

# Blue-on-Black Violence: A Provisional Model of Some of the Causes

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*This Article offers a theoretical model that explains the persistence of what I will call “blue-on-black violence.” Six features comprise the model. First, a variety of social forces converge to make African-Americans vulnerable to ongoing police surveillance and contact. Second, the frequency of this surveillance and contact exposes African-Americans to the possibility of police violence. Third, police culture and training encourage that violence (mostly implicitly). Fourth, when violence occurs, a range of legal actors in the civil and criminal process translate that violence into justifiable force. Fifth, the doctrine of qualified immunity makes it difficult for plaintiffs to win cases against police officers, and when plaintiffs win such cases, police officers rarely suffer financial consequences because their local government indemnifies them. Sixth, the conversion of violence into justifiable force, the qualified immunity barrier to suing police officers, and the frequency with which cities and municipalities indemnify police officers reduce the risk of legal sanction police officers assume when they employ excessive force. This reduction in the risk of legal liability diminishes the incentive for police officers to exercise care with respect to when and how they deploy violent force. Although the foregoing factors are not exhaustive of the causes of police violence against African-Americans, they suggest that the problem is structural and transcends the conduct of particular officers engaging in particular acts of violence against particular African-Americans.*

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\* The Honorable Harry Pregerson Professor of Law, University of California, Los Angeles Law School. © Devon W. Carbado, 2016. For conversations about or comments on this Article, I thank Paul Butler, Beth Colgan, Scott Cummings, Ian Haney-López, Justin Hansford, Cheryl Harris, Kimberlé Crenshaw, Priscilla Ocen, Andrea Ritchie, Addie Rolnick, Russell Robinson, Joanna Schwartz, Jonathan Simon, Sherod Thaxton, Leti Volpp, and Noah Zatz. I also thank *The Georgetown Law Journal* and Paul Butler for inviting me to participate in the symposium of which this Article is a part, and the editors of the law journal for the care with which they edited the piece. Participants at African American Policy Forum’s Writer’s Retreat, UCLA’s Critical Race Studies Symposium on race and policing, Yale Law School’s Critical Race Theory Conference, and at faculty colloquia at UCLA School of Law, UC Berkeley School of Law, George Washington Law School, the UNLV Law School, and the University of Washington School of Law provided constructive engagement and feedback. Finally, I thank Stephen Grodski, Asleigh Washington, Scott Dewey, Flinn Milligan, and Evelyn Rangel-Medina for excellent research assistance. All errors are mine.

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INTRODUCTION

This Article articulates some of the causes of what I will call “blue-on-black violence.” I describe police violence against African-Americans in this way for two principal reasons.<sup>1</sup> First, as a rhetorical strategy.<sup>2</sup> Think about how saliently

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1. Throughout this Article, I will employ the terms “black” and “African-American” interchangeably. I do this in part because although there are, of course, black people in the United States who were not born here, black encounters with the police transcend ethnicity. *See* Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 947–964 (2002) (describing police interactions as a “naturalization process” through which black people who are not American become black-American).

2. Here, I am drawing on literature that suggests that rhetorical frames matter. That is to say, what we call things shapes how we think about them. *See generally* ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980); GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL*

the terms “black-on-black violence” and “black-on-black crime” figure in our discussions about race, crime, and policing.<sup>3</sup> Indeed, at the very moment that the Black Lives Matter movement<sup>4</sup> and the Movement for Black Lives<sup>5</sup> are pushing for a discussion about police killings of African-Americans, opponents of these movements are critiquing their adherents for ignoring “black-on-black” crime.<sup>6</sup>

The invocation of black-on-black crime to displace discussions about blue-on-black violence is a relatively new phenomenon. The term may have originated in (and certainly circulated through) black political discourses. Disturbed by the surge of crime in black communities in the late 1970s through the early 1990s,

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ABOUT THE MIND (1987); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000).

3. For example, a general search of Westlaw’s News database for “black-on-black” appearing in the same sentence with “crime” or “violence” produces 8,267 results, with 2,208 of those since January 1, 2014; 7,071 of the general results, and 507 of those after 2013, have appeared in Westlaw’s Major Newspapers database.

4. For a discussion of the genesis of this movement and the principles around which it is organized, see, for example, *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> [https://perma.cc/FY7T-3S6E]; Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, THE GUARDIAN (Jul. 19, 2015, 5:00 PM), <http://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement> [https://perma.cc/J4JY-75Z4]; Alica Garza, *A Herstory of the #BlackLivesMatter Movement*, THE FEMINIST WIRE (Oct. 7, 2014), <http://www.thefeministwire.com/2014/10/blacklivesmatter-2/> [https://perma.cc/Q88W-EPBK].

5. The Movement for Black Lives describes itself as an activist collective movement that aims to reclaim and revive the more radical aspects of Dr. Martin Luther King, Jr. and the Civil Rights Movement—aspects that have been whitewashed and forgotten during intervening decades of conservative retrenchment. Among other projects and goals, the movement supports radical democracy and focuses on divestment from racist systems and investment in black communities; local community control and empowerment; and innovation and establishment of community-based alternative institutions. Like the Black Lives Matter movement, of which it appears to be an outgrowth and with which it remains ideologically close, the Movement for Black Lives is intersectionally sensitive and inclusive regarding traditionally marginalized gender and sexual orientation sub-minorities within the African-American community and was similarly triggered and energized by various infamous police killings of African-Americans. See, e.g., Mark Winston Griffith, *Black Love Matters*, THE NATION (Jul. 28, 2015), <http://www.thenation.com/article/black-love-matters/> [https://perma.cc/JRU4-TG2C]; Jane Morice, *Thousands of ‘Freedom Fighters’ in Cleveland for First National Black Lives Matter Conference*, CLEVELAND.COM (Jul. 26, 2015, 8:37 AM), [http://www.cleveland.com/metro/index.ssf/2015/07/thousands\\_of\\_freedom\\_fighters.html](http://www.cleveland.com/metro/index.ssf/2015/07/thousands_of_freedom_fighters.html) [https://perma.cc/7N2X-MH5H]; *Reclaim MLK 2016*, THE MOVEMENT FOR BLACK LIVES, [http://action.movementforblacklives.org/reclaim\\_mlk\\_2016](http://action.movementforblacklives.org/reclaim_mlk_2016) [https://perma.cc/9CTR-8THK]; Shani Saxon-Parrish, *The Movement for Black Lives is Urging You to #ReclaimMLK This Weekend*, COLORLINES (Jan. 15, 2016, 3:47 PM), <https://www.colorlines.com/articles/movement-black-lives-urging-you-reclaimmlk-weekend> [https://perma.cc/C7EB-LJ7C].

6. See, e.g., John McWhorter, *Black Lives Matter Should Also Take on ‘Black-on-Black Crime,’* WASH. POST (Oct. 22, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/10/22/black-lives-matter-should-also-take-on-black-on-black-crime/> [https://perma.cc/JJ9Q-GNZM] (Prof. McWhorter notably writes as a self-professed friend, but nonetheless a critic, of the movement); Derryck Green, *The “Black Lives Matter” Slogan Ignores Self-Destructive Behavior*, PROJECT 21 NEW VISIONS COMMENTARY—NAT’L LEADERSHIP NETWORK OF CONSERVATIVE AFRICAN-AMERICANS, <http://www.nationalcenter.org/P21NVGreenBlackLivesMatter90115.html> [https://perma.cc/KP4W-2UTA]; Jerome Hudson, *5 Devastating Facts About Black-On-Black Crime*, BREITBART (Nov. 28, 2015), <http://www.breitbart.com/big-government/2015/11/28/5-devastating-facts-black-black-crime/> [https://perma.cc/UN8P-W7S4]; Brennan Suen, *Fox News Revives “Black-On-Black Crime” Canard To Dismiss Black Lives Matter Movement*, MEDIA MATTERS FOR AM. (Sept. 3, 2015, 4:19 PM), <http://mediamatters.org/research/2015/09/03/fox-news-revives-black-on-black-crime-canard-to/205364> [https://perma.cc/BN86-FUBT].

African-Americans queried whether the government and society at large were concerned about black vulnerability to violent and drug-related crimes. Though not expressly framed in this way, African-Americans were insisting that black lives should matter in the sense of figuring more prominently in public policy discussions about victims of crime. Their intervention in this respect was not intended to promote, sanction, or legitimize police violence against African-Americans but to disrupt the patterns of violence that had become endemic features of many black communities. In short, the initial mobilization of black-on-black crime by African-Americans was intended to foreground, not displace, the idea that black lives matter.<sup>7</sup>

Contemporary deployments of black-on-black crime by conservatives serve a different function: to shift the discussion from police killings of and violence against African-Americans to a discussion about black people killing and mobilizing violence against themselves. There is no similar go-to rhetorical device, no quick-and-easy discursive frame, to which progressives can turn to refocus the discussion on and describe the violence police almost routinely enact on black bodies. The phrase “blue-on-black violence” is a corrective. I employ it as a form of discursive resistance, a rhetorical register in which to name and push back against a particular form of state violence that has too frequently figured as an inevitable or necessary feature of American life: police killing and physical abuse of African-Americans.

My second reason for speaking in terms of blue-on-black violence is to encourage us to view police violence against African-Americans as a structural phenomenon and not simply as a product of rogue police officers who harbor racial animus against black people.<sup>8</sup> Racial attitudes and stereotypes, including

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7. For an illuminating discussion of how the specific phrase “black-on-black crime” originated with 1970s-era complaints by African-American community leaders regarding underprotection and underpolicing of their communities, before being “hijacked” and then “calcified” as a convenient conservative shibboleth fingering blacks as the source of their own problems, see Brentin Mock, *The Origins of the Phrase ‘Black-on-Black Crime,’* CITYLAB (June 11, 2015), <http://www.citylab.com/crime/2015/06/the-origins-of-the-phrase-black-on-black-crime/395507/> [<https://perma.cc/TFA5-27E8>]. In a similar vein, see Charlayne Hunter, *Blacks Organizing In Cities to Combat Crimes by Blacks*, N.Y. TIMES, Feb. 22, 1976, at 1 (“Black crime—a subject that blacks once regarded as ‘too sensitive’ to be discussed openly—has now become a major public issue among many blacks who feel that the rising crime rate is hitting their communities hardest.”); Robert Sherrill, *Despite New Strength Among Reformers, Bills in Congress Have Little Chance: Gun Controls Are Not Likely This Year; Either*, N.Y. TIMES, Mar. 9, 1975, at 6 (“The 17-member black caucus in the House [of Representatives] has endorsed strong [gun] controls, observing that ‘black-on-black crime is an especially prevalent problem.’”).

8. As will become clear, my point here is that police officers have implicit, and not just explicit, biases. For a discussion of the implicit biases phenomenon, see generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (offering an overview of the implicit bias research); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (describing how implicit racial biases are reinforced by news programming); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (describing the ways implicit bias impacts perceptions of criminal defendants and employment discrimination plaintiffs) [hereinafter Kang et al., *Implicit Bias in the Courtroom*]; Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063 (2006) (discussing the relevance of implicit bias research to discussions of affirmative action); Jerry Kang & Kristin Lane,

implicit biases,<sup>9</sup> are only one part of a broader complex of factors that expose African-Americans to police violence.<sup>10</sup> This Article sets forth some additional variables. It does so in the form of a theoretical model that frames blue-on-black violence as a structural problem.

Before I proceed to describe the model, a caveat is in order. The model I offer does not purport to be a “total theory” explanation of police violence against African-Americans. Think of it, instead, as a heuristic device or a provisional account that synthesizes the following six dynamics into an overarching framework:

1. A variety of social forces (including, but not limited to, broken windows policing, racial stereotypes, racial segregation and gentrification, and Fourth Amendment law) converge to make African-Americans vulnerable to ongoing police surveillance and contact.
2. The frequency of this surveillance and contact exposes African-Americans to the possibility of blue-on-black violence.
3. Police culture and training encourages that violence.
4. When violence occurs, a range of legal actors in civil and criminal processes translate that violence into justifiable force.
5. The doctrine of qualified immunity makes it difficult for plaintiffs to win cases against police officers, and when plaintiffs win such cases, police

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*Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (advocating for legal structures that acknowledge rather than ignore implicit racial biases); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006) (introducing the concept of behavioral realism); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the challenges of demonstrating intentionality in expressions of contemporary racial bias); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (describing original and prior research on the ways in which judge and jury decisions are impacted by implicit racial bias). I am also arguing that even the implicit biases literature on race and policing leaves an awful lot out.

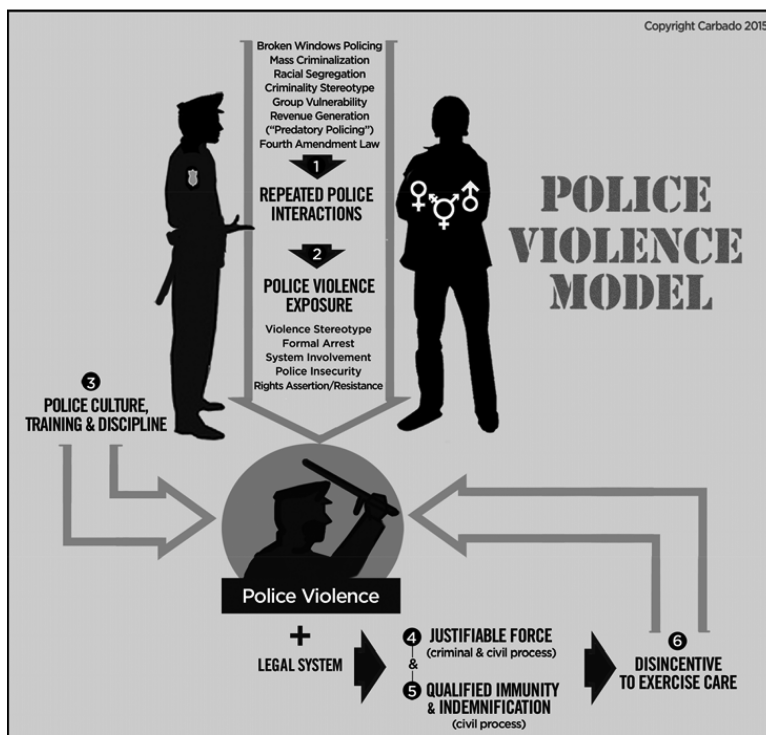
9. See generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004); David Jacobs & Robert M. O’Brien, *The Determinants of Deadly Force: A Structural Analysis of Police Violence*, 103 AM. J. SOC. 837 (1998); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); K. Michelle Scott, *Looking Through a Glass Darkly: Applying the Lens of Social Cubism to the Police-Minority Group Conflict in America*, 8 ILSA J. INT’L & COMP. L. 857 (2002).

10. Over the past few years, legal scholars have increasingly drawn from social psychology to explain the relationship between racial profiling and police violence on the one hand, and racial stereotypes and racial biases on the other. See L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 279–82 (2012); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 124–31 (2014) (also discussing stereotype threat) [hereinafter Richardson & Goff, *Interrogating Racial Violence*]; L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2970 (2015) [hereinafter Richardson, *Police Racial Violence*]; see also Cynthia Lee, *But I Thought He Had a Gun”: Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1, 24 & n.108 (2004); Kang et al., *Implicit Bias in the Courtroom*, *supra* note 8.

officers rarely suffer financial consequences because their local government indemnifies them.

6. The conversion of violence into justifiable force, the qualified immunity barrier to suing police officers, and the frequency with which cities and municipalities indemnify police officers reduce the risk of legal sanction police officers assume when they employ excessive force. This reduction in the risk of legal liability diminishes the incentive for police officers to exercise care with respect to when and how they deploy violent force.<sup>11</sup>

Figure 1 below schematically represents this summary.



The remainder of the Article more fully describes the model. Part I highlights the factors that make African-Americans vulnerable to repeated police interac-

11. This Article is part of a four-part series that explicates different dimensions of the model. This Article provides a general overview of the model. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, CALIF. L. REV. (forthcoming 2016) [hereinafter Carbado, *From Stopping Black People to Killing Black People*] focuses on the Fourth Amendment part of the story. Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence*, HARV. C.R.-C.L. L. REV. (forthcoming 2016) draws on social psychology to highlight various dimensions of the model.



tions (Point 1) and explains how this frequent police contact exposes African-Americans to the possibility of violence (Point 2). Part II describes the rest of the model. After explaining how police culture, training, and discipline contribute to police violence (Point 3), Part II spells out how the translation of police violence into justifiable force (Point 4) combines with the doctrine of qualified immunity and the practice of indemnification (Point 5) to create a disincentive for police officers to exercise care with respect to when and how they employ violent force (Point 6).

## I. POLICE INTERACTIONS AND VIOLENCE EXPOSURE DYNAMICS

This Part discusses the first two points in the model—repeated police interactions (Point 1) and police violence exposure (Point 2). Together, Points 1 and 2 convey the idea that frequent police contact increases one’s exposure to police violence. Putting this point another way, the disproportionate exposure African-Americans have to police violence derives in part from their disproportionate contact with the police.<sup>12</sup>

### A. POINT 1: REPEATED POLICE INTERACTIONS

At Point 1, seven factors converge to render African-Americans vulnerable to repeated police interactions: broken windows policing, mass criminalization, racial segregation, the black criminality stereotype, group vulnerability, revenue generation (in the form of what I call “predatory policing”), and Fourth Amendment law. I discuss each factor in turn.

#### 1. Broken Windows Policing

Broken windows policing is perhaps the most common form of proactive policing—characterized by policing practices designed to prevent or deter criminal wrongdoing. Under broken windows policing, police officers target “neighborhoods at the tipping point—where the public order is deteriorating but not unreclaimable, where the streets are used frequently but by apprehensive people, where a window is likely to be broken at any time, and must quickly be fixed if all are not to be shattered.”<sup>13</sup> The basic idea is that if police officers do not vigorously focus their attention on low-level crimes and signs of disorder in a given community, that community will experience more serious and long-

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12. Tracey Meares makes a related point: “The disproportionate involvement of African-American men in the criminal justice system . . . starts with the police . . .” Tracey Meares, *Barrock Lecture on Criminal Law: The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 654 (2009).

13. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/9EKX-DLRP>]. The broken windows theory encourages police to specifically target teenagers, streetwalkers, homeless persons, and panhandlers as sources of low-level disorder.

lasting problems of criminality and social upheaval.<sup>14</sup>

Broken windows policing, then, is expressly predicated on the view that police officers should enforce minor criminal infractions and surveil communities for signs of disorder. Both imperatives increase African-Americans' contact with the police. This is because blacks are more likely to be arrested for low-level crimes than whites<sup>15</sup> and because our perception of disorder is racialized.<sup>16</sup> For example, a police officer is more likely to view three black teenagers on a street corner as a sign of disorder than he is to so view three white teenagers on a street corner.<sup>17</sup>

The attribution of disorder to African-Americans occurs at the community level as well. That is to say, neighborhoods consisting of predominantly black residents are more likely to be deemed disorderly and subject to broken windows policing than predominantly white neighborhoods.<sup>18</sup> The vulnerability

14. The empirical evidence on this theory is mixed, at best. *See, e.g.*, Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 271 (2006). Moreover, at least some scholars argue that the costs of broken windows policing outweigh its benefits. *See* Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. ON POVERTY L. & POL'Y 419, 426 (2007) ("When police departments do adopt aggressive arrest policies to combat disorder, . . . the group most affected by those strategies is the poor. The Baltimore City Council acknowledged as much in a report on arrest rates, stating that the 'unintended consequence' of vigorous policing in the city is 'the disproportionate arrest of both African Americans and the poor.'" (internal citations omitted)); Tracey Meares, *Broken Windows, Neighborhoods, and the Legitimacy of Law Enforcement or Why I Fell in and out of Love With Zimbardo*, J. ON RES. CRIME & DELINQ. 1 (2015).

15. *See, e.g.*, JOYCELYN M. POLLOCK, CRIME & JUSTICE IN AMERICA: AN INTRODUCTION TO CRIMINAL JUSTICE 44 (2012) (noting FBI statistics showing that in 2009, over 40% of arrests for vagrancy and 68.6% of arrests for illegal gambling were of African-Americans, who represent only 13% of the U.S. population); Spencer Ackerman & Zach Stafford, *Chicago Police Detained Thousands of Black Americans at Interrogation Facility*, GUARDIAN (Aug. 5, 2015, 12:56 PM), <http://www.theguardian.com/us-news/2015/aug/05/homan-square-chicago-thousands-detained> [<https://perma.cc/7F54-VD7E>]; Simon McCormack, *Jarring Racial Disparity Uncovered in Arrests for Minor Crimes in Minneapolis*, HUFFINGTON POST: HUFFPOST CRIME (Oct. 29, 2014, 5:13 PM), [http://www.huffingtonpost.com/2014/10/29/racial-disparity-arrests-minneapolis\\_n\\_6070324.html](http://www.huffingtonpost.com/2014/10/29/racial-disparity-arrests-minneapolis_n_6070324.html) [<https://perma.cc/69Q9-9XJA>].

16. *See, e.g.*, Robert J. Sampson & Stephen W. Raudenbush, *Neighborhood Stigma and the Perception of Disorder*, 24 FOCUS 7 (Fall 2005), <http://www.irp.wisc.edu/publications/focus/pdfs/foc241b.pdf>.

17. Another way to make this point is to say that black teenagers are more criminally suspect than white teenagers. *See infra* Section I.A.2 (discussing black criminality); *see also* Bennett L. Gershman, *Use of Race in "Stop-and-Frisk": Stereotypical Beliefs Linger, But How Far Can the Police Go?*, 72 N.Y. ST. B.J. 42, 42 (2000) ("Most recently, an unprecedented investigation by the New York State attorney general's office documented the racially disparate stop-and-frisk practices of the New York City Police Department. . . . The report found that blacks were more than six times more likely to be stopped than whites, and Hispanics were more than four times more likely to be stopped than whites. Such disparities were most pronounced in precincts where the majority of the population was white. The report also found that in many of these stops, the police lacked a sufficient factual basis to justify the action, and that race apparently affected the decision to make the stop." (internal citations omitted)).

18. *See, e.g.*, Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 309, 311, 323–25, 331–32 (Stephen K. Rice & Michael D. White eds., 2010) (indicating that broken windows police stops in New York City are concentrated in predominantly black neighborhoods); Christopher Mathias, *This Is What Broken Windows Policing Looks Like*, HUFFINGTON



of predominantly black communities to broken windows policing derives at least in part from economic marginalization itself functioning as a sign of disorder. African-American communities characterized by disinvestment, deindustrialization,<sup>19</sup> and joblessness have functioned as precisely the kind of communities local governments encourage law enforcement agencies to police proactively.

## 2. Mass Criminalization

A second factor that contributes to the multiple encounters African-Americans have with the police is what I call “mass criminalization.” By mass criminalization, I mean the criminalization of relatively nonserious behavior or activities and the multiple ways in which criminal justice actors, norms, and strategies shape welfare state processes and policies.

First, consider the kinds of nonserious behaviors and activities that states and/or cities have criminalized.<sup>20</sup>

- a. Spitting in public places;<sup>21</sup>
- b. Possession of spoons, bowls, and blenders (as indicative of drug paraphernalia);<sup>22</sup>
- c. Loitering for illicit purposes;<sup>23</sup>

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POST: HUFFPOST BLACK VOICES (Oct. 9, 2015, 5:15 PM), [http://www.huffingtonpost.com/entry/broken-windows-policing-new-york\\_us\\_5617f428e4b0082030a2573f](http://www.huffingtonpost.com/entry/broken-windows-policing-new-york_us_5617f428e4b0082030a2573f) [<https://perma.cc/N45T-EPHN>].

19. For a classic articulation of the problem of disinvestment, deindustrialization, and joblessness in predominantly African-American communities, see WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1997).

20. See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 750–52 (2005); Jamie Michael Charles, “America’s Lost Cause”: *The Unconstitutionality of Criminalizing Our Country’s Homeless Population*, 18 PUB. INT. L.J. 315, 315–16 (2009); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 528–29 (2000) [hereinafter Luna, *Principled Enforcement*]; Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704–05 (2005) [hereinafter Luna, *Overcriminalization*]; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 515–16 (2001); Eric S. Tars et al., *Can I Get Some Remedy?: Criminalization of Homelessness and the Obligation to Provide an Effective Remedy*, 45 COLUM. HUM. RTS. L. REV. 738, 739–40 (2014).

21. See, e.g., VA. CODE ANN. § 18.2-322 (2004).

22. See, e.g., ARIZ. REV. STAT. ANN. § 13-3415 (2000); FLA. STAT. § 893.145(8) (2001); MASS GEN. LAWS ch. 94C, §§ 1, 321 (2000); see also Stuntz, *supra* note 20, at 516 n.51.

23. ARK. CODE ANN. § 5-71-213 (1997); CAL. PENAL CODE § 647(d) (West 1988); see also Pamela Sirkin, *The Evanescent Actus Reus Requirement: California Penal Code § 647(d)—Criminal Liability for “Loitering with Intent . . .”—Is Punishment for Merely Thinking Certain Thoughts While Loitering Constitutional?*, 19 SW. U. L. REV. 165, 165–66, 166 n.8 (1990). The Model Penal Code itself notably includes provisions against “disorderly conduct, public drunkenness or drug incapacitation, and loitering or prowling.” Luna, *Principled Enforcement*, *supra* note 20, at 528–29, 529 n.58 (citing Model Penal Code §§ 250.2 (disorderly conduct), 250.5 (public drunkenness and drug incapacitation), 250.6 (loitering or prowling) (AM. LAW. INST., Official Draft and Revised Comments 1985)).

- d. Loitering;<sup>24</sup>
- e. Selling alcohol to a “common drunkard”;<sup>25</sup>
- f. Public intoxication;<sup>26</sup>
- g. Sleeping in a public place;<sup>27</sup>
- h. Sitting or lying down in particular public places;<sup>28</sup>
- i. Camping or lodging in a public place;<sup>29</sup>
- j. Panhandling anywhere in the city;<sup>30</sup>
- k. Storing personal property in a public place without a permit;<sup>31</sup>
- l. Drinking in public;<sup>32</sup>
- m. Jaywalking;<sup>33</sup>
- n. Riding bicycles on the sidewalk;<sup>34</sup>
- o. Removing trash from a bin;<sup>35</sup>
- p. Urinating or defecating in public.<sup>36</sup>

Five points bear emphasis. First, in addition to not being serious, some of the foregoing crimes (for example, loitering) are decidedly vague. Second, poor people are more likely to find themselves committing several of the crimes (for example, sleeping in public) than people who are not poor.<sup>37</sup> Third, precisely because the above crimes are nonserious or vague, police officers will have little difficulty establishing the requisite probable cause to justify arresting people for committing them. For example, if the law criminalizes jaywalking, and people

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24. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* 8 (2011) [hereinafter *CRIMINALIZING CRISIS*].

25. CAL. BUS. & PROF. CODE § 25602 (West 2000).

26. See, e.g., CAL. PENAL CODE § 647(f)–(g) (West 2000); IOWA CODE § 123.46 (2000).

27. See, e.g., DALL., TEX., CITY CODE, vol. II, ch. 31 §31-13(a)(1) (1992).

28. *CRIMINALIZING CRISIS*, *supra* note 24, at 7.

29. See, e.g., LAWRENCE, KAN., CITY CODE, ch. XIV, art. IV, §14-417(C)–(D) (2005); ORLANDO, FLA., CITY CODE, tit. II, ch. 43, §43.52(2) (2000); SARASOTA, FLA., CITY CODE, ch. 34, art. V, §34-41(b) (2005); PORTLAND, OR., MUN. CODE, tit. 14, ch. 14A.50, §14A.50.020(B) (2006); *CRIMINALIZING CRISIS*, *supra* note 24, at 7.

30. *CRIMINALIZING CRISIS*, *supra* note 24, at 8.

31. SANTA ANA, CAL., MUN. CODE, art. VIII, §§ 10-400–10-403 (1992); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1150–52, 1169 (upholding Santa Ana ordinance against challenge for facial unconstitutionality vagueness).

32. *Id.* at 1151.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1151, 1184; *CRIMINALIZING CRISIS*, *supra* note 24, at 7.

37. See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. LAW & CRIMINOLOGY 643 (2009).

regularly jaywalk, the question is not whether the police will have probable cause (they will because many people jaywalk). The question is whether the police will use that probable cause selectively to arrest members of particular groups (for example, African-Americans). All of this is to say that the more law criminalizes activities in which many people engage, the wider the pool of people from which police officers may arrest.

Fourth, even when officers do not arrest people for minor offenses, they may issue citations. As I discuss more fully below with reference to what I call “predatory policing,” in some jurisdictions, police officers specifically target poor African-Americans, and other marginalized groups, and dish out citations as source of revenue generation. Should people fail to pay those citations, municipal courts issue warrants for their arrests. Note, again, how poverty and race intersect to create a pathway to criminalization. The issuance of arrest warrants for failure to pay fines provides another basis on which police officers may arrest and incarcerate African-Americans.

A final point about the importance of mass criminalization is this: The problem is compounded by the enormous discretion police officers have with respect to whom they arrest.<sup>38</sup> Assuming that an officer has probable cause to arrest a person, and assuming that the person is in public,<sup>39</sup> the officer’s discretion whether to effectuate that arrest is mostly unbridled.<sup>40</sup> The scope of that discretion enables police officers to target African-Americans, particularly young African-Americans in public places and those whose very embodiment or self-presentation is a sign of disorder (for example, those who are gender nonconforming).<sup>41</sup>

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38. For a fuller discussion on police discretion on arrests, see David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271; see also Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 57 (2014) (“The Supreme Court’s decision in *Terry v. Ohio* authorizes the police to ‘stop and frisk.’ The police can temporarily detain someone they suspect of a crime, and they can ‘pat down’ suspects they think might be armed. Because the ‘reasonable suspicion’ standard that authorizes stops and frisks is lenient, the police have wide discretion in who they detain and frisk. Even suspicion of a trivial offense like jaywalking, or spitting on the sidewalk, can give the police the authority to stop you.” (internal citation omitted)); Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 152–53 (2012) (“The [Supreme] Court cannot fully address the use of searches incident to arrest without acknowledging that racial profiling is the heart of the problem. . . . Second[ly], if we care about racial profiling, we have to limit police discretion. To do so in the search incident to arrest context requires a return to the heart of the *Chimel* approach.”); Barry Friedman & Cynthia Benin Stein, *Redefining What’s “Reasonable”: The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 281 (2016) (arguing that Fourth Amendment protections “ensure against the use of arbitrary police discretion”); Christopher R. Green, *Reverse Broken Windows*, 65 J. LEGAL EDUC. 265, 273 (2015) (observing that “[t]he lack of significant method-of-arrest law is striking”).

39. See *United States v. Watson*, 423 U.S. 411, 423–24 (1976) (noting that probable cause is sufficient to justify arresting a person in public).

40. There are, however, constraints on how an officer effectuates the arrest. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (prohibiting officers from employing excessive force).

41. Consider, for example, an officer’s discretion to arrest someone who has committed a traffic infraction. The Supreme Court has held that so long as an officer has probable cause to believe that the person has committed a traffic infraction, the fact that the officer’s decision to arrest the person is

Against the background of mass criminalization, police officers can almost always find a justification to investigate an African-American for some crime. Understood in this way, mass criminalization is not just a source of criminal sanction—it is a source of police empowerment. It provides police officers with a kind of free-floating probable cause—or free-floating reasonable suspicion—that they can use to justify their repeated interactions with African-Americans.

Mass criminalization also enables police contact with African-Americans through the diffusion of criminal justice officials, norms, and strategies into the structure and organization of the welfare state. Consider, for example, the school-to-prison pipeline.<sup>42</sup> Lawyers, scholars, and activists have long decried the ways in which school discipline policies and practices create a prison-like environment that facilitates the incarceration of black and Latino students.<sup>43</sup> Many inner city schools have become quasi-penal institutions through which black and Latino students enter the juvenile or criminal justice systems. These schools have installed metal detection devices that local police or school police officers administer. This surveillance apparatus means that students have to quite literally clear security before entering schools. School police also conduct random searches of students, including frisks.<sup>44</sup> Moreover, they regularly arrest students for minor misconduct, such as arguing in the corridors or being disrespectful to a teacher.<sup>45</sup> Even when school police officers do not arrest students for such conduct, students face other administrative sanctions, such as

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racially motivated is irrelevant for Fourth Amendment purposes and must be addressed through the Equal Protection Clause. *Whren v. United States*, 517 U.S. 806, 813 (1996).

42. For general discussion of the school-to-prison pipeline, see, for example, ACLU, *What is the School-to-Prison Pipeline?*, <https://www.aclu.org/fact-sheet/what-school-prison-pipeline> [<https://perma.cc/63BL-F84G>]; Editorial, *Stop the School-to-Prison Pipeline*, 26 RETHINKING SCHOOLS (2011–2012), [http://www.rethinkingschools.org/archive/26\\_02/edit262.shtml](http://www.rethinkingschools.org/archive/26_02/edit262.shtml) [<https://perma.cc/K79R-N72P>]; Mary Ellen Flannery, *The School-to-Prison Pipeline: Time to Shut It Down*, NEATODAY (Jan. 5, 2015), <http://neatoday.org/2015/01/05/school-prison-pipeline-time-shut/> [<https://perma.cc/LC7Z-8EAU>].

43. See, e.g., AFRICAN AM. POLICY FORUM & CTR. FOR INTERSECTIONALITY AND SOC. POLICY STUDIES, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED (2015); CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM (2010); Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, 20 POVERTY & RACE 5 (2011).

44. Stephen Betts, *Police Searches of Schools Common, Draw Little Opposition*, BANGOR DAILY NEWS (Dec. 13, 2014, 7:45 AM), <http://bangordailynews.com/2014/12/13/news/midcoast/police-searches-of-schools-common-draw-little-opposition/> [<https://perma.cc/JNC5-B7BW>]; Kate R. Ehlenberger, *The Right to Search Students*, 59 EDUC. LEADERSHIP 31 (2001), <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx> [<https://perma.cc/K5FJ-3KW8>]; *No Whiff of Drugs at 2 Elgin Schools: Police, Dogs Perform Random Searches at Middle Schools*, CHI. TRIB. (May 10, 2012), [http://articles.chicagotribune.com/2012-05-10/news/ct-met-middle-school-random-drug-search-0511-20120511\\_1\\_smell-drugs-random-searches-middle-schools](http://articles.chicagotribune.com/2012-05-10/news/ct-met-middle-school-random-drug-search-0511-20120511_1_smell-drugs-random-searches-middle-schools) [<https://perma.cc/7PV5-MR23>].

45. For various examples of relatively minor misconduct triggering major consequences, or of nonoffending or victimized students being punished under zero tolerance policies, see, for example, Kaitlin Banner, *Breaking the School-to-Prison Pipeline: New Models for School Discipline and Community Accountable Schools*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 301, 301–03 (Nancy E. Dowd ed., 2015); Jack Holmes, *White Kids Get Medicated When They Misbehave, Black Kids Get Suspended—Or Arrested*, N.Y. MAGAZINE (Aug. 6, 2015, 8:00 AM), <http://nymag.com/scienceofus/2015/08/white-kids-get-meds-black-kids-get-suspended.html>

suspension or expulsion, that are gateways to the criminal justice system in increasing the likelihood that the students will end up arrested and incarcerated later.<sup>46</sup> The short of it is that the diffusion of criminal justice actors, norms, and practices into inner city schools increases the contact African-Americans have with law enforcement and the criminal justice system more generally.

### 3. Racial Segregation

There are two sets of reasons why racial segregation renders African-Americans vulnerable to repeated police interactions. The first relates to policing in black communities. Historically, the police have perceived poor, racially segregated black communities as “war zones” that require ongoing police presence.<sup>47</sup> The most aggressive forms of this presence are tantamount to a kind of military occupation.<sup>48</sup> Moreover, segregation facilitates the extent to which the state can employ policing as a vehicle of social control.<sup>49</sup> That is to say, segregation effectuates what we might call governance through policing, a state-sanctioned management strategy that requires the police to force engagements with African-Americans as a form of social regulation.<sup>50</sup>

Additionally, because racially segregated black communities lack substantive employment and educational opportunities, some of their members may engage in both low-level and more serious forms of crime.<sup>51</sup> In other words, racial

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[<https://perma.cc/PU6B-GHUZ>]; *Pushed Out*, TEACHING TOLERANCE (Fall 2009), <http://www.tolerance.org/pushed-out> [<https://perma.cc/W5Z6-995K>].

46. See, e.g., Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, F. ON PUB. POL’Y 1, 2 (2009) (“The risk of later incarceration for students who are suspended or expelled and unarrested is also great.”).

47. See, e.g., ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (1999) (detailing the strained police-community relationship in a low-income African-American neighborhood); Steven Rosenfeld, *15 Reasons America’s Police Are So Brutal*, SALON (Dec. 20, 2014, 8:00 AM), [http://www.salon.com/2014/12/20/15\\_reasons\\_americas\\_police\\_are\\_so\\_brutal\\_partner/](http://www.salon.com/2014/12/20/15_reasons_americas_police_are_so_brutal_partner/) [<https://perma.cc/J7YM-GMWF>] (noting federal report finding that Cleveland police “View Their Beats As War Zones”).

48. See, e.g., RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* (2013) (discussing the militarization of the police).

49. See, e.g., Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539 (2014) (identifying policing and deprivation of privacy as state social control); Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156 (2001) (tracing social control and race-oriented policing back to antebellum slave patrols and postbellum Black Codes); see also Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1368 (2012) (“Instead of a legal regime of justified punishment, the criminal process starts to look increasingly ad hoc, a practice of social control in search of a justification.”).

50. Cf. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (discussing the way in which the war on crime is a mechanism through which society governs through crime).

51. See, e.g., AM. SOCIOLOGICAL ASS’N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM 8 (2007); Nekima Levy-Pounds, *Par for the Course?: Exploring the Impacts of Incarceration and Marginalization on Poor Black Men in the U.S.*, 14 J.L. SOC’Y 29, 34 (2013) (noting relationship between lack of access to education and employment and the propensity to become involved with the criminal justice system in Detroit); see also Douglas S. Massey, *Getting Away With Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203 (1995).

segregation structures not only the production of poverty; it structures the production of crime. The existence of this crime increases African-American contact with the police by fueling tough-on-crime policy initiatives.<sup>52</sup> Finally, because segregated poor communities have little political power,<sup>53</sup> law enforcement can aggressively police such neighborhoods with impunity.<sup>54</sup> The bottom line is that the more economically and politically powerless a community, the greater that community's vulnerability to law enforcement contact and thus the possibility of excessive force by the police.<sup>55</sup>

The second way segregation facilitates African-American contact with the police is by normalizing the idea that particular racial groups belong in particular geographic areas. In some parts of the United States, to know where a person lives is virtually to know that person's race.<sup>56</sup> For instance, an African-American in Pacific Palisades at 9 p.m. is presumptively "out of place" and therefore presumptively suspicious because of the racial geography of Los Angeles County; there are relatively few black people who live in Pacific

52. See, e.g., Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 15–16 (1999) (noting particular racial aspects of tough-on-crime policies); Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 L. & SOC. INQUIRY 823, 838–39 (1998).

53. See, e.g., Myron Orfield, *Segregation and Environmental Justice*, 7 MINN. J.L. SCI. & TECH. 147, 152–53 (2005); Steve Bogira, *Separate, Unequal, and Ignored*, CHI. READER (Feb. 10, 2011), <http://www.chicagoreader.com/chicago/chicago-politics-segregation-african-american-black-white-hispanic-latino-population-census-community/Content?oid=3221712> [<https://perma.cc/KC5N-8Y7H>] (discussing how segregated neighborhoods in Chicago have remained segregated and mostly unchanged for forty years, whereas the issue of desegregation cannot get political traction).

54. See, e.g., Conor Friedersdorf, *The Brutality of Police Culture in Baltimore*, ATLANTIC (Apr. 22, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-brutality-of-police-culture-in-baltimore/391158/> [<https://perma.cc/T4US-7SZ8>] (providing more reflections on an alleged culture of police violence in Baltimore); Mark Puente, *Undue Force*, BALT. SUN (Sept. 28, 2014), <http://data.baltimoresun.com/news/police-settlements/> [<https://perma.cc/KQN6-2USL>] (reporting on police brutality in Baltimore and numerous settlements paid by the city that admit no wrongdoing).

55. See David Jacobs & Robert M. O'Brien, *The Determinants of Deadly Force: A Structural Analysis of Police Violence*, 103 AM. J. OF SOC. 837, 860 (1998) ("[T]he police use of lethal force varies with the degree of inequality between the races, the presence of blacks, and local political arrangements that increase black control over the behavior of law enforcement personnel supports political explanations for these violent events. Such results are consistent with claims that state violence is used in racially unequal jurisdictions to preserve the existing order."); see also William Terrill, *Police Use of Force and Suspect Resistance: The Micro Process of the Police-Suspect Encounter*, 6 POLICE Q. 51 (2003) (suggesting that police officers are more likely to use force in economically marginalized areas); William Terrill & Michael D. Reisig, *Neighborhood Context and Police Use of Force*, 40 J. RES. CRIME & DELINQ. 291 (2003) (same).

56. See, e.g., UNIV. OF MICH. POPULATION STUDIES CTR., *Racial Residential Segregation Measurement Project*, <http://enceladus.isr.umich.edu/race/racestart.asp> [<https://perma.cc/6UBU-XA3Z>] (offering data on relative residential racial segregation in numerous American cities down to the census tract and block level). For one relatively extreme example of de facto racial or ethnic segregation, consider East Los Angeles, which was 96.8% Hispanic in the 2000 census, with some blocks showing even higher concentrations. *Id.* (from the URL follow "Get Segregation Indexes!" in the upper left corner; then select "U.S. Cites [sic] > 100,000" and "Proceed with query;" then select "West" and "Proceed with query;" then select "East Los Angeles, CA" and "Proceed with query").



Palisades.<sup>57</sup> Scholars sometimes refer to this problem as policing “racial incongruity,”<sup>58</sup> and as Bennett Capers observes, “[a]lthough some courts have held that racial incongruity cannot be a factor in establishing suspicion . . . other courts have held that consideration of racial incongruity may be a factor . . . .”<sup>59</sup> The bottom line is that the existence of racial segregation helps to create a racial logic about race and place, or who belongs where, that extends to policing.

Importantly, this “who belongs where” logic applies not only to communities where racial segregation is complete. The reasoning applies to “transitional” communities as well—that is to say, those that are undergoing gentrification. Invoking gentrification in the context of a discussion about police violence is particularly important because, as Fanna Gamal notes, “while the constellation of housing and development policies that facilitate gentrification is a growing area of concern for scholars and activists, the intersection of gentrification and the political and social nature of policing remain undertheorized.”<sup>60</sup> The specific gentrification problem I want to emphasize here is that white movement into black urban areas (in, for example, New York, Los Angeles, and Washington, DC) can exacerbate police contact with African-Americans in at least two ways.

First, the presence of whites in these areas could create an added incentive for law enforcement to *proactively* engage in broken windows policing<sup>61</sup> to “protect and serve” a group they might perceive to be particularly vulnerable to black crime: white people. Here, police officers would perform a kind of brush-clearing of inner city areas to enable whites to traverse the neighborhood unencumbered by signs of disorder (read: public black presence, particularly in the form of adolescence, homelessness, and gender non-conformity). The more “successful” the police are at this brush-clearing, the more African-Americans are “pushed” out of the community and the more whites are “pulled” in—which is to say, the more the community is gentrified.

A second way in which gentrification intersects with law enforcement is through *reactive* broken windows policing. Here, police officers mobilize broken windows policing in response to white pressures and demands. Because

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57. The *Los Angeles Times*’ Mapping L.A. project reported the “Black” population of Pacific Palisades at a miniscule 0.4% of the estimated total population of 25,507 in 2008. See *Mapping L.A. > Westside: Pacific Palisades*, L.A. TIMES, <http://maps.latimes.com/neighborhoods/neighborhood/pacific-palisades/> [https://perma.cc/L7Y8-VK8D].

58. See, e.g., Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 240 (1983).

59. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 66 n.148 (2009).

60. Fanna Gamal, *Gentrifying the Fourth: Policing in the Age of Displacement* (Spring 2016) (unpublished paper) (on file with author). I thank Fanna Gamal more generally; her thinking about policing and gentrification persuaded me to link gentrification to the arguments I am advancing about segregation and policing.

61. It might seem redundant to employ *proactive* to modify broken windows policing when broken windows policing is already understood to be a form of proactive policing. As you see, I employ proactive broken windows to distinguish it from reactive broken windows—that is, broken windows policing that results from residents calling the police and urging them to address what the residents perceive to be signs of disorder.

local government agents sometimes prod their residents to inform the police of signs of disorder, we might think of reactive broken windows policing as a particular kind of public/private partnership: City officials (the public) encourage residents (the private) to report various signs of disorder to the police (the public). This has been happening in San Francisco—and during precisely the period in which the city has undergone significant gentrification. Between 2009 and 2014, nonemergency calls to local law enforcement, including the reporting of nonserious conduct like loitering, “increased 291 percent from 9,946 . . . to 28,950.”<sup>62</sup> (Think back to the earlier discussion about mass criminalization.) During this period, city officials turned residents of San Francisco into quasi informants by urging them to report signs of disorder using a nonemergency-311 line and a mobile application, Open311. According to the Mayor’s Office, “The new SF311 app for residents and visitors to San Francisco allows users to quickly and easily report quality of life issues by sending pictures, a brief description and a map-based location.”<sup>63</sup> With respect to enabling gentrification through the policing of public disorder, the government of San Francisco has an app for that.

More crucially, the city management of what it perceives to be public disorder facilitates police contact with African-Americans by encouraging reactive broken windows policing. At least some of the public disorder reports people file using the 311 line or the Open311 application will generate a law enforcement response, and at least some of those responses will take the form of broken windows policing.<sup>64</sup>

The reason gentrification engenders both reactive and proactive broken windows policing is because gentrification is part of what we might call “the new racial segregation.” Like the “old racial segregation” (Jim Crow), the new racial segregation moves racial bodies and economic resources in and out of places, enacts borders that are vigorously policed, and reconfigures opportunities and various social structures (housing, schools, public transportation, parks) in ways that reproduce racial inequality.

This is not to say that gentrification is *just like* Jim Crow. It is not. The point, instead, is that gentrification is one of the mechanisms through which particular forms of contemporary segregation are racially accomplished. Think, for example, about the creation of de facto white-only spaces in formerly quasi de

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62. Adam Hudson, *How Punitive and Racist Policing Enforces Gentrification in San Francisco*, TRUTHOUT (Apr. 24, 2015) <http://www.truth-out.org/news/item/30392-how-punitive-and-racist-policing-enforces-gentrification-in-san-francisco> [https://perma.cc/573C-8TGU]; *311 Calls SF*, CARTODB, [http://ampitup.cartodb.com/viz/9c7b01ec-d255-11e4-b032-0e9d821ea90d/embed\\_map](http://ampitup.cartodb.com/viz/9c7b01ec-d255-11e4-b032-0e9d821ea90d/embed_map) [https://perma.cc/M6S3-SLQM].

63. News Release, *Mayor Lee Launches New Open311 Platform to Improve City’s 311 Customer Service*, S.F. OFFICE OF THE MAYOR (Aug. 8, 2013), <http://www.sfmayor.org/index.aspx?recordid=387&page=846> [https://perma.cc/2S6U-YTA9].

64. For one articulation of the relationship between gentrification and policing, see Hudson, *supra* note 62.

jure black-only inner cities.<sup>65</sup> More generally gentrification produces reverse white flight (the movement of whites into, as opposed to out of, urban areas) and reverse black migration (the movement of blacks out of, as opposed to into, those domains).

All of this is to say, broken windows policing is part of the gentrification architecture. The private can mobilize broken windows policing on demand, and the government can proactively supply it at will. This public/private mobilization of broken windows policing makes blacks out of place in, and facilitates their displacement from, areas on route to becoming new white communities. We should be concerned about gentrification not just because it makes black people a racial nuisance and dislocates them from their very own communities but also because the phenomenon enlists law enforcement to do so.

In sum, racial segregation, including gentrification, facilitates police interactions with African-Americans by creating a logic about race and space that justifies the aggressive policing of predominantly black neighborhoods and the police targeting of African-Americans in predominantly white neighborhoods and areas in racial transition.

#### 4. Criminality Stereotype

The basic idea is that to the extent that police officers view African-Americans as criminally suspect or disorderly, they are likely to stop and question African-Americans repeatedly.<sup>66</sup> Empirical evidence suggests that police officers, like the rest of us, harbor such stereotypes.<sup>67</sup> In a particularly strong line of research on this point, researchers briefly expose participants to an initial stimulus (a prime) and then ask them to respond to a secondary stimulus (a target).<sup>68</sup> For instance, a participant might be exposed to a black face (the prime) and then asked to identify whether a subsequently presented image (the target) is a weapon or a tool.<sup>69</sup> Psychologists have discovered that individuals

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65. I employ “quasi de jure” to denote a form of racial segregation that is somewhere between de facto and formally de jure forms of racial segregation.

66. For a discussion of how implicit biases, including stereotypes, affect various dimensions of policing, see L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012); see also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

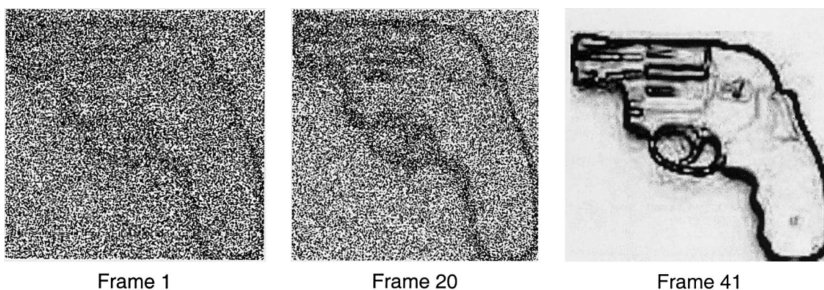
67. See, e.g., Toussaint Cummings, *I Thought He Had a Gun: Amending New York’s Justification Statute to Prevent Police Officers from Mistakenly Shooting Unarmed Black Men*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 781, 785–86 (2014); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 878 (2004); Jessica J. Sim et al., *Understanding Police and Expert Performance: When Training Attenuates (vs. Exacerbates) Stereotypic Bias in the Decision to Shoot*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 291, 292 (2013).

68. See, e.g., Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315 (2002) (reviewing line of priming/target research).

69. A classic example is B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001).

respond more quickly and more accurately when the prime and the target object are cognitively close to one another.<sup>70</sup> As a result, when researchers observe that participants respond more quickly to the image of a gun after one kind of prime (such as a black face prime, relative to a white face prime), they conclude that black faces are more closely associated with crime than are white faces.

A compelling collection of studies by Jennifer Eberhardt and colleagues used priming methods to reveal a robust association between race and crime among white Americans.<sup>71</sup> First, the researchers found that subliminally priming participants with black male faces enabled them to identify degraded crime-related images more quickly than did participants primed with either white male faces or no faces at all.<sup>72</sup> In this object detection task, participants were initially exposed to a series of black or white male faces for thirty milliseconds each, such that each face was perceived by the participant only as a flash.<sup>73</sup> They were then asked to identify a degraded object as quickly as possible.<sup>74</sup> The object moved through forty-one progressive frames, becoming less degraded in each frame.<sup>75</sup> The figure below captures three of these frames at different levels of degradability.<sup>76</sup>



Eberhardt and colleagues found that participants primed with black faces were able to accurately identify the gun after fewer frames (in a more degraded state) than participants who saw white faces or no faces at all.<sup>77</sup> Further, participants recognized crime-related objects more slowly after seeing white

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70. The idea here is that the prime makes the category of the target (for example, crime) more easily brought to mind by the participant. For a thorough description of priming and accessibility, see Payne, *supra* note 69, at 182–86.

71. Eberhardt et al., *supra* note 7.

72. *Id.* at 880.

73. *Id.* at 879.

74. *Id.* at 880.

75. *Id.* at 879 fig.1.

76. *Id.*

77. *See id.* at 880.

face primes than after seeing no primes at all.<sup>78</sup> The authors interpreted these two findings to mean that thinking about black individuals made the category of crime more cognitively accessible, while thinking about white individuals made crime less cognitively accessible.<sup>79</sup> To state the point slightly too strongly, black faces encouraged participants to attend to crime, whereas white faces encouraged them to ignore it.

Perhaps more remarkably, Eberhardt and her colleagues showed in the same paper that priming the concept of crime itself led participants to focus more on black faces than on white faces.<sup>80</sup> What this means, concretely, is that the association of race and crime operates in two directions: Not only does seeing a black person arouse suspicions of criminality, but thinking about criminality brings to mind an image of a black person.<sup>81</sup> This finding suggests that, even absent evidence of racial animus or explicitly held stereotypes, the formally race-neutral project of crime prevention and detection is already racially inflected. When police officers think about crime and criminality, black people are implicitly on their minds. And when officers think about or observe African-Americans, crime and criminality are implicitly on their minds.<sup>82</sup> This research helps explain why Africans-Americans have repeated interactions with the police.

## 5. Group Vulnerability

Group vulnerability increases the likelihood that the police will target African-Americans, particularly those who are marginalized both inside and outside of the black community, such as LGBTQ people.<sup>83</sup> Marginalized groups are more vulnerable to police contact and violence because members of these groups often have non-normative identities to which stereotypes of criminality and presumptions of disorder apply.<sup>84</sup> Additionally, people with vulnerable identities are less likely to report instances of police abuse and less likely to be believed

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78. *Id.*

79. *Id.* at 878. The researchers hypothesized that seeing a black face would serve as “a visual tuning effect, reducing the perceptual threshold for spontaneously recognizing guns and knives.” *Id.*

80. *Id.* at 882.

81. *Id.*

82. For an account of how this science ought to impact our conceptions of reasonable suspicion and self-defense, see L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012) (suggesting that cognitive biases lead police officers to perceive a need for self-defensive violence more often when dealing with racial minorities).

83. On the vulnerability of the LGBTQ community and overpolicing, see JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2011); AFRICAN AM. POLICY FORUM & CTR. FOR INTERSECTIONALITY AND SOC. POLICY STUDIES, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN 24 (2015), [http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF\\_SMN\\_Brief\\_Full\\_singles-min.pdf](http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf) [<https://perma.cc/HY5R-SHVF>] [hereinafter SAY HER NAME] (“The overlap of sexism, racism, homophobia, and transphobia place Black LGBTQ and gender-nonconforming people in a precarious position at the intersection of constructs around gender, race, and sexuality, fueling police violence against them.”).

84. See MOGUL ET AL., *supra* note 83, at 23 (suggesting that LGBTQ bodies are already perceived to be disorderly and criminally-oriented).



when they do. That is to say, members of vulnerable groups are impossible witnesses to their own victimization and lack the social standing and credibility to articulate it.

Consider the foregoing points about group vulnerability and police violence with respect to a particular vulnerable group—poor black women—and a particular form of police violence—sexual assault, the second most reported form of police misconduct in the United States.<sup>85</sup> Many Americans became more aware of police sexual violence in December of 2015,<sup>86</sup> when a jury convicted Daniel Holtzclaw, the roughly six-foot-tall son of a white police officer and failed NFL draftee, of eighteen counts of sexual assault, including rape, forcible oral sodomy, and sexual battery.<sup>87</sup> Though the case warranted

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85. See Yolande M. S. Tomlinson, *Invisible Betrayal: Police Violence and the Rapes of Black Women in the United States*, BLACK WOMEN'S BLUEPRINT (Sept. 22, 2014) [http://tbinetnet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT\\_CAT\\_CSS\\_USA\\_18555\\_E.pdf](http://tbinetnet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18555_E.pdf) [https://perma.cc/9RQX-PTAQ]; see also NAT'L POLICE MISCONDUCT REPORTING PROJECT, 2010 Annual Report, CATO INST., <http://www.policemisconduct.net/statistics/2010-annual-report/> [https://perma.cc/C84F-3KJN] (reporting that there were "618 officers involved in sexual misconduct complaints [throughout 2010], 354 of which were involved in complaints that involved forcible non-consensual sexual activity such as sexual assault or sexual battery"); Amy Goodman, *When Cops Rape: Daniel Holtzclaw & the Vulnerability of Black Women to Police Abuse*, DEMOCRACY NOW! (Dec. 15, 2015), [http://www.democracynow.org/2015/12/15/daniel\\_holtzclaw\\_convicted\\_of\\_serial Rape](http://www.democracynow.org/2015/12/15/daniel_holtzclaw_convicted_of_serial Rape) [https://perma.cc/4HN6-CKS8]; Submission from Andrea J. Ritchie, Soros Justice Fellow, to President's Task Force on 21st Century Policing, U.S. Dep't of Justice (Jan. 28, 2015), *Policy and Oversight: Women of Color's Experiences of Policing* 3, <http://changenetnypd.org/sites/default/files/docs/Women%27s%20Sign%20Letter%20on%20to%20P residential%20Task%20Force%20-%20Policy%20and%20Oversight%20-%20FINAL.pdf> [https://perma.cc/99RB-JHDN] (suggesting that police violence is endemic); Matt Sedensky & Nomaan Merchant, *AP: Hundreds of Officers Lose Licenses over Sex Misconduct*, ASSOCIATED PRESS (Nov. 1, 2015, 12:00 AM), <http://bigstory.ap.org/article/fd1d4d05e561462a85abe50e7eae4ec/ap-hundreds-officers-lose-licenses-over-sex-misconduct> [https://perma.cc/SYE5-27KQ] ("In a yearlong investigation of sexual misconduct by U.S. law enforcement, The Associated Press uncovered about 1,000 officers who lost their badges in a six-year period for rape, sodomy and other sexual assault; sex crimes that included possession of child pornography; or sexual misconduct such as propositioning citizens or having consensual but prohibited on-duty intercourse.").

86. See Ben Fenwick & Alan Schwarz, *In Rape Case of Oklahoma Officer, Victims Hope Conviction Will Aid Cause*, N.Y. TIMES (Dec. 11, 2015), [http://www.nytimes.com/2015/12/12/us/daniel-holtzclaw-oklahoma-police-rape-case.html?\\_r=0](http://www.nytimes.com/2015/12/12/us/daniel-holtzclaw-oklahoma-police-rape-case.html?_r=0) [https://perma.cc/YDA9-RLGX]; see also Jacquellena Carrero, *Oklahoma City Cop Daniel Holtzclaw Sentenced to 263 Years for Rapes*, NBC NEWS (Jan. 21, 2016, 3:54 PM), <http://www.nbcnews.com/news/us-news/oklahoma-city-cop-daniel-holtzclaw-sentenced-263-years-rapes-n501111> [https://perma.cc/YG3G-ATTZ]; Sarah Larimer, *Disgraced Ex-Cop Daniel Holtzclaw Sentenced to 263 Years for On-Duty Rapes, Sexual Assaults*, WASH. POST (Jan. 22, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/01/21/disgraced-ex-officer-daniel-holtzclaw-to-be-sentenced-after-sex-crimes-conviction/> [https://perma.cc/9J7D-MLNP]; Elliott C. McLaughlin et al., *Oklahoma City Cop Convicted of Rape Sentenced to 263 Years in Prison*, CNN (Jan. 22, 2016, 12:26 PM), <http://www.cnn.com/2016/01/21/us/oklahoma-city-officer-daniel-holtzclaw-rape-sentencing/> [https://perma.cc/NDG6-RHVV].

87. He was convicted under several Oklahoma criminal statutes. OKLA. STATE COURTS NETWORK, <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&cmid=3167778&number=CF-2014-5869> [https://perma.cc/4EVb-SEF3]. Holtzclaw's race is listed as "Asian or Pacific Islander" in the Oklahoma State Courts Network. *Party Record*, OKLA. STATE COURTS NETWORK, <http://www.oscn.net/dockets/GetPartyRecord.aspx?db=oklahoma&cn=CF-2014-5869&id=15801826> [https://perma.cc/UH3R-WWSP]. However, as Kirsten West Savali points out, "[t]hat Holtzclaw's mother is reportedly of Japanese descent does not matter; once he put on that uniform, he became a beneficiary of a racist



more media attention than it received, the prosecution of Daniel Holtzclaw, and that he was subsequently sentenced to 263 years in prison,<sup>88</sup> raised public consciousness about police sexual violence.

Yet, it is decidedly less than clear whether people's knowledge of the Holtzclaw case includes the understanding that Holtzclaw likely targeted the women he sexually assaulted because he perceived them to be vulnerable and marginalized.<sup>89</sup> The thirteen women who accused him were between the ages of seventeen and fifty-seven, and they were all black.<sup>90</sup> Most of the women were poor and lived in the most economically depressed neighborhoods of Oklahoma;<sup>91</sup> some of them had pending warrants for unpaid tickets and were thus more vulnerable to being arrested;<sup>92</sup> some of the women had prior criminal records, including for sex work and substance use;<sup>93</sup> and some of the women lived at the intersection of all of the foregoing marginalities.<sup>94</sup> Holtzclaw likely thought that he could target these women because, in the context of police interactions, they had no bargaining power over their personhood and sexual autonomy.<sup>95</sup> The women were in a weak position from which to say "no" at the

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system that devalues and destroys black people as a matter of course and with impunity." Kirsten West Savali, *If Daniel Holtzclaw's Victims Were White, Everyone Would Know His Name*, ROOT (Nov. 5, 2015), [http://www.theroot.com/articles/news/2015/11/hate\\_crime\\_if\\_daniel\\_holtzclaw\\_s\\_victims\\_were\\_white\\_everyone\\_would\\_know.html](http://www.theroot.com/articles/news/2015/11/hate_crime_if_daniel_holtzclaw_s_victims_were_white_everyone_would_know.html) [<https://perma.cc/F5RL-D3TE>].

88. McLaughlin et al., *supra* note 86.

89. See Goldie Taylor, *White Cop Convicted of Serial Rape of Black Women*, THE DAILY BEAST (Dec. 10, 2015, 1:00 AM), <http://www.thedailybeast.com/articles/2015/12/10/the-most-horrific-cop-rape-case-you-ve-never-heard-of.html> [<https://perma.cc/U8PP-KQ24>] ("[Holtzclaw] didn't go after doctors, lawyers, housewives, and schoolteachers in a white suburb . . . Holtzclaw targeted and preyed on women he thought no one would believe, women who didn't have the power to push an investigation or to demand his arrest.").

90. McLaughlin et al., *supra* note 86.

91. Taylor, *supra* note 89.

92. See Jessica Testa, *The 13 Women Who Accused a Cop of Sexual Assault, in Their Own Words*, BUZZFEED (Dec. 10, 2015, 10:33 PM), <http://www.buzzfeed.com/jtes/daniel-holtzclaw-women-in-their-own#.ufX3Wg1nv> [<https://perma.cc/X4KW-EEUY>] [hereinafter Testa, *The 13 Women Who Accused A Cop of Sexual Assault*].

93. *Id.*

94. Goodman, *supra* note 85. Candace Liger, co-founder of OKC Artists for Justice, an Oklahoma City-based advocacy group founded around the case of Officer Daniel Holtzclaw after the mainstream media, civil rights groups, and feminist organizations mostly ignored the issue, stated:

I think the key issues really revolve around the abuse of power. . . . Holtzclaw specifically preyed on women in the lower-income, impoverished areas of the African-American community. . . . [W]e wanted to make sure that we gave these women a voice, not only in the judicial system, but also show that there is a community that backs their claims, that believes these women. And I think that's really important, especially involving sexual assault cases where they were constantly under attack, as far as their character, as far as their history, their past, their past criminal records.

*Id.* For a discussion of the theory of intersectionality, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

95. For a discussion of the extent to which we might think of police interactions as bargaining zones, see Carbado, *supra* note 1, at 1020; see also Carbado, *From Stopping Black People to Killing Black People*, *supra* note 11.

outset of the encounter, and they were in a weak position to contact law enforcement or otherwise publicize the sexual assault after the fact. Any initial resistance to Holtzclaw would eventually give way to coerced compliance given Holtzclaw's authority to arrest the women, and any initial thoughts the women had to report Holtzclaw's sexual violence would eventually give way to reticence and then silence given the women's perceived lack of respectability and credibility. The women whom Holtzclaw assaulted were bargaining in the shadow of their vulnerability and his power. That vulnerability and power derived from the presumptive legitimacy of police conduct, the invisibility of sexual assault as a form of police violence, the historical sexual inviolability of black women,<sup>96</sup> and that these women were unlikely icons of victimization around whom the public at large or the black community specifically would organize.<sup>97</sup>

Significantly, there is at least some uncertainty as to whether any of the women Holtzclaw assaulted were involved in a criminal activity when they came into contact with him.<sup>98</sup> This is important not because Holtzclaw's conduct would have been any less disturbing had the women been engaged in criminal wrongdoing. The point is rather that Holtzclaw had no real reason to interact with these women to begin with. Prior to encountering Holtzclaw, the women were engaged in presumptively innocent activities: walking, sitting in their car, and driving.<sup>99</sup> After approaching the women, Holtzclaw ran all of their names through law enforcement databases for existing warrants and to check their arrest record.<sup>100</sup> (Think back to the earlier discussion about mass criminalization.) After determining that some of the women had outstanding warrants for unpaid tickets, Holtzclaw used that information as leverage to enact what we

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96. See SAY HER NAME, *supra* note 83, at 26 ("Black women are particularly vulnerable to sexual assault by police due to historically entrenched presumptions of promiscuity and sexual availability. Historically, the American legal system has not protected Black women from sexual assault, thereby creating opportunities for law enforcement officials to sexually abuse them with the knowledge that they are unlikely to suffer any penalties for their actions.").

97. For a discussion of the ways the perceived respectability of an individual shapes whether that individual can function as a civil rights icon, see Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000); see also Jasmine Phillips, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, How. L.J. (forthcoming 2016) ("When activists in Oklahoma City reach[ed] out to Black churches, they were turned away because the survivors were not seen as 'sanctified,' rendering them 'throw away women.' Thus, our quest for 'respectable' survivors entrenches victim blaming and silences the experiences of vulnerable populations at the margins, such as Black transgender women." (citations omitted)).

98. See Testa, *The 13 Women Who Accused A Cop of Sexual Assault*, *supra* note 92.

99. *Id.* Fourth Amendment law permits police officers to force engagements with people under precisely these circumstances. See *infra* Section I.A.7.

100. Jessica Testa, *How Police Caught the Cop Who Allegedly Sexually Abused Black Women*, BUZZFEED (Sept. 5, 2014, 1:40 PM), <http://www.buzzfeed.com/jtes/daniel-holtzclaw-alleged-sexual-assault-oklahoma-city> [<https://perma.cc/HC4Q-2HBM>] [hereinafter Testa, *How Police Caught the Cop Who Allegedly Sexually Abused Black Women*].

might call quid pro quo police sexual violence.<sup>101</sup> Specifically, Holtzclaw threatened to arrest the women if they refused his sexual advances.<sup>102</sup> More generally, Holtzclaw used his constant presence in the community and his authority as a police officer to harass and psychologically intimidate the women.<sup>103</sup> He stalked at least three of them, and one of the women had to move her family to another area of town after he came looking for her at her home a third time.<sup>104</sup>

Although some of the women told their family members, boyfriends, and friends that Holtzclaw had sexually assaulted them, only one of them reported the incident to the police.<sup>105</sup> By and large, the women were “so terrified of police—or resigned to the system designed to protect officers and white America, not black victims—that he knew he could threaten them with jail if they dared to refuse or report him.”<sup>106</sup> Hence, the women were also deeply aware of their lack of credibility, particularly against a police officer.<sup>107</sup>

Particularly relevant to the point I am making about group vulnerability is that the only woman who reported the incident was Jannie Ligons, a fifty-seven-year-old black grandmother who did not live in the poor neighborhood that Holtzclaw patrolled.<sup>108</sup> Unlike the rest of the survivors, Jannie Ligons was not poor and she reported the assault immediately after it happened.<sup>109</sup> She stated, after he was convicted, “I wasn’t a criminal. I have no record. I didn’t do anything wrong. . . . I was innocent, and he just picked the wrong lady to stop that night.”<sup>110</sup> It was not until Ligons, the least economically marginalized of

101. *Alexander v. Yale Univ.*, 631 F.2d 178 (1980), was the first case to establish quid pro quo sexual harassment, drawing on the work of Catharine MacKinnon to do so. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 34 (1979).

102. Testa, *The 13 Women Who Accused A Cop of Sexual Assault*, *supra* note 92 (recounting that Holtzclaw told a seventeen-year-old girl he was convicted of raping, “You got warrants. I don’t want to have to take you to jail . . . This is what you’re going to have to do.”).

103. *Id.* (documenting that Holtzclaw repeatedly told the women that he would be back).

104. *Id.* (T.B.’s story).

105. *Id.*

106. Savali, *supra* note 87.

107. The women repeatedly stated they did not report the assaults they experienced because they would not be deemed believable. S.H., one of the survivors, stated: “I didn’t think that no one would believe me.” Another survivor, C.R., stated: “It was nobody there but just me and him, so to me, I just took it as my word against his.” C.J., another survivor, stated: “Who are they going to believe? It’s my word against his because I’m a woman and, you know, like I said, he’s a police officer.” Testa, *The 13 Women Who Accused A Cop of Sexual Assault*, *supra* note 92.

108. Testa, *How Police Caught the Cop Who Allegedly Sexually Abused Black Women*, *supra* note 100 (“Holtzclaw’s ‘mistake’ . . . was believing J.L. was similar to his other alleged victims: all black middle-aged women, but women of a lower social status and with reason to fear the authorities. . . . [whereas Jannie Ligons] had no criminal record to be held over her. She was driving through the neighborhood where the other women were confronted, but she didn’t live there.”).

109. *Id.*

110. Goodman, *supra* note 85 (Jannie Ligons also stated, “I was traumatized. I went to therapy. I had a stroke behind this. And I still live with this, day after day.”); see also Testa, *How Police Caught the Cop Who Allegedly Sexually Abused Black Women*, *supra* note 100 (noting that Holtzclaw got caught after “he profiled the wrong woman”).

the women, who did not live in the community Holtzclaw patrolled, reported her account of sexual violence that the other women came forward. The broader point is that Daniel Holtzclaw's systematic targeting of vulnerable black women is just one example of how group vulnerability can engender frequent police contact that culminates in violence.

## 6. Revenue Generation

Revenue generation engenders what I call “predatory policing”—the direct targeting of vulnerable groups by way of arrests or the issuance of citations as sources of revenue for the city or the police department or to effectuate promotions and pay increases for particular officers.<sup>111</sup> Ferguson, Missouri presents a concrete example of the ease with which predatory policing can become an institutional feature of everyday policing. After conducting a thorough investigation of the Ferguson Police Department and the overall city governance structure of Ferguson in the aftermath of Michael Brown's death, the Department of Justice found that: “The City[] [of Ferguson's] emphasis on revenue generation has a profound effect on [the Ferguson Police Department's] approach to law enforcement. Patrol assignments and schedules are geared toward aggressive enforcement of Ferguson's municipal code, with insufficient thought given to whether enforcement strategies promote public safety . . . .”<sup>112</sup>

The city's investment in revenue generation permeated almost every aspect of government in Ferguson. In fact, the city's budget was dependent on revenue generation from municipal fines.<sup>113</sup> For example, in an email to the city's Chief of Police, Thomas Jackson, the City Finance Director commented that “unless ticket writing ramps up significantly before the end of the year, it will be hard to

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111. I use this term to trade on a practice with which many Americans are now familiar—predatory lending. See ATLANTA LEGAL AID SOC'Y INC., *History of Predatory Lending*, GEORGIALEGALAID, <http://www.georgialegalaid.org/resource/history-of-predatory-lending?ref=d49dg> [<https://perma.cc/F5ZY-HZP6>].

112. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/QY5N-XETW>] [hereinafter, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT]; see also Editorial Bd., *Policing for Profit in St. Louis County*, N.Y. TIMES (Nov. 14, 2015) [http://www.nytimes.com/2015/11/15/opinion/sunday/policing-for-profit-in-st-louis-county.html?\\_r=0](http://www.nytimes.com/2015/11/15/opinion/sunday/policing-for-profit-in-st-louis-county.html?_r=0) [<https://perma.cc/3462-XC74>] (“The Missouri Legislature has since set limits on how much of a city's revenue can come from traffic fines. But municipal creativity, at least in St. Louis County, seems boundless. An investigation by The St. Louis Post Dispatch this spring warned that towns in the county might start looking for cash in violations of building codes and neatness ordinances.”); Michael Martinez et al., *Policing for Profit: How Ferguson's Fines Violated Rights of African-Americans*, CNN (March 6, 2015, 10:55 PM), <http://www.cnn.com/2015/03/06/us/ferguson-missouri-racism-tickets-fines/> [<https://perma.cc/W6KN-GRDP>] (“Just about every branch of Ferguson government—police, municipal court, city hall—participated in ‘unlawful’ targeting of African-American residents such as Hoskin for tickets and fines . . . .”).

113. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 112 at 2 (“The City budgets for sizeable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved.”).

significantly raise collections next year.”<sup>114</sup> Chief Jackson, for his part, committed to “looking at different shift schedules which will place more officers on the street, which in turn will increase traffic enforcement per shift.”<sup>115</sup> Moreover, Jackson regularly reported the police department’s level of revenue generation to the City Manager, among others.<sup>116</sup> In one email correspondence, Chief Jackson indicated that “May is the 6th straight month in which court revenue (gross) has exceeded the previous year.”<sup>117</sup>

Other government officials and institutions were active participants in this revenue generation apparatus as well, including: the Finance Director, who recommended to the Chief and the City Manager that the police department develop specific traffic enforcement strategies “to fill the revenue pipeline”<sup>118</sup>; the municipal court system, which kept track of “the number of tickets issued by each officer and each squad”<sup>119</sup> and issued “severe penalties when a defendant fail[ed] to meet court requirements, including added fines and fees and arrest warrants that [were] unnecessary and run counter to public safety”<sup>120</sup>; the prosecutor, who, among other things, instructed police to ensure that “all necessary summonses [were] written for each incident, i.e. when DWI charges [were] issued, [were] the correct companion charges being issued, such as speeding, failure to maintain a single lane, no insurance, and no seatbelt, etc.”<sup>121</sup>; police supervisors, who incentivized and pressured rank-and-file officers to issue as many citations as possible<sup>122</sup>; and beat officers, who competed among themselves with respect to the number of citations they issued.<sup>123</sup>

The manifestation of predatory policing in Ferguson, and across the state of Missouri,<sup>124</sup> has raised questions about whether the practice is prevalent in

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114. *Id.* at 10.

115. *Id.*

116. *Id.* at 13.

117. *Id.*

118. *Id.*

119. *Id.* at 11.

120. *Id.* at 42.

121. *Id.* at 11.

122. *Id.* (“Each month, the municipal court provides FPD supervisors with a list of the number of tickets issued by each officer and each squad. Supervisors have posted the list inside the police station, a tactic officers say is meant to push them to write more citations.”).

123. *Id.* at 11 (“FPD supervisors and line officers have undertaken the aggressive code enforcement required to meet the City’s revenue generation expectations. . . . Indeed, officers told us that some compete to see who can issue the largest number of citations during a single stop.”).

124. For instance, residents in the approximately ninety municipalities surrounding Ferguson report similar instances of predatory policing Orlando de Guzman & Tim Pool, *The Policing of Black Bodies: Racial Profiling for Profit and the Killing of Ferguson’s Mike Brown*, FUSION (Mar. 23, 2015), <http://fusion.net/video/108471/ferguson-a-report-from-occupied-territory/> [<https://perma.cc/Q2LM-KW9P>] (“This problem, however, is not unique to Ferguson. St. Louis County is made of around 90 municipalities, each with their own police departments and courts. Residents report similar discriminatory treatment at the hands of law enforcement. And with so many different jurisdictions, a small infraction like an expired license plate can turn into dozens of fines and eventually warrants. Those in St. Louis who live below the poverty line are faced with the reality of buying food or paying fines.”).

other parts of the United States.<sup>125</sup> The answer, quite likely, is yes.<sup>126</sup> The systemic practice and normalization of predatory policing in Ferguson is a more generalizable phenomenon in which the more economically and racially vulnerable a community in the United States is, the more vulnerable members of that community are to predatory policing.<sup>127</sup>

The problem is even worse: The more vulnerable a group is to predatory policing, the greater that group's police contact and thus exposure to the possibility of violence. We should be concerned about predatory policing, then, not just because it trades on and compounds the marginalization of an already marginalized group,<sup>128</sup> but also because predatory policing potentially facilitates police violence by increasing the frequency with which African-Americans have contact with the police. This possibility for violence exists not only at the moment the officer initially issues the citation, but also during the subsequent moments in which the officer stops individuals on the assumption that they may have an outstanding warrant for a previously-issued citation that would justify an arrest.<sup>129</sup> Understood in this way, revenue generation creates both a primary market and a secondary market for police violence. The issuance of the initial

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125. See Editorial Bd., *Policing for Profit Perverts Justice: Our View*, USA TODAY (Mar. 11, 2015, 7:01 PM), <http://www.usatoday.com/story/opinion/2015/03/11/ferguson-mo-police-traffic-tickets-justice-department-editorials-debates/70175690/> [<https://perma.cc/26PE-P8QD>] (asserting that "Ferguson, Mo. is not the only guilty municipality" and exploring similar practices in cities in Ohio, Alabama, and Mississippi).

126. Jag Davies, *Above the Law: New DPA Report Finds 'Policing for Profit' Gone Wild*, HUFFINGTON POST (June 29, 2015), [http://www.huffingtonpost.com/jag-davies/civil-asset-forfeiture\\_b\\_7174238.html](http://www.huffingtonpost.com/jag-davies/civil-asset-forfeiture_b_7174238.html) [<https://perma.cc/VRH9-LHG5>] (reporting on rampant "policing for profit" across the country including in Baltimore and multiple cities in Los Angeles County); see also BACK ON THE ROAD CAL., STOPPED, FINED, ARRESTED: RACIAL BIAS IN POLICING AND TRAFFIC COURTS IN CALIFORNIA 1 (2016), [http://ebclc.org/wp-content/uploads/2016/04/Stopped\\_Fined\\_Arrested\\_BOTRCA.pdf](http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf) [<https://perma.cc/9REE-W4GA>].

127. See BACK ON THE ROAD CAL., *supra* note 126, at 1 ("Across the country, low-income people who commit minor offenses are saddled with fines, fees and penalties that pile up, driving them deeper into poverty. What's worse, they are arrested and jailed for nonpayment, increasing the risk of losing their jobs or their homes.").

128. See INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 112, at 4 ("Together, these court practices exacerbate the harm of Ferguson's unconstitutional police practices. They impose a particular hardship upon Ferguson's most vulnerable residents, especially upon those living in or near poverty. Minor offenses can generate crippling debts, result in jail time because of an inability to pay, and result in the loss of a driver's license, employment, or housing.").

129. See e.g., Terrence McCoy, *Ferguson Shows How a Police Force Can Turn into a Plundering 'Collection Agency'*, WASH. POST (Mar. 5, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/05/ferguson-shows-how-a-police-force-can-turn-into-a-plundering-collection-agency/> [<https://perma.cc/2H2Y-Z7V2>] ("Of all the harrowing stories buried inside the Justice Department's report on the Ferguson Police Department, one of the most illustrative begins with an illegally parked car. The year was 2007. And a Ferguson officer who noticed the illegally parked vehicle issued its driver, an African American woman, two citations and a ticket for \$151. To the driver, who had bounced in and out of homelessness, the fine was draconian. She couldn't pay it in full. So over the next seven years, the woman missed several deadlines and court dates. That tacked on more fees, more payment deadlines, more charges. She ultimately spent six days in jail. All because she didn't park her car correctly. As of December 2014, the woman had paid the city of Ferguson \$550 resulting from a \$151 ticket. And she still owes \$541.").



citation (the primary market) and the stopping of people to enforce a warrant based on that citation (the secondary market) are police contact events that can culminate in violence.

## 7. Fourth Amendment Law

By prohibiting the government from engaging in unreasonable searches and seizures, the Fourth Amendment is supposed to impose constraints on the police. However, the Supreme Court has interpreted the Amendment in ways that empower, rather than constrain, the police. More precisely, the Court's interpretation of the Fourth Amendment allows police officers to force engagement with African-Americans with little or no basis. To put the point more provocatively, the Supreme Court has interpreted the Fourth Amendment to protect police officers, not black people.<sup>130</sup> Indeed, we might think of the Fourth Amendment as a Privileges and Immunities Clause for police officers—it confers tremendous power and discretion to police officers with respect to *when* they can engage people (the “privilege” protection of the Fourth Amendment) and protects them from criminal and civil sanction with respect to *how* they engage people (the “immunities” protection of the Fourth Amendment).<sup>131</sup>

*a. Nonseizures:* Consider, for example, the following conduct police officers can engage in without implicating the Fourth Amendment. Assume that Mary is on a street corner on a given afternoon. Stipulate that the police have no reason to believe that she has engaged in any wrongdoing. Notwithstanding the absence of any basis of suspicion—in other words, the officer has neither probable cause nor reasonable suspicion—the officer could, consistent with Fourth Amendment law:

1. Approach Mary.
2. Question Mary about her whereabouts. “Where have you been?” “Where are you going?” “Do you live around here?”
3. Ask Mary for her identification.
4. Question Mary about her immigration status or about whether she is a member of a gang.
5. Follow Mary onto a bus, approach her in her seat, and question her as the bus departs.
6. Seek permission to search Mary's person or effects without informing Mary that she has the right to refuse consent.

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130. Cf. *Katz v. United States*, 389 U.S. 347, 351 (1967) (Harlan, J. concurring) (observing that “the Fourth Amendment protects people, not places”).

131. Here I am thinking about the reasonableness standard that governs Fourth Amendment jurisprudence. See, e.g., *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).

7. Ask Mary whether she “wouldn’t mind following” the officer to the police station.
8. Question Mary at the police station, without ever telling her that she has a right to leave.
9. Follow Mary home.
10. If, upon observing the officer, Mary decides to run away, the officer would be free to chase her.<sup>132</sup>

Again, in none of the foregoing circumstances does the officer have any reason to believe that Mary has done anything wrong. The absence of evidence of wrongdoing is irrelevant to the analysis because the Supreme Court would conclude that nothing the officer does in items one through ten implicates the Fourth Amendment. Which is to say, at no moment does the officer’s conduct trigger the Fourth Amendment in the sense of becoming a search or seizure. And governmental conduct that is not a search or seizure is governmental conduct that is beyond the reach of the Fourth Amendment. In short, one way in which Fourth Amendment law facilitates contact between the police and African-Americans is by creating a relatively high bar for when police conduct constitutes a seizure. The higher the bar, the narrower the Fourth Amendment boundary between the police and the people—and the greater the discretion police officers have to decide how to engage us along the lines that our hypothetical officer engaged Mary.

*b. Reasonable Searches and Seizures:* Another way in which Fourth Amendment law facilitates contact between African-Americans and the police is by ruling that particular searches and seizures are reasonable. To appreciate the scope of this problem, assume that Officer A and Officer B are driving their car through downtown Washington, D.C., and that they observe Mary commit a traffic infraction. Consider the following “reasonable” actions the officers could take:

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132. For a more extended discussion of these examples, see Devon W. Carbado, *From Stopping Black People to Killing Black People*, *supra* note 11. There is now a fairly robust literature critiquing the racial dimensions of Fourth Amendment law. *See, e.g.*, Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245 (2010); Frank Rudy Cooper, “Who’s the Man?”: Masculinities Studies, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671, 683 (2009) [hereinafter Cooper, “Who’s the Man?”] (criticizing the Terry regime); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Lisa Walter, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255 (2000) (see especially Parts II and III); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Sklansky, *supra* note 38; Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672 (2015); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133 (2012); Richardson, *supra* note 66; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) (a reply to Professor Amar).

1. The officers could base their decision to stop Mary on race. The Supreme Court would conclude that such a stop is a reasonable seizure under the Fourth Amendment. That the officers have probable cause to believe that Mary committed a traffic infraction renders the race-based nature of their decision irrelevant for purposes of the Fourth Amendment.
2. The officers could stop Mary to investigate a drug crime, not to enforce the traffic infraction, even though they have no reason to believe that Mary has engaged in drug-related criminal conduct. The Supreme Court has expressly held that pretextual stops of the foregoing sort are constitutionally reasonable.
3. In the context of executing the traffic stop, the officers could question Mary about matters completely unrelated to the traffic infraction. It would be permissible, for example, for the officers to ask: “Do you have any drugs in the car?” “Are you an illegal immigrant?” Moreover, the officers are free to ask Mary general questions about her whereabouts.
4. The officers would be permitted to ask Mary for permission to search her car, without informing her of her right to refuse consent, and they can run her name through state and federal databases without any additional justification.
5. If the officers develop “reasonable suspicion” that Mary is armed and dangerous, they could “frisk” Mary and the car. If Mary is driving in a “high crime area” (read: predominantly black or Latina/o neighborhood), that would be one factor on which the officers could rely to satisfy the reasonable suspicion standard.
6. The officers could ask Mary to exit the car.
7. The officers could ask passengers to exit the car. Significantly, the officer’s authority to ask Mary or other passengers to exit the car would be based solely on Mary having committed a traffic infraction. The officers would not need any additional justification for these additional intrusions.
8. The officers could arrest Mary. Even if state law does not authorize an officer to arrest a person for a traffic infraction, an officer’s decision to do so would not violate the Fourth Amendment. Put another way, the officers’ arrest of Mary would be reasonable even if that arrest were inconsistent with state law. What this means, concretely, is that Mary could be arrested and hauled to jail for not wearing her seatbelt or for failing to use a turn signal.
9. If Mary is arrested, the officers could search her incident to that arrest, impound her car, and conduct a full inventory search of her car.

10. If, subsequent to arresting Mary, the officers decide to place her in the general jailhouse population, the officers may subject Mary to a strip search prior to doing so.<sup>133</sup>

The bottom line here is that, like the Supreme Court's decisions about when the Fourth Amendment is triggered by way of a search or seizure, the Court's conclusions about when searches or seizures are reasonable facilitates frequent police surveillance of and contact with African-Americans. Stated another way, the Supreme Court's interpretation of the Fourth Amendment has rendered Fourth Amendment law an open border across which a range of law enforcement officials can travel to intrude on black bodies and spaces.

*c. Summary:* Recall that our starting point for this analysis was to identify the various factors that render African-Americans vulnerable to repeated police interactions. I ended the discussion with an analysis of the Fourth Amendment, prior to which I identified six other factors: broken windows policing, mass criminalization, racial segregation, stereotyping, group vulnerability, and revenue generation. In compiling these factors in a list, I do not mean to suggest that they operate in precisely the same way. They do not. Nor is my claim that the factors I describe here are in equipoise with respect to how much of a role they play staging police interactions. They are not. The basic idea I employ Point 1 to advance is that a number of forces converge to make African-Americans presumptive investigatory subjects of the police. Section I.B. discusses the second dynamic: the relationship between police contact and police violence.

#### B. POINT 2: POLICE VIOLENCE EXPOSURE

Central to Point 2 is the idea that the simple fact of repeated police interactions overexposes African-Americans to the possibility of police violence. There are five more specific dynamics that compound the general exposure to police violence repeated police interactions create. First, African-Americans' exposure to the police occurs against the background of stereotypes of African-Americans as violent and dangerous,<sup>134</sup> increasing the likelihood that police officers will interact with African-Americans from the perspective that violent force is both necessary and appropriate. How persuasive one finds this theory depends, at least in part, on how persuasive one finds the empirical evidence demonstrating that people associate African-Americans with violence.<sup>135</sup>

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133. For a more extended discussion of the foregoing examples and the Supreme Court cases on which they are based, see Carbado, *From Stopping Black People to Killing Black People*, *supra* note 11.

134. See *supra* Section I.A.4.

135. For a discussion of how implicit biases affect various dimensions of criminal law and procedure, see Richardson, *supra* note 66.

An important body of work in this respect focuses on what social psychologists call “shooter bias.”<sup>136</sup> Participants play a video game in which they must rapidly respond to images of men holding either violent objects (for example, guns or knives) or nonviolent objects (for example, cell phones or cameras).<sup>137</sup> Their task is to “shoot” the men with violent objects and “not shoot” the men with nonviolent objects by pressing two different keys on a keyboard.<sup>138</sup> Significantly, then, both the aggressive and the restrained responses require the participant to press the keyboard. Researchers have found that participants are faster to respond aggressively (that is, press “shoot”) to blacks with guns than whites with guns, and faster to practice restraint (that is, press “not shoot”) toward whites without guns than blacks without guns.<sup>139</sup> Put another way, participants are quick to decide that blacks have guns and that whites do not and slow to decide that whites have guns and blacks do not.

Scholars interpret these findings to mean that the viewing of these nonwhite faces evokes stereotypes of danger and violence.<sup>140</sup> Supporting the idea that this effect might be even more pronounced in police, researchers have found that individuals are particularly prone to these errors in situations of mortality salience—that is, when they have been asked to reflect on their own death.<sup>141</sup> Given the high-risk situations in which police officers find themselves, and the extent to which they perceive on-the-beat policing itself to be fraught with danger, it stands to reason that mortality salience, and the accompanying higher rates of error, may be endemic to police officer life.<sup>142</sup> Point 2 draws on the shooter bias literature, among others, to suggest that associations between blackness on the one hand, and violence and dangerousness on the other, compound African-Americans’ exposure to police violence.

The problem of race, stereotyping, and police violence is potentially even worse. Plausibly, the more police officers interact with African-Americans in law enforcement situations, the stronger the perception of African-Americans as violent and dangerous. In other words, police interactions not only reflect racial stereotypes, they produce and help to instantiate them. Understood in this way, police targeting of (and violence against) African-Americans produces the very stereotypes about African-Americans that justify that targeting and violence.<sup>143</sup> Black interactions with the police are troubling, then, not only because they are often racially motivated but also because they confirm, or function as strong social cues for, presumed black violence and dangerousness. We might think of

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136. Correll et al., *supra* note 68, at 1314, 1322.

137. *Id.* at 1314–17.

138. *Id.*

139. *Id.* at 1317.

140. Payne, *supra* note 69, at 181–82, 187.

141. Kristopher I. Bradley & Shelia M. Kennison, *The Effect of Mortality Salience on Weapon Bias*, 36 INT’L J. INTERCULTURAL REL. 403, 406–07 (2012).

142. *Id.* at 405, 407.

143. For an example of this vicious cycle at work, see generally ANDERSON, *supra* note 47.

this as a “stereotype entrenchment effect.” Pointing it out helps to highlight a potential feedback loop between stereotypes of African-Americans as violent and dangerous (which implicitly and explicitly motivate police violence against African-Americans) and police violence against African-Americans (which helps to produce the stereotype of African-Americans as violent and dangerous).

A second reason why African-Americans’ exposure to the police makes them vulnerable to police violence is that frequent police contact increases the likelihood of arrest. This is important because an arrest—being handcuffed and placed in the back of a patrol car—increases the likelihood that an officer will use force.

Third, African-Americans’ repeated exposure to the police potentially increases their incarceration rates or facilitates some form of system involvement,<sup>144</sup> and the heightened rate of incarceration and system involvement of African-Americans likely informs how police officers interact with black people. An officer’s perception that an African-American has been incarcerated or is otherwise under the supervision of the criminal justice system could, for example, lower the officer’s level of regard<sup>145</sup> for that person, diminish the extent to which the officer respects rights in the context of the encounter, and heighten the officer’s level of anxiety about safety.<sup>146</sup> Each of the preceding reactions would increase the likelihood that the officer’s conduct will become violent.

Moreover, knowledge of the degree to which people are incarcerated could have a punitive effect on policing. Rebecca Hetey and Jennifer Eberhardt have demonstrated that individuals who viewed images or heard information about a prison population with a higher proportion of blacks in it were subsequently more afraid of crime, which in turn predicted greater support for more aggressive law enforcement practices.<sup>147</sup> The question is whether police officers’ awareness of the overincarceration of African-American men and women could have a similar effect on endorsement of punitive policing. Researchers have not studied this possibility, but Hetey and Eberhardt’s study certainly invites us to think about it.

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144. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 39 (2012) (“[P]olicing practices are a significant source of racial disparity in incarceration rates.”); Fagan et al., *supra* note 18, at 314.

145. See Regina Austin, *“The Shame of It All”: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 178 (2004).

146. *Id.* at 178–79 (“Convicts in general are assumed to be ‘tough, mean, sneaky, dangerous, aggressive, and untrustworthy’ and are labeled as such.” (internal citation omitted)); Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 269 (2009) (describing how formerly incarcerated people, especially black ex-offenders, are viewed by society as “dangerous, aggressive, and unworthy of trust”).

147. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949, 1951–52 (2014).



A fourth exposure problem vis-à-vis African-Americans and police violence is this: The more frequent African-Americans' contact with the police is, the more vulnerable African-Americans are to a set of violence-producing insecurities or vulnerabilities police officers experience in the context of police encounters. These include, but are not limited to, "masculinity threat," which is an officer's sense that his masculinity is being undermined or challenged during an interaction.<sup>148</sup> Other things being equal, officers who experience this threat are more likely to employ violence than officers who do not. People who have multiple interactions with the police are more exposed to police insecurities, like "masculinity threat," than people who do not.

Fifth, and finally, African-Americans' ongoing experiences with the police may cause them to resist police authority, assert rights, or flee upon seeing or encountering the police, each of which increases the likelihood of police violence. "Since the 1960s, a general theme in much of the literature [on race and police violence] is that those who challenge the 'authority' of the police are more likely than others to experience police use of force."<sup>149</sup> This realization is particularly important against the background of empirical evidence suggesting that people in disadvantaged communities are more likely to resist police authority than people whose communities are not characterized by poverty.<sup>150</sup>

Borrowing from Derrick Bell, one might frame black people's resistance to the police as a form of "confronting authority"<sup>151</sup> that derives, at least in part, from concerns about "procedural justice." Tom Tyler developed the procedural justice framework to explain why people obey the law. The idea, roughly, is that people are more inclined to comply with the law when they perceive it to be legitimate.<sup>152</sup> On the flipside, people who perceive the law to be illegitimate, are less likely to follow it.

Already you might appreciate how the procedural justice framework applies to the policing context. Consider the late Bill Stuntz's application of the theory:

[I]t is the *manner* of the stop—the degree of disrespect and force the officers display—that largely determines how the suspect will react: with mild embarrassment, or with rage. . . . If street stops were carried out more politely, if suspects were treated with more dignity, the level of suspect compliance with the police would rise. That would presumably mean more consensual searches—a boon for the police. It might also mean a rise in police safety . . . . If Tyler's claims are even partly true, the police could simultaneously increase

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148. See Richardson & Goff, *Interrogating Racial Violence*, *supra* note 10, at 128–31; Richardson, *Police Racial Violence*, *supra* note 10, at 2970.

149. Karen F. Parker et al., *Racial Threat, Urban Conditions, and Police Use of Force: Assessing the Direct and Indirect Linkages Across Multiple Urban Areas*, 7 JUST. RES. & POL'Y 53, 54–55 (2005).

150. Stephen D. Mastrofski et al., *Police Disrespect Toward the Public: An Encounter-Based Analysis*, 40 Criminology 519, 524, 538–40 (2002).

151. DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* (1994).

152. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361 (2001).

the number of *Terry* stops, decrease the injury those stops cause, and substantially reduce complaints of police discrimination—all without changing the way they select search targets.<sup>153</sup>

Stuntz is partially right. The qualitative dimension of police contacts does indeed impact African-Americans' sense of the legitimacy of the police and thus the degree to which they might comply with police authority. However, the quantitative dimension of police contact matters as well. Critiques about racial profiling have always included concerns about the frequency, and not just the manner, of police encounters. It would be terribly unsatisfying to those of us on whose bodies the practice of racial profiling has been inscribed if the proposed solution to the phenomenon became racial profiling with a smile. Focusing on the manner of stops but not the frequency would only partially ameliorate the overincarceration of African-Americans. This is important from a procedural justice perspective because the overincarceration of African-Americans is one of the most significant facts to which African-Americans turn to suggest that the criminal justice system is illegitimate.<sup>154</sup> Although the manner of stops surely matters in the way Stuntz describes, the frequency of stops is critical: The more contact African-Americans have with the police—as investigatory subjects—the more likely they are to resist police authority, assert rights, or flee upon seeing or encountering the police, each of which can precipitate police violence.

In sum, under Point 2, racial stereotypes, arrests, system involvement (including incarceration), police insecurities, and resistance to authority inform the relationship between repeated interactions and exposure to police violence.

## II. OTHER DYNAMICS IN THE POLICE VIOLENCE MODEL

This Part explicates Points 3, 4, 5, and 6 in the model. I begin with an analysis of police training culture and discipline (Point 3). I then move on to discuss how police violence interacts with the legal system in ways that diminish the risk of legal sanctions that police officers assume for their acts of violence (Points 4 and 5). I conclude by explaining how the difficulties of holding police officers accountable create a disincentive for police officers to use restraint (Point 6).

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153. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2173–74 (2002) (emphasis added). Importantly, an African-American's sense of legitimacy of the police turns not only on that individual's experiences with the police, but on knowledge about African-Americans' vulnerability to the police writ large. See Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 160 (2014) (discussing the different ways in which different dimensions of the criminal justice system, including policing, educates).

154. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

## A. POINT 3: POLICE CULTURE, TRAINING AND DISCIPLINE

There are at least ten mutually enforcing dynamics that facilitate the relationship between police culture and training on the one hand, and police violence on the other.<sup>155</sup>

1. Police officers are more likely to use excessive force as a routine feature of everyday policing, rather than as an exceptional law enforcement practice, if they are inadequately trained (or receive no training) on the use of force and on strategies to de-escalate police encounters.<sup>156</sup>
2. Violence will continue to shape law enforcement practices if police culture and/or formal training encourage violence (explicitly or implicitly).<sup>157</sup> In this respect we should be concerned about the increasing militarization of the police<sup>158</sup> and the “warrior mythos” that characterizes some police departments<sup>159</sup> because these are ways in which violence can

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155. Parker et al., *supra* note 149, at 56 (observing that “[t]he style and organizational structure of the police department affects officer behavior, including use of force”).

156. See Seth Stoughton, *Law Enforcement’s “Warrior” Problem*, 128 HARV. L. REV. F. 225, 226 (2015) [hereinafter Stoughton, *Law Enforcement’s “Warrior” Problem*] (narrowly describing the “warrior mindset” that is widespread throughout police enforcement trainings in the United States). As Stoughton explains: “In its most restrictive sense, it refers to the mental tenacity and attitude that officers, like soldiers, are taught to adopt in the face of a life-threatening struggle. In this context, the warrior mindset refers to a bone-deep commitment to survive a bad situation no matter the odds or difficulty, to not give up even when it is mentally and physically easier to do so.” *Id.* (internal citations omitted).

157. See generally Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/> [https://perma.cc/QEK5-T726] (“Police training starts in the academy, where the concept of officer safety is so heavily emphasized that it takes on almost religious significance. . . . Officers aren’t just told about the risks they face. They are shown painfully vivid, heart-wrenching dash-cam footage of officers being beaten, disarmed, or gunned down after a moment of inattention or hesitation. . . . More pointed lessons come in the form of hands-on exercises. One common scenario teaches officers that a suspect leaning into a car can pull out a gun and shoot at officers before they can react.”).

158. See generally BALKO, *supra* note 48 (discussing the militarization of the police); see also Fanna Gamal, *The Racial Politics of Protection: A Critical Race Examination of Police Militarization*, 3 CALIF. L. REV. 101, 104 (forthcoming Aug. 2016) (on file with author) (examining “the phenomenon of police militarization” and arguing that “the trend of police militarization [has] constructed and reinforced race and racial hierarchies in America”); see also Paul D. Shinkman, *Ferguson and the Militarization of Police: Camo-clad Snipers Trained on Michael Brown Protesters Elicits Concerns from Americans, Including Iraq, Afghanistan Vets*, U.S. NEWS & WORLD REP. (Aug. 14, 2014, 10:13 AM), <http://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization> [https://perma.cc/58P9-R7M8] (“The growing militarization of domestic police forces has been a concern . . . for years. . . . The 1033 Program . . . named for a section of the National Defense Authorization Act, has provided congressional approval for upward of \$4.3 billion in military equipment to flow to police forces throughout the country . . . .”); Taylor Wofford, *How America’s Police Became an Army: The 1033 Program*, U.S. NEWSWEEK (Aug. 13, 2014, 10:47 PM), <http://www.newsweek.com/how-americas-police-became-army-1033-program-264537> [https://perma.cc/E2VL-EX9S] (reporting that “[b]y providing law enforcement agencies with surplus military equipment free of charge, the NDAA encourages police to employ military weapons and military tactics”).

159. See Stoughton, *Law Enforcement’s “Warrior” Problem*, *supra* note 156, at 225, 228 (“Modern policing has so thoroughly assimilated the warrior mythos that, at some law enforcement agencies, it

be folded into the organizational structure and culture of police departments.<sup>160</sup>

3. The more police culture and/or formal training conceive of inner city neighborhoods as “war zones” that they must occupy,<sup>161</sup> the greater the likelihood that police officers will employ aggressive policing against the people who live in those areas.
4. To the extent that police culture and/or formal training encourage or promote masculinity,<sup>162</sup> police officers will be more inclined to act out that masculinity in the form of violence during interactions with people, particularly people whom officers perceive to threaten or challenge their masculinity.<sup>163</sup> The relationship between masculinity and violence is particularly concerning given the explicit and implicit ways in which

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has become a point of professional pride to refer to the ‘police warrior.’ . . . For Warriors, hypervigilance offers the best chance for survival. Officers learn to treat every individual they interact with as an armed threat and every situation as a deadly force encounter in the making. *Every individual, every situation—no exceptions.*” (internal citations omitted)).

160. Richardson & Goff, *Interrogating Racial Violence*, *supra* note 10, at 133 (“[P]hysically aggressive masculinity is institutionalized in police departments. In fact, hierarchies amongst the rank and file are defined by the amount of aggression and violence perceived to be necessary to perform the job.” (internal citations omitted)).

161. *See* Gamal, *supra* note 158, at 115–16 (“Across the country, black communities are both overpoliced and underprotected, and police militarization strengthens this harmful paradigm. Law enforcement—transformed into soldiers and outfitted with battle-ready equipment—police black communities as war zones. Principles of militarism, rather than careful and considered intervention, become the dominant means of addressing social problems. Unsurprisingly, violence and the repeated loss of black life is so often the product of police-community encounters . . . [Furthermore] in the context of police militarization, the most useful lesson from the 1960s is that the State responds to racial uprisings by increasing police militarization and further devaluing black life.” (internal citations omitted)). The conception of African-American communities as war zones is precisely what has justified the “war on drugs” and the “war on crime.” *See* Dennis Romero, *The Militarization of Police Started in Los Angeles*, LA WEEKLY (Aug. 15, 2014, 6:04 AM), <http://www.laweekly.com/news/the-militarization-of-police-started-in-los-angeles-5010287> [<https://perma.cc/4XGH-G3MS>] (describing the origins of militarized policing and tactics in Los Angeles after the Watts riots).

162. Richardson & Goff, *Interrogating Racial Violence* *supra* note 10, at 132 (“The emphasis on hypermasculine traits continues in the police academy. In a disturbing study of one academy training program, researchers noted the ‘hidden curriculum’ that ‘instructs students about the particular form of masculinity that is lauded in police culture, the relationship between extreme masculinity and police work, and the nature of the groups that fall ‘inside’ and ‘outside’ of the culture of policing.’ Recruits were taught in various ways that aggressive, misogynist forms of masculine identity were favored and expected. Furthermore, physical fighting and violence were emphasized both in and out of class.” (internal citations omitted)).

163. *Id.* at 119 (identifying a “masculinity threat” that refers to “insecurities many men have concerning their masculine identity”); *see also* Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 793 (2000) (“Violence and masculinity converge in the sociological notion of ‘hypermasculinity’: a masculinity in which the strictures against femininity and homosexuality are especially intense and in which physical strength and aggressiveness are paramount. Police work has traditionally been coded hypermasculine.”); *see also* Cooper, “*Who’s the Man?*,” *supra* note 132 (“[T]he combination of race and gender influences the behavior of the perpetrators of discrimination—police officers who racially profile—rather than its victims. . . . [E]xamining the issue through the lens of masculinities studies will enable us to see that masculinity norms greatly influence policemen’s behaviors.” (internal citations omitted)).

police departments promote masculinist-leaning police cultures.<sup>164</sup> Phil Goff and L. Song Richardson have noted, for example, “the recruitment materials from twenty-two departments serving the twenty-five most populous cities in the United States highlight attributes associated with hypermasculinity.”<sup>165</sup> And, according to Anastasia Prokos and Irene Padavic, police officers are essentially oriented toward or channeled into masculinity via a “hidden curriculum” in which masculinity training is both deeply embedded and normative.<sup>166</sup>

5. Approaches to policing that are designed to signal to lay people that police officers are in charge of or “own” the community they police encourage police officers to employ policing as a source of governance strategy to socially control communities.<sup>167</sup> This kind of policing inevitably engenders individual-level and community-wide pushback and resistance that can escalate into violence.<sup>168</sup>
6. Police violence will likely be more frequent in departments that lack robust internal review mechanisms to evaluate officers’ use of force.<sup>169</sup> The

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164. See Harris, *Gender, Violence, Race and Criminal Justice*, *supra* note 163, at 793 (“The cultural image of a police officer is a uniquely valuable and rare kind of man: tough and violent, yet heroic, protective, and necessary to society’s very survival. . . . [Hence, t]he close association of hypermasculinity with police work emerges in the very qualifications for the job.”); see also Richardson & Goff, *Interrogating Racial Violence*, *supra* note 10.

165. See Richardson & Goff, *Interrogating Racial Violence*, *supra* note 10, at 131–32.

166. See Anastasia Prokos & Irene Padavic, ‘There Oughtta Be a Law Against Bitches’: *Masculinity Lessons in Police Academy Training*, 9 GENDER, WORK & ORG. 439, 443–44 (2002) (explaining the meaning of hidden curriculum as “the lessons schools teach students that go beyond the explicit curriculum. This concept originated among scholars examining the role of schools in reproducing social class across generations. They found that schools endorse orientations that correspond to the needs of employers, such as the importance and naturalness of hierarchy and obedience. Gender scholars have recently applied the idea of a hidden curriculum to the reproduction of gender inequality. They have pointed out that hidden curricula are crucial to the construction of gender, as schools teach and enforce what it means to be masculine and feminine and how to behave masculinely and femininely.” (internal citations omitted)).

167. For a discussion of the extent to which policing in the United States functions as a vehicle for social control, see Richardson & Goff, *Interrogating Racial Violence*, *supra* note 10, at 146 (“To the extent that the powerful elite within a community view young black men and other people of color with suspicion, these more privileged members can work with the police to implement policies that increase state control over subordinated groups.”); see also Gamal, *The Racial Politics of Protection*, *supra* note 158, at 104 (“In what I call the *racial politics of protection*, the process of police militarization allows the State to construct race by selectively assembling two groupings—those who will be marginalized through heightened surveillance and control and those who will be advantaged by their access to state protection.”).

168. See Gamal, *The Racial Politics of Protection*, *supra* note 158, at 116 (arguing “that in the context of police militarization, the most useful lesson from the 1960s is that the State responds to racial uprisings by increasing police militarization and further devaluing black life”); see also Stoughton, *Law Enforcement’s “Warrior” Problem*, *supra* note 156, at 230 (“Consider that of the ten most destructive and violent riots in United States history, fully half were responses to perceived police abuses.”).

169. See Cooper, “Who’s the Man?,” *supra* note 132, at 735–36 (“Officers have to use their discretion in deciding whether command presence is necessary in a situation that could be read as either threatening or benign. Consequently, the present form of academy training is ill-equipped to teach the

less police officers are held accountable by way of internal administrative review processes, the less likely they are to exercise care with respect to when and how they employ violent force.

7. Given the extent to which people explicitly and implicitly associate African-Americans with violence and dangerousness, police training that does not include bias awareness and disruption practices leaves officers free—consciously and unconsciously—to act out their racial stereotypes on the bodies of African-Americans.<sup>170</sup>
8. Police culture and training can lead to violence via the promulgation and instantiation of the idea that police officers need to assume that every police/lay person encounter has death as a potential entailment. The more police officers internalize the idea that their life is always already at risk, the more likely they are to perceive an encounter as one in which deadly force is necessary.<sup>171</sup>
9. Certain forms of police violence, like sexual violence, remain marginalized in police training and overall law enforcement conscientiousness.<sup>172</sup> The failure to bring such forms of violence to the forefront of police accountability mechanisms increases the likelihood that they will persist.<sup>173</sup>

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appropriate use of command presence. . . . In other words, a belief in the appropriateness of aggression and a lack of supervision can lead to excessive force.”). This was precisely the finding of the Justice Department with respect to the Ferguson Police Department. *See* INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 112, at 38–41; *see also* GEORGE FACHNER & STEVEN CARTER, COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 4 (2015), <http://ric-zai-inc.com/Publications/cops-w0753-pub.pdf> [<https://perma.cc/CC33-JUY7>] (“[Philadelphia Police Department] officers do not receive regular, consistent training on the department’s deadly force policy.”).

170. Richardson & Goff, *Self-Defense and the Suspicion Heuristic*, *supra* note 82, at 310 (“Blacks serve as our mental prototype (i.e., stereotype) for the violent street criminal. Furthermore, the tendency for black suspects to be over-represented in media portrayals of violent street crime makes the Black-as-criminal stereotype readily available.” (internal citations omitted)); *see also* Sarah Zwach, *Disproportionate Use of Deadly Force on Unarmed Minority Males: How Gender and Racial Perceptions Can be Remedied*, 30 WIS. J. L. GENDER & SOC’Y 185, 204 (2015) (enunciating that “sociological factors such as sex, race, socioeconomic status, and age all factor into whether an officer suspects an individual of committing a crime”).

171. *See* Stoughton, *Law Enforcement’s “Warrior” Problem*, *supra* note 156, at 228; *see generally* Stoughton, *How Police Training Contributes to Avoidable Deaths*, *supra* note 156.

172. *See* HUMAN RIGHTS WATCH, IMPROVING POLICE RESPONSE TO SEXUAL ASSAULT 19 (2013), [https://www.hrw.org/sites/default/files/reports/improvingSAInvest\\_0.pdf](https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf) [<https://perma.cc/H9X3-4TYY>] (“Training patrol officers to respond to sexual assault is often neglected; detectives, too, may have insufficient information about how to conduct interviews of traumatized victims. As noted above, an improper initial response may sabotage the entire investigation. . . . Many police remain highly skeptical of victims.”).

173. *See, e.g., id.* at 1 (“For example, the number of reported rapes actually rose significantly in Philadelphia when city police instituted reforms ensuring all sexual assaults were investigated after the *Philadelphia Inquirer* reported in the fall of 1999 that the department had not investigated large numbers of sex crimes in previous years.” (internal citations omitted)).



10. The more law enforcement agencies respond to acts of violence as a problem that derives from “bad apple” police officers, the less successful they will be at diminishing dimensions of police violence that are structural and endemic to police culture.<sup>174</sup>

The foregoing ten dynamics are just some of the ways in which police culture and training facilitate police violence. Cumulatively, those dynamics comprise Point 3 in the model.

#### B. POLICE VIOLENCE AND THE LEGAL SYSTEM

This section explicates Points 4 and 5. More specifically, it examines how police violence interacts with the legal system in ways that make it difficult to hold police officers accountable for their acts of violence.

##### 1. Point 4: The Translation of Police Violence into Justifiable Force

Consider first how the criminal process manages police violence: It all too often translates that violence into justifiable force. There are four ways in which legal decision makers in the criminal process mobilize law to do so. First consider prosecutors. They have enormous discretion in deciding whether to file charges, and their decisions in this respect are often unreviewable.<sup>175</sup> Each time a prosecutor decides not to file charges in a police violence case, that prosecutor has essentially concluded that the violence is justifiable force or at least that there is not enough evidence to justify pursuing a charge of unreasonable force.<sup>176</sup>

A second legal conduct is which police violence is converted into justifiable force is the indictment process. A prosecutor might file charges, but the grand jury refuses to indict. This too translates police violence into justifiable force. When a grand jury declines to issue an indictment, it is sending a clear signal that, from where it sits, the evidence does not demonstrate that the officer engaged in misconduct.<sup>177</sup> This is what happened in Michael Brown’s case: The

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174. Jay Stanley, *We Need to Move Beyond the Frame of the “Bad Apple Cop,”* ACLU BLOG (Mar. 19, 2015, 6:30 AM), <https://www.aclu.org/blog/we-need-move-beyond-frame-bad-apple-cop> [https://perma.cc/5SE4-YMSX] (“In [the ‘bad apple’] view of the world, the only problem that we face in law enforcement is the inevitable appearance within police ranks of an occasional individual of unusual anger and brutality. The problem is, police problems appear to be far more systematic. There are many reports of police abuse that call into question the ‘bad apple’ notion.”).

175. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 11 (2007); Charles H. Koch, Jr., *An Issue-Driven Strategy for Review of Agency Decisions*, 43 ADMIN. L. REV. 511, 551 (1991); see generally Brandon K. Crase, *When Doing Justice Isn’t Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475 (2007) (discussing prosecutors’ motivations and whether their discretion should be checked).

176. See Richard Lempert, *The American Jury System: A Synthetic Overview*, 90 CHI.-KENT L. REV. 825, 831 (2015).

177. See Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1295 (2006).

grand jury decided not to indict Officer Wilson.<sup>178</sup> What is particularly remarkable about that decision is the relatively low evidentiary standard for issuing an indictment.<sup>179</sup> Significantly, the grand jury was not being asked to determine whether in fact Officer Wilson employed excessive force against Michael Brown, but rather whether probable cause existed to conclude so.<sup>180</sup> The grand jury answered that question in the negative, and in so doing, translated Officer Wilson's conduct into justifiable force.

A third way in which legal actors translate police violence into justifiable force in the criminal context is via the reasonableness doctrine on which excessive force cases are based.<sup>181</sup> Assuming that a prosecutor brings charges and a grand jury indicts, a judge or a jury will still have to decide whether the officer's conduct violated the law. The inquiry is fundamentally about reasonableness—whether a reasonable person in the officer's position would have believed that the use of force was necessary.<sup>182</sup> An officer's testimony that he/she feared for his/her life, that he/she was in a high-crime area, that it was late at night, and that he/she thought the suspect had a gun, will often be enough to support the conclusion that the officer acted reasonably.<sup>183</sup>

Importantly, explicit and implicit biases can impact each of the foregoing decisions—that is, the prosecutor's decision to charge,<sup>184</sup> a grand jury's deci-

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178. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [https://perma.cc/8L5K-FST3].

179. See *Kaley v. United States*, 134 S. Ct. 1090, 1097–99, 1103 (2014) (describing the grand jury's probable cause standard for issuing an indictment as “not a high bar”); Ryan Grim et al., *From Daniel Pantaleo to Darren Wilson, Police Are Almost Never Indicted*, HUFFINGTON POST (Dec. 4, 2014), [http://www.huffingtonpost.com/2014/12/03/police-indictments\\_n\\_6264132.html](http://www.huffingtonpost.com/2014/12/03/police-indictments_n_6264132.html) [http://perma.cc/P7ZX-HECY] (“Grand juries are meant to determine only whether there is ‘probable cause’ to indict a criminal suspect—a standard far lower than the ‘beyond a reasonable doubt’ standard that comes into play when deciding guilt at trial.”).

180. See *Kaley*, 134 S. Ct. at 1103 (“Probable cause, we have often told litigants, is not a high bar: It requires only the ‘kind of “fair probability” on which reasonable and prudent [people,] not legal technicians, act.’” (internal citations omitted)). The probable cause standard presupposes that there will be uncertainties and conflicting testimonies. See *Illinois v. Gates*, 462 U.S. 213, 231–32 (1983) (“[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules”).

181. Bryan N. Georgiady, *An Excessively Painful Encounter: The Reasonableness of Pain and De Minimis Injuries for Fourth Amendment Excessive Force Claims*, 59 SYRACUSE L. REV. 123, 124, 131 (2008). See generally *Graham v. Connor*, 490 U.S. 386 (1989) (holding that excessive force claims are analyzed under an objective reasonableness standard); *Tennessee v. Garner*, 471 U.S. 1 (1985) (holding that apprehension by deadly force is subject to a reasonableness requirement).

182. See *Kaley*, 134 S. Ct. at 1103; *Gates*, 462 U.S. at 231; *Cortez v. Baca*, No. CV 11–03274 DDP, 2012 WL 3887067, at \*3 (C.D. Cal. Sept. 7, 2012).

183. See Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 155 (2014); Toussaint Cummings, *I Thought He Had a Gun: Amending New York's Justification Statute to Prevent Police Officers from Mistakenly Shooting Unarmed Black Men*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 781, 785 (2014); Lee, *supra* note 66, at 1573–74; Lee, *supra* note 10, at 24 & n.108.

184. Justice Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 42 (2014) (articulating how implicit bias affects those in the court room and their decisions).

sion to indict, and a judge or a juror's decision to convict.<sup>185</sup> The broader point is that officers are rarely held criminally liable for their acts of violence and thus have fewer incentives to carefully manage when and how they deploy violent force.<sup>186</sup>

To be clear: I am not suggesting that every act of police violence is translated into justifiable force. Prosecutors do bring charges in police violence cases. Grand juries do indict.<sup>187</sup> And juries do convict. My point has been to note that each of the preceding decision making contexts are ones in which a legal actor can translate police violence into justifiable force.

A similar dynamic is at play in the civil process as well. Here, too, police officers can escape accountability. Here, too, part of the problem is that actors in the civil process—judges and juries—translate that violence into justifiable force by concluding that the officer's conduct was reasonable. And here, too, explicit and implicit biases can inform a judge or jury's determination that it was reasonable for an officer to think that a black male suspect posed a serious risk of harm or death to the police officer.<sup>188</sup>

## 2. Point 5: Qualified Immunity & Indemnification

*a. Qualified Immunity:* Perhaps a more fundamental barrier to holding police officers accountable in the civil process is the doctrine of qualified immunity.<sup>189</sup> That the purpose of this doctrine is to protect “all but the plainly incompetent or

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185. See generally Kang et al., *supra* note 8 (discussing the broad literature on implicit racial biases in the courtroom and their impact on decision making); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 829 (discussing whether screening jurors with the Implicit Association Test can eliminate implicit bias in juries).

186. See Greg Pogarsky & Alex R. Piquero, *Studying the Reach of Deterrence: Can Deterrence Theory Help Explain Police Misconduct?*, 32 J. CRIM. JUST. 371, 377 (2004) (discussing research on deterrence of police misconduct and presenting original research showing that perceived sanction certainty deterred police misconduct, such as performing an unauthorized background check on a new neighbor).

187. Although it is notable here that indictments are incredibly rare when police officers are involved. See, e.g., Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015) <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> [<https://perma.cc/7TTW-48V7>]. This pattern may be changing, however. See, e.g., Conor Friedersdorf, *The Number of Cops Indicted for Murder Spikes Upward*, ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/08/the-shocking-number-of-cops-recently-indicted-for-murder/401732/> [<https://perma.cc/99KN-AEW7>].

188. See Richardson, *supra* note 66, at 1148; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 795 (2012).

189. For a discussion of how qualified immunity makes it difficult to hold police officers civilly liable, see, for example, RODNEY A. SMOLLA, *FEDERAL CIVIL RIGHTS ACTS* § 14:54 (3d ed. 2015), noting that burdens on plaintiffs have made § 1983 “an increasingly less attractive vehicle for attempting to move forward the substantive evolution of civil rights.” See also Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 117–19 (2009) (contending that reasonableness standards courts have applied to § 1983 effectively create “an almost impenetrable barrier to liability results”).

those who knowingly violate the law”<sup>190</sup> is already a strong signal that the doctrine functions to protect police officers from liability. To understand the broader scope of the problem, a brief discussion of the doctrine of qualified immunity is necessary.

Victims of police violence can sue police officers under Section 1983, a civil rights statute that permits plaintiffs to sue governmental officials for violating statutory or constitutional rights.<sup>191</sup> In the excessive force context, plaintiffs typically assert that a police officer’s use of force violated the plaintiff’s Fourth Amendment right to be free from unreasonable seizures.<sup>192</sup> Police officers can defend against such suits by asserting the defense of qualified immunity.<sup>193</sup> Whether an officer prevails on this defense turns on whether that officer can show that (a) his/her conduct did not violate the plaintiff’s constitutional rights, or (b) assuming that his/her conduct did violate a constitutional right, that the right was not clearly established at the time the officer acted.<sup>194</sup>

With respect to whether the officer’s conduct violated the plaintiff’s constitutional rights, the standard, as in the criminal context, centers on reasonableness: whether a reasonable officer would have believed that the use of force was necessary.<sup>195</sup> And, as in the criminal context, juries will often defer to an officer’s claim that he/she employed deadly force because he/she feared for his/her life.<sup>196</sup> Moreover, implicit and explicit biases can inform their decision making.<sup>197</sup>

With respect to the “clearly established” doctrine, there are two problems with the standard. First, courts often avoid deciding the question of whether the officer’s conduct violated the Constitution and rule instead on whether the constitutional right in question was clearly established.<sup>198</sup> The Supreme Court

190. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743–44 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); see also *Hassel*, *supra* note 189, at 118 (“[Q]ualified immunity has metastasized into an almost absolute defense to all but the most outrageous conduct.”).

191. 42 U.S.C. § 1983 (2012) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .”); see also, e.g., DAVID W. LEE, 2015 HANDBOOK OF SECTION 1983 LITIGATION § 1.02 (2015); MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 3 (2d ed. 2008).

192. *Hassel*, *supra* note 189, at 117–19; IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, 2 STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 2:9 (2015); 5 AM. JUR. 2D *Arrest* § 126 (2015).

193. 63 C.J.S. *Municipal Corporations* § 644 (2015); 5 AM. JUR. 2D *Arrest* § 126 (2015).

194. *SMOLLA*, *supra* note 189, § 14:52.

195. See *Hassel*, *supra* note 189.

196. See Daniel Yeager, *Cop Killers*, 48 CRIM. L. BULL. 428, 473 (2012) (“[T]he public—whether they sit on citizen-review boards or juries—is consistently sympathetic to ‘feared for my life’ claims, even when the basis of that fear is unelaborated or, at a minimum, vague.”).

197. See, e.g., Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can’t We All Just Get Along*, 37 U. HAW. L. REV. 339, 364–66 (2015); Roberts, *supra* note 185, at 832–43; Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama’s Election*, 37 N. KY. L. REV. 243, 257 (2010).

198. See *SMOLLA*, *supra* note 189, § 14:52.

has made clear that lower courts are free to proceed in this way,<sup>199</sup> making it relatively easy for courts to make the defense of qualified immunity available to a police officer without having to decide whether the officer violated a constitutional right.<sup>200</sup> This avoidance compounds the extent to which the law is unsettled. And, the greater the uncertainty about the law, the greater the doctrinal space for a police officer to argue that particular rights were not “clearly established” at the time the officer acted.<sup>201</sup> In other words, the more courts avoid weighing in on the substantive question of whether police conduct violates the Constitution, the more leeway police officers have to argue that their conduct did not violate a clearly established right.

Consider, for example, *Stanton v. Sims*.<sup>202</sup> There, the Court avoided the question of whether an officer’s entrance into a yard to effectuate the arrest of a misdemeanor violated the Fourth Amendment, but ruled that the right to avoid such an intrusion was not clearly established.<sup>203</sup> Unless and until the Supreme Court expressly rules that, absent exigent circumstances, one has a right to be free from warrantless entry into one’s yard, courts will likely grant qualified immunity in cases involving such arrests.<sup>204</sup>

A second problem with the “clearly established” doctrine pertains to how courts apply it. According to the Supreme Court, in applying the “clearly established” standard, the inquiry is whether the right is “sufficiently clear ‘that every reasonable official would [have understood] that what he[/she] is doing violates that right.’”<sup>205</sup> This standard creates rhetorical room for police officers to argue that not “every” reasonable officer would have understood that the

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199. See *Pearson v. Callahan*, 555 U.S. 223, 243–44 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982).

200. See SMOLLA, *supra* note 189, § 14:52; Hassel, *supra* note 189, at 118.

201. As Rodney Smolla explains:

When it becomes apparent that the claim of illegal action by the public official involves a proposition of law that was unsettled at the time the official acted, the suit will be dismissed on qualified immunity grounds. Yet this very dismissal will tend to frustrate ever reaching the merits of the substantive law question, for if the legal rule is not resolved, the operation of the *Harlow* standard dictates that it will remain unresolved, at least in any litigation in which the qualified immunity defense can presently be asserted. The general effect of the *Harlow* standard, when multiplied by the thousands of individual capacity public official suits brought yearly in § 1983 and *Bivens* cases, is to systematically filter out all new and innovative claims, permitting damages liability only for those claims in which the law is already settled. This has a tendency to prevent these new claims from ever becoming settled, except in cases seeking prospective relief not covered by the immunity rules.

SMOLLA, *supra* note 189, § 14:54.

202. 134 S. Ct. 3 (2013) (per curiam).

203. *Id.* at 5–7.

204. See Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 931–32 (2015).

205. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

right in question was clearly established.<sup>206</sup>

The standard is also, as Karen Blum observes, “riddled with contradictions and complexities.”<sup>207</sup> Eleventh Circuit Judge Charles Wilson puts the point this way:

[T]he way in which courts frame the question, “was the law clearly established,” virtually guarantees the outcome of the qualified immunity inquiry. Courts that permit the general principles enunciated in cases factually distinct from the case at hand to “clearly establish” the law in a particular area will be much more likely to deny qualified immunity to government actors in a variety of contexts. Conversely, those courts that find the law governing a particular area to be clearly established only in the event that a factually identical case can be found, will find that government actors enjoy qualified immunity in nearly every context.<sup>208</sup>

When one adds the difficulties of the “clearly established” standard to the other dimensions of the qualified immunity doctrine, it becomes clear that the qualified immunity regime erects a significant doctrinal hurdle to holding police officers accountable for acts of violence.

*b. Indemnification:* The municipal practice of indemnification exacerbates the preceding problem. For even when plaintiffs overcome the qualified immunity hurdle, proceed to trial, and obtain verdicts in their favor, chances are the officers will not financially account for their wrongdoing. In perhaps the first extensive empirical study on police indemnification, Joanna Schwartz demonstrates that police officers rarely foot the bill for their damages.<sup>209</sup> According to Schwartz, in the jurisdictions she studied—eighty-one in total from around the country—police officers “almost never contributed to settlements and judgments in police misconduct lawsuits.”<sup>210</sup> Remarkably, the widespread use of indemnification exists even in jurisdictions whose laws expressly prohibit indemnification.<sup>211</sup> So pervasive is the practice of indemnification that Schwartz has

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206. See, e.g., *Lassiter v. Ala. A&M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc), *abrogated by* *Hope v. Pelzer*, 536 U.S. 730 (2002) (describing the defendant-protective standard that developed in the Eleventh Circuit: “[f]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*”); *Volkman v. Ryker*, 736 F.3d 1084, 1090 (7th Cir. 2013) (repeating language from *Lassiter*); Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 654–55 (2013) (noting how Justice Scalia’s substitution of the construction “every reasonable official” for the earlier “a reasonable official” in his majority opinion in *al-Kidd* (2012) marked “a major change in the stringency of the clearly-established-law test”).

207. Blum, *supra* note 204, at 945.

208. Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified Immunity Defense*, 57 *N.Y.U. ANN. SURV. AM. L.* 445, 475 (2000).

209. Joanna C. Schwartz, *Police Indemnification*, 89 *N.Y.U. L. REV.* 885, 912 (2014).

210. *Id.*

211. *Id.* at 919.



concluded that “officers are more likely to be struck by lightning than they are to contribute to a settlement or judgment in a police misconduct suit.”<sup>212</sup>

One could argue that from a plaintiff’s perspective it makes sense that cities would indemnify police officers. Unlike cities, police officers don’t have “deep pockets.” Thus, plaintiffs who win civil suits against police officers are financially better off under a regime in which the government indemnifies police officers.

Fair enough. But the foregoing argument fails to consider how indemnification interacts with qualified immunity in ways that make it unlikely that the plaintiffs will be in a position to claim damages in the first place. Significantly, the problem here is not only that qualified immunity protects police officers from civil liability and indemnification protects them from financial liability. It is also that the civil liability protection qualified immunity affords is predicated on the idea that police officers will pay civil damages. Indeed, the Supreme Court’s assumption that police officers pay damages is precisely why the Court—via the qualified immunity doctrine—has made it difficult for plaintiffs to sue police officers.<sup>213</sup> According to the Court, the threat of financial loss looms large in the consciousness of law enforcement officials and creates a disincentive for police officers to engage in violent conduct.<sup>214</sup> Under this view, relaxing the qualified immunity standard to enable more lawsuits against police officers would yield no additional deterrent benefits.<sup>215</sup>

But, as we have discussed, police officers rarely suffer financial losses when they are found civilly liable. Thus, the incentive system the Court imagines simply is not there. Combining qualified immunity with indemnification creates a world in which plaintiffs rarely win cases against police officers (because of civil liability protection that qualified immunity affords), and when plaintiffs do win, police officers suffer no financial consequences (because of financial liability protection that indemnification affords). In this respect, the ability of a particular plaintiff in a particular case to get a tidy settlement because of indemnification should not obscure the overarching incentive structure that indemnification, working in conjunction with qualified immunity, helps to create—one that diminishes the risk of civil and financial liability for police violence overall and thus diminishes the incentive for police officers to exercise care with respect to when and how they employ violent force.

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212. *Id.* at 914.

213. *See* *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); Schwartz, *supra* note 209, at 892–95.

214. *See, e.g.,* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (“*Meyer* made clear that the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity, are indemnified by the employing agency or entity, or are acting pursuant to an entity’s policy.” (internal citations omitted)); *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (“[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future. . . . This deterrent effect is particularly evident in the area of individual police misconduct.”).

215. *See, e.g.,* *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 485 (1994).

## C. POINT 6: THE DISINCENTIVE TO EXERCISE CARE

At this point in the analysis, the combined effects of Points 4 and 5 produce a disincentive for police officers to be careful. The logic here is this: If police officers know that their violent conduct will be considered justifiable force, or that they will be immune from civil liability or indemnified if they are found civilly liable, they are less likely to exercise care with respect to when and how they employ violent force.

The following summarizes the features of the model. A variety of social forces converge to make African-Americans vulnerable to ongoing police surveillance and contact. The frequency of this surveillance and contact exposes African-Americans to the possibility of police violence. Police culture and training encourages that violence (mostly implicitly). And, when violence occurs, a range of legal actors in the civil and criminal process translate that violence into justifiable force. The doctrine of qualified immunity makes it difficult for plaintiffs to win cases against police officers, and when plaintiffs win such cases, police officers rarely suffer financial consequences because their local government indemnifies them. The reconfiguration of violence into justifiable force, the qualified immunity barrier to suing police officers, and the frequency with which cities and municipalities indemnify police officers reduces the risk of legal sanction police officers assume when they employ excessive force. This reduction in the risk of legal liability diminishes the incentive for police officers to exercise care with respect to when and how they deploy violent force.

## CONCLUSION

No single model can fully explain African-American vulnerability to police violence. At the same time, there are good reasons to believe that the problem transcends the conduct of particular police officers engaging in particular acts of violence against particular African-Americans. There is, in other words, a structural dimension to blue-on-black violence. In this respect, Michael Brown's death was not simply a function of a rogue police officer acting outside the boundaries of law and normative police behavior. The death of the African-American teenager at the hands of white police officer Darren Wilson was a function of the very dynamics the blue-on-black violence model describes. To frame Michael Brown's death in this way is not to deny the agency and responsibility of Officer Wilson. It is rather to situate Wilson's conduct in the context of a broader set of factors that combine to make police violence a constitutive feature of black life. My purpose in this conclusion is to elaborate that point. More precisely, I will map the circumstances under which Wilson killed Michael Brown onto the blue-on-black violence model this article articulates.

## A. POINT 1: REPEATED POLICE INTERACTIONS

Recall that at Point 1 of the model a variety of social forces converge to make African-Americans vulnerable to ongoing police surveillance and contact:

1. Broken Windows Policing
2. Mass Criminalization
3. Racial Segregation
4. Criminality Stereotype
5. Group Vulnerability
6. Revenue Generation (“Predatory Policing”)
7. Fourth Amendment Law

Arguably, each of the foregoing variables was at play in Ferguson. Darren Wilson was likely engaged in broken windows policing when he saw Michael Brown and his cousin, another black teenager, in the road that afternoon. Wilson’s testimony before the grand jury makes clear that at the time he approached the two young men, he had no reason to believe they had engaged in serious wrongdoing.<sup>216</sup> In deciding to approach the teenagers, Wilson presumably knew that he could take advantage of mass criminalization (and, in particular, a law that criminalized “manner of walking in the road”).<sup>217</sup> All of this occurred against the backdrop of racial segregation in Ferguson<sup>218</sup> (and the political and economic powerlessness of Ferguson’s black community), as well as racial stereotypes of African-Americans as criminally suspect.

The point about racial stereotyping deserves emphasis because one of the striking findings in the Ferguson Report is that Ferguson police officers harbored explicit racial attitudes and stereotypes of African-Americans, suggesting that the problem of race and policing in Ferguson is about conscious and not only unconscious biases. The following examples are revealing:

- A November 2008 email stated that President Barack Obama would not be President for very long because “what black man holds a steady job for four years.”
- A March 2010 email mocked African-Americans through speech and familiar stereotypes, using a story involving child support. One line from the email read: “I be so glad that dis be my last child support payment! Month after month, year after year, all dose payments!”
- An April 2011 email depicted President Obama as a chimpanzee.

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216. Transcript of Grand Jury at 202–03, 206–07, 262–63, *Missouri v. Wilson* (Sept. 16, 2014), <https://graphics8.nytimes.com/newsgraphics/2014/11/24/ferguson-assets/grand-jury-testimony.pdf> [https://perma.cc/LM6N-ASBB].

217. See *supra* Section I.A.2.

218. Regarding Ferguson’s long history of racial segregation, see, for example, RICHARD ROTHSTEIN, ECON. POLICY INST., *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* (2014), <http://www.epi.org/files/2014/making-of-ferguson-final.pdf> [https://perma.cc/5Z5A-2QNJ].

- A May 2011 email stated: “An African-American woman in New Orleans was admitted into the hospital for a pregnancy termination. Two weeks later she received a check for \$5000. She phoned the hospital to ask who it was from. The hospital said, ‘Crimestoppers.’”
- A June 2011 email described a man seeking to obtain “welfare” for his dogs because they are “mixed in color, unemployed, lazy, can’t speak English and have no frigging clue who their Daddies are.”
- An October 2011 email included a photo of a bare-chested group of dancing women, apparently in Africa, with the caption, “Michelle Obama’s High School Reunion.”<sup>219</sup>

Darren Wilson was a part of the police department in which the foregoing explicit racial biases circulated. It’s hard to imagine that such ideas had no bearing on his policing practices and those of the FDP more generally.

Other factors that increased African-American vulnerability to repeated police interactions in Ferguson include the historical and contemporary vulnerability of African-Americans to police surveillance and contact,<sup>220</sup> that governmental officials and police leadership encouraged rank-and-file police officers to engage in predatory policing,<sup>221</sup> and Fourth Amendment law. As discussed earlier, rather than operating as a meaningful boundary between the police and the people, Fourth Amendment law permits police officers to follow, approach, and question people without any indication that they have done anything wrong and to effectuate arrests for minor offenses (like “manner of walking in the road”) or vague offenses (like “failure to comply”).<sup>222</sup> The short of it is that the variables the model suggests render African-Americans vulnerable to repeated police interactions were all at play in Ferguson, Missouri on the day that Darren Wilson approached, forced an engagement with, and killed Michael Brown.

Significantly, the claim I am making about African-American exposure to repeated police interaction in Ferguson is not just theoretical. Empirical evidence bears this out. A year before Michael Brown’s death, the Missouri Attorney General’s Office issued a report that reveals the overpolicing of African-Americans in Ferguson.<sup>223</sup> Ferguson is 63% black and 34% white. Out of 611 searches that police officers in Ferguson conducted in 2013, 562 (90%) were of African-Americans, forty-seven (8%) were of whites.<sup>224</sup> Moreover, of the twenty-one searches that lasted between sixteen and thirty minutes, twenty

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219. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 112, at 72.

220. See, e.g., Saki Knafo, *1 in 3 Black Males Will Go To Prison In Their Lifetime, Report Warns*, HUFFINGTON POST, (Oct. 4, 2013, 3:24 PM), [http://www.huffingtonpost.com/2013/10/04/racial-disparities-criminal-justice\\_n\\_4045144.html](http://www.huffingtonpost.com/2013/10/04/racial-disparities-criminal-justice_n_4045144.html) [<https://perma.cc/34FA-LD76>].

221. See *supra* Section I.A.6.

222. See *supra* Section I.A.2.

223. See MO. ATTORNEY GEN., RACIAL PROFILING DATA (2013), <https://ago.mo.gov/docs/default-source/public-safety/2013agencyreports.pdf?sfvrsn=2> [<https://perma.cc/M4U2-N5D5>].

224. *Id.* at 359.

were of African-Americans and one was of a white person.<sup>225</sup> With respect to stops, the statistics, though less stark in their racial disparity, at the least raise a question as to whether the Ferguson police were engaged in racial profiling. Of 2,489 stops, 1,983 (80%) were of African-Americans and 469 (19%) were of whites.<sup>226</sup> When police officers stopped cars for investigatory purposes (meaning for reasons other than traffic infractions), they likewise focused their attention on African-Americans. 328 of 363 such searches (90%) were of African-Americans; only twenty-seven (7%) were of whites.<sup>227</sup> Finally, Ferguson police arrest records reveal a similar racial pattern. Whereas 483 out of 521 (93%) of the arrests were of African-Americans, 36 (7%) were of whites.<sup>228</sup> The Missouri Attorney General's report thus reveals that black residents in Ferguson have had significant "front-end" contact with the police. This is the same basic story that the more recent 2015 U.S. Department of Justice report articulates.<sup>229</sup> The broader point I am making is that Michael Brown's death occurred against the background of a range of factors that rendered black people in Ferguson vulnerable to repeated police interactions.

#### B. POINT 2: POLICE VIOLENCE EXPOSURE

At Point 2, the model identifies five factors that mediate the relationship between police contact and police violence:

1. Violence Stereotype
2. Formal Arrest
3. System Involvement
4. Police Insecurity
5. Rights Assertion/Resistance

At least some of the foregoing factors likely structured Wilson's interactions with Brown. Stereotypes of African-American men as not just criminal but violent and dangerous<sup>230</sup> plausibly heightened Wilson's sense of fear and influenced how he interacted with Brown. The high percentage of black men in Ferguson, and indeed all over the United States, that have had some contact or involvement with the criminal justice system<sup>231</sup> diminished the extent to which Wilson would exercise care or respect rights in the context of his interaction with Brown. Like other police officers, Wilson likely experienced a range of

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225. *Id.* at 360.

226. *Id.* at 359.

227. *Id.*

228. *Id.*

229. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 112, at 4.

230. *See supra* Section I.A.4.

231. *See supra* Section I.A.5.

insecurities in the context of his encounter with Brown and his cousin, including “masculinity threat,” that increased the likelihood of violence.<sup>232</sup> Finally, according to Wilson, Brown resisted Wilson’s show of authority multiple times.<sup>233</sup> This may or may not be true. The point is that any resistance to authority on Brown’s part increased the likelihood that Wilson would employ violence to effectuate compliance. Indeed, resistance on the part of Brown was particularly dangerous because police officers in Ferguson operated under the assumption “that any level of resistance justifie[d] any level of force.”<sup>234</sup>

#### C. POINT 3: POLICE CULTURE, TRAINING AND DISCIPLINE

At Point 3 in the model, police culture and training contribute to police violence. These factors are certainly relevant to policing in Ferguson. According to the 2015 Department of Justice Report, the Ferguson Police Department (FPD) had no meaningful mechanism in place to review and investigate reported instances of police violence.<sup>235</sup> Moreover, the FPD “does not perform any comprehensive review of force incidents sufficient to detect patterns of misconduct by a particular officer or unit, or patterns regarding a particular type of force.”<sup>236</sup> In sum, the FPD culture was not one in which police violence was taken seriously. The FPD’s institutional lack of regard for police violence diminished the likelihood that officers would be held accountable for their acts of violence and increased the likelihood “that constitutional violations will occur.”<sup>237</sup> The absence of robust police training on use of force strategies, de-escalation techniques, racial bias, and police–community relations compounded the problem.<sup>238</sup> The bottom line is that Darren Wilson was socialized in a police department in which police violence was relatively routinized, reflecting “a pattern of excessive force in violation of the Fourth Amendment.”<sup>239</sup>

#### D. POINT 4: THE TRANSLATION OF POLICE VIOLENCE INTO JUSTIFIABLE FORCE

Point 4 in the model notes that a range of legal actors in the civil and criminal process translate police violence into justifiable force. As discussed earlier,<sup>240</sup> the decision on the part of the grand jury in Ferguson not to issue an indictment against Wilson is an example of a legal institution translating police violence into justifiable force.

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232. See Carbado and Rock, *What Exposes African Americans to Police Violence*, *supra* note 11.

233. Transcript of Grand Jury at 207–215, *Missouri v. Wilson* (Sept. 16, 2014), <https://graphics8.nytimes.com/newsgraphics/2014/11/24/ferguson-assets/grand-jury-testimony.pdf> [<https://perma.cc/LM6N-ASBB>] (providing Wilson’s description of his encounter with Brown from first observing Brown and Johnson to pulling out his gun).

234. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 112, at 40.

235. *Id.* at 38–41.

236. *Id.* at 41.

237. *Id.*

238. *Id.* at 91–95.

239. *Id.* at 28.

240. *See supra* Section II.B.1.



## E. POINT 5: QUALIFIED IMMUNITY AND INDEMNIFICATION

At Point 5 in the model, the doctrine of qualified immunity makes it difficult for plaintiffs to win cases against police officers, and when plaintiffs win such cases, police officers rarely suffer financial consequences because their local government indemnifies them. The doctrine of qualified immunity applies in Ferguson as it does everywhere else in the United States. Moreover, some aspects of Eighth Circuit case law on qualified immunity, which applies to Missouri, make it particularly difficult for plaintiffs to win excessive force claims against the government.<sup>241</sup> There is no current data on whether, and to what extent, the city of Ferguson indemnifies its police officers.

## F. POINT 6: THE DISINCENTIVE TO EXERCISE CARE

At Point 6 in the model, the reconfiguration of violence into justifiable force, the qualified immunity barrier to suing police officers, and the frequency with which cities and municipalities indemnify police officers reduce the risk of legal sanction police officers assume when they employ excessive force. This reduction in the risk of legal liability diminishes the incentive for police officers to exercise care with respect to when and how they deploy violent force. Although, as indicated above, we do not know about indemnification practices in Ferguson, the other dynamics that create a disincentive for police officers to exercise care with respect to whether and to what extent they use violence likely shape the policing practices of officers in Ferguson, including Darren Wilson.

Mapping the police violence model this Article describes onto Ferguson and the circumstances under which Officer Wilson shot and killed Michael Brown puts in sharp relief the multiple social forces that facilitated Brown's trajectory from life to death. Of course, Wilson's individual conduct mattered—indeed, it mattered in the most deadly sense. But Wilson's conduct was part of a broader set of dynamics that render too many African-Americans in too many parts of the United States effectively death-eligible the very moment they encounter the police.<sup>242</sup>

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241. See Blum, *supra* note 204, at 956–57.

242. Cf. Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 498–501 (2013) (discussing factors that render a person eligible for the death penalty).