish the carceral state. Part III then demonstrates the role each branch of government can play to permanently eradicate mass incarceration and to shift our understanding of what public safety can be. To commit to abolition democracy, each branch of government must practice movement constitutionalism and shift society's and the law's approaches to democracy and the Constitution.

### *I. Mass Incarceration as Oppression*

*It's been too hard living / But I'm afraid to die / 'Cause I don't  
know what's up there / Beyond the sky*

– Sam Cooke<sup>8</sup>

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7. *See id.* at 2006 (“Resource constraints . . . are the major anti-carceral force capable of checking the modern American penal system.”).

8. COOKE, *supra* note 1.

As I wrote previously, Blackness is punished.<sup>9</sup> States arrest, charge, convict, and sentence Black people at a rate disproportionate to the overall population.<sup>10</sup> The carceral state oppresses Blackness.

Professor Kimani Paul-Emile maintains that “[t]o be [B]lack means to face increased likelihood, relative to Whites, of . . . being stopped by the police, being killed during a routine police encounter, . . . [and] receiving longer prison sentences.”<sup>11</sup> In 2020, Black men were overall 5.7 times as likely to be imprisoned as white men, while young Black men—aged eighteen to nineteen—were 12.5 times as likely to be imprisoned as white men of the same age.<sup>12</sup> Black women in 2020 were more likely to be incarcerated than white women; young Black women—aged eighteen to nineteen—were 4.1 times more likely to be incarcerated than young white women of the same age.<sup>13</sup> Police view Black boys as older and guiltier than white boys and are consequently more likely to use force against Black boys.<sup>14</sup>

The racist roots of the current crisis of mass incarceration run through Richard Nixon’s 1971 War on Drugs.<sup>15</sup> Richard Nixon “emphasized that you

9. Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 633 (2021) [hereinafter Hasbrouck, *The Just Prosecutor*].

10. *See id.*

11. Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 295–96 (2018).

12. *See* CARSON, *supra* note 2, at 23.

13. *Id.*

14. *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 540–41 (2014).

[I]f . . . “[t]he most important question in the world is, ‘Why is the child crying?’” then, for Black children, the most important answer may be that they cry because they are not allowed to be children at all.

. . . Black children may be viewed as adults as soon as 13, with average age overestimations of Black children exceeding four and a half years in some cases . . . [A]lthough most children are allowed to be innocent until adulthood, Black children may be perceived as innocent only until deemed suspicious.

*Id.*

15. *See Thirty Years of America’s Drug War: A Chronology*, PBS: FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited July 10, 2022). *See generally* Richard Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control, June 17, 1971*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control> (last visited July 10, 2022) (“America’s public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive.”).

have to face the fact that the whole problem is really the [B]lacks.”<sup>16</sup> Although it was really a form of social control,<sup>17</sup> the Nixon administration packaged the War on Drugs as a public health issue.<sup>18</sup> The White House counsel to President Nixon explained that

we understood we couldn't make it illegal to be young or poor or [B]lack in the United States, but we could criminalize their common pleasure . . . . We understood that drugs were not the health problem we were making them out to be, but it was such a perfect issue . . . that we couldn't resist it.<sup>19</sup>

Policies the Nixon administration implemented continued with President Ronald Reagan's "tough on crime" strategy.<sup>20</sup> President Reagan signed the Anti-Drug Abuse Act of 1986 into law, which added many mandatory minimums for drug offenses.<sup>21</sup> Racial stereotypes led to sentencing

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16. Diary Entry by H. R. Haldeman (Apr. 28, 1969), in *H. R. Haldeman Diaries Collection, January 18, 1969 – April 30, 1973*, NAT'L ARCHIVES: RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM, <https://www.nixonlibrary.gov/sites/default/files/virtual-library/documents/haldeman-diaries/37-hrhd-journal-vol02-19690428.pdf> (last visited June 27, 2022); see also Memorandum from Daniel P. Moynihan to President Nixon 4 (Jan. 16, 1970), <https://www.nixonlibrary.gov/virtuallibrary/documents/jul10/53.pdf> (asserting a connection between “anti-social behavior of young black males” and “the problem of crime”).

17. See ALEXANDER, *supra* note 4, at 8 (“The stark and sobering reality is that, for reasons largely unrelated to actual crime trends, the American penal system has emerged as a system of social control unparalleled in world history.”).

18. See German Lopez, *Was Nixon's War on Drugs a Racially Motivated Crusade? It's a Bit More Complicated.*, VOX (Mar. 29, 2016, 2:00 PM EDT), <https://www.vox.com/2016/3/29/11325750/nixon-war-on-drugs>. See generally DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* (1996).

19. Larry Gabriel, *Joining the Fight*, DET. METRO TIMES (Aug. 10, 2011, 12:00 AM), <https://www.metrotimes.com/detroit/joining-the-fight/Content?oid=2148184>.

20. See Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 12 (2013) (“Capitalizing on overwhelming public opinion in favor of more rigid crime control, conservative politicians at the national and state levels stoked their constituents' fear of crime waves and endorsed policies designed to put more offenders in prison for longer periods of time.” (footnote omitted)).

21. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; *id.* § 1402, 100 Stat. at 3207-39 to 3207-40 (adding drug offenses to the Armed Career Criminal Act's base offense list at 18 U.S.C. § 924(e)); *id.* §§ 1002–1003, 100 Stat. at 3207-2 to 3207-6 (amending the Controlled Substances Act at 21 U.S.C. § 841, which concerns possession with intent to distribute controlled substances); *id.* § 1052, 100 Stat. at 3207-8 to 3207-10 (amending the Controlled Substances Act at 21 U.S.C. § 844, which concerns simple possession); *id.* § 1005, 100 Stat. at 3207-6 (amending the Comprehensive Crime Control Act at 21 U.S.C. § 845,

disparities between crack and powder cocaine, resulting in the imprisonment of Black and Brown bodies at a higher rate and for a longer amount of time than their white counterparts.<sup>22</sup>

Today, “although there is no evidence that Blacks are more likely to use or sell drugs, we are more likely to be arrested, charged, and convicted for those crimes.”<sup>23</sup> In a letter to his fifteen-year-old son, author and journalist Ta-Nehisi Coates wrote that “the [police] officer carries with him the power of the American state and the weight of an American legacy, and they necessitate that of the bodies destroyed every year, some wild and disproportionate number of them will be [B]lack.”<sup>24</sup>

There were approximately 1.2 million people in state and federal prison at the end of 2020.<sup>25</sup> Thirty-three percent of those people were Black,<sup>26</sup> even though Black people represent only 12.4 percent of the population.<sup>27</sup> The stigma of criminality, while purportedly colorblind, insidiously promotes systemic racism.<sup>28</sup> Even now, the law sanctions the discriminatory exercise

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which prohibits distribution to a person under 21 years of age); *id.* § 1104, 100 Stat. at 3207-11 (expanding prohibitions by the Controlled Substances Act at 21 U.S.C. § 845a against distribution near a school); *id.* § 1102, 100 Stat. at 3207-10 (prohibiting the use of children in a drug operation under 21 U.S.C. § 845b); *id.* § 1302, 100 Stat. at 3207-15 (enhancing penalties for controlled substance import or export offenses). For a deeper discussion of this history of mandatory minimums, see CHARLES DOYLE, CONG. RSCH. SERV., R45074, MANDATORY MINIMUM SENTENCING OF FEDERAL DRUG OFFENSES 2–5 (2018).

22. See *Thirty Years of America’s Drug War: A Chronology*, *supra* note 15; David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1293 (1995) (explaining how whites strongly associated crack with inner city Black people and that “there was widespread fear that use of the drug was expanding beyond the ghetto into suburbia”); DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIV. LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 4–5 (2006) (dispelling common myths about crack cocaine).

23. Hasbrouck, *The Just Prosecutor*, *supra* note 9, at 633.

24. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 103 (2015).

25. CARSON, *supra* note 2, at 1 (reporting 1,182,200 persons “sentenced to more than 1 year in state or federal prison” in 2020).

26. See *id.* at 10 (stating that 389,500 of the 1,182,166 sentenced individuals at the end of 2020 were Black).

27. Nicholas Jones et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html> (“In 2020, the Black or African American alone population (41.1 million) accounted for 12.4% of all people living in the United States . . .”).

28. See PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 131 (2009) (“We are supposed to be disgusted with people the law labels as criminals, but that would mean we are disgusted with one in three black men.”).

of police powers against Black citizens.<sup>29</sup> As Paul Butler noted, the system of mass incarceration “is working the way it is supposed to,” and “[t]he most far-reaching racial subordination stems not from illegal police misconduct, but rather from legal police conduct.”<sup>30</sup> Police, with the condonation of politicians, have treated Black men as criminals for so long that the public simply accepts it as fact; the law reflects this situation.<sup>31</sup>

This subordination comes at a huge price tag. Between federal, state, and local policing of communities and incarcerating 2.2 million people, we spend nearly \$300 billion per year.<sup>32</sup> But that’s only a small piece of the total cost of incarceration to society; when you factor in lost income, adverse health consequences, and added burdens on the families of incarcerated people, the societal cost of our carceral system rises to \$1.2 trillion.<sup>33</sup>

In 2017, Jay-Z wrote in the *New York Times* that “it’s time we highlight the random ways [Black] people trapped in the criminal justice system are punished every day. The system treats them as a danger to society, consistently monitors and follows them for any minor infraction—with the goal of putting them back in prison.”<sup>34</sup> Indeed, the consequences are bleak, as Ashley Nellis laid bare:

- Black Americans are incarcerated in state prisons at nearly 5 times the rate of white Americans.
- Nationally, one in 81 Black adults in the U.S. is serving time in state prison. Wisconsin leads the nation in Black imprisonment rates; one of every 36 Black Wisconsinites is in prison.
- In 12 states, more than half the prison population is Black: Alabama, Delaware, Georgia, Illinois, Louisiana,

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29. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1424 (2016) [hereinafter Butler, *The System Is Working the Way It Is Supposed to*] (“It is possible for police to selectively invoke their powers against African-American residents, and, at the same time, act consistently with the law.”).

30. *Id.* at 1425.

31. *Id.* at 1426 (acknowledging that Black men are “prototypical criminals in the eyes of the law”).

32. Tara O’Neill Hayes, *The Economic Costs of the U.S. Criminal Justice System*, AM. ACTION F. (July 16, 2020), <https://www.americanactionforum.org/research/the-economic-costs-of-the-u-s-criminal-justice-system/>.

33. *Id.*

34. Jay-Z, Opinion, *Jay-Z: The Criminal Justice System Stalks Black People Like Meek Mill*, N.Y. TIMES (Nov. 17, 2017), <https://www.nytimes.com/2017/11/17/opinion/jay-z-meek-mill-probation.html>.

Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia.

- Seven states maintain a Black/white disparity larger than 9 to 1: California, Connecticut, Iowa, Maine, Minnesota, New Jersey, and Wisconsin.
- Latinx individuals are incarcerated in state prisons at a rate that is 1.3 times the incarceration rate of whites. Ethnic disparities are highest in Massachusetts, which reports an ethnic differential of 4.1:1.<sup>35</sup>

Any attempt to remedy these disparities will meet with a predictable reactionary backlash. It will be nearly impossible to make progress by small steps; a radical overhaul of—at least—the entire criminal legal system is likely the only viable option. The next Part argues that the only way to end the inequities caused by mass incarceration is by abolishing the carceral state and replacing it with an equitable vision of public safety. If the system is working the way it is supposed to, the only solution is to get rid of the system.

## II. Abolition as Democracy

*I go to the movie / And I go downtown / Somebody keep telling  
me / Don't hang around*

– Sam Cooke<sup>36</sup>

Mass incarceration is oppression, but abolition democracy is freedom. To abolish something means to formally end it.<sup>37</sup> But when slavery ended, it was replaced with a society in which no person could legally be held as property;<sup>38</sup> when Jim Crow ended, it was replaced with a society in which discrimination on the basis of “race, color, religion, or national origin” was prohibited.<sup>39</sup> So abolition, in the sense of social change, means more than just ending one system of oppression and leaving a vacuum to be filled by the

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35. ASHLEY NELLIS, SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

36. COOKE, *supra* note 1.

37. *See Abolish*, 1 OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“To put an end to, to do away with . . . ; to annul or make void; to demolish, destroy or annihilate. . . . [I]t is usually said of institutions, customs or practices.”).

38. *See* U.S. CONST. amend. XIII (prohibiting slavery except as punishment for crime).

39. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243.



next system of oppression.<sup>40</sup> It means getting rid of one system and deliberately building another in its place.<sup>41</sup> That system, ideally, is one that is just, inclusive, and liberating, and in which all citizens are afforded the respect, education, economic security, resources, and civil rights necessary to be free, informed, and active participants in all significant aspects of public life.<sup>42</sup> That is abolition democracy.<sup>43</sup>

From this perspective, historical abolition movements failed.<sup>44</sup> Slavery was replaced with convict leasing and Jim Crow,<sup>45</sup> which, in turn, were replaced with mass incarceration.<sup>46</sup> In each case the abolition movement failed to build a life- and liberty-affirming institution in place of the one it tore down, allowing reactionary forces to fill the resulting vacuum with the next hatred-fueled system of oppression. These previous efforts failed to simultaneously create a large enough alliance of movements in solidarity to secure political power, enact major reconstructive legislation, and appoint judges committed to abolition constitutionalism.<sup>47</sup> If prison abolition is to succeed, we cannot merely end the carceral state. Instead, we must reimagine what it means for the public to be safe and *all* people secured and create a system through which we reinvest in our society, build up historically underprivileged communities, and finally acknowledge that everyone is equally deserving of dignity and material opportunity.

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40. See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1618 (2019) (“Rachel Herzing, cofounder of the prison-abolitionist organization Critical Resistance, conceives of abolition as a ‘set of political responsibilities’ to organize new forms of collective security that do not rely on police forces or incarceration.”); ALEXANDER, *supra* note 4, at 20–21 (noting that Jim Crow laws emerged after the abolition of slavery and that an oppressive racial caste system emerged after the abolition of Jim Crow laws).

41. See McLeod, *supra* note 40, at 1616 (“[A]bolitionist justice offers a . . . material effort to realize justice—one where punishment is abandoned in favor of accountability and repair, and where discriminatory criminal law enforcement is replaced with practices addressing the systemic bases of inequality, poverty, and violence.”).

42. See W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 182–89* (Free Press 1998) (1935).

43. See Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. L. REV. (forthcoming 2022) [hereinafter Hasbrouck, *Reimagining Public Safety*].

44. See Brandon Hasbrouck, *Democratizing Abolition*, 70 UCLA L. REV. (forthcoming 2022) (on file with author) [hereinafter Hasbrouck, *Democratizing Abolition*].

45. See *Convict Leasing*, EQUAL JUST. INITIATIVE (Nov. 1, 2013), <https://eji.org/news/history-racial-injustice-convict-leasing/>.

46. See ALEXANDER, *supra* note 4, at 1–2 (analogizing slavery to mass incarceration).

47. See Hasbrouck, *Democratizing Abolition*, *supra* note 44 (detailing the limitations of the gains made by the abolitionist, labor, civil rights, and women’s rights movements).

The end of slavery was followed by a brief period of Reconstruction, during which the abolitionist movement's efforts continued to be successful. Congress passed the Reconstruction Amendments and created the Freedmen's Bureau to provide support and protection to newly freed Blacks.<sup>48</sup> But with the Compromise of 1877, white supremacy got its way: Rutherford B. Hayes became President, but he promised to remove federal troops overseeing Reconstruction from the South, cutting Reconstruction short.<sup>49</sup> The promises of abolition gave way to new forms of oppression.<sup>50</sup> "The slave went free; stood a brief moment in the sun; then moved back again toward slavery."<sup>51</sup> The first attempt at abolition democracy failed.

Eventually, the Civil Rights Movement of the 1950s and 1960s brought an end to Jim Crow, and, for a time, increased protections of constitutional rights for Black people.<sup>52</sup> But soon the conservative backlash to the rights-protective Warren Court overtook the judiciary.<sup>53</sup> Simultaneously, Nixon launched the War on Drugs, setting in motion a chain of events that would end in mass incarceration.<sup>54</sup> The seeds of abolition democracy that briefly took root in the mid-twentieth century once again withered.

Modern calls for abolition seek to end mass incarceration just as the abolitionist movements of the nineteenth and twentieth centuries sought to end slavery and Jim Crow. But this time, we cannot merely eliminate the

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48. See Dorothy E. Roberts, *The Supreme Court 2018 Term Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 62–63 (2019).

49. See C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 5–7* (Doubleday Anchor Books, 2d ed. 1956); see also Hasbrouck, *Democratizing Abolition*, *supra* note 44 (manuscript at 10–11).

50. Daniel S. Harawa, *Black Redemption*, 48 FORDHAM URB. L.J. 701, 719 (2021) ("After the Civil War, state governments designed penal labor systems to replicate slavery."); see also Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 92 (2022) [hereinafter Hasbrouck, *The Antiracist Constitution*].

51. DU BOIS, *supra* note 42, at 30.

52. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (holding that anti-miscegenation laws are unconstitutional); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that racially segregated schools are unconstitutional); see also Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1477 (2003) ("The Warren Court's 'Due Process Revolution' was part of a judicial effort to protect minorities from state officials, to impose procedural restraints on official discretion, and to infuse governmental services with greater equality.").

53. See David M. O'Brien, *Why Many Think That Ronald Reagan's Court Appointments May Have Been His Chief Legacy*, HIST. NEWS NETWORK, <http://www.historynewsnetwork.org/article/10968> (last visited July 10, 2022) (explaining how the Reagan administration used judicial selection as a tool to achieve its policy goals).

54. See *supra* Part I.

existing system of oppression. Abolition means that we must enact programs and implement protections to create lasting social change, including novel institutions and structures, that the next wave of backlash cannot undo. Otherwise, the next system of oppression will follow hard on the heels of the end of mass incarceration.

When people's needs are met, they experience the material freedom that comes with having better choices and largely take advantage of those opportunities. In 2018, as part of a Canadian study called the "New Leaf Project," researchers gave fifty recently unhoused people \$7,500 and told them they could do whatever they wanted with the money.<sup>55</sup> The study compared that group of individuals with a control group.<sup>56</sup> The control group wasn't given any money, but both groups were given access to "workshops and coaching focused on developing life skills and plans."<sup>57</sup> Compared to the control group, those who received money "moved into stable housing faster and saved enough money to maintain financial security over the year of follow-up."<sup>58</sup> Contrary to widely held stereotypes, they did not spend the money on alcohol and drugs.<sup>59</sup> In fact, "[t]hey decreased spending on drugs, tobacco, and alcohol by 39 percent on average."<sup>60</sup> This study demonstrates that lack of access to resources, rather than an individual's bad choices, is a major driver of poverty and homelessness. Programs like this are necessary to make the end of mass incarceration part of the establishment of a lasting abolition democracy. If America set aside its addiction to white supremacy, we could enact programs like this on a scale to effectively eradicate poverty.

But we know who would most benefit from the eradication of poverty, and uplifting 8.5 million Black Americans and 600,000 Native Americans<sup>61</sup> starts to sound like the dreaded reparations to some white ears.<sup>62</sup> For white

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55. See Sigal Samuel, *A Canadian Study Gave \$7,500 to Homeless People. Here's How They Spent It.*, VOX (May 7, 2021, 12:15 PM EDT), <https://www.vox.com/future-perfect/21528569/homeless-poverty-cash-transfer-canada-new-leaf-project>.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. See *Basic Statistics*, TALK POVERTY, <https://talkpoverty.org/basics/> (last visited July 10, 2022) (presenting data on poverty rates from 2020 for Black Americans and from 2019 for Native Americans).

62. See generally Lawrence Glickman, *How White Backlash Controls American Progress*, ATLANTIC (May 22, 2020, 10:41 AM ET), <https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/> ("But both before and since, the

reactionaries, no price is too high to avoid the discomfort of truth and reconciliation. The carceral system costs approximately \$88.5 billion every year.<sup>63</sup> In an abolition democracy, this money isn't simply withheld from prisons. It is reinvested into society through programs that make people materially safer and freer.<sup>64</sup> The trillion dollars in annual societal harms stemming from incarceration<sup>65</sup> would be mitigated, allowing some of our most vulnerable communities to flourish. By abolishing mass incarceration, we can realize the ideal of true equality and strengthen our democracy.

### *III. Movement Constitutionalism*

*Then I go to my brother / And I say, brother, help me please / But  
he winds up, knockin' me / Back down on my knees / Oh, there  
been times that I thought / I couldn't last for long / But now I think  
I'm able, to carry on*

– Sam Cooke<sup>66</sup>

I recently explored the vast powers of Congress and the courts to protect the rights of marginalized people under an abolition constitutionalist framework.<sup>67</sup> Dorothy Roberts traced the origins of “abolition constitutionalism” back at least to the 1830s activism of antislavery lawyers and politicians who saw the Constitution as means to limit slavery’s

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preemptive politics of grievance and anti-egalitarianism [counter-revolutionaries] championed, whereby the psychology of privilege takes center stage while the needs of the oppressed are forced to wait in the wings, has left a deforming and reactionary imprint on our political culture.”).

63. Tara O’Neill Hayes, *The Economic Costs of the U.S. Criminal Justice System*, AM. ACTION F. (July 16, 2020), <https://www.americanactionforum.org/research/the-economic-costs-of-the-u-s-criminal-justice-system/> (reporting \$88.5 billion as the operating costs for “the nation’s prisons, jails, and parole and probation systems”).

64. See Hasbrouck, *Democratizing Abolition*, *supra* note 44 (manuscript at 39–50) (discussing how the institutions necessary to bring about abolition democracy—such as full employment with robust labor protections, housing, universal healthcare, public control of the press, and education built primarily to nurture citizens of a democratic society—make people both safer and freer).

65. Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S.* at 21 (Concordance Inst. for Advancing Soc. Just., Working Paper No. CI072016, 2016), <https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf>.

66. COOKE, *supra* note 1.

67. See generally Hasbrouck, *Democratizing Abolition*, *supra* note 44 (manuscript at 23–24) (discussing the power and consequences of the system of rights-protective Amendments enacted by the Reconstruction Congress).

expansion.<sup>68</sup> As our democracy evolved, abolition constitutionalism changed, adapted, and grew.<sup>69</sup> It is an interpretive principle that views the Constitution—particularly the Reconstruction Amendments—as containing the tools necessary to abolish oppressive institutions.<sup>70</sup>

A related but distinct concept is movement constitutionalism. Where abolition constitutionalism is an interpretive principle, movement constitutionalism is a process. It is the process through which movements—and especially abolitionist movements—shift society’s and the law’s approaches to democracy and the Constitution. It is the practice of liberationist movements that promote novel, liberty- and life-affirming constitutional interpretations and changes through organizing, legislative and litigation advocacy,<sup>71</sup> and direct action. To make abolition democracy a reality, every actor in our constitutional system must practice movement constitutionalism. Abolition democracy requires an all-hands-on-deck approach.

This Part describes the role that movement constitutionalism envisions for each branch of government and gives a few examples of how this vision

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68. See Roberts, *supra* note 48, at 54–55.

69. See *id.* at 54–71 (describing the history of abolition constitutionalism).

70. See *id.* at 108–10 (“Abolition constitutionalism, unlike other constitutional fidelities, aims not at shoring up the prevailing constitutional reading but at abolishing it and remaking a polity that is radically different.”); Hasbrouck, *Democratizing Abolition*, *supra* note 44 (manuscript at 23–24) (explaining the breadth Congress intended for its enforcement powers under the Reconstruction Amendments as sufficient support for reparations).

71. Movement constitutionalism overlaps with both movement law and movement lawyering. See generally Anna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821, 825–26 (2021) (providing a summary of movement law and its relationship to movement lawyering); Brandon Hasbrouck, *Movement Judges*, 97 NYU L. REV. 631 (2022) [hereinafter Hasbrouck, *Movement Judges*] (discussing the interactions of liberationist social movements with law). Black activists from Frederick Douglass to the Black Panther Party to Black Lives Matter have recognized that American law stands in opposition to Black people’s lives and freedom and sought out new interpretive frameworks to effectuate Black liberation. See Paul Finkelman, *Frederick Douglass’s Constitution: From Garrisonian Abolitionist to Lincoln Republican*, 81 MO. L. REV. 1, 66 (2016) (quoting Douglass’s statement that Black people did not enjoy the “rich inheritance of justice, liberty, prosperity and independence” that white Americans enjoyed under the Declaration of Independence); *Hanrahan v. Hampton*, 446 U.S. 754, 760 (1980) (per curiam) (reversing the attorney’s fees award received by Black Panther Party activists after vindicating their procedural right to pursue a suit against law enforcement officials for a deadly 1969 Chicago raid); Nimalan Yoganathan, *Black Lives Matter Movement Uses Creative Tactics to Confront Systemic Racism*, CONVERSATION (July 30, 2020, 1:54 PM EDT), <https://theconversation.com/black-lives-matter-movement-uses-creative-tactics-to-confront-systemic-racism-143273> (describing new tactics used by the Black Lives Matter movement to legitimize protestors’ demands for Black liberation).

could be put into practice. These examples are by no means exhaustive. Movement constitutionalism centers on the requirement that institutional actors adapt and respond to the changing facets of systems of oppression as these actors work to actualize an abolition democracy toward the end goal of establishing a functional multiracial democracy.

#### A. *The Legislature*

As I argued in an earlier piece, Congress has broad authority under the Thirteenth Amendment to eliminate the “badges and incidents” of slavery: the racially discriminatory political, civil, and legal disadvantages resulting from slavery or potentially facilitating its return.<sup>72</sup> Mass incarceration is slavery’s modern-day equivalent.<sup>73</sup> It provides a purportedly race-neutral means of controlling Black and Brown bodies and maintaining a social hierarchy.<sup>74</sup> As the quintessential modern-day incident of slavery, mass incarceration, or rather, its abolition, falls squarely within Congress’s authority under the Thirteenth Amendment. Movement constitutionalism requires Congress, as well as state legislatures, to take up the task of abolishing the badges and incidents of slavery by enacting legislation to counteract slavery’s continuing stranglehold on our democracy.

In 1865, Massachusetts Senator Charles Sumner introduced a bill “[t]o preserve the right of trial by jury, by securing impartial jurors, in the courts of the United States.”<sup>75</sup> The bill would have required that half of the jurors be Black in every case between a Black person and a white person or in which a Black person is accused of inflicting injury on a white person.<sup>76</sup> One study has shown that “[a]ll-White juries convicted Black defendants 16 percent more often than White defendants, but when at least one Black person was on the jury, conviction rates for Black and White defendants were nearly identical.”<sup>77</sup> All-white juries, which are still all too common in our criminal justice system,<sup>78</sup> are one of the badges and incidents of slavery, and as such Congress has the authority to abolish them under the Thirteenth

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72. See generally Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1112 (2020) [hereinafter Hasbrouck, *Abolishing Racist Policing*].

73. See ALEXANDER, *supra* note 4, at 2.

74. *Id.*

75. See S. 2, 39th Cong. (1865).

76. *Id.*

77. #Barriers2innocence: *All-White Juries*, MONT. INNOCENCE PROJECT, <https://mtinnocenceproject.org/all-white-juries/> (last visited July 10, 2022).

78. See Janell Ross, *Ahmaud Arbery and America’s White Juror Problem*, TIME (Nov. 5, 2021, 11:33 AM EDT), <https://time.com/6114194/ahmaud-arbery-white-jury-problem/>.

Amendment.<sup>79</sup> This 1865 bill, or its contemporary equivalent, is one way in which legislators can endeavor to achieve an abolitionist democracy.

In addition to enacting legislation to dismantle the badges and incidents of slavery, legislatures should enact non-reformist reforms<sup>80</sup> specifically targeted at decreasing the number of incarcerated people and eliminating mass incarceration's lasting societal consequences. This begins with dismantling the War on Drugs legislation that fueled mass incarceration in the first instance.<sup>81</sup> The Armed Career Criminal Act and the Antiterrorism and Effective Death Penalty Act should be among the first to go. Additionally, legislatures should decriminalize non-violent crimes;<sup>82</sup> restrict police discretion;<sup>83</sup> reinstate felons' civil rights;<sup>84</sup> eliminate court fees;<sup>85</sup> and end the practice of requiring convicted criminals to report their criminal

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79. See Hasbrouck, *Abolishing Racist Policing*, *supra* note 72, at 1112 (“The Supreme Court, in the *Civil Rights Cases*, interpreted the Thirteenth Amendment to grant Congress broad authority to eliminate the ‘badges and incidents’ of slavery.”).

80. See Amna N. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98–106 (2020) (tracing the concept of non-reformist reforms through socialist theory to its use among modern abolitionists, contrasting the opposition to replacing the death penalty with incarceration for life—or “death by prison”—with policies that critique the carceral state as part of a broader program of building organized popular power as an illustrative example); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 242 (2007) (defining non-reformist reform as “changes that, at the end of the day, unravel rather than widen the net of social control through criminalization”); McLeod, *supra* note 40, at 1616; Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 803 (2021) (acknowledging the growing recognition in legal scholarship that policing cannot be reformed).

81. See Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs>.

82. See Caitlin Oprysko, *Biden: ‘Nobody Should Be in Jail for a Nonviolent Crime,’* POLITICO (Sept. 12, 2019, 9:27 PM EDT), <https://www.politico.com/story/2019/09/12/joe-biden-debate-nonviolent-crime-1493732>.

83. See, e.g., Katie Krzaczek, *8 Common Traffic Violations No Longer Warrant a Police Stop in Philly*, PHILA. INQUIRER (Mar. 3, 2022), <https://www.inquirer.com/news/philadelphia/philadelphia-police-wont-stop-drivers-minor-offenses-20220303.html>.

84. See Sarah C. Grady, Comment, *Civil Death Is Different: An Examination of a Post-Graham Challenge to Felon Disenfranchisement Under the Eighth Amendment*, 102 J. CRIM. L. & CRIMINOLOGY 441, 447 (2012) (“Many have noted that [the increase in felon disenfranchisement laws immediately following the Civil War] is largely due to the fact that southern states used criminal disenfranchisement provisions to prohibit black men from access to the ballot, otherwise barred by the Fifteenth Amendment.”).

85. See Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>.

history on loan applications, job applications, housing applications, and so on.<sup>86</sup>

Ultimately, the fastest way to decrease the number of people in prison is to let people out of prison. Legislatures, at both the federal and state levels, should mandate a presumption of parole after eight or ten years of incarceration for everyone—including violent offenders.<sup>87</sup> While this presumption, like many other legal presumptions, could be rebutted in individual cases,<sup>88</sup> prisons would begin from the default of granting parole after an individual has served ten years. If a presumption of parole is rebutted in an individual case, for example by evidence of recent violent conduct from the incarcerated person's institutional record, parole boards should hold subsequent parole hearings every year, again with a presumption of release. This presumption of release is supported by empirical evidence of declining recidivism rates among older offenders<sup>89</sup> and among offenders after ten years of incarceration.<sup>90</sup> Under no circumstances should people released under such a program be subject to reincarceration for failure to comply with rules unrelated to public safety, as current parolees and probationers too often are. If people need additional help to transition back into society, it should come in a life-affirming treatment facility rather than a prison.

“Only the people's elected representatives in Congress have the power to write new federal criminal laws.”<sup>91</sup> Their counterparts in state legislatures

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86. See Jaboa Lake, *Preventing and Removing Barriers to Housing Security for People with Criminal Convictions*, CTR. FOR AM. PROGRESS (Apr. 14, 2021), <https://www.americanprogress.org/article/preventing-removing-barriers-housing-security-people-criminal-convictions/>.

87. See Hasbrouck, *Reimagining Public Safety*, *supra* note 43 (noting that carceral systems already do a poor job of removing dangerous individuals from society, while abolitionist interventions have already demonstrated successful violence reduction). Our carceral systems disproportionately concentrate punishment's removal of dangerous individuals from society among marginalized populations. Abolitionist anti-violence interventions have the benefit over prisons of reducing violence without unfairly burdening Black, Brown, and poor people to accomplish that goal.

88. See FED. R. EVID. 301 (“[T]he party against whom a presumption is directed has the burden of producing evidence to rebut the presumption.”).

89. See U.S. SENT'G COMM'N, *THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS* 23 fig.13 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207\\_Recidivism-Age.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf).

90. See U.S. SENT'G COMM'N, *LENGTH OF INCARCERATION AND RECIDIVISM* 4 (2020), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200429\\_Recidivism-SentLength.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200429_Recidivism-SentLength.pdf).

91. *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).



usually hold the sole power to create new state criminal laws.<sup>92</sup> It logically follows that the legislature has the greatest power and authority to eliminate those aspects of the criminal justice system that fuel and perpetuate mass incarceration. Movement constitutionalism requires that legislatures use their broad authority to do so.

### *B. The Judiciary*

In the same way, movement constitutionalism requires judges to recognize how the law sustains oppressive institutions grounded in white supremacy and to center the goal of dismantling these systems in their jurisprudence.<sup>93</sup> If the judiciary accepts and embraces movement constitutionalism, stepping in to defend democracy itself when other branches seek to undercut it is at the very core of judicial responsibility. When the safeguards built into our system break down, the judiciary is the last backstop.<sup>94</sup> Mass incarceration represents a constitutional breakdown of a sufficiently significant magnitude to warrant heavy-handed judicial intervention. It is a self-perpetuating cycle, implemented and maintained for the purpose of subjugating and controlling Black and Brown bodies.<sup>95</sup>

The pervasive, systemic nature of the problem is extraordinary.<sup>96</sup> At common law, equity courts developed to respond to outrages of this kind: “equity emerged as a system for interposing just results in cases where the common law courts were inadequate.”<sup>97</sup> Equity and law merged into one in the Federal Rules of Civil Procedure and in most state courts.<sup>98</sup> While we no longer have independent courts of equity, judges retain the powers of traditional courts of equity, which they have discretion to exercise in

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92. *But see* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 980–82 (2019) (chronicling the shift from common law criminal law to codification, then listing the jurisdictions in the United States where judges explicitly retain the power to convict defendants for uncodified crimes).

93. *See generally* Hasbrouck, *Abolishing Racist Policing*, *supra* note 72, at 1113–14.

94. *See* THE FEDERALIST NO. 78, at 393 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“Limitations [on coordinate branches] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”).

95. *See generally* ALEXANDER, *supra* note 4, at 2 (“[W]e use our criminal justice system to label people of color ‘criminals’ and then engage in all the practices we supposedly left behind [after Jim Crow].”).

96. *See supra* Part I.

97. John Valery White, *Civil Rights Law Equity: An Introduction to a Theory of What Civil Rights Has Become*, 78 WASH. & LEE L. REV. 1889, 1901 (2022).

98. *See id.* at 1902.

extraordinary cases.<sup>99</sup> Most notably, the Supreme Court exercised its equitable powers to craft an appropriate remedy to Jim Crow in *Brown v. Board of Education*.<sup>100</sup> Like Jim Crow, mass incarceration is an extraordinary problem that requires an extraordinary remedy. If anything is to change, we must first shake loose the pieces. When judges preside over cases bearing the imprimatur of white supremacy, mass incarceration, and social control, they should exercise their equitable powers to induce necessary change and counteract the oppressive institutional forces at play.

In this respect, state court judges, who hear ninety-five percent of all cases and a significant majority of all criminal cases,<sup>101</sup> often have more flexibility than federal judges. Federal courts have a very limited ability to create common law, and consequently their decisions are largely bound by the letter of the statute or constitutional provision the court is applying in each case.<sup>102</sup> State courts have broader authority to develop common law and, in doing so, must consider principles of fairness and justice.<sup>103</sup> State court judges thus have more latitude to depart from the rigid formalism of the law in the name of justice and fairness in extraordinary circumstances. And they should do so.

In addition to their role as the ultimate guardians of democracy, judges can implement many of the examples of legislative action discussed above. To illustrate just one example, in light of the rampant racial disparities of the criminal justice system, judges could conclude that seating a proportional number of Black jurors is required in cases where one of the parties is Black or a Black person is accused of inflicting injury on a white person.<sup>104</sup> The Sixth Amendment's guarantee of a trial by a jury of one's peers, in

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99. See *id.* at 1905–06 (“[The merger] permitted courts to tailor unique remedies to fit the right violated without worrying about procedural, substantive, or remedial limitations on that substantive right.”).

100. 349 U.S. 294, 300–01 (1955) (discussing how equitable principles will guide desegregation procedures); see White, *supra* note 97, at 1912–14.

101. See *Top Court Filing Statistics from Around the Country*, ONE LEGAL (Apr. 3, 2019), <https://www.onelegal.com/blog/top-court-filing-statistics-from-around-the-country/>.

102. See *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) (“The instances where we have created federal common law are few and restricted.”); see also Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 1–4 (2015) (discussing the limited nature of federal common law).

103. See Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMPAR. L. 419, 422 (1967) (stating that the common law “embodied the protection of the rights of the people”).

104. See *supra* notes 76–77 and accompanying text.

conjunction with the Fourteenth Amendment's Equal Protection and Due Process Clauses, can easily be read to include this protection.<sup>105</sup>

At the very least, any legislative action requires the judiciary's commitment if it is to be effectively carried out. Following the Reconstruction Congress's enactment of the Reconstruction Amendments, the Court adopted a narrow reading of the Amendments.<sup>106</sup> The lasting consequences of these decisions crippled and undercut the legislature's work.<sup>107</sup> Since then, courts have repeatedly employed a trifecta of tools—colorblindness, the discriminatory purpose requirement, and the fear of “too much justice”—to limit constitutional rights and protections for Black and Brown people.<sup>108</sup> A movement constitutionalist must renounce such artificial narrowing of the Constitution's guarantees of liberty and embrace legislative efforts to usher in an abolition democracy.

To that end, activists should demand that politicians and voters select movement judges<sup>109</sup> to uphold a movement constitutionalist vision of the law. Such judges should come from backgrounds either in or in solidarity with liberationist social movements.<sup>110</sup> Fortunately, organizations like Demand Justice are already calling for the diversification of the kinds of lawyers we select as judges.<sup>111</sup> Movement judges at all levels could apply the law more equitably and adopt abolitionist constitutional interpretations.<sup>112</sup> These interpretations would include, for example, understanding the Thirteenth Amendment to protect reproductive rights,<sup>113</sup> the Privileges or Immunities Clause to protect a broad range of unenumerated rights,<sup>114</sup> and the enabling clauses of the Reconstruction Amendments to grant Congress the power to

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105. See #Barriers2innocence: *All-White Juries*, *supra* note 77 (“The 6th and 14th amendments grant you the right to a speedy, public trial by an impartial jury of your peers, but these rights are often reserved for White people.”).

106. See generally *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *United States v. Cruikshank*, 92 U.S. 542 (1875).

107. See *Roberts*, *supra* note 48, at 73–75.

108. *Id.* at 77–93.

109. See generally Hasbrouck, *Movement Judges*, *supra* note 71 (advancing the concept of a movement judge).

110. See *id.* at 669. These social movements are distinct from the top-down campaigns of oligarchs to rally support to their positions.

111. See *Diversifying the Bench*, DEMAND JUST., <https://demandjustice.org/priorities/diversifying-the-bench/> (last visited Aug. 19, 2022).

112. See Hasbrouck, *The Antiracist Constitution*, *supra* note 50, at 142–63 (outlining an abolition constitutionalist interpretation of the Reconstruction Amendments).

113. See *id.* at 148.

114. See *id.* at 154–56.

enact race-conscious remedial legislation.<sup>115</sup> Rather than resisting the abolitionist project, movement judges would review the administration of abolitionist legislative enactments to ensure equity and enforce the Constitution's abolitionist protections broadly.

### C. *The Executive*

Movement constitutionalism likewise requires the executive branch to implement policies that not only end mass incarceration as the current system of oppression but also abolish all systems of oppression. The executive branch oversees the legislative and judicial branches and has the power to carry out the law.<sup>116</sup> The most logical starting point for an abolitionist executive is changes within the Department of Justice ("DOJ"). The executive branch, via DOJ policy, can restrain police and prosecutorial discretion to prevent abuse.<sup>117</sup> The executive branch should establish oversight procedures to ensure prosecutors adhere to DOJ policy, which should be guided by the principles discussed below.

First, just as the movement judge avoids insular thinking and seeks answers from historically repressed communities,<sup>118</sup> executive officials and those drafting administrative laws must center the voices of movements in executive rulemaking. Movements' voices are calling for an end to the War on Drugs.<sup>119</sup> The executive branch, via the DOJ, can listen and respond by prohibiting prosecutors from prosecuting non-violent drug crimes. Currently, 374,000 individuals are incarcerated for non-violent drug offenses on any given day.<sup>120</sup> Ending the prosecution of non-violent drug offenses would significantly reduce mass incarceration.

The DOJ should disallow the current system in which prosecutors overcharge those accused of wrongdoing and are not transparent when plea

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115. *See id.* at 161–62.

116. *See* U.S. CONST. art. II., §§ 2–3.

117. *See* 28 U.S.C. § 510 (allowing the Attorney General to delegate his authority); 28 U.S.C. § 512 (allowing the Attorney General to advise other executive agencies).

118. *See* Hasbrouck, *Movement Judges*, *supra* note 71, at 635.

119. *See, e.g., End the War on Drugs*, M4BL: MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/end-the-war-on-drugs/> (last visited July 10, 2022) ("Immediately and retroactively decriminalize drug . . . offenses and invest savings into programs and services identified by people in the drug . . . trades, and implement a full and comprehensive reparations package for people, families, and communities harmed by the drug war . . .").

120. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> (graphing at slideshow three how one in five incarcerated people is locked up for a drug offense).

bargaining. As discussed in Part I, “[i]n an effort to get tough on crime, Congress and state legislatures expanded criminal codes and created mandatory-minimum sentencing regimes that gave prosecutors the ability to choose between a greater range of possible charges to file or threaten to file.”<sup>121</sup> But the opposite is also true. If prosecutors have discretion to overcharge defendants, they also have the discretion to reasonably charge defendants or to decline to charge them at all.

The DOJ should also create and support more robust diversion programs. Diversion policies give defendants

a conditional opportunity . . . to have their charges dismissed. Defendants might be required to make amends through restitution or community service or improve themselves through rehabilitation, drug or alcohol treatment, or a program for education or employment. When the diversion program’s requirements are met, the prosecutor dismisses the charges.<sup>122</sup>

The DOJ should likewise require prosecutors to refuse to pursue cases with unreliable, weak, or questionable evidence. The DOJ should expect prosecutors to rigorously adhere to the *Brady* rule<sup>123</sup> and other due process requirements rather than pushing boundaries for gamesmanship.<sup>124</sup> There are manifold examples across history of the prosecution of Black individuals in which the evidence was lacking.<sup>125</sup> Prosecutors should not take cases that were preceded by police misconduct. Specifically, “when evidence suggests that a police officer engaged in racial profiling or conducted a pretextual stop, prosecutors should exercise their discretion to either not bring charges, exclude tainted evidence, or conduct an independent investigation against the police officer for civil rights violations.”<sup>126</sup>

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121. Hasbrouck, *The Just Prosecutor*, *supra* note 9, at 644.

122. *Id.* at 678.

123. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

124. *See Hasbrouck, The Just Prosecutor*, *supra* note 9, at 650 (“[C]onviction rates matter and attorneys who have a reputation for winning are promoted.”).

125. *See, e.g., Aisha Harris, The Central Park Five: ‘We Were Just Baby Boys,’* N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us.html> (describing how five Black and Latino teenagers were wrongfully convicted for the assault and rape of a white woman jogging in Central Park despite the poor evidence connecting them to the crime).

126. Hasbrouck, *The Just Prosecutor*, *supra* note 9, at 671.

While it will take time for the legislature to amend or abolish the Armed Career Criminal Act (“ACCA”)<sup>127</sup> and other draconian sentencing regimes, prosecutors have the discretion right now to seek these punishments sparingly. The ACCA mandates a fifteen-year minimum prison sentence for those previously convicted of a violent felony or serious drug offense who are caught with a firearm in their possession.<sup>128</sup> These prior convictions are usually for violations of state law.<sup>129</sup> This means an individual could wind up in federal prison for at least fifteen years, even if they have only ever been convicted at the state level. The ACCA’s one-size-fits-all approach to punishment creates unjust results.<sup>130</sup> The DOJ should only allow prosecutors to utilize this regime in the cases that actually call for punishment under the ACCA.

The DOJ can also change its policies to require aggressive prosecution of police for Blue-on-Black violence. Over time, prosecutors, as representatives of the executive branch, have succeeded in securing narrow interpretations of the Constitution from judges “that have resulted in racial profiling, pretextual stops, and use of excessive force. This has led to what many refer to as police ‘superpowers.’”<sup>131</sup> Police superpowers led to our current system of Blue-on-Black violence.<sup>132</sup> Where the evidence suggests the police were

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127. 18 U.S.C. § 924(e).

128. *Id.* (referencing the firearm restriction under 18 U.S.C. § 922(g)(1)–(9)).

129. *See* DOYLE, *supra* note 21, at 23 n.175 (listing Supreme Court cases where state convictions were the predicate offenses under the ACCA).

130. *See* Rachel Kunjummen Paulose, *Power to the People: Why the Armed Career Criminal Act Is Unconstitutional*, 9 VA. J. CRIM. L. 1, 66–73 (2021) (describing four ways that the ACCA is unconstitutional).

131. Hasbrouck, *The Just Prosecutor*, *supra* note 9, at 637 (footnotes omitted) (citing Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 129–30 (2017); Kevin R. Johnson, *How Racial Profiling in America Became the “Law of the Land:” United States v. Brignoni-Ponce and Whren v. United States and the Need for Rebellious Lawyering*, 98 GEO. L.J. 1005, 1009–45 (2010); Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CAL. L. REV. 199, 209 (2007); Butler, *The System Is Working the Way It Is Supposed to*, *supra* note 29, at 1452; PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 56 (2017) [hereinafter BUTLER, CHOKEHOLD]).

132. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1485 (2016) (arguing that police violence against Black people persists because constitutional structure and qualified immunity “create a disincentive for police officers to exercise care with respect to when and how they employ violent force”).

using their “superpowers” to control Black and Brown people,<sup>133</sup> the DOJ should require prosecutors to decline to prosecute the case.

The DOJ and state attorneys general should require prosecutors to support post-conviction motions when the prior sentence would not be given under present, changed circumstances.<sup>134</sup> They should also revise policies to obligate prosecutors to individually tailor conditions of release. Currently, prosecutors request a kitchen-sink’s worth of conditions in parole cases so as to achieve maximum control over the, often, Black or Brown body.<sup>135</sup> This results in formerly incarcerated individuals winding up back in prison for the smallest slip-ups, often meaning the punishment is vastly disproportionate to the original crime.<sup>136</sup> If prosecutors required fewer conditions of release that actually made sense for each individual, the carceral state’s power over Black and Brown bodies would decrease.

Presidents and governors can also take matters into their own hands, as President Biden recently did by pardoning everyone convicted of simple possession of marijuana at the federal level.<sup>137</sup> The move is more symbolic than pragmatic—the approximately 6,500 simple possession of marijuana convictions since 1992 represent a relatively small proportion of federal drug charges.<sup>138</sup> Nor does this action reach the much larger number of people

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133. See BUTLER, CHOKEHOLD, *supra* note 131, at 56 (“U.S. police officers have super powers . . . . The police have been granted these powers [by] . . . the United States Supreme Court . . .”).

134. Currently, prosecutors usually act defensively and discount post-conviction innocence claims. See Bruce A. Green, *Why Should Prosecutors “Seek Justice?”*, 26 FORDHAM URB. L.J. 607, 638 n.133 (1999). However, “[a] court is more likely to grant relief if the prosecutor joins in a defendant’s motion to set aside his conviction based on new evidence.” Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 486–87 (2009); see also Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 186–87 (2005) (“[A] prosecutor’s consent to a motion for a new trial may have a persuasive effect on a judge making these determinations . . .”).

135. See ALEXANDER, *supra* note 4, at 176 (“Those released from prison on parole can be stopped and searched by the police for any reason—or no reason at all—and returned to prison for the most minor of infractions . . .”).

136. See *id.* at 178 (“Myriad laws, rules, and regulations operate to discriminate against people with criminal records and effectively prevent their reintegration into the mainstream society and economy.”).

137. See Liz Dye, *Biden Blazes Federal Drug Policy, Sparks Change with Blunt Talk About Marijuana Laws*, ABOVE THE L. (Oct. 6, 2022, 4:45 PM), <https://abovethelaw.com/2022/10/biden-blazes-federal-drug-policy-sparks-change-with-blunt-talk-about-marijuana-laws/>.

138. See Michael D. Shear & Zolan Kanno-Youngs, *Biden Pardons Thousands Convicted*

convicted for possession of marijuana in state courts.<sup>139</sup> But Biden did not disregard the role of the states—he asked governors to take similar action to pardon charges within their authority.<sup>140</sup> Both the federal pardon and corresponding state action enjoy majority support.<sup>141</sup> While pardoning simple possession charges is only a small first step, it is at least one in the right direction and provides a greater focus on anti-carceral efforts.

In conjunction with the legislature and the judiciary, the executive branch—on both the state and federal level—has the power and the responsibility to abolish mass incarceration and erect a new, just system in its place.

### *Conclusion*

*It's been a long / A long time coming / But I know a change gonna  
come / Oh, yes it will*

– Sam Cooke<sup>142</sup>

Mass incarceration is the modern oppression of the Black body. The pervasive problem of mass incarceration is not going away anytime soon—certainly not with reformist solutions that leave systemic oppression unaddressed. Truly abolitionist solutions require new life- and liberty-affirming institutions even more than they require the actual end of carceral violence. But building those structures will take a massive commitment to movement constitutionalism across all branches of state and federal government.

Congress and state legislatures must enact sweeping remedial legislation. Long before the legislative enactments that formally end carceral violence, new institutions will be created to ensure public safety without it. Those institutions will address the material and economic security of all Americans, liberating them from the cycles of poverty, abuse, and addiction that

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*of Marijuana Possession Under Federal Law*, N.Y. TIMES (Oct. 6, 2022), <https://www.nytimes.com/2022/10/06/us/politics/biden-marijuana-pardon.html>.

139. See Maegan Vazquez & Aditi Sangal, *Here's Who Is Not Eligible for Biden's Marijuana Pardon*, CNN (Oct. 10, 2022, 1:58 PM EDT), <https://www.cnn.com/2022/10/08/politics/biden-marijuana-possession-pardons>.

140. *Id.*

141. See Kyle Jaeger, *Majority of Americans Support Biden's Marijuana Pardons and Want Governors to Follow Suit, Poll Finds*, MARIJUANA MOMENT (Oct. 7, 2022), <https://www.marijuanamoment.net/majority-of-americans-support-bidens-marijuana-pardons-and-want-governors-to-follow-suit-poll-finds/>.

142. COOKE, *supra* note 1.



undergird criminalized behavior. Even before the coup de grâce ending our systems of carceral violence, judges will need to embrace abolition constitutionalism to uphold this legislation against the inevitable white supremacist backlash. These institutions will need the affirmative participation of executive officers with the courage to reject the punitive outcry after an act of violence within the community.

We cannot merely end mass incarceration. We must promote the constitutional interpretations and political will necessary to replace it with abolition democracy. Only through movement constitutionalism on a massive scale will we see such a future.