

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2017

Democratizing Criminal Law as an Abolitionist Project

Dorothy E. Roberts

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), [Criminology and Criminal Justice Commons](#), [Law and Race Commons](#), [Race and Ethnicity Commons](#), and the [Social Control, Law, Crime, and Deviance Commons](#)

Repository Citation

Roberts, Dorothy E., "Democratizing Criminal Law as an Abolitionist Project" (2017). *Faculty Scholarship at Penn Law*. 2492.

https://scholarship.law.upenn.edu/faculty_scholarship/2492

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

DEMOCRATIZING CRIMINAL LAW AS AN ABOLITIONIST PROJECT

Dorothy E. Roberts

ABSTRACT—The criminal justice system currently functions to exclude black people from full political participation. Myriad institutions, laws, and definitions within the criminal justice system subordinate and criminalize black people, thereby excluding them from electoral politics, and depriving them of material resources, social networks, family relationships, and legitimacy necessary for full political citizenship. Making criminal law democratic requires more than reform efforts to improve currently existing procedures and systems. Rather, it requires an abolitionist approach that will dismantle the criminal law’s anti-democratic aspects entirely and reconstitute the criminal justice system without them.

AUTHOR—George A. Weiss University Professor of Law and Sociology, Raymond Pace & Sadie Tanner Mossell Alexander Professor of Civil Rights, Professor of Africana Studies, University of Pennsylvania. I presented an earlier draft of this Essay at the Democratizing Criminal Justice Conference at Northwestern University Pritzker School of Law, and thank its organizers, Joshua Kleinfeld and Richard Bierschbach, for inviting me to participate and the other participants for their comments.

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION..... 1598
I. RACIST DEFINITIONS OF LAW BREAKING 1599
II. CRIMINAL LAW’S DISENFRANCHISEMENT OF BLACK COMMUNITIES 1600
III. AN ABOLITIONIST APPROACH TO DEMOCRATIZING CRIMINAL LAW 1604
CONCLUSION..... 1607

INTRODUCTION

Reflecting on the theme of this Symposium, I realized that my criminal law scholarship over the last twenty-six years has been a democratizing project.¹ My work in this field coalesces around demonstrating and contesting the ways various aspects of the criminal justice system exclude black people from democratic participation in the service of white supremacy. In 2007, I entitled part of an article, “The System’s Anti-Democratic Function,” to sum up how mass incarceration, capital punishment, and police terror deny African Americans full citizenship by disenfranchising large numbers of black individuals, damaging black communities’ social networks, and reinforcing racist stereotypes about black criminality.² Democratizing criminal law requires, first and foremost, eliminating law enforcement’s anti-democratic functions that subordinate black people politically. Indeed, achieving racial justice in the criminal justice system is essential to making the United States a truly democratic society.

Attending to the criminal justice system’s subordinating function shifts the nature of the democratizing problem and, consequently, its solution away from black people’s attitudes and behaviors. The problem is

¹ See, e.g., Dorothy E. Roberts, *Collateral Consequences, Genetic Surveillance, and the New Biopolitics of Race*, 54 HOW. L.J. 567 (2011) [hereinafter Roberts, *Collateral Consequences*]; Dorothy E. Roberts, *Complicating the Triangle of Race, Class, and State: The Insights of Black Feminists*, 37 ETHNIC & RACIAL STUD. 1776 (2014) [hereinafter Roberts, *Complicating the Triangle*]; Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261 (2007) [hereinafter Roberts, *Constructing*]; Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005 (2001) [hereinafter Roberts, *Criminal Justice and Black Families*]; Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999) [hereinafter Roberts, *Foreword*]; Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012) [hereinafter Roberts, *Prison, Foster Care*]; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) [hereinafter Roberts, *Punishing Drug Addicts*]; Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) [hereinafter Roberts, *Cost of Mass Incarceration*].

² See Roberts, *Constructing*, *supra* note 1.

not black communities' alienation from law enforcement because criminal law is not democratic enough; the problem is that criminal law excludes black people from democratic participation in the political economy. In other words, the criminal justice system is not a democratic institution that needs to be more inclusive of black people; nor does its exclusion of black people result from bureaucratic malfunction.³ Rather, the law enforcement bureaucracy is designed to operate in an anti-democratic manner. Therefore, democratizing criminal law requires an abolitionist—not reformist—approach.

I. RACIST DEFINITIONS OF LAW BREAKING

As an initial matter, democratizing criminal law requires acknowledging that the very definition of law breaking in the United States is biased against black people.⁴ Democratizing efforts that aim to improve relations between law enforcement and black communities in order to motivate obedience to the law overlook the law's criminalization of black people. In my first article, I argued that racism was critical to turning the public health problem of drug use during pregnancy into a crime, addressed by locking up black women rather than providing them with needed health care.⁵ Prosecutors' identification of prenatal drug use as a crime and their extension of existing criminal statutes to cover harms to a fetus were shaped by racist media portrayals of pregnant black women and their "crack babies," as well as the longstanding devaluation of black motherhood.⁶ Prosecutors concocted newfangled interpretations of homicide, assault, child neglect, and drug distribution laws to punish black women's childbearing and blame black mothers for the disadvantages their children suffered owing to structural racism. Treating black mothers as biological threats to their children became a rationale for punishing these women with astounding brutality.⁷

³ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND PRISON, TORTURE AND EMPIRE* (2005); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

⁴ See generally SARAH HALEY, *NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY* (2016); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2011).

⁵ See Roberts, *Punishing Drug Addicts*, *supra* note 1.

⁶ *Id.* at 1481; see also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (2017).

⁷ See, e.g., ROBERTS, *KILLING THE BLACK BODY*, *supra* note 6, at 167 ("Police arrested some [black female] patients [at the Medical University of South Carolina] within days or even hours of giving birth and hauled them off to jail in handcuffs and leg shackles.").

I later made a similar observation about the criminalizing impact of loitering laws, challenging the claim made by social norm theorists that order-maintenance policing benefits communities—particularly black inner-city neighborhoods—because promoting norms of orderliness deters crime.⁸ I argued, in contrast, that the identity of “visibly lawless” people at the heart of vague loitering laws incorporates racist notions of criminality and legitimates police harassment of black citizens. Social norm theorists who support order-maintenance policing make two key errors: (1) they misread the empirical data about crime and disorder⁹ and (2) they misjudge the social influence of order-maintenance policing by failing to recognize that the categories of order and disorder have a preexisting meaning that associates black people with lawlessness.¹⁰ In my earlier work, I wrote:

My point goes beyond the observation that the loitering law happened to result in the arrest of a disproportionate number of minorities. By necessarily assuming a distinction between law-abiding and lawless people that can be detected apart from criminal conduct, the gang-loitering ordinance incorporates and reinforces pernicious stereotypes about Black criminality.¹¹

Focusing reform efforts on interrogating why black people break the law elides the more fundamental question of how racism affects the way law breaking is defined and identified in the first place. The criminal justice system’s reinforcement of a presumed association between black people and criminality in the very determination of law breaking undergirds the system’s anti-democratic function and points to the need for an abolitionist approach.

II. CRIMINAL LAW’S DISENFRANCHISEMENT OF BLACK COMMUNITIES

The criminal justice system has long served as a chief means of excluding African Americans from full political participation.¹² In a prior work, I traced the origins of three pillars of the U.S. criminal justice system—mass incarceration, capital punishment, and police terror—to the enslavement of black people, and argued that the modern day survival of these pillars radically contradicts liberal democratic ideals in order to preserve an unjust racial order.¹³ Through these institutions, law

⁸ See Roberts, *Foreword*, *supra* note 1.

⁹ *Id.* at 806–08 (arguing that police officers routinely use black people’s race as a proxy for criminal propensity, leading to racial bias in arrests).

¹⁰ *Id.* at 813–14 (pointing to events in New York City where order-maintenance proponents boasted of falling crime rates while ignoring the increased complaints of police abuse and the large number of innocent people who were detained, a majority of whom were black and Latino).

¹¹ *Id.* at 806.

¹² See ALEXANDER, *supra* note 3; DAVIS, *supra* note 3; MUHAMMAD, *supra* note 4.

¹³ See Roberts, *Constructing*, *supra* note 1.

enforcement continues to implement slavery's logic: the criminal justice system implements the white supremacist myth that black people are less valuable than white people and therefore inherently subject to white rule. A related logic stemming from black resistance to subordination casts African Americans as a threat to the security of the nation that must be contained by law enforcement.¹⁴

Returning to loitering laws provides a paradigmatic example of subordination via the criminal justice system. In my criticism of order-maintenance policing, I noted the anti-democratic function of loitering laws that give police wide discretion to control black people's presence on public streets.¹⁵ Restricting black people's freedom of movement historically facilitated racial subjugation:

The colonies sought to prevent slave rebellions by enacting laws that prohibited slaves from traveling without a pass and permitted slave patrols to arrest slaves on mere suspicion of sedition. After Emancipation, white southerners tied freed Blacks to plantations through Black Codes that punished vagrancy. As the Court described them, "vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery."¹⁶

Vague loitering laws, like the Chicago gang loitering ordinance struck down in *City of Chicago v. Morales*,¹⁷ give license to police officers to arrest people purely on the basis of race-based suspicion, identifying a class of citizens as "lawless" apart from their criminal conduct.

In another article,¹⁸ I identified prison policy as a mechanism of black political subordination. Drawing on sociological studies, I catalogued the ways in which locking up astronomical numbers of black men and women interferes with their democratic participation in the national political economy. Mass incarceration confines and disenfranchises a staggering proportion of African Americans. Felon disenfranchisement laws have a significant impact on black political power, added to the inability to vote while behind bars.¹⁹ Nearly one in seven black men of voting age has been

¹⁴ MUHAMMED, *supra* note 4.

¹⁵ Roberts, *Foreword*, *supra* note 1.

¹⁶ *Id.* at 788 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 53 n.20 (1991)).

¹⁷ 527 U.S. 41. The Gang Congregation Ordinance "prohibit[ed] 'criminal street gang members' from 'loitering' with one another or with other persons in any public place." *Id.* at 45–46.

¹⁸ Roberts, *Cost of Mass Incarceration*, *supra* note 1; *see also* Roberts, *Criminal Justice and Black Families*, *supra* note 1.

¹⁹ The Sentencing Project's recently updated primer estimates that, out of the 6.1 million Americans prohibited from voting due to disenfranchisement laws, 2.2 million are black citizens. JEAN CHUNG, SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1–2 (2017), <http://sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf> [<https://perma.cc/F9GT-C63F>]. In some states, felony disenfranchisement laws permanently disqualify people convicted of felonies from voting, even after they have served their time behind bars. ALEXES

denied the right to vote as a result of incarceration.²⁰ This dilution of voting power reduces black people's ability to have a say in elections and referenda, diminishing their power to help elect candidates and advocate for legislation that is in their best interests.

Moreover, the criminal justice system's supervision of black communities has a disempowering impact that extends far beyond electoral politics. Incarcerating so many members of black communities robs them of material resources, social networks, and legitimacy required for full political citizenship and for organizing local institutions to contest repressive policies.²¹ Law enforcement also has silenced black protest and political leadership directly, as exemplified by the jailing of Martin Luther King, Jr., in Birmingham, Alabama,²² the assassination of Fred Hampton by the Chicago Police Department and FBI,²³ and the military-style assault on protesters in Ferguson, Missouri, after the police killing of unarmed African-American teenager Mike Brown.²⁴

My most recent criminal justice scholarship has examined how the contemporary intersection of the prison, welfare, and foster care systems in black mothers' lives intensifies the criminal law's anti-democratic function.²⁵ All three systems are marked by glaring race, gender, and class disparities, with cash poor and low-income black mothers disproportionately involved in them.²⁶ Thousands of black women in prison today—mostly for nonviolent offenses—need treatment for substance abuse, support for their children, or safety from an abusive relationship, not criminal punishment. Since Congress abolished the federal entitlement to welfare in 1996—fueled by racist stereotypes of black “Welfare Queens”—

HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006).

²⁰ Roberts, *Cost of Mass Incarceration*, *supra* note 1, at 1292 (citing MARC MAUER, RACE TO INCARCERATE 186 (1999)).

²¹ See DONALD BRAMAN, DOING TIME ON THE OUTSIDE (2007); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2007); MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001); Roberts, *Cost of Mass Incarceration*, *supra* note 1.

²² MARTIN LUTHER KING, JR., *Letters from Birmingham Jail*, in WHY WE CAN'T WAIT 85 (1963).

²³ JEFFREY HAAS, THE ASSASSINATION OF FRED HAMPTON: HOW THE FBI AND THE CHICAGO POLICE MURDERED A BLACK PANTHER (2011).

²⁴ Paul D. Shinkman, *Ferguson and the Militarization of Police*, U.S. NEWS & WORLD REP. (Aug. 14, 2014, 10:13 AM), <https://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization> [<https://perma.cc/UZL6-8TDT>].

²⁵ Roberts, *Complicating the Triangle*, *supra* note 1, at 1777; Roberts, *Prison, Foster Care*, *supra* note 1, at 1476.

²⁶ See ALEXANDER, *supra* note 3; ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); BETH RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION (2012); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

public assistance has been restructured as a behavior modification system to regulate the sexual and reproductive decisions of cash poor mothers.²⁷ The multibillion-dollar foster care apparatus, which entails extreme disruption and surveillance of families, is a vital aspect of the U.S. carceral state that brutally intervenes in the very communities most devastated by the neoliberal evisceration of public resources. Federal law governing child welfare practice encourages the termination of incarcerated mothers' parental rights, and local policies do too little to keep these mothers in contact with their children or to support their families after they are released from prison.²⁸ On the contrary, the collateral penalties routinely inflicted on convicted women—including monetary sanctions and bans on welfare benefits, public housing, post-secondary financial aid, and professional licenses—place affirmative barriers to having the economic and social stability required to regain and maintain custody of children placed in foster care while the mother is behind bars.²⁹

By attributing black families' hardships to maternal deficits, these punitive systems devalue black mothers' bonds with their children, and prescribe prison, low-wage jobs, foster care, and adoption in place of adequate resources and social change. State regulation of black women's bodies, already devalued by a long history of reproductive regulation and derogatory stereotypes of maternal irresponsibility,³⁰ makes excessive policing by punitive state systems seem justified in order to protect black communities and the broader public from harm.

Equally destructive of democratic participation is the routine harassment of black people for alleged petty offenses that often leads to impoverishing and detaining them without regard to their culpability for law breaking.³¹ The relationship between black communities and law

²⁷ See KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2012); GWENDOLYN MINK, WELFARE'S END (2002); ROBERTS, KILLING THE BLACK BODY, *supra* note 6; ANNA MARIE SMITH, WELFARE AND SEXUAL REGULATION (2007).

²⁸ Roberts, *Prison, Foster Care*, *supra* note 1.

²⁹ Geneva Brown, Am. Const. Soc'y, *Issue Brief: The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women* 1, 18 (2010), <https://www.acslaw.org/sites/default/files/Brown%20issue%20brief%20-%20Intersectionality.pdf> [<https://perma.cc/6L3G-GYTP>]; Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L.J. 462 (2006); George Lipsitz, "In an Avalanche Every Snowflake Pleads Not Guilty": *The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746 (2012).

³⁰ See ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN (2004); MELISSA V. HARRIS-PERRY, SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA (2011); ROBERTS, KILLING THE BLACK BODY, *supra* note 6.

³¹ See ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf [<https://perma.cc/PJK3-WRRZ>]; NICOLE VAN

enforcement is better characterized as mass control than either protection from harm or adjudication of guilt or innocence. The cycle of racist state control works as follows.

First, police officers patrolling black communities engage in discriminatory stop and frisk and other law enforcement procedures that unjustly target black men, women, and children for arrest for minor crimes.

Second, many black people who cannot afford to pay bail end up spending vast amounts of time in jail awaiting adjudication and pleading guilty to crimes they did not commit.

Third, post-conviction monetary sanctions and other collateral penalties impose additional punishments that create a two-tiered system of criminal justice that exacts more onerous and perpetual punishment on those who do not have the money to pay for them.³²

This cycle targets entire black communities for state regulation that deprives them of the resources, liberties, and legitimacy needed for democratic participation.

III. AN ABOLITIONIST APPROACH TO DEMOCRATIZING CRIMINAL LAW

The anti-democratic function of criminal law suggests that a reformist approach is inadequate to democratize it. Improving procedures within a system designed to exclude black people from political participation may obscure its anti-democratic aspects or even make it operate more efficiently. Making law enforcement appear more legitimate to black people so they are more willing to obey the law mistakes the problem as one of black law breaking rather than white supremacy. It is nonsensical to believe an anti-democratic system can be fixed by ensuring greater obedience from the very people it is designed to subordinate. As I have written: “[d]eveloping a norm of trust in repressive agencies would be pathetic and self-defeating.”³³ Rather, my analysis of criminal law’s anti-democratic function suggests the need for an abolitionist approach.

My criminal law scholarship has not claimed that criminalizing pregnant black women, loitering laws, order-maintenance policing, mass incarceration, capital punishment, and police terror enforce a democratic system in a discriminatory manner. Rather, I have argued that these institutions enforce an undemocratic racial caste system originating in slavery. Making criminal law democratic, then, requires something far

CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT (2016); HARRIS, *supra* note 19; Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 685 (2014).

³² HARRIS, *supra* note 19, at 9; *see also* Roberts, *Collateral Consequences*, *supra* note 1, at 570.

³³ Roberts, *Cost of Mass Incarceration*, *supra* note 1, at 1295.

more radical than reducing bias or increasing inclusion in this anti-democratic system. Democratizing criminal law requires dismantling its anti-democratic aspects altogether and reconstituting the criminal justice system without them. I therefore have joined calls for an abolitionist approach.³⁴

Approaching the democratization of criminal law as an abolitionist project means releasing the stranglehold of law enforcement on black communities that currently excludes residents from democratic participation so they have more freedom to develop their own democratic alternatives for addressing social harms. Such efforts include: (a) ending police stop and frisk practices, bail, monetary sanctions, restrictions on felons' voting rights, and other collateral penalties; (b) drastically reducing the numbers of incarcerated people by repealing harsh mandatory minimums for violent crimes, eliminating incarceration for nonviolent offenses, giving amnesty to those currently locked up under draconian laws, and decriminalizing drug use and possession and other conduct that poses little harm to others; and (c) holding police and other law enforcement agents accountable for brutality and rights violations.³⁵ An abolitionist project thus requires envisioning a radically different approach to crime that creates alternatives to prison as the dominant means of addressing social harms and inequities.³⁶ Additionally, abolition must be accompanied with "a redirection of criminal justice spending to rebuild the neighborhoods that they have devastated," as well as "a massive infusion of resources to poor and low-income neighborhoods to help residents build local institutions, support social networks, and create social citizenship."³⁷

In the domestic violence context, black feminists have begun to think through what abolition means. The experience of black women at the intersection of the criminal justice system and other punitive state institutions has generated their exploration of approaches to domestic violence that do not rely on law enforcement for protection.³⁸ Black feminists are developing an anti-carceral approach that places domestic

³⁴ See, e.g., DAVIS, *supra* note 3; GILMORE, *supra* note 3; MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN'T WORK AND HOW WE CAN DO BETTER (2014); PRISON RESEARCH EDUC. ACTION PROJECT, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS (2006).

³⁵ See ALEXANDER, *supra* note 3; DAVIS, *supra* note 3; MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015).

³⁶ Roberts, *Constructing*, *supra* note 1, at 285.

³⁷ *Id.*

³⁸ See BETH RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN 14 (1996); ANDREA RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017); *Building Peaceful Communities*, PROJECT NIA, <https://niastories.wordpress.com/about/> [<https://perma.cc/TRU3-H7UX>]; Roberts, *Complicating the Triangle*, *supra* note 1, at 1777.

violence in a broader context of inequitable social structures, tying intimate violence to state violence. They recognize that the U.S. law enforcement system has not only locked up enormous numbers of black people, but also often harms black victims of domestic abuse when police arrest, injure, or kill black women who summon them for help.³⁹ In response, they have proposed community-based responses that address the social underpinnings of violence and that hold community members accountable without subjecting them to state violence.⁴⁰ The black feminist strategy for addressing domestic violence suggests the possibility of taking an abolitionist approach to criminal law without sacrificing protection from violence in black communities.

Finally, democratizing criminal law must be explicitly anti-racist in order to contest the white supremacist ideology that maintains its anti-democratic function. A majority of white Americans acquiesce in or support the anti-democratic features of the U.S. criminal justice system because these features prop up the unequal U.S. racial order. They are willing to tolerate intolerable amounts of state violence against black people because their white racial privilege protects them from experiencing this violence themselves and because they see this violence as necessary to protect their own privileged racial status.⁴¹

The Chicago gang-loitering ordinance in *Morales* proves exemplary. As I noted earlier, the categorical racial separation of law-abiding and lawless citizens permitted the simultaneous commitment to liberal democratic and totalitarian principles.⁴² Presumptively law-abiding citizens could continue to frequent public forums free from police interference, while presumptively lawless people were viewed as justifiably subject to aggressive police surveillance. The gang-loitering ordinance was passed by the predominantly white Chicago City Council while minority communities were disproportionately subjected to the violations of liberty it imposed. Most of the political representatives of the black communities affected by the ordinance opposed it. By centering on suspected gang members and their companions, the very terms of the law applied virtually to minorities only. Relatively few white Chicagoans, on the other hand, risked being arrested for standing on the streets of their neighborhoods. White

³⁹ See RICHIE, *supra* note 26; RITCHIE, *supra* note 38.

⁴⁰ See, e.g., *Building Peaceful Communities*, *supra* note 38.

⁴¹ See CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* (2016); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993); CHRIS HAYES, *A COLONY IN A NATION* (2017); IAN HANEY LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* (2015).

⁴² See *supra* note 19 and accompanying text.

Americans embrace law enforcement strategies that disenfranchise black communities because these strategies converge with white interests in reducing crime while preserving their own individual freedoms.

CONCLUSION

In addressing the nature of racism in America, playwright Lorraine Hansberry did not speak about a fairer way of punishing the crimes of black people; rather, she identified “the paramount crime in the United States” as “the refusal of its ruling classes to admit or acknowledge in any way the real scope and scale and character of their oppression of Negroes.”⁴³ Democratizing criminal law requires acknowledging the crimes that an anti-democratic criminal justice system perpetrates against black people and abolishing them so that black communities have greater freedom to envision and create democratic approaches to social harms—for themselves and for the nation as a whole.

⁴³ Roberts, *Constructing*, *supra* note 1, at 261 (quoting Lorraine Hansberry, *The Scars of the Ghetto*, 16 MONTHLY REV. 577, 588–91 (1965)).

