

## PRETEXT AND JUSTIFICATION: REPUBLICANISM, POLICING, AND RACE

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*On April 4, 2015, Police Officer Michael Slager gunned down Walter Scott in North Charleston, South Carolina with a cool that resembled target practice. Scott's name joined a heartbreaking list of men of color killed by unjustified police violence. The video of the incident also broadcast to the world the spectacular violence always lurking beneath the surface of daily interactions between police and men of color.*

*The "Black Lives Matter" movement has fiercely insisted Scott's death not be viewed as an isolated incident but understood as woven into the fabric of American policing. American policing harms individual people of color, guts communities and establishes an image of Black or brown men as criminal. Tragically, current Fourth Amendment law insulates the very police practices that allow a different policing regime for communities of color and ensures that the rising death toll of unjustly killed Black and brown men will continue.*

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*This Article reveals why policing reform cannot be achieved by piecemeal alteration of case law or even by focusing on doctrinal law alone. First, the Article makes clear why the racial harms of contemporary policing are borne by individual persons of color, unravel communities of color, and change the very social meaning of race. Yet, careful examination of Fourth Amendment doctrine reveals the Supreme Court's commitment to viewing Fourth Amendment rights as individually held and thus devoid of racial and social context. This view purposefully silences the Fourth Amendment's ability to address the volatile interaction of race and policing. Without a philosophical transformation placing the Fourth Amendment on different theoretical grounds, our bonds as civic equals, there can be little progress.*

*Changing our understanding of Fourth Amendment justification allows us to imagine a new world of policing. A world where policing must secure civic bonds requires disabling the ability of police to use pretextual stops as a tool of racial domination. But further, this Article illustrates how a different political justification naturally leads to untying powers of police we take for granted; separating traffic or order maintenance from criminal investigation. Thus, this Article serves as the philosophical grounding for the often-invoked shift of policing from a warrior culture to a guardian culture, illustrating not only how to prevent policing from standing as racial oppression but viewing policing as in service of our civic bonds.*

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## INTRODUCTION

On April 4, 2015, Walter Scott—a father, former Coast Guard officer, forklift operator, and licensed massage therapist who was engaged to be married—was driving his twenty-five-year-old Mercedes to buy auto-parts in North Charleston, South Carolina. Perhaps Scott was thinking about the cost of keeping up his car, his impending wedding, or mulling over his struggles to stay current on child support payments to his four children. From experience, I can well imagine how Scott’s heart suddenly sank when the flashing lights and siren pierced his thoughts. Like many Black men, my heart rate escalates just thinking about it. I know the dread and tension when you see the police cruiser in the mirror. The mixed anger and humiliation as you feel—actually feel—the eyes of the police reading you, scanning your driving, drinking in your hue. Most likely, Scott thought something along the lines of, “not again,” “of course,” or even, “what Bul;\*@#!.” I have little doubt of the mix of weariness, tension and outrage that filled him. Police officer Michael Slager pulled Walter Scott over for a non-functioning taillight.<sup>1</sup>

Friends and family speculate it was Scott’s fear of being jailed for an outstanding warrant for overdue child support payments that caused Scott to exit his car and run. Whatever the reason, Scott, with a lopping gait, ran from his car. Officer Slager’s response—there is no other way to describe this—was to train his gun on Scott’s back, set his stance, and coolly fire eight times at him. He did it with such calculation that Scott’s

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<sup>1</sup> See Alan Blinder & Marc Santora, *Officer Who Killed Walter Scott Is Fired, and Police Chief Denounces Shooting*, N.Y. TIMES (Apr. 8, 2015), <http://www.nytimes.com/2015/04/09/us/walter-scott-shooting-video-stopped-case-from-being-swept-under-rug-family-says.html> [https://perma.cc/PLT5-MUL2] [hereinafter Blinder & Santora, *Officer Who Killed Walter Scott Is Fired*]; see also Devon W. Carbado, (E)Racing the Fourth Amendment, 100 MICH. L. REV. 946, 952–60 (2002) [hereinafter Carbado, (E)Racing]; Colin Daileida, *Walter Scott Loved Dancing, Dominoes and the Dallas Cowboys*, MASHABLE (Apr. 9, 2015), <http://mashable.com/2015/04/09/walter-scott-dallas-cowboys-dominoes/#XOns76eGxSqu> [https://perma.cc/6DNX-FEGT]; Michael Gartland, *Slain Walter Scott Struggled to Be a Better Dad*, N.Y. POST (Apr. 13, 2015, 4:34 AM), <http://nypost.com/2015/04/13/walter-scott-enrolled-in-program-to-help-support-his-kids> [https://perma.cc/B3B9-Q8DM].

father likened it to gunning down a deer,<sup>2</sup> and his brother described it as akin to “target practice.”<sup>3</sup> Scott was struck in the back by five bullets, killing him. The fatal encounter was recorded by an eyewitness, and the resultant video has been seared into the national imagination.

Understandably overlooked in the terrific anger that emerges from Scott’s murder is the smoldering ember from which the fatal encounter began. I use the word smoldering advisedly in both the sense of a long burning objection and something that threatens to burst into flame at any moment. As noted, the encounter between Walter Scott and Officer Slager began with a traffic stop so innocuous, it is puzzling for some, particularly White Americans, who have never or rarely experienced such a police stop. Simultaneously, the stop instantly raises the eyebrows of many minority members, particularly men of color. African American and Hispanic men are all too accustomed to the causal humiliation of a police officer driving alongside their car and taking in their dark skin, followed by the creeping inevitability of flashing lights—expected and yet still somehow always startling—and the short blast of the siren. This ritual is so commonplace that people of color openly referred to the crime of “driving while Black” long before it was noticed in academic literature.<sup>4</sup>

Of course, there is no way to know what Officer Slager’s motives were or whether he stopped Walter Scott based on his race. There is never a way to know. A police officer can always offer a nominal reason for making a stop—perhaps this time your view seemed obstructed or perhaps you swerved too close to the dividing line.<sup>5</sup> Indeed, this Article

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<sup>2</sup> Blinder & Santora, *Officer Who Killed Walter Scott Is Fired*, *supra* note 1.

<sup>3</sup> Ginger Adams Otis et al., *Accused Killer Cop Michael Slager Fired by North Charleston PD, as Walter Scott’s Brother Says Officer Used Victim ‘for Target Practice’*, N.Y. DAILY NEWS (Apr. 9, 2015, 11:28 AM), <http://www.nydailynews.com/news/crime/walter-scott-gunned-deer-s-dad-article-1.2177389> [<https://perma.cc/R8JC-T2CA>].

<sup>4</sup> See *id.*; Carbado, *(E)Racing*, *supra* note 1, at 1030–31; Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 130 (2017) [hereinafter Carbado, *From Stopping to Killing*]; Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [<https://perma.cc/7585-EDRE>].

<sup>5</sup> As one judge in the related case of immigration stops noticed in describing the infinite variety of action which can supply authorities’ suspicion:

will show how the law has taught police how to wink at this ritual of domination. Whatever the officer's proffered reason, such stops usually have a dangerous charge felt particularly by Black and Hispanic men who are pulled over at disproportionate rates—the feeling barely hidden by steeled voice, suppressed fury, slightly trembling hands, and knowing exhaustion.<sup>6</sup> The stop may conclude safely, solely with the interruption and delay or the burden of a ticket. Too often, however, these “delays” are accompanied with the humiliation of being asked to leave the car and being cast in a roadside show.<sup>7</sup> Some go further, leaving the lingering feeling of an officer's fingers after a pat-down—probing fingers reaching inside a jacket and around the groin—with a tangible sense of rough treatment and near force.<sup>8</sup> The worst stops, as with Walter Scott, explode into spectacular and even fatal violence.

What these stops share for Black and Hispanic persons is the reinforced sense that the color of their skin not just causes the state

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The vehicle was suspiciously dirty and muddy, *or* the vehicle was suspiciously squeaky-clean; the driver was suspiciously dirty, shabbily dressed and unkept, *or* the driver was too clean; the vehicle was suspiciously traveling fast, *or* was traveling suspiciously slow (or even was traveling suspiciously at precisely the legal speed limit); the [old car, new car, big car, station wagon, camper, oilfield service truck, SUV, van] is the kind of vehicle typically used for smuggling aliens or drugs; the driver would not make eye contact with the agent, *or* the driver made eye contact too readily; the driver appeared nervous (or the driver even appeared too cool, calm, and collected); the time of day [early morning, mid-morning, late afternoon, early evening, late evening, middle of the night] is when “they” tend to smuggle contraband or aliens; the vehicle was riding suspiciously low (overloaded), *or* suspiciously high (equipped with heavy duty shocks and springs); the passengers were slumped suspiciously in their seats, presumably to avoid detection, *or* the passengers were sitting suspiciously ramrod-erect; the vehicle suspiciously slowed when being overtaken by the patrol car traveling at a high rate of speed with its high-beam lights on, *or* the vehicle suspiciously maintained its same speed and direction despite being overtaken by a patrol car traveling at a high speed with its high-beam lights on; and on and on *ad nauseam*.

United States v. Zapata-Ibarra, 223 F.3d 281, 282–83 (5th Cir. 2000) (Wiener, J., dissenting) (footnotes omitted); *see also* David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 560–61 (1998) [hereinafter Harris, *Car Wars*].

<sup>6</sup> Carbado, (*E*)*Racing*, *supra* note 1, at 956–58; CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (John M. Conley & Lynn Mather eds., 2014).

<sup>7</sup> Carbado, (*E*)*Racing*, *supra* note 1, at 958, 962; Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 675–77 (2015).

<sup>8</sup> Carbado, (*E*)*Racing*, *supra* note 1, at 958.

authorities to treat them differently but permits state authorities to police their communities differently.<sup>9</sup> While the fact that such treatment comes at the hands of the police adds to the sense of sanctioned insult, it is the legal authority that shields police behavior from accountability—that there is no one to whom you can complain—that ultimately delivers the most powerful psychic blow. With every harassing stop and shared conversation with other persons of color, one realizes with sinking hopelessness that the law has decreed that *you* can be made subject to a policing regime White citizens would instantly reject. It is cutting to notice that when this same arbitrary police power explicitly threatens all *other* (White) people, the Court has been quick to reject it. Only when this police abuse is thinly disguised in regimes likely to harm Black and Hispanic drivers does the Court turn a blind eye.

The result has been a tragic litany of unarmed Black men killed by police officers; names seared into the national conscious as emblems of the seething racial tension between the police and too many Black communities: John Crawford III, Eric Garner, Tamir Rice, Laquon McDonald, Samuel DuBose, Sandra Bland,<sup>10</sup> Michael Brown, Philando Castile. (I confess with a heavy heart, the hardest thing about writing this Article has been that with every new draft I can update the mournful list.) The litany tolls on; yet, despite the seemingly endless examples, each case is governed under the Fourth Amendment as a distinct incident, leaving each horrific death denuded of their racial context. The last few years have seen the most furious and painful national conversation about policing and race in a generation, culminating in the Black Lives Matter movement. Americans everywhere are confronting our long history of police violence and race; everywhere, that is, except our Supreme Court.

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<sup>9</sup> EPP ET AL., *supra* note 6, at 12–17, 93–110; Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1038–39 (2010); Carbado, *From Stopping to Killing*, *supra* note 4.

<sup>10</sup> This Article focuses largely on the policing of men of color due to the magnitude of the problem. This should not be taken as a denial of the unique harms and violence to which women of color are subjected. Nnennaya Amuchie, “*The Forgotten Victims*” *How Racialized Gender Stereotypes Lead to Police Violence Against Black Women and Girls: Incorporating an Analysis of Police Violence into Feminist Jurisprudence and Community Activism*, 14 SEATTLE J. FOR SOC. JUST. 617 (2016).

That our legal system insulates racially motivated and disparate policing regimes is not happenstance. In roughly the past half-century, our Supreme Court has repeatedly turned a blind eye to the combustible intersection of criminal law, policing, and race. While unjustified police violence is disproportionately borne by young men of color—revealing ugly truths about structural racism in policing—the Supreme Court’s Fourth Amendment jurisprudence has explicitly silenced the ability to use the Constitution to address racism in policing, and the current national conversation has laid bare the poverty of our legal language.

This Article illustrates that, in the area of criminal law, punishment, and policing, the Supreme Court has consciously obscured the corrosive role race plays in the everyday experiences of so many. The Court’s studied indifference has led to one of the more bizarre tensions in modern American political life: we are all aware of how deeply race infuses our criminal justice system, and yet, the law gives us few ways to properly recognize and contextualize its impact. These fraught days—with videos of young African American men unjustifiably killed by police officers appearing all too regularly on the news—demand frank and courageous conversation, starting with our Supreme Court.

The inadequacy of our legal responses to oppressive policing of minority communities is clear. In the most spectacular examples, police shoot unarmed Black men and months later multi-million dollar settlements are reached, sometimes quietly registered, other times met with defiant public rejections of wrongdoing or vague bromides about ensuring “such and such” tragedy never occurs again. History has shown that hope for any meaningful structural change too often depends on rare and time consuming exogenous federal investigations—the equivalent of hoping for justice the way one hopes for lightning to strike. A dull heartache reminds me that, as of this writing, three-and-a-half years have passed since the world watched Police Officer Daniel Pantaleo choke Eric Garner to death without the Justice Department being able to decide so much as whether to bring charges.<sup>11</sup> Incredibly, Officer Slager, who executed Walter Scott, had his

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<sup>11</sup> Tom Hays, *Eric Garner Chokehold Case Rolls On, But Future Is Cloudy*, BUS. INSIDER (Feb. 17, 2017, 4:32 PM), <http://www.businessinsider.com/ap-eric-garner-chokehold-case-rolls-on-but-future-is-cloudy-2017-2> [<https://perma.cc/TCH8-D55N>].



first trial end in a mistrial.<sup>12</sup> Meanwhile, the Constitutional Amendment that directly governs the everyday use of police force has been rendered silent on the important questions of race and policing.

I am not the first legal scholar to recognize the importance of tackling the way our Fourth Amendment doctrine has institutionalized racial domination and entrenched tension between the police and minorities, which regularly bursts into confrontation, violence, and death.<sup>13</sup> But understanding the failures of the current legal regime is not merely a matter of surveying individual legal doctrines and adjusting them piecemeal. No matter how thorough the doctrinal discussions, there is little long-term hope of changing the law of policing without a deeper inspection into the underlying philosophical premises upon which the Supreme Court's jurisprudence relies. Thus, this Article brings together philosophical inspection and doctrinal examination in a single reform project, uncovering how current Fourth Amendment doctrine is embedded in a very particular interpretation of individualist conception of legal rights and, in turn, revealing how that philosophical view fails to accurately describe or justify our legal practices.

Whatever the motivation for the Supreme Court's avoidance of the topic of race in policing, its jurisprudence relies implicitly on a particular rights-centric view of political rights. This rights-based view, I will argue, is central to the dominant liberal philosophy of our times.<sup>14</sup>

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<sup>12</sup> Conor Friedersdorf, *What Will It Take to Convict a Police Officer for Shooting an Unarmed Man?*, ATLANTIC (Dec. 6, 2016), <https://www.theatlantic.com/politics/archive/2016/12/slayer-tensing-acquittals/509672> [https://perma.cc/953E-Z8DG].

<sup>13</sup> The insightful literature exploring the connection between race and policing stands in stark contrast to the Court's willingness to tackle the subject. Just to name a few that have influenced my thinking: David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 312–15 (1997); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1738 (2005); EPP ET AL., *supra* note 6; I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011); Carbado, *(E)Racing*, *supra* note 1.

<sup>14</sup> By liberal, I refer to liberal in the philosophical sense, whether it be a Kantian theory that highlights individual freedom to, at the extreme, a Nozickian libertarianism that makes the enforcement of individual exchanges the only legitimate grounds of state power. I do not mean to suggest that the Supreme Court's interpretations are in fact true to a thoughtful interpretation of these positions, nor do I believe that liberal theories are completely without the resources to address the gaps in our current jurisprudence. For example, Rawls' view, central to modern liberal theory, highlighted the importance of the social basis of self-respect. Some of these resources are canvassed in later Sections. What I do argue is that the priority of

This claim may be surprising to some because the value of equality seems centrally important across the nearly countless variants of philosophical liberalism. But equality, in too many contemporary theories underlying criminal law and policing, is embedded in an unquestioned view of individual rights.

The view of rights as individualistic rather than placed in a social context is not simply of philosophical interest. Indeed, I do not attack this view because it is the most philosophically persuasive picture available. The individualistic rights view must be excavated because of its enormous practical significance; it is the justification that has come to dominate criminal theory and undergird the Supreme Court's understanding of the Fourth Amendment. Thus, this view determines the values that shape everyday interactions with the police and, more importantly, what voices and values go entirely unheard.<sup>15</sup> Moreover, because this feature of liberalism cuts across the current left/right divide in American politics, it is hard for many observers to express—in a comprehensive way—their objection to this stunted form of legal reasoning. Only by refocusing our philosophical justification on a different type of political theory can we highlight critically needed changes in constitutional doctrine and imagine a world of just policing. An alternative theory must accurately capture that legal rights stem from our right to be civic equals. This Article offers such a theory, building on prior work describing a neo-Aristotelian republicanism, applying it to the Fourth Amendment.

My claim examines the Supreme Court's doctrinal law or, more precisely, the Supreme Court's disturbing silence surrounding the intersection of race and policing. The initial entry point of law is not novel; the target is the infamous Supreme Court decision in *Whren v. United States*.<sup>16</sup> In *Whren*, the Supreme Court ruled unanimously that police officers could stop citizens on any pretext, even if it was not their

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place given to individual rights in the current interpretation of liberal theories naturally obscures the great flaws in the Supreme Court's reasoning.

<sup>15</sup> This same shortcoming is reflected in the Supreme Court's Fourth Amendment jurisprudence: "equality" is so deeply embedded within an individual rights framework that it is smothered. As the cases will make clear, the Supreme Court's Fourth Amendment doctrine buries one's right to be free of racist harassment under the question of whether the police have any legally "objective" reason to affect a stop. See *infra* Part III.

<sup>16</sup> *Whren v. United States*, 517 U.S. 806 (1996).

true motivation, ignoring how pretextual stops provide thin veneer for racist policing. *Whren* all but insulated racialized policing practices from constitutional review, resulting in countless unjustified and tense stops inevitably leading to explosive violence.

*Whren* and its theoretical underpinning continue to exert important and disturbing influence today. Only a few months ago, in *Utah v. Strieff*, the Court recommitted itself to the thin philosophical underpinnings authorizing *Whren*.<sup>17</sup> At the height of the Black Lives Matter movement, the Court fortified two distinct policing regimes—one for poor people of color and one for everyone else. *Whren* and *Strieff* are chosen not just because they are rightfully scorned. Understanding the deep flaws in both cases provides an insight into the fundamental way in which the Supreme Court's contemporary jurisprudence, focused solely on the question of whether one's individual rights have been violated, misunderstands the deeper justification of criminal law.<sup>18</sup> More than simply correcting our understanding of the Fourth Amendment law, moving between theory and doctrine illustrates that reversing cases like *Whren*, *Strieff*, and their peers is insufficient. By clarifying our philosophical commitments, we embark on a new constitutional understanding of the Fourth Amendment—one that requires, rather than avoids, the question of whether a police stop or policing regime is racially motivated, and explicitly holds that racist police practices, even when they rely on an objective justification, are unreasonable and thus a violation of the Fourth Amendment.

This grander philosophical claim brings with it wide reaching doctrinal reforms that may initially seem shocking, but reorienting our underlying justification allows us to imagine a new world of just police practices. Until Fourth Amendment doctrine can end the discriminatory policing practices that haunt persons of color on American roads and explicitly reinforce civic equality, police officers should be restricted from conducting ordinary criminal law policing while policing traffic. That is to say, we should encourage a nationwide

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<sup>17</sup> *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

<sup>18</sup> Thus, the project is roughly analogous to Rawls's reflective equilibrium. See JOHN RAWLS, *Outline of a Decision Procedure for Ethics*, in COLLECTED PAPERS 1, 1–19 (Samuel Freeman ed., 1999); JOHN RAWLS, *A THEORY OF JUSTICE* 40–46 (rev. ed. 1999).

campaign to separate traffic maintenance and policing work. Thus, outside of well-recognized exigencies already accepted as exceptions in the Fourth Amendment, a police stop for a traffic infraction would not permit an officer to inquire about other criminal activity, ask for a “consent” search, or use the stop as an entre into any other policing duty.<sup>19</sup>

Sketching this proposal even in outline will have to wait until later, but a few anticipatory comments may set the stage. A systematic restriction of one of the primary tools of policing will strike some as implausibly strange or drastic. But, it should be noted that such restrictions have some analogous foundation in too often ignored Fourth Amendment law.<sup>20</sup> Indeed, it is a damning indictment that we prohibit arbitrary stops when they are aimed at the general population but ignore them so long as they happen mostly to people of color.<sup>21</sup> Further, some states have enacted related regimes without dire consequences. More importantly, forbidding police from conducting criminal investigations during routine traffic stops may simply be what justice requires.<sup>22</sup> Under such a system, put simply, traffic cops would handle traffic and police would police.

The plan ahead. Part I outlines the pervasive impact of race in our criminal law practices, focusing specifically on the importance of reforming the law at the intersection of race and policing.

Part II outlines the Supreme Court’s jurisprudence, illustrating that the Court has consciously ignored the dangerous interaction of race in policing and its corrosive effect on the perceived legitimacy of the police.

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<sup>19</sup> Roughly, if a police officer pulled a car over and saw a kidnapped child in the car, the already existing exception to the warrant requirement for securing a person’s welfare would kick in. But, an ordinary traffic stop would not allow an officer to start down the path of “So where are you coming from tonight . . .” in a fishing expedition to detect law-breaking.

<sup>20</sup> *Delaware v. Prouse*, 440 U.S. 648 (1979).

<sup>21</sup> *United States v. Cortez*, 449 U.S. 411 (1981); *Brown v. Texas*, 443 U.S. 47 (1979).

<sup>22</sup> The immediate analogy tracks many intuitions surrounding the death penalty. Whatever one thinks of its underlying permissibility, for many, the fact that the death penalty is prone to racial disparities is enough to ban it. The Supreme Court, however, infamously rejected evidence of widespread racial bias as a constitutional deficiency in the death penalty. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). Similarly, whatever policing we would permit in an ideal world, if police power is wielded with systemic racism, then one may legitimately restrict such power.

Part III argues that the Supreme Court's jurisprudence is a natural consequence of the nearly unquestioned commitment to a particular rights-focused form of liberalism. Though the primacy of individual rights is pervasive in our political culture, it is even further entrenched in current justifications of criminal law because it shares an affinity with the retributivist criminal law theories that currently dominate legal theory. This work outlines work done elsewhere, grounding the legal reform project in a larger context.

Part IV builds on these arguments, illustrating that individualist retributivist theories of criminal law ultimately fail to properly describe our criminal law practices or best capture our normative intuitions. Rather, I argue for an understanding of criminal law based on a neo-Aristotelian republican theory, entitled "franchise," that makes central our civic bondedness.

Part V illustrates the important natural conclusions of shifting from focusing on individual rights to policing that secures equality. The larger policing proposal is to completely divorce police powers of traffic safety regulation from those of criminal investigation in order to drain the incentive to use traffic stops as a pretext to continue a regime of racialized policing. Though in the context of our current jurisprudence, this reads as a daring claim, it is based on the simplest intuition: that we ought to collectively stand for the proposition that searching or seizing a citizen based on the color of their skin, absent narrow and specific circumstances, is unreasonable.<sup>23</sup> This paper provides philosophical footing for the gathering political calls for a shift in policing from a "warrior culture" to a "guardian culture."<sup>24</sup>

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<sup>23</sup> One can imagine particular narrow circumstances where race would be a salient characteristic on which to base police investigation, for example, a suspect of a distinct ethnic group runs into a particular building, compelling police to question a handful of persons on the premises.

<sup>24</sup> See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), [http://www.cops.usdoj.gov/pdf/taskforce/TaskForce\\_FinalReport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf) [<https://perma.cc/7B5E-LJWJ>]; U.S. COMM'N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES (1981); Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225 (2015).

## I. THE BLEAK RACIAL REALITIES OF THE CRIMINAL JUSTICE SYSTEM

A. *From Prison to Parole: Tangible Harms Visited Upon Individuals*

Even when aware of the racial disparities in our criminal justice system, the breadth of the problem never fails to stun. If we as a nation are overenthusiastic in using incarceration generally, the cruel distribution across racial lines casts criminal law as a mode of racial and class control.<sup>25</sup> African Americans, who constitute roughly 13% of the overall population, are 38% of all inmates in American prisons.<sup>26</sup> Hispanics, roughly the same percentage of the population, make up another 20% of all prisoners.<sup>27</sup> These figures, shocking in themselves, insufficiently communicate how our system of criminal punishment consumes so many bodies and souls. American prisons are, in the literal sense, dispiriting places with conditions that should shock any right-thinking person. Our overreliance on prisons has resulted in such overcrowding that in California, the largest state in the country, the prison conditions were found to violate the constitutional provision on cruel and unusual punishment.<sup>28</sup> In other cases, we have allowed prison

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<sup>25</sup> Michelle Alexander comprehensively and eloquently illuminated this problem while giving it a powerful name in her book-length treatment. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>26</sup> E. ANN CARSON, *PRISONERS IN 2013* 1 (2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf> [<https://perma.cc/A7NV-GUD4>]; see also WILLIAM J. SABOL ET AL., *BUREAU OF JUSTICE STATISTICS: PRISONERS IN 2008* 2 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf> [<https://perma.cc/RZ3E-3X5E>].

<sup>27</sup> CARSON, *supra* note 26, at 1.

<sup>28</sup> *Brown v. Plata*, 563 U.S. 493 (2011) (“Prisoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth-sized cages without toilets.”). In one instance, “[a] psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic.” *Id.* at 504. When questioned, “[p]rison officials explained they had ‘no place to put him.’” *Id.* (internal quotation marks omitted). These conditions are by no means isolated to one state. Elliott C. McLaughlin & Madison Park, *Delaware Prison Standoff Over; Corrections Officer Dead*, CNN, <http://www.cnn.com/2017/02/02/us/delaware-prison-standoff> [<https://perma.cc/6S3L-UMYJ>] (last updated Feb. 2, 2017, 9:50 PM).

cruelty to become big business.<sup>29</sup> In cruel irony, the all too common relief from such overcrowding is solitary confinement, used in ways that arguably constitute a human rights violation.<sup>30</sup>

Society averts its eyes, ignoring that our prisons are places of constant and horrific violence, with prisoners routinely subject to assaults, rape by other male inmates, and other forms of sexual violence.<sup>31</sup> Despite it being unthinkable that we would sentence someone to the punishment of being violently raped for committing a robbery, in practice this occurs every day.<sup>32</sup> Lastly, with too little in terms of skills training and education, those who survive prison often leave with nothing more than damaged psyches and more sophisticated criminal skills than when they entered.

Once released, ex-felons face a raft of punitive measures, antiseptically labeled “collateral sanctions.”<sup>33</sup> Perhaps most visible,

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<sup>29</sup> Shane Bauer, *My Four Months as a Private Prison Guard*, MOTHER JONES (July–Aug. 2016), <https://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer> [https://perma.cc/B9DA-86ST].

<sup>30</sup> See Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53 (2009); Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575 (2012). For a sobering look at the devastating impacts of solitary confinement, particularly on minors, see Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law> [https://perma.cc/7D3U-QJRV] (describing how Kalief Browder, a minor accused of stealing a backpack, endured more than one thousand days of solitary confinement at Rikers Island, where he tried to take his life on multiple occasions).

<sup>31</sup> See Mary Anne Franks, *How to Feel like a Woman, or Why Punishment Is a Drag*, 61 UCLA L. REV. 566 (2014); Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006). One of the cruelest dangers in our callousness regarding prisons has been allowing the prison industrial complex to actually create the need to fill our prisons. In the case of public prisons, the need to prop up local economies centered on prisons, and maintaining the flow of cheap labor has created perverse incentives. 13TH (KANDOO FILMS 2016). In the case of private prisons, the same problems are exacerbated by lack of democratic accountability and a profit motive. Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUB. AFF. 67 (2013).

<sup>32</sup> Franks, *supra* note 31, at 589–93.

<sup>33</sup> Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1029–33 (2004) [hereinafter Yankah, *Good Guys and Bad Guys*]; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153 (1999).

many ex-felons find they are prohibited from voting.<sup>34</sup> Voting disenfranchisement rightfully attracts attention because it sends a powerful message—even after serving the required sentence, your voice no longer matters; you are no longer a political equal.<sup>35</sup> Though symbolically powerful, voting disenfranchisement pales in comparison to the myriad of quieter ways in which ex-felons are exiled from social and economic life. An ex-felon with ambitions to remake their life through education will find themselves foreclosed from some institutions and shut out from financial aid.<sup>36</sup> Rebuilding a life through steady work is no little feat; in many jurisdictions, ex-felons are excluded from a range of trades from which a life could be rebuilt—barred from jobs from hairdresser to bartender.<sup>37</sup> If these blockades leave the ex-felon on hard times, there is little remedy. Many jurisdictions prohibit ex-felons from living in public housing, receiving welfare benefits, or healthcare.<sup>38</sup> It is hard to imagine a clearer message that society is indifferent to an ex-felon's needs than being denied food stamps.<sup>39</sup>

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<sup>34</sup> Yankah, *Good Guys and Bad Guys*, *supra* note 33, at 1029–33; George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1896–99 (1999); Thomas G. Varnum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 MICH. J. RACE & L. 109, 116 (2008); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 28 (2012) [hereinafter Forman, *Racial Critiques*].

<sup>35</sup> Yankah, *Good Guys and Bad Guys*, *supra* note 33, at 1029–33; Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of Law*, 11 CAN. J.L. & JURIS. 23 (1998) (analyzing the background and feminist underpinnings of Canadian court cases that challenged the denial of voting rights to incarcerated persons).

<sup>36</sup> See generally JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006) (discussing the current disenfranchisement laws in the United States); ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* (2008) (examining the effects of race, power, and politics on the reintegration of recently released prisoners).

<sup>37</sup> Yankah, *Good Guys and Bad Guys*, *supra* note 33, at 1031–32; Demleitner, *supra* note 33, at 155–58 (arguing that the "good moral character" requirement poses the greatest obstacle to obtaining a license); Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 194–95 (1995); S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community*, 34 FORDHAM URB. L.J. 833, 850–52, app. VII, app. VIII, app. IX (2007) (summarizing state licensing laws).

<sup>38</sup> Yankah, *Good Guys and Bad Guys*, *supra* note 33, at 1031–32.

<sup>39</sup> *Id.*



### B. *Race and Communal Harms*

As noted, the harms of incarceration are not equally spread: poor and minority communities are vastly overrepresented in our country's prisons. Thus, it would be a mistake to understand the racially disproportionate costs of mass incarceration as simply piling up of individual suffering without understanding the way harms are shared (and amplified) within particular communities. With disproportionate numbers of African Americans and Hispanics in prison, African American and Hispanic communities, not just individuals, are gutted. In many communities, young men—some of whom could be continuing educations or job training, beginning careers or simply being brothers, sons, and fathers—are absent.<sup>40</sup> All too often, they return with bruised psyches, stunted social and emotional growth, and decimated job prospects.<sup>41</sup> Concentrated neighborhoods of marred young men cannot offer each other the type of everyday social support that contributes to a successful life: be it a job tip; an introduction to a supervisor or admissions counselor; or simply constructive, as opposed to pathos-tinged, advice.<sup>42</sup>

Just as within prisons, neighborhoods concentrated with the exiled and the disaffected can replicate a toxic stew of destructive social norms, particularly caustic drug use and volatile urban machismo. Distilled to hazardous levels, around tattered barbershops or street corners, these traits are distressing to fellow members of the community. If unable to command (through either personal or political resources) constructive methods of repairing the social fabric, distressed neighbors may resort to promoting or acquiescing even harsher policing methods to stave off blight or, in the case of the wealthier, leave all together.<sup>43</sup> The well-known irony is that, with the most stabilizing members of a community fleeing, the already fraying neighborhood may find itself in tatters with

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<sup>40</sup> See Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 27, 52 (1994).

<sup>41</sup> Forman, *Racial Critiques*, *supra* note 34, at 30–31.

<sup>42</sup> George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421, 1430–32 (1993).

<sup>43</sup> See TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007); *see also* GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 21–25, 30–37, 242–43, 247–57 (1995); JAMES FOREMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

the already vulnerable ex-convicts ever more likely to become recidivists. Thus, the harm is not simply to one after another Black or Hispanic ex-felon. Given the concentration in minority communities, the harms visited on the individual person radiate out, corroding entire communities.

C. *Intangible Harms: How Our Policing Regime Reinforces the Stereotype of Black Criminality*

So far, we have addressed the more tangible harms to Black and Brown persons individually and communities collectively. Still, there are other less tangible, but no less real, harms that come from the disproportionate incarceration of African Americans and Hispanics. With a disproportionate number of young men of color, particularly young Black men, imprisoned or under state supervision, it becomes impossible to cabin the social stigma that transforms dark skin into a sign of criminality.<sup>44</sup>

Indeed, terms like stigma often seem too anti-septic to capture the phenomenon. In the United States, the very social meaning of skin color transforms. To be a young, Black or Hispanic man is to be read as presumptively criminal.<sup>45</sup> It was only a half generation ago that the nation was being warned by social scientists and politicians alike of the rise of the “super-predator”: “A violent and random criminal lacking morality or regret.”<sup>46</sup> The super-predator was oft invoked in relation to urban gangs and “the war on drugs,” and there was no doubt of the shape or, more precisely, the shade of this mythical terror. The super-

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<sup>44</sup> Yankah, *Good Guys and Bad Guys*, *supra* note 33, at 1027–33; Foreman, *Racial Critiques*, *supra* note 34, at 30–33; James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 22–25 (2004) [hereinafter Forman, *Community Policing*]; ALEXANDER, *supra* note 25, at 195–208.

<sup>45</sup> RANDALL KENNEDY, *RACE, CRIME AND THE LAW*, at x–xi (1997).

<sup>46</sup> So pervasive was image that both liberal and conservative politicians raced to warn the American public, wielding this racist image irresponsibly. See C-SPAN, 1996: *Hillary Clinton on “Superpredators”* (C-SPAN), YOUTUBE (Feb. 25, 2016), <https://www.youtube.com/watch?v=j0uCrA7ePno> [<https://perma.cc/6YAA-SPRU>] (showing a portion of a speech where Hillary Clinton discussed how crime is “not just gangs of kids anymore. They are often the kinds of kids that are called ‘super predators’—no conscience, no empathy.”); see also Forman, *Community Policing*, *supra* note 44, at 22–25.

predator was imagined as a faceless, young, Black man, wearing a bandana and sagging jeans. If the phrase “super-predator” is no longer in vogue, the image remains near the surface.

When Officer Darren Wilson shot and killed Michael Brown in Ferguson, Missouri, he did not merely assert that Brown threatened him, but also described Brown in both subhuman and supernatural terms.<sup>47</sup> Brown was not only aggressive, but also grunting: a “Hulk Hogan” and unstoppable “demon” who could shrug off bullets.<sup>48</sup> Likewise, when Officer Timothy Loehmann shot and killed twelve-year-old Tamir Rice—who was playing with a toy gun—without warning and within two seconds of racing towards him, he testified he believed the child to be approximately eighteen years old.<sup>49</sup> Both reflect the deeply embedded view of Black boys as older, larger, and more dangerous.

The criminalized Black beast is the apex of conjured racial terror, representing the far end of the spectrum, but African American men everywhere carry to some degree the stain of presumed criminality—noticed in every purse clutched closer, every trailing security guard, and

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<sup>47</sup> Before delving into Wilson’s testimony, it is important to point out the obvious: Michael Brown never got the chance to tell his side of the story, and, therefore, Officer Wilson’s memories should not be read as a definitive account of the events that transpired. According to testimony that Officer Wilson gave to a grand jury, after he asked Brown to move onto the sidewalk, Brown replied “f— what you have to say.” Terrence McCoy, *Darren Wilson Explains Why He Killed Michael Brown*, WASH. POST (Nov. 25, 2014), [https://www.washingtonpost.com/news/morning-mix/wp/2014/11/25/why-darren-wilson-said-he-killed-michael-brown/?utm\\_term=.4f73c013fa74](https://www.washingtonpost.com/news/morning-mix/wp/2014/11/25/why-darren-wilson-said-he-killed-michael-brown/?utm_term=.4f73c013fa74) [<https://perma.cc/C3NH-NKSF>]. From these words, Wilson decided that Brown and his friend were possible robbery suspects. *Id.* When describing Brown’s demeanor, Officer Wilson stated, “He was just staring at me, almost like to intimidate me or to overpower me. The intense face he had was just not what I expected from any of this.” *Id.* Later, Officer Wilson testified, “He looked up at me and had the most intense aggressive face. The only way I can describe it, *it looks like a demon*, that’s how angry he looked. He comes back towards me again with his hands up.” *Id.* (emphasis added). Officer Wilson’s testimony painted Michael Brown as an animal, insisting that Brown was making “sounds” and not using words, and “grunting” rather than breathing loudly. *See id.* (“When he looked at me, he made like a grunting, like aggravated sound and he starts, he turns, he’s coming back towards me.”). This overpowering “animal” was an eighteen-year-old boy. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Catherine E. Shoichet & John Newsome, *Tamir Rice Shooting: Officer Says Threat Was ‘Real and Active’*, CNN, <https://www.cnn.com/2015/12/01/us/tamir-rice-investigation-officer-timothy-loehmann-statement/index.html> [<https://perma.cc/ZNQ8-MFKU>] (last updated Dec. 2, 2015, 10:11 AM) (testifying that Rice “appeared to be over 18 years old and about 185 pounds”).

every woman who hurries across the street. Of course, the burden of such social stigma is not evenly spread. Just as the burdens of mass incarceration are dramatically lessened for well-to-do African Americans and Hispanics, stigmatization can, in part, be fended off by the right clothes or class accent. But it would be a mistake to obscure the universal aspects of racial stigmatization imposed by our punishment system. Men of color are aware of how tenuously their “respectability” is held.<sup>50</sup> To rebut the assumption of criminality often means continually signaling, in ways large and small, that you are safe and respectable.

Such experiences “teach” in innumerable ways that your dark skin is a marker of potential criminality. As a teenager, I realized that the overload horsing around of my White friends drew scolding looks but the same misbehaving voices with my Black and Hispanic friends were greeted with looks of condemnation and alarm. Black boys are keenly aware of the eyes of security guards following them when they enter “a nice shop.” Nearly unconsciously, we internalized that wearing our college sweatshirt or dropping it into conversation could serve as an amulet, warding off the assumption that we were “no good.” Still, the humiliation of being pulled over for no reason or having a cab speed away is a searing reminder that no amount of accomplishment can protect you from the association of your skin and criminality. One reason Trayvon Martin—shot dead by self-assigned neighborhood watch man George Zimmerman—became a potent symbol among African Americans is the keen awareness that changing from work attire

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<sup>50</sup> See Report of Jeffrey Fagan, Ph.D. at 22 tbl.3, *Floyd v. City of New York*, 813 F. Supp. 2d 417 (S.D.N.Y. Oct. 15, 2010) (No. 08 Civ. 01034), [http://ccrjustice.org/sites/default/files/assets/files/Expert\\_Report\\_JeffreyFagan.pdf](http://ccrjustice.org/sites/default/files/assets/files/Expert_Report_JeffreyFagan.pdf) [<https://perma.cc/RZ3P-59EG>] (table showing that NYPD officers conducted a greater number of stop and frisks of Black men in New York City than of Hispanic and White men); Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in *RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS* 309, 314 (Stephen K. Rice & Michael D. White eds., 2010) (discussing surveys which indicate that African Americans are more likely than other Americans to report being stopped on a highway by police); William Terrill & Stephen D. Mastrofski, *Situational and Officer-Based Determinants of Police Coercion*, 19 JUST. Q. 215, 236 (2002) (stating that officers in one study were significantly more likely to use force on “males, non-Whites, young suspects and poor suspects”).

into a causal hoodie is to shed not only formality but also the presumption of equal respect.<sup>51</sup>

Worse, the racist image of the Black criminal is viciously self-reinforcing. The expectation that young, Black men are latent criminals makes an already vulnerable population even more so, erecting barriers to work and social mobility even for Black and Hispanic men who have no criminal record, and exiling those who do.<sup>52</sup> America's racial history is so complex that there is no doubt that there are various forces and stereotypes at work. It would be too much to claim that the only salient racial image is that of the Black criminal, but it would be naïve to pretend that it is not one of the most enduring and damaging.<sup>53</sup> Ultimately, the American criminal punishment system is one that overly consumes men of color by destroying individual lives, often returning young men more dented than when arrested; gutting communities of color; and constructing an image of criminality that stains men of color, guilty or not, with the image of the criminal.

## II. POLICING RACE

### A. *Dispelling the Popularized "Black on Black" Crime Rhetoric*

It is clear that the disproportionate number of African American and Hispanic men imprisoned has devastating effects. But that truth, many contend, is not dependent on policing, but on the underlying high

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<sup>51</sup> Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN, <https://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details> [https://perma.cc/DVW4-GUPB] (last updated May 23, 2012, 10:48 AM); Audra D.S. Burch & Laura Isensee, *Trayvon Martin: A Typical Teen Who Loved Video Games, Looked Forward to Prom*, MIAMI HERALD, <https://www.miamiherald.com/news/state/florida/trayvon-martin/article1939761.html> [https://perma.cc/VPL7-GBS4] (last updated May 19, 2012, 3:13 PM).

<sup>52</sup> DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 90–91 fig.5.1 (2007) (finding that Black applicants with a criminal record had a lower chance of receiving a call back from an employer than White applicants with a criminal record: five percent and seventeen percent, respectively).

<sup>53</sup> See Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, *supra* note 13, at 312–15; see also Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing* *New York Style*, 97 MICH. L. REV. 291, 295–300 (1998).

rates of crime and violence in minority communities. The crude version of this claim, often tinged with racial condescension, is captured in the reflexive invocations of disproportionate levels of “Black on Black” crime as a justification for racist policing practices. More thoughtful versions try to disentangle the role of racially motivated or disparate criminal law policies and examine the extent to which racial disparities would remain in our punishment system. Both versions, however, argue that whatever the harms to minority communities from our system of state punishment, they stem from underlying criminality and not unjust policing. This Section illustrates why policing policies remain critical in the perpetuation of racial harms.

The ever-popular response that “Black on Black” crime justifies countless policing injustices is hackneyed enough to detain us little. It is heartbreakingly true that much of the violence in African American communities is perpetrated by other African Americans, but this fact is neither unique nor justificatory.<sup>54</sup> It is not unique because a similarly overwhelming number of crimes suffered by White victims are committed by White perpetrators<sup>55</sup>—a fact rarely thrown about by perpetrators of the “Black on Black” crime theory. Indeed, the phrase “White on White” crime has no social salience. Given geographic and racial segregation in the United States and the natural fact that much crime is directed at enemies and neighbors, this is not surprising. Our crime, like our neighborhoods, is segregated.

More importantly, this often-invoked line completely fails in justifying our police practices. African American communities suffer from disproportionately high crime rates due to countless historical planks of injustice. But by what reasonable moral light could adding racist, brutal, unjust, or demeaning policing to this burden be an excuse or antidote?

A contemporary example makes clear why increases in crime are no reason to excuse unjust policing methods. The nation is currently

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<sup>54</sup> See JOHN A. RICH, *WRONG PLACE, WRONG TIME: TRAUMA AND VIOLENCE IN THE LIVES OF YOUNG BLACK MEN*, at ix (2008).

<sup>55</sup> JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP’T OF JUSTICE, *HOMICIDE TRENDS IN THE UNITED STATES* 3 (2000), <https://www.bjs.gov/content/pub/pdf/htius98.pdf> [<https://perma.cc/AMC2-L3W7>]; CALLIE RENNISON, U.S. DEP’T OF JUSTICE, *VIOLENT VICTIMIZATION AND RACE, 1993–98*, at 10 tbl.14 (2001), <http://www.bjs.gov/content/pub/pdf/vvr98.pdf> [<https://perma.cc/S6SD-K8W7>].

facing an epidemic in opioid deaths, as well as drug dealing and the crimes that accompany drug use.<sup>56</sup> In many ways, it feels like a return to “the bad old days,” eclipsing even the devastation of crack cocaine in the mid-eighties through the nineties. The most striking difference between the current wave of heroin-related deaths and that of the crack-cocaine epidemic in the mid-eighties is that the prevalence of harm is now found in White and rural communities, not Black and urban ones.

Yet, rather than resort to the militarized policing and “civilization versus super-predators” rhetoric that characterized the crack epidemic—perceived as a Black problem—this epidemic has been characterized by police officers learning how to administer naloxone in cases of overdose,<sup>57</sup> police chiefs working relentlessly to steer addicts into rehab,<sup>58</sup> and addressing crimes as a symptom of addiction rather than as reasons to imprison large portions of young (White) men. The starkly different responses illustrate the long-held complaint of minority communities that they are both over- and under-policed.<sup>59</sup> That is, minority communities are too often subjected to over-concentrated amounts of police surveillance focused on domination and control, rather than securing the well-being of the community. In any case, the point is clear: there is no reason to believe that militarized and unjust policing is a natural response to important social problems. We should be highly suspicious of the fact that policing is our nearly automatic and almost exclusive response to social problems facing minority

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<sup>56</sup> Gina Kolata & Sarah Cohen, *Drug Overdoses Propel Rise in Mortality Rates of Young Whites*, N.Y. TIMES (Jan. 16, 2016), <https://www.nytimes.com/2016/01/17/science/drug-overdoses-propel-rise-in-mortality-rates-of-young-whites.html> [https://perma.cc/62L5-PHRV] (referencing Center for Disease Control statistics).

<sup>57</sup> J. David Goodman & Anemona Hartocollis, *Anti-Overdose Drug Becoming an Everyday Part of Police Work*, N.Y. TIMES (June 12, 2014), <https://www.nytimes.com/2014/06/13/nyregion/anti-overdose-drug-becoming-an-everyday-part-of-police-work.html> [https://perma.cc/645D-EUWL].

<sup>58</sup> Philip Marcelo, *Police Department Offers Heroin Addicts Amnesty, Treatment*, LOWELLSUN, [http://www.lowellsun.com/ci\\_28639697/police-department-offers-heroin-addicts-amnesty-treatment](http://www.lowellsun.com/ci_28639697/police-department-offers-heroin-addicts-amnesty-treatment) [https://perma.cc/2EGS-AGHG] (last updated Aug. 14, 2015, 1:23 AM); Katharine Q. Seelye, *Massachusetts Chief's Tack in Drug War: Steer Addicts to Rehab, Not Jail*, N.Y. TIMES (Jan. 24, 2016), <https://www.nytimes.com/2016/01/25/us/massachusetts-chiefs-tack-in-drug-war-steer-addicts-to-rehab-not-jail.html> [https://perma.cc/CK5G-U8WH].

<sup>59</sup> Tonry, *supra* note 40, at 25, 27, 52; Eric J. Miller, *Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere”*, 94 CALIF. L. REV. 617, 627, 657–58 (2006).

communities.<sup>60</sup> Simply pointing at crime does not answer why we police minority communities the way we do.

B. *Police Methods Matter: How Policing Remains Central*

A more thoughtful version of this critique argues that, even if policing lost its racist character, the harms of disproportionate mass incarceration would remain. Thus, focusing on policing is a distraction from the core drivers of mass incarceration. For example, John Pfaff has argued that the iconic, liberal *bête-noire*, the war on drugs, has overly-occupied the cultural imagination as a vehicle for racist impulses, driving the disproportionate imprisoning of young men of color.<sup>61</sup> By Pfaff's lights, this explanation—central in the popular description of the national prison system as the New Jim Crow—misses the mark by ignoring that drug crimes have accounted for only a quarter of all prisoners during a generational prison boom.<sup>62</sup> Violent offenders, on the other hand, make up half of the prison population.<sup>63</sup> Further, Pfaff argues, it is untrue that drug offenders are typically given extraordinarily long sentences.<sup>64</sup> Pfaff does not deny that race may play an important role in criminal punishment, particularly in the decisions that prosecutors make, but because the real drivers of mass incarceration are violent offenders and no one would argue that the bulk of violent offenders should go unpunished, focusing on policing may have a limited effect on the social harms explored.

Pfaff's points are well taken. No simple change in policing policy will by itself cure the racial injustices of our criminal law system. Yet there remain several reasons why focusing on policing remains critical to addressing the racial harms of the criminal punishment system. First,

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<sup>60</sup> See Forman, *Community Policing*, *supra* note 44.

<sup>61</sup> John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087 (2013) [hereinafter Pfaff, *Waylaid by Metaphor*]; John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13 AM. L. & ECON. REV. 491 (2011) [hereinafter Pfaff, *The Myths and Realities*]; see ALEXANDER, *supra* note 25.

<sup>62</sup> Pfaff, *Waylaid by Metaphor*, *supra* note 61, at 1090–97.

<sup>63</sup> *Id.*

<sup>64</sup> See John F. Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73 (2010) [hereinafter Pfaff, *Durability*]; Pfaff, *The Myths and Realities*, *supra* note 61.



as Pfaff notes, 25% of all prisoners are held pursuant to drug charges. Even if one would not causally imagine simply releasing every drug offender, the war on drugs remains among the most racially skewed criminal law policies. Thus, meaningfully changing unjust criminalization and policing surrounding the war on drugs is obviously important to reforming the system. Further, as Pfaff notes, it is difficult to disentangle the role prior drug arrests might play in blocking one from job opportunities that may have led one down more constructive paths, influencing a prosecutor's charging decisions, or a judge's sentencing.<sup>65</sup>

Moreover, imagining that drug crimes are wholly separable from property or even violent crimes is surely too neat a distinction. One need only look again at the vastly different responses to the current heroin epidemic compared to the crack epidemic that ravaged the Black community. A glaring feature of the new epidemic has been police departments treating the crimes that accompany drug use as symptoms of addiction, rather than reasons to imprison. An intoxicated threat or drug-related fight leaves both police and prosecutors wide latitude as to whether to arrest or warn, divert, charge with a minor offense, or wring out a plea to more serious charges of violent crime.<sup>66</sup> The contrast between how addiction is being treated now that it is a "White problem" is an important reminder that even when faced with actions that cannot be tolerated, how we define and respond to crime is in large part a political decision.<sup>67</sup>

Most importantly, even if Pfaff is entirely correct, our current Fourth Amendment jurisprudence and its refusal to examine the intersection of race and policing remain critical to both the empirical harms and social stigma earlier explored. It is critical to realize that such

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<sup>65</sup> *Id.*

<sup>66</sup> The fact that we treat and punish crime differently depending on our racial lens is nothing new. The gravest example, mentioned earlier, is the racial disparity in the death penalty. Evidence reveals that prosecutors are more likely to seek the death penalty against defendants of color who have killed White victims. Thus, the very meaning of what constitutes a capital crime is held hostage to the perception of racial transgression. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>67</sup> Another heartbreaking example is the increasing ways in which juvenile social problems in minority communities are seen as inviting police responses first. CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 119 (2010).

stigma is a result of policing practices that often do not find their way into prison time or even arrest rates.<sup>68</sup> Indeed, part of the insult of such practices is the feeling of being subjected to an unjustified search that turns up nothing and being told with cool arrogance and a dismissive shrug, “You may go now . . . move along.” There are countless subtle ways being over-policed destabilizes already vulnerable communities of color that do not show up in prison rates.<sup>69</sup>

### C. *How Minor Infractions Lead to a Devastating Cycle*

There is further reason to focus on the intersection of policing and race outside the length of prison time. A growing body of literature, both academic and political, documents the ways seemingly inconsequential misdemeanor arrests pile up to create havoc in a person’s life. Misdemeanor arrests often strain family and intimate

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<sup>68</sup> Sonja B. Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, 2016 U. CHI. LEGAL F. 485, 496–501 (2016).

<sup>69</sup> In New York, for example, there is no formal action on ninety percent of *Terry* stops. See Jeffery Fagan, *The Indignity of Order Maintenance Policing*, at 14 (manuscript on file with author).

Estimates of how often unjustified stops actually happen are method-dependent and accordingly variable. For example, the New York State Attorney General reported that nearly one in six pedestrian stops in 1999 lacked any valid constitutional justification based on case law in effect at that time, and another 23% had insufficient information to determine the legality of the stop under both New York and federal standards of either founded or reasonable suspicion. These estimates were based on reading of notations by officers regarding the reason for the stop.

A 2008 analysis of court cases where New Yorkers challenged the basis of their *Terry* stops showed that the Courts were quite skeptical about the articulated suspicion from police officers, so that even when justified through testimony, the judges in many of these cases found the testimony to not be credible. Judges in that review concluded that in at least 20 cases involving stops by New York police officers that were selected by local U.S. Attorneys for federal prosecution as gun cases, the police officers had simply reached into the backpacks of the accused without cause, found a gun, and then tailored testimony to justify the illegal search. The judge concluded that the officers’ testimony was “patently incredible, riddled with exaggerations, and unworthy of belief.” The officers faced no internal discipline for these fabrications, in large part because judges failed to ask prosecutors to determine if there were constitutional violations, or if any statute had been violated.

*Id.* at 30–31.

relationships, and mean missing chunks of work or losing a job.<sup>70</sup> Misdemeanor records also haunt arrestees in important ways, exacerbating what would otherwise be minor legal infractions. Misdemeanors can saddle one with debts that, if not paid soon enough, may lead to further fines and so on and so on, trapping poor persons in a cycle of thralldom. An unpaid fine may lead to a suspended driver's license, which in turn leads to being pulled over, which leads to losing a new job, and the cycle continues. As the Department of Justice (DOJ) report on Ferguson made painfully clear, while the burden of such financial difficulties is severe, a permanent psychological impact is also felt knowing the state views an entire group of people as powerless dupes, suckers to be abused and fleeced for every dollar possible to fill the coffers.<sup>71</sup>

Moreover, the hardly accidental result of either the initial misdemeanor or subsequent fines is that often arrest warrants permit the police to detain a person at will. Indeed, one of the real harms of our current policing system is its barely tacit sanctioning of a different regime of policing altogether for minority communities—there is no great mystery in the insult of knowing that your community is subject to a policing regime to which no other community would assent. Quite aside from the practical costs, there is harm embedded in the conferred inferior social status of unchecked policing in minority communities.

The experience of being policed, that is over-policed, also independently matters in ways that elude capture by prison sentences alone. The glaring contemporary example of widespread use of “stop-and-frisk” searches among minority communities, receding only in the last few years, are viewed by many minority communities as little more

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<sup>70</sup> A recent estimate by the National Association of Criminal Defense Lawyers used the caseload statistics from twelve states to extrapolate a national rate of approximately 10.5 million misdemeanor prosecutions per year. See ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf) [<https://perma.cc/9G26-22GF>]. For more discussion, see Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101 (2012); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014).

<sup>71</sup> U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/45ST-5VVH>] [hereinafter DEP'T OF JUSTICE, FERGUSON POLICE DEPARTMENT].

than license to harass them, despite the incredibly small percentage of searches that reveal dangerous contraband.<sup>72</sup> Instead, persistent contact with police officers consistently produces humiliating exchanges in which the police—embodying state power—causally insult, use racial epithets, and roughly manhandle.<sup>73</sup> The frustration of fruitless stop after stop, the piling on of misdemeanor after misdemeanor, escapes our attention if we focus only on prison statistics.

D. *And Finally, Death.*

Finally, one cannot ignore the volatile tinder these interactions create, resulting in the most spectacular and tragic explosions. In a world soaked in the cultural image of men of color as criminals, Fourth Amendment doctrine that structurally ignores the role of race in policing leads to moments of murderous violence of Black and brown men by the police. The last few years have revealed in heartbreaking images the lasting use of excessive force long complained of by minority communities. The videos of police officers unjustifiably killing unarmed Black men have not only shocked the national conscience but have laid bare the unstable tension between suspicious minority communities and police—how quickly seemingly innocuous traffic stops can turn deadly.<sup>74</sup>

The litany of Black lives cut short by police encounters could toll tragically on, but I will highlight a few examples specifically. On July 19, 2015, Samuel DuBose was stopped by police officer Ray Tensing, ostensibly because his car was missing the front license plate.<sup>75</sup> When

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<sup>72</sup> David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994) [hereinafter Harris, *Factors*].

<sup>73</sup> In one visceral example, now made famous as a viral video, two officers berate a light-skinned African American teen for seeming out of place. They harass, insult, threaten, and bully the teen. Each time he stands up for himself or asserts his civic rights, the officers redouble their abuse. He is called a dog, a mutt, has all manner of racial and other slurs hurled at him peppered by threats to break his arm. See 8bitRicky, *Systemic Abuse By NYPD: They Will Break Your Arm and Punch You in the Face for Being a F\*\*\*ing Mutt.*, YOUTUBE (Oct. 16, 2012), <http://www.youtube.com/watch?v=qtUDUfagcos> [<https://perma.cc/LYS7-SC8N>].

<sup>74</sup> Carbado, *From Stopping to Killing*, *supra* note 4.

<sup>75</sup> *Samuel DuBose: Full Police Dashcam Video of Shooting*, GUARDIAN (Sept. 1, 2015, 2:51 PM), <https://www.theguardian.com/us-news/video/2015/sep/01/samuel-dubose-killing-full>

Officer Tensing requested DuBose's license, DuBose replied that he was not carrying it. When Tensing then attempted to open the car door, DuBose closed it and started his engine. Tensing responded by yelling, "Stop, Stop," drawing his gun, and shooting DuBose in the head, killing him. Tensing justified the shooting by claiming that DuBose had driven off, nearly dragging Tensing under the car—video revealed the car was stationary and Tensing had lied.

Perhaps more chilling was the killing of Walter Scott by Officer Michael Slager, a few weeks earlier, with which this Article began. As recounted, after Slager pulled Scott over for having a non-functioning taillight, Scott fled his car on foot. Slager pursued him, tasing Scott. Scott escaped from the tasing, lumbering away from Officer Slager. Slager then removed his pistol, took aim, and coolly shot Scott several times in the back, killing him.<sup>76</sup> As in countless similar incidents, Officer Slater's initial report that Scott had taken his taser, causing him to fear for his life, was revealed as a lie by video. Indeed, the video appears to show officer Slager drop the taser near Scott's body to corroborate his story.<sup>77</sup>

What these two stories and countless others, famous and unknown alike, reveal is the latent risk of unjustified violence and death resulting from encounters between the citizens, particularly men of color, and the police. Notice that, like so many others, both the DuBose and Scott tragedies began as simple traffic stops premised on innocuous violations. Sandra Bland, another tragic example, was pulled over for a minor traffic violation. The stop escalated into an abusive scene of machismo by Officer Brian Encinia, who subsequently arrested her. The series of events led to her death in an apparent suicide in a jail cell, days later. Likewise, Levar Jones, who survived being shot by Officer Sean Groubert, was ostensibly approached for not wearing a seatbelt, despite the fact that he had already exited his car. Officer Groubert demanded to see Jones's license, and when Jones reached into his car to get it, Officer Groubert fired four shots. While they have entered the national

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dashcam-video [<https://perma.cc/R3NR-TWPN>] (displaying footage from Officer Tensing's body camera that shows the shooting of DuBose).

<sup>76</sup> The Post and Courier, *Walter Scott Shooting*, VIMEO (Apr. 7, 2015, 2:48 PM) <https://vimeo.com/124336782> (showing footage of Scott's shooting at the hands of Officer Slager).

<sup>77</sup> *Id.*

dialogue, these shootings almost certainly do not reflect an increase in unjustified lethal force. It is important to be disabused of the notion that it has been a particularly bad couple of years. Rather, increasing access to video has allowed the public to strip away each officer's concocted justification and revealed long-standing violence and abuse.

These stories, and those untold, coupled with the lack of consequences for these officers, paint a bleak picture. Doctrine that immunizes racial animus in policing contributes literally to the complexion of our prisons, inflicting myriad harms upon African Americans and Hispanics who make up a disproportionate percentage of prisoners. The disproportionate toll of incarceration in minority communities has costs both measurable and intangible, but no less real. Prison terms, "collateral sanctions," and the stigma accompanying being an ex-felon cause lasting damage in the lives of too many men of color. Losing portions of entire generations of young men, only to have them returned dented and jaded, exacerbates existing problems and further concentrates social ills in communities of color. Moreover, for people of color everywhere, the close ties between their skin and the archetypal prisoner create a social stigma, requiring people of color to bear the daily psychic toll of constantly signaling to rebut presumptions of criminality.

While there is no simple answer that can fully explain the explosion of incarceration over two generations in America, there is ample reason to keep our gazed focus on racialized policing and the legal doctrine that shields it as an important way racial harms are created. The contrast between the treatment of the heroin epidemic facing White Americans and the previous crack epidemic facing people of color illustrates how the way we police can feed this vicious cycle, despite claiming to be neutral crime control. The Fourth Amendment allows minority communities to be stopped, searched, harassed, detained, and humiliated as an extension of official power.<sup>78</sup> It is little surprise that such policing is unacceptable to any community with political power. Besides the everyday inconvenience and humiliation felt by those who attract police attention, these doctrines communicate, in no uncertain terms, that some people are open to subjugation and domination by the state resulting in distrust and tension between minority communities,

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<sup>78</sup> EPP ET AL., *supra* note 6, at 1–25, 134–51.

and can explode into scenes of murderous violence with police officers killing unarmed Black men.<sup>79</sup>

Just as no change in our criminal law can solve all social injustice, no change in our constitutional doctrine can by itself cure all of these ills. What is clear, however, is that important aspects of social justice cannot be achieved without fundamental change in both the doctrine and justification of the Fourth Amendment. It is to the legal doctrine this Article now turns.

### III. THE SUPREME COURT, RACE, AND POLICING: AN OVERVIEW

#### A. *Ignoring the Realities of Race: Terry v. Ohio*

Our criminal justice system is racially oppressive, harming people of color in body, community, and soul. Further, policing practices are a key part in the criminal law's racial harms. Current Fourth Amendment doctrine is constructed to encourage and justify willful blindness to a government that permits people of color to be policed under a distinct and unjust regime. Understanding how our legal structure insulates racist police practices requires peeling back layers of Fourth Amendment case law.

The Supreme Court's sublimation of race in policing starts from the beginning of its modern policing case law. In the seminal *Terry v. Ohio*, the "Warren Court"—that had done so much to check the dangers of arbitrary use of police power<sup>80</sup>—ruled a police officer may briefly stop

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<sup>79</sup> Carbado, *From Stopping to Killing*, *supra* note 4, at 125–30.

<sup>80</sup> See Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1413–14 (2002); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1276–77 (1998). The Warren Court sought to reshape the legal protections between the citizen and the state through criminal procedure. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court ruled that the exclusionary rule applied to the states. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court ruled that indigent felons could not be tried without the assistance of counsel. *Malloy v. Hogan*, 378 U.S. 1 (1964), prohibited the use of a formal subpoena to force a defendant to testify against himself in state trials. *Miranda v. Arizona*, 384 U.S. 436 (1966), famously required any citizen arrested to be informed of an extensive set of Constitutional rights. *Duncan v. Louisiana*, 391 U.S. 145 (1968), required the States to provide jury trials in serious criminal cases.

and frisk a suspect to determine if he is armed if the police have “reasonable suspicion” that the person has committed or is about to commit a crime.<sup>81</sup> In so ruling, the Court stepped away from the long understood position that the seizure of a citizen had to be supported by the much higher “probable cause” standard. The birth of reasonable suspicion in *Terry* sent American criminal procedure down a long and winding path, interjecting a new, malleable standard justifying a broad range of forcible police intrusions on citizens in the course of their daily lives.<sup>82</sup> In real life, this standard of reasonable suspicion eventually became unmoored from its technical premise—protective weapons searches based on “specific and articulable facts” that a suspect is armed—ushering in a new basis of power, extending to cars and eventually neighborhoods in the form of “stop and frisk.”<sup>83</sup> This broader nebulous standard found full bloom in “stop and frisk” policing strategies, pursuant to which millions of overwhelmingly African American and Hispanic men across the country have been stopped and searched for decades.<sup>84</sup>

For our purposes, however, what is striking is the Court’s studied reading of race out of reasonable suspicion and “stop and frisk.” I describe the disregard as studied because it is impossible to imagine the Court’s treatment of the facts of the case as accidental.<sup>85</sup> The two suspects detained in *Terry*, John Terry and Richard Chilton, were both African American.<sup>86</sup> The police officer who noticed them and eventually stopped and frisked them, Officer McFadden, was White. Officer McFadden testified that, while he often watched people during the day,

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<sup>81</sup> *Terry v. Ohio*, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting). Though the phrase reasonable suspicion is found in the dissent, it has come to establish the constitutional justification required for “stop and frisk.”

<sup>82</sup> Jeffrey Fagan, *Terry’s Original Sin*, 2016 U. CHI. LEGAL F. 43 (2016).

<sup>83</sup> Harris, *Factors*, *supra* note 72, at 662, 667–71 (quoting *Terry*, 392 U.S. at 21).

<sup>84</sup> Report of Jeffrey Fagan, Ph.D. at 22 Table 3, *Floyd v. City of New York*, 813 F. Supp. 2d 417 (S.D.N.Y. Oct. 15, 2010) (No. 08 Civ. 01034); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957–59 (1999).

<sup>85</sup> The issue of “stop and frisk” and its impact on minority communities was raised in briefing by the NAACP Legal Defense and Education Fund, among others. See Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae, at 4–5, *Sibron v. New York*, 392 U.S. 40 (1967) and *Terry*, 392 U.S. 1.

<sup>86</sup> Thompson, *supra* note 84, at 963–64.



his eyes were attracted to those who “don’t look right to me.”<sup>87</sup> A third man, Katz, who was Caucasian, approached them, engaged in brief conversation, and left. Terry and Chilton, the two African American men, reportedly walked to the store, looked into the window, and walked back in turn. McFadden decided that the men were “casing a job,” and were about to engage in an armed daytime robbery. McFadden followed the men, and, after seeing them reconvene with Katz a couple of blocks away, approached them and identified himself as a policeman.<sup>88</sup> Unsatisfied with their response, McFadden grabbed Terry, spun him around and patted him down, eventually finding a gun on both him and Chilton.<sup>89</sup>

It is undeniable that two people repeatedly examining a store window in turn may be suspicious behavior. But it is equally undeniable that a White police officer’s inarticulate suspicion of two African Americans because he feels they look out of place implicates historic concerns about the way in which race and police discretion interact, particularly given the relative lack of checks on an individual police officer.<sup>90</sup>

Nonetheless, the Supreme Court was deeply equivocal in addressing the racial overtones of the case. The Warren Court obliquely noted that “[w]e would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court.”<sup>91</sup> More straightforwardly, the Court acknowledged “the wholesale harassment by

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<sup>87</sup> *State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN’S L. REV. 1387, 1456 app.B (1998) (John Q. Barrett ed.) [hereinafter *Ohio v. Terry, Trial Transcripts*]; Thompson, *supra* note 84, at 966–68.

<sup>88</sup> Thompson, *supra* note 84, at 963.

<sup>89</sup> *Id.* at 964.

<sup>90</sup> *Id.* at 969, 989–90. Indeed, elsewhere Chief Justice Warren himself noted in an address that “no public officials are given such wide discretion on matters dealing with the daily lives of citizens as are police officers . . . .” Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 556 (1997) (citing GREGORY HOWARD WILLIAMS, *THE LAW AND POLITICS OF POLICE DISCRETION* (1984)). Not surprisingly, the concern about how such discretion could be abused in targeting racial or other minorities was highlighted to the Court in arguments forwarded by the NAACP in its amicus brief. Thompson, *supra* note 84, at 965.

<sup>91</sup> *Terry v. Ohio*, 392 U.S. 1, 9–10 (1968).

certain elements of the police community, of which minority groups, particularly Negroes, frequently complain . . . .”<sup>92</sup> Yet, the issue of race was otherwise submerged in the Court’s reasoning. Most obviously, nowhere in the opinion does the Court mention the respective race of the persons involved. This is especially troubling when, as earlier noted, Officer McFadden was unwilling or unable to describe why he honed in on the two suspects, other than a sense that they were out of place, and he “didn’t like them.”<sup>93</sup> Further, the Court’s observation that minorities, particularly African Americans, were threatened with “wholesale harassment” came in a fatalistic pronouncement that such behavior was so entrenched that no judicial ruling could curtail it.<sup>94</sup> Even Justice Douglas’s strongly worded dissent, decrying the ruling as a step towards totalitarianism, ignored the questions of race in policing.<sup>95</sup> It is therefore impossible to see *Terry* as the beginning of an honest conversation about race in policing.<sup>96</sup>

#### B. *Terry’s Progeny: Reinforcing the Court’s Avoidance of Race*

If *Terry* illustrated the Supreme Court’s consciously limited discussion of race and policing, its progeny blossomed into full denial, bordering on dismissive contempt. Take, for example, *Delaware v. Prouse*, in which the Supreme Court held that police may not stop a driver without articulable suspicion of illegal activity to check for invalid licenses.<sup>97</sup> Other courts, commentators, and even the State of Delaware itself, acknowledged the risk that such tactics would become a pretext for illegitimate harassment of racial minorities.<sup>98</sup> Though the Court

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<sup>92</sup> *Id.* at 14–15.

<sup>93</sup> *Ohio v. Terry*, *Trial Transcripts*, *supra* note 87, at 1456.

<sup>94</sup> *Id.*

<sup>95</sup> *Terry*, 392 U.S. at 36–39 (Douglas, J., dissenting).

<sup>96</sup> Professor Akhil Reed Amar has famously applauded *Terry* for bringing race to the fore of the Court’s jurisprudence about policing. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808 (1994) [hereinafter Amar, *Fourth Amendment*]. He subsequently seemed to temper his views, noting the ambivalent legacy of *Terry*. See Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097, 1097–1100 (1998) [hereinafter Amar, *Terry*].

<sup>97</sup> 440 U.S. 648.

<sup>98</sup> Thompson, *supra* note 84, at 973–74.

ultimately held Delaware's stops unconstitutional precisely because they conferred too much discretion on police officers, it nowhere discussed or even mentioned the implications of race in police discretion.<sup>99</sup>

In reading *Prouse*, there are two striking observations. First, the Supreme Court's language focuses on the need for the Fourth Amendment to cabin unfettered police discretion and to impose neutral limitations on the legal justifications for stops in order to prevent arbitrary and abusive police practices.<sup>100</sup> For the Court to address these concerns with no discussion of race in policing is surely to be purposefully mute. Of course, perfectly random stops pose similar dangers of being racially motivated. Yet, without the filter of a police pretext, the truly random stop forced the Court to tackle the tradeoffs of wide-ranging police power equally borne by all citizens. Not surprisingly, the Court balked. Simply put, when police behavior is clearly viewed as threatening all citizens, the Court recognizes that no citizen ought to be expected to submit to arbitrary police inspection or harassment as a tradeoff for public safety. Not surprisingly, the rich, the powerful, or the privileged would never tolerate such a tradeoff. But the Court's deafening silence on the role of race in policing would soon leave Black and Hispanic citizens, as a practical matter, precisely subject to such policing power.

It would be a grave, even fatal mistake to dismiss the Supreme Court's race-blind vision of the Fourth Amendment as merely concerned with "trivial" impositions on the lives of people of color, the occasional inconvenience of traffic stops.<sup>101</sup> As illustrated earlier, such policing is tantamount to permitting a separate state-sanctioned policing regime, reinforcing and perpetuating the image of Black criminality. The Court's refusal to address race in any policing practice has been universal, ignoring both the procedures that enflame tensions between minority communities and the deaths that inevitably follow.<sup>102</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Prouse*, 440 U.S. at 653–55, 661–63.

<sup>101</sup> *Id.* at 662 ("Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.").

<sup>102</sup> Carbado, *From Stopping to Killing*, *supra* note 4.

In *Tennessee v. Garner*, the Supreme Court repeated the same pattern under even more startling circumstances.<sup>103</sup> The case involved police officer Elton Hymon and his partner being called to the scene of a suspected burglary.<sup>104</sup> Upon arriving, Officer Hymon saw a suspect, later identified as fifteen year-old Edward Garner, running across the yard.<sup>105</sup> Though Officer Hymon saw Garner's face and hands and knew Garner was unarmed, he feared that Garner would escape arrest.<sup>106</sup> Thus, when Garner attempted to scale a fence, Officer Hymon shot Garner in the back of the head, leading to his death.<sup>107</sup> Subsequently, a woman's purse containing ten dollars was found on the suspect.

*Garner*, a 1985 case, is a painful reminder that disproportionate police violence towards Black Americans did not start with iPhones or the Black Lives Matter movement; it is as old as policing in America.<sup>108</sup> Yet the Court again studiously avoided any discussion of the case's complex racial dynamics. Clearly, disentangling the role of race in *Garner* is not simple. Though the race of the participants is again absent from the text, the decedent Garner was African American, as was Officer Hymon, one of a handful of African American police officers at the time on the Memphis force. Perhaps that fact would seem unremarkable if the case had not been framed to highlight the disproportionate number of Black suspects who were shot by the Memphis police in the commission of property crimes.<sup>109</sup> Indeed, evidence submitted to the Court found that Black suspects were twice as likely to be shot at by the police than White suspects.<sup>110</sup> Nonetheless, the

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<sup>103</sup> 471 U.S. 1 (1985).

<sup>104</sup> *Id.* at 3–5.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Even the name of this case tragically echoes the name of Eric Garner, choked to death on video nearly thirty years later.

<sup>109</sup> See *Garner*, 471 U.S. 1.

<sup>110</sup> See James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 718–21 (1982) (describing disproportionate shootings of Black suspects, as compared to White, by Memphis police); Brief for Appellee-Respondent at 9899, *Garner*, 471 U.S. 1 (Nos. 83-1035, 83-1070) (concluding that “[B]lacks were more than twice as likely to be shot at . . . [than Whites]”). Recent scholarship by Professor Ronald G. Fryer Jr. has called into question the level of disproportionate use of deadly force against African Americans. In his initial work, Professor Fryer concludes that disproportionate force and violence in every

Court once again consciously avoided even noticing the intersection between policing and race, setting the stage for a generation of law inspecting police violence.

To be sure, there have been sporadic Fourth Amendment cases where the Court has been unable to avoid the subject of race. In *United States v. Brignoni-Ponce*<sup>111</sup> and *United States v. Martinez-Fuerte*,<sup>112</sup> the Court struggled with the question of how much weight police officers patrolling the borders could give apparent Mexican ancestry. The Court first ruled in *Brignoni-Ponce* that apparent Mexican ancestry was, by itself, insufficient to amount to probable cause to stop a vehicle,<sup>113</sup> before clarifying in *Martinez-Fuerte* that ethnicity could factor into considering whether to affect a stop.<sup>114</sup> The Court seemed to conceptualize the question of race as merely a question of nationality, noting that Mexican ancestry, while relevant in patrolling the southern U.S. border, would have no role to play in customs seizures along the Canadian border.<sup>115</sup> In such a moment one sees again the Court's reluctance to take on, in any genuine fashion, the complicated racial politics of border patrols and police stops that deem a person of color presumptively non-American.<sup>116</sup> However, given the obvious centrality of ethnic makeup in border crossings, the Court simply could not avoid at least addressing the issue.

A rare crack in the Court's insensitivity might be noted in the exceedingly brief mention of the role of race in *United States v.*

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interaction with the police with the surprising exception of the use of deadly force. Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2016), <http://www.nber.org/papers/w22399> [<https://perma.cc/Y9WM-F2FP>]. Fryer has noted that his findings, both surprising and preliminary, were limited to reviewing police incidents in Houston. Others have raised important doubts about the methods used to reach these conclusions, particularly whether the data correctly measures arrestees who pose the same level of threat. Uri Simonsohn, *Teenagers in Bikinis: Interpreting Police-Shooting Data*, DATA COLADA (July 14, 2016), <http://datacolada.org/50> [<https://perma.cc/92E5-KVWD>]. Other data indicates a significant bias in policing practices. See Report of Jeffrey Fagan, Ph.D. at 22 tbl.3, *Floyd v. City of New York*, 813 F. Supp.2d 417 (S.D.N.Y. Aug. 31, 2011) (No. 08 Civ. 01034).

<sup>111</sup> 422 U.S. 873 (1975).

<sup>112</sup> 428 U.S. 543 (1976).

<sup>113</sup> *Brignoni-Ponce*, 422 U.S. 873.

<sup>114</sup> *Martinez-Fuerte*, 428 U.S. 543.

<sup>115</sup> *Id.* at 564 n.17.

<sup>116</sup> Thompson, *supra* note 84, at 977–78.

*Mendenhall*.<sup>117</sup> There, the Court at least noticed possible racial power dynamics, quickly questioning whether a young Black woman without a high school education could be overwhelmed when being questioned by two White male police officers.<sup>118</sup> Thus, the Court at least noted that racial power dynamics, along with gender and age, might play a role in perceptions of authority. Yet, the Court's engagement is limited to one fleeting sentence merely noting these facts. Taken together, these cases offer little hope that the Court's Fourth Amendment jurisprudence would reverse its otherwise studied avoidance.

C. *Whren v. United States and the Court's Willful Ignorance of Modern Police Practices*

Any hope that the Court would squarely address whether race plays a role in rendering a search or seizure unreasonable was decisively quashed by the aforementioned *Whren v. United States*.<sup>119</sup> *Whren* is (in)famous enough that the facts need only briefly be recited. Plainclothes police officers in an unmarked car were patrolling an area described as a "high drug area" when they observed two young men in an SUV, with temporary plates, at a stop sign for approximately twenty seconds.<sup>120</sup> The officers observed the young Black men stopped for a "suspicious amount of time" and the driver appearing to look into the lap of the driver.<sup>121</sup> When the police then executed a U-turn to head back towards the car, the SUV sped off at what the officers took to be an "unreasonable" speed. The police stopped the car, ostensibly for violating the traffic code, and ultimately found two large plastic bags of crack cocaine in Whren's hands.<sup>122</sup>

There can be little doubt that the police officers used the traffic violation as a pretext for stopping the car; indeed, the procedural manual governing the D.C. Metropolitan police prohibited officers in unmarked cars from making traffic stops except in the case of

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<sup>117</sup> 446 U.S. 544 (1980).

<sup>118</sup> *Id.* at 558.

<sup>119</sup> 517 U.S. 806.

<sup>120</sup> *Id.* at 808.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

emergency.<sup>123</sup> Thus, the question facing the Court was whether a police officer could lawfully use a pretextual reason—e.g. a traffic violation—to stop an automobile he wished to investigate. As this pertained to automobiles, this question had special relevance.<sup>124</sup> Various civil rights groups alerted the Court that given the breadth, depth, and subjectivity of modern traffic laws, it is impossible to drive for an appreciable amount of time without nominally violating some traffic law.<sup>125</sup> Thus, pretextual stops would allow a police officer to stop any motorist, at any time, at the officer's discretion.<sup>126</sup> This discretion created the danger that police officers would be able to stop drivers for impermissible reasons—in particular due to stereotyping or animus based on the race of the driver.<sup>127</sup>

Nonetheless, the Supreme Court, in a unanimous decision, hewed to its expressed commitment that the subjective motivation of a police officer was irrelevant in determining the reasonableness of a Fourth Amendment seizure.<sup>128</sup> Thus, the Court ruled that so long as the police officer had probable cause to believe that a traffic violation had occurred, no matter how petty, the detention was valid without a court inquiring into the officer's underlying motivation.<sup>129</sup>

The critical thing to notice, however, is how the Court justified granting the police immense discretion. It might be thought that the Court avoided tackling racial profiling because disentangling motive for all but the most explicit racist acts is difficult. Further, given that a person contesting a stop will likely be accused of criminal wrongdoing, there is a natural interest in claiming that a police stop that turned up illegal weapons or contraband was born of illicit motives. Of course, some cases like *Whren* may present clear cases of pretextual stops. And, in any case, determining motive and mens rea in difficult situations is the everyday duty of courts. Nonetheless, one might think that worrying

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<sup>123</sup> Hecker, *supra* note 90, 572.

<sup>124</sup> EPP ET AL., *supra* note 6, at 134–51.

<sup>125</sup> *Whren v. United States*, 517 U.S. 806, 810.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 811–16.

<sup>129</sup> *Id.*

about an overwhelming number of false claims and difficulty proving the officer's motivation caused the Court's avoidance.

Instead, the Court abstracted away any real world concerns of how race impacts policing, making clear that their chief concern was not the difficulty of plumbing an officer's mind.<sup>130</sup> Rather, the Court premised its ruling on the underlying "legal right" of the officer to stop Whren. That is, to the extent that there was an objective legal reason for the police to execute the stop, the officer's motivation was irrelevant.<sup>131</sup> So long as one has forfeited their legal right to be free of police interference, why one was stopped could not be a matter of complaint.

The justification in *Whren* is the final evolution of the racial fatalism that began in *Terry*. Recall, in *Terry*, the Court was convinced that police officers were so concerned with safety that no legal prescription could prevent the police from searching the potentially armed. But across the nearly thirty years between *Terry* and *Whren*, the problem of illicit racial motivation in policing has almost entirely disappeared from the Court's decisions. Because the Court now conceptualizes the legitimacy of a police stop by inspecting one's rights against police stops as an individually held license rather than embedded in a social context, it is no longer concerned with the thorny question of how police behavior both reacts to and establishes social, political, and racial status.

The Court's treatment of the threat of racial profiling, given the nearly limitless discretion of police to stop motorists, was dismissive. In its entirety, the Court wrote, "[w]e of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal

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<sup>130</sup> *Id.*

<sup>131</sup> As the Court described its justification,

If those cases were based only upon the evidentiary difficulty of establishing subjective intent, petitioners' attempt to root out subjective vices through objective means might make sense. But they were not based only upon that, or indeed even principally upon that. Their principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.

*Id.* at 814.



Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis.”<sup>132</sup> The Court then footnoted a single case noting that a constitutional prohibition against police conducting a criminal investigation of a person solely based on race, without noting how its own jurisprudence has made winning such cases extraordinarily difficult, bordering on impossible.<sup>133</sup> Indeed, one of the great advantages for a Court steadfastly avoiding the racial dimensions of policing is that by premising the legitimacy of a police stop entirely on an individualistic conception, the Court found a theoretical justification for the narrowness of its vision.

D. *Building on Whren: How Modern Cases Have Given Police Unfettered Discretion and Power*

The Supreme Court’s contemporary jurisprudence has insulated the racial currents of policing from judicial review, leaving the volatile interaction of policing and race further unchecked. In a deceptively important 2004 case, *Devenpeck v. Alford*, the Court subtly but meaningfully extended the power of police to arrest, further puncturing the principle that arrests must rest on probable cause.<sup>134</sup> The peculiar facts of *Devenpeck* make it all too easy to relegate it to a “footnote” case, but that would ignore the important expansion of police power it portends. In *Devenpeck*, a Washington state patrol officer pulled over

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<sup>132</sup> *Id.* at 813.

<sup>133</sup> In short, the Supreme Court’s jurisprudence has made proving systemic discrimination in policing cases nearly impossible. See *Washington v. Davis*, 426 U.S. 229, 239–40 (1976); Hecker, *supra* note 90, 587–89; Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 354–62 (1998); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 322–29 (2001); Sklansky, *supra* note 53, at 326; Starr, *supra* note 68, at 492. Indeed, the Court’s severe limitations on litigants’ discovery rights in order to prove such discrimination makes even *trying* to show discrimination very difficult. See *United States v. Armstrong*, 517 U.S. 456, 462–63 (1996) (holding that discovery under Fed. R. Crim. P. 16(a)(1)(C) is not available in preparing selective prosecution claims). Further, even where one can show systemic discrimination, the Court’s jurisprudence indicates one would have to prove that the discrimination is the cause of one’s individual legal injury. Cf. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>134</sup> *Devenpeck v. Alford*, 543 U.S. 146 (2004)

Alford because he believed that Alford had been impersonating a police officer; in particular, that he had installed “wig wag” (flashing lights) in his car in an attempt to fool others into believing he was a police officer.<sup>135</sup> In the process of questioning Alford about his lights, Sergeant Devenpeck noticed Alford was recording the conversation and, despite Alford’s protestations that he was legally entitled to do so, arrested Alford for making the “illegal” recording.<sup>136</sup>

Ultimately, a lower court sided with Alford, finding that it was lawful to record his encounter with the police.<sup>137</sup> In turn, Alford sued, claiming that his arrest violated, *inter alia*, his Fourth Amendment rights.<sup>138</sup> The Supreme Court dismissed Alford’s argument that the reason for an arrest had to be closely related to the probable cause offered. All that matters is that, given the facts known to the officer, probable cause that a crime has been or will be committed exists. The fact that Officer Devenpeck arrested Alford for an entirely different crime did not invalidate the arrest because other facts known to Devenpeck would have been sufficient to constitute probable cause.<sup>139</sup> The Court held that all that mattered was whether probable cause existed that any crime had been committed. The Court once again expanded the power of the police by fortifying the wall between an officer’s subjective motivation and an “objective” legal justification for an arrest. The Court repeated that a police officer’s subjective state of mind is irrelevant to the validity of a Fourth Amendment stop and search.<sup>140</sup> So long as Devenpeck knew that probable cause was “in the air,” to borrow the phrase, the arrest was valid.

*Devenpeck* comes to the remarkable conclusion that an arrest can be supported by probable cause different from what motivated the officer to make the arrest. Indeed, one of the dark ironies in *Devenpeck* is Justice Scalia’s assertion that premising probable cause on the actual reason an officer arrested a person would cause officers to “charge

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<sup>135</sup> *Id.* at 148–49.

<sup>136</sup> *Id.* at 149–51.

<sup>137</sup> *Id.* at 149–52.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 153–56.

<sup>140</sup> *Id.* at 153.

stack”—to charge a potential arrestee with every conceivable offense.<sup>141</sup> *Devenpeck* bizarrely solves this problem by relieving the officer of any need at all to choose or articulate the reason he is arresting a person. Under *Devenpeck*, an arrest remains valid on any theory of probable cause an officer eventually chooses, perhaps even probable cause of a crime that was not thought of by the officer at the time of effecting arrest. If the first stab at probable cause fails, the officer need only try the next theory. The full gravity of this line of cases can only be seen when they are viewed together. Taken together with *Whren*, the current law leads to the astonishing conclusion that not only can a police officer who pulls over a Black driver shield his racist motivations by pointing to any traffic violation, but that so long as an officer can eventually concoct a narrative picking out some plausible probable cause behind the stop, that officer’s true motivations will be entirely insulated from Fourth Amendment review.<sup>142</sup>

The last fifteen years have seen the Supreme Court deepen its willful blindness to the role of race in policing. The Court has consistently expanded the power of police to stop, frisk, or search citizens, and the Court refuses to sanction police when they are in clear legal error.<sup>143</sup> A minimally attentive Court would have noticed the deep implications of the racialized aspects of policing strung throughout the entirety of their rulings. Instead, the Court has overwhelmingly relied on inspecting only whether this individual, denuded of social context or race, forfeited his right to go about his way. Ultimately, the doctrinal view of an individually held Fourth Amendment right has hidden race from view.

It would be too much to pretend that it is only this individual rights view of the Fourth Amendment that has sanctioned dual policing regimes. To be sure, there are important expansions of police power to

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<sup>141</sup> *Id.* at 155.

<sup>142</sup> Some earlier cases had been tempted by similar thinking, allowing, for example, probable cause known by an officer’s partner to be sufficient to ground probable cause for an arrest by the officer who did not possess probable cause. See *United States v. Ragsdale*, 470 F.2d 24 (1972).

<sup>143</sup> To take one sign of how openly police practices rely on this discretion, the International Association of Chiefs of Police created an award entitled, “Looking Beyond the License Plate” to award officers who leveraged pretextual stops into arrests for more serious crimes. EPP ET AL., *supra* note 6, at 36.

search persons and seize evidence that do not rely on the view of political rights as only individualistically defined. In *Herring v. United States*,<sup>144</sup> Bennie Herring went to a police station in Alabama to check on an impounded pickup truck. A police investigator who knew and presumably disliked Herring spotted him and asked a clerk to check him for any outstanding warrants.<sup>145</sup> Told that there was indeed an outstanding warrant for Herring, the officer stopped him as he drove away and searched his vehicle, finding a pistol and narcotics.<sup>146</sup> Only afterwards did the officer learn that there had been a mistake and that the warrant had, in fact, been recalled months earlier.<sup>147</sup> In *Herring*, the Court once again declined to exclude the evidence seized. Notwithstanding that there was no valid legal basis on which to stop Herring, a closely divided Court declined to exclude the evidence seized, extending the “good faith”<sup>148</sup> defense because there was no evidence of flagrant or deliberate misconduct.<sup>149</sup> Related, if less surprising, in *Davis v. United States*, the Court held that a police officer’s search that was constitutional at the time it was conducted but was made unlawful by a later ruling did not require evidence seized to be suppressed.<sup>150</sup>

The most discordant decision from the rights-centric view is the Court’s recent decision in *Heien v. North Carolina*.<sup>151</sup> In *Heien*, a police officer pulled over Maynor Javier Vasquez for driving with one of his car’s taillights broken, in violation of a North Carolina statute.<sup>152</sup> Upon pulling him over, he noticed another man, Nicholas Heien, lying in the backseat covered by a blanket; this, of course, raised his suspicion.<sup>153</sup> He received permission from Heien to search the car whereupon he found a bag with nearly fifty-five grams of cocaine.<sup>154</sup> The contrast of *Heien* with the Court’s earlier decisions is striking because of the resemblance it

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<sup>144</sup> 555 U.S. 135 (2009).

<sup>145</sup> *Id.* at 137–38.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *United States v. Leon*, 468 U.S. 897 (1984).

<sup>149</sup> *Herring*, 555 U.S. at 145–48.

<sup>150</sup> *Davis v. United States*, 564 U.S. 229 (2011).

<sup>151</sup> *Heien v. North Carolina*, 135 S. Ct. 530 (2014).

<sup>152</sup> *Id.* at 534.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

shares with the pretextual stop in *Whren*, along with the disquieting echo of the many tense police encounters that have ended in the death of unarmed Black men. Yet the legal reasoning the Court employs is nearly the inverse of the concepts employed in *Whren*.

*Heien* likely plays out thousands of times daily across the country.<sup>155</sup> An officer wants to stop a car, all too often a car with a Black or Hispanic driver, and finds a minor driving violation to use as a platform from which he can further investigate. Each of these thousands of stops is shielded from judicial inspection. *Heien*, however, presented a rare stroke of “bad luck” for everyday racial profiling. The underlying statute permitting the stop only required one working taillight, rendering the initial stop invalid.<sup>156</sup> Under *Whren*, so long as a police officer had the legal right to stop a citizen, there was no constitutional injustice regardless of motivation.<sup>157</sup> The logical implication would be that where a police officer did not have the legal right to make a stop, the officer’s misinterpretation of the law could not rescue the validity of seized evidence. Instead, the Court expanded on its line of good faith exception cases. With Justice Sotomayor as the lone dissenting voice, the Court held that a police officer’s good faith mistake of law does not undermine the reasonableness of the search under the Fourth Amendment.<sup>158</sup>

The holdings in *Heien* and its companion good faith cases show there is more going on than simply a Court in thrall with a single philosophical view.<sup>159</sup> As with any complex legal doctrine, no single theory can capture the universe of cases, and it can be argued that the Supreme Court’s jurisprudence simply reveals its willingness to grant police a freer hand with the full knowledge that police power will remain disproportionately focused on persons of color.<sup>160</sup> But it would

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<sup>155</sup> EPP ET AL., *supra* note 6, at 2–3, 52–73; MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005 (2007).

<sup>156</sup> *Heien*, 135 S. Ct. at 535.

<sup>157</sup> *Whren v. United States*, 517 U.S. 806, 811–13 (1996).

<sup>158</sup> *Heien*, 135 S. Ct. at 538–40.

<sup>159</sup> Wayne A. Logan, *Cutting Cops Too Much Slack*, 104 GEO. L.J. ONLINE 87, 87–88 (2015); 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2(b) (5th ed. 2018).

<sup>160</sup> The cases in which the Supreme Court has been willing to restrain police power have been relative islands in the ocean. In *Arizona v. Gant*, 556 U.S. 332 (2009), the Court held that

also be a mistake to underestimate the importance of the individual rights-based view to the Supreme Court's Fourth Amendment doctrine, the damage this view has done to a fuller conception of citizens' rights against the police, and its centrality in constructing a legal world where persons of color are subject to largely unchecked police power. Bringing the Court's justification into full view is critical to lasting reform. No matter how painful and exhausting it is, each time we are confronted with another unjustified police shooting we can no longer be surprised that such unchecked power will inevitably lead to tense, violent, and sometimes fatal encounters.

E. *How Utah v. Strieff Ignored Race at the Height of the "Black Lives Matter" Movement*

Even if the cases do not present a straight line, the Supreme Court's latest Fourth Amendment ruling made clear the Court's commitment both to viewing Fourth Amendment rights as individualistic and to ignoring the role race plays in unjustified policing. *Utah v. Strieff*<sup>161</sup> was argued in the winter of 2016, as the "Black Lives Matter" movement swept across the country, demanding reform of policing practices and greater accountability for police abuses.<sup>162</sup> Despite a national focus on race and policing unmatched in a generation, the majority's ruling in *Strieff* is deafening in its silence. Instead, it applies the antiseptic language of the Court's good faith exception doctrine, returning to its

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police officers could not automatically search a car pursuant to an arrest of a recent occupant without some evidence of an actual threat to their safety or reason to believe that there was evidence of the crime for which the person was being arrested in the car. In *United States v. Jones*, 565 U.S. 400 (2012), the Court held that placing a G.P.S. monitor on an automobile without a valid warrant constituted a search under the Fourth Amendment. The majority peculiarly grounded the Fourth Amendment violation under a theory of trespass widely thought to have been disregarded. *Id.*

<sup>161</sup> *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

<sup>162</sup> See Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, *GUARDIAN* (July 19, 2015, 5:00 AM), <https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement> [<https://perma.cc/7YPK-CWZB>]; BLACK LIVES MATTER, <http://blacklivesmatter.com> [<https://perma.cc/EMD5-HGK7>] (last visited Mar. 30, 2019); Jelani Cobb, *The Matter of Black Lives*, *NEW YORKER* (Mar. 14, 2016), <http://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed> [<https://perma.cc/A3MU-KBZQ>].

long-standing view of the Fourth Amendment as an individually held right.

The facts of *Strieff* are straightforward. Utah police officer Fackrell testified to receiving an anonymous tip that a home had become a drug house.<sup>163</sup> Fackrell watched the house intermittently for a week, observing a number of visitors that raised his suspicions.<sup>164</sup> Eventually Fackrell's suspicions prompted him to follow Edward Strieff when Strieff left the home.<sup>165</sup> On this thin suspicion alone, Fackrell stopped Strieff, questioned him, and demanded to see his identification. It was then Fackrell discovered that Strieff had an outstanding warrant for a traffic violation.<sup>166</sup> Based on the traffic warrant, Fackrell arrested Strieff and searched him pursuant to arrest, finding methamphetamines and drug paraphernalia.<sup>167</sup>

It was uncontested that Officer Fackrell's forcible stopping of Strieff, for merely leaving a home he found suspicious, was legally unjustified—indeed. Fackrell's stop was found to lack even the lower constitutional requirement of “reasonable suspicion.”<sup>168</sup> Thus, the Utah Supreme Court ordered that a violation of the Fourth Amendment required the evidence seized during the arrest to be suppressed.<sup>169</sup>

The United States Supreme Court reversed the holding, admitting the evidence. First, the majority implausibly held that Officer Fackrell's decision to stop Strieff was little more than a negligent accident; a Fourth Amendment slip rather than part of systematic police overreaching, a point to which this Article will return shortly.<sup>170</sup> Because

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<sup>163</sup> *Strieff*, 136 S. Ct. at 2059.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 2060.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 2062–63. The Court ignored voluminous evidence that running a warrant check in conjunction to a stop has become a widespread police practice, allowing the police to turn routine encounters into criminal investigations and greatly expanding police power. *Id.* at 2065–67 (Sotomayor, J., dissenting). As Justice Sotomayor noted in her dissent, the recorded number of outstanding warrants stands at 7.8 million and that probably significantly underestimates the true number. *Id.* at 2068; see also Woods, *supra* note 7, at 725–28.

Fackrell's actions, as the majority supposes, were not part of a dragnet, the illegality of the stop did not require suppression of the evidence.<sup>171</sup>

The majority's reasoning only tells half of the story. Excusing Fackrell's illegal detention of Strieff does not fully tell us why the stop precipitating the arrest should be permitted. Put another way, the fact that the Court viewed Fackrell's "mistake" as one of minor negligence might explain why he should not be liable for a civil rights or false imprisonment claim or why he ought not to be fired. It does not, however, explain why the arrest he made was permissible. The obvious reason the narcotics found on Strieff are admissible is because they were found upon his arrest pursuant to an outstanding warrant. But that ignores the glaring fact the police could not have known of Strieff's warrant were it not for the otherwise unlawful stop and subsequent search. The case for permitting the arrest and subsequently seized evidence turns instead on whether the police had an underlying objective legal right to conduct the stop—the dominant question for the Court remains whether you as an individual have a right to be free of police interference.

Recall in *Whren*, the Court held that the subjective intent of a police officer did not affect the validity of a traffic stop if the officer objectively had probable cause to believe one had violated a traffic law.<sup>172</sup> Similarly, in *Devenpeck*, the Court held that a police officer's arrest for an invalid reason did not undermine the arrest so long as objective probable cause existed somewhere within the officer's purview.<sup>173</sup> *Strieff* is the natural, if disturbing, conclusion of this line of thinking. Because a warrant permitted Strieff to be stopped and arrested by the police, the reason he was stopped originally does not matter. Indeed, it is of no consequence that the officer could not have otherwise stopped Strieff and did not know when stopping him that Strieff had an outstanding warrant. If the Fourth Amendment is viewed not as a political covenant to secure conditions between citizens but rather as an individually held set of personal rights, then the decision in *Strieff*, like *Whren* and *Devenpeck*, makes sense. A warrant means the police have a right to arrest and thus a person has no complaint if the police exercise

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<sup>171</sup> *Strieff*, 136 S. Ct. at 2064.

<sup>172</sup> See *supra* Section III.C.

<sup>173</sup> See *supra* Section III.D.



this right; it is does not matter if police fabricate a reason to stop you because they “[do]n’t like the way you look[.]”<sup>174</sup> or that an officer uses these reasons as a thin cover for their racist motivations.<sup>175</sup> Ultimately, the question of justification depends on the individual’s underlying rights held against the police or the lack thereof. With the focus solely on the individual, the social and racial context disappears from view.

F. *Beyond the National Spotlight: Real and Devastating Consequences of the Supreme Court’s Avoidance of Race*

Though important to excavate the doctrinal structure of the Supreme Court’s rulings, it is crucial not to lose sight of its impact on real lives. The millions of “data points” representing each stop and frisk stands in place of a real person, all too often a young Black or Hispanic man, pushed against a wall or forced to spread his legs. By contrast, the Supreme Court’s jurisprudence has consciously ignored the troubling role that race plays in policing.<sup>176</sup> Its majority decisions pretend a colorblind world exists in which a police officer’s motivations are best described as channeling expertise and finely honed intuition untinged by racial bias.<sup>177</sup> Indeed, I believe the Supreme Court finds focusing

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<sup>174</sup> See Brief for N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae, *Sibron v. New York*, 392 U.S. 40 (1967) and *Terry v. Ohio*, 392 U.S. 1 (1968) (recounting Officer McFadden’s testimony in *Terry*); see also text accompanying *supra* note 85.

<sup>175</sup> *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting).

<sup>176</sup> *Terry*, *Whren*, and the cases between them contributed to the Court’s conception of a “raceless” world of Fourth Amendment jurisprudence—a constructed reality in which most police officers do not act on the basis of considerations of race; the facts underlying a search or seizure can be evaluated without examining the influence of race; and the applicable constitutional mandate is wholly unconcerned with race. See Thompson, *supra* note 84, at 962, 981–82.

<sup>177</sup> A “reasonable” police officer here is one who “views the facts through the lens of his police experience and expertise . . . [to] yield inferences that deserve deference.” *Ornelas v. United States*, 517 U.S. 690, 699 (1996). In the Supreme Court’s worldview, there seems to be no malicious police officers. Indeed, even the internal implicit biases we all carry are nowhere in sight. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011). The Court’s image stands in stark contrast with how police officers understand their powers. “I have what you might call a profile. I pull up alongside a car with black males in it. Something doesn’t match—maybe the style of the car with the guys in it . . . [W]e go from there.” Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES (June 20, 1999), <https://>

Fourth Amendment doctrine on the individually held rights of each person comfortable precisely because it allows such easy avoidance of the searing questions of race and policing, questions with which the nation now wrestles and on which the “Black Lives Matter” movement insists. The Court’s doctrine allows police free hand, shielding racist police practices from legal scrutiny and creating a world where African American and Hispanic citizens are quite simply policed under a separate regime.

The result of the Court’s jurisprudence has been predictable. Study after study, lawsuit after lawsuit reveals dramatic inequalities in police attention and harassment of minorities, particularly on the road.<sup>178</sup> A study in Volusia County, Florida, for example, found that, within a special drug interdiction squad stopping cars for minor traffic violations, over 70% of the drivers stopped were African American or Hispanic.<sup>179</sup> Over 80% of the vehicles searched were those of African Americans or Hispanics and the average length of a stop for an African American or Hispanic driver was twice as long as that of a White driver.<sup>180</sup> Similar patterns were found in Maryland, where litigation by the ACLU found that, despite comprising 17% of all drivers on a particular stretch of the interstate and no evidence that Black and White drivers violate traffic laws at differing rates, nearly 73% of all drivers pulled over were African American.<sup>181</sup> Evidence from other states has similarly borne out this pattern.<sup>182</sup> The evidence further reveals that even in the case that minority drivers are more likely to be trafficking in

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[www.nytimes.com/1999/06/20/magazine/the-color-of-suspicion.html](http://www.nytimes.com/1999/06/20/magazine/the-color-of-suspicion.html) [https://perma.cc/E8FJ-3732].

<sup>178</sup> EPP ET AL., *supra* note 6, at 52–59, 64–73; Woods, *supra* note 170, at 730; Harris, *Car Wars*, *supra* note 5, at 559; David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 572 (1997) [hereinafter Harris, “Driving While Black”].

<sup>179</sup> See Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL (Aug. 23, 1992), [http://articles.orlandosentinel.com/1992-08-23/news/9208230541\\_1\\_stop-and-search-sentinel-drivers-stopped](http://articles.orlandosentinel.com/1992-08-23/news/9208230541_1_stop-and-search-sentinel-drivers-stopped) [https://perma.cc/JZ39-63WJ].

<sup>180</sup> *Id.*

<sup>181</sup> David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, ACLU SPECIAL REPORT (June 1999), available at <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [https://perma.cc/9N73-HW8K].

<sup>182</sup> Hecker, *supra* note 90, at 558–71.

drugs, the police stops remain vastly disproportionate.<sup>183</sup> Still, none of the statistics can fully capture the combination of humiliation and rage that accompanies knowing that a police officer has pulled you over because you are Black, and there is no legal recourse—a flat truth revealed in the sardonic understanding that one can be guilty of the crime of driving while Black.<sup>184</sup>

Of course, racist policing practices do not stop once a Black man exits his car. The nationwide experiment of aggressive stop and frisk policies illustrates the same legal shielding protecting racist policing, and creates a different policing regime on our sidewalks as well.<sup>185</sup> In New York City, home of the nation's largest police force, nearly four and a half million stop and frisks were recorded between 2004 and 2012.<sup>186</sup> New York's population is roughly 23% Black, 29% Hispanic, and 33% White.<sup>187</sup> Nonetheless, in 52% of all searches, the person searched was Black.<sup>188</sup> In another 31% of the searches, the person was Hispanic.<sup>189</sup> Blacks and Hispanics were not only vastly disproportionately the target of searches, but they also disproportionately experienced police violence.<sup>190</sup> Though over half of these searches were justified as weapons searches, a weapon was found in only 1.5% of these searches.<sup>191</sup> In bitter irony, weapons and contraband were slightly more likely to be found on White persons searched than on either Black or Hispanic persons searched.<sup>192</sup> Just as in *Terry*, the overwhelming stated justifications for initiating the stops are vague descriptors that are easily influenced by racial stereotypes or

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<sup>183</sup> *Id.*

<sup>184</sup> Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, *supra* note 13, at 272; Harris, "Driving While Black", *supra* note 178.

<sup>185</sup> Woods, *supra* note 7, at 718–21.

<sup>186</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 596 (S.D.N.Y. 2013) (discussing findings on New York City quota and stop-and-frisk policy); Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. & SOC. SCI. 335, 336 (2014).

<sup>187</sup> *Floyd*, 959 F. Supp. 2d at 559.

<sup>188</sup> *Id.* at 574.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 573.

<sup>192</sup> *Id.* at 574.

prejudice such as “Furtive Movements” and “High Crime Area.”<sup>193</sup> Examining the record in *Floyd v. City of New York* highlights the obvious: a regime that allows such wildly disparate practices all but declares that persons of color live under a different policing regime without recourse.

It is hard to imagine a more telling example of the blind eye the Court has turned to questions of race in policing than its holding in *Strieff*. As mentioned earlier, it is shocking that this holding could be issued in the tumult of national protests and the Black Lives Matter movement without the majority so much as mentioning the subject. It fell to Justice Sotomayor’s powerful dissent to point out the obvious and dangerous implications of the majority’s holding. Under *Strieff*, a police officer may stop a citizen at any time, without probable cause or reasonable suspicion, and demand identification in order to run a warrant check.<sup>194</sup> Such power, as Sotomayor notices, is hardly a negligent slip, as the majority misleadingly suggests. Warrants have become an alarmingly widespread part of everyday life in the United States. A warrant can be issued for an unpaid traffic or parking ticket, as in *Strieff*, for drinking under certain circumstances, or for violating a curfew.<sup>195</sup> A warrant for missing child support payments is thought to be the precipitating factor that led Walter Scott to run from his car

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<sup>193</sup> *Id.* Obviously, in the loaded context of policing, officers will often have their snap decisions influenced by racial images they carry. Contrary to the Supreme Court’s assumptions in *Terry* and its declaration in *Whren*, the subject of race cannot be treated as wholly divisible from the assessment of whether an officer had probable cause for an arrest or warrantless search or reasonable suspicion for a stop or frisk. Many of the perceptions and judgments an officer reports on a witness stand—for example, the commission of a “furtive gesture,” an “attempt to flee,” “evasive” eye movements, “excessive nervousness”—will not be accurate renditions of the suspect’s actual behavior but rather a report that has been filtered through and distorted by the lens of stereotyping. Thompson, *supra* note 84, at 991; *see also* Harris, *Factors*, *supra* note 72, at 680.

<sup>194</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2070–71 (2016). (Sotomayor, J., dissenting) (“By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”).

<sup>195</sup> *Id.* *See, e.g.*, ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [<https://perma.cc/AD4U-MMS4>].

resulting in his being murdered. Nationwide, there are nearly eight million outstanding warrants on state and federal databases, overwhelmingly for minor offenses.<sup>196</sup>

Nor should anyone pretend that these millions of warrants are equally spread among Americans. As earlier noted, warrants for arrest are concentrated among the poor and communities of color and are often viciously circular. Being stopped and frisked may lead to a ticket for a misdemeanor; if one forgets to or cannot pay that ticket, a warrant is issued that may lead to an arrest. Such an arrest may result in being late to work one time too many, resulting in a lost job, with a misdemeanor subsequently making getting a new job harder.

Ultimately, concentrating the issuance of warrants allows police constant access to stop or harass entire communities. As the Justice Department's withering report on Ferguson, Missouri shows, police departments systematically use warrants both as a way of bringing entire communities under unchecked police power and fleecing powerless communities to fill city coffers.<sup>197</sup> Ferguson, a city of 21,000 with nearly 70% Black residents, had over 16,000 citizens with outstanding warrants for their arrest.<sup>198</sup> Similarly, in New Orleans in a single year, over 20,000 arrests were made pursuant to warrants for minor offenses, equaling a third of total arrests.<sup>199</sup> It is of little wonder that police departments train officers to routinely run warrant checks, as happened in *Strieff*.<sup>200</sup> Ferguson illustrates the practical result of the immense power the Court granted in *Strieff*—vulnerable citizens live with the fear they can be stopped and checked anywhere, at any time.

A legal regime that shields racist policing practices exacerbates tensions between the police and communities of color.<sup>201</sup> Even before the ruling in *Whren*, the distrust between African-Americans (and other minorities) and the police—perceived as racist, hostile, bullying and illegitimate—was deep-seated.<sup>202</sup> The practices insulated by *Whren* and

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<sup>196</sup> *Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting).

<sup>197</sup> DEP'T OF JUSTICE, FERGUSON POLICE DEPARTMENT, *supra* note 71, at 3–4.

<sup>198</sup> *Id.* at 7–9.

<sup>199</sup> *Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting).

<sup>200</sup> *Id.*

<sup>201</sup> See Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243 (1991).

<sup>202</sup> *Id.* at 243–45.

*Strieff* feed the perceptions of many minority citizens that the police simply act on racist stereotypes and subject them to arbitrary and illegitimate attention; that one may be pulled over at any time for the crime of “driving while Black.”<sup>203</sup> That the Supreme Court’s jurisprudence seems to all but permit such police behavior leaves too many Black and Brown citizens convinced that criminal law is little more than the arbitrary and crass wielding of power. In the words of David Harris, over twenty years ago:

These fruitless searches and seizures represent a cost, both to individuals and to society. Not the least of this cost is the effect these stops have in widening the racial divide in the United States. . . . [S]tops and frisks, in which police forces consistently treat all-Black neighborhoods like enemy territory, have become the source of a distinctly racial abrasiveness for African Americans. Those communities most in need of police protection may come to regard the police as a racist, occupying force.<sup>204</sup>

The Court’s studied blindness to the discriminatory treatment of minorities in our criminal justice system is not limited to policing, but extends to discriminatory charging and convictions,<sup>205</sup> as well as discriminatory punishment, including the death penalty.<sup>206</sup> But because policing is the most visceral daily face of state power and because the historical moment requires it of us, our current Fourth Amendment doctrine demands change.

Discouraged by the racial injuries unaddressed by our current Fourth Amendment doctrine, some reflexively seek redress in other constitutional or statutory regimes. Yet surveying the landscape illustrates that seeking harbor outside the Fourth Amendment does not effectively address the racial harms of modern policing and is incapable of through-going reform of police practices. In particular, the Fourteenth Amendment offers little hope in the context of policing and statutory regimes have proved unequal to the task. The next Part

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<sup>203</sup> Harris, “*Driving While Black*,” *supra* note 178, at 546.

<sup>204</sup> Harris, *Factors*, *supra* note 72, at 681.

<sup>205</sup> *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>206</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

explores the inadequacy of other legal solutions, making clear the importance of recasting the Fourth Amendment.

#### IV. THE NEW FOURTH AMENDMENT: A PHILOSOPHICAL TURN

The current law and structure of American policing is incompatible with racial justice. Still, one might be skeptical of the prescription; reimagining the fundamental justification of the Fourth Amendment may seem too academic a response to such an urgent problem. One might more naturally turn to other constitutional grounds or seek statutory solutions that eschew high theory. This Part explores why seemingly more obvious solutions to racially oppressive policing are unlikely to succeed. In particular, relying on the Fourteenth Amendment's Equal Protection Clause has become a theoretical and practical non-starter, and executive branch and administrative agency actions have consistently proved insufficient. But the reason to turn to the Fourth Amendment is not solely built on negative reasons. The Fourth Amendment's internal regulation of police norms provides positive reasons to prefer it as the basis of reform. The only promising solution to reform policing at its heart is through the Fourth Amendment.

##### A. *The Fourteenth Amendment and Equality in Policing*

Given the enduring harms of policing—from contributing to disproportionately high minority mass incarceration, everyday domination and humiliation, the social image of the “criminal black man” and the moments of spectacular violence against unarmed African American men—stem from the history of racist police practices, the instinctive place to seek redress would seem to be the Fourteenth Amendment. Indeed, causally dismissing the discretion granted to police, the Supreme Court declared the Equal Protection Clause the appropriate constitutional medicine for racism in policing.

Despite this natural impulse, criminal procedure scholars nearly uniformly view the Court's invitation as disingenuous and the

Fourteenth Amendment as powerless in the context of policing. The Fourteenth Amendment's ability to regulate policing is commonly referred to as "shredded" and "pointless,"<sup>207</sup> "near impossible,"<sup>208</sup> "close to nil,"<sup>209</sup> and a "cruel irony."<sup>210</sup> How has the Fourteenth Amendment become so denuded from policing as to become powerless? The Supreme Court's jurisprudence has created both an interpretive and practical barrier to applying Equal Protection concepts to policing. Independently, each would be formidable. Together, they have become impossible to scale.<sup>211</sup>

The doctrinal or interpretive barrier to applying the Fourteenth Amendment to policing is the Supreme Court's ossified definition of racism. Today even a casual observer notices the complex ways racism affects persons and communities of color. Structural racism describes the way histories and institutions perpetuate modes of power and racial injustice.<sup>212</sup> In the case of criminal punishment, we have inspected how countless decisions accumulate, decisions from which laws are enacted, and which communities are (over)policed enforcing how prosecutors charge cases, all of which lead to a system of disproportionate punishment so gross as to be described as "the New Jim Crow."<sup>213</sup> Likewise, the distinct but related concept of "implicit bias," describing unconscious assumptions about persons and situations based on racial characteristics, has entered the popular lexicon.<sup>214</sup> Thus, whether a

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<sup>207</sup> Brando Simeo Starkey, *A Failure of the Fourth Amendment & Equal Protection's Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131, 136–37 (2012) [hereinafter Starkey, *Failure*]. That this damning claim is leveled by an advocate of Fourteenth Amendment regulation is telling.

<sup>208</sup> DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* 184 (6th ed. 2008).

<sup>209</sup> Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 80 (2003).

<sup>210</sup> ALEXANDER, *supra* note 25, at 106.

<sup>211</sup> *Id.* at 109–36.

<sup>212</sup> Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

<sup>213</sup> ALEXANDER, *supra* note 25, at 123–39.

<sup>214</sup> Richardson, *supra* note 177; Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 42–46 (2009).



police officer views a group of young men as misbehaving youth or dangerous thugs, or reacts to a driver reaching for his license as a compliant citizen or as a mortal threat, is surely driven in part by his unconscious view of Black and Hispanic men as latent criminals.<sup>215</sup> Lastly, constitutional theories, such as “disparate impact,”<sup>216</sup> and sociological concepts, such as social dominance theory,<sup>217</sup> highlight the way facially neutral laws can, even unintentionally, harm vulnerable communities of color or preserve social and racial hierarchies.

Against the background of richer and now common ways of discussing racial injustice, the Supreme Court has obtusely retreated to an anachronistic and restrictive legal definition of discrimination. The modern Supreme Court’s Fourteenth Amendment jurisprudence, particularly as it relates to policing, limits unconstitutional treatment only to intentional racial animus.<sup>218</sup> For the Supreme Court, the only thing that could count as racism is the cinematic villain, the cop who wakes up intending to ticket, arrest or shoot a citizen precisely and only because he is Black. Whatever the right view of racism in our society, if there is such a thing as a right view, it surely cannot be such a simplistic one. While such racism remains, it is only a purposefully obtuse view that limits all discrimination to such hostility.

Even in the exemplar case, *Whren*, it would be impossible to definitively claim that the officers stopped the car *only* because its occupants were Black. Perhaps had the car been in a different neighborhood, dressed in a way that soothed the officers or, even more likely, the occupants were women, the officers would have ignored the

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<sup>215</sup> Richardson, *supra* note 177, at 2038–39.

<sup>216</sup> As professor Akhil Reed Amar notes:

Even if racially disparate impact alone does not violate the Constitution, surely equal protection principles call for concern when [B]lack bear the brunt of a government search or seizure policy. Thus, in a variety of search and seizure contexts, we must honestly address racially imbalanced effects and ask ourselves whether they are truly reasonable.

Amar, *Fourth Amendment*, *supra* note 96, at 808.

<sup>217</sup> Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23 (2014).

<sup>218</sup> *Personnel Adm’r v. Feeney*, 442 U.S. 256, 259–60 (1979); *City of Memphis v. Greene*, 451 U.S. 100 (1981); Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251 (2011).

vehicle. More important is to ask whether the race of the occupants was an important factor in why the officers were interested in stopping the car, or perhaps contributes over time to officers disproportionately stopping people of color.<sup>219</sup> Obviously, police departments and officers often act with mixed motivations, informed by but perhaps not driven solely by race.<sup>220</sup> It is too much to ask (and too little to see) to restrict one's view of racism to a police officer driven to stop any Black man no matter the circumstances.

If the restrictive interpretation of what counts as racism makes combating unjustified policing practices difficult, the practical barriers imposed by the Supreme Court have made it nearly impossible. Given that only direct proof of an individual officer's racist animus can serve as the basis for constitutional relief, the evidentiary burden on a plaintiff is high. Yet in *United States v. Armstrong*, the Supreme Court famously held that in order to compel the government to produce evidence that could substantiate allegations of racial discrimination, the plaintiff must show that the government treated similarly situated persons in a discriminatory fashion.<sup>221</sup> In effect, the Court has held that anyone complaining of racial discrimination by the police must all but have the convincing evidence of that discrimination before they can compel the government to produce the very evidence that would prove their case.<sup>222</sup> Of course, occasionally the very careless officer may leave clear evidence of racial hostility or modern technology may capture inadvertent admissions of racism.<sup>223</sup> But the rare moments provided by sporadic recordings are no answer to the systematically unseen and unheard moments that only broad access in discovery could provide. Further, even were greater evidentiary access permitted, many plaintiffs would still be paralyzed by the staggering cost and effort of collecting such

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<sup>219</sup> Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854–59 (2011).

<sup>220</sup> Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999); Starkey, *Failure*, *supra* note 207, at 137; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 788–89 (2d ed. 2005).

<sup>221</sup> *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>222</sup> ALEXANDER, *supra* note 25, at 114–19.

<sup>223</sup> Jorge Rivas, *NYPD Cop Taped Making Racial Slur About Black Man After Stop-and-Frisk*, COLORLINES (Oct. 18, 2011, 11:51 AM), <http://www.colorlines.com/articles/nypd-cop-taped-making-racial-slur-about-black-man-after-stop-and-frisk> [<https://perma.cc/R7GH-9AED>].

data.<sup>224</sup> Thus, legal scholars have concluded that, as a practical matter, the Fourteenth Amendment is all but a dead letter as a repair to discriminatory policing.<sup>225</sup>

B. *The Insufficiency of Statutory and Administrative Policies*

If the Fourteenth Amendment provides little hope for reforming the racist harms of American policing, some may be tempted by more modest legal controls.<sup>226</sup> After all, one publicly visible response to public outrage over unjustified police violence has been the announcements of consent decrees between police departments and the Department of Justice pursuant to its statutory authority. Yet despite the high visibility of DOJ investigations, it is doubtful that statutory or administrative agency intervention will engender widespread reform of racist police tactics.

The DOJ's contemporary power to restructure police departments stems from a national reckoning with race and police violence from a generation past. In brief, following the notorious videotaped beating of Rodney King, Congress enacted 42 U.S.C. § 12601, empowering the Attorney General to commence a civil action against a police department that evidences a "pattern or practice" of violating citizens' rights.<sup>227</sup> Section 12601 permits the DOJ to obtain "equitable and declaratory relief to eliminate" violating police practices.<sup>228</sup>

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<sup>224</sup> Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1869 (2015).

<sup>225</sup> ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 136, 307 (2d ed. 2003); Harris, "Driving While Black", *supra* note 178; Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk"*, 50 OKLA. L. REV. 451 (1997); Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, *supra* note 13.

<sup>226</sup> Sean P. Trende, *Why Modest Proposals Offer the Best Solutions for Combating Racial Profiling*, 50 DUKE L.J. 331, 342–57 (2000).

<sup>227</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 1111(a), 108 Stat. 1796 (codified in part at 42 U.S.C. § 12601 (2018)).

<sup>228</sup> *Id.*

Though DOJ intervention receives great fanfare when it occurs, it is rare.<sup>229</sup> Between 1994 and 2013, the DOJ had launched forty-one pattern or practice investigations, approximately two per year.<sup>230</sup> Though recent national scrutiny on the issue of police violence towards unarmed men of color has resulted in an uptick of investigations, there have been just over a handful launched in recent years.<sup>231</sup>

It is often forgotten that police powers are quintessentially local. There are approximately 18,000 police forces across the United States, with the overwhelming majority composed of small town police departments of five, ten, or twenty-five.<sup>232</sup> Obviously, in light of evidence of the widespread and institutionalized nature of the damage police practices inflict on communities of color, depending on DOJ intervention for justice is equivalent to depending on a lightning bolt for daily electricity.

Even when the DOJ does intervene, police departments internally, from individual officers<sup>233</sup> to police unions<sup>234</sup>, resist the demands of the reform memorandum, blunting the extent of reform.<sup>235</sup> Further, given the limited resources of the DOJ, its investigations often follow in the wake of highly public and tragic police abuses of force.<sup>236</sup> Thus,

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<sup>229</sup> CIVIL RIGHTS DIV., U.S. DEP'T JUSTICE, *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present* (Jan. 2009), <https://www.justice.gov/crt/file/922421/download> [<https://perma.cc/7ZTT-P63B>].

<sup>230</sup> Elliot Harvey Schatmeier, *Reforming Police Use-of-Force Practices: A Case Study of the Cincinnati Police Department*, 46 COLUM. J.L. & SOC. PROBS. 539, 543 (2013).

<sup>231</sup> CIVIL RIGHTS DIV., U.S. DEP'T JUSTICE, *supra* note 229, at 3 ("The Division has opened 11 new pattern-or-practice investigations and negotiated 19 new reform agreements since 2012 alone, often with the substantial assistance of the local United States Attorney's Offices.").

<sup>232</sup> Friedman & Ponomarenko, *supra* note 224, at 1843.

<sup>233</sup> See ROBERT C. DAVIS ET AL., TURNING NECESSITIES INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE 45-49 (Vera Inst. Justice 2002), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/turning-necessities-into-virtue-pittsburghs-experience-with-a-federal-consent-decree/legacy\\_downloads/Pittsburgh\\_consent\\_decree.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/turning-necessities-into-virtue-pittsburghs-experience-with-a-federal-consent-decree/legacy_downloads/Pittsburgh_consent_decree.pdf) [<https://perma.cc/YPT9-QLRM>].

<sup>234</sup> Letter from Thomas E. Perez, U.S. Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Joseph Maturo, Jr., Mayor of Town of East Haven 19-20 (Dec. 19, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/12/19/easthaven\\_findletter\\_12-19-11.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/12/19/easthaven_findletter_12-19-11.pdf) [<https://perma.cc/E3C2-SFR3>].

<sup>235</sup> Schatmeier, *supra* note 230, at 544.

<sup>236</sup> Joshua M. Chanin, Negotiated Justice? The Legal, Administrative, and Policy Implications of 'Pattern or Practice' Police Misconduct Reform 50, 38, 47-48, 66-67 (July 6,

depending on the DOJ is not only unreasonable but also has the disturbing quality of waiting for the spilling of Black blood before being moved to action.

C. *The Positive Case for a Fourth Amendment Revolution*

There are good reasons to believe the Fourteenth Amendment jurisprudence, statutory, and administrative law oversight are incapable of reforming modern policing. But reinterpreting the Fourth Amendment is not simply compelled because we are out of choices. It is important to conclude by spelling out why reimagining the Fourth Amendment offers the best possibility for permanently reshaping modern policing and dismantling its pervasive racial harms.

Fourteenth Amendment doctrines, DOJ, and statutory oversight of police departments are to a greater or lesser extent exogenous to policing work. I do not mean they are not critical, laudable, or normatively important. Rather, police departments and police officers view DOJ oversight as an imposition on natural policing practices and a public indictment of their competence.<sup>237</sup> Likewise, even Fourteenth Amendment doctrine requires transposing a different and very broad body of legal doctrine into the particular circumstances of policing.<sup>238</sup>

Fourth Amendment jurisprudence, by contrast, sits at the heart of policing practices, regulating the boundaries of legitimate police power. In that sense, Fourth Amendment law is endogenous to policing; police officers, even if slowly and incompletely, internalize Fourth Amendment law as intrinsic to the legitimate limits of their power.<sup>239</sup>

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2011) (unpublished Ph.D. dissertation, American University), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf> [<https://perma.cc/PT7Z-78DF>].

<sup>237</sup> Schatmeier, *supra* note 230.

<sup>238</sup> R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001); R. Richard Banks, *The Story of Brown v. City of Oneonta: The Uncertain Meaning of Racially Discriminatory Policing Under the Equal Protection Clause*, in CONSTITUTIONAL LAW STORIES 223 (Michael C. Dorf ed., 2004); Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. REV. L. & SOC. CHANGE 131 (2006).

<sup>239</sup> It is worth noting that recognizing a norm as a legitimate limit on one's powers is not identical to complying with that norm. A person may have a complicated relationship with

Obviously, Fourth Amendment regulation is neither self-enforcing nor effortlessly internalized by police officers.<sup>240</sup> Mayors, police chiefs, lawyers, civil rights groups, and others must maintain constant vigilance to ensure that police departments respect our Fourth Amendment rights. Nonetheless, it would be a mistake not to understand that the legal rights, obligations, and norms that radiate from the Fourth Amendment command greater police allegiance, and thus have an ability to reform police practices from the “inside out.”

If this claim seems naively optimistic, it pays to recall the history, both long and recent, of American policing. It is worth remembering that modern policing is a relatively new project and, less than a century ago, police officers lacked the professionalism for which we now hold them accountable.<sup>241</sup> Corruption among police officers was rampant, bordering on open, and each officer was often little more than a cruel mini dictator who could rule his beat with violence.<sup>242</sup> If policing practices today are in dire need of reform, they pale in comparison to those of the past; the excesses we seek to curb were not so long ago the norm. While police forces slowly improved, efforts to impose standardized norms of professionalism through cutting edge social science proved futile.<sup>243</sup>

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norms they recognize as valid, as in when one feels guilty for stealing or acquiesces and perhaps even internalizes they ought to be punished for violating a rule.

<sup>240</sup> Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAG., June 20, 1999, at 51.

<sup>241</sup> NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES (1931).

<sup>242</sup> *Id.*; Samuel Walker, *The Engineer as Progressive: The Wickersham Commission in the Arc of Herbert Hoover's Life and Work*, 96 MARQ. L. REV. 1165, 1181–83 (2013).

<sup>243</sup> Friedman and Ponomarenko note:

Policing's “professionalism” paradigm itself began to crumble in the late 1950s, as a new wave of researchers discovered—somehow, to their amazement—that policing was shot through with discretion. In a 1953 speech before the American Bar Association, Supreme Court Justice Robert Jackson condemned the “breakdown, delay and ineffectiveness of American law enforcement.” Responding to Justice Jackson's criticisms, the American Bar Foundation—the new research arm of the American Bar Association—organized a massive effort to study policing close up. What researchers found was that the real “rules” of policing were made “bottom-up” in an ad hoc manner through hundreds of individual decisions made by cops on the beat.

Friedman & Ponomarenko, *supra* note 224, at 1860 (internal citations omitted).

By contrast, moments in even our recent history illustrate the Fourth Amendment's power to reshape policing. One striking example is the 1966 landmark ruling of *Miranda v. Arizona*.<sup>244</sup> *Miranda* famously found, within the Fourth Amendment, the right of any citizen arrested to be advised of their constitutional rights, beginning with the famous phrase, "You have the right to remain silent."<sup>245</sup> It can be hard in today's world to recall what a seismic ruling *Miranda* seemed at the time; indeed, that we can hardly do so is part of the point. Police chiefs, district attorneys, and newspapers decried the ruling, and it quickly became an important issue in the 1968 presidential election.<sup>246</sup> The shockwaves were so deeply felt that Congress quickly passed legislation explicitly reversing the Supreme Court's holding.<sup>247</sup>

Given the broad social outrage and a congressional statute explicitly overruling it, it is remarkable that *Miranda* not only survived but conquered. In part, this was surely because the parade of horrors imagined by *Miranda*'s opponents never materialized.<sup>248</sup> More than that, police departments internalized *Miranda* as part of police work, even recognizing its benefits in both drawing bright lines as to what constituted legal interrogations<sup>249</sup> and the increased legitimacy *Miranda* lent police officers.<sup>250</sup>

When emanating from the Fourth Amendment, even a ruling as profound at its inception as *Miranda* was internalized by police officers within a generation. Thus, seeking a philosophical revolution in our

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<sup>244</sup> 384 U.S. 436.

<sup>245</sup> *Id.* at 467–73.

<sup>246</sup> LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 243–48 (1983).

<sup>247</sup> Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 3501 (1968). The statute was ultimately held unconstitutional when the Supreme Court secured *Miranda*'s status as constitutionally rooted. *See Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>248</sup> Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

<sup>249</sup> Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519 (2008); Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461 (1988).

<sup>250</sup> Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 680 (1996).

Fourth Amendment doctrine is not simply an interesting or elaborate way of reforming policing. A philosophical reimagining of the Fourth Amendment offers the best chance at fundamentally altering the tense relationship between police and communities of color and the devastating harms it creates.

V. THE PHILOSOPHICAL UNDERPINNINGS OF CRIMINAL LAW AND ITS  
REGULATION OF POLICING, RIGHTS, AND RACE

A. *How Understanding Philosophy is Crucial to Changing the  
Relationship Between Police and Race*

Though the individual planks we have explored are each individually recognized, integrating them into a comprehensive landscape reveals how our law permits policing of people of color under a separate and unequal policing regime—one in which arbitrary police stops on the road and on the streets are legally sanctioned and relentless policing eventually explodes, and why there is bound to be yet another Walter Scott, Philando Castile, or Alton Sterling. Evaluating how the various parts of current Fourth Amendment doctrine interlock to purposefully shut out consideration of race in policing reveals that dismantling this structure cannot be done case by case. Rather, each case is built on a very particular philosophical view of the source of Fourth Amendment rights. Legal scholars for too long have viewed the ills of the Fourth Amendment as a problem of legal doctrine. In fact, it is a much deeper problem of legal and political philosophy. Without attacking the underlying philosophical justification, no progress can be made on a policing regime that allows people of color to be monitored and policed unjustly, ossifies an image of Black criminality, and does immense damage both to persons and entire communities of color. Retributivism, or at least the central individual rights focused version on which the Court relies, provides the philosophical impulse for the warrior police officer and the screen behind which race is obscured. An important contribution of this Article is bringing to bear work elsewhere to dismantle the undergirding on which this police regime is built.

Whether the Supreme Court's refusal to even recognize, much less thoughtfully address, the interaction between race and policing is due to



malevolence, anxiety, or an avoidance strategy, it is embedded in a jurisprudence deifying individual rights. Without understanding why this philosophical justification is both inaccurate and dangerous, we cannot reorient policing or provide a stable basis for an entirely different model of policing. The next Section will briefly outline how cases like *Whren* and *Strieff* are premised on individual rights theories of law and policing. I then argue that such individualist or retributivist theories fail to explain basic intuitions and core practices in criminal punishment generally, and suppress our ability to properly highlight the racial wrongs in the Supreme Court's sanctioning of pretextual stops.

It is necessary to address one important clarifying note. The field of criminal law is dominated by scholars who, despite their important differences, loosely identify as liberal retributivists. Many scholars are attracted to retributivism precisely because it appears to erect a bulwark against state interference by focusing on one's individual rights as against the state.<sup>251</sup> Many ascribe roughly to the loose set of commitments described as "liberalism" because of its historical connection with equality.<sup>252</sup> Many will likely object to the following characterizations as insufficiently nuanced or unfairly ignoring philosophical resources. Even worse, hearing what seems an implausible attack, those committed to retributivist views may be tempted to simply "tune out."

The motivation of our inspection, however, is not purely philosophical. While it is important to be fair, my argument is not that the Supreme Court's view is the only or even best understanding of how one could build upon a theory of individual rights. Certainly, there are philosophical resources among committed retributivists to press back on my criticisms. Still, the legal justification I have in my sights sits conveniently with the core tenants of deontological liberal retributivism. More importantly, it is the theoretical justification that best explains the Court's doctrinal commitments and its fatal flaws. First and foremost, I interrogate this particular strand because of its practical importance as a justification for our actual current Fourth Amendment doctrine.

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<sup>251</sup> RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 168–83, 259–65 (1977); Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS (Jeremy Waldron ed., 1984).

<sup>252</sup> RONALD DWORKIN, SOVEREIGN VIRTUE 1–119 (2000).

### B. Defining “Deontological Retributivism”

While there are as many variants on individual rights or deontological theories as there are theorists, for our purposes we need only focus on the core claims that animate the Supreme Court. At its base, deontological comes from the Greek word meaning the study of duty.<sup>253</sup> Deontology, then, is concerned with the realm of morality that inspects that which is forbidden, required, or merely permitted.<sup>254</sup> It is the deontological instinct on which we rely when we claim that people have inalienable or natural rights.<sup>255</sup>

Roughly speaking, the idea of rights leads intuitively to the notion of claims that cannot be infringed on by others, even by all others taken together<sup>256</sup>—no popular vote justifies enslaving me. This is understandably the great attraction of rights; their counter-majoritarian nature provides a check against others taking action against you, whether it is to harm you or for your own good.<sup>257</sup> Rights are naturally seen as a check on what others can do to you, delimiting the legitimate reach of state power.<sup>258</sup> So deontological theories slide quite naturally from a moral theory about what one cannot do to others to a political theory about what the State may not do to persons.<sup>259</sup> The shift is not without treacherous steps; one must explain how moral prohibitions get

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<sup>253</sup> Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/ethics-deontological> [<https://perma.cc/YA3D-83P9>] (last updated Oct. 17, 2016).

<sup>254</sup> *Id.* The natural language of deontologists is that of our rights and duties. While one need not limit our duties to persons—people can conceivably have duties towards the environment or sacred objects, see Dale Jameison, *MORALITY’S PROGRESS* 103–39 (2002); Sarah Harding, *Cultural Property and the Limits of Preservation*, 25 *LAW & POL.* 17 (2003), the primary holders of rights and duties are other people.

<sup>255</sup> Alexander & Moore, *supra* note 253.

<sup>256</sup> See Dworkin, *Rights as Trumps*, *supra* note 251, at 166; DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 251, at 184, 198–205.

<sup>257</sup> Jeremy Waldron, *A Right to Do Wrong*, 92 *ETHICS* 21 (1981); Jeremy Waldron, *Moral Autonomy and Personal Autonomy*, in *AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS* 307 (John Christman & Joel Anderson eds., 2005).

<sup>258</sup> See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 404–20 (1978); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 120–32 (2008); MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 637–795 (1997).

<sup>259</sup> I am grateful to Leo Zaibert for pushing me to clarify these and related claims on the necessary role of deontological theories in my claims about Fourth Amendment doctrine.

translated into law.<sup>260</sup> Nonetheless, the fit intuitively leads to the picture of state power premised on individual rights.<sup>261</sup>

If a view of individual rights is attractive as a check against state power, it is no surprise such views seem instinctively attractive in justifying criminal law. Thus, the “analog” of rights based in political theory tend towards the retributivist views that dominate criminal law. Retributivism stands for the propositions both that it is morally valuable for a person to suffer punishment in response to their wrongdoing and that it is roughly illegitimate to punish someone who has not culpably committed a wrong.<sup>262</sup>

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<sup>260</sup> See Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321 (2002); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* (2009).

<sup>261</sup> Far from a rarified philosophical conversation, the rights-centric view has come to dominate public discourse as well. Take the public conversation around the adoption of the Affordable Care Act, popularly known as “ObamaCare.” While there were countless arguments and criticisms surrounding effectiveness, the core and widespread political objection centered on the idea that the government did not have the paternalistic right to force people into buying healthcare or the communitarian liberty to tax one person in order to provide healthcare to another.

<sup>262</sup> LEO ZAIBERT, *PUNISHMENT AND RETRIBUTION* (2006); MOORE, *supra* note 258, at 83–188. As with the deontological theories prior, there are vast iterations of retributivism. On one extreme, one could be a moral retributivist believing that any violation of any moral duty gives a necessary and sufficient reason for punishment. Michael Moore sometimes indicates his commitment to moral retributivism, though he may be best understood as claiming a moral violation is a *prima facie* reason to punish rather than a necessary and sufficient reason. See MOORE, *supra* note 258, at 189–229, 403–19. This unforgiving view is commonly ascribed to Kant, the godfather of modern retributivism, when he memorably advised that even an island society about to disband should execute the last murderer in prison lest its members share in their “blood guilt.” Elsewhere I have noted there is good reason to doubt this is the best interpretation of his entire body of thought on criminal law. See Murphy, *supra* note 260; Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 NEW CRIM. L. REV. 1 (2011).

Most retributivists, building on Kant’s legal theory rather than moral theory, view state punishment as a response to the violation of the external freedom—loosely put, the rights—of another. *Id.* at 331–33; Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. LAW & PHIL. 457, 461 (2015) [hereinafter Yankah, *Republican Responsibility*]; Ekow N. Yankah, *Crime, Freedom and Civic Bonds: Arthur Ripstein’s Force and Freedom: Kant’s Legal and Political Philosophy*, 6 CRIM. L. & PHIL. 255 (2012); Murphy, *supra* note 260. For an attempt to resolve competing strands of Kant’s theory, see RIPSTEIN, *supra* note 260, at 301–19.

Most retributivists are more sensible than the extremes, admitting a range of other goods or values can outweigh the value of punishing. MOORE, *supra* note 258, at 403–19; ZAIBERT,

All retributivists share two features of the Kantian spirit. First, wrongdoing is a necessary condition of punishment;<sup>263</sup> one cannot be justifiably described as having been punished without having committed a culpable wrong. In other words, to frame and punish someone as a criminal just to quiet social unrest is to use him as a means to an end, rather than to “punish” him.<sup>264</sup> Secondly, to punish someone when he has culpably committed a wrong is, in an important sense, intrinsically valuable and promotes justice.<sup>265</sup>

It is no surprise, then, that deontological and retributivist theories are a natural fit. Taken together as a theory of criminal law, they stand for the proposition that the state only has the power to punish an individual if that individual has culpably committed a wrong.<sup>266</sup> The

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*supra*, at 167–74. No reasonable society foregoes hospitals and schools to manically focus on punishing every petty thief.

<sup>263</sup> MOORE, *supra* note 258, at 403–40.

<sup>264</sup> John Rawls, *Two Concepts of Rules*, in COLLECTED PAPERS 20 (Samuel Freeman ed., 1999).

<sup>265</sup> MOORE, *supra* note 258, at 83–188; ZAIBERT, *supra* note 262, at 69–79.

<sup>266</sup> For completeness, it would be necessary still to flesh out some “liberal” restraints. Though “liberalism” is so broad a term as to escape simple definition, here the focus is on one core unifying principle. Liberalism in this instance is used to pick out the precept that a justified state must remain neutral among competing conceptions of a good and valuable life. JOHN RAWLS, A THEORY OF JUSTICE 4 (1971); John Rawls, *The Priority of the Right and Ideas of the Good*, 17 PHIL. & PUB. AFFAIRS 251, 262 (1988); JOSEPH RAZ, THE MORALITY OF FREEDOM 123–24 (1986); Gerald F. Gaus, *The Moral Foundations of Liberal Neutrality*, in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY (Thomas Christiano & John Christman eds., 2009); see JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 152 (Erwin Kelly ed., 2001). In other words, a liberal state does not use government power to force people to go to a particular church because it would be good for their souls or prohibit abortion premised only on it violating religious doctrine. A liberal state does not punish a person for unattractive self-regarding character flaws. *Id.*; Ekow N. Yankah, *Virtue’s Domain*, 2009 ILL. L. REV. 1167, 1208 (2009). Thus, many view the harm principle—the idea that only actions that hurt others are punishable, as opposed to ones that hurt oneself or stains one’s character—as central to the liberal project. In short, the state should not play priest.

Of course this is nothing more than a sketch of the core modern retributivist position but it is, I hope, an immediately recognizable picture, familiar to legal theorists, law students, and so widely spread as to feel intuitive even to lay persons. Indeed, the fact that it is only a rough sketch is a strength of this explanatory account; remember we focused on this account not because it is the most sophisticated defense of retributivism available but because it is the view implicitly driving the Supreme Court’s individual rights centric justification of policing. It would be surprising, indeed unrealistic, to expect the Court to have a fully worked out and overly nuanced political philosophy.

point is that the predominant political justification of our day, particularly in criminal law and thus naturally in policing, focuses on individual rights against state intrusion as the hegemonic source of legal justification.

C. *Evolution of the Court's Underlying Justifications for its Fourth Amendment Decisions*

Despite the Supreme Court's occasional prominent denials of any philosophical commitments,<sup>267</sup> the theoretical foundation of much of the Court's reasoning is clear. It is clear that the individual rights-based views dominate Fourth Amendment doctrine. The Court's analysis in *Whren* is illustrative. In *Whren*, the Court held an officer's motive for a stop was irrelevant so long as the officer could proffer probable cause for a stop, even if the basis of the stop was a trivial traffic violation.<sup>268</sup> The Court insisted that the empirical challenges were not the primary justification behind its ruling.<sup>269</sup> Rather, the Court justified its ruling with a highly individualistic and cramped view of the rights at stake:

If [prior cases] were based only upon the evidentiary difficulty of establishing subjective intent, petitioners' attempt to root out subjective vices through objective means might make sense. But they were not based only upon that, or indeed even principally upon that. Their principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with “reasonableness” allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.<sup>270</sup>

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<sup>267</sup> A *Conversation with Chief Justice John Roberts*, C-SPAN (June 25, 2011), <https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> (“Pick up a copy of any law review . . . the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth century Bulgaria, which I am sure was of great interest to the academic that wrote it, but isn't of much help to the bar.”).

<sup>268</sup> *Whren v. United States*, 517 U.S. 806, 811–13 (1996).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 814.

Notice the evolution of the underlying justificatory theory. In *Terry*, the Court, at least, made mention of how illegitimate racial motivation was a threat to the Fourth Amendment, only to fatalistically pronounce itself powerless to curb such abuse.<sup>271</sup> By *Whren*, the Court's position had hardened. Rather than sadly resign to the difficulty of regulating illicit racial motivation by police officers, the Court instead declared the Fourth Amendment to be entirely uninterested in regulating racism.<sup>272</sup>

Under the Court's reasoning, because the police officer has objective probable cause, he has the legal right to stop a motorist.<sup>273</sup> And, because the motorist has no right as against being pulled over, it is of no moment if the stop is motivated by the traffic violation or the officer merely uses some nominal violation as a pretext.<sup>274</sup> Thus, the wider social effects of racially unequal policing and disproportionate police harassment disappears as a legally cognizable harm.<sup>275</sup> Once viewed as solely a question of whether an individually held right—here, the right to proceed without interruption—has been violated, the question of why one was stopped is naturally pushed aside. Ultimately, the current dominance of retributivism as justifying criminal law specifically, and autonomous rights-based liberalism as the primary justification of law more generally leaves us without the language to indict the shallowness of *Whren*.

There can be no doubt about the way the Court's justification allows disturbing expansions of police power and, critically, avoids tackling questions of race in policing. No clearer recommitment to this avoidance strategy can be imagined than the Court's recent ruling in

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<sup>271</sup> *Terry v. Ohio*, 392 U.S. 1, 14–15 (1968).

<sup>272</sup> See COLLECTED PAPERS, *supra* note 264, at 813; *Thompson*, *supra* note 84, at 981.

<sup>273</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 362–72 (1974).

<sup>274</sup> Ekow N. Yankah, *The Failure of "Rights" in Racial Justice: Comments on From Slave Abuse to Hate Crime by Ely Aaronson*, 14 JERUSALEM REV. LEGAL STUD. 192 (2016) [hereinafter Yankah, *The Failure of "Rights"*]. Cf. *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008) (describing the First, Second and Fourth Amendments as "unambiguously refer[ing] to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body.").

<sup>275</sup> The Court does mention in vanishingly brief passing that if the motorist could prove he became a target of police investigation due to his race, that would constitute an Equal Amendment constitutional violation. *Whren v. United States*, 517 U.S. 806, 813–14 (1996).

*United States v. Strieff*. In *Strieff*, a police officer admittedly stopped Strieff without reasonable suspicion, much less probable cause.<sup>276</sup> Nevertheless, because a subsequent warrant check on Strieff came back with a hit, the Court held that the outstanding warrant “cured” the initial unlawful stop.<sup>277</sup>

Once again, the Court’s reasoning relies on conceptualizing one’s Fourth Amendment right as an individually held right against the state. Because there was a warrant out for Strieff’s arrest, the police had a right to stop him or, putting it the other way around, he held no right as against the state to go about his way. It does not matter that the police stopped Strieff before knowing about the warrant. The Court’s passing mention—that it would be sensitive to such stops if they were used on a large scale—is betrayed immediately by its evident lack of interest in the widespread, systematic, and disproportionate nature of warrant issuance nationwide.<sup>278</sup> Instead, the Court ignores not only the epidemic of warrants, but also their oppressive racial and class make up.<sup>279</sup> This truncated view of the Fourth Amendment as an individually held right is precisely what denudes similar police interactions of their social context. It deepens the Court’s avoidance of the interaction between policing and race, allowing the Supreme Court—at the height of the Black Lives Matter movement—to ignore the racial implications of its ruling. Put plainly, so long as Fourth Amendment rights are embedded in the deontological and retributivist philosophical views that dominates criminal law, the racial impact of policing will remain submerged.<sup>280</sup>

## V. REPUBLICANISM AND CRIMINAL LAW

### A. *Deconstructing the Supreme Court’s Reasoning*

Holding by holding, the Court built a Fourth Amendment doctrine that is blind to race, describing instead a Fourth Amendment focused

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<sup>276</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2059–60 (2016).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 2068–70 (Sotomayor, J., dissenting).

<sup>279</sup> *Id.* at 2059–60 (majority opinion); Woods, *supra* note 7, at 724–28 (2015).

<sup>280</sup> Yankah, *The Failure of “Rights”*, *supra* note 274.

almost entirely on the question of whether the police have a legal right to conduct a stop and indifferent to their motivation for doing so. Inspecting the Court's doctrine reveals a particular view of the nature of the Fourth Amendment's political rights. Once outlined, it becomes clear that dismantling our current regime of separate and unequal policing requires challenging the Court's deeper philosophical view of what justifies police power.

On first glance, the Supreme Court's analysis seems perfectly sensible—if the police have the right to stop you, then it is not obvious what complaint you have if they do. But the Court's recognition that direct evidence of discriminatory intent would, pursuant to the Fourteenth Amendment, ground a constitutional complaint indicates that there is more to be said. The real point, of course, lies in the deep collective unease prompted by *Whren*; many share the deep intuition that the Fourth Amendment must recognize that being subjected to police attention because one is Black or Hispanic is unreasonable. Our nagging unease at *Whren*'s sanctioning of pretextual stops and *Strieff*'s authorizing random stops of anyone who happens to have an outstanding warrant points at the failure of our individual rights-based theories to properly understand the political obligations grounding criminal law and policing.

Elsewhere, I have elaborated on why the focus on individual rights violations, the central justification of retributivism, can capture neither our most commonplace criminal law practices nor our intuitions. Take two important examples. First, the most significant factor in the amount of punishment meted out upon conviction of similar crimes is a person's past criminal record.<sup>281</sup> Yet, this seems perplexing on a retributivist view. If I rob someone of \$1,000 one year and rob someone else of \$1,000 five years later, it would seem I violate each victim's rights equally. Bracketing considerations of the person's underlying character, surely central to the modern liberal commitments, it is hard to explain how recidivism figures so prominently in our criminal law practices.<sup>282</sup>

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<sup>281</sup> Yankah, *Republican Responsibility*, *supra* note 262, at 467–68; UNITED STATES SENTENCING GUIDELINES MANUAL ch.4, pt. A, introductory cmt. (2008) (U.S. SENTENCING COMM'N 2008).

<sup>282</sup> For an engaging attempt to make sense of the recidivist premium on the basis that it is a special kind of culpable omission, see Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571 (2009).



Second, in every U.S. jurisdiction (and many others), the punishment for many crimes of violence is enhanced if the perpetrator chooses their victim based on certain characteristics such as race, ethnicity, gender, or sexual orientation.<sup>283</sup> Analogous to the blind spot evidenced by *Whren*, a purely retributivist or individual rights theory of punishment cannot make sense of why the offender's motive should factor into his punishment.<sup>284</sup> My right to not be beaten does not turn on whether I am beaten due to my skin color, and yet our practices remain committed to punishing hate crimes more severely.

What these examples show is that premising criminal law primarily on the retributive notion that we must punish violations of individual autonomous rights misunderstands criminal law's principle justification. Rather, our practices and intuitions about criminal law come into focus if we understand that criminal law is best grounded by republican concerns that make central our inescapable civic bonds.<sup>285</sup> To the (decreasing) extent that lawyers and law students are exposed to questions of philosophical justification in criminal law, it is likely that retributivism is the only theory they encountered. The more interested or philosophically sophisticated may have learned of consequentialism as the major competitor and the retributivist's standard foil. Thus, all but the most philosophically inclined law students may be unaware that there is not only another philosophical justification on offer, but one that is so natural to our intuitions that it was the nearly unquestioned theory of political obligation, in one form or another, for millennia.<sup>286</sup>

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<sup>283</sup> Yankah, *Republican Responsibility*, *supra* note 262, at 468–70.

<sup>284</sup> *Id.* Thus, some who are committed to retributivist theories of punishment have concluded that enhanced penalties for the commission of hate crimes are unjustifiable. Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004). Others have defended hate crime legislation as focused on the protection of especially vulnerable victims linked to the state's obligation to equalize the distribution of the burden of crime. Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507 (1999).

<sup>285</sup> Yankah, *Republican Responsibility*, *supra* note 262, at 467–70; R.A. Duff, *Responsibility, Citizenship, and Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 136, 136–37 (R.A. Duff & Stuart P. Green eds., 2011).

<sup>286</sup> Though related to the current resurgent theories of philosophers like Philip Pettit, John Braithwaite, and Alon Harel that focus on the promotion of non-domination as the grounds of political justification, the republican theory I champion is distinct in focusing more rigorously on our civic bonds. See JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A

This view takes seriously Aristotle's contention, supported by contemporary social science, that human beings are first and foremost social and political animals.<sup>287</sup> Aristotle rightfully eschews reasoning about rights from some imagined and unlikely state of nature. Human beings are naturally attracted to each other; they must live together, first to fulfill desperate material wants and then growing to encompass more complex pursuits.<sup>288</sup> On the whole, human beings flourish as a part of political communities and our well-being is in part constituted by institutions that secure civic equality.<sup>289</sup>

B. *Shifting the Focus: From Individual Rights to the Value of Franchise*

Once one notices the perfectly plain fact that human beings are nearly compelled by material and psychological needs to spend their lives in political communities, one recognizes that it is not pre-social autonomous rights that ground claims to the overwhelming number of our rights.<sup>290</sup> The justification of political and legal obligations lies in the same necessary civic bonds; I have described the justification of political obligation as the political value of "franchise." Harkening back to its ancient Athenian roots, franchise is the right and duty to have an equal voice in the governance of one's polity in pursuit of the common civic good. If being a part of human society is a part of the good for persons, then participating fully in society must be part of that good.<sup>291</sup> This communal good is realized in sharing the joint burdens and sacrifices of

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REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990); PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1999); ALON HAREL, *WHY LAW MATTERS* (2014).

<sup>287</sup> ARISTOTLE, *Politica*, in *THE BASIC WORKS OF ARISTOTLE* 1113, 1127–29 (Richard McKeon ed., Benjamin Jowett trans., 1941).

<sup>288</sup> Yankah, *Republican Responsibility*, *supra* note 262; ARISTOTLE, *Ethica Nicomachea*, in *THE BASIC WORKS OF ARISTOTLE* 927, 1071–73 (Richard McKeon ed., W.D. Ross trans., 1941); ARISTOTLE, *Politica*, *supra* note 287; RICHARD KRAUT, *ARISTOTLE* 257 (2002).

<sup>289</sup> John M. Cooper, *Political Animals and Civic Friendship*, in *ARISTOTLE'S POLITICS: CRITICAL ESSAYS* 65, 65–70, 74–75 (Richard Kraut & Steven Skultety eds., 2005).

<sup>290</sup> NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 171 (1994); Nicola Lacey, *The Resurgence of Character: Responsibility in the Context of Criminalization*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 151 (R.A. Duff & Stuart P. Green eds., 2011); Rawls, *supra* note 264.

<sup>291</sup> ARISTOTLE, *Politica*, *supra* note 287.

participating in that society.<sup>292</sup> Part of this participation is to have a voice in the society's affairs, in its structuring, and in its governance. This includes being recognized as a full political equal, and even taking turns in public office.<sup>293</sup> While some small set of rights may be possessed simply in light of our shared humanity—there are some things I may not do to anyone, anywhere simply in respect of their personhood—most of our rights will derive from our coming together to define them in light of our inescapably shared civic project.<sup>294</sup>

Franchise, in this locution, is the freedom that is achieved when one is recognized as a full citizen, equally bound by the laws and duties of citizenship and accorded the equal respect of each citizen.<sup>295</sup> The freedom of franchise can only be experienced as an interconnected part of a political community; it is the freedom of the city rather than the freedom of the heath.<sup>296</sup> This form of political freedom highlights that our status and honor are importantly socially and inter-subjectively defined and citizenship is, in part, based on the shared social knowledge that you take yourself to be bound by the duties of citizenship and, in exchange, you are owed equal respect as a citizen.<sup>297</sup> This distinctive republican vision of franchise—the right and duty to have an equal voice in the governance of one's polity in pursuit of the common civic good—gives a distinct vision of criminal law justified not by punishing

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<sup>292</sup> *Id.* The Aristotelian picture is not without grave faults. Aristotle did not believe that non-citizens, inter alia, barbarians, natural slaves, women, and the working class were rational enough to fully participate in the common good. I have discussed modern repairs to this conception elsewhere. Ekow N. Yankah, *Legal Vices and Civic Virtue: Vice Crimes, Republicanism and the Corruption of Lawfulness*, 7 CRIM. LAW & PHIL. 61 (2012) [hereinafter Yankah, *Legal Vices*].

<sup>293</sup> ARISTOTLE, *Politica*, BK. III, CH. 4, 1276B36–1277B34, *supra* note 287.

<sup>294</sup> Yankah, *Republican Responsibility*, *supra* note 262; Duff, *Responsibility, Citizenship, and Criminal Law*, *supra* note 285, at 139–40. It is too little remembered that even Kant, the foundational thinker of much of modern liberalism, thought that beyond your right to control your body, all legal rights were provisional until adopted by a republican government in the name of the polity. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 89–91 (Lara Denis ed., Mary Gregor trans., 1996); Louis-Philippe Hodgson, *Kant on Property Rights and the State*, 15 KANTIAN REV. 57 (2010).

<sup>295</sup> Duff, *Responsibility, Citizenship, and Criminal Law*, *supra* note 285, at 147–49.

<sup>296</sup> Philip Pettit, *Freedom of the City*, in *THE GOOD POLITY* 141, 159 (Alan Hamlin & Philip Pettit eds., 1989).

<sup>297</sup> *Id.*

violations of individual rights but by prohibiting actions that make it impossible to live together as equal members of a political community.

Understanding franchise as our foundational political value rationalizes our criminal law practices as well. Under this view, punishing repeat offenders more severely than first time offenders is natural. The recidivist not only harms fellow citizens and ignores equal respect, but reveals a studied disregard for the bounds of law that make our civic project possible.<sup>298</sup> Likewise, hate crimes are indexed by civic bonds that may be threatened and undermined by certain expressive criminal acts. We punish hate crimes because, in a given polity with a particular history, there are civic fault lines upon which the offender's act tramples based on historically or socially important assertions of a particular person or groups' inferiority.<sup>299</sup> Our deepest embedded criminal law practices reveal that our rights are not held merely as individuals, but also as persons who claim the equal status of citizens in our necessarily shared civic project.<sup>300</sup>

## VI. REPUBLICANISM, POLICING, AND RACE

### A. *The Badge Matters: How Police Misconduct Escalates Existing Tensions*

For our purposes, the crucial point is that franchise makes sense not just of criminal law practices, but it is particularly true of our policing. It seems obvious that the purpose of a just policing scheme is to protect and assist people and secure public order and punish lawbreakers. Yet the suggestions above indicate that policing is justified not primarily by the invocation of individual rights—retributivist warriors roaming the land; rather, police are best viewed as public officials—or guardians—justified by the political value of franchise to protect the laws that make our shared civic polity possible and protect our claims to civic equality. It follows that police practices that

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<sup>298</sup> Yankah, *Republican Responsibility*, *supra* note 262, at 465; Duff, *Responsibility, Citizenship, and Criminal Law*, *supra* note 285, at 139–40.

<sup>299</sup> Yankah, *Republican Responsibility*, *supra* note 262, at 470.

<sup>300</sup> *Id.*

undermine claims to civic equality undermine the state's claim to legitimacy, and grossly unjust policing methods abrogate the required law abidingness of citizens.<sup>301</sup>

By insulating a practice where the police are empowered to stop citizens on any pretext and use this power to systematically detain citizens of color, the state denotes that people of color are subject to police power at the whim of an officer.<sup>302</sup> This knowledge is devastating, communicating the inferiority of African Americans, Hispanics, and others who understand that their skin color and neighborhood, among other things, subject them to continuous police harassment and intimidation.<sup>303</sup> It is—let me assure you—a stunning source of rage to know that you can be marked as suspicious or criminal largely based on your race; that your status is that of an inferior in the state's eyes; that you are powerless to change it; or, just as badly, that changing the perception others have of you involves a strange attempt to prove you do not suffer from what others hold to be your naturally degraded state. The nearly subconscious corrosive thought, at once rejected but nagging . . . “maybe if you speak well enough, dress well enough,” the imagined criminality of your skin tone will be ignored.<sup>304</sup>

Franchise highlights that there is something distinctively wrongful in the use of police authority to treat citizens with contempt—note that authority alone does not explain this wrong. A private boss is certainly wrongful when mistreating his employees, but there is something distinct about the same actions taken by a police officer. This difference indicates that there is a particular injury, the breach of civic trust, when the action involves police. The role of the police officer as a civic guardian makes the abuse of power and attack on dignity distinct from those of private individuals.

Earlier, this Article noted that franchise emphasizes the social nature of civic respect. In this regard, it is critical to note the insult that racist policing communicates—inferiority not only to those under police gaze but also to the community at large. Among the important social

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<sup>301</sup> Yankah, *Legal Vices*, *supra* note 292, at 74–77; Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

<sup>302</sup> Yankah, *A Paradox in Overcriminalization*, *supra* note 262, at 20–21.

<sup>303</sup> Fagan, *supra* note 69, at 11–12.

<sup>304</sup> Carbado, *(E)Racing*, *supra* note 1, at 952.

basis for self-respect is not just the internally held belief in one's equal status, but the knowledge that this belief is widely held.<sup>305</sup> Conversely, when a person's status signals that police can arbitrarily harass based on skin tone, it disseminates an image of inferiority and being subject to domination.<sup>306</sup> That the powerlessness so many minorities feel is insulated from judicial correction—by a jurisprudence that explicitly denies that police officers overstep their authority when they conduct pretextual searches—creates an added wrong.<sup>307</sup> The Supreme Court's cavalier dismissal of the racial impact of pretextual police stops is an ever present reminder to people of color that their class as true equals is insecure. Even worse than having one's complaint decided against is a jurisprudence that stifles the ability to voice one's complaint at all. The current law communicates to minorities that the larger community either does not care or believes that treating them with suspicion is justified.

Because franchise is inherently a social concept, it perfectly captures the injury that results from racially biased police harassment. Just as damaging as having your civic equality threatened as an individual is having it contemptuously dismissed in light of your immutable status as a Black man. Knowing that one is open to contempt by virtue of simply being who you are—that, without action and without relief, one is considered inferior and prone to criminality—is a particular insult to one's status as an equal citizen.

Deepening the injury is the connection between racialized police degradation and the history of African American discrimination and subjugation. African Americans especially are well aware that a police officer's abuse is connected to a painful history of being treated as less than a citizen, socially amplifying such abuse. Importantly, racially

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<sup>305</sup> CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

<sup>306</sup> PETTIT, *REPUBLICANISM*, *supra* note 286, at 121, 135–45.

<sup>307</sup> *Whren v. United States*, 517 U.S. 806 (1996). As Bennett Capers so aptly describes, it is the humiliation of being shown that one is powerless and being singled out as a criminal that leads to feelings of rage, shame and humiliation. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009). This powerlessness is all the worse for knowing that our jurisprudence does little to even recognize that such personal humiliation is a wrong. Fagan, *supra* note 69, at 11–12.

based attacks are wounding because they undermine the sense that one's claim to civic equality is shared by one's fellow citizens.

Given the American history of racial injustice, to put it antiseptically, actions that attack one's status as a civic equal based on race are particularly dangerous threats to civic equality.<sup>308</sup> Racial humiliation is distressing because its perpetrators indicate to the tormented citizen that there is a socially shared belief in their inferiority.<sup>309</sup> To insulate those racial injuries through the Court system is to decree that the official institutions of civic justice share that belief, communicating broad contempt.<sup>310</sup> A jurisprudence that took explicit account of harms to franchise or citizenship would make clear the mistake in the Supreme Court's blithely ignoring how racial motivations in police stops are unjustifiable, not just as unequal treatment governed by the Fourteenth Amendment, but also as a violation of the Fourth Amendment as unreasonable police behavior.<sup>311</sup>

Lest they seem lost in abstraction, let us return to the examples at hand. As explained in *Whren*, a person's Fourth Amendment right is not violated where the officer had an existing right to conduct the stop. The Court based its decision on a description that one's right against being stopped by the police was best understood as a personal right rather than viewed in context of one's broader social and civic rights. In the case of driving, that means probable cause can be based on any violation of the driving code, even where the officer's actual motivation for stopping a person is little more than thinly veiled racial suspicion.<sup>312</sup> Similarly, *Strieff* treated the right of the police to stop citizens as though it were a free-floating right, divorced from the police's true reasons for

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<sup>308</sup> Fagan, *supra* note 69, at 23; GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 55–108 (2002).

<sup>309</sup> Pettit, *supra* note 296, at 149; PETTIT, *supra* note 286, at 87.

<sup>310</sup> HAREL, *supra* note 286, at 61–62, 133–34.

<sup>311</sup> *Whren*, 517 U.S. 806; Banks, *The Story of Brown v. City of Oneonta: The Uncertain Meaning of Racially Discriminatory Policing Under the Equal Protection Clause*, *supra* note 238; Fagan, *supra* note 69, at 26.

<sup>312</sup> Thus, the reasonableness of a stop for the purposes of the Fourth Amendment is distinct from whether one could bring an equal protection claim for unequal enforcement of the law. *Whren*, 517 U.S. at 811–13.

the stop, whether it be bald suspicion, harassment, racial animus, or no reason at all.<sup>313</sup>

Understanding that police practices depend on our civic claims to equality emphasizes the mistake in the Court's interpretation of the Fourth Amendment.<sup>314</sup> In the myriad of situations, where the police cannot practicably pause for a warrant, we can only rely on a commitment to a shared interpretation of the Fourth Amendment's view of reasonableness to check the abuse of power.<sup>315</sup> Reorienting the Court's justification of the Fourth Amendment invites constitutional evolution and an understanding that the Fourth Amendment incorporates a citizen's claim to equality.

B. *Reimagining a Police Regime Centered Upon Protection of Civic Equality*

It is clear that a jurisprudence focused on civic equality will understand that a pretextual search by police officers must be viewed with suspicion, particularly in light of the historic and systematic racial bias that characterizes the current policing landscape.<sup>316</sup> The grossly disproportionate targeting of minority drivers, for example, is evidence that, whether motivated by racial animus or internalized racial stereotypes, the police use dark skin as a sign of criminality.<sup>317</sup> Further, a long history of tolerance of police abuses, coupled with the political benefits of ever more strident claims of being "tough on crime," leave

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<sup>313</sup> *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

<sup>314</sup> A generation of scholars have argued about the precise requirements encapsulated in the Fourth Amendment, centering on whether the Fourth Amendment primarily requires government searches be pursuant to a warrant or whether it is historically (or best) understood as requiring only that government searches be reasonable. Amar, *Fourth Amendment*, *supra* note 96; Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, *supra* note 13, at 314–17; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994). Whatever the answer to that debate, it is clear that there are certain situations—foremost among them roadside traffic stops or “stop and frisks” on the street—where getting a warrant will be impracticable.

<sup>315</sup> Amsterdam, *supra* note 273, at 393.

<sup>316</sup> Steiker, *supra* note 314.

<sup>317</sup> *Id.* at 840, 850.



little chance of legislative remedies.<sup>318</sup> Problematically, Fourth Amendment litigation is, all too often, embodied in the unpopular criminal who we already know was in possession of an illegal weapon or contraband. Yet, as Justice Marshall reminded us so often in his jurisprudence, the liberty from capricious attention, investigation and, in the worst cases, harassment and detention from public officials, must surely be precious to us all.<sup>319</sup> So long as police harassment is viewed as protested only by criminals or cabined to the socially weak and voiceless, there is little reason for elected officials, absent tremendous public pressure, to restrain police behavior.

It is clear that constitutional interdiction is essential to protect the basic commitment that policing practices are inextricably intertwined with the equal respect owed each citizen.<sup>320</sup> Given the enormous difficulty, erected by the Supreme Court's own equal protection jurisprudence, the only way to check police power in a manner consistent with a vision of equal citizenship is for the Court to reverse its holding that pretextual stops do not violate the Fourth Amendment. Indeed, the Court must do that which it has for so long avoided and tackle directly the difficult question of race and policing. Doing so would begin with the Court going further and holding that stops that evidence impermissible racial motivations are unreasonable in violation of the Fourth Amendment.<sup>321</sup> Legal resistance to such abusive practices would not be forced into Fourteenth Amendment jurisprudence, a body of law deeply stunted by the Supreme Court.<sup>322</sup> Rather, the Fourth Amendment would be a source of positive legal rights as against any

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<sup>318</sup> *Id.* at 849–50.

<sup>319</sup> See, e.g., *Oliver v. United States*, 466 U.S. 170, 184 (1984) (Marshall, J., dissenting); *Illinois v. Gates*, 462 U.S. 213, 274 (1983) (Marshall, J., dissenting); *Smith v. Maryland*, 442 U.S. 735, 748 (1979) (Marshall, J., dissenting); see also Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723 (1992).

<sup>320</sup> Scott E. Sundby, "Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994).

<sup>321</sup> Steiker, *supra* note 314, at 854–56.

<sup>322</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319–22 (1987); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 808–09, 877–78 (2004); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133 (2010).

policing practices that attacked a person's claim to civil equality. The Supreme Court need only be brave enough to declare that police behavior that uses pretextual reasons to forcibly stop a citizen is unconstitutional, and that stops premised on evidence of illicit racial motivation are unreasonable.<sup>323</sup>

Reading the civil equality of franchise into the Fourth Amendment would have a powerful theoretical payoff. First, such a view forces our policing regimes into agreement with our deepest societal commitments and harmony with criminal law practices. As noticed in criminal law, policing is not justified on a thin retributivist view of punishing rights violators; police officers are not avenging warriors. Rather, the justification of policing is embedded in the need to preserve our bonds as civic equals. Understood this way, the very goal of policing changes. We realize the American reflex to deploy to arrest and suppress our way out of problems, particularly problems in communities of color, is unjustified. As foreshadowed, a republican vision gives philosophical structure to the popular view of police as guardians.

Importantly, however, this monumental shift in guiding theory is not simply a theoretical exercise. To explicitly place civic equality within our Fourth Amendment jurisprudence would force the Supreme Court to join with seriousness the national conversation on the intersection of race and policing. It is true, of course, that policing powers are the quintessential state power. Nonetheless, the Supreme Court maintains the critical responsibility of setting the constitutional minimum and is uniquely placed to protect against the ways that discriminatory policing can undermine basic indicia of equal citizenship.<sup>324</sup> Nor should we underestimate the powerful norm-setting function of the Court; indeed, crystallizing national norms and recognizing them as having legal force may be the Court's most important power.

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<sup>323</sup> Whether one believes that the Court's original jurisprudence in *Terry* invited such analysis or purposefully ignored the interaction between race and policing, what is clear is that its jurisprudence since then has abandoned the responsibility to ensure that our policing, no less than our substantive criminal law, remains committed to treating each as an equal citizen. Amar, *Fourth Amendment*, *supra* note 96, at 808; Amar, *Terry*, *supra* note 96, at 1097–99.

<sup>324</sup> EPP ET AL., *supra* note 6, at 134–51.

VII. A NEW POLICE REGIME: SEPARATING GUARDIANSHIP AND POLICE POWERS

A. *Franchise and Guardianship*

Lastly, recasting the underlying justification for policing means reimagining police practices taken for granted. Police practices that undermine the civic equality of groups of citizens cannot be regarded as legitimate. It follows, then, that a system that allows police power to arbitrarily focus on citizens of color on the thinnest of pretexts, while suppressing the ability for these citizens to seek redress, cannot command respect. Policing justified by franchise can only be legitimate if enacted in ways affirming—or at least not harming—shared claims of civic equality.

Franchise forces us to understand that current American policing is simply unjustifiable. Particularly where the power of the police to stop and search is used as a proxy for racial domination, that power cannot continue to be validated. While there are various ways of addressing this legitimacy deficit, one straightforward response requires reimagining policing entirely. Simply put, where police cannot act justly, their police power should be taken away.

To illustrate, imagine a United States in which large portions of the police, in particular traffic police, were only empowered to maintain order. These officers would be authorized to pull over speeders, but would be constitutionally prohibited from using such stops as a platform to conduct further criminal investigations. Worthwhile details would need addressing; presumably the police would maintain the power to arrest if violent or dangerous crime was immediately apparent, as in the longstanding “plain sight” cases.<sup>325</sup> No police officer can be sensibly required to ignore a kidnapping victim in the backseat. But save extraordinary moments, traffic police would be just that—traffic police.

The suggestion that policing power ought to be divorced from ordinary order maintenance is only initially shocking.<sup>326</sup> Indeed, in

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<sup>325</sup> *Horton v. California*, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321 (1987).

<sup>326</sup> Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268 (2015); Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261 (1998); Miller, *supra* note 59, at 663–65.

many ways, returning to a period when policing focused on protecting the public rather than initiating criminal investigations returns us to a historically well understood model of policing.<sup>327</sup> That said, reimagining police legitimacy as premised on franchise or civic equality avoids cheap nostalgia and the danger of returning to a time when police guardians meant police domination and contempt for persons of color.<sup>328</sup> Separating policing and maintenance powers while being responsive to local communities<sup>329</sup> embeds our commitments to civic equality within the Fourth Amendment, begins repairing the long frayed relationship between police and communities of color, and drains the explosive tension from too many interactions that have led to the shooting of too many Black men.

The practical effects of remodeling our policing are likely to be significant, as both citizens and police absorb new limits keyed to promoting civic equality. Remember the heartbreak with which we started—the death of Walter Scott. Though Scott himself is forever silenced, his family and friends believe that Scott began to run because he was afraid of being arrested for unpaid child support. Under our reformed model, whatever Scott’s frustration at the stop, he would have known the officer could not convert the traffic stop into a criminal investigation.<sup>330</sup> The charge of potential violence and domination would have been substantially drained from the situation. In the world where policing is guided by protecting franchise, Walter Scott drives home that day.

The separation of traffic monitoring powers and police powers would not by itself cure the crisis of confidence we face in policing today. As Ferguson taught us, police motivated to harass and bully a community in pursuit of city revenue can inflict great harm, putting minority communities and the police at loggerheads.<sup>331</sup> Police may also disproportionately target communities of color for many reasons,

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<sup>327</sup> JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* 140–71 (1978); Gerstein & Prescott, *supra* note 326.

<sup>328</sup> WILSON, *supra* note 327, 141–43, 166–71.

<sup>329</sup> Cf. Richard A. Bierschbach & Stephanos Bibas, *What’s Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447 (2016).

<sup>330</sup> Miller, *supra* note 59, at 641.

<sup>331</sup> DEP’T OF JUSTICE, FERGUSON POLICE DEPARTMENT, *supra* 71.

including simply to “keep them in their place.”<sup>332</sup> Not every stop—or even every stop that leads to tragedy—would be avoided.

Nonetheless, separating ordinary caretaking functions and traffic maintenance in the minds of both police officers and the general public would drain the incentive of officers to instigate contact—often along racial lines—in order to investigate otherwise lawful behavior. It would increase public confidence in police and decrease apprehension over police interactions. The traffic officer that stopped you could only write you a ticket before letting you go on your way. Walter Scott’s tragedy and too many others remind us that a community aware of the limits of police power will be empowered by the law and made more secure against police abuse. Even in cases like Ferguson, a system that separated order maintenance from criminal investigation would make it easier for the public to see when police were simply tools to extract money from poor communities of color.

Installing this important new value at the center of policing will not only empower citizens to check authority from the outside, it is just as likely to transform policing from the inside out. Focusing on the deeply racialized structural abuses of policing should not render us blind to the majority of police officers fundamentally motivated by public service and a wish to help their community. Officers participate in a regime that systematically imposes petty criminality on and extracts money from persons of color, many believing it is a way to root out dangerous criminals.

Deprived of the illusion that their ticketing was really a search for latent crime, police officers themselves would have to squarely face their merely engaging in shakedowns of Black and Brown communities. The clarity of the injustice would galvanize not only the broader community, but also would make self-justification impossible for the officers involved. Unable to obscure the use of police as tools of racial wealth extraction, communities and police could begin to cooperate to reform policing to match community goals.<sup>333</sup>

Further, among the most persistent issues in policing reform is the hiring of officers with aggressive predispositions. A regime that celebrated officers committed to public assistance would go a long way

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<sup>332</sup> Hutchinson, *supra* note 217.

<sup>333</sup> Miller, *supra* note 59, at 673–74, 684.

in attracting officers interested in service rather than machismo domination. Lastly, there is reason to believe a world where interactions between police officers and members of minority communities, in particular, are less tense would be much safer for the police as well.<sup>334</sup>

It is easy to imagine this same model more broadly applied to other areas of policing. One can imagine a world largely populated by police guardians—my imagination places them in lighter blue uniforms—focused solely on order maintenance and assistance.<sup>335</sup> Indeed, such a division would more realistically reflect the actual job of the most police officers while dramatically lessening the tension and fear that accompanies too many interactions between people of color and the police.

Lastly, a segregated policing regime would allow states to track their success in building a policing regime that promoted franchise. Remember, it is the extent to which policing serves franchise or civic equality that states are justified in the full extension of their police powers. One possible model would allow states that proved their policing was no longer racially disproportionate to regain policing powers for various divisions such as traffic control. Authorizing the reinstitution of a full slate of state powers under conditions that proved the establishment of equal rights would be analogous to decades of voting regulation under the Voting Rights Act of 1965.<sup>336</sup> That said, perhaps refocusing police on the protection—and even promotion—of civic equality would prove attractive enough that states would not rush to reinstate the current system and its potential for abuse.

### B. *The Challenges of Reimagining Policing*

Imagining a dramatic reshaping of contemporary policing may seem overly fanciful—an impossible academic dream. But it bears mentioning that such a model is not wholly unknown even in our current policing. It is too little noticed that many modern “policing”

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<sup>334</sup> Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 363–64, 368–71 (2001).

<sup>335</sup> Miller, *supra* note 59, at 622, 663–65; Livingston, *supra* note 326, at 265–72.

<sup>336</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 52 U.S.C. §§ 10301–702).

duties are handled by an array of specialized agencies tangential but not identical to the police.<sup>337</sup> Every day, thousands of government agents fan out to inspect housing, restaurants, and businesses for code compliance.<sup>338</sup> Child Protective Services and countless agencies are tasked with specialized caretaking functions. Others are tasked with park services, inspecting motor services, and even removing agitated bees in order to uphold the common good.<sup>339</sup> Indeed, our increasing willingness to imbue all government services with an aura of police authority is not a natural state, but rather a conscious set of legal and political choices; one that has had dire consequences and is within our power to reverse.<sup>340</sup>

Still, there is little doubt that separating policing power from other caretaking duties presents challenges. While the purpose of this Article is to firmly fix the political justification for this project rather than iron out all potential wrinkles, a brief survey of these challenges is important to illustrate that the demands of franchise are not just attractive but plausible.

### C. Constitutional Authority

The most immediate question for a profound reformation project is whether the Supreme Court has the constitutional authority to remake local police forces. It is basic to our federalist system that state powers, tellingly dubbed “police powers,” are left to state and local governments. Yet, to dismiss the Supreme Court’s constitutional reach would be to both limit our imagination and to ignore important historical moments when the Court reshaped vast arenas of local governance in order to secure important markers of equality. A particularly instructive analogy can be seen in the Court’s iconic rulings

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<sup>337</sup> Nirej Sekhon, *Purpose, Policing, and the Fourth Amendment*, 107 J. CRIM. L. & CRIMINOLOGY 65, 113–26 (2017).

<sup>338</sup> *Id.*

<sup>339</sup> Frank Rosario & Kirstan Conley, *Beehive Relocated to New Home Atop Waldorf Astoria Hotel*, N.Y. POST (May 27, 2014, 1:36 AM), <http://nypost.com/2014/05/27/beehive-relocated-to-new-home-atop-waldorf-astoria-hotel> [https://perma.cc/6JD3-7YY9].

<sup>340</sup> See *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967); *New York v. Burger*, 482 U.S. 691 (1987); Miller, *supra* note 59, at 622; Sekhon, *supra* note 337, at 122–26.

following *Brown v. Board of Education*.<sup>341</sup> Understanding that the separation of students by race left an indelible social marker of inferiority on people of color, the Supreme Court ordered the desegregation of a field equally considered the domain of the local.<sup>342</sup> Indeed, the Court's rulings set thousands of buses rolling across the nation through towns and cities to integrate schools and break down racial barriers that were seen as intractable.<sup>343</sup> The Supreme Court further empowered district courts to monitor school districts, eyeing their progress in removing vestiges of intentional racism and removing them from court supervision once they had shown sufficient progress.<sup>344</sup> Nor is this method of monitoring state-run agencies to protect fundamental equality unique to schooling. The Court followed the same structure, until recently, under its statutory authority to monitor elections under the Voting Rights Act.<sup>345</sup> By contrast to that authority, the application of Fourth Amendment law to police is squarely within the Court's authority. A Court focused on the ways contemporary policing marks African Americans and Hispanics as criminal could use its constitutional powers to monitor and reform policing practices, perhaps removing departments from monitoring upon reaching discreet markers of success.<sup>346</sup>

The example of the desegregation of schools and busing is instructive in another way; busing is often highlighted in American history for the pronounced social passions it stirred, both in support and in resistance.<sup>347</sup> Likewise, another concern about reimagining policing is that current police officers will reject any form of policing

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<sup>341</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>342</sup> *Id.*

<sup>343</sup> *Raney v. Board of Educ.*, 391 U.S. 443 (1968); *Green v. Sch. Bd. of New Kent Cty.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>344</sup> Deborah Sprenger, *Circumstances Warranting Judicial Determination or Declaration of Unitary Status with Regard to Schools Operating Under Court-Ordered or -Supervised Desegregation Plans and the Effects of Such Declarations*, 94 A.L.R. FED. 667 (2018).

<sup>345</sup> 52 U.S.C. § 10101 (2018).

<sup>346</sup> *Id.* The Voting Rights Act and its enforcement structure remain, as a technical matter, the law of the land. That said, the Supreme Court largely gutted the law by invalidating the formula determining which states fell under its purview. *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>347</sup> Hon. Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 MINN. L. REV. 735 (1985).



separated from the power and authority of arrests. While any large change brings inevitable resistance<sup>348</sup>, we can draw hope from important prior changes in policing which, though initially resisted, were internalized when grounded in the Fourth Amendment.<sup>349</sup> Lastly, to the extent that future officers are not attracted to policing that focuses on reinforcing equality as opposed to exhibiting dominating power, that is a feature, not a bug. Nothing may be more critical to reforming police than recruiting police candidates fundamentally reoriented in their understanding about the purpose of policing.

#### D. *Unintended Consequences*

While *Miranda* gives us reason to hope police officers would internalize limits on their authority to arrest, one may worry that defusing police authority to arrest will simply amplify alternative ways police unjustly harass people of color. As noted earlier, police departments and poor municipalities too often turn policing into rent-seeking, fleecing vulnerable communities of color as a source of revenue.<sup>350</sup> Thus, if special agencies were freed from worrying about using underlying criminal behavior as justification for their actions, they may become unabashed in maximizing revenue.<sup>351</sup> In the opposite direction, one might fear that without the ability to use certain police tactics, such as traffic regulation, as a proxy for crime interdiction, legislatures will be tempted to generate new criminal offenses squarely within the reach of the police as a substitute.<sup>352</sup>

These are serious concerns but hardly reasons to paralyze reform. First, there is little reason to believe that reducing police authority to arrest will exacerbate the revenue demands for municipalities. Moreover, it was earlier noted that separation of police power from an

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<sup>348</sup> Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y 319, 328–31 (2014).

<sup>349</sup> See *supra* text accompanying notes 244–46 (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

<sup>350</sup> U.S. DEP'T JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 71.

<sup>351</sup> Logan, *supra* note 348, at 329–33, 350–51.

<sup>352</sup> Woods, *supra* note 7, at 746.

agency's ticketing function is likely to make such practices more visible to government agents and citizens alike. Unable to obscure ticketing for what it is, crass revenue generation as opposed to a byproduct of rooting out "the bad guys," bringing such practices into the light increases the likelihood of political resistance.<sup>353</sup> As recent reforms in policing of marijuana have illustrated, legislative and public focus on abusive police practices can result in demands for change.<sup>354</sup> Lastly, making plain that certain practices are little more than exerting social control or fleecing poor communities may rob those involved of their self-justifying narratives, making participating in such practices unattractive to police officers and government agents themselves.

#### E. *Accidental Discoveries and Line Drawing*

Another concern regarding fracturing policing powers is what to do when a caretaker accidentally comes across evidence of criminal wrongdoing. As mentioned earlier, no government agent should ignore a kidnapping or a dead body.<sup>355</sup> Though such hypotheticals are vivid, they are undoubtedly exceedingly rare. The more common cases of accidental discovery of minor law breaking would be little different than what occurs in our current system, and there is little reason to believe that great change is required to handle future incidents.

Though no single set of answers could fit the myriad occasions, it is reasonable that police caretakers would have appropriately tailored rules for specialized situations requiring intervention and criminal investigation.<sup>356</sup> Thus, the restaurant inspector who stumbles across a

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<sup>353</sup> The DOJ revelations of the magnitude of the same practice in Ferguson and other jurisdictions resulted in wide public condemnation and reform. To the extent agencies are required to reveal their true motivations for government actions those motivations can be inspected and critiqued by citizens. See Ekow N. Yankah, *Legal Hypocrisy*, 32 *RATIO JURIS* 2 (2019).

<sup>354</sup> Woods, *supra* note 7, at 744–46.

<sup>355</sup> Sekhon, *supra* note 337, at 126. One of the ways in which "accidental" discoveries have been greatly expanded is in the police practice of systematically running warrant checks on even routine traffic stops. Again, without the authority to arrest, there would be no need to run warrant checks outside of specific circumstances where there was probable cause to believe a grave crime had been or was being committed. See Woods, *supra* note 7, at 729–30.

<sup>356</sup> Sekhon, *supra* note 337, at 126.

hidden joint or the housing inspector who notices tenants illegally downloading an album may only be authorized to report such activity to a superior who follows guidelines on when further action is necessary. Finding a meth lab, a dead body, or a drunk driver, on the other hand, may authorize immediate criminal police intervention. It is worth noting that calibrating police arrest authority to the gravity of the crime, if troublingly rejected by our Supreme Court,<sup>357</sup> is not novel and has been imposed by some states pursuant to their state constitutions.<sup>358</sup> Of course, in the event of a grave danger that is not immediate, agents may do what any inspector might do: call the (criminal) police.<sup>359</sup>

#### F. *Effectiveness and Dangerousness*

One last and perhaps more fundamental intuition should be addressed. One reason separating the power of arrest from community caretaking startles us is because our most basic image of police officers intertwines their authority and even respect with their power to arrest. Thus, despite the intellectual realizing that various government agents carry out specialized tasks daily and that the overwhelming majority of police work does not involve criminal law enforcement, there is a nagging feeling that “real police” must be primarily involved in crime control. One imagines that caretakers simply cannot do their job without the authority to arrest nor would “guardians” be exposed to untold danger, left at the mercy of a violent criminal element.

Again, this is not the place to construct a fully realized plan nor could any “one size fits all” plan meet needs of vastly different jurisdictions. Yet there is little reason to suppose that caretakers backed by state authority will be ineffective without routine arresting authority. The small army of private security guards who enforce order at malls and in various neighborhoods are so ubiquitous and reflexively obeyed that it rarely occurs to most that they are empowered with much less authority than a state official.<sup>360</sup> Nor is there any evidence that building

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<sup>357</sup> *Atwater v. Lago Vista*, 532 U.S. 318 (2001).

<sup>358</sup> *Commonwealth v. Cruz*, 945 N.E.2d 899 (Mass. 2011).

<sup>359</sup> *Id.*

<sup>360</sup> Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004); Lawrence W. Sherman, *Policing Communities: What Works?*, 8 COMMUNITIES & CRIME

inspectors and fire marshals, to pick two examples, are routinely disobeyed because their authority does not include the power to arrest. Likewise, there is no reason to believe that traffic officials would be widely ignored without the same power.<sup>361</sup>

Similar considerations apply considering physical danger. Despite our cinematic view of policing as “getting the bad guys” the overwhelming majority of policing is caretaking and order maintenance. Though aware of the tragic handful of officers who are injured or killed in even innocuous duties such as traffic enforcement,<sup>362</sup> there is little reason to believe that the power to arrest is critical in reducing this danger. If anything, it seems plausible that caretakers only empowered to write a ticket, for example, are less likely to become involved in the kind of tense situations that explode into violence. Simultaneously, citizens aware that such interactions are limited to their justification—e.g., the traffic offense—are less likely to react in ways, both innocent or not, that cause officers to overreact with tragic results. To return to our beginning, a Walter Scott who knew there was nothing more than a ticket at hand does not leap out of his vehicle, resulting in his senseless murder.

Though the proposed separation of policing powers would require profound reform, it is not entirely untested. Various U.S. jurisdictions have removed activities previously assigned to police from the hands of arresting officers.<sup>363</sup> As mentioned, others have curtailed the ability of arrest when the offense is minor, or prohibited searches even when passengers would otherwise consent.<sup>364</sup> Lastly, foreign jurisdictions have separated criminal investigation and other caretaking functions without crippling the police. Interestingly, in New Zealand, when traffic monitoring and criminal investigation functions were separated, there was no drop in respect for traffic monitoring and respect for the police

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343 (Albert J. Reiss, Jr. & Michael Tonry eds., 1986); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1998).

<sup>361</sup> Woods, *supra* note 7, at 754–55.

<sup>362</sup> The Supreme Court’s cases have long worried about officer safety in traffic stops. *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Maryland v. Wilson*, 519 U.S. 408 (1997).

<sup>363</sup> Woods, *supra* note 7, at 755–58.

<sup>364</sup> *Minnesota v. Fort*, 660 N.W.2d 415 (Minn. 2003).

rose.<sup>365</sup> Indeed, one of the important lessons to be gained is that fighting racial discrimination by focusing on police dedicated to preserving civic equality is likely to make policing better for Black, Brown and White citizens alike.

Of course, America is not New Zealand; Americans are a remarkably armed nation for one, inherently changing the background danger levels for police. If the difference in gun possession necessitated, caretakers could still be armed with weapons, though without the power to arrest. Still, we should not be so quick to imagine, especially against the daily evidence that government officials can execute their duties without weapons, that alternatives are impossible. Criminals do not systematically lie in wait to harm fire marshals. Nor have jurisdictions that have moved to restrain policing power reported a rise in violence. If avant garde jurisdictions both in the United States and abroad are any indication, a world of community caretakers explicitly justified by their role in preserving equality for all citizens may lend sorely needed legitimacy and reduce the unsustainable tension between police and minority communities.<sup>366</sup>

#### CONCLUSION

Let me conclude by quickly addressing two points that return us to an unspoken anxiety regarding our jurisprudence surrounding pretextual stops. The first is, I fear, a subterranean anxiety causing us to turn from our collective responsibility to promote a more just policing regime. What will a world in which the police do not act on their surreptitious instincts look like? Given the widespread perception by all Americans that racial profiling is a common police tactic, many may feel “They must know better.” This accords with the Court’s long deferential jurisprudence, seen as far back as its elevation of Officer McFadden’s years of experience and intuition in *Terry*. Further, how we will know which stops are pretextual? Will the courts be inundated by drug

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<sup>365</sup> DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 135 (1994).

<sup>366</sup> Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 *LAW & SOC’Y REV.* 777 (1998); Tom R. Tyler, *Enhancing Police Legitimacy*, 593 *ANNALS AM. ACAD. POL. & SOC. SCI.* 84 (2004).

traffickers and others concocting stories describing every stop, no matter how justified, as pretextual and racially motivated?

There are, at least, two replies to such fears. The first is to draw courage from our commitment to justice. There is always the temptation to seek harbor in the comforts of the now rather than respond to the unknown future that justice demands of us. A telling example can be found in the self-professed, well-meaning ante-bellum southerner, proclaiming that while she may not care for slavery, how could one be sure what chaos freeing the slaves would bring. Our example is much less dramatic, but that in itself should re-instill in us the courage to legally prohibit such baldly unjust institutionalized policing. Surely, whatever little security we hope to purchase comes at too high a cost when we squarely confront that our “rewards” are possible only through institutionalized and insulated racialized policing.

Secondly, as is often the case, our fears are almost certainly exaggerated. Indeed, several states have found—pursuant to their state constitutions—that pretextual police stops are invalid. Courts in such states have used a variety of common-sense methods to ascertain whether a stop was in fact pretextual, including inquiring whether the police officer was on traffic duty, whether the questions the officer posed were initially related to the traffic offense, whether the officer typically gives tickets, or whether he even possessed the materials to issue a ticket at the time of the stop. Such an obvious inquiry deflates the notion that courts would be unable to intelligently separate pretextual stops from genuine traffic stops. Other states, such as Minnesota, have found other judicial methods of cabining police discretion by, for example, not allowing searches of automobiles during routine traffic stops regardless of the consent of the occupant.<sup>367</sup> It should give us the courage of our convictions that these states have not become unpolicable wastelands, even as they slowly work to repair frayed relationships with poorer and minority communities.

Lastly, many might suffer from a different kind of doubt. There is neither evidence that judicial checks on pretextual stops lead to

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<sup>367</sup> *Minnesota v. Fort*, 660 N.W.2d 415 (Minn. 2003). Even in States that have tackled the problem of pretextual stops head on, there remains much to be done. *People v. Robinson*, 767 N.E.2d 638 (N.Y. 2001); *People v. Garcia*, Docket No. 2011QN043391 (N.Y. Crim. Ct.); *People v. Nandlall*, Docket No. 2011QN029355 (N.Y. Crim. Ct.).

intolerably restricted police, nor evidence that judicial restraint can instantaneously cure the problems of rogue or racist police officers. An officer bent on racist harassment does not need the convenient tool of the pretextual stop. No simple legal change can thwart police officers committed to targeting persons of color. Still, there is equally no doubt that the unchecked ability to detain citizens who are driving is both a significant source of arbitrary power for the state and of friction between the police and citizen. Further, it is important to remember that legal norms do not only work by sanctioning; legal norms often have powerful effects precisely because they are norms. By prohibiting arbitrary and disproportionate targeting of minority drivers, the law not only checks the bad cop but also instills a particular vision of what the good cop does.<sup>368</sup>

Just as importantly, prohibiting pretextual stops would send an important message that the law will no longer turn a blind eye to the persistent humiliation of people of color at the hands of police, acknowledging the inhumanity of laws that make a person a suspect for driving while Black or having the nerve to own too nice a car. In doing so, the Court would remove the particular civic wound of knowing that the law ignores the arbitrary casting of suspicion upon minorities. And in so doing, the Court would declare the simple message that, in the United States, police detainment of citizens due to the color of their skin is not just unequal but unreasonable.

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<sup>368</sup> Steiker, *supra* note 314, at 852.