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### Policing and "Bluelining"

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# COMMENTARY

## POLICING AND “BLUELINING”

*Aya Gruber\**

### ABSTRACT

In this Commentary written for the Frankel Lecture symposium on police killings of Black Americans, I explore the increasingly popular claim that racialized brutality is not a malfunction of policing but its function. Or, as Paul Butler counsels, “Don’t get it twisted—the criminal justice system ain’t broke. It’s working just the way it’s supposed to.” This claim contradicts the conventional narrative, which remains largely accepted, that the police exist to vindicate the community’s interest in solving, reducing, and preventing crime. A perusal of the history of organized policing in the United States, however, reveals that it was never mainly about interdicting crime. From its inception in the nineteenth century, organized policing served the social, political, and economic priorities of empowered groups, from supporting Southern agrarian capitalist interests by imposing de facto slavery on emancipated Blacks to bolstering Northern industrialization by oppressing immigrant laborers. Afterward, police forces grew in response not to spikes in garden-variety crimes but to political campaigns and cultural anxieties. And today, it remains contested whether current policing practices—especially street policing—function to alleviate, rather than exacerbate, crime problems.

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\* Professor of Law, University of Colorado Law School. I give a heartfelt thank you to my dear friends, Frankel Lecturer Angela Onwuachi-Willig and co-respondent Dean Tamara Lawson. I am also grateful to the organizers of the Lecture, in particular Priyanka Kasnavia and Erin Horan Mendez, and the *Houston Law Review* editors. Peter Selimos and Ariane Frosh provided excellent research assistance.

While policing’s crime-reduction success is questionable, one obvious, tremendous success has been its control of race, space, and place. Police draw blue lines around Black neighborhoods—just as banks drew their red lines—designating them as high-risk, pathological spaces. Police use aggressive stop and frisks, intense surveillance, and military-style home raids to keep the people in their spatial and social place. Brutality is the business of policing, reinforced in recruitment, training, and practice. I conclude that because racialized brutality is integral to policing, reformers should not primarily focus on incarcerating specific bad cops who draw headlines. The “bad apple” narrative casts racist violence as individual and deviant, rather than institutional and structural, and undermines the current promising, if glacial, movement toward dismantling policing as we know it.

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#### I. INTRODUCTION

We are in the midst of a sea change.

During the summer of 2020, millions of people around the world took to the streets to express their outrage at the horrific police killings of George Floyd, Breonna Taylor, Daniel Prude, and too many others. People watched aghast as the militarized police and federal paramilitaries trained their weapons of war on peaceful protesters and disappeared civilians in a manner more

befitting a dictatorship than the United States.<sup>1</sup> Progressives were dismayed that police and prosecutors continued to fill overcrowded and unsanitary prisons where COVID-19 raged, thereby imposing an unofficial death penalty on thousands of detainees, many of whom had not yet been tried for *misdemeanors*.<sup>2</sup> All this galvanized a shift in mindset, and no longer did people regard these events as disconnected points of pain. Rather, they stepped back, and Seurat-like, a picture emerged with each point a component of our intolerable system of racialized mass incarceration.<sup>3</sup>

In the past, most commentators characterized police brutality as a matter of individual racist and sadistic bad cops, and many still do.<sup>4</sup> Progressive carceral critics, including criminologists and law professors, have accordingly advocated for modest procedural reforms of policing and the penal system.<sup>5</sup> But today, an increasing number of experts argue that changes at the margins that leave untouched the oppressive structure of policing and punishment, such as body cameras, implicit bias training, and data-driven practices, are simply not enough. In fact, ineffective and marginal reforms can bolster policing institutions by accruing to them

1. See Benjamin Fearnow, *Pelosi Calls Out Trump Admin Over Portland Unrest: 'We Live in a Democracy, Not a Banana Republic'*, NEWSWEEK (July 19, 2020, 10:02 AM), <https://www.newsweek.com/pelosi-calls-out-trump-admin-over-portland-unrest-we-live-democracy-not-banana-republic-1518902> [<https://perma.cc/8VDE-JNAP>].

2. Katie Park & Tom Meagher, *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> [<https://perma.cc/ME5A-J9EJ>] (Apr. 9, 2021, 5:30 PM); Timothy Williams et al., *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html> [<https://perma.cc/ZP6Q-UZ4Z>]; see Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/2UDM-SQDC>]; Michael Lyle, *'No Outrage. No Concern. No Action. Just More Silence.'*, NEV. CURRENT (Nov. 20, 2020), <https://www.nevadacurrent.com/2020/11/20/no-outrage-no-concern-no-action-just-more-silence/> [<https://perma.cc/HD9M-F9PQ>].

3. See generally David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 28–29, 33–34, 46, 50 (2011).

4. See Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. (forthcoming 2021) (manuscript at 49–50) (on file with author) (describing the agenda to prosecute police and how it communicates that brutality is an individual act of deviance). Such narratives are consistent with liberal mainstream views of racial discrimination. See KIMBERLÉ CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xiii, xv (Kimberlé Crenshaw et al. eds., 1995) (“Along with the suppression of explicit white racism (the widely celebrated aim of civil rights reform), the dominant legal conception of racism as a discrete and identifiable act of ‘prejudice based on skin color’ . . .”).

5. See NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 3–4 (2014); *infra* Part IV (criticizing this tinkering from within).

money and thwarting more substantial interventions.<sup>6</sup> After the events of the summer, many Black Lives Matter protesters and others came to see the criminal system's tendency to wound, control, and thus maintain the subordinate status of people of color, not as a malfunction but as the system's *function*.<sup>7</sup>

In this essay, I have the fortunate task of responding to Dean Angela Onwuachi-Willig's Frankel Lecture, *From "Lynching as Status Quo" to the New Status Quo*. I am delighted to engage the work of my friend and colleague, who is a luminary in the field of racial justice. Onwuachi-Willig persuasively illustrates a pattern of injustice that has been on repeat play with tragic regularity from the days of Jim Crow and before, involving state and societal tolerance for racist violence. Drawing on the theory of cultural trauma developed by sociologist Kai Erickson,<sup>8</sup> she heart-wrenchingly describes how Black Americans experience intense, long-lasting, and damaging pain and trauma caused by repeatedly viewing state actors ignore, tolerate, and glorify state and quasi-state brutality against Black people. Dean Onwuachi-Willig illustrates in exacting detail how the brutal Emmett Till and Trayvon Martin killings, separated by over a half-century, both clearly reflect this recurring pattern of injustice.<sup>9</sup>

I agree with Dean Onwuachi-Willig's analysis about the ubiquity and depth of racial inequality in society generally and in policing particularly. We agree that many White communities take pains to maintain homogenous racial spaces by using private patrollers like George Zimmerman and official police patrols, and exclusionary economic and social practices.<sup>10</sup> We agree that implicit and explicit biases, personal frames of reference, and cultural mythologies render many people blindly trusting of law

6. See *infra* Part IV.

7. See *infra* Part III; Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 273, 310 (2018) ("[Contemporary ideological left criticism] raises questions about all aspects of the criminal system and the political economy in which it is embedded. It sounds not in the language of small-bore solutions or narrow, pragmatic fixes, but in terms of sweeping systemic critique.").

8. KAI T. ERIKSON, EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD 11–12, 136 (1976).

9. Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 829–830, 835–36 (2021); see also Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 353 (2016) [hereinafter Onwuachi-Willig, *Trauma of the Routine*].

10. See *infra* Section III.A; Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1181–82 (2017).

enforcement and skeptical of Black innocence. We agree that the George Floyd protests may have been a tipping point for a number of White Americans, and the newfound convergence against racist police brutality might portend a better future. However, Onwuachi-Willig, like many racial justice seekers, emphasizes the need to hold individual police and private actors accountable through criminal prosecution, conviction, and imprisonment.<sup>11</sup> To be sure, for many years, most Americans,<sup>12</sup> including Black Americans, have understood justice as the incarceration of individuals deemed responsible for harm, even if that incarceration is within our racist, overbroad, and inhumane mass imprisonment system.<sup>13</sup>

However, racialized police violence is but one facet of an American carceral state preoccupied with inflicting pain on Black and Brown bodies. Policing is the legacy of Reconstruction-era penal policies critical to the oppression of formerly enslaved Black Americans.<sup>14</sup> Policing and the punishment system are primary mechanisms by which the government and powerful private actors socially control the masses, perpetuate White supremacy, and maintain the minimal size of the welfare state.<sup>15</sup> As such, the cycle of racist police violence and state toleration identified by Onwuachi-Willig is not a miscalibration of the carceral system but endemic to it.<sup>16</sup> And diverting more resources to that very system in exchange for the prosecution of select racist and murderous officers—a costly bargain—is unlikely to break the cycle.<sup>17</sup>

Racialized police violence is both *institutional* and *structural*. I use the term “institutional” to denote that from the very inception of organized American law enforcement, racialized and classed social control was an essential part of what it means to

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11. See Onwuachi-Willig, *Trauma of the Routine*, *supra* note 9, at 353.

12. I use “American” colloquially, referring to people that reside in the United States either permanently or for a significant period of time.

13. See Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIA. L. REV. 961, 966–67 (2014) [hereinafter *Race to Incarcerate*] (describing a “punitive impulse, deeply entrenched in the American psyche, that leads even left-leaning racial justice proponents occasionally to hastily embrace proposals that augment the very police and prosecutorial power they otherwise criticize”).

14. See *infra* Section II.A.

15. See *infra* Section II.B.

16. See *infra* Part III.

17. See *infra* Part IV; Levine, *supra* note 4 (manuscript at 55) (discussing the broader carceral impacts of the cop-prosecution program).

“police.”<sup>18</sup> Of course, we might imagine a brigade of friendly, race-neutral, nonviolent service providers—something like the Red Cross—but such a vision is distinctly *not* one of policing. I use the term “structural” to denote that racial inequality and brutal violence are embedded in and reinforced by the organization, training, and accepted practices of the police and their supporting criminal law actors.<sup>19</sup> This structural analysis stands in counterdistinction to the common refrain that police brutality is the product of “bad apples” or good apples who “chok[ed],” as President Trump put it.<sup>20</sup> Given the institutional and structural nature of racialized police violence, I question whether Black Lives Matter and other police-critical movements’ discourse and activism should elevate the conviction of killer cops as the highest form of racial redress.<sup>21</sup>

There is a reason some police chiefs, prosecutors, and conservative politicians have gone on the record to vociferously condemn officers in high-profile brutality cases. That narrative affirms that police violence is a product of the rare, intentionally racist and murderous bad cop and not of the institution of policing and its entrenched structures. Indeed, the police killing anyone, especially an unarmed civilian, *is* statistically rare.<sup>22</sup> But the regular violence and everyday indignity officers disproportionately exact on minorities—and plenty of marginalized white people—are not. Interest-convergence theory and history predict that reformers will find it far easier to succeed with an agenda of empowering prosecutors to convict a few murderous cops than with one of dismantling policing as we know it.<sup>23</sup>

18. See *infra* Section II.A.; Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 135 (2014) [hereinafter *Murder, Minority Victims, & Mercy*] (describing how an “institutional” view of the American death penalty and substantive homicide law as institutions of racial domination cuts against efforts to equalize them from within).

19. See *infra* Section III.B; Barbara E. Armacost, *Police Shootings: Is Accountability the Enemy of Prevention?*, 80 OHIO ST. L.J. 907, 960–61 (2019); Seth Stoughton, *Law Enforcement’s “Warrior” Problem*, 128 HARV. L. REV. F. 225, 225–28 (2015).

20. *It’s Called Choking: Donald Trump Blames Racist Policing on ‘Bad Apples,’* GUARDIAN (Sept. 2, 2020, 3:37 AM), <https://www.theguardian.com/us-news/video/2020/sep/02/its-called-choking-donald-trump-blames-racist-policing-on-bad-apples-video> [https://perma.cc/PJ8H-MXER].

21. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1438 (2016) (“In Ferguson . . . people allied with the Movement for Black Lives were among the strongest voices for prosecution of Officer Wilson . . .”).

22. See FRANKLIN E. ZIMRING, *WHEN POLICE KILL* 158 (2017).

23. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); DERRICK BELL, *SILENT COVENANTS: BROWN V.*

I begin this Commentary by disputing a narrative so entrenched in the American mindset it is rarely questioned—that the purpose of policing is to fight crime. I then proceed to examine what the institution of policing has actually proven it is wildly effective at achieving. It has succeeded spectacularly at what I call “bluelining,” that is, maintaining raced and classed spatial and social segregation through the threat and application of violence. As such, racialized brutality is foundational to the structure of organized policing and it is manifested programmatically in everything from recruiting to training and best practices. Finally, I will conclude by cautioning that, given the institutional and structural nature of racialized police violence and the inherent limitations and internal pathologies of criminal prosecution, the cop-prosecution program holds little promise of creating a more just system.

## II. THE “PURPOSE” OF POLICING

Policing is in a perpetual state of repair. Every day there is a new proposal for how police departments can finally provide safety and services without terrorizing marginalized communities and playing judge, jury, and executioner to those suspected of crimes. From body cameras to debiasing and deescalation training, there are a plethora of progressive law and policy reforms intended to control certain officers’ racist and violent tendencies so that police can better “do their jobs.”<sup>24</sup> What has been strikingly absent from the mainstream policing literature is the contention that police officers who engage in racialized violence *are* doing their jobs.

The conventional narrative, even among reformers, has long been that the police primarily exist to vindicate the community’s interest in solving, reducing, and preventing crime.<sup>25</sup> In this view,

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*BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 49 (2004) (discussing interest convergence).

24. See Daniel M. Blumberg et al., *New Directions in Police Academy Training: A Call to Action*, *INT’L J. ENV’T RSCH. & PUB. HEALTH* 7 (Dec. 6, 2019), <https://www.mdpi.com/1660-4601/16/24/4941/pdf> [<https://perma.cc/6KXD-NKNZ>]; Brett Chapman, *Body-Worn Cameras: What the Evidence Tells Us*, *NAT’L INST. JUST.* (Nov. 14, 2018), <https://nij.ojp.gov/topics/articles/body-worn-cameras-what-evidence-tells-us> [<https://perma.cc/FBH3-B6XV>]. See generally Brittain McClurg, Comment, *Reducing the Impact of Racial Discrimination in Policing*, 2019 *J. DISP. RESOL.*, no.1, at 201, 216 (2019).

25. See ALEX S. VITALE, *THE END OF POLICING* 31 (2018) (“The police exist to keep us safe, or so we are told by mainstream media and popular culture.”).

Traditional writing regarding the police function does not view the police as an instrument of the state conceived to protect the interests of the few at the expense of the many. On the contrary, police in both England and the United States are

all the other social arrangements policing has created and maintained are the fortuitous, unintended, and unimportant consequences of the police fulfilling their democratic crime-control function within an as yet unequal society. This presumption is reflected in the simplistic and misleading claim that urban communities of color are inundated with street policing because they have more crime, which law enforcement officers are sworn to fight.<sup>26</sup>

However, it is evident that the designation of what is and is not crime; which crimes within overbroad penal codes are enforced or tolerated; and who, when, and where enforcement takes place are not the products of democratic community input. Political priorities and police practices, from the Black Codes of old to the stop-and-frisk practices of today, make clear that crimes and criminal enforcement have never stemmed from a neutral overlapping consensus about community need. Nevertheless, as anthropologists Cyril Robinson and Richard Scaglion observe, “The idea that the police really issue from the community and are a part of that community has been a pervasive and essential prop to concepts of modern policing.”<sup>27</sup> It is time to lose the prop.

#### A. *Policing Did Not Originate to Fight Crime*

The notion that policing is about interdicting crime—or, more specifically, the conduct everyone agrees is criminal (i.e., burglary)—has been remarkably long-lived and intractable, despite the dearth of evidence that American policing was ever mainly about crime control. Historians are in fair agreement that organized police forces began to emerge in the early nineteenth century and became the norm by the Progressive Era.<sup>28</sup> Just as all

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generally seen as protectors of the law and order that allow democratic institutions to operate.

Cyril D. Robinson & Richard Scaglion, *The Origin and Evolution of the Police Function in Society: Notes Toward a Theory*, 21 LAW & SOC’Y REV. 109, 114 (1987).

26. See *infra* Section III.A; RUTH D. PETERSON & LAUREN J. KRIVO, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE 5 (2010) (“[A] critical and nearly unbridgeable racial-spatial divide in social contexts pervades the United States and sets the stage for ethno-racial inequality in crime.”).

27. Robinson & Scaglion, *supra* note 25, at 114.

28. See SAMUEL WALKER & CHARLES M. KATZ, THE POLICE IN AMERICA: AN INTRODUCTION 29 (8th ed. 2013) (noting that after the creation of the first modern police force in the 1830s, “Americans moved very slowly in creating new police forces”); Gary Potter, *The History of Policing in the United States, Part 1*, E. KY. UNIV. ONLINE: POLICE STUD. (June 25, 2013), <https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1> [<https://perma.cc/V83F-XAT5>] (tracing the earliest police departments to the 1830s and finding that most major cities had police departments by the 1880s).

politics is local, the history of policing in the United States is heterodox, reflecting the social, racial, and economic conditions of the particular places where and the particular times when the forces formed. There are even competing historical accounts of what drove the federal government to organize a national police force, from the need to control interstate vice to the need to patrol the interstate.<sup>29</sup>

The development of state and local police forces is also not a uniform story, but rather hundreds of local stories, each with their own lesson. Nevertheless, there is a strikingly consistent feature of policing origin stories—they have little to do with crime. For example, throughout the South, the creation of organized police forces was a crucial part of states’ and society’s project of maintaining post-war White social and economic supremacy. After the Civil War, legislation in the form of “Black Codes” replaced enslavement as the legal construct that maintained Blacks in a subjugated status.<sup>30</sup> The Codes, with their broad and vague definitions of vagrancy, made emancipated people perpetually criminal, subject at any time to state control, detention, and management. Legal scholar Gary Stewart describes the structure of Mississippi’s Black Codes:

As the first state to pass and implement its set of Black Codes, Mississippi enacted legislation designed to keep black people in their rightful place—that is, on the plantation. One of the most controversial sections of Mississippi’s Black Code defined “vagrant[s]” as “runaways, drunkards, pilferers; lewd, wanton, or lascivious persons, *in speech or behavior*; those who neglect their employment, misspend their earnings, and fail to support their families; and ‘all other idle and disorderly persons.’” The statute also regulated white behavior that threatened the existing social order. Thus, a second group of vagrants included idle blacks and “white

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29. Compare JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* 134–35 (2014) (controlling interstate vice), with SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* 52–53 (2019) (patrolling the interstate).

30. See Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 *YALE L.J.* 2249, 2257–59 (1998); Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 *SOC. JUST.*, Spring 2001, at 156, 160; William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 *J.S. HIST.* 31, 33–34, 51 (1976); Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View*, in *PERSPECTIVES ON POLICING*, at 1, 6 (Nat’l Inst. for Just., No. 13, Jan. 1990). See generally SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 198–200 (2001).

persons associating with them ‘on terms of equality’ or guilty of sexual relations with them.” The Act also authorized local officials to impose a special poll tax on blacks aged eighteen to sixty, the proceeds of which would be collected for a “Freedman’s Pauper Fund.” Failure to pay this tax constituted “*prima facie* evidence of vagrancy.”<sup>31</sup>

These vagrancy laws were facially neutral—indeed, some lawmakers characterized them as intended to protect the emancipated—but when enforced by the newly formed Southern police, they were indistinguishable from the prewar slave patrol regime.<sup>32</sup> Historian Sally Hadden observes that after the Civil War, “policemen in Southern towns continued to carry out those aspects of urban slave patrolling that seemed race-neutral but that in reality were applied selectively. Police saw that nightly curfews and vagrancy laws kept blacks off city streets, just as patrollers had done in the colonial and antebellum eras.”<sup>33</sup>

Like slavery itself, the postslavery legal and law enforcement regime served the ends of both White racial supremacy and exploitative agrarian capitalism. Historian Larry Spruill recounts an 1865 column from the editor of the *Lynchburg Virginian* stating that “stringent police regulations may be necessary to keep [freedmen] from overburdening the towns and depleting the agricultural regions of labor.”<sup>34</sup> States required an organized enforcement apparatus to ensure that these newly developed and broadened vagrancy laws would fulfill their goal of recapturing Black physical labor and imposition of enslavement by another name. States organized police forces, which often simply reconstituted preexisting slave-patrol and slave-hunter groups. These early police departments enforced the Black Codes selectively at the behest of plantation owners. This selective—and brutal—policing was critical to maintaining the racial capitalist

31. Stewart, *supra* note 30, at 2260–61 (alteration in original) (footnotes omitted).

32. William Cohen remarks:

Broadly drawn vagrancy statutes enabled police to round up idle blacks in times of labor scarcity and also gave employers a coercive tool that might be used to keep workers on the job. Those jailed on charges of vagrancy or any other petty crime were then vulnerable to the operations of the criminal-surety system, which gave the offender an “opportunity” to sign a voluntary labor contract with his former employer or some other white who agreed to post bond.

Cohen, *supra* note 30, at 33–34.

33. HADDEN, *supra* note 30, at 219.

34. Larry H. Spruill, *Slave Patrols, “Packs of Negro Dogs” and Policing Black Communities*, 53 *PHYLON*, Summer 2016, at 42, 59.

order built on the backs of enslaved Black people. Historian William Cohen describes the operation in detail:

At harvest time cotton farms experienced an acute need for a large work force, and it was precisely at such times that the police became most active in discovering vagrants. In September 1901 a number of Mississippi towns rounded up “idlers and vagrants” and drove them “into the cotton fields where the farmers are crying for labor to pick the season’s crop.” . . . So common were such practices that the *Atlanta Constitution* could quip to the police: “Cotton is ripening. See that the ‘vags’ get busy.” Local officials at all levels endorsed such tactics, and in 1910 a Memphis police-court judge announced a new policy whereby blacks brought before him on vagrancy charges would be allowed “to go free provided they would accept jobs offered by farmers who have set up a cry over scarcity of ‘hands.’” Warmly endorsed by the mayor and police commissioner, this plan was accompanied by the announcement that the police would “renew their efforts to clear the city of all vagrants and loiterers.”<sup>35</sup>

In the North, societies and economies were not reliant on the unique institution of agrarian capitalism enabled by race-based enslavement. Nevertheless, organized policing’s origin story in Northern industrial communities runs parallel to the Southern Reconstruction story. Late nineteenth- and early twentieth-century Northern urban areas were characterized by rapid industrialization and large influxes of European immigrant groups. Just as Southern police forces maintained racial and economic inequality, Northern police forces coalesced to protect the interests of wealthy manufacturing barons and maintain White-American dominance over workers, often recent immigrants considered to be ethnic inferiors.<sup>36</sup>

The organization of policing in Buffalo, New York, at the turn of the century is described in detail by sociologists Sidney Harring and Lorraine McMullin in their 1975 article *The Buffalo Police*

35. See Cohen, *supra* note 30, at 34, 41–42, 47–50, 52.

36. See Matthew DeMichele, *Policing Protest Events: The Great Strike of 1877 and WTO Protests of 1999*, 33 AM. J. CRIM. JUST. 1, 5–6 (2008) (“The U.S. police institution, for the most part, emerged out of the 19th century Industrial Revolution as a politically dependent organization.”); FRANK DONNER, PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA 11–21 (1990) (recounting a similar dynamic in late-nineteenth-century Chicago). See generally SIDNEY L. HARRING, POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865–1915, at 32–34, 46 (Haymarket Books 2d ed. 2017) (1983).

1872–1900.<sup>37</sup> After the Civil War, Buffalo experienced rapid economic growth due to industrialization and population growth due to a wave of Polish migrants. The Polish immigrants made up the majority of unskilled workers, and they “were crowded into a small section of the East Side and scattered in other undesirable living areas along the waterfront, around factories and near stockyards where they lived with little income in generally deplorable conditions.”<sup>38</sup> During this time—from the first statute organizing an official police force in 1871 to 1900—the Buffalo Police Department also grew precipitously.<sup>39</sup> But, “[t]he growth of the Buffalo force had no direct relationship to either the growth of the population or to an increase in crime.”<sup>40</sup> The question becomes: What accounted for the creation and proliferation of organized policing in Buffalo?

Organized policing in Buffalo came into existence for a very specific purpose: to serve “the wealthiest business interests in Buffalo [who] exercised direct control over the police department.”<sup>41</sup> These business magnates regularly occupied the police infrastructure’s upper echelons, including mayor, police commissioner, and many of the superintendents. Haring and McMullin observe, “During the period under consideration virtually every major business interest in Buffalo was represented among the Police Commissioners at one time or another. . . . All major and many extremely minor decisions affecting the police were made by the two commissioners.”<sup>42</sup>

The police, however, did not just exercise control idiosyncratically in response to the business interests of the day. Their overarching role in Buffalo was clear and programmatic: they existed to quash “disorder,” namely, the disorder of immigrant laborers agitating for workers’ rights. Haring and McMullin explain:

In Buffalo (1872-1900) this “disorder” was based almost entirely on disputes between business owners and workers over wages and working conditions. Behind these disputes are political questions dealing with fundamental

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37. Sidney L. Haring & Lorraine M. McMullin, *The Buffalo Police 1872–1900: Labor Unrest, Political Power and the Creation of the Police Institution*, CRIME & SOC. JUST., Fall–Winter 1975, at 5, 7–8.

38. *Id.* at 5–6.

39. *Id.* at 7.

40. *Id.*

41. *Id.* at 10–11.

42. *Id.* at 8.

relationships of power and wealth, ownership and control. The problem of controlling the large dissatisfied working class became the major impetus to the development of the Buffalo police force during the years Buffalo was developing its industry.<sup>43</sup>

The “disorder” to which the Buffalo police responded with particular viciousness was primarily *not* violent strikes. Rather:

The normal procedure was a large police reaction at the first “reports” of possible strike. It was not unusual for the entire force to be ordered on duty at the moment the strike was declared and to remain on duty continuously until the strike ended—even if it was over a month and no violence occurred.<sup>44</sup>

Buffalo police used violence and the threat of violence to break strikes, break up workers’ meetings, and prevent working-class people from political assembly by “blocking entrances [to halls], and by arresting street-corner speakers.” Like Southern police’s enforcement of Black Codes, Northern police used “[o]ffenses such as disorderly conduct, vagrancy, tramp, drunkenness . . . to control any group of working class people.”<sup>45</sup>

Consequently, the historical antecedents of specific police departments may be heterodox and dependent on geographic and temporal conditions, but one thing is abundantly clear: the early development and proliferation of organized police forces was never about ordinary crime. It was always about the social, political, and economic priorities of an empowered group. Whether policing’s purpose was to impose *de facto* slavery on emancipated Blacks in the South, control immigrant laborers in the North, exclude Asian immigrants in the West, or enforce moral purity regimes nationally, it was decidedly not about responding to increases in garden-variety thefts, murders, burglaries, and the like.<sup>46</sup> In fact, in the South, police forces were clear that the epidemic of murders of Black people was simply not a police issue.<sup>47</sup> This history sounds in the present, according to criminologists Hubert Williams and Patrick Murphy:

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43. *Id.* at 10.

44. *Id.*

45. *Id.* at 11–12.

46. See *supra* notes 28–30, 36–45 and accompanying text; AYA GRUBER, THE FEMINIST WAR ON CRIME 28–32 (2020) (discussing prostitution policing and immigration on the West Coast in the latter 1800s).

47. See Onwuachi-Willig, *supra* note 10, at 1117–18, 1153–54 n.231.

The fact that the legal order not only countenanced but sustained slavery, segregation, and discrimination for most of our Nation's history—and the fact that the police were bound to uphold that order—set a pattern for police behavior and attitudes toward minority communities that has persisted until the present day. That pattern includes the idea that minorities have fewer civil rights, that the task of the police is to keep them under control, and that the police have little responsibility for protecting them from crime within their communities.<sup>48</sup>

Today, policing scholars like Tracey Meares acknowledge “the racialized origins of policing in America—from its roots in nineteenth-century slave patrols to its build-up during the early twentieth century as an immigrant-control brigade.”<sup>49</sup>

### *B. Policing Did Not Proliferate to Fight Crime*

As much as the creation of police departments had nothing to do with crime, their expansions were rarely direct reactions to crime spikes. The early Buffalo Police Department, for example, grew at a rate that outpaced population growth during a time of *declining* crime rates.<sup>50</sup> That police department growth, as noted above, was overtly political, racial, and economic, reflecting industrialists' desire to control the immigrant labor force and quash their burgeoning socialist ideals. There is a similar contemporary story in which state and local law enforcement's precipitous growth in the past several decades had more to do with political fortunes than spiking crime rates.

“Nationwide data on municipal expenditures and crime rates from 1990 to 2017” reveals that cities' crime rates “precipitously declined, while [their] expenditures on policing significantly increased.”<sup>51</sup> To be more specific, in 1990 there were on average “12 violent crimes per 1,000 people, and cities spent an average of \$182 (in today's dollars) per resident on the police.”<sup>52</sup>

48. Williams & Murphy, *supra* note 30, at 2.

49. Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), <http://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad> [https://perma.cc/4R26-Q64L].

50. Harring & McMullin, *supra* note 37, at 13.

51. Brenden Beck & Aya Gruber, *Facts About Defunding Police Departments*, N.Y. DAILY NEWS (June 15, 2020, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-facts-about-defunding-police-departments-20200615-fvqkukbngbb2bko3tev5fq52oe-story.html> [https://perma.cc/9NKB-PKLV].

52. *Id.*

Compare this to 2017, . . . [in which] [t]he violent crime rate had decreased by 56% to five crimes per 1,000, but the . . . police budget had increased by 59%, to \$292 per resident. Across the 1,088 largest municipalities in the U.S., that change amounted to an aggregate police budget increase of over \$17 billion per year. [In the same period], cities’ average allocation of funds to health care and public assistance increased by a modest 5–10%. Spending on housing and community development did not increase at all.<sup>53</sup>

As was the case with turn-of-the-century Buffalo, the increases in city police budgets from the 1990s to today reflect larger political, racial, and economic hierarchies. Many thoughtful scholars have offered insights into the influence of late twentieth-century American political and economic ideology on law enforcement policies. Each of those writings merits its own essay.<sup>54</sup> But for the purposes of this Commentary, I offer a nutshell version of this socio-legal history. In 1968, Richard Nixon, who was campaigning for president, embraced a strategy of centering law enforcement in his political platform. At that time, 81% of Harris poll respondents agreed that “Law and Order has broken down in this country,” a majority of whom blamed “Negroes” and “Communists.”<sup>55</sup> Nixon capitalized on social anxieties about scruffy hippies and hostile Blacks fomenting civil unrest and ran a campaign ad pledging to protect law-abiding citizens from such “domestic violence.”<sup>56</sup> He reportedly later remarked of the ad, “It’s all about those damn Negro-Puerto Rican groups out there.”<sup>57</sup> Nixon deftly employed the so-called “Southern Strategy,” developed during the 1964 Barry Goldwater presidential campaign, which used dog-whistle racist crime rhetoric to court Dixiecrats to the Republican Party.<sup>58</sup>

53. *Id.*; see also Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 761 (2020) (“In economically depressed cities where virtually all other services are defunded, police departments are often one of few entities that remain, usually in weakened form.”).

54. *E.g.*, JONATHAN SIMON, *GOVERNING THROUGH CRIME* 157, 164 (2007); DAVID GARLAND, *THE CULTURE OF CONTROL* 91–93 (2001); LOÏC WACQUANT, *PUNISHING THE POOR* 64–67 (George Steinmetz & Julia Adams eds., Duke Univ. Press 2009) (2004); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS* 20, 31 (2006).

55. Dennis D. Loo & Ruth-Ellen M. Grimes, *Polls, Politics, and Crime: The “Law and Order” Issue of the 1960s*, 5 W. CRIMINOLOGY REV. 50, 59–60 (2004).

56. Scott Laderman, *How Richard Nixon Captured White Rage—and Laid the Groundwork for Donald Trump*, WASH. POST (Nov. 3, 2019, 5:00 AM), <https://www.washingtonpost.com/outlook/2019/11/03/how-richard-nixon-captured-white-rage-laid-groundwork-donald-trump/> [https://perma.cc/GSG6-E54J].

57. *Id.*

58. ANGIE MAXWELL & TODD SHIELDS, *THE LONG SOUTHERN STRATEGY* 37 (2019).

President Ronald Reagan picked up on this strategy in the '80s and notably also used the crime issue to sell his radical deregulatory and anti-welfare economic program, often shorthanded by scholars as “neoliberalism.” Reagan vowed to—and did—gut government aid programs, deregulate banks and the market, cut taxes, and end labor and trade protections.<sup>59</sup> As President Obama remarked in 2008, “Ronald Reagan changed the trajectory of America . . . .”<sup>60</sup> Since the “Reagan Revolution,” the wealth gap has widened into a chasm.<sup>61</sup> According to economists, between 1980 and 2014, “eight points of national income transferred from the bottom 50% to the top 1%. The top 1% income share is now [in 2014] almost twice as large as the bottom 50% share, a group that is by definition 50 times more numerous.”<sup>62</sup> This reverse-Robin Hood program has endured. On October 30, 2020, Bloomberg News reported that during President Trump’s term, billionaires’ accumulated wealth increased by thirty percent, amounting to an “increase[] [in] their combined wealth by a staggering \$1 trillion.”<sup>63</sup>

Reagan and his allies’ ideology was tailor-made for the one percent, but they were able to sell it to the other ninety-nine by portraying the poor as responsible for their plights and recasting the problems of poverty as products of criminality. Reagan drew a

59. See MICHAEL MEEROPOL, SURRENDER: HOW THE CLINTON ADMINISTRATION COMPLETED THE REAGAN REVOLUTION 3, 84–85 (2000); MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM 18, 22 (2017); Spencer Rich, *Reagan Welfare Cuts Found to Worsen Families’ Poverty*, WASH. POST (July 29, 1984), <https://www.washingtonpost.com/archive/politics/1984/07/29/reagan-welfare-cuts-found-to-worsen-families-poverty/077278f9-a875-4791-9c34-d1cf3cd148b5/> [https://perma.cc/8YR C-MPL8]; STAFF OF JOINT ECON. COMM., 106TH CONG., PRESIDENT REAGAN’S ECONOMIC LEGACY: THE GREAT EXPANSION 26–29 (2000), [https://www.jec.senate.gov/public/\\_cache/files/62cfde42-3fbc-4b6e-b308-c78dd32515e6/president-reagan-s-economic-legacy-great-expansion-oct-2000.pdf](https://www.jec.senate.gov/public/_cache/files/62cfde42-3fbc-4b6e-b308-c78dd32515e6/president-reagan-s-economic-legacy-great-expansion-oct-2000.pdf) [https://perma.cc/UL96-TA7B] (primarily authored by Senator Connie Mack).

60. *In Their Own Words: Obama on Reagan*, N.Y. TIMES: THE CAUCUS, <https://archive.nytimes.com/www.nytimes.com/ref/us/politics/21seelye-text.html?module=inline> [https://perma.cc/4LJ6-GTED] (last visited Apr. 21, 2019); Robert Farley, *Obama Not a Reagan Democrat*, POLITIFACT (Jan. 21, 2008), <https://www.politifact.com/factchecks/2008/jan/21/billclinton/obama-not-a-reagan-democrat/> [https://perma.cc/C5V2-U4WH].

61. Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States*, PATHWAYS, Winter 2008, at 6, 7, 7 fig.1, [https://inequality.stanford.edu/sites/default/files/winter\\_2008.pdf](https://inequality.stanford.edu/sites/default/files/winter_2008.pdf) [https://perma.cc/MN27-KZQD].

62. Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q.J. ECON. 553, 557 (2018).

63. Ben Steverman, *U.S. Billionaires Got \$1 Trillion Richer During Trump’s Term*, BLOOMBERG (Oct. 30, 2020, 8:58 AM), [https://www.bloomberg.com/news/articles/2020-10-30/u-s-billionaires-got-1-trillion-richer-in-trump-s-first-term?utm\\_source=url\\_link](https://www.bloomberg.com/news/articles/2020-10-30/u-s-billionaires-got-1-trillion-richer-in-trump-s-first-term?utm_source=url_link) [https://perma.cc/T3HF-YY82].

straight line from liberals’ social welfare ideology to the pressing crime problem:

Individual wrongdoing, they told us, was always caused by a lack of material goods, and underprivileged background, or poor socioeconomic conditions. And somehow . . . it was society, not the individual, that was at fault when an act of violence or a crime was committed. Somehow, it wasn’t the wrongdoer but all of us who were to blame. Is it any wonder, then, that a new privileged class emerged in America, a class of repeat offenders and career criminals who thought they had the right to victimize their fellow citizens with impunity[?]<sup>64</sup>

The rhetorical move is brilliant in its simplicity. It reverses the moral order, transforming the “underprivileged” into a “privileged class,” transforming society’s victims into “victimizers.” Following the Southern Strategy, Reagan utilized racialized crime narratives to displace the image of the deserving poor with the image of the poor Black criminal.<sup>65</sup> This narrative set the stage for a total transformation of government intervention, replacing the safety net with a metal cage.

With pro-prison, pro-policing politics so firmly entrenched in the American psyche, in the late twentieth century politicians on both sides of the aisle competed for the mantle of tough-on-crime by proposing to expand police departments and prison capacity. During the 1988 presidential race, George H.W. Bush ran the infamous race-baiting Willie Horton ad,<sup>66</sup> hammering Michael Dukakis for furloughing (temporarily releasing) the convicted felon, who then raped a White woman. The ad featured a mugshot of Horton—a “very scary looking, disheveled, wild-eyed black man,” one expert observed—with the message, “Weekend prison passes—Dukakis on crime.”<sup>67</sup> In the wake of Dukakis’s electoral decimation, Democratic Senators Joe Biden and Chuck Schumer

64. President Ronald Reagan, Remarks at the Annual Conference of the National Sheriff’s Association in Hartford, Connecticut (June 20, 1984), in RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, <https://www.reaganlibrary.gov/archives/speech/remarks-annual-conference-national-sheriffs-association-hartford-connecticut> [https://perma.cc/FNG2-4KNW] (last visited Mar. 31, 2021).

65. See Dylan Tureff, *Securing White Votes by Incarcerating Black Bodies*, GEO. PUB. POL’Y REV. (2020), <http://www.gpprspring.com/securing-white-votes-by-incarcerating-black-bodies-tureff> [https://perma.cc/QF67-FUQ8].

66. Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 537–38 (1996).

67. T.J. Raphael, *How One Political Ad Held Back a Generation of American Inmates*, WORLD (May 18, 2015, 2:45 PM), <https://www.pri.org/stories/2015-05-18/what-willie-horton-wrought> [https://perma.cc/GAA4-R9TW].

feared the “Hortonizing” of the entire Democratic Party.<sup>68</sup> They masterminded the “Biden-Schumer strategy,” as an insider called it,<sup>69</sup> to court moderate voters by making Democrats the party of law enforcement in an era of racialized hysteria over crack. Biden had previously authored the Anti-Drug Abuse Act of 1986, which established the infamous 100:1 crack-powder cocaine sentencing disparity.<sup>70</sup>

Biden introduced the initial version of the now-infamous “1994 Crime Bill” in 1991 and boasted that Republicans would no longer be able to “demagogue crime.”<sup>71</sup> “By 1992, polls showed that the public had gone from viewing Democrats as relatively weak on crime to [seeing] the parties as virtually even.”<sup>72</sup> Bill Clinton made the Crime Bill a priority of his campaign and a signature achievement of his first term. Signing the law, Clinton reminded folks that it was necessary because “[g]angs and drugs have taken over our streets and undermined our schools.”<sup>73</sup> Biden touted the new law’s ability to change the face of the Democratic party: “The liberal wing of the Democratic Party is now for 60 new death penalties. . . . The liberal wing of the Democratic Party is for 100,000 cops. The liberal wing of the Democratic Party is for 125,000 new State prison cells.”<sup>74</sup>

Similar dynamics of carceral politics and ideology played out in states and localities. Public fears about leftist ideologies, integration, and urban Black spaces made crime control a political

68. Chernoff et al., *supra* note 66, at 538.

69. *Id.* at 538–40.

70. See *Federal Cocaine Sentencing Laws: Reforming the 100:1 Crack Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Sen. Joseph R. Biden, Chairman, S. Comm. on the Judiciary), [https://www.judiciary.senate.gov/imo/media/doc/biden\\_statement\\_02\\_12\\_08.pdf](https://www.judiciary.senate.gov/imo/media/doc/biden_statement_02_12_08.pdf) [<https://perma.cc/J864-MP35>].

71. Guy Gugliotta, *Crime Bill a Hostage of Politics*, WASH. POST (Aug. 5, 1992), <https://www.washingtonpost.com/archive/politics/1992/08/05/crime-bill-a-hostage-of-politics/e3ecbbdb-8259-4cc7-a407-deee5038bbd0/> [<https://perma.cc/8UMS-592G>]; German Lopez, *The Controversial 1994 Crime Law that Joe Biden Helped Write, Explained*, VOX (Sept. 29, 2020, 10:45 AM), <https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration> [<https://perma.cc/84TU-ZS6W>].

72. GRUBER, *supra* note 46, at 147; see Jill Lawrence, *Both Sides Talking Tough on Crime, Looking for Law-and-Order Votes*, ASSOCIATED PRESS, Oct. 13, 1992, LEXIS; David Peterson, *Differences on Crime Barely Register; Bush, GOP Avoid Pulling a ‘Willie Horton’ on Clinton*, STAR TRIB., Oct. 30, 1992, at 5VS, LEXIS.

73. President William J. Clinton, Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994 (Sept. 13, 1994), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 1539–40 (1995).

74. Violent Crime Control and Law Enforcement Act of 1994, 140 CONG. REC. S12,421 (1994) (Conf. Rep.) (LEXIS) (statement of Sen. Joseph R. Biden).

ace to politicians of all stripes.<sup>75</sup> The salience of crime grew in force throughout the '80s and '90s, aided by opportunistic politicians and the burgeoning twenty-four-hour-news industry.<sup>76</sup> Today, there is a wealth of historical and sociological literature describing the rise of the late twentieth-century penal state and the scholarly consensus that crime-control trends were driven by “pathological politics.”<sup>77</sup> Still, many commentators mechanically repeat the conventional narrative that policing and prosecution expanded and became harsher in the 1980s and 1990s in reaction to a precipitous spike in crime.<sup>78</sup> Although there is some empirical support for increased crime during that time, such was not the main driver of the penological changes.<sup>79</sup>

The crime fears that hastened Nixon’s victory did not relate to a rash of robberies and assaults but to fears over rioting hippies and undifferentiated minority “Negro-Puerto Rican[s].”<sup>80</sup> And to the extent that people did fear “crime” in the '80s and '90s, conservative and liberal political rhetoric had already established the “crime problem” as an urban Black problem.<sup>81</sup> Whether by “[l]iberal racial pity” or “conservative racial contempt,” as political scientist Naomi Murakawa put it, crime was synonymized with Black “pathology,” making it impossible to neatly sever crime fears from the older racial segregationist programs that drove initial policing investments.<sup>82</sup> Images of “blighted” Black neighborhoods have regularly made media rounds for decades. To this day, Americans, when polled, consistently express that crime is

75. Loo & Grimes, *supra* note 55, at 60; *see also infra* text accompanying note 131 (discussing salience of “the ghetto”).

76. *See* Elayne Rapping, *Television, Melodrama, and the Rise of the Victims’ Rights Movement*, 43 N.Y. L. SCH. L. REV. 665, 669, 680 (1999); Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 419–23 (2006).

77. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 526 (2001); RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 169 (2019).

78. Scott Boggess & John Bound, *Did Criminal Activity Increase During the 1980s? Comparisons Across Data Sources*, 78 SOC. SCI. Q. 725, 732, 737 (1997) (noting that there is a “widely held belief that there was a significant increase in the level of [serious] criminal activity during the 1980s,” particularly among the urban underclass).

79. *See* Stuntz, *supra* note 77, at 524–57.

80. *See* Laderman, *supra* note 56.

81. MURAKAWA, *supra* note 5, at 15.

82. *Id.*; ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 75–79* (2016); *see also, e.g., id.* at 57–61 (discussing the infamous “Moynihan Report” that argued crime is linked to Black “pathology”); OFF. OF POL’Y PLAN. & RSCH., U.S. DEP’T OF LAB., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 38–44 (1965).

perpetually increasing, a “pressing problem,” and “out of control.”<sup>83</sup>

Still, most people—including progressive scholars—simply accept the widely touted contention that tough-on-crime governance in the ’80s and ’90s was a clear response to out-of-control crime plaguing the entire nation.<sup>84</sup> However, the empirical evidence does not show that the crime-control agenda was a reactionary phenomenon based on clear law enforcement need. When Clinton signed the 1994 Crime Bill, crime rates were already in decline.<sup>85</sup> Analyzing data on police employment and crime rates from 1991 to 2000, researchers William McCarty, Ling Ren, and Solomon Zhao concluded that “increases in police strength during the 1990s [had] little to do with changes in all measures of the crime rate after controlling for other demographic factors.”<sup>86</sup>

In the 1980s, there was an uptick in select violent crimes in urban areas related to the crack cocaine trade.<sup>87</sup> The media and politicians focused relentlessly on the “crack epidemic,” stirring up fears of “Black crime.”<sup>88</sup> The images of crack-driven Black criminality played into the politics that drove policing’s expansion everywhere, despite the fact that crack-associated crime did not affect the vast majority of American communities.<sup>89</sup> Examining crime data between 1979 and 1992, demographers Scott Boggess and John Bound conclude that “[t]he statistics do not support the notion that there [was] any *overall* rise in the level of criminal activity.”<sup>90</sup>

83. See Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717, 724–25 (2001); Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 CRIME & DELINQ. 419, 425 (1999); Maggie Koerth & Amelia Thomson-DeVeaux, *Many Americans Are Convinced Crime Is Rising in the U.S. They’re Wrong.*, FIVETHIRTYEIGHT (Aug. 3, 2020, 6:00 AM), <https://fivethirtyeight.com/features/many-americans-are-convinced-crime-is-rising-in-the-u-s-theyre-wrong/> [<https://perma.cc/LQG7-SNPF>].

84. See, e.g., JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 156 (2017).

85. OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUST., *WHAT CAUSED THE CRIME DECLINE?* 15–16, 16 fig.2 (2015), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_What\\_Caused\\_The\\_Crime\\_Decline.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_What_Caused_The_Crime_Decline.pdf) [<https://perma.cc/87ZF-KQVQ>] (observing that crimes peaked in 1991).

86. William P. McCarty et al., *Determinants of Police Strength in Large U.S. Cities During the 1990s: A Fixed-Effects Panel Analysis*, 58 CRIME & DELINQ. 397, 414 (2012).

87. Boggess & Bound, *supra* note 78, at 725, 736–37.

88. MURAKAWA, *supra* note 5, at 121–25.

89. See Craig Reinerman & Harry G. Levine, *Crack in the Rearview Mirror: Deconstructing Drug War Mythology*, 31 SOC. JUST. 182, 184–88 (2004).

90. Boggess & Bound, *supra* note 78, at 726 (emphasis added).

C. *Policing Does Not Fight Crime*

Finally, the police-as-crime-fighter narrative fares poorly from an empirical efficacy standpoint. Today, there are decades worth of criminological research and hundreds of thousands of pages written on whether police activity actually reduces and prevents crime. Much of this scholarship comes from economists who generally view crime and enforcement in purely financial terms and concentrate on the question of whether a dollar spent on policing prevents a dollar worth of crime in some fixed point in time.<sup>91</sup> Now, some scholars critique the purely economic approach as unduly narrow. It tends to omit the financial costs that arrest, police violence, and criminal prosecution impose on individuals and communities.<sup>92</sup> Moreover, economic analysis does not look at social costs, happiness indexes, the differential meaning of a dollar to different people, and the like. Nor does it consider more inchoate costs, like the healthcare price of the morbid stress suffered by those who experience racialized police violence or the lost productivity of communities whose potential young workforce is trapped in a repeat cycle of arrest, incarceration, and collateral consequences. In short, the police efficiency calculus virtually ignores the long-term costs that systematic state violence imposes on Black Americans.<sup>93</sup>

Nevertheless, even within such narrow parameters that look only at the dollar-based efficiency of police at reducing crime, “[t]here is a consensus [among experts] that the standard model of policing, which focuses on random preventive patrols and rapid response time, does not significantly reduce crime or even fear of crime,” as economists Justin McCrary and Deepak Premkumar note.<sup>94</sup> Researchers have also determined that “proactive policing,” which includes strict enforcement of “quality-of-life” offenses, street sweeps, and stop-and-frisks, does not reduce, and in fact

91. See, e.g., Justin McCrary & Deepak Premkumar, *Why We Need Police*, in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 65–66 (Tamara Rice Lave & Eric J. Miller eds., 2019) (“[W]e discuss how one could estimate how much crime could be reduced if additional funds were directed to hire more law enforcement officers . . .”).

92. Charles F. Manski & Daniel S. Nagin, *Assessing Benefits, Costs, and Disparate Racial Impacts of Confrontational Proactive Policing*, 114 PROC. NAT’L ACAD. SCI. U.S. 9308, 9309–10 (2017), <https://www.pnas.org/content/114/35/9308.short> [<https://perma.cc/4E6Q-7BGK>].

93. See Onwuachi-Willig, *supra* note 10, at 1179 (suggesting that there are other problems with such empirical research, including that it analyzes “crime” reduction without interrogating what should and shouldn’t be a crime and often relies on inaccurate police self-reporting, i.e., bad information goes in, so bad information comes out).

94. McCrary & Premkumar, *supra* note 91, at 79.

may increase, crime.<sup>95</sup> Now, regarding hot-spot policing—a policing where resources are invested in targeted areas—McCrary and Premkumar conclude that the studies show the technique tends to reduce crime.<sup>96</sup> Still, they acknowledge that such a reduction may be due to people avoiding the targeted areas or due to arrestees being temporarily incapacitated.<sup>97</sup> And given that targeted policing entrenches segregation, it may have an overall criminogenic effect. Researchers, for example, find that “racial residential segregation is strongly associated with the Black-White racial disparity in overall rates of firearm homicide at the state level.”<sup>98</sup>

Regardless of the state of contemporary research on the return on investment of hot-spot policing, the important point is that after 150 years in which organized policing has been a daily fact of American life, we still cannot proclaim with any reasonable certainty that policing *actually* fights crime.<sup>99</sup> Consider, for example, the 2014 study by criminologists Gary Kleck and J.C. Barnes, *Do More Police Lead to More Crime Deterrence?*<sup>100</sup> The authors noted at the outset that the “[r]esearch concerning the deterrent effect of police activity on crime is decidedly mixed” and that “no prior research has directly tested whether police strength levels actually affect prospective offenders’ perceptions of arrest risks.”<sup>101</sup> So, they set out to measure the deterrent effect of increased police presence by examining “individual-level perceptions of arrest likelihood.”<sup>102</sup> The researchers discovered

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95. *Id.* at 75 (“Overall, our reading of this literature is that there is a substantial lack of evidence in favor of proactive policing having any substantial effect on crime.”); *see also* 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, 285–86, 285 n.53 (2006); Richard Rosenfeld et al., *The Impact of Order-Maintenance Policing on New York City Homicide and Robbery Rates: 1988-2001*, 45 CRIMINOLOGY 355, 357–58 (2007).

96. McCrary & Premkumar, *supra* note 91, at 69–71.

97. *Id.*

98. Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069, 1086 (2020) (emphasis omitted); *see also* Aldina Mesic et al., *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. NAT’L MED. ASS’N 106, 113 (2018).

99. *See* David Weisburd, *Does Hot Spots Policing Inevitably Lead to Unfair and Abusive Police Practices, or Can We Maximize Both Fairness and Effectiveness in the New Proactive Policing?*, 2016 U. CHI. LEGAL F. 661, 667 (“Studies of policing in [the 1980s] provided a very strong narrative regarding the inability of the police to prevent crime.”).

100. Gary Kleck & J.C. Barnes, *Do More Police Lead to More Crime Deterrence?*, 60 CRIME & DELINQ. 716 (2014).

101. *Id.* at 720.

102. *Id.* at 721.

that “police manpower levels have no effect on perceptions of the risk of arrest, and thus do not influence the amount of general deterrent effects on crime.”<sup>103</sup> And in typical empirical researcher style, their conclusion that policing is not efficient was all about fiscal efficiency:

In light of these findings, policy makers may want to reconsider whether increases in police manpower bring sufficient crime reduction benefits to justify their costs. Conversely, in times of fiscal crisis, it is worth considering the possibility that cuts in police strength may be implemented without causing crime increases. Even in times of fiscal plenty, it may be worth thinking about alternative investments that are more likely to reduce crime.<sup>104</sup>

Indeed, policing studies typically assess efficacy and efficiency by comparing a given policing program to a world without that program *and* without alternative crime reduction efforts. The studies, like the conventional narrative, presume that policing and not policing are the sole crime interdiction options. This presumption is despite the fact that organized policing was not borne of the need to reduce crime, and that its relationship to crime rates is tenuous at best. And even with this all-or-nothing focus, the studies still do not demonstrate with clarity that policing programs are efficacious or efficient. Policing scholar David Bailey put it bluntly:

The police do not prevent crime. This is one of the best kept secrets of modern life. Experts know it, the police know it, but the public does not know it. Yet the police pretend that they are society’s best defense against crime and continually argue that if they are given more resources, especially personnel, they will be able to protect communities against crime. This is a myth.<sup>105</sup>

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103. *Id.* at 732. The researchers hypothesized that people’s perceptions that their neighborhood had high crime rates—a perception that could correlate with more police—could make people feel like the chances of getting caught were low. *Id.* at 724. In addition, they found that having been arrested did not cause an increase in fear of arrest, perhaps because of the “gamblers fallacy” where people who are arrested once feel less likely to be arrested again. *Id.* at 729. The researchers rejected that increased police presence reduced crime through incapacitation because of the state of prisons as always full all the time. *Id.* at 730–31. They thus offered some hypotheses for why other studies had (wrongly) correlated police presence and crime rates. *Id.* at 732.

104. *Id.* at 735–36.

105. DAVID H. BAYLEY, POLICE FOR THE FUTURE 3 (1994).

## III. THE PURPOSE OF POLICING

Policing has never really been about crime. And yet, well-meaning scholars and reformers have expended enormous amounts of intellectual and political capital on trying to “fix” the institution so that it can *finally* fulfill its community crime-fighting function in a fair manner. This persistent emphasis on improving police techniques, which legitimizes and strengthens the policing institution, is largely a legacy of *liberal* politics and sensibilities. According to Naomi Murakawa, Democrats during the 1960s spearheaded the police “professionalization” agenda, which involved an opaque set of imperatives to make the police more objective: reliance on data, hierarchical structure, and resistance to outside political or social influence.<sup>106</sup> Liberal politicians undertook this project precisely to dislodge “the ‘deep-seated belief amongst our Negro citizens that equal law enforcement in police practices does not exist anywhere in our land,’” as one Democratic senator remarked.<sup>107</sup> The professionalization movement intended to, and was largely successful in, the entrenchment of the police-as-crime-fighter narrative, with the result that today most people see the bad effects of policing as failures—unintended and intermittent breakdowns to be worked on.<sup>108</sup>

Despite the general scholarly fixation with fixing the police’s crime-fighting failures, several critical scholars have instead focused on understanding policing’s success in shaping social, political, and economic arrangements. Michel Foucault famously observes in *Discipline and Punish*, “For the observation that prison fails to eliminate crime, one should perhaps substitute the hypothesis that prison has succeeded extremely well . . . in producing the delinquent as a pathologized subject.”<sup>109</sup> He goes on, “So successful has the prison been that, after a century and a half of ‘failures’, the prison still exists, producing the same results, and there is the greatest reluctance to dispense with it.”<sup>110</sup> Similarly,

106. MURAKAWA, *supra* note 5, at 47; see also David Alan Sklansky, *The Persistent Pull of Police Professionalism*, NEW PERSPS. POLICING, Mar. 2011, at 1, 6 (“The core ideal of the professional model—the police as crime control experts, leveraging managerial sophistication and advanced technology to enforce the law objectively, aggressively and apolitically—is in some ways more appealing today than it used to be.”).

107. MURAKAWA, *supra* note 5, at 16 (quoting Senator Joseph Tydings).

108. See Sklansky, *supra* note 106, at 11.

109. MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 277 (2d Vintage Books ed. 1995).

110. *Id.*

we might see the police as wildly successful at fulfilling their role of maintaining hierarchy and state control, from defending racial capitalism to maintaining class dominance and social order in times of class conflict and scarcity.<sup>111</sup> Robinson and Scaglion contend, “The police institution is created by the emerging dominant class as an instrument for the preservation of its control over restricted access to basic resources, over the political apparatus governing this access, and over the labor force necessary to provide the surplus upon which the dominant class lives.”<sup>112</sup>

In recent years, as Black Lives Matter activists and other criminal justice reformers spotlighted the perils of policing, an increasing number of scholarly commentators pushed back on the notion that racist police brutality is simply crime-fighting run amok.<sup>113</sup> Author Alex Vitale wrote in 2017, “The reality is that the police exist primarily as a system for managing and even producing inequality by suppressing social movements and tightly managing the behaviors of poor and nonwhite people: those on the losing end of economic and political arrangements.”<sup>114</sup> Law Professor Paul Butler recently responded to the contention that the law enforcement machine is simply in need of a tune-up with this blunt assessment: “Don’t get it twisted – the criminal justice system ain’t broke. It’s working just the way it’s supposed to.”<sup>115</sup> Those horrified by the recent spate of high-profile police brutality cases could gain invaluable insights by analyzing racist violence not from the point of view of failure but of success.

#### A. *Bluelining as Police Success*

From its very inception, the institution of American policing has succeeded extremely well at controlling race, space, and place.<sup>116</sup> Police, in tandem with organized private neighborhood watches, have served as the border patrols of middle-class neighborhoods, reflecting and reinforcing the mythology of the

111. See *supra* text accompanying notes 34–35 (discussing the role of policing and racial capitalism); AHMED WHITE, *THE LAST GREAT STRIKE: LITTLE STEEL, THE CIO, AND THE STRUGGLE FOR LABOR RIGHTS IN NEW DEAL AMERICA* 130–37 (2016) (describing the Chicago Police Department’s violent response to the Little Steel Strike in May 1937); WACQUANT, *supra* note 54, at 4–5.

112. Robinson & Scaglion, *supra* note 25, at 114 (citation omitted).

113. See, e.g., VITALE, *supra* note 25, at 34.

114. *Id.*

115. Paul Butler (@LawProfButler), TWITTER (Jan. 4, 2018, 7:51 PM), <https://twitter.com/lawprofbutler/status/949095933224120322> [<https://perma.cc/6TWS-C3E3>].

116. See Bass, *supra* note 30, at 159.

suburbs being “invaded” by minorities.<sup>117</sup> Critical race theorist Keith Aoki explains the role of geography in maintaining hierarchy, “Space defines political boundaries as well as private property—constructing, ratifying and reproducing community and individual identities as well as pre-existing distributive inequities—and then, importantly, making those outcomes seem ‘natural.’ Wall Street thrives and South Central Los Angeles seethes—that’s just the way things are.”<sup>118</sup>

Indeed, President Trump emphasized the need to protect the suburbs from minorities, tweeting in August 2020, “The ‘suburban housewife’ will be voting for me[] [because] [t]hey want safety [and] are thrilled that I ended the long running program where low income housing would invade their neighborhood.”<sup>119</sup> His entreaties late in the presidential campaign for “suburban women” to “please like me” because he “saved your damn neighborhood” were relentless and depressingly comical.<sup>120</sup> Trump’s rhetoric follows what philosopher Olúfémi Táíwò calls the “basic social-structural characteristics of those who spread the capitalist economic system: a tendency to organise populations into clusters, to separate those clusters into vertical hierarchies, and to legitimate this stratification via racist thought and practice.”<sup>121</sup>

Dean Onwuachi-Willig has focused on George Zimmerman’s murder acquittal as an exemplar of state and social toleration for the violent maintenance of spatial and social segregation.<sup>122</sup> The killing of innocent teen Trayvon Martin was the culmination of Zimmerman’s years-long quest to stave off spatial diversification by privately patrolling his neighborhood and regularly calling the police to prevent its penetration by Black “outsiders.”<sup>123</sup> In *Policing the Boundaries of Whiteness*, Onwuachi-Willig illustrates through

117. See Onwuachi-Willig, *supra* note 10, at 1174.

118. Keith Aoki, *Space Invaders: Critical Geography, the “Third World” in International Law and Critical Race Theory*, 45 VILL. L. REV. 913, 923 (2000).

119. Reuters Staff, *Trump: ‘Suburban’ Americans Don’t Want Low-Income Housing Foisted on Them*, REUTERS (Aug. 18, 2020), <https://www.reuters.com/article/us-usa-election-trump-suberbs/trump-suburban-americans-dont-want-low-income-housing-foisted-on-the-m-idUSKCN25E1X4> [<https://perma.cc/H8R3-FWK5>].

120. Shane Goldmacher, *Trump Again Tramples on His Own Message, as Biden Courts Older Voters in Florida*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/10/14/us/elections/trump-again-tramples-on-his-own-message-as-biden-courts-older-voters-in-florida.html> [<https://perma.cc/2FMZ-7LFL>].

121. Olúfémi O. Táíwò, *Who Gets to Feel Secure?*, AEON (Oct. 30, 2020), <https://aeon.co/essays/on-liberty-security-and-our-system-of-racial-capitalism> [<https://perma.cc/6T5S-J7H4>].

122. Onwuachi-Willig, *supra* note 10, at 1156–57.

123. *Id.* at 1172–74.

a deep historical examination of Zimmerman’s Sanford, Florida, neighborhood that geography and racial hierarchy are inextricably linked.<sup>124</sup> She writes:

[R]esidents were working to preserve the whiteness of the Retreat at Twin Lakes or at least what they perceived as a “white space.” . . . For some of the residents of the Retreat at Twin Lakes like Zimmerman and Taaffe, they viewed the neighborhood as a white space—meaning a space that is economically more privileged and socially desirable because it is occupied primarily by Whites—and they saw any Blacks whom they did not know as intruders. As a consequence, the narrative they developed for the downturn in their neighborhood centered around race and the sense that their “white” neighborhood was being besieged by black males, despite the fact that only 2 out of 44 incidents were confirmed to involve Blacks or, more specifically, black males—for a total of three Blacks. More so, the Retreat’s neighborhood watch residents, particularly Zimmerman, acted on this racialized view of the neighborhood by repeatedly making calls to 911 whenever they encountered persons they did not know who were black, but not doing the same with Whites who were unknown to them.<sup>125</sup>

This neighborhood border patrolling was aided and abetted by the Sanford police, who likewise adopted a false race-based view of crime in the neighborhood.<sup>126</sup> Onwuachi-Willig explains:

Indeed, the racial meaning of the Retreat at Twin Lakes was also seemingly adopted by the police officers who arrived on the scene to investigate the killing of Martin. Viewing Martin much like Zimmerman did before and after he followed the boy—as an outsider, not a guest or resident in the neighborhood—the officers did not knock on any doors in the neighborhood to see if Martin might be living in or visiting someone in the gated community. In fact, they left Martin at the morgue as a “John Doe” overnight until his parents called the police in a frantic search for their son.<sup>127</sup>

Police are essential to maintaining White, nonpoor citizens’ dominion not just over middle-class neighborhoods but also over *shared* spaces. Officers relentlessly patrol commercial areas and communal spaces like parks and plazas to ensure that the “wrong” people stay in their highly demarcated and tightly controlled

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124. *Id.* at 1168–85.

125. *Id.* at 1181–82.

126. *Id.* at 1182.

127. *Id.*

areas. The police's geographical domination on behalf of the privileged comes under the guise of preventing the "disorder" that is offensive to the "community."<sup>128</sup> The word "community" is prevalent in public order discourses, implying that the police are merely passively following some neutral and natural consensus about who does and does not belong in shared spaces over which, in theory, no one person or group has a veto. The result, as critical geographer Marie-Eve Sylvestre observes, is that "public spaces have been reorganized and reordered in the context of disorder policing so as to create new barriers and signs of exclusion that reduce the range of possible sensations, social practices, and interactions."<sup>129</sup>

Police draw blue lines around Black neighborhoods—just as banks drew their red lines—designating them as high-risk areas and stigmatizing them as degraded, pathological spaces.<sup>130</sup> Police refer to these hyper-surveilled, tightly controlled, excluded neighborhoods as "high crime areas." To be sure, the image of the high-crime Black "ghetto" has been particularly salient in American political culture and has played a significant role in Americans' support for the massive police control of minority communities and inalterable belief that crime is always on the rise.<sup>131</sup> The "high crime neighborhood" language once again deceptively suggests that the police's program of spatial confinement and control over minority neighborhoods is really about crime interdiction.

However, decades-worth of studies have shown that "high crime neighborhood" is merely a proxy for poor minority neighborhood. The designation has more to do with the racial make-up of the area than the number of crimes committed there. A 2019 study by researchers Ben Grunwald and Jeffrey Fagan, the latest in a long-line of research, concludes, "[Officers'] assessments of high-crime areas are only weakly correlated with actual crime rates. The suspect's race predicts whether an officer deems an area

128. See *infra* text accompanying notes 134–137.

129. Marie-Eve Sylvestre, *Disorder and Public Spaces in Montreal: Repression (and Resistance) Through Law, Politics, and Police Discretion*, 31 URB. GEOGRAPHY 803, 820 (2010).

130. Murakawa and others also trace the narrative of the pathological Black "ghetto" to liberal politics and policies. See MURAKAWA, *supra* note 5, at 24; HINTON, *supra* note 82, at 127.

131. See John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1237 (1995) ("[T]he racial ghetto is a paradigm site of racial projects. It is where we connect what race means discursively and racially organize both social structures and everyday experience.").

high crime . . . .”<sup>132</sup> Moreover, researchers find that “one of the strongest predictors of police strength” is “the percentage of Black population” in an area.<sup>133</sup> A study of police deployment in the 1990s confirmed that “[an] increase in 1% of Black population [was] associated with an increase in 5.54 police officers per 100,000 residents.”<sup>134</sup>

Police have set forth other rationales for bluelining Black neighborhoods. The infamous “broken-window theory” postulates that cleaning up the streets of the appearance of lawlessness by arresting those who commit minor offenses, such as graffiti artists, loiterers, and sex workers, efficiently reduces major crimes.<sup>135</sup> In 1982, criminologist George Kelling and social scientist James Q. Wilson wrote an influential popular press article in the *Atlantic* magazine, *Broken Windows*.<sup>136</sup> In it, they argue that arresting “disreputable or obstreperous or unpredictable people” like “panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, [and] the mentally disturbed” creates a virtuous law-abiding community mentality and deters would-be felons from committing serious crimes.<sup>137</sup> “Broken-window theory” champions the very vagrancy policing that proved so critical to maintaining de facto enslavement in the Reconstruction-era South and to managing the economic casualties of the industrializing North.<sup>138</sup>

The theory purports to be about the interdiction of serious crimes, although the social science has shown that quality-of-policing does not reduce serious crime and may exacerbate the structural conditions underlying criminal activity.<sup>139</sup> However, from the beginning, broken-windows policing advocates have not characterized sweeping up people whose only offense is being young, poor, or unhoused as an unfortunate *cost* of preventing “real” crime.<sup>140</sup> Instead, they have emphasized that managing

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132. Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 396 (2019). Race also predicts whether nonpolice people see a neighborhood as “high crime.” See Quillian & Pager, *supra* note 83, at 719.

133. McCarty et al., *supra* note 86, at 412.

134. *Id.* at 410.

135. 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/BV53-R74Q].

136. *Id.*

137. *See id.*

138. *See supra* notes 30–31, 45 and accompanying text.

139. *See supra* notes 94–95 and accompanying text.

140. *See* Kelling & Wilson, *supra* note 135.

these “obstreperous” people is a crucial end in itself.<sup>141</sup> Big-city police chiefs like William Bratton, New York City Mayor Rudy Giuliani’s first police commissioner, strongly embraced and quickly enacted broken-windows policing.<sup>142</sup> He explains that he supported the policing method because of his personal experience as an officer in Boston, where “prostitution and graffiti” were big problems in inner cities.<sup>143</sup> For him, street sweeping is itself an exercise in fighting “crimes committed against the community.”<sup>144</sup> At the same time, broken-window theory’s emphasis on *visible* disorder has given the police a scientifically sanitized justification for their long-standing program of demarcating poor, urban neighborhoods for uniquely aggressive street policing.

The bluelining of Black neighborhoods establishes within cities archipelagos of diminished citizenship, where police use aggressive stop-and-frisks, intense surveillance, and military-style home raids to keep the people in their spatial *and* social place. “You cannot truly be free when the police are able to set upon you at will, for no particular reason at all,” scholar Keeanga-Yamahtta Taylor laments, “[i]t is a constant reminder of the space between freedom and ‘unfreedom,’ where the contested citizenship of African Americans is held.”<sup>145</sup> While claiming to be the “thin blue line” between social order and crime run amok, police were always the thick blue line between elites and the marginalized.

Recently, New York Congresswoman Alexandria Ocasio-Cortez, a staunch critic of police violence, considered the question of what “an America with defunded police look[s] like.” She answered simply, “It looks like a suburb.”<sup>146</sup> To be sure, one residing in a “low crime” suburb is unlikely to recall witnessing a heavily armed militarized “jump-out squad,” clad in flak jackets and ski masks, alight a serial-killer-style white van and slam a bunch of youths against a wall. But many in targeted

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141. *See id.*

142. Bruce Weber, *James Q. Wilson Dies at 80; Originated ‘Broken Windows’ Policing Strategy*, N.Y. TIMES (Mar. 2, 2012), <http://www.nytimes.com/2012/03/03/nyregion/james-q-wilson-dies-at-80-originated-broken-windows-policing-strategy.html> [https://perma.cc/URQ7-XANM].

143. *Id.*

144. *Id.*

145. KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 108 (2016).

146. Hannah Bleau, *Alexandria Ocasio-Cortez: Defund the Police ‘Looks like a Suburb,’* BREITBART (June 12, 2020), <https://www.breitbart.com/politics/2020/06/12/alexandria-ocasio-cortez-defund-police-looks-suburb/> [https://perma.cc/ZL5N-H8VV].

neighborhoods would nod with a sad familiarity.<sup>147</sup> Angela Harris observes:

[P]olice brutality is not random. It follows the vectors of power established in the larger society in which white dominates nonwhite and rich dominates poor. Police often, and not without justification, understand their charge as the protection of “nice” neighborhoods and “decent” people against those perceived to be a threat. In practice, this often means that male power and state power converge on the black and Latino “underclass.”<sup>148</sup>

Courts have consistently upheld the differential treatment of those in “high crime neighborhoods,” thereby inscribing into the law racial segregation and inequality. Many are familiar with the seminal case *Terry v. Ohio*. That case, decided amid the political and demographic upheavals of 1968, authorizes police to stop, question, and search individuals without probable cause.<sup>149</sup> The Supreme Court declared that to stop and investigate an individual, police need only reasonable articulable suspicion that crime may be “afoot.”<sup>150</sup> If they have that level of information, detention and frisk does not offend the Fourth Amendment’s prohibition of unreasonable search and seizure.<sup>151</sup> The Court’s creation of such a nebulous and low bar prompted Justice Douglas to lament, “There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.”<sup>152</sup>

Although *Terry* technically allows the police to engage in “stop and frisks” anywhere, courts have made clear that police have far more leeway to detain people in bluelined neighborhoods. In the 2000 case *Illinois v. Wardlow*, the Court held that a person’s mere presence in a “high-crime area” constitutes half of the reasonable articulable suspicion that justified a stop.<sup>153</sup> The other half of the

147. See Jason Cherkis, *Rough Justice*, WASH. CITY PAPER (Jan. 7, 2000), <https://washingtoncitypaper.com/article/269885/rough-justice/> [<https://perma.cc/YKB7-38PG>].

148. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 797 (2000); see also Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 149–50, 163–64 (2017).

149. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

150. *Id.* at 30.

151. *Id.* at 30–31.

152. *Id.* at 39 (Douglas, J., dissenting).

153. *Illinois v. Wardlow*, 528 U.S. 119, 124–26 (2000).

equation is flight from police.<sup>154</sup> The Court was unmoved by Justice Stevens's dissenting point that "[a]mong some citizens, particularly minorities and those residing in high crime areas . . . the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous."<sup>155</sup> In Justice Stevens's view, the very fact of a high-crime neighborhood negates the inference that flight indicates criminality.<sup>156</sup> Alas, the Court presumed, without evidence, both that police's designation of a neighborhood as "high crime" means that each one of its inhabitants is relatively suspicious and that flight invariably confirms such suspicion. Through doctrinal machinations and formalistic rhetorical flourishes, the Court operatively *defined* arbitrary police interference into the lives of people in bluelined minority neighborhoods as constitutionally permissible crime interdiction.

In 2012, the Center for Constitutional Rights obtained class certification in its suit, *Floyd v. City of New York*, which challenged the constitutionality of the NYPD's longstanding stop-and-frisk program. The program peaked in 2011 with nearly 700,000 stops.<sup>157</sup> While *Terry* rendered the bulk of stop and frisks legal because of its low bar for suspicion, the *Floyd* plaintiffs argued that the Department and City had tolerated widespread violations of even *Terry*'s minimal standard and had disproportionately targeted minorities in violation of the Fourteenth Amendment's guarantee of equal protection.<sup>158</sup> The plaintiffs presented statistics that of the 4.4 million stops between 2004 and 2012, over 80% were of Black and Latinx people while 10% were of Whites (all were mostly of men).<sup>159</sup> For reference, New York's population in 2010 was 52% Black and Latinx and 33% White.<sup>160</sup> Hundreds of the stops clearly lacked reasonable articulable suspicion, and thousands of them were based on vague and meaningless, but ostensibly constitutional, criteria like the

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154. *Id.* at 125.

155. *Id.* at 132 (Stevens, J., dissenting).

156. *Id.* at 139.

157. *Floyd, et al. v. City of New York, et al.*, CTR. FOR CONST. RTS. <https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al> [<https://perma.cc/YSU7-XYCE>] (last visited Feb. 3, 2021); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557–58, 572 n.100 (S.D.N.Y. 2013).

158. *Floyd*, 959 F. Supp. 2d. at 556.

159. *Id.* at 556, 559, 561.

160. *Id.* at 559.

person made a “furtive movement[]” or had a “[s]uspicious [b]ulge.”<sup>161</sup>

Unsurprisingly, the police department insisted that these dignity-harming and often violent encounters were necessary tools of crime interdiction.<sup>162</sup> Unsurprisingly, the data revealed that the program was in fact wildly ineffective at interdicting crime. Fewer than three percent of the stops resulted in the discovery of weapons or contraband.<sup>163</sup> The hit-rate numbers were even smaller for minorities stopped by police.<sup>164</sup> The police and city also justified the stark racial disparities as a part of the crime-fighting mission. According to them, the disparate racial impact of the stop-and-frisk program was merely a result of the department’s embrace of data-driven policing methodologies.<sup>165</sup> Police chiefs, they argued, deployed officers to “high crime” areas with statistically higher arrest rates.<sup>166</sup> They just also happened to be ones with high concentrations of Black and Latinx people.<sup>167</sup>

The city’s argument does not, of course, explain why the police also disproportionately targeted minorities in non-“high crime” neighborhoods. Nor can it overcome the racist-arrest-information-in/racist-arrest-information-out problem or prove that the overwhelmingly *innocent* Black people in a targeted neighborhood were each statistically more crime-prone than the average person.<sup>168</sup> “Why would the people stopped by the NYPD, both criminal and law-abiding, so closely resemble the criminal population—or, more precisely, the NYPD’s understanding of the criminal population, based on its limited suspect data?” District Court Judge Scheindlin queried. “A simple explanation exists,” she

161. *Id.*

162. *Id.* at 575.

163. *Id.* at 559.

164. *Id.*

165. *Id.* at 585, 591.

166. *Id.* at 585, 591 n.3.

167. *Id.* at 560.

168. The court observed,

Because the overwhelming majority of people stopped fell into the latter category, there is no support for the City’s position that crime suspect data provides a reliable proxy for the pool of people exhibiting suspicious behavior. Moreover, given my finding that a significant number of stops were not based on reasonable suspicion—and thus were stops drawn from the pool of non[ ]criminals not exhibiting suspicious behavior—the use of crime suspect data as a benchmark for the pool of people that would have been stopped in the absence of racial bias is even less appropriate.

*Id.* at 586 (emphasis omitted); see also Harris, *supra* note 148, at 797 (police disproportionately deploy to and use disparately aggressive tactics in Black neighborhoods).

ventured, “the racial composition of the people stopped by the NYPD resembles what the NYPD perceives to be the racial composition of the criminal population *because that is why they were stopped.*”<sup>169</sup>

Indeed, during the course of litigation, a smoking gun piece of evidence revealed that racialized social control, not individual crime interdiction, *was* the point of the program. State Senator Eric Adams testified that during a 2010 discussion of the stop-and-frisk program with New York City Police Commissioner Raymond Kelly, Adams expressed concerns about the program’s racial disparities.<sup>170</sup> “Kelly responded that he focused on young Blacks and Hispanics ‘because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police.’”<sup>171</sup> The senator was “amazed” that Kelly was “comfortable enough to say that.”<sup>172</sup>

Judge Scheindlin issued a landmark ruling that the NYPD, through the stop-and-frisk program, for years had been violating New Yorkers’ rights to be free from unlawful search and seizure and unlawful racial discrimination.<sup>173</sup> Then-Mayor Michael Bloomberg and the NYPD were furious, and they fought tooth and nail against the judgment.<sup>174</sup> Bloomberg had always been forthright about how he saw the NYPD. “I have my own army in the NYPD,” he told a crowd in 2011, “which is the seventh biggest army in the world.”<sup>175</sup> In a dramatic turn of events, the Second Circuit Court of Appeals issued a *sua sponte* order staying the decision, remanding the case, and disqualifying Judge Scheindlin.<sup>176</sup> According to the court, the proceedings were tainted by Judge Scheindlin’s bias against the police.<sup>177</sup>

What was the evidence of this bias? First, Judge Scheindlin had requested the case and had indicated in her prior rulings her

169. *Floyd*, 959 F. Supp. 2d. at 588.

170. *Id.* at 606.

171. *Id.* (quoting Transcript of Record at 1589, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 1034(SAS))).

172. *Id.*

173. *Id.* at 658–60, 664–67.

174. Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <https://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> [<https://perma.cc/XC6R-M2V6>].

175. Hunter Walker, *Mayor Bloomberg: ‘I Have My Own Army,’* OBSERVER (Nov. 30, 2011, 10:06 AM), <https://observer.com/2011/11/mayor-bloomberg-i-have-my-own-army-11-30-11/> [<https://perma.cc/4YFH-6TPV>].

176. *Ligon v. City of New York*, 736 F.3d 118, 123, 129 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

177. *Id.* at 127–29.

belief that the stop-and-frisk program was ripe for a class-action challenge.<sup>178</sup> But this was hardly out of the ordinary. The Southern District of New York had a long-standing “related case” rule where judges were assigned cases similar to ones they had in the past.<sup>179</sup> Second, Judge Scheindlin’s detractors argued, and the Second Circuit agreed, that her statements to the press were inappropriate.<sup>180</sup> She did speak to the press, in the face of reporters’ requests for her to respond to Kelly and Bloomberg’s relentless public attacks on her objectivity.<sup>181</sup> Here is her “offending” statement in the *New Yorker*: “Too many judges, especially because so many of our judges come out of [the U.S. Attorney’s Office for the Southern District], become government judges . . . I’m independent. I believe in the Constitution. I believe in the Bill of Rights. These issues come up, and I take them quite seriously. I’m not afraid to rule against the government.”<sup>182</sup>

Millions of stop and frisks and unnecessary arrests happen on the streets of bluelined neighborhoods, and they nearly all proceed with the full blessings of law.<sup>183</sup> The *Floyd* litigation was exceptional, involving years of empirical research, newspaper exposés on NYPD culture, and scores of impact litigators. And still, the legal system ultimately did not have the capacity to recognize the NYPD’s clearly discriminatory program as anything other than ordinary crime interdiction. For plaintiffs to prevail on a discrimination claim against an officer, they have to show that the individual officer was an intentional racist who targeted the plaintiff because of race.<sup>184</sup> Otherwise, the street policing that disproportionately burdens, wounds, and even kills tens of thousands of Black men every year is, in the eyes of the law, just neutral crime fighting. It is business as usual.

178. *See id.* at 124–25.

179. *See* Joseph Goldstein, *A Court Rule Directs Cases over Friskings to One Judge*, N.Y. TIMES (May 5, 2013), <https://www.nytimes.com/2013/05/06/nyregion/a-court-rule-directs-cases-over-friskings-to-one-judge.html> [<https://perma.cc/UE8V-U3L3>].

180. *Ligon*, 736 F.3d at 126–27.

181. Benjamin Weiser, *Departing Judge Offers Blunt Defense of Ruling in Stop-and-Frisk Case*, N.Y. TIMES (May 2, 2016), <https://www.nytimes.com/2016/05/02/nyregion/departing-judge-offers-blunt-defense-of-ruling-that-ended-stop-and-frisk.html> [<https://perma.cc/7VUX-VLDR>].

182. Jeffrey Toobin, *Rights and Wrongs: A Judge Takes On Stop-and-Frisk*, NEW YORKER (May 20, 2013), <https://www.newyorker.com/magazine/2013/05/27/rights-and-wrongs-2> [<https://perma.cc/X92U-EYEB>].

183. *See supra* notes 157–64 and accompanying text.

184. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 570 (S.D.N.Y. 2013).

*B. Brutality Is Business as Usual*

Brutality is a critical part of the business of policing. It is sanctioned and sanitized by law as a necessary component of the police fulfilling their crime-control function. Interfacing with people in “high crime areas” is dangerous business, the logic goes, and the police must have the means to protect themselves. Police must be armed with deadly weapons and have the “reasonable” ability to use them and violent tactics like chokeholds to prevent risks to themselves as they bring people to heel. Given this, discriminatory police brutality is not a function of implicitly or explicitly racist cops. It is simply the police, well, policing within bluelined neighborhoods.<sup>185</sup> Researcher Michael Siegel analyzed the data on police killings and found that the police’s disproportionate use of deadly force on Black people is not “primarily a function of individual-level factors, such as implicit bias against Black individuals or the racial composition of the police force.”<sup>186</sup> Instead, it is “primarily a function of: (1) the degree of historical structural racism in that location and (2) the degree to which Black people living in that location are segregated into neighborhoods with concentrated disadvantage.”<sup>187</sup>

The law encourages brutality in these policed spaces by conferring on officers near absolute power to physically dominate the individuals—Black or White—they encounter on the street. The law makes clear that officers have no obligation to countenance resistance. So ingrained in the law is this principle of police domination that many courts, when examining whether an officer killed in self-defense, refuse to consider whether the officer unfairly detained the individual in the first place, wrongfully escalated the situation, or provoked the force. Instead, courts consider only whether the officer acted reasonably (had reasonable fear) in the “split-second” moment when he pulled the trigger.<sup>188</sup>

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185. This also means that brutality is also the business of policing White detainees. Although there is some evidence that police use injurious force more often on Black detainees, see, for example, *id.* at 559, White detainees are also subject to degradation and brutality.

186. Siegel, *supra* note 98, at 1087.

187. *Id.*

188. *E.g.*, *Plakas v. Drinski*, 19 F.3d 1143, 1146–48, 1150 (7th Cir. 1994); *Dickerson v. McClellan*, 101 F.3d 1151, 1161–62 (6th Cir. 1996); *Drewitt v. Pratt*, 999 F.2d 774, 778–80 (4th Cir. 1993) (rejecting a claim that an officer who resorts to deadly force in self-defense nevertheless violates the Fourth Amendment if he unreasonably provokes the shooting by failing properly to identify himself as a police officer); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (refusing to consider “the events leading to the seizure, for reasonableness

Such was the argument advanced by Cuyahoga County prosecutor Timothy McGinty to convince a grand jury not to indict Timothy Loehmann, the officer who killed Tamir Rice.<sup>189</sup> The killing occurred after Loehmann’s partner drove off the road, onto the grass, and right up to the park pavilion where the baby-faced, twelve-year-old Black tween was playing with a toy gun. Within seconds of the squad car pulling up, and without any conversation, investigation, or pause, Loehmann shot out the passenger side, extinguishing Tamir’s life.<sup>190</sup> District Attorney McGinty, breaking the case up into split-second intervals, successfully argued that the sole moment that mattered out of the entire series of outrageous police actions leading to the child’s death was when the officer fired the fatal shot.<sup>191</sup> At that moment, McGinty asserted, Loehmann could have believed that Tamir was about to point a real gun at him.<sup>192</sup> Thus, regardless of the overall absurdity of the police’s actions, in that one moment, the officer may have felt threatened, so the killing was “reasonable.”<sup>193</sup>

This longstanding legal sanitization of brutality can be traced, in part, to events that occurred on a November day in 1984 when Dethorne Graham, a diabetic, experienced a sudden insulin reaction. Graham rushed into a convenience store to get an orange juice. Finding the line too long, he rushed back out of the store and into his friend William Berry’s car to go to a nearby friend’s house.<sup>194</sup> Charlotte, North Carolina police officer M.S. Connor was

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under the Fourth Amendment”); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (focusing on the moment the officers make the “split-second judgments” and not on the events leading up to the to a shooting); *Sherrod v. Berry*, 856 F.2d 802, 805–06 (7th Cir. 1988) (en banc) (looking at the split second before the officer made a decision).

189. TIMOTHY J. MCGINTY ET AL., OFF. OF THE PROSECUTING ATT’Y, CUYAHOGA COUNTY PROSECUTOR’S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE 1, 35, 60, 70 (2015), [http://prosecutor.cuyahogacounty.us/pdf\\_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf](http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf) [https://perma.cc/Y27L-K6CC] [hereinafter FINAL REPORT]; see also Dan Turkel, *Tamir Rice’s Family Accuses Prosecutor of ‘Manipulating’ Grand Jury to Get Cops Out of Indictment for 12-Year-Old’s Death*, INSIDER (Dec. 28, 2016, 6:10 PM), <https://www.businessinsider.com/ohio-prosecutor-tamir-rice-said-to-be-trying-to-lose-2015-12> [https://perma.cc/F93E-ENUD].

190. Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html> [https://perma.cc/SMD5-HT55]; see also Safia Samee Ali, *Tamir Rice Shooting: Newly Released Interview Reveals Cop’s Shifting Story*, NBC NEWS (Apr. 26, 2017, 3:45 PM), <https://www.nbcnews.com/news/us-news/newly-released-interview-footage-reveal-shifting-stories-officers-who-shot-n751401> [https://perma.cc/2KVN-VFG6].

191. See FINAL REPORT, *supra* note 189, at 41–56.

192. *Id.* at 66–68.

193. *Id.* at 66.

194. *Graham v. Connor*, 490 U.S. 386, 388–89 (1989).

watching and regarded Graham's quick departure from the store as "suspicious." He followed Berry's car and then initiated a *Terry* stop.<sup>195</sup> After being pulled over, Berry explained to Connor that Graham was having a diabetic reaction and asked the officer to get the sick man some sugar.<sup>196</sup>

Connor was unmoved by Berry's exhortations. He ordered the two to wait while he contacted the store to investigate and called for backup.<sup>197</sup> Graham ran out of the car and passed out on the sidewalk. When backup arrived, Berry pleaded to Connor and the other officers to help Graham and give him sugar. They ignored Berry, instead taking Graham's hands and cuffing them tightly, as the sick man lay prone on the ground.<sup>198</sup> One officer remarked, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the motherfucker but drunk. Lock the son of a bitch up."<sup>199</sup> Graham mustered the energy to tell the officers to check for the diabetic seal in his wallet. The police responded by yelling "shut up," shoving Graham's face against the car hood, and throwing him head-first into the squad car.<sup>200</sup>

Graham sustained severe injuries and sued the police department. The case went to a jury trial, where the judge directed a verdict for the police, ruling that no reasonable juror could find that the police used unconstitutional excessive force.<sup>201</sup> According to the judge, a finding of excessive force required the jury to conclude that the police acted "maliciously and sadistically," which, in the judge's mind, no rational jury could.<sup>202</sup> Eventually, the Supreme Court reversed that ruling on the ground that an officer's subjective maliciousness is not the test for excessive force.<sup>203</sup> However, the Court's objective reasonableness standard is hardly more protective and left plenty of room for continued police brutality.<sup>204</sup> The Court opined, "The 'reasonableness' of a particular use of force must be judged from the perspective of a

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195. *Id.* at 389.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* The language from the case reads, "Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up." Because this abbreviation is reflective of the Court and litigators' evaluation of linguistic propriety over accuracy, I have chosen to spell out the epithets in full to accurately capture the contempt the officer had for Graham.

200. *Id.*

201. *Id.* at 390–91.

202. *Id.*

203. *Id.* at 397.

204. *Id.* at 396.

reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>205</sup> It went on to say that the officer must be allowed “to make split-second judgments . . . about the amount of force that is necessary in a particular situation” and “[a]n officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force.”<sup>206</sup> The Court remanded the case, and it went back to trial. The jury found for the police, concluding that the gratuitously violent and degrading actions of Connor and his compatriots were, in the end, objectively reasonable.<sup>207</sup>

In *Graham v. Connor*, as in *Terry*, racialized suspicion was perfectly compatible with constitutional reasonableness. The *Graham* Court did not bother to question Connor’s belief that Graham’s hasty departure from a store was suspicious enough to merit following Berry’s car and engaging in a prolonged investigative stop. One may not be surprised that Dethorne Graham was Black, a detail distinctly omitted from the Supreme Court’s recitation of the facts.<sup>208</sup> In the end, the Court mandated strong deference to *all* police “judgments.” This apparently includes the judgment that Black men leaving stores quickly must be thieves *and* the judgment that vulnerable, dying men pleading for their lives are really just lying “motherfuckers.” What is the point of crying, “I can’t breathe” eleven times, as Eric Garner did,<sup>209</sup> or twenty times, as George Floyd did,<sup>210</sup> if the law says that

205. *Id.*

206. *Id.* at 397.

207. Charles Lane, Opinion, *A 1989 Supreme Court Ruling Is Unintentionally Providing Cover for Police Brutality*, WASH. POST (June 8, 2020, 5:57 PM), [https://www.washingtonpost.com/opinions/a-1989-supreme-court-ruling-is-unintentionally-providing-cover-for-police-brutality/2020/06/08/91cc7b0c-a9a7-11ea-94d2-d7bc43b26bf9\\_story.html](https://www.washingtonpost.com/opinions/a-1989-supreme-court-ruling-is-unintentionally-providing-cover-for-police-brutality/2020/06/08/91cc7b0c-a9a7-11ea-94d2-d7bc43b26bf9_story.html) [https://perma.cc/5BWH-WZZR].

208. *Id.*; see also Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465, 1496–97 (2018) (arguing that the Court’s omission was a deliberate move to ensure that excessive force analysis took place under the Fourth Amendment standard, which made it a matter of individual actions, rather than Fourteenth Amendment equal protection, which could have permitted a broader assessment of police practices).

209. Ashley Southall, *‘I Can’t Breathe’: 5 Years After Eric Garner’s Death, an Officer Faces Trial*, N.Y. TIMES (May 12, 2019), <https://www.nytimes.com/2019/05/12/nyregion/eric-garner-death-daniel-pantaleo-chokehold.html> [https://perma.cc/WK3L-XEQJ]; MATT TAIBBI, *I CAN’T BREATHE: A KILLING ON BAY STREET 120* (2017).

210. Maanvi Singh, *George Floyd Told Officers ‘I Can’t Breathe’ More than 20 Times, Transcripts Show*, GUARDIAN (July 9, 2020, 12:34 PM), <https://www.theguardian.com/us-news/2020/jul/08/george-floyd-police-killing-transcript-i-cant-breathe> [https://perma.cc/4KLG-9KCY].

reasonable officers can ignore the cries as the ramblings of deceptive, intoxicated, or crazy “sons of bitches”?

In recent months, we have witnessed appalling cases where individuals’ heart-wrenching pleas fell on cops’ deaf ears. George Floyd cried out to his mother, and Elijah McClain begged:

I can’t breathe. I have my ID right here. My name is Elijah McClain. That’s my house. I was just going home. I’m an introvert. I’m just different. That’s all. I’m so sorry. I have no gun. I don’t do that stuff. I don’t do any fighting. Why are you attacking me? I don’t even kill flies! I don’t eat meat! But I don’t judge people, I don’t judge people who do eat meat. Forgive me. All I was trying to do was become better. I will do it. I will do anything. Sacrifice my identity, I’ll do it. You all are phenomenal. You are beautiful and I love you. Try to forgive me. I’m a mood Gemini. I’m sorry. I’m so sorry. Ow, that really hurt. You are all very strong. Teamwork makes the dream work. Oh, I’m sorry I wasn’t trying to do that. I just can’t breathe correctly.<sup>211</sup>

Aurora, Colorado, police stopped and ultimately killed McClain, a gentle, cat-loving, violin-playing, twenty-three-year-old Black man, simply because a passing driver thought McClain’s manner of dress and walking was suspicious.<sup>212</sup> Through the din of the police pinning, reprimanding, and threatening to set dogs on him, a terrified, vomiting McClain tried to explain: “I was just going home. . . . I’m just different. . . . I have no gun. I don’t do that stuff. . . . I don’t even kill flies! I don’t even eat meat!”<sup>213</sup> Elijah McClain experienced this *Terry* stop and his last breath on August 24, 2019.<sup>214</sup>

Three days later, an officer from that same Aurora, Colorado, department, Levi Huffine, arrested Shataeah Kelly for a municipal violation (a minor misdemeanor) stemming from a fight.<sup>215</sup> Kelly yelled and cursed at the officer while he took her into custody, so Huffine decided to hog tie the twenty-eight-year-

211. Dan Evon, *Are These Elijah McClain’s Last Words on Police Video?*, SNOPE (June 26, 2020), <https://www.snopes.com/fact-check/elijah-mcclains-last-words/> [<https://perma.cc/2ETB-HGBD>].

212. Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [<https://perma.cc/JCB2-RSD4>].

213. Evon, *supra* note 211.

214. *Id.*

215. *Fired Aurora Police Officer Levi Huffine Appeals Termination After Hobbling Woman*, CBS DENVER (Nov. 11, 2020, 5:09 PM), <https://denver.cbslocal.com/2020/11/11/levi-huffine-fired-shataeah-kelly-aurora-police-officer-lawsuit-hobbling/> [<https://perma.cc/FW7T-QTU5>].

old woman, tethering her feet and hands together behind her back. Kelly ended up face down the floor with her feet toward the roof in the backseat of the cruiser.<sup>216</sup> The weight of her body pressed on her head and neck. “Officer please, I can’t breathe,” Kelly cried. “I don’t want to die like this. I’m about to break my neck.”<sup>217</sup> Huffine ignored her cries and left her in that deadly position for twenty-one minutes. Experts say Kelly is lucky to be alive.<sup>218</sup> As the ride proceeded, Kelly became increasingly panicked, pleading, “My neck is killing me dude. Help me, I can’t breathe.” Finally, in desperation, the Black woman implored of the White police officer, “I beg you master.”<sup>219</sup>

Incidents like these are frequently characterized as outrageous violations of the law, but the law of *Graham* and its progeny tell another story. These incidents are violations of moral conscience, but they are aided and abetted by law. Officers detaining Black people for innocuous behavior *is* reasonable seizure. Officers violently restraining detainees *is* reasonable force. Officers disbelieving and ignoring detainees’ cries to dial back the restraint *is* reasonable judgment in the field. As Butler counsels, “The problem is not illegal police misconduct; the problem is legal police conduct.”<sup>220</sup>

We also might be tempted to believe that, regardless of whether these brutality incidents are legal, they are not standard practice but the rogue actions of particularly “malicious and sadistic” individuals.<sup>221</sup> Such a presumption underlies claims that police violence will be remedied when departments adopt early warning systems and share bad-cop registries. The abusive language used in *Graham* might seem to confirm the idea that police violence is gratuitous and gleeful. Moreover, police brutality may seem deviant because killings—statistic outliers—receive all the publicity.<sup>222</sup>

216. *Id.*

217. *Id.*

218. Brian Maass, ‘Please Don’t Let Me Die Back Here’; Aurora Police Video Released of Woman Cuffed, Hobbled in Back of Patrol Car, CBS DENVER (Sept. 29, 2020, 11:58 PM), <https://denver.cbslocal.com/2020/09/29/shataean-kelly-levi-huffine-aurora-police-video-released-woman-struggling-back-patrol-car/> [https://perma.cc/NX5F-K74L].

219. Brian Maass, *Aurora Officer Fired Over Video Speaks: ‘I Told Her to Shut Up,’* CBS DENVER (Oct. 1, 2020, 12:01 AM), <https://denver.cbslocal.com/2020/10/01/levi-huffine-aurora-police/> [https://perma.cc/93VY-CENR].

220. Paul Butler, Keynote Speaker, *Police in America: Ensuring Accountability and Mitigating Racial Bias*, 11 NW. J.L. & SOC. POL’Y 385, 386 (2017).

221. See *Graham v. Connor*, 490 U.S. 386, 397 (1989).

222. See Sarah DeGue et al., *Deaths Due To Use of Lethal Force by Law Enforcement*, 51 AM. J. PREVENTIVE MED. S173, S175, S182 (2016).

But look more carefully at the chokehold videos. They are horrific and tragic, sad and revolting, but not because the officers are in a frenzied orgy of gratuitous violence. These cases are so horrifying because the victims are crying out, vomiting, begging, and dying. But the officers themselves are just steadily and resolutely using their department-approved carotid holds and restraint techniques and casually directing onlookers away. This brutality is banal. It is routine. It is standard practice when people do not softly submit. It is “split-second judgment[] . . . about the amount of force that is necessary.”<sup>223</sup> Accordingly, Professor Devon Carbado argues that we should not “think of police killings of African Americans as aberrant and extraordinary, failing to see their connections to the routine, to the everyday, and to the ordinary.”<sup>224</sup>

From the roving police gangs of old, the police have always trafficked in brutality. And while professionalization reduced some of the more gratuitous, messy, and disorganized violence, it also formalized violence as a best practice. Police training, now highly official and bureaucratized, ingrains in cadets the notion that people in bluelined neighborhoods—the ones officers are directed to constantly interface with—are invariably lethal and wily killers in disguise. They are walking bundles of deadly risk. The training says that it is kill-or-be-killed out there, which explains why many “police involved” shootings are perpetrated by anxiety-ridden rookies terrified that victims’ innocuous behavior is really a deadly threat. Former officer and policing expert Seth Stoughton writes that training instills a “warrior worldview, [in which] officers are locked in intermittent and unpredictable combat with unknown but highly lethal enemies.”<sup>225</sup> The Aurora officers who accosted Elijah McClain described the 140-pound, wouldn’t-hurt-a-fly, vegetarian as preternaturally strong and perhaps hopped up on drugs—a description that encouraged paramedics to administer a deadly dose of ketamine, enough for a 190-pound person.<sup>226</sup>

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223. *Graham*, 490 U.S. at 397.

224. Carbado, *supra* note 148, at 128.

225. Stoughton, *supra* note 19, at 227; *see also* Seth W. Stoughton, U. S.C. SCH. L., [http://sc.edu/study/colleges\\_schools/law/faculty\\_and\\_staff/directory/stoughton\\_seth.php](http://sc.edu/study/colleges_schools/law/faculty_and_staff/directory/stoughton_seth.php) [<https://perma.cc/NW5T-7Z36>] (last visited Mar. 10, 2021).

226. *See* Tompkins, *supra* note 212; *see, e.g.*, Anna Starostinetskaya, *Police Killing of 23-Year-Old Vegetarian Elijah McClain Goes National amid Black Lives Matter Protests*, VEGNEWS (June 24, 2020), <https://vegnews.com/2020/6/police-killing-of-23-year-old-vegetarian-elijah-mcclain-goes-national-amid-black-lives-matter-protests> [<https://perma.cc/5ULH->

To be sure, many endorse the popular idea that police are in the riskiest business, and this idea is constantly reaffirmed to officers in their training. Stoughton observes:

From their earliest days in the academy, would-be officers are told that their prime objective, the proverbial “first rule of law enforcement,” is to go home at the end of every shift. But they are taught that they live in an intensely hostile world. A world that is, quite literally, gunning for them. As early as the first day of the police academy, the dangers officers face are depicted in graphic and heart-wrenching recordings that capture a fallen officer’s last moments.<sup>227</sup>

In reality, an officer’s risk of being killed by a suspect is not high. In 2019, “[forty-eight] officers died [in the line of duty] as a result of felonious acts.” Compare that to the 999 people police shot and killed.<sup>228</sup> Police are approximately twenty-one times more likely to kill a person than be killed.<sup>229</sup> As of September, “on-the-job coronavirus infections” killed more police officers in 2020 than shootings, “car accidents, and all other causes combined.”<sup>230</sup> The risk of on-the-job fatality for police officers is lower than that for fishers, loggers, pilots, roofers, garbage collectors, steel workers, drivers, farmers, and landscapers.<sup>231</sup>

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5WLU]; Erik Ortiz, *Elijah McClain Was Injected with Ketamine While Handcuffed. Some Experts Worry About Its Use During Police Calls*, NBC NEWS (July 3, 2020, 7:20 PM), <https://www.nbcnews.com/news/us-news/elijah-mcclain-was-injected-ketamine-while-handcuffed-some-medical-experts-n1232697> [https://perma.cc/2VZT-58PA]; Karen Gardner, *Opinion, Columnist Karen Gardner: The Justice They Are Due*, DAILY HAMPSHIRE GAZETTE (July 8, 2020, 8:05 AM), <https://www.gazettenet.com/Columnist-Karen-Gardner-35110647> [https://perma.cc/GXP6-YQNX].

227. Stoughton, *supra* note 19, at 226–27 (footnotes omitted).

228. *FBI Releases 2019 Statistics on Law Enforcement Officers Killed in the Line of Duty*, FBI NAT’L PRESS OFF. (May 4, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-statistics-on-law-enforcement-officers-killed-in-the-line-of-duty> [https://perma.cc/359L-BGAY]; Julie Tate et al., *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/> [https://perma.cc/RV8E-36KA] (last updated Aug. 10, 2020).

229. Madeline Heim, *Yes, Police Were 20.8 More Likely to Kill than Be Killed by a Criminal in 2019*, POLITIFACT (Aug. 27, 2020), <https://www.politifact.com/factchecks/2020/aug/27/chris-larson/yes-police-were-208-more-likely-kill-be-killed-cri/> [https://perma.cc/Y7AZ-8JTS].

230. Christopher Ingraham, *Covid-19 Has Killed More Police Officers This Year than All Other Causes Combined, Data Shows*, WASH. POST (Sept. 2, 2020, 12:29 PM), <https://www.washingtonpost.com/business/2020/09/02/coronavirus-deaths-police-officers-2020/> [https://perma.cc/CN5G-FJ3C].

231. Andy Kiersz & Madison Hoff, *The 34 Deadliest Jobs in America*, BUS. INSIDER (June 3, 2020, 8:08 AM), <https://www.businessinsider.com/the-most-dangerous-jobs-in-america-2018-7#11-electrical-power-line-installers-and-repairers-24> [https://perma.cc/6ZVC-W6KN].

Complementing—or perhaps offsetting—training messages that induce stress and fear, such as “you could die today, tomorrow, or next Friday,”<sup>232</sup> are messages about the virtues and pleasures of being a professional violence dealer. On October 30, 2020, Satchel Walton and Cooper Walton, two high school students at duPont Manuel High School in Louisville, Kentucky, published an article in the school paper that would soon make the *Washington Post*, send shockwaves through the internet, and elicit reactions from the highest levels of the Kentucky government.<sup>233</sup> The students published a copy of a PowerPoint presentation, “The Warrior Mindset,” which was used in the aughts for cadet training at the Kentucky State Police Academy. A civil rights lawyer had obtained the material from an open records request during litigation.<sup>234</sup> He passed it along to the students, who published the PowerPoint in full along with their article. The part of the training materials that was most shocking was the quote, “[T]he very first essential for success is a perpetually constant and regular employment of violence.”<sup>235</sup> Of course, any such lionization of violence is concerning, but what really shocked people of all stripes was the fact that the person who wrote those words was Adolf Hitler. They came straight out of *Mein Kampf*.<sup>236</sup>

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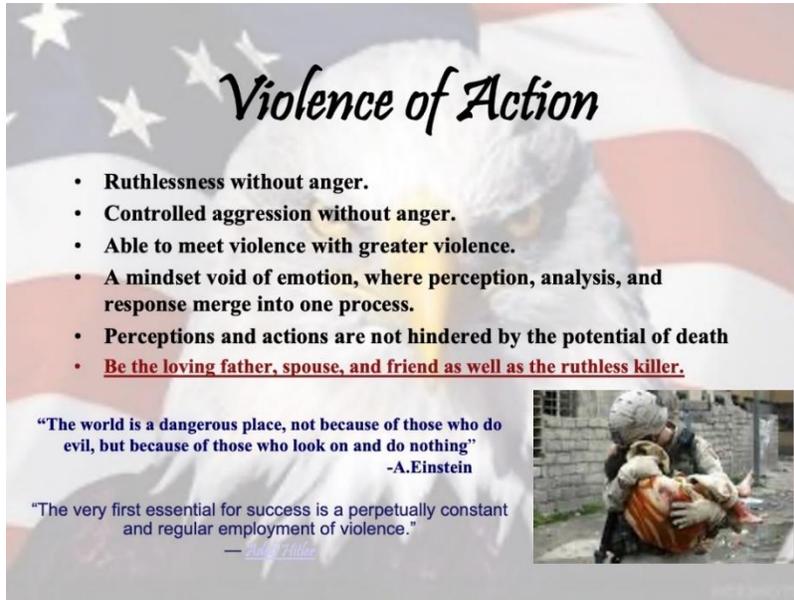
232. Stoughton, *supra* note 19, at 227 (quoting Uriel J. Garcia, *Experts Say Strongly Worded Police Curriculum Is Risky with Cadets*, SANTA FE NEW MEXICAN (Mar. 22, 2014), [http://www.santafenewmexican.com/news/local\\_news/experts-say-strongly-worded-police-curriculum-is-risky-with-cadets/article\\_6fcb7d45-436c-5e48-aa06-2fc6fdcc35a1.html](http://www.santafenewmexican.com/news/local_news/experts-say-strongly-worded-police-curriculum-is-risky-with-cadets/article_6fcb7d45-436c-5e48-aa06-2fc6fdcc35a1.html) [http://perma.cc/FBQ2-LYTP]).

233. Satchel Walton & Cooper Walton, *KSP Training Slideshow Quotes Hitler, Advocates ‘Ruthless’ Violence*, MANUAL REDEYE (Oct. 30, 2020), <https://manualredeye.com/90096/news/local/police-training-hitler-presentation/#modal-photo> [https://perma.cc/S3ZP-MZSC]; Jaclyn Peiser, *Kentucky State Police Quoted Hitler and Encouraged Cadets to be ‘Ruthless’ in a Training Program*, WASH. POST (Nov. 2, 2020, 4:23 AM), <https://www.washingtonpost.com/nation/2020/11/02/kentucky-state-police-hitler-slideshow/> [https://perma.cc/P7YJ-ZR2C]; Celine Castronuovo, *Kentucky Governor Condemns Use of Hitler Quotes in Uncovered Police Training Manual*, HILL (Oct. 31, 2020, 12:15 PM), <https://thehill.com/homenews/state-watch/523760-kentucky-governor-condemns-use-of-hitler-quotes-in-uncovered-police> [https://perma.cc/BU5H-KNSY].

234. Walton & Walton, *supra* note 233.

235. *Id.*

236. *See id.*

*Figure 1.*

The PowerPoint—and I recommend that you peruse it in full—fetishizes hypermasculinity and militarism at its best. Set on a background of Americana symbolism, all eagles and waving flags, it features a plethora of military battle imagery and depictions of men exercising paternalistic protection, disciplined strength, and religious calling. The number one thing a “[w]arrior [m]ust [p]rotect,” it declares, is “[r]eligious [f]aith.”<sup>237</sup> The document is peppered with sentimental pictures of civilian women and children juxtaposed with highly costumed, heavily armed, White, male soldiers in battle stances.<sup>238</sup> “Truth and manliness will carry you through the world much better than policy, or tact,

237. *Id.*

238. *Id.* James Gilligan observes,

The male gender role generates violence by exposing men to shame if they are not violent, and rewarding them with honor when they are. The female gender role also stimulates male violence at the same time that it inhibits female violence. It does this by restricting women to the role of highly unfree sex objects, and honoring them to the degree that they submit to those roles or shaming them when they rebel. This encourages men to treat women as sex objects, and encourages women to conform to that sex role; but it also encourages women (and men) to treat men as violence objects. It also encourages a man to become violent if the woman to whom he is related or married “dishonors” him by acting in ways that transgress her prescribed sexual role.

JAMES GILLIGAN, *VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC* 233 (Vintage Books 1997) (1996).

or expediency,” the PowerPoint counsels, quoting Robert E. Lee.<sup>239</sup> The presentation emphasizes that the police officer-warrior stands above all others in society and his use of violence is more than community protection—it is God’s work. One slide declares, “If we had no engineers or no doctors for a generation, it would be difficult. But if we had no warriors, in a single generation we would be both damned and doomed.”<sup>240</sup>

The messages of the PowerPoint often read as wildly inconsistent, encouraging both constant brutal violence and disciplined strength, even turning the other cheek. But in the end, the training reflects the dynamic I mentioned above, namely that brutality is the everyday business of policing. Within this policing culture and mindset, the officer is a “ruthless killer,” not for pleasure or because he is out of control, but as a matter of professional course. “The cultural image of a police officer,” Harris opines, “is a uniquely valuable and rare kind of man: tough and violent, yet heroic, protective, and necessary to society’s very survival.”<sup>241</sup>

It is thus quite fitting that the presentation quotes Hitler’s views of violence. Philosopher Hannah Arendt famously discussed the “banality of evil,” exemplified by the Nazi genocidaire, who sits in his neat office with his loving family and classical music and orders the extermination of millions of innocent adults and children.<sup>242</sup> The Nazi is the ultimate “loving father, spouse, and friend, as well as ruthless killer,” in the words of the PowerPoint.<sup>243</sup> Jungian psychologist Marie-Louise von Franz observed, “Goering [a high-ranking Nazi] without a qualm . . . could sign the death sentence for three hundred people, but if one of his birds died, then that fat old man would cry. . . . Cold brutality is very often covered up by sentimentality.”<sup>244</sup>

239. See Walton & Walton, *supra* note 233.

240. *Id.* Sociologist Karen Pyke observes that “white heterosexual middle- and upper-class men who occupy order-giving positions in the institutions they control—particularly economic, political, and military institutions—produce a hegemonic masculinity that is glorified throughout the culture.” Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 GENDER & SOC’Y 527, 531 (1996).

241. Harris, *supra* note 148, at 793.

242. See HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 9, 204 (1963); *Hannah Arendt*, PHIL. TALK (June 22, 2008), <https://www.philosophytalk.org/shows/hannah-arendt> [https://perma.cc/5TP9-449P].

243. See Walton & Walton, *supra* note 233.

244. MARIE-LOUISE VON FRANZ, THE PROBLEM OF THE PUER AETERNUS 13 (2000); see also *Marie-Louise von Franz*, C.G. JUNG INST. CHI., <https://jungchicago.org/store/index.php?>

Of course, one might respond that a presentation that openly quotes Hitler, not once but twice, is an outlier. (The PowerPoint also invokes Hitler’s quote, “It is always more difficult to fight against faith than against knowledge,” to drive home the point that police officers must internalize the warrior value system as faith so as to “eliminate[] HESITATION!”).<sup>245</sup> And, to be sure, it is probably unusual for a training PowerPoint to end with a slide that simply states, “Über Alles.” The phrase comes from “Deutschland Über Alles,” the first verse of the old German national anthem, which Hitler used to assert Germany’s superiority over other countries and Germans’ superiority over other races.<sup>246</sup> Immediately after World War II, “Über Alles” was banned as part of Germany’s de-Nazification program, and the country permanently removed it from the national anthem.<sup>247</sup> To be sure, such an open and honest embrace of Nazi-style militaristic authoritarianism is not evident in most police training material, and indeed police training is local and heterodox. Nevertheless, police departments typically emphasize the necessity and duty of using violence to control citizen-enemies and the dangers they pose, even if such sentiments are not dressed up in fascist finery.

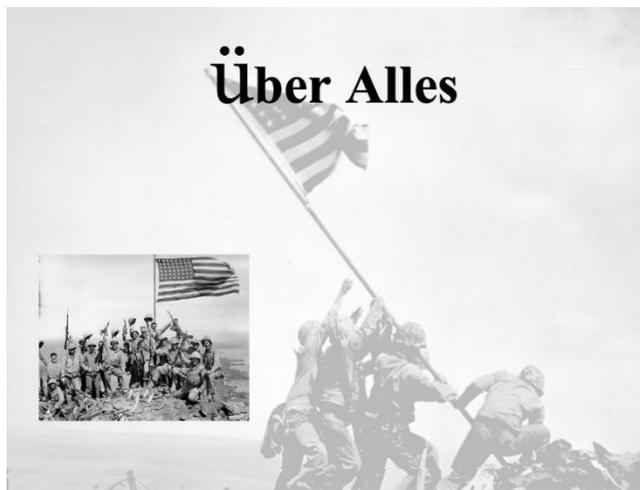
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route=product/manufacture/info&manufacturer\_id=32 [https://perma.cc/R2VZ-NLCS] (last visited Apr. 10, 2021); *High-Ranking Nazi Leader Hermann Göring Dies*, HISTORY (Oct. 14, 2020), https://www.history.com/this-day-in-history/hermann-goering-dies [https://perma.cc/J5FV-WJBW].

245. See Walton & Walton, *supra* note 233.

246. *Id.*; see also Daniel A. Gross, “Deutschland Über Alles” and “America First,” in *Song*, NEW YORKER (Feb. 18, 2017), https://www.newyorker.com/culture/culture-desk/deutschland-uber-alles-and-america-first-in-song [https://perma.cc/RR9U-EKZ4].

247. Gross, *supra* note 246.

**Figure 2.**

By concentrating on training, I do not mean to deny that there are certain officers who, as individuals, have an outlying attraction to violence. Because policing is a well-known profession of violence and control, it attracts men—and it is overwhelmingly men—who find particular allure in physical domination.<sup>248</sup> Within police ranks, we see many former military personnel and, according to recent media reports, a disturbing number of militant White supremacists.<sup>249</sup> Indeed, the toxic masculinity of police officers is a subject of frequent scholarly rumination.<sup>250</sup> My point,

248. See Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. REV. 1183, 1210–11 (2015); Radley Balko, *Rise of the Warrior Cop*, WALL ST. J. (Aug. 7, 2013, 4:44 PM), <https://www.wsj.com/articles/SB10001424127887323848804578608040780519904> [https://perma.cc/VW2V-VYQ3].

249. Simone Weichselbaum, *Police with Military Experience More Likely to Shoot*, MARSHALL PROJECT (Oct. 15, 2018, 3:22 PM), <https://www.themarshallproject.org/2018/10/15/police-with-military-experience-more-likely-to-shoot> [https://perma.cc/4E93-GTBR]; *Vets to Cops*, U.S. DEPT OF JUST.: COPS OFF., <https://cops.usdoj.gov/vetstocops> [https://perma.cc/ZN7E-CEYS]; Glenn French, *4 Reasons Why Military Veterans Make Great Cops*, POLICE1 (Oct. 30, 2018), <https://www.police1.com/police-jobs-and-careers/articles/4-reasons-why-military-veterans-make-great-cops-CXnbR6T9Kub4OwdK/> [https://perma.cc/HR8Y-VV7N]; Sam Levin, *White Supremacists and Militias Have Infiltrated Police Across US, Report Says*, GUARDIAN (Aug. 27, 2020, 10:13 AM), <https://www.theguardian.com/us-news/2020/aug/27/white-supremacists-militias-infiltrate-us-police-report> [https://perma.cc/2ZP4-VQB8]; Grace Tatter & Meghna Chakrabarti, *What's the Connection Between Civilian Militias and the Police?*, WBUR: ON POINT (Sept. 1, 2020), <https://www.wbur.org/onpoint/2020/09/01/right-wing-militias-and-police> [https://perma.cc/PC2G-EZ6U].

250. See Harris, *supra* note 148, at 793; Jennifer Brown, *From Cult of Masculinity to Smart Macho: Gender Perspectives on Police Occupational Culture*, in 8 SOCIO. OF CRIME, L. & DEVIANCE 189, 200 (2007); Frank Rudy Cooper, “Who’s The Man?”: *Masculinities*

however, is that the long-existing police brutality now under public scrutiny has never been just a problem of rogue White supremacists. There is a violence feedback loop that has been revolving for decades: policing is violent; that violence attracts those enamored with violence; many of these individuals become police officials; police officials codify violence as policy and ingrain it as practice; police officers train on violence policy and practice; officers are violent on the street, reinforcing that policing is violent; rinse and repeat.

Perhaps no other facet of policing so clearly exemplifies how policing structures and institutions reflect and reinforce the fear-based, masculinist, and raced glorification of police violence than SWAT. Journalist Radley Balko, in his seminal book on police militarization, *Rise of the Warrior Cop*, traces the development of SWAT in the late twentieth century. SWAT programs, which gained notoriety from clashes with the Black Panthers and the Symbionese Liberation Army in the 1960s and 1970s, grew exponentially during the war-on-crime era of the '80s and '90s.<sup>251</sup> In addition to its domestic political aspects, the war on crime, and particularly Reagan's war on drugs, had a geopolitical face that was no less ideological, political, and economic. Reagan's—and later Bush's—transnational drug interdiction program was intimately intertwined with Cold War-era politics in Latin America. It integrated military operations and domestic law enforcement both abroad and at home.<sup>252</sup> Surplus military equipment—a narrative of urban areas besieged by gangs and drugs—private ex-military contractors, and a glut of grants flowing from the government hastened the rapid militarization of domestic law enforcement.<sup>253</sup>

SWAT and its military-style “raids” became normal in domestic policing, generating its own cultural iconography and

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*Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 674, 676 (2009); Steve Herbert, ‘Hard Charger’ or ‘Station Queen’? Policing and the Masculinist State, 8 GENDER, PLACE & CULTURE 55, 56–58 (2001).

251. RADLEY BALKO, RISE OF THE WARRIOR COP 147–48, 154, 157, 168 (2013); *Swat Teams*, JRANK, <https://law.jrank.org/pages/10652/Swat-Teams.html> [<https://perma.cc/WY36-43H9>] (last visited Mar. 11, 2021); see also discussion *supra* Section II.B (discussing the tough on crime era of the '80s and '90s); Radley Balko, PUBLICAFFAIRS, <https://www.publicaffairsbooks.com/contributor/radley-balko/> [<https://perma.cc/5UEC-DBXZ>] (last visited Mar. 10, 2021).

252. BALKO, *supra* note 251, at 177–78.

253. *Id.* at 139, 145, 147, 152; Joseph B. Doherty, Note, *Us vs. Them: The Militarization of American Law Enforcement and the Psychological Effect on Police Officers & Civilians*, 25 S. CAL. INTERDISC. L.J. 415, 423–25 (2016).

popular following. The SWAT team model filtered down to the smallest of local police departments. Balko explains:

Logan, Utah, is a typical example of the phenomenon. As of 2011, the city had just under 50,000 people, hadn't had a murder in five years, and had recently been rated the "safest city in America." Yet, since the mid-1980s, Logan has had its own SWAT team. What does a SWAT team do in a city with no violent crime? It creates violence out of nonviolent crime. "We haven't really had a whole lot of barricaded subjects, and certainly we haven't had an active gunman shooter," a department spokesman told the local paper. . . . In the meantime, he said, it's "mostly used for assistance on high-risk search warrants"—"high-risk" meaning all or most drug warrants. "We've destroyed some doors over the years that maybe wouldn't have gotten destroyed if there wasn't a SWAT team, but it's all in the name of trying to make a high-risk situation more safe for everyone."<sup>254</sup>

The militarized violence of SWAT has become an ordinary facet of everyday crime interdiction, so much so that, until recently, the public rarely questioned the propriety of a kick-down-the-door raid when a "drug den" search was at issue. But upon even a second of reflection, a lay person can see the obvious: a bunch of heavily armed men storming a house in the middle of the night when people are likely to be home and startled is about the most dangerous way to execute a warrant. Moreover, hastily slapped together drug raids produce worse evidence than more time-consuming investigative techniques, such as undercover operations and controlled buys.<sup>255</sup>

In more candid moments, the police admit that the SWAT raid model is not a particularly safe or effective way to execute narcotics warrants. A former ICE agent and veteran of numerous SWAT narcotics, laundering, and human trafficking raids forthrightly told Balko, "The thing is, it's so much safer to wait the suspect out." He went on, "Waiting people out is just so much better. You've done your investigation, so you know their routine.

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254. BALKO, *supra* note 251, at 207–08.

255. Dara Lind, *Cops Do 20,000 No-Knock Raids a Year. Civilians Often Pay the Price When They Go Wrong.*, VOX (May 15, 2015, 12:12 PM), <https://www.vox.com/2014/10/29/7083371/swat-no-knock-raids-police-killed-civilians-dangerous-work-drugs> [<https://perma.cc/QZ5D-VA97>]; Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html> [<https://perma.cc/278Y-PKNH>].

So you wait until the guy leaves, and you do a routine traffic stop and you arrest him.”<sup>256</sup>

However, such sensible investigations do not have the allure to cops or the public of the image of SWAT officers—bedecked in authoritarian finery, using secretive hand signals and high-tech equipment to storm a Section 8 apartment like an ISIS bunker. One former narcotics officer confessed, “Oh, it’s a huge rush. . . . Those times when you do have to kick down a door, it’s just a big shot of adrenaline.”<sup>257</sup> Another warned that violent drug interdiction could be addictive: “It’s a rush. And you have to be careful, because the raids themselves can be habit-forming.”<sup>258</sup> In this sense, SWAT is more about masculine performance than self-protection. As Angela Harris asserts, “If much of the violence of the criminal justice state emerges from state actors’ own needs to prove their masculinity rather than from the necessity of preventing and punishing crime, then the criminal justice state is, in this sense, a protection racket.”<sup>259</sup>

The SWAT program serves the function of paying officers the nonmonetary wages of masculinist domination. In addition, home raids serve to strictly control the spatial and social place of people in bluelined neighborhoods. They function like the stop-and-frisk program designed by Commissioner Kelly to communicate to male New Yorkers of color that the police own the streets.<sup>260</sup> SWAT raids, like “[m]any contemporary policing and punitive practices . . . communicate a racial and political, rather than moral, message—a message about who is in control and about who gets controlled,” in the words of theorist Bernard Harcourt.<sup>261</sup> Frequent home raids tell residents that they do not even have sanctuary in the privacy of their “castles.” Police make it clear that they will not reserve violent SWAT tactics for the occasional high-risk search but will use them at will to informally punish suspects in their homes. The existence of SWAT tells targeted residents that there is nowhere to hide. The Barton County, Kansas, Sheriff put out a public service announcement depicting a group of officers

256. BALKO, *supra* note 251, at 214.

257. *Id.*

258. *Id.*

259. Harris, *supra* note 148, at 800.

260. Ashly Southall & Michael Gold, *Why “Stop-and-Frisk” Inflamed Black and Hispanic Neighborhoods*, N.Y. TIMES (Nov. 17, 2019), <https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html> [<https://perma.cc/7TCQ-BRVW>].

261. Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 168 (2001).

in full riot gear and warning, “If you use drugs . . . [w]e make house calls.”<sup>262</sup>

*Figure 3.*



With militarization the norm, the police power to brutally maintain people in their “place” is at its zenith. Militarism is now an integral and critical part of how American policing dominates civilians, giving us the absurd sight of domestic law enforcers, clad in light tan camouflage designed for soldiers engaged in Middle East desert warfare, patrolling the humid city streets of downtown Portland. Balko laments that we have become “a country where it has become acceptable for armed government agents dressed in battle garb to storm private homes in the middle of the night—not to apprehend violent fugitives or thwart terrorist attacks, but to enforce laws against nonviolent, consensual activities.” He decries that “order is preserved by armed government agents too often conditioned to see streets and neighborhoods as battlefields and the citizens they serve as the enemy.”<sup>263</sup> But this dystopian reality is not what we have become; it is the latest iteration of what has always been.

262. Russell Edem, *\$100,000 in Methamphetamine Seized by Joint Law Enforcement Agencies*, GREAT BEND TRIB. (Aug. 17, 2015, 3:51 PM), <https://www.gbtribune.com/news/local-news/100000-in-methamphetamine-seized-by-joint-law-enforcement-agencies/> [<https://perma.cc/2266-S2JH>] (containing a statement from the Barton County Sheriff that the police make house calls for drug traffickers).

263. BALKO, *supra* note 251, at xiv.

## IV. THE POISONED PROMISE OF PROSECUTION

Racialized police brutality, from everyday mistreatment to highly publicized murders, takes an immense emotional and physical toll on the victims directly involved and the larger Black community. Many Black people harbor an intense desire to see officers who kill or harm civilians swiftly prosecuted, convicted, and imprisoned. In the aftermath of killings of innocents like Breonna Taylor, society demands the state hold wrongdoers accountable through prosecution and imprisonment.<sup>264</sup> Professor Barbara Armacost observes, “People are dead and we thirst for justice. ‘Officers must be held accountable,’ we cry.”<sup>265</sup> To be sure, crime victims of all kinds tend to equate justice with the incarceration of those who have wronged them. This “punitive impulse” is strong and compelling, but activists should bear in mind that criminal prosecution of individual bad-apple cops holds little promise of upending the structures that maintain policing as an institution of racial, social, and economic control.<sup>266</sup> And an agenda myopically focused on individual criminal prosecution may, in fact, strengthen that institution.

Proponents of cop prosecution as a means of reform make the facially intuitive argument that incarcerating individual officers will provide redress to victims and disincentivize brutality, thereby rendering the criminal system fairer and less violent.<sup>267</sup> Throughout time, progressive lawmakers and activists have sought to use criminal prosecution to fight injustices and, at the same time, balance the criminal system by making it more punitive toward Whites and more responsive to victims of color. Murakawa observes that “[t]he combination of a meager welfare state but a capacious carceral state ha[s] led interest groups to rely on criminal justice for social change.”<sup>268</sup> Part of the explanation is that “reformers tend to build on or adapt existing institutional structures; destroying and building anew is costly, requires challeng[ing] entrenched interests, and poses coordination

264. Lorelei HoJay, *Justice for Breonna Taylor*, CHANGE, <https://www.change.org/p/andy-beshear-justice-for-breonna-taylor> [<https://perma.cc/MRP9-XN4M>] (last visited Jan. 7, 2021).

265. Armacost, *supra* note 19, at 909.

266. See *Race to Incarcerate*, *supra* note 13, at 1016, 1021 (describing the American “punitive impulse”).

267. See Levine, *supra* note 4 (manuscript at 22–23) (surveying the rhetoric and activism favoring police prosecution).

268. MURAKAWA, *supra* note 5, at 17.

problems.”<sup>269</sup> And, as the controversy over the “defund the police” movement has shown, tearing down existing institutions, especially ones frequently touted as a public good, is a hard sell.<sup>270</sup>

In my book, *The Feminist War on Crime*, I trace how the feminist antiviolence movement became entangled in carceral politics:

In past decades, feminists were rightly concerned about gender violence, and they made philosophical and strategic choices about how to address it. These were hard choices. They were contested choices. They were choices under conditions of uncertainty, political pressure, and cultural change. But it becomes clear that powerful feminist subgroups repeatedly chose criminal law. Their reform agendas expanded police and prosecutorial power, emphasized criminals’ threat to vulnerable women, diverted scarce resources to law enforcement, and ultimately made many feminists soldiers in the late twentieth-century war on crime. . . . [F]eminism shaped the modern criminal system [just as] participation in the criminal system shaped modern feminism.<sup>271</sup>

Of course, an extended discussion of the origins of American carceral feminism is not warranted here. Nevertheless, the carceral feminist story can serve as a cautionary tale for those who believe prosecuting officers should be a foremost goal of the Black Lives Matter and similar movements.

Feminists and racial justice advocates often imagine it is possible to simultaneously pursue radical transformation of the penal system and selectively strengthen that system so that it can go after progressives’ identified privileged bad actors.<sup>272</sup> However, the feminist story reveals the distributional reality that “carceral progressivism” rarely works this way.<sup>273</sup> Feminists invested heavily and disproportionately in prosecuting individual men as a means to gender justice, but this program was no panacea: it harmed the many marginalized men who ended up jailed, landed some women in jail, did not always reduce—and sometimes

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269. *Id.*

270. Aidan Smith, *No, Defund the Police and Medicare for All Didn’t Lead to Democratic Losses in the House*, APPEAL (Nov. 9, 2020), <https://theappeal.org/defund-the-police-medicare-for-all/> [<https://perma.cc/4EDZ-G43X>].

271. GRUBER, *supra* note 46, at 6.

272. *Id.* at 10.

273. See Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 529 (2019) (examining the phenomenon of “progressive reliance on criminalization”).

increased—violence, had the tendency to reinforce stereotypes about women, and perhaps most relevantly, thwarted the development of better methods of preventing and remedying violence against women.<sup>274</sup>

Indeed, many equality-minded scholars believe that the penal system becomes more just when privileged parties—cops, White men, the wealthy—receive the same or harsher treatment than marginalized defendants. However, in seeking to ensure that the criminal law severely punishes apparently privileged defendants, progressive activists and lawmakers often propose reforms that expand the reach of substantive criminal laws, lengthen already exorbitant sentences, and add to prosecutors’ already enormous advantages in the criminal process.<sup>275</sup> And, as I have said before, “Rich and powerful men have the corrupt influence to evade even toughened laws, placing the burden of increased criminalization on the poor minorities who form the policed segment of the population.”<sup>276</sup>

Moreover, experiments to provide “equal protection under the carceral state” by ensuring that police, prosecutorial, and prison violence is equally inflicted on marginalized and privileged people alike have ended up as “one-way ratchets” that accrued to the penal state more power over everyone.<sup>277</sup> Right-wing lawmakers justified deleterious policies like three-strikes and mandatory minimum laws on the ground that they decrease ostensibly racist judicial discretion and ensure defendants’ equal treatment.<sup>278</sup> Perhaps the most sobering tale of such efforts involves the federal sentencing guidelines. In the 1980s, conservatives *and* liberals came together to address racial disparity in criminal sentencing, which they attributed to judicial discretion.<sup>279</sup> Lawmakers quickly settled on rigid, mandatory federal sentencing guidelines, which

274. See generally GRUBER, *supra* note 46, at 31–32 (discussing the effects of the Mann Act, which criminalized human traffickers).

275. See generally *Murder, Minority Victims, & Mercy*, *supra* note 18, at 169–70.

276. GRUBER, *supra* note 46, at 10.

277. See Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1367–68 (2018) [hereinafter *Equal Protection*].

278. See, e.g., STEVEN J. IPSEN, ASS’N DEPUTY DIST. ATT’YS, THE REPEAT CRIMINAL OFFENDER/THREE STRIKES FAIR SENTENCING ACT 1 (2006), [https://web.archive.org/web/20180331153648/http://caag.state.ca.us/initiatives/pdf/sa2006rf0005\\_amdt\\_1\\_s.pdf](https://web.archive.org/web/20180331153648/http://caag.state.ca.us/initiatives/pdf/sa2006rf0005_amdt_1_s.pdf) [https://perma.cc/YF29-QYND] (claiming to “provide a complete, proportionate or consistent statutory structure for appropriately and fairly sentencing repeat offenders”).

279. See MICHAEL TONRY, MALIGN NEGLIGENCE—RACE, CRIME, AND PUNISHMENT IN AMERICA 164 (1995); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 573 (2005).

increased the length of sentences overall.<sup>280</sup> It also turns out that lawmakers simply codified their “commonsense,” politically expedient, and inherently racialized notions of crime severity (i.e., crack dealing is worse than cocaine dealing).<sup>281</sup> In the end, the guidelines created *greater* racial disparity.<sup>282</sup>

Still, reformers cling to the fiction that policing and prosecution’s pathologies are the products of individual actors and their discretion. “At the core of liberal law-and-order was the promise to move each individual qua individual through a system of clear rules that allow little room for individual bias,” Murakawa notes.<sup>283</sup> This legal agenda “legitimized extreme penal harm to African Americans: the more carceral machinery was rights-based and rule-bound, the more racial disparity was isolatable to ‘real’ black criminality.”<sup>284</sup> Racial justice seekers’ perpetual hope that “reformed” criminal law and empowered prosecutors will lead to cop convictions that ultimately improve policing—and repeated disappointment and pain when it does not—is based on a misunderstanding of the relationship between law and police violence. Historically, criminal law enabled police violence, and currently it has little capacity to control it.<sup>285</sup>

Consider, for example, the operation of law in the Breonna Taylor killing. Far from prohibiting deadly SWAT raids, the criminal law all but invites them.<sup>286</sup> Courts and legislatures have encouraged the police to seek no-knock warrants and raid homes in the middle of the night based on the fiction that such brutality

280. Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 246 (2005).

281. See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1939, 1944–45 (1988) (noting the “general consensus . . . among judges, lawyers, criminal justice experts . . . and scholars . . . that sentencing guidelines were needed”); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 31–32 (1988) (observing that the guidelines are not a product of political compromise but of the institutional struggle to implement a consensus idea that sentences should be uniform); *Federal Cocaine Sentencing Laws*, *supra* note 70.

282. In *United States v. Booker*, the Supreme Court struck down mandatory federal sentencing guidelines as violative of the Sixth Amendment jury guarantee. *United States v. Booker*, 543 U.S. 220, 256 (2005). Recent debate has concerned whether *Booker* has revived racial disparities. See generally Sonja B. Starr, *Did Booker Increase Sentencing Disparity? Why the Evidence Is Unpersuasive*, 25 FED. SENT’G REP. 323, 323 (2013) (critiquing a recent Sentencing Commission’s report finding that *Booker* has increased racial disparity as unsupported by the evidence).

283. MURAKAWA, *supra* note 5, at 18.

284. *Id.*

285. Butler, *supra* note 220, at 386.

286. See BALKO, *supra* note 251, at 157.

is a necessary component of “inherently dangerous” drug interdiction.<sup>287</sup> In short, the police who kill during drug raids are engaging in a style of search execution that has been explicitly approved by courts, including the Supreme Court.<sup>288</sup>

Moreover, the Supreme Court has made clear that police may engage in this type of home raid even where there is marginal or no probable cause. In *Illinois v. Gates*, for example, the Court made it much easier for magistrates to approve of warrants based on the relatively unsubstantiated claims of informants.<sup>289</sup> The Court directed appellate courts to give “great deference” to “magistrate’s ‘determination of probable cause’” and adopted a nebulous “totality-of-the-circumstances” test that freed magistrates to find probable cause without a strong showing that the informant was reliable.<sup>290</sup> Justice Brennan dissented that these juridical moves undermined the constitutional principle “of having magistrates, rather than police, or informants, determine whether there is probable cause to support the issuance of a warrant.”<sup>291</sup> Indeed, the Court has shown little concern over the “hydraulic pressures” that lead magistrates to rubber-stamp police requests for warrants. “Judges and magistrates are not adjuncts to the law enforcement team,” the Court insisted in *United States v. Leon*, “as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions.”<sup>292</sup>

In fact, however, judges regularly act more like partners to police than a check on them. Balko cites survey evidence that police widely “shop” for friendly magistrates and magistrates

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287. See, e.g., *Richards v. Wisconsin*, 520 U.S. 385, 390 (1997) (citing *People v. Lujan*, 484 P.2d 1238, 1241 (Colo. 1971)); 21 U.S.C. § 879 (authorizing execution of search warrants seeking controlled substances “at any time of the day or night”); NEB. REV. STAT. § 29-411 (2020), <https://nebraskalegislature.gov/laws/statutes.php?statute=29-411> [<https://perma.cc/7SW3-SDQS>] (allowing officer to enter a dwelling “without giving notice” if authorized by the judge or magistrate issuing the search warrant); LA. CODE CRIM. PROC. ANN. art. 224 (2020), <https://www.legis.la.gov/legis/Law.aspx?d=112376> [<https://perma.cc/VG7C-HB8F>] (“The peace officer need not announce his authority and purpose when to do so would imperil the arrest.”); S.D. CODIFIED LAWS § 23A-35-9 (2020), [https://sdlegislature.gov/Statutes/Codified\\_Laws/2049044](https://sdlegislature.gov/Statutes/Codified_Laws/2049044) [<https://perma.cc/WJ5N-5V6A>] (allowing magistrate to issue no-knock warrant if notice would result in destruction of evidence or danger to officer or others).

288. See, e.g., *Muehler v. Mena*, 544 U.S. 93, 95–96, 100 (2005) (approving a SWAT drug raid where police, at gunpoint, intruded upon a sleeping resident, held her handcuffed in a garage for hours, and questioned her about her immigration status).

289. *Illinois v. Gates*, 462 U.S. 213, 241–45 (1983).

290. *Id.* at 230–31, 236 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).

291. *Id.* at 285 n.6 (Brennan, J., dissenting).

292. *United States v. Leon*, 468 U.S. 897, 917 (1984).

generally defer to the police on the need for a search.<sup>293</sup> In the survey, “most police officers interviewed could not remember ever having been turned down.”<sup>294</sup> One *Denver Post* report on warrant applications found that judges approved ninety-seven percent of no-knock warrant requests and noted that “astonishingly, many of the city’s judges would sign off on no-knock warrants *even though the police hadn’t requested one*.”<sup>295</sup> In fact, “about 10 percent of the no-knock warrants were changed from knock-and-announce warrants merely by the judge’s signature.”<sup>296</sup> And remember, as much as the law permits magistrates to defer to police on the need for raids, the law also defers to the police on *how* to execute the raid. SWAT teams using extreme levels of violence are simply officers making their *Graham*-approved “split-second judgments” that cannot be second guessed.<sup>297</sup> Courts have created a virtual legal presumption that the inherent dangers of drug interdiction justify extreme violence, relieving narcotics raiders of the obligation to provide any particularized evidence that the brutal force was warranted.

People are right to be outraged by the drug interdiction SWAT actions that culminated in Breonna Taylor’s untimely death. However, it would be a mistake to see these actions as aberrant, contrary to law, or a grave departure from “ordinary” drug interdiction. The hail of police bullets that killed Taylor was the final act of a formal, legally sanctioned police process all but designed to produce tragedy. We can start with the search warrant application. According to Detective Joshua Jaynes’s affidavit in support of the application, the only connection Taylor had to narcotics at all was that she happened to be friendly with the drug-distribution suspect, Jamarcus Glover, and police had seen him leave her house on *one* occasion with a USPS package.<sup>298</sup> The follow-up “investigation,” according to the affidavit, consisted solely of confirming with the postal inspector that Glover had previously received packages at Taylor’s house.<sup>299</sup>

293. BALKO, *supra* note 251, at 184–85.

294. *Id.* at 185 (quoting RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* 27 (1985)).

295. *Id.*

296. *Id.*

297. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

298. JOSHUA C. JAYNES, *LOUISVILLE METRO POLICE DEPT., JEFFERSON COUNTY, KENTUCKY SEARCH WARRANT AFFIDAVIT: CASE NO. 20-1371*, at 2 (2020), <https://reason.com/wp-content/uploads/2020/06/Breonna-Taylor-search-warrants.pdf> [<https://perma.cc/L6UQ-C22M>] [hereinafter Taylor Affidavit].

299. *Id.*

That’s it. That was the information. There was no positive drug dog sniff of the package Glover left with. There was no controlled buy implicating Taylor. There were no observation post recordings of Taylor. There was no snitch—much less a reliable one—claiming Taylor was involved in drug dealing. Instead, what the affidavit contained was Jaynes’s speculation that “Glover *may* be keeping narcotics and/or proceeds” at Taylor’s house because “it is not uncommon for drug traffickers to receive mail packages at different locations.”<sup>300</sup> Of course, there was *no* individualized information that such a dynamic was present in Taylor’s case.

In fact, Jaynes later admitted that he left out that the officer who spoke to the post office inspector had “nonchalantly” told Jaynes that Glover “just gets Amazon or mail packages there.”<sup>301</sup> Why was Jaynes so wedded to his theory that Taylor must have been receiving drugs for Glover? He later detailed his chauvinist train of thought to internal investigators: “[Dealers] get other people involved and it’s usually females . . . It’s usually baby mamas . . . or it’s girlfriends that they can trust. They can trust them with their money and their stuff.”<sup>302</sup> So Jaynes “didn’t go too in-depth about [the Amazon remark] ’cause again, what I saw on my own two eyes.”<sup>303</sup>

Clearly, Detective Jaynes, with his raced and gendered assumptions that female acquaintances are complicit “baby mamas,” was a poor guarantor of probable cause to search. But what about the judge, Judge Shaw? She says she’s “concerned” that Jaynes may have lied in the affidavit.<sup>304</sup> Indeed, an officer told internal investigators that the postal inspector said Glover had *not* been receiving packages at Taylor’s house.<sup>305</sup> But even if Judge Shaw had no reason to doubt the affidavit’s truth, how could she

300. *Id.* (emphasis added).

301. Darcy Costello, “We All Had a Hand in This”: Louisville Cop Who Got Breonna Taylor Warrant in the Hot Seat, LOUISVILLE COURIER J. (Oct. 7, 2020, 7:18 PM), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/10/07/breonna-taylor-case-what-cop-who-got-warrant-told-police/5912336002/> [<https://perma.cc/D2QE-Q9C3>].

302. Tyler Emery, *Investigators Say Affidavit for Warrant to Search Breonna Taylor’s Home “Should Be Reviewed for Criminal Actions,”* ABC WHAS 11 (Oct. 7, 2020, 11:46 PM), <https://www.whas11.com/article/news/investigations/breonna-taylor-case/breonna-taylor-joshua-jaynes-lmpd-investigation-files/417-a3d39c7a-d76e-431a-be49-f7ca088e5128> [<https://perma.cc/F8KD-X8LZ>].

303. Costello, *supra* note 301.

304. Andrew Wolfson et al., *Judge Says She Is ‘Concerned’ Detective May Have Lied to Get Breonna Taylor Search Warrant*, LOUISVILLE COURIER J. (Oct. 1, 2020, 5:18 PM), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/10/01/breonna-taylor-case-judge-concerned-lmpd-cop-lied-get-warrant/5883362002/> [<https://perma.cc/5Q3P-PPE6>].

305. *Id.*

possibly have approved of the police invading someone's home, which even the most conservative members of the Supreme Court have recognized as the quintessential zone of personal privacy, in the face of such a stunning lack of probable cause?<sup>306</sup> The simple answer is because she had no incentive to do otherwise. In Jefferson County, Kentucky, judges often hastily approve warrants, scribbling an illegible signature on them. "On the vast majority of search warrants—nearly 72%—the names of the judges who approved them were illegible."<sup>307</sup> So much for the Supreme Court's assurance in *Leon* of "judicial officers' professional incentives to comply with the Fourth Amendment."<sup>308</sup>

Detective Jaynes's ground for requesting that the warrant be "no-knock" was no less flimsy and conclusory. The affidavit states simply, "Affiant is requesting a No-Knock entry to the premises due to the nature of how these drug traffickers operate. These drug traffickers have a history of attempting to destroy evidence [and] have cameras on the location that compromise Detectives on[] approach to the dwelling."<sup>309</sup> Notice, there was a lack of particularized information about the practice of the suspects, including Taylor, in this case. Notice also that Jaynes did not bother to claim that safety required a weapons-heavy, kick-down-the-door type of entry. There was only his speculation that a drug dealer might destroy evidence in the time between knock and entry. And, if the issue was that Taylor might have a surveillance camera, the police could have confirmed that *before* the application. On the basis of this information, which did not include one iota of individualized evidence on Taylor or justifying the need for an intrusive entry into her home, "Judge Mary Shaw gave approval for five deadly no-knock warrants in 12 minutes in relation to the drug bust that Taylor had no involvement with, but which cost her life."<sup>310</sup>

Armed with a judicial mandate and plenty of long guns, the search team stormed Taylor's home in the middle of the night. Of

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306. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

307. Jacob Ryan & Travis Ragsdale, *Which Louisville Judge Let Police Search Your House? Most Signatures Are Unreadable*, KY. CTR. FOR INVESTIGATIVE REPORTING (Sept. 16, 2020), <https://kycir.org/2020/09/16/which-louisville-judge-let-police-search-your-house-most-signatures-are-unreadable/> [<https://perma.cc/9PYR-4Y2U>].

308. *United States v. Leon*, 468 U.S. 897, 917 (1984).

309. Taylor Affidavit, *supra* note 298, at 2, 5.

310. BET Staff, *Councilwoman Claims Breonna Taylor Died Because of Judge's 'Shocking' Handling of No-Knock Warrants*, BET (June 22, 2020), [https://www.bet.com/news/national/2020/06/22/breonna-taylor-judge-no-knock.html?cid=BET\\_FBPAGE\\_3441330996&linkId=91519788](https://www.bet.com/news/national/2020/06/22/breonna-taylor-judge-no-knock.html?cid=BET_FBPAGE_3441330996&linkId=91519788) [<https://perma.cc/UKR3-7MSN>].

course, if police were really concerned about potential for destruction of evidence, they would simply have waited for Taylor to leave her house during the day. This would have made particular sense, given that the police admitted they thought Taylor was a “soft target” who posed no danger and were not sure whether children or animals would be present on the night of the raid.<sup>311</sup> In the end, the police landed precisely where history, culture, typical practice, and the law put them—at Taylor’s doorstep, clad in military gear, and breathless to become “ruthless killers” at the first sign of a threat.<sup>312</sup> At that point, it would have been surprising if the police raiders being shot at by Taylor’s boyfriend did *not* elicit a hail of bullets from them.

Now, one might rejoin that if the drug raid practices that terrorize thousands of Americans are aided and abetted by law, law reform is the key to ending them. Perhaps an aggressive civil libertarian litigation strategy and lobbying effort could rein in some of the most egregious drug raid practices. To be sure, there have been successful efforts to limit no-knock and nighttime warrants.<sup>313</sup> Judges are now feeling some counterpressure on the rubber-stamping front.<sup>314</sup> Activists have been calling for local and state leaders to abandon SWAT programs, refuse military gear, and revise drug raid practices.<sup>315</sup> However, these modest successes

311. Laura Strickler et al., *New Audio of Police Interviews Sheds Light on Police Probe of Fatal Shooting of Breonna Taylor*, NBC NEWS (July 9, 2020, 2:00 AM), <https://www.nbcnews.com/news/us-news/new-audio-police-interviews-sheds-light-police-probe-fatal-shooting-n1233183> [<https://perma.cc/QY2B-7UT3>]; Tessa Duvall & Darcy Costello, *Police Interviews Say Breonna Taylor’s Home Was a “Soft Target,” Suspect Already Located*, USA TODAY (July 9, 2020, 2:31 PM), <https://www.usatoday.com/story/news/nation/2020/07/09/breonna-taylor-case-home-soft-target-police-interviews-say/5406961002/> [<https://perma.cc/89SG-FPG4>].

312. In the midst of the gunfire, a “worked up” Brett Hankinson—the one officer charged with endangerment—shouted “reload” and continued spraying the area with bullets. Darcy Costello & Tessa Duvall, *Former Detective Brett Hankinson Faces 3 Charges After Breonna Taylor Shooting*, LOUISVILLE COURIER J. (Sept. 23, 2020, 2:19 PM), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/09/23/what-we-know-about-officer-brett-hankinson-indicted-in-breonna-taylor-shooting/5490411002/> [<https://perma.cc/BM32-K7V9>].

313. *E.g.*, *Fouse v. State*, 989 S.W.2d 146, 150–51 (Ark. 1999); *Richards v. Wisconsin*, 520 U.S. 385, 387–88 (1997). *But see Gooding v. United States*, 416 U.S. 430, 458 (1974).

314. BET Staff, *supra* note 310.

315. *E.g.*, John Aguilar, *Aurora Becomes First Colorado City to Ban “No-Knock” Warrants*, DENV. POST (Oct. 19, 2020, 10:53 PM), <https://www.denverpost.com/2020/10/19/aurora-police-no-knock-warrant-breonna-taylor/> [<https://perma.cc/W4NY-3LT2>]; Jeff Weiner & Tess Sheets, *Orlando Police Ban No-Knock Raids, but Other Central Florida Agencies Still Allow Them*, ORLANDO SENTINEL (July 24, 2020, 12:20 PM), <https://www.orlandosentinel.com/news/crime/os-ne-orlando-police-no-knock-warrant-ban-questions-20200724-5hkqe3nrvneupgt3ntyfzxxh5u-story.html> [<https://perma.cc/RYSF-FMEM>]; Tanvi Misra,

come from social and political efforts, not litigation. In any case, a program to reform the laws and practices that underlie SWAT-style drug interdiction practices is *not* the program of prosecuting select individual officers involved in these raids.

The officers who killed Breonna Taylor, like many killer cops, are difficult to hold individually responsible precisely because they exercise official violence—violence that has long been accepted and even glorified by law and society. The individual criminal liability question is whether, at the moment of the killing, the officer reasonably feared deadly force.<sup>316</sup> In the Taylor case, both killer officers were shot at and one was wounded, conferring on them a good individual claim of self-defense.<sup>317</sup> Of course, the larger issue is that the Louisville police should not be in the business of invading people's homes in the middle of the night and scaring them into shooting at police who they (rightly) believe are deadly intruders. Prosecuting individual officers who shoot back at scared home-defending residents, even if doing so results in conviction, is unlikely to change the practices that lead to such horrific results. In fact, it may reinforce them by propping up the fiction that extreme deadly violence is an aberration caused by deviant individuals and not a mainstay of narcotics policing.<sup>318</sup>

Back in 2000, Angela Harris counseled that “ending pervasive police brutality requires not simply more punishment for ‘rogue’ officers or a greater commitment to the vague idea of ‘community policing,’ but rather a disruption of the entire gendered culture of policing.”<sup>319</sup> Now, twenty years later, scholars like Armacost warn that “the current accountability paradigm—targeting the officer who pulled the trigger—is actually hindering genuine progress in decreasing the numbers of these tragedies, including those motivated by racism.”<sup>320</sup> To be sure, the fact that racialized brutality is part of the very structure of American policing makes it unlikely that a singling out of a few sacrificial lambs, whom law professor Kate Levine warns will likely be minority cops or cops

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*The Local Fight To Demilitarize the Police*, BLOOMBERG: CITY LAB (Aug. 31, 2017, 8:33 AM), <https://www.bloomberg.com/news/articles/2017-08-31/how-cities-say-no-to-military-equipment-for-police> [https://perma.cc/EV4F-5CF9].

316. See, e.g., TENN. CODE ANN. § 39-11-611(b)(1) (2020) (self-defense).

317. Jamiles Lartey, *Why It's Not So Simple to Arrest the Cops Who Shot Breonna Taylor*, MARSHALL PROJECT (Aug. 8, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/08/08/why-it-s-not-so-simple-to-arrest-the-cops-who-shot-breonna-taylor> [https://perma.cc/N46G-8AAY].

318. Armacost, *supra* note 19, at 947–48.

319. Harris, *supra* note 148, at 804.

320. Armacost, *supra* note 19, at 910.

who kill Whites,<sup>321</sup> will have any meaningful impact on violence levels.

Moreover, reforms intended to make it easier for prosecutors to convict hard-to-get cops are mostly not specific to police defendants and portend harm to the very marginalized criminal defendants whom reform is meant to benefit. In previous writings, I have argued that relatively privileged defendants do tend to benefit disproportionately from doctrines of leniency (broad defenses, sentencing discretion, diversion, etc.). However, ridding the law of such leniency has the effect of harming *all* defendants, the majority of whom are the worst off among us.<sup>322</sup> Levine argues that the cop-prosecution program includes a laundry list of carceral, antidefendant laws and norms, many of “which have been clearly and persuasively shown to increase mass incarceration and to prop up the criminal legal system”:

In reaction to officers not being charged, or not being convicted, many have turned to the techniques and tools that have been central to propping up mass incarceration: dehumanizing police defendants, suggesting new and harsher substantive criminal laws, eschewing procedural rights that contribute to fewer convictions, lamenting too short sentences for those officers who are convicted, lambasting prosecutors who are seen to excuse criminal behavior, and insisting upon treating police as harshly as civilians are treated.<sup>323</sup>

In the wake of Breonna Taylor’s killing, many reformers have called for abolition, but not the abolition of policing, drug raids, or SWAT teams. They call for the abolition of grand juries.<sup>324</sup> As a formal federal defender who practiced in a grand jury indictment system, I bristle at this proposal. Now, the grand jury is not much of a check—as goes the old adage, it would “indict a ham sandwich”—nevertheless, many defenders have stories of grand juries saving their clients from serious felony charges based on flimsy evidence. Accordingly, most defense attorneys would prefer that the law *always* require prosecutors—or better, defense

321. Levine, *supra* note 4 (manuscript at 38–39).

322. *Race to Incarcerate*, *supra* note 13, at 1006–07; *Murder, Minority Victims, & Mercy*, *supra* note 18, at 159–60; Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 309 (2015); *Equal Protection*, *supra* note 277, at 1365–66.

323. Levine, *supra* note 4 (manuscript at 7–9).

324. Dahleen Glanton, *Column: Justice in Breonna Taylor’s Death Fell Victim to “Law-and-Order” Politics*, CHI. TRIB. (Sept. 23, 2020), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-breonna-taylor-justice-20200924-xoxev3ywgrcq7bksehhdzwlhj7q-story.html> [https://perma.cc/F3VV-HB66].

attorneys—to present defenses and exculpatory evidence to grand jurors.<sup>325</sup> In a similar vein, after deadly police shootings, commentators regularly call for revisions to the substantive criminal law to make it harder for *anyone* to claim self-defense.<sup>326</sup> I have previously shown how such reforms impact men of color who constitute the bulk of homicide defendants.<sup>327</sup>

However, my main concern with the cop-prosecution program is not distributional. It is possible that reforms that put pressure on prosecutors to charge killer officers and create proconviction rules will not disadvantage noncop defendants. It is possible that they will not disproportionately jail rookie minority officers. Experiences with other carceral progressive programs and recent research of police prosecutions indicate otherwise, but it could be that the cop-prosecution program will just incarcerate bad cops without spillover effects. But my primary critique is that focusing on the individual criminal liability of officers, like other incremental reform programs, reinforces the dominant narrative that racialized brutality is a *failure* of policing. Worse, it portrays this failure as a matter of individual rogue actors. At this moment in time, it is critical for progressive scholars and activists to stop describing policing as a crime-fighting institution with some fixable problems and find a new “language.”<sup>328</sup>

The idea that policing is *the* state program that provides community safety is so naturalized that people of color residing in the bluelined communities—even people who have experienced police violence themselves—often support more, not less, policing. To be sure, there is a long history of scholars, activists, and residents alike characterizing the crime, poverty, and destabilization in marginalized neighborhoods as a function of “underpolicing.”<sup>329</sup> However, as Professor Monica Bell notes, “Sociologists studying poverty and community life have long

325. See Levine, *supra* note 4 (manuscript at 18, 24–25); Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 828–29 (2015).

326. See Levine, *supra* note 4 (manuscript at 25); Kenny Jacoby & Jessica Priest, “Lawful but Awful”: US Self-Defense Laws Questioned After Breonna Taylor’s Death, USA TODAY (Sept. 25, 2020, 4:05 PM), <https://www.usatoday.com/story/news/investigations/2020/09/25/breonna-taylors-death-raises-questions-self-defense-laws/3529543001/> [https://perma.cc/B4VU-YMKC]; *Race to Incarcerate*, *supra* note 13, at 973, 986, 1021 (discussing the calls for reform after a neighborhood watchman with close police ties shot Trayvon Martin).

327. *Race to Incarcerate*, *supra* note 13, at 1003–04, 1006–07, 1011–13; see also *Equal Protection*, *supra* note 277, at 1365–68, 1373, 1378, 1381–83.

328. See Meares, *supra* note 49.

329. See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19–20 (1997); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717–18, 1721–23, 1725, 1727–28 (2006); FORMAN, *supra* note 84, at 10, 29–31.

provided evidence that even when people rely on each other to survive poverty and social marginality, those relationships are generally not sanguine, trusting relationships. Those relationships are often unstable and destabilizing.”<sup>330</sup> For sure, few residents of socially and economically precarious neighborhoods endorse heavy police presence *for its own sake*. They endorse it on the presumption that the police will solve or improve the environmental problems that concern them.<sup>331</sup> Policing has successfully occupied so many parts of American life, but perhaps its most stunning success has been the occupation of the American imagination.<sup>332</sup> We have yet to develop a consistent vocabulary for the state provision of security services that does not invoke “the police.”

Analyzing policing from an *institutional* perspective—viewing it as a fixed institution of race, class, and gender domination that maintains geographic totalitarianism and sustains itself through a monopoly on violence—upends the notion that we can transform the police into an egalitarian security provider. Liberal theorists and lawyers have largely adopted an institutional perspective regarding capital punishment, leading most to embrace abolition over trying to racially equalize the application of capital punishment.<sup>333</sup> Empirical studies have shown that the racial bias in capital punishment relates to victims, that is, capital punishment is far more likely when victims are White than when they are Black.<sup>334</sup> Accordingly, some argue that Black victims’

330. Bell, *supra* note 53, at 733.

331. See generally FORMAN, *supra* note 84 (recounting the history of Black responses to crime); Benjamin Levin, *De-Democratizing Criminal Law*, 39 CRIM. JUST. ETHICS 74, 76 (2020) (remarking that during the 1970s, “[Black] activists were concerned about crime, but they were asking for social services, not just more police and more prosecutions”); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 822–26 (1999) (noting “[t]he conflicting opinions among Blacks . . . about law enforcement strategies” but concluding that “despite their opposition to neighborhood crime, most African Americans believe that the criminal justice system is profoundly biased against them and do not trust the police to fairly enforce the laws”).

332. See David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy’s “Politics of Distinction,”* 83 GEO. L.J. 2547, 2568 (1995) (arguing that the underenforcement view “assumes that the only response to crime is incarceration”).

333. *Murder, Minority Victims, & Mercy*, *supra* note 18, at 169–70.

334. See, e.g., Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2145 (2011) (concluding that a study of a twenty-eight-year period indicated that a victim’s race “is a strong predictor of who is sentenced to death in North Carolina”); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 105 (1984) (conducting study of eight states’ capital systems and

family members are deprived the “closure” of a death sentence.<sup>335</sup> Progressives, however, have for the most part rejected the argument that capital punishment can be fixed by distributing the death “benefit” equally to Black and White families.<sup>336</sup> They reject that deadly punishment is a “good” to be doled out fairly and instead “look at capital punishment institutionally—its philosophical groundings, its larger effects on subordinated groups and communities, and its place within an evolved global civilization.”<sup>337</sup> For institutionalists, disparities in executions are not fixable but serve to “confirm the morally fraught nature of the entire capital punishment enterprise.”<sup>338</sup>

We can take such an institutional view of policing, if not the entire penal system. As an institution of violent domination, policing cannot be reformed from within, and we should not expend more resources on reforming it. In 2020, two *Washington Post* reporters examined the five-year fallout from Baltimore’s efforts to reform its police force beginning in 2015 after the death of Freddie Gray. The reporters found that the end result was that the police budget increased, even as police spent less time making arrests for minor crimes (a good thing) and less time attempting to solve major crimes like murders (a bad thing). In addition, plain-clothed officers stepped up their harassment and intimidation tactics, and police claimed ransom-like levels of overtime. The journalists’ research led to the conclusion that crime-fighting “failures” are the police’s bread and butter:

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finding that race-of-victim discrimination “is a remarkably stable and consistent phenomenon”); U.S. GEN. ACCT. OFF., GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990), <http://www.gao.gov/assets/220/212180.pdf> [<https://perma.cc/6674-QEGZ>] (synthesizing twenty-eight death penalty studies and concluding that “[t]he race of victim influence was found at all stages of the criminal justice system process” but “evidence for the influence of the race of defendant on death penalty outcomes was equivocal”).

335. See, e.g., Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remediating Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 149 (1998) (noting that black-victim bias imposes “important harms” by denying Black victims’ families “the sense of closure and ‘justice’ that the death penalty affords”).

336. See, e.g., Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 33 (2002) (detailing the death penalty’s sordid racial history, including lynching, and opining that “[r]ather than executing more people, we could execute fewer”); Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619, 2628–29 (1998) (reviewing RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997)).

337. *Murder, Minority Victims, & Mercy*, *supra* note 18, at 134–35.

338. *Id.*; see also, e.g., Ronald J. Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 CORNELL L. REV. 1431, 1431, 1441, 1443–45 (1998) (characterizing racial statistics as a weapon in the “arsenal” against capital punishment).

Police departments, strengthened by their own problems, have no incentive to actually change. It is hard to imagine another agency that could use such an abysmal failure as a sign of its necessity. Police will never give up power voluntarily—so it must be taken from them by significantly defunding police departments and reallocating the money in ways that might actually curb violence and offer resources to communities terrorized by police.

Police don’t believe in reform. Baltimore shows that we shouldn’t, either.<sup>339</sup>

Such an institutional critique of policing, and the entire carceral state, is a mainstay of abolitionist ideology, which is currently experiencing a renaissance in progressive scholarly circles. Dorothy Roberts describes prison abolitionist thought:

Efforts to fix the criminal punishment system to make it fairer or more inclusive are inadequate or even harmful because the system’s repressive outcomes don’t result from any systemic malfunction. Rather, the prison industrial complex works effectively to contain and control black communities as a result of its structural design. Therefore, reforms that correct problems perceived as aberrational flaws in the system only help to legitimize and strengthen its operation. Indeed, reforming prisons results in more prisons.<sup>340</sup>

Recognizing that internal reforms and “alternative[]” programs “become add-ons to the prison solution,” abolitionists like Thomas Mathiesen warn that activists should support only “negative’ reforms” that “strive towards ‘shrinking’ the system.”<sup>341</sup> Similarly, the contemporary abolitionist group Critical Resistance draws a strict distinction between “reformist reforms” that “continue or expand the reach of policing”—prosecuting cops, expensive body cams, more money for training—and “abolitionists steps” that “chip away” at the penal state—refusing military equipment, reducing police size, investing in housing and services.<sup>342</sup> Professor

339. Baynard Woods & Brandon Soderberg, *Baltimore Tried Reforming the Police. They Fought Every Change.*, WASH. POST (June 18, 2020, 8:26 AM), [https://www.washingtonpost.com/outlook/baltimore-police-reforms-crime/2020/06/18/7d60e91e-b041-11ea-8758-bfd1d045525a\\_story.html](https://www.washingtonpost.com/outlook/baltimore-police-reforms-crime/2020/06/18/7d60e91e-b041-11ea-8758-bfd1d045525a_story.html) [https://perma.cc/N344-LRB6].

340. Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 42–43 (2019).

341. Thomas Mathiesen, *The Politics of Abolition*, 10 CONTEMP. CRISES 81, 87 (1986).

342. *Reformist Reforms vs. Abolitionist Steps in Policing*, CRITICAL RESISTANCE, [https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR\\_NoCops\\_reform\\_vs\\_abolition\\_CRside.pdf](https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf) [https://perma.cc/YN2Q-JYFZ] (last visited Mar. 12, 2021).

Scott Holmes, for example, recognizes that “[b]ecause police have played the role of enforcing social control of poor people of color, it will be difficult to reorient this aspect of policing.”<sup>343</sup> However, he adds:

Until then it is important to strategically negotiate aspects and terms of this social control to make encounters safer and [fairer]. This might include minimizing contact between police and poor people of color by deprioritizing enforcement of laws which are used to target poor people of color. Ordinances, which deprioritize marijuana where there are racial disparities in marijuana enforcement, offer an example. Also, agencies which stop issuing charges for tail lights, tinted windows, and other non-safety traffic violations have the effect of reducing racially discriminatory [stops].<sup>344</sup>

Let me indulge a somewhat odd analogy and posit that policing is like the coal industry. It is an institution that needs to be phased out in favor of better, less costly methods of providing necessary services. Policing cannot claim a monopoly on provisioning safety any more than coal can claim a monopoly on provisioning energy. Policing cannot be divorced from racialized violence any more than the coal industry can be divorced from coal mining. Policing cannot be cleaned up any more than coal can be sanitized simply by affixing a “clean” label to it. However, the fact of the matter is that policing, even more so than King Coal, is a deeply entrenched facet of American life involving real people’s real lives. Concerned residents, without any alternative, rely on the police for safety, services, and crime-solving. Employees within police departments rely on their salaries to survive. Policing cannot and probably should not disappear overnight.<sup>345</sup>

Still, clean energy has taken decades to gain ground and will take many more to become the norm. The move away from policing toward other means of providing safety, services, and crime-solving will come in fits and starts. Nevertheless, incremental, “negative,” and “transformative” reforms are already occurring. Consider, for example, the aftermath of the *Floyd* litigation in New York City. The courts did not have the capacity to rein in policing, but politics did. Mayor Bill DeBlasio came into office with a

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343. Scott Holmes, *Resisting Arrest and Racism—the Crime of “Disrespect,”* 85 UMKC L. REV. 625, 667 (2017).

344. *Id.*

345. See Bell, *supra* note 53, at 761 (“In the status quo, we have a large, ideologically entrenched policing apparatus that seems unlikely to disappear anytime soon. Policing is not just part of the traditional carceral regime—it has suffused or supplanted many of the ostensibly non-carceral systems that are meant to provide social welfare.”).

promise to reform the police, and with the stroke of a pen, he essentially ended stop and frisk.<sup>346</sup> Stop and frisks went from a high of approximately 686,000 in 2011 down to roughly 11,000 in 2017, a *ninety-eight percent* decrease.<sup>347</sup> Far from the city lapsing into anarchy, New York’s 2017 crime rate was seventeen percent *lower* than its rate in 2011.<sup>348</sup> Already, cities across the nation are making moves to replace the police with nonpolice crisis intervenors for certain emergency situations.<sup>349</sup> Already, there have been bipartisan federal efforts to end the pipeline of military weapons from the federal government to states and local police forces.<sup>350</sup> A critical step in furthering all these and even more ambitious changes is a shift away from the American imaginary that the purpose of policing is crime-fighting. Scholars and activists must resist this mythology that has been so relentlessly fed to the public for decades and unwaveringly insist that policing is an archaic, hierarchy-preserving institution whose phase-out is long past due.

## V. CONCLUSION

This is a moment of radical awareness in which people of all races and socioeconomic statuses are decrying the brutality of street policing and lamenting that the United States has the ignoble distinction of the most punitive nation on Earth. This moment requires activists, scholars, and reform-minded

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346. See Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014), <https://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html> [<https://perma.cc/WK6Z-8B7C>].

347. *Stop-and-Frisk Data*, N.Y. C.L. UNION, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/58HT-ZAFW>] (last visited Mar. 12, 2021).

348. I arrived at this percentage by adding up felonies and misdemeanors in 2011 and those in 2017 and calculating the change. See *Historical New York City Crime Data*, N.Y. POLICE DEP’T, <https://www1.nyc.gov/site/nypd/stats/crime-statistics/historical.page> [<https://perma.cc/R8B5-SAKN>] (last visited Mar. 12, 2021).

349. Such programs have begun appearing in states like Oregon, Pennsylvania, and California. See *What Is CAHOOTS?*, WHITE BIRD CLINIC (Oct. 29, 2020), <https://whitebirdclinic.org/what-is-cahoots/> [<https://perma.cc/L2UF-XX59>]; Laura McCrystal, *Philly Has Put a Behavioral Health Specialist in Its 911 Call Center Amid Calls for Police Reform*, PHILA. INQUIRER (Oct. 9, 2020), <https://www.inquirer.com/news/police-mental-health-911-kenney-reform-behavioral-20201009.html> [<https://perma.cc/5R26-K3R3>]; *Mayor London Breed Announces Roadmap for New Police Reforms*, OFF. OF THE MAYOR: NEWS RELEASES (June 11, 2020), <https://sfmayor.org/article/mayor-london-breed-announces-roadmap-new-police-reforms> [<https://perma.cc/EE35-QVH4>].

350. Catie Edmondson, *Lawmakers Begin Bipartisan Push to Cut Off Police Access to Military-Style Gear*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/us/politics/police-military-gear.html> [<https://perma.cc/F4KD-L2S6>]; see also Misra, *supra* note 315.

policymakers to keep up the pressure even as the twenty-four-hour news cycle moves on and to call for much more than the prosecution of individual officers. This moment necessitates the rejection of policing's organizational structures and tactics that are rooted in slavery, disciplining the poor and lower classes, and suppressing workers' demands for rights. This moment demands nothing less than a total reimagination of how the state can justly, fairly, and effectively serve and protect individuals and communities. We can make real strides and ensure that six-year-old Gianna Floyd spoke truth when she said, "Daddy changed the world."<sup>351</sup>

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351. Aris Folley, *Gianna, 6-Year-Old Daughter of George Floyd, Says Her 'Daddy Changed the World,'* HILL (June 3, 2020, 4:10 PM), <https://thehill.com/blogs/blog-briefing-room/news/500989-gianna-6-year-old-daughter-of-george-floyd-says-her-daddy> [https://perma.cc/CS57-RVVD].