

# Tragedies of the Cultural Commons

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*In the United States, Black cultural expressions of democratic life that operate within specific historical-local contexts, yet reflect a shared set of sociocultural mores, have been historically crowded out of the law and policymaking process. Instead of democratic cultural discourse occurring within an open and neutral marketplace of ideas, the discursive production and consumption of democratic culture in American politics has been rivalrous. Such rivalry too often enables dominant White supremacist cultural beliefs, values, and practices to exercise their hegemony upon law's production and meaning. The result has been tragedy for politically disempowered and socioeconomically excluded communities.*

*This Article uses the origin story of hip-hop music to advance this thesis, making three claims about law and culture. First, it argues that cultural theories of poverty and crime (embedded with racial stereotypes and cultural biases) shaped the political response to the growth of Black urban ghettos in New York City during the 1970s and 1980s. Second, via a textual analysis of Grandmaster Flash & The Furious Five's 1982 hip-hop song The Message, this Article contends that early hip-hop cultural views of democratic life were in rivalry with the dominant cultural discourse of conservative politicians and leading public intellectuals. Third, this Article breaks new ground by conceptualizing the socioeconomic inequities that plague Black urban ghettos as "tragedies of the cultural commons." Building upon Garrett Hardin's famous Tragedy of the Commons allegory, this framing*

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*employs the concept of the commons to illuminate how racism can mold the symbiotic relationship between law and democratic culture.*

*Taken together, this Article’s critical legal history of the rise of early hip-hop culture suggests that if law is in fact both constitutive of and constituted by dominant cultural views, then in the United States, Black cultural expressions of democratic life have historically labored under the hegemonic rivalry of a White supremacist vision of law and order. Further, hip-hop culture emerges as a counter-cultural vision of democratic life—an example of what Sheila R. Foster calls “urban collective action” or what Lisa T. Alexander calls “cultural collective efficacy.” If racial injustice in America is indeed the byproduct of law’s flawed empire, then perhaps reforming law’s empire demands a reconstruction of the democratic cultural commons.*

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It's like a jungle sometimes, it makes me wonder  
How I keep from going under

—The Message<sup>1</sup>

And herein lies the tragedy of the age: not that men are poor,—all men know something of poverty; not that men are wicked,—who is good? not that men are ignorant,—what is Truth? Nay, but that men know so little of men.

—W.E.B. Du Bois<sup>2</sup>

#### INTRODUCTION

Beyond its South Bronx setting, replete with characters who reminded me of the familiar faces that loitered outside of the local barbershop, I was most drawn to the movie's dance battles. Again and again, I watched and learned from the breakdancers on *Beat Street*<sup>3</sup> as they propelled their arms into the air in robotic pops, crossed their legs back and forth in toprock steps, dropped their hips into a footwork of kicks and shuffles, spun their knees across the carboard in a whirlwind of rhythm until the drumbeat reached its apex, their Black bodies frozen in time,<sup>4</sup> as stiff legs pointed toward the sun like prayer hands before the gospel hymn. Engulfed by the complexities of Black culture, I smiled and realized, without then understanding it, that I was witnessing America's dream; a tragicomic joyful noise buried in the crucible of the so-called Black urban ghetto, where generation upon generation of resilient Black American children learn how to beat the street.<sup>5</sup>

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1. GRANDMASTER FLASH & THE FURIOUS FIVE, *The Message*, on THE MESSAGE, at 00:43 (Sugar Hill Records 1982) [hereinafter *The Message*].

2. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 243 (Signet Classic 1995) (1903).

3. BEAT STREET (Orion Pictures 1984).

4. While race as a tool for human categorization is a social construction that too often essentializes and oversimplifies, racial categorizations are employed with tangible effect in the United States to exploit, suppress, and dehumanize subordinated populations. See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 13 (3d ed. 2015). Thus, I use the racial term "Black" to describe individuals of African American identification and members of other African diaspora cultures. I also often use the term "minoritized" rather than "minority" to more accurately describe how some cultural groups are pushed to the margins of society based upon racial, cultural, or other social categorizations, such as Hispanic/Latinx Americans, certain immigrants, and some religious groups.

5. I embrace a strong conception of the term "ghetto" in the sociological tradition of Loïc Wacquant to describe "a social-organizational device" characterized by "stigma, constraint, spatial confinement, and institutional parallelism" that "employs space to reconcile two antinomic functions: (1) to maximize the material profits extracted out of a group deemed defiled and defiling, and (2) to minimize intimate contact with its members so as to avert the threat of symbolic corrosion and contagion they are believed to carry." Loïc Wacquant, *A Janus-Faced Institution of Ethnoracial Closure: A*

Perhaps I was naïve. After all, Mayor Rudolph Giuliani would soon resurrect New York City's Cabaret Law in the 1990s as part of his "Zero Tolerance" policing strategy and "Quality of Life" campaign. Both initiatives were designed to tidy the alleged disorderly culture that threatened safety and well-being across the city's five boroughs.<sup>6</sup> Where I saw a beautiful evocation of the inventiveness of Black America through dance, others had perceived warning signs of dysfunction. As Melvin Glover (known by his stage name, "Melle Mel") of the hip-hop group Grandmaster Flash & The Furious Five would declare in the final verse of the song *The Message* in 1982: "A child is born with no state of mind / Blind to the ways of mankind."<sup>7</sup> In many ways, I was blind to the ways of mankind during my childhood, protected behind the veil of the South Bronx and its predominantly Black and Hispanic/Latinx population.<sup>8</sup> While my neighborhood felt "like a jungle sometimes," it would not be until my enrollment in a predominantly White private high school that I would begin to develop a Du Boisian awareness of my Blackness,<sup>9</sup> and question, much like Glover and Edward G. Fletcher (the featured rapper known as "Duke Bootee" on *The Message*), "how I keep from going under."<sup>10</sup> Navigating the 6 Train from the South Bronx to the Upper East Side, it was hip-hop's Black radical tradition—a musicality steeped in the waves of racial oppression, yet anchored by a radical imagination of age-old freedom dreams—that kept me afloat.

However, hip-hop culture offered far more than a language for urban youth, such as 14-year-old me, to navigate the complexities of socioeconomic inequality in the United States. Inspired by Melle Mel, Duke Bootee, and other "prophets of the hood," as Imani Perry describes them,<sup>11</sup> hip-hop culture emerged in the late 1970s and early 1980s as a dynamic platform for theorizing the Black experience in America. Beyond its rhythmic beats and catchy lyrics,

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*Sociological Specification of the Ghetto*, in *THE GHETTO: CONTEMPORARY GLOBAL ISSUES AND CONTROVERSIES* 85, 106 (Ray Hutchison & Bruce D. Haynes eds., 2011).

6. Originally enacted in 1926 during Prohibition, the cabaret law banned dancing of three or more people in public spaces that served food and beverages, unless the establishment had obtained a cabaret license. As New York City increasingly experienced vandalism and graffiti during the 1980s, Mayor Edward Koch sought to implement a "new spatial order" premised on gentrification and privatizing public space. See JONATHAN SOFFER, *ED KOCH AND THE REBUILDING OF NEW YORK CITY* 255 (2010). Mayor Rudolph Giuliani furthered this vision of "quality of life" by promoting the aggressive and strict enforcement of low-level offenses, suggesting that the answer to community disorder was to remove unwanted people from public space. See *ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY* 4 (Andrea McArdle & Tanya Erzen eds., 2001).

7. *The Message*, *supra* note 1, at 04:51.

8. See DU BOIS, *supra* note 2, at 44 ("Then it dawned upon me with a certain suddenness that I was different from the others; or like, mayhap, in heart and life and longing, but shut out from their world by a vast veil.").

9. *Id.* at 45 ("It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity.").

10. *The Message*, *supra* note 1, at 00:43 ("It's like a jungle sometimes, it makes me wonder / how I keep from going under . . .").

11. IMANI PERRY, *PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP* 2 (2004).

hip-hop was a reunion of “the sacred and the profane” in democratic life that embodied what Mark Anthony Neal terms a “post-soul aesthetic.”<sup>12</sup> By speaking truth to power, hip-hop music evolved into a modern trident of the ongoing Black liberation struggle, evoking a radical political and economic vision of urban life amidst pervasive poverty, governmental neglect, and racial discrimination.

It is perhaps for these reasons that Grandmaster Flash & The Furious Five’s *The Message* has affectionately been named the best hip-hop record of all time.<sup>13</sup> Building upon the blues sentimentality and prophetic witness of Black musicians from the Civil Rights and Black Power eras—from James Brown’s *Say It Loud* to Gil Scott-Heron’s *The Revolution Will Not Be Televised*<sup>14</sup>—*The Message* helped to elevate hip-hop music into the broader socio-political discourse on poverty and crime in urban America. Like Stevie Wonder’s *Village Ghetto Land*,<sup>15</sup> Melle Mel begins the song with a vivid image of the “broken glass everywhere” in New York City’s Black urban ghettos, a world where the confluence of anti-Black racism, neoliberal politics, and racial capitalist expansion pathologized “people pissing on the stairs” in crumbling public housing projects because (presumably) if one is Black and poor, “you know they just don’t care.”<sup>16</sup>

Upon its release by Sugar Hill Records in 1982, *The Message* entered ongoing disputes among scholars about the controversial “culture of poverty” sociological theory.<sup>17</sup> The social concept was perhaps best captured by Daniel Patrick Moynihan’s analysis of urban poverty in his 1965 report, *The Negro*

12. *Id.* at 4–6 (“The reunion marks a democratic space in which expression is more important than the monitoring of the acceptable, a space, rather, that suppresses the silencing impulse extant in various segments of American popular culture, both within and outside [B]lack communities.”); MARK ANTHONY NEAL, SOUL BABIES: BLACK POPULAR CULTURE AND THE POST-SOUL AESTHETIC 2 (2001).

13. *100 Greatest Hip-Hop Songs of All Time*, ROLLING STONE (June 2, 2017), <https://www.rollingstone.com/music/music-lists/100-greatest-hip-hop-songs-of-all-time-105784/grandmaster-flash-and-the-furious-five-the-message-3-102925/> [https://perma.cc/454A-MT5V].

14. See JAMES BROWN, *Say It Loud—I’m Black and I’m Proud*, on SAY IT LOUD—I’M BLACK AND I’M PROUD (King Records 1969); GIL SCOTT-HERON, *The Revolution Will Not Be Televised*, on PIECES OF A MAN (Flying Dutchman Productions 1971).

15. STEVIE WONDER, *Village Ghetto Land*, on SONGS IN THE KEY OF LIFE (Tamla Records 1976) (“Broken glass is everywhere / It’s a bloody scene / Killing plagues the citizens / Unless they own police . . .”).

16. *The Message*, *supra* note 1, at 01:05; see generally ADRIAN NICOLE LEBLANC, RANDOM FAMILY: LOVE, DRUGS, TROUBLE, AND COMING OF AGE IN THE BRONX (2003) (unveiling the story of impoverished New York City families stuck in a world of drug abuse, criminality, and violence, based on eleven years of immersive journalistic reporting by the author).

17. Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN’S L.J. 201, 208 (1996) (defining “culture of poverty” as “based upon observed characteristics of poor people, such as idleness, passivity, and countercultural attitudes and choices. For conservatives, pathology, passivity, and idleness mark the ‘culture of poverty’ and can be cured by policies requiring work and responsibility. For liberals, despair, hopelessness, and alienation mark the ‘culture of poverty,’ otherwise known as ‘the underclass.’”).

*Family: The Case for National Action*.<sup>18</sup> *The Message* not only vividly describes the material traumas of Black urban ghettos of New York City in the 1970s and 1980s, but it also reveals the structural conditions that circumscribed the ambitions of their predominantly Black and Hispanic/Latinx residents.<sup>19</sup> In 1968, Moynihan's critique competed with the National Advisory Commission on Civil Disorders' analysis of social disorder in Black urban ghettos, known as the Kerner Commission Report.<sup>20</sup> Yet, despite the Kerner Commission's conclusion that "White society is deeply implicated in the ghetto,"<sup>21</sup> the mainstream media in New York City became obsessed with the idea that the Bronx was plagued by a "social cancer" that, "unless checked, [would] destroy not just the Bronx but the city itself."<sup>22</sup> As the *New York Times* put it in 1973, "The South Bronx is the American urban problem in microcosm."<sup>23</sup> These tropes would render the South Bronx a spectacle for foreign tourists and a muse for movie producers.<sup>24</sup>

*The Message* responded to such stereotypes of the Bronx through extended metaphors that critiqued the ongoing disputes among law and policymakers. For example, it considered James Q. Wilson's "broken windows" criminological theory,<sup>25</sup> which built upon Moynihan's cultural framing of Black urban life and

18. See DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, OFF. OF POL'Y PLAN. & RSCH., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 5 (Mar. 1965), <https://web.stanford.edu/~mrosenfe/Moynihan%27s%20The%20Negro%20Family.pdf> [<https://perma.cc/MS6R-5XYT>] ("[T]here is one truly great discontinuity in family structure in the United States at the present time: that between the [W]hite world in general and that of the Negro American. The [W]hite family has achieved a high degree of stability and is maintaining that stability. By contrast, the family structure of lower class Negroes is highly unstable, and in many urban centers is approaching complete breakdown.").

19. See generally ANTHONY P. POLEDNAK, *SEGREGATION, POVERTY, AND MORTALITY IN URBAN AFRICAN AMERICANS* (1997) (analyzing why mortality rates are higher for African Americans than for White Americans in racially segregated and poverty-stricken cities).

20. See *infra* Section II.B.1.

21. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1967), [https://belonging.berkeley.edu/sites/default/files/kerner\\_commission\\_full\\_report.pdf?file=1&force=1](https://belonging.berkeley.edu/sites/default/files/kerner_commission_full_report.pdf?file=1&force=1) [<https://perma.cc/AG79-MNY9>].

22. *Urban Cancer*, N.Y. TIMES, Jan. 18, 1973, at 40, <https://timesmachine.nytimes.com/timesmachine/1973/01/18/79832031.html?pageNumber=40> [<https://perma.cc/UKY2-RNQ2>].

23. *Id.*

24. See Bench Ansfield, *The Broken Windows of the Bronx: Putting Theory in Its Place*, 72 AM. Q. 103, 108 (2020) ("A slew of feature films were produced in the space of a few years, including *Fort Apache: The Bronx* (1981), *Wolfen* (1981), and *1990: The Bronx Warriors* (1982), along with the documentaries *The Fire Next Door* (1977), *The Police Tapes* (1977), *80 Blocks from Tiffany's* (1979), and *Wild Style* (1983)."); see e.g., David Gonzalez, *Of Cameras and Community*, in *URBAN MYTHOLOGIES: THE BRONX REPRESENTED SINCE THE 1960S* 102 (John Alan Farmer ed., 1999). Nevertheless, community groups such as the Committee Against Fort Apache protested stereotypical depictions of the Bronx. See David Brand, *'Fear City' on the Big Screen: The Classic Films that Miscast NYC*, CITY LIMITS (Dec. 24, 2018), <https://citylimits.org/2018/12/24/fear-city-on-the-big-screen-the-classic-films-that-miscast-new-york-city/> ("The activists earned one concession from the filmmakers: an on-screen disclaimer before the film begins.").

25. See BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 3–4, 81–82 (2005); see generally Bernard E. Harcourt & Jens Ludwig, *Broken*

profoundly shaped New York City's "Zero Tolerance" policing strategy during that era.<sup>26</sup> In so doing, *The Message*, and the emergence of hip-hop culture in the wake of the Black Power Movement more generally, illuminates a pivotal role of culture (and counterculture) in the urban development process.

This Article argues that Black cultural expressions of democratic life in the United States have historically been crowded out of the law and policymaking process. As a result, instead of democratic cultural discourse occurring within an open and neutral marketplace of ideas, the discursive production and consumption of democratic culture in America has been rivalrous. Such rivalry has enabled dominant White supremacist cultural beliefs, values, and practices to exercise their hegemony upon law's production and meaning. Too often, the result has been tragedy for politically disempowered and socioeconomically excluded communities. This Article uses the origin story of hip-hop music to advance this thesis, making three claims about law and culture.

First, this Article argues that cultural theories of poverty and crime (embedded with racial stereotypes and cultural biases about Black people and other racially and ethnically minoritized populations) fundamentally shaped the political response to the growth of Black urban ghettos in New York City during the 1970s and 1980s. As scholars of the law and culture movement have long argued, the historiography of the ideological tensions driving political economic transformation in the urban landscape reveals the symbiotic relationship of law and culture, and perhaps even a sense of law as culture.<sup>27</sup> Thus, beyond highlighting how early hip-hop culture reflects the persistence of Black radicalism in urban America, this Article also demonstrates how urban laws and public policies that criminalized and suppressed Black cultural expressions of democratic life underscore the hegemony of White supremacist cultural beliefs in "political discourse" during the 1970s and 1980s.<sup>28</sup> Specifically, the lyrics of *The Message* allude to the way the perceived threat of a political revolution posed by the democratic commitments of the Black Power Movement—a communitarian challenge to rampant police brutality, exploitative labor market

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*Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006) (discrediting the broken windows theory).

26. Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQ. 171, 172 (1999) ("Zero-tolerance policing put major emphasis on the kinds of 'quality-of-life' issues that set the drumbeat rhythm for Giuliani's 1993 mayoral campaign . . . the petty drug dealers, the graffiti scribblers, and the prostitutes who rules the sidewalks in certain high-crime neighborhoods all were targeted.").

27. See *infra* Section I.A.

28. This Article defines "political discourse" broadly as a discursive process that transcends speech to also include other cultural expressions of legal reception, interpretation, and contestation. Further, this Article's focus on "early" hip-hop culture is intentional. Like any cultural practice, hip-hop culture has always been susceptible to the whims of the market and, in many cases, has fallen prey to consumerism and capitalist exploitation. As hip-hop music evolved and became increasingly commoditized, the nature of hip-hop music evolved too. However, the story of that evolution is beyond the scope of this Article and does not discredit early hip-hop's role in promoting democratic cultural discourse in marginalized communities.

practices, and the shortcomings of political liberalism<sup>29</sup>—was met by the backlash of President Ronald Reagan’s War on Drugs and later by President William Clinton’s assault on the welfare state through welfare reform.<sup>30</sup>

Second, this Article claims that early hip-hop music embodies a cultural critique of law and public policy, rendering hip-hop culture as an example of a discursive cultural practice in rivalry with dominant cultural views. To elaborate on this argument, this Article employs a textual analysis of *The Message* and distills three hip-hop critiques of law and public policy during the 1970s and 1980s. First, *The Message* casts the residents of Black urban ghettos of that era as prisoners of poverty, exposing the flawed and inherently racist assumptions of Black culture that Moynihan’s “culture of poverty” sociological theory perpetuates.<sup>31</sup> Second, it conveys the homeless, mentally ill, and sex workers of Black urban ghettos of that era as survivors of neglect. Specifically, the song notes the dearth of social welfare services across New York City amidst a surging heroin, marijuana, and crack cocaine epidemic that amplified the challenges of a fiscal crisis and polarized political discourse on local development and crime control solutions.<sup>32</sup> Third, it clarifies the ambitious residents of Black urban ghettos of that era as victims of circumstance, demonstrating how inadequate educational and employment opportunities fractured Black communities and, in some cases, pushed youth toward a life of violence and drug dealing. Such material conditions call the assumptions of Wilson’s “broken-windows” criminological theory into question.<sup>33</sup>

Finally, this Article breaks new ground by conceptualizing the socioeconomic inequities of Black urban ghettos as “tragedies of the cultural commons.” Building upon Garrett Hardin’s famous *Tragedy of the Commons* allegory,<sup>34</sup> this framing employs the concept of the commons to illuminate how racism can mold the symbiotic relationship between law and democratic culture. In Hardin’s original parable, unregulated (i.e., non-excludable) access to a limited (i.e., rivalrous) commonly held physical resource results in tragedy because some users overconsume and deplete the shared resource. This Article conceptualizes democratic cultural discourse as a commonly held non-physical resource that becomes *exclusive* when certain cultural expressions of democratic life are not considered in political debates. Further, democratic cultural discourse becomes *rivalrous* when biased cultural views dominate the production and

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29. See Charisse Burden-Stelly, *Modern U.S. Racial Capitalism: Some Theoretical Insights*, 72 MONTHLY REV. 8, 16 (2020) (arguing that there is a “past and present expropriation of Black people by the ruling class of modern U.S. racial capitalism through consistent and persistent discrimination in employment, unfair wages, forced ghettoization, inequitable and inferior accommodation and services, and the denial of justice in the courts”).

30. See *infra* Section II.B.

31. See *infra* Section II.A.

32. See *infra* Section II.B.

33. See *infra* Section II.C.

34. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).



constitution of law and legal meaning. This claim builds upon the insights of cultural legal studies scholars by using the lens of race to push the boundaries of traditional commons scholarship. In so doing, it suggests that if law is both constituted by and constitutive of culture, then in the United States, Black American culture has historically labored under the hegemonic rivalry of a White supremacist vision of law and order.

To be sure, both the unconscious and self-conscious awareness of cultural meaning produces a fluidity of cultural boundaries in a multicultural society that, in some ways, reveals this Black-White dialectic as oversimplified. While the concept of Blackness implies “a shared set of historical, social, and cultural mores[,] . . . a sociocultural marker indicating that one acts in culturally specific ways,”<sup>35</sup> there exist diverse modes of Black racial identity that operate within specific historical-local contexts. Notwithstanding, this Article demonstrates why the racial lens still provides explanatory power, especially for people racialized as Black in the United States.<sup>36</sup> Whereas David Harvey has argued that “cultural and intellectual commons . . . are often not subject to the logic of scarcity, or to exclusionary uses of the sort that apply to most natural resources,”<sup>37</sup> this Article contends that access to the consumption of democratic culture as a dialogic political practice in the United States has, in fact, been exclusionary. In this way, while this Article defines the discursive production of culture as a “common pool resource” in the tradition of Hardin, it takes a common property—or “commoning”—view of cultural discourse in the tradition of Elinor Ostrom<sup>38</sup> to draw out “the social, cultural, and political processes that foster the constitution of the commons, especially in urban contexts.”<sup>39</sup>

Accordingly, the rise of hip-hop culture upon the heels of the Black Power movement not only alludes to the persistence of Black radicalism in the United States, but also represents a counter-cultural vision of democratic life—an example of what Sheila R. Foster calls “urban collective action” or what Lisa T.

35. Rone Shavers, *Fear of a Performative Planet: Troubling the Concept of “Post-Blackness,”* in *THE TROUBLE WITH POST-BLACKNESS* 81, 82 (Houston A. Baker Jr. & K. Merinda Simmons eds., 2015).

36. As Paul Gilroy argues, Blackness in America often embodies a “‘changing’ same.” Paul Gilroy, *Sounds Authentic: Black Music, Ethnicity, and the Challenge of a Changing Same*, 11 *BLACK MUSIC RSCH. J.* 111, 111 (1991). While the performative aspects of Blackness are always evolving, Blackness continues to reflect the unwavering tradition of freedom struggle in response to the enduring mythologies of White supremacy. *See id.* at 113, 122–23, 134–35 (arguing against essentialism in Black cultural analysis, but concluding that concepts of Blackness, particularly as expressed in music, can authentically change over time and diversify, even if rooted in similar stories and the same history).

37. DAVID HARVEY, *REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION* 72 (2012).

38. *See generally* ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990) (outlining various theoretical and empirical models for the successful and unsuccessful governance of common pool resources).

39. Prakash Kashwan, Praneeta Mudaliar, Sheila R. Foster & Floriane Clement, *Reimagining and Governing the Commons in an Unequal World: A Critical Engagement*, 3 *CURRENT RSCH. ENV’T. SUSTAINABILITY* 1, 2 (2021).

Alexander calls “cultural collective efficacy.”<sup>40</sup> This Article demonstrates how hip-hop culture sought to amplify the voices of historically marginalized populations, even as they existed in the shadows of politically conservative laws and public policies that were molded by White supremacist cultural beliefs, values, and preferences. Even more, by engaging hip-hop culture as more than merely a celebration of the joys and sorrows of the mundane, this Article answers the call of commons scholars to adopt “a thicker sociological orientation for studying the effects that power differences and inequalities have on the emergence, development, and endurance of collective action around commons.”<sup>41</sup> The democratic insights that emerge from a view of hip-hop as collective action suggest that while social and economic injustice may be the byproduct of law’s flawed empire, reforming law’s empire demands a recognition of crowded out voices in the democratic cultural commons to expand the set of feasible alternative social arrangements.

Viewing contemporary political discourse through the lens of the cultural commons also helps to clarify the shortcomings of modern law reforms. Cities across the United States continue to silence counter-cultural political economic expressions of democratic life, notwithstanding the failings of conventional law and policy approaches addressing socioeconomic challenges. Take, for example, the vexed issue of housing insecurity. Racial inequities in housing have remained stagnant since the passage of the Fair Housing Act in 1968,<sup>42</sup> and access to homeownership remains elusive for most low-income Americans. Further, the painful lessons of the Global Financial Crisis and the Great Recession that occurred between 2007 and 2009 have failed to deter unfettered land and property speculation, or to provoke transformational government programs.<sup>43</sup> Instead, the low-income residents of urban communities too often find themselves under threat of displacement as gentrification transforms the character of their city.<sup>44</sup>

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40. See *infra* Section III.

41. Kashwan et al., *supra* note 39, at 2.

42. See THOMAS M. HANNA, DEMOCRACY COLLABORATIVE, REVISITING COMMUNITY CONTROL OF LAND AND HOUSING IN THE WAKE OF COVID-19 2 (2021), [https://static1.squarespace.com/static/62f41050584b40607baef690/t/63066a53adcbbc7174da7a79/1661364820208/PUB\\_Revisiting+community+control+of+land+housing.pdf](https://static1.squarespace.com/static/62f41050584b40607baef690/t/63066a53adcbbc7174da7a79/1661364820208/PUB_Revisiting+community+control+of+land+housing.pdf) [<https://perma.cc/8S3Z-JGF8>] (“[T]he homeownership rate for Black and Latinx American residents stands at 45.1% and 49.3% respectively. For Whites, the rate is 73.8%.”).

43. See Leah Binkovitz, *Gap Between Income Growth and Housing Cost Increases Continues to Grow*, RICE KINDER INST. FOR URB. RSCH. (July 25, 2019), <https://kinder.rice.edu/urbanedge/2019/07/25/gap-between-income-growth-and-housing-cost-increases-continues-grow> [<https://perma.cc/FD83-GJ8F>].

44. See, e.g., Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 104 (2011) [hereinafter Foster, *Collective Action*]; Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL’Y REV. 281, 302–06 (2016); Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 268–70 (2015); Lisa T. Alexander, *Community in Property: Lessons from Tiny Homes Villages*, 104 MINN. L. REV. 385, 402 (2019).

Conventional law and policy approaches toward resolving housing insecurity evoke a distinct cultural view of the role of government in democratic life. Local governments routinely prioritize neoliberal reforms that cater to the market-centric needs of private investors, private developers, and private financial institutions.<sup>45</sup> Even where local governments have attempted to steer private interests toward public needs through creative public-private partnerships in the form of tax credits and targeted public subsidies, such developments rarely entertain counter-cultural visions of democratic governance, such as calls for the community ownership and control of land and housing development in urban landscapes.<sup>46</sup>

But neoliberal approaches toward addressing housing insecurity are not inevitable. To make headway against an increasing wealth gap and stem the tide of escalating residential segregation,<sup>47</sup> activists across the country are advocating for non-traditional development strategies aimed at empowering marginalized communities to be included in democratic cultural discourse. For example, progressive scholars have called for more community benefit agreements, regional area land banks, community land trusts, and housing cooperatives.<sup>48</sup> These tactics not only challenge longstanding notions of “who owns the city” and whose voice matters in urban development,<sup>49</sup> but they also reflect a growing

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45. For example, in the context of housing insecurity, poverty alleviation strategies have ranged from supply-side interventions (such as regulatory reforms to increase the housing supply or zoning law reforms to increase housing density) to demand-side interventions (such as first-time homebuyer subsidies and housing choice vouchers). Some cities have even pursued cost-control strategies, such as rent control and inclusionary zoning, albeit with limited success. For a discussion of the impact of urbanization, see, for example, HARVEY, *supra* note 37, at 5, 18–19 (arguing that urbanization has resulted in the absorption of capital surpluses by developers, while furthering the dispossession of urban residents of control over their city’s development); Hita Unnikrishnan, B. Manjunatha & Harini Nagendra, *Contested Urban Commons: Mapping the Transition of a Lake to a Sports Stadium in Bangalore*, 10 INT’L J. COMMONS 265, 266–67 (2016) (arguing that the urbanization of cities in the developing world has resulted in the depletion of ecological resources that the community historically relied upon).

46. For a critique of the neoliberal and conservative strains in urban development, see, for example, GÉRARD DUMÉNIL & DOMINIQUE LÉVY, *CAPITAL RESURGENT: ROOTS OF THE NEOLIBERAL REVOLUTION* (2004); JASON STAHL, *RIGHT MOVES: THE CONSERVATIVE THINK TANK IN AMERICAN POLITICAL CULTURE SINCE 1945* (2016); TIMOTHY P.R. WEAVER, *BLAZING THE NEOLIBERAL TRAIL: URBAN POLITICAL DEVELOPMENT IN THE UNITED STATES AND THE UNITED KINGDOM* (2016).

47. See generally Amy Traub, Laura Sullivan, Tatjana Meschede & Thomas Shapiro, *The Asset Value of Whiteness: Understanding the Racial Wealth Gap*, DEMOS (Feb. 6, 2017), <https://www.demos.org/research/asset-value-whiteness-understanding-racial-wealth-gap> [<https://perma.cc/CRD8-S4M6>] (describing how “past racial injustices are carried forward as wealth handed down across generations and reinforced by ‘color-blind’ practices and policies”); Matthew Hall, Kyle Crowder & Amy Spring, *Neighborhood Foreclosures, Racial/Ethnic Transitions, and Residential Segregation*, 80 AM. SOCIO. REV. 526 (2015) (describing the impact of racially selective migration streams on patterns of residential segregation).

48. See *infra* Part III.

49. Saskia Sassen, *Who Owns the City?*, URB. AGE (Nov. 2015), <https://urbanage.lsecities.net/essays/who-owns-the-city> [<https://perma.cc/5UWS-6VJH>] (“It is in cities to a large extent where the powerless have left their imprint —cultural, economic, social—even if mostly in their neighborhoods.”).

consensus that inclusionary zoning, anti-eviction laws, low-income tax credits, housing choice vouchers, targeted homeownership programs, etc.—all examples of policy fixes that reflect a democratic culture primed toward short-term private market interests—are simply not enough to address the deeply rooted problem of poverty in the United States. Urban development scholars have long argued that the idea of reorienting the development of cities toward the values, preferences, and needs of marginalized residents is not new. Rather, it is merely underdeveloped and overlooked.<sup>50</sup> This Article builds upon such scholarship to show that, more than underdeveloped or overlooked, the sidelining of alternative cultural expressions of democratic life in mainstream political discourse is a tragedy of the cultural commons; one borne of the hegemonic power of a singular cultural vision of democracy that stifles experimentation, innovation, and reform.

This Article proceeds as follows: Part I provides a normative framework to conceptualize the socioeconomic inequities that plague Black urban ghettos as tragedies of the cultural commons. It begins by summarizing key insights from scholars of the law and culture movement. Then, it invokes the concept of the “commons” through a critical racial lens to explain how democratic cultural discourse in the United States has succumbed to the hegemonic rivalry of White supremacist culture, crowding out countercultural views. This Part argues that such rivalry stems from the failures of government at the local, state, and federal levels to regulate the invasion of racial bias and stereotypes into mainstream political discourse. This “regulatory slippage,” as Foster puts it,<sup>51</sup> has led to the exclusion of diverse cultural expressions of democratic life from the law and policymaking process.

Next, Part II provides a descriptive analysis of the state of Black urban ghettos in New York City during the dawning of hip-hop culture in the late 1970s and 1980s. It includes a brief introduction to hip-hop’s connection to the Black Power Movement that emerged during the 1950s in response to postwar racial liberalism. To demonstrate the exclusive and rivalrous nature of democratic cultural discourse in the United States, this Part further explores how the “culture of poverty” sociological theory and “broken windows” criminological theory shaped urban laws and public policies during that era, notwithstanding compelling alternative cultural views of the drivers of urban poverty and crime. Hip-hop culture offers one such alternative view, as the lyrics of *The Message* illustrate.

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50. See, e.g., SHEILA R. FOSTER & CHRISTIAN IAONE, CO-CITIES: INNOVATIVE TRANSITIONS TOWARD JUST AND SELF-SUSTAINING COMMUNITIES (2022) (arguing that collective stewardship of common property and co-governance of urban communities can sustain diverse political, social, and economic environments); DUNCAN MCLAREN & JULIAN AGYEMAN, SHARING CITIES: A CASE FOR TRULY SMART AND SUSTAINABLE CITIES 1, 9–12 (2015) (articulating a “sharing paradigm” that promotes trust and collaboration in the urban development to encourage civic engagement, political activism, and social solidarity).

51. See *infra* Section I.B.

Finally, Part III describes how the tenets of early hip-hop culture embody a form of collective action, a radical imagination of urban democratic culture that not only contradicted prevailing racial stereotypes of the day, but also reflected the cultural values, political preferences, and material needs of Black communities in New York City. In this way, early hip-hop culture offers an entryway into the intellectual history of America's late twentieth-century "'organic' intellectuals," or in the words of Mari Matsuda, our modern "grass roots philosophers."<sup>52</sup> For example, hip-hop's emphasis on communitarianism through the dancefloor 'cypher' inspires individual agency through the art of breakdancing.<sup>53</sup> Hip-hop's commitment to 'passing the mic' on stage elevates marginalized voices in public discourse. Hip-hop's artistic vision for reimagined placemaking and community empowerment manifests through disruptive graffiti art. Thus, early hip-hop culture reflected a revolutionary cultural vision of the urban landscape forged by social solidarity, economic democracy, and solidarity economies.<sup>54</sup> Part III concludes by demonstrating how progressive urban development movements of today geared toward democratizing control and ownership of land and property in cities share many of the democratic values of hip-hop culture.

Taken together, this Article's critical legal history of hip-hop's emergence in New York City, told through the lens of the cultural commons, demonstrates how multiple democratic cultures can exist in rivalry and to the exclusion of marginalized populations. Not only do such insights benefit law and policymakers seeking to boost community empowerment and dismantle racial capitalist logic from the body politic, but they also situate the dawning of hip-hop as a cultural movement within the *longue durée* of Black radicalism in the United States. Cultural discourse, then, emerges as a foundational building block for urban development practitioners and local governments seeking to amplify community values, preferences, and needs as they contend with the crises of our modern era.

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52. See Antonio Gramsci, *The Intellectuals*, in SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 5 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987).

53. See PERRY, *supra* note 11, at 107 (describing the cypher as "a conceptual space in which heightened consciousness exists . . . [A] mystical and transcendent yet human state, that . . . creates a vibe amid a community, as well as a spirit of artistic production or intellectual/spiritual discursive moments.").

54. An argument for social solidarity, economic democracy, and solidarity economies as foundational pillars to a justice-based vision of community economic development is discussed in the Author's prior scholarship. See Etienne C. Toussaint, *Dismantling the Master's House: Toward a Justice-Based Theory of Community Economic Development*, 53 U. MICH. J.L. REFORM 337, 337 (2019).

## I.

## THE RACIAL CRITIQUE OF “LAW AND CULTURE”

Since at least the 1950s, scholars have debated how culture shapes power relations between individuals living within a liberal democratic state.<sup>55</sup> During a “cultural turn” in the closing decades of the twentieth century, academics increasingly engaged with the concept of culture as an analytical frame to understand social change.<sup>56</sup> As a result, many legal scholars began to explore the politics surrounding the so-called “culture of poverty” sociological theory driving urban development in Black urban ghettos, as well as the cultural impact of the laws and public policies that stemmed from such political discourse and embedded its racial stereotypes and biases. This analysis unearthed the complex entanglement of law and culture in the urban landscape.

Yet, beyond law’s engagement with culture—often portrayed as existing in two discrete realms of discourse and action—Part I.A builds upon the work of Naomi Mezey to clarify law *as* culture.<sup>57</sup> That is, law and culture are mutually constitutive. Both operate in an unstable and ever-evolving synthesis as citizenry produce, interpret, consume, and circulate law’s meaning alongside “the interests, goals, and understandings [of that population] that deeply shape or comprise social life.”<sup>58</sup> As Part I.A argues, culture is not a finite explanatory end or a tangible product to be traded in the economic marketplace. Rather, culture is a set of “signifying or symbolic systems” of practice that comprise “a particular way of life.”<sup>59</sup>

When a multitude of diverse cultures coexist within a liberal democratic state—encompassing a multicultural democratic society—members of that polity engage in political discourse within a domain that Part I.B calls a *cultural commons*. In the cultural commons, each member of a democracy consumes, responds to, and relates with collectively held democratic principles that define the society’s democratic culture and influence the structure of the society’s law and political economy. For example, the principles of equality and liberty that

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55. Emerging in Britain in the 1950s and 1960s, the cultural studies movement explored how society produced, propagated, and consumed cultural perceptions and beliefs about the human condition and social life. See Simon During, *Introduction* to THE CULTURAL STUDIES READER 1, 27 (Simon During ed., 3d ed. 2007); see, e.g., LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION (2006); CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW (Austin Sarat & Thomas R. Kearns eds., 1999); LAW IN THE DOMAINS OF CULTURE (Austin Sarat & Thomas R. Kearns eds., 1998); PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); LEGAL STUDIES AS CULTURAL STUDIES: A READER IN (POST) MODERN CRITICAL THEORY (Jerry D. Leonard ed., 1995).

56. Victoria E. Bonnell & Lynn Hunt, *Introduction* to BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE 1, 2–4 (Victoria E. Bonnell & Lynn Hunt eds., 1999).

57. See Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMANS 35 (2001).

58. Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in LAW IN THE DOMAINS OF CULTURE, *supra* note 55, at 1, 6.

59. RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 89, 91 (rev. ed. 1983) (quoting Johann Gottfried von Herder who criticized the idea of culture as universal).

are enshrined in the Constitution of the United States embody part of America's democratic culture. Thus, political discourse about the meaning of equality and liberty shapes the evolution of law and public policy toward those ends. When cultural interpretations of democratic principles diverge, or as Naomi Mezey puts it, when there is "dislocation between the production of legal meaning and its reception and rearticulation" by the members of a multicultural society, certain cultural interpretations of democratic life tend to predominate, while others are pushed to the fringe, producing a state of political rivalry among citizens.<sup>60</sup>

Rivalry over the cultural production of legal meaning, as Part I.C reveals, can both limit the cultural expressions of marginalized populations and inspire legal regimes that embed biased cultural views of subordinated groups. The resultant "tragedy of the cultural commons," following the example of Garrett Hardin's famous *Tragedy of the Commons* allegory, can render democratic cultural discourse exclusive, infringe on equitable community economic development, and perhaps worst of all, inhibit democratic law and policymaking.

#### A. *The Law and Culture Movement*

During the 1970s and 1980s, many American politicians deployed the concept of culture as a political device—devoid of any analytical content—to support racially biased legal and public policy interventions in low-income Black neighborhoods under the guise of poverty alleviation and crime control. Yet, as anthropologists and cultural studies scholars note, such cultural discourses, "even if they are expressed in novel idioms . . . are not freely invented; they refer back to particular intellectual traditions that have persisted for generations."<sup>61</sup> In other words, the cultural tropes that manifested in twentieth-century politics—such as the "welfare queen" trope popularized by Ronald Reagan during his presidential campaign in the early 1970s<sup>62</sup>—relate back to antiquated conceptions of culture. These conceptions are "deeply compromised" by historical efforts to legitimate European colonialism, imperialism, slavery, genocide, and conquest.<sup>63</sup> Thus, the weaponization of culture in politics—i.e., the so-called "culture wars"—relies upon culture's central role in the ongoing political discourse that occurs within and across societies. Welsh socialist Raymond H. Williams defined these public debates as contestations about "a particular way of life,"<sup>64</sup> a collective agreement over a set of shared "signifying or symbolic systems" that express certain social meanings, values, and preferences.<sup>65</sup>

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60. Mezey, *supra* note 57, at 37.

61. ADAM KUPER, CULTURE: THE ANTHROPOLOGISTS' ACCOUNT 9–10 (1999).

62. *See infra* Section II.B.2.

63. JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 10 (1988); Rosemary J. Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, in LAW IN THE DOMAINS OF CULTURE, *supra* note 55, at 21.

64. WILLIAMS, *supra* note 59, at 89.

65. *Id.* at 91.

Accordingly, cultural beliefs are socially “produced, performed, contested, or transformed,”<sup>66</sup> rendering the concept of culture as “both a semiotic system with its own logic and coherence *and* the practices that reproduce and contest that system—practices which are contradictory and always in flux.”<sup>67</sup> Cultural practice thereby emerges as a process of expressing meaning, value, and preference by using existing cultural symbols and signifiers. These expressions occur at both the unconscious level (e.g., the meaning one ascribes to the sight of a baseball cap worn backwards) and the self-conscious level (e.g., the meaning one intends to express by clapping one’s hands after a musical performance) of human activity.<sup>68</sup> Differences in the unconscious and self-conscious awareness of meaning produce diversity in cultural expression and explains, in part, the fluidity of cultural boundaries between sub-groups within a multicultural society.<sup>69</sup>

In this way, when culture is defined not only politically, but also socially,<sup>70</sup> law can be categorized as but another set of signifying practices and symbols that constitute a society’s “legal culture.”<sup>71</sup> However, law is unique among cultural institutions; it can alter the meaning and interpretation of non-legal cultural practices that operate within its bounds. For example, law eliminated the custom of dueling that was common in colonial America by outlawing the practice. As a result, as Austin Sarat and Thomas Kearns conclude, “law has meaning-making power,”<sup>72</sup> rendering law as “both a producer of culture and an object of culture,”<sup>73</sup> or as “both constituting and being constituted by social

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66. Mezey, *supra* note 57, at 42.

67. *Id.* (referencing the work of cultural historian William H. Sewell, Jr.).

68. Stuart Hall, *Cultural Studies: Two Paradigms*, in *CULTURE/POWER/HISTORY: A READER IN CONTEMPORARY SOCIAL THEORY* 527 (Nicholas B. Dirks, Geoff Eley & Sherry B. Ortner eds., 1994) (describing culture as “both the meanings and values which arise amongst distinctive social groups and classes . . . through which they ‘handle’ and respond to the conditions of existence; *and* as the lived traditions and practices through which those ‘understandings’ are expressed and in which they are embodied”); *see also* RAYMOND WILLIAMS, *CULTURE & SOCIETY: 1780-1950*, at 295 (1958) (describing culture as a process, not a conclusion).

69. *See* EDWARD W. SAID, *CULTURE AND IMPERIALISM*, at xxv (1993) (“Partly because of empire, all cultures are involved in one another; none is single and pure, all are hybrid, heterogenous, extraordinarily differentiated, and unmonolithic.”).

70. *See* RAYMOND WILLIAMS, *THE LONG REVOLUTION* 41 (1961).

71. Of course, many scholars have argued against this interpretation of law. Such debate is beyond the scope of this Article, but see, for example, Edward A. Purcell, Jr., *Exploring the Origins of America’s “Adversarial” Legal Culture*, 70 *STAN. L. REV. ONLINE* 37, 37 (2017) (reviewing AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–77* (2017)) (“illustrat[ing] some of the complex ways that social factors shape legal thinking”).

72. Sarat & Kearns, *supra* note 58, at 10.

73. Mezey, *supra* note 57, at 46; *see also* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 814, 839 (1987) (“[L]aw is the quintessential form of ‘active’ discourse, able by its own operation to produce effects. It would not be excessive to say that it *creates* the social world, but only if we remember that it is this world which first creates the law.”).



relations and cultural practices.”<sup>74</sup> Indeed, Robert Gordon asserts that law’s hegemonic ideological power is its greatest force.<sup>75</sup> Law determines the background rules that coordinate social action and inaction.<sup>76</sup> It thereby creates contractual and property rights, for example, that establish “owners” and “possession[s]” and distribute power by allowing some members of the polity to exclude or coerce others.<sup>77</sup> Even the private decisions of actors in a so-called free economic market require, to a certain degree, the public coordination of an overarching legal regime to establish a culture of free enterprise among the general population.<sup>78</sup>

There have been two fundamental approaches to the study of the relationship between law and culture among legal scholars.<sup>79</sup> The first approach stems from the historical school in German jurisprudence, which argues that a nation’s culture constitutes the law. This claim, most notably associated with the German jurist and historian Friedrich Carl von Savigny, was developed in response to the resurgence of natural law doctrine after the Enlightenment era.<sup>80</sup> When Germany began considering the development of a civil code after the installation of the French Civil Code of 1804 (or the Napoleonic Code),<sup>81</sup> Savigny protested, arguing that the law is a reflection of the customs and habits of a people, and therefore, should not emanate from the minds of legislators, but from the realm of social life.<sup>82</sup> Savigny’s view expressed a romantic conception

74. Mezey, *supra* note 57, at 46–47; see Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 L. & SOC. INQUIRY 145, 148 (2001).

75. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984) (“[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.”).

76. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 473 (1923) (“Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation—unless he can produce food. . . . [B]ut in every settled country there is a law which forbids him to cultivate any particular piece of ground unless he happens to be an owner.”).

77. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12–13 (1927) (“[T]he law of property helps me directly only to exclude others from using the things which it assigns to me.”); see Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 490 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)) (“Property law, when combined with contract law, delegates to property owners the power to coerce nonowners to contract on terms imposed by the stronger party.”).

78. See Singer, *supra* note 77, at 488 (“The distribution of market power is thus only partly a function of private decisions of market actors; to a substantial extent, it is determined by the legal definition and allocation of property rights.”).

79. To be sure, there are more than two approaches. For example, Menachem Mautner identifies twelve approaches and argues that at least three are primary. See Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 841–44 (2011).

80. See Hans Siegbert Reiss, *The Political Thought of the German Romantics*, in *THE POLITICAL THOUGHT OF THE GERMAN ROMANTICS*, 1793-1815, at 1–2 (H.S. Reiss ed., 1955).

81. See ROGER BERKOWITZ, *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION* 67 (2005).

82. See Mautner, *supra* note 79, at 845.

of the law that elevated the primacy of the individual.<sup>83</sup> Yet, even in his efforts to explain how culture molds the subjective human experience and, consequently, affects the creation of law, Savigny assumed a homogenous national culture that both unified all subcultures and assimilated all immigrant cultures.<sup>84</sup> Such a view endures in the concept of the American melting pot. Notwithstanding, in recent decades, the emergence of a multicultural paradigm in cultural studies has largely overtaken the notion of a monoculture within a nation.<sup>85</sup> Moreover, scholars have begun to associate culture as less of a discrete system of meaning, and more of a shared method of *being* (i.e., the expression of individual human agency), or as a practice.<sup>86</sup>

The second primary approach to cultural legal studies, existing on the opposite end of the spectrum, has viewed law as constitutive of the culture of a state. The German jurist Josef Kohler advanced this view in the early twentieth century, asserting that law exists to preserve certain human values—not unlike many Enlightenment era thinkers—that facilitate stable political institutions and cooperative market transactions to further the common good.<sup>87</sup> As Kohler declared:

[I]t is the function of the legal order to secure and increase the progress of culture by so moulding rights and the universal cultural values which it protects that the hampering elements are removed and the upward tendencies are supported and strengthened. This is brought about especially by the manner in which personality gains its forms of expression. The cultural forms of expression (*Verkehr*) which are developed through the standards of law are called acts in the law (*Rechtsverkehr*), and a great many legal standards are standards of liberty and power.<sup>88</sup>

More recently, scholars have embraced a middle ground. Like Kohler, American anthropologist Clifford Geertz contended that law is “constructive of social realities rather than merely reflective of them.”<sup>89</sup> However, Geertz also emphasized a dialectic relationship between law and culture, suggesting that culture constitutes law; he thereby merged the two primary views of law’s relationship to culture. French sociologist Pierre Bourdieu embraced Geertz’s approach in his sociological study of law, reasoning: “Law is the quintessential form of the symbolic power of naming that creates the things named . . . [It] is

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83. See Reiss, *supra* note 80, at 4, 6–8.

84. See Hermann Klenner, *Savigny’s Research Program of the Historical School of Law and Its Intellectual Impact in 19th Century Berlin*, 37 AM. J. COMP. L. 67, 69–70, 79 (1989).

85. See Chi, Cultural Stud. Grp., *Critical Multiculturalism*, in MULTICULTURALISM: A CRITICAL READER 114, 115 (David Theo Goldberg ed., 1994).

86. See, e.g., PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 10–22 (Richard Nice trans., 1977).

87. See Reiss, *supra* note 80, at 4, 6–8.

88. JOSEF KOHLER, *PHILOSOPHY OF LAW* 60 (1914).

89. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 232 (1983).

the quintessential form of ‘active’ discourse, able by its own operation to produce its effects.”<sup>90</sup>

Bourdieu’s assertion responded to a longstanding debate over the perceived objectivity of law. Whereas “legal formalists” have viewed law as objective and neutral in its operation in society, “legal realists” have focused on law’s normative meaning and social implications, thereby recognizing humanity’s influence on subjective legal reasoning.<sup>91</sup> The view of law as constitutive of culture went a step further than both formalists and realists, clarifying law “not so much [as] operating to shape social action, but *as* social action.”<sup>92</sup> In other words, more than simply reifying social conditions, law constitutes the social hierarchies of class, race, gender, and sexuality that govern human interactions, rendering law as an instrument of social control.<sup>93</sup> In this way, Naomi Mezey contends, law might reasonably be deemed *as* culture itself.<sup>94</sup>

### B. Culture as a Commons

Garrett Hardin’s classic allegory, *The Tragedy of the Commons*, helps to clarify the harms that can result when multiple cultures coexist in a liberal democratic state.<sup>95</sup> By extending the metaphor of the commons to describe democratic cultural discourse, this Part reveals how *power* can dictate the making and contestation of cultural meaning. In this context, power is critical because democratic culture, I argue, is produced and consumed, at least in part, through deliberative political discourse.

To understand the value of the tragedy of the commons allegory as an analytical frame to dissect democratic cultural discourse as a shared non-physical resource, one must first understand the idea of the commons for physical goods. First, consider the distinction between public and private goods. While the market can efficiently allocate private goods under a regime of property and contract law (according to neoclassical economic theory), the government is most efficient at managing public goods since it can use its power of the purse to distribute and conserve the resource. Private goods introduce the concept of rivalry and excludability. *Rivalry* occurs when the consumption of a good diminishes the opportunity of other individuals to consume it.<sup>96</sup> *Excludability* describes the existence of discrete mechanisms—be they legal, extralegal, or a

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90. Bourdieu, *supra* note 73, at 838–39.

91. See Mautner, *supra* note 79, at 850–51; Etienne C. Toussaint, *The Purpose of Legal Education*, 111 CALIF. L. REV. (forthcoming Feb. 2023).

92. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 34–35 (1998).

93. See Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMANS 3, 19–20 (2001).

94. Mezey, *supra* note 57, at 37.

95. See generally Hardin, *supra* note 34 (explaining the dangers of allowing individuals to access public resources with restraint and act in self-interested ways that deplete the resource).

96. See *id.* at 1244–45.

combination of the two—that prevent others from consuming a good.<sup>97</sup> As Lawrence Solum explains:

Public goods have two characteristics—nonrivalrousness and nonexcludability. For example, consumption of national defense is nonrivalrous (my being protected by the U.S. armed forces doesn't diminish your protection). National defense is a nonexcludable good: the United States Army cannot say to Mexico, "Solum hasn't paid his national defense bill. Go ahead and attack him."

Private goods are rivalrous and excludable. If I own a laptop computer, my use of it diminishes your ability to use it; therefore, my consumption of the laptop rivals yours. Moreover, I can exclude you from the use of my laptop (by locking it up when I am not using it).<sup>98</sup>

The concept of rivalry and excludability enable two additional types of goods. When a good is non-excludable, but its consumption is rivalrous, such as a species of fish in the ocean, it is defined as a "common pool good."<sup>99</sup> When a good is excludable, but its consumption is non-rivalrous, such as a highway in a rural town, it is defined as a "toll good."<sup>100</sup> Finally, if a toll good can become rivalrous beyond a certain threshold of consumption due to crowding effects—such as a movie theater with limited seats—it is defined as a "club good."<sup>101</sup>

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97. *See id.*

98. Lawrence B. Solum, *Legal Theory Lexicon 029: Public and Private Goods*, LEGAL THEORY LEXICON BLOG (Mar. 28, 2004) (emphasis omitted), [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/03/legal\\_theory\\_le.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le.html) [https://perma.cc/U65B-C2SP].

99. *Id.*; see Vincent Ostrom & Elinor Ostrom, *Public Goods and Public Choices*, in POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS 75, 78–79 (Michael D. McGinnis ed., 1999).

100. Solum, *supra* note 98; see Ostrom & Ostrom, *supra* note 99, at 78–79.

101. Solum, *supra* note 98; see Ostrom & Ostrom, *supra* note 99, at 78.

	Excludable	Non-Excludable <sup>102</sup>
Rival	Private Good	Common Pool Good
Non-Rival	Club Good Toll Good	Public Good

Equipped with this definitional framework, we now turn to Hardin's allegory. Hardin uses the example of herdsmen grazing cattle in an open pasture to portray the traditional concept of a commons. In Hardin's imaginary pasture, which exists in a pre-political and uncoordinated state of nature—meaning there are no government controls to coordinate the allocation of property rights and enforce private contracts—public access is unrestrained and consumption is unrestricted.<sup>103</sup> Consequently, all members of the open pasture enjoy “privileges of inclusion and no one has rights of exclusion.”<sup>104</sup> Hardin argued that such unregulated access to a common pool good—in his allegory, the grass—will ultimately result in tragedy.<sup>105</sup> In the example of the herdsmen, Hardin forewarned that unmanaged herders would introduce too many cattle to the pasture, resulting in overgrazing.<sup>106</sup> Beyond dominating the resource, overgrazing would deplete the shared resource altogether, Hardin argued, because the prototypical herdsman is a rational actor existing in a state of rivalry with others who seeks to maximize their self-interests, even at the expense of his or her peers.<sup>107</sup>

To be sure, Hardin's allegory is premised on neoclassical assumptions about human behavior in relation to open access resources, such as the conception of man driven by individualistic and atomistic impulses in rivalry

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102. Solum, *supra* note 98.

103. See Hardin, *supra* note 34, at 1244.

104. Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQUIRIES L. 79, 84 (2001).

105. See Hardin, *supra* note 34, at 1244.

106. See *id.* (“As a rational being, each herdsman seeks to maximize his gain . . . [Thus e]ach man is locked into a system that compels him to increase his herd without limit—in a world that is limited.”).

107. See *id.*; Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 914 n.31, 919–22 (2004) (explaining that Hardin's tragedy results in outcomes that are suboptimal).

(and not in coordination) with other community members.<sup>108</sup> Perhaps as a result, Hardin’s allegory has been used to justify government regulation of public access to common pool goods, such as parks and waterways, by means of enclosure.

Yet, as property law scholar Sheila Foster argues, even under government control of shared resources, the commons tragedy can still manifest when “government authorities fail to enforce existing regulatory controls and/or tolerate widespread noncompliance with them by users of the resource.”<sup>109</sup> This “regulatory slippage,” as Foster describes it, can facilitate “congestion and/or rivalry,” by enabling users that were previously “excluded from, or constrained in their use of, the common resource,” to become dominating users who “freely access and exploit the resource for their own use.”<sup>110</sup> Empowered users who overexploit the shared resource not only create an inequitable distribution of the good, but they also “increase[] the cost for all users” by degrading the resource (which decreases the supply and raises the demand) and requiring government-sponsored policing of future abuses (which increases management and surveillance costs).<sup>111</sup>

Taking a closer look at urban communities, Foster explains that the “urban commons” is comprised of “tangible and intangible resources” that urban residents share.<sup>112</sup> Foster’s focus in *Collective Action and the Urban Commons* is on the tangible resources that residents use in urban spaces as common property, such as streets, sidewalks, parks, and abandoned lots. This Article builds upon Foster’s foundational analysis by exploring the *intangible* resource that structures urban life—democratic culture, or what Lisa T. Alexander calls “cultural collective efficacy.”<sup>113</sup> In so doing, this Article makes several preliminary assumptions. First, it assumes that multiple expressions of democratic culture can coexist within a liberal democratic state. Thus, when

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108. See ANUP DASH, UNITED NATIONS RSCH. INST. FOR SOC. DEV., TOWARD AN EPISTEMOLOGICAL FOUNDATION FOR SOCIAL AND SOLIDARITY ECONOMY 5 (2014), <https://cdn.unrisd.org/assets/library/papers/pdf-files/op3dash.pdf> [<https://perma.cc/4LDA-RBQY>] (“The starting point for economic analysis in neoclassical economics is the individual, the homo economicus—anthropocentric, instrumentally (hyper)rational, atomistic and self-interested, utility maximizing, autonomous, economic actors. Emphasis on self-interest and maximization as prime movers of human action governed by the principle of competition strip the homo economicus—the ontologically cold and rational, calculative, instrumentally driven, atomistic man with a ‘separative self’—off [sic] any morality and substantive rationality, and create a thin theory of human action.”); see also Hardin, *supra* note 34, at 1244 (“As a rational being, each herdsman seeks to maximize his gain. Explicitly, or implicitly, more or less consciously, he asks, ‘What is the utility *to me* of adding one more animal to my herd?’”).

109. Foster, *Collective Action*, *supra* note 44, at 66.

110. *Id.*

111. See *id.*

112. *Id.* at 58.

113. Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 830 (2011) (“Cultural collective efficacy is a form of positive bonding social capital generated through participation in cultural endeavors, which enables some low-income, inner-city residents to mitigate the negative effects of living in a poor, racially segregated, and disinvested community.”).

residents of a multicultural state vote for political leaders, and when political leaders craft laws and public policies that reflect dominant cultural views, such outcomes convey the dominant culture's influence on the *construction* of law. Second, this Article assumes that residents of a multicultural state consume, interpret, and rearticulate legal meaning in diverse ways. By fusing their unique cultural interests, goals, and understandings with the laws and public policies that govern their community, members of subcultures reveal culture's influence on the *reception* of law. Accordingly, both the construction and reception of law reflect a cultural process of socially produced, contested, and transformed legal meaning that emerges from democratic cultural discourse.

The idea that democratic cultural discourse in a multicultural society exists in a cultural common evokes discursive ethics that reflects the insights of Clifford Geertz. It also draws from the work of German philosophers Jürgen Habermas and Karl-Otto Apel, who argued that moral norms can only be justified "intersubjectively" in fair, open, and reasoned arguments between individuals.<sup>114</sup> To Habermas, the development of shared norms through the process of communicative action (as opposed to instrumental action, which is goal-oriented) establishes the social coordination necessary for individual and shared objectives, and facilitates the possibility for critique of existing social norms and values.<sup>115</sup> Such shared norms can only be deemed legitimate if the democratic discourse is shaped by rational debate, embraces various cultural perspectives, "constrains all affected to adopt the perspectives of all others in the balancing of interests," and engenders a sense of solidarity, or "co-responsibility," among the parties.<sup>116</sup> Thus, discursive ethics as a political process relies upon the rationality of a diverse group of participants to transcend individualistic and instrumental reasoning that ignores their cultural context.

To be sure, scholars have critiqued Habermas's theory of communicative action. For example, the presupposition that all impacted parties are free and equal to participate in political discourse based upon transcendental principles of universalization does not reflect the reality of social inequality and may, in some

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114. The Frankfurt School of critical theory conveyed discursive ethics as a process of uncoerced and undistorted communicative interaction that seeks to identify and reconstruct normative truths by grounding ethics in the agreements reached through mutual deliberation. See JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 88–94 (Christian Lenhardt & Shiery Weber Nichol森 trans., 1990) [hereinafter HABERMAS, *MORAL CONSCIOUSNESS*]; see also Sabine U. O'Hara, *Discursive Ethics in Ecosystems Valuation and Environmental Policy*, 16 *ECOLOGICAL ECON.* 95, 96 (1996) (arguing that discursive ethics offers three critical benefits: "(1) an integrated approach to . . . [problem evaluation], (2) a contextual framework for considering uncertainty and risk, and (3) a basis for identifying operative valuation biases and conditions for their critical reconstruction").

115. See JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY*, at x–xii (Thomas McCarthy trans., 1984).

116. HABERMAS, *MORAL CONSCIOUSNESS*, *supra* note 114, at 65; Karl-Otto Apel, *How to Ground a Universalistic Ethics of Co-responsibility for the Effects of Collective Actions and Activities?*, 52 *PHILOSOPHICA* 9, 19–20 (1993).

instances, perpetuate pre-existing power imbalances.<sup>117</sup> This insight perhaps explains why commons scholars have begun to inquire into the process of “commoning” or “reclaiming the commons” to emphasize “the role of race, gender, caste, and class, among other dimensions of inequality.”<sup>118</sup> Further, not all modes of political discourse occur via speech. Some citizens engage in political speech via action, or even inaction, and society does not embrace all actions as political discourse. Nevertheless, as a procedural framework, discursive ethics is primarily concerned with finding consensus and identifying the preconditions that enable democratic and open communication. The project of discursive ethics, therefore, demands the removal of structural barriers that inhibit participation in political discourse.<sup>119</sup>

By applying the framework of the commons with insights from Hardin’s allegory to the notion of democratic cultural discourse in the cultural commons, at least four insights emerge. The first two insights relate to an *ideal* democratic society where all citizens are engaged in democratic political discourse. First, in an ideal *monocultural* liberal democratic society governed by a distinct *uncontested* conception of democratic culture, political discourse is a public good: (a) it is nonexcludable, because all citizens enjoy equal access to consuming democratic cultural discourse as a dialogic political practice; and (b) it is non-rivalrous, because even if all citizens do not initially agree on the meaning of democratic culture as a way of life, they nevertheless experience a sense of inclusion in the cultural production of legal meaning (under the theory of discursive ethics). Second, in an ideal *multicultural* liberal democratic society comprised of *multiple* conceptions of democracy as a way of life, political discourse is a common pool good: (a) it is nonexcludable, because all citizens retain equal access to democratic cultural discourse as a dialogic political practice; but (b) it is rivalrous, because citizens harbor contested cultural views of democratic life and compete in the cultural production of legal meaning, with law reflecting dominant cultural views at the expense of weaker participants.

The third and fourth insights relate to a *non-ideal* democratic society that perhaps better reflects the existing social reality. Third, in a non-ideal *monocultural* liberal democratic society where not every citizen engages in political discourse, but society remains governed by a distinct *uncontested*

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117. See PETER MILLER, DOMINATION AND POWER 90 (1987) (“There is no guarantee that a formally symmetrical distribution of opportunities to select and employ speech acts will result in anything more than an expression of the status quo.”); IAN F. MCNEELEY, THE EMANCIPATION OF WRITING: GERMAN CIVIL SOCIETY IN THE MAKING, 1790S–1820S, at 3 (2003) (“Jürgen Habermas . . . subscribes to an unrealistic ideal of power-free communication. . . . Michel Foucault remedies this idealism by treating knowledge as power; his work is in fact suffused with applications of knowledge for the control of human bodies. . . .”).

118. Kashwan et al., *supra* note 39, at 2, 7.

119. Participatory democracy efforts will fall short if “[t]he privileged end up with greater power to intervene in and influence political processes, while the least privileged probably suffer feelings of shame that turn them away from public life.” Gustavo Pereira, *What Do We Need to Be Part of Dialogue? From Discursive Ethics to Critical Social Justice*, 16 CRITICAL HORIZONS 280, 292 (2015).



conception of democratic culture, political discourse appears to be a club good: (a) it is non-rivalrous because, presumably, all cultural conceptions of democratic life cohere in the cultural production of legal meaning (under the theory of discursive ethics); but (b) it is excludable, because some members of the polity are excluded from political discourse, whether by legal or extralegal mechanisms. Finally, fourth, in a non-ideal *multicultural* liberal democratic society (like the United States) where some citizens are disengaged from political discourse while other citizens harbor countercultural views about the meaning of democratic life, political discourse is perhaps best defined as a private good: (a) it is rivalrous, because citizens harbor contested cultural views of democratic life and compete in the cultural production of legal meaning; and (b) it is excludable, because some democratic cultural views dominate political discourse, at the expense of others. Specifically, in this fourth formulation, some citizens overconsume the intangible resource (political discourse), effectively crowding out countercultural views from the cultural commons, while some citizens are not allowed to participate in political discourse at all (e.g., the members of the Black Panther Party who were incarcerated in the 1970s and 1980s as political prisoners).

	Excludable	Non-Excludable
	<u>Private Good</u>	<u>Common Pool Good</u>
Rival	a) non-ideal multicultural society b) contested democratic culture	a) ideal multicultural society b) contested democratic culture
	<u>Club Good</u>	<u>Public Good</u>
Non-Rival	a) non-ideal monocultural society b) uncontested democratic culture	a) ideal monocultural society b) uncontested democratic culture

Most would agree that democratic cultural discourse in a liberal democratic state should be a public good available to all citizens for consumption. Others may retort that contestation is unavoidable in democratic political discourse, rendering politics a common pool good in the ideal state. But, what happens when a good that should be public in an ideal world (or, at best, a common pool good) becomes privatized in the real world? According to Hardin, tragedy.

C. *The Tragedy of the Cultural Commons*

To avoid the privatization of political discourse (which might thereby manifest a totalitarian state), it is the task of democratic governments to regulate democratic cultural discourse in the cultural commons. That is, the government's task in upholding the rule of law in a democracy is to coordinate access to political discourse (which must be defined broadly to remain inclusive of diverse cultural expressions of political engagement) such that no citizen or citizen group dominates the culture-law dialectic. Put simply, every citizen should have a seat at the table of democracy to help shape the cultural production of law and legal meaning. However, when there is a decline in the governmental enforcement of social, legal, and political standards necessary for equal access to political discourse in the marketplace of cultural ideas, or regulatory slippage, the cultural commons becomes vulnerable to incompatible uses of political discourse that degrade democracy. As the cultural commons becomes a rivalrous and exclusive marketplace where disempowered cultural expressions of democratic life are crowded out by dominant cultural views, and thereby become unavailable for public consumption, the stage for tragedy is set.<sup>120</sup>

According to Foster, there are many reasons why regulatory slippage occurs in the urban context. For example, regulatory slippage can occur "during times of declining government resources or when government is faced with an overwhelming demand on those resources."<sup>121</sup> However, even though the fiscal crisis of the 1970s did shrink available resources for the New York City government to address unemployment and health inequities in low-income Black communities during the emergence of hip-hop culture,<sup>122</sup> a decline in government spending power does not fully explain why Black cultural expressions of democratic life were not only suppressed, but excluded altogether from the law and policymaking process.

Foster offers a second explanation that better suits the tragedy of the cultural commons narrative: "[S]ome access and use restrictions are unreasonable, unrealistic, or insufficiently attentive to changed usage patterns, giving rise to widespread noncompliance with these restrictions and an increase in monitoring and enforcement costs."<sup>123</sup> This explanation of regulatory slippage better clarifies the tragedy of the cultural commons in New York City when one observes the hegemonic influence of White supremacist culture upon the construction of law and public policy during the 1970s and 1980s.

To afford the counterculture of so-called Black radicals a seat at the table of democratic cultural discourse, and to thereby restrict White supremacists from

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120. See Foster, *Collective Action*, *supra* note 44, at 68 (describing "rivalrousness" as "a reference to the consumption of a good and the extent to which consumption by one individual diminishes the availability of that good to others").

121. *Id.* at 67.

122. See *infra* Section II.A.

123. Foster, *Collective Action*, *supra* note 44, at 67–68.

“overconsuming” and “crowding” the discursive political process that undergirds the construction of law and public policy, a government must not only view such measures as reasonable and realistic. It must also be attentive to the way rivalrous usages of political discourse (at the expense of excluded users in the cultural commons) can lead to widespread noncompliance with the very essence of democracy itself. Put another way, the government should seek to imbue the people (*demos*) with power (*kratos*) to deliberate and decide in the public sphere how to *democratically* govern themselves.

Many conservative political leaders of the 1970s and 1980s were unable to discern how White supremacist culture had shaped the very construction and reception of laws and public policies targeting poverty and crime in Black urban ghettos. Engaging the political views of radical Black thinkers or taking seriously the radical political interventions of marginalized Black communities was not only deemed unrealistic, but it was also perceived as unreasonable. Why such views predominate is unimportant to this Article’s mission, though many might deem unconscious racism as a culprit. What is important to the present analysis is a recognition that White supremacist cultural views of democratic life in the Black urban ghetto dominated political discourse in the cultural commons and thereby shaped law’s production and meaning to reflect its biased views.

To be sure, there has long been resistance to rivalrous consumptions of political discourse in the cultural commons. The Civil Rights and Black Power movements represent but two examples of collective efforts to prevent democratic cultural discourse about the constitutional demands of equality and liberty from being held hostage and overconsumed by the disciples of Jim Crow segregation and the vanguards of racial terrorism. However, as Foster explains, “a strong preference for conservation of a resource can be quite incompatible with a strong preference for consumption or exploitation of that resource.”<sup>124</sup> The intense rivalry of White supremacist culture, coupled with the relaxation of government oversight and management of political discourse, led to tragedy in Black urban ghettos following the Civil Rights era. Peaceful political protests were met with canines, fire hoses, and guns.<sup>125</sup> The Federal Bureau of Investigation (FBI) surveilled Black cultural institutions, such as the Black Panther Party, and their leaders were jailed.<sup>126</sup> Civil rights activists were assassinated.<sup>127</sup> Progressive laws and public policies that reflected the consensus

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124. *Id.* at 69.

125. *See, e.g.*, JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954-1965* (1987) (describing the various protests and boycotts led by Martin Luther King, Jr. and other civil rights leaders).

126. *See, e.g.*, JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* (2016) (discussing the history of the Black Panther Party, including its political activism against racial injustice and its repression by the FBI).

127. *See, e.g.*, MARSHALL FRADY, *MARTIN LUTHER KING, JR.: A LIFE* (2005) (documenting the story of Martin Luther King, Jr.’s fight for civil rights leading up to his assassination in 1968).

of multicultural political debate were rolled back and replaced with a politically conservative cultural view of democratic life that assuaged White fears.<sup>128</sup>

In this way, Foster's description of the conditions that lead to degradation of a common pool resource when unregulated rivalry occurs—"an increase in lawlessness, a decrease in cleanliness, and a generally dramatic decline in the quality and usefulness of the physical resource"<sup>129</sup>—accurately describes the conditions that led to the degradation of democratic discourse as a commons in the United States following the Civil Rights era. Even more, it explains the degradation of the built environment in America's Black urban ghettos. As highlighted in Part II of this Article, the exploitation of political discourse and the resultant construction of poverty laws and crime-control policies that were embedded with racist cultural views of racially and ethnically minoritized populations correlated with: (a) an increase in crime (alongside an increase in racially biased policing); (b) a decrease in public spending (alongside a decrease in municipal services and quality public education); and (c) a decline in multicultural political discourse (alongside an increase in racially charged cultural tropes being weaponized by politicians to pathologize the plight of the working class).

Solving these tragedies of the cultural commons, as it were, is not an easy task. The rivalrous hegemony of White supremacist culture has molded existing social, legal, and political regimes. Consequently, it tends to prioritize solutions that track a classic public-private dichotomy, or a choice between classic republicanism or classic liberalism that each reflect a Eurocentric vision of modernity. We are asked to choose either a welfare state that coordinates efficient consumption of shared resources via systems of regulation and entitlement (which assumes equal representation in the lawmaking process), or a limited government and laissez-faire political economy that relies upon private property rights and contractual market-based incentives to align private behavior with market demands (which assumes equal opportunities to compete in free markets).<sup>130</sup> Notwithstanding the false dichotomy forged by this political divide between the left and the right, each category of possible solutions also carries a cost that has "impeded their adoption by states, local governments, and communities."<sup>131</sup> The cost of implementing public, private, or hybrid solutions that emerge from political discourse in the cultural commons amounts to what James Baldwin called "the price of the ticket"—that is, the price of eradicating the vestiges of White supremacy that remain infused in the architecture of

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128. See, e.g., WILLIAM A. NISKANEN, *REAGANOMICS: AN INSIDER'S ACCOUNT OF THE POLICIES AND THE PEOPLE* (1988) (describing President Reagan's neoliberal economic program, which reduced government spending and regulation in contrast to his predecessors).

129. Foster, *Collective Action*, *supra* note 44, at 70.

130. See Toussaint, *supra* note 54, at 348–49.

131. Foster, *Collective Action*, *supra* note 44, at 71.

America's law and political economy. As Bourdieu reminded us, "[R]emember that it is this world which first creates the law."<sup>132</sup>

As a result of America's inability to reckon with structural racism, neither a welfare state approach (e.g., legislation to protect voting rights<sup>133</sup>) nor a market-based approach (e.g., the corporate social responsibility movement<sup>134</sup>) have proven capable of overcoming the exclusion of countercultural views from the law and policymaking process. Scholars point toward a third option that "depends both on the cooperation of resource users . . . as well as on the support of the central government": collective resource management regimes or collective action.<sup>135</sup> What does it look like when governments empower communities to collectively manage democratic cultural discourse at the local level? Part III will take up that very question. But first, to clarify how the tragedy of the cultural commons manifests in specific historical-geographical contexts, consider how White supremacist culture helped to construct urban ghettos in New York City during the late twentieth century in rivalry to and to the exclusion of the protests of racially and ethnically minoritized low-income New Yorkers.

## II.

### THE CULTURAL PRODUCTION OF LEGAL MEANING

In the United States, the development of urban "ghettos"—a term derived from the impoverished and densely populated Jewish communities throughout Europe where social "outcasts" were confined, dating as early as the sixteenth century—reflects the cultural production of the legal meaning of urban poverty. Ghettos are places of neglect where the poor, often immigrants and other racially or ethnically minoritized populations, are enclosed. Ghettos are places where government services are lacking, and public resources need repair. Ghettos are places where land values and housing prices are cheap, and crumbling infrastructure stands ripe for speculation by private developers and investors. The people living in ghettos are presumed to be lazy and prone to criminality. Thus, when ghettos are developed, which often raises property values faster than wage increases for their working-class residents, the so-called lazy non-property owners are pushed out. Yet, such "exclusionary displacement"<sup>136</sup> is more of a

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132. Bourdieu, *supra* note 73, at 839.

133. See Sam Levine, *Democracy Under Attack: How Republicans Led the Effort to Make it Harder to Vote*, GUARDIAN (Dec. 27, 2021), <https://www.theguardian.com/us-news/2021/dec/27/democracy-under-attack-trump-republicans> [https://perma.cc/J4QL-NFSG].

134. See Brian Knight, *The Dangers of Woke Capitalism*, DISCOURSE (Dec. 14, 2021), <https://www.discoursemagazine.com/politics/2021/12/14/the-dangers-of-woke-capitalism/> [https://perma.cc/NVP4-66RJ].

135. Foster, *Collective Action*, *supra* note 44, at 71; see also Elisabeth Schuppenlehner-Kloyber & Marianne Penker, *Between Participation and Collective Action—From Occasional Liaisons Towards Long-Term Co-Management for Urban Resilience*, 8 SUSTAINABILITY 10 (2016).

136. Adam Elliott-Cooper, Phil Hubbard & Loretta Lees, *Moving Beyond Marcuse: Gentrification, Displacement and the Violence of Un-homing*, 44 PROGRESS HUM. GEOGRAPHY 492,

tradition of White supremacist culture in the United States than a mere market externality.

From the first landing of European settlers upon the eastern shores of North America in the 16th century, indigenous populations and enslaved Africans have been displaced from their homes and largely excluded from the benefits of economic development.<sup>137</sup> Even after enslaved Black Americans were emancipated after more than 200 years of bondage, the law of Jim Crow racial apartheid and the public policy of state-sanctioned racial terrorism herded most of them into segregated and low-income ghettos across the country. The law of racialized local zoning and the public policy of racist real estate lending afforded social and economic mobility for White Americans through homeownership, while relegating Black Americans to concentrated poverty in the so-called hood. When disinvested cities were finally developed—called urban renewal by historians, but referred to as “negro removal” by community members—the social capital and cultural networks of longstanding Black communities were deemed unworthy of preservation.<sup>138</sup>

However, not all city dwellers believed that low-income people were disposable and had no claims to the city, nor did all residents embrace the individualism of capitalist markets and the racism of supervisory policing. As this Part illuminates, hip-hop culture presented a countercultural view of urban law and public policy. Such insights can be found in the lyrics of *The Message*, a classic hip-hop song by one of the earliest hip-hop musical groups, Grandmaster Flash & The Furious Five. These young Black men not only provided marginalized youths with soulful music that flooded their despair with joy, but they also pioneered an artistic public platform to convey the beauty and tragedy of their upbringing. In this way, hip-hop culture emerged as part of the long history of Black radicalism in the United States.

Grandmaster Flash & The Furious Five’s *The Message* unveils three subtextual critiques about life in the Black urban ghettos of America. These critiques not only reveal the intersectionality of racial injustice and economic

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497 (2020) (defining “exclusionary displacement” as that which occurs “where lower-income groups are unable to access property in those neighbouring areas falling under the shadow of gentrification”).

137. For example, the 1830 Indian Removal Act legitimated the expulsion of thousands of indigenous populations from their ancestral homelands. See Ch. 148, 4 Stat. 411 (1830).

138. Efforts like urban renewal fueled by the 1949 Housing Act were dubbed by some as “negro removal.” See *Perspectives: Negro and the American Promise: A Conversation with James Baldwin* 16:58–17:03 (WGBH television broadcast June 24, 1963), <https://americanarchive.org/catalog/cpb-aacip-15-9m03xx2p> [<https://perma.cc/EP3L-7YJH>]; see also Scott L. Cummings, *Between Markets and Politics: A Response to Porter’s Competitive Advantage Thesis*, 82 OR. L. REV. 901, 912 (2003) (“Urban Renewal became associated with clearing away ‘slums’ adjacent to downtown business areas, resulting in massive displacement and resegregation in other urban neighborhoods.”). Further, efforts like the construction of 42,500 miles of national highways fueled by the 1956 Interstate and Defense Highways Act ripped through Black homes, playgrounds, and churches. See Deborah N. Archer, “*White Men’s Roads Through Black Men’s Homes*”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1260 (2020).

inequality in poor urban neighborhoods, but they also open spaces of remembrance and imagination “to challenge the hegemonic structures of understanding and meaning propagated by the dominant culture of [W]hite supremacy.”<sup>139</sup>

### A. *A Tale of Two Cities*

#### 1. *The City on Fire*

While Joseph Saddler (the DJ known as “Grandmaster Flash,” who convened several MCs to form Grandmaster Flash & The Furious Five) was attempting to introduce the music industry to “the worst ghetto in the world” through *The Message*,<sup>140</sup> the South Bronx had already been described as “burning” by the news media.<sup>141</sup> During the 1977 World Series baseball game between the New York Yankees and Los Angeles Dodgers, news anchor Howard Cosell noted in passing the glaring silhouette of burning buildings in the distance, a metaphor for the decay that was ravaging predominantly Black and Hispanic/Latinx neighborhoods across the South Bronx.<sup>142</sup> This was not an isolated incident. One week prior, President Jimmy Carter had made a publicized visit to the Bronx to capitalize on the symbolism of its blight as inspiration for his administration’s national urban policy.<sup>143</sup> And, a few months prior to Carter’s visit, the Bronx had been bombarded by arson and looting during the July 1977 New York City blackout,<sup>144</sup> which amplified the alarm that had been raised about the Bronx by Bill Moyers in March of that year with the CBS television documentary, *The Fire Next Door*.<sup>145</sup> As social worker, Carolyn McLaughlin describes the crisis:

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139. PERRY, *supra* note 11, at 45.

140. Betti-Sue Hertz, *Artistic Interventions in the Bronx*, in URBAN MYTHOLOGIES: THE BRONX REPRESENTED SINCE THE 1960S, *supra* note 24, at 18 (quoting Stefan Eins); *see also* Lee Lescaze, *Mott Haven: Special Place in Sad History of Public Housing*, WASH. POST (Mar. 14, 1980), <https://www.washingtonpost.com/archive/politics/1980/03/14/mott-haven-special-place-in-sad-history-of-public-housing/3dd97803-08dc-4513-bb18-578b9c7eb4b4/> [<https://perma.cc/8NL7-94ZT>] (describing the South Bronx as a “disaster” that merits “a special place in the long, sad history of public housing failure”).

141. James P. Brown, *South Bronx Is Burning*, N.Y. TIMES, Dec. 24, 1974, at 19, <https://www.nytimes.com/1974/12/24/archives/south-bronx-is-burning.html> [<https://perma.cc/F3N8-WN7Q>] (describing the frequency of fires in vacant lots, abandoned tenements, and dilapidated dwellings that had the look of a city under siege rooted in social and economic trouble).

142. *Id.*; *see infra* note 187 and accompanying text.

143. *See* Lee Dembart, *Carter Takes ‘Sobering’ Trip to South Bronx*, N.Y. TIMES, Oct. 6, 1977, at A1, <https://www.nytimes.com/1977/10/06/archives/carter-takes-sobering-trip-to-south-bronx-carter-finds-hope-amid.html> [<https://perma.cc/5VD4-S7RD>].

144. *In the Bronx, Fires and Tempers Raged on Blackout Night*, N.Y. AMSTERDAM NEWS, July 23, 1977.

145. *See* R1 SmokeEater, *The Fire Next Door – The Bronx, Part-1 of 2*, YOUTUBE (Oct. 22, 2011), [www.youtube.com/watch?v=3zDvsS8JsnY](http://www.youtube.com/watch?v=3zDvsS8JsnY) [<https://perma.cc/CRP3-ZYDQ>] (CBS news broadcast on Mar. 22, 1977).

Sometimes the abandoned buildings were left standing, the glass in the windows broken, the front doors open, garbage abounding. Other times, especially if there had been a fire, the structure was knocked down, leaving a useless rubble-filled lot, which was not good for playing ball or making a community garden, just a home for rats as the garbage increased with time.<sup>146</sup>

It was in this “jungle” where Joseph Saddler found himself trapped. As Melle Mel raps in Verse 1 of *The Message*, “I can’t take the smell, can’t take the noise / Got no money to move out, I guess I got no choice.”<sup>147</sup> Saddler, born in Bridgetown, Barbados, and raised in the Bronx, developed an early fascination with records and electronics. Through this passion, he discovered one of the oldest tools for freedom struggle among Black folks: the oral storytelling tradition.<sup>148</sup> By studying the techniques of DJs like Pete Jones, Kool Herc,<sup>149</sup> and Grandmaster Flowers—cutting, scratching, and mixing records on a turntable to produce new rhythms and sounds—Saddler emerged as Grandmaster Flash. As a DJ, Saddler helped to pioneer a new musical genre and youth culture that fostered a platform for prophetic witness among the urban poor.<sup>150</sup> From his early start playing music “in abandoned buildings and in school yards . . . [connecting] turntables to power from streetlights or utility poles,” Saddler eventually transitioned to music clubs in the Bronx and Manhattan before joining Bobby Robinson’s record label in 1979.<sup>151</sup> *The Message*, released in 1982, became one of the first hip-hop songs to unveil the tragedies of Black urban ghettos in the United States.

But the Bronx did not become a “city on fire” overnight. The seeds of the jungle were planted in the 1950s, after World War II, when the demographics of the South Bronx shifted due to the “[W]hite flight” of several immigrant populations—including Irish Americans, Italian Americans, and Jewish Americans—who embraced White racial identification and leveraged the GI Bill to move into segregated and opportunity-rich suburbs.<sup>152</sup> Left behind was a

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146. CAROLYN MCLAUGHLIN, *SOUTH BRONX BATTLES: STORIES OF RESISTANCE, RESILIENCE, AND RENEWAL* 25 (2019).

147. *The Message*, *supra* note 1, at 01:07.

148. See PERRY, *supra* note 11, at 15 (“During the black power movement the original rappers of the 1970s were adolescents. As teenagers, these rappers had been exposed to revolutionary poetry and the spoken word of the traditional African-American secular and sacred music.” (quoting Jon Yasin)).

149. MCLAUGHLIN, *supra* note 146, at 114 (noting that “1520 Sedgwick Avenue where DJ Kool Herc threw the first hip-hop party in 1973 has been co-named Hip Hop Boulevard and is considered hip hop’s place of origin”).

150. *Id.* at 115 (“Hip-hop culture provided an alternative to street life and drugs for many teenagers by allowing them to express the reality of their lives as well as dreams for material wealth.”).

151. *Id.* at 114.

152. See *id.* at 33, 42; LEAH PLATT BOUSTAN, *COMPETITION IN THE PROMISED LAND: BLACK MIGRANTS IN NORTHERN CITIES AND LABOR MARKETS* 93, 122–53 (2017) (discussing the rapid suburbanization of U.S. metropolitan areas, Boustan notes a growing concern during this era that Black families would move into predominantly White neighborhoods).



growing population of working-class Black Americans and Hispanic/Latinx immigrants. The former had fled racial terrorism in the South during the Great Migration and the latter had immigrated primarily from Puerto Rico, both believing the Bronx to be an affordable launching pad toward achieving the American Dream.<sup>153</sup> Robert Moses, the “master builder” of New York City who served in various public leadership roles from 1924 to 1968 across five mayoral administrations, set the stage for a massive reshaping of the Bronx’s built environment during this residential transformation.<sup>154</sup>

Guided by Moses’s preference for highways over public transportation, the Bronx saw the construction of four major expressways and three massive bridges during this era, which dismantled existing neighborhoods and displaced families, many of them Black and Hispanic/Latinx.<sup>155</sup> The development of clustered high-rise public housing projects in redlined sections of the Bronx further contributed to a steady decline in public health from vehicle air pollution.<sup>156</sup> Grandmaster Flash & The Furious Five were intimately familiar with this urban landscape. In *The Message*, Melle Mel describes himself: “Standing on the front stoop, hanging out the window / Watching all the cars go by, roaring as the breezes blow.”<sup>157</sup> However, such serenity is misleading. Bronx residents of this era struggled to find stable work and frequently turned to welfare for support as thousands of factory jobs were moved to southern states where a paucity of unions permitted lower wages.<sup>158</sup> During the 1960s and 1970s, rent control policies and decreasing property values in New York City, combined with rising building operation costs, led many landlords to abandon their apartment

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153. MCLAUGHLIN, *supra* note 146, at 30–31, 35–37, 186–88 (“While the New York City Housing Authority (NYCHA) built public housing throughout the city from the 1930s to the ‘60s, the South Bronx received a disproportionate share.”).

154. Oliver Burkeman, *The Power Broker: Robert Moses and the Fall of New York* by Robert Caro Review—A Landmark Study, *GUARDIAN* (Oct. 23, 2015), <https://www.theguardian.com/books/2015/oct/23/the-power-broker-robert-moses-and-the-fall-of-new-york-robert-caro-review> [<https://perma.cc/UVU2-Y8QY>]; Paul Goldberger, *ROBERT MOSES, MASTER BUILDER, IS DEAD AT 92*, *N.Y. TIMES*, July 30, 1981, at A1, <https://www.nytimes.com/1981/07/30/obituaries/robert-moses-master-builder-is-dead-at-92.html> [<https://perma.cc/8ZGB-XQDF>].

155. See MCLAUGHLIN, *supra* note 146, at 33 (highlighting these bridges and highways including the Triborough Bridge in 1936 (renamed Robert F. Kennedy in 2008), the Bronx-Whitestone Bridge in 1939, the Major Deegan Expressway in 1956, the Throgs Neck Bridge in 1961, the Sheridan Highway in 1963, the Cross Bronx Expressway in 1963, and the Bruckner Expressway in 1973).

156. See *id.* at 30–31, 33, 66 (“In the ‘50s, five large projects consisting of ninety-six tall buildings were constructed with a total of 12,486 apartments, much of it under the direction of Robert Moses.”).

157. *The Message*, *supra* note 1, at 01:35.

158. See MCLAUGHLIN, *supra* note 146, at 42, 44 (explaining that “one-quarter of the residents were on welfare” in the South Bronx in the late 1960s, and “it was close to 40 percent” ten years later); Nicholas Freudenberg, Sandro Galea & Marianne Fahs, *The Impact of New York City’s 1975 Fiscal Crisis on the Tuberculosis, HIV, and Homicide Syndemic*, 96 *AM. J. PUB. HEALTH* 424, 426 (2006) (“Between 1970 and 1976, New York City lost 468,000 manufacturing jobs; in the public sector, by 1980, EFCB-mandated [Emergency Financial Control Board] layoffs and attrition had eliminated 1 in 5 city jobs, severely constricting 2 paths out of poverty.”).

buildings altogether, often burning their buildings for the insurance money.<sup>159</sup> Many would conclude that these various socioeconomic hardships were symptomatic of the so-called toxic culture of the Bronx's inhabitants. However, others would grab hold of hip-hop culture's alternative view. What inspired the rebellious spirit of early hip-hop musical artists to protest the substandard conditions of their community and point the finger back at their government? More than frustration with raging fires, these young men (and in some cases, women<sup>160</sup>) were old enough to remember the fires that raged during their youth.

On April 4, 1968, the day Martin Luther King Jr. was assassinated, massive uprisings swept the nation in more than one hundred cities across the United States, from Washington, D.C. to Detroit, Michigan. The next day, as Black neighborhoods in the nation's capital were still smoldering from fires, Stokely Carmichael (Kwame Ture), then a young leader of the growing Black Power Movement, warned media reporters that widespread violence would soon erupt. But it would be a mistake to situate the origins of Black radicalism that inspired hip-hop culture at the closing years of the Civil Rights Movement. Such conventional civil rights narratives perpetuate the misconception that the radical political and economic vision of the Black Power Movement was a corrupting force that undermined King's struggle for racial justice and weakened the potential for continued civil rights activism. Historians of the Black Power movement point toward the Cold War years of the 1950s and early 1960s—the era between the 1954 *Brown v. Board of Education* decision and the 1965 Voting Rights Act—as the period when both Black militants in the North and civil rights protesters in the South began growing a parallel movement challenging postwar racial liberalism and calling for fundamental social, political, and economic transformation in the United States.<sup>161</sup>

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159. As Valerie Ricciulli explains, “In the 1970s, fires ravaged much of the Bronx: seven census tracts lost 97 percent of their buildings and 44 tracts lost more than 50 percent.” See Valerie Ricciulli, *In the 1970s, the Bronx Was Burning, but Some Residents Were Rebuilding*, CURBED N.Y. (May 3, 2019), <https://ny.curbed.com/2019/5/3/18525908/south-bronx-fires-decade-of-fire-vivian-vazquez-documentary> [<https://perma.cc/2EJA-7L8L>]; see also Choon-Geol Moon & Janet G. Stotsky, *The Effect of Rent Control on Housing Quality Change: A Longitudinal Analysis*, 101 J. POL. ECON. 1114 (1993) (examining the effect of rent control on the quality of rental housing in New York City and drawing a causal connection between rent control policy and declining quality of housing); MCLAUGHLIN, *supra* note 146, at 62 (“The City required buildings to use low-sulfur fuel, which was more expensive, in order to cut down on air pollution. The City also required that heat be provided all night, increasing fuel costs . . . . Oil shortages caused fuel costs to skyrocket, with a 700 percent increase in the cost of oil from 1967 to 1981.”).

160. Although beyond the scope of this Article, hip-hop culture was heavily influenced by the male-dominated culture of the United States. As a result, few women were embraced as MCs when hip-hop music emerged. But there are some notable exceptions. See, e.g., ROXANNE ROXANNE (Netflix 2017) (documenting the story of Roxanne Shanté, who at the age of 14 became one of the most popular battle emcees in 1980s New York City).

161. See Peniel E. Joseph, *The Black Power Movement: A State of the Field*, J. AM. HIST. 751, 753, 759 (2009) [hereinafter Joseph, *The Black Power Movement*].

Early Black radical thinkers such as Paul Robeson, Claudia Jones, Alphaeus Hutton, and W.E.B. Du Bois drew inspiration from anti-colonial uprisings in Ghana, Cuba, and the African Congo.<sup>162</sup> In 1951, Paul Robeson and William L. Patterson presented a report to the United Nations (UN) in Paris, France on behalf of the Civil Rights Congress, accusing the United States of committing genocide against Black Americans. Entitled *We Charge Genocide: The Crime of Government Against the Negro People*, the report not only built upon the UN Convention on the Prevention and Punishment of Genocide, which defined genocide as any action with “intent to destroy” a group, “in whole or in part,” but also referenced the National Association for the Advancement of Colored People’s reporting of police killings and lynching by mobs of at least 152 Black people between 1945 and 1951.<sup>163</sup> Even more, the report paid special attention to the crippling impact of “inhuman Black ghettos” characterized by crumbling infrastructure, inadequate education, and a lack of healthcare and jobs.<sup>164</sup> Both Richard Wright and Robert F. Williams would amplify the international and Pan-African dimensions of Black radicalism and its focus on class struggle and radical humanism through their respective writings.<sup>165</sup>

By 1961, Black radical artists Maya Angelou, LeRoi Jones (Amiri Baraka), and Mae Mallory were taking the floor of the United Nations in New York to protest the assassination of the Democratic Republic of Congo’s first prime minister, Patrice Lumumba.<sup>166</sup> The next year, in 1962, Black students in Ohio established the Revolutionary Action Movement (RAM) to advocate for socialism and armed self-defense in response to rampant poverty and racial terrorism in Black neighborhoods.<sup>167</sup> Malcolm X, a national spokesman and

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162. See Peniel E. Joseph, *Black Liberation Without Apology: Reconceptualizing the Black Power Movement*, 31 *BLACK SCHOLAR* 2, 3 (2001).

163. WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE 1 (William L. Patterson ed., 2d ed. 1951), <https://depts.washington.edu/moves/images/cp/1.%20We%20Charge%20Genocide%201-28.pdf> [<https://perma.cc/V8HP-QQ4C>].

164. *Id.* at xi.

165. See RICHARD WRIGHT, *BLACK POWER: A RECORD OF REACTIONS IN A LAND OF PATHOS* (1954) (discussing political developments in the quest for independence in Ghana); RICHARD WRIGHT, *THE COLOR CURTAIN: A REPORT ON THE BANDUNG CONFERENCE* (1956) (discussing Western imperialism through the lens of the 1955 Bandung Conference in Indonesia); RICHARD WRIGHT, *WHITE MAN, LISTEN!* (Anchor Books 1964) (analyzing the implications of White supremacist ideology for Black communities); ROBERT F. WILLIAMS, *NEGROES WITH GUNS* (Melba Joyce Boyd & Ronald Brown eds., 1962) (documenting efforts to counter anti-Black terrorism in North Carolina); see also Joseph, *supra* note 162, at 4 (citing *Negros with Guns* along with other works as key examples of Black Power internationalism).

166. See Joseph, *The Black Power Movement*, *supra* note 161, at 753.

167. See *id.* at 753, 761. For further discussion of advocacy for Black neighborhoods, see, for example, ROBIN D.G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* 72–93 (2002); MATTHEW J. COUNTRYMAN, *UP SOUTH: CIVIL RIGHTS AND BLACK POWER IN PHILADELPHIA* 139–40, 234–36 (2006); MUHAMMAD AHMAD, *WE WILL RETURN IN THE WHIRLWIND: BLACK RADICAL ORGANIZATIONS 1960-1975* (2d ed. 2008); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 315–23 (2008).

Muslim minister of the Nation of Islam until his departure in 1964, would also become a vocal advocate of Black empowerment, Black racial solidarity, Black cultural pride, and Black political self-determination. His autobiography, published in 1965 during the same year of the Watts riots in Los Angeles, California, would inspire many Black American communities to rally behind calls for systemic political and economic transformation.

This flurry of political activism converged upon the phrase “Black Power,” popularized by Stokely Carmichael (Kwame Ture) when he published with political scientist Charles Hamilton in 1967, *Black Power: The Politics of Liberation in America*. In their manifesto, Carmichael and Hamilton provided a militant political and economic framework for Black political empowerment grounded in social solidarity, local political engagement, and community organizing.<sup>168</sup> Carmichael had already been deeply engaged in grassroots organizing as the chairman of the Student Nonviolent Coordinating Committee, which had evolved to embrace the notion of Black power by the mid-1960s. Others would embrace the call for Black racial solidarity. For example, after a devastating race riot in Newark, New Jersey in 1967, poet Amiri Baraka stepped up as a local political leader. Baraka’s mobilization of Black political engagement and community advocacy eventually culminated in Newark’s election of the nation’s first Black mayor in the northeast region in 1970.<sup>169</sup> Further down south, in Greensboro, North Carolina, Black power militants began mobilizing students at North Carolina Agricultural and Technical State University, alongside other community members, to pursue political power while advocating for systemic reform on issues of housing and labor.<sup>170</sup>

The most visible and widely discussed organization of the Black Power Movement during the 1960s was the Black Panther Party (BPP). Born in response to poverty and racial discrimination in Oakland, California, and building upon the political self-determination of Black sharecroppers in Lowndes County, Alabama, the Black Panther Party for Self Defense (as it was originally called) was founded in 1966 as a militant and radical political organization dedicated to a democratic cultural vision of Black liberation. Due to the organization’s early practice of open carry armed citizens’ patrols to combat racialized police brutality in Black neighborhoods, the BPP and its call for Black Power under leaders Bobby Seale and Huey P. Newton was vilified by the media as a racist organization committed to violence.<sup>171</sup> In 1966, the *New*

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168. See STOKELY CARMICHAEL & CHARLES HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* (1967).

169. See Joseph, *The Black Power Movement*, *supra* note 161, at 760; Daniel Matlin, “Lift Up Yr Self!” *Reinterpreting Amiri Baraka (LeRoi Jones), Black Power, and the Uplift Tradition*, 93 J. AM. HIST. 91, 105 (2006).

170. See WILLIAM H. CHAFE, *CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM* 173, 175 (1980).

171. JANE RHODES, *FRAMING THE BLACK PANTHERS: THE SPECTACULAR RISE OF A BLACK POWER ICON* 8, 74, 91–115 (2007).

*York Times* declared “Black power [i]s Black death.”<sup>172</sup> In 1967, then California governor Ronald Reagan signed into law the Mulford Act to ban the open public carrying of firearms.<sup>173</sup> By 1969, FBI director J. Edgar Hoover would describe the BPP as “the greatest threat to the internal security of the country,”<sup>174</sup> before spearheading the development of COINTELPRO, an extensive FBI counterintelligence surveillance and disruption program designed to dismantle the BPP and “prevent the rise of a ‘Messiah’” in the Black community.<sup>175</sup>

However, while the BPP called for a radical Marxist-inspired revolution to address the economic injustices that overwhelmed Black communities, it was also staunchly committed to pragmatic community-based liberal programs to address poverty amidst governmental neglect. Further, it advocated for Black political engagement, including an attempt to elect leader Bobby Seale as the mayor of Oakland. Contrary to claims that the Black Panther Party was a violent organization, BPP chapters around the country were fundamentally neighborhood-based community service organizations that “served free breakfasts, staffed medical clinics, drove ambulances, sold newspapers, advised striking tenants, counseled prison inmates, and attended and taught political education classes in hopes of shaping a new world.”<sup>176</sup> As historian Peniel Joseph reveals in *Waiting ‘Til the Midnight Hour*, the Black militant movement for community control transcended a fear of police brutality and sought to address inadequate public schools, insufficient welfare rights, and underfunded antipoverty services.<sup>177</sup> Thus, rather than a threat to American democracy, the BPP represented a countercultural vision of democratic life in marginalized communities where racial terrorism was rampant and police brutality was normalized.

In May of 1968, a month after the assassination of Martin Luther King, Jr.—who by that time had also begun to embrace Black radicalism and advocate

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172. *Black Power Is Black Death*, N.Y. TIMES, July 7, 1966, at 36, <https://www.nytimes.com/1966/07/07/archives/black-power-is-black-death.html> [<https://perma.cc/K3NP-BRM7>]; see PENIEL E. JOSEPH, *WAITING ‘TIL THE MIDNIGHT HOUR: A NARRATIVE HISTORY OF BLACK POWER IN AMERICA* 146, 151–54 (2006) [hereinafter JOSEPH, *WAITING ‘TIL THE MIDNIGHT HOUR*].

173. See Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [<https://perma.cc/7YYX-39H9>].

174. *Hoover Calls Panthers Top Threat to Security*, WASH. POST, July 16, 1969, at A3, <https://www.proquest.com/docview/147638465?parentSessionId=rBsrkTMSZQ43CH0mBxuzPvi7A0ZVXwizYHW5uhDWzVs%3D> [<https://perma.cc/3EST-7FG4>].

175. J. Edgar Hoover, *The FBI Sets Goals for COINTELPRO*, SOC. HIST. FOR EVERY CLASSROOM, <https://shc.ashp.cuny.edu/items/show/814> [<https://perma.cc/K5R6-JTQ3>]; Rob Warden, *Hoover Rated Carmichael as ‘Black Messiah,’* CHI. DAILY NEWS, Feb. 10, 1976, at A25, <http://jfk.hood.edu/Collection/Weisberg%20Subject%20Index%20Files/F%20Disk/FBI/FBI%20Hampton%20Case%20Neil%20William%20Jr/Item%2005.pdf> [<https://perma.cc/RHE2-5QPP>] (last visited Dec. 14, 2022).

176. Joseph, *The Black Power Movement*, *supra* note 161, at 764.

177. See JOSEPH, *WAITING ‘TIL THE MIDNIGHT HOUR*, *supra* note 172, at 132–204.

for a multicultural Poor People's Campaign—spoken word artists Felipe Luciano, Gylan Kain, and David Nelson formed the *Original Last Poets* at Mount Morris Park in East Harlem, New York. Other poets would begin performing publicly and set the stage for rap music, inspired by the revolutionary vision of the Black Power Movement. Gil Scott-Heron released the jazz poetry album *Small Talk at 125th and Lenox* in 1970 that would introduce the world to the famous poem, *The Revolution Will Not Be Televised*.<sup>178</sup> Even as such artists found themselves targeted by the FBI's COINTELPRO assault—the FBI kept a file on poet Scott-Heron—the Black vision of democratic culture continued to influence the evolving Black arts movement. Thus, the 1970s would witness a shift from Detroit's Motown sound to a “post-soul aesthetic” that reflected the gritty and rebellious energy of the urban ghettos.<sup>179</sup>

By the late 1970s, as hip-hop emerged onto the scene through pioneers like Joseph Saddler, the South Bronx faced a stagnant economy, a high unemployment rate, high rates of crime, and a growing heroin, marijuana, and looming crack cocaine epidemic buoyed by an illegal drug market and gang activity.<sup>180</sup> While the struggling economy was largely due to the fiscal crisis of the mid-1970s under Mayor Abraham Beame,<sup>181</sup> as well as President Richard Nixon's budget cuts to “War on Poverty” programs,<sup>182</sup> blame was placed on absentee slumlords who exploited Section 8 housing funds to concentrate the city's poor in dilapidated buildings.<sup>183</sup> As the city cut municipal services, laid off firefighters, and reduced healthcare services for the poor to avoid bankruptcy,<sup>184</sup> abandoned buildings spread along with garbage, fires, crime, and drug usage.<sup>185</sup>

To be sure, there were some governmental efforts to support collective action to counteract poverty, such as the construction of Co-op City in the Bronx,

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178. SCOTT-HERON, *supra* note 14.

179. NEAL, *supra* note 12, at 2.

180. See MCLAUGHLIN, *supra* note 146, at 48; Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City*, 90 AM. ECON. REV. 584, 588–90 (2000).

181. See MCLAUGHLIN, *supra* note 146, at 44 (“Half of the Hispanic, a third of the African American, and 22 percent of the [W]hite City workers lost their jobs.”).

182. See KIM PHILLIPS-FEIN, *FEAR CITY: NEW YORK'S FISCAL CRISIS AND THE RISE OF AUSTERITY POLITICS* 22 (2017).

183. See Yonah Freemark, *Myth #5: Public Housing Ended in Failure During the 1970s*, in *PUBLIC HOUSING MYTHS: PERCEPTION, REALITY, AND SOCIAL POLICY* 121, 121–38 (Nicholas Dagen Bloom, Fritz Umbach & Lawrence J. Vale eds., 2015) (examining public housing before, during, and after President Nixon's administration instituted a moratorium on most subsidized housing assistance, curtailing funding for public housing construction).

184. See MCLAUGHLIN, *supra* note 146, at 52–53, 88–89.

185. See Corman & Mocan, *supra* note 180, at 601 (finding “an increase in the growth rate of poverty, proxied by the number of AFDC [Aid to Families with Dependent Children] cases, generates an increase in the growth rate of murders and assaults”); MCLAUGHLIN, *supra* note 146, at 58–61; see generally Bench Ansfield, *Born in Flames: Arson, Racial Capitalism, and the Reinsuring of the Bronx* (forthcoming) (Ph.D. dissertation, Yale University) (on file with author) (describing the high rates of abandoned buildings and fires during this era).

America's largest cooperative housing complex.<sup>186</sup> But new housing only made matters worse when some tenants concluded that burning down their Section 8 housing was necessary to qualify for the coveted new units. According to the *New York Post*, between 1970 and 1980, significant portions of the South Bronx were burned or abandoned (e.g., forty-four census tracts out of 289 lost more than 50 percent of their buildings), giving many neighborhoods the appearance of a warzone.<sup>187</sup> During the New York City blackout of 1977, the anxiety and despair of impoverished Bronx residents led to more than a thousand fires being set by arsonists and more than 1,600 stores being ransacked by looters, coupled with other criminal activity.<sup>188</sup> When Ronald Reagan visited the South Bronx in 1980 while campaigning for president and stood in the same place where President Carter has stood in 1977, he declared that he had not “seen anything that looked like [it] since London after the Blitz.”<sup>189</sup>

The 1980s would eventually bring urban renewal to the South Bronx, kickstarting redevelopment and new construction over the ensuing years.<sup>190</sup> But the government's approach toward mitigating poverty and crime—tearing down crumbling neighborhoods and criminalizing acts of desperation—would only further racial stereotypes and stigmas about Black culture, eventually coalescing around what many had already perceived to be the Bronx's culture of poverty. Hip-hop, however, offered a different cultural view of the drivers of poverty and crime.

## 2. *The Prison for Poverty*

From *The Message*, we learn that the residents of Black urban ghettos are not in fact apathetic or driven by wayward values definitive of a subaltern culture of poverty. Rather, they emerge in the lyrics of Melle Mel as prisoners of poverty, overwhelmed by rodent-infested apartments and equipped with limited

186. See MCLAUGHLIN, *supra* note 146, at 34 (“[C]onstruced in the North Bronx in the late 1960s and early 1970s . . . boasting over fifteen thousand brand-new apartments at a reasonable monthly fee with utilities included, finalized the exodus of thousands of middle-class families from the South and West Bronx.”).

187. See Joe Flood, Opinion, *Why the Bronx Burned*, N.Y. POST (May 16, 2010), <https://nypost.com/2010/05/16/why-the-bronx-burned/> [https://perma.cc/N696-NUT8].

188. See Jennifer Latson, *Why the 1977 Blackout Was One of New York's Darkest Hours*, TIME (July 13, 2015), <https://time.com/3949986/1977-blackout-new-york-history/> [https://perma.cc/9XQ9-8X6G]; MCLAUGHLIN, *supra* note 146, at 68–75.

189. Matthew Purdy, *Left to Die, the South Bronx Rises from Decades of Decay*, N.Y. TIMES, Nov. 13, 1994, at 47, <https://www.nytimes.com/1994/11/13/nyregion/left-to-die-the-south-bronx-rises-from-decades-of-decay.html> [https://perma.cc/73CL-TD82]. *But see* MCLAUGHLIN, *supra* note 146, at 133 (“Reagan criticized Carter for not rebuilding the area, but when he became president, he cut funds in half for public housing and for federal housing subsidy programs such as Section 8.”).

190. See Harold Meyerson, *How the Bronx Came back (but Didn't Bring Everyone Along)*, AM. PROSPECT (Oct. 12, 2015), <https://prospect.org/economy/bronx-came-back-but-bring-everyone-along/> [https://perma.cc/HJ3B-YSFN] (discussing how revitalization efforts in the South Bronx made rent unaffordable for residents).

economic resources to mitigate their substandard conditions.<sup>191</sup> As Melle Mel raps in verse 1 of *The Message*,

Rats in the front room, roaches in the back  
 Junkies in the alley with a baseball bat  
 I tried to get away, but I couldn't get far  
 'Cause a man with a tow truck repossessed my car<sup>192</sup>

Even the so-called “junkies” of this world cower in alleys with bats, overtaken by a paralyzing fear of their unstable and dangerous world. The 1980s witnessed a surge of crack cocaine and heroin use in low-income communities across the country.<sup>193</sup> The crack cocaine epidemic hit Black urban ghettos in New York City particularly hard because the drug was cheap and easily accessible.<sup>194</sup> Drugs not only provided a means for the poor to mentally escape the hardships of low-opportunity neighborhoods, but they also offered a pathway to earn enough money to physically escape, or at least make ghetto life better. Drug addiction and selling became a national problem in low-income neighborhoods, sensationalized by the Reagan administration with news stories about “crack whores,” “crack dealers,” and “crack babies.”<sup>195</sup> The emergence of the AIDS epidemic in the mid-1980s—a disease primarily associated at the time with drug users, sex workers, and gay men—only heightened the public health crisis.<sup>196</sup> To be sure, residents of Black urban ghettos demanded government services to resolve these challenges. For example, in the Bronx, a Puerto Rican gang called the Young Lords (with loose ties to the Black Panther Party) occupied the

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191. The South Bronx was described by a journalist in the 1970s in a similar manner. See Martin Tolchin, *South Bronx: A Jungle Stalked by Fear, Seized by Rage*, N.Y. TIMES, Jan. 15, 1973, at A1, <https://www.nytimes.com/1973/01/15/archives/south-bronx-a-jungle-stalked-by-fear-seized-by-rage-the-south-bronx.html> [<https://perma.cc/KC2G-WM58>] (“Packs of wild dogs pick through the rubble and roam the streets, sometimes attacking residents . . . . A drug pusher is murdered by a youth gang acting on a \$30 contract from a rival pusher. A youngster is nearly stomped to death outside a school in an argument over a soda bottle. Merchants close their stores at sunset even though many are armed and some conduct business inside their stores behind bullet proof glass.”).

192. *The Message*, *supra* note 1, at 01:11.

193. See Michael Massing, *Crack's Destructive Sprint Across America*, N.Y. TIMES, Oct. 1, 1989, at 38, <https://www.nytimes.com/1989/10/01/magazine/crack-s-destructive-sprint-across-america.html> [<https://perma.cc/ML2T-9HR7>]; Albert Samaha, *Cheaper, More Addictive, and Highly Profitable: How Crack Took over NYC in the '80s*, VILLAGE VOICE (Aug. 12, 2014), <https://www.villagevoice.com/2014/08/12/cheaper-more-addictive-and-highly-profitable-how-crack-took-over-nyc-in-the-80s/> [<https://perma.cc/XFK3-XDFA>].

194. See MCLAUGHLIN, *supra* note 146, at 49.

195. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 5 (2010).

196. See MCLAUGHLIN, *supra* note 146, at 50; *HIV and AIDS—United States, 1981–2000*, 50 MORBIDITY & MORTALITY WKLY. REP. 430 (June 1, 2001), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5021a2.htm> [<https://perma.cc/4WT6-5X99>].



administrative offices of Lincoln Hospital in 1970 and demanded a drug treatment program to address surging drug addiction.<sup>197</sup>

However, such pleas often went unheard. The emergence of crack cocaine and heroin addiction was viewed not as a public health crisis, but instead as yet another sign of the destructive culture of poverty, justifying a “tough on crime” policing strategy to enforce the Rockefeller Drug Laws.<sup>198</sup> Building upon a legal regime referred to by the New York Civil Liberties Union as “New York’s Jim Crow Laws,”<sup>199</sup> on November 18, 1988, President Ronald Reagan signed the bipartisan Anti-Drug Abuse Act to “get tough and go on the offensive” against drug addiction by prescribing a minimum five-year sentence for dealers or users caught with as little as five grams of *crack*, the version of cocaine primarily used by the poor.<sup>200</sup> Conversely, dealers and users of the more expensive *powder* cocaine—mostly White and wealthy—required five hundred grams in their possession to receive the same penalty. While drugs trapped poor people into a cycle of addiction, the introduction of the Anti-Drug Abuse Act ushered them into a cycle of mass incarceration,<sup>201</sup> even as studies confirmed that White youths are often more likely to sell drugs than Black youths.<sup>202</sup>

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197. See Organización Obrera Revolucionaria Puertorriqueña [Puerto Rican Revolutionary Workers’ Org.], *Lincoln Hosp. Must Serve the People!*, 2 PALANTE 3 (Sept. 11, 1970), [http://mc.dlib.nyu.edu/files/books/tamwag\\_palante000010/tamwag\\_palante000010\\_hi.pdf](http://mc.dlib.nyu.edu/files/books/tamwag_palante000010/tamwag_palante000010_hi.pdf) [<https://perma.cc/2DLG-L2H5>]; MCLAUGHLIN, *supra* note 146, at 84–85 (“The Young Lords, a Puerto Rican activist group loosely linked with the Black Panthers, took over the hospital by seizing the administrative office with the help of doctors and nurses on July 14, 1970 . . . . Through this action, the Young Lords won their demand for a new hospital, which was opened in 1976, six years after the seizure of the hospital.”); Noël K. Wolfe, *Grassroots Anti-Crack Activism in the Northwest Bronx*, GOTHAM CTR. BLOG (Jan. 18, 2018), <https://www.gothamcenter.org/blog/grassroots-anti-crack-activism-in-the-northwest-bronx> [<https://perma.cc/85U3-FRY3>] (“The Lincoln Hospital Detox Program, a ‘community-worker controlled program,’ paired political education with therapeutic support to assist those seeking help to overcome addiction.”).

198. See MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* 8 (2015) (quoting Jesse Jackson’s changed stance on law enforcement).

199. LOREN SIEGAL, ROBERT A. PERRY & CORINNE CAREY, N.Y. CIV. LIBERTIES UNION (NYCLU), *THE ROCKEFELLER DRUG LAWS: UNJUST, IRRATIONAL, INEFFECTIVE* 3 (2009), [https://www.nyclu.org/sites/default/files/publications/nyclu\\_pub\\_rockefeller.pdf](https://www.nyclu.org/sites/default/files/publications/nyclu_pub_rockefeller.pdf) [<https://perma.cc/V5G5-6B6K>].

200. See Gerald M. Boyd, *Reagan Signs Anti-Drug Measure; Hopes for ‘Drug-Free Generation,’* N.Y. TIMES, Oct. 28, 1986, at B19, <https://www.nytimes.com/1986/10/28/us/reagan-signs-anti-drug-measure-hopes-for-drug-free-generation.html> [<https://perma.cc/SD77-ZEUZ>]; see generally Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801–844 (1986), amended by Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (the Act was also amended to require a mandatory minimum penalty for first time offenses for possession of crack cocaine *only*).

201. See IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 435–36 (2016) (“Between 1985 and 2000, drug offenses accounted for two-thirds of the spike in the inmate population. By 2000, Blacks comprised 62.7 percent and Whites 36.7 percent of all drug offenders in state prisons.”).

202. See *id.* at 436 (“One 2012 analysis, the National Survey on Drug Use and Health, found that White youths (6.6 percent) were 32 percent more likely than Black youths (5 percent) to sell drugs.”) (emphasis omitted).

As a result, Melle Mel and others like him could not escape Black urban ghettos. With no money, no choice, and no car, their neighborhoods became a prison. From Melle Mel's words, the listener discovers that "broken windows" do not convey the apathy and languor of the underclass, but instead the callous indifference and intentional neglect of their government. Such neglect justified the rise of a neoliberal economy that would see the rich grow richer while the poor barely scraped by.<sup>203</sup> Thus, the Black urban ghetto reveals the consequences of capitalist markets that rely upon the exploitation of the poor for economic gain.<sup>204</sup>

From *The Message*, we learn that the Black urban ghetto is a kind of "social purgator[y],"<sup>205</sup> a place where Black and minoritized citizens struggle to stay afloat from day to day, teetering on the edge of sanity in an ocean of despair. The "argumentative realism" of Grandmaster Flash & The Furious Five provides a strong critique of Black life in urban spaces through its description of the contradictory choices poor residents are forced to make.<sup>206</sup> As Melle Mel warns, "Don't push me 'cause I'm close to the edge / I'm trying not to lose my head." Mel's refrain urges the listener to reflect on the absurdity of life in the "jungle" where an ongoing confrontation with systemic oppression beckons one to "wonder how [they] keep from going under."<sup>207</sup>

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203. See generally DAWN PALEY, *DRUG WAR CAPITALISM* (2014) (arguing that the war on drugs is actually a war on people whose lives stand in the way of multinational exploitation and profiteering); Mimi Abramovitz, *Economic Crises, Neoliberalism, and the US Welfare State: Trends, Outcomes and Political Struggle*, in *GLOBAL SOCIAL WORK: CROSSING BORDERS, BLURRING BOUNDARIES* 225, 229–30 (Carolyn Noble, Helle Strauss & Brian Littlechild eds., 2014) ("[I]nstitutional arrangements put into place to achieve neoliberal goals and restore the primacy of the market included: (1) cutting taxes for wealthy individuals and corporations to reduce revenues and limit the progressivity of the tax code; (2) shifting social welfare responsibility from the federal government back to the private sector (privatisation); (3) shifting social welfare responsibility from the federal government back to the states (devolution); (4) reducing federal oversight of business, banks, labor markets as well as consumer and environmental protections (deregulation); and (5) weakening the influence of social movements best positioned to resist this austerity program. At the same time, the New Right gained ground and called for (6) restoring patriarchal 'family values' and . . . a color-blind social order to undo the gains of the women's liberation and civil rights movements."); see also Tim Koechlin, *The Rich Get Richer: Neoliberalism and Soaring Inequality in the United States* 5, 13 (Pol. Econ. Rsch. Inst., Working Paper No. 302, 2012), [http://peri.umass.edu/fileadmin/pdf/working\\_papers/working\\_papers\\_301-350/WP302.pdf](http://peri.umass.edu/fileadmin/pdf/working_papers/working_papers_301-350/WP302.pdf) [<https://perma.cc/2CPP-X2FQ>] ("In 1962, the wealthiest 1 percent had 125 times the wealth of a median household . . . By 2010, this ratio had ballooned to 288 to 1.").

204. See Jodi Melamed, *Racial Capitalism*, 1 *CRITICAL ETHNIC STUD.* 76, 77 (2015) ("Capital can only be capital when it is accumulating, and it can only accumulate by producing and moving through relations of severe inequality among human groups—capitalists with the means of production/workers without the means of subsistence, creditors/debtors, conquerors of land made property/the dispossessed and removed."); MCLAUGHLIN, *supra* note 146, at 66–70.

205. Loïc Wacquant, *Territorial Stigmatization in the Age of Advanced Marginality*, 91 *THESES ELEVEN* 66, 67 (2007) (describing the ghetto as "leprous badlands at the heart of the postindustrial metropolis where only the refuse of society would accept to dwell").

206. PERRY, *supra* note 11, at 97 (noting that from argumentative realism one finds "arguments in support of movement for social justice, and, on the other hand, justifications for illegal activity based on the limited options available to residents of industry-deprived urban centers").

207. *The Message*, *supra* note 1, at 01:22.

## B. Rumble in the Bronx

### 1. Wayward Values

*The Message* was not only an exposé of the hardships of urban poverty. It also was political discourse in rivalry to the “culture of poverty” sociological theory that influenced urban development in the Bronx. In 1965, Daniel Patrick Moynihan published *The Negro Family: The Case for National Action*.<sup>208</sup> An esteemed American sociologist, Moynihan was then serving as the Assistant Secretary of Labor under President Lyndon B. Johnson and had been tasked with helping the administration make headway in its War on Poverty.<sup>209</sup> Observing that the out-of-wedlock birthrate among Black people was 25 percent higher than that of White Americans, Moynihan concluded in his report that a rise in fractured Black families led by single mothers was a leading driver of poverty in Black neighborhoods.<sup>210</sup> According to Moynihan, the destruction of the Black nuclear family had not been caused by racist market conditions, but instead was fundamentally due to a “forced . . . matriarchal structure” in Black neighborhoods, a “tangle of pathology” that had been forged by America’s legacy of racial discrimination.<sup>211</sup> Thus, to Moynihan, the expansion of welfare programs in Black neighborhoods only served to reveal and perpetuate the “steady disintegration of the Negro family structure,” a crucial frame for understanding the broader social and economic disintegration of Black urban ghettos.<sup>212</sup>

Moynihan’s ideas reflected a broader concept in social theory that claimed cultural values play a significant role in perpetuating poverty. According to social and cultural anthropologist Oscar Lewis, an autonomous “subculture” can develop in impoverished neighborhoods that infiltrates “the world view, aspirations, and character of the children who grow up in it.”<sup>213</sup> Members of the subculture thereby develop “a strong feeling of marginality, of helplessness, of dependency, of not belonging” to the broader society.<sup>214</sup> As a result, such communities come to view themselves as “a marginal people who know only

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208. MOYNIHAN, *supra* note 18.

209. See WILLIAM M. EPSTEIN, *DEMOCRACY WITHOUT DECENCY: GOOD CITIZENSHIP AND THE WAR ON POVERTY* 111–49 (2010) (discussing the broader history of the war on poverty and subsequent programs following the Economic Opportunity Act of 1964).

210. MOYNIHAN, *supra* note 18, at 14 (contending “[t]he steady expansion of this welfare program, as of public assistance programs in general, can be taken as a measure of the steady disintegration of the Negro family structure over the past generation in the United States”).

211. *Id.* at 28–29 (arguing that “the negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of the American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male, and in consequence, on a great many Negro women as well”).

212. *Id.* at 14.

213. Oscar Lewis, *The Culture of Poverty*, in *ON UNDERSTANDING POVERTY: PERSPECTIVES FROM THE SOCIAL SCIENCES* 187, 199 (Daniel P. Moynihan ed., 1969).

214. Oscar Lewis, *The Culture of Poverty*, 35 *SOC’Y*, Jan.–Feb. 1998, at 7, 7, [http://academics.nawar.us/The\\_Culture\\_of\\_Poverty.pdf](http://academics.nawar.us/The_Culture_of_Poverty.pdf) [<https://perma.cc/424D-6H3T>].

their own troubles, their own local conditions, their own neighborhood, their own way of life.”<sup>215</sup> To Lewis, people defined by their marginality are not class conscious, but instead are trapped in a cyclical “subculture.”<sup>216</sup>

To be sure, from Moynihan’s report one can infer benevolent intentions. Moynihan used insights from *The Negro Family* to advocate for greater access to jobs in Black neighborhoods that would enable Black men to embrace their role as husbands, fathers, and community leaders.<sup>217</sup> Moynihan also believed that increased access to jobs, alongside vocational training and educational programs, would mitigate the “highly unstable” family structure—high rates of divorce, out-of-wedlock births, single-mother households, low educational achievement, etc.—that trapped Black families in a cycle of poverty.<sup>218</sup> Even more, many scholars, including Black economists such as Walter E. Williams and Thomas Sowell, praised Moynihan’s report for exposing the linkages between poverty and deviant cultural behaviors prevalent in low-income communities.<sup>219</sup> Sowell praised the report for its emphasis on family structure, rather than racism, as a fundamental driver of Black poverty.<sup>220</sup>

Nevertheless, Moynihan’s ideas influenced scientific views about race in unanticipated ways. For example, biologist Edward Osborne Wilson published *Sociobiology: The New Synthesis* in 1975, which called for scholars to explore the biological basis for social behaviors among animals.<sup>221</sup> Perhaps unintentionally, Wilson’s work lent support to the longstanding contention that social and economic disparities were the byproduct of inherited inferiority and not social determinants. Although Wilson initially avoided the discussion of race, he later extended his ideas to explain human behavior and social

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215. *Id.*

216. Oscar Lewis, *The Culture of Poverty*, 215 SCI. AM., Oct. 1966, at 19, 21 (“Once the culture of poverty has come into existence it tends to perpetuate itself. By the time slum children are six or seven they have usually absorbed the basic attitudes and values of their subculture. Thereafter they are psychologically unready to take full advantage of changing conditions or improving opportunities that may develop in their lifetime.”).

217. See Henry Aaron, 82 YALE L.J. 1725, 1725–27 (1973) (reviewing DANIEL P. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN* (1973)) (analyzing Moynihan’s advocacy efforts in the administration’s Family Assistance Plan (FAP) purported to redesign the current welfare system and decrease dependency).

218. MOYNIHAN, *supra* note 18, at 5–12 (expressing deep concern over the decline of the Black family, Moynihan argued that welfare services largely failed to help the poor and promoted dependency).

219. See generally WALTER E. WILLIAMS, *THE STATE AGAINST BLACKS* (1982) (arguing that laws regulating economic activity are far greater impediments to Black progress than racial bigotry and discrimination); THOMAS SOWELL, *RACE AND ECONOMICS* (1975) (referencing and praising the Moynihan report while analyzing the relationship between race and wealth in the United States).

220. See Thomas Sowell, *Random Thoughts*, JEWISH WORLD REV. (Feb. 11, 2014), <http://jewishworldreview.com/cols/sowell021114.php3> [<https://perma.cc/AJ5F-RWCC>]; Thomas Sowell, *Race, Politics and Lies*, CREATORS SYNDICATE (May 5, 2015), <https://www.creators.com/read/thomas-sowell/05/15/race-politics-and-lies> [<https://perma.cc/VF94-NP75>] (affirming a belief that African American poverty has been greatly influenced by social behavior).

221. See EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* (1975).

organization, arguing for an evolutionary basis for characteristics like generosity, self-sacrifice, aggression, and homosexuality.<sup>222</sup> Such claims provided fuel for racist ideas that sought to explain the perceived laziness of welfare recipients, the supposed immorality of single-parent Black households, and the widely-held fear of seemingly restless and exuberant Black youths engaged in gang activity.<sup>223</sup>

Moynihan's report also faced sharp criticism from prominent civil rights leaders, activists, and scholars of its day, such as L. Alex Swan, Alan S. Berger, and William Simon.<sup>224</sup> Some accused Moynihan of grounding his assertions about Black family struggles on racist stereotypes.<sup>225</sup> By portraying unemployment, crime, poor health, and low academic achievement as a kind of pathology endemic to Black culture, Moynihan's claims "blam[ed] the victims" of structural barriers to social and economic mobility, a critique raised by psychologist William Ryan and journalist Whitney M. Young, among others.<sup>226</sup> Others, such as Hortense J. Spillers and C. Eric Lincoln, criticized Moynihan's male-centric and Euro-centric views, which equated social degeneracy with a "matriarchal" family structure and ignored the unique attributes that Black families have garnered across generations of enduring racial terrorism, such as the centrality of religious life, the role of community as an extended family, and the importance of ingenuity to overcoming structural barriers to social mobility.<sup>227</sup> For example, the account of fractured Black families as byproducts

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222. See EDWARD O. WILSON, *ON HUMAN NATURE* 143 (2d ed. 2004) (stating that homosexuality may be "a distinctive beneficent behavior that evolved as an important element of early human social organization").

223. See KENDI, *supra* note 201, at 432.

224. See L. Alex Swan, *A Methodological Critique of the Moynihan Report*, 5 *BLACK SCHOLAR* 18, 21 (1974) (arguing that Moynihan "fails to deal directly with the influence of job discrimination and racism which are major factors associated with the fact that most [B]lacks find it difficult to rise above poverty. This practice of job discrimination and racism certainly contributes significantly to the absence of some fathers."); Alan S. Berger & William Simon, *Black Families and the Moynihan Report: A Research Evaluation*, 22 *SOC. PROBS.* 145, 148 (1974) (arguing that Moynihan "cites a number of studies to indicate that masculine-especially father-roles are weaker among [B]lacks than among [W]hites, that levels of educational aspirations and performance are low, and lower among [B]lack males than females . . ."); see also Herbert J. Gans, *The Moynihan Report and Its Aftermaths: A Critical Analysis*, 8 *DU BOIS REV.* 315, 317–321 (2011) (examining the shortcomings of the Moynihan report).

225. See, e.g., DANIEL GEARY, *BEYOND CIVIL RIGHTS: THE MOYNIHAN REPORT AND ITS LEGACY* 79–109 (2015) (arguing that the Moynihan Report fostered a "new racism" that blamed the victims of institutionalized discrimination rather than the system that victimized them).

226. WILLIAM RYAN, *BLAMING THE VICTIM* 3–63 (Vintage Books rev. ed. 1976) ("Like 'cultural deprivation,' 'Negro family' has become a shorthand phrase with stereotyped connotations of matriarchy, fatherlessness, and pervasive illegitimacy."); see Whitney M. Young, Jr., *The High Cost of Discrimination*, *EBONY MAG.*, Aug. 1965, at 51 (arguing that the "[t]axpayers best able to help support essential services have abandoned our inner cities to those least able to support them—even though the [W]hite middle-class was for a time itself also 'subsidized' by the generation that came before it"); see also GEARY, *supra* note 225, at 80 (noting that Moynihan's understanding of racism stressed the "virus" of individual racial prejudice and the effects of the historical oppression on African American social structure," while largely ignoring ongoing racism embedded in American institutions).

227. Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 *DIACRITICS* 65 (1987) (critiquing Moynihan's view that "[i]n essence, the Negro community has been

of cultural inferiorities failed to reconcile the lack of adoption options for unwed Black mothers and the disincentives for marriage in low-income Black communities, including the expansion of the welfare state and the increased access to employment for Black women during the 1970s and 1980s.<sup>228</sup> Black female scholars would eventually denounce such oversimplifications of Black life.<sup>229</sup> In 1981, Angela Davis released *Women, Race & Class*, which highlighted the activism of Black women in the face of staunch sexism and racial discrimination in the workplace. That same year, bell hooks released *Ain't I a Woman: Black Women and Feminism*, inspiring new modes of scholarly discourse that integrated race and gender into studies of economic inequality.<sup>230</sup>

Still others, such as Carol B. Stack, criticized Moynihan's cultural framing of poverty by emphasizing the political nature of his theory, noting that a focus on culture legitimized low wages, inadequate social services, and other structures of inequality by shifting attention toward the lifestyles and value systems of the so-called underclass.<sup>231</sup> Indeed, in 1969, *Ebony Magazine* highlighted the way racism was impacting both the price of goods and employment opportunities in low-income Black neighborhoods, contending that "Black dollars buy less, are harder to acquire, and are eaten up faster and in larger bits by usurious and fraudulent practices than [W]hite dollars."<sup>232</sup> Some scholars even attempted to shift beyond the racialized framing of poverty altogether. In 1978, sociologist William Julius Wilson published *The Declining Significance of Race*, attempting

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forced into a matriarchal structure which, because it is so far out of line with the rest of American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well"); see C. Eric Lincoln, *A Look Beyond Patriarchy*, EBONY MAG., Aug. 1966, at 112 ("So it was that the headship of the Negro family was thrust upon the Negro mother by the viciousness of a slave system which consciously sought the psychological castration of the Negro male."); see also GEARY, *supra* note 225 (highlighting the feminist critique of Moynihan's advocacy of a male-breadwinner model for the family).

228. See William Ryan, *Savage Discovery: The Moynihan Report*, NATION, Nov. 22, 1965, at 380, <http://watts.library.lmu.build/cms/files/original/feceacfd8a3b038ceebc6a7c299603e7.pdf> [<https://perma.cc/H22U-BWED>] ("The services of adoption agencies and maternity homes are mostly for [W]hite mothers, who account for about 90 percent of agency adoptions of illegitimate children, and probably an even higher proportion of independent adoptions."); ROBERT RECTOR, HERITAGE FOUND., HOW WELFARE UNDERMINES MARRIAGE AND WHAT TO DO ABOUT IT 4 (Nov. 17, 2014), <https://www.heritage.org/welfare/report/how-welfare-undermines-marriage-and-what-do-about-it> [<https://perma.cc/DP8H-5FP4>] ("The marriage penalties from multiple programs when added together can provide substantial financial disincentives to marriage. For example, if a single mother earning \$20,000 marries a man who earns the same, the couple will lose \$12,000 a year in welfare benefits.").

229. See, e.g., ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* (Vintage Books ed. 1983).

230. BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 99 (2d ed. 2015) (noting "[r]acism has always been a divisive force separating [B]lack men and [W]hite men, and sexism has been a force that unites the two groups").

231. See, e.g., CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 28 (1975) (discussing the "extensive networks of kin and friends supporting, reinforcing each other—devising schemes for self-help, strategies for survival in a community of severe economic deprivation").

232. Alex Poinsett, *The Economics of Liberation*, EBONY MAG., Aug. 1969, at 150; see Keeanga-Yamahatta Taylor, *Back Story to the Neoliberal Moment: Race Taxes and the Political Economy of Black Urban Housing in the 1960s*, 14 SOULS 185, 185–206 (2012).

to resolve conflicting views of race by reframing urban challenges as problems of class inequity.<sup>233</sup> Unfortunately, Wilson downplayed evidence of increasing racial discrimination, even among middle-income Black Americans,<sup>234</sup> and after push back, would later admit that his book fell short on such grounds.<sup>235</sup> Still, Wilson would ultimately defend the Moynihan report as “an internal document written for the officials in the executive branch of the government, not for the public,” a point also argued by James T. Patterson.<sup>236</sup>

Notwithstanding the views of its critics, Moynihan’s report had a profound impact on the evolution of anti-poverty and crime control policies in Black urban neighborhoods. Indeed, despite the conclusion of the National Advisory Commission on Criminal Justice Standards and Goals in 1973 that the prison system was a failure, tough on crime policies not only persisted during this era, but were amplified.<sup>237</sup> Moynihan’s report was used as a foundation for the publication of Ken Auletta’s *The Underclass* in 1982,<sup>238</sup> and Bill Moyers’s documentary *The Vanishing Family: Crisis in Black America* in 1989,<sup>239</sup> which not only reinforced the notion that culture was to blame for the social and economic inequities in Black urban ghettos, but also set the stage for an era of supervisory, aggressive, and racially biased policing. These views were also widely embraced by the Reagan administration as it rolled out the “War on Drugs” and sought to “put drug abuse on the run through stronger law enforcement.”<sup>240</sup>

## 2. *Survivors of Neglect*

In verse two of *The Message*, Melle Mel responded to the discourse on Moynihan’s culture of poverty theory by casting marginalized urban residents as

233. See WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 150 (1978) (arguing “class has become more important than race in determining black life-chances in the modern industrial period”).

234. See MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 76 (1997).

235. See William Julius Wilson, *The Declining Significance of Race: Revisited & Revised*, 140 *DÆDALUS* 55, 67 (2011).

236. See William Julius Wilson, *Foreword: The Moynihan Report and Research on the Black Community*, 621 *ANNALS AM. ACAD. POL. & SOC. SCI.* 34, 34–46 (2009); JAMES T. PATTERSON, *FREEDOM IS NOT ENOUGH: THE MOYNIHAN REPORT AND AMERICA’S STRUGGLE OVER BLACK FAMILY LIFE FROM LBJ TO OBAMA* 50 (2010).

237. See NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, *TASK FORCE REPORT ON CORRECTIONS* 358 (1973), <https://www.ncjrs.gov/pdffiles1/Digitization/10865NCJRS.pdf> [<https://perma.cc/8KH7-KJ6L>].

238. See KEN AULETTA, *THE UNDERCLASS* (1983).

239. See Bill Moyers, *The Vanishing Family: Crisis in Black America*, *BILLMOYERS.COM* (July 30, 1989), <https://billmoyers.com/content/the-vanishing-family-crisis-in-black-america/> [<https://perma.cc/Y8A3-QCXY>].

240. Ronald Reagan, *Remarks on Signing Executive Order 12368, Concerning Federal Drug Abuse Policy Functions*, *RONALD REAGAN PRESIDENTIAL LIBR.* (June 24, 1982), <https://www.reaganlibrary.gov/archives/speech/remarks-signing-executive-order-12368-concerning-federal-drug-abuse-policy> [<https://perma.cc/5TTX-P54K>]; see KENDI, *supra* note 201, at 438–39.

survivors of governmental neglect in a world of limited health care and mental health services for the poor.<sup>241</sup> Mel describes for the listener a “crazy lady livin’ in a bag / Eating out of garbage pails, used to be a f[\*]g hag.”<sup>242</sup> Not only does this image convey the dearth of social services for the mentally ill and homeless in low-income urban neighborhoods during this era,<sup>243</sup> it also suggests that the disparaging views of homosexuals in the 1970s and 1980s—the so-called “f[\*]gs”<sup>244</sup>—undermined their status as survivors of neglect due to inadequate healthcare access in poor neighborhoods.<sup>245</sup>

As Melle Mel continues rapping, we learn that in Black urban ghettos, Black and minoritized women are frequent victims of poverty, compelled to use their bodies as a means of economic subsistence.<sup>246</sup> As the song tells us, Black

241. In 1975, New York City entered a fiscal crisis. City officials turned to Wall Street bankers, the state of New York, and President Gerald Ford’s administration for help, but they were turned down and accused of overspending on social services, Medicaid, and the city’s workforce. To restore stability, the state legislature created the Emergency Financial Control Board (EFCB) with a goal of balancing the city’s budget. The EFCB mandated budget cuts to various public service agencies, resulting in municipal hospitals budget cuts, the closure of all fifty community-based clinics, reductions in workforce health education, and the elimination of the Addiction Services Agency, which was responsible for drug addiction treatment and prevention throughout the boroughs. The cuts in the city’s health department and municipal hospitals significantly diminished healthcare access for New York City’s poorest communities. *See generally* Joseph Harris, *New York City and the Economic Crisis*, 4 J. SOCIO. & SOC. WELFARE 351, 351 (1997) (examining the factors that contributed to New York City’s policy of “‘malicious neglect’ toward workers, racial minorities, the poor, the elderly, the youth, women, children—toward all but the very rich and powerful”); MCLAUGHLIN, *supra* note 146, at 88–89.

242. *The Message*, *supra* note 1, at 01:40.

243. *See* Freudenberg et al., *supra* note 158, at 426 (“Between 1970 and 1980, the number of poor people in New York City increased by 20% even as the city’s population declined by 10% . . . . By 1980, a freeze on public assistance imposed by the New York State legislature in 1975 had reduced the inflation-adjusted value of the average welfare grant by 50%, affecting the nearly 1 million city residents dependent on welfare.”).

244. *See generally* Sarah Baughey-Gill, *When Gay Was Not Okay with the APA: A Historical Overview of Homosexuality and Its Status as Mental Disorder*, 1 OCCAM’S RAZOR 5, 7, 9–13 (2011) (discussing various views of homosexuality in the western world, including religious institutions rooted in Christian ideals that regarded homosexuality as a sin by choice, and medical institutions that regarded homosexuality as a mental disorder called “sociopathic personality disturbance,” curable through psychoanalysis (later reclassified as sexual deviation)). For a discussion of the phrase “f[\*]g hag,” see Dawne Moon, *Insult and Inclusion: The Term F[\*]g Hag and Gay Male “Community,”* 74 SOC. FORCES 487, 488 (1995) (“The term f[\*]g hag comes from gay male culture in the U.S.; while participants in this culture differ in opinion on to whom exactly the term applies and when, if ever, it is appropriate, it clearly denotes a woman, usually a straight woman, who associates either exclusively or mostly with gay men.”).

245. *See* Freudenberg et al., *supra* note 158, at 424–25, 427–28 (describing a syndemic of HIV infection, tuberculosis, and homicide in the late 1970s to the mid-1990s in New York City). The elimination of the Addiction Services Agency delayed the response time for early detection of HIV, prompt treatment, and broader community-based education to lower transmission rates. *Id.* at 425. Several nonprofit organizations emerged to help tackle prevention, treatment, and community education, but the need was immense. *Id.*

246. *See* LASHAWN HARRIS, *SEX WORKERS, PSYCHICS, AND NUMBER RUNNERS: BLACK WOMEN IN NEW YORK CITY’S UNDERGROUND ECONOMY* 125 (2016) (examining the nuances of New York City’s informal urban sex economy and Black women’s entrance into paid sexual labor, with driving factors ranging from community socioeconomic conditions to personal circumstances, such as



women will “dance the tango” but “skip the light fandango,”<sup>247</sup> suggesting that low-income women battling serious economic and mental health challenges do not have time for romance. Instead, the impoverished woman depicted by *The Message* becomes “a zircon princess” who has “lost her senses.”<sup>248</sup> Perhaps this behavior makes sense given the rapid rise in mass incarceration of Black men during this era.<sup>249</sup> Yet, this stereotypical image of the impoverished female sex worker in low-income Black and Hispanic/Latinx neighborhoods—the flashy woman donned with fake diamonds who engages in licentious sexual escapades—reflects the prevailing “culture of poverty” sociological theory of the day.

According to Melle Mel, this “crazy lady” can be seen “Down at the peep show watching all the creeps / So she can tell her stories to the girls back home.”<sup>250</sup> During this era, New York City was known for its peep shows and porn theaters near Times Square. Many Black and other minoritized women frequented Times Square not simply because it offered a pathway toward social mobility through sex work, but also because it gave voice to the stories of survival passed on to “the girls back home.”<sup>251</sup> In a sense, Times Square was one of the few areas of New York City that affirmed the liberty of low-income women to use sex work both as a means of survival and an expression of power. Further, these lyrics evoke what Henry Louis Gates calls the “signifying” aspect of Black literary discourse that appears elsewhere in the Black musical tradition,<sup>252</sup> giving voice to hip-hop’s “radical commitment to otherness.”<sup>253</sup> Of course, this era was not the first when Black women would be pushed into less than desirable modes of employment due to exploitative market forces. For example, in 1934, Ella Baker and Marvel Jackson Cook called attention to the way the financial crash of 1929 and the subsequent Great Depression had thrust

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extreme poverty, sexual abuse and trauma, family obligation, and the active pursuit of sexual desire and pleasure).

247. *The Message*, *supra* note 1, at 01:45. In this line, *The Message* references “A Whiter Shade of Pale” by Procol Harum, a 1967 song about the seduction of a woman over the course of an evening, once again demonstrating hip-hop’s nostalgia. See NELSON GEORGE, *HIP HOP AMERICA*, at viii (1998) (noting that hip-hop is a “postmodern art in that it shamelessly raids older forms of pop culture . . . and reshapes the material to fit the personality of an individual artist and the taste of the times”).

248. *The Message*, *supra* note 1, at 01:48.

249. See ALEXANDER, *supra* note 195, at 179.

250. *The Message*, *supra* note 1, at 01:50.

251. *Id.*

252. See SAMUEL A. FLOYD, JR., *THE POWER OF BLACK MUSIC: INTERPRETING ITS HISTORY FROM AFRICA TO THE UNITED STATES* 95 (1995) (“Signifyin(g) is a way of saying one thing and meaning another; it is a reinterpretation, a metaphor for the revision of previous texts and figures; it is tropological thought, repetition with difference, the obscuring of meaning—all to achieve or reverse power, to improve situations, and to achieve pleasing results for the signifier.”); see generally HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM* (1988) (exploring the relationship between African and African-American vernacular traditions and Black literature, including signification in Black American life and literature).

253. PERRY, *supra* note 11, at 47.

many former domestic workers into dangerous new positions as window washers.<sup>254</sup>

The second verse of *The Message* also speaks to the racial tensions surrounding Black and minoritized women's employment, welfare, and social security during this era.<sup>255</sup> Concluding the crazy lady's narrative, Melle Mel raps, "She went to the city and got so, so saditty / She had to get a pimp, she couldn't make it on her own."<sup>256</sup> Here, we see low-income women venturing outside of the ghetto (and into Manhattan) for financial gain. In some cases, they make enough social progress to be perceived as "sadditty," or associated with a higher social class. But, whether venturing downtown for jobs, or venturing downtown to apply for public assistance, it proved to be not enough. The 1960s and 1970s saw a dramatic rise in single Black and minoritized mothers applying to public assistance programs, such as Aid to Families with Dependent Children (AFDC), the Food Stamp program, and Medicaid.<sup>257</sup> The 1970s also saw state programs for the elderly and disabled moved to the federal level with the introduction of the Supplemental Security Income program, which aided elderly, blind, and disabled individuals, as well as the introduction of the Earned Income Tax Credit as a supplement for low-wage workers.<sup>258</sup> Expenditures on these public assistance programs increased during the 1970s and 1980s,<sup>259</sup> yet poverty persisted, often due to unemployment. As Melle Mel reveals, many single low-income or unemployed mothers sought other means of survival ("She had to get a pimp") as public spending on anti-poverty programs eventually waned.<sup>260</sup>

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254. See Ella Baker & Marvel Cooke, *The Bronx Slave Market*, 43 *CRISIS* 330, 330–31, 340 (1935); BARBARA RANSBY, *ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION* 76–78 (2003).

255. See Premilla Nadasen, *From Widow to "Welfare Queen": Welfare and the Politics of Race*, 1 *BLACK WOMEN, GENDER & FAMS.* 52, 53 (2007) ("In the 1960s, the politics of welfare became racialized and sexualized, laying the groundwork for the stereotype of the 'welfare queen.' As increasing numbers of African American women joined the welfare rolls, politicians and policymakers instituted more punitive measures, including work requirements. These reform efforts were premised on a discourse falsely suggesting that most welfare recipients were [B]lack and unworthy of assistance. Welfare became a code word for race and came to symbolize the perceived problems within poor [B]lack communities—single parenthood, family breakup, and unemployment.").

256. *The Message*, *supra* note 1, at 01:54.

257. See Rebecca M. Blank, *Trends in the Welfare System*, in *WELFARE, THE FAMILY, AND REPRODUCTIVE BEHAVIOR: RESEARCH PERSPECTIVES* 33–34 (Robert A. Moffitt ed., 1998).

258. *Id.*

259. See GENE FALK, CONG. RSCH. SERV., R41823, *LOW-INCOME ASSISTANCE PROGRAMS: TRENDS IN FEDERAL SPENDING*, at i (2014), <https://sgp.fas.org/crs/misc/R41823.pdf> [<https://perma.cc/6QAC-9JYB>] ("Cash benefits—to the aged, blind, and disabled and needy families with dependent children—comprised most aid to low-income families in the early 1960s. However, over the period from the 1960s through the end of the 1980s, most of the growth in aid was for non-cash benefits in the form of education, food, housing, and medical assistance.").

260. See *id.* at 9 ("The 1990s was the decade of welfare reform. In that decade, total spending on non-health low-income assistance programs increased. However, aid was substantially restructured during the period. For low-income families with children, policies were shifted away from providing a safety net for families without earnings toward a policy to support work among low-income parents. The 1996 welfare reform law converted the cash assistance entitlement for families with dependent

Black and minoritized women of this era also faced the stigma of racist tropes like the welfare queen. In 1974, then presidential candidate Ronald Reagan popularized the term and directed it toward single Black mothers who were deemed to be manipulating and defrauding the welfare system.<sup>261</sup> Stories like the case of Linda Taylor, who was accused of stealing \$154,000 in public aid and convicted of illegally using multiple aliases to obtain at least twenty-three welfare checks,<sup>262</sup> suggested that impoverished Black people were abusing the system to avoid work. Ronald Reagan referred to the welfare queen during his presidential campaign to convey the urban poor as social parasites who avoided personal responsibility for their financial predicaments.<sup>263</sup> In the 1980s and 1990s, the welfare queen trope would be recycled as a political tool to justify welfare reform, which was finalized under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, spearheaded by President Bill Clinton.<sup>264</sup> The very name of the law suggested that low-income minorities were not taking responsibility for their poverty and needed to be incentivized to work.<sup>265</sup> As a result, the law replaced AFDC with the Temporary Assistance for

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children into the Temporary Assistance for Needy Families (TANF) block grant, with recipients of cash aid subject to work requirements and time limits for federal aid.”).

261. See *‘Welfare Queen’ Becomes Issue in Reagan Campaign*, N.Y. TIMES, Feb. 15, 1976, at 51, <https://www.nytimes.com/1976/02/15/archives/welfare-queen-becomes-issue-in-reagan-campaign-hitting-a-nerve-now.html> [<https://perma.cc/XAV7-6V8B>] (“‘There’s a woman in Chicago,’ the Republican candidate said recently to an audience in Gilford, N.H., during his freeswinging attack on welfare abuses. ‘She has 80 names, 30 addresses, 12 Social Security cards and is collecting veterans’ benefits on four nonexistent deceased husbands . . . . And she’s collecting Social Security on her cards. She’s got Medicaid, getting food stamps and she is collecting welfare under each of her names. Her tax-free cash income alone is over \$150,000.’”).

262. See *Alleged ‘Welfare Queen’ Is Accused of \$154,000 Ripoff*, JET, Dec. 19, 1974, at 16–17, <https://books.google.com/books?id=DVsDAAAAMBAJ&pg=PA16#v=onepage&q&f=false> [<https://perma.cc/RN4A-QHEL>]; *Welfare Queen Gets Two-Six-Year Term*, ROCHESTER SENTINEL, May 13, 1977, at 1, <https://news.google.com/newspapers?nid=ggypx7smY2AC&dat=19770513&printsec=frontpage&hl=en> [<https://perma.cc/3J8X-B4BT>].

263. See *‘Welfare Queen’ Becomes Issue in Reagan Campaign*, *supra* note 261.

264. See Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193 (1996). The law was considered the biggest shift in social policy since the Great Depression and a defeat for liberalism. See Jason DeParle, *The Silence of the Liberals*, WASH. MONTHLY (Apr. 1, 1999), <https://washingtonmonthly.com/1999/04/01/silence-of-the-liberals/> [<https://perma.cc/DPS8-9WR2>]; Martin Carcasson, *Ending Welfare as We Know It: President Clinton and the Rhetorical Transformation of the Anti-Welfare Culture*, 9 RHETORIC & PUB. AFF. 655, 659 (2006) (noting that President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act, drafted by Republican Representative John Kasich in a GOP-controlled Congress, to show his commitment to his 1992 campaign promise to “end welfare as we know it”).

265. Arguably, President Clinton’s campaign rhetoric sought to reconstruct the purpose of welfare to mask his failure for achieving welfare reform in his first term, and also to distinguish his welfare policy from the Republican party. See Carcasson, *supra* note 264, at 664–65 (“Clinton called for a reciprocal relationship between the government and the poor, with the former providing opportunity while expecting responsibility from the latter. . . . He explained the transformation as a move from ‘welfare to work,’ a ‘welfare check to a paycheck,’ ‘dependence to independence,’ or ‘dependence to dignity.’ Welfare’s new purpose would be to ‘empower’ people, to ‘liberate’ welfare recipients, and to be a ‘path’ or ‘bridge’ to a job.”); see also Andrew Glass, *Clinton Signs ‘Welfare to Work’ Bill*, AUG. 22, 1996, POLITICO (Aug. 22, 2018), <https://www.politico.com/story/2018/08/22/clinton-signs-welfare->

Needy Families program and shifted responsibility for social programs to the states. Further, it required welfare recipients to begin working after two years of receiving benefits, placed a limit of five years on benefits paid by federal funds, encouraged two-parent families, discouraged out of wedlock births, and required states to strictly enforce child support.<sup>266</sup>

### C. *A Terrible Tragedy*

#### 1. *Broken Windows*

While the culture of poverty theory influenced anti-poverty laws, the “broken windows” criminological theory shaped policing in New York City’s crime-ridden neighborhoods. Introduced in 1982 by James Q. Wilson and George L. Kelling,<sup>267</sup> the broken windows theory claims that visible symbols of social disorder in poor neighborhoods—abandoned buildings, rowdy teenagers, vandalism, loitering, public intoxication, etc.—coupled with social norms of conformity and neglect create an atmosphere of apathy and criminality that furthers social disorder and civic unrest.<sup>268</sup> Much in the way Moynihan believed that a subculture of wayward values in low-income Black neighborhoods had provoked vicious cycles of poverty, so too did Wilson and Kelling contend that unregulated social disorder and apathy catalyzed cycles of criminality in Black urban ghettos. In their widely read article in the *Atlantic Monthly*, Wilson and Kelling argued, “[I]f a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken . . . . [O]ne unrepaired broken

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to-work-bill-aug-22-1996-790321 [https://perma.cc/5TFW-76EN] (quoting President Clinton as stating that the Act “gives us a chance we haven’t had before to break the cycle of dependency that has existed for millions and millions of our fellow citizens, exiling them from the world of work. It gives structure, meaning and dignity to most of our lives.”).

266. SHEILA R. ZEDLEWSKI, SANDRA J. CLARK, ERIC MEIER & KEITH WATSON, *URB. INST., POTENTIAL EFFECTS OF CONGRESSIONAL WELFARE REFORM LEGISLATION ON FAMILY INCOMES 2–3* (July 26, 1996), <https://www.urban.org/sites/default/files/publication/67221/406622-Potential-Effects-of-Congressional-Welfare-Reform-Legislation-on-Family-Incomes.pdf> [https://perma.cc/2HBK-8YJR] (noting that the reforms marked “a major shift in the AFDC program from an indefinite source of support to a temporary and transitional one . . . . [T]he welfare reform provisions would increase the number of persons in poverty by 2.6 million . . . [and t]he poverty gap—the difference between poor families’ incomes and the poverty threshold—would increase by around \$6 billion for all families, a 12 percent increase relative to current policies.”).

267. See generally George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, *ATL. MONTHLY* (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [https://perma.cc/R5TA-TWNA] (articulating a theory that fear in crime-ridden neighborhoods is not only driven by the threat of a violent attack by a stranger, but also “by disorderly people . . . disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed”).

268. J. Phillip Thompson, *Broken Policing: The Origins of the “Broken Windows” Policy*, 24 *NEW LAB. F.* 42, 44 (2015) (“The Broken Windows theory argues that visible signs of disorder, like broken windows or crack vials in the street, show a lack of neighborhood concern or vigilance. Criminals are attracted to such places to commit more serious crimes. Thus, stopping serious crime starts with the prevention of minor offenses that produce the appearance of disorder.”).

window is a signal that no one cares, and so breaking more windows costs nothing.”<sup>269</sup> In a more detailed exposition of the theory in 1996, Kelling and Catherine Coles explained that the notion of repairing broken windows to mitigate social apathy and community deterioration suggests a need to prioritize small-scale problems of social disorder before they balloon into large-scale criminal activities.<sup>270</sup> Not only do people shape space through behavioral change, they argued, but spaces shape people by normalizing cultural attitudes and communal expectations.<sup>271</sup>

In many ways, the broken windows theory was built upon the rhetoric of “law and order” and program of mass incarceration that emerged in the late 1960s in response to anti-racism uprisings during the Civil Rights era and the widespread fear that such protesters would target their rage at White communities.<sup>272</sup> At the height of the Civil Rights Movement, conservative politicians argued that progressive social policies addressing poverty, such as President Lyndon B. Johnson’s “Great Society” programs, had rewarded low-income citizens for the rising rates of violent crime in their neighborhoods. The slogan “law and order” was used by Republican politicians, such as Ronald Reagan and Richard Nixon, to argue that citizens must be held liable for social disfunction through strict policing of socially disruptive behaviors. Like the culture of poverty theory, these cultural views of democratic governance shifted attention away from the structural conditions that hindered well-being in urban ghettos toward the perceived toxic behaviors of the underclass.<sup>273</sup> As House Republican leader Gerald Ford declared in 1966, “How long are we going to

269. See Kelling & Wilson, *supra* note 267.

270. GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 108 (1997) (“How do we actually begin the process of restoring order in our cities? In many urban centers problems of disorder [have] become so great that order maintenance must start with a campaign to ‘take back the streets.’”).

271. See IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 166–80 (2019). *But see* Jacinta M. Gau & Travis C. Pratt, *Revisiting Broken Windows Theory: Examining the Sources of the Discriminant Validity of Perceived Disorder and Crime*, 38 J. CRIM. JUST. 758, 763 (2010) (critiquing the correlation between perceptions of “disorder” and crime) (“In disorderly areas . . . residents develop a sharper grasp on the distinction between routine annoyance and true danger because their constant exposure to disorder inoculates them against the fear that formal and informal controls are failing and that crime is on the rise.”).

272. See generally HARCOURT, *ILLUSION OF ORDER*, *supra* note 25 (challenging the theory of broken windows policing as repressive and furthering stereotypes of Black criminality). *But see* Ansfield, *supra* note 24, at 117 (“Harcourt’s *Illusion of Order* not only overlooks this evolution in Wilson’s thinking; it regurgitates Wilson and Kelling’s fabricated retelling of the Zimbardo experiment.”).

273. See Sarah Childress, *Michelle Alexander: “A System of Racial and Social Control,”* FRONTLINE (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/> [<https://perma.cc/YKV2-BFTA>] (“This rhetoric of law and order evolved as time went on, even though the old Jim Crow system fell and segregation was officially declared unconstitutional. Segregation[ists] and former segregation[ists] began using get-tough rhetoric as a way of appealing to poor and working-class [W]hites in particular who were resentful of, fearful of many of the gangs of African Americans in the civil rights movement.” (quoting Michelle Alexander)).

abdicate law and order . . . in favor of a soft social theory that the man who heaves a brick through your window or tosses a firebomb into your car is simply the misunderstood and underprivileged product of a broken home?”<sup>274</sup>

The broken windows theory was immediately met with criticism by civil rights leaders, activists, and scholars, such as Robert J. Sampson and Stephen W. Raudenbush, for many of the same reasons that advocates critiqued Moynihan’s culture of poverty sociological theory.<sup>275</sup> First, while the broken windows theory targets inequities in the built environment, it also emphasizes human behavior as a driving cause of urban criminality, placing primary blame on the victims of impoverished conditions.<sup>276</sup> In so doing, broken windows policing tends to criminalize poverty by targeting behaviors that are highly correlated with low-income neighborhoods, even when such behaviors are prevalent among those in middle- and high-income neighborhoods with access to private spaces to shield themselves from criminal liability.<sup>277</sup> As Jordan T. Camp and Christina Heatherton explain, by associating disorder with individual behavior, the theory perpetuated the notion that broken windows are actually a euphemism for broken people, shifting liability for the underdevelopment of urban ghettos “onto the bodies of the blamed.”<sup>278</sup> Yet, scholars have revealed that violent criminality in Black neighborhoods often has more to do with the neighborhood’s concentration of unemployed people than any other factor.<sup>279</sup>

Second, critics argued that the broken windows theory legitimates informal social control over Black neighborhoods through police surveillance guided by racially biased notions of social order.<sup>280</sup> Such surveillance of Black bodies based on stigma reflects centuries-old cultural patterns of policing that derive

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274. MAURICE ISSERMAN & MICHAEL KAZIN, *AMERICA DIVIDED: THE CIVIL WAR OF THE 1960S*, at 202 (2000).

275. See, e.g., Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 *SOC. PSYCH. Q.* 319 (2004).

276. See *id.* at 319–21 (examining whether “disorder” is “filtered through a reasoning based on stigmatized groups and disreputable areas”).

277. See Bruce D. Johnson, Andrew Golub & James McCabe, *The International Implications of Quality-of-Life Policing Practiced in New York City*, 11 *POLICE PRAC. RSCH.* 17, 22 (Feb. 1, 2010) (“Some view quality-of-life initiatives as a growing intolerance for the marginalized poor, especially the homeless and those that smoke marijuana in public for lack of an alternative location.”).

278. Jordan T. Camp & Christina Heatherton, *Introduction: Policing the Planet*, in *POLICING THE PLANET: WHY THE POLICING CRISIS LED TO BLACK LIVES MATTER* 3 (Jordan T. Camp & Christina Heatherton eds., 2016).

279. See David S. Kirk, *The Neighborhood Context of Racial and Ethnic Disparities in Arrest*, 45 *DEMOGRAPHY* 55, 55–77 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831379/> [<https://perma.cc/6KUM-9ENN>] (“[B]lack, on average, live in areas characterized by higher levels of concentrated poverty than other groups, whereas [W]hites live in areas with the lowest levels of concentrated poverty.”); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 22 (1996).

280. See Sampson & Raudenbush, *supra* note 275, at 319–20 (“We find that most research on disorder is based on individual-level perceptions decoupled from a systematic concern with the disorder-generating environment.”).

from the fear of Black revolt to blatant racial injustice.<sup>281</sup> As Prashan Ranasinghe explains, prevailing notions of public “disorder” are often driven by fear of disruption to institutionalized norms.<sup>282</sup> Such norms are frequently shaped by racialized notions of citizenship and human flourishing.<sup>283</sup> Not only do police officers struggle to discern when their fears are driven by implicit or unconscious racial biases,<sup>284</sup> order maintenance policing frequently ignores the imposition of fear in the hearts and minds of surveilled Black and minoritized people.<sup>285</sup> Social scientists have recently concluded that it is unclear whether notions of social disorder can be perceived as distinct from crime itself, calling into question the supposed causal chain.<sup>286</sup>

Recent studies have also revealed that the physical appearance of a community can impact social mobility in numerous ways, such as shaping student behavior in public schools.<sup>287</sup> However, such insights only further demonstrate the way a so-called culture of poverty in under-resourced neighborhoods reflect broader structural inequities, rendering broken windows

281. See Robin D. G. Kelley, *Thug Nation: On State Violence and Disposability*, in *POLICING THE PLANET*, *supra* note 278, at 15–33; see generally ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016) (tracing the problem of mass incarceration to the social welfare programs of President Lyndon Johnson’s Great Society at the height of the civil rights era.).

282. Prashan Ranasinghe, *Jane Jacobs’ Framing of Public Disorder and its Relation to the ‘Broken Windows’ Theory*, 16 *THEORETICAL CRIMINOLOGY* 63, 71–72 (2012) (explaining that perceived disorder refers to visible signs of neighborhood deterioration derived from fear of worsening normality); see Bench Ansfield, *How a 50-Year-Old Study Was Misconstrued to Create Destructive Broken-Windows Policing*, *WASH. POST* (Dec. 27, 2019), <https://www.washingtonpost.com/outlook/2019/12/27/how-year-old-study-was-misconstrued-create-destructive-broken-windows-policing/> [<https://perma.cc/NT4Z-CY5Z>] (“During the 1970s, journalists frequently invoked the South Bronx as ‘the American urban problem in microcosm,’ . . . . Media outlets thereby weaponized the broken windows of the Bronx as a symbol of urban and racial degeneration.”).

283. See Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 *J. CRIM. L. & CRIMINOLOGY* 775, 778 (1999) (arguing that “the role of social norms in criminal behavior also suggests that it is time to curtail or abandon certain constitutional checks on police power to maintain order”).

284. Sampson & Raudenbush, *supra* note 275, at 320 (“The use of racial context to encode disorder does not necessarily mean that people are racially prejudiced in the sense of personal hostility.”).

285. See Joshua C. Hinkle & David Weisburd, *The Irony of Broken Windows Policing: A Micro-Place Study of the Relationship Between Disorder, Focused Police Crackdowns and Fear of Crime*, 36 *J. CRIM. JUST.* 503, 503 (2008) (examining the relationship between disorder, police presence, and fear of crime).

286. See Gau & Pratt, *supra* note 271, at 763; see also Hinkle & Weisburd, *supra* note 285, at 510 (“Finally, when considering the implications of the findings . . . the evidence regarding the effects of broken windows policing on serious crime is inconclusive.”).

287. See Stephen B. Plank, Catherine P. Bradshaw & Hollie Young, *An Application of “Broken-Windows” and Related Theories to the Study of Disorder, Fear, and Collective Efficacy in Schools*, 115 *AM. J. EDUC.* 227, 244 (2009) (“Fixing broken windows and attending to the physical appearance of a school cannot alone guarantee productive teaching and learning, but ignoring them likely greatly increases the chances of a troubling downward spiral.”).

policing as a short-term fix to larger systemic problems.<sup>288</sup> To go further, analyzing how the windows of the Bronx actually broke would call attention to the actions of landlords that destroyed buildings for profit.<sup>289</sup> Scholars have exposed the broken windows theory as being grounded upon dubious evidence of the relationship between human behavior and criminality, concluding that it merely furthers racist tropes about Black people in impoverished neighborhoods.<sup>290</sup> As Bench Ansfield explains, only one empirical source supports Wilson and Kelling's claims, which was "manipulated and distorted . . . to call forth a racialized image of urban decline . . . [and] stoke fears about the future of the US urban landscape."<sup>291</sup>

Notwithstanding criticism that linked crime-control policies to dubious cultural beliefs about racial minorities in the United States that were seemingly influenced by racism, the broken windows theory would go on to profoundly influence the order maintenance policies promoted by New York City police officers. As sociologist Loïc Wacquant explains, once a place is labeled as a "lawless zone," it becomes easier to justify nontraditional policy prescriptions that further marginalize its occupants.<sup>292</sup> Most notably, New York City police officers began implementing a policing technique called "stop-and-frisk," whereby police officers would temporarily detain, question, and search civilians who were suspected of causing social disorder or engaging in criminal activity.<sup>293</sup> In 1985, George Kelling was hired as a consultant by the New York City Transit Authority, leading to the implementation of policing that enforced

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288. See *id.*; see also RALPH B. TAYLOR, *BREAKING AWAY FROM BROKEN WINDOWS: BALTIMORE NEIGHBORHOODS AND THE NATIONWIDE FIGHT AGAINST CRIME, GRIME, FEAR, AND DECLINE* (backcover) (2001) (arguing that "changes in levels of physical decay, superficial social disorder, and racial composition do not lead to higher crime, while economic decline does").

289. See Ansfield, *supra* note 24, at 106 ("A significant number of arsons were performed for profit, which flowed into the bank accounts of absentee landlords in the form of insurance claims. The fires were set by both individual landlords and large-scale arson rings involving insurance adjusters, organized crime, neighborhood youth, and of course landlords.").

290. See *id.* at 104 (arguing that Wilson and Kelling distorted the findings of prior studies and, consequently, produced a racialized image of urban decline); see also Mike Rowan, *The Illusion of Broken Windows Theory: An Ethnographic Engagement with the Theory That Was Not There*, 9 WM. & MARY POL'Y REV. 1, 1 (2017) (critiquing the Broken Windows Theory "by drawing on three years of findings from an ethnographic case study of an urban space in Jersey City, New Jersey, [where] rates of serious crime were relatively low, yet levels of 'disorder' . . . were relatively high").

291. Ansfield, *supra* note 24, at 104.

292. Wacquant, *supra* note 205, at 69.

293. Ernie Naspretto, *The Real History of Stop-and-Frisk*, N.Y. DAILY NEWS (June 3, 2012), <https://www.nydailynews.com/opinion/real-history-stop-and-frisk-article-1.1088494> [<https://perma.cc/JJ6F-4946>] ("That all changed in the 1990s. When Compstat was developed under Police Commissioner Bill Bratton, high-ranking police officials widely incorporated the 'stop, question and frisk.'"); see also N.Y. CRIM. PROC. L. § 140.50 (2020) ("In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed, or is about to commit either (a) a felony or (b) a misdemeanor.").



the removal of graffiti artwork from New York City's subway trains.<sup>294</sup> In the 1990s, the New York Police Department (NYPD) commissioner William Bratton (former head of the New York City Transit Police) and Mayor Rudolph Giuliani embraced the broken windows theory and implemented a “quality of life” campaign across the five boroughs, cracking down on subway fare evasion, public drinking, graffiti art, loitering, panhandling, prostitution, and eventually, even public dancing on subways during Bratton's second appointment as NYPD commissioner.<sup>295</sup>

The dominant cultural beliefs about broken windows also influenced governmental efforts to fix them. The emphasis on behavior as a driver of disorder led Mayor Ed Koch to implement the Occupied Look program one year after the release of Wilson and Kelling's article.<sup>296</sup> Rather than fund the redevelopment of crumbling buildings, budget shortfalls precipitated the creation of the Occupied Look program, during which the Department of Housing Preservation and Development installed vinyl decals over broken windows to give the appearance of revitalization.<sup>297</sup> To make matters worse (perhaps in an effort to cut down on costs even further), the program did not apply the vinyl decals to all broken windows, only those on the sides of buildings facing the Cross Bronx Expressway. The Director of the Bronx City Planning Commission, Robert Jacobson, reasoned, “The image that the Bronx projects . . . is the image that you see from that expressway, and our goal is to soften that image so people will be willing to invest.”<sup>298</sup> The goal was not to eliminate poverty, merely to hide it from view to attract investors.

Advocates of broken windows policing have tried to distance the policy from “zero tolerance” policing, an approach to law and order that “put major emphasis on the kinds of ‘quality-of-life’ issues that set the drumbeat rhythm for Giuliani's 1993 mayoral campaign . . . the petty drug dealers, the graffiti scribblers, and the prostitutes . . . to reclaim the streets of New York for law-

294. See JULIA LOSSAU & QUENTIN STEVENS, *THE USES OF ART IN PUBLIC SPACE* 40 (2014); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 470 (2000).

295. Shankar Vedantam, Chris Benderev, Tara Boyle, Renee Klahr, Maggie Penman & Jennifer Schmidt, *How a Theory of Crime and Policing Was Born and Went Terribly Wrong*, NPR NEWS (Nov. 1, 2016), <https://www.wbur.org/npr/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong> [<https://perma.cc/Q46R-3HHN>]; see MCLAUGHLIN, *supra* note 146, at 169–70; Natasha Lennard, *New York City's Cops Are Waging War on Subway Performers*, VICE (May 7, 2014), <https://www.vice.com/en/article/nem9vm/new-york-citys-cops-are-waging-war-on-subway-performers> [<https://perma.cc/6FWW-SXV5>] (noting that during the first six months of 2014, “at least 46 subway dancers have been arrested and charged with reckless endangerment—a charge carrying a \$100 fine, a huge financial burden on most performers”).

296. See SOFFER, *supra* note 6, at 327; PETER L'OFFICIAL, *URBAN LEGENDS: THE SOUTH BRONX IN REPRESENTATION AND RUIN* 19–33 (2020).

297. See Robert D. McFadden, *Derelict Tenements in the Bronx to Get Fake Lived-In Look*, N.Y. TIMES, Nov. 7, 1983, at A1, <https://www.nytimes.com/1983/11/07/nyregion/derelict-tenements-in-the-bronx-to-get-fake-lived-in-look.html> [<https://perma.cc/L7NQ-LLQV>].

298. *Id.*

abiding citizens.”<sup>299</sup> According to William Bratton and George Kelling, “Broken Windows is a highly discretionary police activity that requires careful training, guidelines, and supervision, as well as an ongoing dialogue with neighborhoods and communities to ensure that it is properly conducted.”<sup>300</sup> Yet, while broken windows policing in New York City in the 1990s was followed by a decline in crime trends,<sup>301</sup> scholars have found an inconsistent relationship between crime and popular notions of disorder.<sup>302</sup> Even more, a recent study shows no statistically significant increase in complaints for various major crimes, including murder, rape, robbery, or grand theft auto—attributed by the study’s authors “to the relatively small number and high variance of such crimes”—when “proactive” policing by NYPD officers is curtailed, suggesting that proactive policing tactics “fail at their stated objective of reducing major legal violations.”<sup>303</sup> Instead, the broken windows theory merely reflects assumptions about the culture of Black urban ghettos as “desolate, as if it were set in a dead crater of the moon,” as the Boston Globe described the South Bronx. As for its Black and Hispanic/Latinx residents, it deemed them as trapped in a “living volcano.”<sup>304</sup>

## 2. *Victims of Circumstance*

Duke Bootee joins *The Message* in verses three and four, launching a cultural critique of both the “broken-windows” and “culture of poverty” theories that conveyed the residents of low-income urban neighborhoods as lazy and prone to violence, instead depicting these residents as victims of circumstance. From Bootee’s rhymes, the listener immediately begins to discern why policy makers have been quick to label the urban poor as trapped by a toxic subculture. Duke Bootee confesses,

My brother’s doing bad, stole my mother’s TV  
Says she watches too much, it’s just not healthy

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299. Greene, *supra* note 26, at 172.

300. George L. Kelling & William J. Bratton, *Why We Need Broken Windows Policing*, CITY J., Winter 2015, <https://www.city-journal.org/html/why-we-need-broken-windows-policing-13696.html> [<https://perma.cc/4X95-H7S8>].

301. See Hope Corman & H. Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 235 (2005) (“From 1990 to 1999, violent crime rates fell by about 28 percent, and property crime rates fell by about 26 percent nationally . . . . New York City . . . experienced even more dramatic declines in crime . . . [falling] by over 56 percent.”).

302. See, e.g., Harcourt & Ludwig, *supra* note 25, at 277 (finding that “moving people to communities with less social or physical disorder—the key intervening factor in the original Wilson and Kelling broken windows hypothesis—on balance does *not* lead to a reduction in their criminal behavior”).

303. See Christopher M. Sullivan & Zachary P. O’Keeffe, *Evidence That Curtailing Proactive Policing Can Reduce Major Crime*, 1 NATURE HUM. BEHAV. 730, 734–35 (2017); see also David Thacher, *Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning*, 94 J. CRIM. L. & CRIMINOLOGY 381, 385 (2004) (“[T]he relationship between disorder and serious crime is modest, and even that relationship is largely an artifact of more fundamental social forces.”).

304. John B. Oakes, *An Act of Urban Faith—or Folly*, BOS. GLOBE, Nov. 28, 1978.

All My Children in the daytime, Dallas at night  
 Can't even see the game, or the Sugar Ray fight  
 The bill collectors, they ring my phone  
 And scare my wife when I'm not home.<sup>305</sup>

While Bootee pokes fun at his brother's petty theft, claiming that his mother's monopolization of the TV has robbed them of a chance to see Sugar Ray Leonard fight (one of the top boxers of the 1980s),<sup>306</sup> the truth is that Bootee's brother likely stole the TV to pawn it for money. This conclusion makes sense when coupled with the subsequent rhyme, which reveals that people in Bootee's world avoid bill collectors because they are frequently strapped for cash. While the Fair Debt Collection Practices Act enacted in 1977 sought to prevent the repeated and continuous harassment of people for the collection of debts,<sup>307</sup> impoverished people like Bootee cannot afford legal counsel to file claims against their creditors.<sup>308</sup> As a result, the bill collectors keep calling.<sup>309</sup>

This revelation underscores the surveillance of Black urban residents by outsiders who police their behavior, such as bill collectors who harass them by phone. It also clarifies why Cornel West's description of the "marginalist tradition" in Black sociality—"a self-image of both confinement and creativity, restriction and revolt, . . . a highly individualistic rebellion"<sup>310</sup>—converges with Imani Perry's description of the "outlaw" in hip-hop culture as an "opposition to norms that unfairly punish black communities or discount the complexity of

305. *The Message*, *supra* note 1, at 02:18.

306. See Colin Hart, *Ray of Fright: Sugar Ray Leonard, the Vicious Animal, Whose Incredible Achievements Surpassed Even the Great Muhammed Ali*, SUN (Nov. 20, 2020), <https://www.thesun.co.uk/sport/13250408/sugar-ray-leonard-marvin-hagler-boxing/> [<https://perma.cc/8KYS-89PS>].

307. See Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (amending 15 U.S.C. § 1601 *et seq.* to prohibit abusive practices by debt collectors).

308. Although the Fair Debt Collection Practices Act of 1977 protects harassment, including excessive phone calls, abusive language and threats of violence, harm or arrest, the law failed to address inequities with respect to consumer's access to legal services. Consumers who refuse to pay bills were referred to as "deadbeat." See *Fair Debt Collection Practices Act: Hearings Before the Subcomm. on Consumer Affs. of the Comm. on Banking, Hous. and Urb. Affs. on S. 656, S. 918, S. 1130, and H.R. 5294*, 95th Cong. 229 (1977) ("[T]he only class that will benefit from this nobly intended legislation will be the 'deadbeat'—the person who refuses to pay his bills." (statement of Philip Rosenthal, President of the Virginia Collectors Association)). Consumer public interest groups rallied behind an amendment to the law that would establish a process of fair, speedy, and informed decision-making resolution as an alternative to the courts. See *id.* at 730–35 (noting a statement from the National Consumers League to the Senate Committee on Banking, Housing, and Urban Affairs). Lawmakers were also urged to consider additional protection for consumers in light of the hefty cost of legal services, which renders "access to our legal system almost prohibitive for many consumers . . . Without access to funds and a lawyer to invoke the rights which the law, in theory, accords the debtor, the debtor cannot gain the law's protections against unfairness, mistake or abuse." *Id.* at 731.

309. See Sewell Chan, *An Outcry Rises as Debt Collectors Play Rough*, N.Y. TIMES (July 5, 2006), <https://www.nytimes.com/2006/07/05/nyregion/05credit.html> [<https://perma.cc/Q2LC-D5GU>].

310. CORNEL WEST, PROPHECY DELIVERANCE! AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY 80 (1982).

choices faced by those black and poor in the United States.”<sup>311</sup> Both West and Perry seek to highlight the way marginalized Black Americans are compelled to rebel against oppressive circumstances by rebelling against law itself. Bootee’s brother breaks the law by stealing a TV in rebellion against the economic conditions of the ghetto, and Bootee weaves that criminal behavior into his music as part and parcel of hip-hop’s outlaw tradition, demonstrating the complexities of searching for joy (yearning to see Sugar Ray Leonard fight) while enduring the hardships of the mundane (pawning the TV for cash while avoiding the harassment of bill collectors).

Duke Bootee shares other examples of the way Black urban ghettos render their residents as victims of circumstance.<sup>312</sup> Bootee continues, “Got a bum education, double-digit inflation / Can’t take the train to the job, there’s a strike at the station.”<sup>313</sup> Bootee and his brother are not lazy and apathetic about their future. Instead, market forces beyond their control have hindered their economic advancement. For example, following the 1979 oil crisis, and in response to contractionary monetary policies advanced by the Federal Reserve to combat rising inflation rates, the United States in the early 1980s entered a recession.<sup>314</sup> Although the economy would soon recover and enter a period of expansion into the 1990s, unemployment rates floundered as the manufacturing and construction industries struggled to rebound.<sup>315</sup> Additionally, a transit strike in 1980 around the time of the song’s recording brought public transportation around New York City to a standstill for twelve days, reflecting the tensions low-wage New Yorkers faced between advocating for workers’ rights and working day-to-day to make ends meet.<sup>316</sup> The 1980 New York City transit strike

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311. PERRY, *supra* note 11, at 103.

312. See MCLAUGHLIN, *supra* note 146, at 62 (“[T]hey were victims of unanticipated economic forces, political decisions, disinvestment, and racial fear—a confluence of factors they could not control.”).

313. *The Message*, *supra* note 1, at 02:33.

314. See generally GEORGE R. IDEN, FREDERICK C. RIBE, ROBERT DENNIS, FRANK S. RUSSEK, JR., PETER M. TAYLOR, JANE D’ARISTA, HEYWOOD FLEISIG, CATHARINE B. HILL, CHRISTOPHER D. KASK, NAIF A. KHOURI, JOSEPH A. RITTER, DAVID M. SANTUCCI, JOAN D. SCHNEIDER, EMERY SIMON, JOHN W. STRAKA, JOHN R. STURROCK & STEPHEN H. ZELLER, CONG. BUDGET OFF., THE PROSPECTS FOR ECONOMIC RECOVERY: A REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE BUDGET—PART 1 (Feb. 1982), [https://www.cbo.gov/sites/default/files/97th-congress-1981-1982/reports/doc03b-entire\\_1.pdf](https://www.cbo.gov/sites/default/files/97th-congress-1981-1982/reports/doc03b-entire_1.pdf) [<https://perma.cc/9SSN-G45H>] (explaining why the United States entered into a recession in the summer of 1981, summarizing fiscal and monetary policy measures taken by the Administration and Congress, and forecasting economic market responses to such policies).

315. See Robert W. Bednarzik, Marilyn A. Hewson & Michael A. Urquhart, *The Employment Situation in 1981: New Recession Takes Its Toll*, 105 MONTHLY LAB. REV. 3, 4 (1982).

316. See Lee Lescaze, *Transit Workers Strike*, WASH. POST (Apr. 1, 1980), <https://www.washingtonpost.com/archive/politics/1980/04/01/transit-workers-strike/58be372a-7610-4440-a97a-28223a028e88/> [<https://perma.cc/QTC5-5C8F>] (“The strike by the city’s 33,600 transit workers could cost the New York economy an estimated \$150 million daily, strand 6 million daily riders and cause thousands of medium- and low-wage earners to miss work and lose pay . . . . An increase soon in the 50-cent transit fare is inevitable -- strike or no strike -- because the transit system faces a \$250 million deficit before a new labor settlement.”).

prevented people like Duke Bootee from traveling to work on public transportation to make the money that he needed to hire legal counsel and stop the bill collectors from calling. As described by Bootee, this lose-lose situation was literally too much for his body to bear: “Neon King Kong standing on my back / Can’t stop to turn around, broke my sacroiliac.”<sup>317</sup>

Duke Bootee’s reference to a “bum education” in verse three, and his description of his son’s educational experience in verse four, reveal the way people living in Black urban ghettos cannot access high-quality public education to facilitate their social mobility.<sup>318</sup> Bootee raps,

My son said, Daddy, I don’t wanna go to school  
 ‘Cause the teacher’s a jerk, he must think I’m a fool  
 And all the kids smoke reefer, I think it’d be cheaper  
 If I just got a job, learned to be a street sweeper  
 Or dance to the beat, shuffle my feet  
 Wear a shirt and tie and run with the creeps.<sup>319</sup>

Not only does Bootee’s son lack academic promise in the eyes of his teachers, which researchers have shown can negatively impact the behavior and performance of students,<sup>320</sup> Bootee’s son also must endure an environment riddled with drug activity. School does not offer a pathway out of the ghetto for Bootee’s son. Instead, it confirms the utility of leaving school altogether for a low-wage job in the local community, or worse, donning fancy clothing with “creeps” to engage in pimping or drug dealing for survival.

In Duke Bootee’s world, we learn “it’s all about the money, ain’t a damn thing funny,” because “[y]ou got to have a con in this land of milk and honey.”<sup>321</sup> Here, as Imani Perry suggests, *The Message* “dislocates the authority for defining the [B]lack underworld and manipulating the negative images of [B]lack America in order to serve the interests of [W]hite America.”<sup>322</sup> By describing pimping as a con that one *needs* to survive, Bootee evokes hip-hop’s rejection of

317. *The Message*, *supra* note 1, at 02:37.

318. See Gail Robinson, *New York Schools: Fifty Years After Brown*, *GOTHAM GAZETTE* (May 17, 2004), <https://www.gothamgazette.com/index.php/education/2424-new-york-schools-fifty-years-after-brown> [<https://perma.cc/4BY8-ZF8H>] (“Although there are exceptions, schools in New York City with higher test scores tend to have greater numbers of [W]hite and Asian students, while struggling schools are more likely to be composed primarily of [B]lack and Hispanic students . . . Black and Hispanic students also bear the brunt of discipline in the city schools. More than 90 percent of students at Second Opportunity Schools for students serving lengthy suspensions were [B]lack or Hispanic.”).

319. *The Message*, *supra* note 1, at 03:44.

320. See MCLAUGHLIN, *supra* note 146, at 46 (“Called the Pygmalion effect, a teacher believing certain students are particularly bright will raise the achievement levels of those students even if, in fact, the students are average.”); Katherine Ellison, *Being Honest About the Pygmalion Effect*, *DISCOVER* (Oct. 28, 2015), <https://www.discovermagazine.com/mind/being-honest-about-the-pygmalion-effect> [<https://perma.cc/RQT7-QXP3>].

321. *The Message*, *supra* note 1, at 03:59.

322. See PERRY, *supra* note 11, at 109.

the politics of respectability and its embrace of the archetypal “badman” that transforms the societal outlaw into a local hero by virtue of his lawlessness.<sup>323</sup> The pimp’s perceived virtue is his ability to thrive via a “Black” market in a world that offers quick fixes to treat the symptoms of systemic poverty and racial injustice. As Duke Bootee tells it,

They pushed that girl in front of the train  
Took her to the doctor, sewed her arm on again  
Stabbed that man right in his heart  
Gave him a transplant for a brand new start.<sup>324</sup>

Although one sees improvements in the lives of the urban poor, the underlying symptoms of poverty persist. The victimhood of urban youths in low-income neighborhoods during this era was perhaps most pronounced in the governmental neglect of outdoor green spaces and parks following the city’s financial crisis.<sup>325</sup> Budget cuts to the Parks Department in the late 1970s and 1980s set the stage for random acts of vandalism and violence by urban youths with nowhere to play and pent-up frustration, perpetuating the perceived criminality of Black urban ghetto residents. As Duke Bootee raps, “I can’t walk through the park ‘cause it’s crazy after dark / Keep my hand on my gun ‘cause they got me on the run.”<sup>326</sup> Youth violence inspired media descriptions of kids during this time as “wilding,” which colored the “Central Park Five” rape case in the late 1980s.<sup>327</sup> However, beneath stories of youth violence lay neighborhoods riddled with unemployment, limited job access, substandard education, and crumbling parks.<sup>328</sup> With aggressive and supervisory policing

323. See *id.* at 129 (“The tradition of the badman, taken from the folktales of Stagolee and Shine, and transposed onto popular media forms, continued into the blaxploitation-era films and their protagonists Superfly, the Mack, and Dolomite . . . . The badman uses the female body as an object of his sexual prowess, as a geography on which to graft the territory of his badness . . . individually triumphant in the battle with [W]hite America rather than . . . falling victim to lynching or castration.”).

324. *The Message*, *supra* note 1, at 04:03.

325. See BERNADETTE CORBETT, URBAN PARKS: A STUDY ON PARK INEQUITY AND ECO-GENTRIFICATION IN NEW YORK CITY 17–18 (May 13, 2016), [https://www.fordham.edu/download/downloads/id/5726/bernadette\\_corbett\\_-\\_urban\\_parks.pdf](https://www.fordham.edu/download/downloads/id/5726/bernadette_corbett_-_urban_parks.pdf) [<https://perma.cc/WUP4-93GF>] (“According to Council Member Levine, ‘by 1986 Parks had fallen to just 0.86% of the budget . . . by 1990 Parks spending had fallen further to 0.65% of the total budget, and by 2000 it had reached just 0.52% . . . .’ Neighborhoods with lower-income residents were especially affected . . . . Parks such as such as Tompkins Square, Washington Square and Marcus Garvey Park were notorious for drug use. The amount of homeless people living in the parks also rose after the 1970s.”).

326. *The Message*, *supra* note 1, at 04:13.

327. See, e.g., *Three Men Assaulted on Evening of ‘Wilding,’* ASSOCIATED PRESS, Oct. 12, 1989, at A3, <https://news.google.com/newspapers?nid=2002&dat=19891012&id=ILgiAAAAIBAJ&pg=2686,2825845> [<https://perma.cc/3LRE-G4LH>] (describing reports of “three men who were attacked by roving gangs of teenagers in Central Park the same night a female jogger was beaten, raped, and left comatose,” and employing the term “wilding” that was frequently used to describe groups of Black and Latinx kids as a dangerous class of criminals).

328. See MCLAUGHLIN, *supra* note 146, at 53.

added to the mix, it is no wonder that people like Bootee felt “like a outlaw” who “broke [his] last glass jaw”<sup>329</sup>—a fugitive in a painful world.

The truth telling power of hip-hop music offered a countercultural view of the drivers of poverty and crime in Black urban ghettos. Further, it served as a political protest to the narratives of victimhood that painted Black people as disengaged and apathetic, a notion of “black sociopathy” afflicted by a “post-Moynihan blues.”<sup>330</sup> Even as Duke Bootee and Melle Mel are “push[ed] to the edge,” the joy emanating from the disco beat of their song and the smooth cadence of their raps reflect an immense faith in the revolutionary power of the Black freedom struggle. As a result, as Part III reveals, even as the residents of Black urban ghettos labor under the rivalry of hegemonic White supremacist cultural beliefs—thereby rendered prisoners of poverty, survivors of neglect, and victims of circumstance—they embrace collective action as a pathway to conserve democratic cultural discourse within their communities.

### III.

#### HIP-HOP CULTURE AS COLLECTIVE ACTION

The struggles for collective action in the Black urban ghettos of New York City in the 1970s and 1980s demonstrate the ongoing need to promote greater democratic cultural discourse in the law and policymaking process. Governments seeking to empower marginalized groups should pay close attention to the collective action of disempowered cultural groups that experience rivalry in the cultural commons. When these groups exhibit what Lisa T. Alexander has called “cultural collective efficacy”—“a form of positive bonding social capital generated through participation in cultural endeavors”<sup>331</sup>—they also showcase an underappreciated type of political discourse.

For its early adopters, hip-hop culture served as a powerful tool to bear witness to the freedom struggles of socially and politically marginalized communities. Hip-hop music not only provided a forum to critique inadequate laws and public policies, but it also offered a platform for community members to reimagine placemaking to meet their unique interests, goals, and understandings of democratic life. From *The Message*, we are reminded of the cyclical nature of poverty in Black urban ghettos, places shaped far more by their socioeconomic barriers to social mobility than their supposedly toxic cultural habits and criminal proclivities. From an exploration of early hip-hop cultural practices, one discovers a unique democratic cultural vision of urban life not reflected in the laws and public policies of its day.

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329. *The Message*, *supra* note 1, at 04:17–19.

330. PERRY, *supra* note 11, at 112.

331. Alexander, *supra* note 113, at 830.

This Section unearths various democratic cultural values from the foundational tenets of early hip-hop culture—breakdancing, DJing, MCing, and graffiting. In so doing, it describes how such values parallel, broadly speaking, three elements of a justice-based theory of community economic development (CED) that I have proposed in prior scholarship:<sup>332</sup> (1) social solidarity; (2) economic democracy; and (3) solidarity economies. As each subsection describes, local law and public policy worked to silence Black cultural expressions of community identity. Nevertheless, many of the governing principles of early hip-hop culture can be seen in today’s progressive urban development strategies for democratizing the ownership of land and property in urban landscapes. Consider first the principle of social solidarity and hip-hop’s culture of breakdancing.

#### A. *Social Solidarity*

The concept of “social solidarity” has been used by scholars to describe the interdependence of people living in a community and the benefits of collective action toward a common good. Solidarity often develops among individuals that share similar norms, values, and beliefs. But it can also emerge from individual acts of trust, altruism, and reciprocity that together promote the betterment of all involved. In liberal democratic societies, political equality is an important prerequisite for social solidarity because it builds public trust in the rule of law and ensures that political institutions prioritize the common good. Urban development scholars have argued that (1) participatory democracy that disrupts class privilege and racial hierarchy, as well as (2) equitable development that transcends local autonomy to embrace the concerns of diverse stakeholders across a region, are two ways to empower marginalized groups, create broad-based multiracial coalitions, and promote cooperation in public decision-making.<sup>333</sup> Early hip-hop culture, such as the tradition of breakdancing, similarly reflects an attentiveness to building grassroots power, forging multicultural bonds of solidarity, and encouraging cooperation toward meeting shared goals.

Breakdancing earned its name from the young dancers—B-girls and B-boys—who showcased their improvisational and acrobatic dance moves during the prolonged “break” (short for break down) of hip-hop songs.<sup>334</sup> The break is the segment of the song, typically without lyrics, that emphasizes the rhythms, beats, and instrumentality of the music. DJs turned such segments into their own music by looping them successively on record turntables. Emerging in the late

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332. To be sure, hip-hop music is not the only musical genre to evoke these values. This Article’s broader point is not that hip-hop culture expresses unique cultural views, but that countercultural expressions of democratic life are too often crowded out of democratic cultural discourse. See generally Toussaint, *supra* note 54.

333. *Id.* at 389–99.

334. *Break Dancing*, BRITANNICA, <https://www.britannica.com/art/break-dance> [<https://perma.cc/PJJ7-JT2B>] (last visited Nov. 24, 2022).



1970s, the athletic dance style was not only inventive, but it was also multicultural. Breakdancing blended jazz, gymnastics, and martial arts with dance movements from the Caribbean, Latin America, and Africa.<sup>335</sup> In so doing, the hip-hop dance culture revealed a commitment to community empowerment and social solidarity.

Whether breakdancing pioneers Richard “Crazy Legs” Colon or Kenneth “Ken Swift” Gabbart of the Rock Steady Crew were pop-locking, top rocking, or performing acrobatic power moves (such as the flare, a common move during gymnastics floor exercises) in conjunction with complex footwork, they were surrounded by a circle of community members.<sup>336</sup> The dance circle, or cypher, has a long history not only in dance culture, but also in African and Indigenous religious traditions.<sup>337</sup> It is an inclusive and supportive practice for community building: anyone can participate, all contributions are welcomed, and all expressions are celebrated. There are no rules, no winners, no losers, and no failures in the cypher. One enters the circle and is energized by the clapping of peers toward an individualized and autonomous expression of liberty within a communitarian ethos forged by a love of music. It was in the cypher where the Black youths of the South Bronx brought their worries and daily struggles. And, it was in the cypher’s dance battles where individuals worked collaboratively in “crews” and leveraged social solidarity to inspire artistic expressions of joy, notwithstanding the poverty that awaited off the dance floor.<sup>338</sup> The values celebrated through breakdancing are the communitarianism of the cypher, the multiculturalism of the breakdancing style, the individual agency encouraged by dance battles, and the collaborative problem-solving techniques of the dance battle crew.

Many of the themes of social solidarity manifested by hip-hop culture parallel those promoted by community benefit agreements (CBAs). Community benefit agreements are contractual arrangements between real estate developers and community stakeholders that aim to democratize the project planning process by amplifying the needs of existing community residents and institutions. The first formal CBA in the United States was created in 1998 in connection with the \$388 million Hollywood and Highland Center, a 640,000-square-foot shopping center and entertainment complex in Los Angeles, California, with over seventy shops, twenty-five restaurants, and a 637-room

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335. *See id.*

336. Jake Uitti, *The Origins of Breaking with Its Biggest Name, Crazy Legs, Still Kicking*, UNDER THE RADAR MAG. (July 20, 2020), [https://www.undertheradarmag.com/interviews/the\\_origins\\_of\\_breaking\\_with\\_its\\_biggest\\_namecrazy\\_legs](https://www.undertheradarmag.com/interviews/the_origins_of_breaking_with_its_biggest_namecrazy_legs) [<https://perma.cc/EM7L-SAR8>].

337. *See* Emmanuel Adekun, *Discover the Meaning and Importance of the Cypher in Breaking*, REDBULL (Apr. 26, 2018), <https://www.redbull.com/us-en/the-importance-of-the-cypher> [<https://perma.cc/38DC-RNUZ>].

338. *See Breakdancing in the Street: See Classic Images of Eighties New York*, ROLLING STONE (Feb. 25, 2021), <https://www.rollingstone.com/music/music-pictures/breakdancing-new-york-1980s-1132065/the-rock-steady-crew-at-jhs-56/> [<https://perma.cc/MJK2-E36A>].

hotel. After members of the Los Angeles Alliance for a New Economy negotiated a CBA whereby the developer agreed to finance traffic improvements, pay living wages to employees, hire local residents, and support union neutrality, the developer was able to obtain \$90 million in local subsidies to support the project.<sup>339</sup>

However, the roots of CBAs can be traced to America's long history of community organizing, especially in low-income and marginalized areas of the country. For example, the Northwest Bronx Community and Clergy Coalition (NWBCCC), established in 1970, played an important advocacy role for low-income residents living in neglected neighborhoods of the Bronx.<sup>340</sup> As policymakers began to discuss revitalizing crumbling areas of the Bronx in the 1990s, NWBCCC coordinated community meetings to advocate for local interests and ensure that marginalized voices could engage in democratic cultural discourse. Such campaigning would prove vital to the redevelopment of the Kingsbridge Armory, a 180,000-square-foot complex in the Bronx that had stood vacant for years.<sup>341</sup> Facing the threat of the armory being torn down and replaced by projects that would gentrify the community, NWBCCC advocated for community benefits to be incorporated into development proposals. Eventually, in 2013, the Kingsbridge National Ice Center (KNIC) earned a winning \$320 million project proposal to redevelop the armory by first negotiating a CBA with NWBCCC and other community stakeholders. The CBA was struck between KNIC and an eleven-member Community Advisory Council, which included three community representatives, three members selected by the chair of the local community board, three members from NWBCCC, one member from the developer, and one member-at-large. The CBA not only called for KNIC to address local environmental concerns by using a LEED silver sustainable design, but also provided for living-wage jobs, 1 percent of jobs going to Bronx residents, at least 25 percent of goods and services sourced from the Bronx, at least 1 percent of the ice rink's annual rental revenue invested in community

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339. See Amy Lavine, *Hollywood and Highland Center*, CMTY. BENEFITS AGREEMENTS BLOG (Jan. 28, 2008), <https://communitybenefits.blogspot.com/2008/01/hollywood-and-highland-center.html> [<https://perma.cc/2V33-NR8A>].

340. See *Our History*, NW. BRONX CMTY. & CLERGY COAL., <https://www.northwestbronx.org/history> [<https://perma.cc/A657-CSXB>] (last visited Dec. 16, 2022); see also JARRID GREEN & THOMAS HANNA, DEMOCRACY COLLABORATIVE, COMMUNITY CONTROL OF LAND & HOUSING: EXPLORING STRATEGIES FOR COMBATING DISPLACEMENT, EXPANDING OWNERSHIP, AND BUILDING COMMUNITY WEALTH 81 (2019), <https://democracycollaborative.org/sites/default/files/downloads/CommunityControlLandHousing.pdf> [<https://perma.cc/FB4S-JB4N>] (“NWBCCC has been a critical force organizing local residents to build political power and community infrastructure to help stabilize the lives of vulnerable residents and gain community control of local land and housing resources.”).

341. See Laura Flanders, *After 20-Year Fight, Bronx Community Wins Big on Development Project Committed to Living Wages and Local Economy*, YES! MAG. (Jan. 3, 2014), <http://www.yesmagazine.org/commonomics/kingsbridge-armory-community-benefits-agreement/> [<https://perma.cc/3MYN-K9TL>].

development, a prohibition for big-box retailers, and \$1 million per year contributed toward local non-profits and public schools to make use of the facilities.<sup>342</sup>

Such benefits demonstrate that CBAs can be a vital tool to confer decision-making authority to local stakeholders while maintaining community control of development projects, highlighting the tremendous power of multicultural political discourse. However, CBAs also have their shortcomings. While there are recognized best practices, there is no definitive CBA structure or negotiation process. Thus, some critics have noted that existing relationships between labor unions and politicians can hinder the incorporation of minority viewpoints into CBAs. Further, when CBA negotiations do not include a diverse spectrum of community stakeholders, community engagement becomes superficial. To promote community control of the development process, CBAs must not only include best practices for community control of land and property (e.g., limited equity cooperatives, community land trusts, resident owned communities, etc.), but also must incorporate formal mechanisms to hold developers accountable to their commitments.<sup>343</sup> Yet, since the best CBAs can require months or even years of negotiation, CBAs are often more likely to occur in strong real estate markets with local government resources to attract investors.<sup>344</sup>

### B. Economic Democracy

The phrase “economic democracy” seeks to reorient the organization and coordination of political economies toward the democratic distribution of economic power. As a result, its proponents typically call for the democratization of the ownership of land, other wealth-generating assets, and decision-making power. To promote economic democracy, urban development scholars have called for local governments “to shift the ownership of land, labor, and capital to community-based entities and community residents to more equitably distribute wealth during economic development.”<sup>345</sup> By encouraging the development of community land trusts or housing cooperatives, for example, local governments not only challenge traditional notions of private property ownership, but also empower more residents to reap the economic benefits of development and become “investors” in the future of their community.<sup>346</sup> Early hip-hop culture, particularly the art of DJing and MCing, also expressed a desire to rethink notions of property ownership and community investment.

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342. *See id.*

343. Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773, 1817 (2016).

344. *See* Leland T. Saito, *How Low-Income Residents Can Benefit from Urban Development: The LA Live Community Benefits Agreement*, 11 CITY & CMTY. 129, 129 (2012).

345. Toussaint, *supra* note 54, at 400.

346. *See* Susan R. Jones, *Transactional Law, Equitable Development, and Clinical Legal Education*, 14 J. AFFORDABLE HOUS. & CMTY. DEV. L. 213, 213 (2005).

Traditionally, the disc jockey, or DJ, worked hand in hand with the master of ceremonies, or MC, of the hip-hop dance party. Before hip-hop emerged, DJs typically played recorded music on the radio or at social gatherings. Early hip-hop DJs such as Kool DJ Herc and Grandmaster Flash introduced a new technique called turntablism, which involved creating new music using two or more record players and an audio-mixing console to control and manipulate the sounds of existing songs.<sup>347</sup> By isolating and extending the drum breaks of popular songs, coupled with the scratching of records and blending of harmonious sounds, DJs became the stars of neighborhood block parties in the Bronx, creating the dynamic setting for breakdancing to emerge. Although technology played a fundamental role in enabling hip-hop DJs to match the beats of different songs by altering their pitch and speed, it was their creativity and eclectic music sensibilities—and ability to make old songs new while simultaneously paying homage to the Black musical tradition—that invigorated the hip-hop party and set the stage for the MC.<sup>348</sup>

The art of MCing, more commonly known as rapping, is a form of vocal music delivery that includes rhythmic speech in poetic style performed over a hip-hop beat or sometimes delivered a cappella without musical accompaniment. While the origins of rapping can be traced to the griots of West Africa, the rhythmic singing of the blues, the political poetry of the Civil Rights Era, and the raw lyrics of funk and soul, the earliest hip-hop MCs emerged in New York City in the late 1970s alongside early DJs.<sup>349</sup> Much like breakdancers and DJs, MCs such as Kurtis Blow, The Sugarhill Gang, and Grandmaster Flash's the Furious Five were celebrated for their creativity and energy.<sup>350</sup> Even more, spoken word enabled the MCs to share their lived experiences on the public stage in ways that transcended the limits of dancing and mixing records. Thus, rapping transformed the hip-hop stage into a forum for public protest, and early rappers quickly began using rap music to critique their experiences of poverty and White supremacist cultural views of Black life in the urban landscape.

Like breakdancing, MCs also used the cypher to engage in rap battles that celebrated the power of community while still affirming the importance of individual autonomy. Time and attention on stage was distributed amongst the participants in democratic fashion. MCs were encouraged to “pass the mic” after sharing their truth and often multiple MCs formed part of one musical group. In this way, the art of MCing evoked a communitarian conception of property ownership. The MC did not exercise dominion over the microphone as private property and the stage was not an exclusive space. Instead, MCs held the

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347. See Rory PQ, *Hip Hop History: From the Streets to the Mainstream*, ICON MUSIC BLOG (Nov. 13, 2019), <https://iconcollective.edu/hip-hop-history/> [https://perma.cc/T766-LWEQ].

348. See *id.*

349. See *id.*

350. See Alan Light, *Hip-Hop: Music and Cultural Movement*, BRITANNICA, <https://www.britannica.com/art/hip-hop/additional-info#history> [https://perma.cc/WD6C-BPPL] (last visited Nov. 24, 2022).

microphone and stage temporarily in trust as a steward of the cooperatively managed community property. The values exhibited by both the DJ and the MC are an appreciation for historic freedom struggles (by sampling old songs in their mixes), a commitment to democratic distribution of community resources, a conception of property that emphasizes stewardship on behalf of the common good, and a focus on community uplift over self-interest (a notion of public purpose over private profit).

Many of the themes of economic democracy evoked by hip-hop culture can be seen in efforts to promote the usage of community land trusts in urban development. Community land trusts (CLTs) are non-profit entities that acquire ownership of land and steward such land in “trust” for the benefit of the community.<sup>351</sup> Under a CLT homeownership model, individuals purchase property on land owned by the CLT through a long-term and renewable ground lease. Often, such parties agree to limits on the home resale price to maintain the affordability of the community for future residents.<sup>352</sup> For example, in 2017, Oakland Community Land Trust (OAKCLT) in Oakland, California, worked with local advocacy groups to purchase a community building that was at risk of being sold to real estate speculators. OAKCLT’s ownership preserved the space for several community-based organizations, including a bike shop and a martial arts studio.<sup>353</sup>

The CLT model enables community control of land by empowering a democratically elected board of community representatives—typically comprised of community residents, CLT tenants, CLT managers, and government representatives—to dictate how the land is to be used. In this way, CLTs have enabled communities to develop affordable housing, community-based commercial enterprises, urban agricultural projects, and urban green spaces with recreational facilities.<sup>354</sup> In many cases, such projects are able to proceed even amidst the pressures of gentrification. Even more, CLT board members can determine how best to address community needs, whether by promoting wealth-building programs or by using resources to improve local infrastructure. This flexibility enables both public subsidies and private

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351. *Overview: Community Land Trusts (CLTs)*, CMTY.-WEALTH, <https://community-wealth.org/strategies/panel/clts/index.html> [https://perma.cc/LX9B-YKUA] (last visited Nov. 24, 2022).

352. See Rosalind Greenstein & Yesim Sungu-Eryilmaz, *Community Land Trusts: Leasing Land for Affordable Housing*, LINCOLN INST. OF LAND POL’Y (Apr. 2005), <https://www.lincolninst.edu/publications/articles/community-land-trusts> [https://perma.cc/SEX9-73TG].

353. CAL. LAND TRUST NETWORK, INCREASING COMMUNITY POWER AND HEALTH THROUGH COMMUNITY LAND TRUSTS: A REPORT FROM FIVE MOVEMENT-DRIVEN CALIFORNIA CLTS 34 (Dec. 2020), <https://trustsouthla.org/wp-content/uploads/2021/02/Increasing-Community-Power-Thru-CLTs-REPORT-TCE-BHC-Dec2020.pdf> [https://perma.cc/C7KC-7FBC].

354. *Community Land Trusts*, GROUNDED SOLS. NETWORK, <https://groundedsolutions.org/strengthening-neighborhoods/community-land-trusts> [https://perma.cc/89CS-Q2E7] (last visited Dec. 16, 2022).

investments to be recycled within the neighborhood for the common good.<sup>355</sup> Research by John Emmeus Davis has shown that organizations that engage in ground leasing, such as CLTs, are more likely to be integrated into the local urban planning process. Thus, as CLTs receive legal standing in disputes related to local property development, marginalized residents are empowered to introduce countercultural views into mainstream political discourse.<sup>356</sup>

CLTs have long been used as a vehicle to uplift marginalized communities. The first CLT in the United States was created in the 1960s in southern Georgia by Black farmers and civil rights activists seeking to insulate themselves from displacement at the hands of market forces and racial discrimination.<sup>357</sup> The founders of New Communities, Inc. converted six thousand acres of land in Albany, Georgia into a cooperatively managed farm and residential community.<sup>358</sup> Today, progressive cities across the United States are deploying the CLT model to promote racial and economic justice. Recent efforts by New York City's Housing Preservation and Development agency led to the allocation of \$1.65 million in grant funding for the further development of CLTs across the city. One recipient, Interboro CLT, represents a city-wide "collaboration between the Center for NYC Neighborhoods, Habitat for Humanity New York City, the Mutual Housing Association of New York, and the Urban Homesteading Assistance Board."<sup>359</sup> Interboro CLT's stated goal is to create affordable housing across the city, with its first projects to be launched in eastern Brooklyn, the South Bronx, and southeast Queens.<sup>360</sup> As leaseholders move into homes on land owned by the organization, the board will expand to include residents and community members to prioritize the interests and needs of the community.<sup>361</sup> Philanthropy and impact investing has also played a role in

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355. See CAL. LAND TRUST NETWORK, *supra* note 353; see also MERIDITH LEVY, CASSANDRA BULL, ANDREA DUARTE, PEYTON SILER JONES, JOSHUA MCLINDEN & LILLIAN WORTH, MEASURING THE IMPACTS OF THE BOSTON NEIGHBORHOOD COMMUNITY LAND TRUST 93 (2021), <https://www.bnclt.org/s/Measuring-the-Impact-of-the-Boston-Neighborhood-Community-Land-Trust.pdf> [<https://perma.cc/XT54-V2NG>] ("Because the CLT holds land in perpetuity, the initial subsidy used in the creation of affordable CLT housing is retained in the land for longer than it would under expiring income restrictions (as with the 30-year period for Low-Income Housing Tax Credits).").

356. See John Emmeus Davis, *Common Ground: Community-Owned Land as a Platform for Equitable and Sustainable Development*, 51 UNIV. S.F. L. REV. 1, 21 (2017) ("In nearly all jurisdictions, landowners are automatically notified by municipal agencies of proposed changes in municipal zoning, public investment, or private development slated for properties abutting their holdings. These landowners are formally invited to comment in public hearings about such proposals, and they are automatically granted legal standing in any regulatory or judicial disputes pertaining to abutting properties.").

357. See John Emmeus Davis, *Origins and Evolution of the Community Land Trust in the United States*, in THE COMMUNITY LAND TRUST READER 15–17 (John Emmeus Davis ed., 2010).

358. See *id.* at 17.

359. *A New Model for Affordable Homeownership in NYC*, INTERBORO CMTY. LAND TRUST, <https://www.interboroclct.org/> [<https://perma.cc/8DM9-HAAN>] (last visited Dec. 16, 2022).

360. See *id.*

361. See *id.*

project development, with Citi Community Development providing \$1 million to the project.<sup>362</sup>

### C. Solidarity Economy

The concept of a “solidarity economy” describes an anti-capitalist political economic framework that prioritizes social solidarity and economic democracy over individual wealth maximization and capital accumulation. This egalitarian and communitarian perspective on political economy pushes back against the notion of law as merely a condition for the preservation of the market.<sup>363</sup> Instead, it focuses on “empowering people-centered organizations” and “emphasizes redistributive justice, participatory democracy, and alternatives to capitalism and a debt-based monetary system.”<sup>364</sup> In so doing, solidarity economies center both the concept of community ownership and community empowerment to elevate the cultural preferences, needs, and values of community members themselves. Early hip-hop culture also reflected similar themes and ideas through graffiti art.

While graffiti as a visual art form dates to the inscriptions and figure drawings on the walls of ancient ruins in Egypt, Greece, and Rome, it became associated with hip-hop culture in the 1980s when Richard Goldstein in a *Village Voice* news article linked graffiti’s explosion on New York City subway trains to the emerging culture of breakdancing and rap music.<sup>365</sup> Yet, the phenomenon of graffiti and street art in urban neighborhoods developed long before the emergence of hip-hop music.<sup>366</sup> In 1968, in working-class neighborhoods in cities like New York and Philadelphia, teenagers began using spray paint to write political messages, gang symbols, and signatures—called “tags”—on the walls of buildings to mark their territory. As the practice developed, an increasing number of urban youths from neglected low-income areas embraced the art form and became so-called “writers,” announcing their names to the world in bold and colorful lettering across their neighborhood’s crumbling infrastructure.<sup>367</sup> Soon,

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362. Press Release, Citi, Citywide Collaborative and Citi Community Development Announce the Creation of the Interboro Community Land Trust (CLT) and a \$1MM Interboro CLT Growth Fund (Oct. 24, 2017), <https://www.3blmedia.com/news/citywide-collaborative-and-citi-community-development-announce-creation-interboro-community> [https://perma.cc/72DC-DPXD].

363. See Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & CONTEMP. PROBS. 71, 86 (2014).

364. Toussaint, *supra* note 54, at 383–84.

365. Richard Goldstein linked graffiti to rap for the first time in the *Village Voice* in 1980. See Richard Goldstein, *In Praise of Graffiti: The Fire Down Below*, VILL. VOICE (Dec. 24, 1980), <https://www.villagevoice.com/1980/12/24/in-praise-of-graffiti-the-fire-down-below/> [https://perma.cc/5K3T-8UAF].

366. See *Street and Graffiti Art*, ART STORY, <https://www.theartstory.org/movement/street-art/> [https://perma.cc/2U62-G5TE] (last visited Nov. 24, 2022) (discussing how graffiti writers have been “tak[ing] to the streets” since the 1960s and 1970s).

367. See Alexa Wang, *A Brief History of Graffiti Art*, FLUX MAG. (Sept. 27, 2020), <https://www.fluxmagazine.com/a-brief-history-of-graffiti-art/> [https://perma.cc/R2D4-8NCT] (arguing that graffiti was “[a] way of passing the time and, quite literally, making their mark, graffiti gave these young people a voice, even if it was only to tell the world they existed”).

large multicolored tags took over the sides of subway cars and elevated subway tracks, enabling writers to become known to the millions of urban residents who traveled the subway system each day. Yet, tagging was merely an elementary form of graffiti. As writers developed their painting skills, they moved on to large murals, called “pieces” (i.e., masterpieces), that took hours to complete under the cover of night.

Graffiti was deemed a nuisance to the city by lawmakers, supposedly transforming the subway into what the *Times* called a “godawful forest.”<sup>368</sup> Since painting on public or private property without authorization is considered defacement and vandalism, graffiti was deemed a sign of increasing criminal activity in a neighborhood, setting the stage for broken-windows policing.<sup>369</sup> But to many writers, the art of graffiti and street art was a revolutionary act, a response to the governmental neglect that left low-income neighborhoods replete with abandoned buildings and vacant lots. The bold colors in oversized art murals were not only an effort to beautify an otherwise bland and depressing environment, but it also evoked the idea of creation in the built environment as a democratic process, a “radical humanism” according to Richard Goldstein that affirmed the importance of forgotten voices in urban development.<sup>370</sup> By “bombing” trains and buildings with murals, writers were effectively waging war as non-property owners in the urban landscape, staking an ownership claim to the city and amplifying the artistic vision of the city’s poorest residents.<sup>371</sup> Like breakdancers and rappers, writers often worked in crews such as the FX Crew or the X-MEN,<sup>372</sup> reflecting the importance of community, notwithstanding a commitment to individual agency. Even more, alongside serving as a forum for personal expression through art, crews often engaged in political expressions with murals that spoke to contemporary issues of social and economic injustice. Thus, graffiti artists worked to change their built environment by amplifying the creative vision of community residents and resisting the legal boundaries established by non-community ownership over land and infrastructure.

The vision of solidarity and community ownership reflected by the graffiti arts movement parallels similar efforts to promote solidarity economies through housing cooperatives. Cooperative economics has a long history in the United

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368. Goldstein, *supra* note 365.

369. *What Graffiti Means to a Community*, L.A. POLICE DEP’T, [http://web.archive.org/web/20210309104136/https://www.lapdonline.org/get\\_informed/content\\_basic\\_view/23481](http://web.archive.org/web/20210309104136/https://www.lapdonline.org/get_informed/content_basic_view/23481) [https://perma.cc/8LSS-WKZD] (last visited Nov. 24, 2022) (discussing the implementation of programs such as the Police Assisted Community Enhancement Program (PACE) in Los Angeles).

370. Goldstein, *supra* note 365.

371. Dimitri Ehrlich & Gregor Ehrlich, *Graffiti in Its Own Words*, N.Y. MAG (June 22, 2006), <https://nymag.com/guides/summer/17406/> [https://perma.cc/LJ8K-L4XV] (“[I]t’s safe to place the origins of a New York style in the late sixties, as a younger generation’s artistic response to the public protests of the Black Power and civil-rights movements.”).

372. See *New York City Graffiti Crews*, @149ST: THE CYBER BENCH, <http://www.at149st.com/crews.html> [https://perma.cc/JNU8-RWUK] (last visited Nov. 24, 2022).



States, particularly in marginalized communities where business owners often collaborated to survive discrimination in the marketplace.<sup>373</sup> For example, in the housing sector, co-partnership and cooperative structures emerged between the first and second World Wars during the era of Jim Crow racial apartheid.<sup>374</sup> By structuring property ownership under the framework of a democratically governed and collectively owned corporate entity (often a non-profit) with individuals as members, the cooperative enabled residents to earn equity while preserving affordability and co-management. By 1925, housing cooperatives had developed in sixteen cities across the United States, empowering many industrial laborers to own housing units in apartment buildings and fend off slumlords and speculative developers.<sup>375</sup> The ownership structure challenged the traditional capitalist model of private property ownership, and perhaps as a result, gained slow traction. But New York City emerged as an early leader by passing the Limited Profit Housing Companies Act (known as Mitchell-Lama) in 1955.<sup>376</sup> The program developed 269 limited-equity cooperative housing developments (LECs) with over 105,000 cooperatively owned apartments that were designed to attract low- to middle-income residents via household income restrictions. Further, it sought to maintain long-term affordability via limitations on equity at resale.<sup>377</sup> By 1984, during the early years of hip-hop culture, there were upwards of 247,000 cooperative units across New York City.<sup>378</sup>

Cooperative entities were also instrumental in helping low-income communities combat displacement during the era of urban renewal. For example, in 1959, residents of Cooper Square in the lower east side of Manhattan formed the Cooper Square Committee (CSC) to fight urban renewal plans that threatened

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373. See Keane Bhatt, *Dangerous History: What the Story of Black Economic Cooperation Means for Us Today*, YES! MAG. (Oct. 7, 2015), <https://www.yesmagazine.org/economy/2015/10/07/dangerous-history-what-the-story-of-black-economic-development-means-for-us-today> [<https://perma.cc/4EEY-FAZQ>] (discussing how cooperatives as an economic model has been used for centuries by various groups to “change society and bring prosperity to the whole group”).

374. See Kristin M. Szylyvian, *Industrial Housing Reform and the Emergency Fleet Corporation*, 25 J. URB. HIST. 647, 647–49 (1999).

375. See *id.* at 648; see also Sukumar Ganapati, *Enabling Housing Cooperatives: Policy Lessons from Sweden, India and the United States*, 34 INT’L J. URB. & REG’L RSCH. 365, 369 (2010) (“Cooperatively owned buildings had been erected in 16 cities by 1925, including Chicago, Detroit, Buffalo, San Francisco, and Philadelphia (Sieglar and Levy, 1986; Bailey, 1988). However, New York surpassed the other cities—over half of the cooperatives were located there in 1930. These cooperatives were mainly tenure cooperatives, associated with upper-class as well as labor housing.”).

376. See Cait Etherington, *The History of Mitchell-Lama Housing: See New Waiting Lists Openings*, CITY REALTY (Dec. 17, 2019), <https://www.cityrealty.com/nyc/market-insight/features/get-to-know/the-history-mitchell-lama-housing-see-new-waiting-lists-openings/19562> [<https://perma.cc/JU8K-DG9K>]; see also N.Y. STATE, *Mitchell-Lama Program*, <https://hcr.ny.gov/ml> [<https://perma.cc/V9P4-V9UW>] (last visited Nov. 24, 2022) (“The Mitchell-Lama Program provides housing across New York State that is affordable to the middle class.”).

377. See N.Y. STATE, *supra* note 376.

378. See Rosemarie Maldonado & Robert D. Rose, *The Application of Civil Rights Laws to Housing Cooperatives: Are Co-Ops Bastions of Discriminatory Exclusion or Self-Selecting Models of Community-Based Living?*, 23 FORDHAM URB. L.J. 1245, 1246 (1995).

to destroy low-income neighborhoods and push out legacy residents.<sup>379</sup> After years of intense rivalry with dominant cultural views of urban development, in 1970, CSC pressured the New York City Board of Estimate to adopt CSC's development proposal.<sup>380</sup> While the plan would ultimately be stalled due to funding shortfalls, CSC continued to advocate for equitable community development over the years.<sup>381</sup>

By the 1990s, once it became clear that federal and local governments were shifting responsibility for urban development to private developers, CSC formed the Cooper Square Mutual Housing Association (MHA), a housing cooperative comprised of twenty-two buildings in the area.<sup>382</sup> The David Dinkins mayoral administration played an important role in providing resources for Cooper Square MHA to make early renovations to the housing stock.<sup>383</sup> In 1994, Cooper Square MHA formed the Cooper Square HDFC Community Land Trust.<sup>384</sup> This hybrid model, with the community land trust owning the land beneath the cooperatively-owned properties, has enabled the community organization to ensure that the land will not be sold to speculators. Further, it has allowed the housing stock to remain affordable for the foreseeable future. Recently, the cooperative was selected to receive a portion of \$1.65 million (alongside three other groups) from the Enterprise Community Partners' Community Land Trust Capacity Building Initiative to assist with future development.<sup>385</sup>

#### CONCLUSION

“[T]he South Bronx, as crucial to an understanding of American urban life as a visit to Auschwitz is crucial to an understanding of Nazism.”

— New York Times, 1997<sup>386</sup>

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379. See *Introduction*, COOPER SQUARE MUT. HOUS. ASS'N, <http://csmha.org/wordpress/about-us/introduction/> [https://perma.cc/J6DZ-GB98] (last visited Nov. 24, 2022).

380. *Our Historical Accomplishments*, COOPER SQUARE COMM., <https://coopersquare.org/about-us/our-historical-accomplishments> [https://perma.cc/2K37-JJFW] (last visited Nov. 24, 2022).

381. See *id.*

382. See *id.*

383. See GREEN & HANNA, *supra* note 340, at 47.

384. *Formation of the Community Land Trust (Formed in 1994)*, COOPER SQUARE MUT. HOUS. ASS'N, <http://csmha.org/wordpress/about-us/formation-of-the-community-land-trust-formed-in-1994/> [https://perma.cc/342N-RDUE] (last visited Nov. 24, 2022).

385. See Abigail Savitch-Lew, *City Dips Toe into Funding Community Land Trusts*, CITY LIMITS (July 19, 2017), <https://citylimits.org/2017/07/19/city-dips-toe-into-funding-community-land-trusts/> [https://perma.cc/6FZS-SLV4].

386. Editorial, *The Trip to the Bronx*, N.Y. TIMES, Oct. 6, 1977, at A26, <https://www.nytimes.com/1977/10/06/archives/the-trip-to-the-bronx.html> [https://perma.cc/M8UD-CNG5].

In the final verse of *The Message*, Melle Mel brings the listener full circle, reminding us that the urban poor are first and foremost prisoners of poverty, second-class citizens relegated to a world where: “You’ll grow in the ghetto living second-rate / And your eyes will sing a song called deep hate.”<sup>387</sup> Even more, the ghetto poor are survivors of neglect. In a world with limited health care and public assistance, ghetto residents come to “admire all the number-book takers / Thugs, pimps and pushers and the big money-makers / Driving big cars, spending twenties and tens . . . wanna grow up to be just like them.”<sup>388</sup> These metonyms of the Black urban ghetto reveal the mundanity of thriving *while* barely surviving the police. Youth in such environments learn to idolize criminal and socially disruptive behavior not because they are overwhelmed by a culture of poverty that dulls their senses, but because they grow attuned to the tools at their disposal for survival in a hostile world.<sup>389</sup>

Finally, we are reminded that the ghetto poor are victims of circumstance, people who often “wind up droppin’ outta high school . . . unemployed, all null and void / Walking ‘round like . . . Pretty Boy Floyd.”<sup>390</sup> This sad ending to *The Message* can be interpreted as both a warning to society and a call for change, as Melle Mel describes the outcome for such victims:

Now your manhood is took and you’re a Maytag  
Spend the next two years as a undercover ff[\*]g  
Being used and abused to serve like hell  
‘Til one day you was found hung dead in the cell  
It was plain to see that your life was lost  
You was cold and your body swung back and forth.<sup>391</sup>

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387. *The Message*, *supra* note 1, at 05:00.

388. *Id.* at 05:10.

389. See Christian D. Rutherford, “Gangsta” Culture in a Policed State: The Crisis in Legal Ethics Formation Amongst Hip-Hop Youth, 18 NAT’L BLACK L.J. 305, 312–13 (“[Y]outh in these circumstances don’t commit crime because they are ‘looking for trouble’ but rather the exercise of violence is part of their everyday existence and, therefore, the behavior cannot be deemed so easily as unreasonable.”).

390. *The Message*, *supra* note 1, at 05:27.

391. *Id.* at 05:38. Here, the phrase “your manhood” in these lyrics reveals a desire to assert Black male subjectivity in contrast to historic constructions of Black male identity. See PERRY, *supra* note 11, at 118–19. See also DARRELL DAWSEY, LIVING TO TELL ABOUT IT: YOUNG BLACK MEN IN AMERICA SPEAK THEIR PIECE, at xii (1996) (“Our humanity has been stripped, restored, attacked, defended, impugned and explained in literature more often than we’d like to recall. We have been hyped and stereotyped, valorized and demonized.”). From Melle Mel’s lyrics, we come away with a sense that Black masculinity has been stolen from the Black man. See PERRY, *supra* note 11, at 120 (“If one thinks of the athlete, the thug, the kinetic entertainer, the idea of the inherent physical ability and intellectual inability, and the hypersexual threat, there emerges an obsession with and the observation, parody, and mutilation of [B]lack male bodies.”); bell hooks, *Feminism Inside: Toward a Black Body Politic*, in BLACK MALE: REPRESENTATIONS OF MASCULINITY IN CONTEMPORARY AMERICAN ART 127, 127 (1994) (contending that “every movement for [B]lack liberation in this society, whether reformist or radical, has had to formulate a counter-hegemonic discourse of the body to effectively resist [W]hite

This final verse of *The Message* reminds us of the dangers of criminalizing poverty. In this case, the urban poor are subjected to prison rape and other forms of physical and mental abuse behind bars, which, in the worst case scenario, leads to suicide, the foremost cause of death for imprisoned people.<sup>392</sup> Such was the outcome for Kalief Browder, a Black youth from the Bronx who died by suicide in 2015 after being held in solitary confinement for two years at Rikers Island for allegedly stealing a backpack.<sup>393</sup> Youths like Kalief Browder who fall prey to the challenges of the Black urban ghetto too often become mere examples of America's unjust system, their name another hashtag on social media, and their story another line to the growing chorus of a "sad, sad song / Of how you lived so fast and died so young," as Melle Mel tells us.<sup>394</sup>

As this Article has argued, the political response to the growth of Black urban ghettos in New York City during the emergence of hip-hop culture was influenced by cultural theories of poverty and crime that embedded racial stereotypes and biases about low-income Black people. As politicians bemoaned the proliferation of "crack babies" and "welfare queens"—political tropes that embedded racial stereotypes—they allowed White supremacist cultural views to craft racist poverty and crime control laws that did little to address the hardships that urban residents endured. The hegemony of White supremacist cultural views about low-income Black urban neighborhoods also crowded out Black cultural expressions of democratic life. Thus, even as hip-hop culture demonstrated a yearning for communitarianism, solidarity economies, and economic democracy in urban development regimes, law and public policy favored neoliberal and market-centric political economic structures.

This Article has clarified the emergence of hip-hop culture as a type of collective action amidst the rivalrous forces of White supremacist culture in the cultural commons. Like the classic *Tragedy of the Commons* allegory, when Black cultural expressions of democratic life are excluded from consideration in the marketplace of cultural ideas, rivalry sets the stage for tragedy. In the case of Black urban ghettos during the emergence of hip-hop culture, the tragedy manifested itself as laws and public policies that did not serve the cultural needs, interests, or preferences of Black communities, but instead pathologized their plights.

As cities explore ways to promote equitable development in our modern age, it will be important to consider how progressive urban development

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supremacy"). Thus, hip-hop music emerges as "a space of transgression" to reclaim and redefine Black manhood through historical reckonings and political imaginings. See PERRY, *supra* note 11, at 122.

392. See Prison Rape Elimination Act, 34 U.S.C. § 30301 ("[E]xperts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.").

393. See AISHA PURVIS, STORIES FROM SOLITARY CONFINEMENT: KALIEF BROWDER (2019).

394. *The Message*, *supra* note 1, at 05:54.

strategies promote democratic cultural discourse and make room for diverse articulations of democratic life. Unfortunately, countercultural views have been largely ignored by local governments due to racial stereotypes and cultural biases. If local governments take seriously the radical vision of marginalized citizens as an expression of democratic cultural discourse—such as recent calls for police abolition—they will develop laws and public policies that are responsive to the democratic cultural values, needs, and preferences of their city’s residents.<sup>395</sup>

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395. See generally SUSAN S. FAINSTEIN, *THE JUST CITY* (2010) (calling for a shift from neoliberal policies that favor economic growth at the expense of social policy to progressive policies that prioritize equitable development and citizen participation).