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## RESPONDING TO ABOLITION ANXIETIES: A ROADMAP FOR LEGAL ANALYSIS

Jamelia Morgan\*

WE DO THIS 'TIL WE FREE US. By Mariame Kaba. Edited by Tamara K. Nopper. Chicago: Haymarket Books. 2021. Pp. xxviii, 197. \$16.95.

### INTRODUCTION

During the uprisings that followed the police killings of George Floyd and Breonna Taylor, abolitionist organizers and groups across the country seized the moment and set forth public demands to end the systems of policing and punishment.<sup>1</sup> Demands to “Abolish the Police” and “Defund the Police” echoed in streets as protestors marched across cities in America. The scale of these mass protests brought the basic components of the abolitionist movement to the attention of the mainstream media. It was in the aftermath of these uprisings that Mariame Kaba’s 2021 book *We Do This 'Til We Free Us*<sup>2</sup> hit like a tidal wave.

Kaba is a longtime abolitionist thinker and organizer, and the book is in many ways a model text for abolitionist analysis and defining abolition praxis. *We Do This 'Til We Free Us* is divided into several parts and spans thirty-one chapters. Each chapter includes an article, essay, or speech previously published by Kaba and her many coauthors—Kelly Hayes and Andrea Ritchie, to name a few—who are distinguished abolitionist theorists and organizers in their own right. The eclectic mix of writings draws the reader into what can be characterized as different phases in Kaba’s personal and political consciousness, both with respect to abolitionist theory and to collective organizing around those principles in local communities. For some readers, the several chapters may seem disconnected, if only because they include work published at different points in time. However, a closer reading reveals not

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1. See, e.g., Josie Duffy Rice, *The Abolition Movement*, VANITY FAIR (Aug. 25, 2020), <https://www.vanityfair.com/culture/2020/08/the-abolition-movement> [perma.cc/VG5X-X8QK]; Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [perma.cc/SR6N-QG6C].

2. Mariame Kaba is cofounder of the Interrupting Criminalization initiative.

only the presence of unifying themes but also a consistent and unrelenting abolitionist ethic and critique.<sup>3</sup>

Kaba captures the abolitionist critique with bold, insightful declarations: “[A] ‘safe’ world is not one in which the police keep black and other marginalized people in check through threats of arrest, incarceration, violence and death.”<sup>4</sup> Legal scholars have provided helpful theoretical grounding for understanding articulations of abolition. Allegra McLeod explains in her groundbreaking article “Prison Abolition and Grounded Justice” that a “prison abolitionist framework” is a “set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement.”<sup>5</sup> This framework also incorporates an “abolitionist critique”—a structural analysis that can be incorporated into legal advocacy to further abolitionist goals.<sup>6</sup> According to Amna Akbar, an “[a]bolitionist critique attempts to understand the historical, material, and ideological dimensions of how policing shapes the material infrastructure of our political, social, and economic relationships.”<sup>7</sup> These critiques inform how abolitionists frame social problems; what they identify as barriers to transformative change; and why abolitionists maintain that “reformist reforms,” discussed below, will not succeed in dismantling the prison-industrial complex and other social institutions, structures, and systems that contribute to human oppression, dispossession, exploitation, and deprivation.<sup>8</sup>

The summer of 2020 ushered in a flurry of attention on these systems and the concept of abolition, capturing the eyes of not only the public but also the legal community. More legal organizations are now expressing a commitment to supporting abolitionist movements. And legal organizations founded on

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3. Professors Akbar and McLeod provide helpful definitions of the abolitionist ethic and critique in legal scholarship. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1817–25 (2020) (defining the abolitionist critique); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161–63 (2015) (defining the abolitionist ethic). Groups like Critical Resistance and Survived and Punished are trailblazers in developing an abolitionist critique and ethic in local campaigns and organizing efforts. See CRITICAL RESISTANCE, WHAT IS ABOLITION? (2016), <https://criticalresistance.org/wp-content/uploads/2012/06/What-is-Abolition.pdf> [perma.cc/SRE2-7VAR] (defining abolition and the PIC); *S & P Analysis and Vision*, SURVIVED & PUNISHED, <https://survivedandpunished.org/analysis> [perma.cc/26LV-BLAT] (endorsing “efforts to abolish these anti-survivor systems and create new approaches that prioritize accountable, community-based responses to domestic and sexual violence”).

4. Kaba, *supra* note 1.

5. McLeod, *supra* note 3, at 1161.

6. Akbar, *supra* note 3, at 1815–25.

7. *Id.* at 1817.

8. See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22–39 (2003); see also Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [perma.cc/N9H8-Z5ZN].

commitment to abolitionist goals<sup>9</sup>—like the Abolitionist Law Center,<sup>10</sup> Amistad Law Project,<sup>11</sup> Law for Black Lives,<sup>12</sup> and Movement Law Lab<sup>13</sup>—have secured legal and political victories.<sup>14</sup> And even traditional civil rights and civil liberties organizations like the ACLU<sup>15</sup> and the NAACP Legal Defense Fund<sup>16</sup> have since expressed support for abolition.<sup>17</sup>

This support has not always existed. Abolitionist legal scholars were published long before the summer of 2020, yet these ideas were met with scathing criticism within legal institutions, and by lawyers and institutional actors in particular.<sup>18</sup> As a legal scholar who studies abolition and abolitionist movements, I have personally experienced such resistance: the discrediting of abolitionist movements, the mischaracterizing of abolitionist theories, the failure

9. See *NLG Statement in Support of #8toAbolition*, NAT'L LAWS. GUILD (June 10, 2020), <https://www.nlg.org/nlg-statement-in-support-of-8toabolition> [perma.cc/EU2L-MQMB]; *About*, ABOLITIONIST L. CTR., <https://abolitionistlawcenter.org/about> [perma.cc/KJ6J-3XZR] (“The Abolitionist Law Center continues to work closely with the Human Rights Coalition and other allies in pursuing our shared vision of prison abolition and social justice.”).

10. See *About*, *supra* note 9.

11. See *About*, AMISTAD L. PROJECT, <https://amistadlaw.org/about> [perma.cc/S8LX-WEP9].

12. See *Mission Statement*, LAW FOR BLACK LIVES, <http://www.law4blacklives.org/our-work-1> [perma.cc/4NUU-FY8A].

13. See *Build Power, Fight Power*, MOVEMENT L. LAB, <https://movementlawlab.org/mlcourse> [perma.cc/YU4E-G7KS].

14. See, e.g., Samantha Melamed, *After 50 Years in Prison—37 in Solitary Confinement—Philly Man’s Conviction Is Vacated*, PHILA. INQUIRER (Aug. 11, 2021), <https://www.inquirer.com/news/philadelphia-37-years-solitary-arthur-johnson-wrongful-conviction-20210811.html> [perma.cc/TK6R-RRD9]; *Divesting from Police to Invest in Our Communities*, AMISTAD L. PROJECT, <https://amistadlaw.org/divesting-police-invest-our-communities> [perma.cc/P6BL-SKR9] (“With our movement partners, we were able to stop a \$19 million increase to the Philadelphia Police Department budget in 2020.”).

15. See *ACLU History*, ACLU, <https://www.aclu.org/about/aclu-history> [perma.cc/FCM2-H2QQ].

16. See *About Us*, NAACP LEGAL DEF. & EDUC. FUND, <https://naacpldf.org/about-us> [perma.cc/SYN2-LLJ8].

17. See *Should We Abolish the Police?*, ACLU (July 24, 2020), <https://www.aclu.org/news/criminal-law-reform/should-we-abolish-the-police> [perma.cc/R89M-2J8M]; Press Release, NAACP Legal Def. & Educ. Fund, LDF and Co-counsel File Lawsuit on Behalf of Black Residents in West Philadelphia Who Endured Militaristic Police Violence During Protests (July 14, 2020), <https://www.naacpldf.org/wp-content/uploads/West-Philadelphia-Draft-Release-for-7.14.pdf> [perma.cc/6DEQ-ADF7].

18. E.g., Scott H. Greenfield, *Harvard Says Abolish*, SIMPLE JUST. (Dec. 22, 2019), <https://blog.simplejustice.us/2019/12/22/harvard-says-abolish> [perma.cc/NFH7-DRPY]; Paul Horwitz, *Some Questions About the Harvard Law Review and Its Scholarly Treatment of Prison Issues*, PRAWFSBLAWG (Dec. 22, 2019, 12:16 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2019/12/is-the-harvard-law-review-very-serious-or-kind-of-unserious-about-prison-issues.html> [perma.cc/P8PJ-N8V6]. To the extent liberal reformist approaches are pervasive within the legal academy and legal institutions, hesitancy, resistance, and ought rejection of abolitionist discourse are not surprising. See, e.g., Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 104 (2020) (“Liberal reformism effectively shields the status quo from deep critique. The end goal of liberal reformism is just that: reform.” (footnote omitted)).

to simply substantively engage (i.e., read) foundational abolitionist texts *prior to* forming a response. In addition to this reflexive resistance, there may be some in the legal profession who are open to abolition but unsure about how to incorporate abolitionist thinking into their practice and study. I argue that this uncertainty is due to the uncomfortable fit of abolitionist methodology within mainstream legal practice, education, and scholarship, caused in part by its direct challenge to conventional ways of thinking about legal reform as a pathway to positive change. This uncertainty and discomfort can be overcome through good-faith, active engagement with these ideas.

This Review uses Kaba's book as a springboard and template for thinking through what abolitionist methodology might offer to legal analysis. It responds to a fundamental question: How does abolition theory supplement existing ways of thinking about legal problems? To push the question further, how can lawyers and legal academics add abolitionist thinking—and more specifically, the abolitionist critique—to the collection of “tools for thinking about legal questions”?<sup>19</sup>

I submit that abolition theory and the abolitionist ethic and critique in particular provide a core set of methodologies that can provide a pathway for law to serve as a mechanism for pursuing transformative abolitionist change. Furthermore, abolitionist methodologies provide a way to radically reshape legal analysis and ways of thinking through complex legal issues and solutions. I also suggest how a “state of unrestrained imagination” could further reshape these ways of thinking (p. 25).

Part I of this Review defines abolition, with a focus on Kaba's work. Part II discusses what I term “abolitionist anxieties,” which are concerns about the abolition movement and, specifically, the ways in which abolitionist thinking and theory disrupt traditional legal analysis. Part III then offers some ways to incorporate abolitionist thinking into legal analysis, providing a pathway to engage with abolitionist theory as a methodology, as well as preliminary thoughts on how it can be taught as a legal methodology within law schools.

## I. WHAT IS ABOLITION?

I start with the “what” of abolition because so much of what abolition *is* defines and shapes the nature of Mariame Kaba's work. To explain what I mean, I think it's helpful to see how Kaba describes her own work: “I've always been interested in *what* we're building. That's been a big part of why I do the kinds of things I do and why I built the kinds of containers I've built over the years” (p. 166; emphasis added). The “what” of abolition involves imagining and creating a new world. This act of “building” is a foundational, though often overlooked, aspect of abolitionist thinking and organizing.

But what is it that abolitionists are building? Abolition of the prison-industrial complex (PIC) “is a positive project that focuses, in part, on building

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19. WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW*, at vii (2007).

a society where it is possible to address harm without relying on structural forms of oppression or the violent systems that increase it” (p. 2). These oppressive structures and systems are manifold. As influential abolitionist scholar and activist Angela Y. Davis explained, the PIC must be understood as part of a social, political, and economic context that both shapes its contours and explains its expansive growth over the past several decades.<sup>20</sup> One of the bedrocks of abolitionist analysis is an understanding of the historical antecedents of the PIC: chattel slavery, racial capitalism, settler colonialism, the dispossession of Native lands, the eugenics policies that promoted the forcible sterilization of disabled people (including individuals with physical, developmental, and intellectual disabilities), and the forced segregation of disabled people into large state-run mental hospitals.<sup>21</sup> But according to Kaba, abolitionists are not focused on merely dismantling the outgrowths of these institutions. In other words, the object of abolition is “[n]ot so much the abolition of prisons but the abolition of a society that could have prisons, that could have slavery, that could have the wage, and therefore not abolition as the elimination of anything but abolition as the founding of a new society.”<sup>22</sup> As these definitions demonstrate, central to abolitionist praxis is the decoupling of social responses to harm and conflict from the criminal legal system and building nonpunitive and noncarceral systems of accountability and care.

It is an understatement to say that abolition is an ambitious and long-term project.<sup>23</sup> Leading abolitionist theorist Ruth Wilson Gilmore captures this by saying that to create an abolitionist society, abolitionists have to change one thing: everything.<sup>24</sup> At the same time, abolitionists do not purport to have every aspect of the “abolitionist horizon” figured out right now. As Kaba explains, abolitionist praxis offers not a blueprint but a process of experimentation that is accessible to all of us:

[W]e’re doing abolitionist work all the time. When you’re an organizer or an activist or just somebody in the community and you’re pushing against climate change . . . you’re really doing abolitionist work. If you’re building and pushing for universal education for all[,] you’re doing abolitionist work. You’re pushing for living wages, you’re doing abolitionist work. So I think

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20. DAVIS, *supra* note 8, at 84–104.

21. See, e.g., LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 11–19, 41, 274 (2020); KELLY LYTTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965*, at 29–39 (2017); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [perma.cc/2CVM-F9CF].

22. P. 24 (quoting Fred Moten & Stefano Harney, *The University and the Undercommons: Seven Theses*, SOC. TEXT, Summer 2004, at 101, 114).

23. See, e.g., Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019) (“Prison abolition is a long-term project that requires strategically working toward the complete elimination of carceral punishment.”).

24. See generally RUTH WILSON GILMORE, *CHANGE EVERYTHING: RACIAL CAPITALISM AND THE CASE FOR ABOLITION* (Naomi Murakawa ed., 2022).

it's an expansive vision and an expansive framework. It's not a blueprint. That work of making the thing we have to do ourselves. We have to come up with the strategies, the demands. . . . [T]he things that are going to be needed to reach that horizon. But I think that vision, it's a good north star to have.<sup>25</sup>

In Part III of *We Do This 'Til We Free Us*, Kaba homes in on a foundational tenet of abolitionist theory and organizing: “The state can’t give us transformative justice” (p. 53; cleaned up). Transformative justice is a community-led process developed by activists committed to antiviolenence and is therefore something the criminal legal system can simply never provide.<sup>26</sup> Adherence to this tenet does not come without recognition of the pain that such commitments bring. In an essay published by Kaba and abolitionist thinker and lawyer Andrea Ritchie in 2020, they address growing calls to prosecute the officers responsible for killing Breonna Taylor and acknowledge the difficulty that comes with accepting that the criminal legal system will not protect the lives of Black women:

Turning away from systems of policing and punishment doesn’t mean turning away from accountability. It just means we stop setting the value of a life by how much time another person does in a cage for violating or taking it—particularly when the criminal punishment system has consistently made clear whose lives it will value and whose lives it will cage. (pp. 65–66)

Justice will not come from prosecuting and imprisoning the officers that killed Breonna Taylor. But that should not be taken to suggest that justice is not possible. Instead, Kaba and Ritchie seek a “broader and deeper conception of justice for Breonna Taylor and other survivors and family members harmed by police violence.”<sup>27</sup> Their proposed conception of justice comes through a reparation framework and consists of five elements (p. 66). First is *repair* and *acknowledgment*, which includes termination of the officers involved in Taylor’s killing, acknowledgment of the value of life lost, and compensation from outside the legal system for the pain and suffering incurred. *Restoration* includes healing and mental-health services. *Cessation* demands an end to actions that caused Taylor’s death, including no-knock warrants. And finally, *nonrepetition* calls for an end to conditions that produced her death: the drug war and the forces of gentrification. This reparations justice framework is abolitionist in that it allows for accountability on the part of the officers that killed

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25. Aminatou Sow & Ann Friedman, *Police Abolition*, CALL YOUR GIRLFRIEND, at 10:15–11:05 (June 5, 2020) (on file with the *Michigan Law Review*).

26. See p. 59. Transformative justice processes respond to harms in ways that the state cannot and will not. Such processes provide support and safety for the individual who experienced harm, assess how the broader social context facilitated the harm, and ask how to alter the social context such that the harm is less likely to occur again. See *id.*

27. P. 66. Kate Levine argues in recent work that “an abolitionist ethic demands a far more nuanced response to police violence from those who seek to radically reduce the prison industrial complex rather than simply calling for the prosecution and imprisonment of individual police officers.” Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1024 (2021).

Breonna Taylor in a manner that does not rely on criminal prosecution and carceral punishment. It instead centers the harms done to Taylor and her family and offers tailored responses to the endemic problem of racialized police violence.

These five elements emphasize the abolitionist idea that justice will exist beyond the law and the state and that it will come through collective struggle. Allegra McLeod argues that “this abolitionist conception of justice presents a formidable challenge to existing ideas of legal justice.”<sup>28</sup> While existing ideas emphasize “individualized adjudication and corresponding punishment or remuneration,” abolitionist justice imagines a future “where punishment is abandoned in favor of accountability and repair, and where discriminatory criminal law enforcement is replaced with practices addressing the systemic bases of inequality, poverty, and violence.”<sup>29</sup> Collective struggle is essential to create such systems that promote social well-being. Kaba argues that building relationships provides answers to the question of what alternatives are possible in the abolitionist future. She writes:

I think community accountability and work in our communities is key. We have to get serious about doing that work and reaching toward each other. If our relationships are transformed over time, we'll be able to think more clearly about more ways to reduce harm. At that point—maybe our society won't need armed people to come to our houses to do wellness checks. Maybe the very fact that we have created a different society for ourselves—have established a different way of relating to one another—answers the question for us eventually. (p. 98)

Patrisse Cullors similarly centers collective struggle and relationships in her abolitionist praxis, stating that “[a]bolition is about how we treat each other.”<sup>30</sup>

These radical ideas may be alarming to many in the legal profession for an obvious reason: radical change dramatically disrupts the status quo. A Review of this kind cannot possibly provide in-depth treatment of a complex, multipronged approach to abolition as evidence of justifications for such disruption. What it offers instead is a step toward meaningful engagement with abolition in legal analysis, in part through tackling head-on some of the anxieties that arise when lawyers and law students attempt to incorporate abolitionist thinking into their legal analysis.

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28. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019).

29. *Id.* at 1646 (“Justice, for abolitionists, is grounded in paying careful attention to experienced harm and its aftermath, addressing the needs of survivors, and holding people who have perpetrated harm accountable in ways that do not degrade but seek to reintegrate, while understanding the root causes of wrongdoing and working to address them. Justice grounded in attending to how redress is experienced also aims to change the world as it is so that those affected have greater resources to heal and so that harm is less likely to befall others in the future.”).

30. Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1694 (2019).

## II. ABOLITION ANXIETIES: CHALLENGES FOR LEGAL ANALYSIS

This Review builds on the existing abolitionist legal scholarship by centering what abolitionist theory and praxis means for legal analysis and by suggesting how a more radical imagination could supplement, and reshape, “tools for thinking about legal problems.”<sup>31</sup> To do so, this Review responds to common “anxieties” about abolition held by lawyers, legal scholars, and law students whose interest in abolition is tinged with uncertainty. These anxieties grow out of traditional approaches to legal analysis and take the form of potential objections to abolition that are not entirely rooted in *substantive* disagreement, but rather in the difficulty of grasping how abolitionist thinking maps onto traditional legal analysis. Responses to four such anxieties are drawn from Kaba’s book and provide a template for thinking through these complex questions. Admittedly, this is not a comprehensive list of all the anxieties that abolitionist thinking may pose for traditional legal analysis. Yet, it’s a start for meaningful engagement—challenges and opportunities—with abolitionist thinking.

## A. “Abolition Doesn’t Tell Us How and Where to Begin”

Legal analysis tends to require identifying a clear problem and clear set of solutions. The IRAC method,<sup>32</sup> for example, starts with the issue or question the court must resolve or answer, then the rules, which include the law, statute, case, or regulation that controls and to which the facts must be applied. The issues and rules form the basis for the most important part in the process, the actual analysis, and then, ultimately, the conclusion, or the particular answer to the legal question.

For some, abolition may not provide a structured or clear starting point. That is to say, one potential anxiety—or even objection—is that abolition provides no template for how and where to begin to identify and examine specific social problems, whether racism, settler colonialism, heteropatriarchy, or other forms of social oppression and deprivation. Given the ambitions of abolitionist theory, which laws and legal institutions should be targeted first? What are the pathways to promoting abolitionist principles within and outside the law? What laws must change? Is there a role for lawyers working in criminal legal institutions, like public defenders, or even progressive prosecutors, in abolitionist movements?<sup>33</sup>

Abolitionist theory does not identify one law, legal institution, or even legal issue as the starting point of the struggle for transformative social change.

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31. FARNSWORTH, *supra* note 19, at vii.

32. IRAC stands for “Issue, Rule, Application, and Conclusion.”

33. See, e.g., Benjamin Levin, Essay, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1444 (2021) (outlining taxonomy of progressive prosecutors and noting that “the anti-carceral prosecutor’s stance comes closest to resembling those embraced by prison abolitionists and other more radical critics of the carceral state”).

This is not due to a lack of clarity in the abolitionist vision; rather, it's an implication of abolitionism's focus on decentralized, local organizing aimed at collective struggle to identify community-based solutions.

In any event, Kaba's book makes clear that the question of how and where to begin is woefully belated: it's already begun.<sup>34</sup> The "how and where to begin" framework grounds thinking in the current state of the world. Kaba invites us to shift this framing; an abolitionist journey should begin not with "What do we have now, and how can we make it better?" but rather, "What can we imagine for ourselves and the world?" (p. 3). As she explains, "If we do that, then boundless possibilities of a more just world await us" (p. 3). Such analysis is, admittedly, freewheeling and unstructured, but it is a brand of analysis nonetheless. Incorporating this into legal analysis would mean starting with a social problem in need of change and then determining what an abolitionist vision of the world would look like—a world that prefigures political, economic, and social conditions such that the social problem no longer exists.<sup>35</sup>

Imagining the world on the abolitionist horizon does lead to another question: What should be the set of abolitionist proposals on the table? Here again, unlike traditional forms of legal analysis, abolitionist thinking doesn't necessarily ask what is currently feasible in terms of concrete reforms. Rather, those committed to a purely abolitionist agenda aim for abolitionist futures and are prepared to walk away when those demands are not met or when objectives are thwarted.<sup>36</sup> For example, when New York passed a bail reform package aimed at regulating bail funds but not abolishing cash bail, abolition-minded leaders from the Brooklyn Community Bail Fund (BCBF) announced that they were ending bail payments.<sup>37</sup> In their open letter, the BCBF explained that "revolving bail funds in New York may now be used to perpetuate money bail," and that they had become an "escape hatch for a political system that lacked the courage to end money bail."<sup>38</sup> Consistent with abolitionist practice, organizers from BCBF emphasized and reaffirmed their commitment to abolishing money bail—not reforming or extending the cash bail and

34. Pp. 107–09. Kaba asserts that abolitionist practice and experimentation, which is essential, is already happening all over the country. P. 103.

35. On the abolitionist concept of prefiguration, see, for example, McLeod, *supra* note 28, at 1623 ("[I]t is also the imagining and generating of alternative institutions and relations . . . [, of] resistance that is responsive to dismantling current systems of colonial empire and systemic hierarchies, while also prefiguring societies based on equity, mutual aid, and self-determination . . . ." (quoting HARSHA WALIA, UNDOING BORDER IMPERIALISM 113 (2013))); GILMORE, *supra* note 24 ("'Instead of asking whether anyone should be locked up or go free, why don't we think about why we solve problems by repeating the kind of behavior that brought us the problem in the first place?' She was asking them to consider why, as a society, we would choose to model cruelty and vengeance.").

36. Robert Saleem Holbrook (@saleemholbrook), TWITTER (July 20, 2021, 11:15 AM), <https://twitter.com/saleemholbrook/status/1417503352506785795> [perma.cc/Z5RA-4PKF].

37. Brooklyn Cmty. Bail Fund (@bkbailfund), *Community Bail Funds and the Fight for Freedom*, MEDIUM (Sept. 27, 2019), <https://medium.com/@bkbailfund/community-bail-funds-the-fight-for-freedom-17dc40311230> [perma.cc/5RDK-A7EN].

38. *Id.*



in identifying—and learning how to identify—these “essential distinctions.”<sup>46</sup> It invites consideration of the specific reform proposals, the features of each particular proposal, the effects of such proposals (within the organization, institution, and beyond), and whether the proposal is a reformist or nonreformist reform. Kaba provides two questions to determine the last point: “Which reforms don’t make it harder for us to dismantle the systems we are trying to abolish? . . . What ‘non-reformist’ reforms will help us move toward the horizon of abolition?” (p. 96).

She asks these questions of proposals to abolish the death penalty that rely on resentencing or commuting sentences to life without parole, and impliedly answers “no” to both. As she puts it, life without parole (LWOP) “is an absolute perfect example of a reformist reform, which actually makes it less likely that we’re going to get people out of jail and prisons.”<sup>47</sup> This reform offers a useful template for working through abolitionist analysis. Death-penalty abolitionists decry the regime of capital punishment as racist, classist, ableist, and fundamentally unfair.<sup>48</sup> Instead, they have supported LWOP as a politically feasible, life-saving alternative to capital punishment.<sup>49</sup> But life in prison without the possibility of parole in harsh conditions of confinement leads to a kind of “slow death” marked by debility and chronic illnesses. These features highlight why PIC abolitionists in recent years have referred to it as “Death by Incarceration.”<sup>50</sup> They also help ground analysis of the questions presented above. LWOP detracts from the broader goal of dismantling the carceral state and reinforces notions of desert that differentiate between certain people (violent or dangerous offenders versus others) and their corresponding “need”

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46. *Id.* at 102, 104 (“I am suggesting neither a false neatness within nor artificial distinctions between rich left traditions. But I mention it to make a point so obscured in legal discourse: that approaches to reform reflect ideological commitments, critiques of or acquiescence to underlying systems, aspirations for the future, and theories of change. Reforms communicate analyses of our conditions, tell stories about possibilities, and contribute to dynamic relations of power. So the target and object of the nonreformist framework will depend on one’s political project and analysis, as will whether one accepts a reformist or non-reformist orientation.”).

47. *See* p. 96. In recent work, Margo Schlanger has contested the claim, put forth by some maximalists, that limited reformist measures undermine the goal of depopulation efforts. She notes that incremental reforms may achieve deeper depopulation, but exactly how effective these incremental reforms are depends largely on social and political factors and the presence of “allies” to support the effort. Margo Schlanger, Essay, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273 (2020).

48. *E.g.*, Robert M. Sanger, IQ, *Intelligence Tests*, “Ethnic Adjustments” and Atkins, 65 AM. U. L. REV. 87 (2015).

49. *E.g.*, Michelle Miao, *Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States*, 15 NW. J.L. & SOC. POL’Y 173 (2020). Of course, capital defense lawyers have an ethical obligation to provide competent and zealous advocacy for their clients who are facing a death sentence. Abolitionists would likely not see such advocacy as anti-abolitionist, but rather consistent with a harm-reduction approach.

50. *E.g.*, QUINN COZZENS & BRET GROTE, ABOLITIONIST L. CTR., *A WAY OUT: ABOLISHING DEATH BY INCARCERATION IN PENNSYLVANIA* (2018), [https://abolitionistlawcenter.org/wp-content/uploads/2018/09/ALC\\_AWayOut\\_27August\\_FullI.pdf](https://abolitionistlawcenter.org/wp-content/uploads/2018/09/ALC_AWayOut_27August_FullI.pdf) [perma.cc/E3VW-5ZRA].

to be caged. As to what a nonreformist reform that enables movement “toward the horizon of abolition” might look like in the context of sentencing, the answer is more difficult. It could look like efforts by Pennsylvania-based Let’s Get Free, whose #LetGrandmaGo campaign seeks the release of aging women from Pennsylvania prisons and “dramatic change in the state of [Pennsylvania]’s broken commutation process.”<sup>51</sup>

For decades, abolitionists have maintained that a radical imagination coupled with the pursuit of nonreformist reforms is where we must begin and that this approach offers the possibility for disrupting some of the most pernicious forms of human suffering. These insights and methodologies can be extended beyond those goals to radically transform conventional approaches to legal thinking. Abolitionist thinking challenges the values that underscore legal analysis (such as the quest for objectivity and neutrality discussed below) and methodology of legal analysis (that legal analysis should produce clear *legal* solutions).

### B. “Abolition Rejects Objectivity and Neutrality”

Abolitionists often proclaim that the criminal justice system is not broken but functioning as it’s supposed to: as a tool for racial, gender, class, and disability subordination.<sup>52</sup> The abolitionist critique insists that rights and liberties are not granted equally to all and that the nature of such rights and liberties themselves differ based across historically marginalized groups.<sup>53</sup> As I’ve discussed, intractable social problems are understood through this lens and provide, in large part, a basis for the abolitionist rejection of reform as a pathway towards liberation and the end of oppressive forms of punishment and control. What is not often surfaced is the aspect of the abolitionist critique that rejects neutrality and objectivity as a value, aspiration, or end goal. If rights and liberties are constructed to serve the function of policing, controlling, surveilling, and imprisoning marginalized communities, then they cannot be neutral, and legal analysis cannot be objective. Collectively, laws and legal interpretation serve this pernicious function.<sup>54</sup> It is here that abolition poses yet another challenge for traditional legal analysis.

The quest for objectivity is a cornerstone of traditional methods of legal analysis. But this can be problematic. In the law, objectivity and neutrality often mask racialized, gendered, and classed perspectives and power distributions.<sup>55</sup> Kimberlé Crenshaw has described such “perspectivelessness” as being

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51. *Campaign for Meaningful Commutation!*, LET’S GET FREE, <https://letsgetfree.info/restore-commutation> [perma.cc/KH8L-Y6PB].

52. See p. 13.

53. For example, Kaba asserts that “[c]ivil liberties and individual rights have different meanings for different groups of people. They also have different priorities, depending on social contexts.” P. 12.

54. See pp. 12, 50.

55. Kimberlé Williams Crenshaw, Foreword, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1, 3 (1998) (“When this expectation is combined with the fact

created by “[d]ominant beliefs in the objectivity of legal discourse” that “discount[] the relevance of any particular perspective in legal analysis and . . . posit[] an analytical stance that has no specific cultural, political, or class characteristics.”<sup>56</sup> By teaching legal analysis “as though it is possible to create, weigh, and evaluate rules and arguments in ways that neither reflect nor privilege any particular perspective or world view,” Crenshaw argues that law schools reinforce the idea that legal reasoning is truly objective and neutral, devoid of personal identity, perspectives, and experiences.<sup>57</sup>

In contrast, abolitionist methodology expressly rejects the objectivity and neutrality that purport to undergird legal education and legal analysis and instead embraces subjectivity.<sup>58</sup> Abolitionist analysis places political, intellectual, and personal commitments front and center to provide grounding for the abolitionist analysis and praxis.<sup>59</sup> Political, because abolitionists share a set of commitments, principles, or what Kaba terms “basic obligations” (pp. 133–34). Intellectual, because abolitionist analysis starts from an entirely different set of intellectual priors—namely, that policing and punishment systems function to subordinate in racist, gendered, and classist ways. And personal, because like critical race theory (CRT) scholarship, abolitionist organizing is rooted in collective struggle and relationship with other community members. As Kaba remarks, “[W]hen we set about trying to transform society, we must remember that we ourselves will also need to transform. . . . We are deeply entangled in the very systems we are organizing to change” (p. 4). Abolitionist legal analysis incorporates these commitments and applies them to identify assumptions underlying legal rules and practices, surface harmful and subordinating logics, and identify nonreformist reforms that discredit and dismantle policing and punishment systems.

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that what is understood as objective or neutral is often the embodiment of a white middle-class world view, minority students are placed in a difficult situation. To assume the air of perspectivelessness that is expected in the classroom, minority students must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts.”); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1377–78 (1986) (“[A]bstract universality constructed a dark tunnel to its tainted delusion. It made maleness the norm of what is human, and did so sub rosa, all in the name of neutrality. . . . It is a conception of the world which takes ‘the part for the whole, the particular for the universal and essential, or the present for the eternal. . . .’ Feminist analysis begins with the principle that objective reality is a myth.”).

56. Crenshaw, *supra* note 55, at 2.

57. *Id.* at 2–3.

58. Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1576 (2019) (“Abolition seeks (as it performs) a radical reconfiguration of justice, subjectivity, and social formation that does not depend on the existence of either the carceral state (a statecraft that institutionalizes various forms of targeted human capture) or *carceral power* as such (a totality of state-sanctioned and extrastate relations of gendered racial-colonial dominance).”).

59. See Cullors, *supra* note 30, at 1694. In many ways the grounding in the personal is similar to CRT’s call for narrative and voice as a way to ground legal analysis and jurisprudence. See, e.g., Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN’S RTS. L. REP. 297 (1992).

Take, for example, the abolitionist critique of stand-your-ground laws. An abolitionist critique offers a specific lens for understanding how legal standards like “reasonableness” are not just legal concepts, but raced, gendered, and classed constructs that function in ways that criminalize survivors.<sup>60</sup> Abolitionist organizers acknowledge these constructs in their work on behalf of criminalized survivors. Kaba’s framing of “victims” maps much of the work that survivors of sexual violence and state violence have done to reject the carceral state as the only mechanism for obtaining justice.<sup>61</sup> Part 2 is aptly titled “There Are No Perfect Victims” (pp. 30–52).

Within part 2, Kaba tells the story of Marissa Alexander, a thirty-one-year-old Black woman who fired a warning shot after she was attacked by her abusive husband. No one was injured, yet Alexander was prosecuted for aggravated assault with a lethal weapon.<sup>62</sup> Alexander received the mandatory minimum of twenty years.<sup>63</sup> Kaba connects Alexander’s unjust prosecution to the long history of “marking Black bodies as innately inferior” (p. 32). She draws a line from slave codes in colonial America that “singled out Blacks for extremely cruel punishment,” to the brutal killing of Mike Brown, to Alexander’s imprisonment—each instance illustrating the way that “[i]nnately inferior’ bodies can be debased, punished, and killed without consequence” and that Black people “can only be seen as the aggressors and are never the victims” (p. 32). Kaba demonstrates that the law is not neutral, and its structural and systematic biases should be surfaced in legal analysis just as it is in the abolitionist approach to examining the law of self-defense.

This approach maps onto other theories of critical praxis within the law. In writing of critical trans theory, abolitionist theorist Dean Spade explains that we should not examine systems through “purportedly ‘neutral’ criteria” because “those systems are often locations where racist, sexist, homophobic, ableist, xenophobic, and transphobic outcomes are produced.”<sup>64</sup> He encourages us to “look more at what legal regimes do rather than what they say about what they do” and at “how vulnerability is distributed across populations, not just among individuals” in order to avoid perspectivelessness and, in turn,

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60. See, e.g., Donna Coker, Foreword, “Stand Your Ground” in Context: Race, Gender, and Politics, 68 U. MIA. L. REV. 943, 954 (2014) (discussing the Marissa Alexander case); D. Marvin Jones, “He’s a Black Male . . . Something Is Wrong with Him!” *The Role of Race in the Stand Your Ground Debate*, 68 U. MIA. L. REV. 1025, 1029 (2014).

61. See Tom Jackman, *How to Curb Violence, and Mass Incarceration, by Focusing on Crime Victims*, WASH. POST, (Feb. 16, 2017), <https://www.washingtonpost.com/news/true-crime/wp/2017/02/16/how-to-curb-violence-and-mass-incarceration-by-focusing-on-crime-victims> [perma.cc/RLU9-EXCR]; MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS* (2020).

62. Julia Dahl, *Fla. Woman Marissa Alexander Gets 20 Years for “Warning Shot”: Did She Stand Her Ground?*, CBS NEWS (May 16, 2012, 4:21 PM), <https://www.cbsnews.com/news/fla-woman-marissa-alexander-gets-20-years-for-warning-shot-did-she-stand-her-ground> [perma.cc/B4D9-Y6A3].

63. *Id.*

64. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 10* (Duke Univ. Press rev. & expanded ed. 2015) (2009).

shape more effective resistance strategies.<sup>65</sup> Abolitionists are also aligned with prominent critical race theorists who have long argued that neutrality is a legal fiction that does little to promote actual racial justice and rather works to maintain the status quo.<sup>66</sup>

### C. “Abolitionist Theory Is Incoherent”

Legal methodologies provide a lens for analyzing legal issues and identifying solutions. Although abolitionist theory provides a set of clear principles, at first glance it is not always clear which specific policies abolitionists would support in every instance. Because abolitionist theory provides structural framing of social (or legal) problems rather than of discrete problems with clear solutions, for some, their arguments may seem unstructured. For others trained in more traditional legal methodologies, abolitionist arguments and style may seem incoherent. But abolitionists’ commitment to a long-term vision of radical social change is rooted in guiding principles and beliefs.

Abolition centers “freedom dream[ing]”<sup>67</sup> of a radically different world; it is a “generative, imaginative, and productive concept” that “entails a radical reconfiguration.”<sup>68</sup> Abolition offers “a long-term political vision.”<sup>69</sup> Because of its ambitiousness, abolitionist theory and organizing offers no quick fixes or clear, concrete pathways forward. As described earlier, there is no blueprint for an abolitionist future.

But there are principles that guide the praxis.<sup>70</sup> Kaba captures the core principles, or “basic obligations,” in part 6 of the book: (1) “elimination of policing, imprisonment, and surveillance”; (2) rejection of the “expansion in breadth or scope or legitimacy of all aspects” of the PIC; and (3) refusal of “premature death and organized abandonment, the state’s modes of reprisal and punishment” (pp. 133–34). Taken together, these principles inform what positions abolitionists take as well as the manner in which they go about pursuing these goals.

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65. *Id.* at 10.

66. Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 21–23 (1991); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,* 62 MINN. L. REV. 1049, 1091–92 (1978).

67. ROBIN D.G. KELLY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* 7 (2002) (describing the “work of dreaming” as a “conversation about what kind of world we want to struggle for”).

68. Rodríguez, *supra* note 58, at 1612. Dylan Rodríguez is a founding member of Critical Resistance. *Dylan Rodríguez*, UNIV. OF CALIF., RIVERSIDE, <https://profiles.ucr.edu/dylan.rodriguez> [perma.cc/JD4U-X6GN].

69. CHARLENE A. CARRUTHERS, *UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS*, at x (2018).

70. P. 133 (“While abolition is a flexible praxis contingent upon social conditions and communal needs, it is built on set of core principles.”).

One of the main features of abolitionist methodology is a centering of process rather than rules, outcomes, and answers.<sup>71</sup> Kaba resists calls for specific answers to deeply entrenched social problems and focuses more on process—“the *how* of things, the strategy of how we get from where we are to where we want to go” (p. 166). She encourages people to make more things, build experiments, take risks—and inevitably fail at some of them (p. 166). These failures, Kaba adds, are “actually the norm and a good way for us to learn lessons that help us” (p. 166). Abolitionists do not shy away from the difficult questions or from failure, but they refuse to tie abolition to a set of immediate solutions.<sup>72</sup> This stance may pose frustrations for those trained in traditional forms of legal reasoning where answers seemingly must always follow the posing of problems, lest the practice of identifying problems in the first place be framed as merely a futile exercise with no practical value to the real world.

While they pursue a radical new world, abolitionists also respond to ongoing and immediate forms of state and private violence—what is referred to as harm reduction. For some, endeavoring toward transformative change while attending to the immediate needs of those currently experiencing harm may seem incoherent. But abolitionists, including Kaba, welcome harm reduction.<sup>73</sup> They do not ignore the urgent needs facing communities experiencing the brunt of state violence; rather, they see these needs as informing priorities. Police killings spark abolitionist protests or direct actions, and witnessing state violence, like solitary confinement or prison construction, drives other abolitionist responses.<sup>74</sup> Abolitionists demand radical reform generated through collective struggle and building power over the long term, but they are equally committed to reducing harm in the short term.

This aspect of abolitionist thinking is consistent with CRT scholars’ embrace of legal rights, which were conceived of as necessary for making claims on the state to rectify persistent and entrenched social inequality. This rights rhetoric—framing needs, protections, and injuries in the language of rights—can be framed as a kind of harm reduction.<sup>75</sup> Perhaps it can be argued that

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71. Barnard Ctr. for Rsch. on Women, *Reina Gossett + Dean Spade (Part 1): Prison Abolition + Prefiguring the World You Want to Live In*, YOUTUBE (Jan. 7, 2014), <https://youtu.be/XDQlW1uJ8uQ>.

72. See Cullors, *supra* note 30, at 1689–91.

73. P. 96; Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019).

74. Pp. 119–26 (discussing an abolitionist campaign following police killing of Rekia Boyd); Berger et al., *supra* note 8 (outlining campaigns).

75. As Professor Anthony Cook put it, rights rhetoric permitted critics to “carve out counterhegemonic space for struggle” and push toward more liberatory goals. Intersectionality Matters!, *The Insurgent Origins of Critical Race Theory*, SOUNDCLLOUD (Sept. 2, 2021) (on file with the *Michigan Law Review*), <https://soundcloud.com/intersectionality-matters/39-looking-back-to-move-forward-the-insurgent-origins-of-critical-race-theory>. Patricia Williams writes eloquently about this relationship in her iconic book *The Alchemy of Race and Rights*: “Although rights may not be ends in themselves, rights rhetoric has been and continues to be an effective form of discourse for blacks. . . . What is needed, therefore, is not the abandonment of rights language for

rights rhetoric offered what may be described as an early articulation of “radical imagining.” CRT scholars applied this rhetoric to reforms aimed at addressing historical and ongoing racial subordination, principally of Black communities.<sup>76</sup>

I bring in CRT to help to illuminate a central insight about abolitionist thinking and organizing: Abolitionist political and moral commitments require addressing present harms as well as long-term goals, and so harm reduction is embedded into abolitionist practice. Adopting a harm-reduction approach serves to ensure that abolitionists do not end up so concerned with the *theory* of abolition that they fail to consider the *practice* of abolition. As Angel E. Sanchez explains, abolition requires treating the prison system like a “social cancer: we should fight to eradicate it but never stop treating those affected by it.”<sup>77</sup> Popular abolitionist campaigns reflect similar values.

Kaba refers to the defense campaigns on behalf of Bresha Meadows and the aforementioned Marissa Alexander, two “criminalized survivors of violence,” as an example of harm reduction as “part of a larger abolitionist project” (p. 110). Those defense campaigns included, among other goals, the release of both Bresha and Marissa from prison (p. 114). Kaba directly refutes suggestions that “it is a mistake to focus on freeing individuals when all prisons need to be dismantled” (p. 110). In rejecting this claim, Kaba articulates a common justification for harm reduction within abolitionist organizing: to ignore people who are currently incarcerated is to “render[] the people who are currently in prison invisible, and thus disposable” (p. 110). Instead, collective organizing and care in individual defense campaigns go hand in hand with the long-term goal of dismantling prisons. Collective organizing around the plight of one individual, to paraphrase Kaba, becomes but a case study for the rationale for abolishing prisons altogether (p. 111). Similarly, care (whether organizing to write letters, provide financial support, or prison visits) becomes a way to provide meaningful connection for people participating in these defense campaigns and, in Kaba’s words, will “change minds and hearts” and “help[] people to (hopefully) develop more radical politics” (p. 111). This animates much of the harm-reduction rationale that is present in abolitionist theory and organizing. So, in a certain way, what may initially

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all purposes, but an attempt to become multilingual in the semantics of evaluating rights.” PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 149 (1991).

76. Mari Matsuda makes a similar point, drawing on W. E. B. Du Bois’s concept of double consciousness to explain the relationship between people of color and rights as the basis for a radical constitutionalism:

Applying the double consciousness concept to rights rhetoric allows us to see that the victim of racism can have a mainstream consciousness of the Bill of Rights, as well as a victim’s consciousness. These two viewpoints can combine powerfully to create a radical constitutionalism that is true to the radical roots of this country.

Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 333–34 (1987).

77. Sanchez, *supra* note 73, at 1652.

seem inconsistent with abolitionist thinking is in fact consistent with higher-level political and moral commitments.

D. “*The Abolitionist Agenda Is Impractical*”

Traditional lawyering involves practicing in the world of what *is* rather than what can be. More fundamentally, lawyers are taught that change through law comes incrementally, and radical swings in legal doctrine are actively discouraged.<sup>78</sup> Impact litigation and community-lawyering models do invite creativity that can push the boundaries of existing laws, but ethical rules limit truly radical thinking.<sup>79</sup> Movement lawyers, community lawyers, and of course rebellious lawyers resist traditional methods and styles of legal representation, as do invaluable clinical programs located in law schools across the country.<sup>80</sup> Yet, despite their work, such lawyering tends not to find its way into the black letter law courses that remain the backbone of legal education.<sup>81</sup> In this context of traditional lawyering, lawyering for abolition may seem naïve or impractical.

Outside of law, critics of abolition have made similar claims. Even self-proclaimed socialist magazine *Jacobin*<sup>82</sup> published an article proclaiming that

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78. This prudentialist view of legal change can be contrasted with the progressive view of legal change. See, e.g., Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139, 1140 (1995) (book review) (“[P]rogressive lawyers often define tradition in the same way that conservatives do and are therefore distrustful of arguments based on tradition. They view themselves as fighting the oppressive rule of unfair, misguided tradition, particularly in situations in which stare decisis inhibits legal change. Because of their misgivings about tradition, progressive lawyers typically invoke legal tradition only to save progressive precedents from being overruled in the tide of deference to ‘majoritarian’ branches of government.”); see also *id.* at 1140–41 (“The prudentialist sees commitment to tradition as an affirmance of culture and practical wisdom over the totalizing demands of modernity. This view, which exalts the image of the ‘lawyer-statesman,’ favors incremental reform and distrusts radical change from any quarter, including technology, markets, and politics.”).

79. See MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2020) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”).

80. See, e.g., Scott L. Cummings, *Movement Lawyering*, 27 IND. J. GLOB. LEGAL STUD., no. 1, 2020, at 87; Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

81. Perhaps that is why finding a template for abolitionist lawyering has been so long in coming. Excellent scholarship by Professors Dorothy Roberts, Daniel Farbman, Amna Akbar, Jocelyn Simonson, and Sameer Ashar has started a discussion. Roberts, *supra* note 23; Bell, *supra* note 80; Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019); Sameer M. Ashar, Essay, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 218 (2016).

82. *Raison d’être*, JACOBIN, <https://jacobinmag.com/about> [perma.cc/PH6T-5V29].

“the rhetoric of prison abolition won’t help us end [the prison system’s] deprivations.”<sup>83</sup> “Rather than call for the complete abolition of prisons—a policy unlikely to win broad public support—the American left should fight to introduce [Scandinavian prison] conditions into our penal system,” as such demands would attract prominent support and a strong base.<sup>84</sup> This, it continues, is key, as “[i]nstitutions become ‘obsolete’ only when more effective and more progressive alternatives become available.”<sup>85</sup>

But Kaba is reluctant to frame abolitionist demands as “alternatives” disconnected from abolitionist visioning (p. 167). Her analysis does not center what is politically feasible or what has a “strong base” for political support. Instead, Kaba believes abolitionist demands should be consistent with the broader goal of dismantling, defunding, and delegitimizing policing and punishment systems (p. 13). While recognizing that what abolitionists seek is a far-off vision,<sup>86</sup> Kaba, writing with Dan Berger and David Stein, adamantly rejects allegations of naïveté: “Prison abolitionists aren’t naïve dreamers. They’re organizing for concrete reforms, animated by a radical critique of state violence.”<sup>87</sup> For example, abolitionists have been involved in several campaigns to free political prisoners and criminalized survivors.<sup>88</sup> Abolitionists also helped lead the coalition that launched People’s Budget LA, which demands “a city budget that invests in the wellbeing of our communities with priority on supporting the underserved and marginalized.”<sup>89</sup> These examples are not provided to demonstrate the success of abolitionist movements.<sup>90</sup> Rather, they demonstrate that abolitionist proposals are practical, but only to the extent that they are accompanied by organizing and political education that can shift discourse and change minds as to certain long-standing and widely held beliefs.

Abolitionists are also very much committed to how theory is operationalized in the world. McLeod rebuts the assumption that abolitionists are too

83. Roger Lancaster, *How to End Mass Incarceration*, JACOBIN (Aug. 18, 2017), <https://www.jacobinmag.com/2017/08/mass-incarceration-prison-abolition-policing> [perma.cc/2H6V-FURX].

84. *Id.*

85. *Id.*

86. Kushner, *supra* note 21 (“For Gilmore, who has been active in the movement for more than 30 years, it’s both a long-term goal and a practical policy program, calling for government investment in jobs, education, housing, health care—all the elements that are required for a productive and violence-free life.”).

87. Berger et al., *supra* note 8.

88. These include the New Jersey 4 and campaigns for Marissa Alexander, CeCe McDonald, Chelsea Manning, and Bresha Meadows, among others. *Id.*

89. PEOPLE’S BUDGET LA, <https://peoplesbudgetla.com> [perma.cc/B3XZ-TXXN].

90. Indeed, there have been setbacks particularly with respect to campaigns to defund the police, at least as that term is used to refer to a pathway to abolishing the police. Sam Levin, ‘It’s a Slap in the Face’: LA Activists Protest Mayor’s Police Budget Increase, GUARDIAN (Apr. 22, 2021, 10:20 AM), <https://www.theguardian.com/us-news/2021/apr/22/los-angeles-protest-mayor-police-budget-increase> [perma.cc/F9CH-PWNV]; see also David Zahniser, Adam Elmahrek & Priya Krishnakumar, *Defund the LAPD? At This Pace, It Would Take 20 Years to Hit Black Lives Matter’s Goal*, L.A. TIMES (Aug. 11, 2020, 6:00 AM), <https://www.latimes.com/california/story/2020-08-11/defund-lapd-la-budget-spending-priorities> [perma.cc/2BZN-FLWK].

far in the clouds to be practical, explaining that “abolitionists are committed to justice grounded in experience rather than proceeding primarily from idealized and abstract premises with little attention to how those ideals are translated into actual practices.”<sup>91</sup> Accordingly, grounded justice permits deeper engagement with the actual causes and consequences of state-based and private harm and a more inclusive analysis of legal problems. Because abolition is rooted in collective organizing, relationships, and lived experience, it incorporates a kind of care and solidarity for those who have experienced harm that adamantly rejects the punitive and carceral reality of the PIC. This abolitionist vision of justice enhances legal analysis by foregrounding the most marginalized—those whose perspectives are often erased or devalued—in how legal problems and solutions are evaluated.

Better legal analysis may not always translate into winning campaigns on the ground, although this is not to suggest that abolitionist haven’t been successful. *We Do This ’Til We Free Us* celebrates successful campaigns driven by abolitionist organizers:

From bail reform to strategic electoral interventions and mutual aid, prison abolitionists are steadily at work in our communities, employing tactics of harm reduction, lobbying for and against legislation, defending the rights of prisoners in solidarity with those organizing for themselves on the inside, and working to forward a vision of social transformation. (p. 20)

Kaba also references the #ByeAnita campaign, which ousted Cook County state’s attorney Anita Alvarez after her mishandling of police-violence cases (p. 107), and the passage of the Chicago reparations ordinance (p. 126). Abolitionists have also secured victories in election campaigns and stopped the building of new jails, among an array of other legislative and policy successes.<sup>92</sup>

Despite these successes, the trope of abolitionists as naïve dreamers remains, likely fueled by those with limited understanding of abolition or its organizing principles. This framing may serve a pernicious function: abolitionist activist, filmmaker, and writer Tourmaline attributes the “naïve

91. McLeod, *supra* note 28, at 1617.

92. Pp. 20–21 (discussing some successes that involved abolitionist organizers, including the #ByeAnita campaign and the Chicago reparations ordinance); Raven Rakia & Ashoka Jegroo, *How the Push to Close Rikers Went from No Jails to New Jails*, APPEAL (May 29, 2018), <https://theappeal.org/how-the-push-to-close-rikers-went-from-no-jails-to-new-jails> [perma.cc/SU4P-R2BJ]; *Fighting a \$3.5 Billion Jail Proposal in Los Angeles*, CRITICAL RESISTANCE, <http://criticalresistance.org/no-jails-crla> [perma.cc/P6CV-VU96]; *Critical Resistance Campaigns: Going Strong into 2019!*, CRITICAL RESISTANCE, <http://criticalresistance.org/2018-campaigns> [perma.cc/8SFC-TKQM]; *How We Got Here*, NO NEW JAILS NYC, <https://www.nonewjails.nyc/background> [perma.cc/WWR5-KLGX]; Osha Oneeka Daya Brown et al., *\$11 Billion for What?! Incarcerated Organizers with No New Jails NYC Explain How to Shut Down Rikers Without Building New Jails*, 23 CUNY L. REV. F. 1 (2020); *About*, DIGNITY & POWER NOW, <http://dignityandpowernow.org/about-us> [perma.cc/Z8K2-MG2A]; Sam Levin & Vivian Ho, *Los Angeles: Progressive Challenger Ousts Top Prosecutor Jackie Lacey*, GUARDIAN (Nov. 6, 2020, 2:57 PM), <https://www.theguardian.com/us-news/2020/nov/06/jackie-lacey-george-gascon-los-angeles-district-attorney-winner> [perma.cc/926K-9Z89]; *Jackie Lacey Must Go*, BLACK LIVES MATTER LA, <https://www.blmla.org/jackie-lacey-must-go> [perma.cc/BGS9-C8AX].

dreamer framing” to the state as part of its efforts to discredit the abolitionist cause. “[T]he state is heavily invested in people believing that abolition is a far away dream and that it is a long off vision.”<sup>93</sup> Furthermore, she explains that the state is invested in people buying into a binary of reality versus PIC abolition as “two separate, distinct problems. . . . [But p]risons and jails being demolished and life right now aren’t two separate things, they are part of one person’s whole life.”<sup>94</sup> Indeed, as I’ve discussed, abolitionists simultaneously pursue both their long-term vision for radical change and harm reduction for those incarcerated or facing acute and persistent forms of state violence. This both/and nature is not evidence of incoherence or impracticality; it’s a foundational aspect of abolitionist organizing.

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Abolitionist thinking offers a mechanism for interrogating law, power, and the relationship between the two.<sup>95</sup> It surfaces what is so often taken for granted in traditional legal analysis of legal rules—that is, whether existing laws and legal standards function to uphold racial, gender, class, and disability-based hierarchies. It permits a critique of power that is not about winning or losing, but about casting the nature and scope of the problem in the proper frame. It’s about distinguishing harmful reforms from useful reforms. It’s an analysis that moves away from reaffirming legal rules and abstract values—equality, fairness, justice—without recognition of the implementation of these values in the real world. That is why at the heart of these campaigns are a set of abolitionist principles that provide a guide for political organizing, whether to resist state violence, to change laws and policies, or to shift power. These principles shape the practice of abolition and allow a deeper, more inclusive kind of organizing less focused on outcomes and more focused on processes—what Kaba terms experimentation—that facilitate political education, raise consciousness, and, importantly, build local capacities for liberatory, abolitionist futures.<sup>96</sup>

Of course, this Review does not address every possible anxiety that arises when considering abolition. It is a starting point for further inquiry and discussion. In the next Part, I provide some ideas for engaging with abolitionist theory as a methodology and some preliminary thoughts for *how* it can be incorporated into legal education. Future research should delve into how abolitionist methodology can be (and, given current abolitionist legal organizations discussed above, how abolition is already) incorporated into legal practice.

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93. Barnard Ctr. for Rsch. on Women, *Reina Gossett + Dean Spade (Part 2): Practicing Prison Abolition Everyday*, YOUTUBE (Jan. 7, 2014), <https://youtu.be/o1-2F3W9VSQ>.

94. *Id.*

95. Prior intellectual traditions like critical legal studies and CRT offer similar mechanisms.

96. *See, e.g.*, pp. 117–18 (discussing abolitionist organizing work with Survived and Punished).

## III. ADDRESSING ABOLITION ANXIETIES IN LEGAL ANALYSIS

Some may still question whether abolitionist theory is suited for analyzing legal rules and thinking through legal and policy outcomes across a range of disputes. I argue that treating abolitionist theory as a methodology invites elaboration as to how it can be taught and incorporated into mainstream legal analysis. Indeed, this is in part the insight of Akbar's earlier work pushing lawyers and legal scholars to think radically about legal solutions to the problems that remain entrenched in the criminal legal system.<sup>97</sup>

Moreover, abolitionist methodology makes the practice of law more relevant to the needs of clients who identify as abolitionists and abolitionist organizations.<sup>98</sup> Abolitionists have not discarded law—many organizers and groups are engaged with the law and see it as a mechanism for removing barriers to transformative change.<sup>99</sup> Teaching law students how to support such movements is vital to ensure that abolitionists have access to counsel that can better understand and represent their political interests. Of course, abolitionists certainly have a critique of law<sup>100</sup>—a developed approach to thinking about legal questions that goes beyond the substance of laws and toward what makes up the cornerstones of the abolitionist critique (i.e., organizing to end white supremacy, heteropatriarchy, predatory capitalism, and other forms of oppression in order to transform American society).<sup>101</sup> Advancing abolitionist ideas in legal education is essential for overcoming abolitionist anxieties and incorporating the abolitionist critique into more mainstream legal thought.

Reshaping the fundamentals of legal analysis implicates the role of law schools and legal education. What should the role of legal educators and scholars in the law-school classroom be? How do law professors interested in abolition—in courses directly related to the PIC and beyond—create space for thinking about abolition and abolitionist movements in the classroom?

I offer what Kaba presents as a “state of unrestrained imagination” as a way of thinking through how the legal academy can create space for discussions on abolition in their courses (p. 25). Such an approach introduces abolitionist—and collective—ideation into legal analysis despite its disruption of

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

98. See, e.g., Press Release, NAACP Legal Def. & Educ. Fund, *supra* note 17.

99. See, e.g., Aaron Kunkler, *A Conversation on Abolition with Rep. Kirsten Harris-Talley*, WASH. STATE WIRE (Sept. 3, 2021), <https://washingtonstatewire.com/a-conversation-on-abolition-with-rep-kirsten-harris-talley> [perma.cc/FJ6P-8WQD].

100. Akbar, *supra* note 97, at 426. For an in-depth analysis of abolitionist theory alongside constitutional analysis, see Roberts, *supra* note 23.

101. See, e.g., Cullors, *supra* note 30, at 1684–86 (“We draw upon the theoretical work of many before us. Professor Angela Y. Davis—philosopher, Marxist, and former Black Panther whose work on prisons, abolition, and Black struggle has proven relevant over time—has informed our movements and communities for decades. Her political theories and reflections on anticapitalist movements around the world have sought not only to transform U.S. society by challenging white supremacy in U.S. laws, institutions, and relationships, but also to act as a catalyst toward building a broader antiracist and antiwar movement internationally.”).

traditional forms of legal analysis. Law students stand to benefit from exposure to this form of legal advocacy.<sup>102</sup>

There will always be space in the law school classroom for counting votes on the Supreme Court and identifying which liberal reform will likely get buy-in from institutional actor X, Y, or Z. But there should also be a space for a more radical imagining of possibilities within American law and legal institutions as well as deeper forms of critical engagement.<sup>103</sup> Abolitionist methodologies provide a way to engage with old and new forms of critiques of law and legal institutions and can be taught alongside dominant critical legal theories like critical legal studies and CRT. Additionally, abolitionist analysis provides the building blocks for developing what Sameer Ashar refers to as the “capacity of deep critique,” or “thinking beneath and beyond liberal legalist approaches to social problems.”<sup>104</sup> Pushing law students to deepen their critique of law unleashes the creativity and innovation that legal education so often seeks to suppress in exchange for dispassionate and formalistic legal reasoning and writing. This innovative thinking can also make students better lawyers who are better able to identify “reforms” in their future practice—terms in settlement agreements, legislative bills, administrative policies—that will in the long run generate more harm than good. Law professors can build skills for identifying what remedies are abolitionist (nonreformist) or reformist. They can also discuss abolitionist methodology as both a political ideology and interpretative method of analysis, as well as address its applications to substantive laws and policies.<sup>105</sup> Framing abolitionist methodology in this way will allow for a discussion of methodologies that inform legal analysis and the political commitments that undergird them.<sup>106</sup>

Professors (more often at law schools with a large percentage of law students that identify as progressive) have shared with me their concern that when they discuss abolition, they feel as though they are “preaching to the choir.” Avoiding this outcome requires posing the right questions. Here, I’d recommend Kaba’s questions, both in their form and substance, as a way of framing discussions of abolition that invite respectful and meaningful engagement and discussion:

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102. See generally Crenshaw, *supra* note 55 (noting that shifting a legal framework allows all students to have their visions, experiences, and values legitimately included).

103. See Akbar, *supra* note 97, at 412 (noting that the “moment calling for a radical imagination, where the scale of deep critique is matched with a scale of grand vision”).

104. Ashar, *supra* note 81, at 218.

105. E.g., Roberts, *supra* note 23 (applying abolitionist theory to constitutional interpretation and analysis).

106. My claim that politics inform even seemingly objective or neutral forms of legal analysis is informed by critical race theorists, see, for example, Gotanda, *supra* note 66 (discussing efforts within colorblindness theory and methodology to leach legal analysis of its political, economic, and social impact), as well as scholars like Reva Siegel and Robert Post, who have distinguished between originalism as a political practice and originalism as interpretive methodology and jurisprudence. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006).

- “What can we imagine for ourselves and the world?” (p. 3).
- “What work do prisons and policing actually do?” (p. 3).
- Why do abolitionists argue that prisons and police cannot be reformed?<sup>107</sup>
- “Why have we become so comfortable with ceding so much power to the police?” (p. 12).
- Whether, and if so, in what ways does “abolition constitutionalism facilitate[]—rather than constrain[]—imagining a society where prisons are obsolete?”<sup>108</sup>
- “What does transformation look like?” (p. 25).
- Which reforms don’t make it harder to dismantle the systems we are trying to abolish?<sup>109</sup>
- “What ‘non-reformist’ reforms will help us move toward the horizon of abolition?”<sup>110</sup>
- What would an abolitionist critique of a given statute, regulation, or policy look like?
- Take a given social problem. Identify the relevant laws, develop legal claims. Then ask, what would it look like to transform not only the legal regime related to the social problem but the social conditions that produced the social problem in the first place? Then work collectively to identify and distinguish nonreformist reforms from reformist reforms.

These questions will facilitate abolitionist thinking in law-school courses. Take the second question, “What work do prisons and policing actually do?” (p. 3). This question opens up discussion that invites abolitionist analysis drawing on the history of the PIC, various axes of contemporary marginalization, and concepts of violence and crime.<sup>111</sup> In discussing “crime,”<sup>112</sup> Kaba notes that “[i]ncreasing rates of incarceration have a minimal impact on crime rates”<sup>113</sup> and that “economic precarity is correlated with higher crime rates”

107. See pp. 14, 18.

108. Roberts, *supra* note 23, at 114 (“A critical test for engaging with the U.S. Constitution is whether there are particular ways an abolition constitutionalism facilitates—rather than constrains—imagining a society where prisons are obsolete.”).

109. See pp. 70–71.

110. P. 96. It may be helpful to include the questions posed by Critical Resistance to distinguish reformist from nonreformist reforms. See *supra* text accompanying note 43.

111. See p. 3.

112. The quotes denote the constructed nature of both crime and victimhood that is central to abolitionist analysis. See p. 3; Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1510–11 (2021).

113. P. 3; see also Nathalie Baptiste, *Stop Blaming Crime Rates on Defunding the Police*, MOTHER JONES (July 2, 2021), <https://www.motherjones.com/crime-justice/2021/07/stop-blaming-crime-rates-on-defunding-the-police> [perma.cc/G48D-7X6G].

(p. 3). As she asserts, “crime and harm are not synonymous. All that is criminalized isn’t harmful, and all harm isn’t necessarily criminalized” (p. 3). She provides the example of wage theft as conduct by employers that is harmful, but not criminalized (p. 3).

Law students presented with this question could explore similar thoughts and uncover other examples. Incorporating the abolitionist critique in this way demonstrates a shift from the traditional theories of punishment and crime typically discussed in a 1L criminal law course. But criminal law and other related courses are not the only place for abolitionist thinking. A growing array of scholars are thinking through abolitionist approaches beyond criminal law that can be incorporated into other law-school courses.<sup>114</sup> Law professors should look to these approaches for guidance on how to add abolitionist analysis to subjects covered in their courses.

#### CONCLUSION

Abolitionists often say that how a problem is framed will inform what solutions are pursued. In this way, methods of legal reasoning informed by liberal norms and principles can impede transformative change in law. Critical race theory taught us this much.<sup>115</sup> Instead, incorporating abolitionist thinking into legal analysis enables greater possibilities for change and building power through law, but in a way that does not center legal rights, lawyers, and other institutional actors in legal institutions.<sup>116</sup> Instead, it centers lived experiences and communities. Inspiring this thinking in law students and new lawyers is imperative.

Writing nearly forty years ago, Duncan Kennedy observed that “law school seems . . . barren of theoretical ambition or practical vision of what social life might be.”<sup>117</sup> In my view, this remains largely true to this day. But abolition offers a vision with the potential to transform how law students and those in the legal profession and academy think about legal analysis. Kaba’s

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114. See, e.g., Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, APPEAL (Mar. 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e> [perma.cc/GEU9-7G3Y] (discussing abolitionist approach to child welfare system).

115. SPADE, *supra* note 64, at 9–11.

116. Akbar, *supra* note 97, at 409 (“Indeed, the movement has largely refrained from fighting to strengthen preexisting rights or demanding legal recognition of new ones. The focus is not on investing even-handedness to law or the police, not on restoring criminal justice to some imaginary constitutional or pre-raced status quo, and not on increasing resources for community policing. But it would be wrong to think the movement has given up on law. The movement is not attempting to operate outside of law, but rather to reimagine its possibilities within a broader attempt to reimagine the state. Law is fundamental to what movement actors are fighting against and for.” (footnotes omitted)).

117. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982). Kennedy is considered one of the founders of the critical legal studies movement. See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1523–24 (1991).

book provides us with a guide to begin the process of developing that theoretical and practical vision—one radically committed to addressing the harms stemming from entrenched systems of surveillance, policing, and punishment. It offers a set of practical tools for how to incorporate abolitionist methodologies into framing legal problems and identifying effective remedies. Most importantly, it provides yet another method for excavating and examining both law's oppressive force and role in supporting (or constraining) visions for a more liberatory future.