

# ARTICLE

## CIVILIAN ENFORCERS

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*This Article analyzes the largely unexplored phenomenon of militant civilians engaged in efforts to police and silence activism that challenges entrenched American power systems and economic distributions placing whites atop the social hierarchy in the United States. I argue that this civilian enforcement is an unregulated vessel for state-sponsored violence meant to silence the contestation of the existing racial hierarchy. While scholars, myself included, have written about the many ways police confront and silence racial justice activists on the streets at least since the beginning of the Black Lives Matter (BLM) movement, the role law enforcement plays in silencing racial justice movements is only part a larger state-sponsored effort to preserve existing racial hierarchies. Supplementing violent policing from law enforcement actors, militant right-wing civilians descend on public streets ready to battle BLM activists. These mostly white, often armed, civilians are force multipliers of state efforts to suppress BLM voices, whose demands for a reevaluation of established distributions of power and wealth ignite fear and resentment among certain whites. Yet, vigilantes' efforts evade constitutional examination because of their nature as non-state actors. However, police routinely tolerate or even collaborate with these civilian vigilantes, while simultaneously focusing violent enforcement efforts on BLM protesters. I argue that this pattern of disparate police enforcement, where racial justice activists are violently policed while civilian enforcers evade punishment, effectively transforms civilian vigilantes into unregulated state-sponsored violence workers. This is reminiscent of the antebellum South, where the state delegated legal authority to all whites to forcibly enforce laws that suppressed Black expression and any sentiment that endorsed Black liberation, thus showing that the suppression of Black liberation ideologies by state-sponsored civilian enforcers persists even today.*

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INTRODUCTION.....	508
I. WHITE SOUTHERNER'S LEGAL DUTY AND RIGHT TO SUPPRESS BLACK GATHERINGS AND ALL ANTISLAVERY SENTIMENT .....	515
A. <i>The Suppression of Black Gatherings and Expression</i> .....	515
1. Codes Regulating Black Gatherings and Expression .....	515
2. The White Man and the Enslaver as Violent Enforcers of the Slave Codes.....	519
B. <i>The Mission To Suppress Black Freedom Led to the Suppression of         Noncompliant Whites</i> .....	525
1. Antebellum Laws Restricting Activities and Expression by White People.....	525
2. White Southern Society's Violent Enforcement of Antebellum Laws on Noncompliant Whites .....	528
II. CONTEMPORARY CIVILIAN ENFORCERS ON THE STREETS.....	530
A. <i>Political Conservative's Disdain of BLM and Praise for Militant         Civilian Enforcers</i> .....	532
B. <i>Right-Wing Civilians Acting as Vigilante Police Reinforcements         Against Racial Justice Activists</i> .....	542
III. SIMILAR TO WHITES IN THE ANTEBELLUM SOUTH, CIVILIAN ENFORCERS ARE STATE SPONSORED VIOLENCE WORKERS COMMITTED TO PRESERVING WHITE SUPREMACY AND ESTABLISHED HIERARCHIES.....	547
A. <i>The Continued Failure of Constitutional Protections for Racial         Justice Activists</i> .....	548
B. <i>Police as the Law unto Themselves</i> .....	551
CONCLUSION.....	557

## INTRODUCTION

On August 23, 2020, Kenosha, Wisconsin Police Officer Rusten Sheskey shot Jacob Blake, a Black man, seven times in the back, leaving him paralyzed from the waist down.<sup>1</sup> This incident occurred in the midst of the Black Lives Matter (BLM) protests over the murders of Breonna Taylor, George Floyd, and other Black people at the hands of law enforcement officers.<sup>2</sup> The BLM protests of the summer of 2020 were the largest and most diverse racial justice movement in United States history.<sup>3</sup>

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1. Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Nov. 16, 2021), <https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html>; Paige Williams, *Kyle Rittenhouse, American Vigilante*, NEW YORKER (June 28, 2021), <https://www.newyorker.com/magazine/2021/07/05/kyle-rittenhouse-american-vigilante> [<https://perma.cc/GXE2-TYFF>].

2. See Morales, *supra* note 1; Omar Jimenez, *Exclusive: Jacob Blake Speaks Out a Year Later. 'I Have Not Survived Until Something Has Changed'*, CNN (Aug. 29, 2021, 4:01 AM), <https://www.cnn.com/2021/08/29/us/jacob-blake-exclusive-shooting-a-year-later/index.html> [<https://perma.cc/47BY-7ZTP>].

3. Gabriel R. Sanchez, *Americans Continue To Protest for Racial Justice 60 Years After the March on Washington*, BROOKINGS (Aug. 25, 2023), <https://www.brookings.edu/articles/americans-continue-to-protest>

Although the BLM movement began in 2013 in response to the acquittal of the killer of Trayvon Martin, a Black teenager, the movement reached its peak in 2020.<sup>4</sup>

Almost immediately after the video of Mr. Blake's shooting went viral, BLM protests began in Kenosha.<sup>5</sup> That evening the county sheriff, David Beth, declared a curfew that was aggressively enforced against BLM protesters.<sup>6</sup> While law enforcement was well equipped with tear gas and rubber bullets to confront BLM protesters, armed civilians also descended onto Kenosha's streets acting as police reinforcements.<sup>7</sup>

With the nation's attention on Kenosha after Mr. Blake's shooting, former city alderman Kevin Mathewson called for "patriots willing to take up arms and defend our City . . . against the evil thugs" and invited these "patriots" to Kenosha to confront BLM activists at an event Mathewson called "Armed Civilians to Protect our Lives and Our Property."<sup>8</sup> Mathewson posted this call to action on the Facebook page titled *Kenosha Guard*, a group he started in May 2020 one week after police officer Derek

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-for-racial-justice-60-years-after-the-march-on-washington/ [https://perma.cc/69CS-QVFM]; Amanda Barroso & Rachel Minkin, *Recent Protest Attendees Are More Racially and Ethnically Diverse, Younger than Americans Overall*, PEW RSCH. CTR. (June 24, 2020), https://www.pewresearch.org/short-reads/2020/06/24/recent-protest-attendees-are-more-racially-and-ethnically-diverse-younger-than-americans-overall/ [https://perma.cc/Z9RD-66BH]; Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

4. *About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ [https://perma.cc/4PGA-JLW9] (last visited Apr. 8, 2025). The movement initially emerged in response to the acquittal of the vigilante who profiled and murdered Trayvon Martin in Florida but gained significant momentum after the police murdered eighteen-year-old Michael Brown in Ferguson, Missouri. See Aaron Morrison, *Black Lives Matter Movement Marks 10 Years of Activism and Renews Its Call To Defund the Police*, AP NEWS (July 13, 2023, 12:26 AM), https://apnews.com/article/black-lives-matter-10th-anniversary-trayvon-martin-c2d79ae4639934ca1eb77d6b54c16f8b [https://perma.cc/L666-Q7ST]; Buchanan et al., *supra* note 3.

5. Williams, *supra* note 1.

6. See Complaint and Jury Trial Demand at 3–4, *Grosskreutz v. City of Kenosha*, No. 2:21-cv-01192 (E.D. Wis. Oct. 14, 2021) [hereinafter *Grosskreutz Complaint*]; *Key Events in Wisconsin Surrounding Rittenhouse Shootings*, AP NEWS (Oct. 29, 2021, 7:05 PM), https://apnews.com/article/wisconsin-police-shootings-homicide-kenosha-68d7ff0e6dd11acc5b5918a93eeef5 [https://perma.cc/3RHC-D5F2]. It bears mentioning that a court later found this curfew to be illegal because the sheriff did not have the authority to declare a state of emergency or a curfew. Bruce Vielmetti, *Kenosha Judge Dismisses 29 More Curfew Citations from Last Year's Jacob Blake Demonstrations*, MILWAUKEE J. SENTINEL (Aug. 20, 2021, 3:49 PM), https://www.jsonline.com/story/news/2021/08/20/kenosha-curfew-citations-2020-jacob-blake-unrest-dismissed/8209656002/ [https://perma.cc/BRG8-G665].

7. See David Choi, *'We Appreciate You Guys': Wisconsin Police in Armored Vehicles Thanked Armed Militia and Gave Out Water Bottles*, BUS. INSIDER (Aug. 26, 2020, 5:34 PM), https://www.businessinsider.com/kenosha-police-thanked-armed-militia-and-gave-water-2020-8 [https://perma.cc/NRR7-DGP7]; Julie Bosman & Richard A. Oppel Jr., *After Jacob Blake Shooting, Scrutiny of Kenosha Police Intensifies*, N.Y. TIMES (Sept. 10, 2020), https://www.nytimes.com/2020/08/25/us/jacob-blake-kenosha-fires.html.

8. Complaint at 7, *Huber v. Beth*, 654 F. Supp. 3d 777 (E.D. Wis. 2023) (No. 21-0969) [hereinafter *Huber Complaint*]; *Fast Rise and Fall of Kenosha Guard Reflect Spirit of Armed Vigilantism in US*, STRAITS TIMES (Oct. 17, 2020, 3:38 PM), https://www.straitstimes.com/world/united-states/when-us-armed-vigilantes-are-summoned-to-a-city-in-wisconsin-with-a-few [perma.cc/3PNL-DXXC].

Chauvin murdered George Floyd in Minneapolis.<sup>9</sup> The group's profile photo featured an American<sup>10</sup> flag and a white man holding a "military-style rifle."<sup>11</sup> Mathewson's August 2020 post summoning "patriots" received four thousand likes and hundreds of responses confirming their attendance at the confrontation event in Kenosha.<sup>12</sup> He then posted a public letter to Kenosha Police Chief, Daniel Miskinis, informing the Chief about Mathewson's earlier call for armed reinforcements to confront BLM protesters and demanding police not interfere with these "patriots."<sup>13</sup> Kenosha police did not attempt to dissuade Mathewson from summoning civilian combat forces to police the demonstrations;<sup>14</sup> instead, when heavily armed, predominantly white men descended onto the streets of Kenosha, police welcomed them as "friendly guns."<sup>15</sup> Police officers thanked the "patriots" for their presence, encouraged them to patrol the streets, collaborated with them, and accepted their aid to enforce curfew.<sup>16</sup>

The Kenosha Police Department's warm welcome to armed, white, right-wing civilians was not unique to that city. An extensive examination of BLM protests across United States jurisdictions in 2020, as well as other anecdotal evidence, demonstrates a pattern of disparate police enforcement where officers were reported to respond more aggressively to left-leaning protesters than right-leaning protesters.<sup>17</sup> Furthermore, like

9. Williams, *supra* note 1; *Fast Rise and Fall of Kenosha Guard Reflect Spirit of Armed Vigilantism in US*, *supra* note 8; *Facebook Removes 'Kenosha Guard' Page Following Shooting*, STRAITS TIMES (Aug. 27, 2020, 7:32 AM), <https://www.straitstimes.com/world/united-states/facebook-removes-kenosha-guard-page-following-shooting> [https://perma.cc/F83G-N43C].

10. I use "American" deliberately throughout this Article to reference images of exceptionalism encapsulated in songs like "God Bless America" and "America the Beautiful." See Daniel Immerwahr, *When Did the US Start Calling Itself "America," Anyway?*, MOTHER JONES (July 4, 2019), <https://www.motherjones.com/politics/2019/07/when-did-the-united-states-start-calling-itself-america-anyway/> [https://perma.cc/J85X-Y5NK] (discussing the use of "America" and "American" and their connection to imperialism).

11. *Facebook Removes 'Kenosha Guard' Page Following Shooting*, *supra* note 9; Braktkon Booker & Mark Katkov, *Illinois Teen Arrested After Fatal Shooting of 2 Kenosha, Wis., Protesters*, HAW. PUB. RADIO (Aug. 25, 2020, 11:42 PM), <https://www.hawaiipublicradio.org/2020-08-26/3-shot-2-fatally-in-kenosha-wis-as-protests-continue-over-police-shooting> [https://perma.cc/84Z4-2F9D].

12. *Fast Rise and Fall of Kenosha Guard Reflect Spirit of Armed Vigilantism in US*, *supra* note 8; Neil MacFarquhar, *When Armed Vigilantes Are Summoned with a Few Keystrokes*, N.Y. TIMES (Nov. 18, 2021), <https://www.nytimes.com/2020/10/16/us/kenosha-guard-militia-kevin-mathewson.html>.

13. *Id.*; see also Grosskreutz Complaint, *supra* note 6, at 5–6; Huber Complaint, *supra* note 8, at 7–8.

14. Grosskreutz Complaint, *supra* note 6, at 8–9; Huber Complaint, *supra* note 8, at 8.

15. See Zack Beauchamp, *Why Police Encouraged a Teenager with a Gun To Patrol Kenosha's Streets*, VOX (Aug. 27, 2020, 4:20 PM), <https://www.vox.com/2020/8/27/21404117/kenosha-kyle-rittenhouse-police-gun-populism> [https://perma.cc/F9J7-YGBU].

16. See *id.*; Julie Bosman & Sarah Mervosh, *Wisconsin Reels After Police Shooting and Second Night of Protests*, N.Y. TIMES (Sept. 10, 2020), <https://www.nytimes.com/2020/08/24/us/kenosha-police-shooting.html>; Ella Torres, Fergal Gallagher & Catherine Sanz, *Timeline of Alleged Wisconsin Protest Shooter's Path*, ABC NEWS (Sept. 1, 2020, 6:03 AM), <https://abcnews.go.com/US/timeline-alleged-wisconsin-protest-shooters-path/story?id=72651587> [https://perma.cc/5BHQ-8EHR].

17. Roudabeh Kishi & Sam Jones, *Demonstrations and Political Violence in America: New Data for Summer 2020*, ACLED (Sept. 3, 2020), <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/> [https://perma.cc/HXT3-R7S7]; Mihir J. Chaudhary & Joseph Richardson, Jr., *Violence Against Black Lives Matter Protestors: A Review*, 8 CURRENT TRAUMA REPS. 96, 98 (2022); Lesley Wood, *Policing Counter-Protest*, SOCIO. COMPASS, Sept. 12, 2020, at 1, 4–6; David Cunningham, *Policing White Supremacy: Asymmetry and Inequality in Protest Control*, 71 SOC. PROBS. 58,

in Kenosha, police sometimes went as far as welcoming or even collaborating with armed right-wing counterprotesters.<sup>18</sup> This pattern of disparate enforcement and instances of collusion show law enforcement's willingness to accept aid from armed civilian forces and to delegate their own government-sponsored authority to monitor the streets under the threat of force to these civilian vigilantes.

Kyle Rittenhouse was one of the white armed civilians welcomed by the Kenosha Police Department in August 2020.<sup>19</sup> Despite being clearly underage, breaking curfew, and carrying a rifle strapped across his chest, police had only favorable interactions with Rittenhouse.<sup>20</sup> Disastrously, Rittenhouse later used his rifle to shoot three protestors, killing two of them.<sup>21</sup> When the prosecution cross-examined Rittenhouse at trial about why he was on the streets past curfew, he explained that he did not believe police were enforcing the curfew.<sup>22</sup> The Kenosha police's affirming conduct signaled to Rittenhouse that the curfew did not apply to him or his armed companions. Law enforcement's welcoming attitude signaled that white militant civilians enjoyed a de facto right to walk the streets, a right which BLM protesters did not have, and a de facto authority to police racial justice activists with the threat of force.

I have previously written about the ways law enforcement actors use criminal law as a tool to silence racial justice activists during protests.<sup>23</sup> Criminal law arms law enforcement officers with a wide breadth of power to arrest and use force against any protestor whose conduct an officer deems criminal (regardless of the seriousness of the purported offense).<sup>24</sup> Police violently target racial justice activists because they challenge the ideals of the American Establishment and the system of racial hierarchy that officers benefit from and are committed to maintaining.<sup>25</sup> However, the Kenosha incident revealed that some civilians share a commitment to similar ideals and play a

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68–71 (2024); Jarrod Shanahan & Tyler Wall, *'Fight the Reds, Support the Blue': Blue Lives Matter and the US Counter-Subversive Tradition*, 63 RACE & CLASS 70, 72–73 (2021); Mara Hvistendahl & Alleen Brown, *Armed Vigilantes Antagonizing Protesters Have Received a Warm Reception from Police*, INTERCEPT (June 19, 2020, 1:55 PM), <https://theintercept.com/2020/06/19/militia-vigilantes-police-brutality-protests/> [<https://perma.cc/Y3WC-C9XV>] (describing a “pep talk” given to right-wing militia present at a BLM protest by a police officer and police being overheard describing the militia group as “armed friendlies”).

18. See discussion *infra* Part II.B.

19. See Williams, *supra* note 1.

20. *Id.*; see also Torres et al., *supra* note 16.

21. Williams, *supra* note 1.

22. Transcript of Record at 82–83, *State v. Rittenhouse*, No. 20-CF-983 (Wis. Cir. Ct. Kenosha Cnty. Nov. 10, 2021) [hereinafter Rittenhouse testimony], Doc. No. 619.

23. See Karen J. Pita Loor, *An Argument Against Unbounded Arrest Power: The Expressive Fourth Amendment and Protesting While Black*, 120 MICH. L. REV. 1581, 1595, 1606–07 (2022) [hereinafter Pita Loor, *Protesting While Black*]; Karen J. Pita Loor, *The Expressive Fourth Amendment*, 94 S. CAL. L. REV. 1311, 1316–17, 1329, 1356 (2021) [hereinafter Pita Loor, *The Expressive Fourth Amendment*]; Karen J. Pita Loor, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 830 (2020).

24. Pita Loor, *Protesting While Black*, *supra* note 23, at 1588–1605; see also Pita Loor, *The Expressive Fourth Amendment*, *supra* note 23, at 1330–36.

25. See Cunningham, *supra* note 17, at 60–61; Shanahan & Wall, *supra* note 17, at 72–74; Wood, *supra* note 17, at 4, 6; Elahe Izadi, *Police Chief Ousted After Calling Black Lives Matter a Terrorist Group in Facebook Post*, WASH. POST (Sept. 16, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/09/16/police-chief-retires-after-calling-black-lives-matter-a-terrorist-group-in-facebook-post/>.

substantial but unexplored role in silencing racial justice activism under the threat of violence.

Militant civilians attend protests in the role of police reinforcements to participate in the project of silencing racial justice protests and protecting established hierarchies. However, unlike police officers, militant civilians are not constrained by the—albeit weak—constitutional limitations applicable to government actors. While incidents such as the Kenosha protests reveal civilians’ willingness to forcibly defend the frontline against racial justice protesters, questions remain: What prompts these civilians to show up, battle, and silence racial justice protesters? What motivates and facilitates the phenomenon of civilian enforcement at racial justice protests?<sup>26</sup>

A closer look into civilian enforcers’ reasons for countering racial justice protests reveals that their actions are expressions of *white fear*. Journalists Roland Martin and Leah Lakins define white fear as “the unwillingness to share power and resources and allow for the redefinition of America’s morals, values, and principles.”<sup>27</sup> For these whites, their fear—which has also been described as a “whitelash”—stems from a combination of factors including demographic changes in the United States, the “browning of America,” and the rise of a Black man to the country’s highest office.<sup>28</sup> According to Martin and Lakins, President Obama’s election heralded a period of “[w]hite minority resistance.”<sup>29</sup>

Threatened by the changing racial landscape, these, often white, civilian enforcers attend racial justice protests as a sign of resistance to BLM demands that the established societal distributions which unfairly and systemically disadvantage Black and Brown people should be reexamined.<sup>30</sup> These BLM demands particularly upset

26. While there are likely other contemporary settings of civilian enforcement, here I discuss the phenomenon in the context of protests. For example, another setting where militant civilians are ardently working to suppress voices perceived as challenging to white meritocracy and privilege is the schoolhouse by monitoring classrooms for teaching and materials they mislabel as “critical race theory.” See Brandon Tensley, *The Engineered Conservative Panic over Critical Race Theory, Explained*, CNN (July 8, 2021, 5:40 PM), <https://www.cnn.com/2021/07/08/politics/critical-race-theory-panic-race-deconstructed-newsletter/index.html> [https://perma.cc/V8W7-EGLQ]; Joel R. Malin & Christopher Lubienski, *Information Pollution in an Age of Populist Politics*, EDUC. POL’Y ANALYSIS ARCHIVES, July 12, 2022, at 1, 13; JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY 5, 9 (2020); Francesca López et al., *Understanding the Attacks on Critical Race Theory*, NAT’L EDUC. POL’Y CTR. 11 (Sept. 2021), [https://nepc.colorado.edu/sites/default/files/publications/PM%20Lopez%20CRT\\_0.pdf](https://nepc.colorado.edu/sites/default/files/publications/PM%20Lopez%20CRT_0.pdf) [https://perma.cc/VJ45-D8H3].

27. ROLAND S. MARTIN WITH LEAH LAKINS, WHITE FEAR: HOW THE BROWNING OF AMERICA IS MAKING WHITE FOLKS LOSE THEIR MINDS 2–3 (2022).

28. *Id.* at 10, 29–31; see also WESLEY LOWERY, AMERICAN WHITELASH 5–13, 26–27 (2023). After President Obama’s election, a Pew poll demonstrated that every racial group besides whites were optimistic about the future of the country. MARTIN WITH LAKINS, *supra* note 27, at 9, 17–18. See also Joseph Lowndes, *From Pat Buchanan to Donald Trump: The Nativist Turn in Right-Wing Populism*, in A FIELD GUIDE TO WHITE SUPREMACY 265, 279 (Kathleen Belew & Ramón A. Gutiérrez eds., 2021).

29. MARTIN WITH LAKINS, *supra* note 27, at 9.

30. The BLM movement demands an end to white supremacy and anti-Black violence not only in policing but in all other areas of American society. This requires a reevaluation and reimagining of government institutions and systems. See, e.g., Patrisse Cullors & Darnell L. Moore, *Ferguson Protests to #FergusonNext: 5 Paths to Progress, After Non-Indictment*, GUARDIAN (Nov. 24, 2014, 10:30 PM), <https://www.theguardian.com/commentisfree/2014/nov/24/ferguson-protests-progress-non-indictment-grand-jury> [https://perma.cc/74TU-2SXU] (“Our laws, economy, education institutions and legal systems are infected

militant civilians who reject the idea that whites have historically benefitted from unfair systemic advantages that place them at the top of the racial, social, and economic order in the United States.

Despite lacking legal authority to enforce laws, manage crowds, or control protests, these white militant civilians see themselves as an extension of law enforcement and play the role of police reinforcement at racial justice protests. Without legal authority, civilian enforcers take on police tasks with the implicit, or at times even explicit, endorsement by law enforcement actors. In their efforts to police racial justice protests, civilian enforcers often break laws themselves by ignoring curfew or being illegally armed.<sup>31</sup> Meanwhile true law enforcement actors through their broad legal discretion to disparately enforce the law (or alternatively, to forego enforcement) affirm these civilians' roles as reinforcements by tolerating and encouraging their quasi-policing efforts. Police—who possess a monopoly on state-sponsored violence, discussed further in Section III—effectively share their authority with these vigilantes to control and monitor activists under the threat of armed force. Further, at a macro level, civilian enforcers also benefit from the endorsement of powerful, politically conservative government officials who publicly vilify racial justice protesters as white-hating, America-hating, evil, and Marxist,<sup>32</sup> while simultaneously praising the vigilantes who confront them in defense of so-called American values.<sup>33</sup> Moved by panic, enabled by law enforcement, and emboldened by political rhetoric, civilian enforcers are unofficial force and violence multipliers for the state. Civilian vigilantes do the violent dirty work for complicit law enforcement officers as well as politically conservative lawmakers and executives. Although these government actors share in the civilian enforcers' ideological project and facilitate their work, they evade legal and even moral accountability by not undertaking the conduct themselves.

The phenomenon of civilian enforcement can be traced to the antebellum South, where white elites, motivated by fear of threats to their brand of Southern life, and poor

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by institutionalized racism. It is going to take complete transformation—at all branches of government—to change the fate of this country.”); Patrisse Cullors, *‘Black Lives Matter’ Is About More than the Police*, ACLU (June 23, 2020), <https://www.aclu.org/news/criminal-law-reform/black-lives-matter-is-about-more-than-the-police> [https://perma.cc/56B8-YK5D].

31. It is worth mentioning that Rittenhouse himself may not have been carrying his rifle in contravention of Wisconsin law. The trial judge dismissed the weapon-related charge because he ruled that, according to the text of the statute, the length of the barrel on Rittenhouse's rifle was too long to constitute a weapon that is illegal for a minor to carry in Wisconsin. Legal experts have called this a “legislative blunder” in the Wisconsin statute. Brad Brooks, *Experts Say Gun Charge Dropped in Rittenhouse Trial Was a Result of Poorly Worded Law*, REUTERS (Nov. 15, 2021, 5:52 PM), <https://www.reuters.com/world/us/experts-say-gun-charge-dropped-rittenhouse-trial-was-result-poorly-worded-law-2021-11-15/> [https://perma.cc/KYR8-XUTY].

32. See discussion *infra* note 209.

33. See Jamelle Bouie, *The Republican Embrace of Vigilantism Is No Accident*, N.Y. TIMES (May 16, 2023), <https://www.nytimes.com/2023/05/16/opinion/neely-penny-perry-rittenhouse-desantis.html> (discussing the positive reaction of conservative media in relation to Kyle Rittenhouse's decision to take the law into his own hands and use lethal force against racial protesters); Todd Zwillich, *The GOP Is Officially the Party of Righteous Violence*, VICE (May 19, 2023), <https://www.vice.com/en/article/gop-jordan-neely-daniel-penny-violence/> [https://perma.cc/ERG7-F5EL] (discussing the trend of GOP politician's positive response to violence at the hands of vigilantes, using the specific case of Jordan Neely's murder where GOP politicians donated over two million dollars to the legal defense of his murderer Daniel Penny).

whites, afraid of labor competition from a liberated Black population, sought to quiet any critique of the institution of slavery. Through so-called “slave codes,” Southern governments legally codified the suppression of Black freedom and abolitionist efforts. The slave codes prohibited gatherings and expression by Black people and forbade abolitionist expression by anyone. The codes were explicitly enforceable by civilians. Antebellum-era laws, such as the slave codes, transformed white people across the South into violent pseudo-legal enforcers. Moreover, Southern society and officials openly encouraged white people to engage in mass violence against Black people perceived as rebellious and noncompliant white people.

While the abolition of slavery and the passage of the Thirteenth and Fourteenth Amendments meant that the State could no longer expressly deny Black people their civil rights—including the right to speech and assembly guaranteed by the First Amendment and freedom from unreasonable seizure as guaranteed by the Fourth Amendment—these legal constraints apply only to government actors, not civilians.<sup>34</sup> Additionally, courts continue to read the Thirteenth Amendment’s general prohibition of slavery narrowly.<sup>35</sup> Given the inapplicability of these constitutional constraints to nongovernment actors, these fundamental legal protections fail to prevent civilian actors from violently interfering with the civil rights of racial justice activists. In this Article, I do not question the soundness of the legal conclusion that these vigilantes’ actions are not attributable to the government. Instead, I argue that, normatively speaking, there is not as bright a line separating the actions of civilian enforcers from the state as legal argumentation suggests. This is because, as discussed in Section III, police—who are the personification of the state’s enforcement power—willingly share their policing authority with right-wing civilians transforming them into state-sponsored violence workers.

Section I roots civilian enforcement in the antebellum South, where laws armed every white person with a duty and a right to suppress Black activism and any antislavery sentiments—even if it meant silencing a white person. Using the monitoring of BLM activism by right-wing actors as a case study, Section II demonstrates that the phenomenon of civilian enforcement has survived the abolition of slavery as militant groups and individuals—enabled by law enforcement officers and emboldened by conservative government actors—participate in the project of silencing racial justice activism in the streets. Section III argues that the phenomenon of civilian enforcement at racial justice protests amounts to a form of state-sponsored violence since it is enabled by complicit law enforcement officers, who are the embodiment of the government’s exclusive authority to exercise violence on its people. Understanding the role of civilian enforcement is essential to appreciate the scope of the suppression of racial justice activism and resistance to Black liberation.

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34. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. I; U.S. CONST. amend. IV; *see also* discussion *infra* note 288.

35. U.S. CONST. amend. XIII; *see also* discussion *infra* notes 296–97.



I. WHITE SOUTHERNER'S LEGAL DUTY AND RIGHT TO SUPPRESS BLACK GATHERINGS  
AND ALL ANTISLAVERY SENTIMENT

Civilian enforcers' contemporary actions to silence racial justice protesters is reminiscent of the white Southerners' enforcement actions to uphold proslavery codes in the antebellum South. White Southerners forbade all gatherings and forms of expressive conduct—including religious worship and literacy—by Black people. The slave codes also required white Southerners to restrict antislavery expression by anyone, regardless of race. Using virulent and racist rhetoric to argue for their adoption, Southern lawmakers and politicians enacted these prohibitions into law and relied on all white civilians to enforce the law. The responsibility to enforce the codes became the project of keeping the South the “white man’s country,” a project to which every Southern citizen had a right and duty to defend.<sup>36</sup> Consequently, white Southerners ruthlessly and violently enforced these prohibitions not only against the Black population, but also against noncompliant whites.

A. *The Suppression of Black Gatherings and Expression*

1. Codes Regulating Black Gatherings and Expression

The slave codes were despotic laws in slaveholding states that sought to suppress and control every aspect of Black life. The codes forbade Black people from marrying, establishing families, entering into contracts, bringing legal causes of action, escaping into freedom, and engaging in even the most mundane day-to-day conduct.<sup>37</sup> Certain code provisions specifically targeted Black people’s engagement in expressive conduct with the objective of suppressing Black liberation and bolstering the institution of slavery.<sup>38</sup> Particularly, the codes encouraged white civilians to persecute Black people engaged in expressive assembly and the dissemination of Black Thought.<sup>39</sup>

The end of slavery was the greatest threat to powerful white Southerners because they depended on the institution to maintain their wealth and position in the socioeconomic hierarchy. Abolition, particularly without compensation to enslavers, would have yielded “an enormous property loss to Southerners, and would have disrupted the economic structure of Southern society[,] . . . [b]ut deeper than the

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36. Clement Eaton, *Mob Violence in the Old South*, 29 MISS. VALLEY HIST. REV. 351, 354 (1942).

37. See generally WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* (1853) (discussing the prominent and myriad power structures that the slave codes had on American society, arbitrarily granting whites enforcement power while simultaneously depriving Black people of their right to participate in American society).

38. See THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* 26–27 (1965); Mikah K. Thompson, *A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship Between African-Americans and the Police*, 85 U.M.K.C. L. REV. 697, 715 (2017) (citing the preamble to the South Carolina and Georgia slave code which reference the need to protect the white population from attacks and insurrections).

39. Black Thought refers broadly to the body of knowledge, philosophies, theories, and cultural critiques generated by Black scholars, writers, activists, and community intellectuals. Typically this racial theory concerns what it means for Black people to free themselves from the clutches of white supremacy and colonialism. See LOU TURNER & JOHN ALAN, FRANTZ FANON, *SOWETO & AMERICAN BLACK THOUGHT* 5–7 (1978).

economic motive, . . . Southerner[s] feared the social effects of abolition, especially in destroying racial control of the [Black population].”<sup>40</sup> “The desire to keep the South a white man’s country . . . was an imperative motive that affected all classes of society from the top crust to the humblest poor white.”<sup>41</sup> Anti-expression, antithought, and antigathering laws were more likely to be enacted or more vigorously enforced in periods of heightened fear of abolition such as instances of Black uprisings and the years preceding the Civil War.<sup>42</sup>

Lawmakers in the antebellum South developed elaborate legal provisions to quash Black Thought by criminalizing gatherings, expression, and access to written materials among the Black population (whether enslaved or free) out of concern that their exposure to liberation ideologies would spur uprisings.<sup>43</sup> Slaveholding states outlawed participation in Black cultural practices such as “caballing[.]” “drumming or playing,”<sup>44</sup> “preach[ing],” “exhort[ing],”<sup>45</sup> and religious worshipping.<sup>46</sup> The codes further prevented enslaved Black people from gathering with each other or attending any meeting “without a written permission from his or her owner, overseer or master.”<sup>47</sup> Under the codes, certain states would classify gatherings as an unlawful assembly if Black people were involved—a criminal offense otherwise related to riots in early America.<sup>48</sup>

White Southerners’ concern extended to Black religious worship and literacy. The rationale for white Southerners’ fear of Black religious expression was twofold. First, white Southerners feared that gathering for worship would provide Black people an

40. Eaton, *supra* note 36, at 354; *see also* Tera W. Hunter, *When Slaveowners Got Reparations*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/opinion/when-slaveowners-got-reparations.html> (discussing how enslavers in Washington, D.C., received government reparations of up to \$300 for each enslaved person pursuant to the District of Columbia Emancipation Act which freed the Black population in the district).

41. Eaton, *supra* note 36, at 354. *But see id.* at 354–55 (explaining that elite Southerners also worried that poor whites would join the Black population against the wealthier class).

42. *See* RUSSEL BLAINE NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860*, at 148 (1949); WILSON, *supra* note 38, at 28–29, 31–33.

43. *See* Nancy Alenda Hillman, *Between Black and White: The Religious Aftermath of Nat Turner’s Rebellion* 11–16 (Nov. 2005) (M.A. thesis, William & Mary) (Scholar Works); Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 AM. J. LEGAL HIST. 237, 241, 245, 247 (2007); NYE, *supra* note 42, at 23–24.

44. Act of Sept. 2, 1721, para. XXVII, *reprinted in* 9 STATUTES AT LARGE OF SOUTH CAROLINA 640 (David J. McCord ed., 1841).

45. Act of Mar. 15, 1832, ch. 22, 1832 Va. Acts 20, 20; Act of Dec. 23, 1833, § 5, 1833 Ga. Laws 226, 226–28.

46. Act of Dec. 23, 1833, § 5.

47. Act of Mar. 15, 1832, 1832 Va. Acts at 20; *see also* Act of Dec. 23, 1833, § 5; THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619–1860*, at 346 (1996) (referencing an 1846 Florida Patrol Law which stated that “[a]ll assemblies and congregations of slaves, free negroes and mulattoes, consisting of four or more, met together in a confined or secret place, is hereby declared to be an unlawful meeting”).

48. *See* MORRIS, *supra* note 47, at 346–47 (discussing Florida, Mississippi, and South Carolina laws); *The Origin Story of Black Education*, HARV. UNIV. PRESS: BLOG (Feb. 1, 2022), [https://harvardpress.typepad.com/hup\\_publicity/2022/02/the-origin-story-of-black-education.html](https://harvardpress.typepad.com/hup_publicity/2022/02/the-origin-story-of-black-education.html) [<https://perma.cc/5Y2X-TG95>] (citing 1831 Virginia law declaring “that all meetings of free negroes or mulattoes, at any schoolhouse, church, meetinghouse or other place for teaching them reading or writing . . . shall be deemed and considered as an unlawful assembly”).

opportunity to plan for rebellion.<sup>49</sup> Second, whites were concerned that scripture could be read as an “indictment of the institution of slavery.”<sup>50</sup> Suppression of Black participation in religious expression consequently tightened when white fear of revolt heightened.<sup>51</sup> This was especially true after the enslaved Black preacher Nat Turner led a revolt in Southampton County, Virginia, in 1831.<sup>52</sup> This revolt, in conjunction with the discovery of Northern abolitionist material in Southern Black people’s possession, sparked the Virginia governor’s belief that Black clergy members were colluding with Northern abolitionists to plan continued uprisings.<sup>53</sup> Consequently, the Virginia governor insisted on silencing Black ministers, arguing that,

[t]he most active among ourselves, in stirring up the spirit of revolt, have been the [Black] preachers. . . . The public good requires the [Black] preachers to be silenced, who, full of ignorance, are incapable of inculcating any thing but notions of the wildest superstition, thus preparing fit instruments, in the hands of the crafty agitators, to destroy the public tranquility.<sup>54</sup>

Support for this view was evident among other white Southerners.<sup>55</sup> A Virginia newspaper stated: “The case of Nat Turner warns us. No black man ought to be permitted to turn a Preacher through the country.”<sup>56</sup> The Virginia legislature ultimately passed a law that punished by thirty-nine lashes any Black person who engaged in preaching.<sup>57</sup> While Virginia law also made unlawful the assembly of Black people for *any* reason, it expressly criminalized religious instruction unless permitted by a Black individual’s enslaver.<sup>58</sup> Likewise, in South Carolina, legislators enacted laws severely curtailing Black religious worship in response to Nat Turner’s revolt and other Black uprisings.<sup>59</sup> By the 1850s, all Southern states had some form of restriction on Black

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49. See May, *supra* note 43, at 237.

50. *Id.*

51. *Id.*; cf. Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE, no. 2, 1988, at 51, 55–56 (discussing the prevalence of informal policing that occurred in the period of time before the Civil War by civilian slave patrols).

52. See May, *supra* note 43, at 251–52; *Nat Turner: American Enslaved Person and Bondsman*, BRITANNICA, <https://www.britannica.com/biography/Nat-Turner> [<https://perma.cc/2M29-DMYM>] (Apr. 19, 2025). The Nat Turner rebellion led to harsher restrictions on Virginia’s Black population, *id.*, as is discussed in this Part.

53. Hillman, *supra* note 43, at 14.

54. *Id.* (quoting Message of Governor Floyd to the Virginia Legislature (Dec. 6, 1831), in HENRY IRVING TRAGLE, *THE SOUTHAMPTON REVOLT OF 1831* 432–33 (1971)).

55. See May, *supra* note 43, at 252.

56. *Id.* (quoting SUSAN R. GREGSON, *NAT TURNER: REBELLIOUS SLAVE* 29 (2003)).

57. See Hillman, *supra* note 43, at 16; Act of Mar. 15, 1832, ch. 22, 1832 Va. Acts. 20. It is notable, however, that before the Virginia House of Delegates passed the law, legislators debated slavery on the House floor, and while the delegates ultimately decided to maintain the institution of slavery, agreement was not unanimous. Hillman, *supra* note 43, at 14–16; see also Act of Dec. 23, 1833, § 5, 1833 Ga. Laws 226, 226–28 (“[N]o person of colour, whether free or slave, shall be allowed to preach to, exhort or join in any religious exercise, with any persons of colour, either free or slave, there being more than seven persons of colour present.”).

58. See Act of Mar. 15, 1832, 1832 Va. Acts. 20, 20; May, *supra* note 43, at 252.

59. See May, *supra* note 43, at 252–53. There had also been prior attempts to restrict religious worship and expression of Black people in South Carolina, although some had been unsuccessful. See *id.* at 250, 253–54.

people's participation in religious practice and expression.<sup>60</sup> In *American Slave Code in Theory and Practice*, abolitionist William Goodell wrote about the status of the enslaved person, stating "The Slave, being held as a Chattel, is held by a tenure which excludes any legal recognition of his rights as a thinking and religious being."<sup>61</sup>

Southern legislators sought to curtail all instruction of and by Black people because they feared that Black people would be exposed to abolitionist literature that may incite cause for revolt.<sup>62</sup> Fearing that Black people "would have placed in their hands . . . 'documents, books, and papers,' inculcating insubordination and rebellion,"<sup>63</sup> Southern legislators sought to extinguish thoughts of freedom among the Black population through laws mandating Black illiteracy.<sup>64</sup> Thus, South Carolina legislators campaigned to ban religious education and literacy among the Black population.<sup>65</sup> Lawmakers argued that religious scriptures in the hands of the enslaved population were dangerous because biblical messages of equality could be used to advocate for emancipation.<sup>66</sup> These restrictions, however, were not entirely uncontested in South Carolina, as prohibitions on Black religious participation conflicted with the regional history where, prior to statehood, English settlers had established the practice of teaching the Bible and worshipping alongside Black people.<sup>67</sup> Nonetheless, the South Carolina legislature enacted religious and literacy restrictions.<sup>68</sup> Moreover, South Carolina was not the only state where the move to restrict literacy among the Black population was contested. Opposition to Black literacy and other freedoms was not unanimous even among Southern legislators.<sup>69</sup> However, the antiliteracy proponents

60. May, *supra* note 43, at 237; see also *The Slave Experience: Religion*, PBS: THIRTEEN, <https://www.thirteen.org/wnet/slavery/experience/religion/history2.html> [https://perma.cc/ENU4-PSB7] (last visited Apr. 8, 2025); *Illegal To Preach*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, <https://www.searchablemuseum.com/illegal-to-preach> [https://perma.cc/338U-5TMV] (last visited Apr. 8, 2025) (listing Alabama, District of Columbia, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, and Virginia as states that restricted religious activity by Black people).

61. GOODELL, *supra* note 37, at 251.

62. See NYE, *supra* note 42, at 71–72; GOODELL, *supra* note 37, at 297–302. But see MORRIS, *supra* note 47, at 347–48 (pointing out that often statutes forbidding literacy among Black individuals were not enforced and that the high rate of illiteracy among enslaved people was a "result of the indifference of whites toward teaching slaves to read and write combined with the exhaustion or resignation of the slaves as of the laws against teaching. . . . The law was much more important in controlling slaves' movements than their minds").

63. NYE, *supra* note 42, at 71 (quoting S. Presbyterian, *Ought Our Slaves Be Taught To Read?*, 18 DE BOW'S REV. 52, 52 (1855)).

64. *Id.*

65. May, *supra* note 43, at 237.

66. *Id.* at 253–54; see also JANET DUTSMAN CORNELIUS, *WHEN I CAN READ MY TITLE CLEAR* 42 (1991).

67. May, *supra* note 43, at 253.

68. *Id.* at 253–54.

69. See Hillman, *supra* note 43, at 14; May, *supra* note 43, at 254; NYE, *supra* note 42, at 122, 136. Virginia House Delegate Henry Berry passionately advocated against laws imposing illiteracy among the Black population and argued instead for gradual emancipation, warning that no number of despotic laws could prevent a revolt of the enslaved population. Henry Berry, Delegate, Va. House of Delegates, *On the Abolition of Slavery* 3 (Jan. 20, 1832) (transcript available at <https://archive.org/details/speechofhenryber1832ber/> [https://perma.cc/TY4N-S8X6]). Berry proclaimed:

overwhelmingly succeeded. According to Goodell, Kentucky was the only state in the antebellum South where academic instruction of the enslaved population was not prohibited, but Black literacy was still an anomaly within the state.<sup>70</sup> Goodell wrote, “[i]f slaves [were to be] educated, it must involve some outlay on the part of the master. . . . It is inconsistent with our knowledge of human nature to suppose that he will do this for them.”<sup>71</sup> In an interview from the Federal Writers’ Project of the Works Progress Administration, a New Deal agency which collected narratives of formerly enslaved individuals,<sup>72</sup> John W. Fields stated, “[o]ur ignorance was the greatest hold the South had on us.”<sup>73</sup>

## 2. The White Man and the Enslaver as Violent Enforcers of the Slave Codes

As will be discussed in Section III, a distinguishing feature of the state is its monopoly on the authority to use violence. While the state as an entity cannot impart violence, it can delegate this authority to certain actors to execute violent enforcement. Through a combination of legal measures, Southern states delegated this authority to white civilians, enabling them to use violence against the Black population to uphold and sustain the institution of slavery.

While the earliest slave codes in the South did not specify the laws’ enforcers, subsequent codes explicitly placed the right and duty of enforcement on the white Southern population as a whole.<sup>74</sup> Later provisions of the slave codes requested, and in some instances required, Southern whites take action to police Black people.<sup>75</sup> The expectation to police the Black population already existed for plantation owners; however, the codes legally extended control over the Black population beyond the boundaries of the plantation to any place and to any white person.<sup>76</sup> Financial rewards

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Pass as severe laws as you will, to keep these unfortunate creatures in ignorance, it is in vain, unless you can extinguish that spark of intellect which God has given them. . . . Sir, we have, as far as possible closed every avenue by which light might enter their minds; we have only to go one step further—to extinguish the capacity to see the light, and our work would be completed; they would then be reduced to the level of the beasts of the field, and we should be safe; and I am not certain that we would not do it; if we could find out the necessary process . . . .

*Id.*

70. GOODELL, *supra* note 37, at 323–24.

71. *Id.* at 301 (quoting the Presbyterian Synod of Kentucky, 1834).

72. Norman R. Yetman, *The WPA and the Slave Narrative Collection: The WPA and Americans’ Life Histories*, LIBR. OF CONG., <https://www.loc.gov/collections/slave-narratives-from-the-federal-writers-project-1936-to-1938/articles-and-essays/introduction-to-the-wpa-slave-narratives/wpa-and-the-slave-narrative-collection/> [https://perma.cc/KH6L-56HA] (last visited Apr. 8, 2025).

73. “*I Was Not Sent to School — Never*”: *The Pursuit of Learning by African Americans Before the Civil War*, NAT’L HUMANS. CTR. 1 (2007), <https://nationalhumanitiescenter.org/pds/maai/identity/text8/slavefree.pdf> [https://perma.cc/7ER8-QCK5]. However, Mr. Fields’s statement that “[i]t was the law that if a white man was caught trying to educate a negro slave, he was liable to prosecution entailing a fine of fifty dollars and a jail sentence” suggests that there was some type of antiliteracy law or ordinance in Kentucky. *Id.*

74. See SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 17–18, 26, 34 (2001) (illustrating how laws such as Virginia’s 1669 law, North Carolina’s laws, and South Carolina’s 1690 and 1696 laws all engaged civilians in the capture of runaway slaves).

75. *Id.* at 38.

76. See GOODELL, *supra* note 37, at 122–27; Keri Leigh Merritt, *Private, Public, and Vigilante Violence in Slave Societies*, AAIHS: BLACK PERSPECTIVES (Nov. 17, 2016) [hereinafter Merritt, *Private Violence*],

incentivized white civilians to execute the codes.<sup>77</sup> While Southern lawmakers eventually instituted so-called slave patrols specifically for their enforcement,<sup>78</sup> the feature of enforcement by private white citizens was never extinguished from slave code provisions.<sup>79</sup> Goodell explained that “[s]ubmission is required of the Slave, not to the will of the Master only, but to the will of all other White Persons.”<sup>80</sup> For example, in Virginia the militia commander could direct all white men to come to Sunday service armed to suppress a possible revolt or attack.<sup>81</sup> Until emancipation, white Southern society maintained that the preservation of the system of slavery and the control of enslaved people was the righteous duty of every Southern citizen.<sup>82</sup>

White people had the legal authority to enforce the code and faced little consequence for using violent methods of enforcement. The law rendered Black people, whether free or enslaved,<sup>83</sup> largely defenseless against any white person.<sup>84</sup> For example, it was extremely rare for an enslaver to face prosecution for injuring an enslaved Black person.<sup>85</sup> On the other hand, while the enslaved had no form of legal recourse, the enslaver possessed legal recourse for injury to an enslaved person in the

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<https://www.aaihs.org/private-public-and-vigilante-violence-in-slave-societies/>  
[<https://perma.cc/3SZ9-QMMD>].

77. See HADDEN, *supra* note 74, at 16–18 (South Carolina law); *id.* at 25–28 (Virginia law); *id.* at 33 (North Carolina law). Provisions rewarded anyone for capturing and returning those who fled plantations, meaning that at times Native Americans or even Black people were employed to hunt down a runaway. See *id.* at 15, 34.

78. See HADDEN, *supra* note 74, at 19; Reichel, *supra* note 51, 51–52 (discussing slave patrols as precursors to police in the South).

79. HADDEN, *supra* note 74, at 39.

80. GOODELL, *supra* note 37, at 305 (quoting GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 96–97 (1827)).

81. HADDEN, *supra* note 74, at 31.

82. *Id.* at 6, 38.

83. GOODELL, *supra* note 37, at 122 (“At every step, the slave will have been found wholly subject to his master, dependent upon him, and defenseless. . . . ‘incapable of being injured’. . . .”); *id.* at 156–57 (discussing Southern society’s and courts’ adoption of the Roman civil code on the subject of slavery which authorized an enslaver to kill those whom he enslaved, as “the life of the slave must be in his master’s keeping” (quoting STROUD, *supra* note 80, at 97) (citing OLIVER H. PRINCE, DIGEST OF THE LAWS OF THE STATE OF GEORGIA 450 (1822))).

84. See *id.* at 305–07. An exception to this principle that a Black person cannot defend themselves existed in Virginia where “such negro or mulatto was wantonly assaulted, and lifted his or her hand in his or her self-defense.” *Id.* at 306 (emphasis omitted). Although Goodell pointed out that since a Black individual could not give testimony in court or lodge a complaint, “it is not easy to see how the exception can be made available for his or her benefit.” *Id.* at 307.

85. See *id.* at 131, 174–75. In terms of homicide, Goodell explained that while the deliberate and malicious murder of an enslaved person was then criminal across Southern states, prosecution of a white person was difficult to conceive considering that it would require testimony of a white witness. See *id.* at 177–96. He then recounted the dearth of criminal prosecutions for the murder of an enslaved individual. *Id.* at 187–96. However, in *American Mobbing*, David Grimsted suggests that there were some prosecutions for the killings of enslaved persons. DAVID GRIMSTED, AMERICAN MOBBING, 1828–1861: TOWARD CIVIL WAR 168 (1998). These prosecutions were few and far between and convictions led sometimes to fines, instead of serious punishments. *Id.* at 168–69. However, there are records of few cases where those convicted received jailtime or were executed. *Id.*

form of civil recovery for harm to their “property,” highlighting the tyranny of the system.<sup>86</sup>

Beyond the enslaver, Southern whites used extralegal mob violence to silence expression, preclude Black Thought, and prevent unregulated assembly among the Black population. While proslavery mob activity also existed in the North, mob activity was actually prosecuted by Northern states.<sup>87</sup> Additionally, Northern mobs were comparatively less violent since they targeted property rather than people.<sup>88</sup> Mob activity in the Northern states also dissipated much earlier. By the late 1830s, proslavery mob activity in the North decreased as public opinion shifted and coalesced around the importance of freedom of speech and press.<sup>89</sup> In the South, however, government authorities continued to encourage mob violence throughout the antebellum period.<sup>90</sup>

Southern mob violence targeting Black people generally took the form of crowds of whites converging to execute mass violence on a Black individual or a group of Black persons in response to perceived threats of rebellion.<sup>91</sup> However, the Southern system of mob violence could also be more structured, as vigilance committees began to form in the 1830s and persisted throughout the antebellum period.<sup>92</sup> Citing a need to protect themselves and their society, vigilance committees, which were also called committees for public safety, functioned as extralegal means of enforcing rules and dispensing punishments for violations of the slave codes—as well as for expressions of abolitionist sentiment by whites, as discussed in Part I.B.2.<sup>93</sup> Although not official state

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86. GOODSELL, *supra* note 37, at 124.

87. NYE, *supra* note 42, at 97, 158–72; MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 131–34, 182–93, 216–18 (2000); *see also* GRIMSTED, *supra* note 85, at 3, 7, 14, 35.

88. GRIMSTED, *supra* note 85, at 13–14.

89. CURTIS, *supra* note 87, at 227–29 (explaining that abolitionist Elijah Parish Lovejoy’s killing in 1837 as he defended his press from a mob in Alton, Illinois “crystallized the fear that slavery would destroy free speech and civil liberty in the North as well as in the South. . . . After Lovejoy’s death and the firestorm of criticism it evoked, fewer in the North supported suppression of abolition”).

90. Eaton, *supra* note 36, at 352–53.

91. *See* GRIMSTED, *supra* note 85, at 137.

92. Jonathan Obert & Eleonora Mattiacci, *Keeping Vigil: The Emergence of Vigilance Committees in Pre-Civil War America*, 16 PERSPS. ON POLS. 600, 601 (2018); *see also* GRIMSTED, *supra* note 85, at 135–76 (discussing whites’ irrational fear of Black insurrection).

93. *See* JAMES ELBERT CUTLER, LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES 90–136 (1905) (discussing the use and prevalence of lynching in the United States between 1830 and 1860); NYE, *supra* note 42, at 139–76 (discussing the activities of vigilance committees in the South); GRIMSTED, *supra* note 85, at 114–34; HADDEN, *supra* note 74, at 168–70. Vigilance committees were not created by legal instrument or proclamation, and there were no particular rules for their formation or structure. Nevertheless, the usual process consisted of concerned and well-respected white Southerners gathering at a town or city meeting to discuss perceived threats to the institution of slavery. NYE, *supra* note 42, at 142. Committee members were chosen from the upper echelons of Southern society. They included plantation owners, members of the judiciary, high-ranking militiamen and other influential Southerners. *Id.*; Keri Leigh Merritt, *Private, Public, and Vigilante Violence in Slave Societies, Part 3*, AAIHS: BLACK PERSPECTIVES (Jan. 11, 2017), <https://www.aaihs.org/private-public-and-vigilante-violence-in-slave-societies-part-3/> [<https://perma.cc/9PVH-JGTW>] (“Defenders of the groups proudly claimed that the committees were filled with affluent gentlemen, ‘to the manor born.’”). Committees ranged in size anywhere from six to sixty members. NYE, *supra* note 42, at 142.

actors, these groups' activities were endorsed by the government officials who considered these committees vital to the Southern project of preserving slavery.<sup>94</sup> While vigilance committees also meted out punishment for offenses unrelated to the issue of slavery, such as for gambling and theft,<sup>95</sup> much of the work of these committees in the South was focused on suppressing any progress on the question of abolition, particularly rebellion by the enslaved population, antislavery beliefs, and any collaboration or congregation between Black and white people.<sup>96</sup> Materials discussing mob violence in the South often do not differentiate between traditional mobs and vigilance committees but refer to both interchangeably. Nevertheless, what is clear is that these mobs, whether organized as vigilance committees or not, operated "with little fear that legal authorities would question their action[s]."<sup>97</sup> This impression was justified since accounts suggest that mob activity was overwhelmingly unopposed, and instead praised, by Southern officials.<sup>98</sup> While vigilance committees mostly targeted white people perceived as noncompliant on the topic of slavery, when these committees did target Black people, their violence was particularly egregious.<sup>99</sup>

Regardless of whether they were slaveholders, mobbers, or part of vigilance committees, Southern whites treated their Black victims with exceptional barbarity. The Federal Writers' Project interviews contain accounts detailing enslaved Black people's experiences, including being beaten, whipped, and even having their fingers cut off by their enslavers after being discovered with books or for attempting to learn to read or write.<sup>100</sup> In addition to policing by enslavers, slave patrols routinely ransacked enslaved people's living quarters looking for books, papers, writing utensils, and any

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94. See Merritt, *Private Violence*, *supra* note 76.

95. See CUTLER, *supra* note 93, at 99–101, 108; Obert & Mattiacci, *supra* note 92, at 606–10.

96. See NYE, *supra* note 42, at 142; CUTLER, *supra* note 93, at 105–06; ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 104 (2006); Eaton, *supra* note 36, at 361 (discussing a Mississippi newspaper article expressing approval for the mob execution of white men believed to have participated in the planning of an uprising of enslaved people as expressing the sentiment of the community). Conversely, in the North, some vigilance committees worked for antislavery causes. See TASLITZ, *supra* note 96, at 174 ("Vigilance committees to protect fugitive slaves from recapture and to meet their basic needs for food and clothing formed in Boston, Syracuse, New York, Harrisburg, and Detroit, among other locations. Although African Americans initially took the lead in almost all these instances, whites often joined later . . .").

97. GRIMSTED, *supra* note 85, at 14.

98. *Id.*

99. Mobs were particularly sadistic when directed at Black victims. GRIMSTED, *supra* note 85, at 101. The number of Black victims killed during proclaimed "insurrections" are demonstrative of white fear rather than Black action. There are 448 deaths reported from these white fears, where 447 of those deaths were at the hands of mobs. *Id.* at 135. The hysteria of white fear led to accounts of these murders saying that Black people were "killed as examples," and even the governor of South Carolina admitted that some of the victims killed were innocent. *Id.* at 143. While progressive whites faced backlash for supporting antislavery movements, in the Reconstruction era, white backlash worked to reimpose white dominance through egregious violent repression, such as the Colfax riot that killed as many as 150 Black churchgoers on Easter Sunday. EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 29–44 (3d ed. 2017), <https://ejl.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-110121.pdf> [https://perma.cc/X239-8TD2].

100. NAT'L HUMANS. CTR., *supra* note 73, at 1–3 (providing accounts of George Thompson, John W. Fields, Hal Hutson, Arnold Gragston, Andrew Simms, and others).



materials that suggested literacy.<sup>101</sup> Patrollers also sought to police potential gatherings, scouring enslaved people's dwellings and any building or location believed to be frequented by Black people.<sup>102</sup>

Free Black people were also subject to Southern white people's unfettered wrath.<sup>103</sup> Despite their status as free individuals, Black people did not have access to forms of legal redress since they were barred from testifying in a court of law or bringing lawsuits against a white person.<sup>104</sup> As a result, Black victims could not access any legal recourse without a white witness to testify on their behalf.<sup>105</sup> Just like the legal restrictions affecting Black freedom, Black suffering increased dramatically when whites believed—whether rationally or not—that there were heightened threats of rebellion.<sup>106</sup>

As an example, Nat Turner's Rebellion resulted in increased violence toward Black people across multiple Southern states.<sup>107</sup> Fifty people believed to be actual participants in the rebellion were killed—either during the rebellion or executed after conviction.<sup>108</sup> Additionally, white mobs lynched an estimated forty more Black individuals in the Southampton area who were not connected to the rebellion.<sup>109</sup> An eyewitness reported that even after any threat of rebellion had dissipated “[m]any [were] killed every day . . . . Men were tortured to death, burned, maimed, and subjected to nameless atrocities.”<sup>110</sup> Specific examples of these atrocities included burning off an innocent man's foot in an attempt to coerce a confession and dragging another man (whose ear had been sliced off) behind a horse into the woods.<sup>111</sup>

Extrajudicial executions extended beyond the Southampton area to other areas of Virginia as well as to other states.<sup>112</sup> About a month after Nat Turner's Rebellion, a rumor of a Black insurrection led to the torture and gruesome death of many Black people in areas of North Carolina with dense Black populations.<sup>113</sup> The rumor was likely fabricated and intended to incite further violence on innocent Black people.<sup>114</sup>

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101. HADDEN, *supra* note 74, at 106. Patrollers needed neither warrant nor consent from anyone to enter and search the living quarters. *Id.* at 130–31. This was an exception to the warrant requirements of the time. *See id.* at 130; GOODELL, *supra* note 37, at 324 (“In North Carolina, the ‘patrols’ were ordered to ‘search every negro house for books or prints of any kind. Bibles and hymn books were particularly mentioned.’” (emphasis omitted) (quoting THEODORE DWIGHT WELD, *AMERICAN SLAVERY AS IT IS* 51 (1839))).

102. HADDEN, *supra* note 74, at 108.

103. GOODELL, *supra* note 37, at 295–99.

104. *Id.* at 293.

105. *Id.* at 296.

106. *See supra* Part I.A.1 for a discussion of the trend in rising legal restrictions.

107. Christopher Klein, *10 Things You May Not Know About Nat Turner's Rebellion*, HISTORY, <https://www.history.com/news/10-things-you-may-not-know-about-nat-turners-rebellion> [<https://perma.cc/C496-45AC>] (Mar. 6, 2025).

108. *Id.* (explaining that Nat Turner hid for two months but was eventually captured, convicted, and executed by hanging); *see also* GRIMSTED, *supra* note 85, at 136.

109. Klein, *supra* note 107.

110. GRIMSTED, *supra* note 85, at 137.

111. *Id.*

112. *Id.* at 137–38.

113. *Id.* at 139–40.

114. *Id.*

Nonetheless, mobs brutally beat and tortured Black people indiscriminately.<sup>115</sup> Under threat of violence, white mobbers coerced Black people to confess to an insurrection plot they likely never even contemplated.<sup>116</sup> Many Black people died as a result of the beatings before providing coerced confessions or incriminating others.<sup>117</sup> Ultimately, sixty-five Black victims were captured based on these accusations.<sup>118</sup> But more was still to come as unsubstantiated rumors of Black insurgence continued to circulate throughout the South, inciting growing fear among white people and violence upon the Black population.<sup>119</sup>

Another instance of widespread mob violence in Virginia was spurred by unsubstantiated reports that Black insurrectionists had killed several white families in Sampson County, North Carolina.<sup>120</sup> The rumor alleged that the rest of the Black population had armed itself to rescue the captured insurrection leaders and thereafter planned to burn down the town.<sup>121</sup> In response to these allegations, a white mob of about six hundred people set out to defend against the concocted plot to destroy Wilmington.<sup>122</sup> Local officials presented the two alleged insurrection leaders in town custody and released them to the white mob who proceeded to shoot them, behead them, and elevate their heads on spikes as exemplars of the consequences that befell rebellious Black people.<sup>123</sup> The mob then continued “[r]ounding up its batch of suspects and whipping them into confessed insurrectionists.”<sup>124</sup> Ultimately, white Southerners’ fear of insurrection resulted in the death of several Black people either through extralegal mob violence or prosecutions following coerced confessions.<sup>125</sup> The victims’ actual involvement in insurrectionist plots was irrelevant to white Southerners who used public executions and illustrative beheadings “to repress all doubts about slavery.”<sup>126</sup>

The pattern of mass killings of Black people in response to rumors of insurrection—mostly extrajudicially by mobs, but also through legal prosecutions—continued throughout the South until the Civil War.<sup>127</sup> For example, five years before the war, after insurrection rumors spread in Tennessee, a brutal mob captured enslaved individuals and coerced “identical” confessions from them.<sup>128</sup> Thereafter, mobs hung and beat to death an estimated fifty-seven Black individuals, along with one white man painted black, and proceeded to parade the streets with their

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115. *Id.*

116. *Id.*

117. *Id.* at 140.

118. *Id.* at 139–40.

119. *Id.* at 140.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 137–38, 140–43.

126. *Id.* at 143.

127. *See generally id.* at 135–78.

128. *Id.* at 173.

victims' heads hoisted on poles.<sup>129</sup> That same year in Texas, suspicions that the Black population was responsible for a string of serious fires led to several Black deaths.<sup>130</sup> While the exact number of deaths remains unknown, conservative accounts suggest that at least seventy-five people were either hung or burned alive due to suspicions surrounding the Texas fires.<sup>131</sup>

*B. The Mission To Suppress Black Freedom Led to the Suppression of Noncompliant Whites*

1. Antebellum Laws Restricting Activities and Expression by White People

Although certainly to a lesser degree, antebellum laws also limited white freedom and expression that challenged the institution of slavery. This included restrictions on the circulation of antislavery materials, the academic instruction of Black people, and, in more extreme cases, the expression of any antislavery sentiment.

Southerners committed to upholding the institution of slavery were threatened by abolitionist rhetoric and fought violently to suppress it, even if it meant turning on other white people.<sup>132</sup> Southern rhetoric categorized abolitionists as enemies to the Southern way of life.<sup>133</sup> Abolitionists were characterized as bloodthirsty; “bloodless hypocrit[e]s;” “fiend-like fanatics;” “wretches, who delight in confusion and disorder, merely with a view to plunder;” and “sickly sentimentalists.”<sup>134</sup> They were accused of being “driven by uncontrolled lust for [B]lacks and ‘unnatural tastes’ that were ‘peculiarly disgusting’ in women.”<sup>135</sup> According to Southerners, the goal of the abolitionist was “to accomplish the extermination of the white population of the South.”<sup>136</sup>

The dissemination of antislavery literature was forbidden throughout the antebellum South, regardless of who was circulating the information. Around the 1830s, the Northern antislavery movement began calling in earnest for the immediate abolition of human bondage and engaging in efforts to expose, through publications in various abolitionist newspapers, the evils of the institution of slavery.<sup>137</sup> When these abolitionist publications reached the South, legislatures moved to forbid their circulation out of fear that these works would instigate Black rebellion.<sup>138</sup>

Following the discovery of an abolitionist pamphlet titled *Appeal to the Colored Citizens of the World* in Southern cities, lawmakers in Georgia, North Carolina, and

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129. *Id.* at 173–74.

130. *Id.* at 174–75.

131. *Id.* at 175.

132. See, e.g., Act of Mar. 15, 1832, 1832 Va. Acts 20; William Y. Chin, *Domestic Counterinsurgency: How Counterinsurgency Tactics Combined with Laws Were Deployed Against Blacks Throughout U.S. History*, 3 U. MIA. RACE & SOC. JUST. L. REV. 31, 39 (2013); NYE, *supra* note 42, at 140.

133. GRIMSTED, *supra* note 85, at 114–16.

134. *Id.* at 114.

135. *Id.*

136. *Id.*

137. CURTIS, *supra* note 87, at 126–27. See generally NYE, *supra* note 42, at 94–138.

138. NYE, *supra* note 42, at 96–97; see also Eaton, *supra* note 36, at 355.

Virginia enacted laws prohibiting the circulation of antislavery literature.<sup>139</sup> Authored in 1829 by David Walker—a free Black man living in Boston—the *Appeal* addressed Black people directly, advocating for the revolt of enslaved people against their “masters” and identifying white Christians as hypocrites for failing to oppose slavery.<sup>140</sup> After finding the pamphlet among enslaved people in Georgia,<sup>141</sup> legislators swiftly passed a law punishing by death the “circulation [by anyone] of pamphlets of evil tendency among [its] domestics.”<sup>142</sup> After discovering that the *Appeal* had reached the hands of free Black individuals in North Carolina, the legislature passed “an Act to prevent the circulation of seditious publications,” which criminalized “the circulation of books and papers that tended to ‘excite insurrection, conspiracy[,] or resistance in the slaves or free [Black people] and persons of colour within the State.’”<sup>143</sup> Likewise, lawmakers in Virginia passed a law forbidding the writing, printing, publishing, or circulating of any materials “advising persons of colour . . . to make insurrection, or to rebel.”<sup>144</sup>

A subsequent national mail campaign by the American Antislavery Society (“Antislavery Society”), a Northern abolitionist organization, renewed fears of Black revolt, prompted Southern states that did not already have laws forbidding antislavery materials to enact them, and encouraged other Southern states to strengthen their existing restrictions on abolitionist materials.<sup>145</sup> Notably, the Antislavery Society’s materials targeted Southern white elites in attempts to convince them of the inherent wrongs of slavery.<sup>146</sup> The materials did not advocate for any type of rebellion and,

139. CURTIS, *supra* note 87, at 121.

140. See *David Walker’s Appeal*, PBS: AFRICANS IN AMERICA, <https://www.pbs.org/wgbh/aia/part4/4h2931.html> [<https://perma.cc/Z7HK-MD3L>] (last visited Apr. 8, 2025); CURTIS, *supra* note 87, at 121; Hillman, *supra* note 43, at 12 (“Can the American preachers appeal unto God, the Maker and Searcher of hearts, and tell him, with the Bible in their hands, that they make no distinction on account of men’s colour? Can they say, O God! Thou knowest all things—thou knowest that we make no distinction between thy creatures, to whom we have to preach thy Word? Let them answer the Lord; and if they cannot do it in the affirmative, have they not departed from the Lord Jesus Christ, their master?” (quoting DAVID WALKER’S APPEAL TO THE COLORED CITIZENS OF THE WORLD 44 (Peter P. Hinks ed., 2000))).

141. JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790-1860, at 66 (1943). The *Appeal* was delivered from Massachusetts to the South by “sailors and ship’s [sic] officers sympathetic to the [antislavery] cause.” *David Walker*, PBS: AFRICANS IN AMERICA, <https://www.pbs.org/wgbh/aia/part4/4p2930.html> [<https://perma.cc/JA3Z-T9BV>] (last visited Apr. 8, 2025).

142. CURTIS, *supra* note 87, at 121. After the Savannah mayor failed to convince the Boston mayor to punish Walker, the state of Georgia offered a \$10,000 reward to anyone who would capture and deliver Walker to the state. *Id.*; *Perspectives: David Walker*, NAT’L UNDERGROUND R.R. FREEDOM CTR., <https://freedomcenter.org/voice/perspectives-david-walker/> [<https://perma.cc/NQF5-KJSH>] (last visited Apr. 8, 2025).

143. FRANKLIN, *supra* note 141, at 68.

144. Act of Mar. 15, 1832, 1832 Va. Acts 20. South Carolina’s statute criminalized circulation of “any paper with intent to disturb the peace and the security of the state, in relation to the slaves thereof.” NYE, *supra* note 42, at 67.

145. See NYE, *supra* note 42, at 66. Kentucky was the only Southern state that did not enact laws restricting or banning abolitionist expression. *Id.* at 140. However, it still used other laws forbidding “incendiary” publications to prevent circulation of abolitionist literature. *Id.* at 65–66; see also Jennifer Rose Mercieca, *The Culture of Honor: How Slaveholders Responded to the Abolitionist Mail Crisis of 1835*, 10 RHETORIC & PUB. AFFS. 51, 51–52 (2007).

146. CURTIS, *supra* note 87, at 159–60; see also NYE, *supra* note 42, at 54–55, 62, 98–100.

unlike Walker's *Appeal*, they were not addressed or intended for the Black population.<sup>147</sup> Nevertheless, Southern leaders remained convinced that the circulation of Northern abolitionist newspapers "encouraged slave revolts" and responded quickly by tightening or enhancing their laws to suppress antislavery literature.<sup>148</sup> In Louisiana, the law restricted not only writings but also any "language in any public discourse" or even "private conversation[s], or making use of any signs or actions having a tendency to produce discontent among the free-colored population, or insubordination among the slaves," and punished such conduct and speech by imprisonment or death.<sup>149</sup>

Additionally, Southerners' fears of a literate Black population meant that whites were prohibited from teaching Black people to read or write. State and local governments passed laws that punished whites for providing reading materials or instruction to Black people.<sup>150</sup> In his memoir *Good Words*, John Sella Martin—who had been enslaved in North Carolina, Georgia, and Alabama—explained how the white boys, that were his playmates as a child, refused his requests to teach him how to read by saying that "the law would not allow it."<sup>151</sup> Goodell described how the law prohibited white Christian South Carolinians from teaching at schools originally established for the religious education of Black children.<sup>152</sup> Additionally, Goodell wrote about how Southern clergy and missionaries who taught Black children at

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147. See NYE, *supra* note 42, at 102 (describing an ex-Southern slaveholder who justified antislavery publications and antislavery efforts as a means to avoid future revolts).

148. NYE, *supra* note 42, at 66, 96. For example, the Virginia legislature passed a more targeted statute that specifically directed postmasters to inform judicial officers about any "incendiary" correspondence, burn it publicly, and arrest any recipient whose intent was to assist the aims of abolition. *Id.* at 66. At the federal level, the Antislavery Society's mailings resulted in a congressional debate about whether control of the mail systems should be in the hands of the federal or the state government. *Id.* at 63. Prompted by President Andrew Jackson, South Carolina Senator and prior Vice President John C. Calhoun, a staunch supporter of both slavery and state's rights, drafted an unsuccessful bill that would have given states the power to block anyone within their territory from receiving correspondence "touching the subject of slavery." *Id.*; see also CURTIS, *supra* note 87, at 164–66; John C. Calhoun, CLEMSON UNIV., <https://www.clemson.edu/about/history/bios/john-c-calhoun.html> [<https://perma.cc/JEE7-SWXL>] (last visited Apr. 8, 2025). Instead, after much debate, which expanded beyond suppression of antislavery sentiment to more general questions of freedom of speech, Congress enacted a law which forbade a postmaster's interception of "any letter, package, pamphlet, or newspaper with intent to prevent the delivery of the same." NYE, *supra* note 42, at 64–65. However, the federal law was largely ignored in the South in both words and practice. *Id.* at 68–69.

149. GOODELL, *supra* note 37, at 322–23 (quoting Kent's Commentaries, vol. ii, part iv, p. 254).

150. See GOODELL, *supra* note 37, at 319–23 (describing the laws in South Carolina, North Carolina, Virginia, Georgia, and Louisiana, as well as a Savannah ordinance that penalized whites for providing instruction to Black individuals). It is important to distinguish, however, that whatever punishments these laws conferred on whites, they were generally much less severe than those meted out to Black individuals. While whites usually received fines or sometimes jail time, Black people received corporal punishment. See GOODELL, *supra* note 37, at 321–22 (Georgia and North Carolina laws); NYE, *supra* note 42, at 71 (describing the Georgia law which fined a white person who taught a Black person to read, but added whipping to the fine when a Black person violated the provision); CORNELIUS, *supra* note 66, at 42.

151. NAT'L HUMANS. CTR., *supra* note 73, at 5; see also GOODELL, *supra* note 37, at 321 (explaining that codes criminalized providing an enslaved person a book or academic instruction, often excepting religious instruction specifically permitted by an enslaver).

152. GOODELL, *supra* note 37, at 383–84; CORNELIUS, *supra* note 66, at 42.

“sabbath-schools” limited themselves to “oral instruction” to avoid the use of any books in compliance with the law.<sup>153</sup>

## 2. White Southern Society’s Violent Enforcement of Antebellum Laws on Noncompliant Whites

Despite laws across Southern states forbidding the circulation of antislavery materials, actual criminal prosecutions of whites for violations of these provisions were challenging, and verdicts were often lenient.<sup>154</sup> In response to the inefficacy of the legal process, Southerners took the law into their own hands by engaging in mob violence aimed at silencing all perceived opponents to the institution of slavery.<sup>155</sup>

As mentioned in Part I.A.2, Southern vigilance committees largely targeted whites perceived as recalcitrant on the issue of slavery. Even when their targets were other whites, vigilance committees operated with the support of the white Southern society<sup>156</sup> and with the blessing of Southern state and local government.<sup>157</sup> South Carolina Governor James Hammond aptly represented the sentiment of Southern officials when he asserted that abolitionists should be “silenced in but one way—Terror—Death” and stated, in praise and defense of vigilance committees’ activities, that “[a] group formed to suppress abolitionists . . . was ‘no more a mob than a rally of shepherds to chase a wolf out of their pastures.’”<sup>158</sup> Vigilance committees viciously and efficiently administered punishments effectively functioning as pseudo-lawmakers, prosecutors, judges, and juries.<sup>159</sup> They enacted their own directives, which were enforced with the government’s endorsement and collusion.<sup>160</sup> Based on these directives or previously existing law, vigilance committees summarily brought accusations, issued orders, provided rewards for an offender’s capture, adjudged guilt or innocence, and dispensed punishments.<sup>161</sup>

Considering the summary nature of the committee’s actions, claims that someone was an abolitionist or plotting an uprising of the enslaved population were often incorrect, mistaken, or an overstatement.<sup>162</sup> However, accuracy mattered little to the project of suppression of antislavery sentiment. “Only a small portion of the ‘abolition’ victims of Southern mobs had any claim to inclusion in that [abolitionist] group, even if

153. GOODELL, *supra* note 37, at 324.

154. NYE, *supra* note 42, at 141.

155. *Id.*; see also Eaton, *supra* note 36.

156. See NYE, *supra* note 42, at 144; Merritt, *Private Violence*, *supra* note 76 (asserting that vigilance committees also targeted the activities of poor whites).

157. See GRIMSTED, *supra* note 85, at 14; NYE, *supra* note 42, at 141, 151; Eaton, *supra* note 36, at 370. Southerners did not fear official action or even questioning for their mob activity; in the South, there is record of a single criminal (unsuccessful) prosecution of the mob member who led the fatal beating of an enslaved person in Mississippi. GRIMSTED, *supra* note 85, at 14.

158. NYE, *supra* note 42, at 141 (first quoting ELIZABETH MERRITT, JAMES HENRY HAMMOND 1807-1864, at 32 (1923); and then quoting James Henry Hammond, *Gov. Hammond’s Letters on Slavery*, 7 DE BOW’S REV. 490, 491 (1849)).

159. *Id.* at 144.

160. See *id.*

161. *Id.* at 143-44.

162. See GRIMSTED *supra* note 85, at 115-34.

one uses the vaguest possible membership requirement.”<sup>163</sup> In reality, few of those whites accused of being opposed to slavery were actually committed to the cause of abolition.<sup>164</sup> Vigilance committees targeted individuals based on the scantest suspicion of having antislavery sentiment. For example, vigilance committees went after individuals who may have discreetly held antislavery views, might be critical of some aspect of Southern society, were observed interacting amicably with an enslaved person, made some assertion supporting equality among the races, or questioned the utility of the institution of slavery.<sup>165</sup>

Vigilance committees’ punishments for whites perceived to hold abolitionist sentiments ranged from fines, head shaving, face blackening, whippings, tarring and feathering, and banishment from the state.<sup>166</sup> For whites believed to be involved in plotting an insurrection among the enslaved population, punishments could amount to death by hanging and other egregious methods of execution.<sup>167</sup> Throughout the South, vigilance committees employed this violent punishment system to suppress the words and actions of white people perceived to be opposed to the slavery institution. In South Carolina, after complaining that slavery “caused white workers to be looked down on,” an Irishman was initially jailed and then released to a mob (which included the city’s mayor and a jail official) that dragged him “through muddy streets” while observers yelled various threats and intermittently assaulted him.<sup>168</sup> The man was eventually stripped, tarred, and feathered.<sup>169</sup> In Virginia, a man was lashed thirty times for suggesting that “black men have, in the abstract, a right to their freedom.”<sup>170</sup> Even outside of the antebellum South, when a Kansas lawyer claimed that proslavery forces stole a local election, a vigilance committee made an example out of him by shaving half his head, tarring and feathering him, and taking him around town offering to “sell him for \$1.”<sup>171</sup> For some white people, the vigilance committees’ violent acts ended not only in humiliation and abuse but in death. In Mississippi, amid fears of an impending uprising among the enslaved population, a vigilance committee hunted, whipped, and hung two steam doctors for suspicions of inciting rebellion.<sup>172</sup> That same year in Mississippi, many other whites suffered a similar fate at the hands of mobs.<sup>173</sup>

In addition to patrolling antislavery sentiments, vigilance committees were also essential in preventing the dissemination of Northern abolitionist materials in the

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163. *Id.* at 115.

164. *See id.*

165. *Id.* at 115–16.

166. *See* NYE, *supra* note 42, at 143, 146, 148; Merritt, *Private Violence*, *supra* note 76; CUTLER, *supra* note 93, at 100–06, 111–14, 118; Eaton, *supra* note 36, at 358–70.

167. Eaton, *supra* note 36, at 358–70.

168. GRIMSTED, *supra* note 85, at 119.

169. *Id.*

170. CUTLER, *supra* note 93, at 92.

171. GRIMSTED, *supra* note 85, at 250.

172. *Id.* at 149; *see also* Headsman, 1835: Joshua Cotton and William Saunders, *Steam Doctors*, EXECUTED TODAY (July 4, 2017), <https://www.executedtoday.com/2017/07/04/1835-joshua-cotton-and-william-saunders-steam-doctors/> [https://perma.cc/V8CU-QSAN]; *Steam Doctor*, OXFORD ENG. DICTIONARY, <https://www.oed.com/search/dictionary/?scope=Entries&q=steam+doctor> [https://perma.cc/89ZN-VJJC] (last visited Apr. 25, 2025) (defining steam doctors as “one who treats diseases [holistically] by vapour-baths”).

173. *See* GRIMSTED, *supra* note 85, at 146.

South. South Carolinians did not wait for the legislature to enact laws prohibiting the Antislavery Society's mailing campaign coming from the North. Before the government responded,<sup>174</sup> white Charlestonians had already broken into the city's post office and burned any abolitionist materials they discovered.<sup>175</sup> Subsequently, a committee of twenty-one private citizens, headed by the former governor, was formed at a mass meeting and charged "to inspect the mails in cooperation with the postmaster and to burn any objectionable matter."<sup>176</sup> Other towns and cities across the South similarly appointed committees to surveil postage for antislavery mail and other publications from the North.<sup>177</sup> This response in the South led to much debate among federal lawmakers who eventually enacted a federal law forbidding the interception of correspondence.<sup>178</sup> Nevertheless, Southern postmasters continued to enforce inconsistent state laws in collaboration with vigilance committee members in violation of the federal statute.<sup>179</sup> In collusion with vigilance committees, postmasters seized and destroyed abolitionist mailings and other materials they considered offensive to the institution of slavery.<sup>180</sup>

The actions of vigilance committees were widely publicized (with approval) by Southern newspapers,<sup>181</sup> with the objective of inciting fear among the population. Nothing "quiet[ed] all questioning of slavery . . . more effectively than knowledge that at almost any time, for almost any reason, almost any punishment might come."<sup>182</sup> Reports about vigilance committees' arbitrary use of violence played a vital role in cementing fear among white Southerners that any critique or even discussion on the topic of slavery could have fatal consequences.<sup>183</sup> As is discussed further in Section III, the threat of violence—even when not carried out—can be sufficient to enforce compliance. "Terror as political system works best when rules are vague, and Southern mobs acted often and arbitrarily enough to make terror visible and felt."<sup>184</sup>

## II. CONTEMPORARY CIVILIAN ENFORCERS ON THE STREETS

The near weekly reports of police killings and attacks on people of color in 2020, which culminated in the brutal murder by asphyxiation of George Floyd in May of that

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174. See *supra* Part I.B.1 for a discussion of the legislature's actions.

175. GRIMSTED, *supra* note 85, at 22. When the post offices in South Carolina initially received the Antislavery Society's mailings in July 1834, their postmasters did not know how to respond and sought the guidance of the Postmaster General, who sought direction from President Andrew Jackson, himself an enslaver. CURTIS, *supra* note 87, at 155–56. President Jackson ordered the Postmaster to refrain from delivering the "inflammatory papers" to any Southerners except those recipients who were subscribers and were willing to be publicly exposed as party to the "wicked plan of exciting the [Black people] . . . to massacre." *Id.* at 156.

176. NYE, *supra* note 42, at 56.

177. *Id.* at 56–58.

178. *Id.* at 63–65.

179. *Id.* at 65–70.

180. *Id.*

181. See GRIMSTED, *supra* note 85, at 16–18; Eaton, *supra* note 36, at 361.

182. GRIMSTED, *supra* note 85, at 117.

183. See *id.*

184. GRIMSTED, *supra* note 85, at 117.



year, reignited the BLM movement that had begun in 2013.<sup>185</sup> The crowds coming out to the streets in protest were staggering, with fifteen to twenty-six million people protesting in the first three weeks after George Floyd's murder.<sup>186</sup> Unlike prior BLM movements, in 2020 white people responded to these unjust killings of Black individuals in significantly increased numbers than ever before.<sup>187</sup> However, for other white people, these public demonstrations denouncing racism amounted to an existential threat to their brand of America.<sup>188</sup> Despite the passage of time, some BLM opponents were willing and eager to engage in violence to defend established racial hierarchies like Southern whites were during the antebellum period.<sup>189</sup>

The double homicide of BLM protest attendees at the hands of a young vigilante, Kyle Rittenhouse, whose armed presence was embraced by law enforcement officers, is emblematic of the phenomenon of police-enabled white militant vigilantism.<sup>190</sup> White supremacy and right-wing groups often attended racial justice protests as police reinforcements to confront and silence BLM activists.<sup>191</sup> This form of vigilantism can be traced to the violence executed by whites against the Black population and noncompliant whites to stifle Black liberation in the antebellum South.<sup>192</sup> While the violent enforcement of laws that impact the speech, expression, and assembly of Black and Brown people and also noncompliant whites is no longer the duty of the "good white citizen" like it was in the pre-Civil War South,<sup>193</sup> right-wing vigilantism is enabled and encouraged today by complicit law enforcement and the praise of certain conservative political actors. This Section first recounts conservative government actors' simultaneous disdain for racial justice activists and glorification of vigilante violence against them, as well as how conservative lawmakers have effectively permeated this sentiment into legislative agendas. It then illuminates these vigilantes' connections to the white supremacist movement and their cozy relationship as auxiliaries to police at racial justice protests.

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185. See Jimenez, *supra* note 2.

186. Buchanan et al., *supra* note 3.

187. See *id.*; Erin B. Logan, *White People Have Gentrified Black Lives Matter. It's a Problem*, L.A. TIMES (Sept. 8, 2020, 12:32 PM), <https://www.latimes.com/opinion/story/2020-09-04/black-lives-matter-white-people-portland-protests-nfl> [<https://perma.cc/6JZ7-VBBX>]; Jennifer Chudy, *Many Whites Are Protesting with Black Lives Matter. How Far Will Their Support Go?*, WASH. POST (June 15, 2020), <https://www.washingtonpost.com/politics/2020/06/15/many-whites-are-protesting-with-black-lives-matter-how-far-will-their-support-go/>.

188. See Mike Gonzalez & Katharine Gorka, *How Cultural Marxism Threatens the United States—and How Americans Can Fight It*, HERITAGE FOUND. (Nov. 14, 2022), <https://www.heritage.org/progressivism/report/how-cultural-marxism-threatens-the-united-states-and-how-americans-can-fight> [<https://perma.cc/LJ2Z-8GJH>].

189. See *supra* Section I.

190. See *infra* note 226 and accompanying text for further discussion on this topic.

191. See *infra* note 226 and accompanying text.

192. See *supra* Parts I.A.2, I.B.2.

193. See *supra* Parts I.A.2, I.B.2.

A. *Political Conservative's Disdain of BLM and Praise for Militant Civilian Enforcers*

Despite the record number of diverse protesters on the streets, institutions promising to foster reflection and change, and the millions of #BlackOutTuesday Instagram squares,<sup>194</sup> not all Americans supported the BLM movement in 2020.<sup>195</sup> Instead, the combination of race and political party affiliation made a difference on whether an individual likely opposed or was suspicious of the BLM movement. Overwhelmingly, white conservatives expressed explicit disapproval of the BLM movement. The online research service Civiqs conducted polls of over five hundred thousand registered voters that provide a snapshot of respondents' sentiments towards the BLM movement at the time of Jacob Blake's shooting.<sup>196</sup> On the date of the shooting, 49% of respondents supported the BLM movement, 38% opposed it, and the remainder were apathetic or unsure.<sup>197</sup> Controlling for race and party affiliation, however, suggests a split centered around the intersection of race and politics, with 80% of white and 59% of Black Republicans opposed to the BLM movement, compared to 2% each of white and Black Democrats.<sup>198</sup> A 2021 University of Illinois Chicago survey conducted by political scientist Alexandra Filindra reinforced this demarcation, finding 81% of Republican respondents were cynical about the movement and expressed agreement with the assertion that "BLM does not support democracy, [but] only care[s] about power," while only 8% of Democrats agreed with this statement.<sup>199</sup> Without equating opposition to the BLM movement with support of

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194. Paul Monckton, *This Is Why Millions of People Are Posting Black Squares on Instagram*, FORBES (June 2, 2020, 11:14 AM), <https://www.forbes.com/sites/paulmonckton/2020/06/02/blackout-tuesday-instagram-black-squares-blackouttuesday-theshowmustbepaused/?sh=5a8d88f62794> [<https://perma.cc/BWU3-LB69>].

195. The division continues today and the amount of general support for BLM has actually waned since 2020. See *National Black Lives Matter Poll*, CIVIQS, [https://civiqs.com/results/black\\_lives\\_matter?uncertainty=true&annotations=true&zoomln=true&net=true](https://civiqs.com/results/black_lives_matter?uncertainty=true&annotations=true&zoomln=true&net=true) [<https://perma.cc/3PBP-5AHZ>] (last visited Apr. 25, 2025); Russell Contreras, *Support for Black Lives Matter Movement Lowest in 3 Years*, AXIOS (June 14, 2023), <https://www.axios.com/2023/06/14/black-lives-matter-support-blm-survey> [<https://perma.cc/K6GP-RBW8>]. The change is connected to a decrease in support by the white population, with Black and Latine support remaining stable. Juliana Menasce Horowitz, Kiley Hurst & Dana Braga, *Support for the Black Lives Matter Movement Has Dropped Considerably from Its Peak in 2020*, PEW RSCH. CTR. 8 (June 14, 2023), [https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2023/06/ST\\_2023.06.14\\_BLM-Support\\_Report.pdf](https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2023/06/ST_2023.06.14_BLM-Support_Report.pdf) [<https://perma.cc/CX65-44VF>].

196. See *National Black Lives Matter Poll*, *supra* note 195. For the sake of simplicity and the theme of this Article, I have focused on only Black and white respondents, to the exclusion of Latine respondents. I have also excluded consideration of how gender affects the results. See generally Kim Parker, Juliana Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RSCH. CTR. (June 12, 2020), [https://www.pewresearch.org/wp-content/uploads/sites/20/2020/06/PSDT\\_06.12.20\\_protest\\_fullreport.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2020/06/PSDT_06.12.20_protest_fullreport.pdf) [<https://perma.cc/S8F9-K92E>] (analyzing generally the diverse reception trends of the BLM movement across racial and ethnic demographics).

197. *National Black Lives Matter Poll*, *supra* note 195.

198. *Id.*

199. Alexandra Filindra, Andrea Manning, Isaac Pollert & Sebastian Tobon-Palma, *American Identity, Guns, and Political Violence in Black and White: A Report Based on a New National Survey*, UNIV. OF ILL. CHI. 12–13 (June 14, 2021), <https://pols.uic.edu/wp-content/uploads/sites/273/2021/06/Guns-and-Violence-in>

violence against these activists, the survey also indicated that conservative respondents were more likely to tolerate civilians who do harm to protesters.<sup>200</sup> Republican respondents were generally supportive of laws that immunize civilians who shoot at protesters deemed a threat either to life or property, with 75% of them approving of these laws as opposed to 17% of Democrats.<sup>201</sup> Moreover, Republicans (40%) were also more likely than Democrats (8%) to think that it is appropriate for civilians to carry firearms to protests.<sup>202</sup>

Like the classic chicken or the egg dilemma, it is difficult to discern whether conservative base voters' opposition to the BLM movement and tolerance for vigilantism was spurred by Republican leadership or whether party leadership sowed the seeds of fear for political gain. In any event, conservative political actors have been vocal about their disdain for the BLM movement activists, characterizing the group as a white-hating existential threat to America.<sup>203</sup> Further, conservative politicians have engaged in legislative efforts that simultaneously work to silence racial justice protesters and immunize civilians who violently confront them. Considering the responses to the polls discussed above, the actions of right-wing civilian enforcers may be a reflection of the sentiments of the majority of the particularly white Republican Party.

There are myriad examples of conservative political actors using virulent rhetoric against the BLM movement activists.<sup>204</sup> Some of this rhetoric certainly mirrors the tone, even if not the content, of assertions made by Southern political figures about abolitionists in the antebellum era.<sup>205</sup> For example, President Donald Trump and those

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-America-Report-6.17.21.pdf [https://perma.cc/3WQN-7F5G]. When considering race, 37% of white and 15% of Black respondents agreed with the statement. *Id.*

200. *Id.* at 8.

201. *Id.* at 3, 8–9. This fifty-eight-point disparity is significant and mirrors the fifty-nine point difference between Republican and Democrat support for stand your ground laws in general. *Id.* at 8–9.

202. *Id.* at 10.

203. *See infra* note 231.

204. *E.g.*, Laura Barrón-López & Alex Thompson, *Facing Bleak November, Republicans Look To Stoke BLM Backlash*, POLITICO (Aug. 10, 2020, 4:30 AM), <https://www.politico.com/news/2020/08/10/elections-republicans-black-lives-matterbacklash-389906> [https://perma.cc/P5B9-8JAN]; Katie Benner, *Barr Told Prosecutors To Consider Sedition Charges for Protest Violence*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/16/us/politics/william-barr-sedition.html>; Joshua Nelson, *Trump Rips Athletes Kneeling for Anthem, Calls Black Lives Matter a 'Marxist Group'*, FOX NEWS (Aug. 5, 2020, 10:07 AM), <https://www.foxnews.com/media/trump-anthem-kneeling-black-lives-matter-marxist> [https://perma.cc/68ZT-YGFH]; Letter from Paul Stuber to Joel Briscoe, Rep., Utah State Legislature (July 3, 2020), <https://le.utah.gov/publicweb/BRISCJK/PublicWeb/43194/43194.html> [https://perma.cc/TXA8-7722]; Sakshi Venkatraman & Brooke Sopelsa, *'Transgender Black Marxists' Seek To Overthrow U.S., Trump Backer Michele Bachmann Says*, NBC NEWS (Sept. 9, 2020, 6:18 PM), <https://www.nbcnews.com/feature/nbc-out/transgender-black-marxists-seek-overthrow-u-s-trump-backer-michele-n1239683> [https://perma.cc/HF76-ZEP6]; Brent Johnson, *N.J. Senator Calls Black Lives Matter Movement 'Marxist,' Says Systemic Racism Is 'Evil Lie'*, NJ.COM (Sept. 17, 2020, 12:21 PM), <https://www.nj.com/politics/2020/09/nj-senator-calls-black-lives-matter-movement-marxist-says-systemic-racism-is-evil-lie.html> [https://perma.cc/WE6V-MX52].

205. *Compare* Nye, *supra* note 42 (describing how Southern politicians negatively characterized the abolitionist movement while praising vigilantes), with Rachel Scott & Will Steakin, *Trump Again Stokes Racial Divides, a Reality at Odds with His Efforts To Court Black Voters*, ABC NEWS (May 30, 2020, 4:47 PM),

in his inner circle have called BLM protesters “thugs,”<sup>206</sup> “anarchists,” “looters,” “radical[ists],” “Marxists,”<sup>207</sup> “terrorists,” “killers,” and “a symbol of hate.”<sup>208</sup> They have asserted that “[t]hese are people who hate white people” and want to “destroy the ‘nuclear family.’”<sup>209</sup> Republican politicians have equated the BLM movement with the Ku Klux Klan.<sup>210</sup> At the 2020 Republican National Convention (RNC), speakers vilified the BLM movement and by association the Democratic Party, which at that time was much more supportive of the movement.<sup>211</sup> Republican politicians

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<https://abcnews.go.com/Politics/trump-stokes-racial-divides-reality-odds-efforts-court/story?id=70957826> [https://perma.cc/2EKN-JTLC].

206. Scott & Steakin, *supra* note 205.

207. Emma Bowman, *In Fourth of July Remarks, Trump Attacks ‘Radical Left,’* NPR (July 4, 2020, 9:53 PM),

<https://www.npr.org/2020/07/04/887346956/in-fourth-of-july-remarks-trump-attacks-radical-left> [https://perma.cc/2TNK-5439]; Nelson, *supra* note 204.

208. Barrón-López & Thompson, *supra* note 204.

209. *Id.* Republican politicians not only reignited many of the insults that GOP leaders had leveled against prior BLM demonstrations preceding 2020, but also used similar insults made against prior civil rights movements. Safia Samee Ali, *‘Not by Accident’: False ‘Thug’ Narratives Have Long Been Used To Discredit Civil Rights Movements*, NBC NEWS (Sept. 27, 2020, 9:19 AM), <https://www.nbcnews.com/news/us-news/not-accident-false-thug-narratives-have-long-been-used-discredit-n1240509> [https://perma.cc/K6VA-TWZS]. While most of the insults hurled at BLM activists are self-explanatory (albeit unwarranted), the “Marxist” label likely requires further explanation. Right-wing individuals and conservatives have increasingly used the term “Marxism” or alternatively “cultural Marxism” disparagingly to characterize any ideology, including BLM and Critical Race Theory (CRT), that they believe seeks to “toppl[e] power structures of patriarchy and white privilege.” See Andrew Lynn, *Cultural Marxism*, HEDGEHOG REV., <https://hedgehogreview.com/issues/the-evening-of-life/articles/cultural-marxism> [https://perma.cc/6EBX-5RWJ] (last visited Apr. 8, 2025). Whereas traditional Marxist theory advances that to create a more just society the proletariat (working class) should rise up and take control of the means of production from the bourgeoisie (capitalist ruling class), conservatives claim that cultural Marxists view these oppressor-oppressed dynamics via a cultural identity lens and thus advocate for those oppressed due to their identity (namely Black, Brown, LGBTQ+, and people who identify as women) to overthrow their oppressors (namely white males). See *id.*; Samuel Moyn, *The Alt-Right’s Favorite Meme Is 100 Years Old*, N.Y. TIMES (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/opinion/cultural-marxism-anti-semitism.html>; Gonzalez & Gorka, *supra* note 188 (exemplifying The Heritage Foundation’s take on cultural Marxism and how it applies to BLM and CRT).

210. See Rep. Rick Becker Says Deleted Post Equating Black Lives Matter to KKK Referred to “Organization,” Not Broader Movement, KX NEWS (Aug. 25, 2020, 5:30 PM), <https://www.kxnet.com/news/rep-rick-becker-says-deleted-post-equating-black-lives-matter-to-klk-referred-to-organization-not-broader-movement/> [https://perma.cc/7FUL-UKMX]; Celine Castronuovo, *Oklahoma State GOP Lawmaker Compares Black Lives Matter to KKK on House Floor*, THE HILL (Apr. 30, 2021, 4:26 PM), <https://thehill.com/homenews/state-watch/551238-oklahoma-state-republican-lawmaker-compares-black-lives-matter-to-klk-on/> [https://perma.cc/N5L9-L9GS].

211. Many Democratic leaders were prominent at the 2020 BLM demonstrations and embraced the movement’s racial justice values at the 2020 DNC. See Melanie Zanona & Sarah Ferris, *‘This Is the Same Damn Fight’: Lawmakers Join Protesters as Congress Stuck in Paralysis*, POLITICO (June 3, 2020, 9:50 PM), <https://www.politico.com/news/2020/06/03/protests-congress-lawmakers-299291>

[https://perma.cc/U7F6-2HQK]; Annie Linskey, *Hoping To Harness Activist Energy, Democrats Embrace Black Lives Matter*, WASH. POST, Aug. 18, 2020, at A11. The DNC’s agenda included a moment of silence in memoriam of George Floyd and featured as speakers the families of those killed by police. *Id.* However, Democratic leadership has carefully delineated that they only support peaceful activism and has consistently drawn the line at what are considered BLM’s more radical demands like defunding the police. Camille Caldera, *Fact Check: Democrats Have Condemned Violence Linked to BLM, Anti-Fascist Protests, USA*

condemned the Democratic Party for supporting “the vengeful mob that seeks to destroy our way of life” and presented the BLM movement as an existential threat to the nation.<sup>212</sup> Additionally, the Republican Party proposed that President Trump’s reelection was the only way to respond to this threat because, in the president’s own words, he would, “protect law-abiding Americans [instead of] . . . giv[ing] free rein to violent anarchists and agitators and criminals who threaten . . . citizens. . . . [T]his election will decide whether we will defend the American way of life or allow a radical movement to completely dismantle and destroy it.”<sup>213</sup>

While these outrageous claims about the BLM movement are false, it is worth exploring why the movement is so threatening to conservative political actors and certain white people. At a basic level, Republicans, who identify as “the party of law and order,” perceive the BLM movement’s critique of police and calls to defund the police as dangerous to the Party’s platform.<sup>214</sup> While some may claim that identifying with “law and order” is inconsistent with support for laws that immunize vigilante civilians from the harm they cause racial justice protesters, others may argue that for some conservative political actors, the preservation of established systems of

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TODAY (Aug. 13, 2020, 2:08 PM), <https://www.usatoday.com/story/news/factcheck/2020/08/13/fact-check-democrats-have-condemned-violence-linked-protests/3317862001/> [<https://perma.cc/82NC-XCVS>]; Chelsey Cox, *Fact Check: Quotes from Democratic Leaders About Riots, Unrest Taken Out of Context*, USA TODAY (Feb. 14, 2021, 7:01 PM), <https://www.usatoday.com/story/news/factcheck/2021/01/15/fact-check-quotes-democratic-leaders-riots-out-context/6588222002/> [<https://perma.cc/2SW3-77TN>].

212. NBC News, *Turning Point USA Founder: Trump Is the ‘Bodyguard of Western Civilization,’* YOUTUBE, 1:28–1:32 (Aug. 24, 2020), <https://www.youtube.com/watch?v=gpJcIrKVDFk> [<https://perma.cc/8FWX-7MUB>]; see also Michael Finnegan, *Giuliani Attacks Black Lives Matter at RNC, Says Biden Threatens Mayhem in Streets*, L.A. TIMES (Aug. 27, 2020, 8:11 PM), <https://www.latimes.com/politics/story/2020-08-27/republican-convention-giuliani-trump> [<https://perma.cc/Z9XE-UWYF>]; Zeke Miller & Jill Colvin, *GOP Convention Defends Police as Racial Tension Rises Anew*, WHYY (Aug. 26, 2020), <https://whyy.org/articles/watch-live-2020-republican-national-convention-night-three/> [<https://perma.cc/3KTP-VSNQ>]; Steve Peoples, Michelle L. Price & Zeke Miller, *Watch: Night One of Republican Convention Showcases Rising Stars, Dark Warnings*, WGBH (Aug. 25, 2020), <https://www.wgbh.org/news/politics/2020-08-24/watch-night-one-of-republican-convention-showcases-rising-stars-dark-warnings> [<https://perma.cc/YAB8-AQNB>].

213. Glenn Thrush, *Full Transcript: President Trump’s Republican National Convention Speech*, N.Y. TIMES (Sept. 1, 2020), <https://www.nytimes.com/2020/08/28/us/politics/trump-rnc-speech-transcript.html>; see also Ali, *supra* note 209. Not every Republican politician has made inflammatory statements about BLM. Mitt Romney from Utah, Will Hurd from Texas, and Fred Upton from Michigan each showed support for the movement by marching with BLM activists in the summer of 2020. See Christopher Brito, *Mitt Romney Marches with Black Lives Matter Protestors, Becoming First GOP Senator To Join Them*, CBS NEWS (June 8, 2020, 12:13 PM), <https://www.cbsnews.com/news/mitt-romney-marches-black-lives-matter-protest-washington-dc/> [<https://perma.cc/JZ94-XUYV>]; *March for Racial Justice, Unity Held in Benton Harbor and St. Joseph*, WSJM (June 13, 2020), <https://www.wsjm.com/2020/06/13/march-for-racial-justice-unity-held-in-benton-harbor-and-st-joseph/> [<https://perma.cc/X6S2-PBDM>].

214. See REPUBLICAN NAT’L COMM., REPUBLICAN PLATFORM 2016, at dedication, 39 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL%5B1%5D-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf) [<https://perma.cc/EGX8-56J5>] (describing the Republican platform as dedicated to the “men and women . . . of our law enforcement” and calling itself the “party of law and order”). But see Catherine Rampell, *The GOP Surrenders Any Claim To Being the ‘Law and Order Party,’* WASH. POST (Aug. 11, 2022), <https://www.washingtonpost.com/opinions/2022/08/11/republicans-no-longer-party-law-order/> [<https://perma.cc/89LS-C6G6>] (providing commentary contesting the Republican party’s self-identification as the law and order party).

hierarchy—which the BLM movement challenges—supersedes the demands of the law.<sup>215</sup> Importantly for BLM supporters as well as their opponents, the critiques the BLM movement poses are not limited to policing, but extend to racism and economic inequality throughout the American system of hierarchy. The BLM movement evolved from voicing frustration at police brutality on the Black population to a larger movement that demands freedom from anti-Black violence across all government institutions and American society.<sup>216</sup> As movement activists explain, a commitment to Black emancipatory politics extends beyond scrutinization of the carceral state to “access to food, shelter, and mobility”<sup>217</sup> and includes “racial justice AND economic justice.”<sup>218</sup> When discussing the BLM movement, Distinguished Professor in Black Studies Barbara Ransby has remarked that “any serious analysis of racial capitalism must recognize that to seek liberation for [B]lack people is also to destabilize inequality in the United States at large, and to create new possibilities for all who live here.”<sup>219</sup> This destabilization is threatening for powerful whites who fear their interests will suffer from such realignment in the same way that threats to the system of slavery were threatening to the Southern plantation and political elite.<sup>220</sup> However, this fear of destabilization can extend beyond the powerful whites (who benefit the most from the current system) to lower income whites who may already feel disadvantaged, use Black people and other people of color as political scapegoats, and fear further disempowerment<sup>221</sup>—like the poor whites during antebellum times that feared the labor market competition from a free Black population.<sup>222</sup>

Conservative political actors have also glorified the violent suppression of racial justice activists.<sup>223</sup> For example, in 2020, the RNC featured a speech by the McCloskeys, the white suburban St. Louis couple who were charged with felonies after video surfaced of them on their front lawn pointing firearms at unarmed BLM activists who marched past their home.<sup>224</sup> As another example, in 2020, President Trump posted

215. See Shane Burley, *Trump and the GOP Are Using Kyle Rittenhouse in Last-Ditch 2020 Voter Strategy*, NBC NEWS: THINK (Oct. 4, 2020, 4:30 AM), <https://www.nbcnews.com/think/opinion/trump-gop-are-using-kyle-rittenhouse-last-ditch-2020-voter-nena1241940> [https://perma.cc/L7ZU-2ZXH].

216. See Cullors & Moore, *supra* note 30; Cullors, *supra* note 30.

217. Barbara Ransby, *The Class Politics of Black Lives Matter*, DISSENT, Fall 2015, at 31, 31 (quoting Patrice Cullors, one of the three organizers who pioneered the BLM hashtag).

218. *Id.* (quoting Black Youth Project 100’s founder Charlene Carruthers). See also Zackary Okun Dunivin, Harry Yaojun Yan, Jelani Ince & Fabio Rojas, *Black Lives Matter Protests Shift Public Discourse*, PROC. NAT’L ACAD. SCI. U.S., Mar. 3, 2022, at 1, 10 (explaining how the BLM movement has progressively evolved “beyond police killings, even beyond policing, to the social structures that create and maintain the conditions of Black life in the United States. . . . The broad discursive response to the George Floyd protests shows it is a mistake to characterize BLM as fundamentally, or exclusively, concerned with policing or even the carceral state. Positions taken by BLM organizers and rhetoricians . . . make clear that policing is only one facet of Black emancipatory politics under the banner of BLM”).

219. Ransby, *supra* note 217, at 31.

220. Eaton, *supra* note 36, at 354.

221. See Glenn Lee Starks, *Explaining Antithetical Movements to the Black Lives Matter Movement Based on Relative Deprivation Theory*, 53 J. BLACK STUD. 346, 346 (2022).

222. Eaton, *supra* note 36, at 354.

223. Finnegan, *supra* note 112.

224. Joan E. Greve, *St Louis Couple Who Threatened Black Lives Matter Protesters Speak at RNC*, GUARDIAN (Aug. 25, 2020, 12:31 AM), <https://www.theguardian.com/us-news/2020/aug/24/st-louis>

several tweets endorsing members of a multi-vehicle pro-Trump caravan that drove through BLM demonstrations in Oregon, tear gassing and shooting paintballs at protesters, as “GREAT PATRIOTS!”<sup>225</sup> When asked about Rittenhouse in 2020, President Trump did not condemn his actions.<sup>226</sup> During the presidential debate between President Trump and then-candidate Joe Biden in September 2020—while discussing the issue of right-wing groups’ violence against racial justice protesters—moderator Chris Wallace asked if President Trump was willing “to condemn white supremacists and militia groups and to say that they need to stand down and not add to the violence in a number of these cities as we saw in Kenosha and as we’ve seen in Portland.”<sup>227</sup> After claiming “almost [all violence] I see is from the left-wing not from the right[-]wing,” President Trump professed that he wanted “peace” and was “willing to do anything,” but when asked specifically to condemn the Proud Boys—the paramilitary group that most frequently appear armed at BLM protests—President Trump said, “Proud Boys, stand back and stand by.”<sup>228</sup> President

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-couple-rnc-mark-patricia-mccloskey [https://perma.cc/M6EF-3ATR]; see also Finnegan, *supra* note 212; Alex Thomas, *The Right Has a Vigilante Fetish*, NEW REPUBLIC (June 9, 2023), https://newrepublic.com/article/173108/daniel-penny-republican-vigilante-fetish [https://perma.cc/BP5C-822Y].

225. Allan Smith, *Trump Praises Right-Wing Supporters, Rails Against Protesters After Unrest in Portland*, NBC NEWS (Aug. 31, 2020, 5:46 AM), https://www.nbcnews.com/politics/donald-trump/trump-rails-against-protesters-following-unrest-portland-n1238808 [https://perma.cc/7969-BGYG]; see also Charlotte Klein, *After Two Fatal Shootings, Trump Just Keeps Fanning the Flames*, VANITY FAIR (Aug. 30, 2020), https://www.vanityfair.com/news/2020/08/after-two-fatal-shootings-trump-just-keeps-fanning-the-flames [https://perma.cc/V8JJ-PHW4]; Keith A. Spencer, *One Man Killed at Pro-Trump Caravan in Downtown Portland*, SALON (Aug. 30, 2020, 3:35 PM), https://www.salon.com/2020/08/30/one-man-killed-at-pro-trump-caravan-in-downtown-portland/ [https://perma.cc/3LFJ-5XT4].

226. Alana Wise, *Trump Defends Kenosha Shooting Suspect*, NPR (Aug. 31, 2020, 9:46 PM), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/08/31/908137377/trump-defends-kenosha-shooting-suspect [https://perma.cc/SH83-QRWJ]. President Trump stated that based on the video he watched, “it appeared th[at] [Rittenhouse] was acting in self-defense.” *Id.* Ultimately, the jury agreed with him, finding Rittenhouse not guilty based on a self-defense theory. See Melissa Chan, *In the Kyle Rittenhouse Trial, Self-Defense Took Center Stage*, TIME (Nov. 19, 2021, 6:55 PM), https://time.com/6120607/kyle-rittenhouse-self-defense/ [https://perma.cc/WDQ4-2R3S]; Becky Sullivan, *Why the Kyle Rittenhouse ‘Not Guilty’ Verdict Is Not a Surprise to Legal Experts*, NPR (Nov. 19, 2021, 9:42 PM), https://www.npr.org/2021/11/19/1057422329/why-legal-experts-were-not-surprised-by-the-rittenhouse-jurys-decision-to-acquit [https://perma.cc/F4LR-39QQ].

227. *September 29, 2020 Debate Transcript*, THE COMM’N ON PRESIDENTIAL DEBATES (Sept. 29, 2020), https://www.debates.org/voter-education/debate-transcripts/september-29-2020-debate-transcript/ [https://perma.cc/FB9X-PMYN].

228. *Id.*; see also Chaudhary & Richardson, *supra* note 17, at 98–99. Proud Boys founder Gavin McInnis has described the group as a “Western chauvinist fraternal order.” See Robert Mackey, *Neo-Fascist Proud Boys Exult Over Trump Telling Them To ‘Stand By,’ Not Stand Down*, INTERCEPT (Sept. 30, 2020, 4:16 AM), https://theintercept.com/2020/09/30/neo-fascist-proud-boys-exult-trump-telling-stand-not-stand/ [https://perma.cc/9HK9-5QKC]. McInnis has proudly declared that his group abides by the philosophy that violence is the solution to everything and has asserted, “We will kill you” and that his gang’s job is to “beat[] the shit out of these people” and for “the cops to turn a blind eye.” Vic Berger, *I Started This Gang Called the Proud Boys*, YOUTUBE (Oct. 16, 2018), https://www.youtube.com/watch?v=G95qjjQaNho [https://perma.cc/B6LE-352T]. After the debate, President Trump claimed that he did not know who the Proud Boys were and ultimately denounced the group in a Fox News interview. Jeffrey Cook, *GOP Candidate’s Former Campaign Chief: Thank God for Proud Boys*, ABC NEWS (Oct. 15, 2020, 8:14 PM), https://abcnews.go.com/Politics/gop-candidates-campaign-chief-god-proud-boys/story?id=73636943

Trump's debate reply was criticized by many as a failure to denounce right-wing and white supremacist violence at protests and instead legitimize a hate group.<sup>229</sup> The Proud Boys, however, delighted at President Trump's response, posted on social media in response to the President's statement: "YES SIR, PROUD BOYS STANDING BY."<sup>230</sup> In addition to President Trump, other Republican leaders and lawmakers have praised or rubbed elbows with white supremacists, militias, and right-wing actors.<sup>231</sup>

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[https://perma.cc/LHK8-26T2]. However, President Trump's former attorney and confidant Michael Cohen disputed President Trump's claim of ignorance asserting instead that the Proud Boys are "Trump's army" and that the President knew what he was doing when he advised them to stand by. Charles Kaiser, *We Are Proud Boys Review: Chilling Exposé Illuminates Republicans' Fascist Turn*, GUARDIAN (Sept. 25, 2022, 2:00 AM), <https://www.theguardian.com/books/2022/sep/25/we-are-proud-boys-review-republicans-fascist-trump-andy-campbell> [https://perma.cc/J86P-9N7Y]. Cohen instead stated, "when [President Trump] loses he's going to use [the Proud Boys] to try and keep control of power." *Id.*

229. John Haltiwanger, *Trump Has Repeatedly Been Endorsed by White Supremacist Groups and Other Far-Right Extremists, and They've Looked to Him as a Source of Encouragement*, BUS. INSIDER (Sept. 30, 2020, 3:59 PM), <https://www.businessinsider.com/trumps-history-of-support-from-white-supremacist-far-right-groups-2020-9> [https://perma.cc/XC3R-6UKD]; Alexander Burns, Jonathan Martin & Maggie Haberman, *G.O.P. Alarmed by Trump's Comments on Extremist Group, Fearing a Drag on the Party*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2020/09/30/us/politics/trump-debate-white-supremacy.html>; Craig Timberg & Elizabeth Dwoskin, *Trump's Debate Comments Give an Online Boost to a Group Social Media Companies Have Long Struggled Against*, WASH. POST (Sept. 30, 2020, 4:29 PM), <https://www.washingtonpost.com/technology/2020/09/30/trump-debate-rightwing-celebration/>. The Southern Poverty Law Center has designated the Proud Boys as a hate group. *Proud Boys*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys> [https://perma.cc/XVH3-KC6L] (last visited Apr. 8, 2025).

230. Mackey, *supra* note 228 (quoting another Proud Boys organizer's post: "Trump basically said to go fuck them up! this makes me so happy"); *see also* Meg Cunningham, *Extremist Group Relishes in Trump's Mention During Debate*, ABC NEWS (Sept. 30, 2020, 7:36 PM), <https://abcnews.go.com/Politics/extremist-group-relishes-trumps-mention-debate/story?id=73341826> [https://perma.cc/BGQ8-FEHM] (quoting online Proud Boys member accounts saying "this makes me so happy," and "well sir! we're ready!").

231. *See* Luke Broadwater & Matthew Rosenberg, *Republican Ties to Extremist Groups Are Under Scrutiny*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/2021/01/29/us/republicans-trump-capitol-riot.html> (Representatives Paul Gosar and Andy Biggs of Arizona, Representative Lauren Boebert of Colorado, Representative Marjorie Taylor Greene of Georgia, Representative Matt Gaetz of Florida); Kelly Weill & Will Sommer, *Republicans Are Adopting the Proud Boys*, DAILY BEAST (Oct. 17, 2018, 10:57 AM), <https://www.thedailybeast.com/republicans-are-adopting-the-proud-boys> [https://perma.cc/BZ33-RUKJ] (Representative Mario Diaz-Balart of Florida, Representative Devin Nunes of California, Republican operative Roger Stone); Cook, *supra* note 228 (Representative Lauren Boebert's former campaign manager Sherronna Bishop); Maggie Haberman & Alan Feuer, *Trump's Latest Dinner Guest: Nick Fuentes, White Supremacist*, N.Y. TIMES (Nov. 25, 2022), <https://www.nytimes.com/2022/11/25/us/politics/trump-nick-fuentes-dinner.html> (President Donald Trump); *AFPAC III: Elected Officials Support White Supremacist Event*, ANTI-DEFAMATION LEAGUE (Feb. 27, 2022), <https://www.adl.org/resources/blog/afpac-iii-elected-officials-support-white-supremacist-event> [https://perma.cc/6JW6-DPBT] (Marjorie Taylor Greene, Paul Gosar, Lieutenant Governor of Idaho Janice McGeachin, Arizona State Senator Wendy Rogers, Former Arizona Sheriff Joe Arpaio); Steven Monacelli, *White Nationalists Raid CPAC but Find Themselves Right at Home*, ROLLING STONE (Feb. 26, 2022), <https://www.rollingstone.com/politics/politics-features/cpac-afpac-nick-fuentes-marjorie-taylor-greene-1313210/> [https://perma.cc/LER6-554S]. There are certain Republican leaders like Liz Cheney, Mitt Romney, and former Secretary of State Mike Pompeo who have criticized their fellow GOP members for entertaining connections with white supremacists. Aaron Navarro & Robert Costa, *Marjorie Taylor Greene Downplays Speaking at a Conference Founded by White Nationalist*, CBS NEWS (Feb. 28, 2022, 7:38 AM), <https://www.cbsnews.com/news/marjorie-taylor-greene-cpac-nick-fuentes-afpac-white-nationalist/> [https://perma.cc/B9MB-ZNAN].



In the context of this rhetoric, conservative lawmakers have enabled vigilantism by championing legislation that silences racial justice activists and protects their armed civilian adversaries. From the 2020 protests through April 2025, over three hundred anti-protest bills were proposed in forty-five states and Congress.<sup>232</sup> While these laws do not explicitly state that they are intended to target the BLM movement or racial justice demonstrators,<sup>233</sup> their timing makes this conclusion uncontestable.<sup>234</sup> Common features of these anti-protest bills include imposing harsher penalties or mandatory jail time for protest-related criminal charges, expanding the range of conduct considered criminal, and enhancing the risks associated with protest activity.<sup>235</sup>

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232. *US Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/> [<https://perma.cc/2AWK-993E>] (last visited Apr. 8, 2025). This number excludes anti-protest bills introduced before the 2020 BLM protests ignited by George Floyd's murder and anti-protest bills aimed at protecting pipelines, often referred to as "critical infrastructure." As of April 8, 2025, fifty bills have successfully been enacted and forty are pending. *Id.*

233. Laws that expressly target a particular viewpoint would presumably fail First Amendment review. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (explaining that "[v]iewpoint discrimination is . . . an egregious form of content discrimination" and "is presumed impermissible" under the First Amendment); *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 891 (D.S.D. 2019) (accepting plaintiffs' argument that South Dakota's riot statutes violated the First Amendment); *Okla. State Conf. of the NAACP v. O'Connor*, 569 F. Supp. 3d 1145, 1153–54 (W.D. Okla. 2021) (finding a likelihood of success on the merits for a First Amendment challenge to organizational liability and street obstruction provisions of an Oklahoma riot statute); cf. Karl Etters, *Tallahassee and 8 Other Cities File Lawsuit Challenging HB 1 'Anti-Riot' Bill*, TALLAHASSEE DEMOCRAT (Nov. 16, 2021, 5:10 PM), <https://www.tallahassee.com/story/news/2021/11/16/tallahassee-8-other-cities-suing-state-over-hb-1-anti-riot-bill/8636987002/> [<https://perma.cc/ECM2-WUHW>] (plaintiffs challenging intrusion on home rule and local budget control); Brief of Plaintiffs-Appellees at 20, *Pernell v. Lamb*, No. 22-13992 (11th Cir. June 16, 2023) ("The district court correctly held that Florida's Stop W.O.K.E. Act impermissibly discriminates on the basis of viewpoint by seeking to suppress politically disfavored ideas."); Amended Complaint at 22, 35, *Black Emergency Response Team v. Drummond*, 737 F. Supp. 3d 1136 (W.D. Okla. 2024) (No. CIV-21-1022) (arguing that Oklahoma's anti-CRT law is viewpoint discriminatory).

234. Often, proponents of anti-protest legislation have been pretty transparent about their motivations. In Iowa, proponents of S.F. 342 asserted that the anti-protest legislation was necessary following the BLM demonstrations. Paul Brennan, *Iowa Legislature Passes Bill that Increases Penalties for Some Protest-Related Offenses, Protects Drivers Who Hit Protesters from Lawsuits*, LITTLE VILL. (May 19, 2021), <https://littlevillagemag.com/iowa-legislature-passes-bill-increasing-protest-penalties/> [<https://perma.cc/9EYW-8M46>]. In Texas, Governor Greg Abbott asserted that the anti-protest law H.B. 9 was part of a concerted effort with other new laws to support law enforcement officers, Paul Livengood, *Gov. Abbott Signs Handful of Bills Designed To 'Back the Blue,'* KVUE (June 1, 2021, 6:48 PM), <https://www.kvue.com/article/news/politics/texas-legislature/abbott-signs-back-the-blue-legislation-hb1900-hb9-hb2366-sb-23/269-2100a0e2-f121-4b1e-b024-0c077f1c2edf> [<https://perma.cc/H95Z-AFZF>], suggesting that H.B. 9 targets to-be activists protesting police brutality, see H.B. 9, 87th Leg., Reg. Sess. (Tex. 2021). In Tennessee, proponents of a bill targeting camping on state property signed the law amid encampments of racial justice protesters surrounding the state capitol. Kelly Mena, *New Tennessee Law Penalizes Protesters Who Camp on State Property with Felony and Loss of Voting Rights*, CNN (Aug. 22, 2020, 8:50 PM), <https://www.cnn.com/2020/08/22/politics/tennessee-felony-camping-law-right-to-vote/index.html> [<https://perma.cc/6BC9-NBQ5>]. Furthermore, research shows that these anti-protest bills receive significant support from police unions and are often sponsored by legislators who are current or prior law enforcement officers. Connor Gibson, *Police Are Lobbying for State Anti-Protest Bills*, GRASSROOTBEER INVESTIGATIONS (May 9, 2021), <https://grassrootbeer.substack.com/p/police-lobbying-anti-protest-laws-2021> [<https://perma.cc/CD4Q-2PZU>].

235. See, e.g., H.B. 1508, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (enacted) (increasing penalties for obstructing pedestrian traffic, creating mandatory minimum sentence and restitution requirements for rioting,

Another type of law targets protest activity by reducing punishments for vigilantes' violent conduct against protesters. These laws immunize vigilantes from liability, and in some instances provide an affirmative defense for civilians who injure (or even kill) activists.<sup>236</sup> More specifically, some bills provide a defense to drivers who hit or run over people in demonstrations,<sup>237</sup> a protection particularly timely

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and expanding "act of terrorism" to include damaging a public monument); H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021) (enacted) (enlarging definitions of riot and aggravated riot, creating the crime of "mob intimidation," and establishing an offense for defacing or damaging statues and flags); S.B. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (enacted) (increasing penalties for riot, unlawful assembly, and obstructing traffic; creating new felony for defacing public property); H.B. 40, 2023 Leg., Reg. Sess. (N.C. 2023) (enacted) (increasing penalties for inciting or urging another to participate in a riot if riot causes injury or \$1,500 of property damage); H.B. 1674, 2021 Leg., Reg. Sess. (Okla. 2021) (enacted) (creating new penalties for obstructing traffic while participating in a riot); S.B. 451, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (enacted) (expanding definition of aggravated riot, increasing mandatory minimum to sixty days if more than one aggravating circumstance); H.B. 9, 87th Leg., Reg. Sess. (Tex. 2021) (enacted) (increasing penalties for blocking emergency vehicles and creating a mandatory minimum sentence of ten days' confinement); S.B. 16, 134th Gen. Assemb., Reg. Sess. (Ohio 2023) (enacted) (creating new penalties for protests on public passages as well as for organizations who provide material support or organize others to engage in a riot); H.B. 2059, 56th Leg., 1st Reg. Sess. (Ariz. 2023) (not enacted) (escalating penalties for blocking traffic and other acts during riot or unlawful assembly, and creating "aggravated riot" and "mob intimidation" crimes); H.B. 505, 157th Gen. Assemb., 2023–24 Reg. Sess. (Ga. 2023) (not enacted) (increasing penalties for rioting); S.B. 44, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022) (not enacted) (increasing penalties for crimes committed during a riot, enhancing offenses when committed against a law enforcement officer, creating crime for "accost[ing], insult[ing], taunt[ing], or challeng[ing] a law enforcement officer"); S.B. 211, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021) (not enacted) (requiring mandatory minimum sentence of four years in prison, a \$5,000 fine, and a one-year disqualification from public benefits for blocking traffic during a "riot"); S.B. 3, 2022 Leg., Reg. Sess. (Ala. 2022) (not enacted) (expanding the definitions of riot and incitement to riot and adding penalties for protesters blocking traffic); S.B. 198, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021) (not enacted) (increasing penalties for failure to disperse, rioting, and obstruction of traffic and making it a crime to provide funding or supplies to a group that intends to engage in "unlawful assembly"); H.B. 198, 441st Gen. Assemb., Reg. Sess. (Md. 2021) (not enacted) (creating new penalties for interfering with pedestrian or vehicular traffic); H.B. 6269, 100th Leg., 1st Reg. Sess. (Mich. 2020) (not enacted) (revoking public benefits for one year for persons "charged with looting, vandalism, or a violent crime" related to "civil unrest").

236. See IOWA CODE ANN. § 321.366A (West 2024) (providing immunity from civil liability to drivers who injure protesters blocking traffic under defined circumstances); FLA. STAT. ANN. § 870.07 (West 2024) (providing affirmative defense in civil actions for personal injury or wrongful death when the injured party was "acting in furtherance of a riot"); OKLA. STAT. ANN. tit. 21, § 1320.11 (West 2024) (providing civil and criminal immunity for a driver who injures or kills an individual when "fleeing from a riot . . . under a reasonable belief that fleeing was necessary to protect the [driver] from serious injury or death"); S.B. 1206, 220th Leg., Reg. Sess. (N.J. 2022) (not enacted) (providing affirmative defense in civil actions for personal injury or wrongful death when the participant was "acting in furtherance of a riot"); S.B. 155, 2021 Leg., Reg. Sess. (Ala. 2021) (expired) (expanding instances in which a person can use deadly force to prevent trespass to include areas near a riot); S.B. 171, 156th Gen. Assemb., Reg. Sess. (Ga. 2021) (expired) (providing affirmative defense in civil actions for persons who injure or kill someone obstructing a street or highway); H.B. 101, 2022 Leg., Reg. Sess. (La. 2022) (defeated) (amending "justifiable homicide" law to include those who kill "for the purpose of preventing imminent destruction of property or imminent threat of tumultuous and violent conduct during a riot").

237. See IOWA CODE ANN. § 321.366A (West 2024) (providing immunity from civil liability to drivers who injure protesters blocking traffic under defined circumstances); OKLA. STAT. ANN. tit. 21, § 1320.11 (West 2024) (providing civil and criminal immunity for a driver who injures or kills an individual when "fleeing from a riot . . . under a reasonable belief that fleeing was necessary to protect the [driver] from serious injury or death").

considering the rise in racial justice protesters injured by vehicles.<sup>238</sup> Pertinently, since the 2020 BLM protests, exclusively right-wing individuals have used their cars to hurt people at demonstrations.<sup>239</sup> From June 2020 to April 2022, there were “at least fifty recorded incidents of right-wing use of vehicles to bluntly injur[e] or kill BLM protesters.”<sup>240</sup> A *Boston Globe* analysis tracking “vehicle rammings” at racial justice protests found that there were 139 such incidents over the sixteen months after George Floyd’s murder.<sup>241</sup>

Beyond the specifics of each piece of anti-protest legislation, these legislative efforts have an important expressive and signaling component. They reiterate the message that civilian enforcers have a state-endorsed role in silencing racial justice protests by acting as auxiliary to police. Legislative provisions providing defenses for or minimizing the liability of private individuals who injure protesters essentially extend to civilians the much-criticized immunity that shields police when they engage in their official capacity with private individuals.<sup>242</sup> Most alarming is how these laws and their messaging blur the line between law enforcement officers and right-wing

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238. See Chaudhary & Richardson, *supra* note 17, at 100.

239. *Id.*

240. *Id.* It is possible that right-wing individuals are following the example of James Alex Fields, who infamously crashed his car into a crowd of people protesting the Unite the Right rally in 2017, killing activist Heather Heyer and injuring thirty others. See Elisha Fieldstadt, *James Alex Fields, Driver in Deadly Car Attack at Charlottesville Rally, Sentenced to Life in Prison*, NBC NEWS (June 28, 2019, 3:36 PM), <https://www.nbcnews.com/news/us-news/james-alex-fields-driver-deadly-car-attack-charlottesville-rally-sentenced-n1024436> [<https://perma.cc/38CS-2E4R>]; Jazmine Ulloa, *A Grisly Blueprint of Terror*, BOS. GLOBE (Nov. 1, 2021), <https://apps.bostonglobe.com/news/nation/2021/10/vehicle-rammings-against-protesters/charlottesville/> [<https://perma.cc/4ZZ7-7TBZ>] (citing a study that found eleven vehicular attacks qualifying as terrorism since 2020, with ten committed by right-wing extremists and one by a far-left extremist, and explaining the rise in car attack memes on right-wing and white supremacist websites as the BLM movement proliferated).

241. *A Nationwide Threat*, BOS. GLOBE (Oct. 31, 2021), <https://apps.bostonglobe.com/news/nation/2021/10/vehicle-rammings-against-protesters/map/> [<https://perma.cc/F7GC-WUU6>] (showing a map of these vehicle rammings from May 25, 2020, to September 30, 2021, with data on the type of protest, injuries and fatalities, and whether the driver was charged, convicted, or both).

242. The doctrine of qualified immunity shields government actors from civil liability for their unlawful or unconstitutional conduct so long as their actions did not violate “clearly established” laws. Marcus R. Nemeth, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 992 (2019); *Hunter v. Bryant*, 502 U.S. 224, 226 (1991). Qualified immunity stands in the way of holding the police legally accountable in more than half of excessive force cases. Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> [<https://perma.cc/7PFL-TYJP>]. Many have critiqued the doctrine, arguing that it fails to rein in unreasonably violent practices by law enforcement. See, e.g., John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67, 77 (2017) (citing statistics which “suggest[] that a lack of accountability may contribute to the use of excessive force”); David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives*, 98 DENV. L. REV. 629, 645 (2021) (“Qualified immunity inscribes unlawful violence into the DNA of law enforcement.”); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that the Court’s trend on qualified immunity “tells officers that they can shoot first and think later, and . . . tells the public that palpably unreasonable conduct will go unpunished”).

vigilantes, such that both may engage violently and with impunity against protesters. These efforts harken back to antebellum era Southern society, which relied on civilians to violently enforce silence and denied both the Black population and noncompliant whites avenues for legal redress for injury or even death.<sup>243</sup>

*B. Right-Wing Civilians Acting as Vigilante Police Reinforcements Against Racial Justice Activists*

The nation has been undergoing a dangerous swell of white supremacist activity and violence.<sup>244</sup> Among other things, militant individuals who subscribe to white supremacist or right-wing ideologies frequently appeared to monitor racial justice activism in 2020. These civilians consider themselves ready and willing reinforcements to police, whom they identify as defenders of the Establishment that maintains white power and current economic interests.<sup>245</sup> In the summer of 2020 “[a]t least 25 distinctly named groups . . . brought visibly armed members to BLM protests often in the self-proclaimed role of containing the violent or destructive behaviors of protestors . . . indicating their self-perception as an auxiliary to state violence.”<sup>246</sup> Individuals who show up as police reinforcements have been categorized as belonging to militias, right-wing street movements, or white nationalist groups.<sup>247</sup> Experts suggest that attempts to draw lines between these groups are not productive considering there is significant cross pollination and shared ideology among these groups and the individuals they inspire.<sup>248</sup>

243. See *supra* Parts I.A.2, I.B.2.

244. See Steve Johnson, *Exposing the ‘Disguise’: UChicago Historian Kathleen Belew Spotlights the Rising White Power Movement*, CHI. TRIB. (Oct. 30, 2020, 6:59 PM), <https://www.chicagotribune.com/entertainment/books/ct-ent-uchicago-white-power-expert-belew-militia-proud-boys-1030-20201030-ufkbojvcz5g55ilbfr47jjdu7e-story.html> [<https://perma.cc/T2S9-CBLK>]; Gene Demby, *When White Extremism Seeps into the Mainstream*, NPR (Jan. 15, 2021, 5:57 PM), <https://www.npr.org/sections/codeswitch/2021/01/15/957421470/when-white-extremism-seeps-into-the-mainstream> [<https://perma.cc/UXA6-WXAT>]; *White Supremacist Propaganda Soars to All-Time High in 2022*, ANTI-DEFAMATION LEAGUE (Mar. 8, 2023), <https://www.adl.org/resources/report/white-supremacist-propaganda-soars-all-time-high-2022> [<https://perma.cc/HFW8-WUAJ>]; Cynthia Miller-Idriss, *White Supremacist Extremism and the Far Right in the U.S.*, GALE (2021), <https://www.gale.com/intl/essays/cynthia-miller-idriss-white-supremacist-extremism-far-right-us> [<https://perma.cc/L6WP-8RFP>].

245. See Musa Jalal & Matthew Jerome Schneider, *Bottom-Up Violence Work: Exploring the Case of the Armed Racial Justice Counter-Protest*, in *THE REPRODUCTION AND MAINTENANCE OF INEQUALITIES IN INTERPERSONAL RELATIONSHIPS* 189, 195–96, 198–99 (Tyler Ross Flockhart et al. eds., 2022) (explaining that armed vigilantes confronting BLM activists see themselves as aligned with police, whom they recognize as an institution that “facilitates the reproduction of white supremacy,” ultimately benefitting these vigilantes).

246. Chaudhary & Richardson, *supra* note 17, at 99.

247. See Sarah Slobin & Sam Hart, *When the Right Wing Rallies*, REUTERS (Apr. 15, 2021), <https://www.reuters.com/graphics/USA-CAPITOL/SECURITY/xegpbxoadpq/> [<https://perma.cc/QYN2-VSRX>] (summarizing the views of each type of group).

248. *Confronting Violent White Supremacy (Part V): Examining the Rise of Militia Extremism: Hearing Before the Subcomm. on C.R. & C.L. of the Comm. on Oversight & Reform*, 117th Cong. 10–11, 21 (2021) [hereinafter *Militia Extremism Hearing*] (statement of Peter Simi, Ph.D., Associate Professor of Sociology, Chapman University) (“There is a longstanding overlap between white supremacist extremism and militias. . . . [This] can render clear delineations artificial and misleading.”); see also Johnson, *supra* note 244. Historian Kathleen Belew asserts that it is vital to see that “white power activism” and violence is the connection between various unprovoked killings of people who are members of various ethnic groups and

While most of the extremist and militia groups policing BLM movement activism persistently assert that they are “race neutral” and not racist, those assertions are not credible as their members hold and defend the very beliefs that have been commonly regarded as part of white supremacist ideology, including those of neo-Nazis and the Ku Klux Klan.<sup>249</sup> These include adherence to a belief that the nation should include racial and economic ordering, situating whites at the top of that order, and the fear that others are working to topple or replace white people within that hierarchy.<sup>250</sup> This so-called “great replacement theory” holds that an international elite is promoting immigration and interracial marriage to “replace” the “white race.”<sup>251</sup> It bears mentioning that while this replacement theory had been considered fringe until recently, circulating predominately in white nationalist and Christian right-wing online chat rooms and social media, its message has been cloaked in more palatable language, articulated by Republican political actors, and transitioned into mainstream conservative circles.<sup>252</sup>

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religious groups. *Militia Extremism Hearing*, *supra*, at 3. While these attacks can also be viewed individually as anti-Black, anti-immigrant, anti-Semitic, and anti-Muslim, “[a]ll those gunmen shared the same ideology, symbols, rhetoric, and some of them had deep interconnections with other activists online through the social movement.” Johnson, *supra* note 244.

249. *Militia Extremism Hearing*, *supra* note 248, at 11, 13–14.

250. See *id.*; Randall Blazak, *Revisiting the White Boys from Portland to Ukraine: Anomie and Right-Wing Extremism*, 68 AM. BEHAV. SCI. 216, 220 (2024); Jalal & Schneider, *supra* note 245, at 189, 195–96. Right-wing individuals find support for their fears about the toppling of established systems of racial and economic hierarchy in xenophobic and racist conspiracy theories. See *Militia Extremism Hearing*, *supra* note 248, at 11, 13–14. These various right-wing groups consistently oppose immigration, often policing the border, and are anti-Muslim. *Id.* at 11. A 2022 study found that about one in three U.S. adults believe that a powerful group is actively working to replace the white population with immigrants for electoral gain. Ctr. for Pub. Affs. Rsch., *Immigration Attitudes and Conspiratorial Thinkers*, ASSOCIATED PRESS & NORC AT THE UNIV. OF CHI. 1 (May 2022), [https://apnorc.org/wp-content/uploads/2022/05/Immigration-Report\\_V15.pdf](https://apnorc.org/wp-content/uploads/2022/05/Immigration-Report_V15.pdf) [<https://perma.cc/NK6R-BTRZ>]; see also Lowndes, *supra* note 28, at 284–85 (explaining the “great replacement” theory).

251. Odette Yousef, *The ‘Great Replacement’ Conspiracy Theory Isn’t Fringe Anymore, It’s Mainstream*, NPR (May 17, 2022, 5:57 AM), <https://www.npr.org/2022/05/17/1099233034/the-great-replacement-conspiracy-theory-isnt-fringe-anymore-its-mainstream> [<https://perma.cc/DBQ9-Q33C>] (explaining that the American version of replacement theory asserts that it is elite Jewish people who are pulling these strings). Few have forgotten the 2017 images of white men in Charlottesville, Virginia, carrying tiki torches and chanting, “Jews will not replace us” at the Unite the Right rally. See Jonathan D. Sarna, *Conspiracies About a ‘Catastrophic Takeover’ by Jews Have Long Been an American Problem*, THE CONVERSATION (Nov. 19, 2021, 8:08 AM), <https://theconversation.com/conspiracies-about-a-catastrophic-takeover-by-jews-have-long-been-an-american-problem-172033> [<https://perma.cc/H3UM-8DZT>]. The rally eventually ended when neo-Nazi James Alex Fields rammed into a group of counterprotesters, killing BLM activist Heather Heyer and injuring dozens of others. *Id.* Thus, these various groups consistently oppose immigration, often police the border, and are anti-Muslim. *Militia Extremism Hearing*, *supra* note 248, at 11.

252. Yousef, *supra* note 251; see also Aaron Blake, *How Republicans Learned To Stop Worrying and Embrace ‘Replacement Theory’ — by Name*, WASH. POST (Sept. 27, 2021), <https://www.washingtonpost.com/politics/2021/09/27/how-republicans-learned-stop-worrying-embrace-replacement-theory-by-name/>; Philip Bump, *Nearly Half of Republicans Agree with ‘Great Replacement Theory,’* WASH. POST (May 9, 2022), <https://www.washingtonpost.com/politics/2022/05/09/nearly-half-republicans-agree-with-great-replacement-theory/>; Steve Peoples, *Republican Senate Candidates Promote ‘Replacement’ Theory*, PBS (May 17, 2022, 8:11 PM), <https://www.pbs.org/newshour/politics/republican-senate-candidates-promote-replacement-theory> [<https://perma.cc/46WY-BW4T>].

A poll conducted by the *Associated Press* in late 2021 found that a version of this theory had captivated a significant portion of the conservative electorate, with almost half of Republican respondents agreeing that there is “a group of people in this country [who are] trying to replace native-born Americans with immigrants who agree with their political views.”<sup>253</sup> According to a separate April 2022 poll conducted by the Southern Poverty Law Center (SPLC), almost 70% of Republican respondents adhered to the replacement narrative and believed that “‘progressive and liberal leaders’ [are] the perpetrators of this replacement.”<sup>254</sup> In this same poll, Republican respondents expressed decreased concern about immigration in general, suggesting that the root of their anxiety over “great replacement theory” is not a per se increase in the immigrant population, but is instead concern over a cultural and hierarchical shift in American values.<sup>255</sup> Notably, more than half of Republican respondents in the SPLC poll also agreed that “changing demographics . . . pose a threat to white Americans and their culture and values.”<sup>256</sup> Thus, with the cementing of replacement theory as part of mainstream conservative ideology, the beliefs and anxieties of right-wing militant civilians and mainstream political conservatives are becoming increasingly aligned.<sup>257</sup> This likely accounts in part for President Trump’s executive order purporting to end birthright citizenship.<sup>258</sup> Returning to the SPLC poll, over half of Republican respondents believed that the country is “headed toward a civil war in the near future,”<sup>259</sup> perhaps leaving mainstream conservatives increasingly willing to favor or at least excuse militant civilians who are taking up arms to quash and silence activists urging for a reevaluation of American values. This is evidenced by conservative

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253. Anita Snow, *I in 3 Fears Immigrants Influence US Elections: AP-NORC Poll*, AP NEWS (May 10, 2022, 12:14 AM), <https://apnews.com/article/immigration-2022-midterm-elections-covid-health-media-2ebbd3849ca35ec76f0f91120639d9d4> [https://perma.cc/5BN8-MHBS]; Bump, *supra* note 252. While Democrats are less likely to credit this theory, 27% of them also agree with this claim. *Id.* A different poll by the Southern Poverty Law Center found almost 70% of Republican respondents agreed with this narrative. Cassie Miller, *SPLC Poll Finds Substantial Support for ‘Great Replacement’ Theory and Other Hard-Right Ideas*, S. POVERTY L. CTR. (June 1, 2022), <https://www.splcenter.org/news/2022/06/01/poll-finds-support-great-replacement-hard-right-ideas> [https://perma.cc/M3RS-LXST].

254. Miller, *supra* note 253. Thus, when the polls named liberals and progressives as the culprits, Republican respondents were more likely to credit the theory. *See id.*

255. *See id.*

256. *Id.*

257. The Associated Press poll also measured the connection between media viewing habits and responses, finding that the more conservative outlets a respondent preferred, the more likely they were to believe replacement theory claims. Bump, *supra* note 252.

258. *See* Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 29, 2025) (asserting that U.S. citizenship does not extend to children born in the United States to fathers who are not citizens or legal permanent residents and to mothers who are either undocumented or temporary visitors, and directing federal officials not to issue documents conferring citizenship or recognize citizenship documents for these children); Press Release, ACLU, *Immigrants’ Rights Advocates Sue Trump Administration Over Birthright Citizenship Executive Order* (Jan. 20, 2025), <https://www.aclu.org/press-releases/immigrants-rights-advocates-sue-trump-administration-over-birthright-citizenship-executive-order> [https://perma.cc/3CXL-64RR] (discussing the Constitutional guarantees of birthright citizenship and how ending birthright citizenship is a “ruthless repudiation of American values”).

259. Miller, *supra* note 253. The numbers are less for Democrats but still significant with 39% believing we are on the way to civil war. *Id.*

support of laws immunizing civilians who injure protesters.<sup>260</sup> Right-wing militant civilians confronting racial justice protesters may be doing the unsavory work that a somewhat material portion of more mainstream conservatives support but are unwilling to risk doing themselves.

Militant civilians frame their attendance at BLM protests and their monitoring of activists as an extension of the police force.<sup>261</sup> The relationship between the work of police officers and the work of militant civilians is examined in Section III. For now, it is sufficient to assert that when police engage in disparate enforcement during demonstrations, they ensure that risks associated with protests are borne by left-leaning protesters.<sup>262</sup> These include the risk of arrests and criminal prosecution, as well as the risk of injury or, in most serious cases, death at the hands of police or vigilantes. Police officers' selective permissiveness of right-wing enforcers' pseudo-policing activities means that racial justice protesters are further chilled as they have reason to fear these vigilantes, as well as official law enforcement actors. As I have recounted in other work, the type of aggressive police response to racial justice activists in Kenosha was by no means the exception in 2020; it was the rule.<sup>263</sup> It is therefore not shocking to learn that the Kenosha Police Department welcomed vigilantes with seemingly great approval.<sup>264</sup>

In other cities as well, officers collaborated with nongovernment actors who attended demonstrations to confront and police BLM activists. At a 2020 BLM demonstration in Bethel, Ohio, various gun-toting right-wing individuals yelled insults and attacked activists as police stood by.<sup>265</sup> In Oklahoma in 2020, County Sheriff Chris West called on civilians to join a "Sheriff's Posse" to "safeguard[] lives and

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260. See *supra* note 235 for a list of such laws.

261. Jalal & Schneider, *supra* note 245, at 190, 198.

262. While police can arrest right-leaning activists using these laws to the same degree that they arrest left-leaning activists, that has not been the case in practice. Richard Allan Greene, *Police Respond Differently When It's a Left-Wing Protest, Study Finds*, CNN (Jan. 16, 2021, 1:00 PM), <https://www.cnn.com/2021/01/15/us/protest-disparity-study-trnd/index.html>. [<https://perma.cc/R7Z7-Y6Z9>]; see also Wood, *supra* note 17, at 1–2, 9; Complaint at 23–24, *Okla. State Conf. of the NAACP v. O'Connor*, 569 F. Supp. 3d 114 (W.D. Okla. 2021) (No. CIV-21-859); *Anti-Protest Laws in the United States*, FIRST AMEND. WATCH, <https://firstamendmentwatch.org/deep-dive/states-rush-to-pass-anti-protestor-laws/> [<https://perma.cc/9528-7LRC>] (June 28, 2024).

263. Pita Loor, *Protesting While Black*, *supra* note 23, at 1581–82, 1592–93. Several lawsuits have been filed across jurisdictions seeking judicial remedies for overly aggressive and violent police responses. See, e.g., *Abay v. City of Denver*, 445 F. Supp. 3d 1286, 1290–92 (D. Colo. 2020); Second Amended Complaint at 1–3, *Black Lives Matter L.A. v. City of Los Angeles*, No. 2:20-cv-05027 (C.D. Cal. Oct. 3, 2020), 2022 WL 16888576, *vacated and remanded*, 113 F.4th 1249 (9th Cir. 2024); Complaint at 3–4, *Black Lives Matter Seattle–King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 2:20-cv-00887); Second Amended Class Action Complaint and Demand for a Jury Trial at 6, 11, 14–15, 18, 25, 28–29, *Goyette v. City of Minneapolis*, 338 F.R.D. 109 (D. Minn. 2021) (No. 20-cv-1302); Class Action Complaint at 1–3, *Williams v. City of Minneapolis*, No. 20-cv-1303 (D. Minn. June 2, 2020); Complaint at 3–4, 6–9, *Stevenson v. Doe*, No. 20-cv-02007 (D. Minn. Mar. 11, 2021), 2021 WL 931186.

264. See Jalal & Schneider, *supra* note 245, at 190, 198 (discussing vigilantes' reverence of police thereby facilitating relations).

265. Travis Gettys, *Gun-Toting Trump Supporters Attack George Floyd Protesters in Rural Ohio Town*, RAW STORY (June 15, 2020, 11:31 AM), <https://www.rawstory.com/2020/06/gun-toting-trump-supporters-attack-george-floyd-protesters-in-rural-ohio-town/> [<https://perma.cc/HU8U-7WQU>].

property.”<sup>266</sup> There were subsequent concerns that Sheriff West may have participated in the January 6, 2021, incursion at the U.S. Capitol since he was among the loyalists to President Trump who marched in Washington, D.C., that day.<sup>267</sup> In Chicago, police fraternized with white men armed with baseball bats and golf clubs who patrolled the border of a mostly white neighborhood to keep BLM activists out.<sup>268</sup> Residents of the predominantly Black neighborhood where the demonstration had started expressed their dismay over the police’s noninterference with the armed vigilantes in an open letter that read, “[w]e are disturbed to see that the police are openly fraternizing with a group of anonymous men, who are claiming to protect the neighborhood, but wear no badge number, report to no authority, and have no training for the job they appointed themselves to.”<sup>269</sup> In Portland, Oregon, Department of Homeland Security (DHS) officers asked a right-wing militia member to help arrest a counterprotester at a right-wing rally in 2020.<sup>270</sup> The militia member explained that “[h]e was granted authority to keep the sidewalk clear by the police.”<sup>271</sup> At this same event, there were also reports of other militia members “body slamm[ing]” an individual for DHS officers who then crushed the victim by kneeling on top of them along with a militia member.<sup>272</sup> There were reports of police “playing favorites”<sup>273</sup> with right-wing vigilantes, or just standing by as these vigilantes monitored protests and interacted aggressively with racial justice activists in a myriad of other jurisdictions.<sup>274</sup> In Albuquerque, New Mexico, police used the same language as Kenosha law enforcement when they called militiamen totting rifles “armed friendlies,” and a video surfaced of officers interacting amicably with militiamen and advising them to “take

266. Ben Felder, *Volunteers Reference ‘Combat Skills’ and Firearm Training in Applications for ‘Sheriff’s Posse,’* FRONTIER (Sept. 22, 2020), <https://www.readfrontier.org/stories/volunteers-reference-combat-skills-and-firearm-training-in-applications-for-sheriffs-posse/>. See generally The Oklahoman, *Canadian County Sheriff Addresses Trip to Washington, D.C.*, YOUTUBE (Jan. 8, 2021), <https://www.youtube.com/watch?v=kg3BYxDEQJQ> [https://perma.cc/T3JE-E3TN].

267. See Felder, *supra* note 266.

268. Katherine Fung, *Chicago Residents Push Officials for Answers After Video Shows Police Standing By as White ‘Vigilantes’ Patrol During Protests*, NEWSWEEK (June 9, 2020, 3:02 PM), <https://www.newsweek.com/chicago-residents-push-officials-answers-after-video-shows-police-standing-whit-e-vigilantes-1508780> [https://perma.cc/9B5M-ZNQ5].

269. *Id.*

270. Arun Gupta, *Playing Cops: Militia Member Aids Police in Arresting Protester at Portland Alt-Right Rally*, INTERCEPT (June 8, 2017, 7:06 PM), <https://theintercept.com/2017/06/08/portland-alt-right-militia-police-dhs-arrest-protester/> [https://perma.cc/25XW-WSYD].

271. *Id.*

272. *Id.*

273. Hvistendahl & Brown, *supra* note 17 (discussing the special treatment police give white vigilantes, including in Salem, Oregon, where an officer approached armed individuals and said that his superiors had requested that he advise the group to stay out of sight during curfew so “we don’t look like we’re playing favorites”).

274. Elaine Godfrey, *The Violence Could Get Much Worse*, ATLANTIC (Aug. 27, 2020), <https://www.theatlantic.com/politics/archive/2020/08/kenosha-killings-militia-trump/615775/> [https://perma.cc/XH9X-BES8]; Hvistendahl & Brown, *supra* note 17 (detailing how police welcomed right-wing militia members to respond to racial justice protests in Albuquerque; Dallas; Snohomish, WA; Salem, OR; Philadelphia; Chicago; Oklahoma; and Idaho); see also Shanahan & Wall, *supra* note 17, at 71; *Militia Extremism Hearing*, *supra* note 248, at 3–4, 20–22; Wood, *supra* note 17, at 5–7; Cunningham, *supra* note 17, at 68.



care of each other and take care of the people of Albuquerque.”<sup>275</sup> A few weeks after the video was taken, City Council candidate Steven Ray Baca was accompanied by militiamen when he shot and injured an activist protesting a monument to the Spanish conquistador Juan de Oñate, acclaimed for slaughtering hundreds of Pueblo Indians in the Acoma Massacre of 1599.<sup>276</sup>

### III. SIMILAR TO WHITES IN THE ANTEBELLUM SOUTH, CIVILIAN ENFORCERS ARE STATE SPONSORED VIOLENCE WORKERS COMMITTED TO PRESERVING WHITE SUPREMACY AND ESTABLISHED HIERARCHIES

As discussed in Section I, antebellum Southern society required all whites to participate in the project of protecting and preserving the institution of slavery. It was the white man’s legally endowed duty to enforce slave codes against Black people—forbidding gatherings, expression, and education—and other laws restricting any form of antislavery expression by anyone, regardless of race.<sup>277</sup> These laws preserved the institution of slavery not only by setting restrictions but by signaling the institution’s continued legitimacy. Importantly, when Southern whites believed these laws were not sufficiently strict or that legal processes were not sufficiently swift, they responded by enacting mob violence on perceived perpetrators with the expressed assent of the state.

As discussed in Section II, unlike antebellum codes, contemporary laws that target protesters do not explicitly authorize civilians in the role of enforcers. However, criminal statutes used by police to selectively target and de facto criminalize racial justice protest activity in conjunction with statutes that excuse harm executed on activists provide cover to civilian enforcers stepping out to monitor demonstrations as police auxiliaries. Ultimately, police noninterference and sometimes collaboration transforms these vigilantes into state-legitimized and ultimately state-sponsored enforcers. Conservative political actors’ public praise of vigilante action, along with their denouncement of racial justice movements, serves to further legitimize the quasi-policing role of civilian enforcers.

Connecting the dots between antebellum and contemporary modes of civilian enforcement demonstrates that civilian participation in the project of quashing racial justice activism and maintaining white supremacy persists. It is not only official state actors but also civilians that can and do suppress racial justice protest activity.<sup>278</sup> Understanding the role of civilian enforcement is essential to grasp the full extent of suppression of Black liberation as well as racial justice activism, particularly as activists make some, albeit limited, strides in holding certain law enforcement officials accountable in the civil litigation context for their violent tactics during protests.<sup>279</sup>

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275. Hvistendahl & Brown, *supra* note 17.

276. *Id.*; see also Randall Balmer, *New Mexicans Push a Spanish Conquistador Off His Pedestal*, L.A. TIMES (June 21, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-06-21/onate-new-mexico-statue-removal> [<https://perma.cc/9MAM-Z7RZ>].

277. See *supra* Parts I.A.2, I.B.2.

278. See *supra* Section I for an explanation of the historical analog of civilian vigilantes in the South.

279. Activists and journalists injured by police officers during protests have received significant settlements and awards. See Office of City Attorney, *Litigation Matter of Jaime Bunkholt v. City of*

Moreover, civilian enforcers evade most constitutional constraints by virtue of their nature as nonstate actors. Nevertheless, the police's pattern of disparate policing shows their willingness to share their enforcement power, and authority to use violence, with right-wing vigilantes. Even though modern legal provisions cannot expressly treat racial justice protesters and right-wing activists differently, police—acting as executors of state enforcement authority and state violence—do. This pattern of hyper-policing of protesters and non-policing of vigilantes demonstrates the prevailing relevance of state actors in the project of silencing racial justice activism even when the weapons are in the hands of militant civilians.

A. *The Continued Failure of Constitutional Protections for Racial Justice Activists*

Extant legal provisions did not prevent Southern legislatures from enacting restrictions on the Black population, on white abolitionist expression, or from empowering ordinary whites as enforcers. As discussed at length in Section I, Black individuals were afforded no civil rights in slaveholding states. In 1857, the Supreme Court held in *Dred Scott v. Sandford* that Black individuals' status in the nation was inconsistent with citizenship and personhood.<sup>280</sup> Among other things, the Court specifically highlighted that recognizing Black individuals as citizens or persons according to the Constitution would mean that they would have “full liberty of speech in public and in private . . . [and] to hold public meetings upon political affairs.”<sup>281</sup> Like white Southerners, the Court feared that the granting civil rights to the Black population in the face of the reality of Southern slavery would “inevitably produc[e] discontent and insubordination among them, and endanger[] the peace and the safety of the State.”<sup>282</sup> Black people did not obtain the constitutional right to equal protection until after the Civil War ended in April 1865.<sup>283</sup> In December of that same year,

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*Minneapolis, et al.* (2022-00649), MINNEAPOLIS CITY OF LAKES (June 24, 2022), <https://lms.minneapolismn.gov/File/2022-00649> [<https://perma.cc/JW8S-DKGD>] (approving settlement, including attorney's fees and costs in the amount of \$500,000 in *Bunkholt v. City of Minneapolis*, No. 22-cv-00462 (D. Minn.)); Office of City Attorney, *Litigation Matter of Linda Tirado v. City of Minneapolis* (2022-00582), MINNEAPOLIS CITY OF LAKES (June 3, 2022), <https://lms.minneapolismn.gov/File/2022-00582> [<https://perma.cc/YX5A-C6QX>] (approving a settlement for \$600,000 in *Tirado v. City of Minneapolis*, No. 20-cv-01338 (D. Minn.)); Kevin Rector & David Zahniser, *L.A. Approves \$300,000 Payout to Protester Shot in Testicle by LAPD Projectile*, L.A. TIMES (Apr. 27, 2022, 3:24 PM), <https://www.latimes.com/california/story/2022-04-27/l-a-approves-300-000-payout-to-protester-shot-in-testicle-by-lapd-projectile> [<https://perma.cc/QU4B-8X5V>] (detailing the L.A. city council's approval of a settlement in *Bond v. City of Los Angeles*, No. 22-cv-00098 (C.D. Cal.) for \$300,000, and resulting in policy change requiring new training for police officers on the use of rubber and hard-foam projectiles and an injunction on their use until such training is received); Jake Offenhartz, *New York Police Agree To Reform Protest Tactics in Settlement Over 2020 Response*, AP NEWS (Sept. 5, 2023, 8:08 PM), <https://apnews.com/article/nyc-nypd-protests-george-floyd-new-york-attorney-general-0af031d74c5549ed7897cef38bedb05f> [<https://perma.cc/9FQJ-UP5F>] (explaining how the New York Police Department, the nation's largest police department, was required to deploy fewer officers to most public protests).

280. 60 U.S. 393, 417 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

281. *Id.*

282. *Id.*

283. Jennifer L. Weber & Warren W. Hassler, *American Civil War*, BRITANNICA, <https://www.britannica.com/event/American-Civil-War> [<https://perma.cc/R8YY-B8MP>] (Apr. 5, 2025).

Congress ultimately outlawed slavery via the Thirteenth Amendment and established equal protection under the law via the Fourteenth Amendment.<sup>284</sup>

In terms of restrictions on the speech and conduct of noncompliant whites, while the First Amendment's freedom of speech and assembly and the Fourth Amendment's freedom from unreasonable searches and seizures were already included within the Bill of Rights during the antebellum period,<sup>285</sup> it was unclear that these provisions protected (even white) people from state-level government action. This is because during the antebellum period and after, the principle of federalism was largely contested, as states vigorously challenged federal influence or control over state practices.<sup>286</sup> Furthermore, it was not until the twentieth century that the Supreme Court clarified that the First and Fourth Amendments also applied to the states.<sup>287</sup>

Since the passage of the Fourteenth Amendment, Black people have been constitutionally entitled to equal protection from the government—in connection to both its laws and the actions of government officials.<sup>288</sup> Nevertheless, many recognize

284. See generally Thurgood Marshall, *The Continuing Challenge of the 14th Amendment*, 1968 WIS. L. REV. 979 (1968).

285. *Today in History - December 15: The Bill of Rights*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/december-15/> [<https://perma.cc/Q9QQ-W2YZ>] (last visited Apr. 8, 2025).

286. See Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment Conservative and Progressive Legal Orders*, 67 L. & CONTEMP. PROBS. 175, 207 n.204 (2004) (presenting the idea of a “purified republic” that would retain state power to defend itself against capture).

287. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that the First Amendment's freedom of speech applies to the states); *Stromberg v. California*, 283 U.S. 359, 368 (1931) (holding the same); *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937) (holding that the First Amendment's freedom of assembly applies to states); *Mapp v. Ohio*, 367 U.S. 643, 655, 660 (1962) (holding that the Fourth Amendment applies to the states). But see DAVID MARTIN, TRIAL OF THE REV. JACOB GRUBER, MINISTER IN THE METHODIST EPISCOPAL CHURCH, AT THE MARCH TERM, 1819, IN THE FREDERICK COUNTY COURT, FOR A MISDEMEANOR 21–22 (Fredericktown, Md., 1819), for a description of *State v. Gruber*, where a Methodist minister was acquitted from the criminal charges of

maliciously intending and endeavouring, to disturb the tranquillity, good order, and government of the state . . . and to endanger the persons and the property of . . . peaceable citizens . . . and maliciously, intended to instigate, and incite, divers negro slaves, the property of divers citizens of the said state, to mutiny and rebellion, for the disturbance of the peace of the said state, and to the great terror and peril of the 22 peaceable citizens thereof.

Gruber's attorneys—among them Roger B. Taney, who interestingly later became a Supreme Court Justice and the author of the *Dred Scott* opinion—argued successfully that Gruber did not possess the requisite intent to support the charges and that in light of such lack of intent the jury should consider protecting the accused's freedom of speech, religion, and conscience and acquit him. Timothy S. Huebner, *State v. Gruber (Md., Cty. Ct.) (1819)*, FREE SPEECH CTR., <https://firstamendment.mtsu.edu/article/state-v-gruber-md-cty-ct/> [<https://perma.cc/5NVG-KJFS>] (Aug. 16, 2024). Notably, however, the trial in *State v. Gruber* predated the enactment of Southern laws restricting abolitionist expression around the 1830s, meaning it is uncertain whether a jury would have acquitted Gruber after their passage. See *supra* Part I.B.1.

288. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); see also *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that even though the Fifth Amendment does not include the equal protection language of the Fourteenth Amendment, the Equal Protection Clause applies to the federal government by reverse incorporation via the Due Process Clause of the Fifth Amendment). Federal civil rights statutes also prevent discrimination based on race by government

that despite the enactment of the Fourteenth Amendment, equal protection has never actually been realized for Black and Brown people.<sup>289</sup> Still, contemporary lawmakers cannot constitutionally enact laws like the slave codes of the antebellum South that permit government actors to facially discriminate against Black people and constrict civil rights based on race.<sup>290</sup> Furthermore, it is now settled that the First and Fourth Amendments apply to state and local governments and provide all people freedom of speech, assembly, and freedom from unreasonable seizure.<sup>291</sup> However, since these amendments only protect against government encroachment on these freedoms, they fail to protect Black and Brown individuals or racial justice activists against violence and policing by nongovernment actors. Without state action, there is no constitutional violation of these three provisions.<sup>292</sup> Therefore, the actions of civilian enforcers escape these constitutional protections. On the other hand, the Thirteenth Amendment's prohibition on slavery is more capacious in that it is not limited to the actions of the government or its agents.<sup>293</sup> Instead, it forbids, full stop, the existence of slavery and involuntary servitude in the United States.<sup>294</sup> The Supreme Court has interpreted the Amendment to extend to the eradication of the "badges and incidents of slavery,"<sup>295</sup>

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actors, entities that receive federal funding, certain employers, and places of public accommodation. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (public accommodations); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (federally assisted programs); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (equal employment opportunities); *see also* Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703.

289. *See* NATHANIEL WEYL, *THE NEGRO IN AMERICAN CIVILIZATION* 111 (1960) (establishing that the Jim Crow system did not give Black Americans status in society, rather it was a dynamic movement of subordination supported by law); EMILY CROSBY, *A LITTLE TASTE OF FREEDOM: THE BLACK FREEDOM STRUGGLE IN CLAIBORNE COUNTY, MISSISSIPPI* 10 (2005) (identifying that even after Reconstruction, whiteness was the normal condition and Blackness was the exception); Alan Jenkins, *Racial Equity and U.S. Law*, 7 *HEALTH EQUITY* 61, 63 (2023) (explaining the turbulent relationship between racial equity and American law throughout history and how the law contemporarily enforces racist ideas by isolating communities of color from access to education and health equity). In *United States v. Cruikshank* and the *Slaughter-House Cases*, the Supreme Court invalidated the weight of "privileges or immunities of citizens." *United States v. Cruikshank*, 92 U.S. 542, 550 (1875); *The Slaughter-House Cases*, 83 U.S. 36, 74–75 (1872). In *Williams v. Mississippi*, the Supreme Court held that states could pass laws to prevent Black citizens from voting and that "equal protection of the laws" did not stop states from discriminating and segregating. 170 U.S. 213, 215 (1898).

290. *Brown v. Bd. of Educ.*, 347 U.S. 483, 486–96 (1954) (holding that the Equal Protection Clause of the Fourteenth Amendment protects Black people from state-sponsored discrimination).

291. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. I; U.S. CONST. amend. IV; *see also supra* note 288 and accompanying text.

292. Nevertheless, there are limited circumstances where a private actor can qualify as a state actor, such as when the private entity performs a traditional, exclusive public function. *See Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

293. U.S. CONST. amend. XIII.

294. *Id.* § 1. The Thirteenth Amendment states "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." *Id.* However, the Punishment Clause of the Thirteenth Amendment was interpreted by Republican framers to mean that once convicted of a crime, a person could be sold into slavery—resulting in convict leasing. James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 *N.Y.U. L. REV.* 1465, 1465 (2019).

295. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968) (holding that legislating against private racially restrictive covenants was within Congress's power under the Thirteenth Amendment to "pass

which could arguably extend to the interference by private actors with racial justice related acts of expression—especially considering its antebellum roots. However, courts have read Section 2 of the Amendment—stating that “Congress shall have power to enforce this article by appropriate legislation”<sup>296</sup>—to mean that the judiciary’s role is limited to proscribing literal slavery and involuntary servitude, rationalizing that it is the legislature that has the prerogative to act more broadly.<sup>297</sup> In turn, Congress has failed to give force to this Amendment and fully address the consequences of slavery.

All this being said, constitutional provisions that are relevant to speech, assembly, bodily integrity, and equality are largely useless against civilians who act as enforcers.

### B. *Police as the Law unto Themselves*

The futility of contemporary federal constitutional provisions to curb civilian enforcement does not mean that the government has no avenue to regulate the activities of militant civilians and thereby protect racial justice activists. Police have ample means to protect activists on the streets since officers possess legal authority to enforce laws on private actors—including right-wing vigilantes. Taking Kenosha again as an example, officers could have detained or arrested Rittenhouse for violation of the curfew and at least inquired or investigated his reasons for bringing a firearm to the protests.<sup>298</sup> Contrary to Rittenhouse’s trial testimony, the Kenosha police were enforcing the curfew—just not against him or his armed companions.<sup>299</sup> This is because police not only have authority to enforce the law, but also discretion about whether and against whom to do so.<sup>300</sup> Police neglect to regulate the activities of right-wing civilians because they endorse them.<sup>301</sup>

Scholars have rightly remarked that the breadth of current criminal law renders large swaths of otherwise ordinary conduct criminal, thus allowing police to act as a constant intrusive presence in the lives of (certain) civilians.<sup>302</sup> Moreover, via various

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all laws necessary and proper for abolishing all badges and incidents of slavery in the United States” (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883))).

296. U.S. CONST. amend. XIII, § 2.

297. See William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1314–15, 1327–28 (2007) (explaining that the Supreme Court has never dealt with the question of whether the Thirteenth Amendment is self-executing and that lower courts have consistently “held that the judicial power to enforce the Amendment is limited to conditions of literal slavery or involuntary servitude,” leaving it to Congress “to offer redress for the badges and incidents of slavery”).

298. While Rittenhouse’s charge for carrying a dangerous weapon was dismissed after the trial judge ruled that the text of the Wisconsin statute did not outlaw minors from carrying a firearm of that barrel length, the police certainly had probable cause to believe that he was carrying a dangerous weapon and would have been justified to arrest him. See Brooks, *supra* note 31; *infra* notes 303–05 and accompanying text.

299. See Rittenhouse testimony, *supra* note 22, at 83.

300. See, for example, cases cited *infra* note 303, establishing the various ways police may exercise discretion.

301. See Hvistendahl & Brown, *supra* note 17.

302. Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 641 (2019); see also Drew DeSilver, Michael Lipka & Dalia Fahmy, *10 Things We Know About Race and Policing in the U.S.*, PEW RSCH. CTR. (June 3, 2020), <https://www.pewresearch.org/short-reads/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/> [https://perma.cc/2UAA-8B3Y] (discussing the results of several national surveys and concluding that public perception finds Black, Indigenous, and people of color (BIPOC) as likely

cases, the Supreme Court has lowered the justification threshold—both in terms of the seriousness of the offense and the degree of suspicion—that a police officer must meet before they may constitutionally detain an individual.<sup>303</sup> In a multitude of situations, police need no suspicion at all to engage with individuals going about their daily business.<sup>304</sup> These various tools enable police to target racial justice activists with arrests and force, as I have discussed in prior work.<sup>305</sup> However, in addition to the power to enforce the law, jurisprudence also provides police with discretion to forego enforcement, meaning the latitude to permit armed right-wing vigilantes to monitor the streets in violation of a curfew without consequence.<sup>306</sup> Furthermore, according to the public duty doctrine, police officers do not owe a duty of care to any particular individual but instead to the public at large.<sup>307</sup> This means that police have the discretion to stand on the sidelines as racial justice protesters are monitored, intimidated, accosted, or even attacked by vigilantes.<sup>308</sup>

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victims of police discretion); Timothy J. Geier et al., *History of Racial Discrimination by Police Contributes to Worse Physical and Emotional Quality of Life in Black Americans After Traumatic Injury*, 11 J. RACIAL & ETHNIC HEALTH DISPARITIES 1774, 1774 (2023) (finding that Black Americans are more likely than their white counterparts to experience traumatic injury and worse functional outcomes as a result of police encounters).

303. See, e.g., *United States v. Watson*, 423 U.S. 411, 423–24 (1976) (allowing warrantless arrests when police officers have probable cause to believe a person has committed or is committing a crime); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (allowing warrantless arrests when police officers have probable cause to believe a person has committed even a minor offense that does not carry jail time); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (allowing police officers to stop an individual when the officer has a reasonable and articulable suspicion that the person is engaged in or about to engage in criminal conduct, allowing stop and frisks where there is reasonable and articulable suspicion that the person is armed and dangerous).

304. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (holding that the Constitution did not require police to have reasonable suspicion to use a drug-detection dog on a car during a legal traffic stop); *Wayne v. United States*, 318 F.2d 205, 209 (D.C. Cir. 1963) (holding that police can force entry into a home to check the welfare of the person); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (establishing that police do not violate the Fourth Amendment when they approach individuals in the public to ask questions).

305. See generally Pita Loo, *Protesting While Black*, *supra* note 23.

306. Admittedly, there are limits to police discretion to treat activists differently such as those provided by Equal Protection. See U.S. CONST. amend. XIV, § 1. Thus, police cannot treat protesters differently because of their race. However, proving an Equal Protection violation is challenging in many respects. See generally James D. Thomas, *Burden of Proof in Equal Protection Discriminatory Impact Cases: An Emerging Standard*, 26 CATH. UNIV. L. REV. 815 (1977).

307. See Laura Dunn, *Lessons from the Town of Castle Rock: Providing Meaningful Protection for Domestic Violence Victims at the State and Federal Level* 3, 21–23 (Crime Victim L. Conf., 2013) <https://law.lclark.edu/live/files/14424-dunnncvlipaperpdf> [<https://perma.cc/7FZQ-8UC2>] (describing the public duty doctrine as providing police with discretion about whether to arrest and asserting that in *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005), the “Supreme Court continued to follow the long-standing legal tradition of safeguarding law enforcement discretion” by affirming the lower court’s dismissal of a lawsuit for failure to state a claim brought by a victim of intimate partner violence against police officers who neglected to enforce an active restraining order); *Hines v. District of Columbia*, 580 A.2d 133, 136 (D.C. Cir. 1990) (holding, in a case involving emergency medical providers, that “[u]nder [public duty] doctrine, a government and its agents owe no duty to provide public services to particular citizens as individuals. Instead, absent some ‘special relationship’ between the government and the individual, the District’s duty is to provide public services to the public at large”).

308. In Chicago, during George Floyd protests, police stood on the sidelines allowing armed citizens to patrol the border of a historically Black neighborhood, saying the citizens were just trying to “protect the neighborhood.” Rachel Kim, *In Bridgeport, Past and Present Live Side by Side*, S. SIDE WKLY. (June 9, 2020),

Police, as agents of the state's monopoly on violence, use their discretion to empower civilian enforcers on the streets. The importance of police as executors of state power on the streets should not be underestimated. Perhaps even more than lawmakers and jurists, police matter to civilians as they engage in everyday activities from the mundane to the consequential, like exercising their civil rights. Philosophers and sociologists have analyzed the police's relationship to state violence. As thinkers like Thomas Hobbes, Max Weber, Walter Benjamin, and Egon Bittner have posited, one of the characteristics that differentiates and defines the state is its monopoly on violence.<sup>309</sup> This violence is meted out from the state by particular institutions—most importantly for the purposes of this discussion, the police.<sup>310</sup> However, police have not only state-sponsored authority to mete out violence against individuals but also state-sponsored discretion.<sup>311</sup> As stated, American courts certainly provide police with extensive legal discretion in executing the law.<sup>312</sup> However, apart from legal precedents and instead at an existential level, police act as the embodiment of the state and its exclusive power to enact violence upon its people. This is because even though the state delegates its authority to execute violence to the police for the purpose of enforcing the law, (even assuming legitimate motives) police have wide latitude to interpret how to accomplish these “lawful” ends.<sup>313</sup> Police “fill a gap between the general form that the law qua law takes and the specific circumstances in which it is to be enforced.”<sup>314</sup> Where the state cannot itself practically intervene with individuals in their day-to-day lives and interactions, police intervene either to enforce a particular law or generally “‘for security reasons’ in countless cases where no clear legal situation exists.”<sup>315</sup> Thus, “police . . . take[] the law into [their] own hands.”<sup>316</sup> In her book *Violence Work*, Professor Micol Seigel theorizes the relationship between police and the state as one of degrees, characterizing police as “the human-scale expression of the state” and thus “the state’s most condensed governing organ.”<sup>317</sup> Police are the state and the law unto themselves. Seigel contends that since the state is defined at its core by its monopoly on violence, police should be understood as “violence workers” who

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<https://southsideweekly.com/bridgeport-past-present-live-side-side-vigilantes/> [<https://perma.cc/4KA7-DHPC>]. In Philadelphia, a citizen was threatened by armed civilians, and when she called the police, they told her that her situation was not an emergency; the same armed civilians went on to hurt three people. Hvistendahl & Brown, *supra* note 17.

309. See THOMAS HOBBS, *LEVIATHAN* 239–64 (C.B. Macpherson ed., 1982); WALTER BENJAMIN, *TOWARD THE CRITIQUE OF VIOLENCE* 47–48 (Peter Fenves & Julia Ng eds., 2021); EGON BITTNER, *ASPECTS OF POLICE WORK* 241 (1990); MAX WEBER, *Politics as Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 77–83 (H. H. Gerth & C. Wright Mills eds., 1946).

310. See BENJAMIN, *supra* note 309, at 47–48; WEBER, *supra* note 309, at 78.

311. See BENJAMIN, *supra* note 309, at 47–48.

312. See *supra* notes 306–10 and accompanying text.

313. See BENJAMIN, *supra* note 309, at 47–48. Here I use “lawful” to mean legally authorized and not by any means rightfully.

314. Eli Friedlander, *Assuming Violence: A Commentary on Walter Benjamin’s Critique of Violence*, *BOUNDARY 2*, Nov. 2015, at 159, 161 (interpreting Walter Benjamin’s theory).

315. *Id.*

316. *Id.*

317. MICOL SEIGEL, *VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE* 9–13 (2018) (quoting Guillermina Seri, *All the People Necessary Will Die To Achieve Security*, in *ANTI-SECURITY* 250 (Mark Neocleous & George S. Rigakos eds., 2011)).

“realize—they *make real*—the core [violence] power of the state.”<sup>318</sup> Seigel explains that police violence is not “exceptional.”<sup>319</sup> The police’s use of violence includes “the *potential* violence that is the essence of their power.”<sup>320</sup> Even when police violence is “latent or withheld . . . it is functional precisely because it is suspended. It often need not be made manifest, because people fear it and grant it legitimacy.”<sup>321</sup> The constitutive relationship between the state and police means that the violence realized by police is legitimized.<sup>322</sup>

However, police violence is not equally meted out, leading to the second question: Why do police engage in disparate policing of racial justice protesters and the vigilantes who confront them on the streets? Police generally share affinity for the principles that civilian enforcers seek to defend as they confront BLM activists. Police officers themselves target BLM racial justice activists because they perceive these protesters as questioning American institutions and society, including racial hierarchy.<sup>323</sup> Furthermore, considering BLM protesters are a diverse group, the police’s treatment during demonstrations is an extension of the aggressive policing of Black and Brown communities.<sup>324</sup> Conversely, police feel aligned with civilian militias and other militant right-wing individuals and groups whom officers do not perceive as a threat to the American Establishment.<sup>325</sup> Some have hypothesized that this set of variables leads officers to minimize the threat posed by militias and other right-wing activists, thus accounting for the measured and sometimes friendly response from police.<sup>326</sup> While this may be part of the story, I posit the perhaps more somber hypothesis that at the root of the police’s friendly relationship and interactions with right-wing activists are officers’ understanding that these groups are participating alongside police in the same state-sponsored project of maintaining racial hierarchy. Putting aside the fact that a still small but increasing number of law enforcement officers are members of militia and right-wing groups themselves,<sup>327</sup> I contend that the police’s noninterference,

318. *Id.* at 10.

319. *Id.* at 9.

320. *Id.*

321. *Id.*

322. *Id.* at 10.

323. See Cunningham, *supra* note 17, at 60–61; Shanahan & Wall, *supra* note 17, at 72–74; Wood, *supra* note 17, at 4, 6; Izadi, *supra* note 25.

324. See, e.g., Cunningham, *supra* note 17, at 59–60, 66–71 (“[I]ntensified police attention to particular kinds of political and cultural threats speaks to the constructed nature of protest challenges . . . .” (emphasis omitted)); cf. Pita Loor, *Protesting While Black*, *supra* note 23, at 1583–84 (explaining that activists of color face disparate brutality and policing for protesting activity).

325. Wood, *supra* note 17, at 6; Cunningham, *supra* note 17, at 61; Shanahan & Wall, *supra* note 17, at 71–72; Chaudhary & Richardson, *supra* note 17, at 98; Kristian Williams, *US Cops Are Treating White Militias as “Heavily Armed Friendlies,”* TRUTHOUT (Sept. 17, 2020), <https://truthout.org/articles/us-cops-are-treating-white-militias-as-heavily-armed-friendlies/> [<https://perma.cc/S67J-BWLS>].

326. See Cunningham, *supra* note 17, at 66. Investigations continue to uncover that a number of law enforcement officers are members of white supremacist and right-wing groups. Geoff Ward, *Living Histories of White Supremacist Policing*, 15 DU BOIS REV. 167, 172–74 (2018); see also Vida B. Johnson, *KKK in the PD: White Supremacist Police and What To Do About It*, 23 LEWIS & CLARK L. REV. 205, 210 (2019) (discussing certain affiliations between police and racist ideologies).

327. See Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research>



friendliness, and occasional collaboration with these groups is motivated by their shared mission. This is consistent with how militant right-wing civilians frame their attendance at BLM events—as auxiliary to police and in response to calls for assistance.<sup>328</sup> Although these calls for assistance are not made by police themselves and may use code words for right-wing ideology like “patriots” in the context of Kenosha, police nevertheless accept this assistance either through noninterference or active collaboration. Officers willingly share their policing power with right-wing armed vigilantes who collaborate in the project of maintaining the existing racial hierarchy.

Using Seigel’s framing of police as state-*legitimized* violence workers, sociologists Musa Jalal and Matthew Jerome Schneider remark that armed, mostly white, and male counterprotesters are engaging in the “violence work” traditionally reserved for law enforcement officers.<sup>329</sup> These armed civilians see their actions as expressions of a righteous duty of “self-defense” and to “protect order.”<sup>330</sup> Jalal and Schneider conclude that these civilians are *encroaching* on the state’s violence work as they police protests.<sup>331</sup> I would conclude instead that the state, as defined by its “governing organ” of the police, willingly shares this violence work with white, right-wing civilians who act to suppress racial justice protests and thereby impede Black liberation by maintaining the established—and particularly racial—hierarchy.<sup>332</sup> These civilian enforcers’ violence work ultimately becomes state sponsored and is state legitimized, even when not carried out directly by agents of the state. After all, the police do not enforce the law against these civilians while simultaneously wielding the law as a weapon against racial justice protesters, allowing these vigilantes to exert violence under the cover of law. Moreover, the inflammatory rhetoric of certain government executives and lawmakers towards racial justice activists, their decision to praise rather than denounce vigilante violence against these activists, and legislative efforts to immunize acts of violence directed at these protesters indicate that militant civilians—in complicity with police—are putting into action the mission of at least some conservative political actors.

The Kenosha example is instructive here. It is not clear whether Rittenhouse himself belonged to a specific militia, right-wing, or white supremacist group. On social media, Rittenhouse had expressed his support for causes aligned with the agenda of white supremacist and right-wing groups, namely for President Trump and the pro-police movement “Blue Lives Matter” which rose in direct opposition to the BLM

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[<https://perma.cc/DQR4-CEBW>]; *Extremism in American Law Enforcement: Far Greater Transparency, Accountability Needed*, ANTI-DEFAMATION LEAGUE (June 3, 2021), <https://www.adl.org/resources/report/extremism-american-law-enforcement-far-greater-transparency-accountability-needed> [https://perma.cc/HF29-JFP9].

328. See Chaudhary & Richardson, *supra* note 17, at 99.

329. Jalal & Schneider, *supra* note 245, at 190–93.

330. *Id.* at 190–91.

331. *Id.* at 190, 199.

332. SEIGEL, *supra* note 317, at 9. This is consistent with Seigel’s analysis that while violence work is at the core of the function of police, officers are not the only ones engaged in violence work in the state. See *id.* at 11–12.

movement.<sup>333</sup> In any event, figuring out whether Rittenhouse himself belonged to any specific right-wing group or whether he was just inspired by right-wing causes and rhetoric is not the point of this Article. Instead, it is more important to expose the degree to which Rittenhouse's actions can be understood as state-sponsored. Both the conservatives who lauded Rittenhouse's conduct,<sup>334</sup> as well as the more liberal political actors who condemned it,<sup>335</sup> failed to articulate a connection between his actions and those of Kenosha police. Focusing on Rittenhouse to the exclusion of the police ignores the role that the state bears in enabling right-wing vigilante violence. Rittenhouse attended the BLM protest to do the state's violence work. Rittenhouse testified at his criminal trial that he went to Kenosha, armed with an AR-15, to defend private

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333. Emma Colton, *How Kyle Rittenhouse Ended Up in Kenosha Armed with an AR-15*, FOX NEWS (Nov. 15, 2021, 2:49 PM), <https://www.foxnews.com/us/kyle-rittenhouse-days-leading-up-to-shooting> [<https://perma.cc/BGQ6-LA5Q>]. "Blue Lives Matter" positions police officers as the "last line of defence of an imperilled nation" and its objectives include suppression of the BLM movement and what experts have categorized as "a further entrenchment of a white supremacist status quo." Shanahan & Wall, *supra* note 17, at 71; see also Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621, 635–36 ("Blue Lives Matter . . . is a social movement that is ripe with the potential to be a repository of white resentment of [B]lack and [B]rown progress."); James Alexander McVey, *Policing the Post-Racial: Visual Rhetorics of Racial Backlash* 3, 50 (2018) (Ph.D. dissertation, University of North Carolina at Chapel Hill), <https://cdr.lib.unc.edu/concern/dissertations/1831ck35j> [<https://perma.cc/58ZJ-JEE3>]; Joseph Darda, *The Whiteness of Blue Lives: Race in American Policing*, in A FIELD GUIDE TO WHITE SUPREMACY 304, 304–06 (Kathleen Belew & Ramón A. Gutiérrez eds., 2021). Conversely, in an interview after his arrest, Rittenhouse said that he was supportive of BLM, although he never expressed such support in social media. Elisha Fieldstadt, *Kyle Rittenhouse Claims He Supports Black Lives Matter in Tucker Carlson Interview*, NBC NEWS (Nov. 22, 2021, 9:38 PM), <https://www.nbcnews.com/news/us-news/kyle-rittenhouse-claims-supports-black-lives-matter-tucker-carlson-int-rcna6311> [<https://perma.cc/E8BB-BNY8>].

334. See Molly Beck, *Assembly Speaker Robin Vos Says 2 Kenosha Deaths Are 'Because of Tony Evers' Actions'*, MILWAUKEE J. SENTINEL (Aug. 27, 2020, 9:57 AM), <https://www.jsonline.com/story/news/politics/2020/08/26/wisconsin-gop-leader-faults-gov-tony-evers-2-kenosha-deaths/3444385001/> [<https://perma.cc/D33Z-BMTR>]. Contra Kevin Breuninger, *Trump Suggests Kyle Rittenhouse Acted in Self Defense in Deadly Kenosha Shootings*, CNBC (Sept. 1, 2020, 7:21 AM) <https://www.cnbc.com/2020/08/31/trump-suggests-accused-kenosha-killer-kyle-rittenhouse-acted-in-self-defense.html> [<https://perma.cc/J8N9-WTBM>] (explaining that President Biden condemns violence of any kind, and criticizes President Trump for not repudiating Rittenhouse); Michael Martina, *Kamala Harris Condemns Looting, Violence in Wake of Police Shooting*, REUTERS (Aug. 27, 2020, 6:19 PM), <https://www.reuters.com/article/world/kamala-harris-condemns-looting-violence-in-wake-of-police-shooting-idUSKBN25N34D/> [<https://perma.cc/P5NB-N8QD>] (quoting Kamala Harris as saying "we will not let these vigilantes and extremists derail the path to justice"); Jaweed Kaleem & Chris Megerian, *Teen Charged in Kenosha Killings, Kyle Rittenhouse, Had a History of Praising Police*, L.A. TIMES (Aug. 26, 2020, 8:42 PM), <https://www.latimes.com/world-nation/story/2020-08-26/jacob-blake-kenosha-shooting-kyle-rittenhouse> [<https://perma.cc/FEE3-5BUE>] (quoting Wisconsin governor, Tony Evers, saying they mourned for Rittenhouse's victims).

335. See *President Biden, Wisconsin Lawmakers React to Not Guilty Verdict in Rittenhouse Case*, WISN (Nov. 21, 2021, 10:51 AM), <https://www.wisn.com/article/guilty-verdict-reaction-kyle-rittenhouse-case/38304572> [<https://perma.cc/Y8VF-JZQY>]; cf. Press Release, ACLU of Wisconsin, ACLU Responds to 'Not Guilty' Verdict in Kyle Rittenhouse Case (Nov. 19, 2021, 1:15 PM), <https://www.aclu.org/press-releases/aclu-responds-not-guilty-verdict-kyle-rittenhouse-case> [<https://perma.cc/R8XS-PMZK>] (statement of ACLU of Wisconsin interim executive director Shaadi Ali); Oriana Gonzalez & Russell Contreras, *Democrats, Activists Denounce Not Guilty Verdict in Rittenhouse Case*, AXIOS, <https://www.axios.com/2021/11/19/democrats-kyle-rittenhouses-not-guilty-verdict> [<https://perma.cc/TQ35-YR2S>] (Nov. 19, 2021).

property.<sup>336</sup> Once at the site of the demonstrations, Rittenhouse stationed himself at a car dealership.<sup>337</sup> On his way to the protests, Rittenhouse texted the car dealership's owner to tell him that he and his armed companion were eager to guard his business.<sup>338</sup> He texted, "[m]e and my brother would both be there armed."<sup>339</sup> Defending the private property of another via the threat of violence is not the work of ordinary civilians but is instead the work of law enforcement actors who possess legally mandated authority to utilize violence to enforce legal rights, including property rights.<sup>340</sup> However, Rittenhouse did more than defend a Kenosha car dealership. Even before the shooting, his presence—along with the other militiamen—signaled to BLM activists that they were in danger of harm by armed vigilantes in addition to police. The police's friendly interactions with the vigilantes confirmed this conclusion. Ultimately, Kenosha police officers, as well as BLM activists, understood that the vigilantes were force multipliers in the state's silencing project. Kenosha police willingly shared the state's violence work with the militia members, including Rittenhouse, to the detriment of BLM activists with fatal results.

#### CONCLUSION

Legal scholarship has devoted insufficient attention to how contemporary civilians participate in the project of quashing racial justice activism, silencing dissent, and ultimately impeding efforts to fully achieve Black liberation. Despite the police's monopoly on state violence, these state actors are not the only ones ready to battle racial justice protesters on the streets. During the 2020 BLM protests, armed militant civilians also descended as police auxiliaries at the site of various protests to monitor—under the threat of violence—racial justice activists. Police, in turn, routinely tolerated or even collaborated with these civilian vigilantes while simultaneously aggressively targeting BLM protesters. This pattern of disparate police enforcement transforms these civilians' efforts into a form of state-sponsored violence—which supplements police violence targeting racial justice activists. This is reminiscent of the antebellum South where the state delegated not just to state actors but all whites its authority to forcibly enforce laws suppressing Black expression and any sentiment endorsing Black liberation, thus showing that the suppression of Black liberation ideologies by state-sponsored civilian enforcers persists even today.

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336. See Rittenhouse testimony, *supra* note 23, at 78–81, 152. Rittenhouse also testified that he attended the protest to provide medical assistance to anyone who needed it and carried a medic bag. *Id.* at 152.

337. *Id.* at 16–17.

338. *Id.* at 80–81; Colton, *supra* note 333.

339. Rittenhouse testimony, *supra* note 22, at 81; Colton, *supra* note 333.

340. This is not intended to be a defense of the police's function or an argument in support of them, but rather a statement of modern society's understanding of the role of the police.