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TABLE OF CONTENTS

Twelfth Annual
Wiley A. Branton/*Howard Law Journal* Symposium

Reforming the Criminal inJustice System

LETTER FROM THE EDITOR-IN-CHIEF *Stanton M.B. Lawyer* vii

ARTICLES & ESSAYS

FROM FERGUSON TO PALESTINE:
DISRUPTING RACE-BASED POLICING *Bill Ong Hing* 559

RESTORING COMMUNITY DIGNITY
FOLLOWING POLICE MISCONDUCT *John Felipe Acevedo* 621

MAPPING THE BLANK: CENTERING BLACK
WOMEN'S VULNERABILITY TO POLICE
SEXUAL VIOLENCE TO UPEND MAINSTREAM
POLICE REFORM *Jasmine Sankofa* 651

RACE AND JURY SELECTION: THE PERNICIOUS
EFFECTS OF BACKSTRIKES *Shari Seidman Diamond* 705
and Joshua Kaiser

"POST-FERGUSON" SOCIAL ENGINEERING:
PROBLEM-SOLVING JUSTICE OR
JUST POSTURING *Mae C. Quinn* 739

THE MURDER OF BLACK MALES IN A WORLD
OF NON-ACCOUNTABILITY: THE SURREAL
TRIAL OF GEORGE ZIMMERMAN FOR THE
KILLING OF TRAYVON MARTIN *Mark S. Brodin* 765

NOTES & COMMENTS

ADDRESSING AN EVOLUTION IN AMERICA'S
WORKFORCE: A CALL FOR NEGOTIATED
RULEMAKING IN THE RIDESHARING INDUSTRY *Akasha C. Perez* 787

DISABLING DISABLING DEVICES:
ADOPTING PARAMETERS FOR ADDRESSING
A PREDATORY AUTO-LENDING TECHNIQUE
ON SUBPRIME BORROWERS *Erica N. Sweeting* 817

THE CALIFORNIA LOTTERY: HAVE SUBSTANTIAL
DELAYS IN EXECUTION AND DUE PROCESS
FAILURES RENDERED CALIFORNIA'S
DEATH PENALTY ADMINISTRATION
UNCONSTITUTIONAL? *Najee K. Thornton* 847

THE WILEY A. BRANTON / *HOWARD LAW JOURNAL* SYMPOSIUM ISSUE

LETTER FROM THE EDITOR-IN-CHIEF

The legacy of Wiley A. Branton, former Dean of Howard University School of Law and noted civil rights leader, looms large. The fight for social justice that Dean Branton was at the forefront of continues. Each year, the *Howard Law Journal* celebrates the legacy of our former Dean by creating a forum — the Wiley A. Branton/*Howard Law Journal* Symposium — during which students, scholars, and advocates may engage with the most pressing legal issues of the day.

The theme of this year's Symposium was *Reforming the Criminal Injustice System*. The theme of the Symposium and the tenor of the day was not a wholesale condemnation of the criminal justice system in the United States. There was, however, a recognition that for many observers and participants, the obvious inequities, disparate results, violence wrought against the bodies of people of color, and other issues too numerous to recount here demand immediate attention and proactive change. To that end, the discussions of our Symposium explored: police interactions with communities of color; the use of force against black and brown bodies; the role of juries and the methods they use to reach verdicts; the ubiquitous nature and impact of collateral consequences; and the roles coalition building and community activism play in actualizing change.

Bill Ong Hing, Professor, University of San Francisco School of Law, delivered our morning Keynote Address. Professor Hing is an expert in the field of immigration policy and race relations and has dedicated his career to social justice through a combination of community work, litigation, and scholarship. His article, *From Ferguson to Palestine: Disrupting Race-Based Policing*, leads our Symposium issue.

Marilyn Mosby, State's Attorney for Baltimore City, Maryland, delivered our afternoon Keynote Address. At the time of her election, Ms. Mosby was the youngest lead prosecutor in any major American city. She garnered international attention when she charged six Baltimore City Police Officers for their involvement in the death of Freddie Gray. Her inspirational address to the attendees challenged us to step up to the plate. "If not me then who?"

The Symposium's two panels featured distinguished panelists from legal academia and national non-governmental organizations. Nkechi Taifa moderated the panel "Change Agents in the Community: Precipitating a Paradigm Shift" featuring Erin P. Johnson, Jasmine Sankofa (formerly Phillips), and Seema Sadanandan. The panelists explored the ways in which community activism is bringing about changes in the criminal justice system. The panel, "Reform from Within: Priorities, Opportunities & Challenges," was moderated by Howard University School of Law's Professor Adam Kurland and featured: Professor John Felipe Acevedo, Joshua Kaiser, and Professor Shari Seidman Diamond. They discussed the potential legal and policy-based reforms to the criminal justice system.

It is our honor to introduce you to the final issue of the 2015-2016 academic year, Issue 3 of Volume 59 of the *Howard Law Journal*:

Professor Bill Ong Hing's article *From Ferguson to Palestine: Disrupting Race-Based Policing* builds upon his Keynote Speech. It traces the numerous factors that have resulted in the violent, race-based policing that occurs in parts of the United States. These factors include broken-windows policing, stop-and-frisk policies, the War on Drugs, and the militarization of local police forces. Professor Hing offers a wide range of policy reforms that range from the procedural restriction of the sale of military equipment to local police departments and deployment of less-lethal weapons and tactics to the community-based response of restorative justice.

Professor John Felipe Acevedo's innovative Essay *Restoring Community Dignity Following Police Misconduct* follows. Professor Acevedo argues that the taking of a life in circumstances that speak to police misconduct should be understood as a dignity taking. A dignity taking is an extraordinary taking that occurs from when the government takes or destroys property because the government views the person as less than human. He argues that the traditional remedies for police misconduct — reforms and tort compensation — are inadequate. Acevedo offers two restorative justice approaches that would serve as remedies to dignity takings.

Next, Jasmine Sankofa's article *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Uplend Mainstream Police Reform*, argues that traditional understandings of police violence and the more recent focus on the violent interactions between police and communities of color focus on Black men. This is despite quantitative and qualitative evidence that shows Black women and members of the LGBTQ community are disproportionately affected at rates similar to Black men. Sankofa discusses how Black women have been particularly vulnerable to sexual and racial violence throughout American history. Yet, as Sankofa argues, the failure to recognize how race and gender intersect limits our understanding of sexual assault as structural violence wrought against the most vulnerable. Sankofa concludes by offering several innovative grassroots and survivor focused reforms.

Professor Shari Seidman Diamond's and American Bar Foundation Fellow Joshua Kaiser's article, *Race and Jury Selection: The Pernicious Effects of Backstrikes*, provides an eye-opening examination of the use and effect of backstrikes in Caddo Parrish, Louisiana. A backstrike is used to strike a potential jury member after they have been selected to the jury but before the jury is empaneled. The authors argue that the use of this tool when combined with other variables undermines the principal of race neutral jury selection contrary to the principles articulated in *Batson v. Kentucky*.

Professor Mae C. Quinn's article, "*Post-Ferguson*" *Social Engineering: Problem-Solving Justice or Just Posturing*, is a timely assessment of the supposed change agents that emerged as part of the modern civil rights movement. Quinn shines a light on how many of those individuals who are at the forefront of calling for change were complicit in the ills of the past. She also provides an insightful critique of several of the approaches and theories of change that are currently being advanced. Quinn's article is a reminder that the words of Charles Hamilton Houston still ring true — lawyers *must* be more than parasites on society.

Professor Mark S. Brodin's essay, *The Murder of Black Males in a World of Non-Accountability: The Surreal Trial of George Zimmerman for the Killing of Trayvon Martin*, details the farce that was the trial of George Zimmerman. Brodin explains how the conduct of the prosecutors was far from prosecutorial and seemed to be in support of Zimmerman and his theory of self-defense. As Brodin points out, a deeper examination of the trial is warranted because the trial was, for many, the turning point in the modern civil rights movements.

The final three works are each authored by members of the Volume 59 *Howard Law Journal* Executive Board.

In *Addressing an Evolution in America's Workforce: A Call for Negotiated Rulemaking in the Ridesharing Industry*, Executive Solicitations & Submissions Editor Akasha C. Perez drives home the point that the process of negotiated rule-making may allow the ridesharing industry to confront many of its biggest challenges. Perez steers the reader through current developments and litigation in the ridesharing economy dominated by Uber and Lyft. She completes her argument with a call to action to give drivers, consumers, and existing industries a voice in the regulation of Uber, Lyft and other sharing economy services.

In her Comment, *Disabling Disabling Devices: Adopting a Guideline For Addressing a Predatory Auto-Lending Technique On Subprime Borrowers*, Executive Publications Editor Erica N. Sweeting sparks a conversation about the controversial starter disabling devices on vehicles sold or leased to subprime borrowers. These devices allow lenders to remotely disable the vehicles when the borrower is in arrears. As Sweeting points out,

the practices in the auto-industry surrounding these devices have unsettling similarities to the sub-prime mortgage crisis. She argues that the devices, coupled with the high interest rate, are predatory lending tactics used to lure in a particularly vulnerable buyer, and calls for greater regulation in the industry.

Managing Editor Najee K. Thornton's Comment, *The California Lottery: Have Substantial Delays in Execution and Due Process Failures Rendered California's Death Penalty Administration Unconstitutional?*, focuses on the contemporary practices in capital punishment, especially in California. He argues that the delay between sentencing and execution fails to meet the standards of decency that give meaning to the Eighth Amendment.

On behalf of the members and faculty advisors of the *Howard Law Journal*, I thank you for your support and readership. It is with great pride that we present to you this final Issue. I would like to personally thank all of the authors that have contributed to this Volume. The Executive Board would also like to express our deep appreciation to Ms. Jacqueline Young, Director of Publications and External Communications, for her tireless efforts, wisdom, and support over the past year. I would also like to personally thank the members of the *Journal*. Your dedication to excellence, good cheer, and faith in the leadership of the Executive Board has made serving as your Editor-in-Chief the highlight of my law school experience.

With Love,

Stanton M.B. Lawyer
Editor-in-Chief
Volume 59

**About the Wiley A. Branton/
Howard Law Journal Symposium:**



Each year, Howard University School of Law and the *Howard Law Journal* pay tribute to the life and legacy of our former dean, Wiley A. Branton. What began as a scholarship award ceremony for the first-year student who completed the year with the highest grade point average has grown into a day-long program that focuses on an area of legal significance inspired by Branton's career as a prominent civil rights activist and exceptional litigator. The Symposium is then memorialized in the *Journal's* spring issue following the Symposium. The expansive nature of Branton's work has allowed the *Journal* to span a wide range of topics throughout the years, and the *Journal* is honored to present this issue, *Reforming the Criminal Injustice System*, in recognition of the great Wiley A. Branton. Past Symposium issues include:

*Unfinished Work of the Civil Rights Act of 1964:
Shaping An Agenda for the Next 40 Years*

The Value of the Vote: The 1965 Voting Rights Act and Beyond

*What Is Black?: Perspectives on Coalition Building
in the Modern Civil Rights Movement*

Katrina and the Rule of Law in the Time of Crisis

Thurgood Marshall: His Life, His Work, His Legacy

From Reconstruction to the White House:

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Collateral Consequences:

Who Really Pays the Price for Criminal Justice?

*Health Care Reform and Vulnerable Communities:
Can We Afford It? Can We Afford to Live Without It?*

Protest & Polarization: Law and Debate in America 2012

Civil Rights at a Critical Juncture: Confronting Old Conflicts and New Challenges

Rights vs. Control: America's Perennial Debate on Guns

From Ferguson to Palestine: Disrupting Race-Based Policing

BILL ONG HING*

INTRODUCTION	560
I. HOW DID WE GET HERE?	566
A. Racism – Driving While Black	566
B. War on Drugs	569
C. 9/11 – Urban Areas Security Initiative/Urban Shield	571
D. Broken Windows – Zero Tolerance/Stop and Frisk .	574
II. WHAT HAS BEEN THE RESPONSE?	578
III. PROPOSALS FOR CHANGE	584
A. Procedural Ideas	585
1. Curtailment of sales of military equipment to local law enforcement	585
2. Transparency	586
3. Recruiting better-educated officers	588
4. Use of Tasers and less-lethal weapons	588
5. Training on verbal warnings and warning shots .	590
6. Data reporting by officers involved	591
7. Civilian review, internal affairs, diversifying personnel	593
B. Attitudinal Aspirations	594
1. Promoting non-enforcement activities, sensitivity training, exploring root causes	594
2. Crisis intervention training	597
3. Implicit bias training	597
4. Prosecutions and civil suits	598

* Professor of Law, University of San Francisco; Professor of Law *Emeritus*, University of California, Davis. Many thanks to the *Howard Law Journal* Wiley A. Branton Symposium editors for their hospitality and assistance. Special thanks to my able research assistants, Nuha Abusamra and Darcy Morris.

C. Community-Oriented Responses	601
1. Affirmative restorative justice	601
2. Oakland Power Projects	603
IV. CAN THINGS CHANGE?	606
CONCLUSION – WAGING A DISRUPTIVE WAR AND SEEKING NEW ALLIES	612

INTRODUCTION

Michael Brown, an unarmed black teenager, was shot dead on August 9, 2014, by Darren Wilson, a white police officer, in Ferguson, Missouri. The shooting inspired protests around the country and especially in Ferguson. Some witnesses say the teenager assaulted the officer at the outset and tried to grab his gun; other witnesses say Wilson was the aggressor.¹ About three months later, the St. Louis County grand jury decided not to indict Officer Wilson. The announcement set off even more protests.²

Since Michael Brown’s killing, “Ferguson” has become the battle cry of embattled black communities targeted by over-policing and activists protesting racist policing. The battle cry has been all too important, unfortunately, as more than a dozen other police on black shootings occurred over the next several months.³ The story has become all too familiar. A traffic stop or a call about someone acting out. The target might answer respectfully, blandly, or with some attitude. He or she might sprint to escape, sit still, or glance away with attitude. Whatever the trigger, the cop’s violent reaction can end with another unarmed black man or woman shot in the head.

Consider Walter Scott. Around 9:30 a.m. on April 4, 2015, in North Charleston, South Carolina, 50-year-old Walter was pulled over by Officer Michael Slager. He was reportedly pulled over for a broken tail-light. A few minutes after being stopped, Walter ran from his vehicle. Officer Slager chased after him and they eventually reached a park. The officer used his Taser on Walter, and a struggle ensued. The

1. *Ferguson Protests: What We Know About Michael Brown’s Last Minutes*, BBC NEWS (Nov. 25, 2014), <http://www.bbc.com/news/world-us-canada-28841715>.

2. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2015), <http://www.bbc.com/news/world-us-canada-28841715>.

3. See, e.g., Nicolas Quah, *People Killed By Police Over Past Year*, BUZZFEED (May 1, 2015, 5:46 PM), <http://www.buzzfeed.com/nicholasquah/heres-a-timeline-of-unarmed-black-men-killed-by-police-over#.fp1BWNMIEj>; *Timeline: Recent US police shootings of black suspects*, ABC NEWS (Apr. 7, 2015), <http://www.abc.net.au/news/2015-04-09/timeline-us-police-shootings-unarmed-black-suspects/6379472>.

officer then shot at Walter eight times.⁴ Officer Slager reported that he used his weapon out of “fear for his safety.”⁵ However, a bystander who began to film the encounter on his cell phone released footage to the family. The footage shows that in fact Walter was already running away, and the officer was firing at him. It shows the officer then going over, handcuffing Walter, and checking his pulse. Officer Slager was let go from the police department and he was charged with murder following a grand jury indictment.⁶

Consider Sandra Bland. Sandra was an African American woman who was found hanged in a jail cell in Waller County, Texas, on July 13, 2015. Her death was classified as a suicide by police and the county coroner, and was followed by protests against her arrest, disputing the cause of death and alleging racial violence against her.⁷ Bland was 28 years old when she died. Bland was pulled over for a minor traffic violation on July 10 by state trooper Brian Encina. He arrested her following an escalating conflict, during which he alleged that she had assaulted him, and the encounter was recorded by his dashcam and by a bystander’s cell phone.⁸ The officer was placed on administrative duty for failing to follow proper traffic stop procedures, because the release of the dashcam video demonstrates that normal procedures were not followed by Officer Encina. However, prosecutors have decided not to file charges against Encina.⁹

Consider Brendon Glenn. Brendon was a 29-year-old homeless man with a history of alcoholism living in Venice Beach, California, with his dog. He had a love for environmental causes. Two officers were responding to a call that a man was harassing customers along

4. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0.

5. *Id.* Susanna Kim & Kristen Johnson, *Michael Slager, Jailed Ex-Cop Who Killed Walter Scott, ‘Discouraged and Depressed,’* ABC NEWS (Sept. 11, 2015, 3:43 PM), <http://abcnews.go.com/US/michael-slager-jailed-cop-killed-walter-scott-discouraged/story?id=33685985>.

6. Catherine E. Shoichet & Mayra Cuevas, *Walter Scott Shooting Case: Court Documents Reveal New Details*, CNN (Sept. 10, 2015, 12:10 AM), <http://www.cnn.com/2015/09/08/us/south-carolina-walter-scott-shooting-michael-slager/>.

7. Christine Hauser, *Jail Video of Sandra Bland Aims to Dispel Rumors About Her Death*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/jail-video-of-sandra-bland-aims-to-dispel-rumors-about-her-death.html>.

8. *Trooper Who Stopped Sandra Bland Indicted for Perjury, and to be Fired From DPS*, ASSOCIATED PRESS (Jan. 7, 2016), <http://abc13.com/news/grand-jury-indicts-trooper-in-sandra-bland-traffic-stop/1148818/>.

9. *Id.*

the Venice Beach Boardwalk.¹⁰ After speaking with Brendon, the officers returned to their car and Brendon walked away. However, the officers turned to see some sort of struggle between Brendon and another person. The officers attempted to arrest Brendon and in the process shot him. After watching the video footage, the Los Angeles Police Chief concluded that the circumstances did not amount to extraordinary circumstances that justified shooting an unarmed man.¹¹

And consider Tamir Rice. Tamir was a 12-year-old boy who was shot because Cleveland police officers thought he had a gun. The gun turned out to be a type of replica gun called an airsoft gun. The 911 caller that reported Tamir actually said it was “probably a juvenile” and that it was a probably toy gun twice.¹² The officers responded to the call and Tamir was shot within two seconds after the officers arrived. While he did not say anything or make any physical threat to the officers, he reached toward the replica gun. The gun had no orange safety indicator on the muzzle usually found on toys, and an officer shot him twice. The prosecution investigated the case, releasing a report of the investigation with contradictory and inconsistent statements.¹³ In spite of or perhaps because of discrepancies in timing, the positioning of Tamir’s hands, and the toy gun, two experts hired by the County Prosecutor concluded that the shooting was “reasonable.”¹⁴

Consider also the experience of 13-year-old Maria Calvillo. On an early November morning, in Oakland, California, as Maria was getting ready for school, SWAT team officers barged into her family’s home, pointed a rifle at her, and searched her family, including her three-month-old sister who was wrapped in a baby blanket. According to Calvillo, “[t]he police had a tank in front of our house, an actual tank. I thought I was in a movie . . . It made me angry that they were

10. Kate Mather, *L.A. Police Chief Beck Backs Charges Against Officer Who Fatally Shot Venice Homeless Man*, L.A. TIMES, (Jan. 11, 2016, 8:26 PM), <http://www.latimes.com/local/crime/la-me-venice-shooting-20160112-story.html>.

11. Jeannette Marantos, *The Homicide Report: Brendon K. Glenn, 29*, L.A. TIMES (May 22, 2015), <http://homicide.latimes.com/post/brendon-k-glenn/>.

12. 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), <http://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html>.

13. Wesley Lowery & Afi Scruggs, *Cleveland Officers Say Tamir Rice Reached Into Waistband and Pulled Toy Gun Before One of Them Shot Him*, WASH. POST (Dec. 2, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/12/01/cleveland-officers-say-tamir-rice-reached-into-waistband-and-pulled-toy-gun-before-one-of-them-shot-him/>.

14. Steve Almasy, *Tamir Rice Shooting Was ‘Reasonable,’ Two Experts Conclude*, CNN (Oct. 12, 2015, 5:58 PM), <http://www.cnn.com/2015/10/10/us/tamir-rice-shooting-reports/>.

searching my baby sister.”¹⁵ The officers had a warrant, but it turns out that their information was wrong. It was what is known in the trade as a “bad raid” warrant. Calvillo, who lives in West Oakland with pockets of poor African American and Latino communities and high crime, expressed fear of police when talking about the SWAT raid at her house.¹⁶ The image of a tank in front of Calvillo’s house to enforce a drug warrant is reminiscent of the image of tanks rolling down the streets of Ferguson in response to protests over the police shooting of Michael Brown.

This article is based on an understanding that police in many parts of the country often are guilty of abusing their authority in a racist manner. This is not an assumption. For example, although Ferguson, Missouri, is a third white, in the two-year period prior to the killing of Michael Brown, blacks accounted for 85 percent of traffic stops, 90 percent of tickets and 93 percent of arrests.¹⁷ In cases like jaywalking, which often hinge on police discretion, blacks accounted for 95 percent of all arrests. The racial disparity in those statistics was so stark that the Justice Department concluded in a report that there was only one explanation: The Ferguson Police Department was routinely violating the constitutional rights of its black residents.¹⁸ The 1994 Violent Crime Control and Law Enforcement Act gives the U.S. Department of Justice Civil Rights Division authority to investigate state and local law enforcement agencies that it believes have unconstitutional policies or engage in unconstitutional patterns or practices of conduct. More than twenty-five police departments have experienced some form of DOJ involvement since 1994.¹⁹ The constant in the DOJ’s oversight of police departments, such as those in New Orleans, Seattle, Detroit, Cincinnati, Los Angeles, and Washington, D.C., accused of discriminatory and unconstitutional activity is the primary types of wrongdoing that have triggered federal involvement: im-

15. Halima Kazem, *Police Shop for Military-style Weapons Amid Protests at Urban Shield Expo*, *GUARDIAN* (Sept. 14, 2015, 8:51 AM), <http://www.theguardian.com/us-news/2015/sep/14/police-military-weapons-urban-shield-expo>.

16. *Id.*

17. Matt Apuzzo & John Eligon, *Ferguson Police Tainted by Bias, Justice Department Says*, *N.Y. TIMES* (Mar. 4, 2015), <http://www.nytimes.com/2015/03/05/us/us-calls-on-ferguson-to-overhaul-criminal-justice-system.html>.

18. U.S. DEP’T. OF JUSTICE CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 15 (2015).

19. POLICE EXEC. RESEARCH FORUM, *CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 1* (2013) [hereinafter *LESSONS LEARNED*]; Kimbriell Kelly, Sarah Childress & Steven Rich, *Forced Reforms, Mixed Results*, *WASH. POST* (Nov. 13, 2015), <http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/>.

proper use of force by police, unlawful stops and searches, and biased policing.²⁰

The over-policing of African American communities in many respects can be traced to the “broken windows” model of policing.²¹ The model focuses on the importance of disorder (e.g. broken windows) in generating and sustaining more serious crime. Disorder is not directly linked to serious crime; instead, disorder leads to increased fear and withdrawal from residents, which then allows more serious crime to move in because of decreased levels of informal social control. The idea is that police can play a key role in disrupting this process. If they focus in on disorder and less serious crime in neighborhoods that have not yet been overtaken by serious crime, they can help reduce fear and resident withdrawal.²² Promoting higher levels of informal social control will help residents themselves take control of their neighborhood and prevent serious crime from infiltrating. The problem is that this approach has evolved into a zero-tolerance mentality in the cop-on-the-street, manifested in constant harassment of young black males.

Another problem is Urban Shield, a controversial law enforcement training and weapons expo held in Alameda County every year, where companies that make military-style weaponry market their products to local police and fire departments.²³ Urban Shield is the largest tactical exercise in the world and brings together more than fifty local, national and international law enforcement agencies. The conference features SWAT training, national and transnational police networking, and weaponry marketing. Companies from around the world use the conference to hawk the kind of military-grade equipment that shocked much of the country when it was used in Ferguson. While this equipment often is sold to the public as a tool for high-stakes situations such as active shooters, we now know that it is used for drug raids, to issue search warrants, and against peaceful protesters.²⁴ Urban Shield is coordinated by the Urban Areas Security Initiative, a key program in the extreme militarization of police departments seen in Ferguson, Baltimore, and many other black com-

20. LESSONS LEARNED, *supra* note 19.

21. *See infra* notes 66–85 and accompanying text.

22. *See infra* notes 70–85 and accompanying text.

23. *See infra* notes 56–58 and accompanying text.

24. *See infra* notes 57–58 and accompanying text.

munities nationwide. In short, Urban Shield also inculcates law enforcement officials with a hard core enforcement mentality.

Broken windows policing and Urban Shield represent disruptions in how police work is done. Disruption (a term we may be more familiar with in the technology world) literally uproots and changes how we think, behave, do business, learn and go about our day-to-day. The question for us today is whether we can offer disruptive alternatives to policing that offer real public safety in a manner that is not racist.

Black Lives Matter and others are working on disruptive alternatives to create true community policing that is about public safety for all.²⁵ Their rebellious method of organizing recognizes that meaningful, lasting change can only come about through collaboration with allies with common goals and experiences. Working with the labor movement, immigrant rights groups, Latino and Asian American organizations, and pro-Palestinian activists represents a strong foundation for collective change.

The purpose of this article is to review some of what has been done and new ideas on what can be done to eliminate violent, race-based policing. Some of the old ideas of civilian review, federal intervention, and internal affairs still play an important role, but must be refurbished. Some new ideas are related to newer problem sources and others, such as training civilians to be first responders and requiring police to engage in non-policing community activities, are particularly noteworthy. I conclude that the multitude of ideas should be implemented and that many new ideas are coming from new leaders and allies.

I begin in Part I with a review of policies and phenomena that have contributed to a policing environment that gives rise to violent, race-based policing. This includes broken windows policing and Urban Shield, but also problems with respect to such things as racism and the war on drugs. In Part II, I discuss the response to the crisis of racist policing from various quarters, including traditional institutions as well as new community movements. Part III is a review of various proposals for change that I classify as procedural, attitudinal, and community-oriented. In Part IV, I contemplate whether significant change is possible, and in Part V, I close with a call for a disruptive war.

25. See *infra* notes 86–118 and accompanying text.

I. HOW DID WE GET HERE?

African Americans have become the target of violent, race-based policing as a result of a variety of factors and programs. In this section, I discuss racism, the war on crime and drugs, the effect of September 11, and the broken windows theory of policy. These topics, of course, overlap.

A. Racism – Driving While Black

Racist enforcement can, of course, occur simply because some individual police officers are racist. Other times, the racist action can result from the actions of individuals who are placed in institutions or within structures that have become racist in nature. Those institutions and structures are products of efforts such as the war on crime and drugs and the broken windows theory of policy that are discussed below. Whatever the reason—individual, structural, or institutional²⁶—the results of some policing efforts reveal clear racism.

Consider the phenomenon of “driving while black.”²⁷ In a study of thirteen million traffic stops in North Carolina, black and Latino persons were subject to consistently higher rates of search and arrest than whites.²⁸ This is significant for purposes of this article, because police shootings of blacks often begin with traffic stops. When officers make stops for seemingly minor reasons, e.g., seat belts or vehicle equipment issues, that have great discretion, and disparities in treatment between black and Latino versus white drivers are greatest. Once the car is stopped, black and brown drivers and passengers are more likely to be searched. For example, when the officer cited a “seat

26. Kathleen Shumate, *Who is the Real Patient? Systemic Racism Through the Eyes of Counseling*, HUFFPOST RELIGION (Feb. 1, 2016), http://www.huffingtonpost.com/kathleen-shumate/who-is-the-real-patient-racism_b_9110714.html; Jeff Nesbit, *Institutional Racism Is Our Way of Life*, U.S. NEWS, Mar. 16, 2016; Howard Henderson, *AME Church Massacre and America's Inability to Acknowledge Structural Racism*, HUFFPOST BLACK VOICES (June 24, 2015), http://www.huffingtonpost.com/howard-henderson-phd/ame-church-massacre-and-america-inability-to-acknowledge-structural-racism_b_7632902.html; Christy M. Byrd, *Individual, Institutional, and Structural Discrimination*, BLACK HIST. EVERYDAY, <http://blackhistoryeveryday.tumblr.com/post/55652755514/individual-institutional-and-structural>.

27. On the nation's highways today, police ostensibly looking for drug criminals routinely stop drivers based on the color of their skin. This practice is so common that the minority community has given it the derisive term, “driving while black or brown” – a play on the real offense of “driving while intoxicated.” David A. Harris, *Driving While Black: Racial Profiling on our Nation's Highways*, ACLU 2 (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>.

28. Tyler Dukes, *Project Puts Racial Disparity in NC Traffic Stops on Display*, WRAL.COM (Dec. 16, 2015), <http://www.wral.com/project-puts-racial-disparity-in-nc-traffic-stops-on-display/15181088/>.

belt violation” as the reason for the stop, blacks are 223 percent and Latinos 106 percent more likely than whites to be searched.²⁹

Officials in Greensboro, North Carolina defend the results on the grounds that any racial disparities in traffic enforcement results from the fact that that more African Americans live in high crime neighborhoods subject to aggressive patrolling.³⁰ Officials admit that pulling over drivers is a standard, and regard these efforts as an “effective form of proactive policing.” As we see below, this standard practice likely follows the “broken windows” theory of policing. “The way we accomplish our job is through contact, and one of the more common tools we have is stopping cars,” acknowledged the Greensboro’s police chief.³¹

Over the years, police officials in cities like New York and Chicago have used much the same argument to justify controversial pedestrian stop-and-frisk policies in high-crime areas.³² Criminals will be discouraged from hanging out in high-crime spots, the theory goes, if they know that they will be subject to aggressive policing police there.

The Tenderloin district of San Francisco is a good example of police enforcement with a clear racist tinge. Not far from the fancy Union Square shopping district, tourist guide books often label the Tenderloin as the city’s “worst neighborhood,” filled with drug dealers, addicts, prostitutes, and mentally unstable street people.³³ Black residents in the Tenderloin are consistently subjected to racial bias and racial slurs. In one case, a joint narcotics sting by the San Francisco police and the federal Drug Enforcement Administration resulted in the indictment of fourteen defendants who claimed that officers routinely referred to them as “black bitches” and used racist slurs to refer to other African Americans. In a court filing, the defendants alleged that police used slurs to refer to them and focused on African Americans when making drug arrests while ignoring suspects

29. Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>.

30. David Greenwald, *Analysis: Study Shows Driving While Black Presents Disproportionate Risks*, DAVIS VANGUARD (Oct. 25, 2015), <http://www.davisvanguard.org/2015/10/analysis-study-shows-driving-while-black-presents-disproportionate-risks/>.

31. LaFraniere & Lehren, *supra* note 29.

32. *Id.*

33. *San Francisco: Tenderloin*, <http://www.sfgate.com/neighborhoods/sf/tenderloin/> (last visited Mar. 6, 2016).

of other races.³⁴ “I have witnessed law enforcement officers in the Tenderloin use racial slurs, such as referring to African Americans as ‘n—,’” defendant Lakeysha White said. “I have personally been called ‘n—’ and ‘black bitch’ by police officers in the Tenderloin on multiple occasions.”³⁵ Defendants alleged Tenderloin officers targeted them based on race and used excessive force. Hobert Lee, a black man, said officers have questioned him about his “presence in the Tenderloin” at least 10 times since 2008. His wife, who is white, never faced such questions when she was with him, Lee said.³⁶

Racism among San Francisco police officers apparently is not uncommon. Earlier in 2015, four San Francisco officers were fired, when racist text messages were traced to them.³⁷ In an exchange with another officer in May 2012, Sgt. Ian Furminger asked whether he should be worried that the black husband of one of his wife’s friends was coming to visit. The officer responded, “Get ur pocket gun. Keep it available in case the monkey returns to his roots. It’s (sic) not against the law to put an animal down.” “Well said!” Furminger replied, “You may have to kill the half-breeds too,” the unnamed officer replied, adding, “Don’t worry. Their (sic) an abomination of nature anyway.” “All n— must f— hang,” another unidentified officer texted to Furminger in an unrelated exchange.³⁸ In another text, an officer wrote, “White power” to Furminger, who then repeats the phrase in another text. In a text to a civilian, Furminger described his address as that of a “White power family.”³⁹

34. Vivian Ho, *Drug Defendants Accuse S.F. Officers of Racism, Sex Harassment*, S.F. CHRON. (Dec. 10, 2015, 6:22 PM), <http://www.sfgate.com/crime/article/Drug-defendants-accuse-S-F-officers-of-racism-6690332.php>.

35. *Id.*

36. *Id.*

37. Vivian Ho, *S.F. Cops Who Wrote Racist Text Messages Win Court Ruling*, SFGATE (Dec. 21, 2015), <http://www.sfgate.com/crime/article/Judge-rules-in-favor-of-S-F-cops-who-wrote-6713191.php>. The officers were later reinstated by a superior court ruling that a one-year statute of limitations on personnel matters was not met. Associated Press, *San Francisco Police Officers in Racist Texts Case Can Keep Their Jobs: Judge*, ASSOCIATED PRESS (Dec. 21, 2015), <http://www.nbcbayarea.com/news/local/San-Francisco-Police-Officers-in-Racist-Texts-Case-Can-Keep-Their-Jobs-Judge-363209911.html>.

38. Beenish Ahmed, *These Cops Are Probably Going To Get Away with Praising White Power and Saying Black People Should Be Spayed*, THINKPROGRESS (Dec. 19, 2015, 11:41 AM), <http://thinkprogress.org/justice/2015/12/19/n3734044/sfpd-miscoduct/>.

39. Jaxon Van Derbeken, *Bigoted Texts “Disgraced” SFPD, Chief Says, Vowing Rapid Action*, SFGATE (Mar. 16, 2015), <http://www.sfgate.com/crime/article/Officers-linked-to-racist-texts-were-all-veterans-6134489.php>.

B. War on Drugs

Deep concern over drug use has contributed to an enforcement regime that has come to focus on African Americans. President Richard Nixon's declaration of a "war on drugs" in 1971 was manifested with a dramatic increase in federal drug control agencies, mandatory sentencing, and no-knock enforcement warrants.⁴⁰ Under President Reagan, rates of incarceration began to explode as his administration expanded the war on drugs. In 1980, when Reagan took office, 50,000 inmates were in prison for nonviolent drug law offenses; by 1997, the figure spiked to more than 400,000.⁴¹ In the 1980s, the smoke-able form of cocaine—crack—attracted public attention as the media focused on crack addicts. First Lady Nancy Regan launched media-appealing anti-drug campaign with the catchy slogan "Just Say No." The stage was set for zero tolerance policies in the mid-to-late 1980s. Political hysteria led to the passage of severe penalties at the state and federal levels, fueling an expansion of the prison population.

Presidents Bill Clinton and George W. Bush continued the war. Although Clinton spoke of treatment over incarceration in his 1992 presidential campaign, after assuming the presidency, he adopted drug war escalation strategies reminiscent of his predecessors.⁴² Although the drug war was in somewhat of a decline when he arrived at the White House, Bush invested heavily to reinvigorate efforts. He appointed a "drug czar" who targeted marijuana and called for student drug testing.⁴³ Bush militarized the drug war as well. By the end of his presidency, some 40,000 paramilitary-style SWAT raids were conducted annually, targeting nonviolent drug law offenses, that often were misdemeanors. At the state level, however, reforms began to slow the drug war during the Bush years.⁴⁴

The drug war has resulted in a disproportionate targeting of and suffering by communities of color by law enforcement. Rates of drug dealing and use are similar across racial groups, yet people of color are stopped, searched, arrested, prosecuted, convicted, and incarcerated for drug law violations far more than whites. Higher arrest and incarceration rates of African Americans and Latinos is not due to

40. *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Mar. 7, 2016).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

higher drug use or sales in these communities; the disproportionate rates flows from police prioritization of urban areas and low-income income neighborhoods, as well as racial inequities in the criminal justice system.⁴⁵ Consider crack cocaine sentencing. Beginning in the 1980s, jail sentences for crack have been 100 times tougher than those for powder cocaine, especially for African Americans—the majority of those arrested for crack. In spite of reforms in 2010, the crack/powder sentencing disparity remains 18:1.⁴⁶

For many, the war on drugs has devastated black communities while failing to address the root causes of crime and poverty that stem from an economic system based on institutional racism.⁴⁷ According to Drug Enforcement Agency data, African Americans make up 75 percent of crack cocaine suspects, while whites make up 41 percent of methamphetamine suspects.⁴⁸ Latinos are caught up in the racialization of the war on drugs as well. Latinos make up 46 percent of those arrested, compared to white and black suspects who each constitute about a quarter of the arrestees.⁴⁹ Of those arrested, Latinos constitute 55 percent related to cocaine powder, 52 percent of the marijuana (52 percent), and 49 percent of those involving opiates.⁵⁰

Thus, significant blame for this rampant abuse of power must be laid at the feet of the government's war on drugs. Democratic and Republican presidents and lawmakers have embraced this misguided

45. *Race and the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/race-and-drug-war> (last visited Mar. 6, 2016).

46. *Id.* According to the ACLU:

In 2010, Congress passed the Fair Sentencing Act (FSA), which reduced the sentencing disparity between offenses for crack and powder cocaine from 100:1 to 18:1. The scientifically unjustifiable 100:1 ratio meant that people faced longer sentences for offenses involving crack cocaine than for offenses involving the same amount of powder cocaine – two forms of the same drug. Most disturbingly, because the majority of people arrested for crack offenses are African American, the 100:1 ratio resulted in vast racial disparities in the average length of sentences for comparable offenses. On average, under the 100:1 regime, African Americans served virtually as much time in prison for non-violent drug offenses as whites did for violent offenses. The FSA represents a decade-long, and truly bipartisan, effort to reduce the racial disparities caused by the draconian crack cocaine sentencing laws and to restore confidence in the criminal justice system — particularly in communities of color.

Fair Sentencing Act, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/node/17576> (last visited Mar. 6, 2016).

47. *See, e.g.*, Ash-Lee Henderson, *City's War On Crime Is Extension Of Failed War On Drugs - And Response*, CHATTANOOGAN (Dec. 19, 2013), <http://www.chattanooga.com/2013/12/19/265874/City-s-War-On-Crime-Is-Extension-Of.aspx>.

48. *Crime, Arrests, and US Law Enforcement*, DRUGWARFACTS.ORG, http://www.drugwarfacts.org/cms/Crime#_sthash.fE48V7aS.dpbs (last visited Mar. 6, 2016).

49. *Id.*

50. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2009 - STATISTICAL TABLES 6 (2011), <http://www.bjs.gov/content/pub/pdf/fjs09.pdf>.

crusade. From the outset, “the war on drugs has in fact been a war on people and their constitutional rights, with African Americans, Latinos and other minorities bearing the brunt of the damage. It is a war that has, among other depredations, spawned racist profiles of supposed drug couriers.”⁵¹

Furthermore, the police, like those in Ferguson or Oakland, were transformed by the military hardware that began to arrive with the “war on drugs” in 1980—tanks, helicopters and assault rifles.⁵² Are we shocked that training police recruits with a mantra of a “war on crime” or “war on drugs” breeds a militaristic attitude in the minds of the cop on the street? Every time that new officer straps on his weapon, he does so with the idea that he is about to go to war.

C. 9/11 – Urban Areas Security Initiative/Urban Shield

The tragic events of September 11, 2001, opened the door for local law enforcement agencies to federal funding and military hardware in the name of national security. For example, the Homeland Security Grant Program (HSGP) is a program established in 2003 and was designated to incorporate all projects that provide funding to local, state, and Federal government agencies by the Department of Homeland Security. The purpose of the grants is to purchase surveillance equipment, weapons, and advanced training for law enforcement personnel in order to heighten security.⁵³ The idea is that the HSGP provides funding for the creation and maintenance of national preparedness. That includes the establishment of plans, procedures, policies, training, and equipment at the Federal, State, and local level that is needed to maximize the ability to prevent, respond to, and recover from major events such as terrorist attacks, major disasters, and other emergencies.

51. On the nation’s roads and highways, police ostensibly looking for criminals routinely stop drivers based on the color of their skin. This practice is so common that the minority community has given it the derisive term, “driving while black or brown” – a play on the real offense of “driving while intoxicated.” David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, AM. CIV. LIBERTIES UNION (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>.

52. Dan Siegel, *Ferguson Is A Wake-up Call for America and Oakland*, POST NEWS GROUP (Aug. 29, 2014), <http://postnewsgroup.com/blog/2014/08/29/op-ed-ferguson-wake-call-america-oakland/>.

53. See generally EXEC. OFFICE OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION (Dec. 2014), https://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf.

Several projects of the Office of State and Local Government Coordination and Preparedness formed the foundation of HSGP. Today, HSGP includes these five projects: State Homeland Security Program, Urban Areas Security Initiative, Operation Stonegarden, Metropolitan Medical Response System Program, and Citizen Corps Program.⁵⁴

During the 2010 fiscal year, the Department of Homeland Security (DHS) spent approximately \$1.8 billion on the Homeland Security Grant Program.⁵⁵ DHS funding includes the transfer of military weapons and gear, including armored vehicles, bayonets, grenade launchers, and .50-caliber ammunition—the kind equipment associated with foreign battlefields, but now being added to the arsenals available to local police officers.

Urban Shield. A related challenge is Urban Shield, a law enforcement training and weapons gathering held in Alameda County, California, every year since 2008, where companies that make military-style weaponry market their products. Incorporating perhaps the “largest tactical exercise in the world,” Urban Shield brings together local, national and international law enforcement agencies with weapons manufacturers.⁵⁶ The conference features SWAT training, national and transnational police networking, and weaponry marketing. Hands-on trainings in fire, bomb squad, emergency medical services are available, and anti-terrorism scenarios often are planned at dozens of sites in northern California counties. Companies from around the world use the conference to sell the kind of military-grade equipment that shocked much of the country when it was used in Ferguson. These weapons may be marketed to the public as necessary equipment for high-stakes situations such as those involving mass shooters, but we now know that the use has broadened to “drug raids, to issue search warrants, and against peaceful protestors.”⁵⁷ Most San Francisco Bay

54. Robert O'Connor, *DHS Grant Program Preparedness (Non-Disaster) Grants: Authorized Equipment List (AEL)*, CAL. FIRE NEWS (Feb. 17, 2015), <http://calfire.blogspot.com/2015/02/dhs-grant-program-preparedness-non.html>.

55. U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2010 HOMELAND SEC. GRANT PROGRAM, FREQUENTLY ASKED QUESTIONS, FED. EMERGENCY MGMT AGENCY, http://www.fema.gov/txt/government/grant/2010/fy10_hsgp_faq.txt.

56. Ana Conner & Tara Tabassi, *Ending Police Militarization, One City at a Time*, POPULAR RESISTANCE (Sept. 30, 2015), <https://www.popularresistance.org/ending-police-militarization-one-city-at-a-time/>.

57. NationAction, *Stop Urban Shield: Join a Grassroots Campaign to Fight Police Militarization*, NATION (Aug. 12, 2015), <http://www.thenation.com/article/stop-urban-shield-join-a-grassroots-campaign-to-fight-police-militarization/>.

Area law enforcement agencies attend Urban Shield along with some from other states including Massachusetts, Texas, and Florida. Teams from South Korea take part in the exercises, and teams from 10 countries including Jordan, Uruguay, Colombia, Thailand and China observe trainings.⁵⁸ The Urban Areas Security Initiative coordinates Urban Shield, contributing to the militarization of police departments in Ferguson, Baltimore, and other black communities.

Department of Defense 1033 Program. Surplus U.S. military equipment from places like Iraq and Afghanistan has been turned over to law enforcement agencies across the country free of charge. A congressional program from the 1990s—the Department of Defense’s 1033 program—initially was intended to provide left over equipment for police use in narcotic and terrorism situations. However, even low profile police departments in towns with modest crime rates get mine-resistant vehicles and weapons along with cars.⁵⁹ The equipment is free, but the recipients pay for shipping charges and maintenance.⁶⁰

The public policy Cato Institute has voiced strong opposition to the program. According to its director on criminal justice:

We believe civilian police officers should use the absolute minimum amount of force necessary The goal of the military is to find the enemy and destroy the enemy using maximum force. When you begin to blur the difference between the two . . . what we find is a violation of constitutional rights and unnecessary injuries.⁶¹

Recipient departments recognize that the program “blurs” the lines between local law enforcement and the military.

Given these military resources, is the militaristic attitude of police on the streets a surprise? The HSGP program, Urban Shield training, and 1033 program contribute to inculcating law enforcement officers with a hard core enforcement mentality. The 9/11-instilled war on terror has carried over to city police departments—consider the fact that the Ferguson police chief had trained in “counter-terror” strategies in Israel.⁶² In fact, hundreds of U.S. local sheriffs and police, along with

58. Conner, *supra* note 56.

59. Paulina Firozi, *Police Forces Pick Up Surplus Military Supplies*, USA TODAY (June 17, 2014, 12:16 AM), <http://www.usatoday.com/story/news/nation/2014/06/15/local-law-enforcement-agencies-surplus-military-equipment/10286485/>.

60. *Id.*

61. *Id.*

62. Jaime Omar Yassin, *The Shortest Distance Between Palestine and Ferguson*, COUNTER-PUNCH (Aug. 15, 2014), <http://www.counterpunch.org/2014/08/15/the-shortest-distance-between-palestine-and-ferguson/>.

FBI and border patrol, have traveled to Israel under the auspices of counterterrorism training to receive training in crowd control. The training is provided by the Israeli military on paramilitary and counterinsurgency tactics.⁶³ When McKinney, Texas, police officer David Eric Casebolt brutally took down a teenage girl at a pool party in June 2015, he was using a form of martial arts called Krav Maga in which he trained exclusively.⁶⁴ These combat techniques were developed by the Israel Defense Forces.⁶⁵

D. Broken Windows – Zero Tolerance/Stop and Frisk

The amalgamation of institutional, structural, and individual racism has great roots in the broken windows theory of policing. The idea is to focus on preventing small crimes, such as vandalism and public drinking, and on creating an orderly atmosphere that would prevent more serious crimes from happening.⁶⁶ The idea also is that if you fix the broken windows and clean up the sidewalks, problems will not escalate.

The theory has been used as a motivation for several reforms in criminal policy, including the controversial mass use of “stop, question, and frisk” by the New York City Police Department and it has been copied in places like Los Angeles and Boston.⁶⁷ The stop, question, and frisk program, or stop-and-frisk, in New York City, is a practice in which police officers stop and question a pedestrian, then frisk them for weapons and other contraband; this is what is known in other places as the *Terry* stop. The rules for stop, question and frisk are based on the decision of the United States Supreme Court in the case of *Terry v. Ohio*.⁶⁸ In New York City, about 684,000 people were

63. Justin Gardner, *U.S. Police Routinely Travel to Israel to Learn Methods of Brutality and Repression*, FREE THOUGHT PROJECT (Aug. 30, 2015), <http://thefreethoughtproject.com/u-s-police-routinely-travel-israel-learn-methods-brutality-repression/>.

64. Jeffrey Weiss, *McKinney Officer Was No Rookie*, DALLAS MORNING NEWS (June 8, 2015), <http://www.dallasnews.com/news/community-news/mckinney/headlines/20150608-mckinney-officer-was-no-rookie.ece>.

65. Gardner, *supra* note 63.

66. Stephen Porter, *Compelling Evidence That Broken Windows Theory of Crime is True*, STEPHEN PORTER (May 15, 2015), <http://stephenporter.org/compelling-evidence-that-broken-windows-theory-of-crime-is-true/>.

67. BROOKLYN AND MANHATTAN JOINT PROJECT, *IMPROVING POLICE-COMMUNITY RELATIONS: A REPORT FROM A SERIES OF TOWN HALL MEETINGS IN BROOKLYN AND MANHATTAN* 32–33 (2015), <http://manhattanbp.nyc.gov/downloads/pdf/NYPD%20Town%20Hall%20Report.pdf> [hereinafter *IMPROVING POLICE-COMMUNITY RELATIONS*].

68. *See generally* 392 U.S. 1 (1968).

stopped in 2011.⁶⁹ The vast majority of these people were African-American or Latino,⁷⁰ a disparity which, according to a 2007 study, persists even after controlling for “precinct variability and race-specific estimates of crime participation.”⁷¹

However, encouraging regular low-level intervention of police in neighborhoods is severely problematic. The activities that are emblematic of the philosophy evolve into broad police discretion in minority communities that cause harm to the residents that become commonplace. Individuals in these so-called broken window neighborhoods get hassled and arrested for the crime of simply being “undesirable.”⁷² Low-level police intervention often is simply a cover for racist behavior.⁷³

The application of the broken windows theory in aggressive policing policies essentially is the criminalization of the poor and homeless. What is classified as disorder under broken windows policing are likely simple physical signs of a low-income neighborhood and the conditions under which residents live. Similarly, those who lack private space may engage in legal conduct that might be considered disorderly when done in public; those individuals then are regarded as criminals. Thus, many critics see the application of the broken windows theory in policing as a war against the poor as opposed to a war against more serious crimes.⁷⁴

Furthermore, the application of the broken windows theory leads to the criminalization of communities of color, which are typically disfranchised. Consider the inherent dangers of vaguely written ordinances that provide great discretion to the police to determine what is and who engages in disorderly behavior. The results can in turn produce a racially skewed outcome in crime statistics.

69. CTR. FOR CONST. RIGHTS, RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS (Jan. 15, 2009), https://ccrjustice.org/sites/default/files/assets/Report-CCR-NYPD-Stop-and-Frisk_3.pdf; Ryan Devereaux, *Scrutiny Mounts as NYPD ‘Stop-and-Frisk’ Searches Hit Record High*, GUARDIAN (Feb. 14, 2012, 4:55 PM), <http://www.theguardian.com/world/2012/feb/14/nypd-stop-frisk-record-high>; *Stop-and-Frisk Data*, NEW YORK CIVIL LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data>.

70. *Id.*

71. Andrew Gelman et al., *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, J. AM. STAT. ASS’N (Sept. 2007), <http://www.stat.columbia.edu/~gelman/research/published/frisk9.pdf>.

72. Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2254 (1998).

73. *Id.* at 2268–72.

74. *Id.* at 2262–63.

The application of the broken windows theory in policing and policy-making also can result in development projects that decrease physical disorder but promote gentrification in a manner that exacerbates dangers of racialized policing:

Often, when a city is “improved” in this way, the development of an area can cause the cost of living to rise higher than residents can afford, thus forcing low income people, often minorities, out of the area. As the space changes, middle- and upper class, often white, people begin to move into the area, resulting in the gentrification of urban, low income areas. The local residents are affected negatively by this application of the broken windows theory, ending up evicted from their homes as if their presence indirectly contributed to the area’s problem of “physical disorder.”⁷⁵

And just as importantly, the emotional effect on residents who are victims of the over-policing that broken windows policing brings is devastating in a way that others in the same city remain clueless about:

Most Americans have never experienced this kind of policing. They haven’t had to stare down the barrel of a service revolver drawn for no reason at a routine stop. They haven’t had their wife and kids put on an ice-cold sidewalk curb while cops ran their license plate. They haven’t ever been told to get the fuck back in their car right now, been accused of having too prominent a “bulge,” had their dog shot and their kids handcuffed near its body during a wrong-door raid, watched their seven-year-old dragged to jail for sitting on a dirt bike, or dealt with any of a thousand other positively crazy things nonwhite America has come to expect from an interaction with law enforcement. “It’s everywhere,” says Christen Brown, who as a 24-year-old city parks employee was allegedly roughed up and arrested just for filming police in a parking lot. “You can be somewhere minding your business and they will find their best way to fuck with you, point blank. It’s blatant disrespect.”⁷⁶

A major problem with the broken windows, stop and frisk approach was its evolution into a data-driven initiative. In New York,

75. *Broken Windows Theory*, WIKIPEDIA (2016), https://en.wikipedia.org/wiki/Broken_windows_theory (citing Bruce D. Johnson, Andrew Golub & James McCabe, *The International Implications of Quality-of-Life Policing as Practiced in New York City*, 11 POLICE PRAC. RES. 17–29 (2010)).

76. Matt Taibbi, *Why Baltimore Blew Up*, ROLLING STONE (May 26, 2015), <http://www.rollingstone.com/politics/news/why-baltimore-blew-up-20150526>.

police chief William Bratton implemented CompStat—a statistics-based system requiring that precinct captains report on numbers of arrests, stops and searches.⁷⁷ The calculation was simplistic—more stops and searches meant better crime fighting.⁷⁸ Stop-and-frisk evolved into a highly “interventionist” kind of policing that became inherently discriminatory based on where the location of the so-called broken windows. When the broken windows approach in poorer neighborhoods was first initiated in New York, crime did decline, but police presence was maintained, and the officers were not inclined to just sit on their hands. In those neighborhoods, police did not wait for a 911 call, instead, they self-initiated action to keep statistics up.⁷⁹ In affluent neighborhoods, however, police only responded when they were called, in other words, self-initiating action was not the norm in white neighborhoods.⁸⁰

In practice, the statistics associated with broken windows are staggering. Thousands of police were sent into “tough” neighborhoods, asking for IDs, executing pat-downs, and pushing people to the ground. As one retired NY police officer put it, we were there to “bang the shit” out of locals.⁸¹ In New York, police stopped almost 700,000 people a year (89 percent nonwhite in a population that is more than half white).⁸² During Martin O’Malley’s era as Mayor of Baltimore in the early 2000s, his zero-tolerance policing campaign was so aggressive that by 2005, 108,000 of the city’s 600,000 residents were arrested. The obsession with statistics “destroyed police work,” forcing cops into the roles not of investigators and protectors, but of strong-armers bent on producing numbers above all else.⁸³

In essence, broken windows creates an attitudinal shift akin to that of corrections officers in prisons. Like those in prison, the attitude of police is to control the residents in the broken windows neighborhood. But as a former police officer concedes, “[I]n neighborhoods, you’re not supposed to be controlling people. You’re supposed to be working with them. You’re supposed to be serving them. And that attitude is what’s missing.”⁸⁴

77. IMPROVING POLICE-COMMUNITY RELATIONS, *supra* note 67, at 21–24.

78. *Id.* at 22–23.

79. *Id.* at 23–24.

80. Taibbi, *supra* note 76.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

The results of a post 9/11 policing mindset, Urban Shield, broken windows policing, and racist implementation of laws are evident. Certainly, the results can be measured in terms of the inordinate stops and arrests of blacks. The result also can be measured in terms of the militarization of local police. The Department of Homeland Security's Urban Areas Security Initiative has supplied hundreds of millions worth of equipment, including Bearcat vehicles, speedboats and other items. For example, San Francisco Bay Area police departments got more than \$14 million in military surplus, which included grenade launchers, armored vehicles, and a \$4.4 million speed boat equipped with machine guns.⁸⁵

The combination of a broken windows approach of over-policing and any individual racism that particular officers may hold toward blacks has resulted in an institutional structure in many police departments that now results in focus—intentional or not—on black and poor communities. When a new police recruit enters into that structure, day-to-day activities focus on those communities, and the effects of those activities are racist—intentional or not. If they individual harbors racist tendencies, those tendencies are reinforced by mandated, normative racial actions. If the individual is not racist, the actions have racist effects nonetheless because of the enforcement focus.

II. WHAT HAS BEEN THE RESPONSE?

The response on the street to black shootings has been dynamic. From Ferguson and Baltimore to Cleveland and Oakland, the outrage has been apparent. Mass protests, demands for the resignation of police chiefs, and calls to criminally indict police officers involved have been constant.⁸⁶ The establishment of the Black Lives Matter (BLM) movement has caught the attention of the entire nation. Rooted in the African American community, BLM has become synonymous with the campaign against violence toward black people. BLM typically is

85. Karina Ioffe, *Bay Area Police Departments Got Millions in Military Surplus, Records Show*, SAN JOSE MERCURY NEWS (Sept. 11, 2014), http://www.mercurynews.com/my-town/ci_26508110/bay-area-police-departments-got-millions-military-surplus.

86. See, e.g., Ryan J. Reilly, *Ferguson Officer Darren Wilson Not Indicted in Michael Brown Shooting*, HUFFINGTON POST (Nov. 24, 2014, 9:25 PM), http://www.huffingtonpost.com/2014/11/24/michael-brown-grand-jury_n_6159070.html; Julia Carrie Wong, *Outraged Community Calls for SFPD Chief's Resignation Over Killing of Mario Woods*, S.F. WEEKLY (Dec. 5, 2015, 9:56 AM), <http://www.sfweekly.com/thesnitch/2015/12/05/outraged-community-calls-for-sfpd-chiefs-resignation-over-killing-of-mario-woods>; *White Ex-Police Chief Indicted in Killing of Unarmed Black Man*, HUFFINGTON POST (Dec. 3, 2014, 10:18 AM), http://www.huffingtonpost.com/2014/12/04/ex-police-chief-indicted-killing-black-man_n_6269024.html.

behind the protests of the killings of black suspects by police officers, but also targets the broader issues of racial profiling and racial inequality in the U.S. criminal justice system.⁸⁷

After George Zimmerman was acquitted of shooting to death black teenager Trayvon Martin in 2013, BLM was born, using the hashtag, #BlackLivesMatter, on social media. BLM then attracted widespread notoriety by helping to organize intensive protests in Ferguson over the Michael Brown shooting and in New York City following the 2014 killing of another African American, Eric Garner, in New York City.⁸⁸

By the summer of 2015, BLM was challenging politicians to state their positions on BLM issues.⁸⁹ In one pivotal moment, eleven BLM activists had a private meeting with Hillary Clinton, the Democratic frontrunner for the 2016 presidential campaign long in October 2015.⁹⁰ In the summer of 2015, BLM became noted for forcing candidates to deal with questions of race and justice, including the disruption of a Clinton event in August. At the October meeting, the activists pushed demands for investments in black communities, accused her of white privilege, and challenged her credibility on prison reform because of certain campaign contributions.⁹¹ The meeting appeared to make a difference. At a Democratic debate days later, the candidate opposed mass incarceration, called requiring body cameras for police, and proposed a “new New Deal” for communities of color.⁹² Clinton’s new criminal-justice platform borrowed BLM language, calling on an end to police militarization and greater federal

87. Mr. Militant Negro, *Celebrating Black History Month: Why We Need Black History Month*, OBAMACRAT.COM (Jan. 22, 2016), <https://theobamacrat.com/2016/01/22/celebrating-black-history-month-why-we-need-black-history-month/>.

88. Shannon Luitbrand, *How a Death in Ferguson Sparked a Movement in America*, CBS NEWS (Aug. 7, 2015, 5:39 AM), <http://www.cbsnews.com/news/how-the-black-lives-matter-movement-changed-america-one-year-later/>.

89. See, e.g., Monica Alba, *Clinton Event Interrupted by ‘Black Lives Matter’ Supporters*, NBC NEWS (Oct. 30, 2015, 4:43 PM), <http://www.nbcnews.com/politics/2016-election/clinton-event-interrupted-black-lives-matter-supporters-n454761>; Janelle Bouie, *Black Lives Matter Protests Matter*, SLATE.COM (Aug. 17, 2015), http://www.slate.com/articles/news_and_politics/politics/2015/08/black_lives_matter_and_bernies_sanders_why_the_protesters_are_so_hard_on.html; Denis Slattery, *Black Lives Matter Protester Beaten and Kicked after Disrupting Donald Trump’s Speech*, N.Y. DAILY NEWS (Nov. 21, 2015, 6:48 PM), <http://www.nydailynews.com/news/politics/black-lives-matter-protester-disrupts-donald-trump-article-1.2442688>.

90. Alex Altman, *Black Lives Matter: A New Civil Rights Movement is Turning a Protest Cry into a Political Force*, TIME MAG. (Dec. 21, 2015), <http://time.com/time-person-of-the-year-2015-runner-up-black-lives-matter/>.

91. *Id.*

92. *Id.*

investigations of alleged police misconduct. She also pledged to refuse donations from the private-prison industry.⁹³

By 2015, BLM had become a political force. The BLM cry for justice was invoked in calls for police chiefs to resign or be fired; college students embraced the energy of BLM across the country. The movement even played a role in the hunger strike at the University of Missouri that incited a boycott by the school's football team leading to the resignation of the university president.⁹⁴

The grassroots BLM movement became more organized. National gatherings enabled local groups to meet and exchange strategies. The goals broadened to include campaigns for gender equality, to raise the minimum wage, housing rights, and education policy. A broader story about systemic injustice evolved so that the plight of blacks in America could be understood by more of the American public.⁹⁵

BLM started on the evening of July 13, 2013, when George Zimmerman was acquitted of murder in the killing of Trayvon Martin. When Alicia Garza, an Oakland, California, workers'-rights activist, heard about the verdict, she posted a message on Facebook, which included: "Black people. I love you. I love us. Our lives matter." A friend added the hashtag.⁹⁶ As protests in other parts of the country ensued, banners that were inscribed with #j4tmla (justice for trayvon martin l.a.), included #blacklivesmatter in smaller letters.⁹⁷

Garza and BLM co-founders Patrisse Cullors and Opal Tometi have not formed a nonprofit legal entity for the movement. Although the network has some thirty chapters, becoming a member simply requires a promise to uphold BLM principles.⁹⁸ Other protests groups previously existed or emerged subsequent to Ferguson—and often join forces with BLM, but the Black Lives Matter mantra has become the rallying cry for this new civil rights movement.

While BLM has drawn much of the attention insofar as public response is concerned, demonstrations and disruptions involving a range of grassroots activism have erupted. In the San Francisco Bay Area alone, the groups include Critical Resistance, the Arab Resource

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

Organizing Center, the Anti-Police Terrorism Project, the Stop Urban Shield Coalition, and the BlackOUT Collective. For example, on the day after Thanksgiving 2014 (Black Friday), BLM and other activist protesters chained themselves to a train at the West Oakland Bay Area Rapid Transit (BART) station to stand against what they called police brutality, spurred by the high-profile deaths of Michael Brown, Tamir Rice, Eric Garner and others at the hands of police. Although 14 were arrested, 28 were on the platform and more than 250 joined the action.⁹⁹ BART was the focus of the action due to its perceived role in gentrification, as well as the 2009 killing of Oscar Grant, an unarmed black man shot by a BART police officer.¹⁰⁰

Critical Resistance actually was formed in 1997 when activists began to challenge the idea of over policing—particularly in Oakland, California—and the prison crisis.¹⁰¹ They held their first conference in September 1998, bringing together 3,500 people in the city of Berkeley. The three-day event featured nearly 200 different workshops, cultural events, and a film festival.¹⁰² Today, the movement aims to counter over policing by no longer relying on police solutions.¹⁰³ Its core belief revolves around the notion that through prison abolishment and ridding of reliance on the police, citizens will ultimately be safer in the city of Oakland.¹⁰⁴ Critical Resistance now has four chapters based in Oakland, Portland, New York, and Los Angeles.¹⁰⁵

The disruption and resistance is cultural as well. DarkMatter is an example. A trans South Asian performance art duo comprised of Alok Vaid-Menon and Janani Balasubramanian, DarkMatter has been invited to perform at stages and universities across the world.¹⁰⁶ The duo regularly posts on Facebook articles and statuses that focus on discrimination against people of color, police brutality and over policing, immigrant rights, and LGBT issues. The duo also travels around

99. Joe Fitzgerald Rodriguez, *Alameda County DA Drops Charges Against Black Friday 14, Who Stopped BART Trains*, S.F. EXAMINER (Dec. 4, 2015, 11:33 AM), <http://www.sfexaminer.com/alameda-county-da-drops-charges-against-black-friday-14-who-stopped-bart-trains/>.

100. *Id.*

101. *History*, CRITICAL RESISTANCE (2016), <http://criticalresistance.org/about/history/>.

102. *Id.*

103. *Id.*

104. *Id.* See *infra* notes 213–25, and accompanying text (discussing the Oakland Powers Project).

105. *Chapters*, CRITICAL RESISTANCE (2016), <http://criticalresistance.org/chapters/>.

106. *About*, DARKMATTER, <http://darkmatterrage.com/about/>.

universities and conducts relevant workshops on some of these subject matters.¹⁰⁷

Pro-Palestinian groups have supported efforts to denounce police violence against African Americans, and organizations like Black Lives Matter have responded by supporting pro-Palestinian groups. Consider the actions of Dream Defenders. After the 2012 Trayvon Martin shooting in Florida, a new group called the Dream Defenders sprung into action.¹⁰⁸ They marched for miles. They occupied the state capitol in Tallahassee. They pushed for legislative measures that would address racial inequality. With their focus on racism in America, the group helped lead the new BLM demonstrations that occurred after the deaths of Michael Brown and Eric Garner. But the Dream Defenders also broadened their focus by joining U.S. Palestinian rights groups in calling for an end to Israeli human rights abuses.¹⁰⁹ On December 20, 2014, they deepened their commitment to Palestinian rights by unanimously endorsing the call for boycotts, divestment, and sanctions. In 2015, members of Dream Defenders, along with other groups focused on racial injustice like the Black Youth Project, joined a delegation to Palestine organized by the Institute for Middle East Understanding. The trip was meant to expose Black activists to the Israeli occupation.¹¹⁰

When news reports in summer 2015 revealed that the tear gas canisters used by police to disband Ferguson protests were the same as those used by Israeli soldiers in occupied Palestinian territories, it boosted the connection—and led to a stunning public statement of African-American solidarity with Palestinians.¹¹¹ *The Black Solidarity Statement with Palestine* was published in August,¹¹² a year after the assault on Gaza. The statement defines the struggle for the “liberation of Palestine’s land and people” as “a key matter of our time.”¹¹³ The statement was inspired when Palestinians produced two statements of solidarity with Ferguson and the black struggle in the United States. The gesture was well-received by black activists organizing against po-

107. *Id.*

108. Alex Kane, *The Growing Ties between #BlackLivesMatter and Palestine*, MONDOWEISS.NET (Jan. 26, 2015), <http://mondoweiss.net/2015/01/between-blacklivesmatter-palestine/>.

109. *Id.*

110. *Id.*

111. Salim Muwakkil, *Black Lives Matter Activists Declare Solidarity with Palestine*, IN THESE TIMES (Oct. 15, 2015), <http://inthesetimes.com/article/18505/palestinian-lives-matter-too-blm-activists-draw-international-connections>.

112. *Id.*

113. *Id.*

lice violence. More than 1,000 black scholars, activists, students and artists and nearly 50 organizations have signed. Among them are names like Angela Davis, Cornel West, Mumia Abu-Jamal and Talib Kweli, and groups like the Dream Defenders.¹¹⁴

Pro-Palestinian activists have seen striking similarities between Ferguson and Palestine. Their experience with the militarization of police and brutality in Palestine is a daily occurrence. The disclosure that the police chief of Ferguson studied “counter-terror” measures in Israel in 2011 is regarded as part of the same agenda.¹¹⁵ The proponents of solidarity argue that Black Americans are being targeted by anti-terror funding and training initially designed to control populations from the Muslim and Arab world.¹¹⁶ Palestinian activist statements of support to black activists were supplemented with practical advice on how to “face tear gas.” They tweeted to Ferguson activists: “keep calm . . . the pain will pass, don’t rub your eyes. . . Remember to not touch your face.”¹¹⁷ The similarities in arrests of children and raids of family homes is striking to Palestinian activists.¹¹⁸

Of course local, state, and federal government institutions have responded to these tragic shootings as well. The reaction of police departments involved in the shootings has varied. Some immediately come to the defense of the shooters; others have suspended officers after videos of the shootings show culpability on the part of the officers. Some departments call for Tasers, body cameras, or better training.¹¹⁹ President Obama appointed a task force to come up with recommendations.¹²⁰ Attorney General Loretta Lynch launched investigations and called for more data collection.¹²¹ Local prosecutors brought criminal charges against the officers in some jurisdictions.

114. *Id.*

115. Yassin, *supra* note 62.

116. *Id.*

117. Taylor Hatmaker, *Palestinians Teach Ferguson Protesters How to Deal With Tear Gas*, DAILY DOT (Aug. 14, 2014, 1:27 PM), <http://www.dailydot.com/politics/ferguson-protest-palestinians-gaza-tear-gas/>.

118. Bill Van Esveld, *How Israeli Impunity Threatens Palestinian Children*, HUM. RTS. WATCH (Aug. 26, 2015), <https://www.hrw.org/news/2015/08/26/how-israeli-impunity-threatens-palestinian-children>.

119. *See infra* notes 132–36, 140–43, 169–74 and accompanying text.

120. *See infra* notes 129–31 and accompanying text.

121. *See infra* note 155 and accompanying text; *see, e.g.*, Adam Howard, *Loretta Lynch Launches Federal Investigation into Baltimore Police*, MSNBC (May 8, 2015, 10:24 AM), <http://www.msnbc.com/msnbc/loretta-lynch-launches-federal-investigation-baltimore-police-dept>.

III. PROPOSALS FOR CHANGE

Many proposals for change and ideas about what to do in light of the tragic shootings have been put forth. Some proposals update old ideas, while others are new. What remains to be seen is whether the rhetoric will yield results.

An important question to consider is whether any change or proposal can truly disrupt the status quo. I have been intrigued by the use of the term “disruptive” in the business pages as of late. A disruptive technology is one that displaces an established technology and shakes up the industry or is a ground-breaking product that creates a completely new industry. For example, an October 2014 article in *Forbes*, *Ten Companies That Are Disrupting Their Industries Through Technology*, noted:

Looking for a competitive advantage? Try crushing the competition by becoming a leader in your category. How can you do that? By changing the rules of the game. By reinventing the way business is done in your industry. And by using technology to scale quickly, forcing your competition to play catch-up. Following are ten companies that have done all of the above. Can you find in their stories best practices that will help you disrupt your industry and become a market leader? . . .¹²²

Thus, a disruptive innovation in the business and technology arena is one that helps create a new market and value network, and eventually disrupts an existing market and value network (over a few years or decades), displacing an earlier technology. The term is used in business and technology literature to describe innovations that improve a product or service in ways that the market does not expect, typically first by designing for a different set of consumers in a new market and later by lowering prices in the existing market.¹²³ The term “disruptive technology” has been widely used as a synonym of “disruptive innovation”, but the latter is now preferred, because market disruption has been found to be a function usually not of technology itself but rather of its changing application. It literally means to uproot and change how we think, behave, do business, learn and go

122. Larry Myler, *Ten Companies That Are Disrupting Their Industries Through Technology*, *FORBES* (Oct. 3, 2014, 4:40 PM), <http://www.forbes.com/sites/larrymyler/2014/10/03/ten-companies-that-are-disrupting-their-industries-through-technology/#30582c076967>.

123. *What is Disruptive Health Technology*, CARNEGIE MELLON UNIV. DISRUPTIVE HEALTH TECH. INST., <http://www.dhti.cmu.edu/dhti/definition.asp>.

about our day-to-day, to think outside the box and develop a new framework.

Searching for a disruptive approach to law enforcement that would uproot and change policing in a manner that would clearly and positively reduce the likelihood of the shootings with which we are concerned is something that we must demand. As we know, racialized police shootings did not begin in Ferguson, yet the shootings of Michael Brown, Walter Scott, Sandra Bland, Tamir Rice, and Brendon Glenn all happened in spite of efforts at reforming policing the preceded their deaths. Are any of the proposals for change and ideas on what to do after their shootings likely to bring about the disruption that is needed?

The ideas on how to respond to the types of shootings that are the topic of this article and to stop new ones from occurring fall into three overlapping categories that relate to procedure, attitudinal change in police departments, and community-centered approaches. None of these suggestions is a panacea. In fact, some invite skepticism. But all have some fans and have demonstrated some, perhaps limited, positive impact. A question is whether any of the proposals can be categorized as disruptive in the innovative sense.

A. Procedural Ideas

1. Curtailment of sales of military equipment to local law enforcement

In a move that acknowledges that having military equipment can inspire a dangerous militaristic attitude within police departments, President Obama banned the transfer of federal military-style gear to local police departments in May 2015.¹²⁴ The decision was a direct response to the shootings that are fueling distrust of law enforcement officials in communities across the country.¹²⁵ The banned items including a wide range of equipment including armored vehicles, bayonets, grenade launchers, high-caliber ammunition, and camouflage uniforms.¹²⁶ The transfer of other equipment such as explosives and

124. Gregory Korte, *Obama Bans Some Military Equipment Sales to Police*, USA TODAY (May 18, 2015, 5:04 PM), <http://www.usatoday.com/story/news/politics/2015/05/18/obama-police-military-equipment-sales-new-jersey/27521793/>.

125. *Id.*

126. David Nakamura & Wesley Lowery, *Obama Administration Bans Some Military-style Assault Gear from Local Police Departments*, WASH. POST (May 18, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/05/18/obama-to-visit-camden-n-j-to-tout-community-policing-reforms/>.

riot equipment continues, but only if local police certify that the equipment will be used responsibly.¹²⁷

President Barack Obama's announcement to, in effect, to demilitarize America's police departments, emphasized that heavily-armed police forces leave local residents feeling alienated and intimidated: "We've seen how militarized gear can sometimes give people a feeling like there's an occupying force "We're going to prohibit some equipment made for the battlefield that is not appropriate for those police departments."¹²⁸ Obama's ban signaled an important message to local police about the need to scale back on militarization that was negatively impacting trust between police and communities. Although private purchases of similar equipment by police through programs like Urban Shield are not affected, the curtailment of the free federal equipment program is important.

2. Transparency

In response to the shootings in Ferguson, New York, and other parts of the country, plus the ensuing riots, President Obama saw the need for action. In an effort to build a bridge between affected communities and law enforcement, he signed an executive order establishing the President's Task Force on 21st Century Policing in December 2014.¹²⁹ The goal of the Task Force was to hear testimonials, listen to experts, and gather information from stakeholders and the public to identify the best practices in running law enforcement departments, then to make recommendations.¹³⁰ The group included law enforcement officers, social activists, and academics.

In its final report, released in May 2015, the Task Force made clear that police departments must be more transparent about any serious event by communicating with citizens and the media. Initiating activities unrelated to enforcing the law to build trust with society is an important element of the Task Force recommendations. For example, its recommendations led to the creation of the White House Police Data Initiative that hopes to release information to the public of

127. *Id.*

128. *Remarks by the President on Community Policing*, WHITEHOUSE.GOV (May 18, 2015), <https://www.whitehouse.gov/the-press-office/2015/05/18/remarks-president-community-policing>.

129. Exec. Order No. 13,684, 79 Fed. Reg. 76865 (Dec. 18, 2014) [hereinafter Executive Order].

130. Breanna Noble, *What Is President's Task Force on 21st Century Policing?*, NEWSMAX.COM (July 28, 2015, 6:33 PM), <http://www.newsmax.com/FastFeatures/president-policing-task-force/2015/07/28/id/659347/>.

all cases involving shows of force and shootings in which police were involved.¹³¹

In an effort to improve transparency and accountability, requiring police to wear recording devices or body cameras has become a popular proposal. For example, as President Obama was creating the Task Force, he committed \$75 million to help police departments purchase 50,000 body worn cameras.¹³² In one study, use of force by officers wearing cameras fell by 59 percent and complaints against officers dropped by 87 percent. Another study in Florida yielded similar results: a 53 percent decline in use-of-force incidents resulted for officers who used cameras. In fact, civilian complaints against those officers dropped 65 percent.¹³³ Reform activists and law enforcement officials appear to agree with expanding the use of body cameras.¹³⁴ Not surprisingly, body cameras help with evidence collection and accuracy of reporting the incident. However, officers also have found that citizens change their behavior when they know a camera is rolling, thus helping to de-escalate confrontations. The officers do not view body camera use as a burden nor as a disincentive to respond or self-initiate action. In fact, those who use cameras feel they have become better officers.¹³⁵ Thus, body camera use can prevent things from getting out of hand over concern with too much use-of-force by police or abuse behavior toward police.¹³⁶

Requiring body cameras raises a host of issues. Should policies and regulations be developed by the department internally or legislated? When should videotaping begin and end? How should courts respond to lost or mishandled video? Should officers be able to access footage prior to preparing reports? Should the public have access? What type of hardware is best? The answer to these questions likely affective the qualitative effectiveness of body cameras. Yet in spite of the challenges and outstanding questions, the use of body cameras ap-

131. *Final Report of the President's Task Force on 21st Century Policing* (May 18, 2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [hereinafter "Task Force Recommendations"].

132. *Fact Sheet: Strengthening Community Policing*, WHITEHOUSE.GOV (Dec. 1, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing>.

133. Nick Wing, *Study Shows Less Violence, Fewer Complaints When Cops Wear Body Cameras*, HUFFINGTON POST, (Oct. 13, 2015), http://www.huffingtonpost.com/entry/police-body-camera-study_us_561d2ea1e4b028dd7ea53a56.

134. *Id.*

135. *Id.*

136. *Body-worn Camera Study by Executive Fellow Chief Tony Farrar is Published in Scientific Journal*, POLICE FOUND., <http://www.policefoundation.org/body-worn-camera-study-by-executive-fellow-chief-tony-farrar-is-published-in-scientific-journal/>.

parently promotes accountability and community trust, while decreasing controversial incidents because both officers and subjects are being videotaped.

Make no mistake. Body cameras do have their detractors. Chiefs of some of the nation's biggest police departments say officers in American cities have pulled back and have stopped policing as aggressively as they used to, fearing that they could be the next person in a uniform featured on a career-ending viral video. However, no empirical evidence has been offered to establish a retraction of police activities or "lackluster policing" that somehow contributed to a violent crime.¹³⁷ Police commanders and politicians may claim that the atmosphere in their police departments have changed after the highly publicized police shootings of blacks and ensuing riots. But they acknowledge that officers still do their work. Nonetheless, they claim that a "YouTube effect" discourages officers from being too confrontational, because they do not want to end up on the Internet.¹³⁸

3. Recruiting better-educated officers

The President's Task Force recommended recruitment of officers with higher education or to offer incentives to those without higher education to get a degree.¹³⁹ The goal of this recommendation is to encourage a well-educated police force with an active learning culture. The belief is that a higher level of required education could raise the quality of officer performance.

4. Use of Tasers and less-lethal weapons

The President's Task Force recommended supporting the development of new "less than lethal" technology to help control combative suspects.¹⁴⁰ Conductive energy devices (CED) or "Tasers," also known as stun guns, have been shown to be effective at reducing both

137. Janice Malcolm, *Frustrated Officials Blame Citizens Recording Officers for Rise In Violent Crime, Calls It 'YouTube Effect'*, *Inquisitr* (Oct. 8, 2015), <http://www.inquisitr.com/2481976/frustrated-officials-blame-citizens-recording-officers-for-rise-in-violent-crime-calls-it-youtube-effect/>.

138. Aaron C. Davis, *'YouTube Effect' Has Left Police Officers Under Siege, Law Enforcement Leaders Say*, *HUFFINGTON POST* (Oct. 8, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/10/08/youtube-effect-has-left-police-officers-under-siege-law-enforcement-leaders-say/>.

139. President's Task Force Report, *supra* note 131, at 3, 51.

140. *Id.* at 37–38.

officer and civilian injuries. One study found a 70 percent decrease in officer injuries and a 40 percent decrease in suspect injuries.¹⁴¹

After some shootings, officials are quick to propose arming police officers with Tasers. For example, after the fatal shooting of Mario Woods in San Francisco, the police.¹⁴² The president of the San Francisco police officers union asserted that if “Tasers were available at shooting, there would have been a totally different outcome.”¹⁴³

However, Tasers are not a panacea. Their availability is not a guaranteed, non-lethal use of force. A good use of the Taser is when a knife-wielding individual will not drop the weapon. But more often than not, Tasers, instead, become a tool for compliance. Someone who is not a threat but does not comply also gets tased. That person can fall, hit their head, and in some instances even die. So many fall victim simply for not putting their hands up or failing to get out of a car as instructed. Taser use should be confined to situations when the individual is a threat.¹⁴⁴

Also, sometimes Tasers break down mechanically. Some officer-involved shootings first involved the misuse of a Taser. Once an attempt is made to use a Taser and it does not achieve its desired effect, officers get “a little freaked out,” and then are more willing to use lethal force.¹⁴⁵

Counterintuitively, a general reduction in the lethal use of force does not necessarily follow when Tasers are available. They become an additional use of force most often. New York City is very strict about who can Taser; only sergeants and those of higher rank in the police department are allowed, and yet the NYPD has a very low rate of officer-involved shootings. That supports the position that a department can lower the rate of officer-involved shootings without resort to Tasers.¹⁴⁶

141. *Id.*

142. Phillip Matier & Andrew Ross, *Mayor Ed Lee Now Wants Police to Have Stun Guns Soon*, S.F. CHRON. (Dec. 16, 2015, 11:00 PM), <http://www.sfchronicle.com/bayarea/matier-ross/article/Mayor-Ed-Lee-wants-police-to-get-stun-guns-soon-6700749.php>.

143. Vivian Ho, *Cops Back Stun-gun Plan*, S.F. CHRON., (Dec. 17, 2015), <http://www.sfgate.com/crime/article/S-F-s-top-cop-says-stun-guns-back-on-table-6682342.php>.

144. Rachel Martin, *Police Expert: Tasers Should Be Used Only When Suspects Are Threats*, NPR WEEKEND EDITION (Jan. 3, 2016, 7:48 AM), <http://www.npr.org/2016/01/03/461818439/police-expert-tasers-should-be-used-only-when-suspects-are-threats> (citing Peter Moskos, Associate Professor at John Jay College of Law and former Baltimore police officer).

145. *Id.*

146. *Id.*

Important training methods about verbal de-escalation are critical. Police know that they are going to be dealing with non-compliant individuals from time to time, so the issue is having in your head how you will be dealing with those individuals when those situations arise. Officers need to maintain a certain attitude or mindset. They generally have time to be patient in many of these situations. If someone does not comply immediately, the officer can continue talking with the person. It's always going to be tough to stop officer-involved shootings, nothing is ever going to be perfect. The job has a lot of variables. Talking more and exercising patience may not always work, but greater patience is generally a good starting point for everyone's sake—including the officer's.¹⁴⁷

5. Training on verbal warnings and warning shots

The European Convention on Human Rights requires its European signatories—almost four dozen—to refrain from use of deadly force unless “absolutely necessary” to achieve a lawful purpose.¹⁴⁸ The Convention’s “absolute necessity” standard would not be met if an officer simply had a “reasonable belief” that the suspect had a gun, for example. Thus, the facts around the shootings of Tamir Rice, Brendan Glenn, and Walter Scott would not have been proper under the European standard. Certainly, the officers who shot a mentally ill Dallas man with a screwdriver would not have been absolved of responsibility.¹⁴⁹

In Europe, killing is considered unnecessary if alternatives exist. For example, national guidelines in Spain would have prescribed that [Ferguson police officer Darren] Wilson incrementally pursue verbal warnings, warning shots and shots at nonvital parts of the body before resorting to deadly force. Six shots would likely be deemed disproportionate to the threat that [Michael] Brown, unarmed and wounded, allegedly posed.¹⁵⁰

Europe does have the advantage of having centralized training centers that enables consistent teaching about avoiding deadly force as well as uniform restrictions on police behavior. Typically, countries

147. *Id.*

148. Paul Hirschfield, *Why Do American Cops Kill More People Than in Other Countries?*, NEWSWEEK (Nov. 29, 2015) <http://www.newsweek.com/why-do-american-cops-kill-more-people-other-countries-399169>.

149. *Id.*

150. *Id.*

such as the Netherlands, Norway and Finland require training at the national academy for three years.¹⁵¹ In three years, meaningful time can be devoted to training on communication and counseling skills needed to deal with distraught individuals. In the United States, total instruction at police academies averages 19 weeks of classroom instruction, and trainees receive 20 times more hours on use of force than on conflict de-escalation.¹⁵² Strikingly, less than eight hours of training on crisis intervention is required by most programs in the United States. A person who is desperate, suffering from mental illness, or high on drugs will encounter an officer with very different education and potential restraint in Europe as opposed to the United States.¹⁵³ In fact, psychologists who study U.S. police officers have found that they come out of police academy with a bias for using force.¹⁵⁴

6. Data reporting by officers involved

Attorney General Loretta Lynch is among many voices calling for consistent data on law enforcement interactions with the communities they serve, especially data collection on the use-of-force. Not only would this information be useful in monitoring trends, but requiring data collection would “promote accountability and transparency.”¹⁵⁵ Her voice is consistent with the President’s Task Force recommendation that agencies should be required to collect and report data on all officer-involved shootings, whether fatal or nonfatal.¹⁵⁶

In that vein, in October 2015, California Governor Jerry Brown signed data-related bills aimed at reducing racial profiling and the use of excessive force by law enforcement officers. One of the bills, AB 953, requires police officers to collect data on the people they stop, including perceived race and ethnicity, the reason for the encounter,

151. *Id.*

152. *Id.*

153. *Id.*

154. Nichole Flatow, *How This California Police Officer Escaped Charges For Shooting A 13-Year-Old Dead*, THINK PROGRESS (July 9, 2014) <http://thinkprogress.org/justice/2014/07/09/3457566/how-this-california-police-officer-escaped-charges-for-shooting-a-13-year-old-dead/> (citing Psychology Professor Dennis Rosenbaum).

155. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL LYNCH: USE-OF-FORCE DATA IS VITAL FOR TRANSPARENCY AND ACCOUNTABILITY (Oct. 5, 2015), <http://www.justice.gov/opa/pr/attorney-general-lynch-use-force-data-vital-transparency-and-accountability>.

156. Task Force Recommendations, *supra* note 131, § 2.2.4, at 21–22.

and the outcome.¹⁵⁷ The bill would require state and local law enforcement agencies to annually report to the attorney general data on all stops, including the time, date, location and reason for the stop, what action was taken and the perceived race or ethnicity, gender and approximate age of the person who was stopped. Governor Brown also signed AB 619 requiring annual reports from agencies that include information on officer-involved-cases that cause serious injury or death.¹⁵⁸

Assemblywoman Shirley N. Weber (D-San Diego) introduced the bills in response to “the deaths of unarmed black men and other people of color by police.”¹⁵⁹ She believes that collecting and publishing data required by AB 953 will help shed light on the scope of problems and hold those bad officers and departments accountable, while also finding a set of best practices when law enforcement gets it right. AB 953 also would establish a Racial and Identity Profiling Advisory Board charged with analyzing the data and developing solutions to profiling. The bills expands the definition of racial profiling to include “racial or identity profiling” in order to account for identity characteristics beyond race.

The new law won the support of grassroots organizations, hoping that the legislation would help restore trust in law enforcement by the community. According to Patrisse Cullors, founder of the civil rights group Dignity and Power Now, “Our communities have lived experiences with biased policing—ranging from racial profiling, to excessive, and sometimes lethal, use of force. This inevitably breeds distrust in law enforcement, which in turn undermines the safety of all Californians.”¹⁶⁰ The racial profiling bill drew vigils by dozens of activists from groups including the Communities United Coalition, supporters of the Black Lives Matter movement.

A different kind of data collection issue came up following the Mario Woods shooting in San Francisco. The police chief issued an order requiring officers to file a use-of-force report each time they

157. Patrick McGreevy, *California Measures Target Racial Profiling and Excessive Force by Police*, L.A. TIMES (Oct. 3, 2015) <http://www.latimes.com/local/political/la-me-pc-gov-brown-acts-to-reduce-racial-profiling-excessive-force-by-the-police-20151001-story.html>.

158. *Id.*

159. *Id.*

160. *Id.*; see also Tulio Ospina, *California Senate Passes Racial and Identity Profiling Act*, POST NEWS GROUP (Sept. 10, 2015), <http://postnewsgroup.com/blog/2015/09/10/california-senate-passes-racial-identity-profiling-act/>.

pointed their firearm at a subject.¹⁶¹ Like the California state data collection requirement, apparently the idea is that this requirement discourages officers from being too cavalier about drawing their weapons and pointing them at subjects. The San Francisco police union, however, warns that the “more report writing” required, that means more officers “off the streets to complete those reports.”¹⁶²

7. Civilian review, internal affairs, diversifying personnel

Conventional calls for effective, institutional civilian review and internal affairs bodies have been renewed in light of the high-profile coverage of police officer-involved killings. Those recommendations often have included demands for reviewing whether police departments are as diverse as the communities that they serve.

Unfortunately, data disclose that police internal affairs units usually side with police officers. For example, out of more than 10,000 complaints of misconduct in Chicago from 2002 to 2004, discipline of at least seven days suspension was handed out in only 19 cases.¹⁶³ The statistics in New York are similar in an evaluation of chokehold incidents that are banned. The NYPD’s Inspector General’s office and its Civilian Complaint Review Board found that out of 1,048 incidents, only 10 complaints were “substantiated,” and none of officers were significantly disciplined.¹⁶⁴

A big reason for this disconnect can be traced to how complaints are processed in many big police departments. Unless and until criminal charges are filed, the complaint is handled in-house. Then, in New York for example, a civilian review panel has to substantiate the complaint and suggest punishment or refer to a court-style judge employed in the police department. The judge can recommend discipline, but even then, the judge’s recommendation is subject to the review and possibly reversal by the police commissioner.¹⁶⁵

The President’s Task Force adds a hybrid recommendation that departments establish a “Serious Review Board” comprised of sworn staff and community members to review cases involving officer-involved shootings.¹⁶⁶ The purpose is not simply to analyze the actual

161. Ho, *supra* note 143.

162. *Id.*

163. Matt Taibbi, *Why Baltimore Blew Up*, ROLLING STONE (May 26, 2015), <http://www.rollingstone.com/politics/news/why-baltimore-blew-up-20150526>.

164. *Id.*

165. *Id.*

166. Task Force Recommendations, *supra* note 131, § 2.2.6, at 22.

facts of the incident, but to go further to identify any administrative, supervisory, training, tactical, or policy issues that need to be addressed in the department.¹⁶⁷

The President's Task Force also recommends a simultaneous, less threatening, "nonpunitive" peer review, separate from criminal and administrative investigations.¹⁶⁸ The idea is to use a nonadversarial, private process to review episodes, including those that may be within department policy, but potentially disastrous in terms of community relations. The education-based process is intended to be cooperative.

B. Attitudinal Aspirations

1. Promoting non-enforcement activities, sensitivity training, exploring root causes

Promoting "community policing" has been very popular. The philosophy of community policing is to develop community partnerships systematically, to use non-violent problem-solving strategies, and to be proactive about addressing community conditions and root causes of crime and social disorder.¹⁶⁹ Two key elements of community policing are mutual trust and cooperation. Trust and cooperation only come about from knowing the community with whom you work, so that your frame of mind or attitude is open to those relational qualities.

Smart problem-solving is a key element of community policing that begins by seeking collaboration with important institutions and community resource groups, such as schools, community groups, and neighborhood service providers. This lays the groundwork for effective intervention and prevention. This approach promotes connections between law enforcement and key stakeholders to address and improve public safety, thereby broadening the capability of the community to be more resilient if crimes occur. Thus, the proactive approach of community policy begins long before an emergency call or a criminal investigation; it begins day to day on the streets with "respectful interaction between a police officer and a local resident" in discussions about life not about a particular crime.¹⁷⁰

167. *Id.*

168. Task Force Recommendations, *supra* note 131, § 2.3, at 22–23.

169. *Id.* at 41.

170. *Id.*

The President's Task Force proposes that "police departments proactively promote trust by initiating positive nonenforcement activities to engage communities."¹⁷¹ Especially in communities where police officers engage in many enforcement interactions, the departments should be vigilant about establishing programs and activities for positive, nonenforcement interactions. Examples of these nonenforcement, trust-building opportunities have emerged across the country, including such programs as Coffee with a Cop; Cops and Clergy, Citizens on Patrol Mobile, Students Talking it Over with Police, and the West Side Story Project.¹⁷²

Interacting with the community is another way of enhancing officers' sensitivity toward the community. For example, after protests against excessive force by police, one of the tools used by New York City's police department to teach officers to interact with communities of color was the theater.¹⁷³ Police Commissioner William Bratton, ironically often criticized for taking broken windows policing too far, has commissioned the cast of the one-act play, *Anne and Emmett*, to perform in a lecture room at the New York City Police Academy in full costume.¹⁷⁴ The play is about two well-known stories: Anne Frank, a Jew who hid in an attic with her family and later died in a German concentration camp, and Emmett Till, the black teen from Chicago who traveled to Mississippi in the 1960s and was murdered. For Bratton, the goal is about "stepping back, away from our personal prejudices, casual bias and preconceived notions."¹⁷⁵ The message has resonated with many recruits. For 23-year-old Michael Palermo, that history reminded him of his responsibility as a police officer, "and how important it is that we stay level-headed throughout our training." For Palermo, Frank's and Till's experiences are the result of "governments abusing their authority and persecuting people." Some organizers understand that some police veterans may "roll their eyes" at these efforts, but to the promoters of this type of training, that just means that supervisors need to be retrained as well.¹⁷⁶

171. Task Force Recommendations, *supra* note 131, § 1.5, at 14.

172. *Id.* at 15.

173. Hansi Lo Wang, *NYPD Raises Curtain on New Sensitivity Training Tool For Recruits*, NPR (Oct. 22, 2015), <http://www.npr.org/2015/10/22/450748815/nypd-raises-curtain-on-new-sensitivity-training-tool-for-recruits>.

174. *Id.*

175. *Id.*

176. *Id.*

In large response to the challenge that veteran officers may be hard to sell on the idea of sensitivity and nonenforcement neighborhood engagement, the President's Task Force highlighted the need to infuse the culture and organizational structure of law enforcement agencies with community policing.¹⁷⁷ Community policing is not an assignment for a special unit; the entire police force needs to buy in. For example, the police chief in Richmond, California—a strong proponent of community policing—demanded that every officer be involved in community policing/problem solving in order to transform department culture and establish an effective partnership with residents.¹⁷⁸ In Richmond, officers stay in the same district for years, in order to is expected to get to know the residents, businesses, community groups, churches, and schools on their beat and work with them to identify and address public safety challenges, including quality of life issues such as blight. Officers remain in the same beat or district for several years or more—which builds familiarity and trust. Other departments have come to realize that hiring, training, evaluating, and promoting officers should be based on their ability and track record in community engagement—not just traditional measures such as the number of arrests or tickets issued.¹⁷⁹

The community policing training and its sensitivity aspect must be enforced and rewarded at the supervisory level, otherwise mixed messages are sent to officers. Training is important for officers to understand the expectations of the department, but the policies have to be reinforced in daily operations.¹⁸⁰ The front-line supervisors are largely responsible for translating the department's policies, values, mission, rules, and regulations into operational practice. "By emphasizing some things and not others, they establish the organizational expectations for officers and shape the culture."¹⁸¹

The President's Task Force also urges the development of service models that focus on the root causes of crime and include community members.¹⁸² For example, in Los Angeles, a partnership between the community based Advancement Project and the Housing Authority features police officers going into public housing developments at

177. Task Force Recommendations, *supra* note 131, § 4.2, at 43.

178. *Id.*

179. *Id.*

180. Darrel W. Stephens, *Police Discipline: A Case for Change*, Harvard Kennedy School Program in Criminal Justice Policy and Management, June 2011, at 3.

181. *Id.* at 4.

182. Task Force Recommendations, *supra* note 131, § 2.1, at 20.

times that are not based on emergency calls or crime investigations; the officers are not there to make arrests. The approach requires active building of a positive relationship.¹⁸³ Officers need to reach out and have conversations. A corollary to the approach is recognizing that police training should include critical thinking, social intelligence, dealing with implicit bias, fair and impartial policing, historical trauma, and other topics that address the capacity to build trust and legitimacy in diverse communities.¹⁸⁴

2. Crisis intervention training

In recognition that many police shooting victims are suffering from mental health challenges, in order to enhance police ability to recognize symptoms of mental health crises, the President's Task Force recommended that Crisis Intervention Training (CIT) be made a part of both basic recruit and in-service officer training.¹⁸⁵ The purpose is to enhance officer confidence in addressing such an emergency and reduce inaccurate beliefs about mental illness. Analyses have shown that after completing CIT orientation, officers felt encouraged to interact with people suffering from a mental health crisis and to delay a "rush to resolution."¹⁸⁶ Empathy training is an important component of CIT training, as is the opportunity to develop cross-disciplinary training, collaboration, and partnerships with other professionals.

Related training on recognizing the signs of drug addiction and how to respond when interacting with individuals who may be impaired because of addiction is also vital. Given the science on addiction as a disease of the brain and the benefits of equipping officers with overdose-reversal drugs, the President's Task Force pursued this recommendation as part of the Obama Administration's "smart on crime" approach to drug-related offenses. More than 60 percent of those incarcerated at the state and federal levels regularly used drugs prior to incarceration.¹⁸⁷

3. Implicit bias training

Many who are upset about the racism that they feel is inherent in the shootings of black suspects by police, point to social science stud-

183. *Id.*

184. *Id.* §§ 5.7, 5.9.

185. *Id.* § 5.6.

186. *Id.*

187. *Id.* § 5.8.

ies that demonstrate that individuals are faster to pair positive evaluations with white faces and negative evaluations with black faces. More specifically, in the criminal justice system, Americans tend to “associate black people, especially young black men with criminality, dangerousness, and hostility.”¹⁸⁸ The concern is that these biases essentially shape whether an officer will stop a person of color; an officer is more likely to perceive “crime in the making,” resulting in the likeliness of such parties to be stopped, interrogated, searched, and arrested. In short, this assessment is made by an officer without relying on any sort of reasonable suspicion. Police officers are more susceptible to implicit biases and are more likely to “shoot more rapidly” when a black suspect is holding a gun.

In response to shootings across the country, police departments in many cities have offered implicit bias trainings to their officers. Officers who have received the training have found such trainings “useful and relevant,” but researchers continue to question whether implicit racial bias training reduces racial biases and, if so, for how long.¹⁸⁹ The results have been mixed, and no evidence links reductions in biased behavior with long-term changes.¹⁹⁰

For now, implicit bias training should not be treated as a panacea, and the need for more research is clear. However, even though the training may not significantly reduce implicit bias nor reduce disparate outcomes, trainers find that the trainings provide a good opening for discussing disparities and the need for reform generally.

4. Prosecutions and civil suits

The hope that criminal prosecution of officers involved in shootings and civil suits against police departments will bring about attitudinal and procedural changes that will reduce racially-motivated shootings is apparent. Affected communities regularly call for prosecutions as they seek a sense of justice.¹⁹¹ Prosecutions are often difficult, however, because police internal affairs units are not inclined to

188. Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer*, 37 *HAW. L. REV.* 295 (2015).

189. *Id.* at 306.

190. *Id.* at 305.

191. See, e.g., Greg Moore, *Protesters Call for Prosecution of Police in Fatal [Minneapolis] Shooting*, *ASSOCIATED PRESS* (Nov. 21, 2015), <http://www.businessinsider.com/ap-protesters-call-for-prosecution-of-police-in-fatal-shooting-2015-11>; Conor Skelding, *Sharpton Calls for Special Prosecutor in Chicago Police Shooting*, *POLITICO N.Y.* (Nov. 30, 2015), <http://www.capitalnewyork.com/article/albany/2015/11/8584209/sharpton-calls-special-prosecutor-chicago-police-shooting>.

find fault and the prosecutor is asked to investigate the police department—an entity with whom prosecutors necessarily partner with for their daily work.¹⁹² Skepticism abounds, especially if so-called independent investigators who are recruited to review the facts have histories that suggest a bias toward labeling police shootings justified.¹⁹³

Even when prosecutions are sought, convictions are not automatic by any means. In the Baltimore prosecution of six police officers for the death of Freddie Gray, the trial of the first officer ended in a hung jury, when jurors could not reach a unanimous decision.¹⁹⁴ Gray was a young African American man who suffered a fatal injury while placed in the back of a police van without seatbelts, as the driver swerved the van throughout city streets.¹⁹⁵ Certainly, convictions can result. But when police officers are charged, they are convicted at a lower rate than people in the general populace.¹⁹⁶

Successful civil damage suits can, presumably, have a positive effect on cities and police departments in terms of willingness to change. For example, a federal jury awarded \$11.3 million in damages to a Vietnamese immigrant who was left permanently paralyzed after a San Jose, California, police officer shot him in the back.¹⁹⁷ The plaintiff was wielding a knife as he was suffering a mental breakdown; but witnesses insist he posed no danger to anyone but himself.¹⁹⁸ Although the city may appeal the award, the lawsuit appears to have had

192. Chase Madar, *Why It's Impossible to Indict a Cop*, NATION, Nov. 25, 2014; see also, Jeffrey Benzing, *When PA State Police Shoot, It's Almost Always Ruled 'Justified'*, PITTSBURG COURIER (Sep. 28, 2015), <http://publicsource.org/investigations/when-pa-state-police-shoot-it-s-almost-always-ruled-justified#.VtoIJZMrL-Y>.

193. To investigate the shooting of 13-year-old Andy Lopez who was brandishing a toy gun, Sonoma County, California, prosecutors paid \$10,000 payment to William Lewinski, a Minnesota-based lethal-force adviser who was criticized for siding too often with law enforcement. According to Oakland, California, defense attorney Michael Haddad, Lewinski is known in legal circles as someone who can be relied upon to testify in favor of police officers to help justify fatal shootings. Haddad said agencies who hire Lewinski are not seeking the truth so much as trying to legitimize a pre-determined decision: "Lewinski will find a way to exonerate the officer." See Paul Payne, *Jill Ravitch Spent \$63,000 on Andy Lopez Review*, PRESS DEMOCRAT (Aug. 7, 2014), <http://www.pressdemocrat.com/news/2478782-181/ravitch-spent-63000-on-andy>.

194. Dana Ford, *Hung Jury in Freddie Gray Case a 'Major Setback' for Prosecutors, Analysts Say*, CNN, (Dec. 16, 2015), <http://www.cnn.com/2015/12/16/us/baltimore-police-trial-freddie-gray-setback/index.html>.

195. *Id.*

196. Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, WALL ST. J. (Nov. 24, 2014), <http://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955?mg=id-wsj>.

197. Jenna Lyons, *Man Shot by San Jose Cop to Get \$11.3 million*, S.F. CHRON. (Dec. 23, 2015), <http://www.sfgate.com/bayarea/article/Man-paralyzed-in-San-Jose-police-shooting-awarded-6716234.php>.

198. *Id.*

some positive effects, because police practices are under review along with discussions on how to prevent similar shootings in the future. San Jose has a large Vietnamese American community whose concerns about police use of force are important to the city.¹⁹⁹

Of course, without a commitment to change, even civil damages will not bring about changes in police practices. In a March 2000 report, the Association of the Bar of the City of New York Committee on New York City Affairs reported:

The City paid a total of \$140 million in damages for alleged police abuses, through settlements as well as litigated judgments, between the 1994-95 and 1998-99 fiscal years. By contrast, in the five years 1988-92, the City paid out \$45.5 million for similar cases. Despite the substantial sums involved, there is no showing that either the police department or the City administration has made systematic use of the facts or results in such cases either in connection with the discipline of individual police officers or in the shaping of police department policy. Thus the tort system is failing in one of its principal purposes, to shape the actions of those officials on whose behalf damages are paid.²⁰⁰

Most civil actions against police officers for misconduct are filed under 42 U.S.C. § 1983. More than 30 years ago, the U.S. Commission on Civil Rights argued that § 1983 claims have not been effective in deterring police misconduct and without much change in police practices, § 1983 continues to be ineffective in deterring police misconduct.²⁰¹

One measure for deterrence of police misconduct is the implementation of overall changes in departmental and agency policy. The idea is that one way to bring changes in policy is to impose liability on the department or the agency itself for misconduct of its officers. In *Monell v. Department of Social Services of the City of New York*,²⁰² the Supreme Court made it possible for victims of police misconduct to sue police departments and impose liability on the municipi-

199. Tracey Kaplan, *Jury Awards Vietnamese Man Shot and Paralyzed by San Jose Police \$11.3 million*, SAN JOSE MERCURY NEWS (Dec. 22, 2015), www.mercurynews.com/portlet/article/html/fragments/print_article.jsp?articleId=29300586&siteId=568.

200. *The Failure of Civil Damages Claims to Modify Police Practices, and Recommendations for Change*, N.Y. City Bar (Mar. 2000), http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=32.

201. U.S. Commission on Civil Rights, *Who Is Guarding the Guardians?* October 1981.

202. 436 U.S. 658 (1978).

palties themselves for the actions of their employees.²⁰³ The Court held that civil rights violations committed by public employees might impose liability on the government if it is shown the violation is the result of poor training or poor supervision.²⁰⁴ Some commentators believe that the legal standard first articulated in *Monell* was a catalyst in changing policing by encouraging police administrations to develop a police standard of care in dealing with the public.²⁰⁵ They argue that suits against municipalities have resulted in policy changes that have made a great difference in deterring police misconduct. However, municipal liability faces two important challenges. First, many police chiefs see liability as a cost of doing business and the effect of losing a \$10- or \$12-million lawsuit does not have an impact on police operations. Second, no one in the police department is made aware of the results of the lawsuit, and none of the policy implications of the lawsuits are acted upon.

Thus, cities and police departments who are forced to pay millions in civil damages for the transgressions of its police officers should make a commitment to change, otherwise their inaction is imprudent.

C. Community-Oriented Responses

1. Affirmative restorative justice

A series of recommendations by the President's Task Force implicitly lays the blame for high police presence in black communities on the communities themselves. The focus of several recommendations is on children and youth "most at risk for crime or violence" and revolve around restorative justice programs that "avoid conflict" and "redirect energy."²⁰⁶ Certainly, these recommendations acknowledge the problem of the negative effects of strictly sending youth down the strict path toward suspensions or the juvenile justice system. But the recommendations can be construed as sending a message that if reducing crime among youth fails, then hard-nose police intervention later in these children's lives should be expected.

The implicit message is strikingly similar to the direct message sent to the critics of police shootings themselves: the community has

203. *Id.* at 690.

204. See Mike Jilka, *Municipal Government Liability Under Section 1983*, 67-DEC J. Kan. B.A. 23 (1998).

205. *Id.*

206. Task Force Recommendations, *supra* note 131, §§ 4.6, 4.6.3, 4.6.4.

created the problem by being so crime infested. For example, Rudy Giuliani, the former New York mayor and Republican presidential candidate, opined that black-on-black crime “is the reason for the heavy police presence in the black community. . . . So why don’t (they) cut it down so [that] so many white police officers don’t have to be in black areas?”²⁰⁷ In this view, African Americans have only themselves to blame for the presence and behavior of cops in their neighborhoods. If they would get serious about cleaning up the problems in their own communities, police would not be arresting or killing so many black people.

It’s human nature to not like to be told what to do from someone whom we do not like. So when we are told by police or other authorities that we are to blame for the war zone or that we should take responsibility for the violence in our own communities, that’s tough to hear. That is blame the victim rhetoric.

The responses to Giuliani’s critique are solid. His rhetoric ignores the racism, the militarization, and the clear signs of over-reaction by murderous police officers. The epidemic of unarmed blacks being killed by police comes at a time when black crime is high.

We can certainly reject the message that “blacks created the problem and blacks need to solve it.” We can reject the message that whites are blameless in the situations with which we are concerned. But does that mean that we should be complacent as far as restorative justice programs are concerned? We know in our hearts that with the right touch our preference is to have our families, friends, neighbors, and churches work with troubled or misguided friends. Violent crime rates are significant in the African American community. Criminal offenses are high in some African American neighborhoods.²⁰⁸ Thus, the President’s Task Force recommendations that relate to working with schools to encourage the use of alternative strategies that involve youth in decision making, such as restorative justice, youth courts, family interventions, positive strategies to avoid conflict, and peer interventions to avoid suspensions and the criminal justice system are important enough to not ignore.²⁰⁹

207. Steve Chapman, *The Problem With Blaming Black Crime for Police Shootings*, NEWSWEEK (Dec. 8, 2014), <http://reason.com/archives/2014/12/08/black-crime-and-police-killings/print>.

208. *Id.*

209. President’s Task Force, *supra* note 131, at 47–48.

2. Oakland Power Projects

The Oakland Power Projects was conceived by Critical Resistance, a grassroots organization in Oakland, California, to build capacity for Oakland to reject police and policing as the default response to harm and to highlight or create alternatives that actually work.²¹⁰ One goal of the Oakland Power Projects is to make the police obsolete by building tools and resources to meet people's needs in other ways, and by building connections and relationships to keep those resources going and accessible to residents throughout the city. The project has initiated three resources for emergent and preventative health needs for Oakland residents: medical kits that residents can use for first-response emergencies or for everyday use to help alleviate the need to call 911; a workshop that combines basic information about the prison industrial complex with critical health care information for overall health and chronic health problems; and a digital app or other system for up-to-date health resource information to bridge gaps between institutional and community-based knowledge, and provide basic how-to information.²¹¹ A major part of the project is to train and provide health care workers trained in crisis intervention to serve as first responders to deal with individuals who are having mental health episodes that require immediate attention.

Critical Resistance launched the Oakland Power Projects in September 2015 as a continuation of its efforts to address the ongoing issues of over-militarization and over policing by collaborating with members of the local community.²¹² The aim of the Oakland Power Projects is to enable residents to “invest in practices, relationships, and resources that build community power and wellbeing.”²¹³ The idea is to empower and remind members of the community that they, *themselves*, can successfully upkeep their neighborhoods, without resorting to the use of police in times of emergency.²¹⁴ The initiative hopes to build “the capacity for Oakland residents to reject police and

210. *The Oakland Power Projects*, CRITICAL RESISTANCE (2016), <http://criticalresistance.org/chapters/cr-oakland/the-oakland-power-projects/#AboutOPP>.

211. Rachel Herzing, *Big Dreams and Bold Steps Toward a Police-Free Future*, TRUTHOUT (Sept. 16, 2015), <http://www.truth-out.org/opinion/item/32813-big-dreams-and-bold-steps-toward-a-police-free-future>.

212. *Policing in Oakland: A Year in Review 2014*, CRITICAL RESISTANCE (2014), http://criticalresistance.org/wp-content/uploads/2015/03/Policing_Yr_Review_2014_v2b_WEB.pdf.

213. *The Oakland Power Projects*, CRITICAL RESISTANCE (2016), http://criticalresistance.org/wp-content/uploads/2015/03/TheOakPowerProj_rept_target1_v3WEB.pdf.

214. *Id.*

policing as the default response to harm and to highlight or create alternatives that actually work by identifying current harms, amplifying existing resources, and developing new practices that do not rely on policing solutions.”²¹⁵ In collaboration with other community organizations, training has included material for treating common medical issues. These medical issues include minor injuries, performing CPR, or treating gun or stabbing wounds.²¹⁶ Trainers hope to distribute medical kits to those participating in the training workshops. The trainings for community members also extend to addressing mental health issues and chronic health conditions.²¹⁷

Critical Resistance initiated the Oakland Powers Project in response to the community. Organizers conducted a survey in 2014 where Oakland residents were asked about their experiences with police and what alternatives would be most suitable.²¹⁸ The first report indicated that members of the community wanted to access medical resources completely unconnected to police forces. An alternate model for emergency medical crises was a top priority for residents.²¹⁹ This desire is not unfounded. Consider this example in Texas. Jens Rushing was working as an emergency medical technician when he was dispatched in a small nearby city.²²⁰ He recalls the accompanying police officer handcuffing the patient who was suffering mental health crisis. Rushing stated that the officer was completely unaware of the threat of positional asphyxia, a condition that could kill people.²²¹ “We had to argue with him to get the patient away from [the police], and let us [EMTs] do it our way, chemically sedating the patient rather than physically restraining the patient, and actually tending to them as a patient, rather than as a person committing the ‘crime’ of having an acute psychotic episode.”²²²

Critical Resistance works with a number of other organizations with similar goals of abolishing the need for police.²²³ The Youth Justice Coalition, for example, has a “1% Campaign” that advocates for

215. *Id.*

216. *Id.*

217. *Id.*

218. Candice Bernd, *Community Groups Work to Provide Emergency Medical Alternatives Separate From Police*, TRUTHOUT, (Sept. 14, 2015), <http://www.truth-out.org/news/item/32782-community-groups-work-to-provide-emergency-medical-alternatives-separate-from-police>.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

just 1 percent (roughly \$100 million) to be diverted from the Los Angeles Police Department budget and directed toward programs and services for young people that are alternatives to youth suppression.”²²⁴ Another program focuses on the criminalization of youth in schools. The Black Organizing Project has successfully pushed for guidelines for how police can interact with students. Under the guidelines, police also are no longer able to solicit information from schools.²²⁵ Additionally, the Oakland Unified School District is no longer able to call the Oakland Police Department for minor infractions committed by students.²²⁶ This is emblematic of a part of the Critical Resistance mission of reducing the school to prison pipeline for young students of color.

Another project, the Harm Free Zone project in Durham, North Carolina, provides trainings in which community members learn to respond to emergencies without relying on police intervention.²²⁷ Similar to the Oakland Powers Project, Harm Free Zone aims to empower community residents to be called upon as the first responders.²²⁸ The project equips its members with tools and training sessions on how to properly address emergency situations, while also building strong relations with community members. The project is important, given some rather alarming statistics about Durham County. The black population is 38.6 percent of a total population of close to 300,000,²²⁹ yet blacks represent over 80 percent of those who are incarcerated. Of those who live in poverty, 5,546 are white, while, 21,898 are black. Black students are five times more likely to be suspended from school than white students.²³⁰

224. Rachel Herzing, *Big Dreams and Bold Steps Toward a Police-Free Future*, TRUTHOUT (Sept. 16, 2015), <http://www.truth-out.org/opinion/item/32813-big-dreams-and-bold-steps-toward-a-police-free-future>.

225. *Policing in Oakland: A Year in Review 2014*, CRITICAL RESISTANCE (2014), http://criticalresistance.org/wp-content/uploads/2015/03/Policing_Yr_Review_2014_v2b_WEB.pdf.

226. *Id.*

227. Herzing, *supra* note 224.

228. *See generally Id.* (“Based in Brooklyn, New York, the Safe Neighborhood Campaign focuses on reducing harm to lesbian, gay, bisexual, two spirit, trans and gender-nonconforming people of color by working with local businesses and community spaces to provide safe haven for people in need without contacting the police.”).

229. UNITED STATES CENSUS BUREAU, QUICK FACTS: DURHAM COUNTY, NORTH CAROLINA (2014), <http://quickfacts.census.gov/qfd/states/37/37063.html>.

230. *The Harm Free Zone*, <http://www.spirithouse-nc.org/collective-sun-ii/hfz-communities-schools>.

IV. CAN THINGS CHANGE?

Can things change? Can the militaristic culture be altered? Can racism be eliminated? Can conditions be changed to eliminate or reduce the racially-motivated shootings by police officers? We are reminded of the challenge we face as the words of officers themselves and of those who have observed them closely.

For example, columnist David Brooks has observed this about the police on the beat:

They ride an emotional and biochemical roller coaster. They experience moments of intense action and alertness, followed by emotional crashes marked by exhaustion, and isolation. They become hypervigilant. Surrounded by crime all day, some come to perceive that society is more threatening than it really is. To cope, they emotionally armor up. Many of the cops I was around developed a cynical, dehumanizing and hard-edged sense of humor that was an attempt to insulate themselves from the pain of seeing a dead child or the extinguished life of a young girl they arrived too late to save . . . Most cops know they walk a dangerous line, between necessary and excessive force.²³¹

Los Angeles police officer Sunil Dutta submits:

An average person cannot comprehend the risks and has no true understanding of a cop's job. . . . An average cop is always concerned with his or her safety and tries to control every encounter. That is how we are trained. While most citizens are courteous and law abiding, the subset of people we generally interact with everyday are not the genteel types. You don't know what is in my mind when I stop you. Did I just get a radio call of a shooting moments ago? Am I looking for a murderer or an armed fugitive? For you, this might be a "simple" traffic stop, for me each traffic stop is a potentially dangerous encounter.

In most cases it's less ambiguous [than in Michael Brown's case] — and officers are rarely at fault. When they use force, they are defending their, or the public's, safety. Even though it might sound harsh and impolitic, here is the bottom line: if you don't want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you. Don't argue with me, don't call me names, don't tell me that I can't stop you, don't say I'm a racist pig, don't threaten that you'll sue me and take away my badge. Don't

231. David Brooks, *The Cop Mind*, N.Y. TIMES (Dec. 8, 2014), http://www.nytimes.com/2014/12/09/opinion/the-cop-mind.html?_r=0.

scream at me that you pay my salary, and don't even *think* of aggressively walking towards me.²³²

Seattle's Former Police Chief, Norm Stamper tries to explain:

[I]f. . . I'm scared of young black men that I meet on my beat, but with fear being a socially unacceptable emotion in police work, I can't really express it, then I'm going to sublimate the fear, and I'm going to compensate in my behavior. In other words, because I'm scared, I'm going to act tough. I'm going to become the bully.²³³

An anonymous female street cop puts it this way:

If I take a punch and I'm knocked out, they could take my gun. . . . We need to stay a step ahead of them, so we sometimes use a higher-level of force.²³⁴

And this is typical response from cops to the President's Task Force report:

Wow. You all need to take a few minutes and read this report. Not surprising that all is blamed on the Police. They want to control everything from language used by police during contacts to respect citizens (not ever using commands that direct a criminal to obey and submit avoiding use of force), to giving out our card at each and every contact & getting written consent to search! All OIS/use of force reviewed "independent Prosecutors" (read DOJ). In the end, just a long winded "community organizer" (read Obama) type report with all blame put on LEOs and zero responsibility on the public. They do push training (mostly diversity etc) and having an updated radio system but that's all that helps LEOs. Take a moment to read how "reflecting the community" is so very important (agreed it really is) yet the makeup of this commission is way disproportionately made up of "persons of color". Only 2 W/M on the main board. Gee what a surprise, another waste of public time & money and is useless.²³⁵

232. Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me*, WASH. POST (Aug. 19, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/>.

233. Leighton Woodhouse, *Seattle's Former Police Chief Speaks out Against Police Brutality*, VICE.COM (Aug. 18, 2014), <http://www.vice.com/read/a-former-police-chief-speaks-out-against-police-brutality-818>.

234. D. K., *Policing in America: What the cops say*, ECONOMIST (Apr. 27, 2015), <http://www.economist.com/blogs/democracyinamerica/2015/04/policing-america>.

235. KevCopAz, *Final Report of the President's Task Force on 21st Century Policing Released*, comments, POLICEMAG.COM (May 19, 2015), <http://www.policemag.com/channel/patrol/news/2015/05/19/final-report-of-the-president-s-task-force-on-21st-century-policing-released.aspx>.

In spite of the challenges, apparently, things can change. Imagine a diverse, metropolitan city with nearly three million residents, with high levels of deprivation and poverty, but where confrontations between police and suspects rarely end in death. Where, in the 40-year history of its police force, the police have only shot two individuals. This is Manchester, Great Britain.²³⁶ A typical Manchester police officer does not carry a gun. She has a “stab vest,” radio, and a few “tools”—a spray can of tear gas, handcuffs, and a black baton.

Make no mistake. British police are not immune from charges of racism. Blacks and South Asians are six times more likely to be stopped and frisked by British police than whites. Blacks are more likely to get tased and more likely to be in prison. Complaints of racial profiling and excessive use of force are common, but they usually do not involve guns. Under Great Britain’s strict gun laws, handguns and semi-automatic weapons are effectively banned²³⁷.

Although some criminals in Great Britain have guns and the police have armed response teams, Manchester police are taught to avoid confrontation. The idea is to deal with incidents at the lowest level of de-escalation at all times. Officers are trained to stand back and to assess the situation carefully before moving in on a suspect. In viewing videos of U.S. shootings, the training specialist for Manchester’s police concluded that U.S. officers “move in too fast . . . putting themselves so close to danger,” likely thinking that they can pull their gun if necessary.²³⁸

Similarly, knife violence is a big problem in England, yet British police have fatally shot only one person wielding a knife from 2008 to 2015—a hostage-taker.²³⁹ By comparison, U.S. police fatally shot more than 575 people allegedly wielding blades and other such weapons just in the years from 2013 to 2015.²⁴⁰

Can things change? Consider the police department in Oakland, California. While community activists still have serious complaints, years of court monitoring, efforts at community policing, and new

236. Leila Fadel, *Walking the Beat With an Unarmed Police Officer in Britain*, NPR (Nov. 8, 2015), <http://www.npr.org/2015/11/08/446499501/walking-the-beat-with-an-unarmed-police-officer-in-britain>.

237. *Id.*

238. *Id.*

239. Paul Hirschfield, *Why Do American Cops Kill More People Than in Other Countries?*, NEWSWEEK (Nov. 29, 2015), <http://www.newsweek.com/why-do-american-cops-kill-more-people-other-countries-399169>.

240. *Id.*

leadership apparently have made a difference. Complaints about excessive force and the numbers of officer-involved shootings have dropped dramatically in the past several years.²⁴¹ Over a twelve year period from 2000 to 2012, the Oakland police were involved in about eight shootings each year.²⁴² But there were only six from the fall of 2013 to September 2015.²⁴³

Both use-of-force incidents reported by police and use-of-force complaints by suspects dropped substantially. From 2009 to 2014, the reported use-of-force incidents dropped from almost 4,000 to just under 900.²⁴⁴ A record low 49 incidents were reported in July 2015. Use-of-force complaints by suspects who claimed such things as hair pulling, choke holds, and wrist-bending, fell more than 40 percent in a two-year period.²⁴⁵ As a result, grievances investigated by the Citizens' Police Review Board dropped for 90 in 2009 to 15 in 2014.

Oakland arrests rates are about the same, so improvements in bad incident complaints use-of-force incidents are not about the force being less vigilant. The department's past aggressive enforcement style drew criticism from court-appointed monitors and the public. Critics were especially irked police response to the Occupy Oakland protests; the city had to pay an Iraq War Veteran who blasted in the face with a tear gas canister \$4.5 million to settle a civil suit. They city also was chastised for failing to punish bad cops.²⁴⁶ A new police chief hired in 2013 brought about positive changes. New trainings on use-of-force, a change in pursuit policies, and the adoption of a broad body camera program helped to forge better community relations.²⁴⁷ However, experts warn that Oakland community leaders have to remain vigilant to ensure that the department does not slip backwards.²⁴⁸

Can things change? Increasingly, criminologists and even some police chiefs argue that tactics, such as those embodied by the broken windows approach, needlessly alienate law-abiding citizens and undermine trust in the police. Indeed, in Fayetteville, N.C., 100 miles south-

241. Joaquin Palomino, *Sharp Downturn in Use of Force at Oakland Police Department*, S.F. CHRON. (Sept. 2, 2015), <http://www.sfchronicle.com/bayarea/article/Sharp-downturn-in-use-of-force-at-Oakland-Police-6481637.php>.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* (citing Samuel Walker, a criminologist at the University of Nebraska who has studied the Oakland Police Department).

east of Greensboro—the site of aggressive traffic stops—a new police chief has discouraged officers from stopping motorists for minor infractions.²⁴⁹ Ronald L. Davis, a former California police chief who now runs the Justice Department’s Office of Community Oriented Policing Services, doubts that intensive traffic enforcement in high-crime neighborhoods is beneficial “There is no evidence that just increasing stops reduces crime.”²⁵⁰

Can things change? In addition to California’s new legislation requiring police data collection,²⁵¹ Wisconsin Governor Scott Walker also signed two relevant pieces of legislation. One makes police reports public, so families will be apprised of their legal rights if their loved ones are killed in an officer involved shooting. Another brings in outside agencies to investigate officer-involved deaths. The new requirements are intended to address concerns that police protect their own in investigations involving the use of deadly force.²⁵²

Can things change? After strong public protests, Chicago Mayor Rahm Emanuel reversed his opposition to possible U.S. Department of Justice (DOJ or Justice Department) review of the Chicago Police Department’s practices, the type of investigation that has led to federal court oversight and sweeping reforms in other troubled, big-city police departments throughout the country.²⁵³ The calls for DOJ intervention came amid the fallout of Emanuel releasing a police dashboard camera video of the October 2014 Laquan McDonald shooting, which shows the African-American teenager getting shot repeatedly as he walked away from a white police officer. Although The calls for DOJ intervention came amid the fallout of Emanuel releasing a police dashboard camera video of the October 2014 Laquan McDonald shooting, which shows the African-American teenager getting shot re-

249. Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>.

250. *Id.*

251. McGreevy, *supra* note 157.

252. Kate Pabich, *Walker Signs Officer Involved Shooting Bill into law*, NBC15.COM (Apr. 23, 2014), <http://www.nbc15.com/news/state/headlines/Wis-bill-alters-officer-involved-shooting-reviews-221164071.html>.

253. Bill Ruthhart & Annie Sweeney, *Emanuel now Open to Justice Department Review of Chi. Police*, CHI. TRIBUNE (Dec. 2, 2015), <http://www.chicagotribune.com/news/ct-rahm-emanuel-justice-department-chicago-police-20151203-story.html>. Similarly, after an outcry over the police killing Mario Woods in San Francisco, the mayor directed that policies be adopted to create more transparency and accountability and ordered the creation of a new cultural competency course for officers and training on avoiding subconscious bias. Vivian Ho, *Lee Outlines Reform Plan After Killing by S.F. Police*, S.F. CHRON., Jan. 7, 2015, at D5.

peatedly as he walked away from a white police officer. Although Emanuel has refused to resign as demanded by protestors, he has fired the city's police chief.²⁵⁴ A civil rights investigation by the DOJ would not be limited to the McDonald case and would represent a deeper review of the police department's practices in the use of deadly and excessive force and how those cases are reported and investigated. In many cases, such investigations result in a federal consent decrees, where the Justice Department and the municipality reach an accord on how to right the police department's wrongs and a federal judge oversees the implementation of those changes and appoints a monitor to handle the day-to-day aspects.²⁵⁵ Emanuel also announced changes in police training and department policies on use of force, as well as doubling the number of Tasers available to officers from 700 to 1400.²⁵⁶

Can things change? On October 26, 2015, D.C. police officers were called to break up two groups of fighting teenagers who were black.²⁵⁷ As the crowd lingered, a few minutes later, a female officer approached and told the teens to disperse. That's when Aaliyah Taylor, a 17-year-old girl with a little attitude, walked up to the officer and started playing "Watch Me (Whip/Nae Nae)" on her phone. Then she did the Nae Nae dance. According to Taylor, while friends capture the encounter on their cell phones, the officer laughed and said she could dance better, essentially challenging the teen to a dance-off. Taylor said the officer told the group that if the teens won, they could stay. If the officer won, they would have to leave. The two danced for a few minutes face-to-face and had a good laugh. Both declared themselves the victors and hugged; then the teens left peacefully.²⁵⁸

The interaction was the first time Taylor had a positive experience with the police. She has several siblings who have been arrested or stopped for non-violent offenses. Her siblings experienced unnecessary rudeness and behavior by the police on those occasions. But on this day, "[i]nstead of us fighting, [the officer] tried to turn it around

254. Bill Ruthhart & Annie Sweeney, *supra* note 253.

255. *Id.*

256. *Chicago Mayor Calls For Tasers, Training After Police Shootings*, CBS/AP (Dec. 30, 2015), <http://www.cbsnews.com/news/chicago-mayor-rahm-emanuel-calls-for-tasers-training-amid-backlash-over-police-shootings>.

257. Perry Stein, *A D.C. Cop Tried to Break Up a Group of Teens. It Ended in This Impressive Dance-Off*, WASH. POST (Oct. 28, 2015), <https://www.washingtonpost.com/news/local/wp/2015/10/28/a-d-c-cop-tried-to-break-up-a-group-of-teens-it-ended-in-this-impressive-dance-off/>.

258. *Id.*

and make it something fun. I never expected cops to be that cool. There are good cops.”²⁵⁹

D.C. Police Chief Cathy Lanier declared that the incident was “reflective of the many positive police-community interactions that take place daily in Washington, D.C.”²⁶⁰ The officer chose to remain anonymous and refused personal publicity; but a D.C. police union official said these examples of positive interactions between officers and residents common, but generally do not get posted on the Internet. The unidentified officer told reporters, “This is what we do everyday.”²⁶¹

CONCLUSION – WAGING A DISRUPTIVE WAR AND SEEKING NEW ALLIES

At the outset, we were introduced to Walter Scott, Sandra Bland, Brendon Glenn, and Tamir Rice. Walter Scott was a Coast Guard veteran studying massage therapy. He was a devout Christian who sang in his church choir. Scott was remembered by his brother as loving, kind and outgoing, somebody who “knew everybody.” He spent two years in the Coast Guard, and had four children. Walter Scott’s life mattered.

Before her fateful encounter with the police, Sandra Bland was taking a new job at Prairie View A&M University in Texas. At Prairie View A&M University, Bland was a member of the Sigma Gamma Rho. She had graduated from the college in 2009 and was returning as a student ambassador. Sandra was a graduate of Willowbrook High School in Villa Park, Illinois, where she ran track and played volleyball. She was also a varsity cheerleader, part of the marching band, and a member of the high school’s World Languages Honor Society. She and her family belonged to the DuPage African Methodist Episcopal Church where her funeral was held. Sandra was remembered as someone who was extremely spontaneous, spunky, outgoing, truly filled with life and joy. Her life mattered.

Brendon Glenn was a homeless man living in Venice Beach. He was a New York native and stayed in Venice for months. Brendon enjoyed skateboarding and had a love for the New York Yankees. He was known as a kind man, who constantly expressed his love for

259. *Id.*
260. *Id.*
261. *Id.*

others, and adored his black Lab mix, Dozer. He had an alcohol problem according to local friends. He also was known as a peace-maker, one who would not seek confrontation. One friend, Corey, said “Nothing negative ever came out of Brendon’s mouth.”²⁶² Brendon’s life mattered.

The 12-year-old Tamir Rice was described by neighborhood witnesses as a kid or a “little boy.” Tamir was a well-liked student at Marion C. Seltzer School. His teacher, Carletta Goodwin stated “He would tap on his desk, he would sing to himself. I would say, ‘OK, that’s enough,’ because he would get the rest of the class going.” As a 12-year-old boy, he liked to draw. He also loved sports. His musical side stood out, and he was a well-liked member of the drum line. “Tamir enjoyed life. It just exuded from his very being,” according to his teacher Goodwin.²⁶³ Tamir’s life mattered.

Since the actual convening of the Wiley A. Branton Symposium on October 29, 2015, several other tragic police shootings of African American victims have occurred.

Jamar Clark, a 24-year-old black man, was shot by a Minneapolis police officer early November 15, 2015, under unclear circumstances. Clark was shot by an officer after police and ambulances responded to a domestic-violence call. Police said Clark was a suspect in the domestic assault, and interfered with responders.²⁶⁴ From there, things get murky. A number of people watched the incident unfold—it was across the street from an Elks Lodge—and several of them say that Clark was handcuffed when he was shot in the head. Police insist he was not cuffed.²⁶⁵ Even if Clark was not handcuffed, there is a separate question of whether the use of deadly force was appropriate under the circumstances. Just as the death of Freddie Gray brought new scrutiny on a Baltimore Police Department with a long, troubled history with its citizens—and particularly citizens of color—the police in Minneapolis are about to come under new scrutiny.²⁶⁶

262. Kate Linthicum, *Dozens Turn Out for Brendon Glenn Memorial in Venice*, L.A. TIMES (May 9, 2015), <http://www.latimes.com/local/lanow/la-me-ln-dozens-turnout-for-memorial-for-brendon-glenn-20150509-story.html>.

263. Nicole Hensley, *Tamir Rice’s Family Blasts Police at Boy’s Cleveland Funeral*, N.Y. DAILY NEWS (Dec. 3, 2014), <http://www.nydailynews.com/news/crime/tamir-rice-family-blasts-police-boy-cleveland-funeral-article-1.2032033>.

264. David A. Graham, *How Did Jamar Clark Die?*, ATLANTIC (Nov. 18, 2015), <http://www.theatlantic.com/politics/archive/2015/11/jamar-clark-is-the-next-great-police-brutality-controversy/416418/>.

265. *Id.*

266. *Id.*

The events leading to 26-year-old Mario Woods' death in San Francisco began on December 2, 2015, when a man was injured in a non-fatal stabbing in the city's Bayview neighborhood.²⁶⁷ Later that afternoon, at least five police officers approached Woods, responding to reports of a man who matched the description of the stabbing suspect.²⁶⁸ Police say Woods was wielding a 6- to 8-inch kitchen knife endangering the officers.²⁶⁹ At a community meeting held two days after the shooting, the police chief displayed a large photo in an attempt to show that Woods' arm was outstretched with a weapon.²⁷⁰ The officers first tried to disarm Woods using pepper spray and bean bags, police said, but they were unsuccessful. So when one of them stepped into Woods' path as he tried to walk away from the officers—and toward bystanders—that officer fired his gun. At least 15 shots from police followed and Woods was killed.²⁷¹

A bystander's video shows police surrounding Woods as he crouches and stands near a wall. The video does not clearly show a knife in his hands, but the woman filming shouts, "Just drop it!" At the time when the first shot is fired, Woods is slowly walking, almost limping, away from the officers and his hands appear to be at his sides.

In Chicago, a day after Christmas, a 55-year-old woman, Bettie Jones, and Quintonio LeGrier, a 19-year-old male, were both shot and killed. The police were responding to a call made by LeGrier's father, Antonio LeGrier, who had been arguing with his son. LeGrier's family said the Northern Illinois University student suffered from a mental illness and threatened his father with an aluminum baseball bat. The teen's father called police and then called his downstairs neighbor, Jones, to open the door when officers arrived.²⁷²

After arriving, officers report that LeGrier was "combative" and they had to discharge their weapons. Apparently, LeGrier was charging down the stairs still carrying the bat. Police opened fire, and both

267. Katy Steinmetz, *The Shooting of Mario Woods Brings Ferguson to San Francisco*, *Activists Say*, TIME (Dec. 16, 2015), <http://time.com/4151979/mario-woods-shooting-san-francisco/>.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. Holly Yan and Chandler Friedman, *Chicago: Woman 'Accidentally' Shot and Killed by an Officer*, *Police Say*, CNN (Dec. 27, 2015), <http://www.cnn.com/2015/12/26/us/chicago-police-shooting/>.

LeGrier and Jones—the neighbor who opened the door—were shot and killed. LeGrier was shot seven times.²⁷³

In all likelihood, the lives of Jamar Clark, Mario Woods, and Quintonio LeGrier mattered as well.

As the violent police shootings continue, the question of whether things can change becomes all the more urgent. Racist policing did not start with the shooting of Michael Brown. For African Americans, the history goes back to slavery, through Jim Crow, the war on crime and the new Jim Crow of mass incarceration.²⁷⁴

The history includes Rodney King, the black cab driver who was brutally beaten by Los Angeles police officers following a high-speed car chase in 1991. There were no smart phones at the time, but a witness videotaped much of the beating from his balcony and sent the footage to local news station. The footage shows four officers surrounding King, several of them striking him repeatedly, while other officers stood by. Parts of the footage were aired around the world. Four officers were charged with assault with a deadly weapon and use of excessive force. Three were acquitted of all charges. The jury acquitted the fourth of assault with a deadly weapon but failed to reach a verdict on the use of excessive force. The jury deadlocked at 8–4 in favor of acquittal at the state level.²⁷⁵ The acquittals triggered the 1992 Los Angeles riots, in which 53 people were killed and over 2,000 were injured, ending only when the California national guard was called in.²⁷⁶ However, the acquittals led to the federal government seeking and obtaining grand jury indictments for violations of King's civil rights. The trial of the four in a federal district court ended on April 16, 1993, with two of the officers being found guilty and subsequently imprisoned. The other two were acquitted again.²⁷⁷

In my view, the history of police violence against black Americans also is responsible for establishing the atmosphere condoning hate crimes perpetrated against African Americans. Vigilante racists feel licensed to act in a certain way because of what they see authorities do. For example, reminiscent of lynchings during slavery and Jim

273. *Id.*; Megan Crepeau, Jeremy Gorner and Grace Wong, *2 Fatally Shot, 1 Accidentally*, by *Chicago Police on West Side; Families Demand Answers*, CHI. TRIBUNE (Dec. 26, 2015), <http://www.chicagotribune.com/ct-chicago-police-shooting-20151226-story.html>.

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

275. *Rodney King*, REDIRECTIFY.COM, <http://www.redirectify.com/people/rodney-king.html>.

276. *Id.*

277. *Rodney King*, BIOGRAPHY.COM, <http://www.biography.com/people/rodney-king-954214>.

Crow, James Byrd was an African American who was murdered by three men—at least two of whom were white supremacists—in Jasper, Texas, in 1998.²⁷⁸ Shawn Berry, Lawrence Russell Brewer, and John King dragged Byrd for three miles behind a pick-up truck along an asphalt road. Byrd, who remained conscious throughout most of the torture, died as his body struck an embankment, as an arm was severed and his head decapitated. The murderers dragged the torso another mile, dumping it in front of an African-American cemetery. Byrd's lynching-by-dragging gave impetus to passage of a Texas hate crimes law.²⁷⁹ The tragedy later led to the federal Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, commonly known as the Matthew Shepard Act, which was signed into law on October 28, 2009, by President Obama. Lawrence Russell Brewer was executed by lethal injection for this crime by the state of Texas on September 21, 2011. Berry was sentenced to life in prison, and King is on death row pending appeals.²⁸⁰ Among racial groups, African Americans experience the most hate crimes and are the ones most likely to be targeted. Their chances of being targeted for a hate attack are roughly double any other group and more than 10 times that for white people.²⁸¹

Given the urgency for immediate change, we need some innovative, out-of-the-box options. Certainly, conventional approaches to change should not be totally dismissed. For example, advocates of community policing understand that depending on the approach, concentrating community policing on some communities and segments of the population to maintain public safety can arouse resentment in these neighborhoods.²⁸² Without strong policies and training in place, racial profiling and excessive use of force can result.²⁸³ Community policing requires conscientious, active attention to positive relationship-building. This can be done by assigning officers to neighborhoods on a regular basis so that officers have the opportunity to know community members and vice versa. Bringing in community based organi-

278. *The Murder of James Byrd, Jr.*, PUBLICENEMY.COM (Feb. 4, 2016), <http://www.publicenemy.com/news/343/the-murder-of-james-byrd-jr.html>.

279. *Governor of Texas Signs a Hate Crimes Bill*, N.Y. TIMES, (May 12, 2001), <http://www.nytimes.com/2001/05/12/us/governor-of-texas-signs-a-hate-crimes-bill.html>.

280. *James Byrd's Killer: 'I'd Do It All Over Again'*, KHOU.COM (Sept. 20, 2011), <http://www.khou.com/story/news/2014/07/17/11531380/>; James Byrd, Jr. BIOGRAPHY.COM, <http://www.biography.com/people/james-byrd-jr-092515>.

281. Hari Sreenivasan, *Blacks Most Often Targeted in Hate Crimes*, PBS NEWSHOUR (June 20, 2015), <http://www.pbs.org/newshour/bb/fbi-blacks-often-targeted-hate-crimes/>.

282. President's Task Force Report, *supra* note 139, at 41.

283. *Id.*

zations as partners to help facilitate meetings and public service activities can help.²⁸⁴

As the President's Task Force has recognized, police departments cannot build community trust if they are seen as an occupying force coming in from outside to impose control on the community. Law enforcement culture should embrace a guardian—rather than a warrior—mindset to build trust and legitimacy both within agencies and with the public. Procedural changes such as reducing the availability of military equipment to police departments, requiring body cameras as well as requiring data collection and reporting can only help. The serious potential of crisis intervention training for police and restorative justice efforts in the community is difficult to dismiss.

Some recommendations merit skepticism. Internal affairs units have not proven reliable from the community's perspective.²⁸⁵ Securing indictments, much less convictions, of the officers involved proves difficult, and the lack of success has led to more community frustration. Even multi-million-dollar civil awards appear to fall on deaf ears. The effectiveness of making Tasers available and implicit bias training is not conclusive.²⁸⁶

Broken windows policing and Urban Shield represent disruptions in how police work is done. Those theories and opportunities literally uprooted and changed how police think, behave, learn and go about day-to-day work; but they resulted in an assaultive environment that gave rise to police shooting blacks with alarming frequency. The question for us is whether we can offer disruptive alternatives to policing that offer real public safety in a manner that is not racist.

In fact, some of the ideas and recommendations for change can be classified as out-of-the-box, creative thinking that will bring about effective, disruptive change toward policing. Requiring recruits and experienced officers alike to engage in non-enforcement activities and learning about the sociological backgrounds of the communities served is noteworthy. The European Union's training on verbal warnings and warning shots, grounded in the philosophy of deadly force as a last resort from the European Convention on Human Rights, appears to have achieved remarkable effects in EU policing.²⁸⁷ The Oakland Powers Project designed and implemented by Critical Resistance

284. *Id.* at 42.

285. Taibbi, *supra* notes 163–65.

286. Martin, *supra* notes 144–46; Smith, *supra* notes 188–90.

287. Fadel, *supra* notes 236–38.

is particularly intriguing. The notion of rendering the need to call the police obsolete—at least in some situations as when an individual is suffering a mental health crisis—is terribly intriguing. Witnesses of many of the shooting deaths of blacks claim that the police escalated the situation to the point that the shooting occurred.

Black Lives Matter and others are working on disruptive alternatives to create true community policing that is about public safety for all. Their rebellious method of organizing recognizes that meaningful, lasting change can only come about through collaboration with allies with common goals and experiences.²⁸⁸ Working with the labor movement, immigrant rights groups, Latino and Asian American organizations, pro-Palestinian leaders, and grassroots groups like Critical Resistance, BlackOUT Collective, Stop Urban Shield Coalition, and Dark Matter represents a strong foundation for collective change. What are the disruptive approaches that will result? More civilian monitoring of the police? Changing structures of command in police forces? Better integration of police forces? Working to decrease the need for police as first responders; to make the police obsolete? Or something much more innovative and unconventional that is yet to be described?

Thanks to social media and the ubiquity of 24/7 CNN news coverage today, images of shootings like those of Walter Scott and Tamir Rice are brought to us in our living rooms or smart phones in an instant. Just as quickly as those images are brought to us and spread across the internet, the substance of racialized policing can be distorted or displaced by the next hot topic or shocking image. One could make a good case that the only reason that racialized policing remains in the consciousness of many Americans is due to a new tragic incident on a regular basis. The risk we run is not that we forget, but that we become jaded—unresponsive—to the illness that apparently pervades so much of policing today.

We may not have the PR firms or professional ad agencies that today can control media content and public consciousness for long periods of time. But perhaps we have something better. We do have the allies. We do have social media. The 24-hour news cycle can be disrupted so that racist policing cannot be displaced from the nation's

288. See generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

psyche. The power to challenge framework of policing and to disrupt the cop's approach is there.

Most of us raised a skeptical eyebrow when, in *Grutter v. Bollinger*,²⁸⁹ the affirmative action case of 2003, Justice O'Connor predicted that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."²⁹⁰ We are half way into those 25 years. We wished that she was correct, but knew she was wrong. People of color in the United States experience racially insensitive comments or actions too often to know that judgment by character rather than skin color is not guaranteed. Attentive white Americans know their advantages and also hear and sense the racist sentiments or actions of their white neighbors or friends all too often.

We remain disappointed that in the year 2016 the need for a call to action to combat racism in the institution of law enforcement continues. However, in our lifetimes—in fact just in the past couple years—we have witnessed constant, violent racialized policing; we have witnessed 21-year old white supremacist Dylan Roof killing nine black parishioners and their minister during Bible study at Charleston's Emanuel AME Church; we have witnessed the attempt to hang onto the confederate flag by those who continue to cling to their racist glory days. As the latter examples demonstrate, when violent racist policing continues and goes unpunished, the malevolent actions of racist cops gives license to private vigilante racists who engage in their own brand of hate speech and violence.

This call to action is to address the illness that has plagued the nation since slavery, the institution of Jim Crow, the mass incarceration of the New Jim Crow, and the continued targeting of black men and women in violent racialized policing. This is the same malady that has plagued our nation since the mass annihilation of native Americans, the exclusion of Asian immigrants, and the relentless targeting of Mexicans for deportation.

Law enforcement may resist and argue that a decision had to be made in a millisecond, but we can see from videos of beatings and shootings like those of Rodney King and William Chapman, accused of shoplifting,²⁹¹ that these are not decisions made in a blink. All too

289. *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003).

290. *Id.* at 343.

291. Jon Swaine, *William Chapman: Unarmed 18-Year-Old Shot Dead by Officer Who Killed Before*, *GUARDIAN* (June 1, 2015), <http://www.theguardian.com/us-news/2015/jun/01/william-chapman-unarmed-shot-dead>.

often these decisions are rooted in the evils of structural racism that licenses the individual officer. Other times, these are malicious decisions to simply join in on the fun of beating on a black man.

Given the evil vestiges of the War on Crime and War on Drugs, we need our own war. So I come back to the concept of disruption: We have the power and ability to disrupt. Yes, disruption in the classic take-to-the-streets sense and through social media; but also in the sense of reframing—of uprooting and changing how police do their work day to day. Disturbance on the streets already has led to a reframing or disruptive approach to how police work gets done in places like Camden, New Jersey, and Oakland, California.

Today more than ever, those of us in the legal community need to recommit to racial justice in our criminal justice system. Today, more than ever, we also need to acknowledge that the ideas to reform policing may come from grass roots groups, from a range of allies, and that the leadership for reform also may come from those sources. We need to listen for those innovative ideas that can disrupt the convention. They may come from that young child on an American street or from some soul resisting similar oppression in the Middle East.

Those disruptive ideas will flow from the sorrow and anger over the racist shootings we have witnessed, as we and our friends turn that outrage into humanistic solutions based on the understanding that these lives mattered, as the souls of those who hold the guns and drive the tanks are transformed, willingly or not, into choosing peacemaking over violence.

We have to believe this is possible. So that the answer is: Yes, things can change.

ESSAY

Restoring Community Dignity Following Police Misconduct

JOHN FELIPE ACEVEDO*

INTRODUCTION	622
I. POLICE MISCONDUCT AS A DIGNITY TAKING	625
A. The Body as Property	625
B. Applying Dignity Takings to Police Misconduct	628
II. EXAMPLES AND EXISTING REMEDIES.....	632
A. Department of Justice Investigations.....	632
1. Ferguson Police Department	633
2. New Orleans Police Department.....	636
3. Maricopa County Sheriff's Office	638
B. Existing Remedies	639
C. Tort System	641
III. DIGNITY RESTORATION.....	645
A. Truth and Reconciliation Commissions	645
B. Community Reparations	647
CONCLUSION	649

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INTRODUCTION

Ferguson, Baltimore, New York, and Charleston: the problem of police misconduct has been surfacing around the country with troubling regularity.¹ Many of the victims or their families have successfully pursued civil suits against the police departments accused of misconduct. At the same time—and as Eric Garner’s family suggested at the conclusion of their legal dispute with the New York Police Department—if we are to learn anything from these events, it must be that existing remedies do not resolve the harms caused by police misconduct.² The outrage caused by “Ferguson encounters” is about more than the loss of time or money to individuals or families; it is, at heart, about a loss of dignity suffered by wide swaths of the American public.

This Essay argues that one way to restore good relations between communities and their police departments is by expanding existing remedies to include remedies that help restore the dignity of victimized groups. Dignity restorations make sense in an environment marked by growing suspicion of police power, and American society has arguably been such an environment since 2001. An increase in security since the September 11th attacks, during the “War on Terror,”³ and revelation of the NSA wiretaps and metadata tracking⁴

1. See Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0 (Eric Garner’s death was caused by the use of a chokehold by the NYPD when he was arrested for selling loose cigarettes); Rob Crilly, *Michael Brown: What the Ferguson Riots Tell Us About Race in America Today*, TELEGRAPH (Aug. 24, 2014, 7:05 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11052845/Michael-Brown-What-the-Ferguson-riots-tell-us-about-race-in-America-today.html> (the problems in Ferguson began with the shooting of an unarmed black teenager, Michael Brown, by a Ferguson PD officer); Manny Fernandez, *North Charleston Police Shooting Not Justified, Experts Say*, N.Y. TIMES (Apr. 9, 2015), <http://www.nytimes.com/2015/04/10/us/north-charleston-police-shooting-not-justified-experts-say.html> (Walter Scott was shot in the back by a Charleston police officer as he fled following a routine traffic stop); Kevin Rector, *Officers Plead Not Guilty in Freddie Gray Case as Judge and Trial Date Selected*, BALT. SUN (June 22, 2015, 9:27 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-trial-date-20150622-story.html#page=1> (Freddie Gray died in police custody from severe spinal trauma he suffered).

2. See Josh Dawsey, *New York City Agrees to Pay Family of Eric Garner \$5.9 Million*, WALL ST. J. (July 13, 2015, 11:11 PM), <http://www.wsj.com/articles/new-york-agrees-to-pay-family-of-eric-garner-5-9-million-1436833250> (quoting Al Sharpton saying that “we cannot have a climate where people can be killed and the answer is to just give money and not give justice.”); see also Sarah Begley, *New York City Reaches \$5.9 Million Settlement with Eric Garner’s Family*, TIME (July 13, 2015), www.time.com/3956619/eric-garner-settlement/.

3. See, e.g., Andrew P. Napolitano, *When the Government Demands Silence—the Ugliness of the Patriot Act*, FOX NEWS (Mar. 21, 2013), <http://www.foxnews.com/opinion/2013/03/21/when-government-demands-silence-ugliness-patriot-act.html> (calling the Patriot Act the American

have all contributed to a lowering of trust between citizens and the police that demands attention.⁵

Ferguson encounters also have sparked a movement by minority communities, and especially by African Americans, to reassert their dignity. The “Black Lives Matter” campaign has made dignity one of its primary focal points along with the bodies of victims of police brutality.⁶ But the legal and political salience of dignity is hardly limited to minority activists.⁷ Just a few weeks ago, commentators all over the United States noted Justice Kennedy’s extensive use of “dignity” in the majority opinion for *Obergefell v. Hodges*.⁸ Kennedy justified the

government’s “chief instrument of repression of personal freedom”); *see also* Cassady Pitt, *U.S. Patriot Act and Racial Profiling: Are There Consequences of Discrimination?*, 25 MICH. SOC. REV. 53, 54 (2011) (arguing that “[n]ew laws pertaining to terrorism and counterterrorism. . . have challenged our ideals about constitutional laws protecting against racial profiling and discrimination.”); *Surveillance Under the Patriot Act*, ACLU, <https://www.aclu.org/infographic/surveillance-under-patriot-act> (last visited Feb. 1, 2016) (analyzing how the Patriot Act undermines the right to privacy and other rights).

4. *See, e.g.*, Lauren C. Williams, *House Members Move to Repeal the Patriot Act with Strongest Anti-Surveillance Bill to Date*, THINKPROGRESS (Mar. 24, 2015, 3:39 PM), <http://thinkprogress.org/election/2015/03/24/3638234/house-members-move-repeal-patriot-act-strongest-anti-surveillance-bill-date/> (noting that revelations of the wiretaps prompted “public outrage over *civil liberties violations* and calls for immediate reform” and discussing a move to end the collection of meta-data from all phone use within the United States); *see also* Kim Taipale, *Re-thinking Foreign Intelligence Surveillance*, 23 WORLD POL’Y J. 77, 77 (2006–07) (pointing out areas of concern regarding the surveillance program but not ultimately arguing against it).

5. *See generally* ANTHONY STANFORD, *COPPING OUT: THE CONSEQUENCES OF POLICE CORRUPTION AND MISCONDUCT* (2015).

6. *See, e.g.*, JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 10–11 (1997) (describing many Americans’ views of interracial marriage by stating that “the thought of a 6 foot 8 inch barrel-chested Black man skinny-dipping in their European gene pool unhinged the ‘Lily-putians.’”); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 5–12 (2015); Orisanmi Burton, *Black Lives Matter: A Critique of Anthropology*, CULTURAL ANTHROPOLOGY (June 29, 2015), <http://culanth.org/fieldsights/691-black-lives-matter-a-critique-of-anthropology> (arguing that protestors are concerned “not only for Black lives, but also for Black *bodies*” and in particular that they are expressing “indignation for the ways in which Black bodies are targeted, corralled, and annihilated by the state”); *About Us*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited Aug. 7, 2015) (declaring that the movement is interested in “talking about the ways in which Black lives are deprived of our basic human rights and dignity”).

7. *See* Peter Allmark, *Death with Dignity*, 28 J. MED. ETHICS 255, 257 (2002) (defining “death with dignity” as the process of dying while living as well as possible, for example in a hospice).

8. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). On “dignity” in Justice Kennedy’s majority opinion, *see* Nan D. Hunter, *The Undetermined Legacy of ‘Obergefell v. Hodges’*, NATION (June 29, 2015), <http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/> (arguing that Justice Kennedy is attempting to create dignity-oriented foundation for rights and had previously included similar language in *Lawrence v. Texas*, but that it is not clear where this jurisprudence is headed); *see also* Katherine Franke, “Dignity” Could Be Dangerous at the Supreme Court, SLATE (June 25, 2015, 4:16 PM), http://www.slate.com/blogs/outward/2015/06/25/in_the_scotus_same_sex_marriage_case_a_dignity_rationale_could_be_dangerous.html (observing that dignity-based arguments work by simply shifting the stigma from one group to another rather than attacking the prejudice against homosexuals directly).

expansion of marriage to include same-sex relationships by linking civil liberties to the “personal choices central to individual dignity and autonomy.”⁹ He also drew parallels between the way marriage restrictions harmed the dignity of same-sex couples and the way coverture had harmed women’s dignity until the nineteenth century.¹⁰ The *Obergefell* majority decisively established that “dignity” is no mere rhetorical flourish, but a core element of the Fourteenth Amendment.¹¹ Same-sex couples “ask for equal dignity in the eyes of the law,” wrote the majority, adding that “[t]he Constitution grants them that right.”¹²

Dignity has also been gaining increasing salience in legal scholarship. Property law, for instance, has embraced the idea of dignity to describe the loss of real or personal property at the hands of the state.¹³ “Dignity takings” occur when governments engage in takings that are extraordinary because they go beyond the forcible dispossession of land for a public purpose.¹⁴ Importantly, this concept has well-defined limits. States commit “dignity takings” when they destroy or confiscate property without paying just compensation *or* without serving a legitimate public purpose because they deem the owners to be “sub-persons.”¹⁵ Dignity takings can occur in situations of internal displacement, genocide, apartheid, extreme corporal punishment, and systemic discrimination.¹⁶

9. *Obergefell*, 135 S. Ct. at 2597.

10. *Id.* at 2603–04.

11. *Id.* at 2597 (citing *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

12. *Obergefell*, 135 S. Ct. at 2608.

13. See Bernadette Atuahene, *Paying for the Past: Redressing the Legacy of Land Dispossession in South Africa*, 45 LAW & SOC’Y REV. 955, 964–68 (2009).

14. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law* 2000 UTAH L. REV. 1, 6 (2000).

15. BERNADETTE ATUAHENE, WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM 21 (2014) [hereinafter ATUAHENE, LEARNING]. See generally Bernadette Atuahene, *Property Rights & The Demands of Transformation*, 31 MICH. J. INT’L L. 765 (2010) [hereinafter Atuahene, *Property Rights*].

16. John F. Acevedo, *Dignity Takings in the Criminal Law of Seventeenth-Century England and Massachusetts Bay*, 92 CHI.-KENT L. REV. (forthcoming April 2017) (applying the concept of dignity takings to instances where the state over-punished the defendant’s body); Craig Albert, *No Place to Call Home: The Iraqi Kurds under Arabization, Saddam Hussein, and ISIS*, 92 CHI.-KENT L. REV. (forthcoming April 2017) (applying the concept of dignity takings to the oppression of Kurds in Iraq during the Saddam Hussein regime); Wouter Veraart, *Dignity Taking and the Restitution of Property Rights in the Netherlands and in France after WW-II*, 41 LAW & SOC. INQUIRY (forthcoming Aug. 2016) (describing the need for Germany and collaborative governments to provide dignity restoration following the second world war); Hendrik Hartog, *Marriage is an Honorable Estate*, 41 LAW & SOC. INQUIRY (forthcoming Aug. 2016) (discussing the applicability of the concept of dignity takings to the institution of coverture in the Common Law);

This Essay builds on the concept of “dignity takings” by arguing that takings theory is equally applicable to police brutality against the bodies of individuals when such brutality arises from the kind of systemic discrimination evident in Ferguson encounters. Part I further explores the concept of a dignity taking and shows how it applies to racially motivated police misconduct. Part II identifies current remedies for police misconduct using case law and investigations by the Department of Justice. It also demonstrates why these remedies are insufficient in many instances. Part III suggests new remedies that can be used in conjunction with the existing remedies to effect “dignity restorations” that better address the damage caused by police misconduct.

I. POLICE MISCONDUCT AS A DIGNITY TAKING

A “dignity taking” has five features: (1) a state directly or indirectly (2) destroys or confiscates property (3) from owners or occupiers (4) whom the state deems to be sub-persons (5) without paying just compensation *or* without serving a legitimate public purpose.¹⁷ As it stands, this definition captures some elements of recent Ferguson encounters—it does, for example, cover instances where police misconduct destroys or results in the seizure of tangible property, and it might also include instances where police misconduct results in the levying of unlawful fines. But importantly, this understanding of dignity takings does not capture instances in which the police engage in beatings or extra-judicial killings of persons. Police brutality against a targeted group creates feelings of injustice and mistreatment which cannot be remedied by existing tort law.¹⁸ For that reason, we need to take the difficult but important step of considering an individual’s body to be her property.¹⁹

A. The Body as Property

The idea that an individual has a property interest in her own body can be traced to John Locke’s seventeenth-century political the-

Alfred L. Brophy, *When More than Property is Lost: The Dignitary Losses and Gains in the Tulsa Riot of 1921*, 41 *LAW & SOC. INQUIRY* (forthcoming Aug. 2016) (applying the concept of dignity takings to the losses suffered by African Americans during the Tulsa race riot of 1921).

17. ATUAHENE, LEARNING, *supra* note 15, at 21, 26–34.

18. See Atuahene, *Property Rights*, *supra* note 15, at 11 (arguing that providing compensation “without considering the equity enhancing factors exhibits a myopic understanding of just compensation”).

19. Acevedo, *supra* note 16.

ory.²⁰ In the *Second Treatise of Government*, Locke asserts that every person “has a *property* in his own *person*: this no body has any right to but himself.”²¹ Locke uses this proposition both as the basis of his condemnation of slavery and as the foundation of his theory of property.²² There is a group of scholars who have pushed the limits of Locke’s assertion by arguing that the government should only minimally interfere or regulate a person’s body and any product or profit of labor performed by that body.²³ However, such assertions are not necessary for the purposes of finding that the police commit a dignity taking when they engage in brutality against individuals. Although the state must have good cause to act against the body of a person this is often met in the criminal justice system, which primarily acts against the body of the criminal defendant.²⁴

Admittedly, American experiences with slavery make it difficult to accept the idea of the body as property.²⁵ Not only did slavery involve the objectification of persons as objects to be owned, but it also forced those same persons to participate in the process of objectification when it required them to buy back control over their bodies.²⁶ Still more troublingly, even the emancipation of slaves is strongly associated with “the body as property”: Nancy Rose has argued that emancipation constituted a kind of taking (from slave owners), al-

20. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 19 (C.B. Macpherson ed., 1980); see also Daniel Attas, *Freedom and Self-Ownership*, 26 *SOC. THEORY & PRACTICE* 1, 1 (2000) (asserting that all persons legally own their own body and calling this principle “self-ownership”).

21. LOCKE, *supra* note 20, at 19. All quotations retain the original spelling and grammar without the use of “sic.”

22. See *id.* (arguing that all property ownership originally comes from mixing labor with natural resources and consequently that a man’s own body and the work of his hands are his property alone).

23. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (2013). But see ALAN HYDE, *BODIES OF LAW* 78 (1978); Attas, *supra* note 20, at 23 (calling on libertarian thinkers to abandon the idea of self-ownership because it must be supplemented by other rights and is consequently an insufficient basis for rights theory). This has also led conservative think tanks such as the Cato Institute to begin supporting and producing scholarship that is critical of the overreach of police actions both against the individual and persons’ property. In a rare instance the left and right in America agree that it is time to reign in the police.

24. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (discussing the state’s focus, beginning in the eighteenth century, on disciplining the body).

25. See Barbara L. Solow, *The Transatlantic Slave Trade: A New Census*, 58 *WM. & MARY Q.* 9, 12–13 (2001) (discussing the importance of the Atlantic slave trade to early colonial commerce). See generally MARGARET R. HUNT, *THE MIDLING SORT* 4–8 (1996) (describing the institution of indentured servitude in the early modern era).

26. See, e.g., OLAUDAH EQUIANO, *THE INTERESTING NARRATIVE OF THE LIFE OF OLAUDAH EQUIANO* 132–34 (Robert J. Allison ed., 2d ed. 1995) (describing, among other things, how Equiano bought back his freedom using the money he earned conducting side trades while enslaved to a ship’s captain).

though she acknowledges that the goal of this taking was to remedy a previous expropriation, “that is, of the slaves’ bodies from themselves.”²⁷

But despite this troubled history, the idea of the body as property is entrenched in America’s founding documents.²⁸ The body of a citizen is at once the property of the individual and the locus of a bundle of rights that the law recognizes and protects.²⁹ Although the Bill of Rights does not adopt Locke’s strong assertion that the body is a person’s property there are several areas that recognize the importance of a person’s interest in their body in multiple locations: in the Fourth Amendment’s prohibition against unreasonable searches and seizures; in the Fifth Amendment’s due process clause; in the Eighth Amendment’s prohibition against cruel and unusual punishment; and in the Fourteenth Amendment’s due process clause.³⁰

Similarly, the Supreme Court has recognized an interest in bodily integrity by requiring reasonableness before invasive searches are conducted on the bodies of criminal suspects.³¹ The Court has also recognized a series of rights related to an individual’s control over their own body including the rights to procreate,³² engage in consensual sexual activity,³³ marry whom one pleases,³⁴ and refuse medical

27. Rose, *supra* note 14 at 24–25.

28. See generally DANIELLE ALLEN, *OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY* (2014).

29. HYDE, *supra* note 23, at 50.

30. U.S. CONST. amend. XIV.

31. See, e.g., *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 375 (2009) (holding that school children retained 4th Amendment protections in school. Further the degree of invasiveness of the search must be justified by both the level of suspicion and the seriousness of the item searched for. In the present case a search for over the counter medication based only on suspicion was insufficient to justify the turning out of the waistband of a student’s undergarment and the partial removal of her bra).

32. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down the Oklahoma Habitual Criminal Sterilization Act for infringing on the basic liberty of procreation).

33. See *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (striking down laws criminalizing sodomy between consenting adults on the basis of privacy rejecting the dubious historical argument that sodomy had always been criminalized).

34. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing the right to marry as a protected liberty interest while striking down Virginia’s anti-miscegenation statute); see also *Zablocki v. Redhail*, 434 U.S. 374, 374 (1978) (affirming the fundamental nature of the right to marriage in striking down a Wisconsin law that required all persons with minor children not in their care to be certified by the court that their child support payments were up to date before a marriage license was issued. Although recognizing a state interest in ensuring that child support payments were made the court held this was insufficiently related to marriage to justify the intrusion); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (upholding the right to marry as applied to same sex couples).

treatment options.³⁵ Finally, the Court has also recognized a person's interest in controlling their procreation by approving birth control and abortions.³⁶

However, the Court has been reluctant to extend a property interest in parts of the body that are removed as part of medical procedures from a fear that such a recognition would have a chilling effect on medical research.³⁷ The Court has also declined to recognize a right to die.³⁸ Current law therefore recognizes a person's property interest in the integrity and control of one's body, but like all rights it is not an absolute property right.

B. Applying Dignity Takings to Police Misconduct

Police misconduct clearly involves state action,³⁹ but does it involve the destruction or confiscation of property (Factor No. 2), without just compensation or legitimate public purpose (Factor No. 5), because the state deems the targeted individuals to be sub-persons (Factor No. 4)?⁴⁰ This section argues that the answer in all three cases is "yes," and that we should consequently view racially motivated police brutality as a "dignity taking."

Regarding the destruction or confiscation of property (Factor No. 2), we might argue that the bodily damage caused by police brutality is often—but not always—temporary. However, given the heightened

35. See *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 281 (1990) (recognizing the right of an adult to refuse lifesaving medical treatment).

36. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down a Connecticut law that made it a crime to use or distribute contraceptives by finding the right of privacy in the penumbras and emanations of the First, Third, Fourth, and Fifth Amendments of the Constitution); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding that the right to privacy included a right to reproductive control for married couples in striking down a Massachusetts law that made it a crime for anyone other than a physician to provide contraceptives to a married couple); see also *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that a woman has the right to terminate a pregnancy before viability, but noting that the state has an interest in life post-viability); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming the liberty interests in procreation and reproductive decision making, but abandoned the trimester interests articulated in *Roe*).

37. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 488–90 (1990). But see Lori B. Andrews, *My Body My Property*, 16 HASTINGS CTR. REP. 28 (1986) (arguing that "[d]onors, recipients, and society will benefit from a market in body parts so long as owners—and no one else—retain control over their bodies").

38. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) (holding that only rational basis applies as the Constitution does not imply a right to die).

39. See, e.g., Elizabeth E. Joh, *The Paradox of Private Police*, 95 J. CRIM. L. & CRIMINOLOGY 49, 49, 69 (2004) (observing that the law "recognizes a nearly absolute distinction between public and private" police forces and that "conventional research on the police . . . incorporate[s] Max Weber's definition of the state in terms of its monopoly over legitimate force").

40. ATUAHENE, LEARNING, *supra* note 15, at 21, 26–34.

protection that the state has given to the body even a temporary taking of the body is of serious concern.⁴¹ In addition, the Supreme Court's takings jurisprudence has held that, in situations involving real property, the government owes compensation even for temporary takings if the taking is repeated or severe.⁴² Over-financing or over-policing of specific communities clearly meets this aspect of the Court's takings jurisprudence.⁴³ And, of course, when police brutality results in permanent injury or death, the victim's body has been indisputably occupied by the state.

The idea that a "dignity taking" occurs when the state fails to pay just compensation *or* acts without a legitimate public purpose clearly applies to instances of racially motivated police brutality. Despite the relatively recent arrival of police forces, we now wholeheartedly accept their ability to legitimately exercise violence in the name of public safety. Racially motivated policing does not fulfill that legitimate public purpose. Of course, identifying instances of racially motivated policing is far from easy. The clearest instances are those in which the police target a particular minority group or neighborhood for misconduct.⁴⁴ More difficult are instances where the police choose to over-enforce legitimate laws against racial minorities, and thus turn a lawful enforcement into a discriminatory one.⁴⁵ This Essay uses Department of Justice (DOJ) investigations as a proxy for police misconduct and DOJ investigation reports as offering definitive accounts of the cause of such misconduct. However, as Part III explains, these are highly under-representative proxies for the overall frequency of police misconduct that cause dignity takings.

41. *See Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009).

42. *Ark. Game & Fish Comm. v. United States*, 133 S. Ct. 511, 515 (2012) (holding that the temporary flooding of land was a taking under the Takings Clause); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 430 (1982) (holding that a state-authorized placement of cable television wires on the plaintiff's property constituted a taking because it was a permanent intrusion).

43. *See generally* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter FERGUSON REPORT]. It could also be argued that the over-incarceration of minorities is also a dignity taking as represents the government continuously acting against their bodies through physical restraint.

44. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 31–32 (2011) [hereinafter NEW ORLEANS REPORT] (finding that the NOPD targeted LGBT individuals for stops and failed to adequately investigate crimes committed against LGBT individuals).

45. FERGUSON REPORT, *supra* note 43, at 17 (describing an incident when the police encountered an African American man they knew was not the suspect but handcuffed him anyway and detained him in a squad car. It turned out he was the landlord of the intended arrestee and was on site to aid the police in effecting the arrest).

Finally, the idea that the state views some individuals as “sub-persons” ought to be shocking, but with respect to Americans with criminal records it is hard to dispute. The dehumanization of people with criminal records arguably started in the 1970s, when the effects of the “War on Drugs” began to be really felt and the militarization of the police (including the development of SWAT teams) took off.⁴⁶ President Nixon may have invented the criminal as cultural villain, but President Reagan certainly perfected the image with his rhetoric against “welfare queens” and criminal “predators.”⁴⁷ That rhetoric paid off in 1986 with the passage of the Anti-Drug Abuse Act, which created mandatory minimum sentences for cocaine distribution and even harsher sentences for crack-cocaine.⁴⁸ And, as we now know, this was the beginning of today’s mass incarceration problem: the United States has five percent of the world’s population and twenty-five percent of the world’s prisoners.⁴⁹

But, over-criminalization and mass incarceration are not solely to blame for the way contemporary American society dehumanizes convicted persons. For several decades now, Americans have subsisted on an increasingly sensationalizing diet of news media that disproportionately covers crime and portrays past offenders as lacking all moral consciousness.⁵⁰ For example, Michelle Alexander has noted the *Washington Post* ran 1,565 stories on drug crimes in a one-year span—an average of more than five stories a day—between October 1988

46. RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 102–04, 126–30 (2014).

47. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, 46–48 (2011); see also Joseph Margulies, *Abandoned Symbols: Confederate Flags and Criminal Justice*, JUSTIA.COM (June 29, 2015), <https://verdict.justia.com/2015/06/29/abandoned-symbols-confederate-flags-and-criminal-justice> (stating that symbols like “Willie Horton, the welfare queen, the crack whore . . . have generated an entire set of divisive law enforcement and prosecution strategies, like the war on drugs and ‘zero tolerance’ policing . . . have been broadly endorsed by whites but widely deployed against blacks”). See generally DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGES AMERICAN JUSTICE* (1995) (describing the effect of the Willie Horton case on the Presidential election of 1988 and on the criminal justice system).

48. ALEXANDER, *supra* note 47, at 46–48.

49. Lorna Collier, *Incarceration Nation*, AM. PSYCHOLOG. ASS’N (Oct. 2014), <http://www.apa.org/monitor/2014/10/incarceration.aspx>.

50. See Katharine A. Neill, *Tough on Drugs: Law and Order Dominance and the Neglect of Public Health in U.S. Drug Policy*, 6 WORLD MED. & HEALTH POL’Y 375, 376–77 (2014) (arguing that the “drug war was part of a larger punitive shift in crime policy where the goal was to punish lawbreakers and isolate them from society” and that “drug offenders have been treated as criminals . . . are perceived negatively, undeserving of assistance, and deserving of punishment”); Yvonne Tasker, *Television Crime Drama and Homeland Security: From “Law and Order” to “Terror TV,”* 51 CINEMA J. 44, 44 (2012).

and October 1989.⁵¹ Media and public interest in crime news coverage is obviously something of a chicken-and-egg phenomenon, but the end result is indisputably that Americans view criminals as wholly without redeeming qualities and, troublingly, view minorities as criminally inclined.⁵² Criminal-catching is a sport on shows like *Cops*, and criminals are objects to be hunted.

The overall effect of media portrayal and political rhetoric has been to dehumanize criminals in American society. Criminals are “problems” to be solved, their welfare in prison is of notoriously low priority, and their failures upon re-entry into society are attributed to innate failings rather than systemic flaws.⁵³ Suffice it to say that when a person becomes or is treated like a criminal, she has been dehumanized by being put into a category of not being a full citizen.⁵⁴ Further, as the underlying taking was without legitimate state purpose it qualifies as a dignity taking. The unsatisfactory nature of tort settlements and awards speaks to the need for remedies beyond monetary compensation to make the victims of police misconduct whole.⁵⁵ The next section will examine the existing remedies.

51. ALEXANDER, *supra* note 47, at 53.

52. Sarah Eschholz, *The Color of Prime-Time Justice: Racial Characteristics of Television Offenders and Victims*, in RACIAL ISSUES IN CRIMINAL JUSTICE: THE CASE OF AFRICAN AMERICANS 59, 65, 71 (Marvin D. Free ed., 2003) (concluding that the major problem is that blacks and Hispanics are disproportionately portrayed as offenders, and that black Americans are frequently shown as perpetrators but rarely shown as victims of crime). *See generally* Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—on the Social Construction of Threat*, 80 VA. L. REV. 503 (1994).

53. ALEXANDER, *supra* note 47, at 178–81, 248–49 (noting that the practical effect of current drug laws is to remove many black males from their families and segregating them into prisons, but this is presented as a choice that these men have made).

54. *See* Milica Vasiljevic & G. Tendayi Viki, *Dehumanization, Moral Disengagement, and Public Attitudes to Crime and Punishment*, in HUMANNES AND DEHUMANIZATION 129 (Paul G. Baine, Jeroen Vaes, & Jacques Philippe Leyens eds., 2013) (describing the description of some criminals as savages or sub-humans by the general population); *see also* James M. Binnall, *Convicts in Court: Felonious Lawyers Makes A Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379, 1379–80 (2010) (noting that twenty-nine states and the federal courts prohibit felons from serving on juries, but allow felons to serve as attorneys); Lauren Handelman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875, 1881 (2005) (noting only two states, Maine and Vermont, do not restrict the voting rights of felons in any way, while twenty-nine to paroles, thirty-two states extend the prohibition to those on parole or probation, and fourteen ban all felons from voting); Amy Shlosberg et al., *Expungement and Post-exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 382–83 (2014) (noting that felons lose a variety of benefits including access to government student loans, the right to vote, the right to hold public office, and other government benefits).

55. Begley, *supra* note 2 (discussing how, despite the settlement, Eric Garner's family still is rallying support to push for a federal criminal investigation of his death).

II. EXAMPLES AND EXISTING REMEDIES

That there are clear instances when police cross the line into unlawful behavior is evidenced by the paying out of tort damages to the victims of police misconduct.⁵⁶ Police misconduct usually results in more than the loss of time and money (although these are considerable losses to bear)—it also results in a loss of dignity. However, most existing remedies are forms of tort compensation authorized under 42 U.S.C. § 1983, which does nothing to address this loss. In addition, criminal prosecutions are authorized under 42 U.S.C. § 14141 although they are rarely conducted.⁵⁷ This provision is also the basis of the DOJ investigations into department wide police misconduct. This section uses a sample of recent DOJ investigations to discuss what qualifies as police misconduct. It also surveys existing remedies to such misconduct, which largely derive from 42 U.S.C. § 1983 and § 14141.

A. Department of Justice Investigations

In the past decade, the DOJ has conducted almost thirty investigations into police departments throughout the United States and its protectorates.⁵⁸ The DOJ either investigates after a complaint has

56. Radley Balko, *U.S. Cities Pay out Millions to Settle Police Lawsuits*, WASH. POST (Oct. 1, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/10/01/u-s-cities-pay-out-millions-to-settle-police-lawsuits/> (describing payouts made by cities, although not all of these were made in response to police misconduct); Andy Shaw, *City Pays Heavy Price for Police Brutality*, CHI. SUN-TIMES (Apr. 4, 2014, 2:23 AM), <http://chicago.suntimes.com/chicago-politics/7/71/167182/city-pays-heavy-price-for-police-brutality> (noting that Chicago has paid out \$521 million over the past decade and \$84.6 million in 2013 alone).

57. See Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 151–53 (1998) (attributing the lack of prosecutions to institutional pressures on prosecutors and the lack of credibility of victims of police brutality); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1355 (2015) (observing that limited resources have prevented prosecutors from pursuing cases).

58. The DOJ has investigated: Maricopa County (Arizona) Sheriff's Office; Town of Colorado City (Arizona) Police; Inglewood (California) Police Department; Los Angeles County Sheriff's Department; East Haven (Connecticut) Police Department; Escambia County (Florida) Sheriff's Office; City of Miami Police Department; Orange County (Florida) Sheriff's Office; Harvey (Illinois) Police Department; New Orleans Police Department; Detroit Police Department; Ferguson (Missouri) Police Department; Missoula (Montana) County Attorney's Office; Missoula (Montana) Police Department; University of Montana Office of Public Safety; Newark (New Jersey) Police Department; Albuquerque Police Department; Beacon (New York) Police Department; Schenectady (New York) Police Department; Suffolk County (New York) Police Department; Yonkers (New York) Police Department; Alamance (North Carolina) County Sheriff's Office; Cleveland (Ohio) Division of Police; Warren (Ohio) Police Department; Portland Police Bureau; Puerto Rico Police Department; Virgin Islands Police Department; and Seattle Police Department. The DOJ also issued statements of interest in five cases: *Melendres v. Arpaio*, 784 F.3d 1254 (2015); *Garcia v. Montgomery County*, ?Civil No. 8:12-cv-03592-JFM (2013)?; *Sharp v. Baltimore City Police Department*, Civil No. 1:11-cv-02888-BEL (2012); *Floyd*

been filed or issues a Statement of Interest if there is a private case against a department or official.⁵⁹ Consequently, DOJ investigations are a severely under-representative proxy for police misconduct.⁶⁰ The under-investigation of police misconduct is certainly a national problem, but beyond the scope of this Essay. The rest of this section examines three prominent DOJ investigations: in Ferguson (2015), New Orleans (2012), and Maricopa (2013). These investigations represent cities in different parts of the country, different lengths of investigation, and two different types of law enforcement agencies (police and sheriffs' departments).⁶¹

1. Ferguson Police Department

The shortcomings of the Ferguson Police Department came to public attention following the killing of eighteen year old Michael Brown by police officer Darren Wilson.⁶² After a grand jury decided not to bring charges against Officer Wilson, the city erupted in riots.⁶³ Angry residents protested the grand jury decision with a peaceful candlelight vigil, but following this, some residents broke car windows and looted several local stores, while the Ferguson Police exacerbated the situation by using heavy-handed tactics.⁶⁴ The DOJ's investigation found that Ferguson's police department acted more like a revenue collecting agency for the town than a police force designed to protect

v. City of New York, 1:08-cv-01034-SAS-HBP (2013); and Padilla v. City of New York, 13-CV-0076-MKB-RER (2013). *Special Litigation Section Cases and Matters*, U.S. DEP'T JUSTICE, <http://www.justice.gov/crt/about/spl/findsettle.php#police> (last visited Aug. 7, 2015). It should be noted that this list does not include older investigations against the Chicago Police Department and the Los Angeles Police Department even though monitoring is ongoing.

59. *Id.*

60. Rob Barry & Coulter Jones, *Hundreds of Police Killings Are Unaccounted in Federal Stats*, WALL STREET J. (Dec. 3, 2014, 11:26 AM), <http://www.wsj.com/articles/hundreds-of-police-killings-are-unaccounted-in-federal-statistics-1417577504> (noting that there is no set procedure or requirement for the reporting of police killings to the FBI for tracking).

61. The Ferguson investigation was launched in 2014; New Orleans was launched in 2009; and Maricopa was launched in 2012.

62. Stanford, *supra* note 5, at 166.

63. Moni Basu, Holly Yan & Dana Ford, *Fires, Chaos Erupt in Ferguson After Grand Jury Doesn't Indict in Michael Brown Case*, CNN (Nov. 25, 2014, 8:53 AM), <http://www.cnn.com/2014/11/24/justice/ferguson-grand-jury/>.

64. Christine Byers, *Justice Department Faults Ferguson Protest Response*, SAINT LOUIS POST-DISPATCH (June 30, 2015), http://www.stltoday.com/news/local/crime-and-courts/justice-department-faults-ferguson-protest-response/article_32d55f9f-0bf4-51e4-93d6-71b873cb8038.html; *Ferguson Riots: Ruling Sparks Night of Violence*, BBC (Nov. 25, 2014) <http://www.bbc.com/news/world-us-canaa-30190224>; *Timeline of Events After Fatal Police Shooting in Ferguson*, YAHOO SPORTS (Aug. 7, 2015, 3:59 PM), <http://news.yahoo.com/timeline-events-fatal-police-shooting-ferguson-054258196.html>.

its citizens.⁶⁵ The report also detailed breakdowns in the processes used to review uses of force against citizens: paperwork was often not completed by officers and when it was completed the reports were not investigated by the responsible officers; “supervisors seem to believe that any level of resistance justifies any level of force.”⁶⁶ The Ferguson Police Department engaged in excessive force incidents against citizens of all ages, and in one instance even used a taser on a middle school student when the student refused to leave a classroom following a minor dispute with another student.⁶⁷

As if this were not enough, Ferguson’s municipal court was under the supervision of its police chief, meaning that any complaints about the underlying citation or court process went back to the police chief for decision. Unsurprisingly, due process violations abounded. Judges frequently would not listen to testimony presented by defendants or provide other basic due process procedures, such as written orders.⁶⁸ As part of a larger effort to raise revenue for the city the municipal court’s judge would issue arrest warrants for non-paying individual. This in turn encouraged police to engage in unconstitutional stops, targeting the town’s African American community, in an attempt to search for outstanding failure to pay warrants.⁶⁹ Of the 460 individuals arrested between October 2012 and October 2014 for only outstanding warrants 96% were African Americans.⁷⁰

The DOJ found many reasons to think that the Ferguson Police Department engaged in discriminatory misconduct. African Americans were more likely to be searched when stopped, but were less likely to have contraband. African Americans represented eighty-eight percent of all “use of force” cases.⁷¹ They were more likely to receive multiple citations: seventy-three incidents of African Americans receiving multiple citations, which was twice as much as all other groups.⁷² They were also more likely to be charged for frivolous crimes, and in most of these cases constituted over ninety percent of

65. FERGUSON REPORT, *supra* note 43, at 9–15.

66. *Id.* at 40.

67. *Id.* at 36–38 (describing incidents at the local schools including one where an officer used a Taser on a student in class when they did not comply fast enough with the officer’s orders, and noting that officers assigned to the school “viewed increased arrests in the schools as a positive result of their work”).

68. *Id.* at 14–15, 42, 44.

69. *Id.* at 18, 42.

70. *Id.* at 42, 57.

71. *Id.* at 62.

72. *Id.*

arrests made.⁷³ African Americans were also more likely to fare poorly once they made it into municipal court, since they were sixty-eight percent less likely to have their cases dismissed.⁷⁴

Importantly, the DOJ also found that this was not simply a case of bad policing—it was a case of explicitly racist policing. Ferguson’s law enforcement officials engaged in racist communication such as circulating an email depicting President Obama as a chimpanzee to one another.⁷⁵ Unsurprisingly given this attitude, they also “failed to take any meaningful steps to evaluate or address the race-based impact of its law enforcement practices.”⁷⁶

The investigators spoke to a woman who was issued an initial fine of \$151 for parking violations but because of her inability to pay the fine she “was arrested twice, spent six days in jail, and paid \$550 to the court for the events stemming from this single instance.”⁷⁷ Despite being interviewed for the report, the DOJ notes that she still owes the city of Ferguson \$541 from this instance as of the issuing of the report; clearly the DOJ did nothing for this unfortunate woman.⁷⁸

The lack of responsibility by Ferguson police officers for the department’s problems is illustrated by the necessity of the DOJ to reprimanded Ferguson police officers for wearing bracelets while in uniform in support of Wilson.⁷⁹ Strikingly, the DOJ also found it necessary to instruct Ferguson officials to enforce its own policy of having officers wear name badges while on duty; a practice that officers were refusing to do.⁸⁰ In addition, structural changes were suggested including hiring more minority police officers; providing more training for officers on how to deal with vulnerable populations; instructing officers not to arrest students for trivial in school infractions; investigat-

73. *Id.* (noting that African Americans were primarily stopped for frivolous crimes—accounting for 96% of outstanding municipal warrants; 95% of manner of walking; 94% of failure to comply; 92% of resisting arrest; 92% of peace disturbance charges; and 89% of failure to obey charges).

74. *Id.*

75. *Id.* at 72. The Report also described a May, 2011 email which said; “An African-American woman in New Orleans was admitted into the hospital for a pregnancy termination. Two weeks later she received a check for \$5,000. She phoned the hospital to ask who it was from. The hospital said ‘Crimestoppers.’”

76. *Id.* at 70–71.

77. *Id.* at 4.

78. *Id.*

79. Letter from Christey E. Lopez, Deputy Chief, Special Litigation Section, Civil Rights Division, U.S. Dep’t of Justice, to Thomas Jackson, Police Chief, Ferguson Police Department (Sept. 26, 2014), U.S. DEP’T JUSTICE (Sept. 26, 2014). The bracelets said “I am Darren Wilson,” and were causing additional agitation among the town’s citizens.

80. *Id.*

ing use of force allegations; provide accurate information to individuals regarding what they are charged with; and closing cases on the docket which are only there for failure to appear.⁸¹ While these changes will improve future interaction with the public they are not designed to remedy past discrimination.

The Ferguson case is important as it shows that the technical enforcement of the law can create discriminatory impact; of course it is well settled that discriminatory enforcement of a neutral law is cognizable in court.⁸² However, the fact that individuals are technically criminals makes relief for them difficult to obtain as the DOJ's own report illustrates.⁸³

2. New Orleans Police Department

The DOJ initiated an investigation of the New Orleans Police Department (NOPD) in May 2010.⁸⁴ This investigation of civil rights violations by the NOPD was completely separate from the criminal cases pending against several New Orleans police officers for their actions during the events surrounding hurricane Katrina.⁸⁵ Even without including the malfeasance of the police in the wake of Katrina the DOJ concluded that the NOPD had engaged in a pattern of "unreasonable less lethal force" as well as several instances when "NOPD officers used deadly force contrary to NOPD policy or law."⁸⁶ In addition, the report found that the NOPD engaged in a pattern of stopping, searching, and arresting persons without reasonable suspicion or probable cause.⁸⁷

Unlike Ferguson, where the DOJ found institutional racism and a drive to create revenue, the DOJ attributed the NOPD's failings to poor training and a misguided approach to policing.⁸⁸ The NOPD engaged in statistics-driven policing that focused on increasing the number of arrests rather than on reducing violent crime.⁸⁹ However, this is not to say that the NOPD's misconduct was well-intentioned. To the

81. FERGUSON REPORT, *supra* note 43, at 90–102.

82. *See generally* Whren v. United States, 517 U.S. 806 (1996); Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

83. FERGUSON REPORT, *supra* note 43, at 4.

84. United States v. City of New Orleans, 32 F. Supp. 3d 740 (E.D. La. 2014).

85. NEW ORLEANS REPORT, *supra* note 44, at vi.

86. *Id.* Shockingly, the DOJ found that in the past six years the NOPD had found officer involved shooting had violated a policy.

87. *Id.* at 26.

88. *Id.* at 27.

89. *Id.* at viii.

contrary, the NOPD seems to have particularly targeted African Americans, ethnic minorities, and LGBT community members for excessive stops and arrests.⁹⁰ And as in the case of Maricopa County (discussed in Section III(a)(iii) below) Latinos were often subjected to pre-textual stops for minor offenses as way to harass them about their immigration status.⁹¹

In January 2013, the United States District Court for the Eastern District of Louisiana approved a consent decree between DOJ and the City of New Orleans.⁹² The Consent Agreement covered numerous areas of police conduct, but focused primarily on improved training on the use of force, crisis intervention, stops, searches, arrests, and custodial interrogations⁹³ The agreement also required the NOPD to implement bias-free policing training, some language translation, and training on dealing with victims of sexual assaults and domestic violence.⁹⁴

As in Ferguson the consent agreement focused on improving transparency, improved training, and oversight requiring the police to track all incidents of police misconduct. The DOJ also required the posting of an updated police “policy, procedure, and manual, including those created pursuant to this agreement. . .” online for public view.⁹⁵ Unlike Ferguson the DOJ did not focus primarily on race but on gender and sexual orientation as well as poor officer training, which is noteworthy since the victims of police misconduct are often viewed as solely African American.⁹⁶ The remedies reached between the DOJ and NOPD highlights the DOJ’s approach to police misconduct, which emphasizes structural defects rather than actual restitution for victims.

90. *Id.* at 35.

91. *Id.* at 36.

92. Order and Reasons, 32 F. Supp. 3d 740. *United States v. City of New Orleans*, No. 12-1924 (E.D. La. Jan. 11, 2013).

93. Consent Decree Regarding the New Orleans Police Department, 32 F. Supp. 3d 740 [hereinafter NOPD Consent Decree] (these areas covered approximately 35 of 124 pages of the report or ¼ including all of the front matter and background).

94. *Id.* at 49–59 (the report called not only for training of police officers but mandatory tracking of all sexual assaults and domestic violence cases to address complaints that the police department had failed to properly investigate these crimes and had coded them as miscellaneous).

95. *Id.* at 105.

96. Order and Reasons, 32 F. Supp. 3d 740. *United States v. City of New Orleans*, No. 12-1924 (E.D. La. Jan. 11, 2013).

3. Maricopa County Sheriff's Office

Like in Ferguson and New Orleans, events in Maricopa encompassed racial discrimination and general misconduct, but they occurred in the context of a Sheriff's Office.⁹⁷ The DOJ investigation, launched in June 2008, found that the Office's excessive use of force against Latino citizens and its attempts to enforce immigration laws (which were beyond its purview) created significant mistrust between the Sheriff's Office and the wider community.⁹⁸

Latino drivers were four times more likely than non-Latino drivers to be stopped for moving violations while driving in the southwest portion of the county.⁹⁹ The Sheriff's Human Smuggling Unit used particularly egregious stereotypes in selecting vehicles to be stopped, and often stopped vehicles driven by Latinos when no moving violation had occurred.¹⁰⁰ In one incident an officer pulled over a man for allegedly failing to signal then arrested him for not having proper identification despite his producing several forms of valid identification; he was released after thirteen days in detention without any charges being filed.¹⁰¹ Likewise, the Sheriff's crime suppression operations primarily targeted Latino neighborhoods.¹⁰² In a particularly egregious incident the deputies detained and restrained a man and his twelve year old son for over an hour after removing them from their home simply because they were raiding the neighboring house.¹⁰³ Moreover, in addition to the violations by on-duty officers, the Sheriff's Office discriminated against inmates and jail visitors who did not speak English, with special emphasis placed on those who spoke Span-

97. See, e.g., Adam Serwer, *Sheriff Joe Arpaio: Calling Me Names Violates My Civil Rights*, MOTHER JONES (Dec. 18, 2011, 9:35AM), <http://www.motherjones.com/mojo/2011/12/joe-arpaio-calling-me-names-violates-my-civil-rights> (citing allegations that Arpaio used the Sheriff's Office to target political enemies and critics and noting his general lack of understanding of what constitutes a civil right).

98. Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to Bill Montgomery, County Attorney, Maricopa County (Dec. 15, 2011), [hereinafter *Maricopa Findings Letter*]; see also Complaint, *United States v. Maricopa Cty.*, (D. Ariz. May 10, 2012), at 8–10 [hereinafter *Maricopa Complaint*].

99. *Id.* at 6.

100. *Id.* at 7–9 (noting that in one incident the officers detained the persons for appearing disheveled and wearing stained clothing but photos taken by them show that the individuals were neatly dressed; in a separate incident four men were removed from their car zip-tied and sat on the curb for an hour after they were stopped for having a car that was “a little low,” which is not a traffic violation).

101. *Id.* at 7.

102. *Id.* at 11–13 (describing the unlawful detention, searches and questioning of immigration status of Latinos by the Maricopa Sheriff's Department in their homes, automobiles, and places of work).

103. *Id.* at 12.

ish.¹⁰⁴ And much like the NOPD, the Maricopa Sheriff effectively hindered any investigation of its activities by failing to consistently collect data on the racial identities of the persons it stopped.¹⁰⁵

As in Ferguson and New Orleans, the DOJ recommendations focused on improving training and disciplinary procedures, clarifying policies, and enhancing data collection and data management.¹⁰⁶ Similarly, the DOJ recommended that the department create a “comprehensive complaint, investigation, and disciplinary system to enable it to hold officers accountable when they violate policy and/or the law.”¹⁰⁷ The Maricopa consent agreement also required that all forms be provided to inmates and visitors in both English and Spanish.¹⁰⁸ However, and also like the other cases, the DOJ investigation was wholly forward-looking: it only aimed to help prevent future violations, and not remedy past ones.¹⁰⁹ Stephen Rushin has described this litigation as “structural reform litigation” since it aims to change the systemic causes of police misconduct.¹¹⁰ As can be seen by the discussion of the above cases the primary goal of Department of Justice’s remedies is to improve policing not right wrongs so there is a need for a third type of remedy and we can look to dignity restoration to provide it.

B. Existing Remedies

DOJ action with respect to police misconduct is mandated by 42 U.S.C. § 14141, which was passed after the Rodney King riots of 1992. Section 14141 authorizes the Attorney General of the United States to initiate litigation in cases of systemic police misconduct.¹¹¹ There are several problems with viewing DOJ investigations as a remedy for the

104. Settlement Agreement, Attachment A 9–12, *United States v. Maricopa County*, No. 2:12-cv-00981-ROS (D. Ariz. July 7, 2015) [hereinafter *Maricopa Settlement Agreement*], 3, 67, 71; *see also* *Maricopa Findings Letter*, *supra* note 98, at 2.

105. *Maricopa Findings Letter*, *supra* note 98, at 20–21 (several of the consent decree requirements were that the department collect data for traffic stops).

106. *Id.*

107. *Id.* at 21.

108. *Maricopa Settlement Agreement*, *supra* note 104, at 9–10.

109. *See* *Maricopa Settlement Agreement*, *supra* note 104, at 2, 15; *see also* *Maricopa Findings Letter*, *supra* note 98, at 21.

110. *See generally*, Rushin, *supra* note 57.

111. 42 U.S.C. § 14141(a) provides, “It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” *See also* Rushin, *supra* note 57, at 1347.

harms suffered by victims of police misconduct. For one, the DOJ and the local agencies it cooperates with are strongly encouraged to settle because doing so helps “minimize costly litigation and adverse publicity and avoid the collateral effects of adjudicated guilt.”¹¹² But this very desire to avoid “adjudicated guilt” is precisely what denies victims a sense of closure or an affirmation of their dignity.¹¹³

Second, there are inherent limitations to the kind of “structural reform litigation” that the DOJ engages in. Stephen Rushin has noted that this type of litigation has high costs to municipalities; the reforms’ longevity is often minimal; and the investigations themselves can lead to decreased effectiveness in policing.¹¹⁴

Third, even to the extent that DOJ investigations produce valuable reforms, the DOJ’s extremely low rate of involvement means that misconduct far outpaces reform. As Rushin has observed, if “even 0.1% of [law enforcement agencies] have an issue, that’s more than [the DOJ has] ever done in the entire history of the statute.”¹¹⁵ Indeed the DOJ has only investigated approximately three agencies per year under § 14141, and when it *does* investigate it focuses on larger departments to the exclusion of smaller ones.¹¹⁶ Besides the basic problem of a low rate of change, this clearly communicates to victims that police misconduct is not an issue that the federal government is willing to pour money into.¹¹⁷

Fourth, even when the DOJ launches an investigation and suggests reforms, the process is concluded via a consent decree.¹¹⁸ Consent decrees are only enforceable by the negotiating parties, meaning the offending municipal department and the DOJ. Neither the victims nor the community at large have standing to seek enforcement of the consent decree. Any complaints regarding implementation failures or subsequent abuses within the scope of the consent decree are completely at the mercy of the DOJ. The fact that the public is in this way

112. *United States v. Jackson*, Miss., 519 F.2d 1147, 1152 n.9 (5th Cir. 1975).

113. *Id.*

114. *Id.* at 1408.

115. Rushin, *supra* note 57, at 1416 (quoting an anonymous interviewee).

116. *Id.* at 1415.

117. President Barack Obama, Remarks at the NAACP Conference (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> (acknowledging in his remarks that the racial inequality in policing, but focused on the cost to the tax payers for keeping roughly 1.5 million persons incarcerated. He did note some changes including the reduction of prison sentences for non-violent drug uses. However, the emphasis on increased spending was at the community level for programs not directly related to police misconduct, but encouraging youth development).

118. *United States v. City of New Orleans*, 32 F. Supp. 3d 740 (E.D. La. 2014).

removed from the corrective process can hardly be said to console or empower those who have been wronged by police misconduct.

Most significantly, even if DOJ investigations are effective at addressing deficiencies in police training and procedures (although this is questionable for the reasons given above), they are not effective at providing remedies to the victims of police misconduct. As Ferguson, New Orleans, and Maricopa illustrate, the DOJ's primary goal is to improve future police practices, which at best carries secondary benefits to community residents who have already suffered from police misconduct. To date, the only way in which DOJ investigations have provided relief to victims has been where the DOJ advocates closing all municipal cases where over-fining and compound fines have saddled individuals with obligations far in excess of the original fines issued.¹¹⁹ Even this, however, does not in any way remedy the initial discrimination that caused the over-policing and over-fining of a specific community.¹²⁰

C. Tort System

Tort compensation offers another potential means of remedying police misconduct because any individual may bring suit against a person who, under the color of law, deprives them of "any rights, privileges, or immunities secured by the Constitution and laws."¹²¹ Several cities have already paid out large sums of money to the victims of police abuse.¹²² For example, New York recently paid Eric Garner's family \$5.9 million¹²³ and the City of Los Angeles paid Rodney King \$3.8 million for the beating he received at the hands of LAPD officers.¹²⁴

Nevertheless, there are four drawbacks to relying on the tort system in instances of police misconduct. First, the focus of tort compen-

119. FERGUSON REPORT, *supra* note 43, at 102.

120. *Id.* at 66 (providing details on the over citation of African Americans by the Ferguson police).

121. 42 U.S.C. § 1983 (1996).

122. Dawsey, *supra* note 2.

123. New York Observer Editorial Board, *Sending the Wrong Message with the Eric Garner Settlement*, N.Y. OBSERVER (July 24, 2015, 10: 35 AM), <http://observer.com/2015/07/sending-the-wrong-message-with-the-eric-garner-settlement>.

124. Leezel Tanglao, *Rodney King Dead: Victim in 1991 LAPD Police Brutality Case, Has Died*, ABC NEWS (June 17, 2012), <http://abcnews.go.com/US/rodney-king-dead-victim-1991-lapd-police-brutality/story?id=16589384>.

sation is making the individual who has suffered harm whole again.¹²⁵ While this is certainly an advantage of the tort system as compared to DOJ investigations, it ignores the fact that police misconduct causes significant harm to the dignity of entire (almost always minority) communities.¹²⁶ The “Black Lives Matter” campaign sought to not only address the incidents of police brutality against particular persons but address “the ways in which Black lives are deprived of our basic human rights and dignity.”¹²⁷

Second, there is a kind of “representation reinforcement” problem in asking victims of systemic discrimination to use the very system that discriminates against them in their pursuit of justice.¹²⁸ Moreover, state actors who engage in the kind of discriminatory policing that characterizes virtually all cases of police misconduct essentially create their own escape hatch because over-fining and mass incarceration are extremely effective ways to render potential plaintiffs—who are socio-economically disadvantaged in the first place—even less capable of mounting costly legal battles. To such targeted individuals tort remedies are no remedies at all, and those who would argue otherwise are uniquely adept at self-delusion.

Third, tort law may not be available to individuals who actually did commit a crime. That is, those persons who were targeted because of their race, but were nevertheless actually committing a technical offence, such as a failure to signal. It is technically permissible to bring a lawsuit against the government for discriminatory application of a neutral criminal law, but it is unlikely that a jury would be sympathetic to a convicted individual or that the case would be worth it to any lawyer to bring.¹²⁹

125. See John P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 435 (2006).

126. George L. Priest, *Satisfying the Multiple Goals of Tort Law*, 22 VAL. U. L. REV. 643, 649 (1988) (asserting that the goal of the tort system is not only to pay compensation to wronged individuals, but also to create incentives to reduce accidents).

127. *About Us*, BLACKLIVESMATTER.COM, <http://blacklivesmatter.com/about/> (last visited Aug. 7, 2015).

128. Evan Barret Smith, *Representation Reinforcement Revisited: Citizens United and Political Process Theory*, 38 VT L. REV. 445, 448 (2013); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

129. See STANFORD, *supra* note 5, at 48 (describing how the State of Illinois has sought to prevent currently incarcerated victims of Jon Burge from pursuing a class action lawsuit against the CPD and instead appointed David Yellen, Dean of Loyola University Law School, to ascertain the veracity of the claims); see also Maricopa Findings Letter, *supra* note 98, at 5 (describing the over targeting of Latino drivers for traffic citations).

It should also be noted that offending actors are often heavily disincentivized against settling tort claims arising from police misconduct because such settlements are often criticized by the public as the government giving money to criminals.¹³⁰ This is evidenced by the City of Chicago which spent more money (\$63 million) on outside legal counsel to fight claims, while paying out only \$54.2 million in claims to victims and their attorney fees indicating a willingness to spend more on defending claims than settling them.¹³¹

Fourth, cities—like all powerful litigants—are very skilled at prolonging cases. A prime example is Chicago’s handling of the John Burge case.¹³² From the 1970s until the early 1990s, Jon Burge ran the “Midnight Crew” of the Chicago Police Department (CPD).¹³³ The Crew tortured suspects and planted evidence primarily targeting Chicago’s African American residents.¹³⁴ Although Chicago has been settling claims related to Burge and other CPD officers since the mid-1990s there remains around fifty cases that have not reached settlements.¹³⁵ The \$5.5 million settlement fund created by the city will be

130. See New York Observer Editorial Board, *Sending the Wrong Message with the Eric Garner Settlement*, N.Y. OBSERVER (July 24, 2015, 10:35 AM), <http://observer.com/2015/07/sending-the-wrong-message-with-the-eric-garner-settlement>; see also Connor D. Wolf, *Union Leader Blasts Multimillion Dollar Eric Garner Settlement*, DAILY CALLER (July 14, 2015, 5:00 PM), <http://dailycaller.com/2015/07/14/union-leader-blasts-multimillion-dollar-eric-garner-settlement/> (noting that Ed Mullins, president of the Sergeants Benevolent Association, criticized the settlement calling it shameful).

131. Jonah Newman, *Chicago Police Misconduct Payouts Topped \$50 million in 2014*, CHI. REP. (Feb. 25, 2015), <http://chicagoreporter.com/chicago-police-misconduct-payouts-topped-50-million-in-2014/>.

132. STANFORD, *supra* note 5, at 48.

133. Christina Sterbenz, *A Group of Rogue Cops Known as the ‘Midnight Crew’ Tortured Dozens of People for Decades—and Now Chicago is Paying Millions For It*, BUS. INSIDER (May 6, 2015, 3:13 PM), <http://www.businessinsider.com/r-chicago-council-approves-reparations-for-police-torture-victims-2015-5> (describing the torture, electrocutions, and faux Russian Roulette used by the officers on their victims).

134. STANFORD, *supra* note 5, at 49–50 (describing some of the accusations including police electrocuting suspects, beating them, and suffocating several more); see also Matthew Walberg, *Prosecution Rests in Burge Torture Trial*, CHI. TRIB. (June 15, 2015, 8:05 PM), <http://www.chicagotribune.com/news/ct-met-burge-0616-20100615-story.html> (describing the testimony of Shadeed Mu’min of having a gun with one bullet placed to his head by Burge when he refused to confess and then being forced to play Russian roulette. When this did not work Burge had Mu’min suffocated until he passed out and then repeated until he spoke).

135. Hald Dardick, John Byrne, & Steve Mills, *Mayor Backs \$5.5 Million Reparations Deal for Burge Police Torture Victims*, CHI. TRIB. (Apr. 14, 2015, 7:54 PM), <http://www.chicagotribune.com/news/ct-burge-reparations-emanuel-met-20150414-story.html> (providing a description of the settlement offered to the approximate 50 remaining victims of the Midnight Crew by the City of Chicago, which has been endorsed by mayor Rahm Emanuel).

used to pay each of the remaining victims \$100,000.¹³⁶ Although these victims of police misconduct finally received some form of compensation, they had to wait at least fifteen years or more.¹³⁷ The CPD cases also reveal that despite the horrendous actions of CPD officers, which included electrocuting suspects and choking them until they passed out before repeating in order to obtain confessions, the average payout was a meager \$35,550.¹³⁸

Fifth, even if we view tort compensation purely as an incentive system rather than a means of healing, it simply does not work. Police departments do not feel the pinch of the lawsuits since the cities they serve foot the bill.¹³⁹ Similarly, the tort system creates no incentive for the perpetrating officers to modify their behavior as they are mostly indemnified by their departments (and thus again by their cities) for actions undertaken while on duty.¹⁴⁰ In other words, paying tort damages neither provides adequate restitution to the victims nor works as a mechanism to reform police departments.¹⁴¹

Lastly, monetary damages are plainly not enough to remedy the harms caused by police misconduct.¹⁴² While it is true that the American legal system operates on the assumption that all harms can be monetized and quantified, it is becoming increasingly apparent that the harms of police misconduct are of a type and a scale that evade tort compensation. Most victims or their families have continued pushing for law enforcement reform after receiving settlements.¹⁴³ Most importantly the simple payment of money will not serve to restore the dignity lost by the victims of police misconduct. As Atuahene demonstrated in her work, once a dignity taking has oc-

136. David Schaper, *Chicago Creates Reparations Fund For Victims of Police Torture*, NPR (May 6, 2015, 1:43PM), <http://www.npr.org/sections/thetwo-way/2015/05/06/404545064/chicago-set-to-create-reparation-fund-for-victims-of-police-torture>.

137. Sterbenz, *supra* note 136.

138. *Id.*

139. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U.C.R L.J. 479, 495 (2009).

140. Rushin, *supra* note 57, at 1355.

141. *Id.*, at 1353–56 (providing a thorough discussion of historic attempts by the federal government to regulate police misconduct).

142. See ATUAHENE, LEARNING, *supra* note 15, at 21.

143. For instance, Eric Garner's family encouraged more rallies in favor of criminally charging the officers who were involved. Chris Burek, *NYC Reaches Settlement with Family of Eric Garner: Deal is one of the Largest in NYPD History*, LEGIS. GAZETTE (July 20, 2015), <http://www.legislativegazette.com/Articles-Top-Stories-c-2015-07-20-92479.113122-NYC-reaches-settlement-with-family-of-Eric-Garner.html>.

curred, something more than mere restitution is needed to make the injured persons whole again.¹⁴⁴

The final section of this paper will provide two possible restorations to the victims of police misconduct that would serve as dignity restorations. It is important to note that these additional remedies would not supplant, but supplement the existing DOJ orders and tort remedies currently in use.

III. DIGNITY RESTORATION

A dignity restoration involves not only restitution, but additional compensation that is aimed at making the dehumanized community part of society again.¹⁴⁵ As police misconduct results in a dignity taking as it dehumanizes the individual and works a taking either of their body (brutality or extrajudicial murder) or of their property via discriminatory levying of fine it requires a dignity restoration. In her work examining South Africa's Land Restitution Program, Atuahene argues that the goal of the program was not simply the payment of money to those persons who had lost property during the apartheid regime, but their restoration within society.¹⁴⁶ This form of restitution "is a one-time event that occurs within a specified timeframe. It is an attempt to correct past wrongs by returning to a prior status quo perceived to be more just, or creating a new status quo predicated upon correcting specific past wrongs."¹⁴⁷ All of the programs proposed below are restorative not redistributive; that is the goal is still to set the person or community whole and not to transfer or redistribute wealth in society.¹⁴⁸

A. Truth and Reconciliation Commissions

There are some uses of Truth and Reconciliation Commissions (TRC) in the United States. The City of Greensboro, South Carolina instituted a TRC in 1999 to address the town's history of racial vio-

144. ATUAHENE, LEARNING, *supra* note 15, at 57; *see also* Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419, 1444-46 (2007) [hereinafter Atuahene, *Reparation*].

145. ATUAHENE, LEARNING, *supra* note 15, at 57.

146. Bernadette Atuahene, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft*, 51 ARIZ. L. REV. 829, 850-51 (2009) [hereinafter Atuahene, *Illegitimacy*].

147. Atuahene, *supra* note 147, at 1446.

148. *Id.* at 1446-47.

lence and the 1979 Ku Klux Klan murder of labor activists.¹⁴⁹ The Greensboro TRC completed its final report in 2006, recommending an increase in racial sensitivity training for city officials; the resolution of misdemeanor citations by addressing the underlying problems rather than through the criminal justice system; and instituting an educational program to ensure past events are not forgotten.¹⁵⁰ In South Africa a TRC was established to address harms that occurred during the apartheid era.¹⁵¹ The goal of the commission was to “establish as complete a picture as possible of the causes nature and extent of the gross violations of human rights which were committed.”¹⁵² In addition, the commission would have the authority to grant amnesty to perpetrators who gave full disclosure of relevant facts and helped create a comprehensive report of the incidents for publication to help prevent future abuses.¹⁵³ Although this sounds like a foreign concept it is related to the current DOJ investigations of police officers does include the of community meetings to solicit information from the public regarding police abuses.¹⁵⁴

The benefit of this commission is that it would enable victims’ voices to be heard, thus making them feel part of the fabric of society again.¹⁵⁵ As police officers are already rarely prosecuted and almost universally indemnified for their actions, it would not be much of a stretch to give the majority of them amnesty from past actions.¹⁵⁶ Indeed this would serve the additional purpose of encouraging both victims and officers to come forward to speed along any tort claims

149. Joshua Inwood, *Righting Unrightable Wrongs: Legacies of Racial Violence and the Greensboro Reconciliation Commission*, in ANNALS ASSOC. AM. GEOGRAPHERS 1450 (2011).

150. *Greensboro Truth and Reconciliation Commission, FINAL REPORT* (2006), <http://www.greensborotrc.org/>.

151. Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.) at Preamble to the act (“AND SINCE it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future; AND SINCE the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society; AND SINCE the Constitution states that there is a need for understanding but not for vengeance, a need for reparations but not for retaliation, a need for ubuntu but not for victimization . . . ; BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa . . .”).

152. *Id.* at § 3(1)(a).

153. *Id.* § 3(1)(a)–(d).

154. FERGUSON REPORT, *supra* note 43, at 4.

155. Atuahene, *Reparation*, *supra* note 147, at 1444; *see also* Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg, eds., 1988) (noting the need of marginalized groups to have a voice in society).

156. Joanna C. Schwatz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

against government agencies. Such a commission would also serve to capture the numerous victims of police misconduct who did suffer a harm (such as those in Ferguson who were targeted for municipal fines), but where the harm is not great enough to bring a tort claim.¹⁵⁷

A final benefit of TRCs is their relatively low cost. In South Africa the nationwide commission's annual budget was only \$18 million per year; a commission focused on one department could last for a fairly short duration and not be burdened with nationwide logistical costs.¹⁵⁸ Most importantly, a commission would bring the victimized community back into conversation with the government and the offending agency, thus, removing the stigmatization and promoting police-community relationships.¹⁵⁹

B. Community Reparations

Although not widely used in the United States reparations have been used in response to police brutality in Chicago and on a smaller scale in response to systemic racism in Greensboro. Reparations is the idea that the government would create some form of restitution, which might go beyond monetary compensation to include things such as free education, job training or other benefit to the victims of past abuse.¹⁶⁰ It should be noted that such a program would not be an affirmative action program as it would be directed to redress a specific harm not general inequalities.¹⁶¹ There has been some tentative discussion of similar programs, such as an indication by President Obama of a national level increase in education funding in order to close the overall crime rate disparity, but that is different from what is being proposed here as Obama's plan would be a general redistribution rather than restitution for a specific harm.¹⁶²

A clearer example of reparations is the settlement reached between the City of Chicago and the victims of the CPD and Jon Burge. In that settlement, not only will a fund be set up to pay the victims monetary claims, but the city will offer "free city college tuition for

157. FERGUSON REPORT, *supra* note 43 (discussing the story of the woman who was fined \$151 but it turned into more than \$1000 from administrative fees and other related fines).

158. Truth Commission: South Africa, United States Institute of Peace, <http://www.usip.org/publications/truth-commission-south-africa> (last visited Aug. 7, 2015) (addressing that the South African commission operated from 1995–2002 although there has been discussion of reopening the related land reform commission to help process additional claims).

159. Atuahene, *Illegitimacy*, *supra* note 149, at 849–51.

160. Atuahene, *Reparation*, *supra* note 144, at 1444–46.

161. *Id.* at 1446.

162. Remarks of President Barack Obama, *supra* note 117.

victims and their families, free counseling for psychological issues or substance abuse as well as other assistance.”¹⁶³ In addition, the city will offer a formal apology, erect a memorial to the victims of police misconduct, and require that the incident be taught in Chicago Public School’s civics classes.¹⁶⁴ The Chicago reparations offer a nice combination of specific benefits to be granted to the victims and their families as well as some longer lasting compensation. The programs schooling and counselling are discrete in terms of who can benefit from them and will expire with the lives of the victims. At the same time the memorial and education of future generations about the abuse will help ensure that it is not forgotten. Again these are not affirmative action programs, but a form of restitution to the victims of Burge and his “Midnight Crew”.

The ability of this type of restitution program to be regularly adopted is tantalizing as it would capture all the victims of police abuse. However, the history of attempts to remedy school segregation by bussing students across neighborhoods shows that there is a limit to this type of restoration.¹⁶⁵ In addition, any settlement or ensuing program that was based on racial classification would be subjected to strict scrutiny.¹⁶⁶ It could be argued that the scrutiny is met as it is a compelling governmental interest to remedy the past wrongs of state agents.¹⁶⁷ However, any quota or other direct preference would still likely be struck down.

If a reparations program could be paired with a truth and reconciliation commission, then it would be possible to identify the individuals who suffered at the hands of the police. By doing so the reparations could be limited to actual victims of police misconduct

163. Hal Dardick et al., *Mayor backs \$5.5 Million Reparations Deal for Burge Police Torture Victims*, CHI. TRIB. (Apr. 14, 2015, 7:54 PM), <http://www.chicagotribune.com/news/local/breaking/ct-burge-reparations-emanuel-met-20150414-story.html#page=1>.

164. *Id.*

165. See *Milliken v. Bradley*, 418 U.S. 717 (1974) (prohibiting inter-district remedies for segregation unless the plaintiffs can show that an unconstitutional racial policy in one district caused the segregation in another district); see also Charles U. Smith, *Public School Desegregation and the Law*, 54 SOC. FORCES 317, 322–23 (1975) (discussing the opposition to bussing by public officials).

166. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (using strict scrutiny the court struck down a California admission policy providing boost to minority candidates). *But see Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding an admission policy designed to promote diversity among the student body holding that diversity was a compelling state interest).

167. The Court has held that remedies, which directly remedy past racial discrimination can survive strict scrutiny. For example, in *United States v. Paradise*, the Court upheld a hiring quota implemented by the Alabama Department of Public Safety. 480 U.S. 149 (1987).

thus making the reparation a non-race classification, and thereby, dodging strict scrutiny all together. This would also have the added benefit of making any reparations discrete in terms of those eligible as well as of limited time duration.

CONCLUSION

The hostility and degradation of criminals in the United States over the past quarter century has created the situation that whenever someone is treated like or called a criminal they are essentially being called subhuman. When this is coupled with police misconduct—especially when that misconduct targets a discrete minority and involves physical abuse, extrajudicial killing, or unjust enforcement of the law—that misconduct works as a dignity taking against the victims. Existing remedies are insufficient to put these victims whole, as they have suffered more than the loss of their money or injury to their body. In order to put them whole, remedies that restore their dignity are needed. Two such remedies are the establishment of truth and reconciliation commissions and the granting of reparations, such as those given in Chicago following the Burge case. By creating greater remedies the government will bring the victims back into society as equal members.

Mapping the Blank: Centering Black Women’s Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform

JASMINE SANKOFA*

ABSTRACT	652
INTRODUCTION	652
I. RACE AND POLICING	658
II. RACE AND STRUCTURAL SEXUAL VIOLENCE .	666
A. Police Sexual Violence	666
B. A Brief History of Sexualized Racial Terror Against Black Women	673
III. ADVANCING JUSTICE: BROADENING THE SCOPE OF PROPOSED INTERVENTIONS	683
A. Divesting From Law Enforcement	683
B. Building Survivor Support	689
C. Magnifying Voices and Bringing a Human Rights Framework Home	693
1. Truth and Reconciliation Commissions	693
2. Submissions in International Fora	696
CONCLUSION	703

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ABSTRACT

Police sexual violence is not a recent phenomenon. Historically, police officers have abused their authority, and with sexual violence in particular, Black women are hypervulnerable due to pejorative stereotypes about our sexuality and disproportionate interactions with the criminal legal system. Yet there is a pervasive silence around sexual violence, which obscures its frequency and gravity. Mainstream advocacy has challenged rape culture in a variety of contexts, especially sexual assault on college campuses. However, these efforts have failed to take up the issue of police sexual violence. Similarly, mainstream efforts to combat racial profiling and police brutality have not centered Black women's experiences with structural violence, including sexual assault, resulting in reforms that legitimize the presence of police in marginalized communities under the guise of public safety and community-police collaboration. Thus, this Article advocates for an intersectional, rights-based antiviolence platform in order to advance comprehensive, survivor-centered solutions and institutional accountability.

INTRODUCTION

The year 2014 was a critical moment of visibility into police brutality disproportionately impacting Black people in the United States. In July 2014, Eric Garner, a Black man in Staten Island, New York, was choked to death by white police officers as he pleaded "I can't breathe."¹ The following month, Michael Brown, a teenaged Black male from Ferguson, Missouri, was killed by a white police officer.² These incidents, and many others, sparked a national movement for Black lives.³ With rallying cries such as "Hands Up, Don't Shoot,"⁴ advocates called attention to the number of Black people disproportionately killed by police with impunity. The Department of Justice

1. Gene Demby, *What We See in the Eric Garner Video, And What We Don't*, NPR (July 29, 2014, 8:03 AM), <http://www.npr.org/sections/codeswitch/2014/07/29/335847224/what-we-see-in-the-eric-garner-video-and-what-we-don-t>.

2. Emily Brown, *Timeline: Michael Brown Shooting in Ferguson, Mo, USA TODAY* (Dec. 2, 2014, 7:37 PM), <http://www.usatoday.com/story/news/nation/2014/08/14/michael-brown-ferguson-missouri-timeline/14051827/>.

3. Sara Sidner, *The rise of Black Lives Matter: Trying to break the cycle of violence and silence*, CNN (Dec. 28, 2015, 8:28AM), <http://www.cnn.com/2015/12/28/us/black-lives-matter-evolution/>.

4. Cheryl Corley, *Whether History or Hype, 'Hands Up, Don't Shoot' Endures*, NPR (Aug. 8, 2015, 9:44AM), <http://www.npr.org/2015/08/08/430411141/whether-history-or-hype-hands-up-dont-shoot-endures>.

soon after initiated federal investigations of the Ferguson police department⁵ and before the year's end, President Barack Obama convened the President's Task Force on 21st Century Policing.⁶

As resurgent movements against police violence were unfolding nationally, so were initiatives to combat rape culture,⁷ particularly on college campuses. In January of 2014, the White House Task Force to Protect Students from Sexual Assault was established⁸ and the "It's On Us" campaign was launched in the fall.⁹ The purpose of these efforts is to "reject the quiet tolerance of sexual assault"¹⁰ and provide colleges with best practices. The visibility of the campaign¹¹ also led to an increase in Title IX¹² investigations by the Department of Education—from 55 institutions under investigation in May of 2014 to 159 as of January 2016.¹³

The connection between these two initiatives extend beyond the imposition of federal investigations, task forces, and awareness campaigns—less than two weeks after Michael Brown was killed and approximately one month before the "It's On Us" campaign was launched, an Oklahoma City police officer was arrested for assaulting

5. Department of Justice, *Investigation of the Ferguson Police Department* (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

6. President Barack Obama, *Executive Order – Establishment of the President's Task Force on 21st Century Policing*, WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Dec. 18, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/18/executive-order-establishment-presidents-task-force-21st-century-policin>.

7. Rape culture is defined as the normalization of sexual violence through social attitudes and practices.

8. President Barack Obama, *Memorandum – Establishing White House Task Force to Protect Students from Sexual Assault*, WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Jan. 22, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a>.

9. Tanya Somanader, *President Obama Launches the "It's On Us" Campaign to End Sexual Assault on Campus*, WHITE HOUSE (Sept. 19, 2014, 2:40PM), <https://www.whitehouse.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus>.

10. *Id.* (President Obama's speech).

11. Yet, even within current efforts to combat campus sexual assault, the experiences of Black rape survivors on Historically Black Colleges and Universities (HBCUs) are marginalized. Survivors at HBCUs have been active in raising their voices and making demands. See Anita Badejo, *What Happens When Women at Historically Black Colleges Report Their Assaults*, BUZZFEED (Jan. 21, 2016, 9:53PM), <http://www.buzzfeed.com/anitabadejo/where-is-that-narrative#.pqyy51Ye0>; C. Imani Williams, *Howard U. Students Take To The Streets to Protest Inaction on Campus Rape*, FOR HARRIET (Mar. 23, 2016), <http://theculture.forharriet.com/2016/03/howard-u-students-take-to-streets-to.html#axzz43ppT493S>.

12. *Title IX of the Education Amendments of 1972*, 20 U.S.C. § 1681 – 1688, <https://www.justice.gov/crt/title-ix-education-amendments-1972>.

13. Tyler Kingkade, *Federal Campus Rape Investigations Near 200, and Finally Get More Funding*, HUFFINGTON POST (Jan. 5, 2016, 9:55PM), http://www.huffingtonpost.com/entry/federal-funding-campus-rape-investigations_us_568af080e4b014efe0db5f76.

thirteen Black women.¹⁴ The officer targeted and tracked down these women, utilizing department resources.¹⁵ He deliberately chose women with criminal records and living in an impoverished area because he felt certain no one would believe them.¹⁶

Local activists attempted to gain support from local women's rights organizations and faith-based institutions in the Black community yet were told that the survivors were not respectable enough and partnerships with law enforcement were at stake.¹⁷ During the trial, the defense repeatedly attacked the veracity of the survivors¹⁸ and one survivor in particular took the stand while in chains and a prison jumpsuit.¹⁹ On December 10, 2015, the jury found the officer guilty of 18 of the 36 counts and recommended a 263-year sentence,²⁰ which was later affirmed by the presiding judge.²¹ Although some have hailed the outcome of this case as "justice served,"²² the jury did not substantiate the allegations of five survivors²³ nor are immediate mechanisms of support clearly identifiable and available. This case, even with success in prosecution, exposes the truth behind the of-

14. Jeremy Allen, *OKC Cop, Ex-EMU Football Star Daniel Holtzclaw Formally Charged with Sex Crimes*, M LIVE (Aug. 29, 2014, 7:00PM), http://www.mlive.com/news/ann-arbor/index.ssf/2014/08/okc_cop_ex-emu_football_star_d.html. [hereinafter *OKC Cop*]; Tim Talley, *Rape Allegations Against Officer Detailed*, MCALESTER NEWS-CAPITAL (Nov. 17, 2014), http://www.mcalesternews.com/news/rape-allegations-against-officer-detailed/article_c8ae8c68-6ea3-11e4-ba4a-87965a99060f.html.

15. Allen, *supra* note 14.

16. Michael Martinez, *Former Oklahoma City Police Officer Daniel Holtzclaw Found Guilty of Rape*, CNN (Dec. 10, 2015, 10:50 PM), <http://www.cnn.com/2015/12/10/us/oklahoma-daniel-holtzclaw-trial/>.

17. African Am. Policy Forum, *Stand Up for Justice for the OKC 13: Visibility and Accountability Beyond the Holtzclaw Verdict*, Webcast (Jan. 19, 2016) (comment by Grace Franklin from the OKC Artists for Justice) [hereinafter *AAPF Webinar 3*]. See generally Jasmine Phillips, *Black Girls and the (Im)Possibilities of a Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States*, 62 UCLA L. REV. 1642, at 1669–71 (2015), http://www.uclalawreview.org/wp-content/uploads/2015/08/Phillips-final_8.15.pdf.

18. Anna Merlan, *Daniel Holtzclaw's Defense Suggests Maybe His 13 Alleged Victims Are All Liars With an 'Agenda'*, JEZEBEL (Dec. 7, 2015, 5:10PM), <http://jezebel.com/daniel-holtzclaw-defense-suggests-maybe-his-13-alleged-1746716193>.

19. *AAPF Webinar 3*, *supra* note 17.

20. Elliott C. McLaughlin, Sara Sidner and Michael Martinez, *Oklahoma City Cop Convicted of Rape Sentenced to 263 Years in Prison*, CNN (Jan. 22, 2016, 12:26PM), <http://www.cnn.com/2016/01/21/us/oklahoma-city-officer-daniel-holtzclaw-rape-sentencing/>.

21. *Id.*

22. Shaun King, *KING: Daniel Holtzclaw Sentence of 263 Years Behind Bars is Finally Justice Served*, N.Y. DAILY NEWS (Jan. 21, 2016, 5:25PM), <http://www.nydailynews.com/news/national/king-daniel-holtzclaw-263-year-sentence-justice-served-article-1.2505188>.

23. Molly Redden, *Daniel Holtzclaw: Former Oklahoma City Police Officer Guilty of Rape*, GUARDIAN (Dec. 10, 2015, 9:39 PM), <http://www.theguardian.com/us-news/2015/dec/11/daniel-holtzclaw-former-oklahoma-city-police-officer-guilty-rape>.

ficer's logic for targeting these women—they are not easily believed and not easily supported.

Police sexual violence is not an anomaly. There are several news stories of sexual assault during traffic stops,²⁴ in response to traffic incidents²⁵ or domestic violence calls,²⁶ or the extortion of sex from sex workers.²⁷ Police officers have abused their authority in ways that leave women disproportionately vulnerable to sexualized police violence²⁸ but gaps in data, underreporting, and fear of retaliation, make it difficult to map its prevalence and the populations most vulnerable.²⁹

24. Nicole Flatow, *Cop Charged with Sexually Assaulting 7 Black Women Released From Jail*, THINK PROGRESS (Sept. 6, 2014, 12:20 PM), <http://thinkprogress.org/justice/2014/09/06/3564082/cop-who-allegedly-assaulted-7-black-women-released-from-jail/>; David Lohr, *Woman Says Gas Station Strip Search Was Like Sexual Assault*, HUFFINGTON POST (Aug. 10, 2015, 6:33 PM), http://www.huffingtonpost.com/entry/texas-strip-search-public_55c8f940e4b0923c12bdb903 (addressing Charnesia Corley, a 21 year old woman in Texas, accused officers of pulling her over for allegedly running a stop sign and subjecting her to a public vaginal search at a gas station).

25. Rebecca Rose, *It Happened Again: Police Officer Charged with Rape*, JEZEBEL (Mar. 23, 2014, 9:30 PM), <http://jezebel.com/it-happened-again-police-officer-charged-with-rape-1549983829>; Meg Wagner, *Florida Cop Fired for Allegedly Raping Woman While on Duty*, FOR HARRIET (Nov. 5, 2014), <http://shine.forharriet.com/2014/11/florida-cop-fired-for-allegedly-raping.html?m=1#axzz3Sb8m51ar>.

26. Rebecca Rose, *Police Office Accused of Raping Woman Who Called 911*, JEZEBEL (Mar. 10, 2014, 10:40 AM), <http://jezebel.com/police-officer-accused-of-raping-woman-who-called-911-1540190369>; Rebecca Rose, *Another Cop Accused of Raping a Woman After She Called 911*, JEZEBEL (Mar. 11, 2014, 11:30 PM), <http://jezebel.com/another-cop-accused-of-raping-a-woman-after-she-called-1541848549>.

27. SEX WORKERS PROJECT, *REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY* (2003) at 7, 12, 18, 34, 73, 82, <http://sexworkersproject.org/downloads/RevolvingDoor.pdf>; SEX WORKERS PROJECT, *BEHIND CLOSED DOORS: AN ANALYSIS OF INDOOR SEX WORK IN NEW YORK CITY* (2005) at 15, 78, <http://sexworkersproject.org/downloads/BehindClosedDoors.pdf>.

28. Throughout this paper, I assert that police sexual violence is structural violence. See generally JOY JAMES, *RESISTING STATE VIOLENCE: RADICALISM, GENDER, AND RACE IN U.S. CULTURE* vii (1996) (“[L]ink[ing] multiple forms of state violence—domestic and imperialist—with sexual violence, focusing on the state processes that privatize sexual violence.”).

29. Throughout this Article, I speak about the experiences of Black women historically and contemporarily. However, I am in no way arguing that only women are vulnerable to sexual violence at the hands of law enforcement. For example, Abner Louima, a Haitian man, was sodomized by New York City Police Department officers with a broomstick. See Maria Hinojosa, *NYC Officer Arrested in Alleged Sexual Attack on Suspect*, CNN (AUG. 14, 1997, 4:29AM), <http://www.cnn.com/US/9708/14/police.torture/>; see also ANDREA J. RITCHIE & JOEY L. MOGUL, *IN THE SHADOWS OF THE WAR ON TERROR: PERSISTENT POLICE BRUTALITY AND ABUSE OF PEOPLE OF COLOR IN THE UNITED STATES* 29 (2007), <http://www2.ohchr.org/english/bodies/cehd/docs/ngos/usa/USHRN15.pdf> [hereinafter *IN THE SHADOWS*]. For more information about gender violence perpetuated by and against men in penal institutions, see generally Angela P. Harris, *Gender Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Police Nation*, 37 WASH. U. J. L. & POL'Y 13 at 27–32 (2011).

The Oklahoma City case reveals the hypervulnerability of Black women,³⁰ which dates back to chattel slavery.³¹ Yet policing tropes are typically seen through the lens of stop and frisk, physical violence, and death by cop—which are predominately associated with the Black male experience, thereby personifying Black suffering and struggle in a limited relief. As a result, the experiences of Black women as survivors and victims of police terror³² are excluded, which condones the deprioritization of problematic interactions between the criminal legal system³³ and Black women within advocacy agendas. Simply declaring that police kills us, too³⁴ does not remedy the problem.

The pervasive silence around sexual assault in our society is exacerbated when state agents themselves, especially those tasked with protecting and serving, are indeed the perpetrators. The President's Task Force on 21st Century Policing released a final report, recommending best practices to fight crime and build trust between law enforcement and communities.³⁵ However, it is the frequency of police interactions themselves that increase susceptibility to police violence.³⁶ Reforms that normalize the presence of law enforcement in communities of color simultaneously normalize the use of force.

30. Throughout this Article, when I refer to the hypervulnerabilities of Black women, it is intended to be inclusive of heterosexual, cisgender, and LGBTQ Black women and girls, while also recognizing difference in experience.

31. In Part II, I will briefly historicize sexual abuse experienced by Black women.

32. CRISTA E. NOEL & OLIVIA PERLOW, *AMERICAN POLICE CRIMES AGAINST AFRICAN WOMEN AND WOMEN OF COLOR 1* (2014) (“The voices of America’s African women have been dismissed from the discourse on police violence, harassment, abuse of power and the terribly inhumane policies.”), http://www.ushrnetwork.org/sites/ushrnetwork.org/files/wapb_report_rev_7.14.14-2.pdf [hereinafter *AMERICAN POLICE CRIMES*]. See generally DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER* (2010) [hereinafter *DARK END*].

33. Throughout this paper, I will refer to the “criminal justice system” as the “criminal legal system.” I prefer this phrasing in order to challenge the presumption that the system is “just.” Others have used “criminal (in)justice system” as an alternative but I feel as if the use of parenthesis does not do enough to challenge the systemic oppression deployed by the criminal legal structure, which consequently renders justice nonexistent, especially for marginalized populations.

34. Kirsten West Savali, *Black Women are Killed by Police, Too*, SALON (Aug. 23, 2014, 5:00 PM), http://www.salon.com/2014/08/24/black_women_are_killed_by_police_too_partner/.

35. COPS, *FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING* (2015), http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf [hereinafter *FINAL REPORT*].

36. Devon Carbado, *The Legalization of Racial Profiling* (forthcoming 2016) (draft on file with author).

By characterizing officers who commit sex offenses as “rogue” actors,³⁷ we fail to understand sexual assault as structural violence that courts have not adequately protected against³⁸ and the sinister history of policing and incarceration in this country. Our “reliance on procedural rather than substantive justice” will only reinforce injustice.³⁹ Thus, dominant policy agendas do not adequately challenge the legitimacy of police power nor develop survivor-centered support mechanisms. Providing survivors with resources should not be limited to the context of prosecution.⁴⁰ It should also include immediate and long-term emotional and financial supportive services and a conscious effort to invest in marginalized communities.

Throughout this Article, I make several main arguments: dominant policing discourses often ignore racial and sexualized terror disproportionately impacting Black women, rendering these experiences marginal to police accountability efforts; interventions focus on procedural remedies instead of centering the needs of those most vulnerable to state violence, especially abuses that lie outside the bounds of “legitimate” police interactions; mainstream reforms have failed to advance survivor-centered remedies and mechanisms that challenge police legitimacy; sexual violence cannot be viewed through a primarily interpersonal lens,⁴¹ but rather must be seen as structural violence; to end police violence we must divest from policing and invest in communities; and to hold structures accountable we must adopt a human rights framework. Thus, the project of this Article is to com-

37. Zoe Carpenter, *The Police Violence We Aren't Talking About*, NATION (Aug. 27, 2014, 10:24 AM), <http://www.thenation.com/blog/181365/police-violence-we-arent-talking-about>.

38. Cynthia Gordy, *Recy Taylor: A Symbol of Jim Crow's Forgotten Horror*, ROOT (Feb. 9, 2011, 3:30 PM), http://www.theroot.com/articles/culture/2011/02/recy_taylor_a_symbol_of_jim_crows_forgotten_horror.html.

39. Alex S. Vitale, *Obama's Police Reforms Ignore the Most Important Cause of Police Misconduct*, THE NATION (Mar. 6, 2015), <http://www.thenation.com/article/obamas-police-reforms-ignore-most-important-cause-police-misconduct/> [hereinafter *Reforms Ignore*].

40. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, ADDRESSING SEXUAL OFFENSES AND MISCONDUCT BY LAW ENFORCEMENT: EXECUTIVE GUIDE 1, 13–15 (2011), <http://www.theiacp.org/Portals/0/pdfs/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf> (mentioning counseling and medical care and treating victims with dignity and respect, however, these suggestions are extremely broad suggestions and relate more to evidence gathering, i.e. providing medical care to gather DNA, providing counseling so that officers can gather facts, etc., instead of suggesting programs focusing on the mental, physical, social, and economic needs of victims) [hereinafter CHIEFS OF POLICE]; see Eleanor Goldberg, *Supporters Held Tamir Rice's Mother Move Out of Homeless Shelter*, HUFFINGTON POST (May 8, 2015), http://www.huffingtonpost.com/2015/05/08/tamir-rice-fund_n_7233138.html.

41. ANDREA J. RITCHIE, *Law Enforcement Violence Against Women of Color*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 142 (2006) (“[M]ainstream conceptions of gender-based violence . . . in the United States [] focus on the “private sphere,” failing to imagine women as subjects of state violence in public spaces.”) [hereinafter *Law Enft Violence*].

plicate mainstream policing discourses in order to generate comprehensive support mechanisms and visions of justice that can frame how we address interpersonal and structural violence writ large.

Part I will begin with a brief overview of racial profiling, police violence, and reform discourses, including intersectional interventions. Next, Part II will discuss the prevalence of police sexual violence based on available data and the role of policing itself in producing such violence. Part II will also briefly historicize Black women's hypervulnerability to race- and gender-based violence⁴² and pejorative stereotypes that constrain access to justice and resources. Finally, Part III challenges mainstream police reform by centering grassroots intersectional efforts. Even though this Article aims to connect police violence and antirape activism, it primarily focuses on police reform.⁴³

I. RACE AND POLICING

Racial profiling and police violence reflect the presence of racial discrimination in our criminal legal system. Racial profiling is defined as the “discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual’s race, ethnicity, religion or national origin.”⁴⁴ Overt and deeply entrenched racism exists within police departments as well as implicit biases that inform policing strategies.⁴⁵

Police practices in New York City are an example of this. During former New York Mayor Michael Bloomberg’s administration, the

42. Gender-based violence (GBV) is violence based on women’s subordinate status in society, which includes actions or threats by male dominated institutions or individuals that inflict harm on the basis of gender. Therefore, GBV is both interpersonal and structural—the framework by which I conceptualize sexual assault.

43. Documenting rape culture in our society is a topic worth exploring in a separate article. The point of mentioning it here and elsewhere in the Article is to situate police sexual violence as both sexual assault and police brutality. Additionally, this Article will not reckon with the silencing of intraracial physical and sexual violence and sexual assault by non-law enforcement, which again, is worthy of engagement in ways I am unable to provide in this particular article.

44. *Racial Profiling: Definition*, ACLU, <https://www.aclu.org/racial-profiling-definition> (last visited Feb. 12, 2016).

45. Shaun King, *Let’s Stop Saying Bad Police Officers Are Rare. Fact is They’re Plentiful From Coast to Coast*, DAILY KOS (May 15, 2015, 11:36 AM), <http://www.dailykos.com/story/2015/05/15/1384993/-Let-s-stop-saying-bad-police-officers-are-rare-Fact-is-they-re-plaintiful-from-coast-to-coast#>. See generally Kristen A. Lang et al., *Implicit Social Cognition and Law*, <http://www.annualreviews.org/doi/pdf/10.1146/annurev.lawsocsci.3.081806.112748> (last visited Feb. 3, 2016) (describing the impact of implicit bias on police officer decisions to use deadly force reflecting a “systematic racial bias” in shooting).

New York City Police Department engaged in “stop-and-frisk”⁴⁶ tactics allegedly to fight violent crime. An analysis of data between 2002 and 2013 revealed the ineffectiveness of stop-and-frisk and the racial biases that treated Blacks and Latinxs⁴⁷ as inherent suspects. The New York Civil Liberties Union published a report⁴⁸ showing that during this eleven-year period, over 5 million stops were made.⁴⁹ Of these stops, nearly 4.4 million did not result in an arrest or summons.⁵⁰ Not only were Black and Latino men disproportionately stopped and frisked,⁵¹ but when frisked they were less likely to be found with a weapon than white men.⁵² Rates of racial disparities in stops and frisks among women were identical to those among men.⁵³

Class action lawsuits were filed to challenge the constitutionality of racial profiling in New York. In 2010, the NAACP Legal Defense & Educational Fund, Inc. and Legal Aid Society filed *Davis v. City of New York*.⁵⁴ Residents of, and visitors to, New York City Housing Authority (NYCHA) apartments were subjected to suspicionless stops and arrests for criminal trespass.⁵⁵ These stops and arrests were primarily conducted in non-white NYCHA residences.⁵⁶ The case argued that officers were stopping people without reasonable and individualized suspicion, arresting individuals without probable cause, and engaging in racially discriminatory practices.⁵⁷ Ultimately, the

46. CENTER FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 3–4 (2012), <http://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf> [hereinafter HUMAN IMPACT].

47. Raquel Reichard, *Why We Say Latinx: Trans & Gender Non-Conforming People Explain*, LATINA, (Aug. 29, 2015, 11:00 AM), <http://www.latina.com/lifestyle/our-issues/why-we-say-latinx-trans-gender-non-conforming-people-explain>.

48. NEW YORK CIVIL LIBERTIES UNION, STOP & FRISK DURING THE BLOOMBERG ADMINISTRATION 2002-2013 (2014), http://www.nyclu.org/files/publications/stopandfrisk_briefer_2002-2013_final.pdf.

49. *Id.* at 1.

50. *Id.*

51. *Id.* at 4 (noting that the demographics of stop-and-frisk by race were 54.2% Black, 32% Latino, 10.3% white, and 3.6% Asian or American Indian).

52. *Id.* at 10 (noting that a weapon was only recovered from 1.9% of Blacks and Latinos who were frisked, meanwhile a weapon was found on 3.3% of whites who were frisked).

53. KIMBERLÉ CRENSHAW & ANDREA RITCHIE, AFRICAN AMERICAN POLICY FORUM, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN 7 (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/555cced8e4b03d4fad3b7ea3/1432145624102/merged_document_2+%281%29.pdf [hereinafter SAY HER NAME].

54. *Davis v. City of New York*, 75 F. App'x 827 (2d Cir. 2003).

55. *Id.*

56. *Id.*

57. *Id.*

case served to challenge the treatment of public housing residents as “criminals.”⁵⁸

In 2013, another case, *Floyd v. City of New York* was decided.⁵⁹ A federal district court judge ruled that the police department engaged in a pattern and practice of racial profiling and held the NYPD’s stop-and-frisk practices unconstitutional based on systematic failure to meet the Fourth Amendment standard set forth in *Terry v. Ohio*.⁶⁰

The racial disparities experienced by Blacks and Latinxs are not limited to police harassment via stop and frisk.⁶¹ Although the violent crime rate has decreased over time, the rate of police violence has not.⁶² Interactions between civilians and law enforcement increase

58. NAACP LDF, *Legal Defense Fund is Appalled at Mayor Bloomberg’s Comment That People Should Be “Fingerprinted” Before Entering NYC Public Housing*, <http://www.naacpldf.org/update/legal-defense-fund-appalled-mayor-bloomberg’s-comment-people-should-be-”fingerprinted”> (noting that the assertion by former New York Mayor Michael Bloomberg that visitors and residents of NYCHA housing should be fingerprinted before entering their homes evidences the criminalization of this population).

59. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (addressing the NYPD stop-and-frisk program made possible by the probable cause exception in *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968)). The court held that the City violated plaintiffs’ Fourth and Fourteenth rights by conducting unconstitutional stops and frisks and an indirect racial profiling policy.)

60. *Id.*

61. Brad Heath, *Racial Gap in U.S. Arrest Rates: ‘Staggering Disparity’*, USA TODAY (Nov. 19, 2014), <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/>; Sophia Kerby, *The 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, AM. PROGRESS (Mar. 13, 2012), <https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>; Christopher Mathias, *NYPD Stops and Frisks: 15 Shocking Facts About a Controversial Program*, HUFFINGTON POST (May 15, 2012, 1:54 PM), http://www.huffingtonpost.com/2012/05/13/nypd-stop-and-frisks-15-shocking-facts_n_1513362.html; Ryan Gabrielson et al., *Deadly Force in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM) (finding that young Black males 21 times as likely to be killed by police than young white males), http://www.propublica.org/article/deadly-force-in-black-and-white?utm_source=email&utm_medium=email&utm_campaign=dailynewsletter. When it comes to the issue of police murders per year, comprehensive official data is not gathered, leading to various numbers reported. See Kevin Johnson et al., *Local Police Involved in 400 Killings Per Year*, USA TODAY (Aug. 15, 2014, 9:41 AM), <http://www.usatoday.com/story/news/nation/2014/08/14/police-killings-data/14060357/>; The FBI’s Uniform Crime Report only calculates law enforcement justified homicides so the data leaves out all forms of police killings, justified or not. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: EXPANDED HOMICIDE DATA—JUSTIFIABLE HOMICIDE BY LAW ENFORCEMENT (2009–2013), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expandedhomicide/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2009-2013.xls (last visited Feb. 3, 2016) [hereinafter EXPANDED HOMICIDE].

62. Federal Bureau of Investigation, *Uniform Crime Report: Violent Crime* (2009–2013), (showing a drastic decline in violent crime from 2009–2013), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/violent-crime-topic-page/violentcrime_main_final; EXPANDED HOMICIDE, *supra* note 61 (showing an increase in officer killings based on what the FBI’s Uniform Crime Report tracks).

the likelihood of police misconduct and violence.⁶³ Excessive force is often justified by claiming the officer “felt” in danger or “thought” the victim was armed. However, eyewitnesses or other evidence frequently show that victims are unarmed⁶⁴ yet they are often characterized as “thugs” and blamed for being beaten or killed.⁶⁵

The perception of communities of color as dangerous played out in Ferguson, Missouri. Local law enforcement armed themselves with military grade equipment, such as tanks and sniper rifles,⁶⁶ supplied by the National Defense Authorization Act, which allocated billions of dollars in war-like equipment to local police forces.⁶⁷

The stereotypes used to justify militarization have a long history in this country.⁶⁸ The vulnerability of Black men and women to state violence is connected to a painful history of racial terror—from castrations to beatings, from rape to lynchings.⁶⁹ However, the pervasive-

63. See Carbado, *supra* note 36.

64. Robert J. Lopez, *Police Say They Shot a Man Because They Thought He Was Armed*, L.A. TIMES (Nov. 20, 2013), <http://articles.latimes.com/2013/nov/20/health/la-me-ln-police-say-they-shot-man-because-they-thought-he-was-armed-20131120>; Thomas Johnson, *Ezell Ford: The Mentally Ill Black Man Killed by the LAPD Two Days After Michael Brown's Death*, WASH. POST (Aug. 15, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/08/15/ezell-ford-the-mentally-ill-black-man-killed-by-the-lapd-two-days-after-michael-browns-death/>; Shalia Dewan & Richard A. Opper, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <http://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html>; Janell Ross, *Cleveland: 137 Shots, One Lawsuit, Two Alternate Realities on Race and Police*, WASH. POST (May 26, 3:00 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2015/05/26/cleveland-police-137-shots-and-the-alternate-realities-of-the-debate-over-race-and-police/>.

65. Nicole Flatow, *Michael Brown, Police Violence, and Why It's So Hard for Victims to See Justice*, COLORLINES, (Aug. 12, 2014, 1:34PM), <http://thinkprogress.org/justice/2014/08/12/3470313/justice-race-and-michael-brown/>; Eric Barrow, *Trayvon Martin Three Years Later: Pain, Anger and Sadness Still Haunt Family and Friends as They 'Pray for Truth'*, N.Y. DAILY NEWS, (Feb. 26, 2015, 2:30 AM), <http://www.nydailynews.com/news/national/trayvon-short-article-1.2129359>.

66. Evan Perez, *Police Militarization: The Ferguson Issue that Wasn't*, CNN (Dec. 8, 2014, 6:01 PM), <http://www.cnn.com/2014/12/01/politics/ferguson-police-militarization-white-house/>.

67. *Id.*; Paul D. Shinkman, *Ferguson and the Shocking Nature of U.S. Police Militarization*, U.S. NEWS (Aug. 14, 2014, 10:13 AM), <http://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization>; Aamer Madhani, *St. Louis County Chief Defends Militarization of Police*, USA TODAY (Sept. 16, 2014, 6:45 PM), <http://www.usatoday.com/story/news/nation/2014/09/16/ferguson-st-louis-county-michael-brown-militarization/15736907/> (noting that St. Louis county police chief defends the militarization of police, arguing that use of military equipment can keep officers and civilians safer because officers do not have to use weapons against civilians if officers are protected more by equipment.).

68. Ali Gharib, *In 2011, NYPD Made More Stops of Young Black Men than the Total Number of Young Black Men in New York*, THINK PROGRESS (May 10, 2012, 2:10 PM), <http://thinkprogress.org/justice/2012/05/10/481589/nypd-stop-and-frisk-young-black-men/>; SAY HER NAME, *supra* note 53, at 1; Andrea Ritchie, *We're Dying Too*, COLORLINES (May 20, 2015, 2:39 PM), <https://www.colorlines.com/articles/were-dying-too>.

69. Robert A. Gibson, *The Negro Holocaust: Lynching and Race Riots in the United States, 1880-1950*, 2 YALE-NEW HAVEN TEACHERS INSTITUTE, NO. 4, 1979, <http://www.yale.edu/ynhti/>

ness of state violence is not adequately acknowledged. Currently, the federal government does not require and officially gather data of officer-involved violence annually.⁷⁰ Grassroots and media driven efforts to capture data have found that a Black person is killed every 28 hours by police officers or vigilantes.⁷¹

Available evidence maps the vulnerability of all Black people—including LGBTQ⁷² folks and women.⁷³ However, police violence is seen as an issue primarily endangering Black men and boys:

Remember Trayvon Martin;⁷⁴

Remember Tamir Rice;⁷⁵

Remember Walter Scott;⁷⁶

curriculum/units/1979/2/79.02.04.x.html; Dorothy Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 273 (2007) [hereinafter *Abolitionist Framework*]; This history is why advocates commonly refer to police and vigilante violence as “modern day lynching.” “A Modern-Day Lynching”: *Outrage Grows Over Killing of Trayvon Martin by Neighborhood Watch Patrol*, DEMOCRACY NOW (Mar. 20, 2012), http://www.democracynow.org/2012/3/20/a_modern_day_lynching_outrage_grows.

70. Wesley Lowery, *How Many Police Shooting a Year? No One Knows*, WASH. POST (Sept. 8, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/>.

71. MALCOLM X GRASSROOTS MOVEMENT, OPERATION GHETTO STORM: 2012 ANNUAL REPORT ON THE EXTRAJUDICIAL KILLING OF BLACK PEOPLE 3, <https://mxgm.org/operation-ghetto-storm-2012-annual-report-on-the-extrajudicial-killing-of-313-black-people/>; Other sources documenting the number of people killed by police include: The Guardian, *The Counted: People killed by police in the US*, <http://www.theguardian.com/us-news/series/counted-us-police-killings> (last visited Apr. 10, 2016); The Washington Post, *Investigation: People shot and killed by police this year*, <https://www.washingtonpost.com/graphics/national/police-shootings/> (last visited Apr. 10, 2016).

72. In this Article, LGBTQ includes lesbian, gay, bisexual, transgender, queer, non-binary, and gender non-conforming folks.

73. SAY HER NAME, *supra* note 53, at 6–7 (“Even where women and girls are present in the data, narratives framing police profiling and lethal force as exclusively male experiences lead researchers, the media, and advocates to exclude them.”); AMNESTY INTERNATIONAL, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. (2005), <http://home.earthlink.net/~shirleyolivia/Amnesty%20International%20Stonewalled%20Summary.pdf>; CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE (2016), <http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf>; JOEY L. MOGUL, ANDREA J. RITCHIE, & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2012).

74. CNN Library, *Trayvon Martin Shooting Fast Facts*, CNN (Feb. 7, 2016, 4:25PM), <http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/> (noting that in 2012, 17-year-old, unarmed Trayvon Martin was visiting his father when approached and killed by a neighborhood watch captain, who was later tried but not convicted of murder) [hereinafter *Trayvon Martin*].

75. Ashley Fantz, *Tamir Rice Shooting: No Charges for Officers*, CNN (Dec. 28, 2015, 7:28PM), <http://www.cnn.com/2015/12/28/us/tamir-rice-shooting/> (noting that in 2014, 12-year-old Tamir Rice was killed in Ohio within seconds on the scene because they mistook his pellet gun for a real gun. The officers were not indicted. Ohio is an open-carry state).

76. Catherine E. Scoichet and Mayra Cuevas, *Walter Scott Shooting Case: Court Documents Reveal Details*, CNN (Sept. 10, 2015, 12:10AM), <http://www.cnn.com/2015/09/08/us/south-carolina-walter-scott-shooting-michael-slager/> (noting that 2015, after being pulled over for a minor

Remember John Crawford III;⁷⁷

Remember Samuel DuBose⁷⁸

Thus, mainstream discourses seldom depict the experiences of non-cisgender, heterosexual Black men,⁷⁹ unless it fits within a general framework—when “[w]e don’t have existing frames to understand and talk about [B]lack women . . . [people] forget the facts.”⁸⁰ To challenge the erasure of these experiences,⁸¹ advocates have called for us to #SayHerName and declare that #BlackWomenMatter, #BlackGirlsMatter, and #BlackTransLivesMatter.⁸²

Several organizations have been at the forefront of applying an intersectional lens to state violence. Scholars and activists such as Angela Y. Davis and Andrea J. Ritchie, and members of radical feminist spaces such as INCITE! and the Audre Lorde Project, have worked to combat police violence and penal institutions. These efforts predate current initiatives; such as the recently visible campaigns of the Afri-

traffic violation, Walter Scott was shot in the back while running away from a police officer. The officer has been charged with murder).

77. Phillip Jackson, *One Year After John Crawford III's Shooting by Police, His Family is Still Waiting for Justice*, THE ROOT (Aug. 5, 2015, 3:00AM), http://www.theroot.com/articles/culture/2015/08/one_year_after_john_crawford_iii_s_shooting_by_police_his_family_is_still.html (noting that in 2014, John Crawford III was killed while holding a toy pellet gun at a Walmart in Ohio. Officers approached him and immediately shot him. Ohio is an open-carry state).

78. Michael Martinez, *Video Shows the Encounter Between Samuel Dubose, Officer Ray Tensing*, CNN (July 29, 2015, 10:30PM), <http://www.cnn.com/2015/07/29/us/video-sam-dubose-ray-tenzing-chronology/> (noting that in 2015, Samuel DuBose was stopped by a University of Cincinnati police officer. During the back and forth with the officer, the officer pulls out his gun and fatally shoots DuBose in the head. He has been charged with murder).

79. *Law Enft Violence*, *supra* note 41, at 139 (“To date, public debate, grassroots organizing, litigation strategies, civilian oversight, and legislative initiatives addressing police violence and misconduct have been almost exclusively informed by a paradigm centering on the young Black or Latino heterosexual man as the quintessential subject, victim, or survivor of police brutality.”).

80. Lily Workneh, #SayHerName: Why We Should Declare That Black Women and Girls Matter, Too, HUFFINGTON POST (May 21, 2015, 3:52 PM), http://www.huffingtonpost.com/2015/05/21/black-women-matter_n_7363064.html. [hereinafter Workneh].

81. *Law Enft Violence*, *supra* note 41, at 141 (“[T]he few incidents of police violence against women of color which have commanded national attention continue to be viewed as isolated, anomalous deviations from the police brutality “norm.” Perhaps the overwhelming silences are yet another manifestation of the ongoing sublimation of women of color’s experiences to those of men in struggles for racial justice. Perhaps police violence against women of color is experienced as merely one strand in a seamless web of daily gendered/racialized assaults by both state and private actors, unworthy of the focused attention commanded by police brutality against men of color perceived as a “direct” form of state violence.”).

82. Cleis Abeni, *Trans Lives Matter and Black Lives Matter Join Forces for Justice*, ADVOCATE (Sept. 10, 2015, 4:10PM), <http://www.advocate.com/2015/9/10/trans-lives-matters-and-black-lives-matters-join-forces-justice>; Cherno Biko, *Black Trans Lives Matter, Too*, HUFFINGTON POST (Feb. 4, 2016, 8:18AM), http://www.huffingtonpost.com/cherno-biko/black-trans-lives-matter-_b_9157514.html.

can American Policy Forum (AAPF) led by legal scholar Kimberlé Crenshaw.

Through webinars, town hall meetings, protests, blog posts, twitter hashtags, issue briefs, and social media guides, activists have elevated the names of Black women murdered by law enforcement,⁸³ reminding us that Black men and boys are not the only ones:

Remember Rekia Boyd;⁸⁴

Remember Sandra Bland;⁸⁵

Remember Aiyana Stanley-Jones;⁸⁶

Remember Tanisha Anderson;⁸⁷

83. James Nye, *Walmart Security Guard Shoots ‘Shoplifting’ Mother Dead in Parking Lot as She Tries to Escape with Two Young Children*, DAILY MAIL ONLINE (Dec. 8, 2012, 2:31 PM), <http://www.dailymail.co.uk/news/article-2245074/Walmart-security-guard-shoots-shoplifting-mother-dead-parking-lot-tries-escape-young-children.html>; Josie Pickens, *Can We Talk About How Black Women Are Treated as Threats, Too?*, ROOT (Aug. 24, 2014, 3:03 AM), http://www.theroot.com/articles/culture/2014/08/racialized_violence_black_women_are_the_underdiscussed_victims.html; Evette Dionne, *Police Kill Black Women All the Time, Too—We Just Don’t Hear About It*, BUSTLE (Aug. 12, 2014), <http://www.bustle.com/articles/52433-police-kill-black-women-all-the-time-too-we-just-dont-hear-about-it>; Kirsten West Savali, *Tanisha Anderson: Unarmed, Mentally Ill Woman Killed During Altercation with Police*, NEWS ONE (Nov. 19, 2014), <http://newsone.com/3072660/tanisha-anderson-unarmed-mentally-ill-woman-killed-during-altercation-with-police-video/>; Danielle Stevens, *Ain’t I a Human?: Ferguson and the Neglect of Black Women, Femmes, and Girls*, ELIXHER (Nov. 26, 2014), <http://elixher.com/aint-i-a-human-ferguson-and-the-negligence-of-black-women-femmes-and-girls/>; Marie Myung-Ok Lee, *Women of Color and the Hidden Trauma of Police Brutality*, NATION (Sept. 16, 2014), <http://www.thenation.com/article/181648/women-color-and-hidden-trauma-police-brutality#>; Kirsten West Savali, *Black Women are Killed by Police, Too*, SALON (Aug. 23, 2014, 5:00 PM), http://www.salon.com/2014/08/24/black_women_are_killed_by_police_too_partner/; Karen Jones, *Request Federal and State Investigation of the “Mysterious” Death of 18yo Sheneque Proctor Found in Bessemer, AL Jail*, CHANGE.ORG, <https://www.change.org/p/quinton-ross-request-federal-and-state-investigation-of-the-mysterious-death-of-18yo-sheneque-proctor-found-in-bessemer-al-jail>; *Black Women and Girls Killed by the Police. Speak Their Names, See Their Faces and Know Their Stories*, BOUGIE BLACK GIRL (Aug. 24, 2014), <http://bougieblackgirl.com/black-women-girls-killed-law-enforcement-see-faces-speak-names-know-stories/>.

84. SAY HER NAME, *supra* note 53, at 22 (noting that in 2012, Rekia Boyd was killed by an off-duty police officer in Chicago while standing in an alley with friends. In 2015, a judge cleared the officer of all charges).

85. *Id.* at 13 (noting that in July of 2015, Sandra Bland was pulled over for an alleged minor traffic violation. Video of arrest shows her being slammed on the ground by an officer before being arrested and taken into custody. While in custody, just three days later, she was found dead in. The Waller County Jail stated that she had committed suicide, however, foul play is suspected).

86. *Id.* at 22 (noting that in 2010, seven year old Aiyana Stanley-Jones was killed by a Detroit police officer during a raid. In January 2015, the officer was cleared of any criminal liability and returned to work on the police force).

87. *Id.* at 18 (noting that in 2014, Tanisha Anderson was killed by police while responding to a call that she was having a mental crisis. She was slammed on the pavement by officers and died from those injuries).

Remember Kayla Moore.⁸⁸

In addition to police murders, advocates acknowledge gender- and sexuality-based police violence such as sexual harassment, assault, rape, or extortion that Black women and LGBTQ folks are disproportionately vulnerable to.⁸⁹ A report by the Center for Constitutional Rights also examines the experiences of members of the LGBTQ community with sexual harassment via stop-and-frisk.⁹⁰ However, mainstream efforts have not centered these experiences, consequently leaving victims, survivors, families, and communities with limited recognition and support.⁹¹ Rachel Gilmer, former Associate Director of AAPF, stated:

When we wear the hoodie, we know that we're embodying Trayvon. When we hold our hands up, we know we're doing what Mike Brown did in the moments before he was killed. When we say 'I can't breathe,' we're embodying Eric Garner's final words. We haven't been able to do the same thing for [B]lack women and girls. We haven't carried their stories in the same way.⁹²

Until we center diverse narratives of police violence, we cannot end it. Although advocates have spoken out against police sexual vio-

88. *Id.* at 19 (noting that in 2013, officers were called to help Kayla Moore, a Black transgender woman who was having a mental crisis. Instead of helping, officers attempted to arrest Kayla and suffocated her to death. This occurred in Berkeley, California).

89. Isis Madrid, *10 Tweets From #BlackWomensLivesMatter and #BlackTransLivesMatter You Need to Read*, GOOD (Dec. 24, 2014), <http://magazine.good.is/slideshows/black-women-trans-lives-matter#8>; Feminist Newswire, *UN Committee Reviews US on Police Brutality and Gender-Based Violence*, FEMINIST MAJORITY BLOG (Nov. 14, 2014, 4:52 PM), <http://feminist.org/blog/index.php/2014/11/14/us-delegation-to-un-demands-action-on-use-of-force-and-sexual-violence-against-citizens/> [hereinafter *Committee Reviews*]; Joseph Mayton, *When a Cop is the Rapist*, DAILY BEAST (Mar. 18, 2014, 9:37 AM), <http://www.thedailybeast.com/witw/articles/2014/03/18/cops-raping-women-while-on-duty-has-become-an-alarming-trend.html>; Michael Daly, *She Dialed 911. The Cop Who Came to Help Raped Her*, DAILY BEAST (Jan. 29, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/01/29/she-dialed-911-the-cop-who-came-to-help-raped-her.html>; Ericka Eichelberg, *The LAPD Waited How Long to Suspend 2 Cops Repeatedly Accused of Sexual Assault?!*, MOTHER JONES (Apr. 4, 2014, 9:15 AM), <http://www.motherjones.com/politics/2014/03/los-angeles-lapd-sexual-assault/>; Lucy Nicholson, *Houston Cop Handcuffed and Raped Immigrant in Police Cruiser*, RT (Sept. 5, 2012, 8:00 PM), <http://rt.com/usa/handcuffed-immigrant-police-rape-465/>; Paula Mejia, *Why Cops Get Away with Rape*, NEWSWEEK (July 9, 2014, 6:12 PM), <http://www.newsweek.com/police-sexual-assault-rape-justice-258130>; *Law Enft Violence*, *supra* note 41, at 139 (“Yet women and girls, and particularly women of color, are sexually assaulted, raped, brutally strip-searched, beaten, shot, and killed by law enforcement agents with alarming frequency, experiencing many of the same forms of law enforcement violence as men of color, as well as gender- and race-specific forms of police misconduct and abuse.”); Black Women’s Blueprint, <http://www.blackwomensblueprint.org/tribunal.html> (last visited Apr. 10, 2016); INCITE!, *Stop Law Enforcement Violence Toolkit*, <http://incite-national.org/page/stop-law-enforcement-violence-toolkit> (last visited Apr. 10, 2016).

90. HUMAN IMPACT, *supra* note 46, at 5.

91. *Id.* at 5.

92. Workneh, *supra* note 80.

lence, there is a dearth of legal scholarship on the subject. It is time to close this gap.⁹³ The next section will briefly discuss the prevalence of police sexual violence and historicize and demarginalize Black women's vulnerability.

II. RACE AND STRUCTURAL SEXUAL VIOLENCE

Various identity markers,⁹⁴ including race, compound vulnerabilities to sexual harassment and assault. By discussing police sexual violence and historicizing the vulnerabilities of Black women to interracial rape, this section critiques policing as an institution rooted in rights violations in order to recognize and address sexual assault as structural oppression.

A. Police Sexual Violence

With close to 18,000 state and local law enforcement agencies in the United States,⁹⁵ police officers are tasked with protecting and serving the general public by enforcing the law. However, police officers have failed in myriad ways to do just that. Policing is a male dominated institution demographically and culturally,⁹⁶ which is reflected in how issues disproportionately impacting women and other marginalized populations are handled. In the context of sexual assault, rape culture—producing the stigma, shame, silence, and justification of sexual assault—within police departments results in the failure to properly record and investigate rape allegations.⁹⁷

93. *Law Enf't Violence*, *supra* note 41, at 139–40 (“[I]t is long past time that law enforcement accountability and organizing integrate and address the experiences of women of color—not just as mothers, partners, and children of men of color targeted by systemic state violence and the criminal legal system, but as both targets of law enforcement violence and agents of resistance in our own right.”).

94. Although intending to utilize an intersectional lens, this section speaks specifically to the historical vulnerabilities of Black cisgender women but is not meant to exclude the particular vulnerabilities of non-cisgender folks in our community.

95. University of Alaska Anchorage Justice Center, *U.S. State and Local Law Enforcement Agencies Census 2008: A BJS Report*, ALASKA JUSTICE FORUM VOL. 28, No. 2-3 (2011), http://justice.uaa.alaska.edu/forum/28/2-3summerfall2011/f_lawenf_census.html.

96. Peter B. Kraska & Victor E. Kappeler, *To Serve and Pursue: Exploring Police Sexual Violence Against Women*, 12 JUST. Q. 1, at 87 (1995), <http://dx.doi.org/10.1080/07418829500092581> [hereinafter *To Serve*]; SANDRA N. HEIB, POLICE OFFICERS AS PERPETRATORS OF CRIMES AGAINST WOMEN AND CHILDREN 2, 7 <http://justicewomen.com/wjc-project-final.pdf> (“Police work has primarily been a male-dominated profession and has had its own distinct culture; both of which are conducive to violence behavior against women and children.”). [hereinafter PERPETRATORS]

97. HUMAN RIGHTS WATCH, CAPITOL OFFENSE: POLICE MISHANDLING OF SEXUAL ASSAULT CASES IN THE DISTRICT OF COLUMBIA 170 (2013), http://www.hrw.org/sites/default/files/reports/us0113ForUpload_0.pdf.

Survivors are frequently subjected to character attacks and victim blaming, where officers appear more concerned with what they were doing or wearing than what was done to them.⁹⁸ Additionally, the legal burden of proof in criminal proceedings is often too high to meet⁹⁹—the nature of sexual assault produces the classic “he said, she said” situation due to the usual lack of witnesses, a prior romantic or acquaintance relationship between the parties, and sexist views about women’s sexuality.¹⁰⁰

To circumvent these barriers, advocates have sought to train law enforcement and establish resources at hospitals and within police departments. Additionally, in the context of sexual assault on college campuses, advocates have fought for stronger campus policies to address sexual harassment and assault for several reasons, including the lessened burden of proof for campus based adjudications.¹⁰¹

In 1994, the Violence Against Women Act¹⁰² was passed to generate harsher penalties for rapists, establish resources for survivors, and build stronger partnerships with law enforcement.¹⁰³ Viewing law

98. PERPETRATORS, *supra* note 96, at 5.

99. In criminal proceedings, the Due Process Clause requires that the prosecution prove all elements of the crime charged beyond a reasonable doubt. *See Bunkley v. Florida*, 538 U.S. 835 at 840. In civil proceedings, the standard of proof is by a preponderance of the evidence. *See generally In re Winship*, 379 U.S. 358 (holding that the preponderance of the evidence standard was insufficient in juvenile delinquency proceedings).

100. *See generally* Cassia Spohn and Katharine Tellis, *Justice Denied?: The Exceptional Clearance of Rape Cases in Los Angeles*, 74 ALB. L. REV. 1379, at 1395–97.

101. Advocates often lean on mechanisms that have a lower burden in order to circumvent the formal adversarial judicial system that relies on physical evidence, assessing witness credibility, and rooted in biases and a failure to understand trauma. For information on the impact of a lower standard of proof on respondents in college sexual assault matters, see generally Stephen Henrik, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 NORTHERN KENTUCKY L. REV. 49 (2013), http://chaselaw.nku.edu/content/dam/chaselaw/docs/academics/lawreview/v40/nklr_v40n1_pp049-092.pdf.

102. H.R. 3355 – Violent Crime Control and Law Enforcement Act of 1994, <https://www.congress.gov/bill/103rd-congress/house-bill/3355/text>; Violence Against Women Reauthorization Act of 2013, <https://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf>.

103. Although VAWA was established with the goal of protecting women, advocates have asserted that VAWA has actually backfired on women of color due to stereotypes. When police respond to domestic violence complaints, women of color are seen as engaging in “mutual combat” and are subjected to arrest. For information, see POLICE VIOLENCE & DOMESTIC VIOLENCE, INCITE!, http://www.incitenational.org/sites/default/files/incite_files/resource_docs/2883_toolkitrev-domesticviolence.pdf; Fact Sheet on Domestic Violence and the Criminalization of Survival, FREE MARISSA NOW, <http://www.freemariissanow.org/fact-sheet-on-domestic-violence—criminalization.html>; A.B.A. COMM’N DOMESTIC VIOLENCE, DOMESTIC VIOLENCE ARREST POLICIES BY STATE (2007), http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.authcheckdam.pdf; Radha Iyengar, *The Protection Battered Spouses Don’t Need*, N.Y. TIMES (Aug. 7, 2007), <http://www.nytimes.com/2007/08/07/opinion/07iyengar.html>; David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*, 98 J.

enforcement as a safety necessity begs the question: What about police who are perpetrators themselves?¹⁰⁴

As mentioned in Part I, the framing of racial profiling and police violence revolves around the experiences of men as victims of excessive force. Based on that narrative, “one would assume that police commit unjustifiable acts of violence only against men, and that women suffer no direct and systemic mistreatment at the hands of police officers.”¹⁰⁵ This is gravely untrue.

Police culture and authority encourages misconduct of all types, including sexual harassment and violence.¹⁰⁶ The training officers receive “emphasizes being in control, gaining compliance through various levels of force, and behaving in an authoritative manner.”¹⁰⁷ Until recently, research into police sexual violence typically focused on police on-duty consensual sex. This research considered quid pro quo sexual solicitation as consensual¹⁰⁸ thereby masking the inherent coerciveness of such “favors.”¹⁰⁹

A more comprehensive definition of police sexual violence includes “situations in which a [person] experiences a sexually degrading, humiliating, violating, damaging, or threatening act committed by a police officer through the use of force or police authority.”¹¹⁰ Police sexual violence operates on a continuum, from invasions of privacy to

CRIM. L. & CRIMINOLOGY 255 (2007), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7284&context=jclc>; Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009); *Law Enft Violence*, *supra* note 41, at 150 (“Society’s reliance on law enforcement-based responses to violence against women has had a number of unintended consequences, not the least of which is increased vulnerability of survivors to violence.”).

104. *Law Enft Violence*, *supra* note 41, at 140–42 (noting that women’s rights advocates “rely almost exclusively on law-enforcement agencies as the primary, if not exclusive, response to interpersonal violence” thus framing law enforcement as protectors rather than perpetrators of violence against women. By doing so, the experience of marginalized populations is left out of the conversation).

105. *To Serve*, *supra* note 96, at 86.

106. Philip M. Stinson, John Liederbach, Steven L. Brewer, & Brooke E. Mathna, *Police Sexual Misconduct: A National Scale Study of Arrested Officers*, CRIMINAL JUSTICE FACULTY PUBLICATIONS, at 2, http://scholarworks.bgsu.edu/crim_just_pub/30 [hereinafter *National Scale*].

107. PERPETRATORS, *supra* note 96, at 9.

108. *National Scale*, *supra* note 106, at 4; *To Serve*, *supra* note 97, at 87.

109. *To Serve*, *supra* note 96, at 88 (treating officers as “passive actors who are “corrupted,” rather than active corruptors”).

110. *To Serve*, *supra* note 96, at 93.

body cavity searches from sexual extortion to rape.¹¹¹ Unfortunately, data is not systematically collected nationwide.¹¹²

Several studies have been conducted, analyzing media sources and criminal cases, which renders the data non-comprehensive.¹¹³ One of these studies by the CATO Institute in 2010 found that police sexual violence is the second highest reported police complaint, after use of force¹¹⁴ with over half of the complaints “involv[ing] forcible non-consensual sexual activity such as sexual assault or sexual battery.”¹¹⁵ Adult survivors were mostly assaulted while officers were on duty.¹¹⁶

The report not only exposed the high volume of sexual violence complaints, but also showed that the rate of police sexual assaults significantly surpasses that of the general public¹¹⁷—indicating that we have more accused sex offenders in our police departments than we do outside of them.

Sexual assault in general is grossly underreported¹¹⁸—therefore, available data is just the tip of the iceberg. Reporting barriers are even more problematic when the assailant is a police officer¹¹⁹ due to fear of retaliation, intimidation, embarrassment, and blame¹²⁰—as one

111. *To Serve*, *supra* note 96, at 94; *National Scale*, *supra* note 106, at 6.

112. *National Scale*, *supra* note 106, at 7 (“[H]idden nature of the problem and the resulting absence of any sort of official data.”); *IN THE SHADOWS*, *supra* note 29, at 26–27.

113. *IN THE SHADOWS*, *supra* note 29, at 26 (“[O]ur methodology is probably more likely to capute those cases that could not be ignored and compelled an arrest because they were indeed egregious.”).

114. CATO INSTITUTE, 2010 ANNUAL REPORT 4, 7–8, http://www.policemisconduct.net/statistics/2010-annual-report/#_Sexual_Misconduct [hereinafter CATO REPORT].

115. *Id.*

116. PERPETRATORS, *supra* note 96, at 11.

117. CATO REPORT, *supra* note 114.

118. See MICHAEL PLANTY ET AL., FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010, at 6, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>. (“In 1995, 29% of rape or sexual assault victimizations against females were reported to police. This percentage increased to 56% in 2003 before declining to 35% in 2010.”) [hereinafter FEMALE VICTIMS].

119. *IN THE SHADOWS*, *supra* note 29, at 27. (“One can only imagine that the reporting rate is far lower among women who are raped or sexually assaulted by the very law enforcement agents who are charged with protecting them.”).

120. CHIEFS OF POLICE, *supra* note 40, at 4; *National Scale*, *supra* note 106, at 3; PERPETRATORS, *supra* note 96, at 5; *To Serve*, *supra* note 96, at 92 (“Victims of sexual violence in general have few incentives to pursue a formal complaint, as well as many disincentives including the fear of being blamed for the incident and the fear of not being believed.”); Janice Du Mont et al., *The Role of “Real Rape” and “Real Victim” Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 466, 468–69 (2003), <http://vaw.sagepub.com/content/9/4/466>. See generally Angi Becker Stevens, *17-Year-Old Imprisoned for Failing to Testify Against Her Alleged Rapist*, MS MAGAZINE BLOG (Apr. 16, 2012), <http://msmagazine.com/blog/2012/04/16/17-year-old-imprisoned-for-failing-to-testify-against-her-alleged->

survivor stated, “Like, what am I going to do? Call the cops? He was a cop.”¹²¹

Police officers are infamous for shielding each other,¹²² making it difficult to hold officers accountable.¹²³ The differential treatment of police officers accused of sexual assault impacts punishment, or the lack thereof. Officers are charged with lesser offenses,¹²⁴ “dealt with internally and away from the public eye,”¹²⁵ and allowed to remain on the force.¹²⁶ Therefore, officer impunity is a constant—whether through the failure to discipline and prosecute,¹²⁷ the failure to convict and incarcerate,¹²⁸ or the failure to sentence comparably to the general public.¹²⁹

The lack of physical evidence and data also complicates criminal prosecution and access to civil remedies. Delays in seeking medical treatment reduce the likelihood of obtaining any physical evidence of sexual assault. Also, assumptions about survivor behavior can lead to the classification of their allegations as a false report.¹³⁰ In the civil context, the lack of police sexual violence data can produce barriers in showing a pattern or practice¹³¹ of police misconduct in order to hold police departments or municipalities accountable for the actions of officers.¹³²

rapist/. (noting additionally, by lodging a complaint and pursuing criminal charges, survivors need to be prepared to testify, which can be a retraumatizing experience).

121. Matt Sedensky and Nomaan Merchant, *Hundreds of Officers Lose License Over Sex Misconduct*, AP (Nov. 1, 2015, 12:00 AM), <http://bigstory.ap.org/article/fd1d4d05e561462a85abe50e7eae44ec/ap-hundreds-officers-lose-licenses-over-sex-misconduct> [hereinafter *Lose License*].

122. PERPETRATORS, *supra* note 96, at 7.

123. *Abolitionist Framework*, *supra* note 69, at 278.

124. *National Scale*, *supra* note 106, at 9; *To Serve*, *supra* note 96, at 102 (“rarely handled as “crime” by a police department or the criminal justice system.”).

125. PERPETRATORS, *supra* note 96, at 2.

126. *National Scale*, *supra* note 106, at 7; CHIEFS OF POLICE, *supra* note 40, at 4; *Lose License*, *supra* note 121 (noting that the Associated Press uncovered about 1,000 officers who lost their badges between 2009 and 2014 for rape, sodomy, and other sexual assault. The data is limited because nine states and the District of Columbia either did not have a decertification process or refused to provide information. California and New York, for example, have two of the largest departments in the country yet do not have a system of decertification).

127. CATO REPORT, *supra* note 114.

128. *Id.*

129. *Id.*

130. National Sexual Violence Resource Center, *False Reporting Overview*, at 2–3, http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf [hereinafter *NSVRC Overview*].

131. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141; Omnibus Crime Control and Safe Streets Act of 1968; Title VI of the Civil Rights Act of 1964.

132. Research has shown that individual officers hardly ever pay settlements for police misconduct, instead the local government indemnify officers. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

To contest the framing of police sexual violence as an aberration,¹³³ studies clearly show that sexual violence at the hands of law enforcement is occupationally generated.¹³⁴ In the course of their job, officers have unprecedented access to power and engage in legally sanctioned intrusive practices, such as invasive cavity searches. Officers operate under little to no supervision,¹³⁵ are armed, and have access to personal information. Conducting searches is a frequent task of officers, which can serve as a cover for sexually abusive conduct. However, “operational justification means little” when you are on the receiving end.¹³⁶

Additionally, assaulting a police officer and resisting arrest laws preclude citizens from physically protesting their arrest,¹³⁷ even slightly. These laws can then be leveraged against survivors when attempting to refuse sexual advancements and resist sexual assault. Thus, police sexual violence is occupationally generated through the legitimization of “routine” police practices that mask “illegitimate” conduct. By allowing structures that facilitate sexual misconduct to persist, we fail to protect people from dignity harms, especially when searches are used for the sexual gratification of officers or to sexually humiliate or intimidate civilians.¹³⁸

133. ANDREA RITCHIE, PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, POLICY AND OVERSIGHT: WOMEN OF COLOR’S EXPERIENCES OF POLICING 3 (2015), <http://changethenypd.org/sites/default/files/docs/Women’s%20Sign%20Letter%20on%20to%20Presidential%20Task%20Force%20-%20Policy%20and%20Oversight%20-%20FINAL.pdf> (“Sexual misconduct, while not justified by any lawful purpose, is by no means an isolated phenomenon, and is facilitated by the authority vested in law enforcement officers, and therefore requires a policy response by law enforcement agencies.”).

134. *To Serve*, *supra* note 96, at 89, 97–98 (“A continuum counters the tendency to view the more extreme forms of sexual violence as aberrations, which severs them from their common structural and cultural bases.”).

135. *To Serve*, *supra* note 96, at 89; *National Scale*, *supra* note 106; PERPETRATORS, *supra* note 96, at 13; CHIEFS OF POLICE, *supra* note 40, at 4 (“Within the policing profession some conditions of the job may inadvertently create opportunities for sexual misconduct. Law enforcement officers (1) have power and authority over others; (2) work independently; (3) sometimes function without direct supervision; (4) often work late into the night when their conduct is less in the public eye; and (5) engage with vulnerable populations who lack power and are often perceived as less credible (noting as juveniles, crime victims, undocumented people, and those with addictions and mental illness as examples).”).

136. *To Serve*, *supra* note 96, at 99; ANGELA DAVIS, ARE PRISONS OBSOLETE? 82–83 (2003) (stating that invasive searches would be considered sexual assault if done by someone not in police uniform) [hereinafter OBSOLETE].

137. For more information on how “Assaulting a Police Officer” statutes can be used to harm citizens, see Christina Davidson & Patrick Madden, *Assault on Justice*, WAMU 88.5, <http://wamu.org/projects/assault-on-justice/>.

138. *Id.*; IN THE SHADOWS, *supra* note 29 (“Individuals and advocates also report that searches of women and transgender individuals by law enforcement officials are often conducted in a violent or abusive fashion amounting to sexual assault or cruel, inhuman, and degrading

Furthermore, serial misconduct,¹³⁹ incidents involving more than one officer,¹⁴⁰ and the involvement of officers of all ranks¹⁴¹ are common. Therefore, characterizing police sexual violence as occurring by “rogue” officers “promotes a conceptualization of police sexual deviance that denies the violence associated with sexual victimization, and negates the possibility of a systematic or occupationally generated form of police victimization of women.”¹⁴²

The vulnerabilities of women and children are documented within the research.¹⁴³ For example, the “pattern of police officers using their traffic enforcement powers to abuse women” has been dubbed “driving while female.”¹⁴⁴ Police sexual violence is “often committed against women not at random, but systematically, because of their status as women,”¹⁴⁵ thereby constituting gender-based violence. Because officers select victims they think will not be believed, victimization is often higher among certain populations including:

- (1) minors; (2) individuals in prostitution and/or the commercial sex industry; (3) individuals under the influence of drugs or alcohol; (4) immigrants and undocumented persons; (5) individuals with limited English proficiency; (6) people with mental illness or developmental challenges; (7) individuals with physical disabilities; and (8) those who have been victimized previously.¹⁴⁶

treatment. For instance, strip searches conducted on the street in full public view or in police precincts in view of other detainees and officers, often by officers of a different gender, have been reported in several jurisdictions. Transgender women and gender nonconforming individuals also report frequent unwarranted, invasive and abusive searches, including strip searches, often for the sole purpose of ascertaining their genital status.”)

139. *National Scale*, *supra* note 106, at 7, 14 (locating in its study 548 cases between 2005 and 2007 where police officers were arrested for sexual offenses. Of those officers, over 12% of them were either arrested more than once or had more than one victim).

140. *To Serve*, *supra* note 96, at 96.

141. *National Scale*, *supra* note 106, at 15.

142. *To Serve*, *supra* note 96, at 89, 108 (“These sociocultural links demonstrate the importance of conceptualizing police sexual violence on a continuum. In this way we can avoid viewing police crime as simply an aberration committed by a rogue officer; we can place it within an entire range of less obtrusive behaviors, all of which have common structural and cultural roots.”).

143. *See generally* PERPETRATORS, *supra* note 96.

144. *See generally* SAMUEL WALKER & DAWN IRLBECK, POLICE PROFESSIONALISM INSTITUTE, “DRIVING WHILE FEMALE”: A NATIONAL PROBLEM IN POLICE MISCONDUCT (2002).

145. *To Serve*, *supra* note 96, at 86.

146. CHIEFS OF POLICE, *supra* note 40, at 13; IN THE SHADOWS, *supra* note 29, at 26 (“[O]fficers target women who are vulnerable and unlikely to be believed should they attempt to report the abuse, including women of color, immigrant women, transgender women, domestic violence survivors, women who use controlled substances, homeless women, sex workers, and women labeled as mentally ill.”).

Available data does not include “names and other personally identifiable information”¹⁴⁷ of survivors. The hypervulnerability of people of color and members of the LGBTQ community is seldom addressed within studies and reports, however, FBI arrest statistics for prostitution offenses,¹⁴⁸ for example, confirm that race matters.

To center the vulnerability of Black women to police sexual violence, I will briefly historicize sexualized racial terror and its relationship to policing in the next section. By not recognizing the intersections of race and gender, our solutions to sexual violence are limited and the unique vulnerabilities of Black women and other marginalized populations are ignored.

B. A Brief History of Sexualized Racial Terror Against Black Women

A [B]lack woman’s body was never hers alone
– Fannie Lou Hamer.¹⁴⁹

The vulnerability of Black women in the United States to interracial rape with impunity has its roots in chattel slavery and Jim Crow. By historicizing these vulnerabilities, we are able to map the legacy of state sanctioned violence against Black women and its intergenerational impact.

Chattel slavery in the United States began in the 17th century with the arrival of captured Africans who were soon after sold to the highest bidder to work on plantations as property.¹⁵⁰ Not only were enslaved Africans exploited for their physical labor, but enslaved Black women in particular were exploited for their reproductive labor

147. *National Scale*, *supra* note 106, at 14.

148. According to FBI, in 2014 over 40% of adults arrested for prostitution offenses were Black and over 50% of youth arrested for prostitution offenses were Black. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS tbl. 43 (2014), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-43>; Meanwhile, Black people only make up approximately 13% of the U.S. population. United States Census Bureau, *Quick Facts United States*, <http://www.census.gov/quickfacts/table/PST045215/00>.

149. CHANA KAI LEE, *FOR FREEDOM’S SAKE: THE LIFE OF FANNIE LOU HAMER* 9–10 (2000).

150. Chattel slavery differed from indentured servitude. Instead of a set term of service, enslaved people were rendered property. Additionally, being enslaved was an inherited status. Several laws in the American colonies shifted the treatment of Africans from indentured servants to chattel in the 1600s. For example, in 1640, a Virginia court case was one of the first to distinguish between white and Black indentured servants by declaring a Black runaway indentured servant a slave for life, while two white indentured servants were given additional years of servitude. Helen Tunnicliff Catterall, ed., *Judicial Cases Concerning American Slavery and the Negro*, 5 vols. (1926; reprint, New York: Octagon Books, 1968; KF4545.S5 C3 1968), 1:77.

as well.¹⁵¹ Laws such as the Virginia *partus sequitur ventrem*¹⁵² statute in 1662, assigned the status of enslaved women to their children,¹⁵³ thus making any child born during slavery the property of the enslaver—this included children conceived through rape. Therefore, rape was a tool of white supremacy¹⁵⁴ and wealth generation.

Pejorative stereotypes about Black womanhood were developed to justify sexual violence.

[I]magery of [Black women's] bodies as hypersexual, 'wild,' 'savage,' and 'dirty,' served to rationalize the brutality of the social control mechanisms used against them . . . [O]ne of the original functions of the socially constructed Jezebel, or hypersexual temptress image, was to justify the institutionalized rape of African women under slavery.¹⁵⁵

The legal system did not protect Black women—to the contrary, laws deeply entrenched and legitimized their subjugation. Rape was viewed as “negligible” and “not affecting the existence” of the enslaved person because sexual violence functioned to improve the func-

151. See Camille LaFleur et al., *Resistance and Revolts by Enslaved Women*, COMPARATIVE SLAVE REBELLIONS (2011), <http://sites.uci.edu/slaverebellionswinter2011/enslaved-women-and-rebellion/>; BLACK WOMEN'S BLUEPRINT & YOLANDE M. S. TOMLINSON, *INVISIBLE BETRAYAL: POLICE VIOLENCE AND THE RAPES OF BLACK WOMEN IN THE UNITED STATES* (2014) at 3, http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18555_E.pdf [hereinafter *INVISIBLE*] (“As bodies to produce other enslaved bodies, as flesh to satisfy their slave master’s desires, as slaves to be worked as needed, and as property to be sold at will, Black women were deemed not able to be raped.”).

152. JOHN BOUVIER, *A LAW DICTIONARY: ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES* (1856), <http://legal-dictionary.thefreedictionary.com/Partussequitur+ventrem> (“The offspring follow the condition of the mother. This is the law in the case of slaves and animals; 1 Bouv. Inst. n. 167, 502; but with regard to freemen, children follow the condition of the father.”).

153. Act XII, Laws of Virginia, December 1662 (Hening, Statutes at Large, 2: 170) Act XII: Negro womens children to serve according to the condition of the mother. WHEREAS some doubts have arrisen whether children got by any Englishman upon a Negro woman should be slave or free, Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shalbe held bond or free only according to the condition of the mother, And that if any christian shall committ ffornication with a Negro man or woman, hee or shee soe offending shall pay double the ffinnes imposed by the former act.

154. *AAPF Webinar 3*, *supra* note 17 (moderator Kimberlé Crenshaw); Danielle McGuire, “*It Was Like All of Us Had Been Raped*”: *Sexual Violence, Community Mobilization, and the African American Freedom Struggle*, 91 J. AM. HIST., at 907 (2004), http://www.jstor.org/stable/3662860?origin=JSTOR-pdf&seq=1#page_scan_tab_contents (“Rape, like lynching and murder, served as a tool of psychological and physical intimidation that expressed white male domination and buttressed white supremacy.”) [Hereinafter *All of Us*].

155. AMERICAN POLICE CRIMES, *supra* note 32, at 2; *INVISIBLE*, *supra* note 151 (“Under this logic, Black women were thought to not only lack the capacity to make morally sound decisions but they are made to bear the blame for their own abuse. This racist logic further implies that this deficient capacity and animalistic quality function to entice their perpetrators, which means Black women seek out their own rape and sexual exploitation, and therefore cannot be raped because they wanted it—it’s in their nature.”).

tionality of chattel slavery through reproductive labor.¹⁵⁶ Consequently, Black women in particular were not “appropriate subjects of common law, and thus not protected against rape.”¹⁵⁷

By denying Black people the opportunity to testify against white perpetrators¹⁵⁸ and the inability to allege self-defense,¹⁵⁹ rape law itself upheld the notion of Black women as “always already willing” and “invulnerab[le] to sexual violation.”¹⁶⁰ In other words, Black women were unrapeable.

As stated by Harriet Jacobs, a formerly enslaved Black writer and abolitionist:¹⁶¹

You never knew what it is to be a slave; to be entirely unprotected by law or custom; to have the laws reduce you to the condition of a chattel, entirely subject to the will of another.¹⁶²

Controlling images, gender-specific punishments,¹⁶³ and

156. Saidiya Hartman, *Seduction and the Ruses of Power*, 19 CALLALOO, EMERGING WOMEN WRITERS: A SPECIAL ISSUE 537–60, 542, 553 [hereinafter *Ruses of Power*].

157. *Id.* at 537.

158. 1717 Maryland law:

II. Be it Therefore Enacted, by the right honourable the Lord Proprietary, by and with the advice and consent of his Lordship's Governor, and the Upper and Lower Houses of Assembly, and by the authority of the same, That from and after the end of this present session of assembly, no Negro or mulatto slave, free Negro, or mulatto born of a white woman, during his time of servitude by law, or any Indian slave, or free Indian natives, of this or the neighbouring provinces, be admitted and received as good and valid evidence in law, in any matter or thing whatsoever depending before any court of record, or before any magistrate within this province, wherein any christian white person is concerned.

Laws of Maryland, chap. XIII (May 1717), 140.

159. *Ruses of Power*, *supra* note 156, at 543.

160. *Id.* at 539, 543, 555.

161. Harriet Jacobs was born into slavery. After running away to freedom, she wrote and published an autobiography, *Incidents in the Life of a Slave Girl*. Her autobiography openly documented her experiences with, and resistance to, sexual harassment at the hands of her enslaver. Once free, Jacobs was active in the abolitionist movement. See generally HARRIET JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* (1891).

162. *Id.* at 47–48.

163. OBSOLETE, *supra* note 136, at 67–68 (“It should also be kept in mind that until the abolition of slavery, the vast majority of black women were subject to regimes of punishment that differed significantly from those experienced by white women. As slaves, they were directly and often brutally disciplined for conduct considered perfectly normal in a context of freedom. Slave punishment was visibly gendered—special penalties, were, for example, reserved for pregnant women unable to reach the quotas that determined how long and how fast they should work. In the slave narrative of Moses Grandy, an especially brutal form of whipping is described in which the woman was required to lie on the ground with her stomach positioned in a hole, whose purpose was to safeguard the fetus (conceived as future slave labor). If we expand our definition of punishment under slavery, we can say that the coerced sexual relations between slave and master constituted a penalty exacted on women, if only for the sole reason that they were slaves. In other words, the deviance of the slave master was transferred to the slave woman, whom he victimized.”).

dehumanizing sexual assault jurisprudence,¹⁶⁴ did not shift post-emancipation.

After the era of Reconstruction, segregationist laws ushered in the era of Jim Crow.¹⁶⁵ Just as during chattel slavery, Black women were frequently subjected to sexualized racial terror with impunity, such as threats, indecent exposure, and gang rape.¹⁶⁶ Rosa Parks, prior to refusing to give up her seat at the front of a segregated bus, investigated the rapes of Black women in the South.¹⁶⁷ Indeed, it was the sexual assault of Black women by white employers, police officers, and strangers that helped to spark the Montgomery bus boycotts.¹⁶⁸

Black women would bring forth their narratives of interracial sexual harassment and assault in order to magnify their voices.¹⁶⁹

Remember Betty Jean Owens;¹⁷⁰

Remember Recy Taylor;¹⁷¹

Remember Gertrude Perkins;¹⁷²

Remember Fannie Lou Hamer;¹⁷³

Remember Mary Ruth Reed.¹⁷⁴

164. *Ruses of Power*, *supra* note 156, at 538 (“If the definition of the crime of rape relies upon the capacity to give consent or to exercise will, then how does one make legible the sexual violation of the enslaved, when that which would constitute evidence of intentionality, and thus evidence of the crime, the state of consent or willingness of the assailed, opens onto a Pandora’s box in which the subject formation and object constitution of the enslaved female is no less ponderous than the crime itself.”).

165. For background on Jim Crow, see LESLIE VINCENT TISCHAUSER, *JIM CROW LAWS* (2012).

166. *All of Us*, *supra* note 154, at 909.

167. *DARK END*, *supra* note 32, at xx.

168. *All of Us*, *supra* note 154, at 910.

169. *DARK END*, *supra* note 32, at xix.

170. *All of Us*, *supra* note 154, at 906–07, 928 (noting that in 1959, Betty Jean Owens along with three other Florida A&M University students were leaving from a ball when they were stopped by four white men. The two males were told to leave. Betty Jean and Edna Richardson were forced out of the car. Edna was able to break free. Betty Jean was held at knife and gunpoint. The men raped her repeatedly. Her case went to trial and her rapists were convicted and sentenced to life in prison).

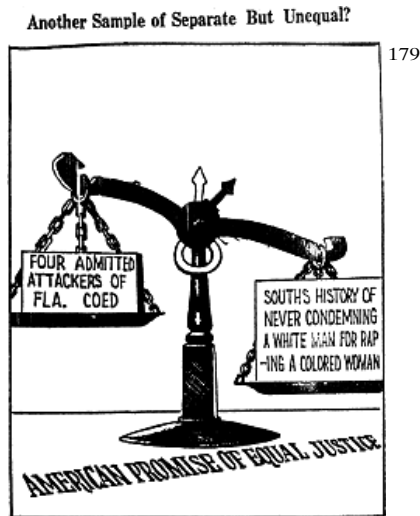
171. *Id.* at 911 (noting that in 1944, Recy Taylor was kidnapped and gang in Alabama by six white men who held her at gun point. Rosa Parks took part in investigating her assault).

172. *Id.* at 912 (noting that in 1949, Gertrude Perkins was walking home in Alabama when she was stopped by two white police officers and arrested for public drunkenness. She was forced into their car and then repeatedly raped at gun point. When they were done, they threw her out of their car).

173. *Id.* at 910 (noting that while detained in a Mississippi jail in 1963, Fannie Lou Hamer, a renowned freedom fighter, was severely beaten. While being assaulted, her dress was pulled up as officers attempted to grope her).

174. *All of Us*, *supra* note 154, at 922 (noting that in 1959, Mary Ruth Reed was raped and beaten by a white mechanic in front of her five children. At the trial, jurors laughed as she testified. Within ten minutes of jury deliberation he was found not guilty).

Sexualized violence and rape would result in campaigns, congressional hearings, press releases, radio broadcasts, and even criminal trials.¹⁷⁵ Hundreds would attend antirape protests and pack courtrooms.¹⁷⁶ The activism and support to survivors reflected the key role of fighting against sexual violence in the Black freedom struggle.¹⁷⁷ As one activist noted, “we all felt violated, male and female. It was like all of us had been raped.”¹⁷⁸



Survivors and activists were not only fighting against sexual assault, but also the character assassinations of Black women that went hand in hand. When cases against white rapists were brought to trial, defense attorneys would argue that the rapists were simply “having a little fun”¹⁸⁰ and Black women enjoyed it.¹⁸¹ Similar to slavery, the dignity and bodily autonomy of Black women was incomprehensible.

175. *Id.* at 908–12.

176. *Id.* at 918.

177. *Id.* at 914; Even prior to the Civil Rights Movement, the rape of Black women and girls prompted community outrage and protests. For example, after World War I in Long Beach, California a race riot ensued after the sexual assault of a fourteen year old Black girl by a group of four white men. See B. GORDON WHEELER, *BLACK CALIFORNIA: THE HISTORY OF AFRICAN AMERICANS IN THE GOLDEN STATE* 198 (1993) (“In Long Beach, an incident that touched off a race riot was the sexual assault of a fourteen-year-old [B]lack girl. Walking home from school, she was attacked by four white men, one of whom raped her. No arrests were made, and a Long Beach police officer was overheard saying, “What’s the big fuss? It was only a colored girl.”).

178. *Id.* at 917.

179. *All of Us*, *supra* note 154, at 921.

180. *Id.* at 922.

181. *Id.* at 924.

Rape as a “weapon of terror”¹⁸² reified the second class status of Black men and women in the United States.¹⁸³ White men were given “the authority to stop, search, detain, beat, rape, and kill [people of] African[] [descent].”¹⁸⁴ Policing is rooted in this legacy. It was common for police officers to assist in brutal violence against Black folks as the cops themselves were often unabashedly members of the Ku Klux Klan.¹⁸⁵ While detained in a Mississippi jail, Fannie Lou Hamer was brutally beaten and officers pulled up her dress to sexually grope her.¹⁸⁶ Gertrude Perkins was raped repeatedly at gunpoint by two uniformed police officers and thrown out of their squad car once they were done.¹⁸⁷

Although the Thirteenth Amendment abolished slavery, it permitted slavery to be leveraged against people as punishment for a crime,¹⁸⁸ thereby reifying police surveillance and abuse. As shown in Part II(A), the deference, power, and authority given to police officers creates a breeding ground for violations, such as sexual harassment and assault.¹⁸⁹ Invasive searches, profiling as sex workers, and the operation of controlling images have historically justified access to Black women’s bodies.¹⁹⁰ The policing of sexuality and gender expression was made possible

through historic laws making it an offense for a woman to be found in the streets unaccompanied at night and current prostitu-

182. DARK END, *supra* note 32, at xvii-xviii.

183. In regards to Black men, they were subjected to the death penalty or extra-judicially lynched for unsubstantiated allegations of sexually assaulting white women. The rape of Black women was also used to justify highly punitive laws against Black men out of white fear of retaliatory rapes. *All of Us*, *supra* note 154, at 919–20.

184. AMERICAN POLICE CRIMES, *supra* note 32, at 1.

185. *Id.* (“[I]t was common practice for the Sheriff and police officers to assist lynch mobs in brutalizing and murdering citizens of color.”).

186. *All of Us*, *supra* note 154, at 910.

187. *Id.* at 912.

188. Thirteenth Amendment, Section 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”). Thirteenth Amendment jurisprudence also is supposed to protect from “badges and incidents of slavery” yet the systemic rape of Black women hasn’t fully been acknowledged through this lens as a constitutional violation.

189. *Ruses of Power*, *supra* note 156, at 555 (noting that sexual violence is inherent within the “condition of enslavement.” Similarly, I argue that sexual violence is inherent within the structure of policing).

190. *Law Enft Violence*, *supra* note 41, at 144; AMERICAN POLICE CRIMES, *supra* note 32, at 3. (“[P]oor women of color are disproportionately targeted for police violence and harassment, especially with regard to stigmatized populations such as sex workers and transgender women of color.”); IN THE SHADOWS, *supra* note 29, at 21; OBSOLETE, *supra* note 136, at 62–63 (noting that women pushed back against the process of “getting finger-fucked” by law enforcement through campaigns with “Stop State Sexual Assault” as a slogan).

tion laws, moral regulations such as “lewd conduct” statutes, and, until recently, sodomy laws[.] [P]olice have been charged with enforcing dominant sexualities and punishing sexual “deviance.”¹⁹¹

Additionally, “individuals whose existence, expression, or conduct defies structures are, at best, objects of suspicion, heightened attention, and harassment by law enforcement officers, and, at worst, disposable people turned over to police to punish or ignore as they please.”¹⁹² Black women are often “treated by police as potentially violent, predatory, or noncompliant regardless of their actual conduct or circumstances.”¹⁹³ The characterization of Black women as criminals and deviants leads to “police extortion schemes such as those in which officers routinely demand sexual acts in exchange for leniency.”¹⁹⁴

As this section shows, white supremacy is maintained through physical and sexual domination.¹⁹⁵ Yet the “[s]ilence around sexual violence against Black women is pervasive, both within and outside of Black communities.”¹⁹⁶ This was not always the case¹⁹⁷—so why are the stories of Black women not centered in current efforts?

There are several possible explanations, including respectability politics, interest convergence,¹⁹⁸ and the emphasis on mass incarceration. Respectability politics impact collective memory,¹⁹⁹ thereby limiting our knowledge of vulnerabilities particular to Black women. Cases during the Civil Rights Movement were bolstered through appeals to purity and righteousness.²⁰⁰ But what happens when survivors are not “perfect victims”? The recent case of police sexual violence in Oklahoma City provides a great window into this dilemma.

191. *Law Enft Violence*, *supra* note 41, at 143.

192. *Id.* at 142.

193. *Id.* at 143, 148 (“[T]he operation of gender-specific controlling images informing police responses to Black women.”).

194. *Id.* at 152.

195. *All of Us*, *supra* note 154, at 929.

196. BLACK WOMEN’S BLUEPRINT, SEXUAL VIOLENCE AGAINST BLACK WOMEN IN THE UNITED STATES 1 (2015), <http://www.blackwomensblueprint.org/wp-content/uploads/Sexual-Violence-Against-Black-Women-2015-BWB-2015-final.pdf> [hereinafter BLUEPRINT].

197. The point here isn’t to fetishize prior time periods as being fully inclusive of Black women’s struggles and needs. However, the purpose is to historicize community campaigns and truth telling around the interracial rape of Black women with impunity.

198. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).

199. *All of Us*, *supra* note 154, at 913.

200. *Id.* at 931.

It was not until a 57-year-old grandmother filed a complaint that the investigation moved forward.²⁰¹ The other survivors had prior criminal records, including engaging in sex work and substance use.²⁰² When activists in Oklahoma City reach out to Black churches, they were turned away because the survivors were not seen as “sanctified,”²⁰³ rendering them “throw away women.”²⁰⁴ Thus, our quest for “respectable” survivors entrenches victim blaming and silences the experiences of vulnerable populations at the margins, such as Black transgender women.²⁰⁵

Additionally, interest convergence with law enforcement complicates our ability to fully critique policing as an institution. As mentioned in Part II(A), women’s rights organizations have partnerships with law enforcement that compromise their capacity to challenge policing practices. Advocates in Oklahoma City reached out to local women’s rights organizations but were met with private, but not public support.²⁰⁶ Although Black women are more likely than white women to be raped,²⁰⁷ isolated from support services,²⁰⁸ and less likely to report sexual assault,²⁰⁹ the hypervulnerability of Black women is not

201. Sarah Kaplan, *A Serial Rapist Cop’s ‘Mistake’: Assaulting the Grandmother Who Finally Reported Him*, WASH. POST (Dec. 11, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/12/11/daniel-holtzclaws-mistake-assaulting-the-grandmother-who-finally-reported-him/>.

202. Jessica Testa, *The 13 Women Who Accused A Cop Of Sexual Assault, In Their Own Words*, BUZZFEED (Dec. 10, 2015 10:33 PM), <http://www.buzzfeed.com/jtes/daniel-holtz-claw-women-in-their-ow#.itxNjpYwo>.

203. African Am. Policy Forum, *The Holtzclaw Trial: It’s Not Over Yet*, Webcast (Dec. 16, 2015) (comment by Candace Liger from the OKC Artists for Justice) [hereinafter *AAPF Webinar 2*].

204. *Id.* (comment by Kimberlé Crenshaw).

205. For example, trans women of color are particularly vulnerable to police violence. For information, see generally, DC TRANS COALITION, ACCESS DENIED: WASHINGTON DC TRANS NEEDS ASSESSMENT REPORT 51–53, <https://dctranscoalition.files.wordpress.com/2015/11/dctc-access-denied-final.pdf>; National Center for Transgender Equality, *Meaningful Work: Transgender Experiences in the Sex Trade*, at 5–6, 9–10, 17–20, http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf. For information about the experiences of LGBTQ folks in general, see AMNESTY INTERNATIONAL *supra* note 73.

206. *AAPF Webinar 2*, *supra* note 203 (comment by Grace Franklin).

207. WOMEN OF COLOR NETWORK, FACTS & STATS: SEXUAL VIOLENCE IN COMMUNITIES OF COLOR 2 (June 2006), http://www.doj.state.or.us/victims/pdf/women_of_color_network_facts_sexual_violence_2006.pdf [hereinafter NETWORK FACTS] (“Approximately 40% of Black women report coercive contact of a sexual nature by age 18. The National Violence Against Women Survey (NVAWS) found that 18.8% of African American women reported rape in their lifetime.”).

208. *Id.* at 1–2 (“Stereotypes regarding African American women’s sexuality, including terms like “Black jezebel,” “promiscuous,” and “exotic,” perpetuate the notion that African American women are willing participants in their own victimization.”).

209. NETWORK FACTS, *supra* note 206 (“For every African American/Black woman that reports her rape, at least 15 African American/Black women do not report theirs.”).

adequately addressed in women's rights advocacy. This is indicative of the "[f]ailure of the women's movement to wrap its head around intersectionality and what that means in practice."²¹⁰

Furthermore, as described in Part I, Black women's experiences with policing have largely been ignored in mainstream discourses. When Black women's narratives are elevated, it is typically in the context of jails and prisons. Detention-specific issues such as sexual assault by guards, forced sterilizations, shackling during childbirth, access to menstruation supplies, and mental health services have been topics of several fact-finding investigations and law review articles.²¹¹ By discussing custodial violations, advocates are able to situate the experiences of Black women and other women of color behind bars in the era of mass incarceration. However, there is a gap in fully engaging abuses at the front-end of the penal system.

Women in general make up a considerably smaller demographic of the United States prison population, which is often used to justify the lack of attention given to the experiences of women with policing and incarceration.²¹² The lower rate of incarceration does not mean that women are not subjected to state violence in other realms²¹³ nor

210. *AAPF Webinar 2*, *supra* note 203 (comment by Terry O'Neill).

211. Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1253–55 (2012); Hunter Schwarz, *Following Reports of Forced Sterilization of Female Prison Inmates, California Passes Ban*, WASH. POST (Sept. 26, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/26/following-reports-of-forced-sterilization-of-female-prison-inmates-california-passes-ban/>; SHANNON M. LYNCH, WOMEN'S PATHWAYS TO JAIL: EXAMINING MENTAL HEALTH, TRAUMA, AND SUBSTANCE USE, BUREAU OF JUSTICE ASSISTANCE, at iv (Mar. 2013), <https://www.bja.gov/Publications/WomensPathwaysToJail.pdf>; Maya Schenwar, *In Prison, Toilet Paper Is the New Tampon*, MS. MAGAZINE BLOG (Apr. 12, 2010), <http://msmagazine.com/blog/2010/04/12/in-prison-toilet-paper-is-the-new-tampon/>.

212. E. ANN CARSON, PRISONERS IN 2013, BUREAU OF JUSTICE STATISTICS 2 (Sept. 30, 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>; OBSOLETE, *supra* note 136, at 65 ("The most frequent justification for the inattention to women prisoners and to the particular issues surrounding women's imprisonment is the relatively small proportion of women among incarcerated populations throughout the world.").

213. PRISCILLA A. OCEN, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 U.C.L.A. L. REV. 1540, 1546–50 (2012); OBSOLETE, *supra* note 136, at 66 ("In seeking to understand this gendered difference in the perception of prisoners, it should be kept in mind that as the prison emerged and evolved as the major form of public punishment, women continued to be routinely subjected to forms of punishment that have not been acknowledged as such. For example, women have been incarcerated in psychiatric institutions in greater proportions than in prisons. Studies indicating that women have been even more likely to end up in mental facilities than men suggest that while jails and prisons have been dominant institutions for the control of men, mental institutions have served a similar purpose for women. That deviant men have been constructed as criminal, while deviant women have been constructed as insane. Regimes that reflect this assumption continue to inform the women's prison. Psychiatric drugs continue to be distributed far more extensively to imprisoned women than to their male counterparts."); *Id.* at 68 ("What is not generally recognized is the connection

does it account for violence they encounter disproportionately when interacting with the carceral system.

When “[w]e say racial profiling, everyone gets it. We say Black women getting raped, nobody gets it.”²¹⁴ To challenge the assertion that Black women are not direct targets of state violence, it is important to recognize Black women’s experiences of police violence at the front-end of the criminal legal system. What it reveals are vulnerabilities that are not typically captured by crime statistics, prison demographics, and inmate complaints.

The importance of mapping these vulnerabilities was articulated in a 1984 dialogue between Audre Lorde and James Baldwin.²¹⁵ Baldwin stated that “[t]o be a Black American is in some ways to be born with the desire to be white” and to believe in the American Dream even as it seems unlikely to obtain.²¹⁶ In response, Lorde stated:

I don’t, honey. I’m sorry, I just can’t let that go past. Deep, deep, deep down I know that dream was never mine. And I wept and I cried and I fought and I stormed, but I just knew it. I was Black. I was female. And I was out — out — by any construct wherever the power lay. So if I had to claw myself insane, if I lived I was going to have to do it alone. Nobody was dreaming about me. Nobody was even studying me except as something to wipe out.²¹⁷

Baldwin then stated “[y]ou are saying you do not exist in the American dream except as a nightmare.”²¹⁸ After initially confirming, Lorde asserted that “[e]ven worse than the nightmare is the blank. And Black women are the blank.”²¹⁹

In this conversation, Lorde centers the pervasive silencing of Black women’s particular vulnerabilities²²⁰ and calls for us to “deal with the horror of even our different nightmares.”²²¹ To advance jus-

between state-inflicted corporal punishment and the physical assaults on women in domestic spaces. This form of bodily discipline has continued to be routinely meted out to women in the context of intimate relationships, but it is rarely understood to be related to state punishment.”).

214. *AAPF Webinar 2*, *supra* note 203 (comment by Barbara Arnwine).

215. *Revolutionary Hope: A Conversation between James Baldwin and Audre Lorde*, ESSENCE (1984).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* (“[W]hen all our asses are in the sling, it looks like it is easier to deal with the samenesses. When we deal with sameness only, we develop weapons that we use against each other when the differences become apparent. And we wipe each other out – Black men and women can wipe each other out – far more effectively than outsiders do.”).

221. *Id.*

tice, Black women can no longer be the blank—an unheard, unsupported landscape where antiracist and feminist movements can invoke and use us to further narrow goals that do not guarantee, or even contemplate, our liberation.

From the slave ship to the auction block from the plantation to Jim Crow from chain gangs²²² to mass incarceration, Black women have been vulnerable and Black women have been resilient. In recognition of sexualized racial terror, the role of policing institutions, and the disremembered widespread resistance to it, Part III will challenge mainstream police reform and put forth interventions grounding grassroots efforts.

III. ADVANCING JUSTICE: BROADENING THE SCOPE OF PROPOSED INTERVENTIONS

Police sexual violence is invisible in mainstream media and legal reform efforts. Historicizing police violence exposes the inadequacy of procedural police reform and our failed reliance on penal institutions. As expressed above, Black women have been historically vulnerable to sexual violence at the hands of law enforcement and vigilantes with impunity. Highlighting the simultaneous operation of racism and misogyny within legal systems bolsters grassroots efforts to invest in community-based initiatives and divest from policing. The authority and power ascribed to law enforcement welcomes abuse. In order to resist institutional white supremacy within policing we must limit our reliance on law enforcement and support people and communities harmed by it. Therefore, we must ask ourselves—is policing obsolete?²²³

A. Divesting From Law Enforcement

The police in our community occupy our area—our community as foreign troops occupy territory. And the police, they are not to—in our community—are not to promote our welfare or our security, our safety but they are there to contain us, to brutalize us, and murder us because they have their orders to do so. . . . The police in our

222. See generally Sarah Haley, “*Like I Was a Man*”: *Chain Gangs, Gender, and the Domestic Carceral Sphere in Jim Crow Georgia*, 39 *WOMEN, GENDER, & PRISON: NAT’L & GLOBAL PERSP.* 1, 53–77 (2013), <http://condemnationofblackness.voices.wooster.edu/files/2013/08/haley.like-i-was-a-man.pdf>.

223. See generally OBSOLETE, *supra* note 136. I ask this question, evoking Angela Davis’ book where she challenges the carceral system, including policing and prisons, but here I focus specifically on the front-end of the penal system.

community couldn't possibly be there to protect our property because we own no property. They couldn't possibly be there to see that we receive the due process of law for the simple reason that the police themselves deny us the due process of law. And so it's very apparent that the police only in our community not for our security, but the security of business owners in the community and also to see that the status quo is kept in tact – Huey P. Newton²²⁴

During the 1960s, liberal reforms focused on improving relationships between police and community members through the professionalization of police officers.²²⁵ The effort to build police legitimacy and trust through the involvement of community partners and problem-solving techniques is known as community policing.²²⁶ When the final report of the President's 21st Century Task Force was released in 2015, it evoked the reforms of the 1960s by encouraging once again the implementation of community policing throughout the country.²²⁷ In this section, I will focus primarily on the task force's recommendations,²²⁸ specifically community policing, because the suggestions within the task force report are reflective of mainstream police reform efforts. This section offers four critiques of mainstream police reform in order to substantiate a call for law enforcement divestment.

The first issue is that the task force's recommendations are non-binding—the report puts forth guidance but police departments are not required to implement it. The lack of police uniformity and enforcement mechanisms nationwide is a product of the localization of crime and punishment and the failure of constitutional law jurisprudence to establish a stronger floor of protections.

Secondly, community policing has been challenged as problematic in contrast to mainstream framing of community policing as key in holding officers accountable to the communities they patrol.²²⁹ The

224. Malcolm X Network, *Huey P. Newton Interview From Jail*, YOUTUBE (May 11, 2007), <https://www.youtube.com/watch?v=WUU7bEqKcLk>.

225. *Reforms Ignore*, *supra* note 39.

226. COPS, *Community Policing Defined*, <http://ric-zai-inc.com/Publications/cops-p157-pub.pdf>; FINAL REPORT, *supra* note 35, at 41.

227. FINAL REPORT, *supra* note 35, at 41–50.

228. The Task Force puts forth some strong recommendations around police sexual misconduct, however, the recommendations must be read within a larger, problematic context. *Id.* at 28, 58, 90, 98.

229. WE CHARGE GENOCIDE, COUNTER-CAPS REPORT: THE COMMUNITY ENGAGEMENT ARM OF THE POLICE STATE 5, <http://wechargegenocide.org/wp-content/uploads/2015/10/CAPS-report-final.pdf> (“police agencies nationwide are returning to community policing, seemingly in search of an idyll where police once knew their neighborhoods and patrolled their beats as

War on Drugs, “tough on crime” and “zero tolerance” policies, and mass incarceration are indeed byproducts of community policing.²³⁰ By encouraging the involvement of private citizens in surveillance, community policing essentially endorses the neighborhood watch mentality that proved deadly for Trayvon Martin.²³¹

Often, the people involved in community policing interventions do not reflect the diversity of the community and actually help to displace residents who are viewed as undesirable. We Charge Genocide, a Chicago-based grassroots organization, released “Counter-CAPS Report: The Community Engagement Arm of the Police State”²³² in response to President Obama’s endorsement of community policing.²³³

In the report, We Charge Genocide illustrates how the Chicago community policing program essentially exacerbates gentrification in communities of color,²³⁴ legitimizes biases,²³⁵ insulates the Chicago Police Department from criticism,²³⁶ and results in aggressive policing tactics that embolden private citizens.²³⁷

Thirdly, mainstream efforts often overextend the role of police. Recommendations within the task force’s report for police involvement in communities include “adopt[ing] community policing strategies that support and work in concert with economic development efforts within communities.”²³⁸ In the context of youth, the task force suggests that law enforcement help schools create “alternatives to student suspensions and expulsion through restorative justice, diversion,

though they were out for a neighborly stroll, where Officer Friendly was real.”) [hereinafter COUNTER-CAPS].

230. *Reforms Ignore*, *supra* note 39.

231. *Trayvon Martin*, *supra* note 74.

232. COUNTER-CAPS, *supra* note 229.

233. *Id.*

234. *Id.* at 4, 9–10 (noting that during community review board meetings, the discussions would revolve around surveillance of and evicting tenants, confirming community concerns that the “CAPS meetings are venues where disproportionately white, property-owning Chicagoans ask for more police to further criminalize their Black and Brown neighbors as part of an overall effort to push them out, quicken redevelopment and increase property values.” Strategies of officers gave meeting attendees were “911 calls and reports of minor issues, such as citations for long grass, to systematically harass residents and build evidence for an eviction case”).

235. *Id.* at 11 (noting that during the meetings, coded racial language was used).

236. *Id.* at 4, 6 (arguing that the meetings result in more aggressive policing and fails to challenge the policing practices of the Chicago Police Department).

237. *Id.* at 14 (“[C]ombined effects of aggressive policing and mass incarceration create the conditions for extraordinary levels of violence” and encourage private citizens to “reclaim” areas by engaging in “positive loitering.”).

238. FINAL REPORT, *supra* note 35, at 45.

counseling, and family interventions,”²³⁹ “help students develop new behavior skills and positive strategies to avoid conflict, redirect energy, and refocus on learning,”²⁴⁰ get involved with school discipline practices and reentry programs, and designate School Resource Officers (SROs) to work in schools.²⁴¹

The recommendations above are problematic for several reasons. Grassroots organizations have argued that “[t]he problems laid before police agencies are beyond their capacity to address. We can no longer expect police to manage a series of connected social problems rooted in poverty, joblessness, segregation, and the criminalization of drug addiction.”²⁴² Therefore, we should not centralize law enforcement in community-based initiatives nor encourage the presence of SROs in schools.

Police officers do not have the adequate expertise to consult educators on how to discipline youth, apply restorative justice principles, and encourage engagement in school. Police officers and law enforcement agencies are not best suited to take up such a role. Indeed, their interest in job security is in conflict with making their means of employment unnecessary. Thus, police officers should not be viewed as inherent experts on public health and safety.

In lieu of social services led by law enforcement and housed within penal institutions, a strong nexus of qualified community collaborators, such as fully resourced and culturally competent teachers, social workers, gang intervention advocates, harm reduction service

239. *Id.* at 48.

240. *Id.*

241. *Id.* at 48; What is especially troubling about the suggestion of placing School Resource Officers in schools is the assumption that these law enforcement agents will apply non-punitive measures of discipline. As seen in the situation caught on video in 2015 where a School Resource Officer in Spring Valley, South Carolina violently threw a Black girl from her desk, this is not the case. Sarah Aarhun & Holly Yan, *Student's Violent Arrest Caught on Video; Officer Under Investigation*, CNN (Oct. 27, 2015, 12:50 AM), <http://www.cnn.com/2015/10/26/us/south-carolina-spring-valley-high-school-student-video/>. For another instance, see also the handcuffing of a six-year-old Black girl for allegedly taking candy from off her teacher's desk. *Six-Year-Old Girl Handcuffed in School Shows Continuing Criminalization of Black Children*, DIGNITY IN SCHOOLS (Mar. 25, 2016), <http://www.dignityinschools.org/blog/six-year-old-girl-handcuffed-school-shows-continuing-criminalization-black-children> (“This incident is unacceptable and shows us once again why School Resource Officers (SROs), municipal police, probation officers and other law enforcement personnel should not handle student safety or school discipline issues in and around schools.”). A recent report has also found that 3 of the 5 largest public schools in the United States have more SROs than they do counselors. See Matt Barnum, *Exclusive: Data Shows 3 of the 5 Biggest School Districts Hire More Security Officers Than Counselors*, 74 MILLION (Mar. 27, 2016), <https://www.the74million.org/article/exclusive-data-shows-3-of-the-5-biggest-school-districts-hire-more-security-officers-than-counselors>.

242. COUNTER-CAPS, *supra* note 229, at 15.

providers, and peer-led programs, in conjunction with decriminalization schemes, are key resources and strategies to build lives instead of taking them.

Lastly, procedural justice is insufficient. The rationale for community policing in the task force's report is based on the assertion that the "public confers legitimacy only on those they believe are acting in procedurally just ways."²⁴³ The emphasis on procedural justice is linked to principles of formal equality, which has been critiqued by critical race scholars.²⁴⁴

[They] have not placed their faith in neutral procedures and the substantive doctrines of formal equality; rather, critical race theorists assert that both the procedure and the substances of American law, including American antidiscrimination law, are structured to maintain white privilege.²⁴⁵

Principles of procedural law and formal equality distort and silence challenges to the status quo.²⁴⁶ As a result, procedural justice fails to acknowledge that "[s]ome of the worst racist tragedies in history have been perfectly legal."²⁴⁷ Even police misconduct and violence is not viewed as criminal activity.²⁴⁸

Ascribing to procedural justice presumes legitimacy and focuses on excessive abuses thereby normalizing penal institutions.²⁴⁹ The pu-

243. FINAL REPORT, *supra* note 35, at 10.

244. Dean Spade, *Intersectional Resistance and Law Reform*, 38 J. WOMEN IN CULTURE & SOC'Y 1, 3 (2013) [hereinafter *Intersectional Resistance*].

245. Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002).

246. *Intersectional Resistance*, *supra* note 244, at 4–5.

247. Katie McDonough, "Some of The Worst Racist Tragedies in History Have Been Perfectly Legal": Kimberle Crenshaw on Eric Garner, Broken Windows and Police Impunity, SALON (Dec. 5, 2014, 8:30 AM), http://www.salon.com/2014/12/05/some_of_the_worst_racist_tragedies_in_history_have_been_perfectly_legal_kimberle_crenshaw_on_eric_garner_broken_windows_and_police_impunity/ (The full quote states: "So in a way, what I think Garner reminds us is this whole business about "the rule of law." It kills me. When the president says it, it just kills me. The whole thing of, We are a nation of laws. I mean, what are we talking about? Some of the worst racist tragedies in history have been perfectly legal. We've been perfectly able to use these processes to create kangaroo courts, legal lynchings.").

248. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1206 (2015) [hereinafter *Grounded Justice*].

249. By discussing police sexual violence in this Article, the intention has not been to exceptionalize sexual violence and the experiences of women, but rather to dismantle banal and spectacularized institutional violence. OBSOLETE, *supra* note 136, at 61 ("Certainly women's prison practices are gendered, but so, too, are men's prison practices. To assume that men's institutions constitute the norm and women's institutions are marginal is, in a sense, to participate in the very normalization of prisons that an abolitionist approach seeks to contest."); Steve

nitiveness of our system cannot be regulated through positive police relationships—“[f]eelings [cannot] balance the use and role of force.”²⁵⁰ Police reform centering trust building and improved procedures furthers “colorblind due process” rhetoric²⁵¹ and fails to address the ills inherent within police work. Therefore the solution should be less law enforcement, not more of it.

As argued throughout this Article, injustice is engrained within the system of policing²⁵² and is not an aberration.²⁵³ Grassroots organizations, such as Critical Resistance,²⁵⁴ have adopted an abolitionist framework²⁵⁵ as vital in combating systemic oppression. An abolitionist framework allows for us to recognize that a key problem with the U.S. penal system is the concentration of power and authority in the hands of a few. However, within legal scholarship, there is a “troubling absence”²⁵⁶ of abolitionist engagement. This absence is often due to the conceptualization of abolition as impractical and “foolish.”²⁵⁷ The rendering of abolition to the realm of radical fantasy fails to un-

Martinot & Jared Sexton, *The Avant-garde of White Supremacy*, SOCIAL IDENTITIES 9(2) (JUNE 2003), <https://www.ocf.berkeley.edu/~marto/avantguard.htm>.

250. *Ruses of Power*, *supra* note 156, at 550 (noting that during chattel slavery, “the brutal dominion guaranteed by the law was to be regulated by the influence of the enslaved—their pull on the heartstrings of the master. Slave law contradictorily asserted that absolute dominion was both necessary and voluntary. The intimacy of the master and the slave purposely operated as an internal regulator of power and ameliorated the terror.” I argue that community policing and other trust building reforms evoke this “regulatory” scheme).

251. *Abolitionist Framework*, *supra* note 69, at 263; For more information on the use of intersectionality to resist myopic legal reform and formulate abolitionist projects combating the presumed neutrality of the law, see *Intersectional Resistance*, *supra* note 244, at 1 (“[M]ethodologies of resistance . . . bring attention to the violences of legal and administrative systems that articulate themselves as race and gender neutral but are actually sites of the gendered racialization processes that produce the nation-state.”); *Id.* at 17 (“[L]egal equality contains and neutralizes resistance and perpetuates intersectional violence.”).

252. *Id.* at 262 (“[R]acism is engrained in the very construction of the system and implicated in its every aspect—how crimes are defined, how suspects are identified, how charging decisions are made, how trials are conducted, and how punishments are imposed.”).

253. *Id.* at 263 (“[R]ejects the current conceptualization of racial bias as an aberrational malfunction, recognizing instead how the system refashions past regimes of racial control to continue to sustain white supremacy.”); *Id.* at 278 (“Current legal doctrine condones police brutality and makes individual acts of abuse appear isolated, aberrational, and acceptable rather than part of a systematic pattern of official violence.”).

254. Leading abolitionist organization, Critical Resistance, notes “Our goal is not to improve the system even further, but to shrink the system into non-existence. We work to build healthy, self-determined communities and promote alternatives to the current system.” Vision Statement, CRITICAL RESISTANCE, <http://criticalresistance.org/about/> (Mar. 28, 2016).

255. *Grounded Justice*, *supra* note 248. An abolitionist framework can be defined as “a set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement.” *Id.* at 1161.

256. *Id.* at 1156.

257. *Id.* at 1160–61.

derstand abolition as a positive project requiring concerted social investments.²⁵⁸

The Black Panther Party for Self Defense, for example, recognized the importance of social supports. They created various “survival pending revolution” programs in order to develop self-determined communities as part and parcel of the freedom struggle.²⁵⁹ Positive interventions include those mentioned above in this section, such as leaning on system collaborators to create a nuanced network of first responders to address harm, trauma, and complex needs. Given the racial history of the United States, penal reform is simply not enough.²⁶⁰ By divesting in law enforcement, we can shift priorities²⁶¹ and support the creation of sustainable communities.²⁶² “[A] fear of too much justice”²⁶³ is in direct conflict with a just society.

B. Building Survivor Support

When Michael Brown’s family was asked in an interview whether they were given any promises of care, advanced notice, or transport to a secure location before the grand jury announced whether or not the cop who killed their son would be tried, his father stated that he had

258. *Id.* at 1162–63 (“Prison abolition—both as a body of critical social thought and as an emergent social movement—draws on earlier abolitionist ideas, particularly the writings of W.E.B. Du Bois on the abolition of slavery. According to Du Bois, to be meaningful, abolition required more than the simple eradication of slavery; abolition ought to have been a positive project as opposed to a merely negative one.”); *Intersectional Resistance*, *supra* note 244, at 14.

259. DAVID HILLIARD, THE BLACK PANTHER PARTY: SERVICE TO THE PEOPLE PROGRAMS: THE DR. HUEY P. NEWTON FOUNDATION (2008), <http://www.caringlabor.files.wordpress.com/2010/09/hilliard-ed-the-black-panther-party-service-to-the-people-programs.pdf>.

260. *Grounded Justice*, *supra* note 248, at 1184 (“Two hundred and forty years of slavery and ninety years of legalized segregation, enforced in large measure through criminal law administration, render U.S. carceral and punitive policing practices less amenable to the reforms undertaken.”).

261. In addition to supporting initiatives such as fully resourced schools, employment with living wages, and access to comprehensive health care, we can also consider environmental changes to reduce offending. See *Grounded Justice*, *supra* note 248, at 1221.

262. *Abolitionist Framework*, *supra* note 69, at 285 (“Abolishing these institutions should be accompanied by a redirection of criminal justice spending to rebuild the neighborhoods that they have devastated. There should be a massive infusion of resources to poor and low-income neighborhoods to help residents build local institutions, support social networks, and create social citizenship. Abolishing them will also force us to envision a radically different approach to crime disengaged from the racist logic of [B]lack enslavement and white supremacy.”).

263. *McCleskey v. Kemp*, 481 U.S. 279 (1987) (finding that on a case determining whether the death sentence of an inmate was unconstitutional because Blacks in Georgia were disproportionately likely to be sentenced to death, Justice Brennan’s dissent spoke to the majority opinion’s assessment of the evidence of bias as reflective of “a fear of too much justice.” A fear of addressing the outcomes of racial discrimination due to an overarching fear of system collapse leaves us unable to envision comprehensive justice.); see also *Abolitionist Framework*, *supra* note 69, at 264.

not “heard from anyone, which [was] pretty cruel and unfair . . . No hand, no hug, just deal with it.”²⁶⁴

Samaria Rice, the mother of 12-year-old Tamir Rice, just five months after he was gunned down by an officer, was “forced to move to a homeless shelter because she could no longer live next door to the killing field of her son.”²⁶⁵ Tamir had not been buried.²⁶⁶ Samaria was incurring expenses daily.²⁶⁷ And in February 2016, the City of Cleveland sent her a bill for the ambulance that could not save her son’s life.²⁶⁸

Syrita Bowen, who was one of thirteen Black women raped by an Oklahoma City police officer, reported that “she thinks about it daily . . . wonder[ing] what might happen” when she sees “a man in uniform.”²⁶⁹

The lack of immediate and long-term financial and emotional support to survivors, victims, families, and communities is a crucial issue.²⁷⁰ As mentioned in previous sections, there are substantial barriers to justice for victims and survivors of police violence. These barriers extend beyond securing criminal indictments and convictions.

Private civil lawsuits and Department of Justice (DOJ) initiated civil rights litigation are insufficient in addressing the impact of police violence for several reasons. The purpose of a private civil lawsuit is

264. See Josh Levs, *Michael Brown’s Parents Address UN: “We need the world to know”*, CNN (Nov. 12, 2014, 1:22 AM), <http://www.cnn.com/2014/11/11/us/ferguson-brown-parents-u-n/>.

265. Douglas Winston v. Timothy Loehmann, et. al, *Plaintiffs Objection to Defendants Motion to Stay*, at 4, <https://s3.amazonaws.com/s3.documentcloud.org/documents/2071647/tamir-stay-opposition.pdf>; Wesley Lowry, *As Investigation Enters Fifth Month, Tamir Rice’s Mother Has Moved into a Homeless Shelter*, WASH. POST (May 4, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/05/04/as-investigation-enters-fifth-month-tamir-rices-mother-has-moved-into-a-homeless-shelter/>; Eleanor Goldberg, *Supporters Help Tamir Rice’s Mother Move Out of Homeless Shelter*, HUFFINGTON POST (May 8, 2015, 1:19 PM), http://www.huffingtonpost.com/2015/05/08/tamir-rice-fund_n_7233138.html; see also Eric Heisig, *Mother of Tamir Rice Not Homeless, Despite Court Filing that Indicates Otherwise, Attorney Says*, CLEVELAND (May 6, 2015, 4:13 PM), http://www.cleveland.com/court-justice/index.ssf/2015/05/mother_of_tamir_rice_not_homeless.html (noting that family owes \$18,000 from the December 2014 Memorial Service).

266. *Id.*

267. *Id.*

268. David A. Graham, *‘Insult to Homicide’: Cleveland Sues Tamir Rice’s Family for Ambulance Fees*, ATLANTIC (Feb. 11, 2016, 2:34PM), <http://www.theatlantic.com/national/archive/2016/02/cleveland-tamir-rice-bill/462354/>. Cleveland’s Mayor soon after stated that the Rice family would not have to pay for it. Greg Bothelo and Ed Payne, *Tamir Rice Shooting: Cleveland Won’t Make Family Pay for Ambulance*, CNN (Feb. 11, 2016, 5:45 PM), <http://www.cnn.com/2016/02/11/us/tamir-rice-shooting/>.

269. *Lose License*, *supra* note 121.

270. Access to such support should not be limited to folks who fit within a narrative of “innocence” and “deservingness.” See generally *Intersectional Resistance*, *supra* note 244, at 18.

to make harmed parties as whole as possible. Even though the burden of proof for a civil case is less than that for a criminal case, myths exist about the availability of settlements and how much compensation survivors and the families of victims receive. Civil lawsuits are only filed in approximately 6% of cases alleged.²⁷¹ Lawyers may not want to take a survivor's case, juries favor the word of law enforcement, and state laws often limit recovery.²⁷² Yet media reports highlight large million dollar settlements in police brutality cases²⁷³ and fail to note disparities in civil awards for use of force in comparison to cases of sexually intrusive police misconduct.²⁷⁴

Given limited resources of the DOJ, criminal cases are rarely filed on behalf of individual survivors.²⁷⁵ In civil rights lawsuits initiated by the DOJ, victim support is not prioritized—improving policies and procedures take center stage. Individuals can seek individual monetary relief in federal court, but must prove intent if they allege discrimination in violation of their civil rights.²⁷⁶ Litigation alleging unconstitutional police department policies or a pattern of unlawful conduct does not provide for individual monetary relief.²⁷⁷

Even if someone is able to recover through the civil system, it is a very long process. How are the immediate needs of families met? State and federal governments have established victim compensation programs to provide resources, including financial assistance, to vic-

271. David Packman, *The Myth of Police Misconduct Lawsuits*, CATO INSTITUTE (Aug. 9, 2009, 11:52 AM), <http://www.policemisconduct.net/the-myth-of-police-misconduct-lawsuits/>.

272. *Id.* For more information about barriers to civil recovery, see *IN THE SHADOWS*, *supra* note 29, at 36–38.

273. See generally Radley Balko, *U.S. Cities Pay Out Millions to Settle Police Lawsuits*, WASH. POST (Oct. 1, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/10/01/u-s-cities-pay-out-millions-to-settle-police-lawsuits/>; Jackson Marciana, *Police Abuse Cases Forced NYC to Pay \$428,000,000 in False Arrest and Civil Rights Settlements*, COUNTER CURRENT NEWS (Oct. 19, 2014, 2:33 PM), <http://countercurrentnews.com/2014/10/police-abuse-cases-forced-nyc-to-pay-428000000-in-false-arrest-and-civil-rights-settlements/>; Mark Puente, *Court of Appeals Upholds Cap on Damages in Police Brutality Case*, BALT. SUN (Mar. 30, 2015, 8:19 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-state-damage-cap-20150330-story.html>; Nick Wing, *We Pay a Shocking Amount for Police Misconduct, And Cops Want Us Just to Accept It. We Shouldn't*, HUFFINGTON POST (May 29, 2015, 7:39 AM), http://www.huffingtonpost.com/2015/05/29/police-misconduct-settlements_n_7423386.html. (noting, for example, the City of Chicago paid \$521 million in civil lawsuits from 2004-2014, New York City paid \$348 million from 2006-2011, and Los Angeles paid \$101 million from 2002-2011).

274. *To Serve*, *supra* note 97, at 96. (noting that civil awards for sexual violence, such as unlawful strip and body cavity searches, are “more than 100,000 below average damage award level against the police for the use of force”).

275. *IN THE SHADOWS*, *supra* note 29, at 36–38.

276. *Id.* at 18.

277. U.S. DEP'T OF JUSTICE, ADDRESSING POLICE MISCONDUCT LAWS ENFORCED BY THE DEPARTMENT OF JUSTICE (2015), <http://www.justice.gov/crt/about/spl/documents/polmis.php>.

tims of crime. For the FBI program, crime victims are defined as “a person who has been directly or proximately harmed (physically, emotionally, or financially) as a result of the commission of a federal offense.”²⁷⁸ In California for example, eligibility for the Victim Compensation Program includes timely reporting of the crime to law enforcement and participating in the prosecution of the offender where applicable.²⁷⁹ Persons who are involved in a commission of a crime are barred from receiving services through the program.²⁸⁰ The New York State Office of Victim Services “provide[s] compensation to innocent victims of crime for their out-of-pocket losses associated with the crime.”²⁸¹ These eligibility criteria are typical throughout the country.

Advocates are currently pushing for the expansion of the Crime Victims Fund,²⁸² but not specifically in the police violence context. Based on program eligibility requirements, it is not clear whether or not survivors and victims of police violence are even eligible. Can the families of someone killed by law enforcement receive compensation for a proper burial? Or would the contested “guilt” of the victim create a barrier? Can a survivor of police sexual violence receive immediate financial support for lost wages, counseling, and other supportive services?²⁸³ Or will their character and failure to report the assault to law enforcement render them ineligible? As it stands currently, these programs do not anticipate supporting survivors and victims of police violence.

The lack of attention given to the well being of survivors of police violence in mainstream reform efforts is indicative of a failure to com-

278. *Rights of Federal Crime Victims*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/stats-services/victim_assistance/victim_rights (last visited Feb. 3, 2016).

279. *Who's Eligible*, VICTIM COMPENSATION PROGRAM, <http://vcgcb.ca.gov/victims/eligibility.aspx> (last visited Feb. 3, 2016).

280. *Id.*

281. *Help for Crime Victims*, N.Y. STATE OFF. VICTIM SERV., <https://ovs.ny.gov/help-crime-victims> (last visited Feb. 3, 2016) (emphasis added).

282. RAINN, *Top Priorities in Congress*, <https://rainn.org/public-policy/top-priorities-in-congress>.

283. Sexual assault survivors make up the smallest proportion of persons receiving victim support. *Crime Victim Compensation: An Overview*, NAT'L ASSOC. OF CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?bid=14> (last visited Feb. 3, 2016) (noting that victims of rape, assault, child sexual abuse, drunk driving, and domestic violence, as well as the families of homicide victims, are all eligible to apply for financial help. Statistics show that victims of assault comprise about half of the claimants for compensation, with more than a third of those claims being paid to domestic violence victims. Child sexual abuse victims comprise 29% of the victims helped by compensation programs. About 10% of benefits overall are paid to families of homicide victims, and 8% goes toward sexual assault victims).

prehensively understand the various forms of police violence and how it impacts lives,²⁸⁴ both present and future. Historical, transgenerational trauma,²⁸⁵ such as sexualized racial terror discussed in Part II, entrenches societal inequities. By centering marginalized voices, we can call attention to the effects of trauma and violence and develop more grounded and intersectional interventions.

C. Magnifying Voices and Bringing a Human Rights Framework Home

Addressing structural violence requires that we center survivor empowerment and adopt a human right framework domestically.²⁸⁶ Through survivor narratives, we can understand the scope of police violence and address it structurally. The following section centers grassroots efforts to magnify the voices of survivors via alternative fora, such as truth and reconciliation commissions and international human rights bodies, in order to demand system accountability and redress.

1. Truth and Reconciliation Commissions

To bring attention to police sexual violence and other forms of structural violence, advocates have hosted town hall meetings and webinars in order to provide space where survivors can speak and be heard. Aligned with this effort is the establishment of Truth and Reconciliation Commissions (TRCs).²⁸⁷ TRCs employ the concept of restorative justice. Restorative justice is an alternative to penal processes that seeks to repair harm through dialogue and recommen-

284. The impact on Black women in particular is exacerbated by poverty. See Thema Bryant-Davis et. al, *Struggling to Survive: Sexual Assault, Poverty, and Mental Health Outcomes of African American Women*, AM. J. ORTHOPSYCHIATRY 1, 3 (2010) (“African American women are more vulnerable to persistent poverty and sexual assault. African American women who live in low-income housing complexes or are homeless most often are in communities with high rates of violence and substance use and abuse that ultimately increase their vulnerability to being sexually assaulted. . . . Impoverished women may not be able to seek out assistance to alleviate the distress caused by sexual assault when they are unable to meet basic needs such as feeding their children.”).

285. *Id.* at 2.

286. Even though there is a “suspicion” of formal declarations of equality and of the idea that legal governmental protections are remedies for violence rather than sources of it, “I think a human rights framework can be deployed to demand justice and equity, rather than formal equality, to address and hold governments accountable for structural violence. *Intersectional Resistance*, *supra* note 244, at 12.

287. Bennett Collins & Alison M.S. Watson, Carnegie Council for Ethics in International Affairs, *Examining the Potential for an American Truth and Reconciliation Commission*, (Feb. 5, 2015), http://www.carnegiecouncil.org/publications/ethics_online/0102.

dations.²⁸⁸ Restorative justice provides the space for victims, survivors, and their families to have a direct voice in determining just outcomes, and reestablishes the role of community in supporting all parties affected by crime.²⁸⁹ Restorative justice moves beyond an individualistic concept of justice.

The most well known TRC occurred in post-Apartheid South Africa. South Africa's TRC provided amnesty to perpetrators of race-based violence on a case-by-case basis.²⁹⁰ In response to the assertion that non-punitive responses to violence was not "justice," the Archbishop Desmond Tutu replied:

Certainly, amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature . . . We believe, however, that there is another kind of justice—a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships—with healing, harmony and reconciliation.²⁹¹

Justice is not limited to the actions of courts. TRCs can be utilized to address systemic injustice and center the healing of harmed parties.

In the United States, only a few TRCs have been initiated. The Greensboro Truth and Reconciliation Commission in North Carolina was first conceived of in 1999 and began taking testimony in 2004.²⁹² The Commission was developed to reconcile the November 3, 1979 "Greensboro Massacre" where several demonstrators at a racial and economic justice rally were murdered and maimed by the Ku Klux Klan.²⁹³ In 2006, the Commission released a final report documenting their finding and offering recommendations.²⁹⁴

Beginning in 2008, a grassroots effort commenced to develop The Mississippi Truth Project in order "to create a culture of truth telling that will bring to light racially motivated crimes and injustices commit-

288. Nuri Nusrat, *What Is—And Is Not—Restorative Justice?*, NATIONAL COUNCIL ON CRIME & DELINQUENCY BLOG (Aug. 20, 2013), <http://www.nccdglobal.org/what-we-do/major-projects/restorative-justice>; *Restorative Justice*, LMU CENTER FOR URBAN RESILIENCE, <http://cures.lmu.edu/our-programs/restorative-justice/>.

289. *Id.*

290. Collins & Watson, *supra* note 287.

291. Michigan State University, *Unit 7. Exploring the Truth and Reconciliation Commission, SOUTH AFRICA: OVERCOMING APARTHEID BUILDING DEMOCRACY*, <http://overcomingapartheid.msu.edu/unit.php?id=65-24E-3>.

292. Greensboro Truth & Reconciliation Comm'n, *About*, <http://www.greensborotrc.org/november3.php> (last visited Jan. 30, 2016).

293. *Id.*

294. *Id.*

ted in Mississippi between 1945 and 1975.”²⁹⁵ Even though this Commission has not been instituted, their goals are to “explore the institutional structures of racism as well as examine crimes against the body, crimes against property, the collusion of public officials and conspiracies of silence” for a six to 24 month period concluding with a final report of findings and recommendations.²⁹⁶

In 2013, the Maine Wabanaki- State Child Welfare Truth and Reconciliation Commission was established.²⁹⁷ In the 1950s, indigenous children were taken from their families and placed in white homes.²⁹⁸ In Main, indigenous children were taken at a disproportionate rate when compared to most other states.²⁹⁹ The Commission is expected to gather testimony and process the information over a two-and-a-half year period and will end with the production of a final report.³⁰⁰

In 2010, Black Women’s Blueprint began organizing a Black Women’s TRC (BWTRC) about sexual assault, resulting in a four-day convening in April of 2016.³⁰¹ According to one survey, 40-60% of Black women have reported being a survivor of sexual assault.³⁰² “[M]ass rapes have occurred systematically against” Black women in the United States yet there are limited spaces where Black women can collectively tell their stories, expose transgenerational trauma, and receive justice on their own terms.³⁰³

The BWTRC is consistent with a long and powerful history of testimony.³⁰⁴ As Danielle L. McGuire states in her book, *At the Dark End of the Street: Black Women, Rape, and Resistance*:

Black women did not keep their stories secret. African-American women reclaimed their bodies and their humanity by testifying about their assaults . . . [and naming] sexual violence as a “systemic

295. *What is the Mississippi Truth Project?*, Miss. Truth Project, <http://www.mississippitruth.org/index.htm> (last visited Jan. 29, 2016); *Timeline*, Miss. Truth Project, <http://www.mississippitruth.org/pages/timeline.htm> (last visited Jan. 29, 2016).

296. *What is the Mississippi Truth Project?*, *supra* note 295.

297. *About*, Me. Wabanaki-State Child Welfare Truth & Reconciliation Comm’n, <http://www.mainewabanakitrc.org/about/> (last updated 2016).

298. *Id.*

299. *Id.*

300. *Id.*

301. *Reclaiming Ourselves*, BLACK WOMEN’S BLUEPRINT, INC., <http://www.blackwomensblueprint.org> (last updated 2015).

302. BLUEPRINT, *supra* note 196.

303. *What Is the Black Women’s Truth and Reconciliation Commission*, BLACK WOMEN’S BLUEPRINT, http://www.blackwomensblueprint.org/sex_assault.html (last updated 2015).

304. *Black Women’s Truth & Reconciliation Commission*, BLACK WOMEN’S BLUEPRINT, INC., <http://myfreedomlounge.com/home.html> (last visited Feb. 2, 2016).

abuse of women” Their testimonies spilled out in letters to the Justice Department and appeared on the front pages of the nation’s leading [B]lack newspapers. Black women regularly denounced their sexual misuse. By deploying their voices as weapons in the wars against white supremacy, whether in the church, the courtroom, or in congressional hearings, African American women loudly resisted what Martin Luther King Jr., called the “thingification” of their humanity . . . [reflecting the] tradition of testimony and protest.³⁰⁵

The BWTRC focused on interracial and intraracial rape, systemic silencing, and its impact.³⁰⁶ The BWTRC is a powerful tool that can and should be replicated to address a myriad of issues impacting marginalized populations. Black women need spaces of redress.³⁰⁷ Thus, the creation of venues to address harm provides a key opportunity for healing and accountability.

2. Submissions in International Fora

It is ironical that these un-American outrages occur as our representatives confer in Geneva to expand democratic principles . . . it might well be necessary and expedient to appeal to the conscience of the world through the . . . United Nations – Dr. Martin Luther King, Jr.³⁰⁸

305. DARK END, *supra* note 32, at xix–xx. Martin Luther King Jr. wasn’t the only person during this time to speak about the particular vulnerabilities of Black women. In a 1962 speech, Malcolm X stated: “[t]he most disrespected person in America is the Black woman, the most unprotected person in America is the Black woman, the most neglected person in America is the Black woman.” Malcolm X, On Protecting Black Women, <https://www.youtube.com/watch?v=6EIEKe8fVmg>; L.G. Parker, Malcolm Taught Us: 7 Quotes from Malcolm X, Black Youth Project (Feb. 21, 2015, 11:04 AM), <http://www.blackyouthproject.com/2015/02/malcolm-taught-us-7-quotes-from-malcolm-x/>; W.E.B. DuBois, *Darkwater: Voices from Within the Veil* 172 (Harcourt, Brace and Howe, Inc., 1920) (“I shall forgive the white South much in its final judgment day: I shall forgive its slavery, for slavery is a world-old habit; I shall forgive its fighting for a well-lost cause, and for remembering that struggle with tender tears; I shall forgive its so-called ‘pride of race,’ the passion of its hot blood, and even its dear, old, laughable strutting and posing; but one thing I shall never forgive, neither in this world nor the world to come: its wanton and continued and persistent insulting of the [B]lack womanhood which it sought and seeks to prostitute to its lust.”).

306. BLUEPRINT, *supra* note 196 (“There is an undeniable, complex and often cyclical connection between violence against women and poverty. Violence can jeopardize women’s economic well-being, often leading to homelessness, unemployment, interrupted education, and other daily struggles. Psycho-social stressors can undermine a victim’s pursuit of education, decreasing their earning potential and economic stability throughout the course of their lives.”).

307. *Ruses of Power*, *supra* note 156, at 556 (Because “the erasure or disavowal of sexual violence engendered [B]lack femaleness as a condition of unredressed injury, which only intensified the bonds of captivity and the deadening objectification of chattel status” I believe it is important that we create spaces where these injuries are redressed).

308. *All of Us*, *supra* note 159, at 921.

The common goal of 22 million Afro-Americans is respect as human beings, the God-given right to be a human being. Our common goal is to obtain the human rights that America has been denying us. We can never get civil rights in America until our human rights are first restored. We will never be recognized as citizens there until we are first recognized as humans – Malcolm X³⁰⁹

Police violence is a reflection of deeper structural dynamics.³¹⁰ Even though the United States has not ratified several international treaties, has made reservations for those they have signed, and fails to comply with international law, work is being done to bring a human rights framework home.³¹¹

For almost 70 years, advocates have pleaded to the United Nations in regards to structural violence against Black people in the U.S., recognizing the supremacy of human rights³¹² and connecting with global freedom struggles. In 1947, the NAACP, under the direction of W.E.B. DuBois, submitted “An Appeal to the World: A Statement of Denial of Human Rights to Minorities in the Case of citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress.”³¹³ In this document, DuBois stated that Blacks have been subjected to “partial emancipation” as a result of unmitigated segregation, discrimination, and prejudice.³¹⁴ In 1951, the Civil Rights Congress submitted “We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of The United States Government Against the Negro People.”³¹⁵ The petition used

309. See generally RACISM AND BORDERS: REPRESENTATION, REPRESSION, AND RESISTANCE (Jeff Shantz ed., 2010).

310. David Jacobs & Robert M. O'Brien, *The Determinants of Deadly Force: A Structural Analysis of Police Violence*, 103:4 AM. J. SOC. 837, 862, 859–60 (1998), <http://www.jstor.org/stable/10.1086/231291>.

311. Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 461 (2008); Krissah Thompson, *A New Mission for Amnesty International: Bringing Human Rights Home*, WASH. POST (Oct. 21, 2014), <http://wpo.st/O4W81>.

312. Civil rights are a narrow legal framework and typically exclude certain populations, such as non-citizens and folks who are not viewed as “good” and “productive” citizens. Thus, civil rights are conditional, while human rights are inalienable thereby making human rights superior.

313. W.E.B. Du Bois Papers (MS 312). Special Collections and University Archives, W.E.B. Du Bois Library, University of Massachusetts Amherst, <http://www.blackpast.org/1947-w-e-b-dubois-appeal-world-statement-denial-human-rights-minorities-case-citizensn#sthash.4a159vBi.dpuf>.

314. *Id.*

315. Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of The United States Government Against the Negro People* (New York: Civil Rights Congress, 1951), pp xi–xiii, 3–10, <http://www.blackpast.org/we-charge-genocide-his>

the language of genocide to call attention to the “premature death” and other harms committed against Black folks in the United States, including the rape of Black women.³¹⁶

Decades following these petitions, several international instruments were created to hold state parties accountable for human rights abuses. The most relevant treaties to this topic are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),³¹⁷ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),³¹⁸ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).³¹⁹ CAT, ICERD, and CEDAW have all been

toric-petition-united-nations-relief-crime-united-states-government-against#sthash.
x9K9DyHt.dpuf.

316. *Id.*

317. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. I, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. CAT defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id. CAT also requires state parties to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” *Id.* art. II. CAT also requires training of law enforcement, right to a complaint process and protection from retaliation, and the availability of redress. *Id.* art. X, XIII, XIV (“enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”).

318. International Convention on the Elimination of All Forms of Racial Discrimination art. I, Dec. 21, 1965, 660 U.N.T.S. 195. ICERD defines racial discrimination as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Id. Article 2 requires that state parties “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.” *Id.* art. II. ICERD also requires that state parties assure to everyone within their jurisdiction effective protection and remedies, through national tribunals and other State institutions “against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.” *Id.* at art. VI.

319. Convention on the Elimination of All Forms of Discrimination Against Women art. I, Dec. 18, 1979, 1249 U.N.T.S. 13 (defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”). CEDAW also requires state parties

signed by the United States and CAT and ICERD have also been ratified.³²⁰ Non-binding guidance on police practices also include the UN Code of Conduct for Law Enforcement Officials³²¹ and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.³²²

Within the past ten years, police violence, including police sexual violence, has been incorporated in submissions to the United Nations. In 2006, advocates Andrea Ritchie and Tonya McClary, writing on behalf of over 100 local, state, and national organizations working on issues of police accountability and violence against women, made a submission to the UN Committee Against Torture entitled “In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States.” The petition spoke about police sexual violence as a form of torture under international law.³²³ The Committee responded by recommending “[t]he State party . . . ensure, in accordance with the Convention, that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials.”³²⁴

In 2007, the report was expanded and resubmitted to CERD during the Periodic Review of the United States, and “address[ed] the U.S. government’s failure to comply with its obligations under the Convention to prevent and punish acts of excessive force, rape, sexual abuse, and racial profiling committed by law enforcement officers

“[t]o adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women” and “[t]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection.” *Id.* art. II.

320. United Nations Office of the High Commissioner, *Status of Ratification Interactive Dashboard*, <http://indicators.ohchr.org> (last visited Apr. 10, 2016).

321. United Nations Office of the High Commissioner, *Code of Conduct for Law Enforcement Officials*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx> (last visited Apr. 10, 2016).

322. United Nations Office of the High Commissioner, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx> (last visited Apr. 10, 2016).

323. See generally ANDREA J. RITCHIE & TONYA MCCLARY, IN THE SHADOWS OF THE WAR ON TERROR: PERSISTENT POLICE BRUTALITY AND ABUSE IN THE UNITED STATES (2006), http://www.ushrnetwork.org/sites/default/files/shadow_report_to_cat_on_police_brutality_final.pdf.

324. U.S. DEP’T OF STATE, CONSIDERATION OF REPORTS SUBMITTED BY PARTIES UNDER ARTICLE 19 OF THE CONVENTION 8 (2006), <http://www.state.gov/documents/organization/133838.pdf>.

against people of color.”³²⁵ The submission also challenged the assertion of the United States “that existing judicial remedies are sufficient to meet its obligations under the Convention.”³²⁶

More recently in 2014, along with robust national attention on issues of police brutality, Women’s All Points Bulletin submitted a report titled “American Police Crimes Against African and Other Women of Color” to CERD.³²⁷ The report focused on the past and present violence experienced by Black women at the hands of law enforcement in the U.S.³²⁸ CERD stated in its Concluding Observations:

While acknowledging the measures taken by the State party to reduce the prevalence of violence against women, the Committee remains concerned at the disproportionate number of women from racial and ethnic minorities, particularly African American women, immigrant women, and American Indian and Alaska Native women, who continue to be subjected to violence, including rape and sexual violence.³²⁹

In confirmation of the unique vulnerabilities of women of color to sexual and other forms of violence, CERD recommended that the U.S. investigate and prosecute offenders, provide appropriate remedies to survivors, resources for prevention and service programs, and training, and raise awareness about available remedies and the procedures to access them.

A few months later the 2014 CAT Periodic Review of the U.S. took place. The parents of Michael Brown, the teenager killed in Ferguson, Missouri, submitted a brief to CAT and went to Geneva to testify during the review period.³³⁰ The brief and testimony alleged human rights violations by the Ferguson Police Department for the

325. IN THE SHADOWS, *supra* note 29, at 4. The submission outlined the use of torture tactics to obtain coerced confessions, the prevalence of beatings and deaths in custody, and sexual harassment and assault. *Id.* at 9, 11–15, 15–17, 26–29.

326. *Id.* at 5; *id.* at 4 (stating that state statute of limitations prevented survivors of police violence from filing civil lawsuits).

327. AMERICAN POLICE CRIMES, *supra* note 32.

328. *See generally id.*

329. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, CONCLUDING OBSERVATIONS ON THE COMBINED SEVENTH TO NINTH PERIODIC REPORTS OF UNITED STATES OF AMERICA ¶ 19, CERD/C/USA/CO/7-9 (Aug. 29, 2014), http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cerd_concluding_observations2014.pdf.

330. Amanda Sakuma, *Michael Brown Family Headlines Delegation to UN Panel in Geneva*, MSNBC (Nov. 11, 2014, 6:17 PM), <http://www.msnbc.com/msnbc/michael-brown-family-headlines-delegation-un-panel-geneva>; Levs, *supra* note 264; HandsUpUnited, et al., *Written Statement on the Police Shooting of Michael Brown and Ensuing Police Violence Against Protesters in Ferguson, Missouri—Submission to UN Committee Against Torture* (Nov. 2014), <http://www.fergusontogeneva.org/FergusonReport.pdf> [hereinafter *Mike Brown Brief*].

excessive use of force against unarmed Brown and peaceful protesters demonstrating after his death.³³¹ CAT “express[ed] deep concern” in its Concluding Observations about frequent police shootings and killings of unarmed Black persons and the lack of accountability.³³²

CAT recognized gaps in available use of force data and pointed out that “the vast majority of those tortured –most of them African Americans–, have received no compensation for the extensive injuries suffered.”³³³ The Committee then recommended timely and independent investigations of police brutality and excessive use of force, criminal prosecution of officers, and “effective remedies and rehabilitation to [] victims.”³³⁴ Effective remedies included, but were not limited to, medical and psychological assistance and “fair and adequate compensation.”³³⁵ CAT acknowledged the importance of providing economic and social support in addition to effective mechanisms of accountability and violence prevention.

At the same periodic review, but attracting less media attention, Black Women’s Blueprint submitted “Invisible Betrayal: Police Violence and the Rapes of Black Women in the United States”³³⁶ and We Charge Genocide, the Chicago-based organization referenced earlier which took its name from the 1951 United Nations petition, submitted “Police Violence Against Chicago’s Youth of Color.”³³⁷ Both reports documented the prevalence of sexual violence against Black women and youth at the hands of law enforcement.³³⁸ While the CAT Concluding Observations acknowledged police brutality as torture, this time they did not mention the issue of sexual violence by law enforcement.³³⁹

Although CAT’s 2014 Concluding Observations failed to reference non-custodial police sexual misconduct as they did in 2006:

331. *Mike Brown Brief*, *supra* note 330, at 2.

332. COMMITTEE AGAINST TORTURE, CONCLUDING OBSERVATIONS ON THE THIRD TO FIFTH PERIODIC REPORTS OF UNITED STATES OF AMERICA ¶ 26, http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat_concludingobservations_2014.pdf [hereinafter *CAT Observations*].

333. *Id.*

334. *Id.*

335. *Id.* at ¶ 29.

336. *Committee Reviews*, *supra* note 89.

337. WE CHARGE GENOCIDE, POLICE VIOLENCE AGAINST CHICAGO’S YOUTH OF COLOR (2014), <http://report.wechargegenocide.org>.

338. INVISIBLE, *supra* note 151; *Id.* at 7–8.

339. The only reference to rape was its occurrence in immigration detention, the Prison Rape Elimination Act (PREA), and sexual assaults in the military. *CAT Observations*, *supra* note 332, at ¶¶ 19, 21, 30.

It is widely recognized, including by former Special Rapporteurs on torture and by regional jurisprudence, that rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials.³⁴⁰

Thus, rape extends beyond the individual-to-individual attack. Rape is a manifestation of misogyny and structural forces that have made women and other marginalized populations vulnerable to violence. This vulnerability is particularly complex and structural when agents of the state (i.e. law enforcement) produce such violence.

In acknowledgement of human rights abuses experienced by Black people throughout the Diaspora, the UN General Assembly declared 2015-2024 the International Decade for People of African Descent with the theme “recognition, justice and development.”³⁴¹ As part of this effort, the United Nations Working Group of Experts on People of African Descent conducted hearings in the United States in January of 2016. Following various meetings with community members and activists, the working group urged the United States to provide reparations in order to remedy systemic injustices.³⁴² The head of the working group, Mireille Fanon Mendes France, stated:

Despite substantial changes since the end of the enforcement of Jim Crow and the fight for civil rights, ideology ensuring the domination of one group over another continues to negatively impact the civil, political, economic, social, cultural and environmental rights of African Americans today.³⁴³

Although reparations³⁴⁴ have not been taken seriously domestically, except in limited circumstances such as the recent reparations

340. HUMAN RIGHTS COUNCIL, PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT ¶ 34, A/HRC/7/3 (Jan. 15, 2008), <http://www.refworld.org/pdfid/47c2c5452.pdf>.

341. See generally UNITED NATIONS, RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY ON 23 DECEMBER 2013 (2014), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/237; United Nations, *2015-2024 International Decade for People of African Descent*, <http://www.un.org/en/events/africandescentdecade/index.shtml> (last visited Apr. 10, 2016).

342. United Nations Human Rights Office of the High Commissioner, UN expert group urges the US to address legacies of the past, police impunity and racial injustice crisis (Jan. 29, 2016), <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17001&LangID=E#sthash.0NjmLwtr.dpuf>.

343. *Id.*

344. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>; Ta-Nehisi Coates, *Why Precisely is Bernie Sanders Against Reparations?*, ATLANTIC (Jan. 19, 2016), <http://www.theatlantic.com/politics/archive/2016/01/bernie-sanders-reparations/424602/> (noting that Bernie Sanders, a senator running for the democratic presidential nomination, who is a self-proclaimed “democratic socialist” framed reparations as “divisive” as many others have). The viewing of reparations as divisive and impractical has resulted in the failure of the United States

ordinance in Chicago for survivors of police torture from 1972-1991,³⁴⁵ situating structural violence in international fora equips advocates and survivors with a broader rights-based framework to discuss and challenge intergenerational harm and demand comprehensive remedial efforts for human rights violations at home.

CONCLUSION

The dominant perceptions of police violence and sexual assault are limited. Imagine the names we do not know and the posters we do not raise—how can justice for everyone be prioritized? By mapping “the blank,” we are able to expand the lens by which we understand and construct solutions to violence. Historicizing police sexual violence exposes the unique vulnerability of Black women and challenges the framing of sexual assault as interpersonal and racial injuries as male. Institutions do not simply witness violence—they themselves are agents of it.

Procedural interventions reinforce institutional power, thereby entrenching their legitimacy in lieu of alternative forms of safety and justice. Mainstream antiviolence interventions have led to the expansion of police presence in low-income communities of color. As a result, law enforcement is viewed as a permanent fixture in our communities and as a partner in justice. We fail to reckon with the history of policing in this country and the overwhelming deference given to penal institutions.

To address police violence of all types, we need to challenge our reliance on police. To address interpersonal and structural violence, we need to support survivors, magnify their voices, and invest in individuals and communities. Police sexual violence reveals the need for, yet lack of, nuance and synergy within and between mainstream and grassroots movements. Justice will not be served unless we build an

to seriously engage the topic. Every congressional term since 1989, Congress member John Conyers introduces a bill to establish a commission to study appropriate remedies for racial injustices committed against Blacks in the United States. H.R.40 — Commission to Study Reparation Proposals for African-Americans Act, 114th Congress (2015–2016), <https://www.congress.gov/bill/114th-congress/house-bill/40/text>.

345. See Krishnadev Calamur, *Chicago Plans Reparations Fund for Victims of Police Torture in '70s, '80s*, NPR (Apr. 14, 2015, 1:30 PM), <http://www.npr.org/sections/thetwo-way/2015/04/14/399609170/chicago-plans-reparations-fund-for-victims-of-police-torture-in-70s-80s>; Merrit Kennedy, *Decades Later, Victims of Chicago Police Torture Paid Reparations*, NPR (Jan. 5, 2016, 3:47 PM), <http://www.npr.org/sections/thetwo-way/2016/01/05/462040444/decades-later-victims-of-chicago-police-torture-paid-reparations>; *Chicago Torture Justice Memorials*, CHICAGO TORTURE, chicagotorture.org (last visited Apr. 10, 2016).

intersectional, rights-based framework rooted in diverse narratives, community self-determination, system accountability, and penal divestment.

“Until you do right by me, everything you touch will crumble . . . Until you do right by me . . . everything you even dream about will fail.”³⁴⁶

346. ALICE WALKER, *THE COLOR PURPLE* 176 (1982).

Race and Jury Selection: The Pernicious Effects of Backstrikes

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INTRODUCTION	706
I. JURY SELECTION AND THE PEREMPTORY CHALLENGE	708
II. THE HISTORY AND USE OF BACKSTRIKES IN LOUISIANA	712
III. BACKSTRIKING IN CADDO PARRISH	713
A. Background on Jury Selection Procedures in Caddo Parrish	713
B. The Data	714
C. The Use of Peremptory Challenges and Backstrikes	716
1. Overall Pattern of Peremptory Challenges and Backstrikes	716
2. Method of Analysis	717
3. Overall Patterns of Prosecutorial Challenge by Juror Race	717
4. Overall Patterns of Defense Challenge by Juror Race	718
IV. THE PROBLEM OF BACKSTRIKES IN CADDO PARRISH	733
APPENDIX A: VARIABLES IN THE BACKSTRIKE ANALYSIS	738

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INTRODUCTION

Allen Snyder was tried for first-degree murder in Louisiana.¹ After the prosecutor used peremptory strikes to eliminate the only five black prospective jurors from the panel, the all-white jury convicted Snyder and sentenced him to death.² To remove all of the black jurors, the prosecutor had the assistance of a procedure not permitted in most jurisdictions: the backstrike. A “backstrike” is a peremptory challenge used to strike a prospective juror after the juror has been accepted onto the jury panel but before the panel has been sworn.³ Thus, backstrikes permit an attorney to tentatively accept a juror by declining to exercise a peremptory challenge, but then revisit that decision after additional potential jurors are questioned. Only four states permit backstrikes.⁴ Louisiana⁵ and Tennessee⁶ have explicit statutory provisions providing for challenging previously accepted jurors. Florida’s less explicit language⁷ has been interpreted to permit backstrikes as a right. In Illinois, discretion resides with the court;⁸ many judges, however, prohibit the use of backstrikes, a position that the Illinois Supreme Court has endorsed.⁹ According to several experienced defense attorneys in Cook County, backstrikes are now rarely permitted.¹⁰

Jury consultants Ted Donner and Richard Gabriel claim that the backstrike “plays an important role” in jury selection because the jury can be selected “with an eye towards group dynamics, as opposed to a jury of isolated individuals.”¹¹ Even if the goal of managing group dynamics is seen as a legitimate use of peremptory challenges, there is

1. Snyder v. Louisiana, 552 U.S. 472, 472 (2008).

2. *Id.* at 476.

3. *Id.* at 475.

4. Ross P. LaDart, *Mechanics of Jury Selection: Some Tools of the Trade* (Dec., 2014) at 26 (Master’s Thesis in Judicial Studies, U. of Nevada, Reno).

5. LA. CODE CRIM. P. art. 799.1 (2006) (“[T]he state or the defendant may exercise any remaining peremptory challenge to one or more of the jurors previously accepted.”).

6. TENN. R. CRIM. P. 12(d)(3) (“Peremptory challenges may be directed to any member of the jury; counsel are not limited to using such challenges against replacement jurors.”).

7. FLA. R. CRIM. P. 3.310 (“The state or defendant may challenge an individual prospective juror before the juror is sworn to try the cause.”).

8. ILL. SUP. CT. R. 434(a) (“In criminal cases the parties shall pass upon and accept the jury in panels of four, commencing with the State, unless the court, in its discretion, directs otherwise, and alternate jurors shall be passed upon separately.”); *People v. Moss*, 108 Ill. 2d 270 (1985) (interpreting Ill. Sup. Ct. R. 434(a) to permit courts to dispense with backstriking).

9. *Moss*, 108 Ill. 2d. at 275.

10. Thomas F. Geraghty, Director, Bluhm Legal Clinic, Northwestern Law; Jeffrey Urdangen, Director, Center for Criminal Defense, Bluhm Legal Clinic, Northwestern Law; William Murphy, Private Practice.

11. JURY SELECTION STRATEGY AND SCIENCE § 24:3 (3d ed.) (2013).

good reason to be skeptical of this claim. Questioning during jury selection typically does not supply sufficient information to effectively enable attorneys, even those assisted by trial consultants, to predict the likely interaction patterns of prospective jurors.¹² Attorneys generally have limited information on which to exercise challenges (e.g., prospective jurors do not take standardized personality or cognitive tests at any point). Therefore, predictions about group dynamics during deliberations are more likely to be pure speculation than grounded judgment.

Against this weak claim of a benefit for backstrikes is the serious objection that the backstrike procedure can facilitate the use of race-based peremptory challenges.¹³ A glimpse of this potential role was visible in *Snyder v. Louisiana*, when the prosecutor removed five black prospective jurors, resulting in the all-white jury that convicted Allen Snyder.¹⁴ Mr. Brooks, the first black juror questioned during selection, was initially accepted by both sides, but then, after striking two other black jurors, the prosecutor returned to the initially accepted Mr. Brooks and backstruck him.¹⁵ The potential significance of the strike's timing was not lost on Justice Johnson when the case was appealed to the Supreme Court of Louisiana: "The prosecutor's action in accepting the first African-American juror seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions."¹⁶ Ultimately, the U.S. Supreme Court found the prosecutor's explanation for the exclusion of Mr. Brooks unconvincing and concluded it had been a *Batson* error to remove him, although the Court did not discuss the potential role played by the backstrike procedure in facilitating race-based exclusions during jury selection.¹⁷

The data we analyze for this article provide the first systematic evidence on the role played by backstrikes. Our results show that use of backstrikes is common in Caddo Parrish, Louisiana, occurring in 40 percent of the 332 cases we studied. Moreover, controlling for other characteristics, prosecutors had overall between three and five times the odds of using a backstrike on a black prospective juror as on a

12. LaDart, *supra* note 4 at 37–38.

13. Bruce Hamilton, *Bias, Batson, and "Backstrikes": Snyder v. Louisiana Through a Glass, Starkly*, 70 LA. L. REV. 3 (2010), <http://digitalcommons.law.lsu.edu/lalrev/vol70/iss3/10>.

14. *Snyder*, 552 U.S. at 476.

15. *Id.* at 477.

16. *State v. Snyder*, 750 So. 2d 832, 866 (1999) (Johnson, J., dissenting).

17. *Snyder*, 552 U.S. at 478.

non-black prospective juror.¹⁸ Depending on the type of case and the race of the defendant, the odds of prosecutorial backstrikes against black prospective jurors could be as high as almost nine times that of non-black ones.¹⁹ Prosecutors were also more likely than defense attorneys to exercise backstrikes.²⁰ This analysis reveals the nefarious implications of backstrikes for race-neutral jury selection.

We begin in Part I with a brief history of the evolution of jury selection and the role of the peremptory challenge. Part II focuses on the history and use of backstrikes as part of peremptory challenge procedures in Louisiana. In Part III we describe data collected on peremptory challenges and the use of backstrikes in Caddo Parrish, Louisiana between January 2003 and December 2012, showing that backstrikes were used in the course of jury selection to increase the already disproportionate exclusion of black prospective jurors from service. In Part IV, we discuss how the unique combination of Louisiana's majority decision rule (permitting verdicts based on 10 out of 12), the unusually large number of peremptory challenges permitted (12 per side for each defendant) and the availability of backstrikes all combine to undermine race-neutral jury selection.

I. JURY SELECTION AND THE PEREMPTORY CHALLENGE

The Sixth Amendment guarantees the right to an impartial jury and the U.S. Supreme Court has found that “a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.”²¹ As a result, the Sixth Amendment provision is binding on the States through the due process clause of the Fourteenth Amendment.²² Over time, the meaning of impartiality has come to include the cross-sectional ideal.²³ In *Taylor v. Louisiana*, the Supreme Court was explicit that “the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the com-

18. *See infra* at Table IV and p. 26.

19. *See infra* at p. 26.

20. *See infra* Tables 1 & 2.

21. *Duncan v. Louisiana*, 391 U.S. 145, 158–59 (1968).

22. *Id.*

23. *See* JEFFREY ABRAMSON, *WE, THE JURY* (1994).

munity.”²⁴ The Court has always focused on the composition of the jury pool, rather than on the make-up of a particular jury.

In order to guarantee trial by an impartial jury, courts have recognized that it is necessary for the jury selection process to include challenges for cause that remove jurors who reveal they are unable to be impartial. To achieve the goal of impartiality, challenges for cause are not limited in number. They may be initiated by the court on its own initiative or proposed by one of the parties and confirmed by the court.

The peremptory challenge, which allows the parties to reject a certain number of potential jurors *without* stating a reason and *without* court endorsement, in contrast, is a limited mechanism for achieving an impartial jury. Only a limited number of peremptory challenges are granted to the parties. Moreover, the right to exercise peremptory challenges is not protected under the federal constitution.²⁵ Nonetheless, peremptory challenges have been a part of the justice system in the United States since 1790²⁶ and all state and federal jurisdictions permit them. Various grounds have been offered for this longstanding right to peremptory challenge. Parties can use a peremptory challenge as a “safety valve” to remove a juror they suspect of bias when they don’t have evidence sufficient to sustain a challenge for cause.²⁷ Peremptory challenges can also act as a safeguard against judicial error in deciding on challenges for cause.²⁸ Finally, peremptory challenges give defendants an opportunity to influence the composition of the panel that will judge them.²⁹

The number of peremptory challenges in felony jury trials for offenses other than murder varies substantially, from three per side in New Hampshire³⁰ and Hawaii,³¹ to fifteen in New York.³² In federal

24. 491 U.S. 522, 527 (1975); *see also* Leslie Ellis & Shari S. Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1036 (2003) (characterizing impartiality as a *jury* rather than a *juror* quality).

25. *See, e.g.*, *Rivera v. Illinois*, 129 S. Ct. 1446, 1450 (2009) (“This Court has ‘long recognized’ that peremptory challenges are not of federal constitutional dimension.”) (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000)).

26. *Swain v. Alabama*, 380 U.S. 202, 214 (citing 1 Stat. 119 (1965)).

27. Rose, M.R. & S.S. Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOCIETY REVIEW 513 (2008) at 543.

28. A.B.A., PRINCIPLES FOR JURIES AND JURY TRIALS, PRINCIPLE 11, SUBDIVISION D COMMENTARY, 77 (2005).

29. *Id.*

30. N.H. R. CRIM. P. 22. Selection of Jury (d) Peremptory Challenges. For offenses punishable by death, the defendant shall be accorded, in addition to challenges for cause, no fewer than twenty peremptory challenges; the State shall be afforded, in addition to challenges for cause, no fewer than ten peremptory challenges. In first degree murder cases, both the State and the de-

court, defendants in non-capital felony cases have ten peremptory challenges and the U.S. attorney has six.³³ Only four states, including Louisiana,³⁴ give the state as many as twelve challenges per defendant for non-capital offenses carrying less than a life sentence.³⁵

defendant shall be afforded, in addition to challenges for cause, no fewer than fifteen peremptory challenges. In all other criminal cases the defendant and the State shall, in addition to challenges for cause, be entitled to no fewer than three peremptory challenges. In trials involving multiple charges, the number of peremptory challenges shall be the number of challenges allowed for the most serious offense charged.

31. HAW. R. PENAL P. 24(b) Peremptory Challenges. (In felony cases other than murder, each side is entitled to 3 peremptory challenges). If there are 2 or more defendants jointly put on trial for such an offense, each of the defendants shall be allowed 2 peremptory challenges. In all cases, the prosecution shall be allowed as many peremptory challenges as are allowed to all defendants.

32. N.Y. CODE CRIM. P. § 270.25, *infra* note 35.

33. FED. R. CRIM. P. 24(b). (“Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) *Capital Case*. Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) *Other Felony Case*. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.”).

34. LA. CODE CRIM. P. art. 799 (2006). (“Number of peremptory challenges. In trials of offenses punishable by death or necessarily by imprisonment at hard labor, each defendant shall have twelve peremptory challenges, and the state twelve for each defendant. In all other cases, each defendant shall have six peremptory challenges, and the state six for each defendant.”). In cases with six peremptory challenges per side, the jury is composed of six rather than twelve jurors. LA. CODE CRIM. P. art. 782 (2006).

35. The other three are Kansas, New Jersey, and New York.

KAN. CODE CRIM. P. § 22-3412 (“Jury selection; peremptory challenges; swearing of jury; alternate or additional jurors. (a) . . .

(2) For crimes committed on or after July 1, 1993, peremptory challenges shall be allowed as follows:

(A) Each defendant charged with an off-grid felony or a nondrug or drug felony ranked at severity level 1 shall be allowed 12 peremptory challenges.

(B) Each defendant charged with a nondrug felony ranked at severity level 2, 3, 4, 5 or 6, or a drug felony ranked at severity level 2 or 3, shall be allowed 8 peremptory challenges.

(C) Each defendant charged with an unclassified felony, a nondrug severity level 7, 8, 9 or 10, or a drug severity level 4 felony shall be allowed six peremptory challenges.

(D) Each defendant charged with a misdemeanor shall be allowed three peremptory challenges.

(E) The prosecution shall be allowed the same number of peremptory challenges as all defendants.

(F) The most serious penalty offense charged against each defendant furnishes the criterion for determining the allowed number of peremptory challenges for that defendant.”);

N.J.: 1:8-3 (“Examination of Jurors; Challenges (d) Peremptory Challenges in Criminal Actions. Upon indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by N.J.S.A. 2C:21-1b, or perjury, the defendant shall be entitled to 20 peremptory challenges if tried alone and to 10 such challenges when tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defend-

Before 1986, the right to eliminate jurors without stating any reason, although not constitutionally guaranteed, was provided for in federal and all state statutory jury procedures.³⁶ In *Batson v. Kentucky*, the Supreme Court placed a limit on the exercise of all peremptory challenges in criminal cases, forbidding prosecutors from using juror race as a basis for striking jurors who are the same race as the defendant.³⁷ *Powers v. Ohio* extended *Batson*, making it unlawful to strike a juror because of his or her race, whether or not the juror is of the same race as the defendant.³⁸ Shortly after that, the Court ruled in *Edmonson v. Leesville Concrete Co.* that *Batson* applied to civil cases,³⁹ and in *Georgia v. McCollum* expanded this prohibition to cover defense attorneys in criminal cases.⁴⁰ A few years later, in *J. E. B. v. Alabama ex rel. T. B.*, the Court found that gender, like race, could not be used as the basis for a peremptory challenge.⁴¹

Both court observers and empirical studies have suggested that *Batson* has had little effect in curtailing race-based peremptory challenges.⁴² In practice, judges are reluctant to accuse an attorney of dissembling if the attorney offers any non-race explanation for a challenge, however suspicious or flimsy. As we have previously sug-

ants when tried jointly. In other criminal actions each defendant shall be entitled to 10 peremptory challenges and the State shall have 10 peremptory challenges for each 10 challenges afforded defendants.”);

N.Y. CODE CRIM. P. § 270.25 (“Trial jury; peremptory challenge of an individual juror.

1. A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.

2. Each party must be allowed the following number of peremptory challenges:

(a) Twenty for the regular jurors if the highest crime charged is a class A felony, and two for each alternate juror to be selected.

(b) Fifteen for the regular jurors if the highest crime charged is a class B or class C felony, and two for each alternate juror to be selected.

(c) Ten for the regular jurors in all other cases, and two for each alternate juror to be selected.

3. When two or more defendants are tried jointly, the number of peremptory challenges prescribed in subdivision two is not multiplied by the number of defendants, but such defendants are to be treated as a single party. In any such case, a peremptory challenge by one or more defendants must be allowed if a majority of the defendants join in such challenge. Otherwise, it must be disallowed.”).

36. Kenneth Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1116–20 (2011).

37. *Batson v. Kentucky*, 476 U.S. 79 (1986).

38. *Powers v. Ohio*, 499 U.S. 400 (1991).

39. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

40. *Georgia v. McCollum*, 505 U.S. 42 (1992).

41. *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 129 (1994) (“We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.”).

42. Melilli, *supra* note 36, at 447.

gested, “[i]t is only when the pattern of excuses is extreme (e.g., the prosecutor eliminates the only five blacks on the panel) that the ambiguity is reduced.”⁴³ Even then, creative non-race explanations (e.g., facial hair) for removing a juror can insulate challenges from *Batson*⁴⁴ unless they also apply to other jurors who were not struck.⁴⁵ By giving attorneys even greater latitude in molding the composition of the jury, as revealed in *Snyder v. Louisiana*,⁴⁶ backstrikes have the capacity to exacerbate the problem. And the evidence we present in this article reveals that they do.

II. THE HISTORY AND USE OF BACKSTRIKES IN LOUISIANA

The opportunity to exercise backstrikes as part of the jury selection process has long been accepted in Louisiana. Originally, the right to peremptorily challenge a juror generally ended when the juror was initially accepted, but the trial judge had discretion to permit the challenge of a previously accepted juror.⁴⁷ Over time, judges came to routinely permit backstrikes.⁴⁸ The current Louisiana statute governing jury selection in criminal cases states, “Peremptory challenges shall be exercised prior to the swearing of the jury panel.”⁴⁹ This provision has been interpreted to expressly sanction backstriking. That is, it has been interpreted to mean that a juror in a criminal prosecution, though “provisionally accepted” and sworn, may nevertheless be challenged peremptorily by a party at any time prior to the swearing of the jury panel.⁵⁰ Thus, a juror who has not been removed for cause and who has been deemed acceptable by the attorney, may yet be removed by a peremptory challenge exercised at any time before the jury panel is sworn by a backstrike.

Prior to the research described here, no systematic analysis had assessed how often backstriking was used and when it occurred. What might on the surface be expected to constitute a rarely used “adjustment” measure, in fact turns out to be a commonly used procedure

43. Shari Seidman Diamond, Leslie Ellis & Elisabeth Schmidt, *Realistic Responses to the Limitation of Batson v. Kentucky*, 7 CORNELL J.L. & PUB. POL. 77, 82 (1997).

44. See, e.g., *Purkett v. Elem*, 514 U.S. 765 (1995).

45. *Miller-El v. Dretke*, 545 U.S. 231 (2005).

46. 552 U.S. 472, 472 (2008).

47. *State v. Thornhill*, 188 La. 762, 777 (1937).

48. See, e.g., *State v. Layton*, 217 La. 57 (1950).

49. LA. CODE CRIM. PROC. ANN. art. 795(B)(1) (2015).

50. *Riddle v. Bickford*, 785 So. 2d 795, 798 (La. 2001) (citing *State v. Watts*, 579 So.2d 931 (La. 1991)).

that attorneys deploy to mold the composition of juries, and their use of the procedure is not race-neutral. Although *Snyder v. Louisiana* gave a hint of this possibility,⁵¹ the systematic use of backstrikes across cases revealed here provides evidence that *Snyder* was not an isolated incident.

III. BACKSTRIKING IN CADDO PARRISH

A. Background on jury selection procedures in Caddo Parrish

Jury selection in Caddo Parrish courtrooms begin with the questioning of a randomly selected panel of six or twelve prospective jurors drawn from the larger venire seated in the courtroom.⁵² The number in the panel is determined by the number of jurors to be selected.⁵³ The first step is for the judge to determine whether, due to hardship or partiality or some other inability to act as a juror, a juror should be excused for cause.⁵⁴ Prospective jurors removed for cause are then excused.⁵⁵ The remaining prospective jurors may be questioned further. The prosecutor and defense attorney then simultaneously submit “strike sheets” to the court, listing the names of jurors they wish to peremptorily challenge.⁵⁶ Unless one of the attorneys raises a *Batson* challenge alleging that race or gender was the reason for the peremptory challenge, attorneys do not have to give any reason for their peremptory challenges.⁵⁷ If a *Batson* challenge is raised, and the judge finds a prima facie case for discrimination, the party disputing the *Batson* claim must then supply a race or gender-neutral explanation for the challenge, and the court will then reject or sustain the *Batson* claim.⁵⁸ Challenged jurors, unless they have been the sub-

51. Hamilton, *supra* note 13, at 3.

52. A review of court documents in the cases (Criminal Case Minutes and Jury Selection sheets) showed this procedure.

53. LA. CODE CRIM. PROC. ANN. art. 782(A) (2015) (requiring twelve member juries if the punishment upon conviction necessarily consists of confinement at hard labor or death. Otherwise, the jury is composed of six jurors.).

54. *See generally* LA. CODE CRIM. PROC. ANN. art. 783, 797, 798 (2015).

55. LA. CODE CRIM. PROC. ANN. art. 783 (2015).

56. 1st Judicial District Court Parish of Caddo (“Pursuant to Code of Criminal Procedure Article 788, the court adopts this rule to provide for a system of simultaneous exercise of peremptory challenges. At the conclusion of the examination of prospective jurors as provided in Article 786, those prospective jurors who have not been excused pursuant to a challenge for cause shall be tendered to the state and the defendant(s) for simultaneous exercise of peremptory challenge in writing in a manner to be determined by the court.”); www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX19.0.pdf.

57. *Batson*, 476 U.S. at 96-98.

58. *Id.*

ject of a sustained *Batson* claim, are then excused.⁵⁹ This process is repeated until twelve (or six if only six are required) jurors are accepted by both sides and sworn in. During this process, attorneys can *at any time* return to a previously questioned and accepted juror to exercise a peremptory challenge, i.e., to backstrike that juror. Prospective alternate jurors are then questioned and subjected to challenge using the same procedure.

Under Louisiana law, jury size and number of defendants determine the number of peremptory challenges.⁶⁰ Each side has twelve peremptory challenges for each defendant in a case with a twelve member jury.⁶¹ Each side has six peremptory challenges for each defendant in a case with a six member jury.⁶² Because the number of challenges is determined *per defendant*, a given case may have up to twenty-four challenges per side with two defendants, up to thirty-six per side with three defendants, or even more, giving the attorneys substantial opportunity to de-select jurors they would prefer not to seat, either for race or any other reason.

B. The Data

The MacArthur Justice Center in New Orleans, Louisiana, collaborating with the Louisiana Capital Assistance Center and Reprieve Australia, collected detailed data tracing jury selection in 332 cases in Caddo Parish, Louisiana.⁶³ The data include the demographic characteristics of the defendants, judge and attorneys, the nature of the charged offenses, the demographic characteristics of the prospective jurors in these cases, the use of *Batson* challenges, the exercise of backstrikes, and the selection outcome for each juror.

The Clerk's Office in Caddo Parrish provided a list of all criminal jury trials held between January 2003 and December 2012. The list consisted of 476 trials. Cases could not be included in this analysis if the record was sealed or could not be located or accessed by the Clerk's Office, the defendant pled guilty or the judge declared a mistrial during jury selection, or the information identifying either the

59. *Id.*

60. LA. CODE CRIM. PROC. ANN. art. 799 (2015).

61. *Id.*

62. *Id.*

63. Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's office* (2015), https://blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf.

prospective juror or selection outcome was unclear or incomplete.⁶⁴ Complete selection and outcome information were obtained for the 332 trials analyzed here involving 10,968 prospective jurors. Of the juries, 224 were twelve person juries and 108 were six person juries. Six of the cases had two defendants; the remainder had one. In nine cases, the state sought the death penalty.

Information on each case and each juror was obtained from the court records for these cases, supplemented with information from voter registration lists. A variety of court documents supplied this information: official minute entries from jury selection, voir dire transcripts, official jury selection charts prepared by minute clerks, other juror lists included in the trial record, the trial court's official jury charts, and peremptory challenge forms submitted by each attorney. The information included: the race, gender and selection outcome for each prospective juror; the race and gender of the defendant; the trial outcome; and the names of the judge, prosecutors(s) and defense attorney(s). The selection outcome for a juror reflected all possible results in the selection process: Accepted as a juror (n=3336); Accepted as an alternate (n=463); Removed for cause (1847); Struck by the state (n=1982); Struck by the defense (n=2351); Struck by both (n=186); or Unused (n=803).⁶⁵

We also collected information on the criminal charges in each case and categorized the charges according to the FBI's NIBRS typology: crimes against persons (n=124); crimes against property (n=101); and crimes against society (n=107).⁶⁶ We attempted to obtain information on victim race and gender, but were only able to obtain that information for 144 of the 239 cases that involved victims. As a result, we conducted all analyses both on the entire sample without the victim data and on the sub-sample of cases that included victim data.

64. Of the 145 excluded cases, 59 of them were sealed, 6 others could not be located by the clerk's office, and 11 had incomplete *voir dire* information either because the defendant pleaded guilty or a mistrial was declared during selection, or because some of the challenge information or juror identification was missing. The remaining 69 had incomplete race and gender information for some of the jurors.

65. Unused jurors consisted of those who had been questioned, but were not needed because the attorneys had completed their strikes and the full number of required jurors and alternates had been accepted by both sides.

66. When a case included multiple charges in different categories, we coded the case according to the most serious of the charges, with crimes against persons taking precedence over crimes against property, and crimes against property taking precedence over crimes against society.

Excluding the 1,847 jurors removed for cause and the 803 jurors who remained unused after jury selection was completed, 8,318 prospective jurors were tendered to the parties for potential peremptory challenge, either initially or later before the jury was sworn. These jurors are the focus in this study because they are the only jurors on whom backstrikes could be used. At this point in the jury selection process, 35 percent of the jurors eligible to serve were black (see Appendix A for the list of variables used in this analysis and the distribution of each in the data set).

C. The Use of Peremptory Challenges and Backstrikes

1. Overall Pattern of Peremptory Challenges and Backstrikes

During the peremptory challenge stage of jury selection, attorneys exercised at least one challenge in 330 of the 332 trials. Prosecutors in twelve-member jury trials exercised an average of 8.0 peremptory challenges per trial (exercising at least eleven challenges in 23 percent of trials with one defendant),⁶⁷ while defense attorneys averaged 9.2 per trial (exercising at least eleven challenges in 46 percent of trials with one defendant).⁶⁸ In six-member jury trials, the averages were 3.6 and 4.3, respectively. The prosecutors in the six-member jury trials used at least six challenges in 23 percent of those trials, which all involved one defendant, and the defense attorneys used at least six challenges in 30 percent of those trials. Thus, attorneys in Caddo Parrish made extensive use of the substantial number of peremptory challenges they were permitted to exercise.

The attorneys exercised at least one backstrike in 133 of the 332 trials (40 percent): 23 percent of the six member jury trials and nearly half (48 percent) of the twelve member jury trials. They exercised a total of 315 backstrikes, averaging about one prospective juror per case (range = 0–16). The defense exercised a higher number of peremptory challenges overall (2351 versus 1982 exercised by the prosecution, plus 186 jointly exercised), but prosecutors were more likely than defendants were to use backstrikes to remove jurors (175 versus 145).⁶⁹ Thus, prosecutors used backstrikes to supplement their initial challenges by 9 percent (175/1993), while defense attorneys used back-

67. In the six trials with two defendants, prosecutors exercised at least 11 challenges in two cases: 11 in one and 24 in the other.

68. In the six trials with two defendants, defense attorneys exercised at least 11 challenges in three cases: 14, 15, and 24.

69. Five jurors were backstruck by both the prosecution and the defense.

strikes to supplement their initial challenges by 6 percent (145/2392). The difference is statistically significant ($\chi^2 = 10.72, p < .002$).

2. Method of Analysis

Our analysis of the potential role of juror race in jury selection and the exercise of backstrikes proceeds in two steps. We first describe the overall patterns of peremptory challenge and the use of backstrikes. We then present multivariate analyses that control for potential juror and case characteristics other than juror race in the exercise of backstrikes.

3. Overall Patterns of Prosecutorial Challenge by Juror Race

Table I shows the overall pattern of prosecutor use of peremptory challenges and backstrikes by juror race.

Table I. Prosecutorial Peremptory Challenges and Backstrikes Across Cases

Selection Outcome	Black prospective jurors	All other prospective jurors	All prospective jurors
Struck	46.0% (1338)	15.3% (830)	26.1% (2168)
Initially struck	42.2% (1226)	14.3% (767)	24.0% (1993)
Backstruck	3.9% (112)	1.2% (63)	2.1% (175)
Retained	54.0% (1570)	84.7% (4580)	73.9% (6150)
Total	100.0% (2908)	100.0% (5410)	100.0% (8318)

Without controlling for other factors, prosecutors were three times as likely to challenge a black juror as a non-black juror ($46.0/15.3 = 3.01$). In exercising initial peremptory strikes, they were almost three times as likely to challenge a black juror as a non-black juror ($42.2/14.3 = 2.95$). The disproportionate use of strikes against black jurors was even more extreme for backstrikes: prosecutors used backstrikes 3.25 times as often against black jurors as against non-black jurors ($3.9/1.2 = 3.25$). The difference in use of strikes by juror race is statistically significant in all three of these comparisons ($p < .001$).

4. Overall Patterns of Defense Challenge by Juror Race

The pattern of challenges by the defense provided a partial correction to the disproportionate use of challenges on black jurors by the prosecution. Before the peremptory challenge process began, the venire of eligible jurors was 35.0 percent black. If only prosecutors were permitted to exercise peremptory challenges, the eligible jury pool would have ended up 25.5 percent black. With the defense challenges included, the ultimate composition of the pool that formed the 332 juries, including the alternates, was 31 percent black. Table II shows the pattern of strikes by the defense.

Table II. Defense Peremptory Challenges and Backstrikes Across Cases

Selection Outcome	Black prospective jurors	All other prospective jurors	All prospective jurors
Struck	14.9% (434)	38.9% (2103)	30.5% (2537)
Initially struck	13.8% (400)	36.8% (1992)	28.8% (2392)
Backstruck	1.2% (34)	2.05% (111)	1.7% (145)
Retained	85.1% (2474)	61.1% (3307)	69.5% (5781)
Total	100.0% (2908)	100.0% (5410)	100.0% (8318)

The aggregate analyses presented in Tables I and II present a rough picture of the patterns of peremptory challenge and the use of backstrikes. They do not, however, control for a variety of case and juror characteristics that could affect the comparisons. First, because challenge decisions within the same case may not be independent of one another, it is important to control for that potential influence. In addition, juror, defendant, judge, and attorney characteristics, as well as the nature of the offense and jury size, might modify the overall patterns. To control for these factors, we conducted multivariate analyses that predicted challenge patterns controlling for all of these factors. We discuss the results for all uses of peremptory challenge

elsewhere, showing that the patterns in Tables I and II are robust;⁷⁰ here we focus on the use of backstrikes.

5. Multivariate Analysis of Backstrikes and Juror Race

In the analysis reported below, we tested the predictors of the decision to backstrike a juror. We used logistic regression to test the odds that each party would exercise a backstrike against jurors in particular situations (e.g., against a black prospective juror or in cases involving crimes against persons) compared to the odds that the party would exercise in other situations (e.g., against non-black prospective jurors or in cases with other kinds of charges).

In each model, we controlled for the number of defendants in a case, the type of charge according to the FBI's NIBRS typology, the jury size, and the race and gender of the prospective juror, the prosecutor, and the defendants. Additionally, we included two variables (Percent Non-black members in venire and Percent Male in venire) that measure the race and gender of the other prospective jurors who could have served on the jury. These two variables account for a party's considerations about the likelihood of obtaining a juror of a different race or gender when deciding whether to exercise a backstrike. A prosecutor attempting to avoid black jurors, for instance, would be more likely to accomplish that goal if the jurors next in line in the remaining venire were not black. We also tested each model with and without the nine capital cases included in the analysis, since capital cases in Louisiana are the only twelve-member jury cases that require a unanimous jury verdict and can otherwise contain unique jury selection procedures; our results are substantially the same including or excluding capital cases.⁷¹ Finally, each model includes adjustments in the standard errors by clustering them according to case; this procedure statistically accounts for factors common to a particular case that affect patterns of backstriking within that case.

i. Backstrikes by the Prosecution

The decision to exercise a backstrike can occur at any point between the first exercise of a peremptory challenge and the time that

70. Joshua Kaiser & Shari Seidman Diamond, *Understanding Jury Selection: The Role of Race*. Note that we find that the patterns of disproportionate use of peremptory challenges revealed in Tables I and II are even more extreme in the multivariate analysis.

71. Tables presented include the nine capital cases in the sample. Tables without these cases are available upon request.

the jury is sworn. As a result, we analyzed the odds of a backstrike in two contexts: first (context 1), against the background of all of the 8318 jurors who were questioned and not excused for cause or unused when selection ended, and second (context 2), against the background of those 8318 jurors minus those jurors the attorney had removed with an initial peremptory challenge. The reduced group of jurors in Context 2 reflects the fact that attorneys did not need to use a backstrike to remove a juror the attorney had already struck. Each table in this subsection presents the results for both contexts. As the tables that follow show, juror race was a significant, persistent predictor of the odds of a backstrike in all of these analyses.

Table III shows the racial pattern of prosecutorial backstrikes when other control variables are included in the analysis.

Table III. Odds of Prosecutorial Backstrikes, Clustered by Case

	All Jurors Questioned and Not Excused for Cause (Context 1)		Questioned Jurors not Challenged for Cause or Initially Struck by Prosecution (Context 2)	
Variable Description	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	3.37***	0.55	5.18***	0.88
Juror gender†	1.06	0.18	1.01	0.18
Number of defendants	4.13***	1.63	4.23***	1.74
Charge				
Crime against property	(reference category)		(reference category)	
Crime against society	0.92	0.22	0.93	0.22
Crime against persons	1.43	0.33	1.41	0.33
Jury size (1 = 12, 0 = 6)	1.07	0.31	1.10	0.31
Percent white in venire	1.00	0.01	1.01	0.01
Percent male in venire	0.98	0.01	0.98	0.01
Judge race†	1.57*	0.33	1.59*	0.34
Judge gender†	0.76	0.23	0.77	0.23
Prosecutor race†	0.88	0.17	0.90	0.17
Prosecutor gender†	1.24	0.29	1.19	0.27
Defendant race†	0.80	0.22	0.86	0.24
Defendant gender†	1.02	0.56	1.05	0.58
Intercept	0.00	0.00	0.00	0.00
n	8318		6325	

* p < 0.05, ** p < 0.01, *** p < 0.001

†for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

Among the controls we used in this analysis, the only factors that are statistically significant in predicting prosecutorial backstrikes are the number of defendants, the race of the judge, and the race of the prospective juror. Multiple defendants in a case increase the number of available peremptory challenges, so it is not surprising that an additional defendant in a case increases the odds of a prosecutorial backstrike against any given prospective juror by a factor of 4.13 ($p < 0.001$). If the judge is black, the odds of a prosecutor exercising a backstrike is just over 1.5 times ($p < 0.05$) the odds with a non-black judge.⁷² Most importantly, black prospective jurors faced prosecutorial backstrikes at 3.37 times the odds that non-black prospective jurors did ($p < 0.001$). The results are substantially similar for the analysis in context 2, that is, if we exclude prospective jurors who were initially struck by the prosecution, except that in this context, the odds that the prosecution will exercise a backstrike against a black prospective juror increases to more than five times the odds of a backstrike for a non-black prospective juror ($p < 0.001$).

Table IV shows the analysis including variables for victim race and victim gender—and therefore excluding all cases that do not include a victim or for which victim information was unavailable.⁷³

72. We are not certain how to explain this result, but in light of the small number of black judges ($n = 4$), we are hesitant to attribute it to race.

73. Note that the FBI's NIBRS classification does not necessarily correspond to inclusion of a victim or not. A crime against property can include a victim who testifies or is involved if no physical violence is done to that victim (e.g., simple burglary of a dwelling that does not involve firearms or other violence). Crimes against society can involve victims in similar ways.

Table IV. Odds of Prosecutorial Backstrikes, Clustered by Case (for cases with victim race and gender)

Variable Description	All Jurors Questioned and Not Excused for Cause (Context 1)		Questioned Jurors not Challenged for Cause or Initially Struck by Prosecution (Context 2)	
	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	3.37***	0.79	5.21***	1.28
Juror gender†	0.97	0.21	0.89	0.21
Number of defendants	6.03***	2.31	6.68***	2.51
Charge				
Crime against property	(reference category)		(reference category)	
Crime against society	2.07	1.29	1.84	1.22
Crime against persons	1.83	0.60	1.86	0.60
Jury size (1 = 12, 0 = 6)	1.04	0.30	1.11	0.32
Percent white in venire	0.97*	0.04	0.97	0.01
Percent male in venire	0.96**	0.03	0.96	0.01
Judge race†	1.87*	0.54	2.00*	0.58
Judge gender†	0.39**	0.14	0.37**	0.14
Prosecutor race†	1.28	0.31	1.29	0.31
Prosecutor gender†	1.66*	0.41	1.58	0.38
Defendant race†	0.47	0.23	0.48	0.23
Defendant gender†	1.58	1.25	1.60	1.35
Victim race†	1.84	0.83	1.92	0.86
Victim gender†	0.85	0.27	0.93	0.30
Intercept	0.06	0.08	0.04	0.05
n	3653		2787	

* p < 0.05, ** p < 0.01, *** p < 0.001

†for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

Neither the victim’s race nor the victim’s gender produced a significant impact on the prosecutor’s decision to backstrike in either context 1 or context 2. However, in this limited set of cases that includes victims, each defendant increases the odds of a prosecutorial backstrike by 6.03 (context 1) or 6.68 (context 2) times, respectively (p<0.001), while a black judge increases the odds by a factor of 1.87 (context 1) or 2.00 (context 2), respectively (p<0.05). In cases involving victims, it appears that the gender of the judge also matters. Prospective jurors in cases with a female judge face only 0.39 or 0.37 times the odds, respectively, of being backstruck by the prosecution as they

would in cases with a male judge ($p < 0.01$). The pattern and significance of the odds ratio for backstrikes of black jurors compared to non-black jurors, however, is nearly identical in this subset of cases and in the larger sample: the odds ratios are 3.37 (context 1) and 5.21 (context 2).

We also tested interactions between juror race and the variables in these analyses. In Table V, we present the statistically significant interactions between juror race and defendant race, and between juror race and type of charge.⁷⁴

74. We tested interactions between juror race and other variables that are not listed in the tables, including interactions with defendant gender, prosecutor race, prosecutor gender, judge race, judge gender, effective venire race, and effective venire gender. None produced statistically significant results. Tables are available upon request.

Table V. Odds of Prosecutorial Backstrikes, with Interactions, Clustered by Case

Variable Description	All Jurors Questioned and Not Excused for Cause (Context 1)				Questioned Jurors not Challenged for Cause or Initially Struck by Prosecution (Context 2)			
	Model 1 (with juror race X defendant race interaction)		Model 2 (with juror race X charge interaction)		Model 3 (with juror race X defendant race interaction)		Model 4 (with juror race X charge interaction)	
	Odds Ratio	Standard Error	Odds Ratio	Standard Error	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	1.71	0.57	5.50***	1.61	2.15*	0.70	8.75***	2.56
Defendant race†	0.50	0.18	0.80	0.22	0.47*	0.17	0.86	0.24
Defendant race X Juror race	2.30*	0.86			2.93**	1.09		
Juror gender†	1.06	0.18	1.06	0.18	1.00	0.17	1.01	0.17
Defendant gender†	1.03	0.18	1.02	0.55	1.06	0.57	1.03	0.56
Number of defendants Charge	4.07***	1.61	4.08***	1.61	4.16***	1.72	4.20***	1.75
Crime against property	(reference category)		(reference category)		(reference category)		(reference category)	
Crime against society	0.92	0.22	1.31	0.50	0.94	0.23	1.31	0.50
Crime against society X juror race			0.61	0.25			0.61	0.25
Crime against persons	1.43	0.33	2.32*	0.81	1.41	0.33	2.40*	0.84
Crime against persons X juror race			0.48	0.19			0.44*	0.17
Jury size (1 = 12, 0 = 6)	1.07	0.31	1.07	0.31	1.10	0.31	1.10	0.17
Percent white in venire	1.00	0.01	1.00	0.01	1.00	0.01	1.01	0.01
Percent male in venire	0.98	0.01	0.98	0.01	0.98	0.01	0.98	0.01
Judge race†	1.57*	0.33	1.57*	0.33	1.60*	0.34	1.59*	0.34
Judge gender†	0.77	0.23	0.77	0.23	0.77	0.23	0.77	0.23
Prosecutor race†	0.88	0.17	0.88	0.17	0.89	0.17	0.90	0.17
Prosecutor gender†	1.23	0.28	1.23	0.29	1.18	0.27	1.18	0.27
Defendant race†	0.50	0.18	0.80	0.22	0.47*	0.17	0.86	0.24
Defendant race X Juror race	2.30*	0.86			2.93**	1.09		
Defendant gender†	1.03	0.18	1.02	0.55	1.06	0.57	1.03	0.56
Intercept	0.01	0.01	0.00	0.00	0.01	0.01	0.00	0.00
n	8318	8318	6325	6325				

* p < 0.05, ** p < 0.01, *** p < 0.001

†for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

Models 1 and 3 of Table V show the results when the interaction between juror race and defendant race is included in the analysis. There is a statistically significant effect of the race of the prospective juror for both black and non-black defendants, but the effect is far more pronounced for black defendants. In the context 1 analysis, including jurors who were initially struck by the prosecution (model 1), black prospective jurors in cases with *non-black defendants* are at risk of being backstruck by the prosecution only 1.71 times more than non-black jurors are ($p>0.05$). In cases with *black defendants*, however, black prospective jurors are 3.92 times more at risk than are non-black jurors ($p<0.05$). In context 2 (model 3), the same relationship exists but is even more pronounced. In cases with non-black defendants, black prospective jurors have 2.15 times the odds of being backstruck by the prosecution as do non-black prospective jurors ($p<0.05$), while in cases with black defendants, black prospective jurors have 6.29 times the odds of being subject to a prosecutorial backstrike as do non-black jurors ($p<0.01$). No other variables in these models demonstrate notably different effects from those in the initial analysis from Table III.

The pattern of results in this interaction with defendant race highlights the use of juror race in the exercise of backstrikes. If non-racial qualities of a juror (such as facial hair or demeanor) were motivating the prosecutor's backstriking patterns, we would anticipate that the race of the defendant would not affect the odds of backstriking black jurors relative to the odds of striking non-black jurors. Yet, as this analysis shows, it does. Prosecutors are more likely to backstrike black jurors than non-black jurors, and they are particularly likely to do it if the defendant is black. We see a similar, but reverse and smaller effect for defense attorneys.⁷⁵

Lastly, we add to the analysis the interaction between juror race and the nature of the charge. Both the context 1 and context 2 analyses (models 2 and 4 of Table V) show that the odds of prosecutorial backstrikes vary significantly according to the nature of the charge brought against a defendant; and that the odds are even higher than shown in other models when we account for this interaction. Backstrikes are about as likely in cases involving crimes against society as they are in cases involving crimes against property, but prospective jurors do have higher odds of being backstruck when the charge is a

75. See *infra* Table VIII.

crime against persons (2.32 times in the context 1 analysis and 2.40 times in the context 2 analysis; $p < 0.05$).

Because the odds of prosecutorial backstrikes are higher for *all* prospective jurors in cases that involve crimes against persons, however, the disparity between non-black and black jurors is less pronounced in those cases. In other words, the disparity in prosecutorial backstriking behavior between black and non-black prospective jurors is greatest in cases that do *not* involve crimes against persons. In the context 1 analysis (model 2), the significant difference in the odds of a prosecutorial backstrike for black compared to non-black jurors is not exacerbated by the type of charge; in property crimes cases, black jurors have 5.50 times the odds of being backstruck as do non-black jurors ($p < 0.001$), but there is no significant increase in those odds for other types of charges. However, in the context 2 analysis (model 4), there is a significant effect. Compared to non-black prospective jurors in cases that involve property crimes, black prospective jurors face 8.75 times the odds of being backstruck by the prosecution as do non-black prospective jurors in cases involving crimes against property, about the same increased odds in cases involving crimes against society, but only 3.86 times the odds in cases involving crimes against persons ($p < 0.05$). Importantly, although the disparity between the odds of backstrikes for black and non-black jurors is compressed in person-crimes cases, black prospective jurors in those cases face increased chances of a prosecutorial backstrike both from their race and from the nature of the charges. As such, black prospective jurors in person-crimes cases have the highest odds of any group in this analysis of being backstruck by the prosecution.

ii. Summary of Results for Prosecution Backstrikes

All of the results in these analyses reveal persistent increased odds of being backstruck for black jurors relative to non-black jurors, with overall odds ratios between 3.37 and 5.18. For some sub-groups of cases (e.g., those with black defendants), the odds ratio is even higher (i.e., in context 2, for cases involving blacks defendants the odds ratio reaches 6.29 and for cases involving property- or society-crimes it reaches 8.75). This robust disproportionate use of backstrikes against black jurors, undiminished by controls for other case characteristics, provides systematic evidence that the procedure contributes to undermining race-neutral jury selection.

iii. Backstrikes by the Defense

Our analysis of defense backstrikes includes the same controls and proceeds in the same fashion as our analysis of prosecutorial backstrikes did. Just as with prosecutorial backstrikes, backstrikes by the defense are considered in context 1 and then in context 2. Thus, our analysis of defense backstriking also includes two sets of models: context 1 includes the 8318 prospective jurors who were not excused for cause or unused, and context 2 includes only the 5926 prospective jurors who were not excused for cause, unused, or initially struck by the defense. Subsequent tables show both sets of results.

Table VI shows the racial pattern of defense backstrikes when other control variables are included in the analysis.

Table VI. Odds of Defense Backstrikes, Clustered by Case

Variable Description	All Jurors Questioned and Not Excused for Cause (Context 1)		Questioned Jurors not Challenged for Cause or Initially Struck by Defense (Context 2)	
	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	0.50***	0.11	0.36***	0.09
Juror gender†	0.89	0.17	0.78	0.15
Number of defendants	2.47	1.51	2.60	1.59
Charge				
Crime against property	(reference category)		(reference category)	
Crime against society	0.65	0.21	0.66	0.21
Crime against persons	1.73*	0.44	1.71*	0.43
Jury size (1 = 12, 0 = 6)	1.23	0.36	1.29	0.36
Percent Non-black percent in venire	0.96***	0.01	0.96***	0.01
Percent Male in venire	0.99	0.01	0.99	0.01
Judge race†	1.60*	0.26	1.64*	0.36
Judge gender†	0.72	0.18	0.74	0.18
Prosecutor race†	0.90	0.18	0.89	0.18
Prosecutor gender†	0.94	0.22	0.82	0.21
Defendant race†	0.68	0.24	0.84	0.25
Defendant gender†	1.43	0.91	1.36	0.84
Intercept	0.15	0.15	0.27	0.28
n	8318		5926	

* p < 0.05, ** p < 0.01, *** p < 0.001

†for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

The pattern of defense backstrikes is quite different from that of prosecutorial backstrikes. For defense backstrikes, the likelihood of a backstrike does not change significantly with the number of defendants. Unlike the prosecution's patterns, defense backstriking is influenced by the type of charge in the case. Prospective jurors in cases that involve a crime against persons have 1.73 times the odds of being backstruck by the defense as do those in cases involving property crimes ($p < 0.05$); prospective jurors in cases involving crimes against society, however, face about the same odds as do those in property-crimes cases. As with prosecutors, defendants apparently exercise backstrikes more frequently in front of black judges, with a similar odds ratio of 1.60 times the odds ratio for non-black judges ($p < 0.05$).

Juror race is significant for defense attorneys, but the direction of the effect reverses the pattern for prosecutors: the defense is less, rather than more, likely to backstrike a black juror. The odds of a black prospective juror being backstruck by the defense is 0.50 times the odds of a non-black juror being backstruck ($p < 0.001$). This is equivalent to saying that the odds of a *non-black* juror being backstruck by the defense is two times the odds of a *black juror* being backstruck ($1/0.50 = 2$). Moreover, defense backstriking is also influenced by the racial composition of the remaining jurors in the effective venire; for every one percentage point increase in non-black prospective jurors who were seated for questioning in the case, the odds of a defense backstrike decreases by about four percent ($p < 0.001$).

The patterns for defense backstrikes presented in Table VI are substantially similar for context 2, except for the odds ratio for juror race. For *non-black* prospective jurors, the odds of a defense backstrike increases to 2.78 times the odds of a defense backstrike of a *black* juror ($p < 0.001$).

The analyses in Table VII include variables for victim race and victim gender, and thus also exclude cases without victims or for which victim information was unavailable.

Table VII. Odds of Defense Backstrikes, Clustered by Case
(for cases with victim race and gender)

Variable Description	All Jurors Questioned and Not Excused for Cause (Context 1)		Questioned Jurors not Challenged for Cause or Initially Struck by Defense (Context 2)	
	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	0.59*	0.18	0.43**	0.14
Juror gender†	0.92	0.27	0.78	0.23
Number of defendants	5.82***	2.90	5.91***	2.90
Charge				
Crime against property	(reference category)		(reference category)	
Crime against society	1.42	1.47	1.31	1.35
Crime against persons	2.32*	0.95	2.27*	0.90
Jury size (1 = 12, 0 = 6)	0.72	0.21	0.75	0.22
Percent white in venire	0.94***	0.01	0.94***	0.01
Percent male in venire	0.96**	0.01	0.96***	0.01
Judge race†	1.64	0.55	1.70	0.56
Judge gender†	0.80	0.27	0.83	0.28
Prosecutor race†	1.07	0.28	1.06	0.27
Prosecutor gender†	1.41	0.34	1.32	0.31
Defendant race†	0.68	0.36	0.79	0.42
Defendant gender†	4.73	3.96	4.24	3.22
Victim race†	1.07	0.38	1.00	0.35
Victim gender†	0.66	0.18	0.64	0.18
Intercept	0.91	1.16	1.70	2.21
n	3653		2601	

* p < 0.05, ** p < 0.01, *** p < 0.001

†for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

As with prosecutorial backstrikes, neither the victim's race nor the victim's gender has a significant impact on the defense's decision to backstrike. Nonetheless, in this more limited sample that includes only cases involving victims, the number of defendants does appear to matter; when victims are present, each defendant increases the odds of a defense backstrike by 5.82 (context 1) or 5.91 (context 2) times ($p < 0.001$). The effect size for the race of the judge does not change, but it becomes non-significant with the smaller sample size. The odds ratio for person-crime cases compared to property-crime cases increases to a factor of about 2.3 ($p < 0.05$). The odds ratio for black com-

pared to non-black jurors, however, stays approximately the same. If anything, the rate at which the defense backstrikes disproportionately according to race decreases in cases involving victims (to a factor of 0.59 for context 1 or 0.43 for context 2). Still, defendants appear to backstrike less frequently as the effective venire includes more white jurors (an odds ratio of 0.94 per percentage increase; $p < 0.001$) as well as less frequently as the effective venire includes more men (an odds ratio of 0.96 per percentage increase; $p < 0.001$).

As we did for prosecutorial backstrikes, we also tested the effects of significant interactions with juror race in the defense decision to backstrike.⁷⁶ Table VIII adds the interactions with juror race and juror gender.

⁷⁶ Again, none of the other interactions with juror race was significant. Tables reflecting those analyses are available upon request.

Table VIII. Odds of Defense Backstrikes, with Interactions, Clustered by Case

Variable Description	All Jurors Questioned and Not Excused for Cause		Model 1 (with juror race X defendant race interaction)		Model 2 (with juror race X charge interaction)		Model 3 (with juror race X defendant race interaction)		Model 4 (with juror race X charge interaction)	
	Odds Ratio	Standard Error	Odds Ratio	Standard Error	Odds Ratio	Standard Error	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	1.01	0.39	0.26**	0.11	0.91	0.37	0.18***	0.08		
Defendant race†	0.89	0.30	0.68	0.24	1.03	0.35	0.73	0.25		
Defendant race X Juror race	0.40*	0.18			0.30*	0.14				
Juror gender†	0.89	0.17	0.89	0.17	0.78	0.15	0.78	0.15		
Defendant gender†	1.44	0.92	1.45	0.93	1.38	0.85	1.39	0.86		
Number of defendants Charge	2.52	1.56	2.54	1.57	2.70	1.65	2.74	1.70		
Crime against property	(reference category)	(reference category)	(reference category)	(reference category)	(reference category)	(reference category)	(reference category)	(reference category)		
Crime against society	0.65	0.21	0.65	0.21	0.99	0.77	0.65	0.21	0.66	0.22
Crime against society X juror race									0.96	0.76
Crime against persons	1.73*	0.44	1.36	0.35	1.72*	0.43	1.33	0.34		
Crime against persons X juror race			2.93*	1.51			3.14*	1.64		
Jury size (1 = 12, 0 = 6)	1.23	0.35	1.24	0.17	1.28	0.36	1.30	0.36		
Percent white in venire	0.96***	0.01	0.96***	0.01	0.96***	0.01	0.96***	0.01		
Percent male in venire	0.99	0.01	0.99	0.01	0.99	0.01	0.99	0.01		
Judge race†	1.60*	0.36	1.61*	0.36	1.65*	0.36	1.66*	0.37		
Judge gender†	0.72	0.18	0.71	0.18	0.73	0.18	0.72	0.18		
Prosecutor race†	0.89	0.18	0.89	0.18	0.88	0.17	0.89	0.18		
Prosecutor gender†	0.95	0.22	0.94	0.22	0.95	0.22	0.93	0.21		
Intercept	0.11	0.13	0.17	0.18	0.20	0.20	0.31	0.33		
n	8318		8318		5926		5926		5926	

* p < 0.05, ** p < 0.01, *** p < 0.001† for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

Models 1 and 3 of Table VIII show the results when the interaction between juror race and defendant race is included in the analysis. As with the prosecutorial backstrike pattern, the defense backstrike pattern depends on the race of the defendants in a case. In the context 1 analysis (model 1), non-black prospective jurors are about as likely to be backstruck by the defense as are black prospective jurors in cases involving all *non-black defendants*, but they have about 2.50 times the odds of a defense backstrike as do black prospective jurors in cases with *black defendants* ($p < 0.05$). The same relationship is even more pronounced in the context 2 analysis (model 3); non-black prospective jurors have about the same odds of facing a defense backstrike as do black prospective jurors in cases with non-black defendants, but about 3.70 times the odds that black prospective jurors do in cases with black defendants ($p < 0.05$). No other effects are of note compared to those in Table VI.

Our final models 2 and 4 show the patterns in defense backstriking when the interaction between juror race and type of charge is added to the analysis. Defense backstrikes by juror race also depend on the type of charge brought in the case—in a similar pattern to the one we saw with prosecutorial backstriking. Although prosecutors backstrike both black and non-black jurors more frequently in cases that involve crimes against persons (though still backstriking black jurors at a higher rate than non-black ones), defendants backstrike both black and non-black jurors at about the same rate in person-crime cases. However, in cases involving property or society crimes, the odds that a defense backstrike is exercised for a *non-black* juror is almost four (3.84) times the odds for a *black* juror ($p < 0.01$). These figures increase slightly when jurors initially struck by the defense are removed from the analysis (context 2): non-black jurors in property- or society-crime cases have 5.56 times the odds of facing a defense backstrike as do black jurors ($p < 0.001$), while odds of defense backstrikes for black and non-black jurors in person-crimes cases do not differ.

iv. Summary of Results for Defense Backstrikes

Defense backstrikes are exercised significantly less frequently than prosecution backstrikes, so they influence jury composition less.⁷⁷ Nonetheless, they do act as something of a counterweight to the

77. Cf. text following *supra* note 50.

prosecution's robust pattern of persistently increased odds of backstriking black jurors relative to non-black jurors. The overall odds ratios for defense backstrikes of non-black jurors compared to black jurors range from 2.0 to 2.78, and rise further for some sub-groups of cases (e.g., 3.70 with black defendants in context 2). Note that the significantly greater use of backstrikes by prosecutors than by defense attorneys further undermines the argument that backstrikes are merely a rational tool for managing group dynamics.⁷⁸ If that were true, we would expect both sides to be equally active in using them.

IV. THE PROBLEM OF BACKSTRIKES IN CADDO PARRISH

Using this unique data set that maps the use of peremptory strike and backstrikes during jury selection, we find that backstrikes occur frequently, removing jurors who have initially been accepted in 40 percent of these 332 cases. Moreover, controlling for other available case and juror characteristics, prosecutors were between three and more than five times as likely to use a backstrike on a black prospective juror as on a non-black prospective juror, thus expressing a strong preference for backstriking black jurors. The reverse pattern for defense attorneys is weaker and thus only partially counterbalances the actions of the prosecutors.

Prosecutors were even more likely to disproportionately backstrike black prospective jurors in two situations: when the cases involved black defendants, and when the case involved a property crime or a crime against society as opposed to a crime against a person. They were also more likely than defense attorneys to exercise backstrikes. This pattern of backstrikes exacerbates the already disproportionate removal of eligible black jurors by peremptory challenge during jury selection. The higher backstrike rate for the prosecutor in the cases with black defendants, which constitute 83 percent of the cases, provides evidence of the racial influence on these decisions to exercise a backstrike. It is hard to explain why black jurors are less desirable to the prosecution when the defendant is black unless race infects the decisions.

But what about *Batson* challenges as a way to prevent race-based exclusions? Attorneys in only ten of the 332 cases in Caddo Parrish raised a *Batson* challenge: eight prosecutors and six defense attorneys.

78. See note 12 *supra*.

A minority of these efforts, three of the prosecution and two of the defense challenge efforts had some effect, restoring to juries a total of 14 jurors. Only four of the restored jurors whose strikes were subjected to a successful *Batson* challenge were black jurors who had been initially struck by the prosecutor; the remaining ten were non-black jurors who had been initially struck by the defense. Thus, as a way to protect race-neutral strikes by the prosecution, *Batson* had an almost imperceptible effect. The rare effort to mobilize *Batson* is not surprising in view of the trail of both U.S. Supreme Court⁷⁹ and lower court acceptance of all but the most egregious and blatant instances of race-based use of the peremptory challenge.⁸⁰

A number of judges and scholars have called for the elimination of peremptory challenges to avoid race-based use of peremptory challenges. Almost thirty years ago, Justice Thurgood Marshall, in his concurring opinion in *Batson*, pointedly argued that the Court should eliminate the use of peremptory challenges in all criminal proceedings so that they could not be based on race.⁸¹ He predicted that because courts would find it difficult to identify a race-based motivation for a peremptory challenge unless it was blatant, the rule in *Batson* would fail to eliminate racially motivated strikes from jury selection.⁸² Twenty years later, Justice Stephen Breyer concluded that Justice Marshall was correct.⁸³ Others too have found the elimination of the peremptory challenge as an attractive way to produce race-neutral jury selection.⁸⁴

Does the peremptory challenge have a place in the modern jury trial? One potential justification for the peremptory challenge is that it can remove a juror suspected of bias when the party who suspects bias lacks sufficient proof to sustain a challenge for cause.⁸⁵ This justi-

79. See, e.g., *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam).

80. See, e.g., *Stokes v. State*, 194 S.W.3d 762, 765 (Ark. 2004); *Taylor v. State*, 620 S.E.2d 363, 366 (Ga. 2005); *Smith v. State*, 448 S.E.2d 179, 181–82 (Ga. 1994).

81. *Batson*, 476 U.S. at 107 (J. Marshall, concurring) (“Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.”).

82. *Id.* at 106.

83. *Miller-El*, 545 U.S. at 273 (J. Breyer, concurring) (“I believe it necessary to reconsider *Batson*’s test and the peremptory challenge system as a whole.”).

84. See, e.g., Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 199–211 (1989); Akhil Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS. L. REV. 1169, 1182–83 (1995); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997); Melilli, *supra* note 36, at 502–03.

85. A.B.A. PRINC. OF JURIES AND JURY TRIALS (2005) princ. 11, subdiv. D.

fication has some merit outside the racial context. If the spouse of a police officer whose son is also an officer declares during jury selection that he will not give greater weight to the testimony of the police officers who will testify than to other witnesses, the court will not remove the juror for cause. The juror may be accurate in his claim, but it would be understandable if the defendant was skeptical and wished to exercise a peremptory challenge to remove this juror. Thus, the ability to remove this juror can promote the defendant's (and presumably any observer's) confidence in the fairness of the tribunal. But even if some use of the peremptory challenge is justified, how extensive should the right to peremptory challenges be? Three features of jury selection and decision making in Louisiana combine to make jury selection particularly vulnerable to race effects.

First, recall that in twelve-member juries, Louisiana permits each side to exercise twelve strikes with one defendant, adding another twelve strikes for each additional defendant, and additional challenges for each alternate.⁸⁶ This large number of peremptory challenges enables attorneys to influence the composition of the jury far more than in jurisdictions where the number of challenges is more limited. In contrast to Louisiana, the majority of states with twelve-member juries in felony cases⁸⁷ allocate six or fewer peremptory challenges to the state. Only three others give the state as many as twelve.⁸⁸

Second, Louisiana is one of only two states that permit juries in felony cases to reach a verdict based on the agreement of ten out of twelve jurors.⁸⁹ Thus, an attorney need not remove all potential jurors who may be unsympathetic; two can be retained without jeopardizing the preferred verdict of the remaining ten. The number of potential challenges and the ten-out-of-twelve decision rule thus inflate the opportunity of a prosecutor who is consciously or unconsciously motivated by race to disproportionately remove black jurors during jury selection. The prosecutor can retain two minority jurors without jeopardizing a verdict the prosecutor expects will be affected by, or at least correlate with, the racial composition of the jury.

86. LA. CODE CRIM. PROC. ANN. art. 789 (2015) (noting that the court determines whether alternate jurors are desirable, how many, and how many additional peremptory challenges shall be allowed).

87. All states except Connecticut, Florida, and Utah.

88. See *supra* note 35 and accompanying text.

89. Oregon permits ten out of twelve jurors in most felony cases, but requires unanimity in cases of aggravated murder.

What about the backstrike? This is the third feature of the Louisiana jury selection system that affects the racial make-up of the jury. Recall that the juror who is subjected to a backstrike has previously been deemed acceptable by the attorney exercising the backstrike. The attorney exercising the backstrike has simply decided belatedly that he or she would prefer another juror to the juror being backstruck. Why might that happen? Assume that the prosecutor is implicitly or explicitly motivated to remove black jurors because they are viewed as unfriendly to law enforcement, unduly sympathetic to defendants, or for any other reason. If race influences the prosecutor's choice, it is an unconstitutional violation of the Equal Protection Clause. How can the opportunity to backstrike facilitate such behavior? As in *Snyder v. Louisiana*,⁹⁰ the prosecutor may tentatively retain a minority juror to avoid the appearance of a race-based challenge pattern, and then return to use a backstrike later in the process. We cannot directly measure the motivation of the backstriking in Caddo Parish, but we do have evidence that race is a persistent predictor not only of initial peremptory challenge decisions, but also *among jurors already found acceptable by the prosecutor* of the odds that a juror will be removed with a backstrike. The series of analyses presented in this article show that juror race consistently predicts backstriking even when a variety of case controls are introduced. Thus, the opportunity to backstrike supplies an additional way to engage in race-based exclusion.

If we wanted to facilitate the use of race-based exclusions and the seating of juries on which minority jurors can be ignored, the Louisiana system provides a good template: First, use a decision rule that will permit the majority of ten out of twelve to ignore or outvote the minority. Second, provide the prosecutor with a large supply of peremptory challenges. Recall that the prosecutor in Louisiana gets twelve for each defendant. Third, permit backstrikes that can enable additional maneuvering to manage the use of the peremptory challenges. The remedy for all of these threats to race-neutral jury selection is clear: use a unanimous decision rule on twelve-person juries that empower all jurors, as 44 other states and the federal courts do;⁹¹ reduce the number of peremptory challenges permitted so that the number reflects the lower norms for number of peremptory challenges

90. See *Snyder*, 552 U.S. at 474.

91. The other exceptions are Arizona and Utah (unanimous 8 person juries); Florida and Connecticut (unanimous six person juries) and Oregon (10 agreeing on a 12-person jury).

in most other parts of the country; and eliminate backstrikes, a procedure used in only three other states. Peremptory challenges are under attack and vulnerable to criticism, but they can be defended and justified if their use is cabined reasonably. The problem is that *Batson* has unfortunately been an effective tool in only the most egregious instances of race-based exclusions and there is convincing evidence presented in this article and elsewhere that race-based exclusions are far more common than those resulting in successful *Batson* challenges.

Backstrikes only exacerbate the problem of race-based exclusions through peremptory challenge by providing attorneys with greater latitude in striking jurors and making it harder to monitor the basis for an individual challenge decision. *Snyder v. Louisiana* showed how that can happen.⁹² The prosecutor did not exercise a backstrike on Mr. Brooks until the day after Mr. Brooks had initially been accepted and after excusing two other black jurors.⁹³ The defense lodged a *Batson* challenge at that point, but by that time the prosecutor was prepared to offer supposedly race-neutral reasons for the strike: Mr. Brooks' conflicting obligations as a student-teacher and his nervous demeanor.⁹⁴ The trial court accepted the prosecutor's explanations for the strike and it was only twelve years later when the case made its way to the U.S. Supreme Court that the removal of Mr. Brooks was judged to be pretextual and discriminatory.⁹⁵ As the Court noted, several white jurors who the prosecution had chosen not to strike had said they had conflicting work and family obligations at least as serious as those of Mr. Brooks.⁹⁶

Our results from Caddo Parish point to a systemic problem with backstrikes that mirrors the problem in *Snyder*: They cannot be characterized as race-neutral. Permitting backstrikes increases the likelihood of race-based exclusions, and they are used by prosecutors to disproportionately to remove black jurors. In doing so, they undermine the legitimacy of a jury selection process that is already viewed with suspicion. The most effective way to eliminate the harm that backstrikes inflict is to eliminate backstrikes as an option.

92. See *Snyder*, 552 U.S. at 474.

93. *Id.* at 477–79.

94. *Id.* at 478.

95. *Id.* at 485.

96. *Id.* at 480–83. In addition, in response to the trial court's inquiry, the Dean supervising Mr. Brooks had said that he didn't see a problem and promised to work with Mr. Brooks to help him meet his requirements.

APPENDIX A:
VARIABLES IN THE BACKSTRIKE ANALYSIS

Variable Name	Sample Characteristics	n
Number of defendants	326 (98.2%) = 1; 6 (1.8%) = 2	332 cases
Charge		332 cases
Crime against property	101 (30.4%)	
Crime against society	107 (32.2%)	
Crime against persons	124 (37.4%)	
Jury size	108 (32.5%) six-person juries = 0; 224 (67.5%) twelve-person juries = 1	
Victim race	all non-black victims = 0; all black victims = 1; mean of 61.4% black victims per case	296 victims
Victim gender	all male victims = 0; all female victims = 1; mean of 48.8% female victims per case	296 victims
Juror race	5410 (65.0%) non-black jurors = 0; 2908 (35.0%) black jurors = 1	8318 jurors
Juror gender	3555 (42.7%) male jurors = 0; 4763 (57.3%) female jurors = 1	8618 jurors
White percentage of venire	all non-white prospective jurors = 0; all white prospective jurors = 1; mean of 70.2% white prospective jurors per case	332 cases (8318 jurors)
Male percentage of venire	all female prospective jurors = 0; all male prospective jurors = 1; mean of 44.2% male prospective jurors per case	332 cases (8318 jurors)
Judge race	203 (74.9%) cases with non-black judge = 0; 129 (38.9%) cases with black judge = 1	332 cases (12 judges)
Judge gender	261 (78.6%) cases with male judge = 0; 71 (21.4%) cases with female judge = 1	332 cases (12 judges)
Prosecutor race	all non-black prosecutors = 0; all black prosecutors = 1; mean of 25.1% black prosecutors per case	332 cases (45 prosecutors)
Prosecutor gender	all male prosecutors = 0; all female prosecutors = 1; mean of 16.1% female prosecutors per case	332 cases (45 prosecutors)
Defendant race	all non-black defendants = 0; all black defendants = 1; mean of 83.4% black defendants per case	332 cases (338 defendants)
Defendant gender	all male defendants = 0; all female defendants = 1; mean of 4.1% female defendants per case	332 cases (338 defendants)

ESSAY

“Post-Ferguson” Social Engineering: Problem-Solving Justice or Just Posturing

MAE C. QUINN*

INTRODUCTION	739
I. INTERROGATING NEW CHANGE AGENTS, CORRECTIVE AGENCIES, AND THEIR AGENDAS	742
II. PROBING PROFFERED THEORIES: RESTORATIVE, PROCEDURAL AND THERAPEUTIC JUSTICE	753
III. CRITICALLY CONSIDERING “PROBLEM- SOLVING” COURTS AS THE SOLUTION	758
CONCLUSION	764

INTRODUCTION

In 1929, Howard Law School Dean Charles Hamilton Houston urged lawyers to serve as “social engineers” to actively apply the United States Constitution to help solve “problems of local communities” and “better conditions of underprivileged citizens.”¹ His re-

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1. See *About the School of Law*, HOW. U. SCH. L., <http://www.law.howard.edu/19> (last updated Mar. 12, 2016) [hereinafter *Howard’s History*] (“As stated by Charles Hamilton Houston, ‘A lawyer’s either a social engineer or . . . a parasite on society[. . .] A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities and in bettering conditions of the underprivileged citizens.’”).

marks were primarily intended for attorneys of color,² to inspire them to come together to work to dismantle racially oppressive systems and institutions in society.³ But much like the insights offered by the contemporary #BlackLivesMatter movement, they served as a revolutionary call to action for all.⁴

Yet today some are cloaking themselves in some version of Houston's proclamations while deploying their own personal agendas relating to youth, criminal justice, and court reform. Rather than truly speaking truth to power and digging into the root causes of much of what ails our criminal and juvenile justice systems, too many are simply papering over—and in some instances exacerbating—long standing networks, institutions, and systemic issues that have worked to reduce the life chances of minority youth across America.

2. Charles H. Houston, *The Need for Negro Lawyers*, 4 J. OF NEGRO EDUC. 49, 52 (1935) (“The lines are drawn however, and neither the law schools nor the lawyers can retreat. The great work of the Negro lawyer in the next generation must be in the South and the law schools must send their graduates there and stand squarely behind them as they wage their fight for true equality before the law.”).

3. But Dean Houston also collaborated with non-minority advocates. For instance, he counseled racial justice rights matters with Marian Wynn Perry, a white woman and NAACP attorney. See Brief for Petitioners, *McGhee v. Sipes*, 331 U.S. 804 (1947) (No. 87), 1947 WL 30427. He also hosted Clarence Darrow at Howard Law School to teach students about challenges they might face while undertaking civil rights litigation. Douglas O. Linder, *Before Brown: Charles H. Houston and the Gaines Case*, UMKC SCH. L., <http://law2.umkc.edu/faculty/projects/ftrials/trialheroes/charleshoustonessayF.html> (Mar. 29, 2016). Similarly, Dean Houston's protégé, Thurgood Marshall, worked side by side with Jack Greenberg and Jack B. Weinstein, both white and then young attorneys, on *Brown v. Board of Education* and its companion cases to deploy Dean Houston's legal theories to win desegregation of American public schools. See NAACP LEGAL DEF. & EDUC. FUND, EXCERPT FROM THE WINDING ROAD TO BROWN: AN LDF CHRONOLOGY (2004), <http://www.naacpldf.org/files/Excerpt%20From%20The%20Winding%20Road%20to%20Brown.pdf>. Both Jack Greenberg and Jack Weinstein became Columbia Law School professors. *Columbians Who Played a Role in Brown v. Board*, COLUM. L. SCH., <https://www.law.columbia.edu/focusareas/brownvboard/bvbcolumbians> (Mar. 29, 2016). Weinstein, for whom this author had the great privilege of clerking from 1997–98, was later appointed to the federal bench.

4. This year, Brittany Packnett, Executive Director of St. Louis Teach for America, member of the Ferguson Commission, and a powerful presence at St. Louis protests following Michael Brown's death, wrote this about the #BlackLivesMatter movement for TIME magazine on Dr. Martin Luther King Jr. day:

Who are we? While we are mostly black, we are diverse in belief, experience and practice. We are thankful to the generations that toiled before us, though at times, we experience the intergenerational challenges that have been repeated throughout history. We reject the notion that dressing, speaking or acting in less confrontational ways will save us—because respectability and accomplishment won't protect us from the perils of blackness in America. We are Jews, Gentiles, Muslims and the non-religious. We are cisgender, transgender, and non-binary; straight and LGBTQ. We are college graduates and high school dropouts. Some of us have been trained as professionals; we have all trained by protest. We are many colors and full of dedicated, consistent allies who stand with us.

Brittany Packnett, *Black Lives Matter Isn't Going Anywhere*, TIME (Jan. 18, 2016), <http://time.com/4178280/black-lives-matter-2016>.

“Post-Ferguson” Social Engineering

In our current “post-Ferguson” frenzy⁵—where it is now fashionable for allies to be associated with the #BlackLivesMatter movement⁶ and doing better and being better on the question of race⁷—too many alleged advocates are appropriating Houston’s directives for their own motives. While purporting to act in the interest of minority children and their families, some emerging activists fail to sufficiently surface, name, and address many of the real problems facing court-involved youth of color in the United States today.

Indeed, countless individuals and institutions seem to be stepping forward to claim they stand for change. Frequently, however, they are doing so without confessing their own prior complicity, honestly addressing the problematic practices of their own institutions, or admitting the history of racial oppression in their own communities. Others are attempting to lead the charge with little in the way of actual knowledge or expertise about policing, prosecution, court practices—or even the Constitution. And too much of what is being floated as “fixes” are shallow, surface-level, feel-good “innovations” that steer

5. Let me acknowledge there are many problems with the term “Post-Ferguson.” First, Ferguson still exists. So it is wrong to engage in a post-mortem on a community where people live and seek to thrive. The term also suggests the entire town and all of its inhabitants somehow deserve our scrutiny or disdain. This, too, is far from the truth. In addition, it minimizes the breadth and depth of the problem of racial injustice in this country that has publically shown its ugly head in recent months in many American cities and towns, including Charlotte, Cincinnati, Chicago, and my own home town of Staten Island, New York. However, as it has been so widely embraced as a modern meme, I will use it here while acknowledging its limits and issues.

6. *Id.* (“[T]he Black Lives Matter movement has gone from an unpopular effort to a cause célèbre.”).

7. In his end of 2014 reflections to campus, following student protests and calls for greater engagement with racial justice issues, Washington University’s Chancellor Mark Wrighton offered these sentiments:

I thank all of you for what you are doing to make Washington University great, and there is much to celebrate in that regard. But we have fallen short in creating an environment where everyone feels respected, honored and safe. We must acknowledge these shortcomings and work together toward a future where “Black lives matter” is more than a slogan and where racial inequality is something to be studied in a history course. Our community can be a force for positive change. Together, we can do better and be better.

Mark S. Wrighton, *End of Year Reflections*, WASHU VOICES: FERGUSON & BEYOND (Dec. 10, 2014), <https://voices.wustl.edu/message-chancellor-wrighton-3/>; see also Mark S. Wrighton, *Doing Better and Being Better, There is Much We Agree On*, WASHU VOICES: FERGUSON & BEYOND, <http://voices.wustl.edu/much-agree/> (Mar. 29, 2016) (acknowledging demands of student protestors and admitting: “This is a time when the university must make a meaningful difference and help bring about necessary change”); cf. *Do Something*, WASHU VOICES: FERGUSON & BEYOND, <http://voices.wustl.edu/do-something/> (last visited Jan. 23, 2016) (“The St. Louis region has the opportunity to become better and stronger through the response to events in Ferguson. Washington University must do our part. We must share, learn, and act. The following are ways to engage on our campuses and throughout the community. Please join us: *No events found for this month.*”) (emphasis added).

clear of constitutionally-rooted, critically race-based, fundamental rethinking.

Potentially squandering the power of this historic moment, some self-proclaimed reformers may be the kind of problematic legal actors Dean Houston spoke about in contrast to legitimate reformers—professional “parasites” who feed on societal ills for their own benefit.⁸ Thus using the platform of juvenile, criminal, and racial justice to advance their own interests many claimed “change agents” are part of the problem.⁹

This essay, therefore, encourages careful assessment of today’s supposed social engineers, their proffered legal theories, and proposed plans for reforms. It further urges resistance in the face of inauthentic and insufficient commitment to meaningful change. And while it surely does not have all of the answers, I hope it offers sentiments that align with the late Dean Houston’s insistence upon remaining alert, speaking truth to power, and giving no less than our all to fight for “true equality before the law”— including for youth of color.¹⁰

I. INTERROGATING NEW CHANGE AGENTS, CORRECTIVE AGENCIES, AND THEIR AGENDAS

In the days, weeks, and months since the press shined its white-hot light on the wide-spread problem of inhumane and racially biased policing and prosecution of young people of color in this country, we have heard much about race and justice. Countless legal experts and institutions have now published papers, hosted panel discussions, and convened committees to talk about issues like racially disparate crimi-

8. See Howard’s History, *supra* note 1.

9. See Sally Kohn, *This is What White People Can Do to Support #BlackLivesMatter*, WASH. POST (Aug. 6, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/08/06/this-is-what-white-people-can-do-to-support-blacklivesmatter/> (#BlackLivesMatter leader, Malia Cyril, warns that some people who claim to support racial justice and criminal law reforms may be “fighting to retain white privilege in different ways.”); See also Agyei Tyehimba, *How to Identify Compromised or Fraudulent Black Leaders*, MY TRUE SENSE (July 21, 2015), <http://mytruesense.org/tag/fake-black-leaders/> (referencing Dr. Martin Luther King, Jr.’s “Drum Major Instinct” sermon and warning: “do not assume that wide popularity, a full schedule of speaking engagements, or recognition in social or traditional media makes a person authentic or effective as a leader or activist”).

10. *NAACP History: Charles Hamilton Houston*, NAACP, <http://www.naacp.org/pages/naacp-history-charles-hamilton-houston> (Mar. 29, 2016) (“All our struggles must tie in together and support one another . . . We must remain on the alert and push the struggle farther with all our might.”).

nal proceedings, targeted pedestrian and traffic stops, municipal governance problems, and racial justice more generally.¹¹

This wave of words is exciting and historic. And it is easy to get swept up in all of the podium presentations and purported promises of our post-Ferguson world. But we should remember that talk is surely cheap.¹² More importantly, caution may be in order as we consider recent developments in the name of the cause.¹³ Because as Thurgood Marshall so presciently pointed out when he spoke to a St. Louis audience nearly 50 years ago, “success [of any] reform scheme” is “directly related to the quality of the people, especially the lawyers, who become active in it.”¹⁴

Thus as new juvenile and criminal justice reformers step into leadership roles following the deaths of LaQuan McDonald, Tamir Rice, and Michael Brown it is important to ask where many of these people and institutions were in the days, weeks, months and years

11. See, e.g., Julie Hail Flory, *New Committee to Help Shape Diversity and Inclusion Strategy*, WASH. U. ST. LOUIS SOURCE (March 9, 2015), <http://news.wustl.edu/news/Pages/diversity-inclusion-committee.aspx> (describing “robust conversations” at Washington University’s February 2015 “Day of Discovery and Diversity,” subsequent appointment of law school leadership to a committee to “turn ideas into action,” and commitment to “make good” on the institution’s “promise to . . . do better and be better” in the days ahead); Chris King, ‘Color of Debt’ Scrutinized, ST. LOUIS AM. (Nov. 12, 2015, 7:15 AM), http://www.stlamerican.com/business/local_business/article_1e85f63a-88c5-11e5-a405-b7c94277b853.html (reporting on law school’s “spirited public forum” and panel discussion regarding long-standing racially disparate debt collection practices in St. Louis); see also Courtney Humphries, *New Harvard Law School Program Aims for ‘Systemic Justice’*, BOS. GLOBE (Feb. 6, 2015), <https://www.bostonglobe.com/ideas/2015/02/06/new-harvard-law-school-program-aims-for-systemic-justice/PeGBqIenWhqqCuJ37Y20kJ/story.html> (discussing Harvard Law School’s Systemic Justice class); *The Critical Race Studies Symposium: Race and Resistance Against Police Violence*, UCLA L. SCH. (Oct. 2015), <https://law.ucla.edu/centers/social-policy/critical-race-studies/events/annual-symposium/> (displaying the flyer for UCLA Law School’s eighth annual critical race studies symposium and its purpose to integrate racial justice and practice).

12. See Darnell L. Moore, *9 Things #BlackLivesMatter Activists Need to See Presidential Candidates Do Now*, MIC (July 24, 2015), <http://mic.com/articles/122776/9-things-black-lives-matter-activists-need-to-see-presidential-candidates-do-now#.dSC5Fqs4o> (“Talk is cheap, but action and commitment are commendable. This is no time for platitudes. Activists want candidates who are committed to truly transformative policy platforms.”); see also Jamil Smith, *What Black Lives Matter Made Clear to Hillary Clinton*, NEW REPUBLIC (Aug. 19, 2015), <https://newrepublic.com/article/122572/what-black-lives-matter-made-clear-hillary-clinton> (reporting on confrontation with Hilary Clinton resulting in her acknowledging the problem of merely giving “lip service” to the Black Lives Matter movement).

13. See Kara Brown, *In the Aftermath of Ferguson, Stay Angry and Stay Woke*, JEZEBEL (Aug. 15, 2014, 4:10 PM), <http://jezebel.com/in-the-aftermath-of-ferguson-stay-angry-and-stay-woke-1622364931>; see also Bill Wylie-Kellermann, *Exorcising an American Demon*, in SOJOURNERS MAG. 7, 8 (1998), https://sojo.net/sites/default/files/wysiwyg/DG_racialjustice.pdf (urging Christian activists to approach the project of racial justice not just with faith but discernment).

14. Thurgood Marshall, *Law and the Quest for Equality*, 1967 WASH. U. L. Q. 1, 9 (1967) (published remarks of Thurgood Marshall, delivered as the Solicitor General, at Washington University School of Law’s Tyrrell Williams’ Memorial Lectureship).

before those young people were senselessly gunned down. Some attorneys and advocates were fighting hard in courts and communities to call out racially biased, due-process starved, and unduly harsh systems of policing and prosecution before these incidents. And for this, many of these activists suffered the political backlash that comes with speaking up and out about injustice when those around them remain silent.¹⁵

Others, however, helped to build, perpetuate, and sustain the very structures and practices they now claim to disclaim. For instance, in Missouri where the state public defender's system ranks 49th in the country for funding, countless adults and children negotiate legal proceedings in our criminal, juvenile, and municipal courts without the assistance of counsel.¹⁶ The vast majority of these unrepresented individuals are people of color.¹⁷ This shameful situation has gone on for years.¹⁸

Yet before Michael Brown's killing, a miniscule number of legal professionals stepped in to offer legal assistance. Worse, fewer yet did anything to actively surface or challenge the deplorable situation—despite the fact that the Show Me State is home to countless practicing lawyers, hundreds of law professors, and four different law schools—two in Michael Brown's community alone.¹⁹ And even

15. Mae C. Quinn, *The Other Missouri Model: Systemic Injustice in the Show Me State*, 78 MO. L. REV. 1193, 1220–21 (2013); see also CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT 10, n.17 (2015) [hereinafter INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT] (describing how juvenile justice system actors appeared to take negative actions against Washington University's legal clinic after the Department of Justice launched its investigation, which was lauded by this author).

16. Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185, 2205, 2212 (2014); see also Monica Davey, *Budget Woes Hit Lawyers for the Indigent*, N.Y. TIMES (Sept. 9, 2010), <http://www.nytimes.com/2010/09/10/us/10defenders.html?pagewanted=all>.

17. Michael Barrett, *Missouri: Letter to the Governor from the Director of the Public Defender System*, NAT'L ASS'N FOR PUB. DEF. (Aug. 11, 2015), <http://publicdefenders.us/?q=node/862> (describing how the public defender crisis disproportionately impacts Black defendants in the state's criminal and juvenile courts); see also Alex Stuckey, *In Missouri, Public Defenders Describe Mountains of Work, Low Pay*, ST. LOUIS POST-DISPATCH (Oct. 19, 2015), http://www.stltoday.com/news/local/crime-and-courts/in-missouri-public-defenders-describe-mountains-of-work-low-pay/article_c46b8f10-4f97-5a19-932e-c4c229a3b722.html (describing the heavy caseload for Missouri's public defenders).

18. See Stuckey, *supra* note 17.

19. Missouri is home to two private law schools, Washington University School of Law and St. Louis School of Law, located just miles from the location where Brown was killed. It also hosts two public law schools, University of Missouri in Columbia and University of Missouri at Kansas City. But sadly, as is the case across the country, few of the faculty members at these law schools are currently licensed to practice law in any state—much less in Missouri. See, e.g., Brian Clarke, *Practice Experience: A New Facet of Faculty Diversity?*, FAC. LOUNGE (July 14, 2014, 8:00 AM), <http://www.thefacultylounge.org/2014/07/a-new-facet-of-faculty-diversity.html>

those who work in and around the courts did so largely without actively addressing the ongoing dehumanization and rights deprivations endured by clients of color. Rather they mostly stepped over the carnage, day in and day out, contributing to injustice with their apathy.²⁰ Some of these same individuals and institutions have suddenly declared themselves spokespersons for impacted communities, deeply concerned change agents, and social engineers with bright ideas for reforming our justice systems.

To be sure, following the recent shooting deaths by police, some who were previously uninformed or unconvinced²¹ have emerged with new understandings of the plight of youth of color in this country. This is one small silver lining in the recent tragedies of kids gunned down on our streets—that greater insight and true desire for reform has occurred.²² In addition, some people were legitimately frightened to speak out and needed communal cover of thousands of protestors to feel safe to share their truths.²³ It seems impacted communities and

(describing how the legal academy has historically been biased against experienced practitioners when hiring faculty).

20. Tyrone Forman & Amanda Lewis, *Racial Apathy and Hurricane Katrina: The Social Anatomy of Prejudice in the Post-Civil Rights Era*, 3 DU BOIS REV. 175, 188, 195–96 (2006) (describing wide-spread indifference and “strategic avoidance” on the part of white Americans as having contributed to the tragic circumstances that devastated Black communities during Hurricane Katrina); see also JOHN FOSTER, WHITE RACE DISCOURSE: PRESERVING RACIAL PRIVILEGE IN A POST-RACIAL SOCIETY 9 (2013) (acknowledging the power of Forman and Lewis’s thesis, but suggesting ignorance is frequently a “pretext” as many whites are actually “aware of such injustices but cast them away in defense of white privilege”); cf. Elizabeth Vasco, *Beyond Apathy: A Theology for Bystanders* (2015) (urging white Christians to own and take account of their own apathy and “unethical passivity” in the face of Black suffering in this country).

21. I must confess that over the last year-and-a-half my own thinking has shifted. I have now become firmly convinced of the need for race-based reparations in this country, a concept I previously met with skepticism. See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

22. NPR’s *Interview with President Obama*, NPR (Aug. 10, 2015, 11:31 AM), <http://www.npr.org/sections/itsallpolitics/2015/08/10/431244020/full-video-and-transcript-nprs-interview-with-president-obama> (declaring “there has been an awakening around the country to some problems in race relations,” which provides an opportunity for change); see also Rev. Geoffrey A. Black et al., *A Pastoral Letter on Racism: A New Awakening*, UNITED CHURCH CHRIST (Jan. 16, 2015), http://www.ucc.org/pastoral_letter_new_awakening_01162015 (suggesting the possibility of further awakening).

23. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 27–28 (2d ed. 2001) (acknowledging the very real concern that “it may be physically dangerous to talk back” to racially biased speech and actions). In fact, as this author participated in the NAACP’s Journey for Justice march across the state of Missouri in December 2014, the bus on which participants rested had its window shattered by an unknown projectile. Some believe we were the targets of a shooting. See Jeff Haldiman, *Marchers Endure Counter-Protest in Rosebud*, NEWS TRIBUNE.COM (Dec. 4, 2014), <http://www.newstribune.com/news/2014/dec/04/march-now-bigger-cause/>; see also Kohn, *supra* note 9 (“Black folks are never safe, so it’s important for white

long-time advocates should embrace such new voices who genuinely want to help stop over-policing and prosecution of Black and Brown children, even as they may need to be fully educated about the depths and nuances of the issues.

But for those lawyers, law professors, and legal professionals—of all races—who for years chose to keep their heads in the sand to avoid inconvenient truths²⁴ or more affirmatively contributed to the status quo, we should demand greater accountability.²⁵ This is not to say that individuals who directly and indirectly maintained morally bankrupt structures should never again have a place at the table. But it strikes me that some confession of their complacency and complicity—along with affirmative renunciations—must occur before they can be seen as seriously committed to the cause. Only through such acknowledgment of their hand in maintaining racially oppressive systems can they truly begin to make amends.²⁶

Even then it seems such contributing forces and their ideas must be met with some level of distrust. For what has changed with regard to their prior political commitments and personal agendas?²⁷ What of

co-conspirators or comrades to think about the level of comfort—safety—that is assumed to them by sitting on the sidelines and not actively engaging in the movement for black lives because it seems ‘too risky.’”).

24. Cf. ‘Stand Up, Speak Out’ Derrick Bell Told Law Students, NPR (Oct. 7, 2011, 11:33 AM), <http://www.npr.org/2011/10/07/141152319/stand-up-speak-out-derrick-bell-told-law-students> (Derrick Bell called it “comfortable and convenient” but “not necessarily accurate” when legal professionals embrace elite positions claiming they are changing oppressive structures from within). Indeed, some of my own students took to Twitter to call out what they saw as problematic actions—and inactions—on the part of our law school faculty and administration in the days following Michael Brown’s death. See generally @WUL4racialjusti (WULaw4RacialJustice), TWITTER (Nov. 10, 2014, 10:07 AM–Nov. 14, 2014, 8:34 PM), <https://twitter.com/WUL4racialjusti>. After these posts, it appeared that some faculty and institutional leadership took somewhat different and more public positions relating to the need for change in our courts and community. See e.g., *id.* at Nov. 19, 2014, 3:16 PM. Some continued to remain silent. See FOSTER, *supra* note 20. Worse, some apparently warned the students about the possibility of legal and other sanctions for expressing their opinions.

25. Cf. Conor Friedersdorf, *The Corrupt System that Killed LaQuan McDonald*, ATLANTIC (Nov. 27, 2015), <http://www.theatlantic.com/politics/archive/2015/11/protesting-the-corrupt-system-that-killed-laquan-mcdonald/417723/> (“There is no doubt that Officer Van Dyke acted badly. As he faces murder charges, there remains a need to demand accountability for the Chicagoans complicit in the injustice he perpetrated.”). Such complicity takes many forms, including hosting events to laud individuals actively violating individual rights, disregarding the dignity of persons in our courts, or profiting at the expense of vulnerable populations.

26. As one example, white Methodist Pastor Wylie-Kellerman suggests such amends might occur by way of a formal baptismal ceremony. Wylie-Kellermann, *supra* note 13, at 11. He lifts up the work of the Detroit Catholic Worker where adult members are asked to publicly “renounce racism, nationalism, sexism, and all other barriers to human unity” and reject “the idols of money and property, race and class.” *Id.* at 10–11.

27. For instance, Alicia Garza, one of the acknowledged founders of the #BlackLivesMatters movement says: “I want white people to do the work of pushing Democratic darlings to take

their own skin do they have in these efforts?²⁸ Indeed for some of the most vocal voices right now who are taking up the front pages of our newspapers and sounding out on the radio, their ties to racially-biased structures, connections to people who have abused power, and maintenance of corrupt systems continue unabated.²⁹

In fact, much of what is being rolled out as supposed responses to deeply entrenched injustices belie commitment to broad-based change. For instance, following recent events in Ferguson—including weeks of protests and activism by the #BlackLivesMatter movement—Governor Jay Nixon appointed a Commission tasked with the job of “unflinchingly” examining the range of causes that contributed to dissatisfaction, discord, and unrest in the region.³⁰ Many of us met this development with hope and optimism, believing in the good faith of the people appointed to serve as its volunteer staff. And the Commission’s final report did squarely call out the structural racism and injustice that infects so much of Saint Louis life.³¹

Nevertheless, it seems performance and politics still bled their way into both the process and content of the Ferguson Commission’s

more seriously the impact of structural racism Beyond saying #BlackLivesMatter, I want to hear more about what each of them *will do* to ensure a world where #BlackLivesMatter.” Kohn, *supra* note 9 (emphasis added). Similar need for discernment applies to some emerging Black voices, too. See LOIS BENJAMIN, *THE BLACK ELITE: STILL FACING THE COLOR LINE IN THE TWENTY-FIRST CENTURY* 281–86 (2d ed. 2005) (describing the class divide in Black America and perception that some affluent Blacks are not committed to equality for all); see also Tyehimba, *supra* note 9.

28. CHRISTOPHER PRAMUK, *HOPE SINGS, SO BEAUTIFUL: GRACED ENCOUNTERS ACROSS THE COLOR LINE* xxiii (2013) (challenging traditional notions of who has “skin in the game” when it comes to racial justice, calling for all of us to see it as a “personal and urgent” issue and rethink daily efforts and engagements to ensure a “radically inclusive way” forward); William Barber II, *Grief at the Heart of a Moral Movement*, *NATION* (Jan. 4, 2016), <http://www.thenation.com/article/grief-at-the-heart-of-a-moral-movement/> (calling for a “moral revolution” and agreeing with Pope Francis that we all must “become painfully aware” and “dare to turn what is happening in the world into our own personal suffering”); see also Houston, *supra* note 2, at 49 (“[E]xperience has proved that the average white lawyer, especially in the South, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes. He has too many conflicting interests, and usually himself profits as an individual by that very exploitation of the Negro which, as a lawyer, he would be called upon to attack and destroy.”).

29. I acknowledge here the work of Steve Martinot, which points out it is impossible for non-racist whites to dismantle racist structures through abandonment of individual privileges largely attributable to skin color. But in the concrete and non-theoretical world in which we live, I see such efforts as more than a “cry in the wilderness” but a form of personal resistance and acknowledgment that we need “an alternative politics and political culture.” STEVE MARTINOT, *THE RULE OF RACIALIZATION: CLASS, IDENTITY, AND GOVERNANCE* 200–208 (2003).

30. *Exec. Order No. 14–15*, OFF. OF MO. GOVERNOR JAY NIXON (Nov. 18, 2015), <https://governor.mo.gov/news/executive-orders/executive-order-14-15>.

31. FERGUSON COMMISSION, *FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY* (Sept. 2015), <http://forwardthroughferguson.org/report/executive-summary/> [hereinafter *FORWARD THROUGH FERGUSON*].

findings,³² leaving many fearful that it did little to disrupt the status quo.³³ While the Commission sought input from impacted community members who had been touched by racially biased policing, overly punitive prosecution practices, and criminal punishment based upon poverty, the Commission spent much of its time listening to specially-invited testimony and considering select input from subject matter experts.³⁴ To be sure, I was one of those subject matter “experts.”³⁵ And at the time I was grateful for the opportunity to respond to the Commission’s request to provide significant testimony about the treatment of young defendants by our region’s police and in our municipal courts.

However, I was somewhat concerned at that early stage in the Commission’s work, and have become even more convinced now, that the full range of experiences and voices of youth and families of color in the region were not given enough time, attention, or platform.³⁶ In addition it seemed I was being intentionally steered away from talking about certain issues—in particular, the significant problems that continue to plague our juvenile court system. And research I provided to the Commission about juvenile justice issues in Missouri was not being shared with or considered by all of its members.

In fact, despite the fact that the local Juvenile Court system had been under investigation by the United States Department of Justice since November of 2013—nearly a year before Michael Brown was killed—somewhat remarkably not a single working group, subcommittee, or public hearing was dedicated to testimony from the community

32. The Commission hired public relations consultants, meticulously managed webpages, carefully constructed its messages through social media, and began each Commission meeting with high-tech polling exercises to collect audience demographics. See Mariah Stewart, *Will the Ferguson Commission’s Final Report Just Collect Dust on a Shelf?*, HUFFINGTON POST (Sept. 8, 2015 3:07 PM), http://www.huffingtonpost.com/entry/ferguson-commission-report_us_55e72aefe4b0aec9f3557584 (describing strategizing behind the Commission’s work and meetings); see also STL POSITIVE CHANGE, www.STLPositiveChange.org (last visited Mar. 29, 2016); FORWARD THROUGH FERGUSON, *supra* note 31.

33. Steven W. Thrasher, *The Ferguson Commission Won’t Bring Social Change. Black Lives Matter Will*, GUARDIAN (Sept. 15, 2015, 7:26 AM), <http://www.theguardian.com/commentisfree/2015/sep/15/the-ferguson-commission-wont-bring-social-change-black-lives-matter-will> (lauding the Ferguson Commission for acknowledging the impact of race and racism in St. Louis, but lamenting that its findings and report unrealistically promote “‘positive change’ with catchy, optimistic phrases and a happy hashtag (#STLFwdThru)”; see also Stewart, *supra* note 32).

34. Stewart, *supra* note 32.

35. Jason Rosenbaum, *Ferguson Commission Eyes Overhaul of Region’s Municipal Courts*, ST. LOUIS PUB. RADIO (Dec. 16, 2014), <http://news.stlpublicradio.org/post/ferguson-commission-eyes-overhaul-regions-municipal-courts> (reporting on author’s youth justice-related testimony before the commission).

36. Stewart, *supra* note 32.

“Post-Ferguson” Social Engineering

about problems in our juvenile courts and how they impacted children and families in the region. And although the Department of Justice issued its investigative findings about the Missouri juvenile court system on July 31, 2015,³⁷ weeks before the Commission wrapped up its work, it did not include any such information in its final report, findings, or continually updated website.³⁸

In the end, the Commission issued a nearly 200-page report declaring its “findings” and offering a range of specific suggestions for law reform.³⁹ Many involved in drafting the report were diligent, well-intended citizens who gave their time and energy at great personal expense—even if without subject matter or professional expertise to carry out the jobs with which they were tasked. Others, however, appeared at times to use the process as a platform for their own personal or professional advancement,⁴⁰ including taking credit for results that many believe are attributable to Ferguson protestors and advocates—not the Commission as a quasi-governmental body.⁴¹ And some with little knowledge about applicable laws, practices, or proceedings in our local legal system—or with their own agendas in mind—had a hand the Commission’s final Calls to Action.⁴²

For instance, the St. Louis Municipal Court system was addressed in great detail, with its local appointed judges openly taken to task.⁴³

37. See INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT, *supra* note 15.

38. See, e.g., FORWARD THROUGH FERGUSON, *supra* note 31. To this day the website says nothing about the Juvenile Court findings.

39. *Id.*

40. See, e.g., Stewart, *supra* note 32 (noting that one attendee called out the Commission’s leadership for advancing an agenda to create a lasting privatized entity, rather than serving as an arm of the public). See generally Vonn New, *Note to Self: White People Taking Part in #BlackLivesMatter Protests*, AM. FRIENDS SERV. COMMITTEE (Jan. 22, 2015), <http://www.afsc.org/friends/note-to-self-white-people-taking-part-blacklivesmatter-protests> (“Don’t use the Black Lives Matter actions to push your own agenda . . .”).

41. See Thrasher, *supra* note 33.

42. For instance, Commission members with training in areas such as religion, social work, and medicine drafted provisions relating to youth law, criminal procedure, and municipal court practice, as did lawyers who had never before worked in or challenged municipal courts and their practices. See, e.g., Christian Gooden, *Ferguson Commission Group Meets to Eke Stronger Recommendations*, ST. LOUIS POST-DISPATCH (July 9, 2015), http://www.stltoday.com/news/multi-media/ferguson-commission-group-meets-to-eke-stronger-recommomendations/image_7b9e7224-6a4d-5561-b865-27a0f092e8f2.html (photo of private group of three individuals, including Professor Karen Tokarz, meeting to draft the “final wording changes” for the Municipal Court Working Group of the Ferguson Commission); Susan Block, *St. Louis Attorneys, Judges Join New Commission on Racial and Ethnic Fairness*, 53 ST. LOUIS L. 8, 8 (2014), http://c.ygcdn.com/sites/www.bamsl.org/resource/resmgr/St_LouisLawyerPDFs/DEC-15Lawyer.pdf (crediting Professor Karen Tokarz as editor of the Ferguson Commission Report).

43. Jason Rosenbaum, *On the Trail: Ferguson Commission Banks on Enthusiasm for Implementation as Work Winds Down*, ST. LOUIS PUB. RADIO (July 19, 2015), <http://news.stlpublic>

But not a single Call to Action expressly addressed Missouri's Juvenile Courts—a more politically-powerful system run by elected judges,⁴⁴ and staffed probation officers with a significant state lobby.⁴⁵ Rather, on the last day it took testimony the Commission finally invited this author along with another juvenile justice advocate, Reverend Dr. Dietra Wise Baker, to present concerns about the Department of Justice's findings about our juvenile court system to the Commission.⁴⁶ But we were given only four minutes to address the issue.

Many have begun to question how, if at all, the racial and criminal justice reforms proposed by the Commission will be meaningfully implemented.⁴⁷ Indeed, rather shockingly, in his January 2016 final state of the state address, Governor Nixon did not even mention Ferguson or the very Commission he created.⁴⁸

radio.org/post/trail-ferguson-commission-banks-enthusiasm-implementation-work-winds-down (referring to municipal courts as “low hanging fruit” that still may evade extensive reform).

44. Tara Kulash, *St. Louis Judge Receives National Recognition*, ST. LOUIS POST-DISPATCH (Aug. 5, 2013), http://www.stltoday.com/news/local/metro/st-louis-judge-receives-national-recognition/article_8402cbe1-705a-5528-a449-eabf321c2322.html (lauding St. Louis City Juvenile Court Judge as being among the most progressive in the country). *But see* CHRISTINE PATTERSON, RECOMMENDATIONS FOR REDUCING DISPROPORTIONALITY AND DISPARITY IN MISSOURI CERTIFICATION DECISIONS (2013), <http://law.wustl.edu/news/documents/DMCCRB5-RecommendationsFINAL.pdf> (finding St. Louis City is one of three Missouri juvenile court systems statewide that has disproportionately certified Black youth to adult court, resulting in a phenomenon referred to as “justice by geography”).

45. *See generally* Mary Kay O'Malley, *Chapter 1: The Juvenile Office*, in MISSOURI BAR JUVENILE LAW DESKBOOK (4th ed. 2011), <http://www.mobar.org/esq/publications/juvenile.pdf> (acknowledging without critical analysis that “the juvenile officer” is provided with “such wide-ranging authority and functions that the office can truly be said to be the focal point of Missouri's juvenile justice system”).

46. Transcript of Ferguson Commission Record of Proceedings at 33–36 (Aug. 24, 2015), <http://stlpositivechange.org/sites/default/files/082415%20Transcript.pdf> (limiting testimony on the issue of juvenile justice reform to a total of four minutes).

47. Chris King, *Details ‘Fuzzy’ on Entity to Implement Ferguson Commission Calls to Action*, ST. LOUIS AM. (Dec. 8, 2015, 8:58 AM), http://www.stlamerican.com/news/local_news/article_150150d0-9dbc-11e5-b818-23ffdaa98ca9.html; *see also* *Political Eye: Ferguson Commission Applicant Trained Ferguson Mayor in Leadership*, ST. LOUIS AM. (Nov. 11, 2015, 11:38 AM), http://www.stlamerican.com/news/local_news/article_f7b2d17e-889a-11e5-99f0-332a9c9f1724.html (outlining the many problems plaguing implementation of the Ferguson Commission's findings and calls to action, including potential conflicts of interest inherent in the St. Louis City-based entity selected to carry on its work).

48. For instance, as the Commission wrapped up its work in September 2015, Governor Nixon stated he would “use his last year in office to push for some of the commission's recommendations” because “lessons learned from the past year are too important to ignore.” Jason Rosenbaum, *We Have Not Moved Beyond Race: Ferguson Report Details Course for a Divided St. Louis*, ST. LOUIS AM. (Sept. 14, 2015, 12:45 AM), http://www.stlamerican.com/news/local_news/article_d3988bf0-5aa3-11e5-934a-0b844963eaca.html. Yet, during his state of the union address in January 2016, the Governor said almost nothing about the Commission or Ferguson-related reform efforts. Danny Wicentowski, *Gov. Nixon Ignores the Ferguson Commission He Created in Final ‘State of the State,’* RIVERFRONT TIMES (Jan. 22, 2016, 10:25 AM), <http://www>

Recent actions on the part of the Missouri Supreme Court, purporting to take on racial justice issues in our courts raise similar concerns about true commitment to change. In October 2015, following the United States Department of Justice’s findings relating to Missouri’s Juvenile and Municipal Court systems, the Court appointed nearly 50 individuals to serve on what it has dubbed a Commission on Racial and Ethnic Fairness.⁴⁹ In a letter to the Court, this author previously commended its apparent admission there are problems in need of attention.⁵⁰ But installing yet another hand-selected group of judges and lawyers—many political insiders who helped build and maintain the current system—to conduct a four-year study of something so readily apparent hardly seems like a recipe for meaningful response and reform.⁵¹

What is more, the Racial Fairness Group has been divided into various subcommittees each with its own focus including criminal courts, civil courts, municipal courts, and juvenile courts.⁵² But again, many asked to offer their views on how to improve juvenile court practices have absolutely no prior juvenile court knowledge or experience. Instead, to date the juvenile court subcommittee has been held numerous non-public meetings without opportunity for meaningful input by reformers or impacted persons.⁵³ Perhaps worse, some of the group’s key members seem to have already decided there is no problem of racial injustice worth addressing.

.riverfronttimes.com/newsblog/2016/01/22/gov-nixon-ignores-the-ferguson-commission-he-created-in-final-state-of-state-speech.

49. Press Release, Missouri Supreme Court, Chief Justice Announces New Supreme Court Commission on Racial and Ethnic Fairness (Oct. 13, 2015), <https://www.courts.mo.gov/page.jsp?id=93102>.

50. See Letter from Missouri Association of Criminal Defense Lawyers to Chief Justice Breckenridge (Nov. 16, 2015) (on file with author).

51. Jennifer S. Mann, *Missouri Supreme Court Committee Will Study Racial Issues in the State’s Justice System*, ST. LOUIS POST-DISPATCH (Oct. 13, 2015), http://www.stltoday.com/news/local/crime-and-courts/missouri-supreme-court-committee-will-study-racial-issues-in-the/article_da262b91-6805-5581-a231-aa6fff824ce0.html; see also Anne Fisher, *How to Make Sure Nothing Gets Done at Work*, FORTUNE MAG. (Sept. 30, 2015, 11:35 AM), <http://fortune.com/2015/09/30/workplace-bureaucracy-simple-sabotage/> (noting that endless committee work can ensure sabotage of impactful new ideas); Editorial, *Another Commission to Study Another Problem with an Obvious Solution*, ST. LOUIS POST-DISPATCH (Oct. 16, 2015), http://www.stltoday.com/news/opinion/columns/the-platform/editorial-another-committee-to-study-a-problem-with-an-obvious/article_210bd278-cc67-5cbe-aa92-c40cc51e6c91.html.

52. See Press Release, *supra* note 49.

53. Sadly, this mode of operating is all too common in Missouri. The Missouri Auditor’s Office recently issued a report calling for greater access to government and more open meetings around the state. Mike Lear, *Missouri Auditor Lists Top Violations of Open Records and Meetings Laws*, MISSOURINET (Nov. 25, 2015), <http://www.missourinet.com/2015/11/24/missouri-auditor-lists-top-violations-of-open-records-and-meetings-law/>.

On July 31, 2015, the very same day the United States Department of Justice issued scathing findings about the extent of racial bias and disproportionality in St. Louis County, former St. Louis County Family Court Judge Susan Block, one of the leaders of the Missouri Supreme Court's juvenile court working group took to the media to suggest the United States Department of Justice got it wrong.⁵⁴ Specifically Judge Block stated: "I have never had a case where I felt that a child was being discriminated [against] because of their color."⁵⁵ Instead, when asked about the "poor and Black" children brought before the court, she broadly generalized that all of the children suffered from mental health and substance abuse problems.⁵⁶ "Their parents," she further asserted, "need help too."⁵⁷ Thus given the juvenile court's rehabilitative goals, it was suggested there should be no cause for concern.

Of course, taken to their extremes, such claims about "just helping" and "for their own good" were used to justify all manner of eugenics-based efforts that have mostly been abandoned in our modern society.⁵⁸ And these very same paternalistic and overly-inclusive sentiments about juvenile courts, in particular, were criticized nearly fifty years ago when the United States Supreme Court decided *In Re Gault*.⁵⁹ In holding youth were entitled to appointed counsel and other due process rights, it acknowledged the problem of overreaching and non-evidence based practices that needed to be kept in check.⁶⁰ Such attitudes have also been repeatedly unpacked to disclose imbedded false assumptions and negative implications for youth of color.⁶¹

It is, therefore, puzzling at best why such outmoded views would be allowed to shape the future of our courts.⁶² More fundamentally, it demonstrates that government actions and claimed commitments to

54. Associated Press, *DOJ Report Critical of St. Louis County Family Court*, KSDK (July 31, 2015, 7:39 PM), <http://www.ksdk.com/story/news/local/2015/07/31/doj-report-critical-of-st-louis-county-family-court/30938291/>.

55. *Id.* (quoting former St. Louis County Family Court Judge Susan Block).

56. *Id.*

57. *Id.*

58. See Mae C. Quinn, *From Turkey Trot to Twitter: Policing Puberty, Purity, and Sex Positivity*, 20 N.Y.U. REV. L. & SOC. CHANGE 51, 79 (2014).

59. *In re Gault*, 387 U.S. 1, 14 (1967).

60. *Id.* at 15–20.

61. See, e.g., Jyoti Nanda, *Blind Discretion: Girls of Color and Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1530–31 (2012); Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 660 (2013).

62. See Press Release, *supra* note 49.

change must be continually subjected to scrutiny and inquiry.⁶³ And lawyers as public citizens have an express duty and professional obligation to engage in such efforts, even when it gets uncomfortable or involves calling out friends, colleagues, and the politically popular and powerful.⁶⁴

II. PROBING PROFFERED THEORIES: RESTORATIVE, PROCEDURAL AND THERAPEUTIC JUSTICE

In too many instances more effort is going into managing conversations—putting up window dressing to make it look like change is taking place—than trying to get to the truth of where the problems lie and meaningfully move forward. This can also be seen in the ways that, post-Ferguson, system actors are redirecting attention away from concrete, constitutionally-rooted reforms towards friendly, trendy-sounding ideas.⁶⁵

Rather than digging in to find that current practices violate constitutional norms and demand such protections, many of today’s claimed change agents are offering up softer “solutions” to side step the issue. One term that I have repeatedly heard offered as somewhat of a magic bullet in recent days is: “restorative justice.” While the idea of restorative justice may be defined differently depending upon the speaker, audience, or context⁶⁶—at its core it is obviously inter-

63. See Block, *supra* note 42 (announcing commitment to address issues of racial bias within the justice system).

64. See MODEL RULES OF PROF’L CONDUCT pmbl. (AM. BAR ASS’N 1983); see also Mae C. Quinn, *Teaching Public Citizen Lawyering from Aspiration to Inspiration*, 8 SEATTLE J. SOC. JUST. 661, 661 (2010) (describing the ethical role of lawyer as public citizen who should address systemic issues); see also, e.g., VERA INST. JUST., <http://www.vera.org/about-us> (last visited Mar. 4, 2016) (“We pride ourselves on asking difficult questions, entertaining unconventional answers, and reckoning with any uncomfortable truths which our research and practice may reveal.”).

65. See generally Gabriel Rubin, *Big Problems, Fake Solutions*, WASHU VOICES: FERGUSON & BEYOND (last visited Mar. 4, 2016), <https://voices.wustl.edu/big-problems-fake-solutions/>.

66. According to the YMCA, a leading proponent of such efforts: “Restorative justice is a theory or set of beliefs that informs how communities can resolve problems that have caused harm or damaged relationships. Restorative justice prioritizes accountability and community healing over punishment, shifting the focus from what rules were broken and what punishment is deserved to what harm was done and what needs to be done to repair the harm.” See *Restorative Justice Program*, YMCA MADISON (last visited Mar. 4, 2016), http://www.ywcamadison.org/site/c.cuIWLiO0JqI8E/b.7968327/k.87EF/Restorative_Justice_Program.htm. Others have said restorative justice has “been described in such far-reaching terms as a revolution in criminal justice . . . fueled by commitment and passion not unlike that of a revival meeting” and an “entirely new framework for understanding and responding to crime and victimization within American society.” MARK UMBREIT & ROBERT COATES, OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUST., MULTICULTURAL IMPLICATIONS OF RESTORATIVE JUSTICE: POTENTIAL PITFALLS AND DANGERS 3 (2000), https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176348.pdf.

ested “RE-storing” a situation to the way it was before.⁶⁷ Thus applying this thinking, many now suggest that we might stem the tide of youth being shuttled into our criminal justice and school discipline systems if we just apply some kind of informal, REstorative, non-legal process. This will help restore the alleged wrongdoer, the victim, and the community to some position they held previously.⁶⁸

While in theory this sounds benign and benevolent enough, it overlooks the fundamental problem that prior to accusation many youth of color were not in a position that we should want to RE-store.⁶⁹ In the eyes of the larger community all too frequently they are seen as unworthy of dignity and respect in the first place.⁷⁰ Thus any return to the prior state of affairs—whether it is within a neighborhood court or classroom community—likely involves a march back to a power and value imbalance embedded in a system of oppression.⁷¹

What is more, restorative justice projects too frequently are based on the assumption that a wrongdoing worthy of correction has oc-

67. “Restorative justice needs something to restore, and one key thing it is very often said to restore is, in some formulation or other, ‘community.’” Robert Weisberg, *Restorative Justice and Dangers of Community*, 2003 UTAH L. REV. 343, 343 (2003).

68. See, e.g., Fania E. Davis, *Interrupting the School to Prison Pipeline Through Restorative Justice*, HUFFINGTON POST (Oct. 5, 2015, 10:54 AM), http://www.huffingtonpost.com/fania-e-davis/interrupting-the-school-t_b_8244864.html (espousing restorative justice efforts like alternative restorative justice-based schools that use “circle sessions” led by students—rather than teacher or administrative actions—to “make things right”); *Creative Courts and Caring Communities*, RESTORATIVE JUST. CTR. (last visited Mar. 4, 2016), <http://restorativejusticecenter.org/RTF1.cfm?pagename=Leadership> (noting that the Atlanta Community Court’s “Restorative Boards put volunteer neighborhood leaders front and center in the sentencing and restorative process” to develop a “course of action that the defendant will take to ‘right the wrong’ his/her actions have created”).

69. See GERRY JOHNSTONE, *RESTORATIVE JUSTICE: VALUES, IDEAS AND DEBATES* (2001) (describing concerns about restorative justice efforts including “making weak parties weaker” and imposing harsher sanctions on those deemed least desirable in a particular community).

70. See, e.g., MELVIN DELGADO, *NEW ARENAS FOR COMMUNITY SOCIAL WORK PRACTICES WITH URBAN YOUTH* 5 (2000) (noting that urban youth of color are rarely seen as “an asset” but instead framed as a “dangerous liability” and “drain on national resources” by politicians and others in leadership roles); Stephanie Goldberg, *TV Can Boost Self-Esteem of White Boys*, *Study Says*, CNN, <http://www.cnn.com/2012/06/01/showbiz/tv/tv-kids-self-esteem/index.html> (last updated June 1, 2012, 12:06 PM) (reporting on ways in which children’s perceptions of themselves and others in society are shaped by television, which overwhelmingly depicts white boys in a more positive light than other children).

71. As powerfully stated by Stanford University’s Robert Weisberg: “[C]ommunity’ is a very dangerous concept because it sometimes means very little, or nothing very coherent, and sometimes means so many things as to become useless in legal or social discourse, and because sometimes the sunny harmonious sound of the very word ‘community’ masks the conflict and uncertainty underlying legal issues, and because sometimes ‘community’ turns out to refer to something very concrete but which is actually very bad for justice.” Weisberg, *supra* note 67, at 343.

curred.⁷² But such supposition fails to account for the ways in which many ordinary adolescent behaviors, particularly on the part of youth of color, are unnecessarily surveilled and criminalized.⁷³ What might be seen as horse play or “kids’ stuff” for some is regulated by written and unwritten rules that work to ensnare minority youth in criminal and disciplinary systems.⁷⁴ Thus whether met with arrest or a school-based restorative community circle, framing and naming normal missteps of children as harms or actions in need of formal address and correction may send the wrong message.

Similarly, by focusing on the accused as the central harm generator who has done wrong but should be met mercifully by a forgiving community, restorative justice fails to take to task systemic racism, unequal distributions of wealth, and other contributing societal dysfunctions.⁷⁵ Indeed, quite remarkably, some who propose using restorative justice sanctions to deal with children accused of crime acknowledge that unfair social conditions may well be the cause of the action in question.⁷⁶ Yet, they still call for holding children accountable and requiring them to make amends to alleged victims.⁷⁷

72. Indeed, even while warning about false binary assumptions that might bleed into restorative justice efforts, proponents talk about such processes in black and white terms such as “put[ting] right the wrongs.” See UMBREIT & COATES, *supra* note 66, at 3.

73. See generally Kristin Henning, *Criminalizing Ordinary Adolescent Behaviors in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 435 (2013).

74. *Id.* at 420 (what might be seen as “cute” behavior for non-minority youth may be seen as dangerous conduct on the part of youth of color); see also David Leanord & J Love Calderon, *Everyone But Us (Sobering Thoughts on Ferguson & Racial Justice)*, HIP HOP & POL. (Dec. 1, 2014), <http://hiphopandpolitics.com/2014/12/01/everyone-us-sobering-thoughts-ferguson-racial-justice/> (“In a culture that seemingly ignores white riots as “kids being kids” or “black Friday” and that seeks to understand and explain white behavior, there has been little effort to hear and listen to the statements emanating from the streets of Ferguson.”).

75. PATRICIA HUGHES & MARY JANE MOSSMAN, *RETHINKING ACCESS TO CRIMINAL JUSTICE IN CANADA: A CRITICAL REVIEW OF NEEDS, RESPONSES, AND RESTORATIVE JUSTICE INITIATIVES* 114–15 (2001) (“A related concern is whether the concept of ‘community’ which underlies restorative justice, particularly conferencing and circles, is meaningful in urban settings. Do these programs acknowledge and provide ways of addressing internal community power differentials and possible conflicts between the goals of victims and the community.”).

76. Hon. T. Bennett Burkemper, Nina Balsam & May Yeh, *Restorative Justice in Missouri’s Juvenile System*, 63 J. Mo. B. 128, 134 (2007).

77. *Id.* at 128 (Under a restorative juvenile justice regime, “[t]he offender takes responsibility for the harm he/she caused and makes amends. The community supports the victim while holding the offender accountable for the harm. Communities examine the conditions that might have caused the harm and then find ways to change those conditions so that the likelihood of harm is reduced in the future.”); see e.g., Steven Verberg, *Race Bias in Dane County Legal System to be Fought in Special Courts*, WISC ST. J. (Oct. 29, 2013), http://host.madison.com/wsj/news/local/crime_and_courts/race-bias-in-dane-county-legal-system-to-be-fought/article_0d29d854-09b9-550a-ab63-b7ad8e6e8b75.html (“Some of Dane County’s troubling problems with inequality in the criminal justice system could be offset by new initiatives to funnel more African-American

Deployed in this way, restorative justice serves as an amoral apologist for existing unjust arrangements.⁷⁸

Many restorative justice models also fail sufficiently to consider the confidentiality of personal information like mental health diagnoses, proportionality principles, and power imbalances baked into the system. For instance, most children's school disciplinary and special education records are private documents subject to disclosure only upon a threshold showing of need.⁷⁹ Thus, laying bare for an entire classroom the details of a particular incident—much less a child's medical condition or “past record”—runs the risk of violating state and federal law.⁸⁰

Similarly, if not familiar with or regulated by normative assessments of appropriate sanctions and discipline,⁸¹ children and community members may seek to impose sanctions that have improper shaming components or seem unduly harsh in an individual case when compared to other matters.⁸² And, of course, any restorative project where the majority-vote prevails or highly flexible processes are dominated by persons who come from different backgrounds or social groups from the “accused” youth, may work to replicate the very system it seeks to displace.⁸³ Thus without sufficient rooting in critical

suspects into special courts aimed at rehabilitation, officials say. ‘Community courts’ would take 17- to 25-year-olds from neighborhoods with high concentrations of racial minorities and place them in a restorative justice program where they can make amends for minor offenses without getting criminal records that would hurt them when looking for jobs and housing.”)

78. HUGHES & MOSSMAN, *supra* note 75, at 115–22 (warning that restorative justice projects may not be sufficiently attentive to race and class inequality).

79. *See, e.g.*, Thomasin Hughes, *Releasing Student Information: What's Public and What's Not*, SCH. L. BULL. 13 (2001).

80. *Id.* at 22–23; *see also* Ramona Gonzales & Tracy Godwin Mullins, *SELECTED TOPICS ON YOUTH COURTS: A MONOGRAPH 17* (2004) (describing the legal and ethical problems of monitoring and managing “sensitive . . . information that may be revealed about the youth and his or her family” during peer-driven school discipline processes).

81. Indeed, many restorative practices—like those purportedly rooted in procedural justice or therapeutic jurisprudence—seem to have a kind of “anything goes” approach that embrace all procedural and substantive possibilities. *See, e.g.*, *Restorative Justice*, INST. FOR DEMOCRATIC EDUC. AM., http://www.democrateducation.org/index.php/solutions/restorative_justice/ (“There is no one clear set of practices, but there are a variety of high-quality resources and approaches to Restorative Justice that can be implemented in districts and schools, large and small.”)

82. Sharon J. Zehner, *Teen Court*, FBI (Mar. 1997), <https://www2.fbi.gov/publications/leb/1997/mar971.htm> (talking about “the tendency” of some teen volunteer jurors to “impose harsh sentences” in Teen Courts); Tim Hrenchir, *Teens on Trial*, TOPEKA CAP.-J. (Oct. 21, 2003), http://cjonline.com/stories/102103/tee_court.shtml#.Vre9P1JNrFJ (reporting that in one evaluation of a peer-punishment initiative, “two of the three defendants said they thought their punishments were too harsh, though their parents thought the sanctions were reasonable”).

83. Indeed, too much of the restorative justice literature is focused on a singular injured party without acknowledging that the line between defendants and victims in our society is often

race theory, due process norms, and a meaningful rights regime, restorative justice efforts do not provide a real alternative to the status quo at all.⁸⁴

The same can be said for the similar popular projects of procedural justice and therapeutic jurisprudence, different but related theories that have also received increased attention in the wake of the killings of kids of color at the hands of police.⁸⁵ Procedural justice focuses on the feelings of court-involved persons, suggesting beliefs about how they are treated are more important than the actual fairness of the process or outcome of their cases.⁸⁶ Therapeutic jurisprudence amorphously claims that we should adopt justice system policies and practices that seem “therapeutic” in nature, and avoid ones that are “anti-therapeutic,” in part by drawing lessons from the field of psychology.⁸⁷

Taken together, with their emphasis on the perceptions of those processed through our courts rather than protection of individual rights, constitutional principles, or delivery of substantive justice, these concepts can—and this author believes do—provide cover for

quite grey, and that a process could also revictimize the accused. *See, e.g.*, Mark S. Umbreit, *Restorative Justice, Victim-Offender Mediation*, OFF. FOR VICTIMS CRIME (July 2000), https://www.ncjrs.gov/ovc_archives/reports/rjbulletin1/files/ncj20180301.txt (“Often the cultural backgrounds of victim, offender, and program staff member are different from one another, sometimes leading to miscommunication, feelings of being misunderstood, or even revictimization.”).

84. HUGHES & MOSSMAN, *supra* note 75, at 122 (arguing that with so many minor “offenses” diverted to restorative processes, “[t]here is a real danger of increased criminalization of activities which would not otherwise be the subject of a criminal charge with a disparate impact on the poor and members of vulnerable groups”).

85. Matthew J. D’Emic, *Justice in America: Diverting the Mentally Ill*, CUNY L. REV. (Dec. 26, 2015), <http://www.cunylawreview.org/justice-in-america-diverting-the-mentally-ill-2/> (calling for greater use of therapeutic jurisprudence principles and problem solving courts to help “bolster trust” in the criminal justice system following a “rough year” that involved many “[r]acially charged confrontations”).

86. *See generally* TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (suggesting that lawmakers and law enforcers would do much better to make legal systems worthy of respect than to try to instill fear of punishment and finding that people obey law primarily because they believe in respecting legitimate authority); *see also* Emily Gold & Melissa Bradley, *The Case for Procedural Justice: Fairness as a Crime Prevention Tool*, 6 COMMUNITY POLICING DISPATCH (Sept. 2013), http://cops.usdoj.gov/html/dispatch/09-2013/fairness_as_a_crime_prevention_tool.asp (“Procedural justice (sometimes called procedural fairness) describes the idea that how individuals regard the justice system is tied more to the perceived fairness of the process and how they were treated rather than to the perceived fairness of the outcome.”).

87. David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Practices and Procedures*, 7 ARIZ. SUMMIT L. REV. 463 (2014) (Professor Wexler, one of the founders of the Therapeutic Jurisprudence—“TJ” as its adherents call it—claims Therapeutic Jurisprudence seeks “to look at the law in a richer way by pondering the therapeutic and antitherapeutic impact of ‘legal landscapes’ (legal rules and legal procedures) and of the ‘practices and techniques’ (legal roles) of actors such as lawyers, judges, and other professionals operating in a legal context.”).

problematic activities. This is because under such theories the main concern is whether a person believes or feels like they were treated politely or dealt with therapeutically while prosecuted.⁸⁸ This is so even if they were targeted by police in the first instance based on their race, searched and arrested in violation of the Fourth Amendment, never read their *Miranda* rights when a confession was obtained, prosecuted under a provision of law that should be struck from the books for chilling protected First Amendment conduct, and made to address the court personally instead of through a court-appointed attorney as required by the Sixth Amendment.

Proponents of these approaches quite remarkably laud them for their ability to encourage greater compliance with “the law” and orders of the court in the days ahead without any critical analysis of what that actually means.⁸⁹ But unless we are affirmatively seeking to advance the status quo, we should not encourage complacency and blind adherence to underlying laws and orders that may be racially biased, criminalize ordinary adolescent behaviors in communities of color, or simply unconstitutional. It is difficult, therefore, to square such efforts with the #BlackLivesMovement or substantive justice more generally. Yet, many of today’s emerging social justice engineers are calling for broader embrace of such principles as a “Post-Ferguson” means of reforming the justice system—in particular through the creation of specialized “problem-solving courts.”

III. CRITICALLY CONSIDERING “PROBLEM-SOLVING” COURTS AS THE SOLUTION

Numerous voices have now suggested the use of “problem-solving courts” as a means of responding to many of the concerns expressed by activists—and the United States Department of Justice—

88. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, 2015 PROCEDURAL JUSTICE SITE SOLICITATION 1 (2015), <http://www.courtinnovation.org/sites/default/files/documents/PJ%20Site%20Assessment%20Solicitation.pdf> (According to one recent Request for Proposals put out by the Center for Court Innovation and federal Bureau of Justice Assistance, the four core concerns of a court operating consistently with Procedural Justice teachings are: “(1) *voice* (litigants’ perception that their side of the story has been heard); (2) *respect* (litigants’ perception that the judge, attorneys, and court staff treat them with dignity and respect), (3) *understanding* (litigants’ comprehension of the language used in court and the decisions that are made); and (4) *neutrality* (litigants’ perception that the decision-making process is unbiased and trustworthy).”) Thus, it seems perception could easily trump reality; yet, a court would score high on the Procedural Justice scale.

89. *Id.* (“Research shows that when litigants believe the court process is fair, they are more likely to comply with court orders and the law generally.”).

regarding policing, prosecution, and court practices in the St. Louis region. In particular, some involved in “post-Ferguson” justice reform efforts have called for the creation of specialized “community courts.” However, like the underlying theories they allegedly apply—restorative, therapeutic, and procedural justice principles—such institutions do not work to disrupt the status quo in any significant way. Instead, they largely overlook, and thus implicitly permit and perpetuate, a wide range of problematic practices—including racially bias policing, unconstitutional searches and seizures, prosecution under overbroad laws, and the criminalization of poverty, addiction, and ordinary adolescent behaviors. Therefore, it is hard to see such institutions as actually solving problems facing already at-risk youth.

Shortly after Michael Brown’s death, attorneys and advocates who actually practice in St. Louis County municipal courts—including this author—called for complete overhaul of the system, which is comprised of 90 different venues that have been engaging in a range of unconstitutional practices.⁹⁰ Such calls for action, which included culling local ordinance codes to remove unconstitutional provisions, requests for consolidation of the courts, and provision of court appointed counsel, were consistent with complaints from our clients and demands by protestors for robust reform of a fragmented system without sufficient oversight or protections.⁹¹

Yet these efforts were directly and indirectly resisted by some members of the Ferguson Commission and a number of lawyers in the region.⁹² For instance, I was disappointed to learn that one of my own colleagues, Professor Karen Tokarz, worked to rally significant

90. Jennifer Mann & Jeremy Kohler, *Activists Call for Consolidation of Municipal Courts at St. Louis Hearing*, ST. LOUIS POST-DISPATCH (Nov. 12, 2015), http://www.stltoday.com/news/local/crime-and-courts/activists-urge-consolidation-of-area-municipal-courts-at-st-louis/article_498c0c55-1fa9-5e8e-ace2-c0cae41b68c9.html; see also Rosenbaum, *supra* note 35 (reporting on the invited testimony before the Ferguson Commission of this author, Thomas Harvey of ArchCity Defenders, and Dave Leipholtz of Better Together) (quoting St. Louis Law School professor John Amman, who also called for consolidation of the region’s municipal courts).

91. Chris King, *‘Please Consolidate the Municipal Courts,’* ST. LOUIS AM. (Nov. 18, 2015, 2:18 PM), http://www.stlamerican.com/news/local_news/article_9140ff00-8e31-11e5-8c48-3b6979641da6.html; Mann & Kohler, *supra* note 90; see also MISSOURIANS ORGANIZING FOR REFORM AND EMPOWERMENT, *TRANSFORMING ST. LOUIS COUNTY’S RACIST MUNICIPAL COURTS* 4 (2015), [http://populardemocracy.org/sites/default/files/publications/Transforming%20St.%20Louis%20County’s%20Racist%20Municipal%20Courts%20\(2\).pdf](http://populardemocracy.org/sites/default/files/publications/Transforming%20St.%20Louis%20County’s%20Racist%20Municipal%20Courts%20(2).pdf) (calling for consolidation of the municipal courts under the umbrella of four existing county traffic courts).

92. See Jennifer Mann, *Ferguson Commission Seeks Complete Overhaul, Shrinking of Municipal Courts*, ST. LOUIS POST-DISPATCH (June 23, 2015), http://www.stltoday.com/news/local/crime-and-courts/ferguson-commission-seeks-complete-overhaul-shrinking-of-municipal-courts/article_14b97058-ac3f-537d-9616-1378ed0e0cae.html (reporting on resistance by Commission Member T.R. Carr and local attorney and municipal court judge Frank Vatterott, while Muni-

support for a more-trendy sounding but softer and less radical approach—that is, the maintenance of our current municipal court system with the creation of an “innovative” “community court” overlay—focusing primarily on leniency and treatment for youth.⁹³

In offering her alternative proposal, Professor Tokarz concedes that consolidation of the 90 municipal courts in the St. Louis region would not only be more cost-effective, but would also help protect against corruption and bias.⁹⁴ Professor Tokarz acknowledges that provision of counsel could also ensure a more professional and ethical system.⁹⁵ Yet, without any supporting evidence or concrete reasons why we should assume defeat, she claims such rethinking is unrealistic.⁹⁶ Instead, she posits, “[t]rue reform could be accomplished through the development of innovative, problem-solving, community justice, municipal courts that might serve as a model for the rest of the country.”⁹⁷

But in suggesting we simply rename the existing system and “re-vamp” it with a range of feel-good specialized “problem-solving” features, it seems Professor Tokarz is looking to avoid the harsh realities that would be involved in a real accountability effort in St. Louis and the hard work that would go into delivering fundamental reforms for the region. Moreover, the “problem-solving” features she proffers not only paper-over problematic policing and prosecution practices, they actually work to blame the victims of structural and systemic oppression—including youth—and may exacerbate the manifold problems they already face.⁹⁸

pal Court Working Group member Brendan Roediger called for consolidation and other fundamental reforms).

93. Karen Tokarz & Sam Stragand, *Community Justice Courts Can Be an Innovative Reform*, ST. LOUIS POST-DISPATCH (May 5, 2015), http://www.stltoday.com/news/opinion/community-justice-courts-can-be-an-innovative-reform/article_96a59f74-f1cd-5aff-802e-014955831e69.html.

94. *Id.* (“Almost inevitably, such a court would be better run, more available to the public, less beholden to outside pressures—and, in the end, less costly and more efficient than the current system of multiple part-time courts, with part-time employees, some with arguable conflicts of interest, that meet a couple of evenings a month.”).

95. *Id.*

96. *Id.* (claiming “it seems unlikely” that such things “will come to fruition”). And, sadly, since this press statement was issued another Missouri Supreme Court Working Group, which was appointed to look at the possibility of consolidation of the municipal courts, has similarly accepted the status quo. *See generally* REPORT OF THE MUNICIPAL DIVISION WORK GROUP TO THE SUPREME COURT OF MISSOURI (Mar. 1, 2016), <https://www.courts.mo.gov/file.jsp?id=98093>.

97. *Id.*

98. *See* Leon Neyfakh, *The Custom Justice of ‘Problem Solving Courts,’* BOS. GLOBE (Mar. 23, 2014), <https://www.bostonglobe.com/ideas/2014/03/22/the-custom-justice-problem-solving-courts/PQJLC758Sgw7qQhiefT6MM/story.html> (“[A]s specialty courts have proliferated, their

For instance, Professor Tokarz argues that by processing youthful defendants through a community justice court we are actually helping to solve their problems and those of the community.⁹⁹ That is because such venues use “alternative sentencing options” that not only help defendants “avoid future violations” but protect “public safety.”¹⁰⁰ As an example, Tokarz offers that young people facing low-level ordinance violations and traffic charges could be given a case worker and then access to things like group counseling or mental health services through the court. And apparently believing that a lack of financial know-how “not infrequently underlie[s] traffic and other municipal violations,” she suggests “credit counseling services” might also be part of the sanction in such courts.¹⁰¹

The problem with such an approach is that it utterly fails to interrogate how or why young people are being stopped, arrested, and/or charged by local police for low level ordinance violations in the first place.¹⁰² For instance, playing a loud “boom box,” walking in groups, and failing to provide identification to officers upon demand are all prohibited by St. Louis County local ordinances. But this is not because they present major public health concerns or safety risks. Instead their policing and prosecution results in social control over particular populations—usually kids of color. And in my experience it is not bad credit or mental health challenges that underlie such “crimes”—it is the unchecked use and abuse of power.

In fact, many such charges should not exist in municipal codes because they are unconstitutionally overbroad, prohibit protected activity, and chill legitimate actions. Moreover, even where such code

rapid adoption has caught the attention of legal experts who worry that an immense shift in the American justice system has taken place almost totally ad hoc, with relatively little thought given to its potential pitfalls.”).

99. Tokarz & Stragand, *supra* note 93. In this way, Professor Tokarz’s call mirrors some other recent suggestions to “funnel” the cases of minority youth into rehabilitation-based courts. See, e.g., Verberg, *supra* note 77 (“Some of Dane County’s troubling problems with inequality in the criminal justice system could be offset by new initiatives to funnel more African-American suspects into special courts aimed at rehabilitation, officials say. ‘Community courts’ would take 17- to 25-year-olds from neighborhoods with high concentrations of racial minorities and place them in a restorative justice program where they can make amends for minor offenses without getting criminal records that would hurt them when looking for jobs and housing.”).

100. Tokarz & Stragand, *supra* note 93. *But see* Rubin, *supra* note 65 (warning that “elites have co-opted municipal court reform” and are offering “watered down versions” of demands made by community groups like the Millennial Activists and Organization for Black Struggle).

101. Tokarz & Stragand, *supra* note 93.

102. See Erin Collins, *Status Courts*, 105 GEORGETOWN L.J. (forthcoming 2016) (warning about the ways in which problem solving courts as release valves may fail to hold the criminal justice system accountable for its failings); see also, e.g., Verberg, *supra* note 77.

provisions might be legitimate, they are disproportionately used to target and stop minority youth. But in a problem-solving system that focuses on the defendant as the one in need of correction, such injustices go largely unquestioned and unaddressed.¹⁰³

What is more, Professor Tokarz contemplates imposing a broad range of alternative sanctions upon youth in her community court model without also offering court appointed counsel to help them negotiate the legal process, consider their options, or challenge unconstitutional conduct. Instead, her proposal would provide all municipal court litigants with “limited legal advice on how to avoid future violations.”¹⁰⁴ Not only does this conflict with basic constitutional standards, it again frames youth as the cause of the problem. That is, they are the ones who need to change and somehow have the capacity to make such change happen. But this does not account for the wrongdoings of system actors or the structural impediments—like race-based policing or poverty—that might make avoiding future contact with law enforcement impossible.

To be sure, Professor Tokarz is correct to note that some young people in our courts may be struggling with a lack of permanent housing or mental health issues. But here, too, by erroneously suggesting that *all* youth passing through our courts—primarily kids of color—will benefit from case workers and wrap-around services runs the risk of returning to overly paternalistic practices and pathologizing many ordinary adolescent behaviors. It also begs the question of why a young person needs to become a criminal justice statistic—presumably in a public courtroom¹⁰⁵—to access basic services when they are

103. As a further example of this “papering over” phenomenon, consider the following recent statement offered by another problem-solving court proponent when asked his views on how specialty courts might work to address community concerns about racial bias in the system:

I think, a lot of times, just for judges and court staff and prosecutors and defense attorneys to realize that they have implicit bias is an important factor. Then, controlling that with tools, to make sure they can overcome those natural biases that exist. I think that’s number one, the training behind that is really important. Then number two, really trying to overcome that by making sure that we have things like community courts and drug courts.

Race, Data, and Procedural Justice: A Conversation with David Slayton, CTR. FOR CT. INNOVATION (Jan. 13, 2016), <http://www.courtinnovation.org/research/race-data-and-procedural-justice-conversation-david-slayton-0>.

104. Tokarz & Stragand, *supra* note 93.

105. In fact, both Professor Tokarz and the Ferguson Commission findings fail to sufficiently account for the fact that children as young as 15 years old may be prosecuted in our municipal courts—yet they are provided with no special privacy protections and have their cases heard in the same public courtrooms as adult defendants. See Mae C. Quinn, *In Loco Juvenile Justice: Minors in Munis, Cash from Kids, and Pro Se Adolescent Advocacy—Ferguson and Beyond*, BYU L. REV. (forthcoming 2016).

appropriate. That is, if we are truly committed to change, we should not accept the proposition that arrest or a court date is needed to obtain meaningful care and support.

Finally, Professor Tokarz’s community court proposal fails to cite or reference a single one of the thoughtful critiques offered by countless practitioners and researchers over the years relating to the growing cottage industry of “problem-solving” courts in this country.¹⁰⁶ These analyses have long warned about the ethical and constitutional issues presented by such institutions, which in many cases financially benefit certain service providers and technical assistance agencies at the expense of legal rights and protections.¹⁰⁷ It seems to be no coincidence that while the state of Missouri is 49th in country when it comes to funding public defenders,¹⁰⁸ we are a national leader when it comes to creating “problem-solving” courts that provide treatment in exchange for waiving constitutional and other protections—including representation by counsel.¹⁰⁹

106. See, e.g., Mae C. Quinn, *The Modern Problem Solving Court Movement: Domination of Discourse and the Untold Stories of Criminal Justice Reform*, 31 WASH. U. J. L. & POL’Y 57 (2009); Jane Spinak, *Reforming Family Court: Getting it Right Between Rhetoric and Reality*, 31 WASH. U. J. L. & POL’Y 11, 18 (2009); Anthony Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J. L. & POL’Y 63, 79 (2002); see also Tamar Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75 (2007); Eric Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004). Consistent with this one-sided framing, the Ferguson Commission Report, for which Tokarz apparently served as the editor, also fails to cite the work of any of these well-respected researchers and scholars who have been studying these issues for years. Instead, Tokarz appears to be the only cited legal academic now speaking and writing about juvenile and criminal justice and “problem solving” courts in the wake of Ferguson and its press coverage. See FORWARD THROUGH FERGUSON, *supra* note 31, at 102. Most of the rest of what is cited is work written by or for the Center for Court Innovation, an organization that creates and perpetuates problem-solving courts—and stands to gain financially by providing “technical assistance” to such institutions. *Id.*

107. Indeed, Professor Tokarz’s op-ed and the Ferguson Commission Report she apparently edited entirely leaves out the fact that the last “community court” that operated in St. Louis was shut down following a constitutional challenge by some of her colleagues. See *Clinic Wins Legal Victories for the Homeless*, WASH. U. SCH. L., <https://law.wustl.edu/m/content.aspx?id=4339>.

108. See Davey, *supra* note 16; see also Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Right to Counsel*, 99 IOWA L. REV. 2185 (2014).

109. *Missouri’s Chief Justice Delivers State of the Judiciary Address*, YOUR MO. CTS. (Jan. 27, 2016), <http://www.courts.mo.gov/page.jsp?id=96693> (“Missouri is a national leader in treatment courts. As you know, our adult, juvenile and family drug courts change the trajectory of lives from addiction and crime to being productive citizens, while saving money by reducing the prison population.”).

Despite such enthusiastic assertions that “they work,” the very claim that specialized treatment courts are effective at treating addiction remains deeply contested. See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 786 (2008) (“[C]ompulsive addicts are not the only ones who do comparatively badly in drug courts. Studies have shown that other historically disadvantaged groups—for example minorities, the poor, the uneducated and the socially disconnected—are also likelier to fail.”); Mae C. Quinn, *Time for an Intervention: Rethinking*

Thus, continuing down the primrose path of assuming problem-solving courts are the answer—particularly at this historic moment with all of its opportunities—is contrary to Dean Houston’s call for radical social engineering by committed, knowledgeable lawyers who are mindful of constitutional rights and equal justice under the law.

CONCLUSION

While we continue to mourn and rage against the senseless killings of so many youth of color at the hands of police in this country, we stand at an important crossroads. Harnessing the power of grief and outrage, we can demand—and make—amends for a history of shameful second-class treatment visited upon persons of color. We can insist upon dismantling structures and practices that have worked to perpetuate inhumanity and injustice against vulnerable populations generally—and Black and Brown youth in particular. And, in their wake we may begin to reconstruct systems absolutely faithful to individual rights, equal opportunity, dignity, and hope.

This will not be easy work; it requires accountability, integrity, and courage. And for lawyers, it further demands constitutional know-how, professional skill, sensitivity, and perception. Thus, it is important to remain vigilant at this time. In the days ahead it will be important to protect against disingenuous allies hijacking reform efforts, vacuous theories from being deployed to maintain the status quo, and feel-good fixes from getting in the way of more radical rethinking. It is time for truly committed social engineers to drive the movement—and to ensure the parasitic individuals and institutions Dean Hamilton warned about do not thwart success in the “fight for true equality before the law” in the 21st century.¹¹⁰

Drug Treatment Courts, 4 WASH. U. L. MAG. 49 (2010), <https://law.wustl.edu/magazine/spring2010/endpaper-maequinn.pdf> (“Recent estimates also suggest that between one-third and one-half of all defendants actually ‘fail out’ of drug court. For these defendants, their efforts at treatment are ultimately rewarded with lengthy prison terms.”).

Indeed, the most recent findings around juvenile drug courts find that they are actually counterproductive to youth rehabilitation and success. See LESLI BLAIR, CARRIE SULLIVAN, EDWARD LATESSA & CHRISTOPHER J. SULLIVAN, U.S. DEP’T OF JUSTICE, OFFICE JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE DRUG COURTS: A PROCESS, OUTCOME, AND IMPACT EVALUATION 1 (2015), <http://www.ojjdp.gov/pubs/248406.pdf> (“[T]here is still cause for concern about whether these [juvenile drug] courts follow evidence-based practices and how they may lead to counterproductive outcomes, such as increased referral and detention rates.”). Thus Missouri’s efforts to roll out even more of such institutions, particularly at this historic moment, raise real questions about the State’s commitment to justice reform.

110. Houston, *supra* note 2.

ESSAY

The Murder of Black Males in a World of Non-Accountability: The Surreal Trial of George Zimmerman for the Killing of Trayvon Martin

MARK S. BRODIN*

“Nothing predicts future behavior as much as past impunity.”¹

“[N]othing makes you feel more black in America than experiencing police mistreatment. Very few modern oppressions convey the permanence of racism—individual and institutional—like the ritual of unpunished police abuse.”²

In the face of the ugly violence against civil rights protesters in Birmingham, Alabama, broadcast nightly on the TV network news throughout the long hot summer of 1963, President John F. Kennedy gave an impassioned speech to the nation:

We are confronted primarily with a moral issue. It is as old as the Scriptures and is as clear as the American Constitution. The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.³

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1. Jane Mayer, *Torture and the Truth*, NEW YORKER (Dec. 22, 2014), <http://www.newyorker.com/magazine/2014/12/22/torture-truth> (quoting Darius Rejali, professor of political science at Reed College and an expert on torture regimes).

2. David Dante Troutt, *Imagining Racial Justice in America*, NATION, Dec. 29, 2014, at 17.

3. John F. Kennedy, Civil Rights Address (June 11, 1963).

Those words retain their impact in our times, in so many ways, but particularly in light of recent events in Ferguson, New York, Cleveland, Charleston, Baltimore, and other cities where unarmed black men have been killed by white police officers. It has been reported that a black male is killed by police (or security guard) at the rate of once every two days.⁴ As staggering as that statistic is, more shocking is the *almost total* lack of accountability—either by criminal or civil litigation, or even internal disciplinary action—following these killings. It was just such indifference to the extinguishing of black lives that led to the formation of the National Association for the Advancement of Colored People (NAACP) over one hundred years ago.⁵

This Essay will explore one of the rare killings that actually went to indictment and trial. But it does not involve a duly-sworn police officer. George Zimmerman was a “wannabe” cop,⁶ a “neighborhood watch” civilian enrolled in criminal justice courses, armed with a semi-automatic handgun, who profiled 17-year-old Trayvon Martin, stalked him, and shot him to death.⁷ It took 42 days for local authorities to finally arrest and charge Zimmerman, and only in response to tremendous pressure from civil rights groups and marches and rallies around the country.⁸ He was “prosecuted,” and ultimately acquitted on July

4. See Monica Davey & Manny Fernandez, *Security in Ferguson is Tightened after Night of Unrest*, N.Y. TIMES (Nov. 25, 2014), <http://www.nytimes.com/2014/11/26/us/ferguson-missouri-violence.html>. An analysis by the news organization Pro Publica concludes that black males are at 21 times the risk of being shot dead by police than their white counterparts. See Brent Staples, *Race and Death in Police Shootings*, N.Y. TIMES (Oct. 10, 2014), <http://takingnote.blogs.nytimes.com/2014/10/10/whos-killing-all-those-black-men-and-boys/>. We have witnessed the fatal shootings of Michael Brown in Ferguson, twelve-year-old Tamir Rice (playing with a toy gun in a playground) in Cleveland, Akai Gurley in a darkened stairway in a Brooklyn housing project, Walter Scott in Charleston, and Eric Garner choked to death on a Staten Island street corner. Not one of these victims posed any real threat to the officer.

5. NAACP: 100 Years of History, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, <http://www.naacp.org/pages/naacp-history> [https://perma.cc/W855-CLLQ]. The “impunity for the murder of black men remain[s] America’s great, though mostly invisible, race problem.” Jennifer Gonnerman, *Jill Leovy’s ‘Ghettoside,’* N.Y. TIMES (Jan. 21, 2014), <http://www.nytimes.com/2015/01/25/books/review/jill-leovys-ghettoside.html> (quoting JILL LEAVY, GHETTOSIDE). We’ve allowed black lives to become “cheap. . . . Where the criminal justice system fails to respond vigorously to violent injury and death, homicide becomes endemic.” *Id.*

6. It was revealed at trial that Zimmerman was working towards a criminal justice degree and unsuccessfully applied to at least one police force for appointment as an officer. Video [WFTV 9 in Sanford recorded the entire trial & it available on its website], Day 16, Part 11. <https://www.youtube.com/watch?v=F4a006Yo2Jo&index=35&list=PLYEBn4w1XOieEsljIyTohqC6BQLI81vx&spfreload=5>.

7. Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN, <http://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/> [https://perma.cc/X4MM-LHQC].

8. Wil Haygood, Brady Dennis & Sari Horwitz, *Trayvon Martin’s Killing Galvanizes Florida Community, Civil Rights Groups*, WASH. POST (Mar. 21, 2012), <https://www.washingtonpost.com>

13, 2013, setting off protests across the nation.⁹ The quotation marks set the theme of this piece—that the prosecutors committed the most inexplicable strategic and evidentiary blunders of a type that experienced prosecutors would very likely not commit in a more *earnest* effort to convict the accused.¹⁰

Trayvon Martin's murder and the subsequent trial have been identified as "a turning point" in the evolution of what is now known as the Black Lives Matter movement.¹¹ Parallels were drawn to the infamous case of Emmett Till, an African American teenager from Chicago visiting relatives in Mississippi in 1955, brutally murdered after reportedly flirting with a white woman.¹² Some trace the modern civil rights movement to the outcry over the acquittal of Till's killers by an all-white jury.¹³

President Barack Obama spoke publically about the Trayvon Martin case in deeply personal terms: "If I had a son, he'd look like Trayvon."¹⁴

POLICE USE OF LETHAL FORCE

Police (like Ian Fleming's James Bond) have a license to kill, and in the case of African-Americans, it is exercised with some frequency. As a matter of law, it is a *limited* license—an officer may use deadly force *only* when necessary to prevent the escape of a person whom the officer has probable cause to believe poses a significant threat of death or serious physical injury to the officer or others, or when the officer *reasonably believes* the subject is an imminent lethal threat to himself or others.¹⁵

.com/politics/trayvon-martins-killing-galvanizes-florida-community-civil-rights-groups/2012/03/21/gIQAbQslSS_story.html.

9. See Mychal Denzel Smith, *How Trayvon Martin's Death Launched a new Generation of Black Activist*, NATION (Sept. 15, 2014), <http://www.thenation.com/article/how-trayvon-martins-death-launched-new-generation-black-activism/>.

10. Lisa Bloom, in her insightful book *SUSPICION NATION*, writes the "overlooked evidence, lack of witness preparation, and poor strategic choices made by the state's attorneys were nothing short of astonishing." LISA BLOOM, *SUSPICION NATION* 175 (2014).

11. Mychal Denzel Smith, *The Rebirth of Black Rage*, NATION (Aug. 31, 2015), <http://www.thenation.com/article/the-rebirth-of-black-rage/>.

12. Haygood, Dennis & Horwitz, *supra* note 8.

13. *Id.*

14. Krissah Thompson & Scott Wilson, *Obama on Trayvon Martin: 'If I Had a Son, He'd Look Like Trayvon'*, WASH. POST (Mar. 23, 2012), https://www.washingtonpost.com/politics/obama-if-i-had-a-son-hed-look-like-trayvon/2012/03/23/gIQApKPPVS_story.html.

15. See generally *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

Not surprisingly, the Supreme Court case that established this standard in 1985, *Tennessee v. Garner*, involved the police killing of a fifteen-year-old black male fleeing a suburban home he was suspected of having burglarized (ten dollars and a purse from the house were found on his body).¹⁶ Tellingly, it has been revealed that the Ferguson grand jury that cleared officer Darren Wilson in the death of Michael Brown were misinformed about the correct standard to apply to his actions—the district attorney instructed the jurors that all that was required of a police officer was *his own belief* that he was in danger.¹⁷

The *reality* of the police license to kill is something very different. Prosecutors stubbornly refuse to hold officers to this standard, or any standard. And even when they pursue criminal charges, jurors, bombarded by the media with a constant barrage of “scary black men” stories, often refuse to convict. Police can become quite well rehearsed in the “exoneration narrative”¹⁸ that will be their get-out-of-jail-free card: the black male suddenly developed demonic super-human strength, intent on the immediate demise of the officer, leaving the latter no choice but to kill.¹⁹ The stories are spiced with what the officers probably imagine as ghetto profanities like “MF” and

16. *Id.* at 4.

17. Frank Vyan Walton, *Missouri AG Confirms Michael Brown Grand Jury Misled by St. Louis DA*, DAILY KOS (Dec. 4, 2014 4:54PM), <http://www.dailykos.com/story/2014/12/04/1349421-Missouri-AG-Confirms-Michael-Brown-Grand-Jury-Misled-by-St-Louis-DA#>.

18. See Troutt, *supra* note 2, at 18.

The following is from *The Wire*, the highly acclaimed real-life HBO drama about policing in Baltimore. The lieutenant has just arrived on the scene where a black teenager has been brutally assaulted by a white officer using his service weapon handle, in the total absence of any justification.

Lieutenant: Now tell me, who cold-cocked the kid?

Officer: Me.

Lieutenant: Why?

Officer: He pissed me off.

Lieutenant. No, Officer Pryzbylowski, he did not piss you off. He made you fear for your safety and that of your fellow officers. I'm guessing now, but maybe he was seen to pick up a bottle and menace officers Hauk and Carver both of whom had already sustained injury from flying projectiles. Rather than use deadly force in such a situation maybe you elected to approach the youth, ordering him to drop the bottle. Maybe when he raised the bottle in a threatening manner you used a Kel-Light, not the handle of your service weapon to incapacitate the suspect. *Go practice.*

The Wire: The Detail (HBO television broadcast June 9, 2002). Any perceived disrespect or challenge to their authority, dubbed “contempt of cop,” may result in the use of brutal force. Farah Stockman, *Trigger-Happy Ferguson Police, Trigger-Shy Secret Service*, BOS. GLOBE (Oct. 7, 2014), <https://www.bostonglobe.com/opinion/2014/10/06/trigger-happy-ferguson-police-trigger-shy-secret-service/RSjHRwEALPHuIiyqxxhOO/story.html>.

19. Michael Brown, according to the officer's account, reacted with profanities and threats when asked to walk on the sidewalk, and then exploded like “Hulk Hogan,” with “the most intense and aggressive face, like a demon.” Bruce A. Singal, *Was the Ferguson Grand Jury Riggged?*, MASS. LAW. WKLY. (Dec. 15, 2014).

“homey.”²⁰ What is missing is any sense of regret or remorse, as the shooters invariably state publicly that their consciences are quite clear.²¹

The Supreme Court has played its part as well in maintaining a regime of non-accountability. In *Plumhoff v. Rickard*, decided only months before Ferguson, the Court overturned two lower court decisions denying summary judgment on the qualified immunity defense in a § 1983 action.²² It found no fault with the officers, who in six pursuing cruisers had fired fifteen shots at the fleeing motorist, initially stopped for a headlight violation, killing him and his passenger.²³ Writing for a rare unanimous Court, Justice Alito held that “[i]t stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.”²⁴ A passenger’s presence in the vehicle does not bear on the reasonableness of the officer’s use of lethal force, according to the decision.²⁵

Years before, in *Scott v. Harris*, the Court also reversed two lower courts and itself granted summary judgment to a county deputy who had ended a car chase by ramming the pursued vehicle, overturning it down an embankment, and leaving the motorist a quadriplegic.²⁶ Viewing a videotape of the events, the Court (over Justice Stevens’ dissent)²⁷ determined that the danger posed by the fleeing vehicle jus-

20. The unfortunate phenomenon of police “testilying” has been documented in other contexts. See Alan Dershowitz, *Controlling the Cops; Accomplices to Perjury*, N.Y. TIMES (May 2, 1994), <http://www.nytimes.com/1994/05/02/opinion/controlling-the-cops-accomplices-to-perjury.html>; *Testimony of Alan Dershowitz Before the H. Rep. Judiciary Comm.*, 105th Cong. (1998), http://www.constitution.org/lrev/dershowitz_test_981201.htm; Anthony Flint, *Bratton Calls ‘Testilying’ by Police a Real Concern*, BOS. GLOBE, Nov. 15, 1995, at 1.

21. Daryl Wilson, killer of Michael Brown, told ABC News his conscience was clear. See Darryl Pinckney, *In Ferguson*, N.Y. REV. BOOKS (Jan. 8, 2015), <http://www.nybooks.com/articles/2015/01/08/in-ferguson/>. In a July 20, 2012 interview with Sean Hannity on FOX News (introduced at trial by the state on Day 16), George Zimmerman described his killing of Trayvon Martin as “part of God’s plan,” about which he had no regrets. Robert Schlesinger, *George Zimmerman and God’s ‘Plan’ to Kill Trayvon Martin*, U.S. NEWS (July 19, 2012, 5:20 PM), <http://www.usnews.com/opinion/blogs/robert-schlesinger/2012/07/19/george-zimmerman-and-gods-plan-to-kill-trayvon-martin>.

22. *Plumhoff v. Ricard*, 134 S. Ct. 2012 (2014).

23. *Id.* at 2024.

24. *Id.* at 2022.

25. *Id.*

26. *Scott v. Harris*, 550 U.S. 372 (2007).

27. The Court “used its observation of the video as an excuse for replacing the rule of law with its ad hoc judgment. . . . Whether a person’s actions have risen to a level warranting deadly force is a question of fact best reserved for a jury.” *Id.* at 394–95 (Stevens, J., dissenting).

tified the officer's actions, clothing him in qualified immunity, and thus there was no need to proceed to a jury trial on the matter.²⁸

In short, use of lethal force by police officers is not meaningfully subject to judicial review, and certainly will rarely be assessed by a jury. The Supreme Court has facilitated the summary dismissal of police misconduct civil actions based on the qualified immunity defense, and has also placed additional procedural obstacles like standing to sue²⁹ in the path of possible redress for victims.

Police officers are even more rarely subjected to the criminal process, and almost never held accountable when they are. The Los Angeles officers who brutally beat Rodney King following a high-speed chase in 1991 were acquitted of assault charges even though an onlooker's videotape clearly showed the unprovoked attack by five officers surrounding the helpless victim on the ground.³⁰ The New York City officers who fired 41 shots at unarmed African immigrant Amadou Diallo in the vestibule of his Bronx apartment in 1999 were indicted and tried for his murder, but the trial was moved to Albany, where the officers were cleared of all charges.³¹

Police in Massachusetts have reportedly shot to death 73 people in the past twelve years, with only three having been presented to a grand jury.³² Typically, a New York grand jury declined to indict the officer who killed Eric Garner with an illegal chokehold while attempting to arrest him for illegal sale of loose cigarettes, *all caught on video*.³³

Whatever benefit of the doubt sworn police officers have under law and practice, however, obviously does not inure to a civilian like George Zimmerman in his use of lethal force.

28. *Id.* at 386.

29. See e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983).

30. Seth Mydans, *The Police Verdict*, N.Y. TIMES, http://www.nytimes.com/1992/04/30/us/the-police-verdict-los-angeles-policemen-acquitted-in-taped-beating.html?rref=collection%252Ftimestopic%252FKing%252C%20Rodney%20Glen&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=search&contentPlacement=2&pgtype=collection. A subsequent federal civil rights trial resulted in guilty verdicts against two of the officers. CNN Wire Staff, *A Timeline of Events in Rodney King's Life*, CNN, <http://www.cnn.com/2012/06/17/us/rodney-king-timeline/>.

31. Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted Of All Charges*, N.Y. TIMES (Feb. 26, 2000), <http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html?pagewanted=all>.

32. Jack Sullivan, *Clearing the Cops*, COMMONWEALTH, 2014, at 29, 33.

33. Lauren Gambino, *Eric Garner: Grand Jury Declines to Indict NYPD officer Over Chokehold Death*, THE GUARDIAN (Dec. 3, 2014, 5:43 PM), <http://www.theguardian.com/us-news/2014/dec/03/eric-garner-grand-jury-declines-indict-nypd-chokehold-death>.

THE KILLING OF TRAYVON MARTIN

On the evening of February 26, 2012, Trayvon Martin, a seventeen-year-old African American, was returning from a convenience store to the townhouse of his father's fianc_e in a gated community in Sanford, Florida.³⁴ Martin caught the eye of George Zimmerman, who had organized a neighborhood watch program and was armed with a 9 mm semiautomatic handgun.³⁵ Zimmerman called 911 (non-emergency) and described Martin as a guy who “looks like he’s up to no good or he’s on drugs or something. It’s raining and he’s just walking around looking about.”³⁶ Referring to the black teen in the context of previous burglaries and home invasions in the area, Zimmerman complained to the 911 dispatcher “These assholes. They always get away,” and later referred to “these f-ing punks.”³⁷

It was later revealed that all three previous “suspicious person” 911 calls Zimmerman had made also identified young black males.³⁸ Somehow, however, the prosecutors were unable to convey to the trial jury this simple narrative of racial profiling and stalking by a vigilante not acting under color of law.

Zimmerman reported on the 911 call that the subject was running away, but against the explicit instructions of the dispatcher *not* to follow him, he pursued Martin, ending in a confrontation in which Zimmerman shot the unarmed youth once in the heart, killing him instantly.³⁹

Police investigators concluded that Martin, who was not involved in any criminal activity at the time and had no criminal record (his body could not be identified by any fingerprints in police files), was “running generally in the direction of where he was staying as a guest in the neighborhood,” and “[t]he encounter between George Zimmerman and Trayvon Martin was ultimately avoidable, if Zimmerman had remained in his vehicle and awaited the arrival of law enforcement, or

34. Botelho *supra* note 7.

35. Botelho *supra* note 7; Campbell Robertson & John Schwartz, *Shooting Focuses Attention on a Program That Seeks to Avoid Guns*, N.Y. TIMES, <http://www.nytimes.com/2012/03/23/us/trayvon-martin-death-spotlights-neighborhood-watch-groups.html> (article about Zimmerman starting the neighborhood watch).

36. *Audio: Calls from Zimmerman, Neighbor Capture Last Minutes of Martin's Life*, WASH. POST (May 20, 2012), <http://www.washingtonpost.com/wp-srv/special/nation/last-minutes-trayvon-martin-911-calls/>.

37. *Id.*

38. William M. Welch, *Police: Trayvon Martin Shooting 'Avoidable'; Large Cache of Evidence Released in Zimmerman Case*, USA TODAY, May 18, 2012, at 3A.

39. *Calls from Zimmerman, supra* note 34; Welch, *supra* note 36.

conversely if he had identified himself to Martin as a concerned citizen and initiated dialog in an effort to dispel each party's concern."⁴⁰

Six minutes had transpired from Zimmerman's call to 911 and his firing of the shot into Martin's heart. Police arrived less than a minute later.⁴¹ There were no eyewitnesses to the events, although some neighbors had seen the two men scuffling on the ground and heard one calling for help, but could not agree on which one it was.

Zimmerman claimed he acted in self-defense: that Martin jumped on top of him, tried to smother him, repeatedly slammed his head into concrete (twenty times), said he would kill him, and finally reached for his holstered gun.⁴² Notwithstanding the lack of any physical evidence to support this story – the absence of any of Martin's DNA on the gun or holster, the absence of any of Zimmerman's DNA under Martin's fingernails,⁴³ the absence of injuries consistent with his assertion of Martin's violence against him –⁴⁴ and the fact that Zimmerman's gun was hidden in a back holster that could not have been seen by Martin, as well as Zimmerman's considerable size advantage over the 158-pound (described as skinny in testimony during the trial) unarmed teen, the local authorities accepted his version of events at face value, with no independent investigation.

40. Eyder Peralta, *New Evidence Released: Trayvon Martin Had Traces of Pot in System*, NPR (May 17, 2012, 10:06 PM), <http://www.npr.org/sections/thetwo-way/2012/05/17/152948727/new-evidence-released-trayvon-martin-had-traces-of-pot-in-system>.

41. SANFORD POLICE DEP'T, SPD MAJOR CRIMES: REPORT OF INVESTIGATION (2012), <http://i2.cdn.turner.com/cnn/2012/images/05/17/zimmerman.investigation.reports.pdf>.

42. SANFORD POLICE DEP'T, NARRATIVE REPORT (2012), http://i2.cdn.turner.com/cnn/2012/images/06/21/written_statement_0226.pdf.

43. DNA analysis excluded Martin from the grip of the weapon, and results from the trigger, slide, and holster were inconclusive. FLORIDA DEPARTMENT OF LAW ENFORCEMENT, LABORATORY REPORT, March 26, 2012; *George Zimmerman Trial – Day 8 – Part 3*, YOUTUBE (July 3, 2013), <https://www.youtube.com/watch?v=Zq006zh3e08&index=37&list=PLY-EBn4w1XOIeEsjIiyfTohqC6BQLI81vx> (testimony of DNA Expert Anthony Gorgone).

44. The assessment by the EMT's of the Sanford Fire Department on the night of the shooting records abrasions to Zimmerman's forehead, a small laceration to the back of the head, and a bloody nose, with no treatment required, clearly contradicting his complaint that he had been assaulted and his head struck repeatedly on concrete pavement. SANFORD POLICE DEP'T, INCIDENT NUMBER 2-1372 (Feb. 26, 2012), <http://www.axiomamnesia.com/TrayvonMartinFiles/TwinLakesShootingInitialReport.pdf> [hereinafter SANFORD POLICE DEP'T, INCIDENT REPORT]. Trayvon Martin was noted to have a single gun-shot wound to the center of the chest. Botelho *supra* note 7.

Testifying at trial, Medical Examiner Valerie Rao described Zimmerman's injuries as insignificant and requiring no treatment other than band aids. *George Zimmerman Trial – Day 7 – Part 3*, YOUTUBE (July 2, 2013), <https://www.youtube.com/watch?v=qqpDdDw-3Y&index=31&list=PLYEBn4w1XOIeEsjIiyfTohqC6BQLI81vx>. Zimmerman was in no way incapacitated after the events. *Id.* In her opinion, he suffered between one and three impacts of his head onto a rough surface, and one blow to the face. *Id.* She discounted that Zimmerman's head had been "slammed" into concrete. *Id.*

Zimmerman was finally charged (after nationwide protests) with second-degree murder by a special state prosecutor on April 11.⁴⁵ The case was assigned to a veteran prosecutor who claimed an 80-1 win/loss record going into the Zimmerman trial.⁴⁶ Had he tried the other cases the way he did Zimmerman's, that record would almost certainly have been reversed.

THE TRIAL⁴⁷

Zimmerman's self-defense claim required him to show that he *reasonably believed* shooting Martin was necessary to prevent *imminent* death or bodily harm to himself. The scales would seem to be significantly tipped in favor of the prosecution in several regards:

- Martin was unarmed, and considerably outweighed (nearly 30 pounds) by Zimmerman.
- Zimmerman's own report to the police operator had him *chasing* (and Zimmerman's out-of-breath voice confirms this) a "running" Trayvon Martin, against the explicit instructions of the operator not to follow the subject.
- Zimmerman suffered only minor scrapes from what he described as a struggle to the death that included Martin repeatedly pounding Zimmerman's head into the concrete.
- Zimmerman's history of racial profiling in his prior "suspicious" persons reports, and his use of questionable language to describe Martin in his 911 report.
- Zimmerman never identified himself as a neighborhood watch volunteer to explain his pursuit to Martin.
- Martin was on his cell phone with a friend at the time he was confronted by Zimmerman, and he reported (as a present sense impression) being followed by a "crazy and creepy" man. The call ended in Martin screaming "Get off! Get off!"⁴⁸

45. CNN Library, *Trayvon Martin Shooting Fast Facts*, CNN, <http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/>.

46. LISA BLOOM, *SUSPICION NATION: THE INSIDE STORY OF THE TRAYVON MARTIN INJUSTICE AND WHY WE CONTINUE TO REPEAT IT* 38 (2014).

47. In the absence of a written transcript, the cost of which was prohibitive, I have viewed the video coverage "Gavel to Gavel" by WFTV Channel 9 and on YouTube. See *Gavel to Gavel*, WFTV, <http://www.wftv.com/news/news/local/george-zimmerman-video-blog-archive/nYHg/> (last visited Apr. 26, 2016). There is also a day-by-day account by the New York Times. See *The Zimmerman Trial, Day by Day*, N.Y. TIMES, <http://www.nytimes.com/interactive/2013/07/12/us/zimmerman-highlights.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=Marginalia&pgtype=article> (last visited Apr. 8, 2016).

48. Serge F. Kovaleski, *Martin Spoke of 'Crazy and Creepy' Man Following Him, Friend Says*, N.Y. TIMES, <http://www.nytimes.com/2012/05/19/us/trayvon-martins-friend-tells-what-she-heard-on-phone.html>.

All of this was set out by prosecutor John Guy in his compelling and moving opening for the State.⁴⁹ In contrast, defense counsel Don West's opening was halting, meandering, and sometimes incoherent.⁵⁰ And he began, remarkably, with an offensive knock-knock joke demeaning the jurors.⁵¹ When both counsel had sat down, viewers of the Channel 9 live coverage tweeted in that Zimmerman's case had already been lost.⁵²

Yet the prosecution allowed Zimmerman's highly implausible version of events to become the dominant narrative at trial. Most notably and shockingly, *it was the State* that introduced into evidence the audio and video recordings of Zimmerman's uncross-examined, unchallenged, self-serving statements to police, as well as his video reenactment at the crime scene the next day.⁵³

The defendant's account of events has the ring of fabrication,⁵⁴ what one might concoct to exploit racist stereotypes: The skinny youth who had successfully evaded his stalker inexplicably returns, jumps the considerably bulkier Zimmerman from "out of nowhere," and (using what Zimmerman no doubt perceived as typical ghetto language) threatens "You got a f-ing problem, homie?" and "You're gonna die tonight, MF [expletive omitted]." Martin then punches Zimmerman, knocks him to the ground, slams his head repeatedly into the concrete sidewalk (but somehow the two ended up on the soft wet grass), and grabs for his firearm (which is actually hidden under his shirt in a rear

49. *George Zimmerman Trial – Day 1 – Part 1*, YOUTUBE, <https://www.youtube.com/watch?v=qsgtFBN8uKs&index=1&list=PLYEBn4w1XOIeEsjIiyfTohqC6BQLI81vx> (Day 1, part 1).

50. *George Zimmerman Trial – Day 1 – Part 2*, YOUTUBE, <https://www.youtube.com/watch?v=ktQ9mgjH-9w&index=2&list=PLYEBn4w1XOIeEsjIiyfTohqC6BQLI81vx>.

51. *Id.*

52. Andrew Gatto (@andrewgatto), TWITTER (June 24, 2013, 7:48 AM), <https://twitter.com/AndrewGatto/status/349177333707587584>; Jerry Jones (@jerryjonesr), TWITTER (June 24, 2013, 10:33 AM), <https://twitter.com/jerryjonesr/status/349218821044846593>; Willie O'Say (@wordzofwill), TWITTER, (June 24, 2013, 11:44 AM), <https://twitter.com/WordzofWill/status/349236506281508864>.

53. *George Zimmerman Trial – Day 6 – Part 3*, YOUTUBE, (July 1, 2013) https://www.youtube.com/watch?v=4r2TUf_Efx4&index=26&list=PLYEBn4w1XOIeEsjIiyfTohqC6BQLI81vx.

54. Zimmerman's story is reminiscent of Boston's Charles Stuart case, in which the husband diverted attention from his fatal shooting of his pregnant wife by falsely reporting to police that a black man in a hooded sweatshirt had robbed them at gunpoint and fired the shot. Fox Butterfield, *Charles Stuart's Brother Indicted in Murder Case*, N.Y. TIMES (Sept. 27, 1991), <http://www.nytimes.com/1991/09/27/us/charles-stuart-s-brother-indicted-in-murder-case.html>. Testimony at Zimmerman's trial established that he had taken criminal justice courses including topics of the elements of self-defense. Crimesider Staff, *George Zimmerman Trial: Prosecutors May Introduce Zimmerman's School Records, Judge Rules*, CBS NEWS, (July 23, 2013, 2:38 PM), <http://www.cbsnews.com/news/george-zimmerman-trial-prosecutors-may-introduce-zimmermans-school-records-judge-rules/>.

holster), at which point Zimmerman shoots him at point blank range in the heart. Zimmerman remarkably claimed Martin, fatally wounded, sat up and continued to speak, saying “You got me!,” a feat the medical experts viewed as quite impossible.⁵⁵ Zimmerman later professed to police his complete surprise that the young man was dead, though his body was covered with a tarp by police at the scene.

Sanford police officer Doris Singleton had conducted the first interview with Zimmerman on the night of the shooting and admitted at trial (where tellingly she referred to the defendant, as all the police witnesses for the state did, as “George”) that at the time, she had not been to the murder scene, “essentially knew nothing going in to speak to him,” and was thus not able (even inclined) to challenge Zimmerman on anything he claimed occurred.⁵⁶ During her testimony for the state, the prosecution compounded this departure from usual police protocol by placing the audio recording of Zimmerman’s self-serving narrative before the jury *as its own exhibit 178*.⁵⁷ (Singleton testified she did not videotape the interview, even though the equipment was available, because she did not know how to use it. The other officers viewing the interview through the one-way mirror apparently thought nothing of this omission). The prosecutor even had Singleton *read to the jury* Zimmerman’s written statement, corroborating his oral interview and referring to Trayvon Martin as “the suspect.”⁵⁸

Singleton testified that Zimmerman told her at the time that as a Catholic he was taught that all killing is wrong, and he bowed his head.⁵⁹ Without objection, the defense lawyer reiterated this point on cross-examination, and then elicited the officer’s *opinion that it signified sincere regret*.⁶⁰ The prosecution thus evoked sympathy from the jurors as well as courtroom observers before the defense even put on its case. The officer told the jurors that she assured Zimmerman he had acted properly in self-defense.⁶¹ An odd prosecution witness, who exonerates the man in the dock. But just the first of many.

55. See *George Zimmerman Trial – Day 9 – Part 2*, YOUTUBE, <https://www.youtube.com/watch?v=sg0Tlyswcm4&list=PLYEBn4w1XOleEsjliyfTohqC6BQLI81vx&index=40> (Testimony of Medical Examiner Dr. Shiping Bao).

56. *Id.*

57. *Id.*

58. *Id.*

59. *George Zimmerman Trial – Day 6 – Part 3*, *supra* note 53.

60. *Id.*

61. *Id.*

In his cross-examination, defense attorney O'Mara merely built on the direct examination, asking, *again without objection*, whether Singleton observed any anger⁶² or ill will in Zimmerman towards Martin that night—to which she assured the jury there was none.⁶³ O'Mara got her to testify that Zimmerman's statements were all consistent, thus undercutting the prosecution's later rationale that it was introducing Zimmerman's many statements to point out inconsistencies. The uniformed officer simply put the official stamp of police approval on Zimmerman's dubious defense.

Singleton was followed to the stand by Sanford police officer Chris Serino, the lead detective, through whom the prosecutor *again* put in evidence two more friendly (sometimes joking and bantering) interviews with Zimmerman later the night of the killing (audio-recorded) and two days later (video-recorded), as well as a video of Zimmerman's own re-enactment the next day,⁶⁴ in which bandages prominently appear on the back of Zimmerman's head and he is allowed to describe (clearly hearsay) his doctor's diagnosis of the wounds.⁶⁵

Rather than challenging Zimmerman's version of events, as police interrogators routinely do, Serino simply repeated what Zimmerman had told Singleton and had him acknowledge the statements.⁶⁶ The jurors then heard Serino conclude the interview by sympathetically telling Zimmerman before he allowed him to leave the station: "You're going to have anxiety, nightmares, a hard time with this— but I'm here for you, and I'll get you help."⁶⁷ He added that he wanted to prepare Zimmerman for the reaction of Trayvon's family and the public to the killing of the unarmed teenager.⁶⁸

62. Since the killing of Martin, Zimmerman has been involved in several domestic assaults with his gun or other weapon, clearly evidencing anger management issues. Jessica Mendoza, *Why George Zimmerman Was Arrested in Florida— Again*, THE CHRISTIAN SCI. MONITOR (Jan. 10, 2015), <http://www.csmonitor.com/USA/USA-Update/2015/0110/Why-George-Zimmerman-was-arrested-in-Florida-again-video>; see also Niccole Hensley, *Where are they Now: The Players of George Zimmerman's Trial*, N.Y. DAILY NEWS (July 13, 2014 7:51 PM), <http://www.nydailynews.com/news/crime/george-zimmerman-article-1.1865317>.

63. *George Zimmerman Trial – Day 6 – Part 3*, *supra* note 53.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

In the eyes of the police witnesses, Zimmerman had apparently performed a public service, ridding the neighborhood of a threatening menace—doing their job for them.⁶⁹

The government thus put *five unchallenged*⁷⁰ versions of Zimmerman’s self-defense story before the jury, with sympathetic nods and helpful prompts from the police witnesses. In each, Zimmerman was permitted to connect Martin to previous burglaries in the neighborhood, even though he admitted in a later interview that Martin was not the same person who had been arrested for those break-ins (the only connection being their race).⁷¹

At some points the police interviewers actually helped Zimmerman with gaps in his story, as when officer Singleton says: “I don’t want to put you on the spot, but these are the questions they’re going to ask you,”⁷² or when Serino tells Zimmerman after an obvious contradiction: “You see where the obstacle is here. I want you to think about that. I’m speaking for you. *I’m trying to protect you the best I can.*”⁷³ Officer Serino actually tells Zimmerman: “*I’m here working for you.*”⁷⁴

In the video interview, Serino inquires if there was any racial profiling regarding Martin, and when Zimmerman assures him there was not, the officer confirms: “So you would have done the same thing if Martin had been white.”⁷⁵ The lead detective even corrects Zimmerman regarding one of the crucial issues contested at trial—whose voice is crying for help on the 911 recording, Martin’s or the defendant’s.⁷⁶ Serino, who never heard Martin’s voice, unequivocally tells Zimmerman “That’s you” after Zimmerman himself admitted “That doesn’t even sound like me.”⁷⁷ That portion of the tape was played over and over again before the jury.⁷⁸

69. At one point in the interview reviewing Zimmerman’s 911 call, where Zimmerman uses the word “f-ing punk” to describe Martin, officer Serino appears to say: “He was a ‘f-ing punk.’” *Id.* The sound quality of the recording precludes a precise transcription. *Id.*

70. The prosecutors stood mute while defense counsel repeatedly referred to these “challenge interviews.” *George Zimmerman Trial – Day 6 – Part 5*, YOUTUBE, (July 1, 2013) <https://www.youtube.com/watch?v=rBv3hhnNnYs&list=PLYEBn4w1XOIeEsljyfTohqC6BQLI81vx&index=28>.

71. *George Zimmerman Trial – Day 6 – Part 3*, *supra* note 53.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. FBI sound experts were unable to identify the voice because of the poor quality of the 911 recording.

77. *Id.*

78. *Supra George Zimmerman Trial – Day 6 – Part 3* note 53.

The state's defense-friendly presentation continued when it called Mark Osterman, best friend of Zimmerman and a law enforcement officer who authored a book about the case completely exonerating Zimmerman.⁷⁹ On the stand Osterman repeated Zimmerman's story of the killing in all its detail, replete with the defendant's claim that Martin was suffocating him and grabbed his gun, but adding new embellishments like placing Martin in front of a lighted townhouse peering through the window right before Zimmerman confronted him, and that Zimmerman did not know his point-blank shot into Martin's heart had actually hit him!⁸⁰ Osterman assured the jurors that Zimmerman's insistence that Martin spoke after being shot through the heart was typical for shooting victims.⁸¹

What prosecution strategy could possibly explain calling such a witness? Or again, without objection, permitting defense counsel on cross-examination to have Osterman repeat Zimmerman's story *for the seventh time*, testify to Zimmerman's stunned state of mind after the shooting and his wife's grief over the events, and elicit more sympathy by describing how as a nurse she tended to her husband's wounds.⁸²

The prosecution's admission into evidence of Sean Hannity's (Fox News) soft-ball interview with Zimmerman gave the jury its eighth dose of the defense.⁸³ This time Zimmerman claimed Martin broke his nose,⁸⁴ clearly contradicted by the EMT report of a bloody nose requiring no treatment.⁸⁵

The only time the jury heard Zimmerman's voice⁸⁶ was in these recordings introduced by the government—the only evidence of Zimmerman's self-defense came from the *state's own witnesses*. At no time during the interviews did Zimmerman express any regret or re-

79. Frances Robles, *George Zimmerman's Friend's Book Offers Starkly Different Account of Trayvon Martin's Death*, (Sept. 21, 2012), <http://www.mcclatchydc.com/news/crime/article24737374.html>.

80. *George Zimmerman Trial – Day 7 – Part 2*, YOUTUBE, <https://www.youtube.com/watch?v=ISVMogzRw6A&list=PLYEBn4w1XOleEsjIiyfTohqC6BQLI81vx&index=30>.

81. *Id.*

82. *Id.*

83. *George Zimmerman Trial – Day 7 – Part 3*, YOUTUBE, (July 3, 2013), <https://www.youtube.com/watch?v=qqpndDdw-3Y&list=PLYEBn4w1XOleEsjIiyfTohqC6BQLI81vx&index=31>

84. *George Zimmerman Trial – Day 7 – Part 3*, YOUTUBE, (July 2, 2013), <https://www.youtube.com/watch?v=qqpndDdw-3Y&list=PLYEBn4w1XOleEsjIiyfTohqC6BQLI81vx&index=31>.

85. SANFORD FIRE DEP'T, INCIDENT REPORT, *supra* note 42.

86. Indeed, Zimmerman was the most impassive and expressionless of defendants—confering with counsel only a handful of times throughout the course of the long trial, and looking quite bored.

morse for killing the teenager, nor did the interrogators ever treat Zimmerman as if he might have committed a crime.

A defendant's own statements are of course inadmissible hearsay when offered *by him* at trial (in contrast with a confession by the accused offered by the government).⁸⁷ False or misleading statements may be used to demonstrate consciousness of guilt.⁸⁸ But the admission of *exculpatory* narratives of this sort, as state exhibits, is as bizarre as it is unprecedented.

What defendant has ever been given such a free ride at a murder trial? Had Zimmerman been required to take the witness stand to spin his wild tale, the jury would have had the benefit of observing his demeanor under oath, and, most important, during cross-examination, exposing the obvious flaws in the story as well as his race-profiling, demonstrated by his reference to Martin as "one of them."⁸⁹ He would have had to confront the facts that he marked Martin as a suspicious person apparently based on nothing other than his race; that he followed him (against instructions from the 911 operator) and never once identified himself as a neighborhood watch volunteer, explaining why Martin may have been suspicious of Zimmerman.⁹⁰ He would have had to explain how he came out of the "life-or-death struggle" with the slight teenager absent any injuries other than superficial abrasions.⁹¹

With a prosecution like this, the defense lawyers were nearly superfluous. They merely reinforced the state's witnesses. There was no prosecution objection when counsel asked the lead detective whether Zimmerman's version was consistent with what *other* witnesses (who did not testify) had reported, although that amounted to the functional equivalent of hearsay from those declarants.⁹² There was no objection when defense counsel asked whether the defendant's statements were consistent with the physical evidence, or the coroner's report.⁹³ There was no objection when counsel asked if Zimmerman had been straightforward, cooperative, and non-evasive with the po-

87. FRE 801(d)(2)(A). (the statement must be offered "against an opposing party.")

88. *See, e.g.*, Mark S. Brodin & Michael Avery, *Handbook of Massachusetts Evidence* (2016 ed.), § 4.2.1, at 123.

89. *Id.*

90. *Id.*

91. SANFORD POLICE DEP'T, INCIDENT REPORT, *supra* note 42.

92. The term refers to testimony that functions as hearsay, i.e., the witness did or did not do something in response to what an act of court declarant said to him.

93. *George Zimmerman Trial – Day 6 – Part 5*, *supra* note 73.

lice.⁹⁴ There was no objection when counsel elicited that police had no basis to challenge Zimmerman’s narrative,⁹⁵ or that Zimmerman was being honest when he denied Martin’s race had anything to do with this encounter,⁹⁶ or that Zimmerman’s reaction to the possibility of a surveillance video of the event that night — “Thank God, I was hoping there was a video” — indicated to the experienced detective that Zimmerman was telling the truth.⁹⁷

The state’s attorneys also stood quiet when the defense counsel elicited from a detective that Zimmerman had been traumatized by “having had to shoot someone;”⁹⁸ when counsel elicited that Zimmerman did not appear cavalier or uncaring about the event;⁹⁹ when counsel had Serino connect Martin to previous burglaries committed by a tall thin black male who had been arrested and sentenced;¹⁰⁰ and when an officer described a burglar’s tool found five days after the killing in an area where Martin “might have been,”¹⁰¹ even though it turned out to be part of a broken awning.¹⁰² There was not even a motion to strike detective Serino’s description of Zimmerman as the possible victim here.¹⁰³

All this happened on Trial Day 15. *On Day 16*, the prosecutor finally made a belated objection to the opinion testimony, citing several Florida Supreme Court cases making it crystal clear (as is universally recognized) that the entire line of questions vouching for Zimmerman’s credibility was improper.¹⁰⁴ But all the prosecutor

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *George Zimmerman Trial – Day 5 – Part 3*, YOUTUBE, <https://www.youtube.com/watch?v=ILefNHbAi-k&list=PLYEBn4w1XOIeEsjliyFTohqC6BQLI81vx&index=23>.

100. *George Zimmerman Trial – Day 7 – Part 1*, YOUTUBE, <https://www.youtube.com/watch?v=erVzhz-OsYc&index=29&list=PLYEBn4w1XOIeEsjliyFTohqC6BQLI81vx>.

101. *Id.*

102. *Id.*

103. *George Zimmerman Trial – Day 6 – Part 5*, YOUTUBE, <https://www.youtube.com/watch?v=rBv3hhnNnYs&list=PLYEBn4w1XOIeEsjliyFTohqC6BQLI81vx&index=28>.

104. *See* *Tumblin v. Florida*, 29 So. 3d 1093 (Fla. 2010). In *Tumblin*, the Court reversed a murder conviction because a police witness was permitted to testify about the veracity of another witness. *Id.* at 1104. Even though the judge in *Tumblin* had sustained an objection to the testimony and instructed the jury to disregard it, the Florida Supreme Court found the error so egregious that a mistrial should have granted, as the prejudice was so great that it was impossible to “unring the bell.” *Id.* at 1102.

Allowing one witness to offer a personal view on the credibility of a fellow witness is an invasion of the province of the jury to determine a witness’s credibility. It is clearly error for one witness to testify as to the credibility of another witness. Moreover, it is especially harmful for a police witness to give his opinion of a witnesses’ [sic] credibility because of the great weight afforded an

asked the court to do was to give a curative instruction— *a day after the jury had heard and digested all the police testimony absolving the defendant of guilt.*¹⁰⁵ The judge accommodated by simply recalling detective Serino, having the court reporter repeat the question seeking his opinion on Zimmerman’s veracity, and instructed the jury that the question was improper and they should disregard the answer.¹⁰⁶ No mention was made of all the other highly prejudicial evidence that preceded it. The jury was credited with the unique ability to “unring the bell,” a feat the *Johnson* Court recognized is impossible; and the trial proceeded in its own surreal way, with Serino continuing to support Zimmerman’s veracity, again without objection.¹⁰⁷

No first-year law student would have sat idly by while these clearly objectionable questions were repeatedly asked and answered. What follows is a transcript of the cross-examination of detective Serino that would be expected in an adversary proceeding:

Defense counsel: Did you note any inconsistencies in the various versions of the events Mr. Zimmerman offered to you?

Prosecutor: Objection, that is for the jury to decide.

Judge: Sustained.

Defense counsel: Did you have any reason to doubt his version of the events?

Prosecutor: Same objection.

Judge: Sustained.

Defense counsel: Did you note any inconsistencies between Mr. Zimmerman’s versions of events and those provided by other witnesses?

Prosecutor: Objection your honor. That’s a backhanded way of presenting the hearsay statements of third parties.

Judge: Sustained.

Defense counsel: Did you note any inconsistencies between Mr. Zimmerman’s versions of events and the physical evidence?

Prosecutor: Objection, again that is for the jury to decide.

Judge: Sustained.

Defense counsel: Did you find Mr. Zimmerman to be straightforward, non-evasive, and honest with you?

officer’s testimony. Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions. *Id.* at 1101 (brackets and citations omitted). *See also* Jackson v. Florida, 107 So. 3d 328, 330 (Fla. 2012) (reversing another murder conviction for the same reason).

105. *George Zimmerman Trial – Day 7 – Part 1*, YOUTUBE, <https://www.youtube.com/watch?v=erVzhz-OsYc&list=PLYEBn4w1XOIeEsjliyfTohqC6BQLI81vx&index=29>.

106. *Id.*

107. *Id.*

Prosecutor: Objection, Your Honor, no witness can testify to the credibility of another.

Judge: Sustained.

Defense counsel: As an experienced police officer, is it your opinion Mr. Zimmerman was telling you the truth?

Prosecutor: Same objection, Your Honor.

Judge: Sustained.

Defense counsel: Did you have any reason to think George was lying to you?

Prosecutor: Same objection, Your Honor.

Judge: Sustained.

Defense counsel: Do you have any basis to challenge Mr. Zimmerman's claim of self-defense?

Prosecutor: Objection, that's what the jury is here to decide.

Judge: Sustained.

Defense counsel: Do you have any basis to challenge Mr. Zimmerman's claim that Trayvon Martin's race had nothing to do with this tragic event?

Prosecutor: Same objection, Your Honor.

Judge: Sustained.

Defense counsel: Detective, did you observe that Mr. Zimmerman had been traumatized by being put in fear of his life and having to shoot and kill Trayvon Martin?

Prosecutor: Objection, Your Honor. The question assumes facts that the jury will have to decide, and calls for an opinion this witness is not qualified to render. Would the Court please admonish defense counsel that this entire line of questioning is highly objectionable?

Judge: Yes, sustained. And so admonished.

Zimmerman's trial was an Alice-In-Wonderland proceeding, where the prosecution's witnesses served only *to support* the defense (*all* witnesses, whether called by the state or Zimmerman, became defense witnesses in the hands of this prosecution team¹⁰⁸), where the defense exploited the prosecution's no-objection approach by admitting clearly inadmissible evidence, where the murder victim became

108. The state for example called Zimmerman's former professor to testify that the defendant was familiar with the requirements to make out a self-defense from the class he took with him (and so, it would be argued, could have concocted his narrative of being put in fear accordingly). *George Zimmerman Trial – Day 7 – Part 1*, YouTube, <https://www.youtube.com/watch?v=F4a006Yo2Jo&index=35&list=PLYEBn4w1XOIeEslIyfTohqC6BQLI81vx>. But the prosecutors stood mute as defense counsel turned their witness into an expert *for the defense* on cross, leading him through what would ultimately be the defense closing argument. *Id.*

the accused and vice versa (in fact, defense counsel several times referred to the state's case as the defense case¹⁰⁹).

Not once did George Zimmerman have to take the stand in Courtroom 5D, nor raise his right hand to take the oath, nor be challenged on cross-examination. State witnesses referred to the defendant in the familiar as George in their testimony, including Zimmerman's professor at Seminole State College who addressed him directly from the stand with a friendly—"Hi George, how you doing?"¹¹⁰ The result was to signal the jurors that there was no real disagreement about the legitimacy or credibility of Zimmerman's self-defense. How could the jurors return any other verdict than "not guilty"?

Could this collection of blunders have been mere "missteps" by a veteran prosecutor with a nearly 100% conviction rate in 80 murder trials?

Throughout the trial, Trayvon Martin's parents sat up front, watching impassively as their murdered son was portrayed as a violent thug who deserved his fate. Perhaps they concluded early on that the government was merely going through the motions of pursuing their son's killer.

The jury's acquittal on all charges—second-degree murder and manslaughter—came after 16 hours of deliberation over two days.¹¹¹ The six women jurors bought the defendant's story—told solely through prosecution witnesses—that he had no choice but to kill Martin, for otherwise he would have been killed. Trayvon's parents were not in the courtroom for the verdict.

When Trayvon's family (mother, brother, and father) testified, at the end of the state's case, it was clear to everyone in the courtroom that the victim came from "a good family," educated, well-spoken, hard-working, and loving.¹¹² No objective observer could square this with the thuggish, violent, gangsta brute that Zimmerman's defense

109. See, e.g., Video, Day 17, Part 1, 4:00 Minutes.

110. *George Zimmerman Trial – Day 8 – Part 1, 25:40 minutes*, YouTube, <https://www.youtube.com/watch?v=F4a006Yo2Jo&list=PLYEBn4w1XOIeEsjIiyfTohqC6BQLI81vx&index=35>.

111. Lizette Alvarez & Carla Buckley, "Zimmerman Is Acquitted In Trayvon Martin Killing," *New York Times*, July 13, 2013.

112. *George Zimmerman Trial – Day 9 – Part 1*, YouTube, https://www.youtube.com/watch?v=qN_16PWph94&list=PLYEBn4w1XOIeEsjIiyfTohqC6BQLI81vx&index=39; see *George Zimmerman Trial – Day 10 – Part 3*, YouTube, <https://www.youtube.com/watch?v=VQTuxhWtwRY&list=PLYEBn4w1XOIeEsjIiyfTohqC6BQLI81vx&index=46>.

(with the prosecution's assistance) portrayed young Trayvon Martin as.

CONCLUSION

The matter of race has been with us since the day African-Americans involuntarily first set foot upon this land. It has penetrated every generation since, and has preoccupied the attention of some of our greatest thinkers and writers—W.E.B. DuBois, William Faulkner, James Baldwin, Martin Luther King, John Hope Franklin, and now Ta-Nehisi Coates. The “color line,” as DuBois named it in 1903, is very much with us today, reflected in the staggering incarceration rate among black males,¹¹³ the ever widening wealth gap,¹¹⁴ and the abandonment and deterioration of our inner cities. We learn from social science research that race is registered unconsciously in the brain of the observer within milliseconds of an encounter.¹¹⁵

In cases like Trayvon Martin, it matters not that the killer substantially outweighs the victim, that the victim had no history of crime or violence, or that the story of his sudden inexplicable and unprovoked aggression against an armed officer lacks all plausibility. Even when there is a clear video revealing the officer's complete lack of justification and excessive use of force, as in the cases of Rodney King¹¹⁶ and Eric Garner,¹¹⁷ the police walk free. And these cases appear almost daily in the news media.

President Barack Obama's remark that “if I had a son, he would look like Trayvon Martin,” testifies to the universality of the experience in the black community. George Zimmerman's trial represented a unique, but tragically missed, opportunity to begin to hold these killers — be they police or vigilantes — accountable. Zimmerman has

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

114. See generally JOSEPH E. STIGLITZ, *THE PRICE ON INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2013).

115. See generally L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 *IND. L.J.* 1144 (2012) (collecting studies); Tiffany A. Ito & Geoffrey R. Umland, *Race and Gender on the Brain: Electrocortical Measures of Attention to the Race and Gender of Multiply Categorizable Individuals*, 85 *J. PERSONALITY & PSYCHOL.*, 616 (2003).

116. See Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, *N.Y. TIMES*, Apr. 30, 1992, at A1.

117. See generally David Goodman & Al Baker, *New York Officer Facing No Charges In Chokehold Case*, *N.Y. TIMES*, Dec. 4, 2014, at A1.

The Murder of Black Males

predictably gone on to other assaultive conduct,¹¹⁸ and police officers have been green-lighted in however they choose to deal with young black males in our troubled nation.

118. See, e.g., Carimah Townes, *Why George Zimmerman Keeps Getting Away With It*, THINKPROGRESS, (Jan. 30, 2015 11:23 AM), <http://thinkprogress.org/justice/2015/01/30/3617493/assault-charges-dropped-against-george-zimmerman/>.

COMMENT

Addressing an Evolution in America's Workforce: A Call for Negotiated Rulemaking in the Ridesharing Industry

AKASHA C. PEREZ*

INTRODUCTION	788
I. THE SHARING ECONOMY AND RIDESHARING INDUSTRY	791
A. Ridesharing in a Nutshell	792
B. Ridesharing Drivers as Independent Contractors ...	796
C. Independent Contractor/Employee Distinction	797
1. Presumption of Employee Status	797
2. The Common Law Agency Test	798
II. ONGOING LITIGATION BETWEEN LYFT, UBER, AND DRIVERS	801
A. Prima Facie Case of Employment	801
B. Right to Control	803
C. Additional Factors	803
D. Uber's State Agency Decisions in Florida and California	805
1. California's Workforce Commission Response ..	805

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2. Florida’s Department of Equal Opportunity Response	806
III. OTHER CRITICISMS OF THE INDUSTRY	808
IV. NEGOTIATED RULEMAKING	810
A. Negotiated Rulemaking for the Ridesharing Industry	814
CONCLUSION	815

INTRODUCTION

On October 7, 2015, President Barack Obama hosted the White House Summit on Worker Voice.¹ The summit brought together workers, employers, unions, business leaders, and experts in the labor and employment realm to discuss the future of the American workforce.² In the President’s address to the summit, he confronted an issue faced by no President before him — how to address employment in the new, “on-demand” or “sharing” economy.³ The sharing economy refers to peer-to-peer markets that are facilitated through online platforms.⁴ The President hailed this new economy as promising, citing increased opportunities for worker flexibility and autonomy.⁵ But in the same breath, the President issued a warning to workers, unions, employers, and legislators alike: “[t]echnology has made it easier for companies to do more with less . . . if the combination of globalization and automation undermines the capacity of the ordinary worker . . . we’re going to have problems.”⁶

The President credited innovation and technology as the driving force behind the sharing economy, stating that the two forces have empowered people and employers “to create value and services in new ways.”⁷ The sharing economy has impacted the transportation industry by producing the ridesharing model.

1. Barack Obama, President, Remarks by the President at the White House Summit on Worker Voice (Oct. 7, 2015), <https://www.whitehouse.gov/the-press-office/2015/10/07/remarks-president-white-house-summit-worker-voice>.

2. *Id.*

3. *Id.*

4. “[Airbnb] is the most prominent example of a huge new “sharing economy”, in which people rent beds, cars, boats and other assets directly from each other, co-ordinated via the internet.” *The Rise of the Sharing Economy*, THE ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

5. Obama, *supra* note 1.

6. *Id.*

7. *Id.*

The ridesharing business (including companies like Uber and Lyft) has blossomed to a multi-billion dollar industry.⁸ By providing on-demand transportation at a relatively low cost, the ridesharing model has proven to be a top choice among consumers.⁹ The ridesharing industry has also provided thousands of jobs to fairly unskilled workers.¹⁰ This aspect of the sharing economy is a glimmer of hope in the technological age for many people, including Mary Wright.¹¹

Ms. Wright has been driving for both Lyft and Uber for over a year. She described the companies as “a lifesaver.”¹² In 2014, Ms. Wright’s previous position as a call center manager was eliminated. Shortly thereafter, her health began to decline.¹³ As a single-mother without a college degree, Ms. Wright struggled to find flexible employment that would allow her to care for herself and financially support her family.¹⁴ Ms. Wright was instantly drawn to the autonomy and flexibility that came with working as a Lyft and Uber driver, since she was able to work at her leisure according to her needs.¹⁵ However, Ms. Wright is concerned about the lack of health benefits and job protection for Lyft and Uber drivers. When asked about what would happen if she lost her position with Lyft and Uber, Ms. Wright stated: “It would be a nightmare. I wouldn’t be able to make ends meet.”¹⁶ Though Ms. Wright would like to work at a call center again, she sees herself working with Lyft and Uber for now.¹⁷ “I will do this as long as I can,” Ms. Wright explained, “I don’t see any reason why I would stop doing Uber or Lyft, I can always use it to make extra money.”¹⁸

8. David Johnson, *See Where Uber Faces the Biggest Competition*, TIME (Nov. 21, 2014), <http://time.com/3598873/uber-alternatives/>.

9. Andrew Bender, *Uber, Lyft Have Surpassed Taxis, Now Spell Trouble For The Rental Car Business*, FORBES (Oct. 17, 2015, 11:51 AM), <http://www.forbes.com/sites/andrewbender/2015/10/17/uber-lyft-have-surpassed-taxis-now-spell-trouble-for-the-rental-car-business/>. Fifty-seven percent of business travelers now prefer ridesharing as opposed to traditional taxi services. *SpendSmart™ Report for Q2 2015*, CERTIFY, <https://www.certify.com/Infograph-Sharing-Economy-Q2-2015.aspx> (last visited Nov. 18, 2015).

10. “As of September, the sharing economy has created 17 companies with a combined revenue of more than \$1 billion, provided jobs to some 60,000 people, and attracted a total of \$15 billion in funding. And the market is expected to double in the next year.” Shelley Goldberg, *Profit from the Sharing Economy*, WALL ST. DAILY (Nov. 10, 2015), <http://www.wallstreetdaily.com/2015/11/10/sharing-economy/>.

11. Name changed to protect parties involved.

12. Telephone Interview with Mary Wright, Uber/Lyft Driver Partner (Nov. 20, 2015).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

New technology has allowed for peer-to-peer sharing and services that have in many ways revived the service industry.¹⁹ Overall, the sharing economy emphasizes simple access to goods and services over outright ownership, fundamentally shifting the way that we work and consume, emphasizing simple access to goods and services over outright ownership.²⁰ It is now time to adopt legislation that will assist the labor force in adapting to this new model. Adaptation is not a new concept in response to shifting economic conditions.²¹ As President Obama pointed out, our economy evolved once from an agrarian model to an industrial model.²² As the economy shifts again from an industrial model to a sharing model, legislation must also adapt to yet another evolution of America's workforce.

This Comment will focus on the labor and employment challenges presented by the ridesharing industry, and proposes negotiated rulemaking as a vehicle to comprehensive remedial legislation. Part I of this Comment will provide an overview of the on-demand/sharing economy, focusing particularly on the ridesharing industry. This section will outline the challenges faced by workers in the ridesharing industry, focusing on the independent contractor/employee dichotomy. Part II explores the complex and ongoing litigation between on-demand workers and Lyft and Uber, two ridesharing companies. Part III highlights other challenges the ridesharing industry is facing, particularly the lack of regulation and disruption of the taxicab industry. Part IV explains the process of negotiated rulemaking, and how it could be used to develop a comprehensive and collaborative solution

19. As of May 2015, 7 percent of U.S. adults reported working on sharing economy platforms. Rachel Botsman, *Can the Sharing Economy Provide Good Jobs?*, WALL ST. J. (May 10, 2015, 11:08 PM), <http://www.wsj.com/articles/can-the-sharing-economy-provide-good-jobs-1431288393>; see also Casey Leins, *Who's a Sharing Economy Worker?*, US NEWS (Aug. 21, 2015, 1:49 PM), <http://www.usnews.com/news/blogs/data-mine/2015/08/21/uber-airbnb-etsy-who-are-the-sharing-economy-workers>.

20. For example, many young people in urban areas are foregoing car ownership in favor of using ridesharing services like Lyft and Uber. This allows users to eliminate the costs associated with ownership but maintain access to the services and goods that they need. "In this new model, access 'is the new form of ownership.'" Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 416 (2015). See generally Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing As A Modality of Economic Production*, 114 YALE L.J. 273 (2004) (discussing the shift towards a market of marketable goods).

21. Maurice L. Shevin, *Consumer Finance – The Fuel That Drives the Economy*, 58 ALA. L. 230, 230–31 (1997); *Economic Growth and the Early Industrial Revolution*, USHISTORY.ORG, <http://www.ushistory.org/us/22a.asp> (last visited Nov. 18, 2015).

22. President Obama here refers to America's Industrial Revolution. Obama, *supra* note 1.

to the lack of regulation in the ridesharing industry. Part V concludes with a call for action.

I. THE SHARING ECONOMY AND RIDESHARING INDUSTRY

The sharing economy is a socio-economic system built around the monetization of human and physical resources.²³ The thought behind the sharing economy is simple: “Consumers will share goods when transaction costs related to the coordination of economic activities within specific communities are low.”²⁴ In other words, people will buy into the sharing economy when technological platforms make it easy to do so. Following the financial crisis of 2008, the sharing economy blossomed.²⁵ Technological advances, desperation for additional income, the increased adoption of social media, and the universal adaptation of smart phones have been cited as driving factors for the takeoff of the sharing economy, which has largely infiltrated the service industry.²⁶ Airbnb, an extremely popular peer-to-peer network that allows individuals to rent out their homes or rooms within their homes, provides a prime example of how the sharing economy model has disrupted the hotel industry.²⁷

The “on-demand” economy is a piece of the sharing economy.²⁸ The on-demand economy specifically refers to “the economic activity created by technology companies that fulfill consumer demand via the immediate provisioning of goods and services.”²⁹ Within the on-demand economy, technological platforms have made it possible for companies to offer consumers instantaneous services by relying on independent contractors who use their own resources.³⁰ The ridesharing

23. Josh Krauss, *The Sharing Economy: How State and Local Governments Are Failing and Why We Need Congress to Get Involved*, 44 SW. L. REV. 365, 366 (2014); see Michael J. Olson & Andrew D. Connor, *The Disruption of Sharing: An Overview of the New Peer-to-Peer ‘Sharing Economy’ and The Impact on Established Internet Companies*, 2013 PIPER JAFFRAY 20.

24. Ranchordás, *supra* note 20, at 416.

25. Olson & Connor, *supra* note 23, at 6.

26. *Id.* at 4.

27. *About Us*, AIRBNB, <http://www.airbnb.com/about/about-us> (last visited Nov. 18, 2015) (stating that the company has over two million locations worldwide); see John Melloy, *Airbnb Guests Triple, Hurting Priceline, HomeAway*, CNBC (Feb. 2, 2015, 1:03 PM), <http://www.cnbc.com/2015/02/02/airbnb-guests-triple-hurting-priceline-homeaway.html>.

28. Mike Jaconi, *The ‘On-Demand Economy’ Is Revolutionizing Consumer Behavior – Here’s How*, BUS. INSIDER (July 13, 2014, 4:52 PM), <http://www.businessinsider.com/the-on-demand-economy-2014-7>.

29. *Id.*

30. *Id.*

companies, Uber and Lyft, are examples of on-demand businesses within the sharing economy.

A. Ridesharing in a Nutshell

In March 2009, Travis Kalanick and Garrett Camp developed a mobile application (app)³¹ seeking to improve the taxicab industry in San Francisco.³² Soon UberCab (now known simply as Uber) was born.³³ Since then, Uber has expanded from San Francisco, California to hundreds of cities around the world and has become known as the most successful startup in history.³⁴ Other companies, such as Lyft, have mirrored the ridesharing model and offer similar (if not identical) services.³⁵

Ridesharing companies operate under the assumption that the drivers who work with them are independent contractors.³⁶ As independent contractors, drivers have considerable freedom in setting

31. “A mobile application, most commonly referred to as an app, is a type of application software designed to run on a mobile device, such as a smartphone or tablet computer. Mobile applications frequently serve to provide users with similar services to those accessed on PCs. Apps are generally small, individual software units with limited function.” *Mobile Application*, TECHPEDIA.COM, <https://www.techopedia.com/definition/2953/mobile-application-mobile-app> (last visited Mar. 2, 2016).

32. “Garrett’s big idea was cracking the horrible taxi problem in San Francisco — getting stranded on the streets of San Francisco is familiar territory for any San Franciscan.” Travis Kalanick, *Uber’s Founding*, UBER NEWSROOM (Dec. 22, 2010), <https://newsroom.uber.com/2010/12/ubers-founding/>.

33. UberCab (Uber) was officially released via the iTunes App Store in May 2010. *How Uber Started*, UBERESTIMATE, <http://uberestimate.com/timeline/> (last visited Nov. 18, 2015).

34. Uber now has approximately 1 million drivers working in over 300 cities worldwide. Luz LAZO, *Uber Turns 5, Reaches 1 Million Drivers and 300 Cities Worldwide. Now What?*, WASH. POST (June 4, 2015), <https://www.washingtonpost.com/news/dr-gridlock/wp/2015/06/04/uber-turns-5-reaches-1-million-drivers-and-300-cities-worldwide-now-what/>; Nathan McAlone, *Here’s How Uber Got Its Start and Grew to Become the Most Valuable Startup in the World*, BUS. INSIDER (Sept. 13, 2015, 8:00 AM), <http://www.businessinsider.com/history-of-uber-and-its-rise-to-become-the-most-valuable-startup-in-the-world-2015-9>.

35. Lyft is the second most popular ridesharing company. Leslie Picker & Mike Isaac, *Lyft Said to Seek \$500 Million in Funding*, N.Y. TIMES (Nov. 17, 2015), http://www.nytimes.com/2015/11/18/business/dealbook/lyft-said-to-seek-dollar500-million-in-funding.html?_r=0. See generally LYFT, <https://www.lyft.com/> (last visited Nov. 18, 2015) (stating that people may ride with local drivers at the tap of a button).

36. Lyft does not indicate that their drivers are independent contractors as plainly on their website. The company does, however, state that drivers are independent contractors in their Help Center – Tax Information. *Tax Information*, LYFT, <https://www.lyft.com/drive/help/article/1229066> (last visited Nov. 18, 2015). Uber refers to the drivers as “partners” or “driver-partners.” The company clearly indicates on their recruiting website that the drivers are independent contractors. *Uber Needs Partners Like You*, UBER, <https://get.uber.com/drive/> (last visited Nov. 18, 2015).

their own working hours while Uber and Lyft avoid the costs associated with having hundreds of thousands of employees.³⁷

Lyft and Uber operate apps that match passengers with nearby drivers.³⁸ To use Uber or Lyft apps as a rider, one simply downloads either app on any smartphone, enters their personal information or connects the account with an existing social media account, and inputs payment information.³⁹ The entire process takes no more than three minutes, or even less for the technologically savvy. Once the rider's account is set up on a smart phone, the rider can open the app, request a ride, and be instantly matched with a driver in the area.⁴⁰ The app allows the rider to see a picture of the driver, the driver's car, the driver's customer service rating, and the driver's location.⁴¹ Once a ride is completed, payment occurs automatically via the credit card information the rider has provided through the app.⁴² Like a taxi, the fare includes a base charge, a charge for the distance traveled, and a charge for the total time traveled.⁴³ Additionally, the fare includes a safety fee that varies by city, which supports the companies' background checks, vehicle checks, and other safety procedures.⁴⁴ During times when demand is heaviest, Uber and Lyft charge a premium (typically between 1 to 2.5 times the normal fare, but as high as 9 times the normal fare during times of extreme demand) to encourage more drivers to get on the road.⁴⁵

37. *Frequently Asked Questions*, LYFT, https://www.lyft.com/drivers?lyft4_source=navbar (last visited Nov. 18, 2015); *Uber Needs Partners Like You*, *supra* note 36.

38. LYFT, *supra* note 35; UBER, *Uber.com*, (last visited Nov. 18, 2015).

39. *Downloading the App*, UBER, <https://help.uber.com/h/20ff0367-9680-4517-baf0-6b0d218264e2> (last visited Nov. 18, 2015); LYFT, *supra* note 35; *see also* Mary Beth Quirk, *How Do Uber and Lyft Work And Why Should I Even Care?*, CONSUMERIST (Sept. 18, 2014), <http://consumerist.com/2014/09/18/how-do-uber-and-lyft-work-and-why-should-i-even-care/>.

40. *How Do I Request a Ride*, UBER, <https://help.uber.com/h/7ef159ca-3674-4242-bc0c-b29024958b26> (last visited Nov. 18, 2015); LYFT, *supra* note 35; *see also* Quirk, *supra* note 39.

41. LYFT, *supra* note 35; *see also* Quirk, *supra* note 39.

42. *Do I Need to Tip My Driver*, UBER, <https://help.uber.com/h/1be144ab-609a-43c5-82b5-b9c7de5ec073> (last visited Mar. 28, 2016) (stating that there is no need to tip after fare is automatically deducted); LYFT, *supra* note 35 (stating, through a picture, that Lyft gives riders an option to tip their drivers); *see also* Quirk, *supra* note 39.

43. *Getting a Fare Estimate*, UBER, <https://help.uber.com/h/d1c92ce8-d061-4324-a6b5-5ba44be7ffed> (last visited Mar. 28, 2016); LYFT, *supra* note 35; *see also* Quirk, *supra* note 39.

44. Uber refers to the premium pricing as "Surge Pricing." Lyft uses the term "Prime Time." *What is Surge Pricing?*, UBER, <https://help.uber.com/h/6c8065cf-5535-4a8b-9940-d292ffdce119> (last visited Nov. 18, 2015); *Driver Center*, LYFT, <https://drivers.lyft.com/customer/portal/articles/1366676-prime-time> (last visited Nov. 18, 2015).

45. Caroline Moss, *26-Year-Old Successfully Crowd Funds To Pay For Her \$362 Halloween Uber Ride*, BUSINESS INSIDER, <http://www.businessinsider.com/women-raises-362-to-pay-for-uber-ride-2014-11> (Nov. 2, 2014); *Become a Lyft Driver*, LYFT, <https://www.lyft.com/drivers> (last

Generally, to become an Uber or Lyft driver, one must own a smartphone⁴⁶, be at least 21 years old, own a car that is no more than 10 years old⁴⁷, possess vehicle insurance and registration⁴⁸, submit their vehicle for inspection, and pass a background check⁴⁹. In most cases, the entire application process can be completed in one to two weeks.⁵⁰

Once a driver partner is accepted, their account is activated and they may begin driving immediately.⁵¹ The driver simply opens the Lyft or Uber app when they want to work and will be connected with riders in the area.⁵² After every ride the driver completes, the rider rates the driver on a 1-5 star scale, with 5 stars being optimal. In order to keep a driver account in good standing, a driver must maintain an average customer service rating of at least 4.5 out of 5 stars. If a driver's customer service rating falls below 4.5 stars, Lyft or Uber may deactivate the driver's account.⁵³ Drivers have no set schedule and are able to work at their leisure.⁵⁴ The average hourly earnings of Uber and Lyft drivers vary by city and demand. In Baltimore, Lyft and Uber drivers earn an average of \$9.49 – \$12.21 per hour, but in New York City where individuals rely heavily on public transportation and taxis,

visited Nov. 18, 2015); *Driving Jobs v. Driving with Uber*, UBER, <https://www.uber.com/driver-jobs> (last visited Nov. 18, 2015).

46. The smartphone must be Android or IOS compatible. *Driving with Uber*, *supra* note 45; *Become a Lyft Driver*, *supra* note 45.

47. In some cities, cars may be 10–15 years old. *Id.*

48. Uber and Lyft's insurance covers drivers from the time they sign-on to accept rides until they drop off their customer. *Driving with Uber*, *supra* note 45; *Lyft's Insurance Policy*, LYFT, <https://www.lyft.com/drive/help/article/1229170> (last visited Nov. 18, 2015).

49. Background checks and safety requirements are city and state specific. *City and State-Specific Requirements*, LYFT, <https://www.lyft.com/drive/help/article/1695469> (last visited Nov. 18, 2015); *Safe Rides, Safer Cities*, UBER, <https://www.uber.com/safety> (last visited Nov. 18, 2015).

50. *How to Become an Uber Driver in 3 steps*, I DRIVE WITH UBER BLOG (June 10, 2015), <http://www.idrivewithuber.com/how-to-become-an-uber-driver/>.

51. In most cities, Lyft requires new drivers to meet with a "Lyft Mentor" to have their vehicle inspected and complete a practice ride before the driver account is activated. *The Mentor Session*, LYFT, <https://help.lyft.com/hc/en-us/articles/214219617-Mentor-Session> (last visited Nov. 18, 2015).

52. LYFT, Lyft.com (last visited Nov. 18, 2015); see *How to Use Uber*, UBER, <https://help.uber.com/h/15b0d4d8-2763-40d4-80c0-ff83a9a37cc4> (last visited Nov. 18, 2015); see also Quirk, *supra* note 39.

53. *Driver and Passenger Ratings*, LYFT, <https://www.lyft.com/drive/help/article/1405846> (last visited Nov. 18, 2015); *Fired from Uber: Why Drivers Get Deactivated and How to Get Reactivated*, THE RIDESHARING DRIVER BLOG (July 15, 2015), <http://www.ridesharingdriver.com/fired-uber-drivers-get-deactivated-and-reactivated/>.

54. However, drivers who do not make a trip for four consecutive weeks will have their accounts deactivated for inactivity. *UberX FAQ*, UBER-PARTNERS, http://uber-partners-static.s3.amazonaws.com/chicago_uberx/faq.html.

drivers can earn a whopping \$28.63 – \$29.34 per hour.⁵⁵ Regardless of what a driver earns per hour, Lyft and Uber collect the flat-rate safety fee and 20 percent of all fares.⁵⁶ Drivers are paid weekly via direct deposit.⁵⁷

In December of 2014, Uber hired the Benson Strategy Group to conduct a study on their “driver-partners.”⁵⁸ Their survey sought comprehensive data on the quality of life and satisfaction that Uber driver-partners experience.⁵⁹ The results were overwhelmingly positive. Seventy-eight percent of respondents said they are either very satisfied or somewhat satisfied with Uber, and 69 percent reported that their opinion of the company has improved since they began working with the company.⁶⁰ Seventy-one percent of respondents reported a boost in their income, compared to just 11 percent who said it worsened it.⁶¹ The drivers found seemed to indicate that autonomy was an extremely attractive feature of their ridesharing job. Seventy-three percent of respondents claimed that they prefer working at a job where they are able to “choose [their] own schedule and be [their] own boss.”⁶² It is important to note here that the results of the online survey distributed by the Benson Strategy Group encapsulates the re-

55. Rachel Gillett, *Here's How Much You Could Make as an Uber or Lyft Driver in 20 Major US cities*, BUS. INSIDER (July 20, 2015, 11:40 AM), <http://www.businessinsider.com/how-much-uber-drivers-make-in-each-city-2015-7>; Sarah Kessler, *How Much Uber and Lyft Drivers Make in Different Cities*, FAST COMPANY (July 15, 2015, 4:00 AM), <http://www.fastcompany.com/3048563/fast-feed/this-is-how-much-uber-and-lyft-drivers-make-in-different-cities>.

56. Starting in September 2015, Uber began testing higher commissions in San Francisco. “In a new pilot program in San Francisco, a small percentage of new UberX drivers will pay a 30% commission on their first 20 rides in a week, 25% on their next 20 rides, and then 20% on any rides beyond that.” Ellen Huet, *Uber Tests Taking Even More from Its Drivers with 30% Commission*, FORBES (May 18, 2015, 6:32 PM), <http://www.forbes.com/sites/ellenhuet/2015/05/18/uber-new-uberx-tiered-commission-30-percent/>. “Drivers get 80% of ride fees from passengers. Money is deposited into your account each week.” *Frequently Asked Questions*, *supra* note 37.

57. “Statements are generated on a weekly basis for trips completed through Monday at 4:00 AM local time. Payments will appear in your bank account by Thursday evening.” *View My Payment Statements*, UBER, <https://help.uber.com/h/8ba64dc9-a85b-4923-8277-c0e813395d79> (last visited Nov. 18, 2015). “Drivers get 80% of ride fees from passengers. Money is deposited into your account each week.” *Frequently Asked Questions*, *supra* note 37.

58. BENENSON STRATEGY GRP., UBER REPORT (2014), <http://www.scribd.com/doc/253352867/Benenson-Strategy-Group-Uber-Report>; *cf.* Polly Mosendz, *Thousands of Drivers Declined to Take Uber Survey Claiming 78% of Drivers Are Satisfied With Platform*, NEWSWEEK (Jan. 22, 2015, 10:53 AM), www.newsweek.com/thousands-drivers-declined-take-uber-survey-which-claims-78-drivers-satisfied-301252.

59. BENENSON STRATEGY GRP., *supra* note 58.

60. *Id.*

61. *Id.*

62. *Id.*; Danny Vinik, *Uber Drivers Love Uber, Says Uber Survey. Here's Why You Should Believe It*, NEW REPUBLIC (Jan. 22, 2015), <https://newrepublic.com/article/120832/uber-study-uber-drivers-are-happy-uber>.

sponses of just 601 drivers – less than 11 percent of drivers in the United States.⁶³

B. Ridesharing Drivers as Independent Contractors

By classifying its drivers as independent contractors, Uber and Lyft have avoided certain payroll taxes, insurance, and administrative expenses that companies must pay for employees.⁶⁴ If a court determines that the drivers working with Lyft and Uber are employees instead of independent contractors, Uber and Lyft could face billions of dollars in increased operating costs and fines.⁶⁵ Fortune estimates that reclassifying Uber's drivers as employees could cost the company over \$4 billion.⁶⁶ The largest potential cost for the employer would be reimbursement for mileage, gas, and tolls, estimated at \$2.6 billion, which accounts for 64 percent of Uber's potentially increased costs.⁶⁷ The additional \$1.5 billion in estimated cost is divided⁶⁸ amongst payroll taxes, workers' compensation, health insurance, vacation and sick pay, unemployment insurance, and potential 401k plan.⁶⁹

With Uber and Lyft's estimated worth, \$50 billion and \$2.5 billion respectively, the companies could likely survive a ruling that their drivers must be classified as employees.⁷⁰ However, this would undoubtedly force the companies to reevaluate their operating model – the same operating model that makes the companies so attractive to both riders and drivers. As such, the companies have fought vigorously against all claims that have called into question their drivers' independent contractor status.

63. Mosendz, *supra* note 58.

64. Stephen Gandel, *Uber-nomics: Here's What It Would Cost Uber to Pay Its Drivers as Employees*, FORTUNE (Sept. 17, 2015, 2:12 PM), <http://fortune.com/2015/09/17/ubernomics/>; Abigail Tracey, *The Massive Costs Uber Faces If All Drivers Become Employees*, FORBES (June 18, 2015, 11:01 AM), <http://www.forbes.com/sites/abigailtracy/2015/06/18/the-massive-costs-uber-faces-if-all-drivers-become-employees/>.

65. Stephen Gandel, *Uber-nomics: Here's What It Would Cost Uber to Pay Its Drivers as Employees*, FORTUNE (Sept. 17, 2015, 2:12 PM), <http://fortune.com/2015/09/17/ubernomics/>; Abigail Tracey, *The Massive Costs Uber Faces If All Drivers Become Employees*, FORBES (June 18, 2015, 11:01 AM), <http://www.forbes.com/sites/abigailtracy/2015/06/18/the-massive-costs-uber-faces-if-all-drivers-become-employees/>.

66. *Id.*

67. *Id.*

68. List is ordered from potentially most costly expense to least costly. *Id.*

69. *Id.*

70. Leslie Picker & Mike Isaac, *Lyft Said to Seek \$500 Million in Funding*, N.Y. TIMES (Nov. 17, 2015), http://www.nytimes.com/2015/11/18/business/dealbook/lyft-said-to-seek-dollar-500-million-in-funding.html?_r=0.

C. Independent Contractor/Employee Distinction

The classification of workers as either independent contractors or employees is a constant area of contention in labor and employment law.⁷¹ A worker's classification as either an employee or independent contractor has vast consequences.⁷² Employees enjoy many legally mandated protections and benefits, like minimum wage, overtime, and meal breaks, while independent contractors receive almost none.⁷³ The protections and benefits granted to employees are designed to protect wageworkers from the bargaining advantage that employers have in dictating working conditions, especially for low-wage or unskilled workers.⁷⁴ These protections are not applied to independent contractors because independent contractors are seen as being in a more advantageous position than employees.⁷⁵ "For example, contractors who are truly independent readily can sever the business relationship and take their services and equipment elsewhere when faced with unfair or arbitrary treatment, or unfavorable working conditions."⁷⁶

1. Presumption of Employee Status

In some states, including California, courts have clearly indicated that when considering and interpreting remedial legislation involving the regulation of wages, hours, and working conditions, the statutory

71. Most federal statutes include circular definitions of "employee." For example, the definition of "employee" under the Fair Labor Standards Act is "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (2012). The term "employ" is defined as "to suffer or permit to work." 29 U.S.C. § 203(g). The Department of Labor recently issued a *Administrators Interpretation* in an effort to clarify the statute specifically in response to claims that workers were being misclassified as independent contractors. DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION No. 2015-1 (July 15, 2015).

72. "Independent contractor misclassification illegally deprives employees of basic labor employment rights because the majority of the employment-related federal Acts do not provide protection for independent contractors. In addition, misclassification causes billions in federal, state, and local tax revenue loss due to underreporting and non-filing. Unemployment compensation programs also miss out on billions of dollars because employers only have to pay federal and state unemployment taxes for employees." David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 144-51 (2015).

73. *Id.* at 145-46; see *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1074-75 (N.D. Cal. 2015).

74. *Cotter*, 60 F. Supp. 3d at 1074; Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 130 (1997).

75. *Cotter*, 60 F. Supp. 3d at 1074; Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 130 (1997).

76. *Id.*

provisions “are to be liberally construed with an eye to promoting such protection.”⁷⁷ In such states, there is a presumption that a person providing services to a principal in exchange for wages or compensation is an employee.⁷⁸ When employment classification is challenged, the burden of proof lies with the party that is asserting that the alleged employee is an independent contractor to prove that the worker is not an employee.⁷⁹ To prove that a worker is not an employee, but rather an independent contractor, the asserting party must show that a combination of certain factors, arising from general principles of agency, is present.⁸⁰

2. The Common Law Agency Test

The United States Supreme Court has held that the independent contractor/employee distinction is an issue of agency.⁸¹ Though states have adopted various iterations, generally, there are nine relevant factors in determining whether an individual is an employee or an independent contractor.⁸² The factors include:

1. The extent of control that the principal can exercise over the means and manner of the work;
2. Whether the one performing services is engaged in a distinct occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
4. The skill required in the particular occupation;
5. Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. The length of time for which the services are to be performed;
7. The method of payment, whether by the time or by the job;
8. Whether or not the work is a part of the regular business of the principal; and

77. *Cotter*, 60 F. Supp. 3d at 1075 (citing *Martinez v. Combs*, 109 Cal. Rptr. 3d 514, 231 (Cal. 2010)).

78. *Id.*

79. 14 AM. JUR. PL. & PR. FORMS, Independent Contractors § 18.

80. *NLRB. v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968).

81. *Id.*

82. RESTATEMENT (SECOND) OF AGENCY § 2 (1958).

9. Whether or not the parties believe they are creating the relationship of employer-employee.⁸³

In determining whether an employee or independent contractor relationship exists, “there is no shorthand formula or magic phrase that can be applied . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”⁸⁴ A court must assess the “total factual context [of the relationship] . . . in light of the pertinent common-law agency principles.”⁸⁵ It is easy to see why these fact specific determinations are so contentious.

a. Applying the Test in California

The class action claims against the companies, *Cotter v. Lyft, Inc.* and *O'Connor v. Uber Technologies, Inc.*, are currently being heard in the Northern District of California. Under California law, once a plaintiff comes forward with evidence that he provided services for an employer, the plaintiff has established a prima facie case that the relationship was one of employer-employee.⁸⁶ The burden then shifts to the employer to prove that the alleged employee is an independent contractor.⁸⁷ California courts employ a multi-factor test that mirrors the common law test outlined above.⁸⁸ However, California courts have placed special emphasis on the alleged employer's right to control.

The principal test of an employment relationship in California is “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”⁸⁹ However, this does not require total control over the work itself. California courts have found that an employee-employer relationship may still exist where a “certain amount of freedom is inherent in the work.”⁹⁰ Additionally, whether or not an alleged employer actually

83. *Id.*

84. *NLRB*, 390 U.S. at 258; *see also* *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989).

85. *NLRB*, 390 U.S. at 258; *see also* *S. G. Borello & Sons, Inc.*, 769 P.2d at 404.

86. *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010).

87. *Id.*

88. *Infra* Part I (C)(2).

89. *S. G. Borello & Sons, Inc.*, 769 P.2d at 404.

90. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1076 (N.D. Cal. 2015) (quoting *Air Couriers Int'l v. Emp't Dev. Dep't*, 59 Cal. Rptr. 3d 37, 44 (Cal. 2007)).

exerted control carries less weight than a finding that an alleged employer retained the power to exercise control at its discretion.⁹¹

The court has also recognized that the additional factors indicated above are “intertwined” and “their weight depends often on particular combinations.”⁹² California courts consider the totality of the relationship between the alleged employee and employer, recognizing factors used by other states as “logically pertinent to the inherently difficult determination” of employee status.⁹³ These factors include “the alleged employee’s opportunity for profit or loss depending on his managerial skill” and “the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers.”⁹⁴

Typically, disputes involving the employee-independent contractor distinction involve some factors that suggest an employment relationship and others that point to an independent contractor relationship.⁹⁵ If there is a clear indication based on the undisputed facts of the case that either an independent contractor or employee relationship exists, the court may decide the case via summary judgment.⁹⁶ But, where “reasonable people could differ on whether a worker is an employee or an independent contractor based on the evidence in the case,” the question must go to a jury.⁹⁷ In *Alexander v. FedEx Ground Package Systems, Inc.*, a California jury tackled the issue of drivers as independent contractors.

b. *Alexander v. FedEx Ground Package Systems, Inc.*

In 2014, the Ninth Circuit addressed a similar case involving delivery drivers for FedEx Ground Package Systems (FedEx), who were classified as independent contractors.⁹⁸ In *Alexander v. FedEx*, drivers, who were hired to deliver packages to FedEx customers, challenged their classification and claimed that they were actually

91. “[W]hether Lyft actually exercises this control is less important than whether it retains the right to do so.” *Id.* at 1078.

92. *S. G. Borello & Sons, Inc.*, 769 P.2d at 404.

93. *Cotter*, 60 F. Supp. 3d at 1076 (quoting *S. G. Borello & Sons, Inc.*, 769 P.2d at 407).

94. *Id.*

95. *Id.* at 1077–78; see also *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 994–97 (9th Cir. 2014).

96. *Narayan v. EGL, Inc.*, 616 F.3d 895, 901 (9th Cir. 2010).

97. “A grant of summary judgment is appropriate when ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Alexander*, 765 F.3d at 987 (quoting Fed. R. Civ. P. 56(a)); *Cotter*, 60 F. Supp. 3d at 1076.

98. *Cotter*, 60 F. Supp. 3d at 1076 (citing *Angelotti v. Walt Disney Co.*, 121 Cal. Rptr. 3d 863, 870 (2011)).

employees of FedEx.⁹⁹ The drivers were required to wear FedEx uniforms, drive FedEx-approved vehicles, and groom themselves according to FedEx's appearance standards.¹⁰⁰ FedEx directed its drivers as to what packages to deliver, on what days, and at what times.¹⁰¹ Although drivers were permitted to operate multiple delivery routes and to hire third parties to help perform their work, they could do so only with FedEx's consent.¹⁰² The court found that these facts established that FedEx exercised a right to control the work of their drivers and as such, FedEx was found to have misclassified the drivers as independent contractors.¹⁰³ Summary judgment was granted in favor of the drivers.

II. ONGOING LITIGATION BETWEEN LYFT, UBER, AND DRIVERS

Uber and Lyft essentially operate using the same business model. As a result, the claims against Uber and Lyft share most material facts and both the companies and drivers make similar arguments.¹⁰⁴ For the purposes of this paper, I will discuss the courts' summary judgment opinions in *Cotter v. Lyft, Inc. (Lyft)* and *O'Conner v. Uber Technologies, Inc. (Uber)* concurrently.

A. Prima Facie Case of Employment

Under California law, the company's obligation to prove that the drivers were independent contractors does not arise until the drivers establish a prima facie case of employment status.¹⁰⁵ As discussed above, this element is satisfied when an employee establishes that they provided services for a company.¹⁰⁶ Uber and Lyft have taken the approach that the drivers did not provide services to the company, but rather it was the company that provided services for the drivers and

99. *Alexander*, 765 F.3d at 987.

100. *Id.* at 984–87.

101. *Id.*

102. *Id.*

103. “[T]he extrinsic evidence supports a conclusion that FedEx has the right to control its drivers. Viewing the evidence in the light most favorable to FedEx, we conclude that plaintiffs are employees.” *Id.* at 988.

104. See Part II. See generally *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

105. *O'Connor*, 82 F. Supp. 3d at 1138 (citing *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010)).

106. See Part II(C)(1).

that the drivers agreed to pay the company for those services.¹⁰⁷ The crux of this argument relies on the proposition that Uber and Lyft are not transportation companies (like a taxi cab service), but rather technology providers.¹⁰⁸ To support this argument, the companies turn to their terms of service, which both riders and drivers must agree to before using the ridesharing platform.¹⁰⁹ In its terms of service, Uber clearly states that it is not a transportation carrier and has no affirmative obligation to provide transportation services or to ensure that passengers receive transportation services.¹¹⁰ Lyft's terms of service similarly state that "Lyft does not provide transportation services, and Lyft is not a transportation carrier."¹¹¹ If one accepts this proposition, it then follows that the drivers cannot provide transportation services for companies that do not offer transportation services. Lyft and Uber use this argument in an attempt to show that the drivers have not established a prima facie case for employment.¹¹²

The drivers refute this proposition by arguing that Lyft and Uber drivers form an integral and indistinct part of the companies' businesses.¹¹³ Indicating that without its drivers, Lyft and Uber would have no way to derive revenue from their apps.¹¹⁴ The drivers in *Uber* also point out that Uber has advertised itself as "your on-demand car service" and its tagline is "Everyone's Private Driver," further emphasizing the role of drivers in Uber's business model.¹¹⁵ On summary judgment, both the *Lyft* and the *Uber* court rejected the companies' argument that Uber and Lyft drivers had not met the prima facie requirement. The *Uber* court criticized the company's argument as "fatally flawed in numerous respects."¹¹⁶ The *Lyft* court flatly rejected Lyft's argument that the drivers do not provide services as "obviously wrong."¹¹⁷ The courts then turned to the question of whether an em-

107. *O'Connor*, 82 F. Supp. 3d at 1141; *Cotter*, 60 F. Supp. 3d at 1078.

108. *O'Connor*, 82 F. Supp. 3d at 1141; *Cotter*, 60 F. Supp. 3d at 1070.

109. *O'Connor*, 82 F. Supp. 3d at 1141; *Cotter*, 60 F. Supp. 3d at 1071-73.

110. Brief for Plaintiffs at 6, *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. CV 13-3826-EMC).

111. Brief for Defendants at 5, *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015) (No. 3:13-cv-04065-VC).

112. *O'Connor*, 82 F. Supp. 3d at 1138; *Cotter*, 60 F. Supp. 3d at 1077.

113. Joint Case Mgmt. at 5, *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015) (No. 3:13-cv-04065-VC); Brief for Plaintiffs, *supra* note 110, at 5-6.

114. Brief for Plaintiffs, *supra* note 110, at 6.

115. *O'Connor*, 82 F. Supp. 3d at 1142.

116. *Id.* at 1141.

117. *Cotter*, 60 F. Supp. 3d at 1078.

ployee-employer relationship exists between Lyft, Uber and their drivers.

B. Right to Control

The “primary test” of an employment relationship in California is “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”¹¹⁸ This right to control can be established by showing that various conditions exist. In *Alexander*, the court found evidence indicating that FedEx controlled the appearance of drivers and their vehicles, the drivers’ work location, and how and when the drivers delivered packages.¹¹⁹ Based on these facts, the FedEx drivers were found to be employees.¹²⁰

Lyft and Uber attempt to distinguish their case from *Alexander* by indicating that the drivers who work with them set their own schedule and have the freedom to work at their leisure.¹²¹ The drivers can choose when to log-on to the online platform and for how long. They essentially have no obligation to work a schedule determined by Lyft or Uber.¹²² Additionally, neither Lyft nor Uber have a dress code for the drivers. However, both Lyft and Uber have rules regarding their drivers’ conduct with customers and the cleanliness of the drivers’ vehicles.¹²³ For example, both Lyft and Uber prohibit their drivers from smoking in their cars or having pets in their vehicles while providing rides.¹²⁴ The courts here recognized the significant flexibility that drivers have in setting their schedule and work location, but concluded that based on the allegations made by the drivers, the amount of control that Lyft and Uber exercised over how they conducted their work was sufficient to make a finding of employment plausible.¹²⁵

C. Additional Factors

A review of the briefs filed in both *Lyft* and *Uber* reveal that certain secondary factors may also favor a finding of employment relationships at trial. Typically, courts have found that a position that

118. *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989).

119. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988–90 (9th Cir. 2014).

120. *Id.*

121. *O’Connor*, 82 F. Supp. 3d at 1151–52; *Cotter*, 60 F. Supp. 3d at 1078.

122. *O’Connor*, 82 F. Supp. 3d at 1151–52; *Cotter*, 60 F. Supp. 3d at 1078.

123. *O’Connor*, 82 F. Supp. 3d at 1151–52; *Cotter*, 60 F. Supp. 3d at 1078–79.

124. *O’Connor*, 82 F. Supp. 3d at 1153; *Cotter*, 60 F. Supp. 3d at 1078–79.

125. *O’Connor*, 82 F. Supp. 3d at 1153; *Cotter*, 60 F. Supp. 3d at 1080–81.

requires little to no skill may indicate the existence of an employee-employer relationship.¹²⁶ Lyft and Uber drivers have claimed that their positions do not require a high degree of skill.¹²⁷ In fact, the only skill required is the ability to drive and a driver's license. California has recognized on multiple occasions that driver positions generally do not require a high degree of skill.¹²⁸ Additionally, Lyft and Uber's agreement with their drivers allow either party to terminate the relationship at any time, for any reason.¹²⁹ The California Supreme Court has noted that the ability to discharge a worker without cause is "[p]erhaps the strongest evidence of the right to control."¹³⁰

The courts did note, however, that other secondary factors weighed against a finding of employment. For example, a finding that a worker supplied the materials and instrumentalities for their work is indicative of an independent contractor relationship.¹³¹ Lyft and Uber drivers provide their own vehicles and use their own cellular phone to access the free Uber or Lyft app.¹³² Also, the agreements between Lyft, Uber, and their drivers specifically state that the drivers are entering into an independent contractor relationship.¹³³ This may indicate that both parties believed they were entering into an independent contractor relationship. The drivers are also paid per ride, not by the time worked, another possible indicator of an independent contractor relationship.¹³⁴

The *Lyft* court described the remaining secondary factors as "equivocal."¹³⁵ We can assume that both the Lyft and Uber cases will turn on the jury's interpretation of the evidence presented at trial. What is very clear in the *Lyft* and *Uber* opinions is the sensitive and

126. See *JKH Enters., Inc. v. Dep't of Indus. Relations*, 48 Cal. Rptr. 3d 563, 577 (Cal. Ct. App. 2006).

127. *Cotter*, 60 F. Supp. 3d at 1080; *O'Connor*, 82 F. Supp. 3d at 1152.

128. *Cotter*, 60 F. Supp. 3d at 1080; see *Air Couriers Int'l v. Emp't Dev. Dep't*, 59 Cal. Rptr. 3d 37, 46 (Cal. Ct. App. 2007); *JKH Enters., Inc.*, 48 Cal. Rptr. 3d at 577; cf. *Arnold v. Mut. of Omaha Ins. Co.*, 135 Cal. Rptr. 3d 213, 220–21 (Cal. Ct. App. 2011).

129. Uber has disputed the existence of an at-will relationship, the court cited this as an additional reason to deny summary judgment. *O'Connor*, 82 F. Supp. 3d at 1149 n. 19; *Cotter*, 60 F. Supp. 3d at 1080.

130. *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014); *S. G. Borello & Sons, Inc.*, 769 P.2d at 404.

131. *O'Connor*, 82 F. Supp. 3d at 1153.

132. See Part II (A).

133. *Cotter*, 60 F. Supp. 3d at 1079; *Uber Needs Partners Like You*, UBER, <https://get.uber.com/drive/> (last visited Nov. 18, 2015).

134. See Part II (A); see also *JKH Enters., Inc.*, 48 Cal. Rptr. 3d at 577 at 580.

135. *Cotter*, 60 F. Supp. 3d at 1080.

fact-dependent nature of the employee/independent contractor determination.

D. Uber's State Agency Decisions in Florida and California

In addition to the class action suit pending in California, Uber recently defended itself against claims by individual drivers in Florida and California.¹³⁶ These claims were brought to the respective state agencies that adjudicate disputes over employment benefit matters. Both claims turned on whether the drivers were independent contractors or employees and required the adjudicator to apply the independent contractor factors. Despite having nearly identical relationships with Uber, the decisions rendered opposite results.

1. California's Workforce Commission Response

Barbara Berwick, a California resident, drove for Uber from July 2014 to September 2014.¹³⁷ In her complaint to the California Workforce Commission, Berwick claimed that Uber violated California Labor Code § 2802, which requires employers to indemnify an employee for all that the employee necessarily expends in the discharge of the employee's duties.¹³⁸ Essentially, California Labor Code § 2802 mandates that employers must reimburse employees for all necessary expenses incurred by employees while working for the employer.¹³⁹ This claim required the California Workforce Commission to resolve two issues: first, whether Berwick was an employee of Uber, and second, if Berwick was an employee, what benefits were due.¹⁴⁰

Ms. Berwick claimed that she was an employee for Uber and therefore Uber owed her reimbursement for mileage, bridge tolls, and a citation she received while dropping off a customer.¹⁴¹ On June 3, 2015, the California Workforce Commission entered a non-precedent setting decision that found Berwick to be an employee of Uber and awarded her \$4,152.20 in expenses and interest.¹⁴² In its decision, the

136. *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK (Cal. Lab. Comm'n, June 4, 2015); see *McGillis v. Raiser, LLC*, No. 0023 26825 90-02 Ewers (Fla. Dept. Econ. Opportunity, May 20, 2015), *rev'd sub nom.* *Raiser, LLC v. Florida Dep't Econ. Opportunity*, No. 0023 26825 90-02 Ewers (Fla. Dept. Econ. Opportunity, Sept. 30, 2015).

137. *Berwick*, No. 11-46739 EK (Cal. Lab. Comm'n, June 4, 2015).

138. *Id.*; CAL. LAB. CODE § 2802 (West 2001).

139. CAL. LAB. CODE § 2802.

140. *Berwick*, No. 11-46739 EK (Cal. Lab. Comm'n, June 4, 2015).

141. *Id.*

142. *Id.*

Commission rejected the argument that Uber exercised minimal control over its drivers, finding instead that the minimal degree of control was not dispositive because Uber retained “necessary control over the operation as a whole” by obtaining the riders in need and providing the drivers to conduct the rides.¹⁴³ The commission found that Uber was not a “neutral technological platform” but was actually involved in “every aspect of the [ridesharing] operation.”¹⁴⁴

2. Florida’s Department of Equal Opportunity Response

Darrin McGillis, a Florida resident, began driving for Uber in the Fall of 2014.¹⁴⁵ Shortly thereafter, McGillis decided to purchase a larger sports-utility vehicle (SUV) so that he would be eligible to accept rides with Uber’s UberXL service.¹⁴⁶ Uber requires drivers to drive a minivan or SUV in order to drive for the UberXL service; in turn drivers are paid a higher base fare.¹⁴⁷ One day, while dropping off a customer, a scooter hit the rear door of McGillis’ SUV, damaging the vehicle.¹⁴⁸ McGillis attempted to work with Uber’s insurance company to have the door repaired but was unsuccessful. As Uber was McGillis’ primary source of income, he applied for unemployment.¹⁴⁹

Typically, unemployment benefits are not available to independent contractors because companies utilizing independent contractors do not pay into a state unemployment fund on behalf of independent contractors.¹⁵⁰ McGillis’ case provides no exception to this general rule. Uber does not pay into a state unemployment benefits fund on behalf of its drivers, who are classified as independent contractors. Thus, the Florida Department of Equal Opportunity was charged with a two prong task: first, to determine whether or not McGillis was misclassified as an independent contractor, and second, if McGillis was misclassified, to what benefits would he be entitled.¹⁵¹

143. *Id.*

144. *Id.*

145. McGillis, No. 0023 26825 90-02 Ewers (Fla. Dept. Econ. Opportunity, May 20, 2015); Douglas Hanks, *For Uber, Loyal Drivers and A New Fight for Benefits*, MIAMI HERALD (May 21, 2015, 4:17 PM), <http://www.miamiherald.com/news/business/article21599697.html>.

146. Hanks, *supra* note 145; Lauren Weber, *Florida Agency Reverses Uber Ruling*, WALL ST. J. (Sept. 30, 2105, 5:41 PM), <http://www.wsj.com/articles/florida-agency-reverses-uber-ruling-1443649261>.

147. Hanks, *supra* note 145; *see* Weber, *supra* note 146.

148. Hanks, *supra* note 145; *see* Weber, *supra* note 146.

149. Hanks, *supra* note 145; Weber, *supra* note 146.

150. *See* Part II (B)-(C).

151. McGillis, No. 0023 26825 90-02 Ewers (Fla. Dept. Econ. Opportunity, May 20, 2015).

The Florida Department of Equal Opportunity (FDEO) initially found in favor of McGillis, but reversed its decision on appeal.¹⁵² The FDEO considered both the common law factors of agency as well as additional secondary factors in its decision.¹⁵³ Unlike California common law, Florida common law requires control and direction over the *actual* conduct of a worker to prove an employer-employee relationship.¹⁵⁴ This is a slightly higher standard than California, which requires that the alleged employee show that the alleged employer retained the power and authority to exercise control.¹⁵⁵ Additionally, Florida does not create a presumption of employment like California does.¹⁵⁶ In Florida, the burden of proof was not on Uber to prove that McGillis was an independent contractor.¹⁵⁷ Instead, the burden of proof required McGillis to prove he was an employee and had been misclassified.¹⁵⁸

Ultimately, the FDEO determined that Uber did not exercise control over its drivers.¹⁵⁹ In coming to this determination, the FDEO found that the drivers had significant autonomy in terms of when, where, and how they accepted work from Uber.¹⁶⁰ The agency found that Uber's instructions given to its drivers regarding the manner in which they completed rides amounted to no more than general suggestions.¹⁶¹ The FDEO also gave significant deference to the contract between Uber and its drivers that explicitly state that the drivers are to be independent contractors.¹⁶²

The inconsistent decisions in *Berwick* and *McGillis* further illustrate the difficulty with classifying Lyft and Uber drivers as independent contractors or employees. The cases also highlight the drivers' exposure to insurance claims and lack of unemployment benefits while classified as independent contractors.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

III. OTHER CRITICISMS OF THE INDUSTRY

The employee/independent contractor issue is not the only woe plaguing the ridesharing industry. Uber and Lyft are also facing serious criticism stemming from its disruption of the taxicab industry.¹⁶³ The companies have been accused of undercutting the industry and taking away jobs from taxi drivers at an “unprecedented rate.”¹⁶⁴ A recent report by Certify, an expense management system provider, shows that Uber was responsible for 47 percent of ground transportation for business travelers.¹⁶⁵ This represents a significant departure from the traditional ground transportation industry, which was previously dominated by taxicabs and limousines.¹⁶⁶

A recent study revealed that only 8 percent of New York City taxi drivers were born in the United States.¹⁶⁷ The ridesharing industry’s domination over the transportation market has resulted in lost jobs and wages for the predominantly immigrant population that relies on the taxicab industry as a reliable source of income.¹⁶⁸ Further expansion of Uber and Lyft’s business model could also mean a loss of many non-driver jobs related to the taxicab industry.¹⁶⁹ For example, dis-

163. Lyft and Uber have faced criticism for undercutting the price of taxicabs. The battle between the industries has proven to be especially contentious in New York City and most recently, St. Louis, Missouri. Andrew Tangel, *Uber-Taxi Battle Over Fares Costs the MTA*, WALL ST. J. (Nov. 18, 2015, 11:34 PM), <http://www.wsj.com/articles/uber-taxi-battle-over-fares-costs-the-mta-1447898826>; Leah Thorson, *St. Louis Area Taxi Drivers File Suit Against Uber*, ST. LOUIS POST-DISPATCH (Nov. 16, 2015, 11:45 PM), http://www.stltoday.com/news/local/metro/st-louis-area-taxi-drivers-file-suit-against-uber/article_f2c2a69f-90cb-58a6-b513-d122cb6189cd.html. Uber has expanded from the United States to 67 countries around the world. The disruption of the taxicab industry in some countries has spurred protests. Victoria Ho, *250 Taxi Drivers in Malaysia March Against Uber and GrabCar*, MASHABLE (Nov. 18, 2015), http://mashable.com/2015/11/18/taxi-malaysia-protest-uber/#tM_MosOEDsq; Amar Toor, *French Taxi Drivers Lock Down Paris in Huge Anti-Uber Protest*, THE VERGE (June 25, 2015, 6:04 AM), <http://www.theverge.com/2015/6/25/8844649/french-taxi-driver-protest-uber-pop-paris>.

164. *SpendSmart™ Report for Q2 2015*, *supra* note 9; see Scott Mayerowitz, *Uber is Taking Business From Taxis at an ‘Unprecedented’ Rate*, BUSINESS INSIDER (April 8, 2015, 8:09 AM), <http://www.businessinsider.com/uber-is-taking-business-from-taxis-at-an-unprecedented-rate-2015-4>.

165. *SpendSmart™ Report for Q2 2015*, *supra* note 9; see Mayerowitz, *supra* note 164.

166. *SpendSmart™ Report for Q2 2015*, *supra* note 9; Mayerowitz, *supra* note 164.

167. Matt Flegenheimer, *American-Born Cabbies Are a Vanishing Breed in New York*, N.Y. TIMES (Feb. 8, 2014), <http://www.nytimes.com/2014/02/10/nyregion/american-born-cabbies-a-vanishing-breed-in-city.html>.

168. Laura Osman & Rick McConnell, *Uber Debate Overlooks Taxi Industry’s ‘Silent Victims’*, CBC NEWS (Nov. 17, 2015, 5:30 AM), <http://www.cbc.ca/news/canada/edmonton/uber-debate-overlooks-taxi-industry-s-silent-victims-1.3321499>; Anna Walters, *An Immigrant’s Fare Fight*, WILLAMETTE WEEK (June 2, 2015), http://www.wweek.com/portland/article-24836-an-immigrants_fare_fight.html.

169. *New York’s Taxi Industry Says Uber Expansion Would Kill Existing Jobs*, INSURANCE JOURNAL (Nov. 3, 2015), <http://www.insurancejournal.com/news/east/2015/11/03/387223.htm>.

patchers, mechanics, and office employees represent more than 11,000 employees in the state of New York alone.¹⁷⁰

While many cities and lobbying groups, such as the Committee for Taxi Safety in New York, are attempting to discourage the growth of ridesharing companies, Long Beach, California has taken a different approach.¹⁷¹ In an unprecedented move, the Long Beach city council has approved a measure that would force taxicabs to operate like the more popular ridesharing models starting in May 2015.¹⁷² The pilot program, created in conjunction with Yellow Cab, “removes taxis’ fare floor, allowing Yellow Cab to discount fares as conditions warrant, comparable to ride sharing services’ less expensive fares.” The program also allows taxicabs to charge additional fees during peak hours, similar to the premium-pricing model employed by Lyft and Uber.¹⁷³ Only time will tell whether the program will curb Uber and Lyft’s domination.

The ridesharing industry has also been criticized as not doing enough to protect the riders (consumers) that use the ridesharing platforms. There have been dozens of reports of physical assault, sexual assault, and kidnapping made by Uber and Lyft riders against drivers.¹⁷⁴ The lack of adequate background checks and lack of training by the ridesharing companies have been cited as possible causes of the infractions.¹⁷⁵ Absent legislation, there is no guaranteed protection for consumers in the ridesharing industry.

170. *Id.*

171. See, e.g., Steve MacDonald, *Uber is Über-Regulated by New Hampshire Municipalities*, WATCHDOG (April 29, 2015), <http://watchdog.org/214860/uber-new-hampshire-regulations/>; Polly Mosendz, *Taxi Safety Committee Urges TLC to Suspend Uber in NYC*, NEWSWEEK (Nov. 21, 2014, 11:23 AM), <http://www.newsweek.com/uber-taxi-travis-kalanick-emil-michael-josh-mohrer-uber-nyc-taxi-safety-286125>; Laura J. Nelson, *Long Beach Allows Taxis to Lower Fares as they Compete with Uber*, Lyft, L.A. TIMES (May 14, 2015, 4:36 AM), <http://www.latimes.com/local/california/la-me-long-beach-uber-20150514-story.html>.

172. Nelson, *supra* note 171; see also Andrew Bender, *Uber Vs. Taxis: One City's Incredibly Simple Solution To The Turf War*, FORBES (May 16, 2015, 1:46 PM), <http://www.forbes.com/sites/andrewbender/2015/05/16/uber-vs-taxis-one-citys-incredibly-simple-solution-to-the-turf-war/>.

173. Nelson, *supra* note 171; Bender, *supra* note 172.

174. The Taxicab, Limousine & Paratransit Association, a non-profit trade association who claims Lyft and Uber do not conduct sufficient background checks on drivers, maintain a website that tracks claims of assault, kidnappings, and other bad acts made against Uber and Lyft drivers. *Reported List of Incidents Involving Uber and Lyft*, WHO'S DRIVING YOU, <http://www.whos-drivingyou.org/rideshare-incidents> (last visited Nov. 19, 2015).

175. WHO'S DRIVING YOU, *supra* note 174; see also Ellen Huet, *Uber's Background Checks Failed To Catch A Murderer And Other Felons, Prosecutors Say*, FORBES (Aug. 19, 2015, 7:44 PM), <http://www.forbes.com/sites/ellenhuet/2015/08/19/uber-background-check-lawsuit-convicted-felons-prosecutors/>; Dara Kerr, *How Risky is your Uber Ride? Maybe More than You Think*, CNET (Oct. 8, 2014, 4:00 AM), <http://www.cnet.com/news/how-risky-is-your-uber-ride-maybe-more-than-you-think/>.

The noticeable lack of regulation in the ridesharing industry has far reaching implications. It is evidenced by the inconsistent determinations of independent contractor/employee classifications as well as through the disparate impact the industry has had on others. The void impacts the ridesharing companies themselves, consumers, drivers, the taxicab industry, and immigrant populations around the country. The solution lies in comprehensive federal regulation. The issues plaguing the ridesharing industry are complex and the livelihood of many Americans is at stake. Collaboration between the affected parties is necessary in order to address the multiple facets of the United States economy that have been affected by the ridesharing industry. Such collaboration could serve as the model for developing regulations for other industries that are sure to evolve within the sharing economy as well. As society advances, new technologies are guaranteed to disrupt the labor market, it is in our best interest to be proactive about finding solutions that allow us to adapt to the inevitable innovation.

IV. NEGOTIATED RULEMAKING

“Rulemaking by federal administrative agencies is one of the most important lawmaking functions of the U.S. government.”¹⁷⁶ Typically, Congress grants executive agencies general authority to regulate specific activities by statute.¹⁷⁷ Agencies are usually charged with the promulgation of laws when Congress does not have the subject matter expertise to do so.¹⁷⁸ For example, Congress has delegated the promulgation of environmental regulations to the Environmental Protection Agency.¹⁷⁹ When agencies develop rules, the rules have the weight of law. As such, all rules made by agencies must follow an open, public process in accordance with the Administrative Procedure Act (APA).¹⁸⁰

Traditionally, agencies conduct both formal and informal research and then publish a Notice of Proposed Rulemaking that outlines the agency’s proposed rule.¹⁸¹ All proposed rules must be

176. Steven Croley, *Making Rules: An Introduction Rulemaking: How Government Agencies Write Law and Make Policy*, 93 MICH. L. REV. 1511, 1512 (1995).

177. 5 U.S.C. § 553 (1994).

178. *Id.*

179. *See* Intent to Form an Advisory Committee to Negotiate Proposed Farmworker Protection Standards, 50 Fed. Reg. 38,030 (Sept. 19, 1985).

180. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 515–16 (2013); *see also* 5 U.S.C. § 553.

181. 5 U.S.C. § 553; *see also* Croley, *supra* note 176, at 1513 (“First, the agency must apprise potentially interested parties that it is contemplating adopting some proposed rule. Second, the

published in the Federal Register to notify the public and to allow the public to submit comments.¹⁸² The agency must consider public comments but is not required to incorporate the comments into the final rule.¹⁸³ As one can imagine, the traditional rulemaking process is adversarial in nature. The groups who are concerned about the proposed rule must fight to amend a rule that the agency has already created. In contrast, the negotiated rulemaking procedure provides a proactive process that incorporates the interests of the public during the creation of the rule.

Negotiated rulemaking is a process that provides an avenue for the collaborative creation of regulations and policy by government agencies. The process was first developed and proposed by Philip J. Harter in 1982, was adopted by statute as the Negotiated Rulemaking Act of 1990 and was re-authorized by Congress as the Administrative Dispute Resolution Act of 1996.¹⁸⁴ As opposed to the traditional adversarial process used in the promulgation of regulations, negotiated rulemaking requires consensus among the parties involved. The process involves direct participation in governmental rulemaking by public agency regulators and private business and advocacy groups affected by the proposed regulations.¹⁸⁵ The goal of the process is to reach consensus on the proposed rules.¹⁸⁶ By encouraging participation by interested stakeholders, the process makes use of private parties' perspectives and expertise and reduces the possibility of litigation or contention over the resulting rule.¹⁸⁷ The process has also been credited with being more expedient than traditional rulemaking.¹⁸⁸

The negotiated rulemaking process requires several elements. First, a governmental agency must determine that a negotiated

agency must allow those parties an opportunity to respond to the agency's proposed rule. Third, after receiving any such responses and generating whatever additional information the agency thinks necessary to consider, the agency must promulgate, at least thirty days before the rule is to take effect, a "concise general statement" explaining why the rule took the final form it did.").

182. 5 U.S.C. § 553; *see also* Croley, *supra* note 176, at 1513.

183. 5 U.S.C. § 553; *see also* Croley, *supra* note 176, at 1513.

184. Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570 (1994 & Supp. V 2000), which was re-authorized by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11, 110 Stat. 3870, 3873–74 (codified at 5 U.S.C. § 561 (Supp. III 1997)).

185. 1 Alt. Disp. Resol. § 2:66 (3d ed.)

186. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 32 (2000).

187. Harter, *supra* note 186.

188. *Id.* at 53–54.

rulemaking process is in the public interest.¹⁸⁹ In making this determination, the head of the agency is to consider whether:

1. There is a need for a rule;
2. There are a limited number of identifiable interests that will be significantly affected by the rule;
3. There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:
 - A. Can adequately represent the interests identified under paragraph (2); and
 - B. Are willing to negotiate in good faith to reach a consensus on the proposed rule;
4. There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
5. The negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
6. The agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and
7. The agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.¹⁹⁰

Once the agency makes a determination that negotiated rulemaking is appropriate, the agency participates in a process to assemble the interested parties into a negotiated rulemaking committee.¹⁹¹ The agency may elect to use a convener in this process. A convener is defined by the act as “a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking.”¹⁹² A convener can also assist the agency in identifying the relevant interested parties who make up the committee.¹⁹³

189. 5 U.S.C.A. § 563 (West 2015).

190. *Id.*

191. Derek Raymond McDonald, *Judicial Review of Negotiated Rulemaking*, 12 REV. LITIG. 467, 471–72 (1993).

192. 5 U.S.C.A. § 563.

193. *Id.*

An Evolution in America's Workforce

The identification and selection of appropriate parties is instrumental in the success of the negotiated rulemaking process.¹⁹⁴ The committee must be diverse so that all critical issues are raised, but not be so inclusive as to incorporate members with remote interests.¹⁹⁵ Once the committee has been formed, negotiations can begin.¹⁹⁶ Typically, the negotiations are facilitated or mediated by a neutral third party, though it is not required that a neutral third party be present.¹⁹⁷

If consensus is reached, the agency publishes a draft of the rule created by the negotiated rulemaking committee.¹⁹⁸ If consensus cannot be reached, the agency may proceed with drafting a proposed rule.¹⁹⁹ Negotiated rulemaking has been used by various governmental agencies, such as the Federal Aviation Administration and the National Park Service, in the promulgation of regulations and policies.²⁰⁰

Negotiated rulemaking has been criticized as being less efficient and arguably less effective than traditional rulemaking.²⁰¹ Critics argue that the negotiated rulemaking process creates more sources of conflict, takes just as long as traditional rulemaking, and does not curb litigation.²⁰² Negotiated rulemaking may create additional sources of conflict through the vary nature of the process.²⁰³ Conflicts may arise before the formal process even begins during the contentious process of deciding which parties will be on the committee.²⁰⁴ Once the committee has been decided, conflict may arise again over the extent by which the agency adheres to the proposed solution.²⁰⁵ Negotiated rulemaking may also be a lengthy process. On average, it takes about 2.8 years from the time an agency announces that a rulemaking committee is being formed to the time a rule is published.²⁰⁶ By contrast,

194. McDonald, *supra* note 191.

195. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 53 (1982) ("Careful judgment must be exercised to determine which interests are so central that the regulation could not be developed without their participation and which interests are so remotely affected that their participation should be limited to written comments or other limited methods.").

196. Harter, *supra* note 186, at 36.

197. The use of facilitators is authorized by 5 U.S.C. § 566(c) (Supp. III 1991).

198. Negotiated Rulemaking Act of 1990, *supra* note 184.

199. *Id.*

200. Harter, *supra* note 186, at 36.

201. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1278 (1997); *cf.* Harter, *supra* note 186, at 39–40.

202. Coglianese, *supra* note 201, at 1321; *cf.* Harter, *supra* note 186, at 39–40.

203. Coglianese, *supra* note 201, at 1324; *cf.* Harter, *supra* note 186, at 39–40.

204. Coglianese, *supra* note 201, at 1324; *cf.* Harter, *supra* note 186, at 39–40.

205. Coglianese, *supra* note 201, at 1324; *cf.* Harter, *supra* note 186, at 39–40.

206. Harter, *supra* note 186, at 40; *cf.* Coglianese, *supra* note 201, at 1279.

traditional rulemaking takes approximately 3 years to complete.²⁰⁷ Critics have also noted that negotiated rulemaking has not spared agencies from the litigation spurred by traditional rulemaking.²⁰⁸ Critics instead argue that the process has increased incidents of litigation.²⁰⁹ Regardless of criticism, the process has proven to be successful in the development of rules.

A. Negotiated Rulemaking for the Ridesharing Industry

The complexity and breadth of issues involved in the ridesharing industry make negotiated rulemaking an ideal medium for the development of regulations. The ongoing litigation against Lyft and Uber reveal the significant hurdles facing this new labor market.²¹⁰ Absent remedial legislation, the workers involved in the on-demand transportation industry lack necessary protections and ridesharing companies will remain embroiled in costly litigation.²¹¹ On top of employment issues, the industry has also had a significant impact on the taxicab and limo industry and as a result of this impact, an effect on immigrant populations.²¹² We must also consider the effect that the lack of regulation has on consumers within the ridesharing industry.²¹³ A negotiated rulemaking process would ensure that the multi-billion dollar ridesharing industry does not drown out the voices of the consumers, drivers, and taxicab industry that have less bargaining power than the ridesharing giants. It is in the public's best interest to pursue a solution that incorporates the interests of all effective parties from the outset of the rulemaking process.

As illustrated by the examples above, there is clearly a need for intervention in the ridesharing industry. Negotiated rulemaking is an ideal model for the promulgation of remedial policy because there are a limited number of identifiable interest groups that have a significant stake in any proposed solution. Even if a negotiated rulemaking committee cannot reach a consensus, the negotiated rulemaking process will ensure that all interest groups are heard. Lyft and Uber have built

207. Harter, *supra* note 186, at 40.

208. *See generally* Coglianese, *supra* note 201.

209. *Id.* at 397 (“Negotiated rules are challenged fifty percent of the time, while other comparable, significant EPA rules are challenged only thirty-five percent of the time.”).

210. *See generally* Part III.

211. *See* Part III; *see also* Eric Posner, *Why Uber Will—and Should—Be Regulated*, SLATE (Jan. 5, 2015, 2:49 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/01/uber_surge_pricing_federal_regulation_over_taxi_and_car_ride_services.html.

212. *See generally* Part IV.

213. *See generally* Part IV.

businesses that have forced the evolution of our labor force and the transportation industry. By bringing the groups affected by the industry together, the Department of Labor and/or the Department of Transportation can collaboratively develop legislation to meet the demands of this emerging market.

CONCLUSION

The ridesharing industry has permeated the United States. It has changed the way we think about the transportation industry and in turn, those workers who are engaged in it. Absent comprehensive legislation, the industry will continue to grow and have a pervasive effect on the transportation industry as a whole. Negotiated rulemaking is an ideal vehicle for crafting legislation to regulate the complexities of the ridesharing industry. Collaboration between government agencies and the essential stakeholders will ensure that all interests are raised and that any proposed regulations will take into account these vital interests.

Much like the way in which ridesharing indicates an advancement in the transportation industry, the negotiated rulemaking model represents innovation in agency rulemaking. It is only fitting that we use this innovative model to address rapid change in the transportation industry and the evolution of the American workforce head-on. For workers like Mary Wright, the industry has the capability of being either a lifesaver or a nightmare. The future for her and all of the sharing economy workers like her lies in developing regulations that allow for the protection of workers while promoting thriving and innovative business models.

COMMENT

Disabling Disabling Devices: Adopting Parameters for Addressing a Predatory Auto-Lending Technique on Subprime Borrowers

ERICA N. SWEETING*

INTRODUCTION	820
I. THE WHO, WHAT, WHEN, WHERE AND WHY OF STARTER DISABLING DEVICES	822
A. Background into the Subprime Auto Loan Industry	824
1. The Pros and Cons of the Subprime Industry and Its Role in Predatory Lending	825
B. Lenders vs. Borrowers: The Crux of the Debate....	827
1. Lenders' Arguments For	827
2. The Borrowers Response	831
C. Current Legal Standard on Predatory Lending, Repossession, and Starter Disabling Devices	835

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II. PAYDAY ADVANCE LOANS	838
A. The Scheme of Payday Lending	838
B. Payday Lending and its Parallel to the Subprime Auto-Loan Industry.....	840
1. Legislation of Predatory Lending in the Auto- Industry.....	842
III. PROPOSED SOLUTION: A NEW WAY TO COMBAT THE DEVICE AND PREDATORY AUTO LENDING.....	845
A. Outlining a Proposal for New Legislation: Federal vs. State Regulation	847
CONCLUSION	848

INTRODUCTION

*Ms. Smith was driving her car on a Nevada highway, when she was surprised to have her car slowly shut down and ultimately stop. Stranded on the side of the road, she called her lender to find out her car was disabled because she was delinquent in her car payments.*¹

*Ms. Bolender, a mother from Las Vegas, realized her car's starter was disabled just before taking her asthmatic daughter to the emergency room. Her lender remotely deactivated her car after being three days behind on her monthly car payment. The single mother was left feeling "absolutely helpless."*²

Starter disabling devices are a mechanism used by lenders, almost exclusively for subprime borrowers. They are designed to disable the vehicle's starter once the consumer fails to make a timely car payment.³ The devices have been installed in almost two million vehicles, enabling high-risk subprime borrowers to get loans.⁴

However, while the device itself presents challenges to public policy with glitches that, albeit inadvertently, interrupt the starter while someone is driving,⁵ the devices themselves are not the biggest issue. Considering that the disabling devices are reserved for subprime bor-

1. Sean Patrick Farrell, *The Remote Repo Man*, N.Y. TIMES (Sept. 24, 2014, 5:20 PM), <http://www.nytimes.com/video/business/10000003095109/the-remote-repo-man.html>.

2. Michael Corkery & Jessica Silver-Greenberg, *Miss a Payment? Good Luck Moving that Car*, N.Y. TIMES (Sept. 24, 2014, 9:33 PM), http://dealbook.nytimes.com/2014/09/24/miss-a-payment-good-luck-moving-that-car/?_php=true&_type=blogs&_r=0&module=ArrowsNav&contentCollection=Business%20Day&action=keypress®ion=FixedLeft&pgtype=Blogs.

3. *Id.*

4. *Id.*

5. Farrell, *supra* note 1.

rowers, the device serves as another lending tactic to lure subprime borrowers into accepting loans for vehicles they cannot afford due to the high-interest rates and costly down payments that accompany the loans.⁶ Therefore, when the high-risk borrower defaults, it inevitably has a negative impact on the individual's credit score.⁷

This Comment will focus on the disproportionate impact starter disabling devices have on minorities and those in economically impoverished areas, where lower credit ratings are accepted and predatory lending schemes thrive. This Comment will explore the way the starter disabling device tactic has been used by lenders over the years to target subprime borrowers into unconscionable auto loan contracts, therefore creating and contributing to predatory lending schemes that, without regulation, will inevitably lead to a downturn in the auto loan industry.⁸

Considering the public policy and social implications behind predatory lending and its impact on minorities and economically impoverished individuals, there needs to be policy or legislative reform to regulate subprime lending specifically in the auto industry. This Comment proposes a change in state legislation to provide stronger standards for lenders to use when implementing self-help repossession and subprime auto-lending by regulation of the subprime lending industry and prohibiting use of such devices as a tactic to lure in subprime borrowers. Part I of this Comment will begin by outlining the background information for starter disabling devices and the current legal standards that states impose on repossession laws. In doing so, this Part will present the financial benefits and incentives of subprime lending in the lender's perspective as well as the negative consequences of the industry considering the consumers' interests. This portion will also address the arguments presented by the lenders in support of the devices compared to the considerations of the subprime borrowers. Part I will further detail the self-help remedies afforded to

6. *Banks Will Expand Lending to Car Buyers with Damaged Credit, FICO Survey Finds*, FICO, (July 9, 2012), <http://www.fico.com/en/about-us/newsroom/news-releases/banks-will-expand-lending-to-car-buyers-with-damaged-credit-fico-survey-finds/>.

7. *Id.*

8. There is certainly a need for regulation of predatory lending in the automotive industry, particularly considering the rise in lending to individuals considered subprime. The fear is that subprime loans in the automotive industry are being sold in similar packages to the mortgage backed securities being inflated and sold to investors. The sale of these types of securities was, arguably, one of the reasons, which led to the mortgage crisis in 2008. While still a plausible concern, and certainly there is room for further regulation, the argument is beyond the scope of this Comment.

lenders outlined in the Uniform Commercial Code that facilitate the use of repossession techniques for collateral. Part II provides an analogy between predatory lending tactics and payday advance loans and the lending tactics of the payday lending industry and the regulations implemented together with agencies created after the downturn of the mortgage industry. While the 2008 mortgage crisis has a different parallel to the auto-industry, this Comment will present the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was in response to the mortgage crisis that called for greater regulation in various financial industries.⁹ This Part will also argue that tactics used by payday advance lenders are reminiscent of the tactics used by subprime auto-loan lenders and without regulation, can have a substantial impact on the economy. Part II will then address the social implications of starter disabling devices and lending to subprime borrowers. This portion will address the disproportionate and negative impact of these devices and suggest that the increased interest rate to subprime borrowers does not ultimately lead to lenders' desired results. Finally, Part III will present a new proposal for addressing the starter-disabling devices and recommends regulation of the subprime lending tactics, including prohibition of starter disabling devices.

I. THE WHO, WHAT, WHEN, WHERE AND WHY OF STARTER DISABLING DEVICES

Starter disabling devices although created by a variety of manufacturers, are generally designed to be installed in the vehicle of a subprime borrower. The device allows a lender (or the device manufacturer) to remotely disable the starter of the vehicle, rendering the car unusable until the borrower contacts the lender to negotiate a payment.¹⁰ The device is placed near the dashboard and is accompanied with a keycard that will often beep when the payment due date is approaching.¹¹ The device will also indicate when the due date has passed, signaling the borrower to contact the lender to make a payment.¹² Lenders purchase the device from a variety of manufacturers, so the precise design of the device itself often varies depending on the manufacturer. For example, some devices beep at customers just before payments are due, while others whistle when the borrower is

9. See discussion *infra* Part III.B.1.

10. Farrell, *supra* note 1.

11. *Id.*

12. *Id.*

just a day shy of being shut off.¹³ Although the devices are designed to only disable the starter when the device is not in motion, there have been reported instances where the device disables the car when the car is either idle at a stop sign or even in motion on the highway.¹⁴

Passtime, a Colorado company, is the biggest supplier of starter-disabling devices.¹⁵ Although the device began to be manufactured in the early 1990's, former Detroit Lions football player Mel Farr, who owned several car dealerships in the Detroit area, pioneered the use of the device in 1999.¹⁶ He appeared in local television commercials as a "superstar" flying through the air in a red cape, proclaiming to specialize in lending to people with poor credit.¹⁷ Although the deal initially only came with the starter-disabling device, a small Global Positioning System (GPS) later accompanied the device and manufacturers began combining the two as a package to be sold to lenders.¹⁸

The GPS allows a lender to monitor the location of a vehicle serving as its collateral and assists the creditor in physically repossessing the vehicle upon default by locating the vehicle without having to conduct a search as in a traditional repossession using a third-party company.¹⁹ As a result, repossession costs are significantly lowered when the creditor is able to pinpoint the location of the vehicle.²⁰ Therefore, a customer who defaults in connection with collateral equipped with GPS ordinarily pays less in repossession costs when a creditor is forced to recover on its security interest.²¹

Once the borrower defaults on their car payment, the lender retains the control to remotely disable the car's starter, preventing the individual to turn on the engine.²² The borrower typically calls the lender and the lender provides the option to pay the owed amount.²³ If the borrower is unable to pay, the lender will then consult the GPS

13. Jim Gallagher, *Starter Cut-off Devices Keep Car Payments Coming*, ST. LOUIS POST-DISPATCH (Sept. 22, 2013, 12:15 AM), http://www.stltoday.com/business/local/starter-cut-off-devices-keep-car-payments-coming/article_be4dfa8d-48bb-5d4c-9734-c93404c63250.html.

14. Corkery & Silver-Greenberg, *supra* note 2; Gallagher, *supra* note 13.

15. PASSTIME, *How It Works*, <http://www.passtimeusa.com/howitworks> (last visited Sept. 27, 2014).

16. Gallagher, *supra* note 13.

17. *Id.*

18. *Id.*

19. PASSTIME, *supra* note 15.

20. Corkery & Silver-Greenberg, *supra* note 2.

21. *Id.*

22. Tracy Alloway, *Repo Man is Now a Heartless Robot*, FIN.TIMES LIMITED, (Oct. 15, 2014), <http://www.bdlive.co.za/life/gadgets/2014/10/15/repo-man-is-now-a-heartless-robot>.

23. *Id.*

to determine the vehicle's location and send a "repo man" to take back the car.²⁴ To date, the devices have been used in almost two million vehicles.²⁵ Further surveys show that 40 to 60 percent of subprime lenders and dealers are using some sort of starter interrupt device.²⁶

A. Background into the Subprime Auto Loan Industry

Before examining the disparity in arguments between lenders and borrowers, it is important to understand why lenders are attracted to certain borrowers. Borrowers classified as "subprime" are individuals that pose a higher risk of default.²⁷ This risk comes from a variety of factors including a history of late or missed payments, default debt, excessive debt or no property assets that could be used as security.²⁸ Subprime borrowers are often identified as having a FICO® credit score below 640.²⁹ As a result to the classification of being considered "subprime," these individuals are often reduced to only qualifying for higher-interest rates as a penalty for their poor credit.³⁰ Lenders in the auto industry gain profit from these high-risk loans, because the high interest rates are often on the high end of 29 percent.³¹ Comparing a car's bluebook value with the amount a subprime borrower would ultimately pay while repaying the loan, the lender can potentially profit twice as much as the car is worth.³²

Most lenders consult with an individual's FICO® credit score to determine their risk of non-repayment. A FICO® credit score is computed through a company that delivers predictions of consumer behavior based on the use of a mathematical formula.³³ Many of the

24. *Id.*

25. Corkery & Silver-Greenberg, *supra* note 2.

26. *Id.*

27. *Subprime Borrower*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/subprime-borrower.asp> (last visited Oct. 26, 2014).

28. *Id.*

29. *Id.* A FICO score is a credit score developed by FICO® that is used to determine an individual's credit risk. *FICO Score*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/ficoscore.asp> (last visited Feb. 2, 2015). A person's FICO score will range from 300 to 850 and takes into account each of five areas to determine credit risk: payment history, current level of indebtedness, types of credit used and length of credit history, and new credit. *Id.* The credit score is used by lenders to assess whether an applicant's credit risk and whether to extend a loan. *Id.*

30. *Subprime Borrower*, *supra* note 27.

31. Gallagher, *supra* note 13; Corkery & Silver-Greenberg, *supra* note 2.

32. Gallagher, *supra* note 13.

33. *Banks Will Expand Lending to Car Buyers With Damaged Credit, FICO Survey Finds*, FICO (July 9, 2012), <http://www.fico.com/en/about-us/newsroom/news-releases/banks-will-expand-lending-to-car-buyers-with-damaged-credit-fico-survey-finds/>. The calculation of the FICO

world's top banks, leading insurers, retailers, and other lenders rely on FICO solutions, such as a FICO® credit score, to measure consumer credit risk, control such risk, boost profits, and meet regulatory and competitive demands.³⁴ Additionally, the aforementioned method of computing consumer credit risk, allows consumers to be aware of their personal credit health and manage their risk before seeking credit extension from lenders.³⁵

Many consumers living in areas where it is necessary to have access to mobility value having a car versus travelling by other means. Few people can buy a car without seeking credit. Many car purchases are financed through some sort of credit, either directly from the seller, or through an outside lender.³⁶ Car dealerships generally are motivated to push for car loans as many of their profits stem from service charges, loan fees, and profits from interest rates.³⁷ The more loans a car dealership extends, the more cars they are able to sell, and therefore, the more money they can make.³⁸ Lending to borrowers who are classified as subprime has its benefits. Lenders justify extending credit to at-risk individuals because the borrowers would otherwise have no access to credit.³⁹ Individuals are in full control to enter into subprime transactions and it is essentially the borrowers' financial irresponsibility that led them to the excessive debt, and therefore a subprime credit score.⁴⁰

1. The Pros and Cons of the Subprime Industry and Its Role in Predatory Lending

There has been constant debate as to how to best respond to the increased presence of predatory lending tactics in the mortgage and auto industries.⁴¹ However the issue of predatory lending first stems

score was developed in 1956 by engineer Bill Fair and mathematician Earl Isaac, which later developed into the industry standard for providing an individual's credit score. *Who Calculates Credit Scores?*, CREDIT SCORE CENTER, <http://www.creditscorecenter.org/Credit-Score/Who-Calculates-Credit-Scores.html> (last visited Mar. 26, 2016)

34. FICO, *supra* note 33.

35. *Id.*

36. Chunlin Leonhard, *Negative Externalities and Subprime Financing: Time to Let the Hanging Paragraph Go*, 45 U. TOL. L. REV. 267, 273 (2014).

37. *Id.*

38. *Id.* at 274–75.

39. *Id.* at 274.

40. *Id.* at 289.

41. *See, e.g.*, Lending Group Forces Delay of Predatory Ordinance, Nat'l Mortgage News, Aug. 24, 2001 (reporting a statement by a trade association representative that "his group is willing to challenge any local effort to regulate" subprime lending), available at <http://www.thebankingchannel.com/comm/story.jsp?story=TBCMJK3OYOC>.

from the lenders' attraction to subprime borrowers. There is a correlation between predatory lending and the subprime market as the subprime market is identified as being a product of the growing and widespread problem of predatory lending.⁴² Therefore, it is necessary to further examine the benefits to subprime lending as well as the negative consequences of these tactics and its further role in the predatory lending scheme of the loan industry.

Generally, subprime loans come with higher interest rates than prime loans, which lenders attribute to the contention that subprime borrowers' have a greater risk of default and therefore warrant a higher interest rate for the lenders' protection.⁴³ Further, subprime lenders also charge higher points and fees at the loan inception.⁴⁴ These charges are assessed to compensate for higher origination and servicing costs that lenders claim subprime loans have.⁴⁵

Predatory lending is often a difficult term to define. In a joint report by the U.S. Department of Housing and Urban Development and the U.S. Department of the Treasury Task Force on Predatory Lending, the two government agencies defined "predatory lending" as "whether undertaken by creditors, brokers, or even human improvement contractors, involving engaging in deception or fraud, manipulating the borrower through aggressive sales tactics, or taking unfair advantage of a borrower's lack of understanding about loan terms."⁴⁶ It is these practices that are often combined with loan terms where, either in combination or isolation are abusive or make the borrower more vulnerable to abusive practices.⁴⁷ In effect, one scholar in his attempt to craft a more concrete definition noted that it is more of a "mismatch between the needs and capacity of the borrower."⁴⁸ In essence, "the loan does not fit the borrower, either because the bor-

42. Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 509 (2002).

43. David Reiss, *Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market*, 33 FLA. ST. U.L. REV. 985, 995 (2006).

44. *Id.* at 995-96.

45. *Id.*

46. Eggert, *supra* note 42, at 511; see also Chris Arnade, *People are Buying Cars They Shouldn't Be: Subprime Autos are the Next Crisis*, THE GUARDIAN, (Oct. 12, 2014, 12:30 PM) (defining subprime borrowers by quoting "Wall Street" as "[o]bligors who do not qualify for conventional motor vehicle financing as a result of, among other things, a lack of or adverse credit history, low income levels and/or the inability to provide adequate down payments").

47. Eggert, *supra* note 42, at 511.

48. Daniel S. Ehrenberg, *If the Loan Don't Fit, Don't Take It: Applying the Suitability Doctrine to the Mortgage Industry to Eliminate Predatory Lending*, 10 J. AFFORDABLE HOUS. & CMTY. DEV. L. 117, 119-20 (2001).

rower's underlying needs for the loan are not being met or the terms of the loan are so disadvantageous to that particular borrower that there is little likelihood that the borrower has the capability to repay the loan."⁴⁹ Even while the definition is cited in several court opinions and scholarly works related to lending practices, it is persistently difficult to pinpoint an exact definition.⁵⁰

Varying ways predatory lending tactics are manifested by lenders may also make establishing a consistent definition of predatory lending difficult. Despite its damaging effects on the borrowers, one especially harmful predatory lending technique used by the lenders is creating loans where the lender has no reasonable expectation that the borrowers can repay them.⁵¹ This process, also known as "equity stripping" in the mortgage industry for its inevitable outcome of diminishing a property's value,⁵² is especially prominent in the subprime market and will essentially set people up for failure.⁵³ As such, a regulation on the predatory lending methods used by lenders in the subprime market is particularly necessary to contribute to a fair economy. To further this assertion, two scholars have argued that increased incentives for lenders to specialize in lending to low- and moderate-income borrowers, has made it possible for predatory lenders to thrive.⁵⁴ As such, predatory lenders target "naïve people who, because of historic credit rationing, discrimination . . . and other social economic forces, are disconnected from the credit market and hence are vulnerable to predatory lenders' hard-sell tactics."⁵⁵

B. Lenders vs. Borrowers: The Crux of the Debate

1. Lenders' Arguments For

While lenders argue that they are creating a system to allow borrowers to receive loans by which borrowers are otherwise are not qualified to receive, the subprime auto loans made to borrowers with

49. *Id.*

50. *See* Assocs. Home Equity Servs. v. Troup, 778 A.2d 529 (N.J. Super. 2001)

51. Eggert, *supra* note 42, at 515.

52. *Id.*

53. James T. Berger, *Subprime Lending Produces Dangerous Side-Effects*, CHI. SUN-TIMES, June 9, 2000, at 16N, 2000 WL 6681282 (quoting William Apgar, assistant secretary for housing at HUD, as saying "In many of these [subprime] loans, from Day One people can't repay them. We are just setting people up for failure").

54. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1257 (2002).

55. *Id.* at 1258–59.

low credit scores has risen sharply over the years.⁵⁶ However, these loans create a new subprime era that leaves many borrowers still complaining.⁵⁷ One Missouri attorney finds that “no middle-class person would ever be hounded for being a day late, but for poor people, there is a debt collector right there in the car with them.”⁵⁸ Many borrowers are left feeling degraded and humiliated by the constant reminder that their car can be disabled at any given moment, despite state statutes that mandate borrowers have 30 days before repossession measures take place.⁵⁹ Considered a “tough love” tactic by some lenders,⁶⁰ approximately one in four new auto loans last year went to borrowers considered subprime coupled with the starter-disabling device that is installed in their car.⁶¹

Lenders find that the devices promote economic and financial stability for subprime borrowers in that it provides an opportunity for consumers, who would otherwise not be considered for such a loan, to have a chance to purchase a vehicle.⁶² The devices allow the lender to extend credit to at-risk consumers, which reduces the risk for loss for lenders, and allows lenders to make greater loans to borrowers.⁶³ Lenders argue that the devices encourage buyers to make timely car payments, which in turn, help to improve the subprime borrower’s existing impaired credit.⁶⁴ An increase in a subprime borrower’s credit score can in turn increase the borrower’s credit score, therefore increasing the buyer’s credit availability, and extending the possibilities of attaining credit in other industries.⁶⁵ If fewer individuals have sub-

56. Corkery & Silver-Greenberg, *supra* note 2 (outlining borrowers’ complaints ranging from starter being disabled when they were only a few days behind on their payment to disabling while at stop signs).

57. *Id.*

58. *Id.*; see also Mike Flacy, *Some Lenders Can Remotely Disable Cars When Payments are Missed*, ABC 8 KLKN-TV, (Sept. 24, 2014, 4:53 PM) (noting that many borrowers are speaking to regulators about these devices as they are unhappy with the level of control that is exerted by lenders).

59. Some debt collectors may take it upon themselves to provide a 30-day “grace period” before disabling the car’s starter. Corkery & Silver-Greenberg, *supra* note 2.

60. Sean Patrick Farrell, *The Remote Repo Man*, N.Y. TIMES, (Sept. 24, 2014, 5:20 PM), <http://www.nytimes.com/video/business/10000003095109/the-remote-repo-man.html>.

61. Jessica Silver-Greenberg & Michael Corkery, *In a Subprime Bubble for Used Cars, Borrowers Pay Sky-High Rates*, N.Y. TIMES, (July 19, 2014, 12:36 PM), http://dealbook.nytimes.com/2014/07/19/in-a-subprime-bubble-for-used-cars-unfit-borrowers-pay-sky-high-rates/?_php=true&_type=blogs&_r=0.

62. Gallagher, *supra* note 13; Flacy, *supra* note 58.

63. *Id.*

64. Thomas B. Hudson, *The “Consumer Wins” Argument For Starter Interrupt Devices*, AUTO DEALER MONTHLY, (Aug. 2006), <http://www.autodealermonthly.com/channel/dps-office/article/story/2006/08/the-consumer-wins-argument-for-starter-interrupt-devices.aspx>.

65. *Id.*

prime credit ratings, and are thereby able to purchase assets—in particular, cars—without the standard accompanying heightened interest rate, this can benefit the economy with fewer individuals being rejected for purchases.⁶⁶

Under a traditional repossession, the “repo man” had to physically show up to wherever the borrower is located, assuming the car is either at home or work.⁶⁷ This makes it easier for the borrower to avoid certain areas where the repo man can easily locate the vehicle and avoid having the car repossessed.⁶⁸ On the contrary, with these starter-disabling devices in place, the “repo man” does not have to search for the car.⁶⁹ Instead, the repossession can be done at any given time, remotely.⁷⁰ While borrowers are aware that their car can be easily repossessed, and the option to avoid the “repo man” is no longer available, borrowers seem to have a greater incentive to keep up to date with their auto loan payments.⁷¹ By making repossessions easier for the lender through remote repossession, it effectively allows credit to be extended to risky borrowers that society has already deemed undeserving of receiving credit. Lenders find that borrowers are naturally attracted to a system that not only enables them to receive loans contingent on the device being installed in their car,⁷² but in an agreement where timely repayments will increase their credit in a way that would not be possible if they were not extended any credit in the first place.⁷³

Lenders also argue that the device is a benefit to the borrowers as the GPS component can be used to track down the vehicle in the event that the car is stolen, and disable the starter remotely.⁷⁴ Another instance, the lenders may also argue that the device is beneficial to assist in monitoring or preventing criminal activity by locating an

66. *Id.*

67. Tracy Alloway, *Repo Man is Now a Heartless Robot*, BUSINESS DAY, (Oct. 15, 2014), <http://www.bdlive.co.za/life/gadgets/2014/10/15/repo-man-is-now-a-heartless-robot>.

68. *Id.*

69. *Id.*; see Corkery & Silver-Greenberg, *supra* note 2 (describing the business of one debt collector who would have to hire someone to scour neighborhoods for cars belonging to defaulted borrowers, a process alone that could take years).

70. Alloway, *supra* note 67; Corkery & Silver-Greenberg, *supra* note 2 (describing the increasingly remote process of starter disabling by citing Lionel M. Veard Jr., head of collections at a federal credit union that “disabled a car while [he] was shopping at Walmart”).

71. *Remote Repo: How is Tech Changing Auto Loan Collection?*, BLOOMBERG TV, (Sept. 26, 2014) <http://www.bloomberg.com/video/remote-repo-how-is-tech-changing-auto-loan-collection-jdjbsf6bSRWNY83x89hNtQ.html>.

72. *Id.*; Gallagher, *supra* note 13.

73. *Remote Repo*, *supra* note 71.

74. Gallagher, *supra* note 13.

individual's whereabouts (assuming they are in the same location as their car).⁷⁵ In one example, the alleged abductor of a missing Philadelphia woman, Carlesha Freeland-Gaither, had a starter-disabling device installed in his Ford Taurus.⁷⁶ With the assistance of the car dealership, the alleged abductor was tracked down by the authorities to his precise location and arrested.⁷⁷ Although this is a seemingly attractive feature to lure borrowers desperate for a loan, this seems more like a sale based on false pretenses as some states that specifically regulate the starter disabling device, like Colorado or Connecticut, actually prevent the use of such device for any other purpose than repossessing the car once the borrower fails to cure payment.⁷⁸

Lenders further contend that the borrowers consent to the installation of these devices, which, they argue, negates any unconscionable or violation of public policy arguments.⁷⁹ However, borrowers in the subprime market do not have much of a choice when it comes to auto lending, which rationally supports a procedural unconscionability argument, because they are not left with many other reasonable alternatives.⁸⁰ A desperate borrower would accept a loan, despite extreme loan terms, if a lender is willing to create those extreme loan terms granted that no other lender would lend to such a high-risk borrower.⁸¹ This contention further ignores the fact that the borrowers in the subprime market are the same borrowers who made poor financial decisions that put them in the subprime market to begin with.⁸² In other words, these individuals often do not have any other financing options and are much less financially sophisticated than the average

75. See Abby Ohlheiser, *The Controversial GPS Device That Helped Police Catch Carlesha Freeland-Gaither's Alleged Abductor*, WASH. POST (Nov. 7, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/11/06/the-controversial-gps-device-that-helped-officials-catch-an-alleged-philadelphia-abductor/>.

76. *Id.*

77. *Id.*

78. See COLO. REV. STAT. §§ 4-9-609(e), 4-9-629 (2015); CONN. GEN. STAT. ANN. §§ 42-419, 42a-2A-702, 42a-9-609 (2015).

79. *Remote Repo*, *supra* note 71.

80. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Ct. App. 1965) (“[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.”).

81. Leonhard, *supra* note 36, at 289. Leonhard further argues that there is justification in subprime lending in that lenders are providing an opportunity to a particular borrower as other lenders in the industry want to avoid doing business with. *Id.* at 289–90.

82. See *id.* at 289.

purchaser.⁸³ As such, these tactics are much more predatory to the seemingly vulnerable subprime borrower.⁸⁴

2. The Borrowers' Response

Despite the contention that lenders are seeking the opportunity to give subprime borrowers a chance, default rates remain steadily increasing while subprime lending also increases.⁸⁵ Auto loans to borrowers considered subprime have spiked in the last five years.⁸⁶ Statistics show that roughly 25 percent of all new auto loans made last year were to subprime borrowers.⁸⁷ In the first three months of 2014, subprime auto loans reached more than \$145 billion.⁸⁸ Considering that the starter-disabling device is reserved for subprime borrowers, roughly 30 percent of customers with an auto loan at the average credit union have starter interrupt devices.⁸⁹ Despite lenders' efforts to install starter-disabling devices as a method to limit default, subprime borrowers still manage to default on 30 percent of their loans, which inevitably leads to repossession.⁹⁰ Although the devices are designed to further the lender's ability to repossess the car in the event that the borrower defaults, a National Alliance survey found that 14 percent of lenders start GPS tracking or disable the starter immediately when a customer misses a payment compared to 30 percent of lenders that have a "short" grace period for the borrower to regain access to their vehicle.⁹¹ Further, 54 percent of lenders use discretion before disabling the starter and 1 percent only use the device as a threat with no intention of actually disabling the starter.⁹²

83. *Id.* Leonhard brings up the argument that the activity of subprime lenders do not take into consideration the other available means of improving a subprime borrower's access to credit without having to exploit the poor, desperate, and/or unsophisticated borrower. *Id.* at 290.

84. *Id.* at 289; see also Ken Bensinger, *A Hard Road for the Poor in Need of Cars*, L.A. TIMES (Nov. 3, 2011), <http://articles.latimes.com/2011/nov/03/business/la-fi-buyhere-payhere-20111103>.

85. Jessica Silver-Greenberg & Michael Corkery, *In a Subprime Bubble for Used Cars, Borrowers Pay Sky-High Rates*, N.Y. TIMES (July 19, 2014, 12:36 PM), http://dealbook.nytimes.com/2014/07/19/in-a-subprime-bubble-for-used-cars-unfit-borrowers-pay-sky-high-rates/?_php=true&_type=blogs&_r=0; Corkery & Silver-Greenberg, *supra* note 2.

86. Corkery & Silver-Greenberg, *supra* note 2.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Gallagher, *supra* note 13; Corkery & Silver-Greenberg, *supra* note 2.

92. Gallagher, *supra* note 13; see e.g., Corkery & Silver-Greenberg, *supra* note 2 (describing the business of one debt collector where he tries to reach the delinquent borrower on the phone or in person first, before disabling the starter).

When looking back to the starter disabling devices, the devices are used to facilitate something further. On its own, although currently permitted through various states' legislation, the starter-disabling device is arguably another predatory lending tactic used to target subprime borrowers into entering contracts that are outside of their means of affordability. Subprime consumers, albeit voluntarily, enter into auto-loan contracts with interest rates upwards of 29 percent.⁹³ Consumers are left with a device that reminds them of their car payments and are contractually bound to repay a costly loan because they are labeled as "at-risk" for borrower default. While lenders argue that the use of these devices provide borrowers with a loan that they would otherwise not qualify for, a contract with the installation of such a device, coupled with mandated high interest rate is unconscionable and discriminatorily impacts minorities and economically impoverished individuals. Additionally, while the costs associated with repossession remain high, considering the tow and storage costs, the lenders argue that the consumer avoids these costs since the repossession occurs remotely rather than a third-party locating the vehicle to physically repossess.⁹⁴ Furthermore, lenders should be particularly cautious of their tactics, as scholars have begun to see a similarity in the loose lending standards that echoes the subprime mortgage crisis.⁹⁵

Other consumers may find the devices to be degrading, humiliating, and in some instances, containing glitches that are ultimately unsafe.⁹⁶ In one instance, a woman in Nevada found her car slowly coming to a stop while driving at high speeds on a highway.⁹⁷ Other reports have found that borrowers "say their cars were disabled when they were only a few days behind on their payments," while others say their cars were shut down while idle at stop signs.⁹⁸ Such an exaggerated response to a seemingly minor offense, in this instance, can be deemed humiliating to the average borrower. There have also been instances where the borrower's car was shutoff accidentally while the borrower suggests, and the records reflect, that they were current on

93. Corkery & Silver-Greenberg, *supra* note 2; *see also* Arnade, *supra* note 46 (referring to subprime loans as "loans that charge on average 17% a year, often exceed 20%, and sometimes are as high as 30%).

94. *Remote Repo*, *supra* note 71.

95. Corkery & Silver-Greenberg, *supra* note 2.

96. Farrell, *supra* note 1.

97. *Id.*

98. Corkery & Silver-Greenberg, *supra* note 2.

their payments.⁹⁹ Rather than a traditional repossession, the device comes with warning signs days before payment is due.¹⁰⁰ The device itself emits a warning beep that becomes more persistent as due dates approach.¹⁰¹ Borrowers find the warning more degrading than helpful.¹⁰² If the device is attempting to be consistent with traditional repossessions from a repo man, then it should be noted that traditional repossessions do not come with such “pre-warnings.” The driver simply shows up to the car at the time of the repossession.¹⁰³ In other devices, the driver must insert a four-digit passcode each time before starting their vehicle.¹⁰⁴ Having to go through these special maneuvers each time a driver starts his car, with others around, it becomes noticeable to others and a constant reminder of the poor credit decisions of their past.¹⁰⁵

Although the lender can claim to make the effort to disable the starter at a midnight, where many individuals are expected to be at home sleeping, this is not always the case as some individuals have been found to instead be stranded away from home during the time the device is activated.¹⁰⁶ This component is particularly alarming for women who may be away from home, at night, and alone, thereby posing a serious threat to their safety.¹⁰⁷ For example, one woman was driving with her young child at night and her car stalled at an intersection.¹⁰⁸ After trying to restart the car and realizing her lender disabled her starter, she was subjected to roll the car to the side of the road, remove the child from the vehicle, and beg for money to get on a bus in order for her and her child to make it home.¹⁰⁹ Without considering these implications of safety of the consumers, the lender can potentially be placing its borrowers in unsafe and inopportune situations.

Consumers also argue that the GPS component that comes with the device, allows for the lender to constantly track the borrower’s

99. Gallagher, *supra* note 13.
100. Corkery & Silver-Greenberg, *supra* note 2.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*; Gallagher, *supra* note 13.
107. Gallagher, *supra* note 13.
108. *Id.*; Corkery & Silver-Greenberg, *supra* note 2.
109. Gallagher, *supra* note 13.

whereabouts, thereby being an invasion of the individual's privacy.¹¹⁰ The GPS grants the lender permission to maintain where the borrower is driving, which presents safety and privacy concerns to many vulnerable consumers.¹¹¹ This component too can be particularly threatening, as the lender is constantly able to keep tabs on the borrowers' whereabouts.¹¹² Although an extreme example, consumers find that such surveillance can ultimately compromise a borrower's safety.¹¹³ For example, a woman in Austin, Texas fled to a shelter to escape her abusive husband.¹¹⁴ After failing to make her monthly payment, the lender shut off her starter and later sent a tow truck to take back the vehicle.¹¹⁵ The woman became terrified that her husband would be able to find out where she was from the tow truck company.¹¹⁶ Because her car was equipped with a GPS, theoretically there was not much stopping the husband from locating his wife's whereabouts.¹¹⁷ These tactics are leaving borrowers who are already subjected to scrutiny due to their poor credit scores having to further worry about their privacy and safety due to their lenders having access to watch their every move.¹¹⁸ Although the devices prevent cars from starting, one legal aid nonprofit agency, Legal Services of Eastern Missouri, contends they are dangerous and leaves motorists stranded far from home, sometimes at night, and in crime-ridden neighborhoods.¹¹⁹

Further, many of these borrowers are the same individuals who have made poor financial decisions to begin with, leaving them more susceptible to making further poor financial decisions. In the end, the borrowers are the ones who are left with decreased credit scores and continuously diminishing financial stability and financial independence. This state of financial illiteracy, if left unregulated, can lead to borrowers continuing to be victims. By luring these borrowers in to

110. *Id.*

111. *Id.*

112. *Id.*; Corkery & Silver-Greenberg, *supra* note 2 (describing one debt collector's ability to monitor the movements of over 800 subprime borrowers on a computerized map that shows the location of all the cars with the device installed).

113. Corkery & Silver-Greenberg, *supra* note 2.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Gallagher, *supra* note 13; Corkery & Silver-Greenberg, *supra* note 2 ("Some borrowers say their cars were disabled when they were only a few days behind on their payments, leaving them stranded in dangerous neighborhoods.").

predatory lending tactics such as the high interest rates and starter disabling devices, in the long run, the lender is creating a method to attract desperate buyers into particularly desperate loans.

C. Current Legal Standard on Predatory Lending, Repossession, and Starter Disabling Devices

Article 9 of the Uniform Commercial Code is the body of regulations governing transactions creating a security interest in personal property by contract.¹²⁰ Article 9 further regulates the manner in which secured creditors exercise self-help to repossess or recover collateral after the borrower defaults.¹²¹ The use of a starter-disabling device can be interpreted as rendering equipment unusable, permissible under Section 9-609(a)(2), which provides that when exercising rights against collateral upon the consumer's default, the creditor may render the collateral unusable.¹²² When the device is activated, the driver is prevented from starting the car; therefore, the collateral is unable to be used.

While courts have not directly addressed the legality of the use of starter-disabling devices in any reported decisions, some states' legislative bodies have expressly addressed the use of such devices. For example, Colorado permits the use of such a device, but provides for certain limitations and penalties.¹²³ Under Colorado's statute, a secured creditor may not disable or render unusable any computer program or similar device embedded in the collateral if immediate injury to any person or property is a reasonable foreseeable consequence of such action.¹²⁴ Connecticut has also provided for the use of starter interrupt devices, but also subject to a set of limitations.¹²⁵ Under this statute, Connecticut permits installation of such device only if the borrower separately agrees in the security agreement authorizing such self-help electronic measures.¹²⁶ Further, the statute requires the lender to give notice to the borrower before they disable the vehicles starter.¹²⁷ Similar to Colorado, Connecticut also provides that such devices may not be used if the lender has reason to believe that its use

120. U.C.C. § 9-109(a)(1) (AM. LAW INST. & UNIF. LAW COMM'N 2016).

121. *Id.* at § 9-609.

122. *Id.* at § 9-609(a)(2).

123. COLO. REV. STAT. ANN. §§ 4-9-609(e), (g) (West 2001).

124. *Id.*

125. CONN. GEN. STAT. ANN. §§ 42-419, 42a-2A-702, 42a-9-609 (West 2003).

126. *Id.*

127. *Id.*

will result in substantial injury or harm to the public health or safety.¹²⁸ While Colorado and Connecticut have allowed for the use of the starter disabling devices, consistent with some restrictions, they have not considered the use of such devices as predatory lending tactics.¹²⁹ Their respective statutes appear to alleviate concerns that the devices are dangerous and put individuals in uncompromising and unsafe predicaments. While those are legitimate concerns, the devices themselves can be viewed as any other predatory lending tactic used to lure particularly vulnerable buyers, thus creating a platform for lenders to take advantage of buyers who have not made the best financial choices in the past.

More recently, New Jersey and New York are picking up on the potential predatory lending scheme as the states are proposing their own legislation to entirely ban the use of disabling devices.¹³⁰ Although it may seem like an extreme option, it is quite opposite than the reform taken by Connecticut and Colorado. While both states and their respective bills have yet to be drafted into law, their unanimously voted decisions do not come without protest from payment assurance technology support groups.¹³¹ Members of the Payment Assurance Technology Association (PATA) are against the proposed legislation and are attempting to overcome the alleged misconceptions associated with the device such as the device disabling vehicles while they are in motion on the freeway.¹³² However, the justification for the proposed legislation in New York for example, remains strong. As currently written, the proposed bill justifies its ban on SIDs because of:

A recent explosion in the subprime auto lending market has some of the same banks and financial institutions responsible for the catastrophic collapse of the mortgage industry in 2008, and consequently in the U.S. and global economies, cashing in big once again. High-risk, high-interest automobile loans are victimizing low-income consumers trying to recover from the recent economic recession.

128. *Id.* While this type of caveat has been addressed in Colorado and Connecticut legislation, it is absent in other jurisdictions, which arguably leaves the issue largely unresolved.

129. *See generally* CONN. GEN. STAT. ANN. §§ 42-419, 42a-2A-702, 42a-9-609; COLO. REV. STAT. ANN. §§ 4-9-609(e), (g) (failing to include language suggesting that the permitting of such devices subjects borrowers and consumers to predatory lending).

130. *See* Nick Zulovich, *NJ & NY Lawmakers Out to Prohibit Payment Assurance Devices*, BHPH REP., (Feb. 03, 2015, 3:12 PM), <http://www.autoremarketing.com/bhph/nj-ny-lawmakers-out-prohibit-payment-assurance-devices>.

131. *Id.*

132. *Id.*

In its recently published investigation into lenders' unscrupulous practices within the booming subprime auto lending market, The New York Times found that "roughly 25 percent of all new auto loans made last year were subprime (interest rates on some of the loans exceeding 29 percent) and the volume of subprime auto loans reached more than \$145 billion in the first three months of this year."

A growing number of these predatory lenders are now equipping cars with a starter interrupt device as a condition of the loan. This new technology allows lenders to remotely disable the ignition in order to prevent a car from starting within minutes of a payment being late. This reckless practice can threaten public safety and result in serious consequences. Instances of parents being unable to rush seriously ill children to the hospital due to lenders activating the devices are becoming increasingly more common.

Additionally, many of these devices have GPS technology, which allow the lenders to track the cars' location and movements with very few regulations to protect individual privacy and public safety.¹³³

If passed, these laws could set a framework for other states to follow in their attempts to alleviate the tension between subprime borrowers and subprime auto loan lenders, all while curbing the suspicions of predatory lending.

As the law currently stands with respect to predatory lending, there are a number of federal, state, and local laws designed to prevent predatory lending.¹³⁴ Federal laws concerning predatory lending include the Truth in Lending Act, which requires lenders to disclose certain information, prior to an agreement, such as annual percentage rate, term of the loan, and total costs to the borrower.¹³⁵ Another federal law that regulates predatory lending is the Home Ownership and Equity Protection Act.¹³⁶ Although this Act is limited to home loans, the Act also ensures the lender discloses all pertinent informa-

133. 2015 Legis. Bill Hist. NY A.B. 3463 (LexisNexis).

134. Predatory lending is a concept that has been heavily regulated in the home mortgage industry through the Truth in Lending Act and Home Ownership and Equity Protection Act. Additionally, there are arguments that payday advance loans are predatory in nature, which caused regulations to be implemented in that industry as well. This Comment argues that predatory lending is beginning to show up in the auto-industry through the use of starter disabling devices, which should cause for state regulation to be implemented.

135. Consumer Credit Protection Act, 90 P.L. 321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. 1601 et seq. (2012)).

136. Home Ownership and Equity Protection Act of 1994, Pub. L. 103-325, 108 Stat. 2160 (codified as amended at 15 U.S.C. 1639 et seq. 2012)).

tion to the borrower.¹³⁷ In addition to the federal laws implemented, several states have enacted their own anti-predatory lending legislation, including Arkansas, Massachusetts, Tennessee, and Minnesota.¹³⁸

II. PAYDAY ADVANCE LOANS

The days of individuals being able to pay for their cars in cash, is growing further and further behind us as many Americans now look to banks and other institutions for financial assistance in their large purchases of cars, homes, and the like. But along with the increase in traditional automobile and home mortgage loans, the need for consumers to seek financing through various measures also increases as buyers are considering other avenues of lending—such as payday lending—in order to continue funding their assets. Although payday lending is illegal in some states,¹³⁹ some states have responded to the scheme by placing interest rate caps that prevent an interest rate greater than a certain amount to be attached to the loan. The purpose here is to establish a similarity between this market and the market for auto-loans. Both industries present concerns of predatory lending, however the payday lending has resulted in regulation to control these concerns, leaving the auto industry’s use of starter-disabling devices, a predatory lending tactic in and of itself, unregulated.

A. The Scheme of Payday Lending

Payday lenders have arisen to serve consumers with low-to-moderate incomes and have grown central to the banking industry.¹⁴⁰ Although known by various names such as “payday advances, deterred deposit loans, and cash advance loans, these loans are advertised by lenders as providing borrowers the opportunity for consumers to ob-

137. *Id.*

138. 2003 Ark. Adv. Legis. Serv. 1340 (LexisNexis); Mass. Ann. Laws ch. 183C, § 1 et seq. (LexisNexis 2004); 2006 Tenn. Code Ann. Adv. Legis. Serv. 801 (LexisNexis); 2007 Bill Text MN S.B. 988.

139. See CORPORATION FOR ENTERPRISE DEVELOPMENT, RESOURCE GUIDE: PROTECTIONS FROM PREDATORY SHORT-TERM LOANS 2 (2012), http://cfed.org/assets/scorecard/2013/rg_PredatoryLending_2013.pdf; see also Heather Morton, *Payday Lending State Statutes*, NAT’L CONF. ST. LEGIS. (Jan. 14, 2015), <http://www.ncsl.org/issues-research/banking/payday-lending-state-statutes.aspx>.

140. Melissa Allison, *Regulators Leave Locations up to Banks*, CHI. TRIB., Nov. 25, 2001, 5, at C1.

tain, in minutes, advances on their paychecks.”¹⁴¹ As a benefit to the borrower, these deals are done without the hassle of traditional lending, such as credit checks, and the borrower will typically be able to leave with cash in hand.¹⁴² In a typical scenario, the lender will make a small cash advance, ranging from \$50 to \$1,000, to the borrower in exchange for a post-dated personal check written for the amount of the loan plus any fees set by the lender.¹⁴³ The lender will then hold the check until the borrower’s next payday and the borrower is able to repay the loan.¹⁴⁴ What makes these loans particularly controversial are the extraordinary high interest rates and fees that accompany the loans, which can be upwards of 33 percent per advance. For a two week loan, this can equate to several thousand percent on an annualized basis.¹⁴⁵

These loans can also be identified as being predatory lending tactics that can inevitably be financially detrimental to the individual. Even though such advances are technically legal based on current legislation, there are still common loopholes and methods implemented that can make some tactics “unlawful.”¹⁴⁶ In some instances, some payday lenders mislead consumers about the cost of credit, including unreasonable fees and interest rates that deceive borrowers and thereby entice them into a loan transaction they cannot afford to begin with.¹⁴⁷ While borrowers generally see the payday lenders as a quick source of cash, payday loans can also have a negative impact on the borrower’s credit by trapping them in to a downward spiral of debt.¹⁴⁸ This “trap” comes from the borrower not being able to meet the terms of

141. Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 9 (2002).

142. *Id.* at 9–10.

143. *Id.* at 10; *see also id.* at 9 n.35 (citing Dewanna Lofton, *Is It Legalized Loan Sharking, or Help for Those with Nowhere Else to Go?*, Com. Appeal (Memphis), Sept. 3, 2000, at DS1 (“Most [payday lenders] require that borrowers bring a driver’s license or state-issued photo ID, a recent pay stub, telephone bill, bank statement and checkbook with pre-printed checks.”)).

144. Johnson, *supra* note 141, at 10.

145. *Id.* at 4 (providing an example of a typical scenario where a customer may pay a lender a \$33 fee for a \$100 cash loan along with a promise to repay the amount in two weeks).

146. *Id.* at 25 (outlining the various practices by payday lenders that deceive and exploit customers such as charging fees amounting to triple-digit rates, misrepresenting information related to cost of credit, seeking damages upon default, and threatening criminal prosecution against delinquent customers).

147. *Id.* at 6–7.

148. HAYDAR KURBAN, ADJI FATOU DIAGNE & CHARLOTTE OTABOR, HOWARD UNIV. CTR. ON RACE & WEALTH, *THE ECONOMIC IMPACT OF PAYDAY LENDING IN ECONOMICALLY VULNERABLE COMMUNITIES* 1, 8 (2014), <http://www.coas.howard.edu/centeronraceandwealth/reports&publications/1214-the-economic-impact-of-payday-lending-in-economically-vulnerable-communities.pdf>.

the deal and thereby defaulting on their short-term loans. Notably, the ability of a borrower to repay a loan goes down as the cost of the loan itself goes up. The probability of a borrower not being able to repay these nontraditional loans, due to the peripheral costs associated with borrowing the principal, increases as the cost of borrowing proportionally increases.¹⁴⁹ While only a few states have passed legislation to restrict the fees and excessive rates of payday lenders, much legislation remains to be enacted that will actually deter lending practices.¹⁵⁰ However, on one end, North Carolina and Georgia have actually abolished these practices in their states while justifying the argument that “these institutions exacerbated the financial insecurity being experienced in their communities.”¹⁵¹

In one study produced by Howard University’s Center on Race and Wealth, it was demonstrated that there was actually a negative economic impact of payday loans to vulnerable communities; specifically, communities of color and those in lower income neighborhoods felt the economic burdens created by the payday loans the most.¹⁵² The report specifically focuses on the economic impacts of payday loans on the state economy in Florida, Alabama, Louisiana, and Mississippi, but still makes a widespread analogy by noting, “regardless of whether the state level net economic impacts are positive or negative, payday loans exacerbate distress in the economically vulnerable communities in which they are located.”¹⁵³ In its effect, the impact will likely shift the cost of increased poverty and financial distress to the state.¹⁵⁴ In turn, welfare benefits increase as well as services of bankruptcy courts and credit counseling.¹⁵⁵

B. Payday Lending and its Parallel to the Subprime Auto-Loan Industry

Research on the economic impacts of various loans has concluded that lower income persons are most vulnerable to higher interest and

149. See Michael Kenneth, *Payday Lending: Can “Reputable” Banks End Cycles of Debt?*, 42 U.S.F. L. REV. 659, 667 (2008) (suggesting that the types of borrowers attracted to payday loans are not “one time use” or “emergency use” borrowers but rather enter a cycle of debt where they inevitably take out other loans with multiple lenders to pay off the debt with payday lender).

150. KURBAN ET AL., *supra* note 148.

151. *Id.*

152. *Id.* at 4.

153. *Id.*

154. *Id.*

155. *Id.*

penalty loans,¹⁵⁶ and factors such as economic income disparities have demonstrated the higher predictive measure for payday loan borrowing, amongst other risky loans. Naturally, the same types of borrowers are attracted to both payday loan agreements and subprime, high-risk auto loan agreements that include the use of a starter disabling device: both are lower income. These types of borrowers are high-risk, with lower credit scores, and have not made the best financial decisions when it comes to spending and borrowing money. Further, these borrowers feel the hurt of the industry the most. Walking in to a loan agreement with a poor credit/loan history where the risk for default is high and probability for prompt repayment is low, can in turn hurt or worsen the borrower's credit even further.

Currently, some states have legislation in place to limit and restrict the potential for predatory lending tactics in payday lending.¹⁵⁷ Many states implement some sort of legislation where, in its effect, will assist in preventing predatory lending tactics associated with payday loans such as high interest rates or falsifying information on loan documents to make the borrower seem more attractive on paper.¹⁵⁸

Similar to payday loans, subprime auto lenders include a high interest rate on subprime borrowers because they claim that the borrowers are "high risk" and may default on the debt. In order to protect their investment and therefore secure a profit, the lenders find the high interest rates necessary to ensure a positive rate of return. However, along with the subprime auto lenders concerns with risky buyers, there are concerns of default as well as loss of the collateral designed to secure the debt. To compensate for these potential loses, subprime auto lenders often include a starter disabling device to ensure that they maintain control of the collateral in the event they need to take advantage of their self-help repossession opportunities available under Article 9 of the Uniform Commercial Code.¹⁵⁹ This tactic presumes, possibly discriminatorily, that subprime borrowers have a higher probability of default and are more likely to abscond with collateral that has been secured by the lender.

Unlike the auto lenders that include starter-disabling devices on the cars to ensure confidence in repossessing the collateral upon de-

156. *Id.*

157. *Id.*

158. *Id.*

159. U.C.C. § 9-609(b)(2) (1999).

fault, payday lenders are not afforded with this option as the debt with payday loans is secured in the high interest rates.¹⁶⁰

Another similarity to the subprime auto industry and the payday lending industry is the targeted consumers. These loans are attractive to a specific type of borrower: borrowers that are having a difficult time obtaining traditional loans. While alternatives exist for the various loan arrangement available on the market (for example an alternative to payday loans would be a credit card or a short term bank loan) many borrowers undergoing financial difficulties or with subprime credit scores are ineligible for the traditional types of loans. Therefore, they are in fact subjected to the high interest rates and other penalties related to the loan due to the nature of being high risk for default.

The American Bar Association published an article that has outlined predatory lending practices and what those practices can include.¹⁶¹ While the article recognizes that the presence of “nontraditional lending practices” can contribute to a greater percentage of individuals attaining home loans in the United States, upon a closer examination, these practices can be disguised as predatory lending practices used to lure in hopeful buyers.¹⁶² Such tactics can include, but are not limited to, high annual interest rates, high loan origination fees, and making arrangements for payments that are higher than the borrower can afford.¹⁶³ These tactics require the lender to examine the borrower’s financial state, and as a result, implement any such device that can entice the seemingly desperate borrower to enter into the loan agreement.

1. Legislation of Predatory Lending in the Auto-Industry

Although predatory lending has, to an extent, been regulated in the payday-lending arena, regulation is not closely monitored in the

160. See Nathalie Martin, *1,000% Interest – Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 564–65 (2010) (providing a description of the controversial credit transaction that is payday loans, where a customer could borrow a designed amount of money and pay what would be an annual percentage rate of almost 1147%).

161. Melissa A. Huelsman, *A Brief Primer on Fighting Predatory Lending Practices*, AM. BAR, (Sept. 2005), http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/0509_business_predatorylending.html.

162. *Id.*; see also Arnade, *supra* note 46 (labeling subprime loans as “loans to desperate people at desperate being facilitated by Wall Street”).

163. Huelsman, *supra* note 161.

auto industry.¹⁶⁴ While most of the attention associated with predatory lending during the mortgage crisis in 2008 was centered on subprime mortgages,¹⁶⁵ subprime borrowers continued to face their own bit of struggle in predatory lending tactics.¹⁶⁶ In response to the mortgage crisis, Congress drafted and ultimately signed in to law the Dodd-Frank Wall Street Reform and Consumer Protection Act (The Dodd-Frank Act), which held Wall Street bankers and lenders responsible for poor lending practices that led to the economic downturn of the mortgage industry.¹⁶⁷ The Dodd-Frank Act was intended to protect consumers from abusive financial practices and, among other purposes, promote the financial stability of the United States by improving accountability and transparency in the financial system.¹⁶⁸

With the intent to establish and preserve economic stability in the United States, the Dodd-Frank Act (Dodd-Frank) demanded stronger oversight from Wall Street of its banks and lenders in the mortgage industry.¹⁶⁹ This oversight requirement encouraged the Consumer Financial Protection Bureau (CFPB) to get involved, which was originally formed as a byproduct of Dodd-Frank to regulate consumer financial products and services.¹⁷⁰ While the CFPB has been successful in regulating banks, credit card companies, credit bureaus and

164. Stacey Bumpus, *How to Avoid Being the Victim of Auto Loan Rip-Offs*, GO BANKING RATES, (July 2, 2014), <http://www.gobankingrates.com/car-loans/signs-predatory-auto-loans-protect-yourself/>.

165. The “2008 mortgage crisis” marks a time where lenders issued millions of subprime mortgages/loans to homebuyers who had lower incomes, smaller available down payments, or worse credit histories, with the hopes that the property values would increase. However, the opposite occurred, and millions of homes depreciated in value and homes were foreclosed. Borrowers were therefore stuck with payments that they could not afford, for homes that were not worth what remained on the loan. In other words, if they chose to back out of the loan and sell the home, they would not be able to sell it for what would cover the cost of repaying the loan. Therefore, their only options were to sell the home and pay the remaining balance on the loan, or to stop making payments and risk foreclosure. For a further discussion and detailed background on the mortgage crisis, see Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 21–24 (2009); see also Raymond H. Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. CIN. L. REV. 1, 4–7 (2009) (“As the pool of viable borrowers that could serve to quench the thirst for these investments began to dry up, underwriting standards loosened, documentation and other requirements were lifted, and marketing got more aggressive, luring in borrowers who were poor credit risks, who took on debt they could not bear, and whose mortgages were packaged into products that would turn toxic once those borrowers could not satisfy their obligations.”).

166. Bumpus, *supra* note 164.

167. *Id.*

168. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C § 780).

169. *Id.*

170. Bumpus, *supra* note 164.

mortgage lenders, auto lenders also serving as auto loan lenders have been effectively exempt from the agency's oversight.¹⁷¹ Although there are parallels to the predatory lending tactics of payday loans and the mortgage industry in its practices, Congress' failure to create laws that crack down on the practices of the auto loan lenders leaves room for the auto dealer to implement risky tactics such as lending to subprime or otherwise financially unstable borrowers. While the rationale is evident to promote financial literacy and fair lending practices, without further regulation in the auto industry, subprime lenders will continue to be permitted to engage in tactics such as installing starter disabling devices to control their collateral.

In considering the lack of regulation in the auto industry, there has been a growth in recent subprime auto finance loans. In one study, it was found that the dollar value of originations to people with credit scores below 660 has roughly doubled since 2009, while originations for the other credit score groups has increased by only half.¹⁷² The Center for Responsible Lending is a non-profit organization based in North Carolina with offices in California, that works to protect home ownership and family wealth by fighting against predatory lending practices.¹⁷³ In a recent study, the organization examined the growth in subprime auto lending and cautioned that the growth may raise concerns that the lending practices risk causing problems in the larger auto market such as a greater increase in repossession rates and increasing the risks of defaults for subprime auto loans.¹⁷⁴

Abusive practices that increase the cost of the auto loans subsequently increase the risk of default as borrowers struggle to repay. Of particular concern in subprime lending is the abusive tactics that disproportionately affect borrowers of color.¹⁷⁵ The study produced by Center for Responsible Lending further notes a history of African-American and Latino car buyers being sold more add-on products than similarly situated White borrowers which increase the borrowers' respective interest rates and length of loan relationship.¹⁷⁶ The sug-

171. *Id.*

172. Ctr. for Responsible Lending, "Reckless Driving": Implications of Recent Subprime Auto Finance Growth, CTR. FOR RESPONSIBLE LENDING at 1 (Jan. 2015), http://www.responsiblelending.org/other-consumer-loans/auto-financing/researchanalysis/recklessdriving_implications_subprime_autofinance_growth.pdf.

173. CTR. FOR RESPONSIBLE LENDING, *About Us*, <http://www.responsiblelending.org/about-us/> (last visited Feb. 2, 2015).

174. Ctr. for Responsible Lending, *supra* note 172, at 1-2.

175. *Id.* at 4.

176. *Id.*

gestion, therefore, is for regulators and law enforcement to pay particular attention to the abuses in the subprime auto lending market before they become systematic issues affecting the industry as a whole. It has recently been deemed the subject of much litigation in at least the last two decades, which provide for strong evidence that borrowers of color find themselves paying disproportionately higher interest rates than their similarly situated white counterparts.¹⁷⁷ Rather than examining the dynamics of economic disparity in the subprime individuals, maybe the true inquiry should be in taking a closer look at the way the loans and its terms are impacting people of color, either intentionally or inadvertently.

III. PROPOSED SOLUTION: A NEW WAY TO COMBAT THE DEVICE AND PREDATORY AUTO LENDING

While some states have addressed the use of the device by either regulation or a strict ban on its installation, state legislatures should be concerned with the potential consequences of regulating the device as a means to curtail predatory auto lending. Particularly, while the device is reserved for borrowers considered “subprime,” and the lender is prevented from installing the device in such borrower’s car, the collateral is now at risk. Without the threat and option of disabling the starter, thereby preventing the borrower from driving the car, there is very little that is preventing the borrower from fleeing with the collateral once they stop making car payments. In other words, aside from concerns with traditional repossession, the borrower is free run with the collateral and avoids repossession all together. When the lenders are dealing with borrowers with a high risk for default, they seek the starter-disabling device as a more reliable way to secure the debt and prevent the borrower from fleeing with the collateral. But what happens when the most reliable remedy is so heavily regulated that it effectively denies lenders the option to install such a device on a subprime borrower’s car, should leave legislatures particularly concerned. Lenders would still need to protect their assets and profits, and still stay in business.

It remains with little debate that subprime borrowers, while particularly vulnerable, do present a credit risk and some accommodation has to be made of the lender’s right to command a risk premium. It behooves the prudent lender to consider risk management techniques

177. *Id.*

in order to not only control the collateral through its value and retain their monetary profits, but also to create a system to ease the process of repossessing. While there are statutes in place that legally authorize repossession, this Comment argues for the implementation of processes in place that speak to the “ease” of such methods. Pertaining to the former of the risk management techniques, banks struggle with being able to retain monetary profits when dealing with subprime borrowers considering their high risk of default. Wells Fargo, one of the largest subprime car lenders, has gone so far as to implement a new risk management technique with their loans by placing a cap on the amount of loans they will give out for new subprime loans.¹⁷⁸ Essentially, the bank is limiting the dollar volume of its subprime auto originations to just 10 percent of its overall auto loan originations.¹⁷⁹ However, implementing such a ceiling is a risk management technique to subsidize the lenders and investors’ interest and yet an indirect benefit to the consumers. But where some groups benefit, some are still left troubled. If other major subprime lenders follow suit, there becomes a decreased amount of dollars available to those in need. As such, there is still a need for reconciling the needs of consumers, which, I argue, is likely to come through regulation.

One report has indicated that car dealerships that also serve as the auto lenders (also known as “Buy Here, Pay Here” dealers),¹⁸⁰ are really in the business of selling loans rather than used cars.¹⁸¹ In other words, the majority of their profits come from the loans and its terms, rather than the cars being sold.¹⁸² Considering that such a large portion of their profits come from loans, arguably, adding restrictions to the ways lenders can do business, can in turn, cause the cost of the loans to increase. Without further regulation, lenders can seek charging higher interest rates to offset the increased risk to the car loans. This can make it increasingly difficult for borrowers who are already experiencing financial hardship, to obtain a car loan, thus inadvertently discouraging a contribution to an effective economy. Legislatures, when attempting to regulate the use of the starter-disabling

178. See Michael Corkery & Jessica Silver-Greenberg, *Wells Fargo Puts a Ceiling on Subprime Auto Loans*, CNBC, (Mar. 1, 2015), <http://www.cnbc.com/2015/03/01/wells-fargo-puts-a-ceiling-on-subprime-auto-loans.html>.

179. *Id.*

180. A majority of starter-disabling devices and other payment assurance devices are used by “Buy Here Pay Here” dealers. Zulovich, *supra* note 130.

181. *Id.*

182. *Id.*

devices to curb predatory lending, should be cautious of the possible outcomes and potential negative impact on the economy. When presented with the choice to regulate use of the device or ban the device entirely, maybe the choice that would satisfy both borrowers and lenders lies in the latter of the two.

A. Outlining a Proposal for New Legislation: Federal vs. State Regulation

In proposing a new solution that seeks to resolve the issues of predatory lending in the auto industry, the choice is between regulation of the use of the starter disabling devices through federal or state legislation. While the avenue of federal legislation is present in the Dodd-Frank Act and the duties it created with regulatory agencies, the option of state legislation to curb the use of such devices is still available. This comment proposes a uniform state legislation that will regulate, rather than ban, the use of starter disabling devices by implementing a cap on interest rates for lenders that choose to install the device in a subprime borrower's car. Such legislation will also provide a private cause of action for borrowers should they believe they are being subject to predatory lending masked by the installation of the device. While the lenders argue that the device is necessary to protect their collateral and prevent the borrower from fleeing with the asset, the risk is not entirely offset. Lenders are justifying the high risk brought by the subprime borrower and coupling the installation of the device by charging interest rates upwards of 29 percent. Having the device and the high interest rate is unconscionable together, so a valid proposal for uniform state legislation will allow for one and disallow the other. In other words, there should be new reform that provides lenders with the option to either utilize the device and cap the interest rate, or disallow the device and keep the interest rate consistent with market demands.¹⁸³

The current legislation in Colorado and Connecticut, and the proposed legislation in New York and New Jersey are fair in their underlying concerns regarding safety and privacy, but are incomplete in

183. Notably absent from this proposal is a specific cap on the interest rate. While the attempt here is to propose a *uniform* state legislation that creates a cap on interest rates, such specific rates should be left to the state as they consider their market and other factors of that jurisdiction. See Timothy E. Goldsmith and Nathalie Martin, *Interest Rate Caps, State Legislation, and Public Opinion: Does the Law Reflect the Public's Desires?*, 89 CHI.-KENT L. REV. 115, 116–17 (2014) (finding there are currently no federal legislation that places a cap on interest rates, but many states have already set their own interest rate varying from 36% or less).

their failure to address public policy concerns of predatory lending. Predatory lending has eased its way in to the auto loan industry in the past several years, and while federal law is in place to establish agencies that regulate such practices in the broader financial market,¹⁸⁴ the states have not adequately provided for reform in the use of devices that arguably suggest other unfair lending practices. Creating a uniform legislation that puts a cap on interest rates, set by industry demands depending on the jurisdiction, ensures lenders are creating loans with more reasonable financial incentives to borrowers.

CONCLUSION

Of particular importance here is developing a solution to a growing problem in the auto-industry that would satisfy the needs of both sides. While the starter-disabling device is starting to be incorporated into otherwise conscionable auto-loan agreements, the device itself seems difficult to regulate. On one end, state legislation cannot (or at least statutorily, they should not) deny a lender their otherwise lawful repossession rights outlined in the UCC Article 9 provisions. On the other end, public policy suggests subprime borrowers, who are already particularly vulnerable with respect to wise financial decisions, should not be subjected to otherwise unconscionable contracts with high interest rates. The state further has an interest in developing and continuing financial independence and economy, the state should adopt a legislation that addresses the starter-disabling device and the extraordinarily interest rate, as the two together are unconscionable. Considering the device is designed to protect the lender's asset, placing a cap on interest rates when the device is installed in a subprime borrower's car can hopefully resolve this issue of the starter-disabling device creating an unconscionable contract. Although complete financial independence and literacy is a larger and deeper conversation, ideally, this proposal for a uniform state legislation will be the first start.

184. See Dodd-Frank discussion *supra* Part II.B.1.

COMMENT

The California Lottery: Have Substantial Delays in Execution and Due Process Failures Rendered California’s Death Penalty Administration Unconstitutional?

NAJEE K. THORNTON*

INTRODUCTION	848
I. BACKGROUND	853
A. The Current State of Death Penalty Administration in the United States and California	853
B. The Nature of Delay in California’s Death Penalty Administration	854
C. The Result of California’s Systemic Delay in Death Penalty Administration	856
II. THE EIGHTH AMENDMENT’S BAN ON “CRUEL AND UNUSUAL PUNISHMENTS”	857
B. Penological Purposes that Underlie the Use of Capital Punishment	861

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1. Deterrence theory is at best a questionable justification for the death penalty.....	861
2. Retribution theory has been used as a justification for the death penalty.....	861
III. LACKEY CLAIMS AND JUDICIAL RESISTANCE.....	864
A. The Appearance of <i>Lackey</i> Claims in the Federal Courts	864
B. Theories Underlying <i>Lackey</i> Claims	865
1. Delayed executions do not serve any penological purpose.....	865
2. The mental suffering caused by pre-execution delay is torture	866
C. Arguments Against Recognizing <i>Lackey</i> Claims	867
IV. JONES V. CHAPPELL AND ITS IMPACT ON THE LACKEY ANALYSIS	869
A. The District Court’s Decision in <i>Jones v. Chappell</i>	869
B. The Impact of <i>Jones v. Chappell</i> on the <i>Lackey</i> Analysis	871
C. Ninth Circuit Review of the <i>Jones</i> Decision	875
CONCLUSION	876

*It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.*¹

INTRODUCTION

After a jury has sentenced a citizen to death, he is remanded to State custody and is held on Death Row until his sentence can be carried out.² As has happened periodically over Ernest’s twenty years on Death Row, all of the condemned individuals are walked onto the exercise yard and lined up. None of the inmates is sure how the ritual

1. NELSON MANDELA, LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA (1995). In 1961, Mr. Mandela was convicted and sentenced to five-years imprisonment for inciting people to strike and for leaving the country without a passport. But, he was shortly thereafter sentenced to life imprisonment, instead of a possible death sentence, for sabotage in what has come to be known as the “Rivonia Trial.” *Id.* at 375–76.

2. The happenings in this narrative are adapted from a popular short story entitled “The Lottery.” SHIRLEY JACKSON, THE LOTTERY (1948), https://sites.middlebury.edu/individualandthesociety/files/2010/09/jackson_lottery.pdf.

came into being, but each follows its mandates. One at a time, each inmate approaches a weathered, black box and removes a folded slip of paper, holding it firmly yet careful not to reveal its contents. Once each inmate has their slip firmly in hand, the Warden instructs them to reveal its contents. Ernest's slip has a black spot in the center, made the night before with a heavy charcoal pencil in the Warden's office. As he scanned the relieved faces of his fellow Death Row inhabitants, Ernest could not help but think about how inherently unfair and random this portion of the procedure was and how it bore no relationship to his crimes. But this was the procedure that the State had chosen. It was time for his death sentence to be carried out.³

Despite the imposition of a formal death sentence, Judges frequently actually issue a sentence of life imprisonment with a remote possibility of death — a sentence that no rational jury or legislature could lawfully impose. The majority of capital inmates in the United States receive a death sentence, but in actuality have no idea when or whether they will in fact be executed. Every actor involved in the criminal justice system — legislators, judges, prosecutors, defense lawyers, and the inmates themselves — is aware of this reality.⁴ The critical exceptions to this awareness are the jurors, who believe they have in fact imposed death; the families of the victims, who believe they will ultimately see retributive justice done; and some members of the general public — the taxpayers who fund the state apparatus that perpetuates pre-execution delay and the resulting societal costs.⁵

The average amount of time that elapses between sentencing and execution sharply increased from just over six years in 1984 to 16.5 years in 2011.⁶ Nationwide, inmates currently on death row have spent an average of nearly fourteen years under their sentences.⁷ This extended incarceration on death row transforms each passing hour of

3. “Tessie Hutchinson was in the center of a cleared space by now, and she held her hands out desperately as the villagers moved in on her. ‘It isn’t fair,’ she said. A stone hit her on the side of the head. Old Man Warner was saying, ‘Come on, come on, everyone.’ Steve Adams was in the front of the crowd villagers, with Mrs. Graves beside him. ‘It isn’t fair, it isn’t right,’ Mrs. Hutchinson screamed, and they were upon her.” *supra* note 2.

4. See Angela April Sun, “Killing Time” in *the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row are Cruel and Unusual*, 113 COLUM. L. REV. 1585, 1586 (2013).

5. See *id.* at 1586.

6. TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2011 Statistical Tables 14 tbl.10 (2013) [hereinafter BOJ STATISTICS 2011], <http://www.bjs.gov/content/pub/pdf/cp11st.pdf>.

7. *Id.* at 18 tbl.15.

the inmate's typically lengthy lives into a constant "death watch," and has been linked with disproportionate rates of mental illness.⁸

If the harm to the incarcerated individual were not enough, a system of protracted pre-execution delays also imposes heavy costs on broader American society. Taxpayers are on the hook for millions of dollars each year in public expenditures on incarcerating death row inmates, while the citizenry's confidence in the value of capital punishment, as a whole, is simultaneously eroded and undermined. Numerous studies conclude that systemic delay is the primary factor responsible for the mushrooming disparity between the number of death sentences imposed and the number of actual executions carried out in several jurisdictions.⁹

There is currently a national debate that is focused on the need for reforms to the criminal justice system.¹⁰ Of course, this debate extends to the administration of capital punishment. Due to concerns about the manner that the death penalty is administered in several states, including the rarity of actual executions, both public officials and their constituents are evaluating the need for death penalty laws as a matter of public policy.¹¹ For example, in one of his last official

8. See Sun, *supra* note 4, at 1587; see also Rebecca A. Miller-Rice, Comment, *The "Insane" Contradiction of Singleton v. Norris: Forced Medication in a Death Row Inmate's Medical Interest Which Happens to Facilitate His Execution*, 22 U. ARK. LITTLE ROCK L. REV. 659, 661 (2000) (noting that many death row inmates develop mental illness due to the numerous stressors affecting them). This psychological impact of delayed execution, known as "death row syndrome" or "death row phenomenon," has been condemned as a violation of human rights and denounced by the courts in many countries as a reason to stay the execution of an inmate. See *Pratt v. Att'y-Gen. for Jam.*, [1993] 2 A.C. 1 (P.C.) 35 (appeal taken from Jam.) (en banc) (holding that execution delay in excess of five years constitutes "inhuman or degrading punishment" in violation of Jamaican constitution).

9. See Sun, *supra* note 4, at 1589.

10. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (critiquing the American criminal justice system as a contemporary system of racial control though it formally adheres to principles of colorblindness); see also Ovetta Wiggins, *Debate Over Maryland Criminal Justice Bill Heads to House of Delegates*, WASH. POST (Mar. 26, 2016), https://www.washingtonpost.com/local/md-politics/debate-over-maryland-criminal-justice-bill-heads-to-house-of-delegates/2016/03/26/1039f5fc-f1cc-11e5-a61f-e9c95c06edca_story.html (discussing the debate surrounding a Maryland bill that would reduce prison population, ease sentencing laws for non-violent offenders, and push individuals in possession of drugs toward rehabilitation centers instead of into prisons). The political pressures from this public discourse has been mounting, and has resulted in the ousting of at least two head prosecutors in major American jurisdictions — Anita Alvarez in Cook County, Illinois and Tim McGinty in Cuyahoga County, Ohio. See Leon Neyfakh, *Big Wins for Black Lives Matter: The Prosecutors in the Tamir Rice and Laquan McDonald Cases Lose Their Primary Races*, SLATE (Mar. 16, 2016, 11:01 AM), http://www.slate.com/articles/news_and_politics/crime/2016/03/the_prosecutors_in_the_tamir_rice_and_laquan_mcdonald_cases_lose_their_primary.html.

11. See John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1941 (2012) (examining and critiquing the Supreme Court's Eighth Amendment case law and death penalty jurisprudence since *Furman v. Georgia*).

acts, former Pennsylvania Governor Edward Rendell¹² urged the state's General Assembly that "the time has come to re-examine the efficacy of the death penalty under these circumstances."¹³ If the governmental bodies could not find a way to "significantly shorten the time between offense and carrying out the sentence" without jeopardizing the "thorough and exhaustive" judicial review required, Rendell asked the legislators to "examine the merits of continuing to have the death penalty on the books — as opposed to the certainty of a life sentence without any chance of parole, pardon or commutation."¹⁴

Though there are now a large number of maximum-security prisons to house violent offenders indefinitely, executions in the United States continue to be carried out sporadically and usually following a lengthy incarceration on death row. Over the past several decades, the numbers of new death sentences and actual executions have declined and are now largely restricted to a few states.¹⁵ Since 1995, inmates have sought relief under the United States Constitution from their execution after such lengthy stays on death row in what have become known as *Lackey* claims.¹⁶ In *Lackey v. Texas*,¹⁷ the petitioner claimed that to execute him after a protracted incarceration on death row — seventeen years in Lackey's case — would violate the Eighth Amendment ban against cruel and unusual punishments. In the years since, state and federal courts have resisted similar claims. It seems that an extended incarceration alone is not enough to rise to a Constitutional violation.

However, when the executions after protracted death row incarceration finally occur, they are the result of an arbitrary and arguably discriminatory system, and run counter to the basic principles of the

12. Edward "Ed" Rendell is a former District Attorney of Philadelphia, former Mayor of Philadelphia, and long-time supporter of capital punishment. After taking office in January 2003, Governor Rendell signed 119 death warrants. When he left office eight years later, not one execution had been administered in the state. Letter from Edward G. Rendell, former Governor of Pa., to Members of the Pa. Gen. Assembly (Jan. 14, 2011) [hereinafter Rendell Letter], <http://www.deathpenaltyinfo.org/outgoing-pennsylvania-governor-urges-state-legislators-review-death-penalty>.

13. *Id.*

14. *Id.*

15. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1, 3 (Nov. 9, 2012), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. Further, most new death sentences are handed down in a few counties within those states. Adam M. Gershowitz, *Pay now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty*, 41 U. RICH. L. REV. 861, 862 (2007) ("Most death penalty cases are prosecuted at the county level, and there are great disparities between the counties.").

16. See *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (mem.).

17. 514 U.S. 1045, 1045 (1995) (mem.).

Eighth Amendment.¹⁸ This argument was made by the petitioner — and ultimately accepted by the district court — in *Jones v. Chappell*.¹⁹ The arbitrariness in handing out the ultimate penalty, Jones argued, was a result of the state of California’s woeful and inexcusable administration of the death penalty.²⁰ This argument is critically different from that of *Lackey* claimants and carries more force. To borrow a metaphor used by Justice Potter Stewart, lightning continues to strike a “capriciously selected random handful” of those sentenced to die.²¹ When one further considers the disproportionate application of the death penalty to minority and indigent communities, this offense to the Constitution is even more repugnant.

This comment contends that, in light of contemporary shifts in public opinion and the current state of the administration of capital punishment across the United States, the continued execution of those whose death sentence is finally carried out only after protracted post-death sentence incarceration violates the “evolving standards of decency that mark the progress of a maturing society” and runs afoul of the Eighth Amendment ban on cruel and unusual punishments. If the delay between sentencing and execution cannot be significantly decreased without offending the due process concerns that exhaustive judicial review is designed to protect, then the current administration of capital punishment must fall as unconstitutional.

Part I of this Comment discusses the current state of capital punishment in the United States with a particular focus on California, which executes few inmates and has a huge backlog of inmates on death row. Part II discusses the Framers’ intent concerning the adoption of the Eighth Amendment of the Constitution, and the penalogical purposes of the death penalty. Part III discusses the history of the *Lackey* claim, the theories advanced in support of the claim, and the near-universal rejection of these claims by lower courts. Part IV examines *Jones v. Chappell* and the theories advanced by the court in finding California’s implementation of its death penalty system violates the Eighth Amendment.

18. See Bessler, *supra* note 11, at 1941.

19. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1052 (C.D. Cal. 2014), *rev’d on other grounds Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

20. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1052 (C.D. Cal. 2014).

21. *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972).

I. BACKGROUND

A. The Current State of Death Penalty Administration in the United States and California

Across the United States, thousands of inmates are currently experiencing protracted pre-execution incarceration on death row. However, there may be no better example of extended delay than that caused by the state of California. In 1978, California's voters adopted the state's current death penalty system.²² Since then, over 900 people have been sentenced to death by a jury, but a mere thirteen have been executed by the state.²³ Of those remaining, ninety-four have died from causes other than execution and thirty-nine were granted relief from their death sentence by the federal courts and have not been resentenced to death.²⁴ At present, 746 inmates are on California's Death Row either awaiting their execution having exhausted all legal avenues or having their sentence reviewed by either a state or federal court.²⁵

In each year since 1978, more individuals in California have been sentenced to death than have been removed from Death Row, causing the population to balloon to its current immense size.²⁶ As the number of those confined to California's Death Row expanded over the past several decades, so too did the delays associated with carrying out the inmates' sentences. Of the 746 inmates on California's Death Row, 346 — more than forty percent — have been there twenty years or longer.²⁷ Nearly all are still litigating the merits of their sentence, either before the California Supreme Court on direct appeal or before

22. That year, California voters passed Proposition 7, known as the Briggs Initiative, which amended the state's death penalty statute and significantly expanded the circumstances in which prosecutors could seek the death penalty. *See* California Commission on the Fair Administration of Justice, Final Report 120 (Gerald Uelmen ed., 2008) [hereinafter COMMISSION REPORT], <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>. For example, the Briggs Initiative more than doubled the number of "special circumstances" under Penal Code Section 190.2 and removed the requirement that the state had to prove that an accomplice was personally present and physically aided the death causing acts before being eligible for the death penalty *Id.*

23. *Jones v. Chappell*, 31 F.Supp.3d 1050, 1053 (C.D. Cal. 2014), *rev'd by Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

24. *Id.*

25. *See* CAL. DEP'T OF CORR. & REHAB., CONDEMNED INMATE LIST 29 (Feb. 2016) [hereinafter "INMATE LIST 2016"], http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmate_listsecure.pdf.

26. *See* Commission Report, *supra* note 22, at 121 (showing the historical growth in the size of California's Death Row).

27. *See* CAL. DEP'T OF CORR. & REHAB., CONDEMNED INMATE SUMMARY LIST 2 (Feb. 2016) [hereinafter SUMMARY LIST], http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf.

the federal courts on collateral review.²⁸ In fact, the majority of an inmate's time on Death Row — approximately 17.2 years — will be spent litigating before the California Supreme Court.²⁹ Those who challenge their sentence and are ultimately denied relief at each level of review face a process that will likely take a disquieting twenty-five years or more, about twice the national average.³⁰ It is unlikely that the people of California intended victims and their families to wait a generation in order to see retributive justice done. And it is also unlikely that due process commands such a wait.

The reasons for the inefficient administration of California's death penalty have been extensively studied, including by the State of California itself. In 2004, the California State Legislature established the California Commission on the Fair Administration of Justice (the "Commission"). The Commission's task was to conduct a comprehensive review of the state's justice system, including its administration of the death penalty.³¹ The Commission completed its charge and identified several factors that contribute to the delay in California's death penalty system.³² Delay is evident at each stage of the post-conviction review process, from the time the death sentence is issued.

B. The Nature of Delay in California's Death Penalty Administration

Under California law, once a death sentence is imposed it is subject to automatic appellate review at the California Supreme Court.³³ But at the outset, indigent death row inmates must wait an average of three to five years to receive court-appointed counsel.³⁴ Until counsel

28. See *Jones*, 31 F. Supp. at 1054, app'x A.

29. See *id.* at 1054.

30. See Gerald Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495, 496 (2009) ("Typically, the lapse of time between sentence and execution is twenty-five years, twice the national average, and is growing wider each year.").

31. See generally COMMISSION REPORT, *supra* note 22 (examining the administration of the California death penalty, concluding that flaws in the system render it dysfunctional, and recommending remedies to repair such dysfunction).

32. See *id.* at 113–15 ("California's death penalty system is dysfunctional. The system is plagued with excessive delay in the appointments of counsel for direct appeals and habeas corpus petitions, and a severe backlog in the review of appeals and habeas petitions before the California Supreme Court.").

33. See CAL. PENAL CODE § 1239; see also OFFICE OF VICTIM'S SERVICES, CALIFORNIA ATTORNEY GENERAL'S OFFICE, A VICTIM'S GUIDE TO THE CAPITAL CASE PROCESS 3, <http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf>.

34. COMMISSION REPORT, *supra* note 22, at 122.

is appointed, there is effectively no activity on the inmate's case.³⁵ Notably, the Commission found that California's underfunding of its death penalty system is a critical source of the problem, as opposed to a lack of qualified lawyers willing to take such cases.³⁶

Next, the briefing process, which includes the time taken by the State to file a response and counsel for the inmate to file a reply brief, will typically add about four years to the inmate's wait.³⁷ Since the California Supreme Court only hears between twenty and twenty-five death penalty appeals per year, another two to three years will likely pass before arguments are scheduled and the case is decided.³⁸ Thus, a typical person sentenced to death should expect to spend between eleven and fourteen years on Death Row from the time of sentencing until the California Supreme Court's disposition of their automatic direct appeal. Importantly, a significant amount of that time is spent waiting for counsel to be appointed and for oral argument to be scheduled — circumstances that are plainly out of the control of the condemned.

Those who are sentenced to death also have a due process right to both state and federal collateral review. A state scheme must provide for "meaningful appellate review" in order to "promote 'reliability and consistency' in death judgments and to guard against arbitrariness and irrationality in the administration of the death penalty."³⁹ The Commission found inordinate delay present at the review phases as well.⁴⁰ As on direct appeal, indigent petitioners have a constitutionally protected right to the assistance of competent court-appointed counsel.⁴¹ The California Supreme Court has noted that

35. Naturally, once counsel has been appointed, she must take the time to learn the extensive trial record, research applicable the law, and file an opening brief with the California Supreme Court. Further, delay in appointing appellate counsel also delays certification of the accuracy of the record, since the accuracy of the record cannot be certified until appellate counsel is appointed. *Id.*

36. *Id.* at 132–33 (recommending that "[t]he most direct and efficient way to reduce the backlog of death row inmates awaiting appointment of appellate counsel would be to again expand the Office of the State Public Defender").

37. *Id.* at 131.

38. *Id.*

39. Steven F. Shatz, *The Meaning of "Meaningful Appellate Review" in Capital Cases: Lessons from California*, 56 SANTA CLARA L. REV. 79, 87, 124 (2016) (concluding that the Supreme Court's inattention to the "genuine narrowing" and "meaningful appellate review" requirements developed in *Furman v. Georgia* has permitted states — most notoriously California — to disregard its death penalty jurisprudence. "In sum, the scheme is so devoid of checks on arbitrariness that comparative proportionality review should be constitutionally required.").

40. *Id.* at 136.

41. See CAL. GOV'T CODE § 68662. Once habeas counsel is appointed, he must learn the lengthy trial record, investigate any potential constitutional or statutory claims, and file the

“[i]deally, the appointment of habeas corpus counsel should occur shortly after an indigent defendant’s judgment of death” in order to “enable habeas corpus counsel to investigate potential claims for relief and to prepare a habeas corpus petition at roughly the same time that appellate counsel is preparing an opening brief on appeal.”⁴² But the Commission found that habeas counsel is typically not appointed until between eight and ten years after the imposition of the death sentence — a delay that is only becoming longer.⁴³ Of the 352 current death row inmates who do not have habeas counsel, 159 have been waiting for more than ten years.⁴⁴

The Commission’s estimate that the California Supreme Court took an average of twenty-two months to decide a state habeas petition after it was filed has more than doubled since 2008.⁴⁵ Ultimately, by the time an inmate’s state habeas petition is decided, she will likely have spent a combined seventeen years or more litigating her direct appeal and petition for habeas review before the California Supreme Court.⁴⁶ Again, a significant amount of this time is spent waiting for counsel to be appointed or for the processes of the court to work themselves out, which is beyond the control of the petitioner. There is no evidence to suggest that this trend will abate or reverse in the near future.

C. The Result of California’s Systemic Delay in Death Penalty Administration

Perhaps unsurprisingly, the vast majority of individuals sentenced to death in California will not be executed by the State. Indeed, the odds indicate that a given inmate’s death will not come by way of execution by California, but by other means — including execution by

habeas petition with the California Supreme Court. The habeas petition must be filed within either 180 days after the final due date for filing the appellant’s reply brief on direct appeal or thirty-six months after the appointment of habeas counsel, whichever is later. *See Jones*, 31 F.Supp.3d at 1058.

42. *In re Morgan*, 50 Cal. 4th 932, 937 (2010).

43. COMMISSION REPORT, *supra* note 22, at 134.

44. *See Jones*, 31 F. Supp. at 1058. To drive home the point, there are currently 76 indigent inmates whose direct appeals have been *fully denied* by the California Supreme Court but still do not have habeas counsel.

45. *Jones*, 31 F. Supp. at 1059 (“Of the 176 capital habeas petitions currently pending before the California Supreme Court, the average amount of time that has elapsed since each petition was filed is 49 months.”).

46. *See Jones*, 31 F.Supp. at 1059.

another State.⁴⁷ Most will die of natural causes or of old age.⁴⁸ As time inevitably moves forward and California's Death Row population grows older,⁴⁹ the number of such deaths is all but certain to increase.

There is a substantial chance that the death sentence of an inmate who survives to exhaust his state and federal review will be vacated.⁵⁰ As of June 2014, only eighty-one of the 511 individuals sentenced to death under the Briggs Initiative amendments before 1997 had completed the post-conviction review process.⁵¹ Thirty-two of them were denied relief by both the state and federal courts, upholding their death sentence and allowing California to execute them.⁵² The other forty-nine individuals — or sixty percent of all death row inmates whose habeas claims have been finally evaluated by the federal courts — were each granted relief from the death sentence by the federal courts.⁵³ Though many more inmates will be denied relief at each stage of post-conviction review, it remains unclear whether they will be executed. No inmate has been executed in California since 2006, but in November 2015 the state lifted its moratorium on executions.⁵⁴

II. THE EIGHTH AMENDMENT'S BAN ON "CRUEL AND UNUSUAL PUNISHMENTS"

The Eighth Amendment of the United States Constitution prohibits the government from inflicting "cruel and unusual punish-

47. Of the inmates sentenced since 1978, 104 have died of natural causes, suicide, or causes other than execution by the State of California. CAL. DEP'T OF CORR. & REHAB., CONDEMNED INMATES WHO HAVE DIED SINCE 1978 (2016), http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf. 15 of the aforementioned inmates — or two more than the *total* number of inmates actually executed by California since the current death penalty system was implemented — were sentenced after 1997. *See id.* (showing that since 1978, 69 inmates have died of natural causes, 25 have committed suicide, 8 have died of other causes, including drug overdose or violence on the exercise yard, and 2 have been executed by other states), http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf.

48. *See id.*

49. *See* SUMMARY LIST, *supra* note 27, at 1 (showing that nearly twenty percent of California's current Death Row population is over sixty years old).

50. *See* Jones v. Chappell, 31 F. Supp. 3d 1050, 1055 (C.D. Cal. 2014).

51. *Id.*

52. *Id.* Thirteen were executed, seventeen are currently awaiting execution, and two died of natural causes before California acted to execute them. *Id.*

53. *Id.*

54. Joe Palazzolo, *U.S. Appeals Court Upholds Death Penalty in California*, Wall St. J. (Nov. 12, 2015, 4:12 PM), <http://www.wsj.com/articles/u-s-appeals-court-upholds-death-penalty-in-california-1447351759>.

ments.”⁵⁵ There is very little direct evidence of what the Framers of the Constitution intended when including this language in the Bill of Rights.⁵⁶ But a historical examination indicates that early American courts did not tolerate protracted death row incarceration.⁵⁷ Instead, these early courts “advocated swift infliction of the death penalty to further penological goals and to prevent the condemned prisoner from suffering unnecessarily.”⁵⁸

When interpreting the Eighth Amendment, the Supreme Court has looked to the English law to help understand the intentions of the Framers because of its influence on the Constitution and the Bill of Rights. The 1689 English Declaration of Rights, born out of the English common law, prohibited “cruel and unusual Punishments.”⁵⁹ Jurists have suggested that the Declaration of Rights likewise prohibited executions after prolonged pre-execution incarceration.⁶⁰ Since the Framers directly incorporated the Declaration of Rights’ cruel and unusual punishments clause into the Eighth Amendment,⁶¹ it suggests that they knew of the English view that protracted pre-execution incarceration was intolerable and chose to enshrine those same protections in the Bill of Rights.⁶² Accordingly, the Eighth Amendment may have been intended to prohibit the State from creating lengthy

55. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). See generally *Cooper Indus., Inc. v. Leatherman Grp., Inc.*, 532 U.S. 424 (2001) (incorporating the Eighth Amendment to the States).

56. See *Furman v. Georgia*, 408 U.S. 238, 258 (1972) (Brennan, J., concurring) (discussing the parameters of the Cruel and Unusual Punishments clause).

57. See Kathleen M. Flynn, “*The Agony of Suspense*”: *How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 299–300 (1997); PHILIP ENGLISH MACKAY, *HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861* 17, 20 (Frank Freidel ed., 1982) (explaining that New York’s colonial laws required execution of convicted felons after the fourth day following sentencing at trial).

58. See Flynn, *supra* note 57, at 300; see also BARRETT PRETTYMAN, JR., *DEATH AND THE SUPREME COURT* 307 (1961) (“Before the beginning of the twentieth century, substantial delay between trial and execution was almost unthinkable, in part because of the wear and tear on the defendant. As one lawyer put it in 1774: ‘The cruelty of an execution after respite is equal to many deaths, and therefore there is rarely an instance of it.’”).

59. An Act for Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1689, 1 W. & M., ch. 2, § 10 (Eng.).

60. See, e.g., *Pratt v. Att’y Gen. for Jam.*, 33 I.L.M. 364, 380 (1993).

61. Flynn, *supra* note 57, at 301. In fact, the clause is a “verbatim copy of a prohibition in the English Bill of Rights of 1689.” Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*,” *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969).

62. See Jessica Feldman, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187, 195 (1999); Flynn, *supra* note 57, at 301–02.

delays and subjecting inmates to prolonged incarceration between sentencing and execution.⁶³

The Supreme Court's jurisprudence regarding the relationship of the Eighth Amendment to capital punishment has been fraught with disagreement.⁶⁴ In *Trop v. Dulles*,⁶⁵ the Court was faced with the question of whether the expatriation of a wartime deserter after he is dishonorably discharged by court-martial violated the Eighth Amendment. Though the validity of the death penalty was not at issue, the Court considered the meaning of the words "cruel and unusual" within the context of the Eighth Amendment. In its analysis, the Court recognized that the words are not "precise, and that their scope is not static."⁶⁶ Further, the fundamental concept underlying the Amendment is "nothing less than the dignity of man."⁶⁷ As Chief Justice Warren instructed, this clause of the Eighth Amendment must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society."⁶⁸ These guiding principles informed the Court's subsequent consideration of the death penalty in the context of the Eighth Amendment.

The Court invalidated the death penalty as administered on both the state and federal levels in 1972.⁶⁹ The petitioners in *Furman v. Georgia*⁷⁰ were convicted of murder and in Georgia, rape in Georgia, and rape in Texas and sentenced to death pursuant to the applicable state statutes.⁷¹ The Court issued a 5-4 decision in which each justice in the majority wrote a separate concurring opinion in support of the judgment.⁷² The majority held that since states employed the death

63. See Feldman, *supra* note 62, at 195.

64. See Glossip v. Gross, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring) ("If we were to . . . once again consider the constitutionality of the death penalty, I would ask that counsel also brief whether our cases that have abandoned a historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled. That case has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind.").

65. *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality decision).

66. *Id.* at 100–01 (citing *Weems v. United States*, 217 U.S. 349 (1910)).

67. *Id.* at 100. Indeed, the Court noted that this punishment "subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated." *Id.* at 102.

68. *Id.* at 101.

69. *Furman v. Georgia*, 408 U.S. 238 (1972).

70. 408 U.S. 238 (1972).

71. *Id.* at 239; *id.* at 240–57 (Douglas, J. concurring); *id.* at 257–306 (Brennan, J. concurring); *id.* at 306–10 (Stewart, J. concurring); *id.* at 310–14 (White, J. concurring); *id.* at 314–74 (Marshall, J. concurring).

72. The short, per curiam opinion held that the "imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and

penalty in an “arbitrary and capricious” manner, especially with regard to the race of the defendant, capital punishment qualified as cruel and unusual punishment within the meaning of the Eighth Amendment.⁷³ As a result, the Court forced Congress and state legislatures to revisit their capital statutes and adopt standardized guidelines for juries to use at sentencing, ensuring that the death penalty would not be administered in a discriminatory or arbitrary manner.

Five years later, the Supreme Court reinstated the use of capital punishment.⁷⁴ In *Gregg v. Georgia*,⁷⁵ the Court considered the question whether the penalty of death for the crime of murder violates the Eighth and Fourteenth Amendments. The Court admonished lower courts applying the Eighth Amendment to consider whether the punishment at issue is excessive.⁷⁶ For a punishment to be excessive, it must either involve unnecessary and wanton infliction of pain or be grossly out of proportion to the severity of the crime.⁷⁷ The Court was satisfied that Georgia’s death penalty statute ensured careful use of the punishment by including critical procedural safeguards.⁷⁸ Importantly, the Court concluded that the penological purposes of deterrence and retribution may serve as a permissible basis for a legislature to impose the death penalty.⁷⁹ It is on these bases that the Court held the implementation of upheld the use of the death penalty in murder cases. As a result, the execution of an inmate after protracted incarceration between sentencing and execution may violate the Eighth Amendment’s proscription if such an execution violates contemporary standards of decency if it is arbitrary or excessive in nature.⁸⁰

Fourteenth Amendments.” *Id.* Chief Justice Blackmun, Justice Powell, and Justice Rehnquist each filed a separate dissenting opinion.

73. *Id.*

74. *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (plurality opinion).

75. 428 U.S. 153 (1976).

76. *Id.* at 173 (Stewart, J.) (“A penalty must also accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’ This means, at least, that the punishment not be ‘excessive.’”) (internal citations omitted).

77. *Id.*

78. The Georgia death penalty statute required separate trial and sentencing proceedings, specific jury findings as to the severity of the crime and the defendant’s nature, and a comparison of each capital sentence’s circumstances with similar cases. *Id.*

79. *Id.* at 182–83.

80. See Feldman, *supra* note 62, at 197–98. A punishment that is arbitrary or excessive necessarily does not serve the penological purposes that the Court used to justify the imposition of the death penalty in its Eighth Amendment analysis. *Id.* at 197–99.

B. Penological Purposes that Underlie the Use of Capital Punishment

1. Deterrence theory is at best a questionable justification for the death penalty.

A common justification relied on in upholding capital punishment is that the execution of the offender fulfills the penological goal of deterrence.⁸¹ Deterrence refers to the theory that the threat of punishment, or even the possibility of punishment, prevents people from breaking the law.⁸² But there are serious problems with justifying capital punishment on the basis of the deterrence theory; many studies have shown the death penalty to have no appreciable deterrent effect.⁸³ This remains true no matter the prisoner's length of incarceration on death row.⁸⁴ Accordingly, if there is no appreciable deterrent effect in executing a prisoner after protracted incarceration on death row, then the deterrence justification is a shaky ground on which to base our system of capital punishment.

2. Retribution theory has been used as a justification for the death penalty.

Contemporary courts and commentators largely view retribution as the most compelling justification for the use of capital punishment. The retribution theory maintains that one who has engaged in conduct that offends society should be punished because that person has done wrong. This imposes a duty onto society to punish all culpable wrongdoers.⁸⁵ Under retributive thinking, an offender's "just desert" is the necessary and sufficient condition for justified punishment.⁸⁶ Both

81. *Gregg*, 428 U.S. at 183.

82. See Dan Crocker, *Extended Stays: Does Lengthy Imprisonment on Death Row Undermine the Goals of Capital Punishment?*, 1 J. GENDER RACE & JUST. 555, 565 (1998).

83. Feldman, *supra* note 62, at 198–99. See, e.g., Dane Archer et al., *Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis*, 74 J. CRIM. L. & CRIMINOLOGY 991, 1010, 1012 (1983) (demonstrating that abolishing the death penalty is often followed by decreases in the homicide rate and summarizing data from various countries). But see Cass Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (noting that “[a]ll in all, the recent evidence of a deterrent effect from capital punishment seems impressive, especially in light of its ‘apparent power and unanimity.’”).

84. See Feldman, *supra* note 62, at 198. Justice Stevens has observed, “[T]he additional deterrent effect from an actual execution now, on the one hand, as compared to seventeen years on death row followed by the prisoner’s continued incarceration for life, on the other, seems minimal.” *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., mem.).

85. Crocker, *supra* note 82, at 561–62 n.54.

86. Russell L. Christopher, *Death Delayed is Retribution Denied*, 99 MIN. L. REV. 421, 434 (2014). Thus, retribution theory maintains: “(i) only those who deserve punishment may be

classical and contemporary retributivists view the punishment of a guilty party as “categorically imperative.”⁸⁷

The “principle of equality,” advanced by Immanuel Kant and other classical retributive thinkers, maintains that the deserved punishment for a given crime is whatever the criminal perpetrated against the victim.⁸⁸ In the context of the death penalty, retribution translates into the belief that because a convicted murderer has killed someone, justice commands that the convicted murderer deserves to die.⁸⁹ We do not require that all punishments for crimes to be of the same nature as the crime itself; so it is arbitrary to rely upon this retaliatory principle as necessarily required by justice when punishing those who have committed murder.⁹⁰

Rather than the specific equality advanced by Kant, G.W.F. Hegel argued that the crime and the punishment must merely be equal.⁹¹ From this evolved the modern retributivist view that the degree of deserved punishment should “fit” the crime and blameworthiness of the offender — that is, be proportional to the degree of gravity of the offense.⁹² Indeed, the Court has admonished, “[t]he concept of proportionality is central to the Eighth Amendment . . . [and encompasses] the ‘precept of justice that the punishment for crime should be graduated and proportioned to the offense.’”⁹³

Many scholars have recognized that there are two types of disproportionate punishment. A penalty imposed may either be too much or too little in relation to the offense. Norval Morris and Michael Tonry have observed that a sufficiently thorough and principled retributivist would claim that the punishment inflicted on one who has committed a crime “should be exactly ‘as much as he deserves, no more, no

punished; (ii) all those who deserve punishment must be punished; and (iii) those who deserve punishment must be punished neither less nor more than what they deserve.” *Id.* at 435.

87. *Id.* at 435.

88. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 141 (Mary Gregor ed. & trans., Cambridge Univ. Press 1991).

89. Crocker, *supra* note 82, at 562. Many have argued that a flaw with this reasoning is that under this logic, “if we kill killers, we should also rape rapists, rob robbers, and beat those convicted of battery.” See Feldman, *supra* note 62, at 197.

90. Feldman, *supra* note 62, at 197.

91. GWF HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 101, 129 (“[E]quality remains merely the basic measure of the criminal’s *essential* deserts, but not of the specific external shape which the retribution should take. It is only in terms of this specific shape that theft and robbery [on the one hand] and fines and imprisonment etc. [on the other] are completely unequal, whereas in terms of their value, i.e. their universal character as injuries . . . they are comparable.”).

92. Christopher, *supra* note 86, at 437.

93. *Graham v. Florida*, 560 U.S. 48, 59 (2010).

less.’”⁹⁴ These principles of proportionality are key to the modern understanding of retributivism. Jean Hampton has explained, “punishments that are too lenient are as bad as (and sometimes worse than) punishments that are too severe.”⁹⁵ As such, punishments imposed on an offender that are either too severe or too lenient are disproportionate, and thus, unjustified under retribution theory.

3. The penological purposes of retribution and deterrence are not served where there is substantial delay in execution.

There may not be a more clear example of a punishment that is too severe and unjustified under retributivism than when an inmate must wait decades on death row, not as a result of desperate or frivolous litigation, and is subsequently executed by the State. The Italian philosopher Cesare Beccaria maintained, “[t]he more prompt the punishment is and the sooner it follows the crime, the more useful it will be. I say more just, because it spares the criminal the useless and cruel torments of uncertainty”⁹⁶ Similarly, Justice Powell has commented that “[t]he retributive value of the penalty is diminished as imposition of sentence becomes ever farther removed from the time of the offense.”⁹⁷

Even proponents of capital punishment agree that substantial delay before execution is objectionable because it undermines the retributive purpose of punishment. Chief Justice Rehnquist has noted, “[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution.”⁹⁸ In reference to substantial delay across the country, Ninth Circuit Chief Judge Alex Kozinski and Sean Gallagher observed that “[w]hatever purposes the death penalty is said to serve — deterrence, retribution, assuaging the pain suffered by victims’ families — these purposes are not served by the system as it now operates.”⁹⁹

Though there is some agreement between proponents and opponents of the death penalty as to whether the goals of retribution are

94. NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION* 84 (1990).

95. Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1691 (1991).

96. Christopher, *supra* note 86, at 423.

97. Lewis F. Powell, Jr., *Capital Punishment*, 102 *HARV. L. REV.* 1035, 1041 (1989).

98. *Coleman v. Balkcom*, 451 U.S. 949, 960 (1981) (Rehnquist J., dissenting from denial of certiorari).

99. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-on Sentence*, 46 *CASE W. RES. L. REV.* 1, 4 (1995).

served after a protracted delay, there is a sharp divide as to whether such delay is unconstitutional, and if so, what remedy is appropriate.¹⁰⁰ This debate is illuminated by what have come to be known as *Lackey* claims.

III. LACKEY CLAIMS AND JUDICIAL RESISTANCE

A. The Appearance of Lackey Claims in the Federal Courts

In 1995, the claim that the execution of a prisoner who had spent seventeen years on death row would violate the Eighth Amendment was brought to the Supreme Court for the first time in *Lackey v. Texas*.¹⁰¹ Though the Court denied certiorari, Justice Stevens, joined by Justice Breyer, authored a dissent from the denial of a writ of certiorari.¹⁰² In his memorandum, Justice Stevens noted that, “[t]hough novel, petitioner’s claim is not without foundation.”¹⁰³ In the light of the “horrible feelings” of uncertainty and mental anguish associated with the prolonged delay of execution, Justice Stevens questioned whether executions continued to serve the purposes of deterrence and retribution after such delays.¹⁰⁴ The state’s interest in retribution was satisfied by the “severe punishment already inflicted” and the “additional deterrent effect from an actual execution . . . seem[ed] minimal.”¹⁰⁵

Additionally, Justice Stevens acknowledged that some foreign jurisdictions recognize *Lackey* claims.¹⁰⁶ He also noted that it may be appropriate to consider whether the delays are a result of the prisoner’s abuse of the system, the prisoner’s legitimate right to review, or deliberate or negligent action by the State.¹⁰⁷ Accordingly, recognizing the legal complexity of the claim and the “far reaching” impact resolving the issue would have, Justice Stevens proposed that state and lower federal courts “serve as laboratories” and consider the issue, and its implications, further.¹⁰⁸

Unfortunately, in the wake of Justice Stevens’s invitation, lower courts have uniformly rejected similar claims or have avoided the is-

100. See Christopher, *supra* note 86, at 425.

101. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (mem.).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Lackey*, 514 U.S. at 1046–47.

107. *Id.*

108. *Id.*

sue by deciding such cases on alternative procedural grounds, while the Supreme Court has repeatedly denied certiorari. Lower courts most often avoid reaching the substance of the *Lackey* claim by dismissing the case before it on procedural grounds.¹⁰⁹ For example, in *Knight v. Florida*, Justice Thomas wrote a concurrence supporting the denial of the *Lackey* claim at issue.¹¹⁰ Justice Thomas maintained that a defendant may not “avail himself of the panoply of appellate and collateral procedures then complain when his execution is delayed.”¹¹¹ Accordingly, Justice Thomas concluded that the Court’s recognition of *Lackey* claims would “further prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution.”¹¹²

While Justices Stevens and Breyer have urged the Court to resolve the *Lackey* issue, Justice Thomas has continued to support the dismissal of such claims as unsupported by precedent or by the Constitution.¹¹³ Since the Supreme Court has refused to resolve the issue of whether these claims have merit, inmates continue to raise such claims even as lower courts continue to resist them.¹¹⁴ Though courts have declined to grant relief to *Lackey* claimants, most tend to dismiss such claims on procedural grounds, rather than reaching the substance of the claim. Many courts discuss their thoughts about the claim’s substance, but do so in non-binding dicta. As such, the *Lackey* claim remains an issue of first impression in many state and federal courts.¹¹⁵

B. Theories Underlying Lackey Claims

1. Delayed executions do not serve any penological purpose.

Lackey claimants contend that execution after prolonged imprisonment on death row does not serve either of the state’s interests in deterrence or retribution.¹¹⁶ The deterrent value of any punishment depends on the speed with which the state administers a sentence.¹¹⁷ Without the prompt implementation of penalties, the deterrent value

109. See, e.g., *Knight v. Florida*, 528 U.S. 990 (1999); *Duncan v. Carpenter*, No. 3:88-00992, 2014 WL 3905440, at *1 (M.D. Tenn. Aug. 11, 2014).

110. *Knight*, 528 U.S. at 990 (Thomas, J., concurring).

111. *Id.*

112. *Id.*

113. See *Johnson v. Bredeesen*, 558 U.S. 1067 (2009) (Thomas, J., concurring).

114. Sun, *supra* note 4, at 1597.

115. Sun, *supra* note 4, at 1597.

116. See Flynn, *supra* note 57, at 303-04.

117. See Flynn, *supra* note 57, at 304.

of a given form of punishment erodes. Because the deterrent value of even the most quickly imposed death sentences are debatable, “execution after an inmate’s prolonged incarceration on death row logically offers even less value in furtherance of that goal.”¹¹⁸

Additionally, protracted death row delays combined with execution may in fact result in punishment that exceeds the state’s interest in retribution.¹¹⁹ Though the Court has found the incidental physical pain of execution is constitutionally permissible, Eighth Amendment analysis turns in part on whether pain inflicted is a *necessary* part of the punishment.¹²⁰ Arguably, neither protracted delay nor psychological suffering is inherently necessary to a death sentence.¹²¹ Thus, *Lackey* claimants argue, because long time death row inmates undergo punishment distinct from execution, and because neither severe mental suffering nor prolonged incarceration is a necessary aspect of execution, they experience gratuitous pain that offends the Eighth Amendment.

Even if protracted delay itself is not harmful to the inmate, execution after such a delay may be excessive. Professor Russell L. Christopher argues that the combination of extended death row incarceration and execution (the “Combination”) is unjustified under retribution theory.¹²² He concludes that this Combination is unjustified regardless of whether the protracted death row incarceration constitutes additional punishment aggravating capital punishment or a life extending, beneficial mitigation of capital punishment.¹²³ As a result of being unjustified under retributive theory, the Combination loses its primary, and most compelling, support for its constitutionality.

2. The mental suffering caused by pre-execution delay is torture.

Though delay significantly undermines the historical and penological justifications for the death penalty, focusing on the length of confinement alone disregards the full extent of Mr. Lackey’s Eighth Amendment argument.¹²⁴ The theory is succinctly described as fol-

118. See Flynn, *supra* note 57, at 304–5; *Lackey v. Texas*, 514 U.S. 1045, 1421–22 (1995) (mem.) (stating the deterrent value of execution after protracted incarceration seems “minimal”).

119. See Flynn, *supra* note 57, at 305.

120. See *id.* at 304.

121. See generally *id.* at 304.

122. Christopher, *supra* note 86, at 428–29. Professor Christopher argues from the premise, without accepting it, that retribution theory does in fact justify capital punishment. *Id.* at 429.

123. Christopher, *supra* note 86, at 429.

124. See Flynn, *supra* note 57, at 305–06.

lows: Pre-execution delay is cruel and unusual because it “subjects one to extraordinary psychological duress . . . for a period of decades.”¹²⁵ As noted by Justice Stevens in *Lackey*, the link between delay and psychological torture in Eighth Amendment law goes back to the Supreme Court’s statement in 1890 that “one of the most horrible feelings to which [an inmate] can be subjected . . . is the uncertainty . . . as to the precise time [of] his execution.”¹²⁶ Thus, *Lackey* claimants argue, if psychological torture is an immutable characteristic of protracted death row incarceration then it provides a basis for a claim that inordinate delay constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.

C. Arguments Against Recognizing *Lackey* Claims

Death penalty proponents provide several principal arguments against accepting *Lackey* claims as meritorious — and the rejecting of the contention that execution after protracted death row incarceration is unconstitutional. The arguments primarily coalesce around the view that recognition of a *Lackey* claim would be counterproductive, the notion that prisoners are responsible for and benefit from the delay, and the lack of relevant precedent that substantial delay in administering the death penalty is unconstitutional.¹²⁷ As an example, capital punishment proponents highlight the fact that there is no binding American precedent establishing that execution after protracted incarceration is unconstitutional.¹²⁸ In *Knight v. Florida*, Justice Thomas observed that there is no support in Supreme Court jurisprudence or in American constitutional law “for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”¹²⁹ Indeed, the Court has resisted granting certiorari to even consider the relative merits of *Lackey* claims and international precedent finding such punishment illegitimate is neither binding nor persuasive.

125. Ryan S. Hedges, *Justices Blind: How the Rehnquist Court’s Refusal to Hear a Claim for Inordinate Delay of Execution Undermines its Death Penalty Jurisprudence*, 74 S. CAL. L. REV. 577 (2001).

126. *Lackey v. Texas*, 514 U.S. 1045, 1421–22 (1995) (mem.).

127. Christopher, *supra* note 86, at 449.

128. *See, e.g.*, *Thompson v. Sec’y for Dep’t of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (denying a *Lackey* claim based on “the total absence of Supreme Court precedent”); *Knight v. Florida*, 528 U.S. 990, 990 (Thomas, J., concurring) (supporting the denial of certiorari).

129. *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring).

Capital punishment proponents argue recognition of *Lackey* claims would have the counterproductive effect of exacerbating the delay that the condemned complains of. As mentioned above, Justice Thomas has suggested that allowing a *Lackey* claim would “prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution.”¹³⁰ This is buttressed by the argument that the delays in execution result from the prisoner’s frivolous appeals and as such, the delay is the choice of, under the control of, and the responsibility of, the prisoner.¹³¹ Accordingly, Justice Thomas has somewhat callously concluded that any given prisoner on death row may explore other options: “Petitioner could long ago have ended his ‘anxieties and uncertainties’ by submitting to what the people of Florida have deemed him to deserve: execution.”¹³²

Finally, capital punishment proponents — and *Lackey* claim opponents — maintain that protracted incarceration on death row is a byproduct that results from adherence to due process considerations and constitutional safeguards.¹³³ Many commentators view this as a benefit that flows to the prisoner. Judge Kozinski has characterized prisoners’ efforts to challenge their sentences as “diminishing the severity of their sentence by endlessly postponing the day of reckoning.”¹³⁴ Thus, the substantial delay in execution bestows upon the inmate on death row the benefit of allowing them to extend their lives. The inability to see eye to eye regarding the seriousness of *Lackey* claims and whether the execution of an offender after a protracted incarceration on death row offends the Eighth Amendment of the Constitution, has added much fuel to the fire of this raging debate.

130. *Id.*

131. Christopher, *supra* note 86, at 451.

132. *Foster v. Florida*, 537 U.S. 990, 990 (2002).

133. Critically, it is precisely California’s commitment to achieve the goals of “justice, fairness, and accuracy” in its administration of the death penalty that has contributed to the inordinate delay that we see today. *See* COMMISSION REPORT, *supra* note 22, at 157. Indeed, searching review is needed in order to ensure that justice is achieved and not one innocent person is executed by the State. But this system of review as administered in California works to defeat the purposes of capital punishment by “robb[ing] the penalty of much of its deterrent value” and “diminish[ing] [the retributive value] as imposition of the sentence becomes ever farther removed from the time of the offense.” *See* Powell, Jr., *supra* note 97, at 1041–42.

134. Christopher, *supra* note 86, at 451–52.

IV. *JONES V. CHAPPELL* AND ITS IMPACT ON
THE *LACKEY* ANALYSIS

A. The District Court's Decision in *Jones v. Chappell*

In July 2014, Judge Cormac Carney of the United States District Court for the Central District of California issued an order declaring California's death penalty system unconstitutional. The court then vacated the death sentence of the Petitioner, Mr. Ernest Jones.¹³⁵ Before the court's ruling, Jones had spent nineteen years on California's Death Row uncertain as to when, or whether, his execution would come.¹³⁶ Jones waited four years before the State appointed counsel to represent him on direct appeal after he was convicted of murder and rape and received a death sentence in April 1995.¹³⁷ Four years later, in March 2003, the California Supreme Court affirmed his conviction and the judgment became final after the Supreme Court denied certiorari on October 21, 2003.¹³⁸ In all, Jones spent approximately eight years litigating his automatic direct appeal.¹³⁹

While still litigating his direct appeal, Jones's state habeas counsel was appointed in October 2000, five years after he was sentenced to death.¹⁴⁰ By October 2002, his counsel filed his state habeas petition, which the California Supreme Court denied in March 2009, six-and-a-half years later and more than fourteen years after Jones was sentenced to death.¹⁴¹ The California Supreme Court denied the petition in an unpublished order. In fact, There was "[n]o hearing [] conducted, and no briefing was provided by the State beyond an informal reply."¹⁴² Finally, Jones, through counsel, filed his petition for federal habeas relief on March 10, 2010.¹⁴³ Initial briefing on the petition was

135. See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1052 (C.D. Cal. 2014), *rev'd on other grounds* *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

136. *Id.* at 1053–54.

137. *Id.* at 1060. As noted *supra*, this extraordinary wait of four years for court appointed counsel on direct appeal to the California Supreme Court is about the average wait time for the typical death row inmate in the state.

138. See *People v. Jones*, 29 Cal. 4th 1229 (2003) (C.D. Cal.), *cert. denied*, 540 U.S. 952 (2003).

139. See *Jones*, 31 F. Supp. 3d at 1060. Notably, Mr. Jones spent considerably less time waiting on California's Death Row while litigating his automatic direct appeal than the 12 to 14 years spent by most of those sentenced to death. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* This practice contributes to delay in federal proceedings and results in more affirmations of death sentences.

143. *Id.*

completed approximately four years later in January 2014.¹⁴⁴ This federal habeas petition was the petition before Judge Carney in the District Court.

Critically, in April 2014 Jones amended his petition to broaden the nature of his claim of unconstitutional delay in the administration of the death penalty by California.¹⁴⁵ As opposed to asserting a traditional *Lackey* claim, his amended claim asserted that as a result of the “systematic and inordinate delay in California’s post-conviction review process, only a random few of the hundreds of individuals sentenced to death will be executed, and for those that are, execution will serve no penological purpose.”¹⁴⁶ This claim was ultimately accepted by the District Court — after nearly two decades on California’s Death Row, Mr. Jones was finally adjudged worthy of relief on the merits of his claim.¹⁴⁷

In its decision, that has since been remanded by a three judge panel of the Ninth Circuit Court of Appeals,¹⁴⁸ the District Court discussed the principles driving the decisions in *Furman* and *Gregg*. The court noted that the *Furman* decision was rooted in part in the Court’s recognition that arbitrary imposition of the death penalty could not justly further society’s penological goals of deterrence and retribution.¹⁴⁹ The court further found that for an “arbitrarily selected few” of the inmates on California’s Death Row, whether they will be executed depends on “how quickly the inmate proceeds through the State’s dysfunctional post-conviction review process.”¹⁵⁰ Importantly, the court noted that while the arbitrariness addressed in *Furman* was in reference to the selection of who would be sentenced to death, the court reasoned that the Eighth Amendment similarly proscribes a state from “randomly select[ing] which trivial few of those condemned

144. *Id.*

145. *Id.*

146. *Id.* at 1060–61.

147. *Id.* at 1068–69.

148. *See Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

149. *Jones*, 31 F. Supp. 3d at 1061.

150. *Id.* at 1062. (“Yet their selection for execution will not depend on whether their crime was one of passion or of premeditation, on whether they killed one person or ten, or on any other proxy for the relative penological value that will be achieved by executing that inmate over any other. Nor will it even depend on the perhaps neutral criterion of executing inmates in the order in which they arrived on Death Row. Rather, it will depend upon a factor largely outside an inmate’s control, and wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance . . .”).

it will actually execute.”¹⁵¹ Thus, the court held that, were Mr. Jones executed in a system where so many are sentenced to death but a random few are in fact executed, would “offend the most fundamental of constitutional protections—that the government shall not be permitted to arbitrarily inflict the ultimate punishment of death.”¹⁵²

At this point, it is important to note the character of the arbitrary selection of those who will be executed by the state. Judge Carney urges that the execution of a selected few inmates will depend on “how quickly the inmate proceeds through the State’s dysfunctional post-conviction review process.”¹⁵³ Thus, their execution will not depend on whether they committed a crime of passion or premeditation, the number of victims harmed by the convicted, or even the order in which they arrived to Death Row. Instead, execution will depend on a circumstance “wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance” and factors that are generally out of the petitioner’s control.¹⁵⁴ To be sure, inmates are not literally taken to the yard, lined up, and told to draw slips of paper in order to determine who will be executed next, but in critical ways the decision of who will be executed by the state is just as arbitrary and capricious. Though this state-perpetrated and systemic unfairness is taking place at the execution phase, rather than the trial or sentencing phase, it is equally odious to the Constitution.

B. The Impact of *Jones v. Chappell* on the *Lackey* Analysis

In the wake of the in *Jones* holding, petitioners in other jurisdictions have attempted to challenge their death sentences on the same or similar grounds. In concluding, the system violates the Eighth Amendment’s ban on cruel and unusual punishments, the *Jones* court found that arbitrary factors determined whether a very select few of hundreds of individuals sentenced to death would actually be executed, therefore serving no penological purpose.¹⁵⁵ So far, lower

151. *Id.* at 1063. (“Arbitrariness in execution is still arbitrary, regardless of when in the process the arbitrariness arises.”).

152. *Id.* at 29.

153. *Id.* at 1062.

154. *Id.* at 1062.

155. *See id.* at 29.

courts in the various jurisdictions, on both procedural grounds as well as substantive grounds, have rejected these claims.¹⁵⁶

For example, in *Duncan v. Carpenter*,¹⁵⁷ the United States District Court for the Middle District of Tennessee directly addressed the reasoning and holding in *Jones v. Chappell*.¹⁵⁸ At the time the court was considering his claims, petitioner Duncan had served twenty-two years of his death sentence on Tennessee's Death Row.¹⁵⁹ By 1986, the Tennessee Supreme Court affirmed his convictions and sentences on direct appeal; the Supreme Court denied certiorari.¹⁶⁰ Subsequently, Duncan filed his first petition for post-conviction relief in April 1986.¹⁶¹ He then filed a second post-conviction petition in December 1988, which was also dismissed after an evidentiary hearing.¹⁶²

While his appeal from the second post-conviction petition was pending before the Tennessee Court of Criminal Appeals, Duncan filed a *third* post-conviction petition that, as one may expect, was likewise denied after an evidentiary hearing.¹⁶³ In 1997, the Tennessee Court of Criminal Appeals affirmed the denials of Duncan's second and third post conviction petitions and in 1998, the Tennessee Supreme Court denied permission to appeal.¹⁶⁴ In all, Mr. Duncan spent 14 years litigating his direct appeal.¹⁶⁵

Duncan's original federal petition for writ of habeas corpus — filed in November 1988, before the conclusion of his state proceedings

156. See, e.g., *Michaels v. Chappell*, 2014 WL 7047460 (S.D. Cal. 2014) (denying petitioner's motion to amend his petition to include a *Jones* claim as barred by *Teague v. Lane* and untimely); *Duncan v. Carpenter*, 2014 WL 3905440 at *1; *United States v. Sampson*, 2015 WL 7962394 (D. Mass. 2015) (denying petitioner's claim in part because petitioner did not submit evidence that delay in the federal administration of the death penalty is sufficiently similar to that of California's delay to permit relief).

157. *Duncan v. Carpenter*, 2014 WL 3905440 at *1.

158. *Id.* at *15.

159. *Id.* at *1. On April 1, 1983, Duncan, who was convicted of first degree murder, armed robbery, and aggravated rape, was sentenced to death and two consecutive life sentences. *Id.*

160. *Id.*

161. *Id.* This petition was denied after an evidentiary hearing, the Tennessee Court of Criminal Appeals affirmed the denial and the Tennessee Supreme Court denied permission to appeal. *Id.*

162. *Id.*

163. *Id.* at *1.

164. *Id.*

165. *Id.* at *1. While still litigating his second post-conviction petition, Mr. Duncan, much like Mr. Jones, filed a state petition for writ of habeas corpus, the dismissal of which was affirmed on appeal in August 1993. In 2009, he filed a second state petition for writ of habeas corpus, which was also dismissed and affirmed on appeal one year later in 2010. *Id.*

— was before the District Court.¹⁶⁶ Among a “panoply” of claims, Duncan alleged that his execution would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because of the passage of time between his conviction and execution.¹⁶⁷ The court rejected his claim on procedural grounds, finding that the issue was never properly raised in state court.¹⁶⁸

In dicta, the court considered the merits of a *Jones* claim, at least to some extent.¹⁶⁹ At the outset, the court noted that no federal appellate court has found that protracted incarceration prior to execution constitutes cruel and unusual punishment and, in fact, federal appellate courts have consistently rejected *Lackey* claims.¹⁷⁰ Then, the court expressly distinguishes *Jones* on the ground that the opinion was based on an exhaustive record of facts specific to California’s death penalty and involved other claims unrelated to extraordinary delay in an individual’s case.¹⁷¹

In the court’s view, Duncan did not offer “any similar evidence about chronic, systemic delays in Tennessee’s death penalty process and relies solely on the delay in his individual case. Simple reference to the procedural history of Petitioner’s case quickly dispels any hint of similarity between the delay in his case and those at issue in *Jones*.”¹⁷² As a result, the court concluded that systematic failures in Tennessee’s process “cannot be blamed” for Mr. Duncan finding it necessary to follow what may have been the conclusion of his state review process with two additional post-conviction appeals as well as two state habeas proceedings.¹⁷³ Thus, even if the court were to reach the merits of Mr. Duncan’s claim, it would deny him relief because the delay between his conviction and possible execution was “admittedly occasioned in large part by his own voluntary pursuit of state and fed-

166. *Id.* at *2. This petition had held in abeyance with leave to reactivate following the exhaustion of the petitioner’s state remedies. It was reactivated by the court on December 10, 1999. *Id.*

167. *Id.* at *15.

168. *Id.* at *15. Notably, this is similar to the grounds on which Mr. Jones’ claim was denied by the Ninth Circuit. See *infra* note 169 and accompanying text.

169. *Duncan*, 2014 WL 3905440 at *15

170. *Id.*

171. *Id.*

172. *Id.* at *16. This distinction regarding the procedural history of Duncan’s case is notable because it indicates that the court is able to distinguish between frivolous and meritorious cases in the context of both *Lackey* and *Jones* claims.

173. *Id.*

eral remedies,” strongly — and perhaps correctly in this case — echoing the sentiments of Justice Thomas.¹⁷⁴

While *Duncan* is rather easily distinguishable from *Jones*, it highlights that district courts in habeas proceedings are able to distinguish between delay caused by the frivolous claims of the petitioner as opposed to meritorious claims of systemic — and unconstitutional — delay on the part of the state. The role that Justice Stevens indicated that lower courts should play in the determination of these types of claim.

The California Supreme Court has also indicated its disfavor toward accepting a *Jones* claim. In *People v. Seumanu*,¹⁷⁵ On direct appeal, the petitioner in *Seumanu* filed a supplemental opening brief that included a *Jones* claim.¹⁷⁶ Though the court noted it did not reach the merits of the claim, in dicta, the court conducted a *Jones* claim analysis. The court began by noting that such a claim is “subtly different from the Eighth Amendment claim rejected by *People v. Anderson* [a *Lackey* claim].”¹⁷⁷ The court then noted that, even on the record before the *Jones* court, it had not been proved that systemic delays in California’s death penalty administration caused delays that violate the Eighth Amendment.¹⁷⁸ In the court’s view, “such delays are the product of ‘a constitutional safeguard, not a constitutional defect, because they assure careful review of the defendant’s conviction and sentence.”¹⁷⁹ As such, the court concluded that “defendant has not on this record demonstrated that delays in implementing the death penalty under California law have rendered that penalty impermissibly arbitrary.”¹⁸⁰

174. *Id.* at *16; *see also supra* Part III-A.

175. 61 Cal.4th 1293 (2015).

176. *Id.* at 1368.

177. *Id.* at 1370.

178. *Id.* (“Our conclusion would be different were the California Department of Corrections and Rehabilitation to ask all capital inmates to draw straws or roll dice to determine who would be the first in line for execution. But the record in this case does not demonstrate such arbitrariness.”).

179. *Id.* at 1374.

180. *Id.* However, the California Supreme Court was careful to note that such a claim is “more appropriately presented in a petition for habeas corpus, where a defendant can present necessary evidence outside the appellate record.” *Id.*

C. Ninth Circuit Review of the *Jones* Decision

In November 2015, a three judge panel of the Ninth Circuit reviewed the district court's decision in *Jones*.¹⁸¹ In a majority opinion joined by two judges, and in which there was a separate concurring opinion, the Ninth Circuit reversed the lower court's decision, concluding that Jones' claim was barred from habeas review by *Teague v. Lane*.¹⁸² In its analysis, the court admonished that *Teague* "prohibits the application of a 'new rule' on collateral review."¹⁸³ The court then provided its formulation of the rule that Jones was advocating as: "[A] state may not arbitrarily inflict the death penalty."¹⁸⁴ With this formulation, the court rejected the condemned's claim as a "rule" due to its "high level of generality."¹⁸⁵

Further, the court reasoned that *Furman* did not "dictate" a rule that state post-sentencing procedures are unconstitutionally arbitrary if they produce long delays that result in few actual executions and uncertainty as to which prisoners will be executed.¹⁸⁶ In the majority's view, there is a "'simple and logical difference' between *Furman*'s rule prohibiting *unfettered discretion* by a jury deciding whether to *impose* the death penalty and a rule prohibiting *systemic lengthy delays* resulting from a state's post-sentencing procedures in the *carrying out* of that sentence"¹⁸⁷ The difference being that the delay in carrying out a death sentence is a function of the courts effort to explore sufficiently any argument that may save someone's life once they have been convicted.¹⁸⁸ On these bases, the majority rejected the "new rule" because it would not have been "apparent to all reasonable jurists" at the time that Jones' conviction became final.¹⁸⁹

181. *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

182. *Teague v. Lane*, 489 U.S. 288 (1989) (holding that federal courts may not consider novel constitutional theories on habeas review).

183. *Jones*, 806 F.3d at 546–47. The court further explains that "[a] new rule is defined as a rule that was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* (citing *Whorton v. Bockting*, 549 U.S. 406, 416 (2007)).

184. *Id.* at 546 (9th Cir. 2015). As discussed above, this is arguably not a fully accurate formulation of Jones' claim. However, the court notes that it is not convinced that a Jones claim substantially differs from a *Lackey* claim. *Jones*, 806 F.3d at 20 (citing *Andrews v. Davis*, 798 F.3d 549 (9th Cir. 2015)).

185. *Jones*, 806 F.3d at 22.

186. *Id.* at 551.

187. *Id.* (citing *Saffle v. Parks*, 494 U.S. 484, 491(1990)) [emphasis in original].

188. *Id.* This is an important difference, but this Comment contends that though there are noble reasons for this delay — which is state action — its effect is nonetheless repugnant to the Constitution.

189. *Id.* at 552.

Though concurring in the judgment, Judge Watford wrote in a separate opinion that he would not have concluded that Jones' relief was barred by *Teague*, "which bars federal courts from applying 'new rules of constitutional criminal *procedure*' to cases on collateral review."¹⁹⁰ Judge Watford asserted that the "new" rule announced by the district court, forbidding the execution of anyone convicted of a capital offense in California, is substantive rather than procedural — thus not barred by *Teague*.¹⁹¹ Instead, he would have reversed on the ground that Jones had not exhausted all of his remedies in state court because he did not present the particular argument to the California Supreme Court.¹⁹²

Though Jones was denied relief by the three judge panel of the Ninth Circuit — in line with the trend of courts sidestepping the merits of claims resemble *Lackey* — Jones may still find relief. The court was careful to note that Jones may still seek relief through other means, including relief from the California Supreme Court.¹⁹³ But it is the the federal courts, including the Supreme Court, that need to consider the merits of his claim.

CONCLUSION

Shifts in public opinion and the woefully ineffective administration of capital punishment in various states, including California, has brought forth the question of whether to continue to execute those who have been sentenced to death after protracted incarceration between sentencing and execution, through systematic and arbitrary state action, runs afoul of the "evolving standards of decency that mark the progress of a maturing society." If the delay between sentencing and execution cannot be significantly decreased without offending the due process concerns that exhaustive judicial review is designed to protect, then the current administration of capital punishment must fall as unconstitutional. Though the Ninth Circuit reversed the district court's favorable resolution of Mr. Jones' claim, opponents of the death penalty may yet take heart; the data indicates that he will

190. *Jones v. Davis Davis*, 806 F.3d 538, 553 (9th Cir. 2015) (Watford, J. concurring) (citing *Beard v. Banks*, 524 U.S. 406, 414 (2004)) (emphasis in original).

191. *Id.* at 553 (9th Cir. 2015).

192. *Id.*

193. *Id.* at 546, n.2 ("[O]ur ruling today in no way prejudices Petitioner's ability to try to obtain relief from his capital sentence through means other than his amended claim 27 on federal habeas review. He remains free to seek relief through other means, including the state courts.").

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not be executed by the arbitrary capital punishment scheme that he sought to invalidate.

