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"Protection for Every Class of Citizens": The New York City Draft Riots of 1863, the Equal Protection Clause, and the Government's Duty to Protect Civil Rights

Andrew J. Lanham*

This Article examines an important but little-noticed moment in the intellectual history of the Equal Protection Clause: the New York City draft riots of 1863. In mid-July of that year, New York was engulfed by a weeklong riot against the Union military draft, as mobs of predominantly working-class white men beat and murdered Black New Yorkers, looted and burned stores and government buildings, and battled the police in the streets. The scale and intensity of the violence foreshadowed the white supremacist terrorism that subsequently consumed the postwar South. In the wake of the draft riots, though, New York City embarked on a remarkable project of remediation, mobilizing a variety of legal processes as it prosecuted rioters, paid civil damages to riot victims, raised philanthropic funds to provide free legal aid, charged police officers with dereliction of duty, and published extensive volumes of witness testimony to build a record of the events. Those measures anticipated the wider legal efforts at racial redress that were made during Reconstruction*, and they also resonate with urgent debates about civil rights protections, racial justice, and police accountability today.*

Crucially, moreover, as this remedial process unfolded in New York, a powerful discourse of equality took shape, and it sheds new light on the meaning of the Equal Protection Clause. In particular, it demonstrates that the idea of equal protection in 1863 included affirmative duties for the government to protect its people against harms caused by private parties, which stands in sharp contrast to the limitations on equal protection law set by the modern state action doctrine. Republican leaders in New York City, for example, promised to "protect" Black New Yorkers' "full and equal right[s]" and "call[ed] upon the proper

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authorities to take immediate steps to afford them such protection," while the Board of Police Commissioners charged one of its own officers, Sergeant Jones, with failing to provide "protection for every class of citizens[,] black or white, rich or poor," during the draft riots. Sergeant Jones's trial was then covered in the press under the front-page headline "Equal Protection Under the Law," directly linking the affirmative duty to guarantee "protection for every class of citizens" with the "Equal Protection" vocabulary that would be written into the Fourteenth Amendment just over two years later. Rereading the Fourteenth Amendment in the context of the New York City draft riots, this Article therefore argues that the state action doctrine is an anachronism and that a much broader vision of equality, equal rights, and antidiscrimination law resides within the Equal Protection Clause.

Introduction 1069
I. "The Atheist Roar of Riot": Racial Violence and the Draft Riots of 1863 1074
A. Military Crisis and the Conscription Act of 1863 1074
B. Days of "Infamy and Disgrace": The Draft Riots and Anti-Black Violence 1078
II. "An Officer Refuses to Protect" Black New Yorkers "and is Hauled Up Therefor": Public Reckoning, Police Accountability, and the Trial of Sergeant Jones 1084
A. "Delinquent and Traitorous Policemen": Accountability after the Draft Riots 1084
B. Mortimer Thomson, the Antislavery Movement, and the Trial of Sergeant Jones 1087
C. "Doesticks" Takes the Stand 1091
III. "Suffering from the Late Riots": Race and Remediation in Wartime New York 1095
A. Private Philanthropy, Legal Aid, and "Equal Rights" 1096
B. The City Government, the Legal Process, and Public Redress 1102
C. The Press, the Public Sphere, and the Discourse of "Equal Protection" 1105
IV. "Protection for Every Class of Citizens": The Draft Riots, the Equal Protection Clause, and the Doctrine of State Neglect 1109
A. Pre-Ratification Precedent for Enforcing a State Neglect Model of Equal Protection 1111
B. Judicial Enforcement of the State Neglect Doctrine 1112
C. "Protection" as both Access to Judicial Remedies and an 1114
Affirmative Governmental Duty to Act 1114
Conclusion 1117

INTRODUCTION

On August 7, 1863, Sergeant Jones, of the Twenty-Ninth Precinct of the New York Metropolitan Police, was charged by the New York City Board of Police Commissioners with dereliction of duty during the draft riots in July.[1] His trial lasted just two days, and it has been largely forgotten in the vast literature on the social, legal, and political upheavals of the Civil War.[2] The available sources do not even

1. *Police Headquarters*, N.Y. SUNDAY MERCURY, Aug. 9, 1863 [hereinafter *Police Headquarters*, Aug. 9]. On the history of the draft riots, see generally ADRIAN COOK, THE ARMIES OF THE STREETS: THE NEW YORK CITY DRAFT RIOTS OF 1863 (1974); IVER BERNSTEIN, THE NEW YORK CITY DRAFT RIOTS (1990); BARNET SCHECTER, THE DEVIL'S OWN WORK: THE CIVIL WAR DRAFT RIOTS AND THE FIGHT TO RECONSTRUCT AMERICA (2005); LESLIE M. HARRIS, IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626–1863, at 263–88 (2003).

2. *Police Headquarters*, Aug. 9, *supra* note 1; *Police Headquarters*, N.Y. SUNDAY MERCURY, Aug. 16, 1863 [hereinafter *Police Headquarters*, Aug. 16]; *A Police Trial*, N.Y. TRIB., Aug. 18, 1863 [hereinafter *A Police Trial*]. The only references to the trial I have found are a single sentence in COOK, *supra* note 1, at 207, a brief quotation from a newspaper headline about the trial in ERIC FONER, THE SECOND FOUNDING 79 (2019), and a quotation of Foner's description in ILAN WURMAN, THE SECOND FOUNDING 89 (2020). Both Foner and Wurman view the draft riots, as I do, as a relevant

record the final verdict. But Sergeant Jones's trial nevertheless contains a surprising story about the intellectual history of the Fourteenth Amendment and the idea of equality in the United States. During the proceedings, amid a widespread and multifaceted public discourse about reconstructing New York City in the wake of the draft riots, a series of government officials and private individuals argued that the government was obligated to take affirmative steps to protect its people, equally, against harms committed by private parties. Some even went so far as to label this governmental duty "Equal Protection"—a striking choice of words given the centrality that phrase has taken on in the 160 years since.[3]

Such affirmative governmental duties, of course, are starkly incompatible with modern equal protection law, which, under the state action doctrine, holds that only state action—not state inaction, nor private action—can violate the Equal Protection Clause.[4] In contrast to the state action doctrine, the discourse of equality that circulated in New York City in 1863 suggests that the concept of "Equal Protection" that existed at the time also required states to take affirmative steps to protect everyone within their jurisdictions from discriminatory harms caused by private parties. On this model, state *inaction* in the face of some *private* action would also fall within the scope of the Equal Protection Clause. Sergeant Jones's trial therefore holds out a more expansive vision of equality, civil rights, and antidiscrimination law than modern doctrine allows.

The complaining witness at Sergeant Jones's trial was Mortimer "Doesticks" Thomson, a nationally famous satirical writer who had also published a widely read exposé of a notorious slave sale in Savannah, Georgia, in 1859.[5] At the trial, Thomson alleged that during the five days of rioting in New York City in mid-July, as mobs of predominantly working-class white men burned down buildings, battled the police, and hunted Black citizens through the streets, Thomson had escorted a Black woman to the Twenty-Ninth Precinct so that she could take shelter in the police station. But Sergeant Jones refused to let her in.[6] Instead, Thomson claimed, with a rhetorical flourish fit for his Sunday column, Sergeant Jones had "turned" her out "into the street with the mob waiting and thirsting as it were for her blood."[7]

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context for reading the Equal Protection Clause. But this Article offers both the first in-depth account of Sergeant Jones's trial and the first extensive analysis of the larger remedial discourse in New York City as a key background for the Fourteenth Amendment.

3. *Equal Protection Under the Law*, NAT'L ANTI-SLAVERY STANDARD, Aug. 29, 1863.

4. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 10–11 (1883); DeShaney v. Winnebago County, 489 U.S. 189, 194–203 (1989); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 619 (1991); *see generally* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 1–7 (2011).

5. *Police Headquarters*, Aug. 9, *supra* note 1; *see Obituary: Mortimer Thomson—"Doesticks*,*"* N.Y. TIMES, June 26, 1875; *Obituary: Mortimer Thomson*, N.Y. HERALD, June 26, 1875, at 10; Mortimer Thomson, *A Great Slave Auction*, N.Y. TRIB., Mar. 9, 1859. The *Sunday Mercury* spelled it "Thompson," but most nineteenth-century sources used "Thomson," so I've adopted the latter spelling except when quoting directly from the *Mercury*.

6. *A Police Trial*, *supra* note 2.

7. *Police Headquarters*, Aug. 9, *supra* note 1. There is no official transcript of Sergeant Jones's trial, so all quotations from the trial that are used in this Article come from newspaper stories. Those stories, of course, do not provide a perfect record of what was said at the trial. But I nonetheless place interpretive weight on the statements that were reportedly made at the trial because they likely reflect much of what was said, and at the very least, they reflect what the wider public was told occurred.

Despite his polemical language, Thomson asserted that "he had not brought the charge out of any ill feeling whatever toward Sergeant Jones, but merely to settle the principle, should any similar emergency arise in the future, whether colored people should or should not be protected in station houses."[8] The trial was thus a test case,[9] brought by a prominent antislavery activist,[10] to determine whether the police were obligated to "protect[]" Black New Yorkers equally.[11]

The Board of Police Commissioners ruled that they were. Thomas Acton, the President of the Board and one of New York City's leading Republicans, stated:

> [H]e wished it to be distinctly understood that the stationhouses of the city were places of refuge and protection for every class of citizens—black or white, rich or poor, high or low; and that they should there be protected to the full extent of the power in the hands of the Commissioners.[12]

Mortimer Thomson had gotten his equality "principle" on the books: The police were required to wield their "power" to its "full extent" in order to "protect[] . . . every class of citizens" regardless of race, wealth, or status, and police officers could be liable if they neglected that duty.[13]

The press quickly amplified the ruling. The *New York Tribune* reported on Sergeant Jones's trial under the headline "An Officer Refuses to Protect Colored People, and is Hauled up Therefor," while the *National Anti-Slavery Standard*, the weekly publication of the American Anti-Slavery Society, reprinted the *Tribune*'s article with the front-page headline "Equal Protection Under the Law."[14] Less than three years later, of course, Congress drafted the Fourteenth Amendment, with its guarantee of "the equal protection of the laws."[15] We have been fighting over the meaning of that phrase ever since.[16]

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8. *Police Headquarters*, Aug. 16, *supra* note 2. In the late nineteenth century, Black civil rights activists like Frederick Douglass, as well as white antislavery activists like Mortimer Thomson, used the term "colored" as a respectful adjective to refer to race, without the term's modern derogatory connotations. When Douglass denounced the racial violence of the draft riots, for example, he wrote that "colored men of New York" had been "scourged and driven from their homes." Frederick Douglass, *Letter from Frederick Douglass*, ANGLO-AFRICAN, Aug. 1, 1863; *see also* COLORED CONVENTIONS PROJECT, https://coloredconventions.org/ (providing a digital archive of "Colored Conventions," which were "[a] cornerstone of Black organizing in the nineteenth century"). As a result, throughout this Article, I reproduce quotations exactly, for historical accuracy, but outside of such quotations, I use "Black" or "African American" to refer to Black individuals' race.

9. *See Police Headquarters*, Aug. 16, *supra* note 2; *see also A Police Trial*, *supra* note 2 ("The complainant said he wished it to be distinctly understood that he brought this complaint from no wish to persecute any special individual . . . but complainant wished to have the matter decided, once for all, by the proper tribunal . . . [so] that, after this, citizens may know what to expect, and officers what to do.").

10. *See Obituary: Mortimer Thomson*, *supra* note 5.

11. *Police Headquarters*, Aug. 16, *supra* note 2.

12. *Id.*; SCHECTER, *supra* note 1, at 133.

13. *Police Headquarters*, Aug. 16, *supra* note 2; *A Police Trial*, *supra* note 2.

14. *A Police Trial*, *supra* note 2; *Equal Protection Under the Law*, *supra* note 3.

15. U.S. CONST. amend. XIV; ERIC FONER, RECONSTRUCTION 251–61 (1988); LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION 106–08 (2015).

16. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Grutter v. Bollinger, 539 U.S. 306 (2003); Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 143 S. Ct. 2141 (2023);

The name of the Black woman who was involved in Sergeant Jones's case has, unfortunately, been lost to history. Mortimer Thomson did not testify about her in any detail, and she did not appear in court herself. "What became of her," the *Tribune* reported, "is not known."[17] There is therefore a gap in the archive where her voice—her testimony, her framing of her own experience—rightly ought to be.[18] Still, the legal injury she suffered gave rise to a historically significant precedent: the temporal proximity between Sergeant Jones's trial in 1863 and Congress's proposal of the Fourteenth Amendment in 1866, along with the strikingly similar language that was used in both, makes Sergeant Jones's case a compelling gloss on the idea of equal protection just before the Equal Protection Clause was introduced. The fact that Sergeant Jones's case was brought by a leading antislavery activist and was covered in both the mainstream Republican and the abolitionist press makes the trial an even more important window into the vernacular understanding of equality on the very eve of Reconstruction. But that vision of equal protection diverges from the law today, which generally does not apply the Equal Protection Clause to private action or state inaction,[19] implying that the modern state action doctrine is an anachronism. The history of the draft riots demonstrates, instead, that under at least one theory that was current in the mid-1860s, state officials like Sergeant Jones could violate the principle of equal protection if they failed to act and were indifferent to certain kinds of harms caused by private parties.

A number of other scholars over the years have argued that the Equal Protection Clause creates just such affirmative obligations for the government.[20] Pamela Brandwein, in particular, aptly calls this the "state neglect" doctrine: the theory that the Equal Protection Clause, along with Section 5 of the Fourteenth Amendment, allows the U.S. Congress to protect individuals against rights violations caused by private actors when state governments fail to act.[21] A leading casebook has also taken up Brandwein's "state neglect" vocabulary.[22] This Article builds on that tradition of scholarship by arguing that the New York City draft riots

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Aziz Z. Huq, *Equality's Understudies*, 118 MICH. L. REV. 1027 (2020) (reviewing ROBERT L. TSAI, PRACTICAL EQUALITY (2019)).

17. *A Police Trial*, *supra* note 2.

18. Social, political, and cultural historians have long recognized the ways that Black voices, women's voices, and especially Black women's voices have been silenced in the archive by the same forces that repressed them during their lifetimes, and historians have developed a variety of techniques to read the archive against the grain. *See, e.g.*, MICHEL-ROLPH TROUILLOT, SILENCING THE PAST (1995); MARISA J. FUENTES, DISPOSSESSED LIVES: ENSLAVED WOMEN, VIOLENCE, AND THE ARCHIVE 1–3 (2016); Saidiya Hartman, *Venus in Two Acts*, 12 SMALL AXE 1 (2008); SAIDIYA HARTMAN, WAYWARD LIVES, BEAUTIFUL EXPERIMENTS (2019).

19. *See supra* note 4 and accompanying text.

20. *E.g.*, Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1353–60 (1964); Michael G. Collins, *Justice Bradley's Civil Rights Odyssey Revisited*, 70 TUL. L. REV. 1979 (1996); BRANDWEIN, *supra* note 4, at 12–14; FONER, *supra* note 2, at 79; RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 320–21 (2021).

21. BRANDWEIN, *supra* note 4, at 12–14; U.S. CONST. amend. XIV, § 5.

22. SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR, REVA B. SIEGEL & CRISTINA M. RODRÍGUEZ, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 432–33 & n.84 (8th ed. 2022) (citing BRANDWEIN, *supra* note 4, for the "state neglect" theory).

of 1863 represent another key context for interpreting the Fourteenth Amendment and bolster the argument for the state neglect theory.

The draft riots strengthen the case for the state neglect doctrine in three ways. First, while the evidence for federal enforcement of a state neglect doctrine mainly comes from congressional debates over the Ku Klux Klan Act of 1871 and a series of court cases in the 1870s,[23] all of which post-dated the Fourteenth Amendment, Sergeant Jones's trial offers a pre-ratification precedent for enforcing a state neglect theory against the government.[24] Second, while most proponents of the state neglect theory argue that Section 5 of the Fourteenth Amendment grants Congress expansive enforcement powers against certain kinds of private conduct,[25] leaving enforcement largely to the political branches, Sergeant Jones's trial suggests that states and state officers can also be held liable by courts if they neglect to protect civil rights. Determining the precise contours of such liability lies outside the scope of my historically focused inquiry here, but it could mean that governments and their officers might be subject to equitable relief or damages for state neglect.[26] Third, Sergeant Jones's trial and the wider remedial processes that occurred in New York City after the draft riots imply that the governmental duty of "protection" requires a much more active, interventionist state than is advocated by the recent body of originalist scholarship that has likewise read the term "protection" to refer to government regulation of some forms of private conduct.[27]

In addition to reinforcing the state neglect doctrine, the history of the draft riots also offers a compelling case study of how legal processes do—and do not—work to stitch a community back together after mass violence. Besides charging Sergeant Jones, New York City also prosecuted rioters and paid civil damages to riot victims, prioritizing claims made by Black riot victims, while private philanthropists secured free legal aid for the Black community and government agencies and the popular press published extensive volumes of witness testimony, building a record of the events.[28] These various remedial efforts resonate with arguments for both race-conscious remedies and police accountability today, as well

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23. *See id.* at 433; BRANDWEIN, *supra* note 4, at 34.

24. By emphasizing such pre-ratification history, I do not mean to treat the original public meaning or the "original law" of the Fourteenth Amendment as the definitive legal interpretation. *But see* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809 (2019). Rather, I aim to trace the evolution of a public discourse—the ideas that were in the air, so to speak—and to use that history to critique legal doctrine today. *See generally* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE 26 (1996); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). Used in this way, legal history reveals the contingencies of current doctrine, and it offers practical evidence for alternative textual interpretations and doctrinal frameworks.

25. *See, e.g.*, BRANDWEIN, *supra* note 4, at 12–14. *But see* BARNETT & BERNICK, *supra* note 20, at 359–60.

26. For the existing frameworks for legal and equitable relief against governments and government officers, see, for example, 42 U.S.C. § 1983; *Ex Parte Young*, 209 U.S. 123 (1908); and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). *See also* Vicki C. Jackson, *Suing the Federal Government*, 35 GEO. WASH. INT'L L. REV. 521, 524–25 (2003); John F. Duffy, *Sovereign Immunity and the Officer Suit Fiction*, 56 U. CHI. L. REV. 295, 298–99 (1989).

27. *See infra* Section IV.C.

28. *See infra* Part III.

as with attempts to hold anti-government rioters to account.[29] And although Black New Yorkers were ultimately denied the full resources they needed to rebuild their homes and lives, the measures that were undertaken in 1863 still set a powerful example for redress: local Black leaders made key decisions about remediation, the voices of Black New Yorkers featured prominently in public discourse, and city leaders recognized that the disproportionate damage that was suffered by the Black community was rooted in larger structural inequalities.[30] Those practices and ideas were surprisingly egalitarian for their time, and they remain just as essential now. The remedial efforts after the draft riots thus hold both legal and practical import.

This Article examines the draft riots and their aftermath and makes the case for the state neglect doctrine as follows. Part I narrates the New York City draft riots of 1863 and argues that they were fundamentally similar to the white supremacist terrorism that subsequently consumed the postwar South, meaning that the remedial process that unfolded in the wake of the draft riots can also be read productively in tandem with Radical Reconstruction after the Civil War. Part II then uses newspaper accounts to reconstruct Sergeant Jones's trial, while Part III situates that trial within the wider remedial efforts in New York, including criminal prosecutions, civil claims tribunals, the publication of witness testimony, and private philanthropy. Parts I through III take an essentially narrative approach in order to trace the ways that social, legal, and political activists responded creatively to rapidly changing historical circumstances by drawing on and reimagining ready-to-hand concepts like rights protection and equality.[31] Finally, Part IV analyzes the legal implications of this history, arguing that the Equal Protection Clause can and should be read to place affirmative duties on governments to combat certain forms of private discrimination.

I. "THE ATHEIST ROAR OF RIOT": RACIAL VIOLENCE AND THE DRAFT RIOTS OF 1863

A. Military Crisis and the Conscription Act of 1863

In early 1863, the Union was in trouble. The Army of the Potomac had been routed at Fredericksburg the previous December, and in the aftermath, a caucus of Republican senators had pressured President Abraham Lincoln to reorganize his cabinet, creating serious political turmoil in Washington, D.C.[32] Even more disturbing, the army faced a looming shortage of troops. The two-year volunteers who had enlisted in 1861 were finishing up their terms, while the three-year

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29. *See, e.g.*, KATHERINE FRANKE, REPAIR: REDEEMING THE PROMISE OF ABOLITION (2019); ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS (2021); Luke Broadwater, *Bipartisan Senate Inquiry on Capitol Riot Will Begin with Scrutiny of Security Failures*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/02/22/us/politics/senate-hearing-capitol-riot.html [https://perma.cc/D8SC-RGYX].

30. *See infra* Part III.

31. Recent originalist scholarship has emphasized the "original legal meanings" and "known legal concepts" behind constitutional text. *E.g.*, WURMAN, *supra* note 2, at 5–8. My aim in narrating the aftermath of the draft riots, in contrast, is to show how activists pluralistically reinterpreted existing concepts during the messy process of rebuilding a world.

32. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 572–75 (1988).

volunteers only had a year of service left, and with the recent military defeats and the increasing brutality of the war, it was not clear that enough new volunteers would sign up.[33] In addition, over 100,000 soldiers were away without leave, and a series of state-level drafts in 1862 had provoked such intense popular resistance that federal troops had been forced to step in.[34] The morale-boosting Union victories at Gettysburg and Vicksburg still lay months in the future.[35]

Congress therefore passed the Conscription Act on March 3, 1863, to guarantee that the Union would have enough soldiers to continue waging the war. The Act subjected all men between the ages of twenty and forty-five to a new federal draft—unless they paid a $300 commutation fee—and created a muscular new agency, the Provost Marshal's Bureau, with the power to enforce the draft and to arrest draft dodgers, deserters, and suspected spies.[36]

The Conscription Act generated nationwide controversy. By seizing soldiers and giving federal agents criminal jurisdiction over alleged traitors,[37] the Act significantly expanded and centralized federal power at a time when the federal government was just beginning to exercise substantial authority.[38] Many Northerners resented that centralization.[39] The Act also created a glaring class

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33. *Id.* at 322; BERNSTEIN, *supra* note 1, at 7.

34. BERNSTEIN, *supra* note 1, at 7; MCPHERSON, *supra* note 32, at 492–93.

35. MCPHERSON, *supra* note 32, at 664–65.

36. An Act for the enrolling and calling out the National Forces, and for Other Purposes (Conscription Act), ch. 75, §§ 1, 6, 7, 13, 12 Stat. 731(1863). Some have suggested that the Conscription Act didn't apply to African Americans because, although the Act didn't mention race, it only applied to "citizens," so under *Dred Scott*, African Americans weren't citizens subject to the draft. *See* BERNSTEIN, *supra* note 1, at 7–9; Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. But that interpretation appears incorrect. To begin with, the 1862 militia draft explicitly enrolled "persons of African descent" into "the service of the United States, for the purpose of constructing intrenchments, or performing camp service, or any other labor, or any military or naval service for which they may be found competent." An Act to amend the Act calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions, ch. 201. § 12, 12 Stat. 597 (1862); *see also* MCPHERSON, *supra* note 32, at 564. By 1863, therefore, African Americans could serve. Moreover, Attorney General Bates's groundbreaking opinion on *Dred Scott* in 1862 would have brought Black men within the scope of the "citizens" referred to in the Conscription Act of 1863 as a matter of executive-branch legal interpretation. *See Important Opinion of Attorney-General Bates: The Dred Scott Decision Pronounced Void*, N.Y. TIMES, Dec. 16, 1862; *Attorney-General Bates on the Dred Scott Decision*, N.Y. TIMES, Dec. 17, 1862. And most importantly, Black men were in fact enrolled for the draft under the 1863 Act. *See The Draft in Brooklyn*, N.Y. SUNDAY MERCURY, July 12, 1863. It is of course also possible that white Northerners who believed *Dred Scott* was correct would have thought the 1863 Act did not apply to Black men—and would have resented that fact.

37. BERNSTEIN, *supra* note 1, at 7–8.

38. *See* RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877, at 1–3, 135–39 (1991) (describing the expansion of "central state authority" during the Civil War and examining conscription as a tool for state power).

39. EDWARDS, *supra* note 15, at 31–32; BERNSTEIN, *supra* note 1, at 7–9. Southerners despised the Confederate military draft just as much, and according to one historian, "white southerners' skepticism of federal authority" after the war "was as much a product of their experience with the Confederacy as it was of their experience with the U.S. government." EDWARDS, *supra* note 15, at 50–51, 60–63; *see also* BENSEL, *supra* note 38, at 135–38 (analyzing Confederate conscription policy and describing conscription, along with the suspension of habeas corpus, as "the most significant state power-enhancing measures ever adopted by the Confederate state").

divide because anyone who could afford to pay $300 could buy his way out of the war.[40] And the Emancipation Proclamation took effect just two months before the Conscription Act was passed, making it clear that emancipation was one of the war aims for which new draftees would fight and die, and many white potential conscripts rejected that goal.[41]

Indeed, many Northerners thought the Conscription Act was simply unconstitutional—they argued that only the states could conscript soldiers under the militia clauses in Article I—and wide swathes of the white working class, from Boston to Philadelphia to Des Moines, threatened to resist the draft.[42] In New York City, that resistance turned violent, exploding into five days of ferocious rioting from July 13 to July 17, 1863.[43]

Like antebellum America in general, New York City had a long tradition of rioting.[44] There were routine street fights in the city between rival volunteer fire companies and brawls between rival gangs.[45] There was a three-day race riot against African Americans in 1834 on the anniversary of abolition in New York state, as well as a variety of riots over the years against abolitionists.[46] And there was the Astor Place Riot of 1849, which was sparked by a debate between an English actor playing Macbeth at an upper-class theater and an American actor playing Macbeth at a more populist venue and left thirty-one people dead.[47] Even the police in New York City indulged in an occasional riot: in 1857, after the Republican state legislature created the New York Metropolitan Police, the Metropolitans fought a

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40. EDWARDS, *supra* note 15, at 31–32.

41. BERNSTEIN, *supra* note 1, at 7–9; HARRIS, *supra* note 1, at 279–80; MCPHERSON, *supra* note 32, at 563. The resistance to the state-level draft in 1862, for instance, included rioters carrying violently racist banners declaring, among other things, "We won't fight to free the n*****." Robert E. Sterling, Civil War Draft Resistance in the Middle West 96–97 (1974) (Ph.D. dissertation, Northern Illinois University) (ProQuest) (quotation modified); MCPHERSON, *supra* note 32, at 493 & n.7 (quoting Sterling, *supra*, at 96–97).

42. BERNSTEIN, *supra* note 1, at 59; COOK, *supra* note 1, at 139; *The Pennsylvania Decision Against the Conscription Act*, N.Y. TIMES, Nov. 13, 1863; U.S. CONST. art. I, § 8; *id.* art. II, § 2; *id.* amend. II. Akhil Amar still criticizes the constitutionality of the draft based on the militia clauses. AKHIL REED AMAR, THE BILL OF RIGHTS 58–59 (1998).

43. BERNSTEIN, *supra* note 1, at 7–9. The narrative of the draft riots has been well told by Adrian Cook and Iver Bernstein, and my account of the riots in this Section draws substantially on their work.

44. *See* BERNSTEIN, *supra* note 1, at 33; PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 3 (1991); MICHAEL FELDBERG, THE TURBULENT ERA: RIOT AND DISORDER IN JACKSONIAN AMERICA (1980).

45. COOK, *supra* note 1, at 40–41.

46. Linda K. Kerber, *Abolitionists and Amalgamators: The New York City Race Riots of 1834*, 48 N.Y. HIST. 28 (1967); ERIC FONER, GATEWAY TO FREEDOM 10–20 (2015); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY 402–09 (2005). The so-called "Flour Riot" in response to rising food prices also shocked the city in 1837. WILENTZ, *supra*, at 456 & n.1.

47. BERNSTEIN, *supra* note 1, at 5; COOK, *supra* note 1, at 19–27, 30; DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT 433, 638 (2007); Olivia Rutigliano, *In 1849, A Feud Between Two Shakespearean Actors Led to a Massive Riot in New York City*, CRIMEREADS (Jan. 4, 2021), https://crimereads.com/in-1849-a-feud-between-two-shakespearean-actors-led-to-a-massive-riot-in-new-york-city/ [https://perma.cc/Y8A5-BD69].

pitched battle against their predecessors, the Democratic-controlled Municipal Police, on the very steps of City Hall.[48]

Beyond this long-standing social and political practice of rioting, New York City in the 1860s was a powder keg of class differences and racial and religious tensions.[49] Irish Catholic immigrants, most of whom were working class, clashed with Protestants,[50] and the poor, regardless of race or religion, lived in filthy, squalid tenements.[51] The city also leaned Democratic, in contrast to the Republican administration in Washington, D.C.—Irish immigrants were especially attached to the Democrats, who had defended them against nativist Whigs and Know Nothings in the 1850s.[52] In the hot summer of 1863, the Conscription Act, with its expansion of federal power, its harsh class politics, and its emancipatory overtones, lit this powder keg on fire.[53]

The Provost Marshal's Bureau understood this potentially dangerous situation, and it anticipated problems with the draft that July in New York.[54] But there were no troops to spare to help keep the peace because every available unit had been sent south to Gettysburg.[55] There, the Army of Northern Virginia was defeated on July 3, but Union forces remained bogged down in northern Maryland until July 14, chasing after Robert E. Lee.[56] As a result, there were no soldiers free to return to New York City before the draft.[57] Provost Marshal General Fry, in Washington,

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48. COOK, *supra* note 1, at 41. The 1857 law that inaugurated the new police force was part of a sweeping reform project in which the Republican state legislature created a range of new state agencies to administer New York City, thereby disempowering the city's Democratic Common Council and "divesting New York City of many of its traditional public responsibilities." HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 237–39 (1983). When the Democratic city mayor sued the new police commissioners, the New York Court of Appeals upheld the legislature's police power "to rearrange local affairs to suit its own purposes." *Id.* at 237–38; *see* People *ex. rel.* Wood v. Draper, 15 N.Y. 532, 541–45 (1857). This 1857 administrative reorganization also marked an important step in the rise of the modern American regulatory state, as it used independent agencies for police powers regulation and local governance. *See* NOVAK, *supra* note 24, at 228–29; RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896, at 197 (2017) (describing how the New York state legislature governed New York City at a distance by imposing "independent commissions" on the city).

49. *See generally* COOK, *supra* note 1, at 19–46 (examining class tensions, racial violence, and religious conflict in New York City in the lead-up to the draft riots); BERNSTEIN, *supra* note 1, at 8 (noting that the draft exacerbated "three explosive issues in mid-century New York City: relations between the wealthy and the poor, between blacks and whites, and between the city and the nation").

50. *See* COOK, *supra* note 1, at 21–22, 30–31 (discussing the history of ethnic and religious clashes in New York City); *see also* BERNSTEIN, *supra* note 1, at 6, 23–24 (discussing the role of Irish Catholic workers in the draft riots).

51. COOK, *supra* note 1, at 3–17.

52. BERNSTEIN, *supra* note 1, at 10; DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 243–46 (1977).

53. COOK, *supra* note 1, at 2–14, 195, 203. Newspapers reported deaths from "sunstroke" throughout August. *E.g.*, *Weekly Mortality*, N.Y. TRIB., Aug. 18, 1863, at 3.

54. BERNSTEIN, *supra* note 1, at 12–13.

55. *Id.*

56. *Id.*; MCPHERSON, *supra* note 32, at 655–64.

57. COOK, *supra* note 1, at 54 (noting not only that "[t]he New York militia regiments were not yet back" when the draft began, but that "the discipline and authority of the police were suffering from [Democratic] Governor Seymour's attempt to remove the commissioners, who were all Republicans").

therefore advised Colonel Robert Nugent, his subordinate in New York, to hold the draft one congressional district at a time so that the handful of soldiers and police who were in the city could suppress any resistance that did crop up.[58] Nugent duly began the draft on the morning of Saturday, July 11, in the upper wards of Manhattan, leaving the poorer lower wards, where trouble was supposedly more likely to occur, for the following week.[59]

B. Days of "Infamy and Disgrace": The Draft Riots and Anti-Black Violence

The draft went relatively smoothly on July 11 at the Ninth District draft office at Forty-Sixth and Third.[60] John Kennedy, the Superintendent of Police, was there with a substantial force of men, while a large, somewhat restive crowd looked on as a clerk wearing a blindfold drew names from a hopper.[61] By the end of the day, 1,236 men had been drafted.[62] The crowd then dispersed, and Superintendent Kennedy declared that "the Rubicon was passed and all would go well."[63]

But his hope was premature. Over the weekend, tensions grew, especially among the city's volunteer firefighters.[64] Firefighters had been exempted from state militia service, but they were not exempt from the federal draft, and a number of members of the Black Joke Engine Company had been conscripted on Saturday.[65] They decided to resist.[66] So, on the morning of Monday, July 13, back at the Ninth District draft office, the Black Joke drove off a small squad of policemen, broke into the office, smashed all the furniture, doused the place in turpentine, and burned it down.[67] A Copperhead lawyer named John U. Andrews gave a vehement anti-war speech to the crowd as the draft office went up in flames.[68]

During the rest of the day on July 13, mob violence, driven substantially by Irish Catholic laborers, consumed the city.[69] Herman Melville, recently returned to

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58. BERNSTEIN, *supra* note 1, at 12–13.

59. COOK, *supra* note 1, at 54–58.

60. *Id.* at 55; *The Mob in New-York*, N.Y. TIMES, July 14, 1863 ("The initiation of the draft on Saturday in the Ninth Congressional District was characterized by so much order and good feeling as to well-nigh dispel the forebodings of tumult and violence which many entertained in connection with the enforcement of the conscription in this City.").

61. COOK, *supra* note 1, at 55.

62. *Id.*

63. *Id.*

64. *Id.* at 55–56; BERNSTEIN, *supra* note 1, at 13.

65. COOK, *supra* note 1, at 55–56.

66. *Id.* at 56.

67. *Id.* at 56–57.

68. *Trial of John W. Andrews*, N.Y. TIMES, May 25, 1864; *Recollections of the Riot—Andrews*, NAT'L ANTI-SLAVERY STANDARD, Oct. 17, 1863, at 2; *The Doings of a City Mob*, N.Y. TIMES, Feb. 10, 1884; BERNSTEIN, *supra* note 1, at 18. Some sources use the name "John W. Andrews," but it appears that "John U. Andrews" was the name used at his trial. *See Trial of John W. Andrews*, *supra* (using the name "John W. Andrews"); *The Doings of a City Mob*, *supra* (using the name "John U. Andrews"); U.S. Circuit Court for the Southern District of New York, 1 Criminal Dockets 3/12–3/14 (Feb. 27, 1864) (National Archives and Records Administration, Record Group 21, Series: Criminal Dockets, 1853–July 31, 1911) (recording guilty verdict for "John U. Andrews"). Other historians also render it as "John U. Andrews." *See* BERNSTEIN, *supra* note 1, at 18; COOK, *supra* note 1, at 60.

69. BERNSTEIN, *supra* note 1, at 20–24. On the demographics of the rioters throughout the week, see COOK, *supra* note 1, at 196.

New York after thirteen years at Arrowhead farm, pungently called it "the Atheist roar of riot," and the *New York Times* declared on July 14 that it had been "a day of infamy and disgrace."[70] It only got worse from there.

The rioters initially targeted the draft offices, seeking to destroy conscription records and effectively undo the draft, and they struck out at other symbols of federal power and the Republican Party, too.[71] They burned down the Eighth District draft office, and they briefly overran the office of the pro-war *New York Tribune*, managing to set it on fire before the police retook it and put out the flames.[72] The *Tribune*'s staff then fortified themselves with Howitzers and hand grenades while the *Times*, in its office across Printing House Square, installed a trio of Gatling guns borrowed from the Army.[73]

The riots became more sharply racialized in the early evening of July 13, when rioters looted and burned the Colored Orphan Asylum on Fifth Avenue, which housed around 230 children.[74] One historian, in fact, distinguishes two phases of the riots: the first day, which was aimed at stopping the draft, and the following four days, which devolved into a more general rampage against African Americans and white abolitionists.[75] Even if such a clear line cannot be drawn, the riots did intensify during the rest of the week, from Tuesday, July 14, until they ended on Friday, July 17.[76] And the mob did increasingly target white abolitionists and Black New Yorkers: the home of the abolitionist Gibbons family, for instance, was looted and burned, and rioters hunted Horace Greeley, the famously antislavery editor of the *Tribune*, throughout the city.[77]

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70. Herman Melville, *The House-Top. A Night Piece*, *in* WORDS FOR THE HOUR (Faith Barrett & Cristanne Miller eds., 2005); ANDREW DELBANCO, MELVILLE 274–75 (2013); *The Mob in New-York*, *supra* note 63.

71. BERNSTEIN, *supra* note 1, at 18–21; HARRIS, *supra* note 1, at 280; *The Mob in New-York*, *supra* note 60.

72. COOK, *supra* note 1, at 70, 87–90; BERNSTEIN, *supra* note 1, at 21. The *Tribune* was also likely targeted because it engaged in frequent anti-Irish advocacy in the 1850s. *See* MCPHERSON, *supra* note 32, at 132–33. The Irish themselves had routinely faced anti-immigrant and anti-Catholic mobs in New York City and across the country. *Id.*

73. COOK, *supra* note 1, at 87–88, 107–08.

74. *Trial of the Rioters*, N.Y. SUNDAY MERCURY, Aug. 9, 1863; N.Y. TRIB., July 16, 1863; REPORT OF THE MERCHANTS' COMMITTEE FOR THE RELIEF OF COLORED PEOPLE SUFFERING FROM THE RIOTS IN THE CITY OF NEW YORK 15, 24–25 (1863) [hereinafter MERCHANTS' COMMITTEE REPORT]; HARRIS, *supra* note 1, at 280–81; BERNSTEIN, *supra* note 1, at 21; COOK, *supra* note 1, at 76–78; SCHECTER, *supra* note 1, at 146–53. A group of volunteer firefighters rescued children from the Colored Orphan Asylum "and in defiance of the threats of the rioters, escorted them to the Thirty-fifth Precinct Station-house" to take shelter. HARPER'S WEEKLY, Aug. 1, 1863, at 494.

75. BERNSTEIN, *supra* note 1, at 21–31, 40.

76. *See id.* at 40.

77. *Id.* at 25–31, 40; COOK, *supra* note 1, at 66, 88. On Greeley and the Gibbons family, see POTTER, *supra* note 52, at 420; FONER, *supra* note 46, at 228.

Black New Yorkers were singled out by the mob for uniquely intense violence.[78] They were beaten, robbed, lynched, drowned, and burned.[79] Their houses were ransacked and set on fire.[80] Sexual assault was rampant, and mixed-race couples faced particular brutality, as rioters violently enforced white supremacist norms of racial and sexual purity.[81] In one horrific and widely reported episode, a Black man named Abraham Franklin was lynched from a lamppost, as a crowd cheered for Jefferson Davis, before his body was dragged through the streets by the genitals.[82] In retrospect, the draft riots are hard to distinguish from the anti-Black and anti-Republican mass violence that was carried out by the Ku Klux Klan and its white supremacist allies in the postwar South.[83]

New York City's authorities were frankly overwhelmed. On the first day of the riots, Police Superintendent Kennedy was beaten senseless by the mob,[84] so Thomas Acton, the President of the Board of Police Commissioners, took command.[85] Coordinating the official response was only made more difficult as rioters cut telegraph lines in Manhattan.[86] The police and the handful of state militia and federal troops who were still in the city did try to fight the mob, but they were frequently outnumbered and driven back.[87] Police stations were set on fire, and U.S. infantry Colonel Henry O'Brien was captured by the rioters, tortured, and killed.[88] Four hundred Black refugees hid in the Fifth Precinct station house, but there were only two policemen there to guard them, so Sergeant Higgins, who was in charge, gave them guns to defend themselves.[89] Elsewhere, African Americans camped on their rooftops with weapons to protect their homes.[90] The rioters also looted commercial stores—Brooks Brothers reported $50,000 of clothing stolen—and they forced bars to give them free drinks, which only further fueled the violence.[91]

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78. BERNSTEIN, *supra* note 1, at 5, 27; HARRIS, *supra* note 1, at 280. Saidiya Hartman has argued that granular narratives of nineteenth-century racial violence can be counterproductive, inuring readers to pain and "reinforc[ing] the spectacular character of black suffering." SAIDIYA V. HARTMAN, SCENES OF SUBJECTION 3–4 (1997). I have chosen to describe the violence of the draft riots in some detail, though, because it is important to make clear the parallels between racial violence in the North and South.

79. BERNSTEIN, *supra* note 1, at 27–31; HARRIS, *supra* note 1, at 280–86; COOK, *supra* note 1, at 76–95.

80. BERNSTEIN, *supra* note 1, at 29; COOK, *supra* note 1, at 79–80.

81. BERNSTEIN, *supra* note 1, at 29–31; HARRIS, *supra* note 1, at 281–83.

82. *The Riot*, N.Y. TRIB., July 16, 1863, at 1, 8; MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 24–25; HARRIS, *supra* note 1, at 284; BERNSTEIN, *supra* note 1, at 29–30.

83. *See generally, e.g.*, SHAWN LEIGH ALEXANDER, RECONSTRUCTION VIOLENCE AND THE KU KLUX KLAN HEARINGS 6–15 (2015); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008); NICHOLAS LEMANN, REDEMPTION (2006).

84. *The Mob in New-York*, *supra* note 60.

85. COOK, *supra* note 1, at 59, 66–67.

86. *Id.* at 58, 62; BERNSTEIN, *supra* note 1, at 5–6, 23.

87. COOK, *supra* note 1, at 58–70; BERNSTEIN, *supra* note 1, at 37–39.

88. BERNSTEIN, *supra* note 1, at 36–38.

89. COOK, *supra* note 1, at 133.

90. *Id.*

91. *Id.* at 62, 130–33. There was some irony in anti-Black mobs targeting Brooks Brothers since the company, like many New York commercial ventures with close ties to the Southern economy, had

Observing this total social collapse, the Republican elites in the city's Union League Club advocated martial law.[92] The prominent Republican lawyer David Dudley Field even asked President Lincoln to appoint General Benjamin F. Butler, who had famously suppressed Confederate resistance as the military governor of New Orleans, to take charge of New York.[93] For Republicans on the ground, the city had become a literal war zone.

Commissioner Acton, who was a staunch Republican and a founding member of the Union League Club,[94] saw the riots as an attack on Black New Yorkers' rights to be safe in the city. Operating out of Police Headquarters, he ordered every police precinct, "Receive colored people as long as you can. Refuse nobody."[95] On Thursday, July 16, when New York Governor Horatio Seymour, a Democrat who was vocally opposed to both the draft and the Emancipation Proclamation, asked Acton to keep troops out of the Eighteenth Ward so that the middle-class residents there could calm the rioters down, Acton responded fiercely, "We have been fighting a week, and are going to keep on until every man, white or black, can go anywhere on this island in perfect safety."[96] Acton himself did not sleep all week—not until the morning of Friday, July 17, when federal troops, having rushed north from Gettysburg, finally brought order to New York.[97] With multiple regiments patrolling the streets, peace descended on the city by Friday afternoon.[98] Troops remained on duty as a precaution against further riots until well into August.[99]

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long profited by selling clothes for enslaved persons to Southern plantations. *See* FONER, *supra* note 46, at 19.

92. BERNSTEIN, *supra* note 1, at 44, 54–55.

93. *Id.* at 55; *see also* MCPHERSON, *supra* note 32, at 623. Field was a founder of the Republican Party and an advisor to Lincoln. William E. Forbath, *The Ambiguities of Free Labor*, 1985 WIS. L. REV. 767, 774 n.10.

94. SCHECTER, *supra* note 1, at 133–34.

95. COOK, *supra* note 1, at 67, 159.

96. *Id.* at 162; *Doings of Gov. Seymour*, N.Y. TIMES, July 15, 1863. On Seymour's political trajectory, see BERNSTEIN, *supra* note 1, at 50. For instance, Seymour railed against the Emancipation Proclamation, arguing that "[i]f it be true that slavery must be abolished to save this Union, then the people of the South should be allowed to withdraw themselves from the government which cannot give them the protection guaranteed by its terms." MCPHERSON, *supra* note 32, at 560. The New York Democratic platform in the 1862 elections similarly called the Emancipation Proclamation "a proposal for the butchery of women and children, for scenes of lust and rapine, and of arson and murder." *Id.* There was thus a mirror-image rhetoric of rights "protection" on both sides of the slavery question in the North, as Copperheads like Seymour framed emancipation as a Black-led assault on white life against which the government should provide "protection" for slaveowners, while Republicans like Acton demanded "protection" by the government against the very real "arson and murder" that was committed by white rioters against Black New Yorkers.

97. COOK, *supra* note 1, at 157–64; *The Riot Subsiding . . . Triumph of the Military*, N.Y. TIMES, July 17, 1863. The Seventh Regiment of the New York National Guard later recounted their journey from Gettysburg to the city to suppress the draft riots. *See* HISTORY OF THE SEVENTH REGIMENT, NATIONAL GUARD 349–59 (1870).

98. COOK, *supra* note 1, at 159–64.

99. HISTORY OF THE SEVENTH REGIMENT, *supra* note 97, at 359.

After the riots subsided, the city tried to piece itself back together, even as other cities in the North faced similar threats of draft rioting[100] and Southern newspapers gleefully predicted that the riots heralded the end of the war.[101] Indeed, New York City pursued a genuinely impressive range of post-riots remedies, from criminal prosecutions to a civil claims commission, internal disciplinary proceedings by the police, and a philanthropic drive to raise money for Black riot victims.[102] Testimony from hundreds of victims about the events was also recorded and published at both public and private expense, and the newspapers covered the riots and the subsequent remedial efforts in great detail.[103] Read in the most generous light, this rich mix of remedies amounted to a kind of truth and reconciliation commission *avant la lettre* as the city heard claims, made remedial payments, publicized victim testimony, and emphatically declared that the riots had violated basic civic norms.

Despite this intense outburst of remedial activity, however, the city's commitment did not last. Criminal prosecutions wound down by the end of August[104] even though many rioters remained unpunished,[105] and the civil damages that were paid out fell far short of what was needed to rebuild because the city only paid the actual value of the damaged property, not the cost to replace it.[106] Tellingly, the city's Black population dropped by a quarter within a year, from 12,000 to 9,000, as African Americans voted with their feet and fled to safety elsewhere.[107] Historians have argued that at bottom, "[t]he riots demonstrated once again the powerful hold of racism and pro-southern sentiment in New York City,"[108] and they have suggested that most white New Yorkers quickly tried to forget the draft riots entirely in an act of "collective amnesia," psychologically repressing the violent,

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100. *See, e.g.*, Letter from Hoboken Mayor L. W. Elder to Provost Marshall E. N. Miller (July 13, 1863) (National Archives and Records Administration, Record Group 110, Series: Letters Received, 1863–1865), https://catalog.archives.gov/id/7364555?objectPage=2 [https://perma.cc/83T2-AFJL].

101. COOK, *supra* note 1, at 187–88 (citing examples from Southern newspapers including the *Richmond Daily Dispatch*, the *Montgomery Daily Advertiser*, and the *Mobile Daily Advertiser and Register*). *Harper's Weekly* published a short piece titled "Rebel View of Our Riots" that painted the draft riots as, in essence, another Confederate revolution: "The news of the New York disturbances had reached Richmond, and the papers are exultant over it. They hail them as the beginning of a great Northern revolution, styling it a 'good work' and 'an excellent outbreak.'" *Rebel View of Our Riots*, HARPER'S WEEKLY, Aug. 1, 1863, at 483. In 1868, *Harper's* and its cartoonist Thomas Nast, who was himself deeply affected by the riots, played a role in ruining Horatio Seymour's bid for the presidency by reminding the public that Seymour had been a cheerleader for the draft riots. *See* FIONA DEANS HALLORAN, THOMAS NAST: THE FATHER OF MODERN POLITICAL CARTOONS 60, 74–81, 104–17 (2013); Ross Barrett, *On Forgetting: Thomas Nast, the Middle Class, and the Visual Culture of the Draft Riots*, 29 PROSPECTS 25 (2005).

102. Some of these remedial actions have been recently described by Elizabeth Mitchell, drawing on similar sources to the ones I use here. *See* Elizabeth Mitchell, *The Real Story of the 'Draft Riots,'* N.Y. TIMES, Feb. 18, 2021, https://www.nytimes.com/2021/02/18/opinion/draft-riots-racism.html [https://perma.cc/6WCQ-9YW6].

103. *See infra* Parts II and III.

104. *General News*, N.Y. TRIB., Aug. 12, 1863, at 4.

105. COOK, *supra* note 1, at 177–87.

106. *Id.* at 174.

107. *Id.* at 175; BERNSTEIN, *supra* note 1, at 66; HARRIS, *supra* note 1, at 285–86.

108. FONER, *supra* note 46, at 228.

Southern-style racism that the riots had exposed in their midst.[109] Seen in retrospect, that act of forgetting foreshadowed the process of white reconciliation that eventually unfolded throughout the United States after the Civil War.[110] In fact, in the middle of the riots themselves, New York City's Common Council had authorized a $2,000,000 bond issue so that the city could pay the $300 commutation fee for anyone who was drafted.[111] The city government thus gave the rioters exactly what they wanted, effectively nullifying the federal draft.

But even though the city's remedial efforts were relatively brief and circumscribed, they did occur, and they were covered extensively in the press, fostering a lively discourse of equality and equal rights and establishing a normative and practical precedent for the larger process of Reconstruction that went into high gear just over a year later in the South. Indeed, the very same newspapers that reported on the post-riots recovery in New York simultaneously discussed the best policies for Reconstruction in already-occupied areas of the South: the *Anti-Slavery Standard*'s article about Sergeant Jones's trial for dereliction of duty during the draft riots, headlined "Equal Protection Under the Law," for example, appeared in between a pair of articles that described the efforts of the Freedman's Department to resettle formerly enslaved persons "upon the abandoned farms of rebels in Virginia," examined the cultivation of plantations in the South Carolina Sea Islands by formerly enslaved African Americans, and printed recommendations from the Superintendent of Freedmen about long-term planning.[112] New Yorkers in late 1863 were thus thinking about how to rebuild their own city and the Confederate states at the exact same time.

We might even say that with the fiercely Republican Commissioner Acton leading the police, who were deputized as federal provost marshal's guards, against white supremacist mobs in a majority-Democratic city, while Republican politicians in Washington, D.C., debated using federal troops to establish martial law, New York City in July 1863 offered an explosive preview of Reconstruction battles to come.[113] And in turn, insofar as New York City after the draft riots was seeking to redress many of the same kinds of harms that the Radical Reconstructors would work to remedy in the South just a few years later, the city's remedial efforts in 1863 offer an intriguing precedent for interpreting both the Fourteenth Amendment and the sweeping revolution in race relations and the structure of American self-government that it carried out.

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109. BERNSTEIN, *supra* note 1, at 4. On this interpretation of group amnesia, white New Yorkers were already engaging in what historians have called "Southern exceptionalism," cordoning off racism in a putatively different and backward South. *See* Alice Ristroph, *What Is Remembered*, 118 MICH. L. REV. 1157, 1170 & nn.49–50 (2020); LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE 25 (2009).

110. *See generally* DAVID W. BLIGHT, RACE AND REUNION (2001).

111. COOK, *supra* note 1, at 174.

112. *Equal Protection Under the Law*, *supra* note 3; *Freedmen's Report for August*, NAT'L ANTI-SLAVERY STANDARD, Aug. 29, 1863; *The Freedmen of South Carolina*, NAT'L ANTI-SLAVERY STANDARD, Aug. 29, 1863; *see also The Negroes Near Washington*, N.Y. TIMES, Aug. 9, 1863.

113. *See* SCHECTER, *supra* note 1, at 7–8; BERNSTEIN, *supra* note 1, at 37. For Reconstruction conflicts, see generally JAMES K. HOGUE, UNCIVIL WAR (2006); FONER, *supra* note 15; KATE MASUR, UNTIL JUSTICE BE DONE (2021); and EDWARDS, *supra* note 15.

II. "An Officer Refuses to Protect" Black New Yorkers "and Is Hauled Up Therefor": Public Reckoning, Police Accountability, and the Trial of Sergeant Jones

In the wake of the draft riots, both civilians and the police themselves took stock of the police department's performance. Their efforts demonstrated an admirable impulse toward public accountability. But they ultimately painted an overly rosy picture, relying on a handful of scapegoats to take the blame for any of the police department's failings, and their commitment to reform was uneven at best. Nevertheless, the public reckoning over the police department that occurred in the weeks after the draft riots set a powerful precedent for the government's duty to protect its people from harm. This Part examines both the general process of police accountability after the draft riots and, in greater depth, the well-publicized trial of Sergeant Jones.

A. "Delinquent and Traitorous Policemen": Accountability after the Draft Riots

After the riots subsided, there was an outpouring of admiration for the police. By August, the *Tribune* was declaring that "[t]he Policemen of the City of New York . . . behaved during the draft riots so admirably, with such courage, discretion, and excellent judgment, as to honestly earn the hearty thanks of every respectable citizen."[114] Soon after, David Barnes published a bestselling history with the fawning title *The Metropolitan Police: Their Services During Riot Week. Their Honorable Record*. Barnes wrote that his book "affords Historical Record of the excellence" and the "fidelity, bravery, and efficiency" of the police, and in a glowing review, the *Times* asserted that "[n]o period in the history of this City will be more memorable than riot week" and that Barnes's book "will be found indispensable" for anyone trying to "comprehend the real character of the great riot."[115] Despite the police department's tactical errors and its inability to halt the riots without military aid, a potent myth of duty, law, and order was already being built.[116]

At the same time, though, the police department did make an earnest attempt to clean house. And in the process, it made a number of important public declarations about both the principles that should shape policing and the responsibilities of civic government more broadly.[117] Insofar as the 1860s were a

114. *A Police Trial*, *supra* note 2.

115. DAVID M. BARNES, THE DRAFT RIOTS IN NEW YORK, JULY 1863: THE METROPOLITAN POLICE, THEIR SERVICES DURING RIOT WEEK, THEIR HONORABLE RECORD 3 (1863); *New Publications*, N.Y. TIMES, Oct. 23, 1863. Despite the *Times*'s claim that "riot week" would be the most "memorable" period "in the history of th[e] City," of course, it wasn't long before white New Yorkers were ready to forget and move on. *New Publications*, *supra*; *see* BERNSTEIN, *supra* note 1, at 4.

116. On tactical mistakes by the police, see, for example, COOK, *supra* note 1, at 68–70.

117. As suggested above, this history bears an eerie resemblance to the inquiries into the Capitol insurrection on January 6, 2021, and the performance of the Capitol Police, especially given the Confederate flags that rioters flew during the Capitol insurrection. *See* Broadwater, *supra* note 29; Maria Cramer, *Confederate Flag an Unnerving Sight in Capitol*, N.Y. TIMES (Jan. 14, 2021), https://www.nytimes.com/2021/01/09/us/politics/confederate-flag-capitol.html [https://perma.cc/EGA7-RHGR].

key period in the development of professionalized police forces,[118] the Board of Police Commissioners' statements and practices after the draft riots offer insight not only into Republican ideology but also the theory of government obligations underpinning modern policing.

In particular, the Board of Commissioners heard a series of charges against police officers for alleged failures during riot week.[119] These hearings mixed the elements of a criminal trial, a court martial, a modern civilian review board, and an independent agency adjudication.[120] Charges could be brought by both fellow officers and private citizens,[121] giving civilians an opportunity to be heard and to hold the police to account. The outcomes of these hearings, though they were not binding in the manner of a precedential opinion by an appellate court in a modern test case, would at least have had value as official pronouncements of department policy and—more practically for officers on the beat—as predictions about how the Board would handle similar situations in the future.[122] The hearings were thus simultaneously an exercise in public relations and a potential deterrent for police misconduct.

The Board of Commissioners routinely held such hearings in the early 1860s,[123] but they were especially well-publicized after the draft riots. In an August 2 story subtitled *First Trial-Day Since the Riots*, for example, the *New York Sunday Mercury* reported that "the trials" of police officers had "resumed as usual" and that the hearing room at police headquarters was "well filled with the members of the force and such citizens, male and female, as had been drawn there, either from

118. *See* Ristroph, *supra* note 109, at 1163–70; ERIC H. MONKKONEN, POLICE IN URBAN AMERICA, 1860–1920 (1981); WILBUR R. MILLER, COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870 (1977).

119. *See Police Headquarters*, N.Y. SUNDAY MERCURY, Aug. 2, 1863 [hereinafter *Police Headquarters*, Aug. 2].

120. Newspapers called the hearings "trials" and said that officers faced "charges." *Id.* The papers also referred to the trials as "open court" and indicated that "witnesses" were "subpoenaed" and "produce[d]" by officers to defend themselves against charges. *Police Headquarters*, Aug. 16, *supra* note 2. In addition, the trials resemble internal investigations or civilian review boards used for police accountability today. *See* PETER FINN, U.S. DEP'T OF JUSTICE, CITIZEN REVIEW OF POLICE, at iii (2001). Finally, the Board of Police Commissioners was part of a wave of new administrative agencies with independent powers, foreshadowing the modern administrative state. *See* NOVAK, *supra* note 24, at 228–29; WHITE, *supra* note 48, at 197.

121. *See Police Headquarters*, N.Y. SUNDAY MERCURY, July 12, 1863 [hereinafter *Police Headquarters*, July 12] (reporting, among others, a case brought against "Officer Hart" by "Citizen Wessel" and a case brought by "Sergeant Evans" against "Officer Beasley"). In an address to the police force in 1862 discussing its "discipline" and "duties," Superintendent Kennedy warned that "a large share of the complaints brought by [superior] officers" against patrolmen "had their origin in information of previous delinquencies, furnished by observing citizens, who did not desire to stand in the position of public complainants themselves." ADDRESS OF THE GENERAL SUPERINTENDENT TO THE METROPOLITAN POLICE FORCE 3, 5 (1862) (available at Lloyd Sealy Library Special Collections, John Jay College of Criminal Justice). As the police force professionalized in the 1860s, *see supra* note 118 and accompanying text, civilian complaints played an important role in holding officers accountable for delinquency.

122. *See A Police Trial*, *supra* note 2 ("[C]omplainant wished to have the matter decided, once for all, by the proper tribunal . . . [so] that, after this, citizens may know what to expect, and officers what to do.").

123. *Police Headquarters*, Aug. 2 *supra* note 119.

motives of curiosity or business."[124] Newspaper reporters—or at least the writer from the *Mercury*—were also clearly in the room. That substantial crowd meant that the Board's judgments would reach the police force, the curious civilians in attendance, and the reading public at large.

Before this packed room, the *Mercury* reported, the Board heard "several cases" of alleged dereliction of duty.[125] Multiple officers were accused of "desert[ing] from the ranks during engagements with the rioters."[126] Officer Ware, for instance, was acquitted for abandoning his post because he proved that he had gone home to protect "some colored people residing in a portion of the house" where he lived, which was in danger of being "gutted by the rioters."[127] It helped his case that he "showed" that he "was no skulk, and that he was foremost in the fight when engaged with the mob."[128] Officer Herring was likewise acquitted for missing a fight with the rioters because he proved that he had been "knocked down with a stone" and was recovering indoors.[129] But Officer Westervelt, who made the same excuse, failed to present any witnesses to prove his case, so he was held liable and "probably . . . allowed to resign."[130] Officers Kelley, Murdock, and O'Rourke were all charged with speaking in favor of the rioters and refusing to swing their clubs with sufficient vigor, and a number of other officers, the *Tribune* announced under the blistering headline "Delinquent and Traitorous Policemen," were permitted to resign before their cases could be heard.[131] Both rhetorically and conceptually, the charges thus mixed the elements of a negligence tort—that is, officer delinquency[132]—with a wartime indictment for desertion and treason.

By far the longest and most interesting trial, though, was the case against Sergeant Jones. The Board had heard a number of "cases of minor importance," the *Mercury* dramatically declared, "when that of Sergeant Jones was called."[133] And the complaining witness, the paper proudly noted, was "Mr. Mortimer Thompson [sic], the immortal 'Doesticks, P.B.,' whose scintillations in the *Sunday Mercury* have been read by every man in America."[134] Thomson spoke at length, "to the effect that during the July riot he took a colored woman to the Twenty-ninth Precinct Station-house, where Jones was in command, and that the latter put her out."[135] He also "gave a vivid description of the perils he encountered taking the colored woman

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Police Headquarters*, Aug. 9 *supra* note 1.
130. *Delinquent and Traitorous Policemen*, N.Y. TRIB., Aug. 7, 1863.
131. *Id.*; *Police Headquarters*, Aug. 9, *supra* note 1.
132. On the use of antebellum negligence suits to hold officers accountable, see Jerry L. Mashaw, *Recovering American Administrative Law: Federalism Foundations, 1787–1801*, 115 YALE L.J. 1256, 1281 (2006); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1673–84, 1721–23 (2007); and Andrew Kent, *Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers,* 96 NOTRE DAME L. REV. 1755 (2021).
133. *Police Headquarters*, Aug. 9, *supra* note 1.
134. *Id.*
135. *Id.*

to the station house, and thought it was hard she should be turned out into the street with the mob waiting and thirsting as it were for her blood."[136] Sergeant Jones then "talked considerably, but could not deny the fact that the colored woman was sent into the street, nor could he show sufficient justification for the act."[137]

In addition to the moral fervor of his charge against Sergeant Jones, Mortimer Thomson clearly savored his theatrical role in the hearing room, and the *Mercury* clearly relished relating the courtroom drama, especially since one of its own writers was the star. But more importantly, the content of both Thomson's complaint and the Board's eventual ruling articulated a powerful principle of equality—a principle that becomes all the more revealing in light of Thomson's own background as a prominent antebellum social critic, which is worth exploring in some detail.

B. Mortimer Thomson, the Antislavery Movement, and the Trial of Sergeant Jones

Mortimer Thomson, "the immortal 'Doesticks, P.B.,'"[138] was a flamboyant nineteenth-century newspaperman whose satires were read across the country. But he was also a daring antislavery activist and undercover investigative reporter whose antebellum writing, like that of his better-remembered contemporaries such as Frederick Douglass and Harriet Beecher Stowe, helped expose the Northern public to the brutality of Southern slavery.[139] The two halves of Thomson's career—his humor writing and his political activism—even came together in Sergeant Jones's trial, as he recycled some of the prose from one of his satires in his complaint to the Board.[140] Indeed, Thomson's fascinating route from humor writing to the witness stand helps explain the full public meaning of the charges that he brought against Sergeant Jones in 1863.

Thomson's obituary in the *Times*, which was written by one of his old roommates, explained that Thomson had been an undergraduate at the University of Michigan but was "expelled, it is said, for too much enterprise in securing subjects for the dissecting-room."[141] Then, after a brief gig with a theater troupe, he traveled to New York City where he worked as a clerk in a jewelry store before a batch of his satirical letters, under the pen name "Doesticks," was published in the papers to great acclaim.[142] He parlayed that success into a position as the police reporter and then the drama critic for Horace Greeley's *Tribune*, working with the *Tribune*'s managing editor Charles A. Dana, who would become Assistant Secretary of War during the Civil War.[143] Thomson continued to use his pseudonym "Doesticks," the full version of which was "Q.K. Philander Doesticks, P.B.," the initials standing

136. *Id.*
137. *Id.*
138. *Id.*
139. *See generally* James G. Basker, *Introduction*, *in* AMERICAN ANTISLAVERY WRITINGS xxvii (James G. Basker ed., 2012).
140. *See infra* notes 165–166 and accompanying text.
141. *Obituary: Mortimer Thomson—"Doesticks,"* N.Y. TIMES, *supra* note 5.
142. *Id.*
143. *Id.*; *Obituary: Mortimer Thomson*, N.Y. HERALD, *supra* note 5, at 10; MCPHERSON, *supra* note 32, at 138, 589.

for "Queer Kritter" and "Perfect Brick."[144] As Thomson's friend the cartoonist Thomas Nast put it in the caption of a drawing he made of "Doesticks" around 1859, Thomson was soon "a popular lecturer and author" in New York.[145]

Throughout the 1850s, Thomson published numerous Doesticks letters as well as multiple books, including an anti-elitist parody called *A Slight Slap at Mobocratic Snobbery* and an exposé titled *The Witches of New York* that examined the tricks used by fortunetellers in the city.[146] In a satirical rewriting of Henry Wadsworth Longfellow's *Hiawatha* that he published in early May 1856, just before the peak of the violence during the Border War in Kansas, Thomson even imagined a catastrophic civil war between the North and the South over the issue of slavery, with "furious legions" descending from the North "Armed with Beecher's 'moral rifles'" and Southern armies marching forth "[w]ith a store of tar and feathers" to meet "their anti-slavery foemen."[147] Thomson's doggerel verse soon proved prescient.

Thomson often cloaked his social and political commentary in satire, but in the late 1850s, with national tensions rising over slavery, he adopted a more reportorial approach to attack the evils of the "peculiar institution" directly. On March 9, 1859, he published a lengthy exposé in the *Tribune* in which he narrated a slave auction in Savannah, Georgia, where Pierce Butler—whose grandfather had drafted the Fugitive Slave Clause at the Constitutional Convention in 1787—sold 436 enslaved persons.[148] Dubbed "the Weeping Time" by the enslaved individuals who survived it, it was the largest slave auction ever held in the United States.[149]

Thomson's article, as his obituary later put it, "rang through the North like an alarm bell."[150] The March 9 issue of the *Tribune*, featuring Thomson's account, sold

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144. Edward J. Piacentino, *Doesticks' Assault on Slavery*, 48 PHYLON 196, 197 (1987); HALLORAN, *supra* note 101, at 44–48.

145. HALLORAN, *supra* note 101, at 44–48; Thomas Nast, *A Popular Lecturer and Author.—Doesticks., in* 11 Thomas Butler Gunn Diaries 229 (circa 1859) (on file with the Missouri Historical Society).

146. MARK TWAIN'S LIBRARY OF HUMOR 532 (1888); MORTIMER THOMSON, DOESTICKS, WHAT HE SAYS (1855); MORTIMER THOMSON, THE WITCHES OF NEW YORK (1858); MORTIMER THOMSON, NOTHING TO SAY (1857). At the same time, Thomson was certainly partaking in the mid-nineteenth-century reform project of targeting women for especially intense morals regulation, as moral reform and misogyny frequently went hand in hand in the period. *See* NOVAK, *supra* note 24, at 166–71.

147. MORTIMER THOMSON, PLU-RI-BUS-TAH 247–48 (1856); *This Day Published*, N.Y. TRIB., May 7, 1856. The phrase "Beecher's Bibles," referring to Sharps rifles, came from an article about the Kansas conflict in the *Tribune* in which Henry Ward Beecher wrote that each rifle had "more moral power" than "a hundred Bibles." *Ward Beecher on the Observer: Sharp's Rifles as a Moral Agent*, N.Y. TRIB., Feb. 8, 1859. Even Thomson's satirical writing in the 1850s was thus tightly linked to a network of antislavery publishing centered on the *Tribune*. In 1861, Thomson also married Grace Eldredge, the daughter of the popular feminist writer Fanny Fern, which connected him to a wider antislavery literary circle: Fanny Fern was close acquaintances with the antislavery writer Harriet Jacobs, and Jacobs's daughter Louisa briefly lived in Fern's home as a companion of Grace. HALLORAN, *supra* note 101, at 42–48; Jennifer Larson, *Renovating Domesticity*, 38 WOMEN'S STUD. 538, 538–42 (2009); *see also* FANNY FERN, RUTH HALL (1855); HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL (1861).

148. Thomson, *supra* note 5; Piacentino, *supra* note 144, at 196–97; SEAN WILENTZ, NO PROPERTY IN MAN 105–11 (2019).

149. *See* ANNE C. BAILEY, THE WEEPING TIME (2017).

150. *Obituary: Mortimer Thomson*, N.Y. HERALD, *supra* note 5, at 10.

out, so Greeley reprinted the whole issue on March 11.[151] Then, eight days later, Thomson's article was reprinted in the *Anti-Slavery Standard*, and the American Anti-Slavery Society republished it as a standalone pamphlet later that year.[152] It circulated internationally in 1859, and it was published as a pamphlet again in 1863.[153] A review of the pamphlet that ran in *The Atlantic* in September 1859 claimed that Thomson's article had a "prodigious" effect and boasted that "[t]he ire of a good portion of the Southern journals was ludicrous to witness, and proved how keenly the blow was felt."[154]

The South's ire was well earned. Thomson's article was fierce. In the acerbic first line, he called Butler's auction "[t]he largest sale of human chattels that has been made in Star-Spangled America for several years," and he proceeded to chronicle how the sale had "torn asunder . . . all the clinging ties that bound" the enslaved individuals there together.[155] One historian has written that such stories about the "breakup of families," most famously *Uncle Tom's Cabin*, were "the largest chink in the armor of slavery's defenders" in the years just before the Civil War,[156] and Thomson was a virtuoso of the genre. He even referenced *Uncle Tom's Cabin* in his exposé.[157] His article then ended in a kind of inverse Transcendentalist nature writing, as he described the beautiful setting in Savannah and concluded that "the scene was as calmly sweet and quiet as if Man had never marred the glorious beauty of Earth by deeds of cruelty and wrong."[158]

Thomson took genuine risks to write the article.[159] Greeley sent him to Savannah to report on the sale, but as a well-known writer for the antislavery *Tribune*, Thomson couldn't safely attend the auction under his own name.[160] So he posed as a Southern planter, going so far as to make a number of low bids that he knew would be outbid.[161] Indeed, the dramatic story of his undercover exploits formed a major plotline in his article: he used it to illustrate the repression of free speech on the slavery question in the South, since it was so dangerous even to hold antislavery views, and he contrasted the bonhomie that the planters had showed him, a perfect stranger, with their cruelty toward their human property.[162] Thomson's obituary later recalled that after the exposé appeared, "Southerners were angry enough" that "when Thomson went to Charleston as a correspondent, in

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151. Piacentino, *supra* note 144, at 196–97.

152. *Id.*; MORTIMER THOMSON, AMERICAN ANTI-SLAVERY SOCIETY, GREAT AUCTION SALE OF SLAVES (1859).

153. *Reviews and Literary Notices*, ATLANTIC, Sept. 1859, 386, at 387; MORTIMER THOMSON, WHAT BECAME OF THE SLAVES ON A GEORGIA PLANTATION? (1863).

154. *Reviews and Literary Notices*, *supra* note 153, at 387.

155. Thomson, *supra* note 5.

156. MCPHERSON, *supra* note 32, at 38; HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (1852): *see also* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT 23–26, 243 (1998).

157. Thomson, *supra* note 5.

158. *Id.*; *see* PHILIP F. GURA, AMERICAN TRANSCENDENTALISM (2007).

159. Piacentino, *supra* note 144, at 196–97.

160. *Id.*; *see also Obituary: Mortimer Thomson*, N.Y. HERALD, *supra* note 5, at 10 (noting that "the discovery of a New York *Tribune* man at a Southern slave auction was likely to mean death to the scribe").

161. Thomson, *supra* note 5.

162. *Id.*; *Reviews and Literary Notices*, *supra* note 153, at 387.

1861, it was deemed unsafe for him to venture beyond the Northern military lines."[163]

Thomson's obituary in the *Times* also notably recorded his other major exploit—his martial endeavors during the draft riots. "During the riots of July 1863," the obituary reported, "Mr. Thomson performed an act of bravery and manliness that did him much honor":

> Looking from his window in Seventeenth street he saw a poor old colored woman flying from a crowd of Irish rioters. Rushing into the room of the writer of this notice, he seized a navy revolver, and without waiting for hat or coat hurried into the street, took the old woman's arm in his, and pointing the cocked pistol at her persecutors, kept them at bay until he had her safely in the Station-house.[164]

Given the extended treatment this episode received in Thomson's relatively short obituary, it's easy to imagine that he dined out on the story for years to come.

Two features of Thomson's career shed particular light on his role in Sergeant Jones's trial. First, Thomson's satirical writing, his antislavery campaigning, and his legal complaint against Sergeant Jones form a surprisingly coherent body of work. Thomson's true genre was the exposé, and he consistently levied public-minded attacks on social and political corruption, whether he was revealing the charlatanism of New York City's fortunetellers, puncturing the snobbery of the upper classes, or dramatizing the cruelties of slavery. Charging a police officer with dereliction of duty was very much of a piece with Thomson's larger oeuvre.

Thomson even drew on rhetorical formulas from his humor writing in his complaint against Sergeant Jones. In *The Witches of New York*, Thomson had written that he wanted to recast fortunetellers as "dangerous criminals," but he also coyly claimed that "far from desiring to do any injustice to the Fortune Tellers of the Metropolis, I sincerely hope that my labors may avail something towards making their true deservings . . . more thoroughly comprehended by the public" and "the dignitaries of the land."[165] Half a decade later, after the draft riots, Thomson similarly testified that "he had not brought the charge out of any ill feeling whatever toward Sergeant Jones, but merely to settle the principle . . . whether colored people should or should not be protected."[166] In both cases, Thomson pressured city officials and the public, seeking better police regulation of the city and better government regulation of the police.

Second, by 1863, Thomson was closely associated with the antislavery cause,[167] and he had built a significant audience and public profile in both New York City and nationwide, reigning as "the king of American humorists."[168] He was also prominently linked, through his publication record, with Greeley, the *Tribune*, the

163. *Obituary: Mortimer Thomson—"Doesticks,"* N.Y. TIMES, *supra* note 5.

164. *Id.*

165. THOMSON, THE WITCHES OF NEW YORK, *supra* note 146, at ix, 18.

166. *Police Headquarters*, Aug. 16, *supra* note 2.

167. *Obituary: Mortimer Thomson—"Doesticks,"* N.Y. TIMES, *supra* note 5 (noting his inability to travel in South Carolina because of his antislavery writing).

168. *Obituary: Mortimer Thomson*, N.Y. HERALD, *supra* note 5, at 10.

American Anti-Slavery Society, and the *Anti-Slavery Standard*.[169] He had famously risked serious physical danger to publish a bestselling jeremiad against slavery.[170] And he was a well-known enemy in the Confederacy who could not show his face outside Union military lines.[171] Far from a lone voice crying out in the wilderness, then, Thomson was a popular social critic and a leading light in his generation.

Consequently, when the *Tribune*, the *Mercury*, and the *Anti-Slavery Standard* all printed lengthy accounts of Thomson's accusation against Sergeant Jones,[172] antislavery and pro-war Republicans, both in New York City and throughout the North, likely would have taken note. And reciprocally, Thomson, who was enmeshed in a network of both mainstream Republican and abolitionist publications,[173] surely must have absorbed and reflected key themes in the thinking of those groups. The "principle" that Thomson sought to vindicate through his charge against Sergeant Jones, that Black New Yorkers "should . . . be protected" equally by the police,[174] thus offers an important window into evolving Republican views during the highly dynamic period between the Emancipation Proclamation and the drafting of the Fourteenth Amendment.[175]

C. "Doesticks" Takes the Stand

This brings us back, finally, to the trial of Sergeant Jones. To rehearse the charges in greater detail, Thomson alleged that on Wednesday evening during riot week, a young woman who was boarding with his family ran into his room in a panic, exclaiming that "[a]n old negro woman" was outside "running from the mob."[176] The Black woman had tried to find shelter in the back yard next door, Thomson was told, but "the Irish servant girls drove her out."[177] Upon hearing of her plight, Thomson leaped up, "buckled on [his] revolver," and raced outside.[178] When he found the woman, he gave her his arm, drew his pistol, and determined to take her "to a Station-House where she might be protected."[179] As they hurried down the street, Irish servant girls shouted racial slurs and a "riotous crowd collected about [them] once or twice," but Thomson warned them off with his

169. *See supra* notes 138–163 and accompanying text.

170. *Obituary: Mortimer Thomson*, N.Y. HERALD, *supra* note 5, at 10; Piacentino, *supra* note 144, at 196–97.

171. *Obituary: Mortimer Thomson—"Doesticks,"* N.Y. TIMES, *supra* note 5.

172. *See Police Headquarters*, Aug. 16, *supra* note 2; *A Police Trial*, *supra* note 2; *Equal Protection Under the Law*, *supra* note 3.

173. *See supra* notes 138–163 and accompanying text.

174. *Police Headquarters*, Aug. 16, *supra* note 2.

175. *See* JAMES OAKES, FREEDOM NATIONAL 340–429 (2013).

176. *A Police Trial*, *supra* note 2. Thomson said it was Wednesday, July 16, *id.*, but July 16 was a Thursday, *see* BERNSTEIN, *supra* note 1, at 25. Since the rioting began to settle down by Thursday evening, *id.* at 39–40, it was most likely Wednesday, July 15. The *Tribune* also briefly reported on Thomson's actions in the edition for Thursday, July 16, further suggesting that the events took place on July 15. *Refusal of the Police to Protect Homeless Colored Persons*, N.Y. TRIB., July 16, 1863, at 8 [hereinafter *Refusal of the Police*].

177. *A Police Trial, supra* note 2.

178. *Id.*

179. *Id.*

gun.[180] They eventually reached the Twenty-Ninth Precinct station house and ducked inside.[181]

At the police station, Thomson approached the desk and spoke with one Sergeant Ward.[182] But Sergeant Jones went over to the Black woman, who was sitting in a chair, and told her to "clear out."[183] He then "took her by the arm, led her to the door, and put her out."[184] Thomson "protested against such treatment, and told the officers that it was their duty to protect everybody who needed and claimed protection," but Sergeant Ward told him, "If I take this woman in, it won't be 10 minutes before there will come another, and then another, and what am I to do?"[185] Thomson replied, "You are to take them all in and take care of them—that's what your Station-House was made for, and that's part of the duty you are paid to do."[186] Sergeant Ward then fretted that "the mob would pull the house down over their heads if they should take in negroes," but Thomson, now livid, retorted:

> If the neighborhood is in such a condition as that, if you think you could not be safe with negroes in your Station House, behind solid brick walls, and with twenty or thirty men with pistols and clubs to fight the rioters with, what chance will that old woman have . . . whom you have turned out to face singly, the mob who, this very morning, burned her house over her head and turned her into the street?[187]

Thomson then asked for the officers' names, "which so enraged Sergeant Jones . . . that, after giving the names, he ordered [Thomson] out."[188]

By the time Thomson reached the street, however, and "endeavored to find the colored woman again, with the intention of taking her to his own house[,] . . . she had disappeared."[189] Her fate is unclear, and she remained absent and anonymous during Sergeant Jones's trial.[190] But she was far from alone in her plight: some 150 other Black New Yorkers were reportedly turned away at the Twenty-Ninth Precinct station house that week.[191]

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180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. None of the printed sources—neither the *Mercury*, the *Tribune*, nor the *Anti-Slavery Standard*—contain any further information about the woman's identity or whereabouts, except that during riot week, the *Tribune* briefly reported on this episode and noted that the woman had "liv[ed] with her son in a comfortable home near Bull's Head." *Refusal of the Police*, *supra* note 176, at 8. That might have been the "Bull's Head Hotel," which was burned by rioters. *Incendiarism of the Riot*, N.Y. TIMES, July 18, 1863. Regardless, as rioters burned her neighborhood, the woman "went forth to a police station-house to find protection," but what she found instead, in the *Tribune*'s words, was the "refusal of the police to protect homeless colored persons." *Refusal of the Police*, *supra* note 176, at 8.
191. *A Police Trial*, *supra* note 2.

Unfortunately, it is also unclear whether Sergeant Jones was ultimately convicted for his indifference to the threat of mob violence. The *Tribune* reported that he might escape with just "a sharp reprimand" because he was suffering from a "long and severe illness" that potentially excused his behavior.[192] But it seems that Mortimer Thomson cared more about the "principle" at stake than about Sergeant Jones's conviction anyway, as Thomson explained that he "wished to have the matter decided, once for all, by the proper tribunal" so that "citizens may know what to expect, and officers what to do."[193] And although Sergeant Jones's final verdict remains unknown, the Board of Police Commissioners did answer Thomson's question of "principle."

Specifically, speaking for the Board and "raising his voice so that the policemen, with whom the room was filled, should hear," Commissioner Acton declared:

> I want all you men to understand, that human life is to be protected at any and every hazard. The poorest life is infinitely more sacred than the greatest amount of wealth. It is your duty to receive every unfortunate person who claims shelter and defense. You are to pay not the slightest regard to the condition or color of the applicant—take him in and take care of him—fight for him as long as you can strike or stand . . . . [You] must strike just as hard [and] stand up just as long for the poorest negro as for the richest white man.[194]

The question raised by Thomson's test case had been settled. Everyone in the city deserved "to be protected" equally with "not the slightest regard to . . . condition or color."[195] The *Tribune* crowed that even though Sergeant Jones might get away with just a reprimand, "the complainant won his great point, and the police of this city . . . now understand that their clubs are to strike in defense of black as well as white."[196]

The trial and its holding were covered extensively in the press. The *Mercury*, which had tens of thousands of readers and was a leading source of pro-Union war news in the North,[197] gave Sergeant Jones's trial nearly a full broadsheet column.[198] And the *Tribune*, which bragged that its circulation topped 150,000,[199] gave the trial nearly two columns under the approving headline "An Officer Refuses to Protect

192. *Id.*

193. *Id.*

194. *Id.* Commissioner John G. Bergen, who had commanded the Brooklyn and Staten Island precincts during the riots, "cordially agreed" with Commissioner Acton's statement. *Id.*; *see* COOK, *supra* note 1, at 67.

195. *A Police Trial*, *supra* note 2.

196. *Id.*

197. *See* WRITING AND FIGHTING THE CIVIL WAR: SOLDIER CORRESPONDENCE TO THE NEW YORK SUNDAY MERCURY (William B. Styple ed., 2000); JAMES E. CARON, MARK TWAIN, UNSANCTIFIED NEWSPAPER REPORTER 166 (2008); ROWELL'S AMERICAN NEWSPAPER DIRECTORY 153 (1873).

198. *Police Headquarters*, Aug. 16, *supra* note 2.

199. *To Advertisers*, N.Y. TRIB., Aug. 12, 1863, at 4.

Colored People, and is Hauled Up Therefor."[200] The *Anti-Slavery Standard* then reprinted a lengthy excerpt from the *Tribune*'s article with the title "Equal Protection Under the Law."[201]

Thomson, of course, had written for all three papers,[202] which is likely one reason why they lavished such attention on his case. But the papers also treated Sergeant Jones's trial as an exemplar, using it to reflect more broadly on the riots. The *Tribune* and the *Anti-Slavery Standard*, in particular, emphasized the racial violence of the draft riots and editorialized about the actions of the police. Quoting Commissioner Acton, they reminded readers that Black victims had been "hanged to lampposts" and "burned and outraged in every possible manner" by the rioters.[203] But they also argued that the police in general had behaved "admirably" during the riots and that "the greatest risk the police officers had to meet, and the severest test of their personal courage and devotion to duty . . . was in the rescue and protection of the helpless negroes."[204]

According to the papers, this dutiful "protection" of African Americans stood in stark contrast to the actions of Sergeant Jones. "There was in the whole City of New York," the *Tribune* and the *Anti-Slavery Standard* both thundered, "but a single officer in charge of a station-house who conceived it to be his duty to close that station-house against the flying and frightened negroes, and to instruct the men under his charge that they were not to interfere between the mob and their miserable victims."[205] That lone culprit was Sergeant Jones.[206] And "the mob," the papers said, having been "thus encouraged and almost abetted" by his inaction, "showed no mercy to the negroes in that vicinity, and nearly as many were killed and maimed in the streets over which he had jurisdiction, as in all the rest of the city together."[207] "Their homes were burned," readers were told. "Their property destroyed or stolen, and their persons outraged in every conceivable manner, under the very noses of the police."[208] And to add insult to injury, "[t]he citizens living in the immediate neighborhood did not complain of this inhuman conduct, and it was left for a gentleman living in a remote part of the town"—Mortimer Thomson himself—"to bring [Sergeant Jones] before the Police Commissioners for trial."[209] As the *Tribune* and the *Anti-Slavery Standard* both depicted it, Sergeant Jones's trial amounted to a kind of structural reform lawsuit *avant la lettre*, brought by a crusading activist who

200. *A Police Trial*, *supra* note 2.

201. *Equal Protection Under the Law*, *supra* note 3. The primary difference between the two articles was that the *Anti-Slavery Standard* briefly summarized the *Tribune's* more extensive descriptions of Thomson's actions and the testimony of the witnesses whom Sergeant Jones called in his defense. *Compare id.*, *with A Police Trial*, *supra* note 2.

202. *See Police Headquarters*, Aug. 9, *supra* note 1 (noting that Thomson's "scintillations in the *Sunday Mercury* have been read by every man in America"); Thomson, *A Great Slave Auction*, *supra* note 5; Piacentino, *supra* note 144, at 196.

203. *A Police Trial*, *supra* note 2; *Equal Protection Under the Law*, *supra* note 3. The two papers' stories are essentially identical, as the *Anti-Slavery Standard* reprinted the *Tribune's* account.

204. *A Police Trial*, *supra* note 2; *Equal Protection Under the Law*, *supra* note 3.

205. *A Police Trial*, *supra* note 2; *Equal Protection Under the Law*, *supra* note 3.

206. *A Police Trial*, *supra* note 2; *Equal Protection Under the Law*, *supra* note 3.

207. *A Police Trial*, *supra* note 2; *Equal Protection Under the Law*, *supra* note 3.

208. *A Police Trial*, *supra* note 2; *Equal Protection Under the Law*, *supra* note 3.

209. *A Police Trial*, *supra* note 2; *Equal Protection Under the Law*, *supra* note 3.

hoped to vindicate both the rights of riot victims in particular and the larger public good within Sergeant Jones's "jurisdiction."[210] Or, as the *Tribune* put it, Thomson's complaint sought to establish the general "point" that Black New Yorkers "had a right to demand protection" from the police.[211]

Questions regarding racial equality and the duties of the police were thus squarely presented in Sergeant Jones's trial, and both Commissioner Acton and the papers answered them with force. The papers declared that Sergeant Jones's failure to "protect[]" everyone within his "jurisdiction" was akin to "abett[ing]" the mob, while Commissioner Acton ruled that the police must provide "protection for every class of citizens—black or white, rich or poor, high or low."[212] It was this pithy point—that the police must "protect[] . . . every class of citizens," regardless of caste or color—that the *Anti-Slavery Standard* restated as "Equal Protection Under the Law."[213]

III. "SUFFERING FROM THE LATE RIOTS": RACE AND REMEDIATION IN WARTIME NEW YORK

Mortimer Thomson and Commissioner Acton were not the only New Yorkers who were horrified by the draft riots, and they were far from the only ones who took steps to redress the vast physical damage and human suffering caused by the mob. Indeed, a remarkable array of reparative measures unfolded across the city in July and August 1863, supported by a variety of public agencies, private actors, and public-private partnerships. These efforts had various shortcomings, as we shall see, but they also demonstrated, both implicitly and often explicitly, a widely shared substantive and ideological commitment to remediation. And, crucially, these remedial processes extended the discourse of "protection" beyond the context of riot *prevention* and riot *suppression* and into public and private efforts at *repair*, expanding the scope of the duty to protect.

The remedial measures in New York fell, broadly, into three categories, which this Part explores in depth. First, there was a wave of private philanthropy—sometimes with government support—that began immediately after the draft riots and that aimed to secure basic rights and access to the legal system for the Black community. Second, the city government itself launched a range of civil proceedings, administrative inquiries, and criminal prosecutions that displayed an emphatic, if also occasionally superficial, belief in remediation. And third, a torrent of detailed reporting in the press publicized both the brutality of the riots and the civic solidarity of the ensuing process of rebuilding, assembling a record of the

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210. *See A Police Trial*, *supra* note 2; *Equal Protection Under the Law*, *supra* note 3. Though it's anachronistic to describe Sergeant Jones's trial as structural reform litigation comparable to contemporary suits seeking injunctive relief to reshape policing or prison administration, constitutional test cases were part of mid-nineteenth-century legal culture, as demonstrated by explicit "test" suits brought against the draft in 1863. *See Constitutionality of the Conscription Act*, N.Y. SUNDAY MERCURY, July 26, 1863. On structural reform litigation, *see* John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387 (2007).

211. *A Police Trial*, *supra* note 2.

212. *Id.*; *Equal Protection Under the Law*, *supra* note 3.

213. *Equal Protection Under the Law*, *supra* note 3.

events and foregrounding, to an unprecedented extent, the voices of Black New Yorkers themselves. In light of the parallels between the mass racial violence of the draft riots and the evils that Reconstruction would soon seek to repair in the postwar South, this multitude of remedies in New York City in 1863, together with the dynamic public discourse that surrounded it, helps illuminate the ideas about rights, citizenship, and equal protection that were developing and circulating in the North on the very eve of Reconstruction.[214]

A. Private Philanthropy, Legal Aid, and "Equal Rights"

Perhaps the most striking remedial project in New York was a philanthropic drive led by the city's merchants, who simultaneously echoed Commissioner Acton's belief in government "protection" for African Americans[215] and expanded that discourse of "protection" into an explicit demand for "equal right[s]."[216] Bringing together and mobilizing both politically prominent Republicans and influential leaders in New York City's Black community,[217] this philanthropic effort channeled an evolving Republican and antislavery ideology at a moment of growing radicalization in the North in favor of new forms of equality.[218]

The philanthropists began organizing as soon as the riots subsided. On Saturday, July 18, the day after the riots had ended, a group of merchants met "in Front Street," the financial district in Lower Manhattan near Wall Street and the East River piers, "to consider the destitute condition of the colored people of this city, who have been deprived of their homes and their little property, by a mob."[219] They hoped "to devise means to relieve" Black riot victims' "immediate wants," they wrote, "and to secure them in their peaceable and honest labor hereafter."[220]

The group's leader was Jonathan Sturges, a Front Street merchant and railroad magnate whom the *Times* later described as "a stanch supporter of Republican institutions" and a "recognized leader of the anti-slavery movement" and who, as President of the Union League Club in 1863, took "a very active part" in "suppressing the great riots."[221] At the merchants' meeting on July 18, Sturges called on his peers to aid Black riot victims, and he invoked the philanthropic tradition of the city's merchant class—its past "acts of humanity" and "brotherly love"—which he contrasted with the "bad men" who had "persecuted, robbed and murdered" Black New Yorkers just the day before.[222] At a follow-up meeting two days later, the group then adopted a Preamble and Resolutions to create the Merchants'

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214. On public discourses, the history of rights, and the evolution of the law, see Rebecca J. Scott, *Discerning a Dignitary Offense: The Concept of Equal "Public Rights" During Reconstruction*, 38 LAW & HIST. REV. 519 (2020); Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777, 781, 800–01 (2008); RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS (1999); and BLIGHT, *supra* note 110, at 12–30.

215. *Police Headquarters*, Aug. 16, *supra* note 2.

216. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 12.

217. *See infra* notes 219–221, 252–257, and accompanying text.

218. *See* OAKES, *supra* note 175, at 393–429.

219. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 4.

220. *Id.*

221. *Obituary: Jonathan Sturges*, N.Y. TIMES, Nov. 30, 1874.

222. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 4–5.

Committee for the Relief of Colored People Suffering from the Late Riots. They elected a Chairman and a Secretary, they appointed Sturges as the Treasurer, they circulated their Resolutions to the newspapers, and they set to work.[223]

The Merchants' Committee's Resolutions specified two goals. First, the Committee aimed to raise and distribute funds to help Black riot victims bring civil damages claims against the city "to obtain redress."[224] This effort echoed a much longer history of free legal aid for fugitives from slavery in New York City, which was consistently provided by groups like the New York Manumission Society,[225] and it also anticipated the founding of early legal aid societies for the working poor in New York City and other urban centers like Chicago later in the 1860s and 1870s.[226] Free, basic access to the civil justice system, the Merchants' Committee thus implied, was a cornerstone of the post-riots recovery process.

Second, the Merchants' Committee promised to "exert all the influence we possess to protect the colored people of this city, in their rights to pursue, unmolested, their lawful occupations," and it vowed to "call upon the proper authorities to take immediate steps to afford them such protection."[227] The Committee further declared that it would not "recognize or sanction any distinction of persons, of whatever nation, religion, or color, in their natural rights, to labor peaceably in their vocations."[228] The Committee thus encouraged both the government and private citizens to "protect[]" Black New Yorkers' "rights"—or at least "their natural rights, to labor peaceably"—without "any distinction of persons," offering a forceful theory of rights "protection" by "the proper authorities" as a crucial component of both individual rights and governmental duties.[229]

The Merchants' Committee's theory of rights resonated in many ways with Commissioner Acton's. Just as Acton declared at Sergeant Jones's trial that the police must take steps to provide "protection for every class of citizens" with "not the slightest regard to . . . condition or color,"[230] the Merchants' Committee demanded that "the proper authorities . . . take immediate steps to afford [African Americans] protection" from mob violence without "any distinction of persons."[231]

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223. *Id.* at 2–6.

224. *Id.* at 5.

225. *See* FONER, *supra* note 46, at 40–42, 49; MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 34. Shaun Ossei-Owusu is advancing a similar claim about abolitionist societies as a form of early legal aid in a forthcoming book entitled *The People's Champ: Legal Aid from Slavery to Mass Incarceration*. *See* Faculty Page for Shaun Ossei-Owusu, U. Pa. Sch. L., https://www.law.upenn.edu/faculty/oss/.

226. *See* Robert Gordon, *Lawyers, the Legal Profession, and Access to Justice in the United States*, 148 DÆDALUS 177 (2019); FELICE BATLAN, WOMEN AND JUSTICE FOR THE POOR: A HISTORY OF LEGAL AID, 1863–1945, at 4–18 (2015). Batlan traces the origins of modern legal aid to the Working Women's Protective Union, which was founded in New York City in November 1863, just a few months after the Merchants' Committee began its work. BATLAN, *supra*, at 4. The draft riots thus form a bridge between early antislavery legal aid in New York City and the modern legal aid for manual laborers that Batlan discusses.

227. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5.

228. *Id.*

229. *Id.*

230. *A Police Trial, supra* note 2.

231. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5.

But where Commissioner Acton was focused primarily on basic safety, the Merchants' Committee much more broadly emphasized the right to work, one component of which was the "right[] to labor peaceably in [a] vocation[]."[232] And when the Committee discovered, in the weeks just after the riots, that employers were firing Black workers so that their workplaces wouldn't be in danger from future mobs, the Committee published a new appeal asking employers "to unite in protecting the injured and persecuted class" because "[t]he full and equal right of the colored man to work for whoever chooses to employ him . . . is too manifest to need proof."[233] For the Merchants' Committee, being safe both in the streets on the way to work and at one's workplace was the epitome of "equal right[s]," and "protecting" those rights was a civic duty.[234]

This emphasis on the right to work, of course, echoed the prewar Republican Party's central ideology of free labor.[235] And it dovetailed with the free labor ideal that was eventually embodied in both the Thirteenth Amendment and Section 1 of the Civil Rights Act of 1866, the latter of which "protect[s]" the rights of everyone, "of every race and color," to "make and enforce contracts" and to access "the full and equal benefit of all laws and proceedings for the security of person and property."[236] It is unsurprising, if still disappointing, that the merchant princes of the city were so fixated on restarting the labor system after the draft riots—indeed, their right-to-work ideology in some ways foreshadowed the postwar Republican reformers in New York who embraced a particularly harsh theory of liberty of contract that resulted in criminal sentences to hard labor for anyone who needed public charity.[237] But regardless of the limitations and long-term contradictions lurking within their ideology, the critical point is that in 1863, the Merchants'

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232. *Id.*

233. *Id.* at 12.

234. *Id.* Notably, the Chairman of the Merchants' Committee, J.D. McKenzie, also discussed the equal rights of Irish immigrants in a speech shortly after the riots, in which he explained that immigrants in New York City "received protection under our laws both in their persons and property" and possessed "every right both civil and political enjoyed by the most favored citizen." *Id.* at 35. McKenzie thus articulated a vision of equality that required equal "civil and political rights" for everyone within the polity while also making the point that "protection under [the] laws" involves governmental protection of "persons and property." *Id.* Though McKenzie did not use the phrase "equal protection of the laws," U.S. CONST. amend. XIV, his descriptions of equal "civil and political rights" and of "protection under [the] laws," MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 35, together suggest that the modifier *equal* protection plausibly invokes the adjacent idea of equal rights. Indeed, McKenzie next explained that Black New Yorkers deserved "protection" from the mob as well as "mercy" and "justice" in the wake of the riots, and he aspired that "this is what every man who treads this soil should in time to come receive not as a favor, but a right." *Id.*

235. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN 296 (1970); FONER, *supra* note 15, at 525, 534; WILLIAM GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY 1852–1856, at 356–57 (1987) (noting that free labor ideology came into greater prominence within Republican circles after the panic of 1857); EDWARDS, *supra* note 15, at 32–41; OAKES, *supra* note 175, at 2–30; STANLEY, *supra* note 156, at 35–44.

236. *See* U.S. CONST. amend. XIII; An Act to protect all Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication, ch. 31, § 1, 14 Stat. 27 (1866); GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY 3–17 (2013); Lea VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

237. *See* STANLEY, *supra* note 156, at 98–137; *see generally* Forbath, *supra* note 93 (discussing the varieties of free labor ideology in the late nineteenth century).

Committee, just like Commissioner Acton, believed that the "protection" of "full and equal right[s]" required an affirmative, active defense of those rights by the state—"immediate steps" by "the proper authorities" to "afford . . . protection" against rights violations by private parties.[238]

For their part, the Committee's first "steps" consisted of providing "immediate aid" in the form of cash payments to Black riot victims.[239] And the *Times* soon reported that the Committee's office on Fourth Street was "thronged with applicants" and that the Committee had already raised $28,000 and distributed $7,000 in relief.[240] The *Tribune* further pointed out that the Committee's office was "located on a quiet street not far from Police Headquarters, where protection can soon reach the sufferers in the event of a disturbance," and the Committee's office was sometimes so busy that it had to borrow special policemen, "kindly furnished by Mr. Acton," to help process claims.[241] The Committee ultimately raised some $40,000 to "protect[] those who have lost their property," and it assisted over 12,000 people.[242] It later asserted that its relief payments had "brought [African Americans] out of their hiding places in the outskirts of the city" and had "relieved their pressing wants."[243] In addition, the Committee endeavored to connect Black job-seekers with potential employers, functioning as a kind of ad hoc public employment agency.[244]

Critically, the Committee also helped Black New Yorkers seek government aid, taking advantage of the fact that the city was required by an 1855 state statute to pay damages for any property that was destroyed by rioters.[245] The statute imposed a form of absolute liability on the public at large, a legal mechanism that was designed to incentivize riot-prevention measures. Indeed, the New York Court of Appeals upheld the statute in 1865 on the ground that ever since "the earliest period" of English law—from Canute the Dane down through the Saxons, the Normans, and a variety of early-modern riot acts—it has been "the general duty of the government to prevent" injuries caused by "acts of lawless violence."[246] The

238. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5, 12.

239. *Id.* at 3, 5; *see also id.* at 8 (noting that on one day, "over $2,500 was distributed to 900 men").

240. Reprinted in MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 8.

241. *Id.* at 9–11.

242. *Id.* at 3, 10.

243. *Id.* at 4.

244. *Id.* at 11.

245. An Act to provide for compensating parties whose property may be destroyed in consequence of mobs or riots, 1855 N.Y. Ch. 428 § 1 ("Whenever any building or other real or personal property shall be destroyed or injured in consequence of any mob or riot, the city or county in which such property was situated, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured for the damages sustained by reason thereof.").

246. Darlington v. City of New York, 31 N.Y. 164, 187–90 (1865). The Court of Appeals upheld the state riot act against a due process takings challenge, reasoning that the statute exercised the legislature's "plenary" police power "to make good at the public expense, the losses of those who may be so unfortunate, as without their own fault to be injured in their property by acts of lawless violence of a particular kind, which it is the general duty of the government to prevent." *Id.* at 187. "[F]urther," the court said, "and principally, we may suppose," the law was reasonably meant "to make it the interest of every person liable to contribute to the public expenses," i.e., the taxpayers, "to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and

principle of an affirmative government duty to protect against mob violence, which was espoused by Mortimer Thomson, Commissioner Acton, and the Merchants' Committee in 1863, thus built on a deep tradition in Anglo-American common and statutory law, even as New Yorkers in 1863 rearticulated and expanded that duty in the new context of what the *Anti-Slavery Standard* called "Equal Protection," demanding that the state secure its people's "rights" without "any distinction of persons."[247]

Operating within this statutory framework, the Merchants' Committee "registered on their books the names of 2,422 colored claimants against the City" by mid-August 1863.[248] A "number of lawyers" also "volunteered to act as counsel" for Black claimants and to "endeavor to secure payment of losses inflicted upon them, by an appeal to the courts."[249] Black leaders in the city later thanked the Merchants' Committee for providing access to "the valuable services contributed by the gentlemen of the legal profession, who have daily been in attendance at the [Merchants' Committee's] office to make out the claims of the sufferers *free of charge*."[250] The Merchants' Committee thus mobilized pro bono lawyering to make the statutory remedies not just a legal entitlement but a practical reality for Black New Yorkers. That same month, the Freedmen's Department, a precursor to the postwar Freedmen's Bureau, was busy assisting recently freed African Americans in occupied Virginia, providing a contemporary parallel to the Merchants' Committee's relief work and linking the Merchants' Committee's approach to legal aid and financial remedies from the government with the Freedmen's Bureau's larger remedial efforts and reparative ideals during Reconstruction.[251]

Finally, and perhaps most importantly, the Merchants' Committee also empowered a group of four "colored pastors" to interview Black riot victims across

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social order." *Id.* "These ends," the court concluded, "are plainly within the purposes of civil government, and, indeed, it is to attain them that governments are instituted." *Id.* The riot act was thus a classic instance of nineteenth-century police powers regulation for the public welfare, and the prevention and remediation of mob violence was defined as the essence of civil government. *See* NOVAK, *supra* note 24 (discussing police powers regulation in the nineteenth century); Note, *Compensation for Victims of Urban Riots*, 68 COLUM. L. REV. 57, 67–68 (1968); Susan S. Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 IND. L.J. 177, 191–200 (2004); *cf.* Vanderbilt v. Adams, 7 Cow. 349, 351–52 (N.Y. 1827) (noting that police powers regulation "rests on the implied right and duty of the supreme power to protect all by statutory regulations"). Moreover, the riot act did not just impose liability on New York City. It also imposed individual liability on officers. If city officials were warned of a danger to property, they were required "to take all legal means to protect the property attacked or threatened; and any such officer . . . who shall refuse or neglect to perform such duty, shall be liable to the party aggrieved for such damages as said party may have sustained." 1855 N.Y. Ch. 428 § 3. An officer's "duty" "to protect" against harms committed by private parties, and officers' liability in negligence for failing to do so, *id.*, was thus a well-established legal principle by 1863. Sergeant Jones certainly would have been civilly liable if he had been sued. *Id.*

247. *Equal Protection Under the Law*, *supra* note 3; MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5, 12.

248. *The Colored Relief Fund*, N.Y. TIMES, Aug. 9, 1863.

249. *Relief of the Colored Sufferers*, N.Y. SUNDAY MERCURY, July 26, 1863.

250. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 34.

251. *See The Negroes Near Washington*, N.Y. TIMES, Aug. 9, 1863; FONER, *supra* note 15, at 67–70 (discussing the creation of the Freedmen's Bureau and its goals).

the city to determine what aid they required.[252] One of the Committee's interviewers was the radical Black abolitionist Henry Highland Garnet, who had famously called for armed slave insurrection in 1843 and who would become the first Black pastor to preach in the U.S. House of Representatives in 1865.[253] He reportedly used his "extensive acquaintance among the colored people" to record and adjust their claims.[254] Charles B. Ray, who was the head of the New York State Vigilance Committee in the 1850s and a major leader in both the Underground Railroad and wider antislavery activism and fundraising before the Civil War, was another one of the interviewers.[255] In general, the Merchants' Committee was highly paternalistic toward the riot victims whom it sought to help, but this particular aspect of its approach enabled existing leaders within the Black community to shape their community's own recovery from the riots.[256] Altogether, the four pastors conducted some 3,000 interviews in just a month, indicating both the urgency of the project and the brevity with which any given interview must have occurred.[257]

The Merchants' Committee then published a *Report* detailing its activities and printing excerpts of victim testimony, which ranged from short statements of damages to lengthy personal histories. The *Report* explained that the testimony was included so that readers—marked by the text as presumptively white—could "appreciate the situation of the colored people."[258] Despite that patronizing rhetorical framing, the *Report* offered Black New Yorkers a forum to describe the depredations of the mob in their own words, a significant act in a nation that still largely barred non-white testimony in court.[259] Their accounts form a chilling mosaic of mass violence. Nancy Robinson, for example, described how her husband was murdered while they tried to escape by ferry to Brooklyn, and the *Report* noted

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252. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 3–4.

253. *Id.* at 11; FONER, *supra* note 46, at 42, 168, ; POTTER, *supra* note 52, at 454; MASUR, *supra* note 113, at 197–98; James Jasinski, *Constituting Antebellum African American Identity: Resistance, Violence, and Masculinity in Henry Highland Garnet's (1843) "Address to the Slaves,"* 93 Q. J. SPEECH 27 (2007); HENRY HIGHLAND GARNET, A MEMORIAL DISCOURSE (1865). Notably, Garnet was also granted a passport by the State Department early in the war, a political act that affirmed Black citizenship in direct contradiction of *Dred Scott.* MASUR, *supra* note 113, at 287–88.

254. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 9.

255. *Id.* at 9, 11, 34; FONER, *supra* note 46, at 8, 166–75; MASUR, *supra* note 113, at 116.

256. The Merchants' Committee's work also led the Union League Club to raise a Black regiment in 1864. BERNSTEIN, *supra* note 1, at 66–67. The prominent Republican lawyer Francis Lieber even wrote to Charles Sumner about "the historic fact" of that regiment taking up arms, given that just the year before, Black New Yorkers had been "literally hunted down" in the streets. *Id.* Such military service, as activists like Frederick Douglass noted at the time and historians have emphasized since, remade Black men's position within the United States, creating a new degree of equality and citizenship for those who fought to defend the Union. *See* MASUR, *supra* note 113, at 289–91; FONER, *supra* note 15, at 8–10; FREEDOM'S SOLDIERS: THE BLACK MILITARY EXPERIENCE IN THE CIVIL WAR (Ira Berlin, Joseph P. Reidy & Leslie S. Rowland eds., 1998). Consequently, to the extent that the Merchants' Committee, the Union League Club, and leading Republicans like Lieber saw Black enlistment as a direct response to the draft riots, it was another way in which New York City's white Republicans empowered Black New Yorkers, though in this case only Black men, to shape their own destiny in the wake of the riots.

257. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 3–4, 11.

258. *Id.* at 13.

259. *See, e.g.*, People v. Hall, 4 Cal. 399 (1854). On the importance of victim testimony in human rights movements and remediation, see ELAINE SCARRY, THE BODY IN PAIN (1985).

that "the atrocities . . . perpetrated upon him are so indecent, they are unfit for publication."[260] Mrs. Statts, similarly, described an attack on her son William Henry's house, during which the rioters, wielding pickaxes and throwing bricks, stripped a new mother naked, threw her three-day-old baby out the window, "killing it instantly," and chased Mrs. Statts and her son out the back.[261] But as she and William Henry scaled the back fence, she fainted, and he jumped back down to help her, shouting "save my mother, gentlemen, if you kill me."[262] Mrs. Statts escaped while the rioters beat her son to death.[263]

The violence recorded in the Merchants' Committee's *Report* is reminiscent of nothing so much as the Ku Klux Klan in the early 1870s in the South,[264] and the testimony could just as easily be from the pages of a congressional inquiry into Klan terrorism during Reconstruction.[265] The Merchants' Committee's demand in 1863 for government "protection" of "full and equal right[s]"[266] thus fit into and foreshadowed a decade and a half of Reconstruction battles to come.

B. The City Government, the Legal Process, and Public Redress

While the Merchants' Committee was mobilizing private resources, the city government responded to the draft riots with a mix of civil and criminal law. The outcomes of those legal proceedings had substantive impacts on both riot victims, who received damages payments, and the rioters, a significant number of whom were convicted and sentenced to time behind bars. Those various legal processes also gave government officials a public platform to articulate legal and civic norms opposed to the riots and in favor of racial redress. Those officials' statements unfortunately tended to be much more emphatic than their actual conduct, but both their public statements and their conduct contributed to an important period of time in which the city government paid unprecedented attention to the welfare of New York's Black residents.

On the civil side, as the Merchants' Committee had recognized, the city had a statutory duty to pay damages to riot victims.[267] Within a few weeks of the draft riots, the city had already received so many damages claims—some of which, one newspaper asserted, were "palpable attempts" at fraud—that it had to create a new administrative tribunal just to process them.[268] The Board of Supervisors therefore designated a "Special Committee" to adjudicate cases, and it met "daily in the supreme Court room in Duane street," aiming to "dispose of twenty cases" a day.[269]

260. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 15.

261. *Id.* at 16–17.

262. *Id.*

263. *Id.* at 17.

264. *See* ALEXANDER, *supra* note 83, at 6–15.

265. *See* REPORT OF THE JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES (1872).

266. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5, 12.

267. An Act to provide for compensating parties whose property may be destroyed in consequence of mobs or riots, 1855 N.Y. Ch. 428 § 1; *see also* Darlington v. City of New York, 31 N.Y. 164, 187–90 (1865).

268. *Claims for Damages*, N.Y. SUNDAY MERCURY, Aug. 9, 1863.

269. *Id.*

Crucially, the Special Committee also announced that they would "g[i]ve their especial attention to the claims of the colored sufferers, whose cases will be among the first to be adjudicated."[270] The Special Committee thus publicly prioritized remedies for Black victims of the white supremacist mob. Given that Black New Yorkers were entitled to no greater statutory damages than their white counterparts, the Special Committee's decision to prioritize their claims, combined with the fact that the police department had "kindly furnished" officers to the Merchants' Committee to help bring those claims in the first place,[271] represents a remarkable degree of race-conscious remedies for the time. And insofar as the police department in particular was likely able to take that step partly because it was an independent state agency, free from the Democratic mayor's control, the civil claims process in 1863 offers an intriguing prehistory for the strategic use of administrative agencies to advance civil rights claims in the twentieth century.[272]

In practice, however, the efficacy of the civil claims process was at best mixed. By early August 1863, more than $1,400,000 in claims had been made, but the city's own accounting report from December 1867 showed that only $587,000 in claims had been accepted, and only $549,000 had been paid out.[273] That was a large sum for the time, but it was much less than the $2,000,000 that the Common Council had authorized during the draft riots to pay commutation fees for draftees.[274] On the other hand, it remains an important fact that the city made these damages payments at all: when the Merchants' Committee said that the "proper authorities" should "afford . . . protection" to Black riot victims, part of what it had in mind was such financial remedies.[275]

New Yorkers could also follow the civil claims process in the press, making it a kind of public accounting of the destruction caused by the riots. One article about the claims process in the *Mercury*, which described a "perfect rush" of claimants and then itemized their claims, even appeared next to a story about Sergeant Jones's trial.[276] That layout on the page implicitly invited readers to compare Sergeant

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270. *Id.*

271. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 11.

272. *See* Sophia Z. Lee, *Hotspots in a Cold War*, 26 LAW & HIST. REV. 327, 327–33 (2008).

273. *Claims for Damages*, *supra* note 268; BOARD OF SUPERVISORS, 2 COMMUNICATION FROM THE COMPTROLLER RELATIVE TO EXPENDITURES AND RECEIPTS OF THE COUNTY OF NEW YORK, ON ACCOUNT OF THE DAMAGE BY RIOTS OF 1863, DOCUMENT NO. 13, at 171 (1868).

274. *See* COOK, *supra* note 1, at 174. "Protection" discourse was also notably used to describe the commutation-fee program. In late August, the *Mercury* praised the Common Council for appropriating funds to pay the commutation fees because otherwise, "the Conscription would fall with great severity upon the unprotected and defenceless poor." *The Draft: The Exemption and Relief Ordinance*, N.Y. SUNDAY MERCURY, Aug. 30, 1863. The draft relief project also competed sometimes with the project of riot relief. The *Times* reported on one occasion that "[t]he Broadway Bank" had offered the Comptroller "$500,000 to apply" either to the "Substitute and Relief" bonds being used to raise money for draftees "or to the Riot Damages," and the Comptroller "intend[ed] to apply it on the $2,000,000 bonds" for draft relief. *The Exemption Ordinance*, N.Y. TIMES, Aug. 30, 1863, at 3.

275. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5. Indeed, there was a long history, in both the nineteenth-century United States and England before that, of the state and federal governments paying disaster relief, including by using commissions to disburse the funds, like the Special Committee that was employed after the draft riots in New York. *See* Kuo, *supra* note 246, at 184–96; Mashaw, *Reluctant Nationalists*, *supra* note 132, at 1731.

276. *Claims for Damages*, *supra* note 268; *Police Headquarters*, Aug. 9, *supra* note 1.

Jones's failure to "protect" the people and property within his jurisdiction[277] with the significant costs of rebuilding—"the total amount thus far" in damages claims, the paper reported, was "$1,407,066.40."[278] That same story on damages claims also noted that most of the claimants were Black, and it explained that "[t]hese poor people were the severest sufferers, because they were the least able of all others to suffer."[279] Newspaper coverage of the claims process thus reinforced the twin points that Black residents had been uniquely harmed by the riots because of preexisting socioeconomic inequalities and that the city was carrying out its obligation to provide redress.

Many Black claimants, moreover, gained the opportunity to voice their own claims in the public sphere when, five years later, the city completed the claims process and published over a thousand pages of testimony, much of it in the form of direct transcripts.[280] This massive report was less timely than the Merchants' Committee's shorter publication in 1863, but it created a comprehensive record of both the draft riots and the government's actions to remedy those harms.

The city also prosecuted the rioters.[281] There was "sharp work in the court of general sessions," the *Mercury* reported, with "quick trials, prompt convictions, and severe sentences."[282] "The Grand Jury have labored earnestly," the paper intoned, yielding seventy indictments, twenty guilty pleas, and six convictions by August 9.[283] To give just a brief representative sample, the defendants included Patrick Sweeney, who was sentenced to three years for his failed "attempt to burn negro quarters"; Joseph Marshall, who received ten years for throwing a Black man "into the north river" to drown; and Richard Lynch, who pleaded guilty to "the burning of the colored orphan asylum."[284] The newspapers' recitations of the rioters' crimes formed yet another public record of the events.

There was one notable case in federal court, too. Supreme Court Justice Samuel Nelson, riding circuit, sentenced John Andrews to three years in Sing Sing for the anti-war speech he gave at the Ninth District Draft Office as the mob burned it down.[285] Andrews, a lawyer, invoked "freedom of speech," but Justice Nelson retorted that Andrews had been "a leader" of a "violent mob."[286] Andrews

277. *Police Headquarters*, Aug. 9, *supra* note 1.
278. *Claims for Damages*, *supra* note 268.
279. *Id.*
280. *See* COMMUNICATION FROM THE COMPTROLLER, *supra* note 273.
281. *See, e.g.*, *The Trial of the Rioters*, N.Y. SUNDAY MERCURY, Aug. 9, 1863.
282. *Id.*
283. *Id.*
284. *Id.*
285. *Trial of John W. Andrews*, *supra* note 68; *Recollections of the Riot*, *supra* note 68, at 2; *The Doings of a City Mob*, *supra* note 68; BERNSTEIN, *supra* note 1, at 18. Andrews was indicted for four counts: "Treason"; "Conspiracy to levy war against the U.S."; "Inciting, Setting on foot + engaging in a Rebellion + Insurrection agst [sic] U.S."; and "Resisting + Counseling + aiding resistance to a draft." Criminal Dockets, *supra* note 68, at 3/12–3/14. No verdict is recorded for the first three counts, but for the final count, Andrews was "Tried," found "Guilty," and "Sentence[d]" to "3 years imprisonment at hard labor, + fine of 6 cents." *Id.*
286. *Trial of John W. Andrews*, *supra* note 68.

did not just shout "fire" in a crowded building—his speech added fuel to the blaze.[287]

These state and federal prosecutions served an expressive function just as much as a retributive one. "Those who labored under the impression that the rioters would be tenderly dealt with have now found out their mistake," the *Mercury* proudly declared, while Justice Nelson told Andrews that "the court" was "obliged to make an example of you, to warn the community."[288] Prison sentences were thus a symbol, at least in theory, for the illegitimacy of mob violence.

Despite such unequivocal statements by judges and the press, the meaning of the prosecutions remains ambiguous. Some eighty-one rioters were ultimately prosecuted, but thousands of others went free, and convicted rioters often faced longer prison sentences for property damage than they did for physical assault—not dissimilar, perhaps, to the Merchants' Committee's overriding emphasis on restarting the economy.[289] Moreover, as the *Tribune* explained, the District Attorney and the criminal courts wound down the draft riot prosecutions after "enough cases ha[d] been disposed of to give those disposed to violate the law to understand that it cannot be done with impunity."[290] A number of outstanding indictments were never tried.[291] The authorities were thus invested in prosecuting enough rioters to prevent similarly costly disorders in the future, making clear that rioting "cannot be done with impunity,"[292] but given the untried indictments,[293] it seems they were not nearly as interested in seeking justice on behalf of every victim. Nevertheless, the city's brief but intense pursuit of the rioters in court did make it clear that the authorities felt the need to use the criminal process to deter future white supremacist mobs.

C. The Press, the Public Sphere, and the Discourse of "Equal Protection"

Surrounding these many civil, criminal, and philanthropic remedies, finally, was a veritable buzz of newspaper coverage about the draft riots and their aftermath. Mainstream papers like the *Times*, the *Tribune*, and the *Mercury*, as well as more radical abolitionist publications like the *Anti-Slavery Standard* and William Lloyd Garrison's *The Liberator*, ran a steady stream of articles on the riots, and *Harper's Weekly* published an issue filled with reporting and etchings depicting the events.[294] This press coverage simultaneously articulated public values in response to the riots and revealed how varied the public's views could be. Importantly, though, newspapers across the pro-war ideological spectrum circulated the calls made by Commissioner Acton, the Merchants' Committee, and others for "protection" of citizens without regard to race or class, demonstrating just how widely this discourse of rights protection traveled in the weeks following the draft riots.

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287. Compare, of course, *Schenck v. United States*, 249 U.S. 47, 52 (1919).
288. *The Trial of the Rioters*, *supra* note 282; *Trial of John W. Andrews*, *supra* note 68.
289. COOK, *supra* note 1, at 179.
290. *General News*, *supra* note 104, at 4.
291. COOK, *supra* note 1, at 179.
292. *General News*, *supra* note 104, at 4.
293. COOK, *supra* note 1, at 179.
294. *See* sources cited *infra* notes 295–313; HARPER'S WEEKLY, Aug. 1, 1863.

A single issue of the *Mercury* shows how multifaceted—and sometimes contradictory—the coverage of the riots could be. On the front page on July 26, an article titled "The Feeling in this City" placidly reported that "the police go on their accustomed rounds, and all that brings to remembrance the scenes of last week are, the charred ruins of buildings here and there."[295] Amnesia was already setting in. The story then foregrounded the Common Council's decision to pay the commutation fees for draftees, explaining that "[i]n view of the popular belief that our poor people have nothing to apprehend from the draft, we see no signs of future disturbance."[296] But the draft itself was still contentious. The very next article, titled "Constitutionality of the Conscription Act," reported that the Democratic Union Association had voted to "procure counsel" to "test the constitutionality" of the draft—Mortimer Thomson, it seems, wasn't the only one bringing test cases—and a later article levied a full-throated critique of the draft under the searing headline "Conscription Always Repugnant in America. Its Rejection During the War of 1812. No Necessity for it Now."[297] Two stories then reported on private relief funds that were being raised for African Americans and for injured police officers and soldiers, and later in the issue, the paper narrated a series of "Incidents in the Late Riots."[298] The very same paper could thus defend the war, criticize the draft rioters, support remedial efforts, and yet condemn the draft itself.

Another article in the July 26 issue of the *Mercury* demonstrated the racial solidarity of the antislavery print public sphere, at least in the wake of the draft riots. In a short piece titled "An Anglo-African Editor's Appeal," the *Mercury* explained that *The Anglo-African*, a groundbreaking Black newspaper "devoted specially to the best interests of the colored people," had experienced a precipitous drop in circulation when African Americans fled "from outrage and massacre" in the city, so the article asked for donations and subscriptions to help keep the *Anglo-African* afloat.[299] In both the *Mercury*'s and the *Anglo-African*'s views, therefore, supporting Black print culture was a key piece of the larger relief efforts, not unlike damages payments to individual riot victims.

That is not to say, however, that the *Mercury* and the *Anglo-African* had identical editorial views. In particular, the *Anglo-African* took a much less relaxed approach to the post-riots recovery process than the *Mercury*'s sanguine claim on July 26 that "all that brings to remembrance the scenes of last week are, the charred ruins of buildings here and there."[300] In sharp contrast, the front page of the *Anglo-*

295. *The Feeling in this City*, N.Y. SUNDAY MERCURY, July 26, 1863.

296. *Id.*

297. *Constitutionality of the Conscription Act*, N.Y. SUNDAY MERCURY, July 26, 1863; *Conscription Always Repugnant in America,* N.Y. SUNDAY MERCURY, July 26, 1863.

298. *The Police and Military Relief Fund*, N.Y. SUNDAY MERCURY, July 26, 1863; *Relief of the Colored Sufferers, supra* note 249; *Incidents of the Late Riot*, N.Y. SUNDAY MERCURY, July 26, 1863.

299. *An Anglo-African Editor's Appeal*, N.Y. SUNDAY MERCURY, July 26, 1863. On the history of the *Anglo-African*, see DERRICK R. SPIRES, THE PRACTICE OF CITIZENSHIP: BLACK POLITICS AND PRINT CULTURE IN THE EARLY UNITED STATES 161–205 (2019); Ivy G. Wilson, *The Brief Wondrous Life of the* Anglo-African Magazine, *in* PUBLISHING BLACKNESS 18 (George Hutchinson & John K. Young eds., 2013); and Debra Jackson, *"A Cultural Stronghold": The "Anglo-African" Newspaper and the Black Community of New York*, 85 N.Y. HIST. 331 (2004).

300. *The Feeling in this City*, N.Y. SUNDAY MERCURY, July 26, 1863.

African on August 1 featured an article by Frederick Douglass that described how "colored men of New York and other cities" had been "scourged and driven from their homes."[301] The *Anglo-African* then ran a pair of articles on "The Condition of the City and the Colored People Since the Riots" and "Reported Deaths," which together explained that a "spirit of distrust and suspicion" still "reign[ed]" in the city and tried to inform the local Black community about who had survived the riots, since many Black New Yorkers were still in hiding.[302] Like the *Mercury*, though, the *Anglo-African* also covered the formation of the Merchants' Committee, and tellingly, it reprinted the Committee's resolution to "call upon the proper authorities to take immediate steps to afford [Black New Yorkers] protection" of their "rights."[303]

Much like the *Anglo-African*, the August edition of Frederick Douglass's paper, *Douglass' Monthly*, printed his article describing how Black New Yorkers had been "scourged and driven from their homes," and it ran a story titled "Another Feature of the New York Riot," which argued that the "deep-seated and ferocious antipathy" toward African Americans during the draft riots was "the fruit of that long, long era of injustice and violence which has marked our dealing with the negro."[304] The riots, *Douglass' Monthly* asserted, were rooted in a deep history of racism and were driven by "the vile appeals to prejudice, to caste, and to race" that had long been made to the white "lower classes."[305] *The Liberator* made the same claim, arguing that "the late fiendish riots" were the result of long-running racist appeals to the white working class.[306] Black print culture and the radical abolitionist press thus developed a far more structural critique of the draft riots, linking the riots to fundamental features of the economic, social, and political order in the United States.

Lastly, it is essential to note that alongside its coverage of the draft riots, the August issue of *Douglass' Monthly* prominently printed a copy of an executive order that had recently been signed by President Lincoln, under the headline "Protection of Colored Troops," in which Lincoln explained that "[i]t is the duty of every government to give protection to its citizens, of whatever class, color, or

301. Douglass, *supra* note 8.

302. *The Condition of the City and the Colored People Since the Riots,* ANGLO-AFRICAN, Aug. 1, 1863; *Reported Deaths*, ANGLO-AFRICAN, Aug. 1, 1863.

303. *Meeting of Merchants*, ANGLO-AFRICAN, Aug. 1, 1863; *Relief for the Colored Sufferers*, ANGLO-AFRICAN, Aug. 1, 1863; *The Late Riots*, ANGLO-AFRICAN, Aug. 1, 1863; *An Appeal for the Destitute Colored Refugees*, ANGLO-AFRICAN, Aug. 1, 1863.

304. Frederick Douglass, *Letter from Frederick Douglass*, DOUGLASS' MONTHLY, Aug. 1863, at 852; *Another Feature of the New York Riot*, DOUGLASS' MONTHLY, Aug. 1863, at 863.

305. *Another Feature of the New York Riot*, *supra* note 304, at 863.

306. *The Late Fiendish Riots*, LIBERATOR, July 24, 1863, at 118. There had indeed been such explicitly raced and classed appeals during the war. In 1862, for example, Northern Democrats attacked Republicans for trying to free "two or three million semi-savages" to "overrun the North and enter into competition with the white laboring masses," and Democratic newspapers asked, rhetorically, "Shall the Working Classes be Equalized with Negroes?" MCPHERSON, *supra* note 32, at 506–07. More broadly, racist appeals to the white working class in the North were made throughout antebellum history—in the Jacksonian period, for instance, "Democrats often adopted profoundly racist rhetoric to cement support from working-class whites, who were most likely to see African Americans as competitors for jobs." MASUR, *supra* note 113, at 88, 96.

condition."[307] Lincoln therefore threatened to retaliate against Confederate prisoners of war if Black Union prisoners of war were mistreated.[308] Thus, at the very same time that Mortimer Thomson, Commissioner Acton, and the Merchants' Committee were all demanding affirmative steps by the authorities in New York to protect African Americans' rights,[309] Abraham Lincoln himself was declaring that it was his government's "duty" to "give protection" to all of its people, regardless of "class, color, or condition."[310] And Lincoln was taking affirmative steps—quite aggressive ones, in fact—to secure such "protection" against racial violence in the South.[311]

The barrage of newspaper reporting about the draft riots and the post-riots remedial process indicates both that the papers themselves were interested in investigating what had happened and that readers had an appetite for such stories. The papers also recirculated each other's stories, and both David Barnes's book and the Merchants' Committee's *Report* quoted from and reprinted portions of articles from the *Times* and the *Tribune*, keeping those articles in the public mind.[312] The Black press, including the *Anglo-African* and *Douglass' Monthly*, likewise recirculated stories reprinted from each other and from the *Tribune*, stitching together an alternative print public sphere that was even more harshly critical of the draft riots.[313] The press was thus an ongoing forum in which New Yorkers, and readers across the North, recorded, confronted, and debated what had occurred. And despite the many different views that were represented in the public sphere, the practice of reprinting articles from other papers created a number of widely shared, central themes.

In particular, the repeated recirculation of Commissioner Acton's ruling that the police must provide "protection for every class of citizens,"[314] the Merchants' Committee's "call [for] the proper authorities to take immediate steps to afford [African Americans] such protection,"[315] and President Lincoln's declaration that "[i]t is the duty of every government to give protection to its citizens, of whatever class, color, or condition"[316] suggests that the theory of rights "protection" that was articulated in New York City in 1863 had significant public support in the North—and was likely encountered by even more readers than necessarily agreed with it.

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307. *Protection of Colored Troops*, DOUGLASS' MONTHLY, Aug. 1863, at 853.

308. *Id.*

309. *See Police Headquarters*, Aug. 16, *supra* note 2; MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5, 12.

310. *Protection of Colored Troops*, *supra* note 307, at 853.

311. *Id.*

312. *See* BARNES, *supra* note 115, at 5 (explaining that the book consists of articles that were "prepared for the *New York Times*, and are reprinted nearly as therein appearing"); MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 8–9 (reprinting articles from the *Times* and the *Tribune*). Barnes also "condensed" and reprinted material from the Merchants' Committee's *Report*. BARNES, *supra* note 115, at 113–16.

313. *Cf.* NIKHIL PAL SINGH, BLACK IS A COUNTRY 65–69 (2004) (describing "the rise of a black 'counter-public sphere'" in the twentieth century); SPIRES, *supra* note 299, at 6–14 (discussing how "black print culture" in the nineteenth century developed and circulated new ideas about citizenship).

314. *Police Headquarters*, Aug. 16, *supra* note 2.

315. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5.

316. *Protection of Colored Troops*, *supra* note 307.

In the end, the various remedial actions that were taken in New York City after the draft riots were decidedly imperfect. Black New Yorkers certainly expressed that view when they fled the city by the thousands and refused to return.[317] At the same time, however, the remedial process was importantly influenced by Black community leaders, including some of the most radical; it focused on and publicized the accounts of Black witnesses themselves; and it was shaped by the understanding that preexisting social and economic inequalities exacerbated the impact of the riots. Taking those aspects into account, the rebuilding efforts in New York look surprisingly egalitarian for their time, especially in comparison with the top-down approach to reform that was taken by elites in the city in the 1870s with harsh effects for the poor.[318] Today, as cities pursue structural reforms to achieve racial justice and even embark on reparations programs, the grassroots-oriented features of the post-riots remedial process in New York offer an important historical precedent.[319]

Moreover, if we view the 1860s United States as a society in the midst of transitional justice, we can also see the brief but intense outpouring of civil, criminal, philanthropic, and reportorial remedies in New York City in 1863 as a kind of proto-truth and reconciliation process.[320] That remedial process in New York expressed key "principle[s]," to borrow a word from Mortimer Thomson,[321] that would resonate throughout Reconstruction, as Radical Republicans fought to repress and remedy analogous harms in the postwar South.[322] The rich discourse of "equal protection"[323] that developed in the wake of the draft riots in New York therefore deserves to be read together with the longer arc of Reconstruction nationwide, with potentially significant consequences for our understanding of the Equal Protection Clause. I discuss those implications for equal protection law in the next Part.

IV. "PROTECTION FOR EVERY CLASS OF CITIZENS": THE DRAFT RIOTS, THE EQUAL PROTECTION CLAUSE, AND THE DOCTRINE OF STATE NEGLECT

Given the sheer range of official and unofficial actors in New York City who called for affirmative governmental actions to "afford protection"—and even "Equal Protection"—in the weeks after the draft riots,[324] it is clear that the discourse of rights protection that emerged in New York in 1863 exemplified at least one significant strand of Republican and antislavery thought. I have not found any evidence that members of Congress consciously crafted the Equal Protection

317. BERNSTEIN, *supra* note 1, at 4, 76.

318. *See* STANLEY, *supra* note 156, at 98–137.

319. *See* FRANKE, *supra* note 29; Julie Bosman, *Chicago Suburb Moves to Shape Reparations for its Black Residents*, N.Y. TIMES, Mar. 23, 2021, at A21; Jordan Brewington, Note, *Dismantling the Master's House: Reparations on the American Plantation*, 130 YALE L.J. 1952 (2021).

320. On Reconstruction as a period of transitional justice, see Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680, 1711–16 (2006). On victim testimony, truth and reconciliation, and the expressive function of law, see U.C. BERKELEY SCH. OF L. HUM. RTS. CTR., THE VICTIMS' COURT? (2015) and TRANSITIONAL JUSTICE AND THE PUBLIC SPHERE (Chrisje Brants & Susanne Karstedt eds., 2017).

321. *Police Headquarters*, Aug. 16, *supra* note 2.

322. *See supra* notes 83, 113, and accompanying text.

323. *Equal Protection Under the Law*, *supra* note 3.

324. *Id.*; MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5.

Clause just a few years later with the draft riots in mind—though they were thinking about the Memphis riots of 1866 when they voted on the Fourteenth Amendment,[325] and Frederick Douglass later advocated for the Fifteenth Amendment on the grounds that African Americans had been "hunted down through . . . New York and . . . hung upon lamp-posts."[326] But even without explicit references to the draft riots during the congressional debates over the Fourteenth Amendment, the vernacular concept of rights protection that developed in response to the draft riots still helps reveal the intellectual background against which the Fourteenth Amendment was composed.[327]

It is likewise clear that the vernacular concept of rights protection that circulated in New York City in 1863 held, in contrast to the modern state action doctrine, that "Equal Protection" and the "protection" of "full and equal right[s]"[328] requires governments to take affirmative steps to guard against and remedy at least some forms of discriminatory harms caused by private parties. Following Pamela Brandwein, this theory can usefully be characterized as the doctrine of "state neglect."[329] Under a state neglect model, the Equal Protection Clause obligates governments not only to refrain from violating their people's equal rights, but also to take certain actions to protect those rights, and if a state neglects to protect some portion of its people's rights, it violates the Fourteenth Amendment's command, opening space for the U.S. Congress to pass enforcement legislation.[330] The many New Yorkers who called on their government to "take immediate steps to afford [African Americans] protection" were thinking in just such terms, asking the authorities to wield their police powers positively to prevent—and, later, to redress—discriminatory harms, including through the use of race-conscious remedies.[331] A robust public discourse thus advanced a state neglect theory of governmental duties shortly before the Equal Protection Clause was adopted.

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325. *See* Kuo, *supra* note 246, at 198–200; Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment,* 41 DUKE L.J. 507, 569–70 (1991); BARNETT & BERNICK, supra note 20, at 335.

326. WHITE, *supra* note 120, at 101. Douglass made this point as a reason to support Black male suffrage—his logic was that women were not "hunted" through the streets "because they are women"—but he also supported a Sixteenth Amendment to achieve women's suffrage. *Id.* Like Douglass's emphasis on the draft riots, Black writers continued to recall the draft riots well into the twentieth century. *See* JACQUELINE GOLDSBY, A SPECTACULAR SECRET: LYNCHING IN AMERICAN LIFE AND LITERATURE 179 (2006).

327. *See generally* Scott, *Discerning a Dignitary Offense*, *supra* note 214; Scott, *Public Rights*, *supra* note 214; PRIMUS, *supra* note 214; Howard Gillman, *Book Review: The American Language of Rights*, 94 AM. POL. SCI. REV. 712 (2000) (reviewing PRIMUS, *supra* note 214); Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 899. The draft riots are fascinating evidence of what Gillman would call the "everyday, uneven evolution" of concepts of rights "in different corners of the language game," outside traditional forums for constitutional interpretation such as Congress or the Supreme Court. Gillman, *supra*, at 713.

328. *Equal Protection Under the Law*, *supra* note 3; MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5, 12.

329. BRANDWEIN, *supra* note 4, at 12–14.

330. *Id.*

331. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5. Insofar as the Equal Protection Clause also applies to the federal government, the duties created by the state neglect doctrine should apply to federal action, too. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

This reading of the remedial discourse after the draft riots in New York expands the case for the state neglect doctrine in three ways. First, it provides pre-ratification precedent for enforcing a state neglect theory of equal protection against governments and their officers. Second, it offers evidence for judicial, not just legislative or executive, enforcement of a state neglect-style governmental duty to protect. And third, it shows that the legal concept of "protection" had a wider scope in the 1860s than recent originalist scholarship has allowed, as that concept of "protection" broadly encompassed government efforts to achieve equal rights, including through the use of race-conscious remedies. I elaborate on these three points in the remainder of this Part.

A. Pre-Ratification Precedent for Enforcing a State Neglect Model of Equal Protection

To begin with, the history of the draft riots demonstrates that a state neglect theory was circulating in the public sphere—and indeed that legal and political actors were enforcing a state neglect model of affirmative governmental duties against state officers like Sergeant Jones—well before the proposal and ratification of the Fourteenth Amendment. Brandwein's pathbreaking work, in contrast, focuses on post-ratification efforts to enforce a state neglect model, as does the casebook on constitutional law edited by Sanford Levinson and others, leaving their analyses open to charges of anachronism.

In particular, Brandwein argues that "[i]t was in the course of the investigation and in the debates that culminated in the passage of the Ku Klux Klan Act of 1871 that centrist Republicans developed a vocabulary of state neglect,"[332] and Levinson and his coeditors make a similar claim.[333] But although members of Congress did explicitly argue in 1871 that "neglect or refusal to enforce" the laws with regard to some "portion of the people" could "den[y] equal protection," and while Justice Bradley's circuit court decision in *Cruikshank* did include a state neglect component within the evolving state action doctrine in the mid-1870s,[334] such post-ratification sources do not necessarily reveal what the Equal Protection Clause would have meant when it was drafted back in 1866. Similarly, although Senator Oliver Morton did claim in 1876 that it "was the understanding" of the Fourteenth Amendment when it was "passed" that "[i]t is the duty of the State to protect every class of her population[,] and when a State fails to do it . . . it is denying the equal protection of the laws," a skeptic could easily dismiss Morton's statement as a convenient historical revision in the mid-1870s to meet the new challenges posed by the Klan

332. BRANDWEIN, *supra* note 4, at 34.

333. Specifically, they assert that "[t]his idea"—i.e., the state neglect doctrine—"appears in the debates over the 1871 Ku Klux Klan Act" and in "the very first judicial construction of § 5," also from 1871, in an opinion by Judge, and later Justice, Woods, which held that "[d]enying [equal protection] includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *supra* note 22, at 433 (quoting *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (interpreting U.S. CONST. amend. XIV, § 5)).

334. BRANDWEIN, *supra* note 4 at 40, 97–121; Cruikshank v. United States, 92 U.S. 542 (1876).

and by the constricted reading of the Privileges or Immunities Clause in the *Slaughter-House Cases*.[335]

The history of the draft riots helps alleviate such skepticism by showing that a state neglect theory of rights protection was current, and in fact had been enforced, even before the Civil War came to an end. A state neglect model of equal protection was thus fully cognizable when the Fourteenth Amendment was ratified. And at the very least, it seems likely that Mortimer Thomson, Commissioner Acton, and especially the editors of the *Anti-Slavery Standard* who wrote the "Equal Protection" headline in 1863 would have read the proposed text of the Fourteenth Amendment that way. To the extent that history matters in constitutional interpretation, the draft riots therefore confirm that a state neglect model of an affirmative—and enforceable—governmental duty to protect is firmly rooted in Civil War-era antislavery thought.

B. Judicial Enforcement of the State Neglect Doctrine

The draft riots also expand the scope of how a state neglect doctrine might function in practice. Most proponents of the state neglect doctrine, including Brandwein and Michael Collins, argue that the federal government should be permitted to use its enforcement powers under Section 5 of the Fourteenth Amendment when states neglect their duty to protect civil rights.[336] Insofar as the Supreme Court has curtailed Congress's Section 5 enforcement powers over the last few decades,[337] Brandwein's and Collins's version of the state neglect doctrine could serve as a crucial tool to enhance federal statutory protections for civil rights. But Sergeant Jones's trial offers an even broader and stronger version of the state neglect doctrine because it provides a concrete precedent for enforcing the government's duty to protect through adjudication, not just through legislation or executive-branch action to carry out such legislation.

Specifically, in Sergeant Jones's trial, the Board of Police Commissioners, sitting as a kind of court martial or administrative tribunal, entertained a claim against a state officer himself for failing to provide "protection" for everyone within his "jurisdiction"[338] in light of the principle, as the *Tribune* phrased it, that everyone "had a right to demand protection."[339] That claim against Sergeant Jones did not,

335. BRANDWEIN, *supra* note 4, at 127; Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Indeed, originalist scholars have rejected Morton's reading of the Equal Protection Clause as an anachronism. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1440–41 (1992); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 290 (1997) ("Harrison dismisses the Garfield-Morton interpretation of the Equal Protection Clause as revisionist history."). On the rapidly evolving ideology of Reconstruction, see BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES 114–15 (2010) ("[I]t is vital that we not lump the 'Reconstruction Amendments' together . . . . The three amendments span five long, politically tumultuous and violent years in time.").

336. BRANDWEIN, *supra* note 4, at 12–14; Collins, *supra* note 20, at 1996–97; *see* U.S. CONST. amend. XIV, § 5.

337. *See* United States v. Morrison, 529 U.S. 598 (2000); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 181–83 (1997).

338. *Equal Protection Under the Law*, *supra* note 3; *see also supra* Section II.A.

339. *A Police Trial*, *supra* note 2.

for obvious reasons, arise under the Fourteenth Amendment. But if we "translate" the theory of rights protection that was espoused in Sergeant Jones's trial into the legal grammar of the Constitution today,[340] it implies that a state neglect claim could be actionable in court under the Equal Protection Clause. Randy Barnett and Evan Bernick have similarly argued for judicial enforcement of a positive state duty to protect.[341] But Sergeant Jones's trial provides a perhaps unique pre-ratification precedent of a tribunal actually enforcing a duty-to-protect model against a government actor through adjudication.

Determining the precise contours of a state neglect claim in a constitutional tort case in court lies outside the scope of my primarily historical inquiry here. But to take just a few doctrinal examples, a state neglect theory might make it easier to raise failure-to-train and failure-to-supervise claims against superior officers and state agencies like police departments, shifting the standard of liability toward negligence.[342] It might also mean that disparate impact and selective enforcement claims could succeed where governments act negligently "in spite of"—not just intentionally "because of"—foreseeable disparate effects.[343] And most obviously, given the facts of Sergeant Jones's case, it could make state officers liable more often under the state-created danger doctrine.[344] More broadly, a state neglect theory could also ground federal civil rights laws on the Equal Protection Clause, instead of just the Commerce Clause, which has always been a morally disappointing basis for equality and which could even be in danger if the Supreme Court curtailed Commerce Clause doctrine.[345] This approach would make the Equal Protection Clause more like the positive rights guaranteed by some other constitutions, such as the equality clauses of South Africa's Constitution.[346] And it might likewise support the private right of action against perpetrators of gender-based violence in the Violence Against Women Act that was struck down by the Supreme Court.[347]

Robust statutory protections for civil rights are, of course, vital. But as a practical matter, congressional and executive enforcement of civil rights under Section 5 tends to ebb and flow with the electoral tides, as the history of the fitful final years of Reconstruction so powerfully shows.[348] Being able to vindicate a state

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340. *See* JACK M. BALKIN, LIVING ORIGINALISM 88–89, 364 n.30 (2011).

341. *See* BARNETT & BERNICK, *supra* note 20, at 359–60.

342. *See* Connick v. Thompson, 563 U.S. 51, 59–62 (2011) (applying a deliberate indifference standard to determine when superior officers or municipalities are liable for inferior officers' actions).

343. Personnel Adm'r v. Feeney, 442 U.S. 256, 278 (1979); Wayte v. United States, 470 U.S. 598, 610 (1985).

344. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989); Erwin Chemerinsky, *The State-Created Danger Doctrine,* 23 TOURO L. REV. 1 (2007).

345. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); *cf.* BARNETT & BERNICK, *supra* note 20, at 362.

346. *See* S. AFR. CONST. § 9(3)–(4) (1996) ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, ... No person may unfairly discriminate directly or indirectly against anyone on one or more grounds [just listed] . . . . National legislation must be enacted to prevent or prohibit [such] unfair discrimination."); Adrien K. Wing, *The South African Constitution as a Role Model for the United States*, 24 HARV. BLACKLETTER L.J. 73 (2008).

347. Pub. L. No. 103-322, 108 Stat. 1941–1942 (codified in 1994 as 42 U.S.C. § 13981); United States v. Morrison, 529 U.S. 598, 619–627 (2000).

348. *See* BRANDWEIN, *supra* note 4, at 151–60.

neglect claim in a constitutional tort case in court, much as Sergeant Jones was "[h]auled up" for failing to provide "Equal Protection" in 1863,[349] would therefore be a valuable backstop to protect civil rights if and when the political branches abandon that mission.

C. "Protection" as both Access to Judicial Remedies and an Affirmative Governmental Duty to Act

Finally, the history of the draft riots suggests that a body of recent originalist scholarship, which has likewise read the term "protection" to mean government regulation of some forms of private conduct, has taken an unnecessarily limited view of what such "protection" may entail.

Originalist accounts of the Equal Protection Clause are far from uniform. But a degree of consensus has emerged that, contrary to the state action doctrine, the word "protection" in the clause refers to government protection against certain kinds of rights violations committed by private parties.[350] This interpretation is rooted in theories of government from William Blackstone and Edward Coke. Blackstone, for example, argued that in the social contract, subjects give allegiance to the government in exchange for government "protection" of their natural rights against invasion by other subjects.[351] And within this contractarian model, Blackstone defined "protection of the law" as "[t]he remedial part of [the] law," which is to say, the subject's ability to sue for a "remedy" in court "for injury done to him . . . by any other subject."[352] Tracing similar language in antebellum U.S. legal discourse, many originalists contend that "protection of the laws" means "the remedial function of the law" so that "equal protection" means equal access to the judicial process for private parties to vindicate their rights against other private parties, as in a tort suit.[353] The Equal Protection Clause, on this view, does not mean "equal rights,"[354] and it does not confer any positive right to protection, it only requires equality in whatever protections a state deigns to provide.[355] And this model does not permit Congress to define substantive rights using its Section 5

349. *A Police Trial, supra* note 2; *Equal Protection Under the Law*, *supra* note 3.

350. *See* BARNETT & BERNICK, *supra* note 20, at 319 & nn.2–3.

351. Harrison, *supra* note 335, at 1435 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *47–48); WURMAN, *supra* note 2, at 40; *see also* BARNETT & BERNICK, *supra* note 20, at 322 (citing Coke's opinion in *Calvin's Case*, (1608) 77 Eng. Rep. 377; 7 Co. Rep. 1a); Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 299–310; Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305 (1988). On the exchange of allegiance for protection as a fundamental framework for nineteenth-century legal and political theory, see William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, *in* THE DEMOCRATIC EXPERIMENT 85, 89–90 (Meg Jacobs, William J. Novak & Julian E. Zelizer eds., 2003) (discussing Blackstone and Coke).

352. WURMAN, *supra* note 2, at 42 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *55–56, *137 (quoting SIR EDWARD COKE, 2 INSTITUTES OF THE LAWES OF ENGLAND 55–56 (1642))).

353. *Id.* at 36–37, 42–43, 99; Harrison, *supra* note 335, at 1396–97, 1433–37, 1449.

354. WURMAN, *supra* note 2, at 47; Hamburger, *supra* note 351, at 298–99.

355. WURMAN, *supra* note 2, at 47; Hamburger, *supra* note 351, at 300 n.12; Harrison, *supra* note 335, at 1448.

enforcement powers because it only demands equality in the rights protections that a state chooses to create.[356]

The remedial discourse after the draft riots in 1863 paints a broader picture. For the Board of Police Commissioners, for example, "protection" meant going out and swinging a club, and it was that kind of positive action that the *Anti-Slavery Standard* described as "Equal Protection."[357] Lincoln's executive order on prisoners of war, similarly, defined the government's "duty" to "give protection" as an affirmative obligation to take the steps necessary to secure Union soldiers' rights, including by threatening violent reprisals to deter Confederate behavior.[358] And for the Merchants' Committee, whose work was notably aided by the police department, "protection" meant even more: civil damages, with a significant component of race-conscious remedies; legal aid to guarantee a substantive, not just a procedural, right to judicial remedies; assistance finding a job; and safe "[s]treet railroads" because "[t]he full and equal right of the colored man to work . . . is too manifest to need proof."[359] This all suggests that even if the Blackstonian concept of "the protection of the laws" was focused narrowly on access to judicial remedies,[360] Republicans in the 1860s were busy transforming that idea as they developed an innovative civic ideology of equal rights and affirmative governmental duties to meet a rapidly changing political and socioeconomic landscape.[361]

Seen this way, the history of the draft riots bolsters Barnett and Bernick's recent claim that the Equal Protection Clause does not just require equal enforcement of existing laws and equal access to court, it requires states to guarantee "equal security-protective state *laws*,"[362] which Barnett and Bernick define as legislation that "protect[s] all people against subjugation by others, whether state or nonstate actors, to the detriment of their civil rights to life, liberty, and property."[363] The state has a positive duty, on this model, to pursue "antisubjugation" on its people's behalf.[364] And for Barnett and Bernick, the "civil rights" that states must protect as part of that "antisubjugation spirit" are not a "*closed set*" firmly entrenched in 1868, but are instead a flexible body of rights defined over time by the actions of both Congress and the courts.[365] The expansive Republican discourse of rights "protection" and "equal right[s]" after the draft riots in New York broadly supports this approach—and indeed, the Merchants' Committee's emphasis on legal aid and

356. Harrison, *supra* note 335, at 1469–70.

357. *Equal Protection Under the Law*, *supra* note 3 ("I want every man to understand that he must fight to the last in defence of persons under his protection, and he must fight just as well, he must strike just as hard, he must stand up just as long, for the poorest negro as for the richest white man.").

358. *Protection of Colored Troops, supra* note 307, at 853.

359. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5, 11–12.

360. WURMAN, *supra* note 2, at 42 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *55–56, *137 (quoting SIR EDWARD COKE, 2 INSTITUTES OF THE LAWES OF ENGLAND 55–56 (1642))).

361. *Cf.* WILLIAM J. NOVAK, NEW DEMOCRACY 31 (2022) (arguing that "citizenship in the nineteenth century was a concept under construction . . . rooted in the contested equality claims that ultimately redefined the collective interrelationship of all citizens in a modern American state").

362. BARNETT & BERNICK, *supra* note 20, at 320.

363. *Id.* at 353.

364. *Id.* at 352–56.

365. *Id.* at 353–55, 359–62.

access to justice directly supports Barnett and Bernick's argument that *Gideon* might be justified on equal protection grounds.[366]

I would go further, though. Barnett and Bernick emphasize that their model does not require governments to take affirmative steps to "secur[e] equality," but is rather focused on the "tradition of 'protection' against physical subjugation."[367] The draft riots certainly involved extreme physical subjugation. But the remedial efforts that occurred in their wake offer a richer sense of what an anti-subjugation approach to equal protection could look like: not just physical security and equal opportunity, but also economic assistance, genuine access to jobs and transportation, and civil legal aid, all with a component, where appropriate, of race-conscious (or other group-conscious) remedies to combat the larger structural inequalities embedded in the economic and social system. It is not just that *Gideon* could be justified by the 1860s sources on "equal protection"—disparate impact and race-conscious remedies cases could plausibly come out differently under that duty-to-protect model of equal protection, too.[368]

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366. *Id.* at 366 (citing Gideon v. Wainright, 372 U.S. 335 (1963)). Another recent line of historical inquiry has suggested that equal treatment is grounded in the Privileges or Immunities Clause, which, on this view, guaranteed to all citizens a set of "general citizenship rights" defined by "general law" that "secured" those citizens' "fundamental rights." Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 614–18, 691–92 (2023). This perspective frames "the rights of equal protection and due process as being *among* the rights of citizenship, not as sources of *different* rights." *Id.* at 692. Justice Thomas has similarly argued that the Fourteenth Amendment's "citizenship guarantee," by "extending privileges or immunities to all 'citizens,'" was "linked to the concept of equality." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2182 (2023) (Thomas, J., concurring). The post-riots discourse in New York offers some support for this picture: in Sergeant Jones's trial, after all, Commissioner Acton held that the police must provide "protection for every class of *citizens*—black or white, rich or poor, high or low." *Police Headquarters*, Aug. 16, *supra* note 2 (emphasis added). In line with the "general citizenship rights" perspective, Campbell, *supra*, at 616, Commissioner Acton's statement could be read to mean that every citizen necessarily possesses the rights of citizenship equally with other citizens, regardless of race or class. But the discourse of citizenship after the draft riots does not translate fully into the Fourteenth Amendment context because the amendment refers to "the privileges or immunities of citizens of the United States," U.S. CONST. amend. XIV, § 1, while New Yorkers were using the term citizen in its most etymologically resonant sense to refer to the people of the city.

Moreover, it is possible to interpret the rights-protection discourse in the wake of the draft riots as extending a principle of equality associated with citizens into the government's duty to protect. Commissioner Acton's demand for "protection for every class of citizens" would thus infuse an equality principle into the government's affirmative duty to wield state "power," *Police Headquarters*, Aug. 16, *supra* note 2, in order to "afford . . . protection," MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5. This latter approach would read the necessity of equal rights into an evolving concept of the government's duty to provide protection, yielding a more robust Equal Protection Clause, rather than—or in addition to—reading equal treatment into the evolving concept of citizenship. *But see* Campbell, *supra*, at 691–92 (taking the "rights of citizenship approach" and arguing that the "crucial provision" of the Fourteenth Amendment was the Privileges or Immunities Clause). Given the many forms of government action to prevent or remedy racial inequality that various New Yorkers demanded after the draft riots, *see supra* Parts II & III, I tend toward this more robust view of the idea of equal protection: that at least some vernacular equal protection discourse in the 1860s suggested a positive government duty to pursue "antisubjugation," BARNETT & BERNICK, *supra* note 20, at 320.

367. BARNETT & BERNICK, *supra* note 20, at 351–53.

368. *E.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

Beyond simply guaranteeing equal enforcement of existing laws and equal access to judicial remedies, and beyond even Barnett and Bernick's anti-subjugation approach, the remedial discourse after the draft riots in 1863 offers a historical model of "equal protection" that places affirmative duties on the government to work to achieve genuinely equal rights.[369] What such equality means and what kinds of laws will be required to achieve it will necessarily evolve over time. And courts may sometimes need to defer to more institutionally competent legislatures when answering those questions, as Barnett and Bernick sensibly contend.[370] But such an ongoing dialogue about the necessities of equality is itself a step toward a more equal democracy.[371]

Rereading the Equal Protection Clause in the ways I have suggested would yield a crucially different Fourteenth Amendment. A variety of actors in 1863 publicly emphasized that the government had a duty to act affirmatively to prevent and remedy rights violations: the Board of Police Commissioners ruled that officers must provide "protection for every class of citizens,"[372] the *Anti-Slavery Standard* restated that "principle" as "Equal Protection Under the Law,"[373] and the Merchants' Committee issued a "call" for "the proper authorities to take immediate steps to afford . . . protection" of "full and equal right[s]."[374] Taken together, those public statements of legal and political principle indicate that at least one vernacular concept of equal protection in 1863 included a norm against official indifference to rights violations committed by private parties, just as much as it included a norm against invidious discrimination by the state. In light of that intellectual history, when the guarantee of "equal protection" was written into the Constitution just a few years later,[375] at least some readers—Mortimer Thomson, say, or Commissioner Acton, or Frederick Douglass—likely would have seen the Fourteenth Amendment as carrying a state neglect principle, too. For our part, we can and should read the Equal Protection Clause that way today.

CONCLUSION

The New York City draft riots of 1863 were one of the worst episodes of racist mass violence in the history of the United States. But the city's post-riots response was also, despite its various flaws, one of the most robust efforts by a political community in the nineteenth-century United States to remedy such white supremacist harms. Amid that sweeping remedial project, a series of official and unofficial actors articulated a theory of racial equality and rights protection in which

369. Wurman does note the *Anti-Slavery Standard*'s "Equal Protection Under the Law" headline and uses it to support his view that the Equal Protection Clause requires the police to act equally against mob violence. *See* WURMAN, *supra* note 2, at 89. But the wider discourse about "protection" in New York City in 1863, I think, implies a far more activist government than just a duty to arrest rioters regardless of their victims' race.

370. BARNETT & BERNICK, *supra* note 20, at 361–65.

371. *Cf.* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, at 516–18 (1981).

372. *Police Headquarters*, Aug. 16, *supra* note 2.

373. *Equal Protection Under the Law*, *supra* note 3.

374. MERCHANTS' COMMITTEE REPORT, *supra* note 74, at 5, 12.

375. U.S. CONST. amend. XIV; FONER, *supra* note 15, at 251–61; EDWARDS, *supra* note 15, at 106–08.

state authorities are obligated to wield their police powers affirmatively to protect the civil rights of everyone within their jurisdictions—equally—from harm, including harm caused by private parties. In the summer of 1863, in other words, the concept of equal protection included a prohibition on state neglect. There is thus a strong historical case that when the Equal Protection Clause was proposed in 1866 and ratified in 1868, it too contained a norm against state neglect. And under that legal norm, both civil rights litigation and federal enforcement legislation should enjoy a wider scope than is permitted under equal protection doctrine today.

It is also critical to remember, though, that Sergeant Jones's trial neglected the very person who should have been its central actor: the anonymous Black woman who was cast out by the police and left to fend for herself against the mob. Her voice was missing from the very forum that sought to vindicate her rights. And as a woman and an African American, she was doubly disfranchised in 1860s New York.[376] Her views on equal protection and the responsibilities of her government went unmarked within her political community, at least through any of the formal channels of political or legal representation. The United States has made great strides since the Civil War toward a constitutional democracy that respects all of its members equally. But fixing this sort of inequality—the inequality of voice and representation within our legal and political systems—remains to be fulfilled.

376. *See* MARTHA S. JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL (2020); PHYLLIS F. FIELD, THE POLITICS OF RACE IN NEW YORK: THE STRUGGLE FOR BLACK SUFFRAGE IN THE CIVIL WAR ERA (1982); WELKE, *supra* note 335, at 70–73.