BUILDING A NEW CONSTITUTIONAL JERUSALEM: A REVIEW OF *THE ANTIRACIST CONSTITUTION*[†]

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INTRODUCTION

In the summer of 1943, James Baldwin, then only nineteen years old, drove to the cemetery to bury his father in the aftermath of a riot that had broken out in Harlem, New York, after a white police officer shot a Black soldier.[1] Baldwin's father "was of the first generation of free [Black] men,"[2] who ended up living his days locked up inside the terrors the white world and his own broken mind had visited upon him.[3] As the funeral procession made its way "through a wilderness of smashed plate glass,"[4] Baldwin looked back over the bitter legacy that had been his father's life and thought:

> It began to seem that one would have to hold in the mind forever two ideas which seemed to be in opposition. The first idea was acceptance, the acceptance, totally without rancor, of life as it is, and men as they are: in the light of this idea, it goes without saying that injustice is a commonplace. But this did not mean that one could be complacent, for the second idea is of equal power: that one must never, in one's own life, accept these injustices as commonplace but must fight them with all one's strength.[5]

In *The Antiracist Constitution*, Brandon Hasbrouck asks us to similarly hold in the mind two ideas that seem to be in opposition: first, that the elemental constituent of the American national identity in general and the American Constitutional project in particular is white supremacy;[6] and second, that in fact white supremacy need not be the heartbeat of American constitutionalism, but that instead the Constitution as originally drafted in 1789 and as reconstructed after the Civil War contains an altogether different elemental particle—namely, abolitionist democracy.[7] In making his case for how we may hold in the mind

[†] An invited response to Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87 (2022).

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[1] James Baldwin, *Notes of a Native Son*, *in* THE PRICE OF THE TICKET 127 (1985).

[2] *Id.* at 128.

[3] *Id.* at 129-30.

[4] *Id.* at 127.

[5] *Id.* at 145.

[6] Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 109 (2022).

[7] *Id.* at 127-28, 165.

these two seemingly contradictory ideas, Professor Hasbrouck manages to bring together two Black intellectual traditions that I had until now thought impossible to reconcile: the Black liberation jurisprudence of Justice Thurgood Marshall and the critical race theory scholarship of Professor Derrick Bell. I am not certain I am fully convinced that the work of the man who litigated *Brown v. Board of Education*[8] can in fact peacefully coexist with that of the man who insisted that *Brown* was made possible only because it did not threaten "the superior societal status of middle and upper class whites."[9] But my skepticism in believing that it is within our reach to "enact a radical vision"[10] of the Constitution perhaps speaks more to the limits of my own moral imagination than it does to Professor Hasbrouck's persuasiveness. Indeed, by the time I finished *The Antiracist Constitution*, I very much wanted to believe. And still do.

I.

The Antiracist Constitution begins with the irrefutable point that for more than two centuries the Supreme Court has read the Constitution as an instrument of white supremacy such that, when faced with fundamental questions of Black freedom and equality, the Court's recurring pattern has been to initially refuse to recognize our full humanity; then to acknowledge our rights only belatedly, grudgingly, and conditionally; and finally to diminish, restrict, and even repudiate those rights whenever and however it becomes politically palatable for the Court to do so. By itself, this statement is such commonplace that it hardly seems worth bothering to offer evidence to prove it. But it is still extraordinary to read collected in a single place—as Professor Hasbrouck does in his Article—the catalog of what he calls "a multidisc boxed set of racist decisions hits."[11]

And this two-centuries worth of boxed-set moral failures is all the more striking when cataloged not in chronological order but as Professor Hasbrouck does—in random jumps through time between past and present: here is the Court in 1842, holding in *Prigg v. Pennsylvania*[12] that Black people who escape to freedom can lawfully be kidnapped and sold back into slavery;[13] here it is in 1976, holding in *Washington v. Davis*[14] that the Equal Protection Clause does

[8] 348 U.S. 886 (1954); *see* Sherrilyn Ifill, *How Thurgood Marshall Paved the Road to 'Brown v. Board of Education,'* SMITHSONIAN MAG. (Mar. 10, 2021), https://www.smithsonianmag.com/history/how-thurgood-marshall-paved-road-brown-v-board-education-180977197/ [https://perma.cc/SE58-R96L]; *see also* Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 1-2 (1987).

[9] Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[10] Hasbrouck*, supra* note 6, at 163.

[11] *Id.* at 101.

[12] 41 U.S. (16 Pet.) 539 (1842).

[13] *Id.* at 622.

[14] 426 U.S. 229 (1976).

not prevent government from adopting policies that harm Black people so long as these policies are clothed in neutral garb;[15] here it is in 1876, holding in *United States v. Cruikshank*[16] that the federal government has no business prosecuting a white mob who set fire to a Louisiana Courthouse to prevent the Black freedmen gathered inside from exercising political power;[17] here it is in 1987, holding in *McCleskey v. Kemp*[18] that it is constitutional for a state to disproportionally impose the death penalty on Black people;[19] here it is in 1857, holding in *Dred Scott v. Sandford*[20] that Black people and their children, for all the generations to come, can never be people under the Constitution;[21] here it is in 2013, holding in *Shelby County v. Holder*[22] that the election of a lone Black President in more than two centuries means the end of racial discrimination in voting;[23] here it is in 1896, holding in *Plessy v. Ferguson*[24] that a Black man has no rights a white man is bound to respect;[25] here it is in 1974, holding in *Milliken v. Bradley*[26] that the random lines drawn on map to demarcate school districts are more important than providing a good education to Black children;[27] here it is in 1883, holding in the *Civil Rights Cases*[28] that Black people asking for a seat on a train or a table at a restaurant is akin to demanding special treatment;[29] here it is in 1906, holding in *Hodges v. United States*[30] that lynching black people is not a federal crime;[31] here it is in 2003, holding in *Grutter v. Bollinger*[32] that fifty years of half-hearted half measures are more than enough to remedy centuries of racial discrimination in higher education against Black people;[33] here it is in 1908, holding in *Berea College v. Kentucky*[34] that it is well within the power of a state to force a private university to stop educating Blacks and

[15] *Id.* at 238-48.
[16] 92 U.S. 542 (1875).
[17] *Id.* at 551-52.
[18] 481 U.S. 279 (1987).
[19] *Id.* at 298-99.
[20] 60 U.S. (19 How.) 393 (1857) (enslaved party).
[21] *Id.* at 426-27.
[22] 570 U.S. 529 (2013).
[23] *Id.* at 553-56.
[24] 163 U.S. 537 (1896).
[25] *Id.* at 552.
[26] 418 U.S. 717 (1974).
[27] *Id.* at 745.
[28] 109 U.S. 3 (1883).
[29] *Id.* at 24-25.
[30] 203 U.S. 1 (1906).
[31] *Id.* at 25.
[32] 539 U.S. 306 (2003).
[33] *Id.* at 343.
[34] 211 U.S. 45 (1908).

whites together;[35] here it is in 1981, holding in *City of Memphis v. Greene*[36] that white residents can wall off a Black neighborhood so long as they don't explicitly say they are doing so in order to keep Black people out;[37] here it is in 1872, holding in *Blyew v. United States*[38] that the federal government has no power to prosecute two white supremacists for the ax murder of a Black family;[39] and on and on.

It speaks to the persuasiveness with which Professor Hasbrouck prosecutes the case in the first half of his Article—that the Constitution has served as a tool of white supremacy—that I, for one, found myself resisting the defense he offers in the second half—that the Constitution can also be used as an instrument for "an abolitionist constitutional movement sufficient to complete the work of Reconstruction."[40] And to be clear, my resistance to the claim of an antiracist Constitution is not because Professor Hasbrouck is anything less than meticulous in advancing his vision. Indeed, to the extent that the heart of his argument is the recognition that from the moment our constitutional democracy proclaimed "We the People" Black people always understood the Constitution as an instrument of their liberation, Professor Hasbrouck is undoubtedly correct. From Frederick Douglass to Martin Luther King, from the first corps of Black legislators elected to Congress after the War to members of the Student Nonviolent Coordinating Committee, from Black soldiers who enlisted with the United States Colored Troops in the fight to save the Union to Black parents who sent their children in harm's way to integrate segregated schools, Black people always understood the Constitution as the key to freedom and equality in ways that the drafters themselves never fully appreciated. More to the point, Professor Hasbrouck demonstrates how this radical abolitionist view of both the 1789 and Reconstruction constitutions was not—is not—a mere strategic rhetorical device, but rather can form the basis of what he calls a new antiracist Constitution.

Ironically, Professor Hasbrouck's antiracist Constitution owes an intellectual debt to Justice John Harlan, whose dissent in *Plessy v. Ferguson*—proclaiming that court constitution is color blind—was in fact a thinly veiled endorsement of white supremacy.[41] For, while Justice Harlan's dissent is often cited with great, if misguided, reverence, his earlier dissent in the *Civil Rights Cases* is the one deserving of respect because it articulated a vision of an antiracist Constitution. There, Justice Harlan explained that, if the 1787 Constitution, the Fugitive Slave

[35] *Id.* at 58.

[36] 451 U.S. 100 (1981).

[37] *Id.* at 128.

[38] 80 U.S. (13 Wall.) 581 (1872).

[39] *Id.* at 591-92.

[40] Hasbrouck, *supra* note 6, at 126.

[41] *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Act of 1793,[42] the Fugitive Slave Act of 1850,[43] and the Court's own decisions in *Prigg*, *Ableman v. Booth*,[44] and *Dred Scott*, enlisted Federal government authority to enforce human subjugation,[45] the Reconstruction Amendments and accompanying Federal legislation were "adopted in the interest of liberty, and for the purpose of securing, through national legislation, . . . rights inhering in the state of freedom, and belonging to American citizenship."[46] According to Justice Harlan's reading, the Reconstruction Amendments "did something more than to prohibit slavery as an *institution* . . . [they] established and decreed universal *civil freedom* throughout the United States."[47] Justice Harlan's interpretation of the Reconstruction Amendments drew a crucial link between

[42] Congress enacted The Fugitive Slave Act of 1793 as a means of implementing the Fugitive Slave Clause of the Constitution. U.S. CONST. art. IV, § 2, cl. 3. The Act established the process for both the extradition of fugitives from justice and the recapture of fugitive slaves. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

[43] Congress enacted the Fugitive Slave Act of 1850 in order to provide slave owners with a federal mechanism for recapturing fugitive slaves. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462. The Act of 1793 had largely relied upon state authorities to enforce slave owners' rights. The 1850 Act sought to remedy that problem by, among other things, authorizing federal judges to appoint U.S. commissioners with the power "to exercise and discharge all the powers and duties conferred by this act," including the power to seize and return fugitive slaves to their owners. Act of Sept. 18, 1850, § 1. Thus, the 1850 Act for the first time empowered federal law enforcement officials to directly engage in the pursuit, capture and return of slaves to their masters.

[44] 62 U.S. (21 How.) 506 (1858). *Booth* grew out of efforts in northern states to openly resist enforcement of the Fugitive Slave Act of 1850 in the name of state sovereignty. In *Booth*, a number of Wisconsin state officials and private citizens openly defied federal authorities' attempts to recapture a slave by the name of Joshua Glover. Abolitionists who assisted Glover to escape were prosecuted in the United States District Court for Wisconsin. *See* Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 202-04 (2004). One of the arrested defendants, Sherman M. Booth, was tried and convicted of violating the Fugitive Slave Act of 1850. *United States v. Rycraft*, 27 F. Cas. 918 (D. Wis.). Booth petitioned the Wisconsin Supreme Court for a writ of habeas corpus. The Wisconsin high court ordered his release, holding that the Fugitive Slave Act of 1850 was unconstitutional. *In re* Booth, 3 Wis. 179 (1854). The federal government appealed to the Supreme Court. The Court, in a decision by Chief Justice Roger B. Taney, reversed the Wisconsin Supreme Court's decision and upheld the constitutionality of the Act of 1850.

[45] According to the Court's own logic, insofar as the master had the right to his slave, insofar as that right was grounded in the Constitution, and insofar as Congress had both the authority and obligation to secure that right, Justice Harlan said, quoting *Prigg*, that "it would be a strange anomaly to suppose that the *national* government meant to rely for the due fulfillment of its own proper duties, and the rights which it intended to secure upon state legislation, and not upon that of the *Union*." The Civil Rights Cases, 109 U.S. 3, 29 (1883) (emphasis added).

[46] *Id.* at 26.

[47] *Id*. at 34.

the Thirteenth Amendment's prohibition of slavery and the Fourteenth Amendment's grant, in Section 1, of birthright citizenship. According to Harlan, this interplay between the Thirteenth and Fourteenth Amendments meant that Congress had full power to protect those rights "fundamental to citizenship in a free government."[48] The Reconstruction Amendments and acts designed to enforce them were meant "to compel a recognition of the legal right of the black race to take that rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them *as a component of the people for whose welfare and happiness government is ordained*."[49] What Professor Hasbrouck does is give substance to Justice Harlan's theory of a new right to civil freedom, to show how, when read together and in the spirit in which they were drafted, the Thirteenth, Fourteenth, and Fifteenth Amendments may yet and finally remove the remaining badges of slavery and racial caste and return Congress to its rightful role of protecting freedom and equality for all.[50]

II.

Near the end of his career, Professor Derrick Bell, who spent a lifetime writing an epic poem on race and American law, came to terms with the reality that "racism lies at the center, not the periphery; in the permanent, not in the fleeting; in the real lives of black and white people, not in the sentimental caverns of the mind."[51] To those who closely followed his research over the years, Professor Bell's realization had long seemed the preordained last verse of that fifty-years-long poem and, now that he had finally put down in plain words that which he must have believed for a while, his resigned coda that racism is permanent, read as the long-foretold epilogue to the story of Black people in America.

Bell had started his career as a civil rights litigator, first in the Civil Rights Division of the Department of Justice and then as counsel with the NAACP Legal Defense Fund ("LDF"). There, working with Thurgood Marshall, Constance Baker Motley, and Robert Carter, among others, Bell spent a decade trying to enforce *Brown v. Board of Education* while litigating hundreds of school desegregation cases in Mississippi. But, barely ten years after leaving the LDF, Bell would write that his own work on these cases had "helped to precipitate a rise in militant white opposition and . . . seriously eroded carefully cultivated judicial support,"[52] and that "the hoped-for improvement in schooling

[48] *Id.* at 47, 51 ("I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the master.").

[49] *Id*. at 57.

[50] Hasbrouck, *supra* note 6, at 163.

[51] DERRICK BELL, FACES OF THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 198 (1992).

[52] Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 515 (1976).

for black children that might have justified the sacrifice and risk . . . prove[d] minimal at best."[53] Bell was clear-eyed in recognizing that political, economic, and social conditions contributed to the lack of meaningful progress for Black children. And yet, he also insisted, seemingly more in sadness than anger, that the generation of civil rights lawyers who won *Brown* had tried unsuccessfully to serve two masters: the need to obtain a good education for the children of Black parents who were their putative clients, and the desire to enforce *Brown*'s equal protection principle of maximum desegregation of public schools. And, unable to serve these two masters, lawyers, such as Bell, had sacrificed the practical interests of Black parents to obtain a good education for their children in service of a "single-minded commitment to racial balance, a goal which, standing alone, is increasingly inaccessible and all too often educationally impotent."[54]

But whatever disillusionment Bell may have experienced for the failure of civil rights lawyers to serve the needs of Black children paled in comparison to his acknowledgment a few years later that school desegregation in large part failed Black children because it was never in the interest of the white majority for it to succeed. Looking back over twenty-five years of litigation, Bell came to believe that *Brown* could not "be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation."[55] As Bell put it, "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[56]

Bell's interest-convergence theory represents an intellectual waystation in his career—between the starting line litigating school desegregation in Mississippi and the last stop arguing that "racism is permanent no matter what we do."[57] For all of his critique of the decision, Bell admitted that few cases were as historically and constitutionally significant as *Brown*, and that, as numerous legal scholars and historians noted, the decision remained "perhaps the most important judgment ever handed down by an American Supreme Court,"[58] "the single most honored opinion in the Supreme Court's corpus,"[59] and "nothing

[53] *Id.*

[54] *Id.* at 516.

[55] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

[56] *Id.* at 523.

[57] BELL, *supra* note 51, at 199.

[58] Paul Finkelman, Book Review, *Civil Rights in Historical Context: In Defense of* Brown, 118 HARV. L. REV. 973, 974 (2005).

[59] Jack M. Balkin, Brown v. Board of Education*—A Critical Introduction*, *in* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 4 (2001).

short of a reconsecration of American ideals."[60] But, as seemingly sacrosanct as the decision had become, Bell and others have shown that as ultimately implemented, the decision failed in its stated purpose to achieve racial integration in public schools;[61] and second, that as originally conceived, the decision sacrificed the practical outcome of educational equality for the symbolic goal of racial integration with whites.[62] Or, as one scholar would later put it: "*Brown* is of continuing significance mostly as a triumphal narrative that, ironically, serves as rhetorical support for the racial status quo and, only occasionally, as a dim reminder of a constitutional world that might have been."[63]

But, if Bell's interest-convergence theory contained a note of despair in its claim that *Brown* was grounded in, and motivated by, white self-interest rather than any neutral constitutional principle, it nonetheless held out the hope that the case could be made to serve the goals of racial equality so long as lawyers and activists devised strategies in which the interests of Black people converged with those of whites. All such hopes faded by the time he urged those in the fight for Black liberation to "recognize and acknowledge (at least to ourselves) that our actions are not likely to lead to transcendent change and may indeed, despite our best efforts, be of more help to the system we despise than to the victims of that system whom we are trying to help."[64]

III.

Bell's acknowledgement in *Faces at the Bottom of the Well* that racism a permanent feature of our constitutional system was neither an existential fatalism, nor the sudden nihilism of a new convert.[65] Nearly a decade after his

[60] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 713 (2004).

[61] *See generally, e.g.*, DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004); Bell, *supra* note 55; Bell, *supra* note 52; Mark A. Graber, *The Price of Fame:* Brown *as Celebrity*, 69 OHIO ST. L.J. 939 (2008); Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equity in the Wake of* Grutter, 65 U. PITT. L. REV. 175 (2005); Boyce F. Martin, Jr., *Fifty Years Later, It's Time to Mend* Brown*'s Broken Promise*, 2004 U. ILL. L. REV. 1203.

[62] *See* Robert L. Carter, *The Conception of* Brown, 32 FORDHAM URB. L.J. 93, 98, 106 (2004) ("[*Brown*'s] target had been segregation. We thought that segregation was the evil that had to be bested and with segregation put beyond the pale, African-Americans would no longer be hobbled and scarred by racial discrimination. When we succeeded in securing that objective with the *Brown* decision, however, we found that we had misjudged the target. Segregation was but a symptom of the disease we had to best. Eliminating the concept of white supremacy had to be our target if we were to succeed in freeing people of color from the burden of racial bias.").

[63] LOUIS MICHAEL SEIDMAN, CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS 146 (2003).

[64] BELL, *supra* note 51, at 198-99.

[65] *See generally id.*

interest-convergence theory, Bell was still holding on the hope that the movement for Black liberation could deliver constitutional miracles.

It was the determination of Black men and women to be truly free that transformed the Constitution from a document speaking of rights as the main means of protecting property and privilege into an instrument in which the concept of rights has gained a humane purpose and significance for even those who lack property, and for whites as well as Blacks. Viewed from this perspective Blacks have used the Constitution to accomplish miracles.[66]

The very same year Bell published *And We Are Not Saved*. Justice Thurgood Marshall, from whom Bell had picked up *Brown*'s baton, also spoke of the miracle of Black constitutionalism in a speech at the annual trade seminar of a patent and trademark law association in Maui, Hawaii.[67] The speech, which would later be published as a law review article under the title *Reflections on the Bicentennial of the United States Constitution*,[68] offered a corrective to the "proud proclamations of the wisdom, foresight, and sense of justice shared by the framers and reflected in a written document now yellowed with age."[69] Justice Marshall explained that he did not find "the wisdom, foresight, and sense of justice exhibited by the framers to be particularly profound," and that the "government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for individual freedoms and human rights, that we hold as fundamental today."[70] In just five pages, Justice Marshall sketched out a vision of the Constitution: "While the Union survived the Civil War, the Constitution did not."[71] Rather, what arose in the place of the 1789 document was "a living document" born out of the "suffering, struggle, and sacrifice" of the very people the original Constitution once considered property and not people.[72] To Justice Marshall, if the phrase "We the people" had come to hold any real meaning for American citizens, "credit does not belong to the framers" but rather to those who, over generations of struggle and strife, "refused to acquiesce to outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them."[73] Thus, his living Constitution did not merely change with the changing times, unguided by any north star, unanchored to any fixed principles, but was rooted in the hopes and dreams of

[66] DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 252-53 (1987).

[67] Thurgood Marshall, Assoc. Just., Sup. Ct., Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), http://thurgoodmarshall.com/the-bicentennial-speech/ [https://perma.cc/GE6K-WG3A].

[68] *See* Marshall, *supra* note 8, at 1.

[69] *Id.* at 1.

[70] *Id.* at 2.

[71] *Id.* at 4.

[72] *Id.* at 5.

[73] *Id.* at 5.

the slaves and their descendants who had, through two turbulent centuries, nurtured it into a "true miracle."[74]

CONCLUSION

Professor Hasbrouck begins his Article as Professor Derrick Bell, playing a "multidisc boxed set of racist decision hits,"[75] and ends it as Justice Marshall, envisioning "a better world" made real.[76] But this is a reductive way of phrasing it. Even in his late years, Derrick Bell was never a racial nihilist. He may have insisted that "racism is permanent no matter what we do,"[77] but to the last he also believed that we had an obligation to fight against racism because, even when we fail, the fight itself brings meaning to our existence.[78] As for Justice Marshall, it is hard to imagine that in his own late years he remained convinced that we were capable of achieving true lasting miracles, particularly when he must have realized as he retired that much his work would very likely be undone by his successor.[79]

James Baldwin died in November 1987 at his home in Saint Paul de Vence, a small medieval walled hilltop village on the French Riviera, a world away from the ruined streets of Harlem, through which he drove to his father's funeral forty-four years earlier. Like Justice Marshall's jurisprudence and Professor Bell's scholarship, Baldwin's writing cataloged the historical record of what he called "the Negro's past, of rope, fire, torture, castration, infanticide, rape; death and humiliation."[80] But, while Baldwin would end up spending his dying days in a final exile away from the country of his birth, the place he called "the gaudiest, most valuable, and most improbable water wheel the world has ever seen,"[81] the sermon he spent a lifetime preaching came to this: "I do not for an instant doubt, and I will go to my grave believing that we can build Jerusalem, if we will."[82]

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[74] *Id.* at 5.

[75] Hasbrouck, *supra* note 6, at 101.

[76] *Id.* at 165.

[77] BELL, *supra* note 51, at 199.

[78] *Id.* at 198-99.

[79] At a news conference on the occasion of his retirement, a reporter asked Justice Marshall: "You said recently or not too long ago that a lot of people quote Martin Luther King as saying: "'Free at last,' but we're not free." Justice Marshall responded:

> Well, I'm not free. All I know is that years ago, when I was a youngster, a Pullman porter told me that he'd been in every city in this country, he was sure, and he had never been in any city in the United States where he had to put his hands up in front of his face to find out that he was a Negro. I agree with him.

See Excerpts from Marshall News Conference, L.A. TIMES (June 29, 1991, 12:00 AM), https://www.latimes.com/archives/la-xpm-1991-06-29-mn-1178-story.html.

[80] James Baldwin, *The Fire Next Time*, *in* THE PRICE OF THE TICKET, *supra* note 1, at 376.

[81] *Id.* at 379.

[82] James Baldwin, *Nothing Personal*, *in* THE PRICE OF THE TICKET, *supra* note 1, 392.

It seems to me, what Professor Hasbrouck has begun to do is build the road to a new constitutional Jerusalem. And, again, for all the limits of my own moral imagination, as I read *The Antiracist Constitution*, I very much wanted to believe in the Hasbrouck Jerusalem. I still do.