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Grassroots Movement Lawyering: Insights From the George Floyd Rebellion

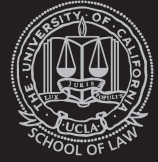
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ABSTRACT

In the immediate aftermath of the murder of George Floyd at the hands of the Minneapolis Police, protesters engaged in acts of destruction, looting, and seizure of private and state property on a scale unseen since the assassination of Martin Luther King, Jr., in 1968. An estimated \$2 billion was caused in private property damage, by far the most expensive for an uprising in American history. The most secure sites of state property, including the Third Precinct in Minneapolis, were set ablaze. In Seattle, protesters seized and converted a neighborhood into an experimental, collectively run society free from state and police intervention. These and other disruptive acts came to be known as the “George Floyd rebellion.” Notable as all these actions were, this rebellion constitutes an increasingly prevalent form of social movement under neoliberalism.

This Article makes sense of the George Floyd rebellion in light of the movement law premise that social movements work to fundamentally transform state and society. The events of 2020 reveal a critical gap between the dominant client-based model of movement lawyering, and movement lawyering oriented to and in solidarity with the grassroots. By analyzing the rebellion, this Article is the first to offer insights on how movement lawyers might reorient their practice to respect the unique contributions of grassroots social movements of today.

This Article argues that movement lawyers should, in the short-term, recalibrate their practical advocacy to support grassroots initiatives that directly expand the capacity of subordinated populations to control their own destinies and equitably distribute resources themselves, instead of depending on the state as the primary provider of rights and resources. As a long-term project, by embracing the transformative horizon of the rebellion, movement lawyers should commit to transformative advocacy of their own to shift the underlying paradigm of property law rooted in private ownership towards recognition of common property. Thus, rather than echoing conventional movement demands for a mere redistribution of property entitlements, the rebellion teaches movement lawyers that structural transformation necessarily entails a foundational reconfiguration of property law.



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When civility leads to death, revolting is the only logical reaction. The cries for peace will rain down, and when they do, they will land on deaf ears, because your violence has brought this resistance. We have the right to fight back! Rest in Power George Floyd.

— Colin Kaepernick¹

INTRODUCTION

On May 25, 2020, George Floyd, a forty-six-year-old Black man, was killed while in custody of the Minneapolis Police. The video of his murder instantly went viral, revealing that for nine minutes and twenty nine seconds, Derek Chauvin, a veteran officer of nineteen years, pressed his knee to the neck of a pinned down Mr. Floyd.² Three other officers at the scene looked on despite Mr. Floyd desperately pleading for life, repeatedly calling for his mother and echoing the haunting refrain of Eric Garner’s last words—“I can’t breathe.”³ Predictably,⁴ a social movement

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1. Colin Kaepernick (@Kaepernick7), TWITTER (May 28, 2020, 9:38 AM), https://twitter.com/Kaepernick7/status/1266046129906552832?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1266046129906552832%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.nbcsports.com%2Fbayarea%2F49ers%2Fcolin-kaepernick-reacts-george-floyds-death-police-custody [https://perma.cc/7X4B-MQPG].
 2. Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer Than Initially Reported*, N.Y. TIMES (Mar. 30, 2021, 10:24 AM), <https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html> [https://perma.cc/ALP3-TF9W].
 3. For a timeline on the final moments of George Floyd’s life, see *George Floyd: What Happened in the Final Moments of His Life*, BBC NEWS (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726> [https://perma.cc/CJB7-E8ZY]. In 2014, Eric Garner, a 43-year-old Black man, was wrestled to the ground in a chokehold by a New York Police Department officer before dying. For footage of Eric Garner’s final moments gasping “I can’t breathe,” see *I Can’t Breathe: Eric Garner Put in Chokehold by NYPD Officer – Video*, GUARDIAN (Dec. 4, 2014, 2:46 PM), <https://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video> [https://perma.cc/8SFX-49Q7].
 4. Police shootings of Black civilians have usually catalyzed local protests in the immediate wake. This was true of the Ferguson and Baltimore uprisings in 2014 and 2015 following the killings of Michael Brown and Freddie Gray, respectively. See generally German Lopez, *The Baltimore Protests Over Freddie Gray’s Death, Explained*, VOX (Aug. 18, 2016, 9:38 AM), <https://www.vox.com/2016/7/27/18089352/freddie-gray-baltimore-riots-police-violence> [https://perma.cc/ZDP9-URZX]; Larry Buchanan, Ford Fessenden, K.K. Rebecca Lai, Haeyoun Park, Alicia Parlapano, Archie Tse, Tim Wallace, Derek Watkins & Karen Youris, *Q&A: What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015),

ignited in Minneapolis the very next day.⁵ Uncharacteristically, the local spark spread like wildfire across the nation and beyond national borders in the immediate aftermath.⁶

On the surface, the spectacle of mass demonstrations, particularly during the daytime, signaled a return of Black Lives Matter (BLM) to its roots—from the policy arena back to the streets.⁷ Yet just beneath the surface of demonstrative spectacle, often under the cover of night, protesters also engaged in acts of destruction, looting, and seizure of private and state property on a scale that has been unparalleled in contemporary social movements, prompting comparisons to the pivotal year of 1968⁸ when riots broke out in more than one hundred cities following the assassination of Martin Luther King, Jr.⁹ Given the widespread

<https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [<https://perma.cc/A8KA-G5YY>].

5. See generally Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/ZDP9-URZX>].
6. While it has been common for uprisings to break out in the locality where the police killing occurs, uprisings have only “extend[ed] nationally (and beyond) when the police are found not guilty, or not charged at all.” Joshua Clover, *66 Days*, VERSO: BLOG (June 2, 2020), <https://www.versobooks.com/blogs/4734-66-days> [<https://perma.cc/S9XJ-BDMC>]. For a snapshot of international protests in solidarity with George Floyd, see *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/NXQ3-Q3DE>].
7. Some grassroots organizers have critically noted that by translating the energy of spontaneous revolt into legal and policy demands through the ‘Vision 4 Black Lives’ platform, professionals had taken the Black Lives Matter movement “out of the streets and back into the system through the nonprofit industrial complex.” Julia Wallace & Juan Cruz Ferre, *Bring BLM Back to the Streets: A Critique of the M4BL Platform*, LEFT VOICE (Dec. 30, 2016), <https://www.leftvoice.org/Bring-BLM-Back-to-the-Streets-A-Critique-of-the-M4BL-Platform> [<https://perma.cc/W7QP-KXEJ>] (emphasis omitted).
8. See, e.g., Mark Z. Barabak, *News Analysis: Racism, Unrest, Police Brutality. Is America Living 1968 All Over Again? Yes, and No*, L.A. TIMES (June 4, 2020, 4:00 PM), <https://www.latimes.com/politics/story/2020-06-04/george-floyd-protests-1968-parallels-2020-election> [<https://perma.cc/5ZFF-DNFY>]; Karen Grigsby Bates, Opinion, *1968–2020: A Tale of Two Uprisings*, NPR: CODE SWITCH (June 3, 2020, 8:40 PM), <https://www.npr.org/sections/codeswitch/2020/06/03/869138222/1968-2020-a-tale-of-two-uprisings> [<https://perma.cc/TL29-ANJV>].
9. In Washington, D.C. alone, in the days after Martin Luther King Jr.’s assassination, statistics show that:
 More than 1100 buildings . . . were damaged or destroyed by an estimated 20,000 rioters. More than 1200 fires were recorded. A dozen people died in the flames or at the hands of others, including the police. . . . Thousands of businesses were looted and destroyed. The city sustained an estimated \$27 million in damage, which equates to about \$193.4 million in 2018 dollars.

nature of these disruptive acts, the social movement that emerged in the summer of 2020 has been aptly described as the “George Floyd rebellion.”¹⁰ These acts of disruption, carried out spontaneously yet collectively by grassroots community members, mark a fundamental departure from what contemporary movement law scholars¹¹ have come to understand of social movements as led by clearly identifiable movement organizations with meticulously prepared and narrowly articulated demands. Far from being exceptional, these disruptive acts constitute an increasingly prevalent form of social movement activity today under a neoliberal political economy,¹² thus demanding serious scholarly attention. This Article aims to make sense of these disruptive actions in light of the movement law premise that social movements “can change thinking about the *content* of law and thus the horizon of the possible and sustainable”¹³ and as such, work to “fundamentally transform state and society.”¹⁴

Drew Hansen, *Then and Now: D.C.’s Riot-Ravaged Blocks 50 Years Later*, WASH. BUS. J. (Mar. 30, 2018, 9:19 AM), <https://www.bizjournals.com/washington/news/2018/03/30/dc-riots-1968-then-and-now.html> [<https://perma.cc/P3SM-C4F2>]. For a timeline of 1968 riots, see generally Matthew Twombly, *A Timeline of 1968: The Year That Shattered America*, SMITHSONIAN MAG. (Jan. 2018), <https://www.smithsonianmag.com/history/timeline-seismic-180967503> [<https://perma.cc/K5HX-FM3F>].

10. See, e.g., Kellie Carter Jackson, *The Double Standard of the American Riot*, ATLANTIC (June 1, 2020), <https://www.theatlantic.com/culture/archive/2020/06/riots-are-american-way-george-floyd-protests/612466> [<https://perma.cc/74W5-U8TN>]; Philip V. McHarris, Opinion, *The George Floyd Protests Are a Rebellion Against an Unjust System*, GUARDIAN (June 4, 2020, 5:15 PM), <https://www.theguardian.com/commentisfree/2020/jun/04/george-floyd-protests-riots-rebellion> [<https://perma.cc/PEP8-WTFR>]; Shemon & Arturo, *Theses on the George Floyd Rebellion*, ILL WILL (June 24, 2020), <https://illwilleditions.com/theses-on-the-george-floyd-rebellion> [<https://perma.cc/Y493-7UVN>].
11. “Movement law approaches scholarly thinking and writing about law, justice, and social change as work done in solidarity with social movements, local organizing, and other forms of collective struggle.” Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 826 (2021).
12. Neoliberalism refers to the ideology and set of policies responsible for the shift from a capitalist economy based in industrial production to financialization. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 16 (2005). See also Athena D. Mutua, *Framing Elite Consensus, Ideology and Theory & a ClassCrits Response*, 44 SW. L. REV. 635, 638 (2015) (“Neoliberalism is a set of ideas, policies and practices meant to ground and preserve in social reality a particular set and type of market relations . . . that it ideologically refers to as a ‘free market’ and which is based on the intellectual scaffold of neoclassical economic theory.”).
13. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2752 (2014).
14. Akbar, Ashar & Simonson, *supra* note 11, at 827. See also Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1647 (2017) (situating social movements “at the center of legal and political transformation”).

This Article argues that movement lawyers should listen to and learn from the language spoken by the grassroots activities of the George Floyd rebellion.¹⁵ These grassroots activities generate important questions for movement lawyers to continually reflect upon in lawyering for transformative social change. To whom are lawyers accountable? What do disruptive actions communicate about the underlying content of law? What new legal horizon is being expressed through acts that violate the long-established sanctity of property? What do grassroots movement activities mean for state transformation and structural change? The George Floyd rebellion teaches lawyers to approach these core movement lawyering questions in fundamentally new ways. By analyzing the rebellion, this Article is the first to offer insights on how movement lawyers might reorient their practice to respect the unique contributions of grassroots social movements of today.

The George Floyd rebellion expands the political and legal horizons of contemporary social justice movements. To illustrate its distinct horizon, this Article contrasts the rebellion from (1) the marriage equality movement, which narrowly sought legal recognition and inclusion into the state for lesbian and gay couples, and (2) the Movement for Black Lives (M4BL), which, despite its “radical imagination,”¹⁶ demands redistribution of resources mediated by the state. The fixation with the state as the predominant site for formal rights and resource allocation owes in large part to the professionalization of both movements—at the outset, in the case of the same-sex marriage campaign,¹⁷ and over time, in the case

15. In describing the “long hot summer” of mass revolt as the “George Floyd rebellion,” this Article places May 26, 2020—the day following the police murder of George Floyd—as its starting point. Though there were ebbs and flows over the summer in the type of social movement activity analyzed in this Article, the rebellion lasted well into the winter. The longevity of the rebellion was in part due to the systematized nature of police violence in the United States against Black lives—as seen with Breonna Taylor, Rayshard Brooks, Jason Blake, and Walter Wallace Jr.—and the inadequacy of legal channels to deliver justice to victims of police violence. See generally Adrian Wohlleben, *Memes Without End*, ILL WILL (May 16, 2021), <https://illwill.com/memes-without-end> [https://perma.cc/53HJ-TRYV].

16. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018).

17. Nan Hunter argues that the contemporary marriage equality campaign represents a new model of social movement geared towards winning elections. The electoral successes at the local level paved the way for the successful outcome in *Obergefell v. Hodges*, 576 U.S. 644 (2015). Crucially, from the outset, this strategy was determined by a gathering of “ten leaders of LGBT rights organizations” in 2005, “[a]lmost all [of whom] were lawyers, most from litigation organizations; participation was by invitation only.” Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1687–88 (2017). See also Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WIS. L. REV. 655, 670 (2016) (showing “how the ascendance of an essentialist model of LGBT identity

of M4BL.¹⁸ While these traditional movement demands once carried the transformative potential for substantive equality under conditions of de jure segregation and an industrialized economy, these demands today work consistently within the ideological constructs and mechanics of neoliberalism, thus effectively masking continued gender and racial subordination. Moreover, because formal recognition confers a form of status property in one's social identity, and because a state-mediated redistribution of resources preserves the quality of tangible property as exclusively owned, traditional movement demands functionally reinforce the underlying tenets of an American property law regime designed for inequitable profit accumulation.

In contrast, the collective grassroots militancy, spontaneity, and “prefigurative” placemaking¹⁹ of the George Floyd rebellion reveal the limits of any law reform strategy rooted primarily in the state. In so doing, the rebellion continues the long lineage of the queer and Black radical traditions—defined by subordinated peoples directly engaged in resistance against the state, the police, and property on the one hand, and attempts to prefigure a society free from homophobia, transphobia, patriarchy, and white supremacy on the other. This tandem of resistance and prefigurative acts during the summer of 2020 reveals a fundamental critique of the state as a historical form that produced and continually extends gendered, racial capitalism²⁰—practically through both

politics can be traced to the rise of a specific form of professionalized, civil-rights-focused LGBT movement organizations”); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1669 (2014) (arguing that litigation dominated the LGBTQ movement's agenda “to the exclusion of more radical and transformative priorities”).

18. The M4BL is comprised of over fifty organizations that drafted the ‘Vision for Black Lives’—a platform of movement demands. Because many of the organizations were professional law and policy-oriented organizations, some have critiqued the Vision as taking the movement “out of the streets and back into the system through the non-profit industrial complex.” Wallace & Cruz Ferre, *supra* note 7.
19. A term common in grassroots activist spaces, “prefigurativism” is “a commitment to using processes in organizing and building a social change movement that are themselves already constructing the world they want to see.” Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 295, 323–24 (2016).
20. The term “racial capitalism” indicates that from its inception, capitalism was built upon and continues to extend the logic of racialism in service of profit accumulation. See generally CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* xiii (1983). Robinson's seminal analysis did not include gender or sexual relations. Radical feminists have since shown that capitalism is similarly built on and continually extends patriarchy and gender normativity. See, e.g., SILVIA FEDERICI, *CALIBAN AND THE WITCH: WOMEN, THE BODY AND PRIMITIVE ACCUMULATION* 12–13 (2004) (arguing that “the development of capitalist relations was premised” on “the construction of a new patriarchal

carceral and non-carceral administrative institutions that distribute life chances at the population level—and foundationally through a regime of property law. Thus, by “looking to the bottom”²¹ to the organic compositional elements of the George Floyd rebellion, this Article argues that movement lawyers should first recalibrate their practical advocacy to support grassroots initiatives that directly expand the capacity of subordinated populations to control their own destinies and equitably distribute resources themselves rather than depending on the precarious and divisive charity of the state.²² Second, by embracing the transformative horizon of the rebellion, movement lawyers should, as a long-term project, commit to transformative advocacy of their own to shift the underlying paradigm of property law rooted in private ownership towards recognition of common property. Thus, rather than echoing traditional movement demands for a mere redistribution of property entitlements, the rebellion teaches movement lawyers that state and social transformation necessarily entails a foundational reconfiguration of property law.

Part I of this Article details an epistemological methodology drawn from Critical Race Theory. By applying this methodology to social movements, this Article challenges movement lawyers to look to and learn from the acts of resistance and prefiguration engaged by grassroots actors of contemporary social movements. Part II discusses the marriage equality movement and M4BL in order to illustrate the limits of rights-based recognition and state redistribution demands, respectively. While these demands have led to formal equality and tangible benefits for some, they have excluded the most vulnerable populations. As such, conventional movements have inadvertently maintained gender and racial hierarchies that enable capitalist exploitation. Moreover, for beneficiaries of formally recognized groups to access the benefits of their status property,

order” and that “the degradation of women are necessary conditions for the existence of capitalism in all times” including the present). To be clear, this Article uses the term to describe the underlying system of relations rather than merely a process as described by Nancy Leong. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013) (describing racial capitalism as “the process of deriving social and economic value from the racial identity of another person”).

21. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C. R.-C. L. L. REV. 323 (1987).

22. Here, charity refers to “rich people or the government deciding who gets the help, what the limits are to that help, and what strings are attached.” DEAN SPADE, *MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT)* 21 (2020). It is “not designed to get to the root causes of poverty and violence.” *Id.* Charity is divisive because the “methods of deciding who is deserving . . . usually promote racist and sexist tropes, such as the idea that poor women of color and immigrant women have too many children . . .” *Id.* at 22. Under neoliberalism, with municipalities cutting back social services as a result of fiscal crises, charity has been “increasingly privatized and contracted out to the massive nonprofit sector . . .” *Id.* at 23.

individuals must confirm their belonging through rigid conformity within established boundaries of social identity, thus restricting their freedom of self-discovery and cultural expression.

Part III outlines the historical contours of the queer and Black radical traditions, which reveal methodologies of resistance and prefiguration directly undertaken by subordinated populations. In contrast to the horizon of formal equality pursued by traditional social movements, these methodologies point to a horizon of substantive freedom for all, characterized by direct control over land and resources on the one hand, and cultural autonomy on the other. As such, these radical traditions reject a tangible property regime that commodifies land and resources and a status property regime that commodifies social identity.

Because grassroots participants of the George Floyd rebellion deployed similar methodologies on a wide scale, this Article situates the rebellion within those radical traditions. While the grassroots actors of the rebellion did not explicitly verbalize their demands, Part IV analyzes the language “spoken” through their actions. On the one hand, acts of resistance communicated a rejection of the classical liberal tenets undergirding the American property law regime. On the other, acts of prefiguration communicated a new paradigm for property law grounded in collective use and benefit rather than private ownership. Because the prefigurative acts experimented with equitable resource distribution driven by the community, survival was neither dependent on formal state recognition nor performance of social identity. In so doing, the rebellion proposed a resolution to the limits of conventional movement strategies.

In Part V, this Article offers some pragmatic implications for grassroots movement lawyers in the short- and long-term. In the short-term, movement lawyers should support grassroots efforts that depart from the capitalist logics of profit accumulation and incarceration in the here and now, such as the development of cooperatives, urban farms, and transformative justice initiatives.²³ Like the prefigurative acts during the rebellion, these organizational forms prefigure new social and property relations among subordinated populations by facilitating collective decisionmaking, grassroots community control over resources, and humane alternatives to punishment. Unlike conventional

23. Transformative justice is a term used by prison abolitionists in contrast to the current justice system, which exercises the logic of punishment to discipline harm doers, and thus ignores the humanity of harm doers and their capacity to change. Instead, transformative justice refers to “the work of addressing harm at the root, outside the mechanisms of the state, so that [individuals] can grow into right relationship with each other.” ADRIENNE MAREE BROWN, *WE WILL NOT CANCEL US: AND OTHER DREAMS OF TRANSFORMATIVE JUSTICE* 5 (2020).

movement strategies, which recreate the subordination of its constituents by creating dependency on both formal movement organizations for leadership and the state for provision, these efforts directly empower the community to trust in each other and collaboratively solve problems themselves. In turn, such social transformation will enable the continued success of a structural transformation in the property law regime towards recognition of common property, a long-term project to which movement lawyers should commit.

I. METHODOLOGY: CRITICAL RACE THEORY'S MANDATE OF "LOOKING TO THE BOTTOM"

The BLM movement transformed the landscape of public interest lawyering, prompting many lawyers with antiracist commitments to provide legal support to community organizers and identify as movement lawyers.²⁴ In turn, this development in the profession has ushered in a new generation of movement lawyering legal scholarship.²⁵ Significantly, this new generation of movement law scholars increasingly "take seriously the epistemological universe of today's left social movements, their imaginations, experiments, tactics, and strategies for legal and social change."²⁶ By recognizing that the very foundations of the system²⁷ are broken, these left social movements "posit

24. Movement lawyering career opportunities have emerged within both established civil rights law organizations and new movement lawyering organizations. For examples of the former, see *Beyond the Courtroom*, CTR. FOR CONST. RTS. (May 27, 2015), <https://ccrjustice.org/home/how-we-work/beyond-courtroom> [https://perma.cc/R9BM-CWHZ]; *Mission and Vision*, ADVANCEMENT PROJECT, <https://fsaproject.wpengine.com/about-advancement-project> [https://perma.cc/7YG3-56HP]. For examples of newer movement lawyering initiatives, see BALT. ACTION LEGAL TEAM, <https://www.baltimoreactionlegal.org> [https://perma.cc/PU2Y-KUPB]; LAW FOR BLACK LIVES, <http://www.law4blacklives.org/#home-section> [https://perma.cc/9VX3-DBY2]; MOVEMENT L. LAB, <https://movementlawlab.org> [https://perma.cc/Q8FG-M2XM].

25. See, e.g., Akbar, Ashar & Simonson, *supra* note 11; Jennifer Ching, Thomas B. Harvey, Meena Jagannath, Purvi Shah & Blake Strode, *A Few Interventions and Offerings From Five Movement Lawyers to the Access to Justice Movement*, 87 FORDHAM L. REV. 186 (2018); Cummings, *supra* note 14.

26. Akbar, Ashar & Simonson, *supra* note 11, at 825.

27. For the purposes of my article, I define "the system" as gendered, racial capitalism. See *supra* note 20. Here, however, I leave the term ambiguous intentionally to reflect the general sentiment expressed by contemporary movement law literature to analyze "the system" through various formulations. Some of those formulations include analyzing structures of oppression like white supremacy, whereas others more narrowly construe "the system" as specific loci of oppression such as the criminal justice system.

wholesale transformation rather than reform as their end goal.”²⁸ Despite these profound epistemological insights, the left social movements studied by movement law scholars are surprisingly narrow. Their exclusion of disruptive activities of the sort prominently engaged in by grassroots actors during the George Floyd rebellion constitutes an erasure of the agency of subordinated peoples to directly resist gendered, racial capitalism on their own terms without the leadership of formal movement organizations. Thus, this Article challenges movement law scholars to conceive of the disruptive activities of the rebellion as social movement activities warranting our serious attention, analysis, and solidarity.

As in my prior work, this Article continues my constructive critique of the dominant methodology in movement lawyering legal scholarship.²⁹ In contrast to Critical Race Theory’s deep interrogation of community,³⁰ movement law scholars instead tended to look to already “mobilized clients,”³¹ or formal movement organizations,³² who purport to represent the community for leadership, formulation of demands, and strategy. On the one hand, this deferential approach to movement organizations constitutes an important corrective to the top-down, lawyer-driven representational model of traditional public interest lawyering, highlighted by an accountability deficit to subordinated communities.³³ On the other, this

28. *Id.* at 827. See also Cummings, *supra* note 14, at 1651 (describing contemporary movement lawyering legal scholarship as “embracing a vision of lawyering that is at once client-centered and politically transformative.”).

29. Veryl Pow, Comment, *Rebellious Social Movement Lawyering Against Traffic Court Debt*, 64 UCLA L. REV. 1770 (2017).

30. In 1976, Derrick Bell boldly challenged civil rights attorneys who, by pushing school desegregation litigation, purportedly served the community. Bell argued that civil rights attorneys instead served the interests of the middle-class Black people, or, in other words, those who “provide financial support.” Bell observed that the Black community was not “monolithic,” and at the minimum, class distinctions matter. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). Through the lens of intersectionality, Kimberlé Crenshaw further interrogated the notion of a monolithic Black community by highlighting the various ways in which multiple social categories shaped the complexity of lived experiences, and thus their political expression. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

31. Cummings, *supra* note 14, at 1691.

32. Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133, 2141 (2007) (describing that “such [movement] lawyers largely partner with community organizations”).

33. “Movement lawyering thereby asserts a strong version of lawyer accountability by shifting the perspective from legal liberal lawyers representing vulnerable individuals or diffuse classes to movement lawyers representing mobilized organizations.” Cummings, *supra* note 14, at 1720.

introspective response among movement lawyers often does not go far enough in extending the interrogation beyond legal professionals to the role of movement organizations in similarly reproducing social hierarchies among their constituents. Rather, because mobilized clients are comparatively accountable by nature of minority leadership³⁴ and their geographic proximity to a community vis-à-vis the externality of movement lawyers, they are treated as presumptively legitimate.³⁵ This is an issue, particularly in the neoliberal era, where mobilized clients are incorporated into the state as tax-exempt nonprofit organizations beholden to the interests of private foundations, large donors, and the government.³⁶ In the wake of the BLM movement, this temptation to defer to the leadership of mobilized clients has only heightened because of the increasing willingness from the

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34. Token minority leadership, or diversity at the top, constitutes one prominent ideological mechanism of neoliberalism and permeates across institutional contexts, ranging from electoral politics to movement organizations. Functionally, minority leadership substitutes for meaningful representation at the bottom of subordinated communities. See, e.g., MANNING MARABLE, *BEYOND BLACK AND WHITE: FROM CIVIL RIGHTS TO BARACK OBAMA* 55–57 (Verso 2016) (critiquing the strategy of “liberal integrationism” or “symbolic representation” among Black political elites in the post-civil rights era); Olúfẹ̀mí O. Táíwò, *Identity Politics and Elite Capture*, BOST. REV. (May 7, 2020), <http://bostonreview.net/race/olufemi-o-taiwo-identity-politics-and-elite-capture> [<https://perma.cc/A9MJ-5V3V>] (explaining class distinctions within subordinated groups through the concept of “elite capture”); KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* 15, 80 (Haymarket Books 2016) (“The most significant transformation in all of Black life over the last fifty years has been the emergence of a Black elite, bolstered by the Black political class, that has been responsible for administering cuts and managing meager budgets on the backs of Black constituents.”); Keeanga-Yamahtta Taylor, *In Baltimore and Across the Country, Black Faces in High Places Haven’t Helped Average Black People*, IN THESE TIMES (Apr. 29, 2015), <https://inthesetimes.com/article/baltimore-riots-black-politicians> [<https://perma.cc/LLQ3-DFMM>] (arguing that a Black political elite today “largely govern[s] in the same way as their white counterparts” and conveniently “helps to deflect a serious interrogation of structural inequality and institutional racism.”). For a specific critique of token minority leadership among movement organizations in the neoliberal era, see generally ASAD HAIDER, *MISTAKEN IDENTITY: RACE AND CLASS IN THE AGE OF TRUMP* (Verso 2018).
35. “[M]obilized clients serve a critical representational role for the broader movement constituency: their organizational structure is built upon a claim to legitimate authority derived from engagement with and leadership of affected constituency members.” Cummings, *supra* note 14, at 1692.
36. In the LGBTQ movement context, the “dominance of particular identity logics” that essentialize sexual identity can be attributed to the “rise of professionalized movement groups” that were able “to secure long-term funding and to survive over time” precisely by adopting a single-axis rights-based agenda. Leachman, *supra* note 17, at 679. See generally THE REVOLUTION WILL NOT BE FUNDED: *BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* (INCITE! Women of Color Against Violence ed., 2007); see also Michael Haber, *The New Activist Non-Profits: Four Models Breaking From the Non-Profit Industrial Complex*, 73 U. MIAMI L. REV. 863, 871–72 (2019).

philanthropic sector to fund more minority-led organizations that embody Black radical rhetoric and aesthetic.³⁷

Even where movement lawyers “exercise discretion to choose which movement organizations to support based on a careful evaluation of the degree to which such organizations do, in fact, represent a constituency’s discernible point of view,”³⁸ the George Floyd rebellion challenges the very notion of movements as being led by mobilized clients. That is, fewer movements in the neoliberal era resemble the neat, policymaking professionalized variety to which movement lawyers can linguistically relate, and more and more are like the rebellion in their spontaneity, disruptive militancy, and prefigurative placemaking in the forms of uprisings,³⁹ encampments, and occupations.⁴⁰ Specifically, under a postindustrial

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37. The Ford Foundation, Borealis Philanthropy, and the Open Society Foundations were among three of the largest donors funding BLM-affiliated organizations in 2016. Inderjeet Parmar & Imran Choudhury, *Black Lives Matter Must Avoid Being Co-Opted by American Corporate Philanthropy*, CONVERSATION (July 15, 2020, 7:04 AM), <https://theconversation.com/black-lives-matter-must-avoid-being-co-opted-by-american-corporate-philanthropy-141927> [https://perma.cc/BY9U-4WB7]. In particular, Open Society Foundations has been noted for its cooptation of “political dissent that works firmly within the constraints of bourgeois liberal democracy.” Dylan Rodriguez, *The Political Logic of the Non-Profit Industrial Complex*, in *THE REVOLUTION WILL NOT BE FUNDED*, *supra* note 36, at 28.
38. Cummings, *supra* note 14, at 1693.
39. The George Floyd rebellion must be contextualized amidst the “global accumulation” of “riots and square occupations” that “have become the new normal” since 2008. These spontaneous and disruptive uprisings have been described as “non-movements,” or “the collective action of dispersed and unorganized actors,” which reflect “all the growing delegitimization of politics in a context of ongoing [neoliberal] stagnation and austerity. . . . [or] a mode of production that can no longer produce welfare or prosperity.” *Onward Barbarians*, ENDNOTES 8–13 (2020), https://endnotes.org.uk/file_hosting/Onward_Barbarians_by_Endnotes.pdf.
40. Examples of encampments and occupations span the globe, from Occupy Wall Street and Standing Rock domestically to Gezi Park in Turkey and the Yellow Vests Movement in France. See, e.g., NICK ESTES, *OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE* (Verso 2019) (documenting the history of the ten-month Indigenous resistance at Standing Rock in 2016); Cenk Özbay & Evren Savci, *Queering Commons in Turkey*, 24 J. LESBIAN & GAY STUD. 516 (2018) (analyzing the Gezi Park occupations in the summer of 2013); *The Holding Pattern: The Ongoing Crisis and the Class Struggles of 2011–2013*, in ENDNOTES 3: GENDER, RACE, CLASS AND OTHER MISFORTUNES 14–19 (2013), <https://endnotes.org.uk/issues/3/en/endnotes-the-holding-pattern> (describing encampments in city squares across the globe from 2011 to 2013); Paul Torino & Adrian Wohlleben, *Memes with Force – Lessons from the Yellow Vests*, MUTE (Feb. 26, 2019), <https://www.metamute.org/editorial/articles/memes-force-%E2%80%93-lessons-yellow-vests> [https://perma.cc/KQ45-ASA8] (outlining the significance of the Yellow Vests Movement as a memetic movement).

economy where employment is increasingly precarious and nonexistent,⁴¹ few movements occur at the site of industrial production in the form of workplace strikes but rather occur in city corners, streets, and squares in the form of rebellions.⁴² In other words, the form of social movement “serves as a clear window into the period’s political economy.”⁴³

Applied to the events of the past summer, a conventional movement lawyering approach would place primary emphasis on the “defund the police” movement led by mobilized clients, which centers law and policy reform strategies to call for a redistribution of state resources.⁴⁴ In so doing, movement lawyers would completely miss the George Floyd rebellion itself, which not only charted its own set of tactics, non-reformist demands, and visions of futurity unmediated by the state but also caused mobilized clients to programmatically intervene and arguably co-opt the rebellion with their set of reformist proposals.⁴⁵

41. “In the long twentieth century, the arc of [capitalist] accumulation has seen first the ‘unprecedented transfer of population from agriculture to industry,’ and then, in a great reversal, deindustrialization moving population out of industry and out of the production process more generally into either service work or under- and unemployment.” JOSHUA CLOVER, *RIOT. STRIKE. RIOT: THE NEW ERA OF UPRISINGS* 135 (2016).

42. “The strike survives as the leading tactic in the industrialized west through the sixties.” *Id.* at 106. Rebellions, or as Clover terms “riots,” emerge as the prominent “social modality” of movements first among Black people in the mid-1960s, whom deindustrialization hits hardest, before increasingly generalizing to non-Black people who are “rendered surplus and forced to confront the problem of reproduction in the marketplace rather than in the formal wage.” *Id.* at 123. See *infra* Subpart II.B for further discussion on surplus population.

43. CLOVER, *supra* note 41, at 121.

44. Like contemporary prison abolitionists, the defund movement is not monolithic. While certain abolitionists demand state redistribution, this Article is inspired by the definition of abolition provided by Stefano Harney and Fred Moten, which accounts for capitalism as a totality of carceral and non-carceral mechanisms. Thus, they link abolition to a prefigurative project. The two authors write, “What is, so to speak, the object of abolition? Not so much the abolition of prisons but the abolition of a society that could have prisons, that could have slavery, that could have the wage, and therefore not abolition as the elimination of anything but abolition as the founding of a new society.” STEFANO HARNEY & FRED MOTEN, *THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY* 42 (2013).

45. The defund movement constitutes an attempt by mobilized clients, or what Adrian Wohlleben terms the “social movement apparatus,” to pacify the George Floyd rebellion. That is, the defund movement:

[J]am[s] the rebellion into a watered down and sanctioned form of dialogue between recognized constituents, marginalize[s] and criminalize[s] any grammar of action or form of communication that doesn’t fit within it. That the apparatus leverages both existing institutional influence as well as moderately disruptive protests should not mislead us as to its essential meaning, which consists in neutralizing and pacifying the joyful collective confidence that the rebellion instilled in thousands of angry people. By displacing the terms of confrontation from a demolitionist wave to [defund] demands the social movement apparatus alters the terms of conflict,

At worst, movement lawyers might even reproduce the respectability politics of mobilized clients that condemn the rebellion as violent and counterproductive to the cause. Such framing minimizes the disproportionate structural violence enacted on subordinated communities, including the systematized state-facilitated looting of the gendered and racialized poor through mechanisms such as eminent domain⁴⁶ and criminal justice debt,⁴⁷ which creates the conditions for rebellion.⁴⁸ Moreover, the framing of legitimate versus illegitimate movement

redirecting the wild, unmediated forms of cooperation, rebellion, and action that initiated the rebellion back into recognizable dialogical grammar of politics, the better to manage them and pacify them.

Wohlleben, *supra* note 15.

46. As deindustrialized cities turn towards urban renewal and redevelopment to attempt to attract a wealthier tax base, many municipalities have used eminent domain to displace Black homeowners in cities such as Baltimore. Marisela B. Gomez, *Johns Hopkins University and the History of Developing East Baltimore*, in *BALTIMORE REVISITED: STORIES OF INEQUALITY AND RESISTANCE IN A U.S. CITY* 243, 247–48, 250–51 (P. Nicole King, Kate Drabinski & Joshua Clark Davis eds., 2019). See also *infra* note 283 and accompanying text for legal discussion of eminent domain.
47. See *infra* Subpart IV.A.2.
48. The Black radical tradition contextualizes the violent resistance often undertaken by subordinated peoples towards structural change. In explaining why the process of decolonization is necessarily violent, Frantz Fanon wrote that colonial societies are built on “the primary violence of the colonizer” who rules “at the point of the bayonet and under cannon fire;” thus, the objective of violent resistance by the colonized is directed to “break” the colonizer’s “spiral of violence.” In other words, colonialism is “naked violence and only gives in when confronted with greater violence.” FRANTZ FANON, *THE WRETCHED OF THE EARTH* 2, 9, 23, 50 (Constance Farrington trans., Grove Press 2004) (1961). From his experience as a member of the Algerian National Liberation Front during the Algerian Revolution of the 1950s, Fanon theorized and foreshadowed the decolonization of Africa from European colonial rule through armed national liberation movements. See generally LEWIS R. GORDON, *WHAT FANON SAID: A PHILOSOPHICAL INTRODUCTION TO HIS LIFE AND THOUGHT* 91–98 (2015). In the late nineteenth century, the resource and labor-rich African continent had been partitioned by European powers to stave off inter-imperialist rivalry, resulting in the “consistent expatriation of surplus produced by African labor out of African resources” to the metropolitan center. Thus, “the development of Europe [was] part of the same dialectical process in which Africa was underdeveloped.” WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* 176 (Verso 2018) (1972). It should be emphasized that “decolonization will take a different shape” depending on the specific colonial context. Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 *DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y*, no. 1, 2012, at 1, 5. With certain exceptions including Algeria and South Africa, the colonization of Africa generally typifies classical colonialism, in which imperialist powers, from the metropolitan center, indirectly “directs the ‘outpost’ of the colony, which is maintained by a small apparatus of colonial administrators scattered throughout the territory whose power is enforced by the colonial military presence.” Candace Fujikane, *Introduction: Asian Settler Colonialism in the U.S. Colony of Hawai’i*, in *ASIAN SETTLER COLONIALISM: FROM LOCAL GOVERNANCE TO THE HABITS OF EVERYDAY LIFE IN HAWAI’I* 1, 10 (Candace Fujikane & Jonathan Y. Okamura eds., 2008). Classical colonialism contrasts from settler colonialism, upon which the United States is founded, where “settlers occupy Native land and rewrite its

tactics amounts to a vilification of the agency of subordinated peoples and their capacity to resist subordination “by any means necessary.”⁴⁹ This construction reflects the dominant tendency among lawyers to view subordinated peoples as powerless on their own and in need of representation from lawyers⁵⁰ or, with social movements, the direction of mobilized clients.⁵¹

Additionally, such framing “reinforces the erasure of their humanity and capacities; this is the legacy of . . . harmful stereotyping.”⁵² Here, the stereotype of Black protesters as “criminal”⁵³ parallels the ideological construct that justified and enabled violent state repression in the forms of infiltration, assassination, and incarceration of key movement organizations and leaders, which effectively

history as their own.” *Id.* While violence is a constant across all forms of colonialism, its aim is similarly distinct: towards control or elimination. Because the geographic separation between the metropolitan center and colonial periphery is maintained under classical colonialism, Indigenous lives and culture may be tolerated—and thus violence constricted to social control—so long as they are deployed as labor or “economic, political, and cultural agents of the European colonialists.” RODNEY, *supra*, at 169. Conversely, settler colonialism requires “a mode of total appropriation of Indigenous life and land” because “the settlers make Indigenous land their new home and source of capital.” Tuck & Yang, *supra*, at 5. Because the existence of Indigenous lives and conceptions of land poses an epistemic, ontological, and material threat to settlers and their “access to territory,” settler colonialism requires a “logic of elimination” in which “invasion is a structure not an event.” Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 387–88 (2006). That is, the “dominant feature” of settler colonialism is a “sustained institutional tendency to eliminate the Indigenous population.” PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY: THE POLITICS AND POETICS OF AN ETHNOGRAPHIC EVENT* 163 (1999); see also ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES* 8 (2014) (describing settler colonialism “as an institution or system,” requiring violence towards a “genocidal tendency”).

49. Malcolm X, Speech at the Founding Rally of the Organization of Afro-American Unity (June 28, 1964), <https://www.blackpast.org/african-american-history/speeches-african-american-history/1964-malcolm-x-s-speech-founding-rally-organization-afro-american-unity> [https://perma.cc/ZK3Z-8KEB].
50. Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1, 8 (1989) (“Instead of using law and lawyers, most low-income women of color apparently often deal with oppressive circumstances through their own stock of informal strategies.”).
51. To date, movement law scholars have largely ignored discussion of lawyering in the context of mass revolt and prefigurative placemaking, unsurprisingly privileging more conventional forms of movement that align with a lawyer’s professional tendencies instead. The notable exception is Michael Haber, who has written extensively on grassroots mutual aid efforts and prefigurative models of decisionmaking that have arisen in the wake of Occupy Wall Street. See, e.g., Haber, *supra* note 19; Haber, *supra* note 36; Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide* (Hofstra U., Legal Stud. Rsch. Paper Ser., No. 2020–06, 2020).
52. K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 2018 (2020) (book review).
53. The category of “criminal” assigned to Black people shortly followed the abolition of slavery, allowing the “former rulers of slavocracy . . . to return Black people to a state of bondage.” VICKY OSTERWEIL, IN *DEFENSE OF LOOTING: A RIOTOUS HISTORY OF UNCIVIL ACTION* 84 (2020).

brought to an end the civil rights and Black liberation movements in the 1970s.⁵⁴ On the one hand, the defeat of these movements has normalized and extended the stereotype of Black criminality to undergird the politics of racialized incarceration⁵⁵ under neoliberalism.⁵⁶ On the other hand, the defeat of the movements has all but erased the primacy of disruptive tactics from the mainstream retelling of the civil rights movement⁵⁷ and has elevated nonviolence from a strategic tactic into a moral philosophy that delimits conventional movement politics today.⁵⁸ Yet even with these boundaries of legitimate movement tactics shaped by the legacy of state repression and the rise of the philanthropic sector, the unprecedented scale of disruptive activities during the summer of 2020 should give pause to any movement lawyer.

Thus, this Article calls on movement lawyers to “look to the bottom” of social movements. Such epistemology, drawn from Critical Race Theory, “suggests that

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54. For discussion of state repression techniques during the Black Power era, see, e.g., WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* (1988); Charles E. Jones, *The Political Repression of the Black Panther Party 1966–1971: The Case of the Oakland Bay Area*, 18 J. BLACK STUD. 415 (1988).
55. The term mass incarceration is misleading “only because the actual historical technologies of incarceration have never targeted an undifferentiated ‘mass,’ but have consistently pivoted on the gendered racial profiling and criminalization of Black, Brown, Indigenous, queer, poor, and colonized (or colonially displaced) peoples.” Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1583 (2019).
56. Under neoliberalism, rather than overt racism, “black social (and physical) death is primarily achieved via coded discourses of ‘criminality’ and mediated forms of state violence carried out by an impersonal carceral apparatus.” JACKIE WANG, *CARCERAL CAPITALISM* 266 (2018).
57. Even two of the most prominent icons of nonviolence, Martin Luther King, Jr. and Rosa Parks, viewed armed self-defense as a viable tactic. See CHARLES E. COBB JR., *THIS NONVIOLENT STUFF’LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE* 8 (2014) (“Even [Martin Luther] King . . . acknowledged the legitimacy of self-defense and sometimes blurred the line between non-violence and self-defense.”); OSTERWEIL, *supra* note 53, at 163 (“Though [Rosa Parks] was a proponent of organized nonviolent protest, she also believed in and practiced armed self-defense. Parks was a supporter of Robert F. Williams and would later call Malcolm X her personal hero. She spent her entire life a militant activist against segregation, sexual violence, and the justice system; on a few occasions she resisted white racists with threats of violence. To reduce this radical lifelong activist to a single quiet act of protest serves as a good metonym for reducing the extensive spread of cultural, political, and social movements for Black liberation to a handful of nonviolent campaigns, protests, and sit-ins.”).
58. OSTERWEIL, *supra* note 53, at 178. It should be noted that disruptive tactics are “racialized, so that certain white men can pantomime unofficial communitarian violence, or even use it, under the sign of lawfulness, while others must use nonviolent civil obedience to appeal to the people against the law.” JEDEDIAH PURDY, *THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH* 8 (2019). Purdy contrasts the police killing of twelve-year-old Tamir Rice, who was brandishing a toy gun, to the police allowing Ammon Bundy and other white armed lawbreakers to occupy the Malheur Wildlife Refuge in southeastern Oregon in 2016. *Id.* at 6–8.

those who have experienced discrimination speak with a special voice to which [lawyers] should listen.”⁵⁹ By “adopting the perspective of those who have seen and felt the falsity of the liberal promise,” lawyers can more accurately “fathom[] the phenomenology of law and defin[e] the elements of justice.”⁶⁰ Rather than deferring to the visible leadership of mobilized clients then, this Article argues that the participants in the front lines of the George Floyd rebellion—those at the bottom of the social movement—speak a language of their own through their actions. Concretely, their actions can be broken down into two categories: (1) acts of resistance that target, destroy, and loot private and state property; and (2) acts of prefiguration to create a sustainable space, free from police violence or state intervention, where land is commonly accessed and resources are managed and distributed directly among grassroots participants.

First, the rebellion featured widespread acts of looting and property destruction on a scale unseen since the assassination of Martin Luther King, Jr. in 1968. The torching of police vehicles and the tearing down of Confederate statues—acts not uncommon in small numbers in uprisings of the past decade—not only exponentially escalated in scale during the rebellion, but in historic fashion, its conflagration spread to more sacred and secure sites of state and police property, including the burning down of the Third Precinct in Minneapolis, the smashing of windows of a Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) field office in Atlanta, and the setting ablaze of courthouses, jails, and city halls nationwide.⁶¹ According to a report by the Major Cities Chiefs Association, an organization representing police executives of the largest cities in North America, between late May and late July 2020, across 68 cities surveyed, there were 574 riots, 624

59. Matsuda, *supra* note 21, at 324. While Matsuda is a critical race theorist, the ethos of “looking to the bottom” is also shared by the Black radical tradition. See, e.g., FANON, *supra* note 48, at 1 (explaining the process of decolonization from “the basic claims of the colonized”); WALTER RODNEY, *THE GROUNDINGS WITH MY BROTHERS* 68, 71 (Asha T. Rodney & Jesse J. Benjamin eds., Verso 2019) (1969) (“I would go further down into . . . dark, dismal places with a black population who have had to seek refuge there. . . . I would like to indicate my own gratification for that experience which I shared with them. Because I learnt. I got knowledge from them, real knowledge.”).

60. Matsuda, *supra* note 21, at 324.

61. See *infra* notes 215–227 and accompanying text for further discussion of specific acts of looting and property destruction during the George Floyd Rebellion.

arsons, 2385 incidents of looting, 97 police vehicles completely set ablaze,⁶² and 16,241 individuals arrested for protest-related activities.⁶³

Second, the rebellion featured creative attempts to appropriate property—both private and public—towards constructing a commons,⁶⁴ a space where decisions are made collectively, resources are held in common and shared, and participants collectively assume the tasks of self-reproduction of the community.⁶⁵ These prefigurative acts included the seizure and subsequent conversion of the Sheraton Minneapolis Midtown Hotel to house the homeless,⁶⁶ and of the Capitol Hill neighborhood of Seattle into the Capital Hill Autonomous Zone.⁶⁷

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62. The report distinguishes the 97 police cars “fully engulfed in flames” from police cars “significantly damaged,” making the number of police vehicles targeted by acts of resistance exponentially higher. One law enforcement agency alone reported 300 police cars damaged. INTEL. COMMANDERS GRP., MAJOR CITIES CHIEFS ASS’N, REPORT ON THE 2020 PROTESTS AND CIVIL UNREST 10 (2020), <https://majorcitieschiefs.com/wp-content/uploads/2021/01/MCCA-Report-on-the-2020-Protest-and-Civil-Unrest.pdf> [https://perma.cc/YPY7-TWLT].
63. The numbers across each category are certainly larger, as cities that were major flashpoints of the rebellion were not surveyed in the report, including Kenosha, Lancaster, Nashville, Philadelphia, Rochester, and Wauwatosa. *Id.* at 7–10.
64. “Commons’ have become a ubiquitous presence in the political, economic, and even real estate language of our time. Left and right, neoliberals and neo-Keynesians, conservatives and anarchists use the concept in their political interventions. The World Bank has embraced it” SILVIA FEDERICI, RE-ENCHANTING THE WORLD: FEMINISM AND THE POLITICS OF THE COMMONS 85 (2019). This Article specifically embraces a conception of ‘the commons’ as anti-capitalist and queer. For a discussion on anti-capitalist commons, see generally Etienne Balibar, Camille Robcis, Mikhail Xifaras, Katharina Pistor, Camila Vergara, Daniele Lorenzini & Bernard E. Harcourt, *Praxis 5/13: The Common*, COLUM. CTR. FOR CONTEMP. CRITICAL THOUGHT (Dec. 5, 2018) (discussing MICHAEL HARDT & ANTONIO NEGRI, COMMONWEALTH (2009)), <http://blogs.law.columbia.edu/praxis1313/5-13> [https://perma.cc/22Q6-8CWJ]. For a discussion on queer commons, see Nadja Millner-Larsen & Gavin Butt, *Introduction: The Queer Commons*, 24 GLQ: J. LESBIAN & GAY STUD. 399, 400 (2018) (arguing that in contrast to the “privatizing and commodification of the gay agenda,” a queer commons is needed because “queer activism—not to mention queer life—is a particularly rich resource for imagining, experimenting with, and enacting the improvisational infrastructures necessary for managing the unevenness of contemporary existence”).
65. See *infra* Subpart IV.B.
66. Julia Lurie, *They Built a Utopian Sanctuary in a Minneapolis Hotel. Then They Got Evicted.*, MOTHER JONES (June 12, 2020), <https://www.motherjones.com/crime-justice/2020/06/minneapolis-sheraton-george-floyd-protests> [https://perma.cc/5QVE-HNEX].
67. Shane Burley, *Life and Times at the Capitol Hill Autonomous Zone*, ROARMAG. (June 16, 2020), <https://roarmag.org/essays/life-and-times-at-the-capitol-hill-autonomous-zone> [https://perma.cc/AB6T-MLLE].

In listening to and learning from the grammar of the rebellion,⁶⁸ this Article extends and alters the basic proposition advanced by Eduardo Peñalver and Sonia Katyal that property outlaws play a productive role in communicating information on systemic inefficiencies that ultimately leads the state to redistribute property entitlements and make adaptations to property law.⁶⁹ For Peñalver and Katyal, “intentional lawbreaking as a mechanism for legal change is . . . a strategy employed by those who cannot afford to file civil suits or whose voice in the legislative process is too weak to attract the attention of lawmakers and [are] thus unable to wrest a change in property relations[, whether de facto or de jure,] from existing entitlements.”⁷⁰ Applying their proposition to the rebellion, this Article argues that what is being communicated is a total rejection of gendered, racial capitalism and its constitutive elements, including property as a regime of private ownership of land and material goods, and property as a regime of status identity.⁷¹ Specifically, the prefigurative placemaking of the Sheraton and Capitol Hill commons communicates both (1) the inadequacy of an exclusive tangible property regime dichotomized between private or state ownership (against the notion of land and resources commonly held by the people), and (2) the breakdown of social identity and family constructs that have historically held together gendered, racial capitalism in their function as status property (against the queering of social relations resulting from the plurality of races and genders directly assuming the task of running the commons).

While Parts IV and V provide a detailed analysis of the George Floyd rebellion to property law and movement lawyering respectively, it is important to preliminarily emphasize the implications of grassroots movement epistemology. In no uncertain terms, the rebellion teaches movement lawyers that structural transformation begins with a reconfiguration of property law. Thus, movement lawyers should assess whether the strategies they pursue ultimately reify or

68. In addition to Critical Race Theory, the ethos of listening to and learning from those at the bottom is inspired by rebellious lawyering and clinical law scholarship. See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 331–78 (1992) (describing rebellious lawyering as actively collaborating with impacted community members to solve societal problems); Margaret Martin Barry, A. Rachel Camp, Margaret E. Johnson, Catherine F. Klein, & Lisa V. Martin, *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 *CLINICAL L. REV.* 401, 404–07, 442–44 (2012) (interrogating the notion of “community” in the clinical education context by distinguishing between directly subordinated persons and nonprofit organizations that provide services to such populations).

69. Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 *U. PA. L. REV.* 1095 (2007).

70. *Id.* at 1100–01.

71. See generally Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1709 (1993).

transform property law as constituted. The difference in strategies pursued by grassroots and conventional movement lawyers then reflects the distinct horizons of those to whom lawyers choose to be accountable: subordinated populations or mobilized clients.

II. LIMITED HORIZONS OF CONVENTIONAL SOCIAL JUSTICE MOVEMENTS

This Part contrasts the rebellion from the marriage equality movement and M4BL in order to highlight the limited horizons of contemporary LGBTQ and racial justice movements, which employ two common strategies led by mobilized clients that center the state for inclusion and mediating resource distribution. First, the marriage equality movement seeks state inclusion and recognition of lesbians and gays through the institution of marriage.⁷² Second, M4BL, particularly through its “invest-divest” policy platform,⁷³ calls for a redistribution of resources from carceral institutions to other sectors, including health, education, and employment, that are mediated by the state.⁷⁴

A. Limits of a Rights-Based Strategy: Lessons from the Marriage Equality Movement

By adopting what could be seen as “a broader respectability politics,”⁷⁵ the marriage equality movement has been extensively critiqued as reifying structures of sexualized racial oppression and heteronormativity.⁷⁶ That is, the movement

72. In contrast to the contemporary LGBTQ movement, which seeks marriage equality as its legitimate goal, the demand for marriage equality emerged in the 1970s as a radical critique of the institution of marriage. See Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. WOMEN'S L.J. 269, 280–86, 296 (2015) (arguing that because judicial victory was impossible, the roots of marriage equality litigation in the 1970s constituted a radical form of protest against the institution of marriage “aimed to destabilize marriage as an institution”).

73. *Policy Platform: Invest-Divest*, MOVEMENT FOR BLACK LIVES (2016), <https://m4bl.org/policy-platforms/invest-divest> [<https://perma.cc/BZ6G-PKQ6>].

74. “In forwarding a decarceral agenda rooted in an abolitionist imagination, the Vision [for Black Lives] demands shrinking the large footprint of policing, surveillance, and incarceration and shifting resources into housing, health care, jobs, and schools.” Akbar, *supra* note 16, at 406.

75. Hunter, *supra* note 17, at 1724.

76. See, e.g., Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1506 (2000); Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS 811, 812 (2013); Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (1999); Darren Lenard

first maintains “stratifying social and economic arrangements”⁷⁷ by primarily benefiting white and middle-class gays and lesbians.⁷⁸ Applying an intersectionality lens,⁷⁹ the “framing of marriage as the most essential legal need of queer people . . . ignores how race, class, ability, indigeneity, and immigration status determine access to [] benefits and reduces the gay rights agenda to a project of restoring race, class, ability and immigration status privilege to the most privileged gays and lesbians.”⁸⁰

Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997); Clare Huntington, *Obergefell’s Conservatism: Reifying Family Fronts*, 84 FORDHAM L. REV. 23 (2015); Anthony C. Infanti, *Victims of Our Own Success: The Perils of Obergefell and Windsor*, 76 OHIO STATE L.J. 79 (2015); Chandan Reddy, *Time for Rights? Loving, Gay Marriage, and the Limits of Legal Justice*, 76 FORDHAM L. REV. 2849 (2008); Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010 (2014).

77. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* xv (2015). *See also* Leachman, *supra* note 17, at 656–57 (arguing that “mainstream LGBT rights groups, dominated by White and class-privileged gay men and lesbians, have engaged in strategies and discourse that marginalize the needs and obscure the existence of low-income queers of color.”).
78. Hunter, *supra* note 17, at 1684. It did so by emphasizing the sameness between same-sex and heterosexual couples. *Id.* at 1715. *But see* Douglas NeJaime, *Differentiating Assimilation*, 75 STUD. L. POL. & SOC’Y 1, 2, 4 (2018) (arguing that the emphasis on sameness “entails the promise of new meanings and institutional norms” and “institutions can be reconstituted in ways that reflect the distinctive practices of those long subject to exclusion”).
79. Critical race scholar Kimberlé Crenshaw is often associated with coining the term intersectionality. *See generally* Crenshaw, *supra* note 30. Yet the theoretical origins of intersectionality derive from Black feminism. Intersectionality refers to “the idea that multiple oppressions reinforce each other to create new categories of suffering.” For example, “Black women could not quantify their oppression only in terms of sexism or racism, or of homophobia experienced by Black lesbians. They were not ever a single category, but it was the merging or enmeshment of those identities that compounded how Black women experienced oppression.” KEEANGA-YAMAHTTA TAYLOR, *HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE* 4 (2017). *See also* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587 (1990) (Black “[f]eminists have adopted the notion of multiple consciousness as appropriate to describe a world in which people are not oppressed only or primarily on the basis of gender, but on the bases of race, class, sexual orientation, and other categories in inextricable webs.”). Applied to the marriage equality context, an intersectionality lens interrogates whether access to marriage benefits gays and lesbians who experience multiple oppressions.
80. SPADE, *supra* note 77, at 31. For example, “[f]raming issues related to child custody through a lens of marital recognition . . . means ignoring the racist, sexist, and classist operation of the child welfare system and passing up opportunities to form coalitions across populations targeted for family dissolution by that system. Black people, indigenous people, people with disabilities, queer and trans people, prisoners, and poor people are targeted in child welfare systems.” *Id.* By portraying white gay and lesbian plaintiffs who “were not seeking to restructure fundamentally the family” and thus not

Additionally, queer, feminist, and family law scholars have criticized marriage as a state-regulated heteronormative institution that devalues “queer family politics, which had emphasized legal protection for a variety of relationship forms.”⁸¹ By attaching “special rights” to marriage, other family forms, including “unmarried couples of any sexual orientation, single-parent households, extended-family units, and any other constellation of individuals who form relationships of emotional and economic interdependence,”⁸² are systematically excluded from essential resources and entitlements, including workers’ compensation or Social Security survivors’ benefits, health insurance, occupancy permits, and exemption from inheritance tax.⁸³ Similarly, “mainstream mobilization” around marriage equality privileges adults seeking access to the institution while neglects situations involving LGBTQ youth, such as religious exemption laws involving child welfare,⁸⁴ overrepresentation in the homeless population,⁸⁵ and overrepresentation in the foster care system.⁸⁶ Because civil rights victories inadvertently reify the subordination of the most

inclined to challenge the institution’s gender norms, the marriage equality movement also erases and excludes bisexual and transgender people. Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 211–12, 228 (2016) (arguing that *Obergefell*’s “biggest losers may very well be transgender and bisexual people” whose collective lived existence “more directly raise questions of gender than the largely gender-conforming (and white) gay and lesbian plaintiffs who represent the community in marriage equality cases”).

81. Hunter, *supra* note 17, at 1684. See also Aviram & Leachman, *supra* note 72, at 275–76 (describing how the framing of marriage equality as between single party same-sex couples actually devalues and reinforces the cultural stigmatization of polyamorous relationships and non-monogamous families); Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 6 OUT/LOOK: NAT’L LESBIAN & GAY Q. 14 (1989) (Rather than “setting up a house, sleeping with a person of the same gender, and seeking state approval for doing so . . . [b]eing queer means pushing the parameters of sex, sexuality, and family, and in the process transforming the very fabric of society.”).
82. Nancy D. Polikoff, *Law That Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIM. L. 85, 86 (2009).
83. *Id.* at 85–89. As the U.S. Supreme Court recognized:
 [States] have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finances restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.
Obergefell v. Hodges, 576 U.S. 644, 670 (2015).
84. Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2347 (2019).
85. Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 671 (2017).
86. *Id.* at 672.

vulnerable populations by excluding them from recognition and the attendant rights and privileges that come with recognition, civil rights victories have functionally replaced discriminatory formal classifications to extend the capitalist modality of “divide and conquer”⁸⁷ in a neoliberal era.

Second, the marriage equality movement leaves intact the structures of heteronormativity and identity constructs based on gender and sexuality stereotypes. Because marriage is elevated as the sole and ideal form for homosexual couples, all gay and lesbian sex “which is not performed in a marital context” will be further ostracized and outlawed.⁸⁸ By closeting queer sex instead of embracing its expressive plurality,⁸⁹ the marriage equality movement deepens stereotypes that are harmful to queer and trans individuals, such as the hypersexuality of gay men.⁹⁰ Unsurprisingly then, in a post-*Obergefell* world, homophobic federal laws and policies in realms like public health continue to discriminate against gay and bisexual men by projecting them as HIV positive.⁹¹ Thus, to fully access and enjoy the privileges of formal recognition, LGBTQ individuals are constrained in their expression of queer identity, sexuality, and relationship forms.

From the perspective of movement building, once legal recognition is won by a social movement, its primary beneficiaries are disincentivized from organizing further and seeking out solidarities with intersecting subordinated groups who are fighting for structural transformations.⁹² With legal recognition comes formal protections under law. These formal protections require beneficiaries to make out legal claims as an individual being discriminated against

87. “Divide and conquer” refers to a concept used by capitalists to mediate class conflict by dividing the working class on the basis of social identity. The concept was executed through various mechanisms, including race-based wage differentials and occupational segregation. For a description of the modality of “divide and conquer” during industrialization in the U.S., see Noel Ignatin, *Black Worker, White Worker*, SOJOURNER TRUTH ORG. (1972), <http://www.sojournertruth.net/bwww.html> [https://perma.cc/8N4N-A9CU]. See also Robinson, *Unequal Protection*, *supra* note 80, at 228–29 (suggesting that “vindicating marriage equality may have granted the Court cover as it chisels away at the civil rights of other groups”).

88. Ettelbrick, *supra* note 81.

89. *Obergefell* stripped “sexual orientation of its sexual dimension.” Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, 60 ARIZ. L. REV. 213, 218 (2018).

90. *Id.*

91. *Id.* at 234.

92. “The compromises made in lesbian and gay rights efforts to win formal legal equality gains have come with enormous costs: opportunities for coalition have been missed, large sectors of people affected by homophobia have been alienated, and the actual impact of ‘victories’ has been so limited as to neutralize their effect on the populations most vulnerable to the worst harms of homophobia.” SPADE, *supra* note 77, at xv.

on the basis of their newly recognized identity, dissuading beneficiaries from identifying even among other primary beneficiaries as a collectively subordinated group.⁹³ This individualizing logic of antidiscrimination law functions as a “master legal frame” to legitimate neoliberalism—to wit, by defining inequality in terms of constraints on individual agency and market inefficiency.⁹⁴

Moreover, after formal rights are recognized, without the popular constitutionalism⁹⁵ of protracted social movements to maintain pressure on lawmakers, protections weaken over time and are even appropriated and deployed by powerful interests in ways to resubordinate protected groups.⁹⁶ As Critical Race theorists have noted, strict scrutiny, once a judicial standard of review that developed to protect racial minorities against the disparate effects of systemic subordination, has been redeployed against race conscious remedial programs in order to maintain the racial status quo.⁹⁷ The U.S. Supreme Court’s counter-

93. The framing of harm from collective subordination to individual discrimination parallels the shift in jurisprudence from broadly protecting against societal discrimination to an intent-based, perpetrator model. Thus, this narrow reading of what constitutes discrimination serves to naturalize and affirm the status quo of subordination. See generally Alan David Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1412 (1990).

94. Deborah Dinner, *Beyond “Best Practices”: Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1062 (2017). “Employment-discrimination law operates today as a means to perfect the market rather than to challenge its logic and operation. Title VII promotes individual rights to opportunity rather than collective needs for economic security.” *Id.* at 1097.

95. See generally Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 25–27 (2004). See also Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 33 (1983) (arguing that lawbreakers and judges alike “are all engaged in the task of constitutional understanding,” and the views of lawbreakers contribute their own normative interpretation of the Constitution through their activities).

96. Khaled Beydoun cautions that the demand by Arab Americans for recognition of a “Middle East and North Africa” racial category in the 2020 U.S. Census may augment anti-terror surveillance and policing against Arab Americans. Khaled Beydoun, *Boxed In: Reclassification of Arab Americans on the U.S. Census as Progress or Peril*, 47 LOY. U. CHI. L.J. 693 (2016). See also Tanya Katerí Hernández, *Latino Antiblackness Bias and the Census Categorization of Latinos: Race, Ethnicity, or Other?*, in *ANTIBLACKNESS* 283, 296 (Moon-Kie Jung & João H. Costa Vargas eds., 2021) (arguing against the adoption of a separate racial category for Latinx in the U.S. Census for fear of “mask[ing] the civil rights harms perpetrated against Latinos with visible African ancestry”).

97. See generally Neil Gotanda, *A Critique of “Our Constitution Is Colorblind,”* 44 STAN. L. REV. 1 (1991); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

mobilization of strict scrutiny⁹⁸ to reconsolidate whiteness as property⁹⁹ coincided with the defeat of the civil rights and Black liberation movements.¹⁰⁰ Afraid of this very trajectory for the LGBTQ community, Russell Robinson cautioned marriage equality advocates from following the course of “black claims for civil rights.”¹⁰¹ These critical insights of the marriage equality movement reveal the limits of formal equality and rights claims in reinforcing broader structures of subordination and identity constructs.

B. Limits of a State Redistribution Strategy: Lessons from the Movement for Black Lives

The call for redistribution of resources from one state institution to another, as demanded by M4BL and the professionalized segments of today’s defund movement, similarly reinforces gendered, racial capitalism.¹⁰² Thus, while M4BL and the defund movement have popularized the notion of “abolition” in mainstream¹⁰³ and legal academic discourse,¹⁰⁴ the tendency to conflate the term

98. In a series of monumental decisions, beginning with *Washington v. Davis*, 426 U.S. 229 (1976), the Nixon-appointed Burger Court undermined the Warren Court’s activist orientation toward Equal Protection jurisprudence. The application of strict scrutiny to any racial classification, regardless of remedial intent, began with the *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), wherein the Supreme Court struck down a city’s race conscious remedial program. This rule was later clarified and extended to all federal programs using racial classifications in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

99. Harris, *supra* note 71.

100. See *supra* Part I.

101. Robinson, *supra* note 76, at 1010.

102. To be clear, much of the critical analyses and transformative language of M4BL, including its intersectional feminist, queer politics, and reparations frameworks, are consistent with the insights from the George Floyd rebellion. Regardless of M4BL’s analyses, the translation of the transformative vision by professionalized actors into policy reform narrowly focused on state redistribution of resources from carceral to non-carceral institutions. In other words, the scale of the critique is large but the demands into action are comparatively small. In addition to being co-opted by professional lawyers and policymakers, M4BL was constrained by the limits of the form of Black Lives Matter as a social movement, which did not feature prefigurative placemaking attempts. The significance of the George Floyd rebellion is that it reveals in embryonic form, through the grassroots movement activities directly engaged by subordinated peoples, transformation as a fundamental reorganization of social and property relations. See *infra* Part IV for further discussion on the distinct transformative horizon articulated by the rebellion.

103. Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/3D4N-E8JA>].

104. In 2019, Harvard Law Review published a symposium on abolition, which has since been extended to several law review volumes. See generally, *Introduction*, 132 HARV. L. REV. 1568 (2019); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1

with the demand for state redistribution of resources¹⁰⁵ reflects the limited imagination of mobilized clients who misconstrue the state as a neutral entity detached from its material function of preserving and expanding political economy.¹⁰⁶ Instead, incarceration is “*a logic and method of dominance*” deployed by the state beyond “the particular institutional form of jails, prisons, detention centers, and other such brick-and-mortar incarcerating facilities (or their corresponding juridical protocols)” in order to cohere the “peace, lawfulness, and security” necessary for capitalist accumulation.¹⁰⁷

Accordingly, some Critical Race theorists have begun to interrogate whether such demand for resource redistribution, if expressed without greater specificity as to its intended recipients, leads to greater “state surveillance and control of [B]lack communities.”¹⁰⁸ Thus, Dorothy Roberts cautions against redistributing carceral funds to the child welfare system since it is similarly “designed to regulate and punish [B]lack and other marginalized people.”¹⁰⁹ Critical Trans theorists extend this interrogation further beyond punitive institutions by design. Dean Spade warns that trans people are not only vulnerable to carceral institutions but non-carceral state agencies and nonprofits that would be the recipients of M4BL’s demand for redistribution of funds.¹¹⁰ This includes benign state agencies that fall

(2019); Catherine L. Fisk & Erwin Chemerinsky, *Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42 (2020).

105. “We should redirect the billions that now go to police departments toward providing health care, housing, education, and good jobs.” Kaba, *supra* note 103. Similarly, abolitionist law scholars tend to accept state redistribution as the ends, and tailor their questions towards how to achieve more equitable outcomes. As Allegra McLeod notes, the “question of how precisely to achieve more equitable distribution . . . necessarily remains only partially described in existing abolitionist accounts.” Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1619 (2019).
106. See *infra* Subpart IV.A for discussion on the state’s role in creating and maintaining the conditions for capitalism through property law.
107. Rodríguez, *supra* note 55, at 1587–88. Incarceration, “understood as a systemic logic and institutional methodology, materializes through *numerous regimes of dominance*, from apartheid, military occupation, imprisonment, and compulsory schooling to Native American reservations, environmental racism, and normative sexual categorizations.” *Id.* at 1588. See also Mariame Kaba & Erica R. Meiners, *Arresting the Carceral State*, JACOBIN (Feb. 24, 2014), <https://www.jacobinmag.com/2014/02/arresting-the-carceral-state> [<https://perma.cc/C8XL-AVNL>] (discussing the materialization of carceral logic through American schools).
108. Dorothy Roberts, *Abolishing Police Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/D5B4-FLLD>].
109. *Id.*
110. This critical trans insight applies to both state agencies that directly provide a social service or awards the funds through grants to private or nonprofit social service agencies. SPADE, *supra* note 77, at 13–14.

outside of Roberts's purview of interrogation, such as state Departments of Motor Vehicles and healthcare programs.¹¹¹ This is because these institutions produce and reproduce gender categories that administer life chances and subject trans populations to "premature death."¹¹² By classifying gender nonconforming individuals to categories that do not match their identity expression, these institutions "actually invent and produce meaning for the categories they administer, and that those categories manage both the population and distribution of security and vulnerability."¹¹³ This Critical Trans insight can be extended to other subordinated groups at the intersections: Because state agencies and nonprofits regulate identity categories to separate the deserving from undeserving,¹¹⁴ these categories will be reified and make those most vulnerable excluded from redistributive efforts managed by the state.

One nuanced aspect of the redistribution demand is to divert carceral resources to greater employment. Because capitalism operates via the twin logics of exploitation of labor and expropriation of the gendered, racialized unemployable,¹¹⁵ this redistributive demand ultimately reproduces exploitative capitalist social relations. In other words, a demand for less expropriation—such as the demand to defund the police or prisons—functions as a demand for more exploitation. Contemporary racial capitalism literature links the evisceration of the welfare state and the onset of mass incarceration to the internal restructuring of capitalism from an industrial-based economy to financialization¹¹⁶ beginning in

111. *Id.* at 11.

112. *Id.* at 15 (quoting Ruth Gilmore). *See also* Rodríguez, *supra* note 55, at 1588 (arguing that incarceration, as a systemic logic, manifests through "normative sexual categorizations").

113. SPADE, *supra* note 77, at 11.

114. JOEL F. HANDLER, REFORMING THE POOR: WELFARE POLICY FEDERALISM AND MORTALITY 140 (1972) (arguing for a "more radical view of poverty [that] would rid welfare policy of all notions of deserving versus undeserving; the emphasis would be primarily on lack of income."). *See also* SPADE, *supra* note 22, at 14 ("In the context of professionalized nonprofit organizations, groups are urged to be single-issue oriented, framing their message around 'deserving' people within the population they serve, and using tactics palatable to elites.").

115. WANG, *supra* note 56. Expropriation assumes that certain gendered, racialized populations are disposable and thus explains routine police violence in Black communities despite conferring no direct economic benefit to capitalists. *Id.* at 88.

116. CLOVER, *supra* note 41, at 132 ("Capital is a unitary space of flows seeking investment opportunities that will return the average profit rate. When this requirement can no longer be satisfied by a growing industrial sector, profits are stored in safe havens, or reinvested elsewhere in commercial enterprise and/or financial instruments. Financialization is simply the name for this shift of capital flows.").

the early 1970s, known as neoliberalism.¹¹⁷ Specifically, the industrial workers of yesterday are now today's surplus population who are rendered permanently unemployable (or precariously employable) by capitalists.¹¹⁸ Instead of reproducing their existence through a steady wage, those rendered surplus are either borrowing as debtors¹¹⁹ or warehoused in prisons as a means of

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117. Neoliberalism was “from the very beginning a project to achieve the restoration of class power” among capitalist elites. HARVEY, *supra* note 12, at 16. While preserving the logic of profit accumulation, the fulcrum of class power shifted from industrial manufacturers to the finance, insurance, and real estate sectors. Some defining features of neoliberalism include “the privatization of public assets[,] the deregulation or elimination of state services[,] . . . trade liberalization and financial deregulation[,] . . . and the use of market language to legitimize new norms and to naturalize opposition.” Michael C. Dawson & Megan M. Francis, *Black Politics and the Neoliberal Racial Order*, 28 PUB. CULTURE 23, 27 (2016).
118. *Misery and Debt: On the Logic and History of Surplus Populations and Surplus Capital*, in ENDNOTES 2: MISERY AND THE VALUE FORM 30 n.15 (2010), <https://endnotes.org.uk/issues/2/en/endnotes-misery-and-debt> (“This surplus population need not find itself completely ‘outside’ capitalist social relations. Capital may not need these workers, but they still need to work. They are thus forced to offer themselves up for the most abject forms of wage slavery in the form of petty production and services—identified with informal and often illegal markets of direct exchange arising alongside failures of capitalist production.”). See also RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 70–78 (2007) (linking the exponential growth of surplus population in California to deindustrialization). As early as the 1960s, travelers within the Black radical tradition foresaw the expansion of the surplus population as a result of automation. Huey Newton, one of the cofounders of the Black Panther Party, argued that if “capitalists . . . continue to develop their technological machinery . . . the proletarian working class will definitely be on the decline because they will be unemployable and therefore swell the ranks of the lumpens, who are the present unemployables.” HUEY P. NEWTON, *THE HUEY P. NEWTON READER* 166–67 (David Hilliard & Donald Weise eds., 2011).
119. From the perspective of the capitalist class, they staved off a crisis of accumulation in large part by shifting profit generation from manufacturing to interest from lending and the selling of indebtedness itself. See also WANG, *supra* note 56, at 78 (quoting Brandon Terry) (Among Black Americans, “[b]etween 1980 and 2006, ‘household debt as a percentage of disposable personal income has grown from 72.1% to 139.7%.’”).

subsistence.¹²⁰ Thus, prisons under neoliberalism function to contain a permanently jobless population who may be prone to rebellion.¹²¹

Given that capital accumulation primarily occurs through financial instruments, the levels of employment envisioned by this redistributive demand will be impossible without another restructuring of capitalism from neoliberalism to a new form of postindustrial work.¹²² Even if this demand is miraculously achieved, subordination will still endure because the underlying logic of capital accumulation is not disrupted. The reincorporation of the surplus into the labor force reproduces capitalist social relations at large between the exploitative boss and the commodified worker,¹²³ and the gendered and racial hierarchies therein, as expressed through functional wage differentials and occupational segregation. This in turn reifies gender and racial subordination beyond the workplace across institutions, inside homes, and in society at large.¹²⁴

While the discussion above focuses on how conventional movement strategies functionally entrench gender and racial subordination under neoliberalism, these strategies also work within and thus preserve the logics of tangible and status property regimes, which underlie a capitalist form of economy. Formal recognition confers individuals of a recognized group with status property, while the redistribution demand reifies a conception of resources as

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120. Chris Chen, *The Limit Point of Capitalist Equality*, in ENDNOTES 3: GENDER, RACE, CLASS AND OTHER MISFORTUNES 217 (2013), <https://endnotes.org.uk/issues/3/en/chris-chen-the-limit-point-of-capitalist-equality> (“The rise of the anti-black US carceral state from the 1970s onward exemplifies rituals of state and civilian violence which enforce the racialization of wageless life, and the racial ascription of wagelessness. From the point of view of capital, ‘race’ is renewed . . . through the racialization of unwaged surplus or superfluous populations from Khartoum to the slums of Cairo.”); GILMORE, *supra* note 118, at 7 (“[A]s a class, convicts are deindustrialized cities’ working or workless poor”); Loïc Wacquant, *From Slavery to Mass Incarceration*, 13 NEW LEFT REV. 41, 53 (2002) (arguing that the “carceral system . . . today . . . serves only to warehouse the precarious and deproletarianized fractions of the black working class.”).
121. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 230 (Routledge 3d ed. 2014) (1986) (describing incarceration as containment of the “racial ‘threat’” under neoliberalism.).
122. If the Civil War was any indication of two modes of economy clashing, the neoliberal elites will not cede power to a new capitalist class without a fight.
123. That is, the coerced worker agrees to be paid just enough of a wage to reproduce their own and their family’s existence only to return to work the following day under the same set of exploitative relations. This dynamic, multiplied by the millions of immiserated individuals, reproduces capitalism as a system. See *A History of Separation: The Defeat of the Workers’ Movement*, in ENDNOTES 4: UNITY IN SEPARATION (2015), <https://endnotes.org.uk/issues/4/en/endnotes-the-defeat-of-the-workers-movement>.
124. See MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE 1978–1979* (Michel Senellart & Francois Alessandro Fontana, eds., Arnold I. Davidson trans., 2004).

exclusively owned tangible property. This dimension will be explored in depth in Part IV.

III. THE REBELLION AS CONTINUATION OF THE QUEER AND BLACK RADICAL TRADITIONS

Whereas the horizons of conventional queer and racial justice movements include formal equality and entitlements from the state, the horizon expressed by the queer and Black radical traditions is substantive freedom. These traditions posit two features of substantive freedom: collective control over land and resources on the one hand and cultural autonomy on the other. The methodologies of these traditions include both acts of resistance to the state, the police, and property, and acts of prefiguration to create a society that resembles substantive freedom in embryonic form. The discussion of the queer and Black radical traditions below is by no means exhaustive but it attempts to paint a working portrait of the methodologies and horizon of each tradition in order to situate the George Floyd rebellion as the latest chapter in their ongoing quest for substantive freedom. Given the much more recent lineage of the queer radical tradition, this Part begins with an overview of the Black radical tradition.

A. The Black Radical Tradition

The Black radical tradition derives from “the mass movements of Black people” to resist racial subordination.¹²⁵ It originates from the collective rebellions of enslaved Africans brought to the New World, continues through the Black liberation movement under de jure segregation in the United States, and extends to decolonization movements throughout the globe. Across time, geography, and form of racialized political economy, Black people have organically engaged in acts of resistance and prefiguration in order to break from a racialized state, to seize control over land and resources, and ultimately to freely live their lives on their own ontological terms. While more contemporary chapters of the Black radical tradition exist,¹²⁶ this Subpart focuses on slave rebellions, both to illustrate that the

125. Robin D.G. Kelley, *Foreword*, in *BLACK MARXISM*, *supra* note 20, at xv.

126. See, e.g., MUHAMMAD AHMAD, *WE WILL RETURN IN THE WHIRLWIND: BLACK RADICAL ORGANIZATIONS 1960–1975* (2d ed. 2008) (recounting the organizational agents of the Black radical tradition during the 1960s, including the Student Nonviolent Coordinating Committee, the Revolutionary Action Movement, the Black Panther Party, and the League of Revolutionary Black Workers).

methodologies of Black people date back to the inception of racial capitalism, and to provide historical context for the forthcoming discussion of the development of the American tangible property law regime in Subpart IV.A.

In addition to the colonization of Indigenous peoples and land, the institution of slavery enabled capitalism's condition of possibility.¹²⁷ African slave labor in the New World colonies¹²⁸ was necessary to achieve the large-scale production of tobacco, sugar, and cotton, which enriched and birthed a mercantile capitalist class that would overturn feudal relations and usher in "bourgeois democracy with a capitalist and commercial trading economy" throughout continental Europe.¹²⁹ Yet far from the manufactured stereotype of "Negro docility" on which plantation owners were promised, this labor force engaged in rebellions from the very beginning of their systematized importation in the sixteenth century.¹³⁰

Both widespread acts of resistance and acts of prefiguration typified slave rebellions. Acts of resistance assumed the forms of destruction and looting of slaveholder property while acts of prefiguration took the form of marronage,¹³¹ or the establishment of autonomous settlements by runaway slaves. The earliest

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127. Karl Marx uses the term "primitive accumulation" to describe the historical processes of racialized violence and expropriation, such as conquest and enslavement, that were preconditions of capitalist development. KARL MARX, *CAPITAL: CRITIQUE OF POLITICAL ECONOMY* 915 (Fredrick Engels eds., Penguin Books 1990) (1867). Subsequent scholars of racial capitalism and slavery have rejected Marx's formulation of primitive accumulation as a historical stage preceding capitalism. Instead, these scholars have shown that processes of racialized violence are co-constitutive and persistent features of capitalism and enable global capitalist expansion. See, e.g., OLIVER C. COX, *CAPITALISM AS A SYSTEM* (1964); DAVID HARVEY, *THE NEW IMPERIALISM* (rev. ed. 2005); ROSA LUXEMBURG, *THE ACCUMULATION OF CAPITAL* (Routledge Classics 2003) (1913); Nikhil Pal Singh, *On Race, Violence, and "So-Called Primitive Accumulation,"* in *FUTURES OF BLACK RADICALISM* 39 (Gaye Theresa Johnson & Alex Lubin eds., 2017).
128. "With the limited population of Europe in the sixteenth century, the free laborers necessary to cultivate the staple crops of sugar, tobacco and cotton in the New World could not have been supplied in quantities adequate to permit large-scale production. Slavery was necessary for this . . ." ERIC WILLIAMS, *CAPITALISM AND SLAVERY* 3 (U.N.C. Press 2021) (1944).
129. ROBINSON, *supra* note 20, at 114. See also C.L.R. JAMES, *THE BLACK JACOBINS* 47 (Vintage Books 1989) (1963) ("The slave-trade and slavery were the economic basis of the French Revolution. . . . The fortunes created at Bordeaux, at Nantes, by the slave-trade, gave to the bourgeoisie that pride which needed liberty and contributed to human emancipation."); WILLIAMS, *supra* note 128, at 39-44 (describing the triangular trade in slaves, which enabled capital accumulation for the Industrial Revolution in Europe).
130. Indeed, "the revolts at the port of embarkation and on board [slave ships] were incessant, so that the slaves had to be chained, right hand to right leg, left hand to left leg, and attached in rows to long iron bars." JAMES, *supra* note 129, at 8.
131. The term "marronage" derives from maroon communities, the English name for autonomous settlements established by runaways. ROBINSON, *supra* note 20, at 130.

documented acts of resistance occurred as slave uprisings against plantation owners in Hispaniola¹³² in 1522, Puerto Rico in 1527, Colombia in 1529, Panama in 1531, and again in Hispaniola in 1533.¹³³ While these uprisings allowed enslaved Africans to collectively break from the chains of their owners, far more prevalent were acts of running away as individuals in pursuit of liberation by means of marronage. Yet it would be false to characterize such individual acts as merely prefigurative. Given that slavery was founded on the dehumanization of Africans and their conversion into private property to be owned, rendered alienable, and later classified as chattel property,¹³⁴ the very act of running away constituted no less than a looting of oneself and thus a rupture from the colonial property regime and a reclamation of one's humanity. Indeed, runaways described their escape as "stealing away."¹³⁵

Marronage, then, was the necessary accompaniment to protect a runaway's reclamation of humanity. In Mexico, during the opening decades of the sixteenth century, African runaways escaped plantations to join nearby settlements of Indigenous peoples, a population that the Spanish colonists initially enslaved but became "decimated by the discipline of the *encomienda*, disease, and

132. Hispaniola is comprised of modern-day Haiti and the Dominican Republic. Its name derives from the Spanish, which, following Christopher Columbus's discovery of the island, annexed it. In the mid-seventeenth century, the French, British, and Spanish fought over the colony for thirty years. This inter-imperialist war resulted in the Treaty of Ryswick, which gave France the legal right to the western part of Hispaniola, or what is today Haiti. JAMES, *supra* note 129, at 3–5.

133. ROBINSON, *supra* note 20, at 130–31.

134. Up through the mid-1850s, "over one-third of the jurisdictions that made up the slave South" classified slaves as real property, rather than chattel property. THOMAS MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619–1860* 64 (1996). According to K-Sue Park, such classification scheme illustrated three important points. First, the malleability and arbitrariness in classifying slaves as real or chattel property indicates the politicized nature of such endeavor. Second, colonists fought for real property designation to protect their assets from the rules governing property in moveable goods, which made chattel property liable for unsecured debts. Third, the value of land and the labor of enslaved people became interdependent and allowed plantation owners to conceal enslaved persons from their creditors when land was protected from liability for debts. K-Sue Park, *Conquest and Slavery as Foundational to the Property Law Course*, in *THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES* 20 (Devon Carbado, Khiara Bridges & Emily Hough, eds., 2022). See also Justin Simard, *Citing Slavery*, 72 *STAN. L. REV.* 79, 85 (2020) ("American courts also provided the apparatus to secure millions of dollars of loans backed by enslaved people").

135. Zoé Samudzi, *Stealing Away in America*, *JEWISH CURRENTS* (June 10, 2020), <https://jewishcurrents.org/stealing-away-in-america> [https://perma.cc/P383-DFQE] (quoting Vicki Osterweil). See also Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 28 *HARV. C.R.-C.L. L. REV.* 263, 263 (1993) (locating the African-American spiritual "Steal Away" within "the tradition of escape songs" sung by enslaved Africans "to alert each other to the time for escape from bondage").

demoralization.”¹³⁶ In Mexico, the settlements came to be known as “*palenques*.”¹³⁷ Forged from the commonality of escape from the brutality of slavery, these *palenques* constituted the first multiracial commons in the Western hemisphere—areas of land, usually located in “mountains, swamps, or forests,”¹³⁸ which prefigured a society grounded in the substantive freedom for the racially subordinated.¹³⁹ These prefigurative settlements, by virtue of their autonomous functioning and subversive existence, rejected the colonial state, private property, and an economics based on profit accumulation.

Given the existential threat to slavery posed by settlements, the ruling elites—which included the landed mobility, settler colonists, and absentee financiers of long-distance trade—prioritized their destruction.¹⁴⁰ Yet despite their militaristic efforts to suppress marronage, “it did not seem to matter.”¹⁴¹ In colonial North America, maroon settlements proliferated throughout the South and “precisely in those places where Blacks constituted a substantial proportion of the population”—North Carolina, Maryland, Georgia, Virginia, and South Carolina.¹⁴² Above all, Florida, which was a colony of Spain in the early eighteenth century, was a prime destination for runaway Blacks.¹⁴³ There, runaways formed maroon communities near and sometimes directly with the Seminole Confederation, an Indigenous nation comprised of the Hitchiti, Yuchi, Yamasee, and Apalachee peoples.¹⁴⁴ Due to the close alliance between the Seminoles and runaways, runaways assumed the identity of Black

136. ROBINSON, *supra* note 20, at 129–31. See also WILLIAMS, *supra* note 128, at 4 (“The Indians rapidly succumbed to the excessive labor demanded of them, the insufficient diet, the white man’s diseases, and their inability to adjust themselves to the new way of life.”).

137. ROBINSON, *supra* note 20, at 131.

138. Barbara Klamon Kopytoff, *The Early Development of Jamaican Maroon Societies*, 35 WM. & MARY Q. 287, 287 (1978) (“Wherever there were slave plantations, there was resistance in the form of runaways and slave revolts; and wherever mountains, swamps, or forests permitted the escaped slaves to gather, they formed communities.”).

139. To be clear, not all autonomous settlements were multiracial. As the population of enslaved Africans grew exponentially from continued importation vis-à-vis Indigenous populations, runaways increasingly formed their own settlements rather than joining Indigenous communities. ROBINSON, *supra* note 20, at 131.

140. “Maroon settlements like those of Jamaica, Cuba, and North America had to be destroyed, or failing that, quarantined. They could not be allowed to contaminate a labor upon which so much depended.” *Id.* at 141.

141. *Id.*

142. *Id.* at 143.

143. “The Spanish government battling the British for territory in North America offered political asylum and freedom to the fugitive slaves [in Florida].” Nubia Kai, *Black Seminoles: The Maroons of Florida*, 8 AFR. & BLACK DIASPORA: INT’L J. 146, 147 (2015).

144. Livia Gershon, *The History of the Black Seminoles*, JSTOR DAILY (Nov. 29, 2020), <https://daily.jstor.org/the-history-of-the-black-seminoles> [https://perma.cc/3KJP-8T3W].

Seminoles.¹⁴⁵ In contrast to the privately owned plantations from which they escaped, the maroon settlements of Black Seminoles featured “a communal land system” absent any “concept of private land ownership.”¹⁴⁶

As with the Seminole Confederation, acts of resistance occasionally featured alliances among the racially subordinated. Rather than being orchestrated by mobilized clients that represented enslaved Africans and Indigenous tribes, this multiracial solidarity was organically forged through collectively surviving together in autonomous settlements with “a common political goal of autonomy and freedom from white domination.”¹⁴⁷ Because autonomous settlements were constantly under threat by colonial expeditions, a more permanent liberation depended not only on defending settlements from such expeditions, but preemptively through uprisings with abolitionist horizons. As early as the 1533 Hispaniola uprising, “Blacks had joined the Native uprising.”¹⁴⁸ Three decades later, “fugitive slaves from the . . . north [of Mexico] were terrorizing the regions from Guadalajara to Zacatecas, allying with the Indians and raiding ranches.”¹⁴⁹ Such accounts of multiracial resistance confirm the inseparability of the dual logics of conquest and enslavement that built racial capitalism on the one hand, and the impossibility of achieving substantive freedom without the abolition of both on the other.

By far, the greatest “movement of slaves” was the Haitian Revolution in the eighteenth century, which achieved abolition—“the permanent destruction of a slave system.”¹⁵⁰ On the eve of the revolution in 1790, Haiti was “perhaps the most productive colony the modern world had known,” with a slave population estimated between 450,000 and 590,000 producing sugar, coffee, indigo, and tobacco that filled the coffers of the emerging capitalist class in France.¹⁵¹ With a white population of only 30,000, Haiti’s slave system was intentionally “cruel and genocidal.”¹⁵² For a century preceding the revolution, the brutality of slavery

145. Kai, *supra* note 143, at 147.

146. *Id.* at 148. “To the Native American land was a gift from the Creator that was to be shared by everyone Native culture and ethics mitigated against competition, usury, and profiteering.” *Id.*

147. *Id.* at 147–48.

148. ROBINSON, *supra* note 20, at 131.

149. David Davidson, *Negro Slave Control and Resistance in Colonial Mexico, 1519–1650*, 46 *HISP. AM. HIST. REV.* 235, 244 (1966).

150. ROBINSON, *supra* note 20, at 144.

151. *Id.* at 145.

152. *Id.* at 146. As C.L.R. James vividly described:

Whipping was interrupted in order to pass a piece of hot wood on the buttocks of the victim; salt, pepper, citron, cinders, aloes, and hot ashes were

resulted in the familiar acts of resistance and prefiguration rehearsed above: “raids on the plantations” and maroon settlements were ubiquitous.¹⁵³ Undoubtedly, the maroons “were an integral part of the disparate elements that crystallized into the Haitian Revolution.”¹⁵⁴ The taste of substantive freedom experienced in maroon settlements—precarious as it inevitably was due to the overarching colonial threat—catalyzed a mass movement towards permanent liberation that endured from 1791 and 1804. Through their own collective will and courage, Haitian slaves ultimately defeated the “most sophisticated armies of the day” in the militaries of the French, Spanish, and English.¹⁵⁵

The historical discussion of slave rebellions above illustrates the methodologies and horizon of the Black radical tradition, which the George Floyd rebellion organically reproduced. First, far from being passive victims, the methodologies of enslaved Africans included widespread acts of resistance and acts of prefiguration. Acts of resistance ranged from the stealing away of one’s body as property, collectively raiding and appropriating tangible property from plantations and colonial towns, and mass movements and uprisings to abolish slavery. Acts of prefiguration included the formation of autonomous settlements such as the maroon communities in North America, which prefigured a society grounded in different set of social relations to land and to fellow human beings.

In turn, these methodologies conveyed a horizon grounded in substantive freedom for the racially subordinated. The Haitian Revolution demonstrated that substantive freedom could only be achieved on a permanent basis through the abolition of colonialism and slavery rather than law reform efforts that sought recognition and protection under those regimes.¹⁵⁶ Indeed, those

poured on the bleeding wounds. Mutilations were common, limbs, ears, and sometimes the private parts, to deprive them of the pleasures which they could indulge in without expense. Their masters poured burning wax on their arms and hands and shoulders, emptied the boiling cane sugar over their heads, burned them alive, roasted them on slow fires, filled them with gunpowder and blew them up with a match; buried them up to the neck and smeared their heads with sugar that the flies might devour them; fastened them near to nests of ants or wasps; made them eat their excrement, drink their urine, and lick the saliva of other slaves.

JAMES, *supra* note 129, at 12–13.

153. *Id.* at 20.

154. ROBINSON, *supra* note 20, at 147.

155. *Id.* at 144.

156. In Haiti, law reform attempts to recognize the humanity of enslaved Africans were thwarted by property owners. “All laws, however just and humane they may be, in favour of Negroes will always be a violation of the rights of property if they are not sponsored by the

regimes could not have granted recognition and protection to enslaved Africans without confronting their own limits and coming to their very destruction. Slave rebellions sharpened this contradiction between possibility and futility by exposing and fundamentally rejecting the colonial state as guarantor of property and social relations, which converted land and human beings into property to be owned, exploited, and turned into profit.

In contrast, slave uprisings and maroon communities prefigured property and social relations characterized by land held in commons and the freedom among human beings to “live[]” and “die[] on their [own] terms.”¹⁵⁷ The substantive freedom prefigured by both slave uprisings and maroon colonies was not limited to material, physiological, and bodily freedom but crucially entailed cultural expression and metaphysical autonomy.¹⁵⁸ New social relations were formed during the course of uprisings because participants collectively discovered who they were ontologically, their mystical powers, and what it meant to be free. That is, to be Black no longer meant to be enslaved, a status that the law of slavery formally enshrined.¹⁵⁹ Similarly, maroon communities provided an infrastructure for the formerly enslaved whom had been forcibly and violently displaced from their kin, culture, and motherland, to “recreate their old life in the new land,” including the “religions of the oppressed.”¹⁶⁰ Substantive freedom meant the remembrance and preservation of “the collective identity of African peoples.”¹⁶¹ Foundationally, then, substantive freedom was premised on a freedom to live according to one’s “mind, metaphysics, ideology, [and] consciousness.”¹⁶² This vastly expansive conception of freedom transcends the narrow horizons of freedom contemplated by conventional demands for formal recognition. Whereas formal equality constrains individual expression to respectable behavior and constructed stereotypes associated with recognized identity,¹⁶³ substantive

colonists. . . . All laws on property are just only if they are supported by the opinion of those who are interested in them as proprietors.” JAMES, *supra* note 129, at 22.

157. ROBINSON, *supra* note 20, at 170.

158. Time and time again, enslaved Africans waged uprisings against militaristically superior forces without fear because of cultural understandings of themselves that transcended the precarity of the material world and immediate situation: “They knew, they believed that ‘if they were killed they would wake up again in Africa.’” *Id.*

159. *See infra* Subpart IV.A.1.

160. These religions included “*obeah, voodoo, myalism, [and] pocomania.*” ROBINSON, *supra* note 20, at 169.

161. *Id.* at 132.

162. *Id.* at 169.

163. *See supra* Subpart II.A.

freedom invites evolving and pluralistic expressions consistent with an authentic conception of self.

So long as racial subordination endured beyond slavery through the various restructurings of capitalism, the Black radical tradition has continued. While the precise forms of resistance and prefiguration have changed in adaptation to new technologies of rule,¹⁶⁴ they remain the core methodologies of the tradition in its ongoing struggle for substantive freedom.

B. The Queer Radical Tradition

Whereas the Black radical tradition emerged in response to slavery, the queer radical tradition dates back much more recently to the 1960s. It grew out of the constraints of the homophile movement of the preceding decade, which set as its horizon formal recognition for gays and lesbians by means of signaling conformity to mainstream values.¹⁶⁵ Led by mobilized clients,¹⁶⁶ the homophile movement modestly demanded equal citizenship rather than marriage equality.¹⁶⁷ In contrast to the movement's emphasis on maintaining "good relations... between the homosexual community and the powers-that-be,"¹⁶⁸ the queer radical tradition was birthed through collective acts of spontaneous resistance against the state, police, and property on the one hand, and prefigurative acts to create a society based on gender and sexual self-determination on the other.¹⁶⁹

164. The most notable organizational expression of the Black radical tradition during the 1960s was the Black Panther Party (BPP), which engaged in acts of resistance in the form of armed community patrols of police and acts of prefiguration in the forms of Panther collectives to house BPP cadre, and survival programs directly controlled and run by the BPP to provide for the Black community, such as free breakfasts for children, free medical care, and free legal aid services. AHMAD, *supra* note 126, at 187, 195–96, 221–23. See also JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* (2016).

165. MARTIN DUBERMAN, *STONEWALL: THE DEFINITIVE STORY OF THE LGBT RIGHTS UPRISING THAT CHANGED AMERICA* 93–94 (Penguin Books 2019). The homophile movement was "primarily interested in winning acceptance on the mainstream's own terms, not in challenging mainstream values; they regarded themselves as patriots and good Americans; and they preferred to rely on 'experts' rather than on political organizing to plead their cause." *Id.* at 94.

166. Throughout the 1950s, the homophile movement was embodied by the "Big Three" organizations—the Mattachine Society, the Daughters of Bilitis, and ONE magazine. *Id.*

167. The nascent homophile movement settled for equal citizenship because marriage equality, while aspirational, was perceived as politically impossible. MARTIN DUBERMAN, *HAS THE GAY MOVEMENT FAILED?* 46 (2018).

168. DUBERMAN, *supra* note 165, at 266.

169. Gender self-determination refers to the freedom "for people to express whatever genders they choose at any given moment." Eric A. Stanley, *Fugitive Flesh: Gender Self-Determination, Queer Abolition, and Trans Resistance*, in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE*

Through the melting pot of military service, World War II revealed the mass existence of gays and lesbians in America.¹⁷⁰ Consequently, the immediate postwar period saw a proliferation of gay bars, clubs, and diners throughout the United States, which in turn constituted the “primary social institutions for gay men in general and for working-class lesbians.”¹⁷¹ Beyond this demographic, homeless queer and trans youth, expelled by intolerant families and turned away from shelters that enforced rigid gender binaries, also sought safety and solace in these newly established businesses.¹⁷² These businesses provided “a queer home that provided safety without closeting”¹⁷³—spaces where “varied forms of gender presentation and oft-decried sexual practices” were welcome.¹⁷⁴ As such, gender and sexual identities in these spaces were “aleatory, improvisatory, and essentially multiplicitous rather than homogenized and holistic”¹⁷⁵—a far cry from the curated image of gays and lesbians represented by the homophile movement. Because the homophile movement programmatically ignored these segments of LGBTQ individuals, the queer radical tradition developed in response to preserving these safe havens from attacks by the state and private owners.

While these spaces offered temporary glimpses of substantive freedom grounded in cultural autonomy for queers, as profit-driven businesses, their willingness to accommodate this freedom was contingent on their bottom line. One major flashpoint of the emerging queer radical tradition occurred at Compton’s Cafeteria, an all-night diner in San Francisco’s Tenderloin district. Compton’s Cafeteria became a popular destination for queer and trans youth in the mid-1960s to congregate. When management changed in the summer of 1966, private security guards were hired “to harass and remove the young drag queens and hustlers if they stayed too long or spent too little money.”¹⁷⁶ One evening in mid-August, management called the police to remove a trans youth.¹⁷⁷ When an officer manhandled a drag queen, she “threw her coffee in his face and a riot broke

PRISON INDUSTRIAL COMPLEX 7, 11 (Eric A. Stanley & Nat Smith eds., AK Press 2d ed. 2015). It recognizes that “these expressions might change and that this change does not delegitimize previous or future identifications.” *Id.* at 11.

170. DUBERMAN, *supra* note 165, at 92.

171. *Id.* at 92–93.

172. Jennifer Worley, “Street Power” and the Claiming of Public Space: San Francisco’s “Vanguard” and Pre-Stonewall Queer Radicalism, in *CAPTIVE GENDERS*, *supra* note 169, at 47, 50.

173. *Id.*

174. Millner-Larsen & Butt, *supra* note 64, at 409.

175. *Id.* at 410 (quoting José Esteban Muñoz).

176. Worley, *supra* note 172, at 54.

177. *Id.*

out.”¹⁷⁸ Drag queens and other trans and queer youth in the vicinity spontaneously came to her defense, and collectively “trashed the restaurant, smashed its plate glass windows and the windows of a police car outside, and set the corner newsstand on fire.”¹⁷⁹ Because Compton’s Cafeteria no longer offered an environment where LGBTQ individuals could experience gender and sexual self-determination, the riot simultaneously targeted both the diner as private property, which excluded trans and queer youth from access and enjoyment on their own terms, and the police, which exercised “violence . . . in the service of [a] business[] that discriminated against transgender women.”¹⁸⁰

Police violence was not limited to the protection of homophobic and transphobic businesses, but endemic to its function of containing subordinated populations who fell outside the employment needs of capital and “forced into criminalized economies such as sex work and the drug trade.”¹⁸¹ Throughout the 1960s nationwide, police routinely engaged in the practice of “sweeping” the streets of gay neighborhoods in paddy wagons to arrest homosexuals and gender nonconforming individuals.¹⁸² In New York City, this practice extended to gay bars, which set the stage for the most recognized flashpoint of the queer radical tradition: the Stonewall riot. In the late 1960s, the Stonewall Inn was the most popular gay bar in Greenwich Village, widely perceived as “a safe retreat from the harassment of everyday life, a place less susceptible to police raids than other gay bars and one that drew a magical mix of patrons ranging from tweedy East Siders to street queens.”¹⁸³ On June 27, 1969, police conducted a raid at Stonewall under the authority of a New York statute that mandated three pieces of clothing “appropriate to one’s gender.”¹⁸⁴ After a few queers were thrown into a paddy wagon, patrons and onlookers who congregated outside erupted into “a flash of group—of mass—anger.”¹⁸⁵ At first, the crowd threw coins, then bottles and bricks, and finally makeshift Molotov cocktails.¹⁸⁶ The police were forced to retreat inside the Stonewall.¹⁸⁷ A few people uprooted and converted a nearby parking

178. *Id.*

179. *Id.* at 54–55.

180. *Id.* at 55.

181. Morgan Bassichis, Alexander Lee, & Dean Spade, *Building an Abolitionist Trans and Queer Movement with Everything We’ve Got*, in *CAPTIVE GENDERS*, *supra* note 169, at 21, 27.

182. Worley, *supra* note 172, at 55.

183. DUBERMAN, *supra* note 165, at 225.

184. *Id.* at 242.

185. *Id.* at 243 (quoting Craig Rodwell).

186. *Id.* at 244–45.

187. *Id.* at 244.

meter into a battering ram to knock down the bar's door.¹⁸⁸ The Tactical Patrol Force, a weaponized riot-control unit resembling "a Roman Legion," was called to rescue the officers barricaded inside the Stonewall.¹⁸⁹ The street battle would last two additional nights.¹⁹⁰ In contrast to the monolithic construct of respectable gays and lesbians portrayed by the homophile movement, the Stonewall riot could be seen as "a blast of radical collectivity, trans/gender-non-conforming folks, queers of color, butches, drag queens, hair-fairies, homeless street youth, [and] sex workers"¹⁹¹ who fought back together against a state that simultaneously criminalized and denied their queer existence.

Unsurprisingly, the mobilized clients of the homophile movement condemned the Stonewall riot,¹⁹² effectively shutting down the opportunity for solidarity based on the freedom of all LGBTQ individuals. After the second night, one homophile organization posted a sign on the boarded-up entrance of the Stonewall Inn to condemn the tactics of the grassroots social movement, which read, "We homosexuals plead with our people to please help maintain peaceful and quiet conduct on the streets of the Village."¹⁹³ While this hardline stance against the courageous participants of the Stonewall riot would ring the death knell of the homophile movement, its direct legacy and assimilationist approach have been inherited by the contemporary marriage equality movement.

Yet for the multitude of queers who refused to conform to heteronormativity, the Stonewall riot gave voice to their desire of creating a society grounded in gender and sexual self-determination. The totality of queer riots of the 1960s¹⁹⁴ ushered in the queer radical tradition. In the immediate aftermath of the Stonewall riot, the tradition was concretized in organizational form through the Gay

188. *Id.* at 245.

189. *Id.* at 247.

190. *Id.* at 250–55.

191. Stanley, *supra* note 169, at 8.

192. Randy Wicker, a leader of the homophile movement, condemned the Stonewall riot, noting that the sight "of screaming queens forming chorus lines and kicking went against everything that I wanted people to think about homosexuals. . . that we were a bunch of drag queens in the Village acting disorderly and tacky and cheap." DUBERMAN, *supra* note 165, at 255.

193. *Id.* at 255–56.

194. Another queer riot was the Cooper's Do-Nuts Riot in Los Angeles in 1959. Stanley, *supra* note 169, at 9.

Liberation Front (GLF).¹⁹⁵ The GLF opposed marriage¹⁹⁶ and gender roles,¹⁹⁷ developed an intersectional analysis of variegated oppression under capitalism,¹⁹⁸ and promoted multiple forms of relationships outside a traditional nuclear family based on care.¹⁹⁹ The GLF did not survive the wave of state repression that effectively ended the liberation movements in the 1970s,²⁰⁰ yet the horizon of the queer radical tradition continues to animate grassroots movements today.

Whereas the riots of the 1960s constituted a desperate attempt to reclaim private spaces from the state and property owners as enclaves of gender and sexual self-determination, queer radical theorists today instead envision the creation of a “queer commons” that would offer substantive freedom on a more permanent basis through control of territory and resources.²⁰¹ This turn towards prefigurative acts has been inspired by recent grassroots social movements against extreme inequality and privatization under neoliberalism, such as the Occupy Wall Street Movement (OWS) in 2011 and Gezi Park uprisings in Turkey in 2013. In both movements, queers played direct roles to create and sustain the experimental commons by organizing resource distribution and educational workshops on sexism and homophobia within encampments.²⁰²

Yet beyond the participation of queers, queer radical theorists emphasize that the making of a commons itself “is always a queer event, a subversive process of subjectivization that, shattering ruling identities and norms, reveals the link between power and freedom, and thereby inaugurates an alternative production of subjectivity.”²⁰³ That is, because the collective sharing of tasks to maintain a commons is undertaken by participants of all genders, its existence necessarily disrupts “the gendered, racial, and sexual divisions of labor that ground society.”²⁰⁴

195. Unlike professionalized, nonprofit mobilized clients who lead the marriage equality movement, the Gay Liberation Front lacked “a constitution, bylaws, or mission statement” and was structured around “affinity cells, with people encouraged . . . to congregate around their primary interests.” DUBERMAN, *supra* note 167, at 9–10. This structure allowed leadership to be diffuse rather than centralized, and decisions to be directly democratic rather than delegated. *See id.*

196. *Id.* at 24–25, 42–43.

197. *See id.* at 7.

198. *See id.* at 16–17.

199. *Id.* at 42–43.

200. *See supra* text accompanying note 54.

201. *See generally* Millner-Larsen & Butt, *supra* note 64.

202. Özbay & Savci, *supra* note 40, at 517.

203. HARDT & NEGRI, *supra* note 64, at 62–63.

204. Rana Jaleel, *A Queer Home in the Midst of a Movement? Occupy Homes, Occupy Homemaking, IS THIS WHAT DEMOCRACY LOOKS LIKE?* (Oct. 8, 2013), <https://what-democracy-looks->

Therefore, new subjectivities—or one’s sense of self—can be formed free from the constraints of social identity and gender roles constructed under capitalism and reproduced by conventional movement claims for formal recognition. In so doing, the commons constitute an environment where queer identity—predicated on gender and sexual self-determination—can begin to proliferate. Additionally, whereas many of these functions of social reproduction normally occur “hidden within the allegedly private, intimate auspices of the home,” the collective sharing of these functions to maintain the commons spur an alternative “queer politics of home.”²⁰⁵ As such, the commons offer a space where individuals can mutually receive and provide care and nurture outside the confines of the heteronormative home, embodied by marriage and a nuclear family. As Subpart IV.B discusses, the prefigurative acts of the George Floyd rebellion directly carry on this legacy of the queer commons as articulated by the queer radical tradition.

IV. A NEW HORIZON FOR PROPERTY LAW GENERATED BY THE GEORGE FLOYD REBELLION

While the George Floyd rebellion represents an increasingly common form of social movement under neoliberalism, its methodologies and ultimate horizon of substantive freedom derive from the queer and Black radical traditions. These traditions reveal the collective courage and determination among the gendered and racialized poor to resist subordination on their own terms. Thus, the rebellion provides an opportunity for movement lawyers to embrace a grassroots movement epistemology consistent with a genealogy of resistance and refiguration that dates back to the inception of the nation.

The property outlaws of the George Floyd rebellion targeted private and state property for destruction, looting, and appropriation towards common use and benefit. By standing in solidarity with and taking direction from the rebellion, movement lawyers should be challenged to transform property law to advance antisubordination ends. This Article’s challenge to movement lawyers to expand the horizon of law draws from Peñalver and Katyal’s “dialogic (or perhaps, dialectic) vision of property law.”²⁰⁶ Far from being constituted as a fixed bundle of rights, “property remains the site of recurring conflict as

like.org/a-queer-home-in-the-midst-of-a-movement-occupy-homes-occupy-homemaking [https://perma.cc/GG6F-PM55].

205. *Id.*

206. EDUARDO PEÑALVER & SONIA KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 12 (2010).

competing camps state and restate their claims to particular contested resources.”²⁰⁷ For Peñalver and Katyal, this dialectic is productive, whereby the state ultimately responds to intentional property outlaws by making adaptations to property law in order to maintain “the long-term health of this system.”²⁰⁸ While this Article builds on the dialectical conception of property law, this Article departs from Peñalver and Katyal in three significant ways. First, unlike Peñalver and Katyal, whose commitments to capitalism are clear,²⁰⁹ by framing the property outlaws of the George Floyd rebellion as social movement actors, this Article draws from movement law’s insight that contemporary social justice movements “posit wholesale transformation rather than reform [of capitalism] as their end goal.”²¹⁰ Second, consistent with their commitment to law reform, to the extent that Peñalver and Katyal implicate social movements, their case studies are limited to “outlaws engaging in peaceful²¹¹ civil disobedience,” thereby making their overall argument “more palatable.”²¹² In contrast, the grassroots property outlaws of the George Floyd rebellion engaged in destructive forms of resistance that descend from the arsenal of the queer and Black radical traditions. Third, whereas Peñalver and Katyal confine their definition of property to tangible property and intellectual property,²¹³ this Article additionally analyzes the import of the rebellion to what Cheryl Harris describes as status property, or property based on one’s social

207. *Id.*

208. *Id.* at 16.

209. *See id.* at 13 (“Indeed, a focus on the mechanisms of legal evolution within existing private property regimes is all the more important and interesting in an advanced capitalist society like ours . . .”).

210. Akbar, Ashar & Simonsen, *supra* note 11, at 827.

211. Ironically, Peñalver and Katyal’s discussion of white settlers who illegally squatted on land on the frontier without any formal legal entitlement was an extremely violent process involving the mass murder and dispossession of Indigenous lives and land. While Peñalver and Katyal discuss the law reform that resulted in the passing of the 1862 Homestead Act, which granted title to squatters, they frame squatting as a nonviolent act of residing on land. The violence that necessarily accompanied squatting is omitted. Peñalver & Katyal, *supra* note 69, at 1105–13; *see also* Park, *supra* note 134, at 12 (“No parcel of land acquired monetary value on this market without the removal of Native people and the extinguishing of Native claims, actual or projected: the production of its value depended, in other words, upon white presence and the racial structure of conquest.”).

212. Greg Lastowka, *Property Outlaws, Rebel Mythologies, and Social Bandits*, 20 CORNELL J.L. & PUB. POL’Y 377, 389 (2010) (“By confining their examples to outlaws engaging in peaceful civil disobedience, rather than revolutionary violence, Peñalver and Katyal make their ‘information value’ claims much more palatable.”).

213. *See generally* PEÑALVER & KATYAL, *supra* note 206, at 36–51. Intellectual property is beyond the scope of this Article.

identity, which mediates access to resources distributed by non-carceral state administrative agencies.²¹⁴

In order to make sense of the rebellion's strong disregard for property, movement lawyers should interrogate the historical and functional role of property law in maintaining gendered, racial capitalism as a system. In so doing, movement lawyers may better translate the instinctive activities of grassroots property outlaws into moral and legal arguments for the transformation of property law. The discussion below begins such historical and functional inquiries of tangible and status property. This part separately analyzes acts of resistance from acts of prefiguration in order to emphasize the distinct contributions of each methodology in rejecting and materializing a normative alternative to property as presently constituted.

A. The Language Spoken by Acts of Resistance

The acts of resistance engaged by grassroots participants of the George Floyd rebellion targeted two categories of tangible property: private property and state property. Representative of acts against private property were the looting and destruction of big box retailers,²¹⁵ shopping malls,²¹⁶ luxury

214. Harris, *supra* note 71, at 1734.

215. See, e.g., Rebecca Heilweil, *Target's History of Working With Police Is Not a Good Look Right Now*, VOX (June 5, 2020, 10:00 AM), <https://www.vox.com/decode/2020/6/1/21277192/target-looting-police-george-floyd-protests> [https://perma.cc/SUU5-LEQW] (describing the looting and destruction of the Lake Street Target in Minneapolis); John Ruch, *Rioting Hits Buckhead's Phipps Plaza Mall, Other Businesses as Part of Floyd Protests*, REP. NEWSPAPERS (May 30, 2020), <https://reporternewspapers.net/2020/05/30/rioting-hits-buckheads-hipps-plaza-mall-other-businesses-as-part-of-floyd-protests> [https://perma.cc/6QS9-ZMQR] (describing the looting of the Lenox Marketplace Target in Atlanta); Brian Sozzi, *Walmart Stores Suffer Damage From George Floyd Protests and Looting—Several Hundred Forced to Close Early*, YAHOO! FIN. (May 31, 2020), <https://finance.yahoo.com/news/walmart-stores-suffer-damage-from-george-floyd-protests-and-looting-several-hundred-forced-to-close-early-011242738.html> [https://perma.cc/WP5N-Z3D4] (describing the looting and damage to over a dozen Walmart retailers across the nation).

216. See, e.g., Ruch, *supra* note 215 (describing the looting and destruction of a shopping mall in Atlanta); Jacob Adelman, Ellie Rushing & Jason Laughlin, *Center City Retailers Endure Epic Looting on Top of Coronavirus Closures*, PHILA. INQUIRER (May 31, 2020), <https://www.inquirer.com/business/retail/philadelphia-protest-retail-restaurants-violence-coronavirus-20200531.html> [https://perma.cc/2TY2-7U9P] (describing the looting and destruction of the King of Prussia Mall in Philadelphia).

stores,²¹⁷ small businesses,²¹⁸ and banks²¹⁹ nationwide. In total, the rebellion caused an estimated \$2 billion damage to insured private property, making the George Floyd rebellion the “most expensive” uprising in history.²²⁰ In addition to private property, participants of the rebellion set ablaze, vandalized, and destroyed state property in the forms of police vehicles,²²¹

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217. See, e.g., Dominic-Madori Davis, *Shattered Storefronts and ‘Eat the Rich’ Graffiti: Photos Show the Aftermath of Destruction in Luxury Stores That Were Looted and Vandalized During the Protests*, BUS. INSIDER (June 1, 2020, 2:30PM), <https://www.businessinsider.com/luxury-stores-looted-vandalized-nyc-la-george-floyd-murder-protests-2020-6> [<https://perma.cc/9BF7-YRBJ>] (describing the looting of luxury stores in Beverly Hills and SoHo in Lower Manhattan); Alejandra Reyes-Velarde & Melissa Etehad, *Hundreds Arrested in Santa Monica Amid Widespread Looting*, L.A. TIMES (June 1, 2020), <https://www.latimes.com/california/story/2020-05-31/looters-hit-santa-monica-place-mall-even-as-protesters-march-peacefully> [<https://perma.cc/6XVP-3ZDX>] (describing the looting of storefronts along the extravagant Santa Monica Pier in Los Angeles).
218. See, e.g., Manny Ramos, *A Year Later, Looted Chicago Businesses Still Feel the Impact of George Floyd Killing*, CHI. SUN TIMES (May 24, 2021, 5:00 AM), <https://chicago.suntimes.com/2021/5/24/22442221/protests-chicago-george-floyd-anniversary-small-businesses-looting-reflect-night-of-chaos-purge> [<https://perma.cc/FX4W-VDLL>].
219. See, e.g., Jonathan Levinson, *Portland Justice Center Broken Into, Set on Fire Following Peaceful Vigil*, OR. PUB. BROAD. (May 29, 2020, 11:26 PM), <https://www.opb.org/news/article/george-floyd-protest-portland-fire-justice-center> [<https://perma.cc/75Z2-KZXB>].
220. Jennifer A. Kingson, *Exclusive: \$1 Billion-Plus Riot Damage Is Most Expensive in Insurance History*, AXIOS (Sept. 16, 2020), <https://www.axios.com/riots-cost-property-damage-276c9bcc-a455-4067-b06a-66f9db4cea9c.html> [<https://perma.cc/GQP6-A2QA>].
221. See, e.g., Associated Press, *NYPD: 303 Police Cars Damaged Since Floyd Death, Costing \$1M*, U.S. NEWS (July 28, 2020), <https://www.usnews.com/news/us/articles/2020-07-28/nypd-303-police-cars-damaged-since-floyd-death-costing-1m> [<https://perma.cc/GA9Q-6ARE>].

Confederate monuments,²²² courthouses,²²³ city halls,²²⁴ DHS and ICE offices,²²⁵ and jails.²²⁶ Most iconic and historically unprecedented was the burning down of the Third Precinct in Minneapolis, the police station that had employed Derrick Chauvin and the three onlooking officers.²²⁷ The sections immediately below analyze how these acts of resistance against private and state property constitute foundational rejections of tangible and status property regimes. As such, they contextualize the acts of prefiguration that simultaneously occurred during the rebellion as experiments in alternative property relations, which will be discussed in Subpart IV.B.

1. Private Property

On its face, acts of resistance against private property communicate a rejection of the classical liberal premises undergirding tangible property, which, at its core, recognize the property owner’s “sole and despotic dominion” over their property.²²⁸ By looting and destroying private property, the property outlaws of

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222. Simone Jasper, *Confederate Monuments Vandalized Across the South During George Floyd Protests*, NEWS & OBSERVER (June 2, 2020, 2:54 PM), <https://www.newsobserver.com/news/nation-world/national/article243196256.html> [https://perma.cc/5ZBD-T6QN].
223. See, e.g., *Fire Seen at Nashville Courthouse and City Hall Building as Protests Turn Violent*, TENNESSEAN (May 30, 2020, 11:06 PM), <https://www.tennessean.com/story/news/crime/2020/05/30/nashville-city-hall-and-courthouse-fire-george-floyd-protest/5295953002> [https://perma.cc/LD5X-BNNX]; Hayley Fowler, *Slaves Were Sold at a Market in George Floyd’s NC Birthplace. Many People Want It Gone*, NEWS & OBSERVER (June 17, 2020, 3:37 PM), <https://www.newsobserver.com/news/state/north-carolina/article243598877.html> [https://perma.cc/D5QF-MZVM] (describing protesters’ setting ablaze the Market House in Fayetteville, North Carolina, where slaves were bought and sold).
224. See, e.g., Fowler, *supra* note 223. See also Ron Todt, *Teargas Used on Philadelphia Crowds as Destruction Continues*, TIMES LEADER (May 31, 2020), <https://www.timesleader.com/wire/state-wire/785919/teargas-used-on-philadelphia-crowds-as-destruction-continues> [https://perma.cc/H84R-WCFR] (describing vandalism of City Hall in Philadelphia).
225. Asia Simone Burns, *Atlanta ICE Field Office Vandalized Overnight, Officials Say*, ATLANTA J.-CONST. (July 26, 2020), <https://www.ajc.com/news/atlanta-ice-field-office-vandalized-overnight-officials-say/DJABP5MUNRA6NK4TOA3QGHTV2E> [https://perma.cc/M6MQ-446N].
226. See, e.g., Levinson, *supra* note 219.
227. Gabe Gutierrez, David K. Li & Dennis Romero, *Minneapolis Police Precinct Burns as George Floyd Protests Rage; CNN Crew Arrested*, NBC NEWS (May 29, 2020, 7:29 AM), <https://www.nbcnews.com/news/us-news/protests-looting-erupt-again-minneapolis-area-following-death-george-floyd-n1216881> [https://perma.cc/7PG8-TLTL].
228. William Blackstone’s authoritative definition of private property is “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Univ. of Chi. Press 1979). Blackstone’s absolutist

the rebellion paid no respect to such dominion. In order to make sense of their collective transgressions committed against private property, the rebellion invites movement lawyers to interrogate both the historical foundations and functional purposes of private property.

A property regime that sanctifies private property above all other alternative property forms was not historically determined.²²⁹ As Subpart IV.B discusses below, acts of prefiguration invite movement lawyers to explore alternative property forms. Instead, the “sole and despotic dominion” described by Blackstone reflected the historical triumph of capitalism as a political project enabled and protected by property law.²³⁰ Slavery and conquest constituted two necessary conditions for the ascendancy of capitalism.²³¹ Between American independence and 1887, the United States brought onto the national land market 1.5 billion acres forcibly seized from Indigenous peoples.²³² Up until the passing of the thirteenth amendment in 1865,²³³ this territorial expansion directly fueled the institution of slavery to meet the demand among private landowners for enslaved African labor to work their newly acquired lands.²³⁴ By the eve of the

formulation of property has been contested and debunked for a relational vision of property as rights and duties between people. See, e.g., Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 862–66 (2011) (describing contemporary alternative conceptions of property to Blackstone’s absolutism); Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property*, 18 CARDOZO L. REV. 473, 502–03 (1996) (applying a relational concept of property to describe slave property). This Article engages with Blackstone’s definition because it remains the theoretical foundation of American property law and the point of departure for common property law theorists. See, e.g., Michael Robertson, *Common Property Redux*, 49 UNIV. B.C. L. REV. 563, 591 (2016). This Article’s critique of private property also extends to a relational vision of property.

229. “It is only when we enter the modern world of the full capitalist market society, in the seventeenth century, that the idea of common property drops virtually out of sight. From then on, ‘common property’ has come to seem a contradiction in terms.” C.B. Macpherson, *The Meaning of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 10 (1978).
230. Robertson, *supra* note 228, at 617 (“[T]he standard liberal taxonomy of property forms is not neutral, but is the expression of a particular politics, namely the politics of classical liberalism and the cold war contest between capitalism and communism.”).
231. See *supra* Subpart III.A.
232. *Invasion of America*, UNIV. OF GA. MAPS, <https://usg.maps.arcgis.com/apps/webappviewer/index.html?id=eb6ca76e008543a89349ff2517db47e6> [https://perma.cc/R5MV-WELS]. See generally ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES (2015).
233. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).
234. Park, *supra* note 134, at 17.

Civil War, the estimated value of property in humans in the United States was \$3.5 billion, “making them the largest single financial asset in the entire U.S. economy, worth more than all manufacturing and railroads combined.”²³⁵

The American property law system developed to consolidate and legitimate the material gains and private wealth generated from these violent racial processes. First, the logic of slavery depended on the legal classification and enforcement of enslaved Africans as private property,²³⁶ subject to be returned to,²³⁷ brutal treatment by,²³⁸ and posted as collateral²³⁹ by their property owners. While appellate courts in the fifteen slave states led the charge in developing the law of slavery,²⁴⁰ the Supreme Court willingly followed. In *Prigg v. Pennsylvania*, the Supreme Court characterized the Fugitive Slave Clause of the Constitution as a “fundamental article, without the adoption of which, the Union could not have been formed.”²⁴¹ Because the Pennsylvania personal liberty law criminalized Edward Prigg for capturing a fugitive slave “with force and violence” and returning her to her owner in Maryland, the Court held that the state law was in conflict with the Fugitive Slave Clause and therefore unconstitutional and void.²⁴² The Court reasoned that no state could abridge on the “positive and unqualified” rights of the slaveholder, as property owner, to “seize and repossess the slave . . . as property.”²⁴³

235. Ta-Nehisi Coates, *Slavery Made America*, ATLANTIC (June 24, 2014), <https://www.theatlantic.com/business/archive/2014/06/slavery-made-america/373288> [https://perma.cc/XDP7-H28D] (quoting David Blight, *The Civil War and Reconstruction Era, 1845–1877*, OPEN YALE COURSES (2008), <https://oyc.yale.edu/history/hist-119> [https://perma.cc/94A8-SBNJ]).

236. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 411–12 (1857) (holding that the Black race constituted a “separate class of persons” from “the people or citizens” because the Constitution discussed the Black race as slave property “brought here as articles of merchandise”).

237. See U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State . . . escaping into another . . . shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”); Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864) (enforcing the Fugitive Slave Clause of the Constitution by providing for the seizure or arrest of “fugitive[s] from labour”); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864) (expanding the power to return fugitives).

238. See, e.g., *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829) (*per curiam*) (“The power of the master must be absolute, to render the submission of the slave perfect.”).

239. See, e.g., *Johnson v. Butler*, 7 Ky. (4 Bibb) 97, 98 (1815) (“The defendant, under the terms of the covenant, no doubt had his election to pay either in money or *negroes*; but in case of his choosing the latter alternative, as the covenant requires the payment to be made in *negroes*, in the plural number, the plaintiff could not be compelled to receive *one only*”).

240. Jenny B. Wahl, *American Slavery and the Path of the Law*, 20 SOC. SCI. HIST. 281, 281, 304 n.1 (1996) (showing that nearly 11,000 cases concerning enslaved Africans were documented by appellate case reporters for the fifteen slave states).

241. 41 U.S. 539, 543 (1842).

242. *Id.* at 540, 556, 558.

243. *Id.* at 613.

The “full recognition” by “every state in the Union” of the “complete right and title of ownership in their slaves, as property . . . was indispensable to the security of this species of property.”²⁴⁴ In so ruling, the Court acknowledged the centrality of slavery in national formation and identity, in which Northern, non-slaveholding states were implicated and bound. Moreover, the Court interpreted the Constitution as the source for classifying slaves as property, and thus affirmed the “sole and despotic” dominion of private owners of human property. Implicit in the ruling was a caution to abolitionist legislatures and property owners: Not only did abolitionists threaten to disrupt the unity of a newly independent nation, but they also threatened to disrupt an entire property regime based on the settled expectations and rights of private owners and thus their very own self-interests.

Second, property law converted commonly held land—forcibly seized from Indigenous populations—into cognizable tracts for private ownership.²⁴⁵ Such jurisprudential developments were made possible materially through new technologies and ideologically through Enlightenment thought. The former included the survey system, the registry, and the recording system, which recognized and divided land into parcels to be bought, sold, and possessed.²⁴⁶ The latter provided a theoretical foundation to rationalize and mask the inherently violent and racialized processes birthing capitalism by elevating individual liberty as the highest value under this new form of political economy, wherein “individually owned private property was the best tool for advancing individual liberty.”²⁴⁷ At the center of Enlightenment thought was John Locke, who justified private property by arguing that the labor of an individual applied to commonly held land was sufficient to transform the land into the laborer’s private property.²⁴⁸

244. *Id.* at 540, 613.

245. Similar to the seizure of commonly held land by Indigenous populations in the colonies, in England, land that had been commonly held by the peasantry under feudalism was seized through the Enclosure Movement. See generally FEDERICI, *supra* note 64; E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1975). Stuart Banner describes the similarities between Indigenous property arrangements and old English commons; for example, families were allocated plots of land for farming based on size and need, while unallocated lands were available to all members of the community for harvesting crops. STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 37–39 (2005).

246. ANDRO LINKLATER, *MEASURING AMERICA: HOW AN UNTAMED WILDERNESS SHAPED THE UNITED STATES AND FULFILLED THE PROMISE OF DEMOCRACY* 160–63 (2002).

247. Robertson, *supra* note 228, at 565.

248. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 116–17 (1690). The irony of Lockean labor theory should not be missed: The so-called European “labor” that was valorized by Locke to demonstrate productivity vis-à-vis commonly held Indigenous land, in which the land was

Lockean labor theory was predicated on construction of America as bountiful, limitless, and vacant for the taking.²⁴⁹

These Enlightenment ideas influenced Chief Justice Marshall's decision in *Johnson v. M'Intosh*, which legitimized "conquest . . . acquired and maintained by force."²⁵⁰ The decision articulated the Doctrine of Discovery, in which the European colonial power who was first-in-time to "discover" a territory had exclusive title to it against other European nations.²⁵¹ That territory could be "discovered" ignored prior possession by Indigenous peoples and paralleled Locke's construction of America as available for the taking. Indeed, to justify "the nature of Indian title to lands" as "a mere right of usufruct and habitation, without power of alienation," the defendants explicitly drew from Lockean labor theory.²⁵² Possession of land depended on one's "capacity of using it," and "[on] every theory of property, the Indians had no individual rights to land" because the lands "were not used by them in such a manner as to prevent their being appropriated by a people of cultivators."²⁵³ Of course, the "every theory of property" cited by defendants indicated the extent to which Enlightenment thought around private property had been naturalized. The settler defendants simply could not conceive of a theory of common property based on Indigenous land relations.

On its part, the Court further described Indigenous peoples as "heathens," "warlike," and "fierce savages" who, if given possession of land, would "leave the country a wilderness."²⁵⁴ In addition to portraying Indigenous peoples as unproductive in contrast to European labor, such denigrating characterizations built on other prominent Enlightenment ideas that justified conquest to control uncivilized populations who were permanently engaged in a "state of war."²⁵⁵ Ultimately, the Court agreed with the defendants, relegating Indigenous peoples to a qualified "right of occupancy" and "deemed [them to be] incapable of transferring the absolute title to others."²⁵⁶ Such right of occupancy could be "extinguished" by the European power who "discovered" the territory, "either by

productively used towards large-scale agricultural production, was in actuality forcibly performed by enslaved Africans.

249. "Thus, in the beginning, all the world was *America*." *Id.* at 125.

250. 21 U.S. 543, 589 (1823).

251. "[A]ll the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians." *Id.* at 584.

252. *Id.* at 569.

253. *Id.* at 569–70.

254. *Id.* at 577, 586, 590.

255. See generally THOMAS HOBBS, *LEVIATHAN* (1651).

256. *M'Intosh*, 21 U.S. at 588, 591.

purchase or by conquest.”²⁵⁷ Thus, the Court held that because Indigenous peoples were not the rightful owners of land, plaintiffs, who had purchased land directly from the Piankeshaw and Illinois Nations, did “not exhibit a title which can be sustained in the Courts of the United States.”²⁵⁸ In so holding, the Court signaled that only European colonists could enjoy full land ownership rights under this new property law regime.

This historical assessment reveals that the judiciary actively constructed a private property law regime that reified and expanded slavery and colonization, and in turn, laid out a legal infrastructure for racial capitalism. In advocating for transformative shifts in property law, then, movement lawyers can begin by showing that the very heart of the contemporary property law regime lies in “racial practices, racial ideological formations, and racial violence since before the nation’s inception.”²⁵⁹

The George Floyd rebellion further invites movement lawyers to interrogate the functional role of private property in mediating access to life and death. A capitalist market economy depends on “the centrality of property” to satisfy “fundamental human needs”²⁶⁰ by converting goods and resources necessary for social reproduction into private property, or commodities,²⁶¹ imbued with value to be sold for profit.²⁶² As Subpart II.B discussed, the restructuring of capitalism from industrial production to financialization has transformed a permanently employed workforce into an immiserated surplus population trapped in cycles of unemployment, debt, and incarceration. Consequently, increasing numbers of Americans are unable to purchase resources for their subsistence. At the same time, the wealth disparity between the rich and the poor has continued to

257. *Id.* at 587.

258. *Id.* at 604–05.

259. Park, *supra* note 134, at 1. “The first English settlers who arrived on the shores of the eastern seaboard seized land from Native nations under a racial colonial mandate to produce property, and the slave trade they built and expanded entrenched a racial social order that would inform practices of trading interests in the land enclosures formed through the process of colonization.” *Id.* See also Joseph Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 44 (1991) (emphasizing that “[p]roperty in the United States is associated with a racial caste system”).

260. PEÑALVER & KATYAL, *supra* note 206, at 27.

261. “[T]he bringing of the product to market . . . could more precisely be regarded as the transformation of the product *into a commodity*. Only on the market is it a *commodity*.” KARL MARX, *GRUNDRISSE* 534 (Penguin Books 1993) (1939).

262. This value-enhancing function of private property “has been well known for several hundred years.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 28 (2d ed. 1977).

exacerbate under neoliberalism²⁶³—a trend that has accelerated during the COVID-19 pandemic.²⁶⁴ Thus, the widespread looting that occurred during the rebellion constituted a concrete act of survival—if not a “*natural* response”²⁶⁵—under conditions of wagelessness in the face of capitalist abundance.²⁶⁶ More importantly, because looting sets the price of goods in the marketplace to zero,²⁶⁷ the property outlaws communicated a total rejection of a private property regime functionally tied to profit accumulation. In its place is a vision of property based on equitable access in order to sustain life.

2. State Property

In addition to the looting and destruction of private property, the grassroots participants of the rebellion targeted carceral state property. These acts, too, expressed a collective desire to survive under neoliberalism. Just as the fulcrum of capitalist accumulation has shifted from industrial production to financialization, the welfare state correspondingly restructured to a carceral state, characterized by

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263. The top 25 richest Americans were worth \$1.1 trillion by the end of 2018 yet paid \$1.9 billion in federal income tax. In contrast, 14.3 million ordinary American wage earners paid \$143 billion in federal income tax. Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PROPUBLICA (June 8, 2021, 5:00 AM), <https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax> [https://perma.cc/V5J4-C7ML]. See also Jesse Drucker & Danny Hakim, *Private Inequity: How a Powerful Industry Conquered the Tax System*, N.Y. TIMES (Sept. 8, 2021), <https://www.nytimes.com/2021/06/12/business/private-equity-taxes.html> [https://perma.cc/TK7B-M8AQ].
264. Peter Eavis, *Meager Rewards for Workers, Exceptionally Rich Pay for C.E.O.s*, N.Y. TIMES (June 11, 2021), <https://www.nytimes.com/2021/06/11/business/ceo-pay-compensation-stock.html> [https://perma.cc/H4FZ-JC6H] (describing the widening of the wealth gap between workers and C.E.O.s during the pandemic).
265. “Society finds in looting its *natural* response to the unnatural and inhuman abundance of commodities.” CLOVER, *supra* note 41, at 125 (quoting Guy Debord).
266. “[T]he specific targeting of luxury stores highlights the economic tension brought forth by the rising inequality in the United States. In the past three months, 40 million Americans filed for unemployment due to coronavirus-related layoffs; meanwhile . . . America’s billionaires had collectively become \$434 billion richer.” Davis, *supra* note 217.
267. “Looting is not the moment of falsehood but of truth echoing across centuries of riot: a version of price-setting in the marketplace, albeit at price zero.” CLOVER, *supra* note 41, at 29.

increased policing,²⁶⁸ prisons,²⁶⁹ and surveillance²⁷⁰ across deindustrialized urban landscapes. One function of the carceral state is to control and warehouse the racialized surplus population left behind in municipalities after the departure of manufacturing and white flight.²⁷¹ As a result of the departure of these two key tax bases, municipalities were thrown into debt crises, with some—including New York City in 1975 and Detroit in 2013—forced into filing for bankruptcy.²⁷² City governments adapted to their new financial doldrums by simultaneously slashing social services and devising methods to loot their remaining residents through aggressive police enforcement of traffic, civil, and criminal violations. The fines and fees subsequently tacked onto citations, arrests, and court processes—what has come to be known as criminal justice debt or legal financial obligations—then fill municipal coffers.²⁷³ Thus, a second function of the carceral state is to ensure financial solvency “*by using the police power and court system to extract revenue from citizens.*”²⁷⁴ As George Floyd tragically embodied, the overall effect of the penal state on the racialized surplus population is an increased likelihood of

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268. WANG, *supra* note 56, at 84 (“At the dawn of the carceral era, the United States chose the path of *divestment* in social entitlements and *investment* in prisons and police. There was nothing inevitable about this policy path.”).
269. See generally GILMORE, *supra* note 118.
270. See, e.g., Todd Feathers, *Baltimore Police Lied About Almost Every Aspect of Its Spy Plane Program*, VICE (Dec. 10, 2020, 6:00 AM), <https://www.vice.com/en/article/qjipqd/baltimore-police-lied-about-almost-every-aspect-of-its-spy-plane-program> [<https://perma.cc/PD9V-APGY>] (describing a spy plane program launched by the Baltimore Police Department). See also *America’s Prisons Are Failing. Here’s How to Make Them Work*, ECONOMIST (May 27, 2017), <https://www.economist.com/leaders/2017/05/27/americas-prisons-are-failing-heres-how-to-make-them-work> [<https://perma.cc/WZZ7-URYU>] (advocating for GPS ankle bracelets and other surveillance technologies as alternatives to incarceration).
271. See *supra* Subpart II.B. The vast majority of those too poor to leave urban cities were Black Americans who experienced generations of systemic racism in the forms of redlining, housing discrimination, and occupational segregation. For a case study of these dynamics in Baltimore, see generally BALTIMORE REVISITED, *supra* note 46.
272. WANG, *supra* note 56, at 162–78. “[T]he 1975 bankruptcy of New York City ushered in a neoliberal model of handling fiscal crises: city budgets would be reorganized to reflect a program of austerity,” effectively placing control of the city budgets in the hands of investment bankers and creditors, rather than residents, of a city. *Id.* at 163.
273. C. R. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson_findings_3-4-15.pdf [<https://perma.cc/K6EP-2DWR>] (noting that the Ferguson Police Department was “focused on generating revenue” through issuing traffic tickets, housing violations, and quality-of-life citations on the city’s residents who are disproportionately Black). See also Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors’ Prisons*, 51 HARV. C.R.-C.L. L. REV. 189 (2016); *Policing and Profit*, 128 HARV. L. REV. 1723 (2015); Pow, *supra* note 29.
274. WANG, *supra* note 56, at 175.

“premature death.”²⁷⁵ Thus, the targeting of police property, prisons, and courthouses during the rebellion conveyed a collective will to live through envisioning a world without prisons and policing.

Yet it would be simplistic to reduce the destruction of carceral state property to a mere call for the abolition of carceral politics and institutions. Instead, just like the direct attacks on private property, the targeting of carceral state property simultaneously communicated a complete rejection of private property in two ways. First, because carceral state property is integrally linked to its function of protecting private property,²⁷⁶ such acts of resistance necessarily rejected both forms of tangible property. Historically, just as the material relations of slavery and conquest were codified by property law, the institution of policing gave teeth to this new legal regime. As many have noted, slave patrols in the South, which enforced state slave codes and fugitive slave laws, constituted the first American police forces.²⁷⁷ Thus, the foundational purpose of policing was to protect private ownership of human property. Though human property was formally abolished by the thirteenth amendment, travelers within the Black radical tradition have emphasized the continuity between the state’s historic and contemporary functions of maintaining racial subordination²⁷⁸ and protecting private property.²⁷⁹ In 1969, George Jackson, then a member of the Black Panther Party, noted that statistics from the Federal Bureau of Investigation (FBI) reported that 87 percent of all crimes were property crimes.²⁸⁰ Even before the onset of mass

275. GILMORE, *supra* note 118, at 247.

276. See *supra* Subpart III.B for discussion of police violence in service of homophobic and transphobic businesses.

277. See, e.g., Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, 46 HUM. RTS. 6 (2021); Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51 (1988); Michael A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint From January 1, 2015, Through December 31, 2015*, 48 J. BLACK STUD. 551 (2017).

278. In discussing the permanence of anti-Black subordination in the United States, the author states:

Perhaps the desire to provide a functionalist explanation for police violence stems from an inability to face the more unsettling aspects of white supremacy: the fact that some whites—and cops in particular—get sadistic pleasure out of dominating, brutalizing, and killing black people. Moreover, it is not merely a matter of a few white people being sadistic; whiteness as a category is, in part, maintained by ritualized violence against black people and white consumption of spectacularized images of antiblack violence.

WANG, *supra* note 56, at 91–92.

279. GEORGE JACKSON, *BLOOD IN MY EYE* 100 (Black Classic Press 1990) (1971) (arguing that “law protects property relations and not social relationships”).

280. *Id.* at 97.

incarceration, Jackson observed that the United States, which incarcerated “two-thirds of a million people or more,” possessed “the largest prison system in the world” designed to warehouse “the working” and the surplus—what he called “lumpenproletariat”—classes.²⁸¹ Thus, Jackson argued that the construction of criminality was “simply the result of a grossly disproportionate distribution of wealth and privilege, a reflection of the present state of property relations.”²⁸² In other words, a new set of property relations that diverges from private ownership could eliminate the need to criminalize poverty. Because of this nexus between the carceral state and private property, the targeting of carceral state property during the rebellion, then, simultaneously renounced the logic of private property.

Second, a deeper interrogation of classical liberal premises of tangible property suggests a fictitious dichotomy between private property and state property. If the bedrock of tangible property is an owner’s “sole and despotic dominion” over property—with the right to exclude others as its essential ingredient²⁸³—then some forms of state property, especially carceral state property, would seem to fit this definition. Property law already recognizes private ownership by artificial persons such as corporations and partnerships.²⁸⁴ The state, like corporations, is an artificially constructed entity that can own private property. State-owned property is “exclusive—and therefore private!—property . . . to which the public does not have access.”²⁸⁵ Indeed, in the area of first amendment jurisprudence, the Supreme Court emphasized that “the first amendment does not guarantee access to property simply because it is owned or controlled by the government.”²⁸⁶ This form of exclusive state property—in which

281. *Id.* at 97–98, 106.

282. *Id.* at 106.

283. In practice, this theoretical definition of exclusivity is subject to limitations. For example, private property is subject to the state exercise of eminent domain, in which private property is taken by the state for a “public use.” In 2005, the Supreme Court held that economic rejuvenation constitutes a public use. *Kelo v. City of New London*, 545 U.S. 469 (2005).

284. Robertson, *supra* note 228, at 592 (“Property owned by the corporation is private property; it is owned by an artificial individual that has the right to exclude everyone else from the resource.”).

285. Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247, 251 (1992). Similar to private property in practice, *supra* note 283, the exclusivity of state ownership is subject to certain limitations. For example, the doctrine of state action prohibits states from employing racial classifications to exclude minorities from access to property. *Gotanda*, *supra* note 97, at 7–16.

286. *USPS v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 130 (1981).

access by the general public is denied—is classified as “nonpublic” forum.²⁸⁷ Falling under this designation is carceral state property. In *Adderley v. State of Florida*, the Court upheld the prosecutions for trespass of a jail.²⁸⁸ There, 107 student demonstrators were arrested for protesting against “state and local policies and practices of racial segregation” at a Florida jail.²⁸⁹ The Court rejected the students’ argument that the first amendment protected their right to assemble and protest, reasoning that jails, “built for security purposes,” were not “open to the public.”²⁹⁰ The Court further explained that the “[s]tate, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”²⁹¹ Of course, as this Article argues, neoliberalism ironically increases access of jails and other carceral institutions to the general public—in the capacity of arrestees and convicts. From the perspective of tangible property, though, the targeting of carceral state property during the rebellion further destabilized the logic of exclusivity, regardless of owner; thereby posing a challenge to the property law regime rooted in private ownership.

3. Status Property

In addition to expressing a rejection of tangible property, acts of resistance communicated a rejection of status property, which confers privilege in the form of a property interest to certain identity groups formally recognized by the state at the exclusion of others.²⁹² To fully use and enjoy this property interest, members demonstrate their possession through publicly performing their status property. Because the grassroots participants who committed acts of resistance during the George Floyd rebellion spanned multiple genders and races, rigid stereotypes tied to status property began to break down. In so doing, the rebellion prefigured a new set of social relations where human interactions are not mediated by constructs, caste, or status distinctions. The new bonds of multigender and multiracial solidarity

287. The Supreme Court first established a tripartite “forum-based” approach—(1) “traditional” public forums, (2) “designated” public forums, and (3) “nonpublic” forums—to reviewing free speech restrictions in *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983). There, the Court held that an interschool mail system constituted a nonpublic forum, and as such, could restrict “access on the basis of subject matter and speaker identity.” *Perry*, 460 U.S. at 48–49.

288. 385 U.S. 39 (1966).

289. *Id.* at 40, 46.

290. *Id.* at 41.

291. *Id.* at 47.

292. See generally Harris, *supra* note 71.

forged from collective acts of resistance invite movement lawyers to engage in a deep interrogation of both the historical and functional roles of status property.

Historically, the conversion of an individual's social identity to status property was tied to a "racial project"²⁹³ of maintaining "whiteness as property."²⁹⁴ Specifically, slavery, "as a system of property," inevitably "facilitated the merger of white identity and property."²⁹⁵ To avoid becoming tangible human property, it became essential to be recognized by the state as white.²⁹⁶ While courts have devised arbitrary metrics to determine whiteness throughout the body of racial assignment jurisprudence,²⁹⁷ formal legal recognition converted whiteness into status property.

The classical liberal premises behind tangible property similarly apply to status property,²⁹⁸ including exclusive rights of possession, use and enjoyment, and disposition.²⁹⁹ Under slave code regimes, those in possession of white status property exclusively enjoyed freedom and its attendant benefits, including travel without permits, property ownership, public assembly, and the ability to carry

293. OMI & WINANT, *supra* note 121, at 58–59.

294. Harris, *supra* note 71. See also OSTERWEIL, *supra* note 53, at 36 ("Access to certain forms of power, legality, and personhood—property-in-whiteness—was a prerequisite for access to property in land or slaves: whiteness became the meta-property from which all other private property flows and is derived.").

295. Harris, *supra* note 71, at 1721.

296. *Id.*

297. Courts have inconsistently applied various criteria to make racial assignments to individual litigants seeking benefits of whiteness. See, e.g., *State ex rel. Treadaway v. La. State Bd. of Health*, 61 So. 2d 735 (La. 1952) (assigning race based on documentary evidence); *Hudgins v. Wrights*, 11 Va. 134 (1806) (assigning race based on physical appearance); *Ozawa v. United States*, 260 U.S. 178 (1922) (assigning race based on "scientific authorities"); *United States v. Thind*, 261 U.S. 204 (1923) (assigning race based on popular meaning of "white persons"). See also Ariela Gross, "The Caucasian Cloak": *Mexican Americans and the Politics of Whiteness in the 20th Century Southwest*, 95 GEO. L.J. 337 (2007) (discussing the assignment of Mexicans as "white by treaty"); Gotanda, *supra* note 97, at 24 (describing racial assignment by the rule of hypodescent).

298. John Locke famously declared that "every man has a 'property' in his own 'person.'" LOCKE, *supra* note 248, at 116. See also James Madison, *Property*, in THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES (William T. Hutchinson ed., 1972) (1792) ("In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.").

299. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 218 (W. Ashely ed., 1909). While tangible property is generally alienable, status property is inalienable. Alienability is not an essential feature of property, as with professional degrees that are inalienable either in the market or by voluntary transfer. Instead, the market-inalienability of whiteness "may be more indicative of its perceived enhanced value, rather than its disqualification as property." Harris, *supra* note 71, at 1734.

arms.³⁰⁰ Central to status property was “the absolute right to exclude.”³⁰¹ As Cheryl Harris describes, the “possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness.”³⁰² As with legitimating property rights generally, American courts “played an active role in enforcing this right to exclude—determining who was or was not white enough to enjoy the privileges accompanying whiteness.”³⁰³ Thus, as multiple judicial decisions in Louisiana emphasized, litigants who sought legal recognition of whiteness faced a burden of proof “even more convincing than that which is necessary in such cases as must be proved ‘beyond a reasonable doubt.’”³⁰⁴ In denying a litigant’s mandamus action to compel the State Board of Health to change the recorded race of the litigant’s deceased mother on her death certificate from “colored” to “white,” the court declared that the registered race of individuals in public records “must be given as much sanctity in the law as the registration of a property right.”³⁰⁵ Whiteness then, constituted “an exclusive club whose membership was closely and grudgingly guarded.”³⁰⁶

Over time, with the formal recognition of civil rights for various subordinated groups, the doors of the exclusive club of status property owners have incrementally opened. As it turned out, in the period of industrial production, capitalists temporarily resolved a crisis of overproduction caused by increased efficiency in the labor process through the expansion of consumer markets among subordinated groups.³⁰⁷ Yet if a tragic outcome of the civil rights movement was to preserve capitalist economics, it should not be its legacy. Demands for formal recognition radically ruptured a Jim Crow industrial economy predicated on legalized racial segregation. Thus, by calling for an integrated society, the civil rights movement communicated a transformative horizon that envisioned the end of legal apartheid.

300. Harris, *supra* note 71, at 1718.

301. *Id.* at 1736.

302. *Id.*

303. *Id.*

304. Green v. New Orleans, 88 So. 2d 76, 80 (La. Ct. App. 1956).

305. State *ex rel.* Treadaway v. La. State Bd. of Health, 61 So. 2d. 735 (La. 1952).

306. Harris, *supra* note 71, at 1736.

307. Capitalism has a tendency to “grow faster than workers’ capacity to consume products, which would ultimately lead to a crisis of realization (surplus value would not be realized in full because there would be no buyers for a portion of the products.” Thus, “it is consumers outside the domain of the formal capitalist sphere who prop up the capitalist economies by absorbing the surplus production of . . . consumer goods . . .”). WANG, *supra* note 56, at 105–06.

In contrast, because neoliberalism embraces multiculturalism and diversity at the top,³⁰⁸ demands for legal recognition today by conventional movements functionally mask and reinforce gender and racial subordination at the bottom. That is, the pursuit of formal recognition today no longer carries a transformative horizon, but functions to legitimate the status quo. Yet conventional movement organizations continue to chase the phantoms of the civil rights movement by pursuing this strategy, which amounts to a demand for status property. With status comes rights and protections of those rights. As with marriage equality, the neoliberal state has periodically accommodated such demands by conventional movements because the conferring of formal group status has demobilized mass movements, reified the neoliberal logic of individualism, and deepened substantive inequality and disparities among excluded groups.³⁰⁹ Contemporary antidiscrimination law doctrines extend the notion, first articulated in *Plessy v. Ferguson*, that a deprivation of status property interests is actionable.³¹⁰ Thus, while not all formally recognized groups experience freedom equally, each have a status property interest protected under law.

Given the narrow framing of legal classifications of group identity under antidiscrimination law,³¹¹ conventional movements for rights must, as a matter of strategy, mimic the narrow framing of the group seeking recognition. In so doing, these movements reinforce gender and racial constructs created by law and that shape social existence. Consequently, just as the legal recognition of Black civil rights has neither dismantled nor displaced whiteness as the baseline in society and harmful stereotypes about blackness, the conferring of lesbian and gay civil rights has neither dismantled nor displaced heteronormativity and harmful stereotypes about queerness. In addition, formal legal status requires individuals to engage in the constant performance of stereotypes that signal respectability³¹² and

308. See *supra* note 34 and accompanying text.

309. See *supra* Subpart II.A.

310. In *Plessy v. Ferguson*, the Court supported the notion that a deprivation of the property interest of whiteness required the protection of the law through an “action for damages.” 163 U.S. 537, 549 (1896).

311. Crenshaw, *supra* note 30 (noting that antidiscrimination law fails to provide recourse for intersectional identities). See also Marcy L. Karin, Margaret E. Johnson & Elizabeth B. Cooper, *Menstrual Dignity and the Bar Exam*, 55 U.C. DAVIS L. REV. 1, 58 (2021) (describing how Title VII’s prohibition of discrimination “on the basis of sex” failed to protect transgenders, gays, and lesbians until *Bostock v. Clayton County*, 590 U.S. 1 (2020)).

312. See generally DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA (2013).

essentialist notions of formal identity,³¹³ which mediates their access to rights and to resources.³¹⁴ Thus, if a historical assessment of status property reveals its foundation in preserving freedom for whites vis-à-vis enslaved Africans, then a functional assessment reveals that status property, in the contemporary form of civil rights, curtails substantive freedom by constraining behavior among recognized groups and excluding non-recognized groups from resources.

The acts of resistance during the George Floyd rebellion rejected both the exclusionary logic of resource allocation tied to status property and the reproduction of stereotypes to signal possession of a status property interest, which inhibits self-autonomy and expression. What separates the George Floyd rebellion from the grassroots composition of the OWS or BLM movements of recent years is both the overwhelming multiracial,³¹⁵ multigender, intersectional, and youthful character of property outlaws, as confirmed by the compilation of demographic data of over 13,600 arrestees nationwide provided by The Prosecution Project.³¹⁶ This unity across intergroup differences communicated the suffocating levels of immiseration—undoubtedly exacerbated by COVID-19—experienced by the class of surplus population. Looting, then, constituted a direct appropriation and distribution of resources by subordinated

313. Essentialism is the belief in true human essence existing outside of social or historical context. Because the law narrowly recognizes group identities, groups are often constructed in terms of essentialized characteristics. See, e.g., Harris, *supra* note 79; DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* (1989).

314. SPADE, *supra* note 77, at 11.

315. See, e.g., Tobi Haslett, *Magic Actions: Looking Back on the George Floyd Rebellion*, N+1 MAG. (May 7, 2021), <https://www.nplusonemag.com/issue-40/politics/magic-actions-2> [<https://perma.cc/25ZQ-SF9U>] (“Black struggle struck the match. The future of that struggle now lies coiled in an enigma: Why . . . did the killing of a single Black man unleash the largest wave of demonstrations this country has ever seen, as well as a multiracial revenge on private property and the state?”); Idris Robinson, *How It Might Should Be Done*, ILL WILL (Aug. 16, 2020), <https://illwill.com/how-it-might-should-be-done> [perma.cc/86SZ-PJLD] (“While spearheaded by a Black avant-garde, this largely multi-ethnic rebellion managed to spontaneously overcome codified racial divisions. . . . There is no category that can sum up all of who was there.”); Shemon & Arturo, *supra* note 10 (“The George Floyd Rebellion was a Black led multi-racial rebellion. . . . Rebels from all racialized groups fought the police, looted and burned property. This included Indigenous people, Latinx people, Asian people, and white people.”).

316. Michael Loadenthal, *Tracking Federal and Non-Federal Cases Related to Summer-Fall Protests, Riots, & Uprisings*, PROSECUTION PROJECT (Oct. 5, 2021), <https://theprosecutionproject.org/2020/12/22/tracking-federal-cases-related-to-summer-protests-riots-uprisings> [<https://perma.cc/V5ER-LEYQ>] (tracking more than 13,600 arrestees nationwide during the George Floyd rebellion by geography, criminal charge, age, race, and gender).

populations regardless of possession of status property.³¹⁷ The message is clear: survival should neither be dependent on the wage nor on one's gender or racial identity.

Conventional social justice movements have largely reinforced gender and racial constructs through their choice of a rights-based strategy.³¹⁸ Moreover, the resource redistribution demand requires conformity to gender and racial constructs at the individual level to access resources.³¹⁹ In contrast, the rebellion broke down and altered these constructs and stereotypes by bringing together the multigender and multiracial surplus population out onto the streets. Through collective acts of resistance, participants constructed new social relations directly with each other, and in turn, new understandings of gender and race, albeit in embryonic form. That is, the process of collective struggle broke down the rigid, socially constructed boundaries that alienate and divide the surplus population under ordinary capitalist social relations on the one hand, and that constrain an individual's freedom to self-determine and express their identity on the other.

Traditional gender roles were disrupted through acts of resistance. For example, traditional gender roles that depict men as soldiers and confine women to the domestic sphere were broken through the course of women engaging in acts of property destruction, such as the alleged burning down of the Wendy's in Atlanta by Natalie White following the police killing of Rayshard Brooks.³²⁰ The essentialized masculinity of political violence was disrupted, and in so doing, the act was reconnected to the forerunners of the queer and Black radical traditions, such as Harriet Tubman,³²¹ Assata Shakur,³²² and the Combahee River Collective.³²³

In contrast to property destruction, the affective and material dimensions of looting resembled characteristics traditionally defined as feminine. Affectively,

317. The multiracial character of looting during the rebellion is consistent with the history of looting in the labor movement, "in which the unemployed, immigrant, internal migrant, and non-white masses [took] direct, decentralized action to usher in a more livable world." OSTERWEIL, *supra* note 53, at 124.

318. *See supra* Subpart II.A.

319. *See supra* Subpart II.B.

320. Ralph Ellis, Ryan Young & Devon M. Sayers, *Woman Charged in Atlanta Wendy's Arson Is Released From Jail on Bond*, CNN (June 25, 2020, 8:31 AM), <https://www.cnn.com/2020/06/25/us/natalie-white-wendys-arson-jail-release/index.html> [https://perma.cc/TKV5-5EYZ].

321. *See generally* CATHERINE CLINTON, *HARRIET TUBMAN: THE ROAD TO FREEDOM* (Hachette Book Group 2004).

322. *See* ASSATA SHAKUR, *ASSATA: AN AUTOBIOGRAPHY* (Lawrence Hill Books 2001) (1987).

323. *See* COMBAHEE RIVER COLLECTIVE, *THE COMBAHEE RIVER COLLECTIVE STATEMENT: BLACK FEMINIST ORGANIZING IN THE SEVENTIES AND EIGHTIES* (1986).

instead of proper political dialogue driven by the rational argumentation of men, looting is seen as emotional and “driven by desire, affect, rage, and pain.”³²⁴ Just as important, acts of resistance are “experienced as celebration, as joyous and cathartic releases of emotion.”³²⁵ Materially, by changing the price of goods to zero,³²⁶ looting takes place in the feminized sphere of care work³²⁷ and social reproduction rather than the masculine sphere of the workplace. Thus, the acts of resistance not only subverted the gendered ordering of work under capitalism but released the emotions catalyzed by conditions of subordination that all genders experienced.

Furthermore, acts of resistance destabilized whiteness as property. Capitalism in its neoliberal form has found it increasingly difficult to guarantee the “public and psychological wage” of whiteness.³²⁸ Thus, dispossessed of the material benefits attendant to their status property, many whites joined in the acts of looting and property destruction during the rebellion.³²⁹ In so doing, racial stereotypes of whites as industrious, hardworking Americans—affirmed by the workers’ movement in the heyday of industrial production³³⁰—were shattered.

324. OSTERWEIL, *supra* note 53, at 14. In the context of decolonization, the Black radical tradition similarly views the process of structural change as “not a rational confrontation of viewpoints” but rather an “impassioned claim by the colonized” using “every means, including, of course, violence” against the colonizer. FANON, *supra* note 48, at 3, 6.

325. OSTERWEIL, *supra* note 53, at 14. *See also id.* at 206 (“The experience of pleasure, joy, and freedom in the midst of a riot, an experience we almost never have in these city streets where we are exploited, controlled, and dominated, is a force that transforms rioters, sometimes forever: the experience of such freedom can be unforgettable.”).

326. CLOVER, *supra* note 41, at 29. *See also* E. P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 *PAST & PRESENT* 76, 115–16 (1971) (“Initiators of the riots were, very often, the women” because they “were also . . . most involved in face-to-face marketing, most sensitive to price significancies, most experienced in detecting short-weight or inferior quality. It is probable that the women most frequently precipitated the spontaneous actions.”).

327. *See* Nathan Goldman & Claire Schwartz, *Taking Care*, *JEWISH CURRENTS* (June 5, 2020), <https://jewishcurrents.org/taking-care> [<https://perma.cc/CPC5-NCY4>] (arguing that property destruction is a “form of care as well as a form of protest”).

328. W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860-1880* 626 (First Free Press ed. 1998) (1935). *See also* WANG, *supra* note 56, at 125 (“[T]he existence of poor whites who have fallen out of the middle class or have been affected by the opiate crisis at the present juncture represents *not* racial progress for black Americans, but the generalization of expropriability as a condition in the face of an accumulation crisis.”).

329. Of course, the dispossession of material benefits attendant to whiteness as status property has also led the white surplus population to form movements to reestablish white supremacy, as seen with the Capitol insurrection on January 6, 2021. *See generally* *U.S. Capitol Riot*, N.Y. TIMES, <https://www.nytimes.com/spotlight/us-capitol-riots-investigations> [<https://perma.cc/SA3U-DUAG>].

330. *See A History of Separation*, *supra* note 123.

More importantly, their actions expressed a commonality of immiseration with the racialized surplus population, a marked departure from the fictitious commonality with capitalists historically forged upon whiteness.³³¹ The direct interactions between nonwhite and white property outlaws as they collectively disrupted the sanctity of tangible property and faced the repercussions by the police³³² simultaneously led to new multiracial bonds of kinship, and to new analytical insights of the intersectional nature of subordination under the system of gendered, racial capitalism. In the absence of coalitions artificially manufactured by mobilized clients,³³³ the rebellion organically achieved multiracial solidarity from below—a direct legacy of the early alliances forged between runaway slaves and Indigenous peoples that typified the opening salvo of the Black radical tradition.³³⁴

Thus, the multigender and multiracial character of looting and property destruction during the rebellion subverted the gendered and racialized ordering of capitalism, which has been reproduced in conventional social movement politics.³³⁵ It was precisely the nonhierarchical, democratic, and leaderless nature of grassroots social movement activities that allowed for a breakdown of gender and racial hierarchies.³³⁶ Multiple leaders across genders and races emerged organically through their audacious acts on the streets. Crucially, leaders who broke stereotypes of race and gender through their actions served as “debiasing agents” for observers, causing observers to interrogate their own implicit biases

331. See *Misery and Debt*, *supra* note 118.

332. “[T]he police developed as a formal governmental organization when the enslaver, colonizer, and/or capitalist could no longer sufficiently protect their property or control on their own the crowds of laborers they required.” OSTERWEIL, *supra* note 53, at 82.

333. On the potential of artificially manufactured coalitions to “struggle against all forms of subordination,” see Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1190 (1991).

334. See *supra* Subpart III.A.

335. See, e.g., Chris Booker, *Lumpenization: A Critical Error of The Black Panther Party*, in THE BLACK PANTHER PARTY (RECONSIDERED) 337 (Charles E. Jones ed., 1998) (describing the contradiction between the rhetorical support for and the practice of gender equality within the Black Panther Party); COMBAHEE RIVER COLLECTIVE, *supra* note 323 (tracing the origins of Black feminism from the racism of the mainstream feminist movement and the sexism of the Black liberation movement); Third World Women’s All., *Women in the Struggle*, in RADICAL FEMINISM: A DOCUMENTARY READER 460 (Barbara A. Crow ed., 2000) (tracing the origins of the Third World Women’s Alliance to the failure of the Student Nonviolent Coordinating Committee to meaningfully involve women beyond “secretarial and/or supportive roles”).

336. Gwendolyn Leachman argues that “external shocks from a movement’s institutional environment create opportunities for a substantive reframing of dominant identity narratives.” Leachman, *supra* note 17, at 680. The George Floyd rebellion constituted such an external shock, which disrupted the essentialized identity logics reproduced by professionalized social movements.

and reject their homophobic and racist tendencies.³³⁷ In turn, many observers were inspired to participate in these activities, leading to self-discovery of their own personal capacities unconstrained by internalized stereotypes about themselves. The rebellion, then, offered participants cathartic release from the constraints of status property.

If the civil rights movement radically envisioned the end of legal segregation by positing integration as its horizon, then the acts of resistance of the George Floyd rebellion radically communicated the transcendence of tangible and status property as its horizon. In Subpart IV.B below, this Article argues that the acts of prefiguration during the rebellion concretely posited a transcendent property regime grounded in common use and benefit, where resources are neither owned by private actor nor state but directly controlled by grassroots community members. Because the state does not mediate access to resources based on an individual's identity, a common property regime doubly resolves the constraints of status property.

B. The Language Spoken by Acts of Prefiguration

In addition to the aforementioned acts of resistance, a second distinguishing characteristic between the George Floyd rebellion and the grassroots activities of the OWS and BLM movements was that it featured prominent acts of prefiguration. By destroying the old and creating a new, this unity of seemingly contrary actions significantly comprised of attempts to materialize alternatives to the logics of both a tangible property regime oriented towards profit accumulation and a status property regime, which mediates access to resources. Far from posing the problem as a pure negative as acts of resistance alone tend to imply, the prefigurative acts of the rebellion pointed to a new horizon for property law in the form of property commonly held, used, and enjoyed by all. In reconfiguring their relationship to land and resources, the prefigurative property outlaws communicated a possible future grounded on substantive freedom for the gendered and racialized poor. While the seizure and conversion of the Sheraton Minneapolis Midtown Hotel to a commons constituted one key example of such prefigurative acts during the rebellion, this Article focuses on the much grander experiment that occurred in Seattle.

337. "A debiasing agent is an individual with characteristics that run counter to the attitudes and/or the stereotypes associated with the category to which the agent belongs." Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1109 (2006).

Two weeks after the rebellion first ignited in Seattle, on June 8, 2020, escalating confrontations between the Seattle Police Department (SPD) and grassroots movement actors³³⁸ led to the police retreating from its east precinct office in Capitol Hill, a densely populated residential and commercial neighborhood.³³⁹ The grassroots actors—comprised of individuals of different genders and races³⁴⁰—then seized a six-to-eight block radius³⁴¹ around the abandoned police station and converted the neighborhood into a commons, which they named the “Capitol Hill Autonomous Zone (CHAZ).”³⁴² Hanging from the abandoned police station was a banner that announced, “THIS SPACE IS NOW PROPERTY OF THE SEATTLE PEOPLE.”³⁴³ While CHAZ was generally open to the public, makeshift barricades were erected around the perimeter to restrict entry by law enforcement. Within CHAZ, the following amenities were collectively run and provided free of charge with “no questions asked”: a grocery and food distribution program, a childcare center, a medical care

338. Because of the regular, indiscriminate, and preemptive use of chemical agents and projectiles, such as tear gas and flash bangs, by the SPD against protesters in the Capitol Hill neighborhood, the American Civil Liberties Union (ACLU) of Washington filed a lawsuit against the City of Seattle and the SPD. *See* Complaint, *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, No. 2:20-cv-887 (W.D. Wash. June 9, 2020). The court granted Plaintiffs’ motion for temporary restraining order (TRO) and enjoined the SPD from “employing chemical irritants or projectiles of any kind against persons peacefully engaging in protests or demonstrations.” *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206, 1216 (W.D. Wash. 2020) (order granting in part motion for temporary restraining order). After determining that the SPD violated the TRO by continuing to use excessive force against protesters, the court found defendants in contempt. *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 516 F. Supp. 3d 1202 (W.D. Wash. 2021) (discussing the order granting in part and denying in part Plaintiffs’ motion for contempt sanctions and petition for attorney’s fees and denying Defendant’s motion for reconsideration and request for leave to supplement the record).

339. *See* Burley, *supra* note 67.

340. “The people who stream through the [Capitol Hill Autonomous Zone (CHAZ)] are a census taker’s dream, a mix of different races, ages, genders, physical abilities, and class identities who rub elbows without seemingly rubbing each other the wrong way.” Rosette Royale, *Seattle’s Autonomous Zone Is Not What You’ve Been Told*, ROLLING STONE (June 19, 2020, 11:46 AM), <https://www.rollingstone.com/culture/culture-features/chop-chaz-seattle-autonomous-zone-inside-protests-1017637> [<https://perma.cc/RS43-TW9G>].

341. All Things Considered, *Protesters in Seattle Take Over 6-Block Area, Announce an ‘Autonomous Zone.’* NPR (June 12, 2020, 4:08 PM), <https://www.npr.org/2020/06/12/876293196/protesters-in-seattle-take-over-6-block-area-announce-an-autonomous-zone> [<https://perma.cc/82RG-4Z93>].

342. Burley, *supra* note 67.

343. Evan Bush, *Welcome to the Capitol Hill Autonomous Zone, Where Seattle Protesters Gather Without Police*, SEATTLE TIMES (Aug. 12, 2020, 11:41 AM), <https://www.seattletimes.com/seattle-news/welcome-to-the-capitol-hill-autonomous-zone-where-seattle-protesters-gather-without-police> [<https://perma.cc/3GLW-NA5F>].

facility, a mental health facility, a library, and a cooperative urban farm.³⁴⁴ From June 8 to July 1, 2020, the grassroots actors—or more aptly prefigurative property outlaws—held CHAZ as a collectively run territory autonomous from the state.

At one entrance, a sign greeted the public reading, “You are entering Free Cap Hill.”³⁴⁵ To locals who know the neighborhood’s history, the words “Free Cap Hill” expressly communicated a desire to liberate the neighborhood from gentrification,³⁴⁶ the state-facilitated, racialized “process of higher-income residents displacing lower-income ones.”³⁴⁷ Gentrification is a generalizing tendency among urban municipalities in a neoliberal era to attract wealthier tax bases through restructuring and rebranding themselves in innovative ways.³⁴⁸ In this regard, Seattle has fared well in developing into the nation’s “fastest growing tech hub” in the past decade.³⁴⁹ Consequently, Seattle is the third most gentrifying American city,³⁵⁰ with Capitol Hill as one of the prime destinations to house tech workers.³⁵¹ As the average rent for a one-bedroom apartment has skyrocketed beyond \$2000 per month,³⁵² historical residents, many of whom were low-income

344. See Burley, *supra* note 67 (quoting an organizer of the CHAZ).

345. Chris Grygiel, *Q&A: What’s Next for Seattle Protesters’ ‘Autonomous Zone?’*, AP NEWS (June 12, 2020, 12:43 PM) (quoting sidewalk signage seen in the CHAZ), <https://apnews.com/article/police-donald-trump-us-news-ap-top-news-wa-state-wire-dbec74a55889d6e7d674fe03773922fb> [<https://perma.cc/N2JA-7LUM>].

346. The property outlaws of CHAZ “formed a movement known as Free Capitol Hill and demanded . . . ‘de-gentrification.’” Khaleda Rahman, *Protesters Want Seattle De-Gentrified—This Is How It Could Happen*, NEWSWEEK (June 17, 2020, 11:48 AM), <https://www.newsweek.com/seattle-capitol-hill-protesters-gentrification-black-lives-matter-1511192> [<https://perma.cc/35BQ-A6BW>].

347. Hannah Weinstein, Comment, *Fighting for a Place Called Home: Litigation Strategies for Challenging Gentrification*, 62 UCLA L. REV. 794, 796 (2015).

348. See *supra* Subpart IV.A.2 for a discussion of how municipalities became indebted as a result of deindustrialization.

349. Nat Levy, *Seattle Is the Nation’s Fastest Growing Tech Hub, Study Says, as Bay Area Engineering Centers Continue to Expand*, GEEKWIRE (Oct. 29, 2018, 12:59 PM), <https://www.geekwire.com/2018/seattle-nations-fastest-growing-tech-hub-study-says-bay-area-engineering-centers-continue-expand> [<https://perma.cc/3DBC-WQGW>].

350. Gene Balk, *Seattle Is the Third Most Gentrifying U.S. City — But That Might Not Be as Bad as You Think, Study Finds*, SEATTLE TIMES (July 24, 2019, 6:20 PM), <https://www.seattletimes.com/seattle-news/data/seattle-ranks-near-top-for-gentrification-but-that-might-not-be-as-bad-as-you-think-study-finds> [<https://perma.cc/RL8N-LBDC>].

351. See Wudan Yan, *Life in Seattle’s Autonomous Zone, According to the People Who Live There*, CURBED (June 23, 2020, 2:00 PM), <https://archive.curbed.com/2020/6/23/21300240/chaz-chop-seattle-autonomous-zone-stories> [<https://perma.cc/XU69-98EN>] (describing Capitol Hill as a “hip” neighborhood that houses tech workers).

352. Justin Chaplan & Rob Warnock, *Average Rent in Seattle & Rent Price Trends*, APARTMENT LIST (Jan. 24, 2022), <https://www.apartmentlist.com/renter-life/average-rent-in-seattle>.

LGBTQ and racial minorities, have been displaced, and the character of Capitol Hill “feels like a place for more affluent white people.”³⁵³ Thus, in defying gentrification, the slogan “Free Cap Hill” conveyed a rejection of a regime of exclusive property owned by private real estate owners, who, primarily motivated by profit, steadily hiked up rents during Seattle’s meteoric rise as a tech hub with no regard to existing tenants.³⁵⁴

If the slogan facially communicated a critique of the classical liberal premises of property, the unspoken language of CHAZ displayed a normative vision of a substantively free Capitol Hill in practice.³⁵⁵ Just as the Black radical tradition, through marronage, and the queer radical tradition, through the queer commons, envision substantive freedom as both territorial control and cultural autonomy, the prefigurative acts simultaneously imagined a “Free Capitol Hill” as both a physical territory free from police and state intervention, where resources were controlled at the grassroots level and distributed free of charge, and an environment where individuals could freely express their identities, cultures, and relationships. As such, CHAZ prefigured a form of common property that responds to the constraints of tangible and status property regimes.

1. Towards a Vision of Tangible Common Property

“THIS SPACE IS NOW THE PROPERTY OF THE SEATTLE PEOPLE” was a bold declaration of the collective intent to convert the entire neighborhood, which comprised of both private and state property, to common property. This declaration reflected the reality that CHAZ, in its foundation, constitution, and reproduction, actively defied the classical liberal premises underlying the American property law regime, which was designed for profit accumulation and

353. Rebecca Fogel, *Gentrification and Changing Foodscapes in Seattle*, URBAN@UW (July 28, 2020), <https://depts.washington.edu/urbanuw/news/gentrification-and-changing-foodscapes-in-seattle> [<https://perma.cc/JX7W-JYAF>].

354. From 2010 to 2018, rents soared 69 percent across Seattle, more than double the national average of 32 percent. Mike Rosenberg, *Hoping for Seattle-Area Rents to Get Cheap? Don't Hold Your Breath*, SEATTLE TIMES (Oct. 12, 2018, 12:38 PM), <https://www.seattletimes.com/business/real-estate/hoping-for-seattle-area-rents-to-get-cheap-dont-hold-your-breath> [<https://perma.cc/QD97-E73E>].

355. While this Article explores how CHAZ specifically prefigures a new horizon for property law, it should be noted that mainstream journalists generally observe CHAZ as putting into practice a vision for a new world. See, e.g., Royale, *supra* note 340 (describing CHAZ as “a peaceful realm where people build nearly everything on the fly, as they strive to create a world where the notion that black lives matter shifts from being a slogan to an ever-present reality”).

predicated on the exclusive rights of possession, use and enjoyment, and disposition.³⁵⁶ In opening access for all to enjoy but law enforcement, CHAZ violated the hallmark right of exclusion. Additionally, CHAZ destabilized the concept of ownership completely. Instead of defining common property through ownership, such that multiple owners replaced a single owner, CHAZ posited a form of common property that was “created by the guarantee to each individual that he will not be excluded from the use or benefit of something.”³⁵⁷

Because CHAZ posed an existential threat to property as constituted, private property owners in Capitol Hill, including businesses and homeowners’ associations, sought to prevent the loss of their sacred rights by filing a putative class action against the City of Seattle. The lawsuit alleged that the City had “subjected businesses, employees, and residents of that neighborhood to extensive property damage, public safety dangers, and an inability to use and access their properties.”³⁵⁸ The lawsuit demystified the power relations behind the beneficiaries of private property, who, despite the neighborhood’s strong liberal political leanings³⁵⁹ and ostensible opposition to police violence,³⁶⁰ stood against CHAZ when their property rights were at stake.

By seizing and renaming the streets of Capitol Hill to “BLACK LIVES MATTER Way” and “BLACK LIVES MATTER Square,”³⁶¹ the “SEATTLE

356. See MILL, *supra* note 299.

357. Macpherson, *supra* note 229, at 5.

358. Class Action Complaint at 2, *Hunters Capital, LLC v. City of Seattle*, No. 2:20-cv-00983 (W.D. Wash. June 24, 2020).

359. According to a CrowdPAC study of the political leanings of various Seattle neighborhoods, Capitol Hill scored a liberal ranking of 8.5 out of 10. Gene Balk, *Do You Live in Seattle’s Most Liberal or Conservative Neighborhood? Check Our Map.*, SEATTLE TIMES (Jan. 6, 2017, 11:27 PM), <https://www.seattletimes.com/seattle-news/data/fyi-guy-almost-everywhere-in-seattle-is-left-of-center> [<https://perma.cc/NG4L-9BZ3>]. In 2013, District 3, which includes Capitol Hill, elected Kshama Sawant, the “first socialist on the Seattle council in nearly a century.” Hallie Golden, *How Socialist Kshama Sawant Triumphed Over Amazon in Its Own Backyard*, GUARDIAN (Nov. 17, 2019, 3:30 AM), <https://www.theguardian.com/us-news/2019/nov/17/kshama-sawant-seattle-socialist-amazon-election> [<https://perma.cc/KH4A-42WJ>].

360. Class Action Complaint at 2, *Hunters Capital, LLC v. City of Seattle*, No. 2:20-cv-00983 (W.D. Wash. June 24, 2020) (characterizing the lawsuit as not seeking “to undermine [CHAZ] participants’ message or present a counter-message). Plaintiffs’ intent is contravened by their action of filing a lawsuit, which reflects a professionalized conception of social movements where the sanctity of property is upheld, demands are meticulously crafted by professionals, and grassroots movement actors are stripped of agency to resist on their own terms. See *supra* Part I.

361. Daniella Silva & Matteo Moschella, *Seattle Protesters Set Up ‘Autonomous Zone’ After Police Evacuate Precinct*, NBC NEWS (June 11, 2020, 7:37 PM), <https://www>.

PEOPLE” was additionally juxtaposed against the state as a private property owner. This is significant because in the area of first amendment jurisprudence, while the Supreme Court has designated carceral state property as “nonpublic” forums where the state can generally restrict access,³⁶² streets and sidewalks are designated as “quintessential [traditional] public forums,”³⁶³ which “have immemorially been held in trust for the use of the public, and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”³⁶⁴ At first glance, from a property law standpoint, the Court’s interpretation of broad access to public forums might imply that some forms of state property should not be conceived as private property because they are “held in trust for the . . . public”³⁶⁵ and as such, the state, though nominally the owner, lacks the central property right to exclude. The Court has clarified, however, that the state can restrict speech and assembly in traditional public forums so long as the state imposes “reasonable, content-neutral time, place and manner restrictions.”³⁶⁶ In practice, such restrictions “are frequently upheld and represent a common part of the regulatory landscape in most cities.”³⁶⁷ Thus, in applying in lockstep the federal standard of intermediate scrutiny review for content-neutral restrictions, the Supreme Court of Illinois upheld an ordinance that, as applied, banned prefigurative property outlaws from occupying Grant Park during the Occupy Chicago Movement in 2011.³⁶⁸ Because the state may “reasonably” restrict access to property designated as “public forums,” it thus retains a qualified right to exclude,³⁶⁹ and as such, functionally resembles a private property owner.

Indeed, the property outlaws of CHAZ recognized the significance of their seizure of state property designated as “public forums.” Marcus Henderson, a Black, self-described “guerrilla gardener,” observed how the cooperative urban farm at CHAZ, which he initiated with one small basil plant, resolved the limits of state property and prefigured a new vision of property that was directly run by—

abcnews.com/news/us-news/seattle-protesters-set-autonomous-zone-after-police-evacuate-precinct-n1230151 [https://perma.cc/GSX2-CHYS].

362. See *supra* Subpart IV.A.2.

363. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

364. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

365. *Id.*

366. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995).

367. Kevin F. O’Neill, *Disentangling the Law of Public Protest*, 45 *LOY. L. REV.* 411, 434–35 (1999).

368. *City of Chicago v. Alexander*, 89 N.E.3d 707 (Ill. 2017).

369. Even among private property owners, the right to exclude is imperfect in practice. See *supra* note 283 and accompanying text.

as opposed to “held in trust for”—the public.³⁷⁰ The urban farm was located in Cal Anderson Park, which CHAZ enveloped within its radius. In critiquing the state as a private owner of the park, Henderson emphasized:

The whole point [of the cooperative urban farm] is to rethink how we utilize public land, and also [consider] who is controlling that public land: Is it public if the public doesn't have direct access to control over it? I know the Parks Department is appointed, but there's a lot of decisions that are made in terms of how we structure land, that are made by urban planners who are creating their own vision for this space. . . . [T]here is a lot of bureaucracy in the way of people doing what's needed and what's valuable for the community.³⁷¹

Henderson's interrogation of “public land” collapses the distinction between state property and private property. Like an owner of private property, the state enjoys its exclusive right to control the land by making decisions on its landscape, access, and use. Additionally, Henderson's critique of the state as decisionmaker for the community highlights the limits of the conventional movement strategy of a state-managed redistribution of resources. Instead of state-mediated resource allocation wherein resources remain the tangible property of the state, the urban farm attempted in practice a model of resource management where grassroots community members directly controlled the land and made decisions on use based on their own intimate knowledge of “what's valuable for the community.” In articulating the significance of prefigurative acts to a new vision of property, Henderson explained:

It starts with land. I've been really fascinated with the idea of land ownership: collective land ownership, taking back property and really making it work for the people, using the land, growing food on the land, becoming self-sufficient. . . . All of this should be freely available. If we can free the land, everything else will literally become free.³⁷²

While Henderson used the term “collective land ownership” in articulating a new vision of property, his description seemed to express a vision of commonly held land that would be “freely available” to the people. Some property law theorists have distinguished collective ownership from common ownership. Such distinction is functionally useful to describe with precision the new horizon

370. Hannah Weinberger, *In Seattle's CHAZ, a Community Garden Takes Root*, CROSSCUT (June 15, 2020), <https://crosscut.com/environment/2020/06/seattles-chaz-community-garden-takes-root> [<https://perma.cc/F7BP-SFJN>]. See also *Hague*, 307 U.S. at 515.

371. Weinberger, *supra* note 368.

372. *Id.*

communicated by CHAZ. Collective property describes “*shared ownership*,” in which “a number of individuals combine their separate property interests in a resource, manage the resource jointly, and all share in the benefits, while non-members of this limited ownership group are excluded from the use or benefit of the resource.”³⁷³ In contrast, common property describes “*unowned non-property* (or open-access resources)³⁷⁴ or “*inherently public property*”³⁷⁵ situated in “the public domain.”³⁷⁶ While those trapped under a classical liberal property paradigm might conflate no ownership of a resource with “no . . . recognized [property] rights of any kind” and thus “is not property at all,”³⁷⁷ C.B. Macpherson instead describes the hallmark common property right as the right of every individual not to be excluded from the use or benefit of the resources in the public domain.³⁷⁸ Thus, by arguing for land to be “freely available,” Henderson envisioned the urban farm—and by extension CHAZ—as prefiguring common property with no exclusive owners, but where members of the public crucially possessed a property right to access land and resources and collectively determine their best use for the community.

Finally, by stating that once land was liberated, “everything else will literally become free,” Henderson proposed a strategy for the transformation of all property that radically departs from conventional law reform movement strategies, which reify the logics of tangible and status property regimes. In calling for the de-commodification of land from property owners, Henderson’s strategy interrogates and addresses both the origins of property law and the value that land generates under a neoliberal economy—in other words, both the historical and functional dimensions of tangible property. First, the conquest and conversion of Indigenous lands into marketable commodity necessitated the development of property law.³⁷⁹ Accordingly, returning to the point of origin signals a remembrance that land and resources before conquest was commonly held, and

373. Robertson, *supra* note 228, at 597. Examples of collective property include “the main property types found in capitalist economies—corporations, partnerships, joint tenancies, trusts, etc.” and would further include “socialist models of collective ownership of the means of production, such as producers’ cooperatives.” *Id.* at 596–7.

374. McKean, *supra* note 284, at 251.

375. “[T]here lies outside purely private property and government-controlled ‘public property’ a distinct class of ‘inherently public property’ which is fully controlled by neither government nor private agents.” Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720 (1986).

376. Robertson, *supra* note 228, at 596.

377. McKean, *supra* note 284, at 250.

378. Macpherson, *supra* note 229, at 5.

379. See *supra* Subpart IV.A.1.

thus, a regime of property law based on private ownership was a political construct that legitimated racial capitalism. Second, in 2018, the American housing market was worth \$34 trillion and constituted 60 percent of assets worldwide.³⁸⁰ Consequently, Henderson's strategy implies the downstream effect on other commodities that would follow when land, the most valuable commodity in the world, is rendered common property.

By seizing the private property of the surrounding businesses and homes and the public property of city streets, CHAZ made clear that tangible property, and its categories of private and state property, did not benefit subordinated populations on the whole. Instead, the grassroots experiment of CHAZ communicated a normative vision for the transformation of property law to recognize common property.

2. Cultural Autonomy through Common Property

By attempting to de-commodify resources, CHAZ further communicated alternatives to status property, both as a precondition to access resources and as a mechanism of stereotype reproduction. Within CHAZ, life-sustaining amenities, from food to healthcare, were collectively run and provided free of charge regardless of gender, race, immigration status, ability, and other indicia of status property.³⁸¹ Because resources were converted from exclusive private property to freely distributed common property, the possibilities of queer life, nontraditional relationships, and nonconforming identities could flourish within CHAZ. Consistent with the insights of the queer commons generated by the queer radical tradition,³⁸² individuals living in the experimental commons could explore and determine their own subjectivities, sexuality, and livelihoods freed from the constraints of status without fear of being labeled "undeserving" of resources. As such, CHAZ attempted to realize the horizon of substantive freedom, grounded in both control of territory and cultural autonomy, charted by the queer and Black radical traditions.

Moreover, traditional gender and racial constructs and stereotypes attendant to status property were challenged through the daily acts of sustaining CHAZ. The essentialized femininity of reproductive care and the heteronormative family

380. Park, *supra* note 134, at 8.

381. Burley, *supra* note 67.

382. See *supra* Subpart III.B.

structure, which “especially target[] women of color (and) lesbians,”³⁸³ was challenged through the sharing in the responsibility of care and self-reproduction by multigendered prefigurative property outlaws.³⁸⁴ The essentialized criminality of Blackness was disrupted through the leadership of Black individuals, such as Marcus Henderson, within CHAZ.³⁸⁵ Participants began to interact with each other as holistic human beings, unhinged from the filters of gender, race, and other forms of status property constantly reproduced by the state.³⁸⁶ Thus, the prefigurative acts that occurred during the George Floyd rebellion facilitated new social relations among subordinated populations through direct contact and collaboration between races and genders, collectively sharing in governance and responsibilities, and free distribution of resources unmediated by status property.

V. WHAT ARE GRASSROOTS MOVEMENT LAWYERS TO DO?

This Article’s call to movement lawyers to listen, understand, and ultimately stand in solidarity with grassroots social movements is not just an intellectual exercise. Just as the predominant form of capitalist accumulation has shifted from industrial production to financialization, the predominant form of social movement has also changed.³⁸⁷ Because more and more Americans are rendered surplus to the employment needs of capitalists, the site of struggle has shifted from the workplace to the most immediate sites of expropriation—the state and police agencies that patrol the surplus population, and the businesses that extract

383. Beth Capper & Arlen Austin, “Wages for Housework Means Wages Against Heterosexuality”: *On the Archives of Black Women for Wages for Housework and Wages Due Lesbians*, 24 J. LESBIAN & GAY STUD. 445, 448 (2018) (arguing that “heteronormativity, as a modality of a work-discipline, especially targeted women of color (and) lesbians who were refused by, or who refused, the regulatory ideals of (white) femininity associated with the housewife, and who faced criminalization, sexual violence, forced sterilization, welfare austerity, and the loss of child custody for their transgressions.”).

384. “From a feminist viewpoint, one of the attractions exercised by the idea of the commons is the possibility of overcoming the isolation in which reproductive activities are performed and the separation between the private and public spheres that has contributed so much to hiding and rationalizing women’s exploitation in the family and the home.” FEDERICI, *supra* note 64, at 4.

385. “I really appreciate the level of respect and the willingness to let Black leaders rise to the surface, because this is not something we’re used to.” Weinberger, *supra* note 368 (quoting Marcus Henderson).

386. Though she was arguing for a classical liberal conception of common property that coexists with capitalism, Carol Rose made an analogous argument about the benefits of recreational common property, such as beaches and parks, in providing “a socializing and educative influence,” where different classes could mingle “and learn to treat each other as neighbors.” Rose, *supra* note 375, at 779.

387. See generally CLOVER, *supra* note 41.

community wealth. In other words, in response to the inescapable cycles of incarceration and debt experienced by the surplus population, social movements under neoliberalism will increasingly resemble the George Floyd rebellion in their diverse demographical composition, the intensity of their disruptive tactics, and their geography. Movement lawyers who fail to make sense of and support these movements will inadvertently recreate the very conditions of subordination for the surplus population by exclusively pursuing conventional strategies.

This Article presents movement lawyers with a choice to uncritically continue their business as usual with mobilized clients or to recognize and align with grassroots social movements.³⁸⁸ The stakes are high. Fortunately, as a matter of politics and principle, movement lawyers already express commitment to movements that “fundamentally transform state and society.”³⁸⁹ Because this Article has examined the transformative horizon of the George Floyd rebellion in contrast to the limited horizons of conventional movement demands, the choice should not be too difficult. While the marriage equality and M4BL movements issued bold declarations of fundamental transformations, the grassroots methodologies of the rebellion exposed those movements as working within the logics of neoliberalism and thus, reifying gendered, racial capitalism at its core. The marriage equality movement reinforced status property, while M4BL preserved tangible property by calling for a mere redistribution of property entitlements. Thus, both movements operated from the premise that existing property relations are a given, and subordinated populations should be satisfied with temporary decreases in exploitation and expropriation, rather than substantive freedom marked by control of land, resources, and cultural destinies.

Instead, the rebellion teaches movement lawyers to distinguish transformation from reform and that what was once transformative under a different period of political economy may actually constitute reform today. That is, today’s conventional strategies carried a transformative horizon in the 1940s

388. To be clear, movement lawyering in practice, particularly outside the context of actively occurring grassroots social movements, often entails compromise to the transformative horizons expressed by grassroots social movements and adoption of conventional strategies endorsed by mobilized clients in order to achieve short-term reforms that materially benefit members of subordinated communities. It is beyond the scope of this Article to explore the transformation-reform dialectic as it relates to praxis. By bringing to light a distinct meaning of transformation—one that aims at substantive freedom rather than formal equality—as informed by grassroots social movements, this Article hopes that movement lawyers who support mobilized clients choose to do so with intentionality and awareness of the inherent limits and unintended harms caused by conventional strategies.

389. Akbar, Ashar & Simonson, *supra* note 11, at 827.

and 1950s.³⁹⁰ Under the political economy of Jim Crow, a civil rights litigation strategy threatened to dismantle a legal system predicated on formal discriminatory racial classifications,³⁹¹ while a state redistribution strategy threatened to dismantle a welfare state that functionally provided whites with exclusive avenues for social advancement at the exclusion of Blacks.³⁹² Thus, this Article challenges movement lawyers to seek out the contemporary analogues to the civil rights and state redistribution strategies such that transformation once again is on the table.

Transformation is necessary for the survival of humanity from the reigns of capital. As Part IV demonstrated, endemic to this mode of economy is the systematic looting of the gendered and racialized poor—facilitated both by the state, through mechanisms such as eminent domain and criminal justice debt, and by private owners, through depressed wages and predatory lending. Concretely, if the state is to be transformed from its historical function of maintaining gendered, racial capitalism, then property law must be reconfigured from its roots. As history has proven, the resiliency of capitalism to restructure amidst crises—from slavery to industrialization/Jim Crow to neoliberalism/the “New Jim Crow”³⁹³—demands short of this inevitably mean continuing immiseration for the gendered and racialized poor. In other words, with each new law reform comes the specter of new ideologies and technologies of subordination.

If the acts of resistance during the rebellion communicated a total rejection of the property regime as presently constituted, then the acts of prefiguration offered “a particularly concrete vision of their alternative conception of the law.”³⁹⁴

390. See *supra* Subpart IV.A.3.

391. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896).

392. See, e.g., IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 22–23 (2005) (arguing that the New Deal and Fair Deal policy initiatives “constituted a massive transfer of quite specific privileges to white Americans,” while “most black Americans were left behind or left out”); KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* 44–48 (2019) (discussing how the 1954 Voluntary Home Mortgage Credit Program, which was intended to increase Black homeownership, overwhelmingly assisted “non-minorities” in practice).

393. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012). While Alexander frames post-1970s racialized incarceration as a “New Jim Crow,” she has been criticized for being too dismissive of its historical continuity to Jim Crow segregation and ultimately “a half-millennium of chattel-colonial carceral violence.” Rodríguez, *supra* note 55, at 1606. As such, her book contributes to a “counter-abolitionist, reformist approach” that “actually endorses an *expansion of carceral policing logics* beyond the discrete institutional-spatial sites of prisons, jails, detention centers, and juvenile facilities.” Rodríguez, *supra* note 55, at 1597–1602, 1606.

394. Peñalver & Katyal, *supra* note 69, at 1139.

The seizure and conversion of state and private property into CHAZ were by no means the ends, but a means to convey the possibility of new property and social relations. CHAZ materialized an alternative to a tangible property law system designed to commodify land and resources by positing a new foundation for property based on the common access, use, and benefit for all. Similarly, CHAZ concretized an alternative to a status property regime designed to mediate class conflict through social hierarchies by fostering direct interactions, new solidarities, and cooperation in collectively running the territory. Thus, as a project, movement lawyers should demand the state to recognize the category of common property.³⁹⁵

To be clear, this Article has been critical of conventional movement demands that center the state as the primary source for rights and resource distribution because these demands do not transform the historic function of the state in legitimating gendered, racial capitalism.³⁹⁶ In contrast, because a conception of common property is fundamentally incompatible with existing tangible and status property regimes and their theoretical bedrock of exclusive ownership, a demand for state recognition of such category of property carries the possibility of genuine transformation of state, economy, and social relations from profit to people and from formal equality to substantive freedom. Thus, rather than rejecting the state as a bright line rule in the formulation of demands, the content of demands to the state matter.

395. One instructive example of property law transformation occurred in Italy, where a wave of seizures and occupations by grassroots property outlaws led to the adoption of “*beni comuni* (commons)” as “a new form of property,” distinct from state and private property, into the Italian Civil Code. Alessandra Quarta & Tomaso Ferrando, *Italian Property Outlaws: From the Theory of the Commons to the Praxis of Occupation*, 15 GLOB. JURIST 261, 262, 272 (2015).

396. Settler colonial law theorists have similarly critiqued conventional movement demands framed in terms of “equal rights” or “redistribution of” property entitlements because such “legal framework . . . presumes the legitimacy of [continued] occupation and colonization” of Indigenous land and peoples. Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. RACIAL & ETHNIC JUST. 31, 32, 46 (2015). That is, “[w]hen we demand equal access to property that depends, for its existence, on Whiteness, whether those demands are framed in terms of formal equality or some version of redistributive justice, we run the risk of implicitly validating the terms and conditions of its existence.” *Id.* at 62. Instead, “dismantling White privilege entails the reconstruction of property and property rights in ways that address both the dispossession of Indigenous peoples and the racialized hierarchy that continues to subordinate all people of color.” *Id.* at 50. While Saito makes the case for a reconstruction of property and property rights, it is “far beyond the scope” of her article to chart out a trajectory. *Id.* at 64. By arguing for state recognition of the category of common property, this Article begins an attempt to concretize such reconstruction.

While this Article interprets the transformative horizon spoken by the acts of the rebellion, the precise strategies and trajectory of advocating for such monumental change will be left to the decisions of movement lawyers in collaboration with grassroots movement actors over the course of movements and beyond. Accountability to and partnership with grassroots actors are necessary when translating transformative movement horizons into transformations of the law since compromises are necessarily entailed in legal and political transformation.

Moreover, given that the origins of the American land classification system lie in colonization and dispossession, transformations to property law must be responsive to Indigenous claims and conceptions of the land.³⁹⁷ According to the Haudenosaunee teaching of “‘One Bowl and One Spoon’ . . . the gifts of the earth are all in one bowl, all to be shared from a single spoon.”³⁹⁸ The earth “exists not as private property, but as a commons, to be tended with respect and reciprocity for the benefit of all.”³⁹⁹ Thus, common property, as defined as “unowned non-property (or open access resources),”⁴⁰⁰ might be compatible with Indigenous conceptions of land as “sites of responsibility rather than possession.”⁴⁰¹ Additionally, this notion of common property seems responsive to critiques of the OWS movement advanced by some settler colonial theorists⁴⁰²—namely, its problematic use of the term “Occupy,” which legitimates occupation on stolen land, and its demand for equitable redistribution of land, which reifies the colonial

397. Demands for liberation by non-Indigenous communities of color should not “only be realized at the expense of Indigenous sovereignty” and must recognize the right of Indigenous peoples to self-determination. *Id.* at 33–34, 64. See also Erica-Irene A. Daes, *Striving for Self-Determination for Indigenous Peoples*, in *IN PURSUIT OF THE RIGHT TO SELF-DETERMINATION* 50, 58 (Y.N. Kly & D. Kly eds., 2001) (emphasizing that the “true test of self-determination . . . is whether indigenous peoples themselves actually feel that they have choices about their way of life”).

398. ROBIN WALL KIMMERER, *BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHINGS OF PLANTS* 376 (Milkweed ed. 2013).

399. *Id.*

400. McKean, *supra* note 285, at 251 (emphasis omitted).

401. Saito, *supra* note 396, at 65.

402. For a definition of settler colonialism, see *supra* text accompanying note 49. While settler colonial theorists share a critique of conquest and colonization as foundation of the United States, their approach to advocacy and solutions may be different. For example, whereas Tuck and Yang emphasize decolonization as a “different perspective to human and civil rights based approaches to justice” and assume an “unfriendly” approach to coalition politics, Tuck & Yang, *supra* note 48, at 35–36, Saito draws from a human rights legal framework and emphasizes “justice for everyone, including Indigenous peoples,” Saito, *supra* note 396, at 64, 66.

logic of land as property to be possessed.⁴⁰³ While this definition of common property may be compatible with certain conceptions of decolonization that emphasize reconstruction of new property relations, however, it may not adequately address others that demand no less than total “repatriation of land” to Indigenous peoples.⁴⁰⁴ Given this discursive variance posed by settler colonial theorists, movement lawyers should instead resolve the meaning of decolonization through listening to and learning from Indigenous peoples directly engaged in grassroots movements—indeed, learning from “*a discourse of struggle*”⁴⁰⁵—before instituting transformations to property law in order to avoid the inadvertent reproduction of settler colonial logistics.

If reconfiguration of the property law regime is a long-term project, the rebellion also challenges grassroots movement lawyers to refocus their day-to-day movement lawyering practice. The successful transition to a common property regime will not happen overnight. Instead, it will require a seismic social transformation among subordinated populations in their attitudes about social identities and power, and in their own belief in their capacities to engage in democratic governance and transformative justice rather than depend on elected officials and the criminal justice system. The rebellion profoundly revealed that broad transformation of social relations cannot be accomplished through dogma or pedagogy but through direct participation among subordinated peoples actively engaging in transformative practices together.⁴⁰⁶ While there is no substitute to direct participation in grassroots social movements, transformative practices can be trained during nonmovement times through grassroots

403. Tuck & Yang, *supra* note 48, at 23–28. To be clear, this Article analyzes the significance of occupations and encampments as a grassroots movement tactic in the era of neoliberalism. By seizing and converting property to commons, the unspoken language of these grassroots tactics articulates a foundational reconfiguration of property relations. In contrast, the spoken demands by traditional movement actors in OWS around the redistribution of property reflect a limited reformist horizon to which this Article is critical.

404. While Tuck and Yang measure decolonization in terms of repatriation of land to Indigenous peoples and the corresponding impoverishment of the settler population, which include non-Indigenous subordinated groups, *id.* at 26, 30, Saito argues that decolonization is a “process of de- and re-construction” among different subordinated groups to “dismantle Whiteness as embodied in various forms of property” so long as the process does not “ultimately come at Native expense[.]” Saito, *supra* note 396, at 39, 42.

405. Idris Robinson, *supra* note 315.

406. As Part IV argued, the collective acts waged by multigender and multiracial participants during the rebellion created new kinships that united a class of surplus population beyond the constraints posed by racism, sexism, homophobia, and transphobia. Similarly, these acts revealed to participants their own collective power to resist the state, police, and property, and to build a new society bending towards substantive freedom.

prefigurative initiatives in the here and now. Movement lawyers should lend their legal support to forming and maintaining these initiatives.

Such grassroots initiatives are increasingly common and arise out of sheer necessity, particularly in deindustrialized cities where generations of redlining, segregation, and predatory and subprime lending have limited access to capital and diminished life chances among subordinated populations.⁴⁰⁷ These current initiatives take the organizational forms of cooperatives, which emphasize collective ownership and democratic decisionmaking in lieu of profit accumulation;⁴⁰⁸ urban farms, which promote Black food sovereignty and environmental sustainability;⁴⁰⁹ and community land trusts, which ensure housing stability by permanently removing housing from the commodity market.⁴¹⁰

In contrast to conventional movement mobilized clients where participation of subordinated peoples is often marginal or tokenized for spectacle, each of these initiatives allow subordinated peoples to directly run the organization and cooperate with each other to ensure resources are equitably distributed. Thus, like CHAZ—but on a limited scale—participants discover their collective agency and learn how to work with each other across genders and races, to engage in

407. See generally ANTERO PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY (2010); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); TAYLOR, *supra* note 392.

408. *Puget Sound Plywood, Inc. v. Comm’r*, 44 T.C. 305, 308 (1965) (distinguishing cooperatives from for-profit corporations on the bases of “[s]ubordination of capital,” “democratic control by the worker-members,” and “the vesting in and the allocation among the worker-members of all fruits and increase arising from their cooperative endeavor”); see also Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 187 (1999) (arguing that worker cooperatives can “increase job security for workers who would otherwise be subject to market exploitation based on their vulnerable economic position”); Ariana R. Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 NEV. L.J. 322, 325 (2014) (“Worker cooperatives are firms that workers own and democratically manage.”); JESSICA GORDON NEMBARD, COLLECTIVE COURAGE: A HISTORY OF AFRICAN AMERICAN COOPERATIVE ECONOMIC THOUGHT AND PRACTICE 166 (2014) (documenting the history of cooperatives as a form of economic empowerment among Black subordinated communities).

409. See, e.g., Etienne C. Toussaint, *Black Urban Ecologies and Structural Extermination*, 45 HARV. ENV’T L. REV. 448, 449–50 (2021) (“[U]rban agriculture has surfaced as a viable solution for ‘food sovereignty’ to free urban residents from the shackles of an increasingly corporatized global food supply chain.”). See generally LAND INJUSTICE: RE-IMAGINING LAND, FOOD, AND THE COMMONS IN THE UNITED STATES (Justine M. Williams & Eric Holt-Giménez, eds., 2017); ASHANTÉ M. REESE, BLACK FOOD GEOGRAPHIES: RACE, SELF-RELIANCE, AND FOOD ACCESS IN WASHINGTON, D.C. (2019); MONICA M. WHITE, FREEDOM FARMERS: AGRICULTURAL RESISTANCE AND THE BLACK FREEDOM MOVEMENT (2018).

410. See generally THE COMMUNITY LAND TRUST READER (John Emmeus Davis ed., 2010).

democratic decisionmaking beyond the ballot box, and to directly control resources without state mediation. Beyond transactional lawyers, grassroots movement lawyers should actively organize with these initiatives in constructing a self-sustaining ecosystem based on mutual aid.⁴¹¹ Such an ecosystem will ensure that subordinated populations can depend on each other rather than traditionally expropriative capital and commodity markets.⁴¹² In so doing, lawyers can begin to create both a material and social basis for common property.

It should be reiterated that grassroots movement lawyers can pursue strategies that involve the state but the calculus for doing so is whether a strategy legitimates or disrupts the status quo. Here, these grassroots initiatives are usually recognized by the state as business entities. Thus, strategies that involve the state should expand the capacity of grassroots participants to collectively take control of their own lives and resources. This is consistent with the major lesson of the George Floyd rebellion—to wit, that grassroots community members have the agency to resist subordination on their own terms. In contrast, the conventional movement strategies of rights-based recognition and state redistribution disempower subordinated populations by forcing cooperative solutions into individual rights claims and by allowing state agencies to administer resources respectively.

Finally, by now supporting opportunities for social transformation among subordinated populations, the transition to common property will less likely succumb to “the tragedy of the commons.”⁴¹³ According to its proponents, the tragedy occurs because each rational actor “is locked into a system that compels him to increase his [share of resource] without limit—in a world that is limited.”⁴¹⁴ Thus, “[f]reedom in a commons brings ruin to all.”⁴¹⁵ Indeed, as impressive as the

411. “Mutual aid is collective coordination to meet each other’s needs, usually from an awareness that the systems we have in place are not going to meet them. . . . and [is] based on a shared understanding that the conditions in which we are made to live are unjust.” SPADE, *supra* note 22, at 7.

412. Some law scholars have proposed a “solidarity economy” as an example of one such ecosystem. See, e.g., Renee Hatcher, *Solidarity Economy Lawyering*, 8 TENN. J. RACE, GENDER, & SOC. JUST. 23, 26–27 (2019) (describing that a solidarity economy “proposes a transformational shift of the relationships between the market, the state, and people, centering the needs of people and the environment over the needs of private interests and capital.”); Etienne C. Toussaint, *Dismantling the Master’s House: Toward a Justice-Based Theory of Community Economic Development*, 53 U. MICH. J.L. REFORM 337, 407 (2019) (grounding solidarity economy in “empowerment-centered and community-owned institutions that address the structural dimensions of poverty”).

413. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968).

414. *Id.*

415. *Id.*

Sheraton takeover and CHAZ were as experiments by subordinated peoples collectively managing resources and reproducing the community, they ended up in a tragedy of their own sorts, less over resources but ultimately succumbing to internal violence and conflict.⁴¹⁶ While critics of common property argue that “the tragedy of the commons” is inherent to human nature,⁴¹⁷ this Article instead argues that the tragedy is a reflection of the competitive and alienating social relations inherited under capitalism in which private property leads to conditions of resource scarcity. That is, as social identity,⁴¹⁸ human nature is an ideological construct underpinning a particular mode of economy.⁴¹⁹ Thus, by training subordinated peoples in cooperation, democratic self-governance, and community control of resources in the here and now, the rigid conception of human nature as selfish will begin to transform to cooperative, reducing mistrust of others and the material need for competition over resources under common

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416. Katelyn Burns, *The Violent End of the Capitol Hill Organized Protest, Explained*, VOX (July 2, 2020), <https://www.vox.com/policy-and-politics/2020/7/2/21310109/chop-chaz-cleared-violence-explained> [<https://perma.cc/ULQ3-R35P>] (contextualizing the end of CHAZ due to “four shootings and several alleged sexual assaults”).
417. Even common property law theorists do not challenge the assumption that “the tragedy of the commons” in the public domain is inevitable, but rather qualify their support for common property by outlining specific scenarios for the utility of common property. See, e.g., Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 553 (2001) (proposing a form of liberal common property with “a limited group of owners” who “retain a secure right to exit”); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (calling for immaterial common property to encourage intellectual authorship); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 23 (1990) (proposing “limited access” common property regimes); Rose, *supra* note 375 (advocating for context-specific common property widely accepted as “inherently public property”).
418. See, e.g., Harris, *supra* note 71; Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (rev. and updated, 10th Anniversary ed. 2006).
419. “But the essence of man is no abstraction inherent in each single individual. In reality, it is the ensemble of the social relations.” KARL MARX, *THESES ON FEUERBACH* (1845), <https://www.marxists.org/archive/marx/works/1845/theses/index.htm> [<https://perma.cc/PA8C-S6HQ>]. While human nature is an ideological construct, this Article rejects a strictly structuralist reading of the quoted passage by Marx, wherein human beings are held captive to the constructs underpinning capitalist social relations. For an understanding of structuralist philosophy, see generally LOUIS ALTHUSSER, *ON THE REPRODUCTION OF CAPITALISM: IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES* (Verso 2014). Instead, this Article embraces a humanistic reading of the passage, whereby despite constructs designed to constrain freedom, human beings have the agency to remake human nature through their conscious actions. For an enunciation of humanist philosophy, see generally RAYA DUNAYEVSKAYA, *MARXISM AND FREEDOM: FROM 1776 UNTIL TODAY* (Human. Books 2000) (1958). Thus, by participating in alternative organizational forms like cooperatives, grassroots community members begin to transform human nature from its capitalist construct of selfishness to solidarity and cooperation.

property. Admittedly, while competitive tendencies may be mitigated, internal contradictions and violence will occur regardless of the property regime. By similarly training subordinated peoples in transformative justice practices in the here and now, however, internal conflicts within the context of common property will be resolved directly at the grassroots level instead of permanently dissolving and reconstituting regimes of private property and incarceration.

CONCLUSION

History may one day show that the George Floyd rebellion was the spark that ignited foundational transformative changes in America.⁴²⁰ The scale and intensity of disruptive activities against the police, state, and property were unprecedented since the assassination of Martin Luther King, Jr., in 1968. Its multigender and multiracial participants revealed the generalized experience of immiseration under neoliberalism on the one hand, and the collective self-agency to resist subordination on the other. Undeniably, the rebellion comprised another chapter in the continuing saga of the queer and Black radical traditions towards substantive freedom, defined by control over land, resources, and cultural destinies. For this reason alone, movement lawyers should seriously study, understand, and stand in solidarity with the rebellion.

Yet the George Floyd rebellion must be seen as merely one example of the increasingly prevalent form of social movement under neoliberalism, what this Article terms “grassroots social movements.” By revealing the language spoken through acts of resistance and acts of prefiguration during the rebellion, a major intent of this Article is to challenge movement lawyers to “look to the bottom” instead of deferring to mobilized clients in order to align advocacy with the most oppressed LGBTQ and racialized populations. By so doing, the implications for the role of lawyering should completely change—in other words, to whom are lawyers accountable, which demands do lawyers advocate, and what strategies do lawyers undertake? In the end, instead of reifying existing legal relations, lawyers will be challenged to help construct new legal horizons that reflect the prefigurative efforts on the ground.

Further, as recent movement law scholars have looked at the lawmaking potential of movements to transform the state, this Article offers a distinct perspective as to what that might mean from a grassroots perspective. In contrast

420. As powerfully stated in 1966 by Stokely Carmichael, chair of the Student Nonviolent Coordinating Committee and traveler within the Black radical tradition, “For racism to die, a totally different America must be born.” Stokely Carmichael, *What We Want*, in *THE EYES ON THE PRIZE CIVIL RIGHTS READER* 284 (Penguin Books 1991).

to the predominant conceptions as expanding legal recognition to invisibilized groups or enlarging the non-carceral state to provide a more equitable social safety net, the rebellion suggests that state transformation entails a fundamental reconfiguration of property law from its basis in private ownership to the common access, use, and benefit of all. Moreover, the immediate, day-to-day activities of movement lawyers should shift to supporting the development of grassroots prefigurative initiatives in the here and now, such that social transformation can precede and simultaneously develop alongside structural transformation.

Given the professional customs and established orientations of progressive lawyering, such an epistemological reorientation among movement lawyers will take courage. But if movement lawyers collectively fail to align with grassroots social movements, their very work, despite their best intentions, will continue to inadvertently thwart the final triumph of substantive freedom.