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## The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform

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## The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform

PAUL BUTLER<sup>\*‡</sup>

*Ferguson has come to symbolize a widespread sense that there is a crisis in American criminal justice. This Article describes various articulations of what the problems are and poses the question of whether law is capable of fixing these problems. I consider the question theoretically by looking at claims that critical race theorists have made about law and race. Using Supreme Court cases as examples, I demonstrate how some of the “problems” described in the U.S. Justice Department’s Ferguson report, like police violence and widespread arrests of African-Americans for petty offenses, are not only legal, but integral features of policing and punishment in the United States. They are how the system is supposed to work. The conservatives on the Court are aware, and intend, that the expansive powers they grant the police will be exercised primarily against African-American men. I then consider the question of reform using empirical analysis of one of the most popular legal remedies: “pattern or practice” investigations by the U.S. Department of Justice. Some reforms are stopgap measures that provide limited help but fail to bring about the transformation demanded by the strongest articulations of the crisis. In fact, in some ways, reform efforts impede transformation. I conclude by imagining the wholesale transformation necessary to fix the kinds of problems articulated by the Movement for Black Lives.*

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\* Professor of Law, Georgetown University Law Center. © 2016, Paul Butler. This Article was substantially improved by careful reading and/or thoughtful comments from Amna Akbar, David Cole, Sharon Dolovich, Justin Hansford, Adam Levitin, Allegra McLeod, Tracey Meares, Andrea Roth, Carol Steiker, Peter Tague, and Tom Tyler. Earlier drafts were presented as works in progress at the University of Alabama Law School, University of Florida Levin College of Law, Fordham Law School, Georgetown University Law Center, Northwestern Law School, and at the Criminal Justice Roundtable at Stanford Law School. I thank all the participants in those sessions, especially Sheila Bedi, Russell Pearce, Gary Peller, Catherine Powell, Stephen Rushin, David Sklansky, and Deborah Tuerkheimer. Exemplary research assistance was provided by Eric Glatt, Suraj Kumar, and Daniel Walsh. Thanks to the members of *The Georgetown Law Journal*, especially V. Noah Gimbel, Catherine Mullarney, and Dani Zylberberg. Last but not least, I am grateful to Dean Bill Treanor for a summer research grant that supported the writing of this Article.

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## INTRODUCTION

*Well, if one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the unprotected—those, precisely, who need the law's protection the most!—and listens to their testimony. Ask any Mexican, any Puerto Rican, any black man, any poor person—ask the wretched how they fare in the halls of justice, and then you will know, not whether or not the country is just, but whether or not it has any love for justice, or any concept of it.*

—James Baldwin<sup>1</sup>

Ferguson police charged a man named “Michael” with “Making a False Declaration” because he told them his name was “Mike.” Michael had been playing basketball in a public park and went to his car to cool off. The police approached him and, for no apparent reason, accused him of being a pedophile. They requested his consent to search his car and Michael, citing his constitutional rights, declined. At that point, Michael was arrested, reportedly at gun-point. In addition to “making a false declaration,” the police charged Michael with seven other minor offenses, including not wearing a seat belt. Michael had been sitting in a parked car.<sup>2</sup>

A woman called the Ferguson police to report that her boyfriend was assaulting her. By the time the officers arrived, the man was gone. Looking around the house, the police determined that the boyfriend lived there and the woman admitted that he was not listed on the home’s “occupancy permit.” The police arrested the woman for a “permit violation” and took her to jail.<sup>3</sup>

The city of Ferguson, Missouri has approximately 21,000 people.<sup>4</sup> In

1. JAMES BALDWIN, *NO NAME IN THE STREET* 149 (1972).

2. U.S. DEP’T OF JUSTICE, CIV. RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 3, 19 (Mar. 4, 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/TDE7-E7QD>] [hereinafter *Ferguson Report*].

3. *Id.* at 81.

4. *Id.* at 6.

December 2014, the city's court system listed over 16,000 outstanding arrest warrants. This actually understates the level of law enforcement in Ferguson because arrest warrants frequently name more than one crime. For example, in 2013, the city's police officers obtained warrants for 32,975 criminal offenses.<sup>5</sup> In other words, Ferguson had more crimes than it had citizens.

African-Americans are approximately 67% of Ferguson's population, but they constituted the vast majority of arrests, especially for minor offenses. They made up 94% of arrests for "fail[ure] to comply," 92% for "resisting arrest," 92% for "peace disturbance," and 89% for "failure to obey."<sup>6</sup>

The United States Department of Justice investigated the Ferguson police department (FPD) and found that bias against blacks affected "nearly every aspect of Ferguson police and court operations."<sup>7</sup> Nearly 90% of the time that FPD officers used force, it was used against African-Americans.<sup>8</sup> Every single time they deployed a police dog to bite a suspect, the suspect was African-American.<sup>9</sup>

The Ferguson Report said that "many officers appear to see some residents, especially those who live in Ferguson's predominantly African-American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue."<sup>10</sup>

The Ferguson Report was initiated after Officer Darren Wilson fatally shot an unarmed African-American man named Michael Brown. Brown had likely been stopped for his "manner of walking along [the] roadway."<sup>11</sup>

The Ferguson Report was not the only report issued on March 4, 2015. The Department of Justice also issued the Department of Justice Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson (Wilson Report).<sup>12</sup> There are some notable tensions between the themes of these two reports.

The Wilson Report found that Officer Wilson's shooting of Brown did not meet the Justice Department's standard for criminal prosecution because Wilson had reasonably perceived a threat from Brown.<sup>13</sup> The Wilson Report states:

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5. *Id.* at 55.

6. *Id.* at 62.

7. *Id.* at 71.

8. *Id.* at 5.

9. *Id.* at 33, 78.

10. *Id.* at 2.

11. Max Ehrenfreund, *The Risks of Walking While Black in Ferguson*, WASH. POST (Mar. 4, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/04/95-percent-of-people-arrested-for-jaywalking-in-ferguson-were-black> [<https://perma.cc/W8RY-PG9V>].

12. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf) [<https://perma.cc/RHH8-2BUJ>] [hereinafter *Wilson Report*].

13. *See id.* at 84.

While Brown did not use a gun on Wilson at the SUV, his aggressive actions would have given Wilson reason to at least question whether he might be armed, as would his subsequent forward advance and reach toward his waistband. This is especially so in light of the rapidly-evolving nature of the incident. Wilson did not have time to determine whether Brown had a gun and was not required to risk being shot himself in order to make a more definitive assessment.<sup>14</sup>

The Wilson Report carefully cites case law that allows an armed police officer to kill an unarmed suspect in self-defense.<sup>15</sup> It discounts the credibility of witnesses who said that Michael Brown was shot despite having his hands up in surrender.<sup>16</sup> The Wilson Report also suggests that even if Officer Wilson had shot Michael Brown while Brown's hands were in the air, Officer Wilson's shooting Brown could still be reasonable.<sup>17</sup> The Report states:

The Eighth Circuit Court of Appeals' decision in *Loch v. City of Litchfield* is dispositive on this point. There, an officer shot a suspect eight times as he advanced toward the officer. Although the suspect's "arms were raised above his head or extended at his sides," the Court of Appeals held that a reasonable officer could have perceived the suspect's forward advance in the face of the officer's commands to stop as resistance and a threat.<sup>18</sup>

The Wilson Report also discounts the claim that Wilson should have used non-lethally force against Brown:

Under the law, Wilson has a strong argument that he was justified in firing his weapon at Brown as he continued to advance toward him and refuse commands to stop, and the law does not require Wilson to wait until Brown was close enough to physically assault Wilson. Even if, with hindsight, Wilson could have done something other than shoot Brown, the Fourth Amendment does not second-guess a law enforcement officer's decision on how to respond to an advancing threat. The law gives great deference to officers for their necessarily split-second judgments, especially in incidents such as this one that unfold over a span of less than two minutes.<sup>19</sup>

In sum, the Ferguson Report described the Ferguson police department as a racist organization that consistently used excessive violence against African-

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14. *Id.*

15. *See id.* (citing *Loch v. City of Litchfield*, 689 F.3d 961, 966 (8th Cir. 2012) (holding that "[e]ven if a suspect is ultimately 'found to be unarmed, a police officer can still employ deadly force if objectively reasonable'" (quoting *Billingsley v. City of Omaha*, 277 F.3d 990, 995 (8th Cir. 2002))); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (noting that "unarmed" does not mean "harmless"); *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991) ("Also irrelevant is the fact that [the suspect] was actually unarmed. [The officer] did not and could not have known this.")).

16. *See id.* at 8.

17. *Id.* at 84.

18. *Id.*

19. *Id.* at 85.

Americans. The Wilson Report, on the other hand, found that a white officer of the Ferguson Police Department acted legally when he shot an unarmed African-American man.<sup>20</sup>

There is no direct contradiction between these two reports. It is possible that even in a prejudiced and brutal police department a shooting of an unarmed African-American man could be justified. What is revealing, however, is the different focus of the two reports. The Ferguson Report uses data and stories to present a troubling case of a police department that has targeted black people.<sup>21</sup> The Wilson Report relies on law to suggest that Officer Wilson's act of killing an unarmed black man was not illegal.<sup>22</sup>

These two reports, read together, demonstrate a problematic reality. It is possible for police to selectively invoke their powers against African-American residents, and, at the same time, act consistently with the law.

Michael Brown's death at the hands of the police was one of a number of highly publicized cases in 2014–2016. Eric Garner died after a New York police officer placed him in a chokehold.<sup>23</sup> Sandra Bland was treated roughly by a police officer during a routine traffic infraction and, three days later, found dead in her jail cell.<sup>24</sup> Walter Scott was shot in the back by a North Charleston police officer.<sup>25</sup> A school resource officer body slammed a high school student who refused the teacher's order to leave the classroom.<sup>26</sup> Freddie Gray's spinal cord was shattered after Baltimore city police put him in the back of their van.<sup>27</sup> In McKinney, Texas, a police officer threw a teenage girl in a bikini to the ground.<sup>28</sup> A Chicago police officer shot Laquan McDonald sixteen times.<sup>29</sup> In

20. See Christopher R. Green, *Reverse Broken Windows*, 65 J. LEGAL EDUC. 265, 265 (2015).

21. See *Ferguson Report*, *supra* note 2, at 70–78.

22. See *Wilson Report*, *supra* note 12, at 5.

23. See Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <http://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html> [<https://perma.cc/BS3Q-GUEJ>].

24. See Mitch Smith, *Grand Jury Declines to Indict Anyone in Death of Sandra Bland*, N.Y. TIMES (Dec. 21, 2015), <http://www.nytimes.com/2015/12/22/us/grand-jury-fi-in-death-of-sandra-bland.html> [<https://perma.cc/AG49-BYDE>].

25. See Erik Ortiz, *Michael Slager Charged with Murder of Walter Scott in South Carolina*, NBC NEWS (Apr. 8, 2015), <http://www.nbcnews.com/storyline/walter-scott-shooting/michael-slager-south-carolina-officer-charged-murder-black-man-n337526> [<https://perma.cc/8VCF-U4RL>].

26. See Tim Selloh & Tracy Connor, *Video Shows Cop Body-Slamming High School Girl in S.C. Classroom*, NBC NEWS (Oct. 27, 2015), <http://www.nbcnews.com/news/us-news/video-appears-show-cop-body-slamming-student-s-c-classroom-n451896> [<https://perma.cc/G92M-JGN3>].

27. See Sheryl Gay Stolberg & Ron Nixon, *Freddie Gray in Baltimore: Another City, Another Death in the Public Eye*, N.Y. TIMES (Apr. 21, 2015), <http://www.nytimes.com/2015/04/22/us/another-mans-death-another-round-of-questions-for-the-police-in-baltimore.html> [<https://perma.cc/F45Z-39GU>].

28. See Lauren Zakalik, *Texas Police Officer in Pool Party Video Identified*, USA TODAY (June 9, 2015), <http://www.usatoday.com/story/news/nation/2015/06/08/texas-police-officer-reaction-pool-party/28673177/> [<https://perma.cc/Z3SB-PQNF>].

29. See Annie Sweeney & Jason Meisner, *A Moment-by-Moment Account of what the Laquan McDonald Video Shows*, CHI. TRIB. (Nov. 25, 2015), <http://www.chicagotribune.com/news/ct-chicago-cop-shooting-video-release-laquan-mcdonald-20151124-story.html> [<https://perma.cc/R2MK-R5M3>].

Baton Rouge, Louisiana, Alton Sterling was pinned to the ground and shot several times at point blank range by a police officer.<sup>30</sup> The aftermath of Philando Castile's shooting by a Minnesota police officer was livestreamed on Facebook.<sup>31</sup>

These cases have contributed to a widespread sense that there is a race crisis in American criminal justice. This Article explores different articulations of that crisis and the limits of the law to address some aspects of it. The thesis is that many of the problems identified by critics are not actually problems, but are instead integral features of policing and punishment in the United States. They are how the system is supposed to work. This is why some reforms efforts are doomed. They are trying to fix a system that is not actually broken. The most far-reaching racial subordination stems not from illegal police misconduct, but rather from legal police conduct.

Reform of police departments can save lives; when successful, it causes the police to kill fewer people. In some cases, therefore, even short-term limited reform is better than the alternative of not disturbing the status quo. At the same time, however, attempts to reform the system might actually hinder the more substantial transformation American criminal justice needs. Other scholars have described how liberal reforms in criminal justice have exacerbated problems. For example, Bill Stuntz wrote that procedural protections for defendants led to harsher sentencing laws.<sup>32</sup> Naomi Murakawa has argued that liberals "built prison America" by advocating for race neutral policies that had the effect of increasing race disparities.<sup>33</sup> In other work, I have described the Supreme Court's *Gideon v. Wainwright* decision, which gave poor people accused of felonies the right to lawyers paid for by the state, as legitimating mass incarceration.<sup>34</sup> In this Article, my point is that "successful" reform efforts substantially improve community perceptions about the police without substantially improving police practices. The improved perceptions remove the impetus for the kinds of change that would actually benefit the community.

Although there is a national consensus that there is a race problem in criminal justice, there is no widespread agreement on what the problem is, who bears the main responsibility for it, or how it might be remedied. This Article describes various articulations of the crisis. It poses the question of whether law is capable of fixing the problem. I first consider the question theoretically by

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30. Richard Fausset et al., *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), <http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html> [https://perma.cc/4K3D-HXHQ].

31. Matt Furber & Richard Pérez-Peña, *After Philando Castile's Killing, Obama Calls Police Shootings 'an American Issue'*, N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html> [https://perma.cc/X2WN-J96Q].

32. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 2, 64, 280, 305–06 (2011).

33. NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 3–4 (2014).

34. Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2176 (2013).



looking at claims that critical race theorists have made about law and race. Using Supreme Court cases as an example, I demonstrate how some of the police conduct depicted in the Ferguson Report as problematic is not only legal, but is how the police are supposed to do their jobs. I explain why granting the police this kind of power is an explicitly racial project by the Court. The Court has sanctioned racially unjust criminal justice practices, creating a system where racially unjust police conduct is both lawful and how the system is supposed to work.

Next, I consider the question of reform qualitatively by looking at the results of one of the most popular legal remedies: “pattern and practice” investigations by the U.S. Department of Justice. I conclude by imagining the wholesale transformation necessary to fix the kinds of problems articulated by the Movement for Black Lives, and offer a caution about how “procedural justice” and civil rights remedies might actually hinder achieving that transformation.

African-American men have become the standard bearers in the debate about race and criminal justice. Other groups, including African-American women, Latinos, Native Americans, immigrants, and transgendered people, also experience police violence or excessive arrests and incarceration, but these groups have not received the same level of attention as black men.

The theory of intersectionality is instructive in explaining why this is so. Intersectionality is a critical race and feminist theory, first articulated by Kimberlé Crenshaw, which hypothesizes that people might experience subordination differently based on their multiple identities.<sup>35</sup> For example, a Latina woman and a Latino man might be subject to different kinds of stereotypes based on their race, ethnicity, and gender identity. But men are perceived as standard bearers for the race regardless of whether that standard applies to the experiences of women. Things that happen to African-American men, for example, may be identified as black problems in a way that things that happen to African-American women would not be. Even if some of the same things that happen to African-American men happen to African-American women, the men are likely to receive the most attention.<sup>36</sup>

In this paper, I focus on the experiences of African-American men not because I think they are the standard bearers for the race, but rather because I think black men are the prototypical criminals in the eyes of the law. African-American men are who legislators and judges imagine when they make and interpret criminal law, especially as it pertains to police practices. This should not be taken to mean that the other groups, including African-American women, do not experience subordination, or that the subordination experienced by black

35. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

36. See, e.g., BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 6–7 (Devon W. Carbadó ed., 1999); Paul Butler, *Black Male Exceptionalism? The Problems and Potential of Black Male-Focused Interventions*, 10 DU BOIS REV. 485, 487–91 (2013).

men is, in some sense, worse.<sup>37</sup> Rather, I focus on the role that attitudes toward African-American men, in particular, play in informing certain criminal justice practices.

### I. WHAT IS THE RACE AND POLICE CRISIS?

There are racial effects of police practices that many people regret, including that unarmed African-Americans are disproportionately killed by the police and that there are vast racial disparities in arrest and incarceration.<sup>38</sup> There are different points of view about what causes these circumstances. This Article considers whether these effects can be fixed through legal reform. One problem with this question, however, is that there is no uniform agreement on what exactly needs to be reformed. Some people, for example, would say it is African-American men,<sup>39</sup> and others would say it is police departments.<sup>40</sup> Still others would view the project of reforming a police department as enabling a system of white supremacist law enforcement.<sup>41</sup> These different sets of critics are too often lumped together into one category of reformers. I want to disrupt that group categorization, separating those concerned about the race and crime crisis into different categories; creating distinct groups to identify the important differences among those who are concerned about this issue and distinguish their different articulations of what the primary problem in the crisis is.

Sections I.A to I.D group articulations of the race and crime problem into four categories. The first group, Articulation 1, focuses on black male culture and black criminality. The second group, Articulation 2, emphasizes underenforcement of law in criminal justice. A third group, Articulation 3, describes the problem as concerning the relationship between the police and African-American and Latino communities. The fourth group, Articulation 4, locates the crisis as rooted in white supremacy and antiblack racism.

These categories are not mutually exclusive. President Obama, for example, employed Articulation 1 when he gave the commencement address at Morehouse College, the prestigious African American men's college. He said, "[w]e know that too many young men in our community continue to make bad choices. And I have to say, growing up, I made quite a few myself. Sometimes I wrote off my own failings as just another example of the world trying to keep a black man down."<sup>42</sup> Speaking after the decision by the grand

37. See Butler, *supra* note 36, at 496–502.

38. For police shootings, see Sandhya Somashekhar & Steven Rich, *Final Tally: Police Shot and Killed 986 People in 2015*, WASH. POST (Jan. 6, 2016), [https://www.washingtonpost.com/national/final-tally-police-shot-and-killed-984-people-in-2015/2016/01/05/3ec7a404-b3c5-11e5-a76a-0b5145e8679a\\_story.html](https://www.washingtonpost.com/national/final-tally-police-shot-and-killed-984-people-in-2015/2016/01/05/3ec7a404-b3c5-11e5-a76a-0b5145e8679a_story.html) [<https://perma.cc/E7D7-2KXC>]. For race disparities, see *Black Lives Matter: Eliminating Racial Inequality in the Criminal Justice System*, THE SENTENCING PROJECT (2015), [http://sentencingproject.org/doc/publications/rd\\_Black\\_Lives\\_Matter.pdf](http://sentencingproject.org/doc/publications/rd_Black_Lives_Matter.pdf) [<https://perma.cc/2PNB-E3LS>].

39. See *infra* Section I.A.

40. See *infra* Sections I.B, I.C.

41. See *infra* Section I.D.

42. President Barack Obama, Remarks at Morehouse College Commencement Ceremony (May 19, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/19/remarks-president-morehouse-college-commencement-ceremony> [<https://perma.cc/5YYL-MR2D>].

jury not to bring charges against Darren Wilson, Obama invoked Articulation 3, saying “we need to recognize that the situation in Ferguson speaks to broader challenges that we still face as a nation. The fact is, in too many parts of this country, a deep distrust exists between law enforcement and communities of color.”<sup>43</sup>

But there are tensions between these explanations. In particular, I want to point out a tension between Articulation 3, the construct that focuses on police–community relations and seeks civil rights focused remedies, and Articulation 4, the radical construct identified by the Movement for Black Lives and the influential public intellectual Ta-Nehisi Coates, among others, that focuses on white supremacy.

#### A. ARTICULATION 1: BLACK MALE BEHAVIOR, CULTURE, AND MASCULINITY

In this construct, if more African-American men obeyed the law, they would not have to worry about being shot by police or being stopped and frisked. The problem is the antisocial way that many black men perform masculinity.

The conservative commentator Bill O’Reilly has criticized those who “believe there is a strong racial element in the American criminal justice system.”<sup>44</sup> O’Reilly says:

The reason there is so much violence and chaos in the black precincts is the disintegration of the African-American family . . . . [R]aised without much structure, young black men often reject education and gravitate towards the street culture, drugs, hustling, gangs. Nobody forces them to do that . . . it is a personal decision.<sup>45</sup>

The CNN journalist Don Lemon responded that O’Reilly was right, but “doesn’t go far enough.”<sup>46</sup> In the days after George Zimmerman was acquitted for killing Trayvon Martin, an unarmed African-American teenager, Lemon had five recommendations for what black people could do to “fix the problem.”<sup>47</sup>

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43. President Barack Obama, Remarks by the President After Announcement of the Decision by the Grand Jury in Ferguson, Missouri (Nov. 24, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/24/remarks-president-after-announcement-decision-grand-jury-ferguson-missou> [<https://perma.cc/G72-3PHEM>].

44. Bill O’Reilly, *Talking Points Memo: Violence Growing in America*, BILL O’REILLY (Oct. 7, 2015), <http://www.billoreilly.com/b/Violence-Growing-in-America/-321368858640864867.html> [<https://perma.cc/M3GP-JF82>].

45. Bill O’Reilly, *President Obama and the Race Problem*, FOX NEWS (July 22, 2013), <http://www.foxnews.com/transcript/2013/07/23/bill-oreilly-president-obama-and-race-problem/> [<https://perma.cc/NXD9-GWCA>].

46. Don Lemon, *Problems the Black Community Faces; Don Lemon’s Suggestions*, CNN (July 27, 2013), <http://transcripts.cnn.com/TRANSCRIPTS/130727/cnr.06.html> [<https://perma.cc/2G7F-BEN3>].

47. *Id.*

The recommendations were that black male teenagers should stop wearing pants that sag off their rear ends, African-Americans should stop using the “n” word, blacks should respect where they live by not littering, they should place more value on education, and they should stop having children out of wedlock.<sup>48</sup>

This critique does not only come from conservatives. Some liberals have also suggested that black men bear some responsibility for the social problems they face. During his first presidential campaign, Barack Obama joked about the work ethic of “gangbangers,” mocking them as saying, “Why I gotta do it? Why you didn’t ask Pookie to do it?”<sup>49</sup> Similarly, in a speech at an African-American church, President Obama said, “[T]oo many fathers . . . have abandoned their responsibilities, acting like boys instead of men . . . . You and I know how true this is in the African-American community.”<sup>50</sup>

There is actually a tradition of liberals blaming African-Americans, at least in part, for the discrimination they face. The difference between conservatives and liberals on this point is that liberals make their analysis contextual, attributing some blame to white racism for creating the circumstances that lead to blacks’ alleged poor cultural adaptations. In 1944, for example, famed Swedish sociologist Gunnar Myrdal wrote, “[w]hite prejudice and discrimination keep the Negro low in standards of living, health, education, manners and morals. This, in its turn, gives support to white prejudice. White prejudice and Negro standards thus mutually ‘cause’ each other.”<sup>51</sup>

More recently, the progressive journalist Jonathan Chait explained:

The argument is that structural conditions shape culture, and culture, in turn, can take on a life of its own independent of the forces that created it. It would be bizarre to imagine that centuries of slavery, followed by systematic terrorism, segregation, discrimination, a legacy wealth gap, and so on did not leave a cultural residue that itself became an impediment to success.<sup>52</sup>

Progressives also present their critique of African-American men as a form of “tough love.” As referenced briefly above, in a commencement address at Morehouse College, President Obama said:

We know that too many young men in our community continue to make bad choices. And I have to say, growing up, I made quite a few myself. Sometimes

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48. *See id.*

49. *Obama’s Racial Identity Still an Issue*, CBS NEWS (Nov. 27, 2007), <http://www.cbsnews.com/news/obamas-racial-identity-still-an-issue/> [https://perma.cc/D38T-KQWE].

50. *Obama’s Father’s Day Remarks*, N.Y. TIMES (June 15, 2008), <http://www.nytimes.com/2008/06/15/us/politics/15text-obama.html> [https://perma.cc/J5X3-VHX7].

51. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY* 75 (1944).

52. Jonathan Chait, *Barack Obama, Ta-Nehisi Coates, Poverty, and Culture*, N.Y. MAG. (Mar. 19, 2014, 11:11 AM), <http://nymag.com/daily/intelligencer/2014/03/obama-ta-nehisi-coates-poverty-and-culture.html> [https://perma.cc/6CUS-GJUQ].

I wrote off my own failings as just another example of the world trying to keep a black man down. I had a tendency sometimes to make excuses for me not doing the right thing. But one of the things that all of you have learned over the last four years is there's no longer any room for excuses . . . Well, we've got no time for excuses. Not because the bitter legacy of slavery and segregation have vanished entirely; they have not. Not because racism and discrimination no longer exist; we know those are still out there. It's just that in today's hyperconnected, hypercompetitive world, with millions of young people from China and India and Brazil—many of whom started with a whole lot less than all of you did—all of them entering the global workforce alongside you, nobody is going to give you anything that you have not earned. (Applause.) Nobody cares how tough your upbringing was. Nobody cares if you suffered some discrimination.<sup>53</sup>

If the problem is African-American male behavior, one obvious response is to attempt to modify black male behavior. This is one of the goals of black male “achievement” programs, like the White House’s My Brother’s Keeper initiative.<sup>54</sup> Likewise, former New York City Mayor Michael Bloomberg attempted to address issues facing young men of color through his Young Men’s Initiative.<sup>55</sup> Under his administration, New York City opened offices in high-crime neighborhoods to offer job training and interpersonal skills training to young men of color.<sup>56</sup> According to *The New York Times*, “[m]uch of the program is intended to prevent young men from entering or returning to the criminal justice system, which has long been a revolving door for many black and Latino youth.”<sup>57</sup>

It is worth noting that Bloomberg, who reportedly spent millions of dollars of his own money on the initiative, responded to racial critiques of the NYPD’s stop and frisk tactic by arguing that the real problem was that not enough blacks were being stopped under the program.<sup>58</sup> A federal judge later ruled that the program was unconstitutional, in part because it discriminated against African-Americans and Latinos.<sup>59</sup>

53. Transcript: *Obama’s Commencement Speech at Morehouse College*, WALL ST. J. (May 20, 2013, 10:00 AM), <http://blogs.wsj.com/washwire/2013/05/20/transcript-obamas-commencement-speech-at-morehouse-college/> [<https://perma.cc/4XLS-NRS7>].

54. See Butler, *supra* note 36, at 505; Michael D. Shear, *Obama Starts Initiative for Young Black Men, Noting His Own Experience*, N.Y. TIMES (Feb. 27, 2014), [http://www.nytimes.com/2014/02/28/us/politics/obama-will-announce-initiative-to-empower-young-black-men.html?\\_r=0](http://www.nytimes.com/2014/02/28/us/politics/obama-will-announce-initiative-to-empower-young-black-men.html?_r=0) [<https://perma.cc/WKF9-EHLE>].

55. See Butler, *supra* note 36, at 505.

56. See *id.*

57. Michael Barbaro & Fernanda Santos, *Bloomberg to Use Own Funds in Plan to Aid Minority Youth*, N.Y. TIMES (Aug. 3, 2011), <http://www.nytimes.com/2011/08/04/nyregion/new-york-plan-will-aim-to-lift-minority-youth.html> [<https://perma.cc/MT7X-GCCQ>].

58. See David W. Chen, *Bloomberg Says Math Backs Police Stops of Minorities*, N.Y. TIMES (June 28, 2013), <http://www.nytimes.com/2013/06/29/nyregion/bloomberg-says-math-backs-police-stops-of-minorities.html> [<https://perma.cc/VB9D-W6VZ>].

59. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013).

## B. ARTICULATION 2: UNDERENFORCEMENT OF LAW

In *Race, Crime, and the Law*, law professor Randall Kennedy writes that, “the principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws.”<sup>60</sup> As an example of “racially selective underprotection,”<sup>61</sup> Kennedy points to the South’s practice—during both the slavery and Jim Crow eras—of not seriously prosecuting black-on-black violence.<sup>62</sup> More recently, he notes, blacks do not demand more law and order because they “fear racially prejudiced misconduct by law enforcement officials. History reinforced by persistent contemporary abuses gives credence and force to this fear.”<sup>63</sup>

In this way of thinking, law enforcement is a public good. For a group to complain about having too much of it is like complaining about having too many public parks or libraries.

Kennedy acknowledges both historic and persistent racism in the criminal justice system.<sup>64</sup> At the same time, he argues:

[T]he administration of criminal law has changed substantially for the better over the past half century and that there is reason to believe that, properly guided, it can be improved even more. Today there are more formal and informal protections against racial bias than ever before, both in terms of the protections accorded to blacks against criminality and the treatment accorded to black suspects, defendants, and convicts.<sup>65</sup>

Former New York City mayors Michael Bloomberg and Rudy Giuliani have been critical of the focus of reformers on police violence. In their view, the main problem is interracial violence within high-crime neighborhoods. According to Giuliani:

Ninety-three percent of blacks are killed by other blacks . . . I would like to see the attention paid to that that you are paying to [Ferguson]. . . . What about the poor black child that was killed by another black child? . . . Why aren’t you protesting that? . . . Why don’t you cut it down so that so many white police officers don’t have to be in black areas? . . . White police officers wouldn’t be there if [African-Americans] weren’t killing each other.<sup>66</sup>

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60. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 19 (1997).

61. *Id.* at 74.

62. *Id.* at 69–70.

63. *Id.* at 75.

64. *See id.* at 21.

65. *Id.* at 388–89.

66. Danielle Paquette, *Giuliani: ‘White Police Officers Wouldn’t be There if You Weren’t Killing Each Other,’* WASH. POST (Nov. 23, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/11/23/giuliani-white-police-officers-wouldnt-be-there-if-you-weren-t-killing-each-other/> [https://perma.cc/BE3N-8D4K].

Some scholars have asserted that many African-Americans endorse this point of view. Exploring the support in Harlem for tough law enforcement in response to a heroin epidemic in the 1970s, Michael Javen Fortner found that, “mass incarceration had less to do with white resistance to racial equality and more to do with the black silent majority’s confrontation with the ‘reign of criminal terror’ in their neighborhoods.”<sup>67</sup> James Forman has documented a similar dynamic in crime policy in Washington D.C., which has a majority black population.<sup>68</sup>

If underenforcement is the problem, then more enforcement is one solution. Order-maintenance policing is the result. According to former New York City Mayor Michael Bloomberg, eliminating aggressive policing strategies like stop-and-frisk would result in “far more crimes committed against black and Latino New Yorkers. When it comes to policing, political correctness is deadly.”<sup>69</sup>

Sometimes proponents of this viewpoint recognize that increased enforcement may create tension in relations between blacks and the police, but they view this as a cost of increased public safety. Bloomberg, for example, asserted that police departments must balance competing considerations: the “right to walk down the street without being targeted by the police because of his or her race or ethnicity” and the “right to walk down the street without getting mugged or killed.”<sup>70</sup> “Both are civil liberties—and we in New York are fully committed to protecting both equally, even when others are not.”<sup>71</sup>

### C. ARTICULATION 3: POLICE–COMMUNITY RELATIONS

Perhaps the predominate articulation is that the crisis concerns the relationship between the police and communities of color, especially the African-American community. Cleveland Police Chief Calvin Williams said, “If we don’t ensure that our officers and our community have a better relationship, then a lot of what we’re trying to implement . . . is going to be hard to do.”<sup>72</sup> Likewise, a federal investigation of the Cincinnati Police Department determined that officers had “superficial relationships” with the community.<sup>73</sup> After five police officers were killed in Dallas, Texas, President Obama said Americans “wonder if an African- American community that feels unfairly targeted by police, and police departments that feel unfairly maligned for doing

67. MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* 23 (2015).

68. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 38–42 (2012).

69. Michael R. Bloomberg, *Michael Bloomberg: ‘Stop and Frisk’ Keeps New York Safe*, WASH. POST (Aug. 18, 2013), [https://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aaf5a5f84\\_story.html](https://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aaf5a5f84_story.html) [perma.cc/W9UN-AMFM].

70. *Id.*

71. *Id.*

72. Alana Semuels, *How to Fix a Broken Police Department*, THE ATLANTIC (May 28, 2015), <http://www.theatlantic.com/politics/archive/2015/05/cincinnati-police-reform/393797/> [perma.cc/WD89-T6B6].

73. *Id.*

their jobs, can ever understand each other's experience."<sup>74</sup>

Some "procedural justice" scholars have also focused on the perceptions of the police in minority communities. Tom Tyler writes, "Public order successes have been achieved at great cost to politically powerless communities. . . . [O]ur laws and the way they are enforced have resulted in public attitudes sharply polarized along racial lines, a division that is scarcely surprising in a nation marked by conspicuous racial disparities."<sup>75</sup>

The Obama administration has most often talked about criminal justice reform through this frame. It created the "National Initiative for Building Community Trust and Justice," which is designed "to improve relationships and increase trust between communities and the criminal justice system."<sup>76</sup> The Initiative's website highlights three areas "that hold great promise for concrete, rapid progress."<sup>77</sup> They are reconciliation, procedural justice, and implicit bias.<sup>78</sup>

This frame focuses on fairness rather than race, per se. Former United States Attorney General Eric Holder said that reform should ensure "that *everyone* who comes into contact with the police is treated fairly"<sup>79</sup>; that reforming drug sentencing laws "presents a historic opportunity to improve the fairness of our criminal justice system"<sup>80</sup>; and that preventing felons from voting is "unfair."<sup>81</sup> Attorney General Loretta Lynch said, "We must continue working to build trust between communities and law enforcement. We must continue working to guarantee every person in this country equal justice under the law."<sup>82</sup>

In this construct, the race problem arises when law enforcement officers treat people of color differently.<sup>83</sup> The fix is the traditional civil rights based approach

74. President Barack Obama, Remarks by the President at Memorial Service for Fallen Dallas Police Officers (July 12, 2016), <https://www.whitehouse.gov/the-press-office/2016/07/12/remarks-president-memorial-service-fallen-dallas-police-officers> [<https://perma.cc/YD2T-UY46>].

75. Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 336 (2011).

76. *Mission*, NAT'L INITIATIVE FOR BUILDING CMTY. TR. AND JUST., <http://trustandjustice.org/about/mission> [<https://perma.cc/G5FD-HW8F>] (last visited Apr. 23, 2016).

77. *Id.*

78. *See id.*

79. *Eric Holder's Keynote Address: Shifting Law Enforcement Goals to Reduce Mass Incarceration*, BRENNAN CTR. FOR JUST. (Sept. 23, 2014), <https://www.brennancenter.org/analysis/keynote-address-shifting-law-enforcement-goals-to-reduce-mass-incarceration> [<https://perma.cc/X7EL-E6EE>].

80. Eric H. Holder, Jr., *Time to Tackle Unfinished Business in Criminal Justice Reform*, WASH. POST (Feb. 27, 2015), [https://www.washingtonpost.com/opinions/time-to-tackle-unfinished-business-in-criminal-justice-reform/2015/02/27/e17878bc-bdf9-11e4-bdfa-b8e8f594e6ee\\_story.html](https://www.washingtonpost.com/opinions/time-to-tackle-unfinished-business-in-criminal-justice-reform/2015/02/27/e17878bc-bdf9-11e4-bdfa-b8e8f594e6ee_story.html) [<https://perma.cc/789V-46AW>].

81. *Id.*

82. Press Release, Dep't of Justice, Attorney General Loretta E. Lynch Delivers Statement on Dallas Shooting, <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-statement-dallas-shooting> [<https://perma.cc/4J87-NNDB>].

83. *See* Jim Abrams, *Congress Passes Bill to Reduce Disparity in Crack, Powder Cocaine Sentencing*, WASH. POST (July 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2-010/07/28/>



of attempting to eradicate the discrimination. One of the principal tools civil rights activists seek to use to repair police–community relations is the intervention of the U.S. Department of Justice. I discuss this remedy at length below.<sup>84</sup> Here I want to note that this is the response that tends to be championed by mainstream civil rights organizations like the National Association for the Advancement of Colored People (NAACP) and the NAACP Legal Defense Fund. Their recommended interventions often focus on mechanisms, like civilian review boards or body cameras for the police, to weed out “bad apple” cops.<sup>85</sup>

#### D. ARTICULATION 4: ANTIBLACK RACISM/WHITE SUPREMACY

At the same time that police violence against African-Americans commands substantial attention in the media, a group of blacks and sympathetic allies who hold radical racial ideologies have ascended to prominence. These activists, scholars, and journalists represent the most substantial leftist movement among African-Americans since the Black Panther Party of the 1960s. Their critique of criminal justice generally, and police practices specifically, creates the fourth explanation of the crisis. It views police practices against blacks as symptoms of structural racism and white supremacy. To describe this point of view, I will focus on the Movement for Black Lives and the work of the scholar Michelle Alexander and journalist Ta-Nehisi Coates.

The Movement for Black Lives is a collective of individuals and community organizations who have come together “[i]n response to the sustained and increasingly visible violence against Black communities in the US and globally.”<sup>86</sup> Black Lives Matter is the most well known organization in the collective. According to its website, “#BlackLivesMatter is a call to action and a response to the virulent anti-Black racism that permeates our society.

#BlackLivesMatter is a unique contribution that goes beyond extrajudicial killings of Black people by police and vigilantes.”<sup>87</sup> Its activists intend to “broaden[] the conversation around state violence to include all of the ways in which Black people are intentionally left powerless at the hands of the state” including “Black poverty and genocide,” mass incarceration, and discrimination against the LGBT community and undocumented immigrants.<sup>88</sup>

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AR2010072802969.html [https://perma.cc/L2Z9-ARGD] (quoting then-Senator Obama criticizing the sentencing disparity because it “has disproportionately filled our prisons with young black and Latino drug users”).

84. See *infra* Part IV.

85. See, e.g., *Policing Reform Campaign*, NAACP LEGAL DEF. AND EDUC. FUND, <http://www.naacpldf.org/case-issue/policing-reform-campaign> [https://perma.cc/X4JP-QBCS].

86. *Message From The Movement 4 Black Lives Policy Table*, THE MOVEMENT FOR BLACK LIVES, <http://movementforblacklives.org/message-from-the-movement-4-black-lives-policy-table/> [https://perma.cc/64DD-S8PH].

87. *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> [https://perma.cc/2X5P-TD4X].

88. *Id.*

In *The New Jim Crow*, one of the most influential books about race in many years, Michelle Alexander argues that mass incarceration is a form of social control of blacks.<sup>89</sup> Alexander proposes a multiracial coalition to address the causes of mass incarceration.<sup>90</sup> She argues that unless the root causes are addressed, even if mass incarceration is defeated, another mechanism for controlling African-Americans will rise in its place.<sup>91</sup>

Ta-Nehisi Coates is a leading public intellectual on race relations in the United States. In his bestselling *Between the World and Me*, he writes, in an open letter to his son, “[a]ll you need to understand is that the [police] officer carries with him the power of the American state and the weight of an American legacy, and they necessitate that of the bodies destroyed every year, some wild and disproportionate number of them will be black.”<sup>92</sup>

Coates situates his critique of the police in a historical context. He notes:

White supremacy does not contradict American democracy—it birthed it, nurtured it, and financed it. That is our heritage. It was reinforced during 250 years of bondage. It was further reinforced during another century of Jim Crow. It was reinforced again when progressives erected an entire welfare state on the basis of black exclusion.<sup>93</sup>

This frame advocates broad economic and political transformation, extending well beyond police reform. For example, the Movement for Black Lives website states:

The violence inflicted on Black communities goes far beyond police brutality. It can be seen in the continued suppression of our history, the exploitation of our culture, and the reality that many of our people live in communities that have been systematically denied resources and jobs. The violence includes inadequate health care, dirty water, failing schools, and a lack of resources. Every day we contend with the indecencies of racism and poverty, which wear on our spirit and make our communities more vulnerable to state violence and fuel community conflict. These varying forms of violence are perpetrated by government and corporate institutions and actors, at both the local and national level.<sup>94</sup>

The radical critique has received a surprisingly favorable reception. Both Alexander’s *The New Jim Crow* and Coates’s *Between the World and Me* have

89. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1–2, 4 (2010).

90. *Id.* at 15, 258.

91. *See id.* at 258.

92. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 103 (2015).

93. Ta-Nehisi Coates, *Other People’s Pathologies*, *THE ATLANTIC* (Mar. 30, 2014), <http://www.theatlantic.com/politics/archive/2014/03/other-peoples-pathologies/359841/> [https://perma.cc/AC8T-F2KK].

94. *Message From The Movement 4 Black Lives Policy Table*, *supra* note 86.

been widely acclaimed. They were national bestsellers, both won NAACP Image awards, and Coates's book also won the National Book Award.<sup>95</sup> Justice Sonia Sotomayor cited both books in a dissenting opinion.<sup>96</sup> The Movement for Black Lives has become an important force in progressive politics. Its members met with President Obama at the White House<sup>97</sup> and with Democratic presidential candidates Hillary Clinton and Bernie Sanders.<sup>98</sup> The pop music star Beyoncé Knowles released a video for the song "Formation" that alluded to iconography of the movement, including the "hands up, don't shoot" gesture that activists often make at protests.<sup>99</sup> These developments represent a new acceptance, if not mainstreaming, of racial ideology that is left of traditional civil rights discourse.

#### E. COMMONALITIES AMONG AND TENSIONS BETWEEN RACE AND POLICE REFORMERS

Although Articulation 4 centers on white supremacy, each of the other three articulations acknowledges some role of race-based subordination in creating the crisis. Probably people who subscribe to any of the frames would say that a significant contributing factor to the crisis is the concentration of poverty in African-American communities.

So, in the black male culture frame, liberals, at least, blame the environment for overdetermining the behavior of the African-American men they critique. People who think law is underenforced in black communities frequently point to the historic denial of "equal protection" of law and the current failure of the white majority to take black-on-black crime seriously.<sup>100</sup> The "relationship between police and the community" frame, Articulation 3, frequently highlights implicit bias as an explanation for why police patrol African-American neighborhoods differently.<sup>101</sup>

Acknowledging both that the problems are complex and interrelated should cause advocates to understand that piecemeal solutions to the race and criminal

95. See *About the Author*, THE NEW JIM CROW, <http://newjimcrow.com/about-the-author> [https://perma.cc/3E2P-FSYN]; *Between the World and Me*, PENGUIN RANDOM HOUSE, <http://www.penguinrandomhouse.com/books/220290/between-the-world-and-me-by-ta-nehisi-coates/9780812993547/> [https://perma.cc/2FDK-2HDX].

96. *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

97. Maya Rhodan, *Black Lives Matter Activist Says Obama Meeting Was Positive*, TIME (Feb. 18, 2016), <http://time.com/4229987/obama-black-lives-matter-meeting/> [LYX4-5KM3].

98. See Dana Liebelson & Ryan J. Reilly, *Inside Hillary Clinton's Meeting with Black Lives Matter*, HUFFINGTON POST (Oct. 9, 2015), [http://www.huffingtonpost.com/entry/black-lives-matter-hillary-clinton\\_us\\_56180c44e4b0e66ad4c7d9fa](http://www.huffingtonpost.com/entry/black-lives-matter-hillary-clinton_us_56180c44e4b0e66ad4c7d9fa) [https://perma.cc/F4FV-LQ5S].

99. Beyoncé, *Formation*, YOUTUBE (Feb. 6, 2016), <https://www.youtube.com/watch?v=LrChZ1gwzTo> [https://perma.cc/PB4V-EQEG].

100. JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 6–7 (2015).

101. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, DEP'T OF JUSTICE, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 58 (2015), [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [https://perma.cc/G2L6-EAG2] (recommending training that "incorporates content around recognizing and confronting implicit bias and cultural responsiveness").

justice crisis are unlikely to succeed. This understanding, in turn, could lead to two different responses.

On the one hand, we could embrace incremental reform in all four areas—black male conduct; underenforcement in African-American communities; police–community relations; and white supremacy/antiblack racism—in the hope that incremental reforms are likely to have some effect on the problem, even if none will solve it.

On the other hand, we could identify and focus on the root of the problem. If the root is concentrated economic disadvantage, the solution might be to advocate for more equitable distribution of wealth, rather than focus on policing. If the root is race discrimination, we could try to implement the most effective laws and practices to combat the discrimination. If the root is white supremacy, we could attack that problem at its core, as opposed to, say, promoting greater investments in inner city communities.

Although the articulations may share some common understandings, there are also important tensions between them. In particular, I want to identify the police–community relations critique as liberal and the white supremacy critique as radical. The [legal scholar Amna Akbar](#) has made a similar observation, noting:

Reform strategy developed after the civil rights movement has tended to centralize the importance of voter registration, court-centered litigation strategies, and discrete issue campaigns as the avenues through which change occurs. This strategy reflects liberal notions of the state and judicial process, wherein the judicial and electoral processes are the neutral hydraulics behind an essentially just system capable of self-correction, and the potential corrections are relatively marginal. In contrast the movement [for black lives] rejects the state’s neutrality and capacity for doing justice without being pushed to do so.<sup>102</sup>

The civil rights interventions sought by liberals are intended to make the criminal justice system fairer. They address racial inequality in a narrow sense, to ensure that similarly situated people are treated the same, regardless of their race or ethnicity. They are especially focused on improving the perceptions of people of color about the police. For example, the Final Report of the President’s Task Force on 21st Century Policing begins with this quote from President Obama: “When any part of the American family does not feel like it is being treated fairly, that’s a problem for all of us.”<sup>103</sup> Elsewhere, he has made it clear that he does not think the problem is particularly widespread. After the grand jury failed to indict Ferguson police officer Darren Wilson for the death of Michael Brown, President Obama said:

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102. Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 363–64 (2015).

103. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 101, at 5.

[T]here are still problems and communities of color aren't just making these problems up. Separating that from this particular decision, there are issues in which the law too often feels as if it is being applied in discriminatory fashion. I don't think that's the norm. I don't think that's true for the majority of communities or the vast majority of law enforcement officials.<sup>104</sup>

The radicals, on the other hand, have more systemic critiques and argue for broader forms of relief. Coates, for example, is a prominent advocate for reparations for African-Americans.<sup>105</sup> The Movement for Black Lives website states, “[w]e believe that we can achieve, and will seek nothing less, than a complete transformation of the current systems, which make it impossible for many of us to breathe.”<sup>106</sup> While liberals think reform is sufficient, radicals believe that until there is fundamental change in the structure of society in the United States, the problems will persist.

Both proponents of the police–community relations and the white supremacy frames have looked to the law, among other things, to help achieve their agenda.<sup>107</sup> In Ferguson, for example, people allied with the Movement for Black Lives were among the strongest voices for prosecution of Officer Wilson and for the intervention of the U.S. Department of Justice in the police department.<sup>108</sup> The question I turn to now is whether the law can actually help, for either the reform that the liberals seek or the transformation that the radicals desire.

Amna Akbar has observed: “The [Black Lives Matter] movement exposes to the mainstream what black communities have argued—and black freedom struggles have organized against—for centuries: Law is not fair, it does not treat people equally, and its violence is lethal and routine.”<sup>109</sup>

For three decades now, a school of jurisprudence has been making those same kinds of claims about law. In the next Part, I reintroduce those ideas, centering them in the analysis of criminal justice reform.

104. President Barack Obama, *supra* note 43.

105. See Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June, 2014) <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/7XZA-VC2F>].

106. *Message From The Movement 4 Black Lives Policy Table*, *supra* note 86.

107. See *supra* Sections I.C, I.D. People who attribute the crisis to African-American male behavior have focused on policy interventions, like black male achievement programs. The conservative commentator Bill O'Reilly famously attended the White House roll out of the My Brother's Keeper initiative. People who think the problem is underenforcement look to police and prosecutorial strategies that would increase enforcement. See *supra* Sections I.A, I.B.

108. See *Ferguson, 1 Year Later: Why Protestors Were Right to Fight for Mike Brown Jr.*, BLACK LIVES MATTER, <http://blacklivesmatter.com/ferguson-1-year-later-why-protesters-were-right-to-fight-for-mike-brown-jr/> [<https://perma.cc/PFZ2-Q3VW>].

109. Akbar, *supra* note 102, at 355.

## II. CRITICAL RACE THEORY CLAIMS ABOUT LAW

*Our nation/empire was and is established and constituted through the plunder, extermination, and exploitation of human beings, rationalized and justified by racialization.*

—Charles Lawrence<sup>110</sup>

Problems in the criminal justice system are just one set of problems that African-Americans face. Despite the Civil Rights Movement of the twentieth century, African-Americans still experience extreme inequality in almost every aspect of life. Because African-American history is often presented in a “celebratory” narrative of forward progress, it is important, especially in light of the strong claims about law that follow, to focus on data that reveal the depth of the inequality.<sup>111</sup>

Between 2000 and 2011, white people experienced an increase of \$3,730 (3.5%) in their overall median net worth.<sup>112</sup> During the same time period, black people experienced a decrease of \$3,746 in their overall median net worth.<sup>113</sup> In 2013, the median white household had thirteen times the wealth of the median black household: the median net worth of a white household was \$141,900 and the median net worth of a black household was \$11,000.<sup>114</sup>

In 1957 there was a gap of 5.1% in college completion rates, where 8% of white people over 25 completed college and only 2.1% of black people over 25 completed college.<sup>115</sup> By 2012, this gap widened to 10.1%, where 31.3% of white people over 25 completed college and 21.2% of black people over 25 completed college.<sup>116</sup>

Between 1954 and 2013, the unemployment rate for black people has consistently doubled the unemployment rate for white people.<sup>117</sup> The disparity is similar for those with a college degree. In 2013, the unemployment rate for black college graduates between the ages of 22 and 27 was 12.4%, compared to the overall unemployment rate of 5.6% for all graduates in the

110. Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 387 (2015).

111. . For a critique of the celebratory tradition in evaluating race relations law, see Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).

112. MARINA VORNOVITSKY, ALFRED GOTTSCHALCK & ADAM SMITH, U.S. CENSUS BUREAU, DISTRIBUTION OF HOUSEHOLD WEALTH IN THE U.S.: 2000 TO 2011, at 3 (2014).

113. *Id.* at 4.

114. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> [<https://perma.cc/4A6X-RN2W>].

115. Austin Nichols, *Black-White Higher Education Gap Larger Today Than 50 Years Ago*, URB. INST. (Aug. 21, 2013), <http://www.urban.org/urban-wire/black-white-higher-education-gap-larger-today-50-years-ago> [<https://perma.cc/2AGD-XW56>].

116. *Id.*

117. Drew Desilver, *Black Unemployment Rate is Consistently Twice that of Whites*, PEW RES. CTR. (Aug. 21 2013), <http://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/> [<https://perma.cc/X5VX-EVWU>].

same age range.<sup>118</sup>

African-Americans experience these deprivations despite constitutional and legislative prohibitions against race discrimination. Indeed, there is widespread evidence that African-Americans still experience discrimination.<sup>119</sup> A 2012 study by the U.S. Department of Housing and Urban Development found that while the most blatant forms of housing discrimination, such as refusing to meet with a minority home-seeker, have declined, other forms of discrimination still exist.<sup>120</sup> African-Americans who want to rent an apartment are informed about 11.4% fewer units and shown 4.2% fewer units than white renters.<sup>121</sup> Blacks who try to purchase homes are told about 17% fewer homes and shown 17.7% fewer homes than their white counterparts.<sup>122</sup>

African-Americans also encounter discrimination on the travel website Airbnb. The Twitter hashtag “#AirbnbWhileBlack” chronicles incidents where black travelers were initially denied a rental because of their profile picture or their “African American sounding name,” but were subsequently granted a rental after changing their picture or name.<sup>123</sup> A study conducted by Harvard Business School provided statistical backing to this phenomenon.<sup>124</sup> Inquiries by guests with white-sounding names were approved by the renter roughly 50% of the time.<sup>125</sup> However, inquiries by guests with black-sounding names were approved by the renter roughly 42% of the time.<sup>126</sup> There was a 16% negative disparity in the acceptance rate for guests with black-sounding names.<sup>127</sup>

Black applicants for employment are less likely to get callbacks than white applicants. A 2003 study found that applicants with white-sounding names needed to submit ten resumes to receive one callback and applicants with black-sounding names needed to submit fifteen resumes to receive one callback.<sup>128</sup> A study released in 2014 that used additional metrics to separate data

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118. Janelle Jones & John Schmitt, *A College Degree is No Guarantee*, CTR. FOR ECON. AND POL'Y RES. 1 (May 2014), <http://cepr.net/documents/black-coll-grads-2014-05.pdf> [<https://perma.cc/J3EF-EA8Z>].

119. See, e.g., *Ferguson Report*, *supra* note 2.

120. Margery Austin Turner et al., *Housing Discrimination Against Racial and Ethnic Minorities 2012*, U.S. DEP'T OF HOUSING AND URB. DEV. 1 (2013), [http://www.huduser.gov/portal/Publications/pdf/HUD-514\\_HDS2012\\_execsumm.pdf](http://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf) [<https://perma.cc/G38J-WQPG>].

121. *Id.*

122. *Id.*

123. Lauren C. Williams, *Airbnb Has an Unsurprising Race Problem*, THINKPROGRESS (May 7, 2016), <http://thinkprogress.org/economy/2016/05/07/3776353/housing-discrimination-and-airbnb/> [<https://perma.cc/U32W-7FAZ>].

124. Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment* (Harv. Bus. Sch., Working Paper No. 16-069, 2016), <http://www.benedelman.org/publications/airbnb-guest-discrimination-2016-01-06.pdf> [<https://perma.cc/F89F-XQZ2>].

125. *Id.* at 11.

126. *Id.*

127. *Id.* at 12.

128. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg more Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

by the prestige of the applicant's degree found similar results.<sup>129</sup> White applicants from elite universities received responses 17.5% of the time and similarly situated black applicants received responses 12.9% of the time.<sup>130</sup> White applicants from less selective universities received responses 11.4% of the time and similarly situated black applicants received responses 6.5% of the time. The disparity continued for salaries, with black applicants receiving offers of approximately \$3,000 less than white applicants.<sup>131</sup>

A study by the University of Chicago Booth School of Business found that loan requests from a profile with a black person in the profile picture were 25 to 35% less likely to receive a loan than a profile with a white person in the profile picture, even with similar credit profiles.<sup>132</sup> African-Americans even encounter bias in a transaction as mundane as selling a used iPod. A 2013 study found that black sellers received fewer and lower offers for iPods when utilizing local, online classified advertisements.<sup>133</sup> Black sellers, compared to white sellers, received 13% fewer responses, 18% fewer offers, and offers that were \$5.72 (11%) lower.<sup>134</sup> In conducting the experiment, the photograph used in the advertisement was one of an iPod being held by either a black hand or a white hand.<sup>135</sup>

Because there has not been more progress, there is a surprisingly robust debate about exactly what good the Civil Rights Movement did African-Americans.<sup>136</sup> Why has the law, especially civil rights and antidiscrimination law, not worked better to remedy these problems? How much should we expect the law to remedy racial injustice? To answer these questions, and to explain why there has not been more progress in racial justice, critical race theorists have asserted certain claims about law and race. Other schools like feminist jurisprudence, critical legal theory, and queer theory have made analogous claims. The purpose of this section is to set out these claims rather than to prove them.<sup>137</sup> Examining these claims' truth is one of the objectives of critical race

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129. S. Michael Gaddis, *Discrimination in the Credential Society: An Audit Study of Race and College Selectivity in the Labor Market*, SOCIAL FORCES 1 (2014), <http://ns.umich.edu/Releases/2015/Mar15/Discrimination-College-Selectivity2015.pdf> [<https://perma.cc/HVF6-CA4Z>].

130. *Id.* at 17.

131. *Id.* at 17–20.

132. Devin G. Pope & Justin R. Sydnor, *What's in a Picture? Evidence of Discrimination from Prosper.com*, 46 J. HUM. RES. 1 (2009).

133. Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes*, 123 ECON. J. 1 (2013).

134. *Id.* at 22.

135. *Id.* at 1.

136. See, e.g., MURAKAWA, *supra* note 33.

137. I want to borrow Devon W. Carbado and Daria Roithmayr's disclaimer from their similar attempt to list critical race theory claims: "Although these arguments are not exhaustive of the 'truths' that underwrite [Critical Race Theory], they reflect key modernist claims of the theory on which there is general consensus among practitioners in the United States." Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. SOC. SCI. 149, 151 (2014).



theory. This Article's contribution to that project is to see how they might inform the project of police reform.

#### A. THE LAW REINFORCES RACIAL HIERARCHY AND WHITE SUPREMACY

Critical race theorists assert that the law “constructs race” by separating people into groups, assigning social meaning to these groups, and instituting hierarchical arrangements.<sup>138</sup> Racial inequalities persist because race informs all areas of the law—“not only obvious ones like civil rights, immigration law, and federal Indian law, but also property law, contracts law, criminal law, and even [corporate law].”<sup>139</sup> As Ian Haney López has powerfully argued, “law constructs race.”<sup>140</sup> Legal institutions like “legislatures and courts have served not only to fix the boundaries of race in the forms we recognize today, but also to define the content of racial identities and to specify their relative privilege or disadvantage in U.S. society.”<sup>141</sup> For example, Haney López cites a series of Supreme Court decisions from the late 1800s and early 1900s in which the Court defined various groups as white or nonwhite, a determination that carried important consequences for naturalization and citizenship.<sup>142</sup> Racial beliefs “were quickly translated into exclusionary immigration laws.”<sup>143</sup>

The law often reinforces white supremacy without explicitly mentioning race. A number of legal scholars—beyond those who self-identify as critical race theorists—have recognized the racial consequences of policies like the death penalty<sup>144</sup> and housing programs.<sup>145</sup>

At the same time, critical race theorists recognize that race is socially constructed and constantly changing.<sup>146</sup> For example, until the twentieth century, “[w]hite in this country meant Anglo-Saxon and the color line explicitly excluded other European groups, including the Irish, the Jews, and all Southern and Eastern Europeans.”<sup>147</sup> Racial categories are best understood as fluid rather than immutable. Therefore, while critical race theorists understand the centrality

138. See Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1610 (2011).

139. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3–4 (1994).

140. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 12 (2006).

141. *Id.* at 7.

142. See *id.* at 1–7, 163–67.

143. Haney López, *The Social Construction of Race*, *supra* note 139, at 35.

144. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1394 (1988).

145. See James J. Hartnett, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 100 (1993) (“[D]uring the two decades between 1930 and 1950, the federal government became a principal agent of segregation by refusing to allow minorities access to subsidized housing in white areas and by requiring racially restrictive covenants in suburban developments as a condition for receiving Federal Housing Administration (FHA) mortgage insurance.”).

146. See Haney López, *The Social Construction of Race*, *supra* note 139, at 33 (“[T]he processes of racial fabrication continuously melt down, mold, twist, and recast races: races are not rocks, they are plastics.”).

147. *Id.* at 34.

of race in determining allocations of societal resources, they also deny that racial identity is “stable, a historic, [or] essential.”<sup>148</sup>

Instead, critical race theorists (crits) assert a “‘historicized’ view of social relations,” in which “there is no objective or natural necessity to the way groups, identities, and social meanings have been structured.”<sup>149</sup> Crits built on the arguments of black nationalists like the Black Panthers and others who felt that allegedly neutral goals like integration were actually imprinted with white cultural practices.<sup>150</sup> As a result, so-called objective tests that rely on the determination of what a “reasonable person” would do could prove problematic, given the “rhetoric of rationality and objectivity that the powerful use to justify their domination generally.”<sup>151</sup> These insights loom large in the criminal justice context because the Supreme Court’s adoption of reasonableness standards for stop-and-frisk and the use of deadly force have enabled police violence against African-Americans.

#### B. RACISM IS DURABLE

While racial categories are dynamic, critical race theorists assert that racism<sup>152</sup> is a deeply ingrained feature of American society. Devon Carbado and Daria Roithmayr write, “[r]acial inequality is hardwired into the fabric of our social and economic landscape.”<sup>153</sup> Derrick Bell and others have argued that racism, rather than an unfortunate accident, represents an “integral, permanent, and indestructible component” of American democracy.<sup>154</sup> Daria Roithmayr has analogized white supremacy to a monopoly, in which “whites anticompetitively excluded people of color to monopolize competition, and then used that monopoly power to lock in standards of competition that favored whites.”<sup>155</sup> Given the central role race has played in shaping allocation of societal resources, addressing racial injustice is not merely a matter of clearing up misconceptions through dialogue or adopting modest reforms.<sup>156</sup>

148. GARY PELLER, CRITICAL RACE CONSCIOUSNESS: RECONSIDERING AMERICAN IDEOLOGIES OF RACIAL JUSTICE 133 (2011).

149. *Id.* at 25.

150. *Id.* at 119.

151. *Id.* at 33.

152. Haney López defines racism as “racial status-enforcement undertaken in reliance on racial institutions,” or actions that have “the effect of enforcing a racial status hierarchy.” Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1809–10 (2000).

153. Carbado & Roithmayr, *supra* note 137, at 151.

154. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM ix (1992); see also Carbado, *supra* note 138, at 1613 (asserting that racism is “built into the constitutional architecture of American democracy”).

155. Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 731–32 (2000).

156. See Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America’s Racial Ills?*, 80 GEO. L.J. 1879, 1884 (1992) (“Racism is not a mistake, like parking in the wrong space or believing that the solar system has eight planets; rather, it is a means of subjugating another person or group.”).

The critics' assertion of the durability of racism is a marked contrast to rhetoric about a "post-racial" or "colorblind" society. In acknowledging the extent to which racism is deeply ingrained in American society, critical race theorists posit a more systemic critique of legal institutions and policies than, for example, liberal advocates of improved police–community relations.

#### C. RACIAL PROGRESS IS CYCLICAL

The dominant narrative of American race relations is one of linear progress. In this story, the United States has moved "from segregation to integration and from race consciousness to race neutrality."<sup>157</sup> For liberals—or "integrationists," in the terminology of Gary Peller—this transition parallels the inevitable progress "from myth to enlightenment, ignorance to knowledge, superstition to reason, primitive culture to civilization, religion to secularism, and . . . status to individual liberty."<sup>158</sup> Critical race theorists reject the linear progress model of American race relations.<sup>159</sup> **The more accurate model is a cycle of reform and retrenchment.** Charles Lawrence writes, "[w]hen people's movements successfully challenge and disrupt racist structures and institutions, and contest the narratives of racial subordination, the plunderers will respond with new law."<sup>160</sup> One example is the passage of civil rights legislation. The Civil Rights Movement of the 1950s and 1960s led to important developments like the Supreme Court's decision in *Brown v. Board of Education*,<sup>161</sup> the Civil Rights Act of 1964,<sup>162</sup> and the Voting Rights Act.<sup>163</sup> As Kimberle' Crenshaw points out, civil rights laws "nurtured the impression that the United States had moved decisively to end the oppression of Blacks."<sup>164</sup> However, the rhetoric of colorblindness and equal opportunity was then deployed to block further remedial measures and "undermined the fragile consensus against white supremacy."<sup>165</sup>

#### D. RACIAL PROGRESS OCCURS WHEN IT IS IN THE INTEREST OF WHITES

Derrick Bell developed the theory of **interest convergence, the notion that the United States has adopted racial justice measures only when "[t]he interest of blacks in achieving racial equality . . . converges with the interests of whites."**<sup>166</sup>

157. PELLER, *supra* note 148, at 7.

158. *Id.* at 7–8.

159. *See, e.g.*, Carbadó, *supra* note 138, at 1607.

160. Lawrence, *supra* note 110, at 387.

161. 347 U.S. 483 (1954).

162. The Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (1964).

163. The Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (1965).

164. Kimberle' Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1346 (1988).

165. *Id.* at 1346–47; *see also* Carbadó, *supra* note 138, at 1607–08 (citing the abolition of slavery and Jim Crow, *Brown v. Board of Education* and massive resistance to school desegregation, and the reframing of Martin Luther King, Jr.'s vision in terms of "colorblindness" as three examples of the reform/retrenchment dialectic).

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

For example, Bell cites global public opinion during the Cold War, the participation of black soldiers in World War II, and segregation as a barrier to industrialization in the South as reasons for the Supreme Court's decision in *Brown v. Board of Education*.<sup>167</sup> After the backlash to integration began taking root in the 1950s and 1960s, the Court turned away from robust enforcement and emphasized local autonomy, even though it would likely "result in the maintenance of a status quo that will preserve superior educational opportunities and facilities for whites at the expense of blacks."<sup>168</sup> These "second thoughts" about school desegregation refl the "substantial and growing divergence in the interests of whites and blacks."<sup>169</sup>

Bell's work has been criticized as simplistic. For example, Justin Driver argues that the interest convergence thesis is potentially harmful because it "invites would-be racial reformers to adopt artificially constrained notions of what constitutes a viable method for seeking change" and perpetuates "a racially conspiratorial viewpoint that hinders black advancement."<sup>170</sup> Bell's work can be understood as "the first wave of [Critical Race Theory]"—a direct challenge to the ideological assumptions of liberal reformers.<sup>171</sup> More recently, Carbado and Roithmayr have made a more nuanced version of the interest convergence theory. Listing "key modernist claims" of critical race theory "on which there is general consensus among practitioners in the United States," Carbado and Roithmayr write, "racial change occurs when the interests of white elites converge with the interests of the racially disempowered" and "the success of various policy initiatives often depends on whether the perceived beneficiaries are people of color."<sup>172</sup>

#### E. THE LAW CAN BE A "RATCHET" TO ADDRESS RACIAL INJUSTICE

Although the law is suffused with racial hierarchy, there are opportunities to use legal tools to address racial injustice. Mari Matsuda suggests that the law can create racial justice when it focuses on effects rather than neutral principles. Applied to the First Amendment and hate speech, an emphasis on effects requires "recognizing racist speech as qualitatively different because of its content."<sup>173</sup> Other remedial legal measures include "affirmative action, reparations, [and] desegregation."<sup>174</sup> These "measures are best implemented through formal rules, formal procedures and formal concepts of rights, for informality and oppression are frequent fellow-travelers."<sup>175</sup> By avoiding the traps of false objectivity and colorblindness, reformers can use the law to achieve racial

167. *See id.* at 523–25.

168. *Id.* at 527.

169. *Id.* at 527–28.

170. Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 189 (2011).

171. Gary Peller, *History, Identity, and Alienation*, 43 CONN. L. REV. 1479, 1489 (2011).

172. Carbado & Roithmayr, *supra* note 137, at 151.

173. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989).

174. *Id.* at 2325.

175. *Id.*

progress. At the same time, there should be “explicit formal rules” in place, especially given the existence of “racism at all levels” and the role of law in addressing “[r]acism as an acquired set of behaviors [that] can be dis-acquired.”<sup>176</sup>

I want to apply these claims to criminal justice reform, specifically to the problems that have been identified with regard to the police. I will make two main points.

The first is that critical race theory helps us understand why the crisis in criminal justice stems more from legal police conduct than illegal police misconduct. The second is that some reform efforts, like the Department of Justice federal investigations, can be ratchets, but they can also undermine the larger radical project of transformation.

Many of the concerns about Ferguson police are about police conduct that is legal. The problem in Ferguson is not as much “bad apple” cops as police work itself—what the law actually allows. What the law allows includes some of the conduct that the Ferguson Report itself criticized. When we understand that features of a justice system that the federal government has found to be discriminatory are actually legal, the claims that critical race theorists make about law have more resonance.

In the next Part, I describe how the Supreme Court has authorized the discriminatory police conduct that creates places like Ferguson all over the United States. I will focus on three “super powers” the Supreme Court has granted the police; these powers provide the legal platform for black lives to matter less to the police.<sup>177</sup>

### III. THE RACIAL ORIGINS OF POSTMODERN CRIMINAL PROCEDURE

*Imagine what we would feel and what we would do if white drivers were three times as likely to be searched by police during a traffic stop as black drivers instead of the other way around. If white offenders received prison sentences ten percent longer than black offenders for the same crimes. If a third of all white men — just look at this room and take one-third — went to prison during their lifetime. Imagine that.*

—Hillary Clinton<sup>178</sup>

176. *Id.* at 2360–61.

177. A report on the Chicago police department, commissioned by Chicago Mayor Rahm Emmanuel, found that the department’s “own data gives validity to the widely held belief the police have no regard for the sanctity of life when it comes to people of color.” POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 7 (2016), [https://chicagopatf.org/wp-content/uploads/2016/04/PATF\\_Final\\_Report\\_Executive\\_Summary\\_4\\_13\\_16-1.pdf](https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_Executive_Summary_4_13_16-1.pdf) [<https://perma.cc/7HXD-JWXE>].

178. Lauren Holter, *These 7 Hillary Clinton Quotes on Race Relations Prove that She Gets It, or Is at Least Trying to*, BUSTLE (July 22, 2015), <http://www.bustle.com/articles/99029-these-7-hillary-clinton-quotes-on-race-relations-prove-that-she-gets-it-or-is-at> [<https://perma.cc/5KXW-RCC8>].

In a series of cases roughly dating from *Terry v. Ohio*,<sup>179</sup> the conservatives on the Supreme Court have established a set of police practices that, in theory, apply to everyone, but are principally directed against black men.

In 1968, when the Court decided *Terry*, the original stop and frisk case, there had been a series of urban riots, all sparked by complaints in African-American communities about excessive force by police officers.<sup>180</sup> In *Terry*, the court gave the police the power to stop people when there is reasonable suspicion about criminal activity, and to frisk those suspects who the police reasonably believed possessed weapons.<sup>181</sup>

The NAACP Legal Defense Fund filed an amicus brief in which it said that concerns about disparate treatment of blacks were “unavoidably intertwined with the issues in *Terry*.”<sup>182</sup> It warned that the police would use the power to stop and frisk to humiliate blacks.

Shortly after finishing a proposed rewrite of *Terry*, Justice Brennan wrote a letter to Chief Justice Warren in which he said:

I’ve become acutely concerned that the mere fact of our affirmance in *Terry* will be taken by the police all over the country as our license to them to carry on, indeed widely expand, present “aggressive surveillance” techniques which the press tell us are being deliberately employed in Miami, Chicago, Detroit [and] other ghetto cities. This is happening, of course, in response to the “crime in the streets” alarms being sounded in this election year in the Congress, the White House [and] every Governor’s office. . . . It will not take much of this to aggravate the already white heat resentment of ghetto Negroes against the police—[and] the Court will become the scape goat.<sup>183</sup>

The *Terry* opinion does not note that Mr. Terry was African-American. It contains only one almost parenthetical reference to race, in which it mentions “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain.”<sup>184</sup> But Justice Brennan’s prediction about the “white heat resentment of ghetto Negroes against the police” has been borne out.

Since *Terry* was decided, African-American men appear to have been the primary targets of stops and frisks. I say “appear” because there is no national

179. 392 U.S. 1 (1968).

180. For an excellent history of *Terry*, see John Barrett, *Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause*, in CRIMINAL PROCEDURE STORIES 295 (Carol S. Steiker ed., 2006).

181. *Terry*, 392 U.S. at 30–31.

182. See David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the “New Federalism” in Constitutional Criminal Procedure*, 3 J. CONST. L. 367, 373 (2001) (citing Brief for the NAACP Legal Defense and Education Fund, Inc., as Amicus Curiae, at 60–62, *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 63, 74, and 67)).

183. John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference*, 72 ST. JOHN’S L. REV. 749, 825–26 (1998).

184. *Terry*, 392 U.S. at 14.

database on who is subject to stop and frisk. Some police departments maintain that data however. Below, I list what is available from several cities.

**Table 1:**

<b>Chicago</b> <sup>185</sup>		
<b>Race</b>	<b>Percentage of Pop.</b>	<b>Percentage of Stops</b>
White	32%	9%
Black	32%	72%
Hispanic	29%	17%
Asian or Pacific Islander	5%	1%
<b>Boston</b> <sup>186</sup>		
<b>Race</b>	<b>Percentage of Pop. (2010 census)</b>	<b>Percentage of Stops (2007–2010)</b>
White	53.9%	21.8%
Black	24.4%	63.3%
Hispanic	17.5%	12.4%
Other Races/Unknown data	13.2%	2.5%
<b>Newark</b> <sup>187</sup>		
<b>Race</b>	<b>Percentage of Pop.</b>	<b>Percentage of Stops (2011–2015)</b>
Black	52.4%	54%
White	26.3%	21.5%
Hispanic (Latino)	33.8%	7% (2014 only)
<b>New York</b> <sup>188</sup>		
<b>Race</b>	<b>Percentage of Pop.</b>	<b>Percentage of Stops (2011–2015)</b>
Black	35%	54.1%
White	24.5%	10%
Hispanic	27%	32.1%
<b>Philadelphia</b> <sup>189</sup>		
<b>Race</b>	<b>Percentage of Pop.</b>	<b>Percentage of Stops</b>
White	43%	19.77%
Black	43%	71.58%
Hispanic	9%	8.65%
Asian or Pacific Islander	5%	N/A

The dynamic in *Terry*—in which the Court is warned that African-Americans will bear the burden of its expansion of police powers, the Court either ignores or discounts the concern, and then, in fact, African-American men do bear the burden of the police practice—is commonplace. For example, in *Virginia v. Moore*, the Court unanimously held that an officer did not violate the Fourth Amendment by arresting and searching a motorist whom they had probable cause to believe was driving with a suspended license, even though as a matter of state law this offense was one for which the officers should have issued a summons rather than made an arrest.<sup>190</sup>

The ACLU filed a brief voicing its concern:<sup>191</sup>

If officers can arrest and search almost on whim, some officers will inevitably use that authority to conduct arbitrary arrests, or to discriminate on the basis of race or some other impermissible factor. There are, unfortunately, many cases showcasing officers who were willing to take advantage of this license to perform what seem to have been arbitrary and possibly discriminatory arrests.<sup>192</sup>

The ACLU also provided data from the DOJ “that demonstrated that African-Americans were nearly three times as likely and Hispanics more than twice as likely as white motorists to be physically searched or to have their vehicles

185. ACLU OF ILL., STOP AND FRISK IN CHICAGO (2015), [http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU\\_StopandFrisk\\_6.pdf](http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf) [https://perma.cc/DW7Z-SV9M].

186. ACLU OF MASS., STOP AND FRISK REPORT SUMMARY (2014), <https://aclum.org/app/uploads/2015/06/reports-black-brown-and-targeted-summary.pdf> [https://perma.cc/94RG-MGUT].

187. *Newark Stop-and-Frisk*, ACLU N.J. (Feb. 25, 2014), <https://www.aclu-nj.org/theissues/policepractices/newark-stop-and-frisk-data/> [https://perma.cc/YX7A-LYCR]; *Quick Facts: Newark City, New Jersey*, CENSUS BUREAU (2010), <http://www.census.gov/quickfacts/table/PST045215/3451000#flag-js-X> [https://perma.cc/BHN4-LJ8U].

188. *Stop and Frisk Data*, N.Y. C.L. UNION (2015), <http://www.nyclu.org/content/stop-and-frisk-data> [https://perma.cc/KZ2M-S97Q]; TOTAL POPULATION BY MUTUALLY EXCLUSIVE RACE AND HISPANIC ORIGIN: NEW YORK CITY AND BOROUGHES 1990 TO 2010, NYC (2010), [http://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/census2010/t\\_pl\\_p2a\\_nyc.pdf](http://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/census2010/t_pl_p2a_nyc.pdf) [https://perma.cc/L9XB-3YYH].

189. Plaintiffs’ Fifth Report to Court and Monitor on Stop and Frisk Practices, *Bailey v. City of Philadelphia*, C.A. No. 10-5962, 6–7 (E.D. Pa. Feb. 24, 2015), [http://www.aclupa.org/download\\_file/view\\_inline/2230/198/](http://www.aclupa.org/download_file/view_inline/2230/198/) [https://perma.cc/Y2B2-JSYL].

190. 553 U.S. 164, 177–78 (2008).

191. See Brief for The American Civil Liberties Union et al. as Amici Curiae Supporting Respondents, *Virginia v. Moore*, 553 U.S. 164 (2008) (No. 06-1082), 2007 WL 4359018 [hereinafter *Virginia ACLU Brief*].

192. *Id.* at 28–29 (citing *Fisher v. Washington Met. Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982) (arrest for eating on the subway); *Thomas v. Florida*, 614 So.2d 468 (Fla. 1993) (arrest for failure to have a bell or gong on one’s bicycle); *United States v. Herring*, 35 F. Supp. 2d 1253 (D. Or. 1999) (arrest for littering); *Barnett v. United States*, 525 A.2d 197 (D.C. Ct. App. 1987) (arrest for “walking as to create a hazard”)).



searched when their cars were stopped.”<sup>193</sup> The Court’s opinion makes no mention of the racial implications of its holding.

These cases, and others described below, evidence a racial project by the U.S. Supreme Court to allow the police to control African-American men. This claim may seem startling, but I am not the first scholar to assert that the Court has used its power over the criminal process to do race work.<sup>194</sup> The Harvard legal historian Michael Klarman, in a groundbreaking article entitled “The Racial Origins of Modern Criminal Procedure,” described modern criminal justice as evolving from landmark cases in the 1920s and 1930s in which black defendants were clearly being treated unfairly.<sup>195</sup> The Court established a body of law, for example the right to counsel in capital cases, intended to resolve racial unfairness.<sup>196</sup> Klarman notes that in these cases the Court was not taking a big lead in civil rights.<sup>197</sup> It was following public sentiment, which was evolving against the brutish justice that black defendants often received in the south.<sup>198</sup>

The Court is still in the business of using criminal justice to promote racial ends. And now, as in the era that Klarman wrote about, the Court is following the will of the majority.

Although Klarman is not typically identified as a critical race theorist, his analysis is, in some ways, sympathetic to some critical race theory claims, including the idea that the law promotes racial hierarchy. Klarman writes, of the progressive cases he describes, “none of these rulings had a very significant direct impact on Jim Crow justice. For example, few blacks sat on southern juries as a result of *Norris v. Alabama*, and black defendants continued to be tortured into confessing, notwithstanding *Brown v. Mississippi*.”<sup>199</sup>

The[] criminal procedure decisions also lend some support to the view of those commentators who have questioned the Court’s capacity to effectuate significant social change. In the face of deeply rooted southern mores, these Supreme Court decisions made little practical difference to southern blacks enmeshed in the Jim Crow legal system. . . . Thus, the criminal procedure decisions of the interwar period foreshadowed the southern white response to *Brown v. Board of Education*. For an entire decade, essentially no school

193. *Id.* at 30 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE 2002, at 5 (2006), <http://www.bjs.gov/content/pub/pdf/cdsp02.pdf> (African-Americans were searched during 10.2% of stops; Hispanics 11.4%, and whites 3.5%)).

194. Professor David Alan Sklansky has made a similar argument about criminal procedure and LGBT rights: “[H]omosexuality and its policing played a role in shaping modern criminal procedure.” David Alan Sklansky, “One Train May Hide Another”: Katz, Stonewall, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875, 897 (2008).

195. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48–49 (2000).

196. *See id.*

197. *Id.* at 49.

198. *See id.* at 49, 78.

199. *Id.* at 49.

desegregation took place in the South, notwithstanding that most famous of all Supreme Court interventions against Jim Crow.<sup>200</sup>

Klarman posits, however, that the cases “indirectly contributed to the modern civil rights movement by educating blacks about their rights, mobilizing protest in the black community, and rallying support among sympathetic whites.”<sup>201</sup>

In looking at the problems in the Ferguson Report, including excessive violence by police and arrests of African-Americans for petty offenses, I want to identify three cases in which the Court authorizes this kind of police conduct. I think these cases have what Klarman calls “racial origins.”<sup>202</sup> I call the authority the Court gives the police “super powers,” but the powers are contained in the sense that it is understood they are intended for black men.

I suggest that if the super powers had been understood as applying mainly to white people, these cases would have been decided differently. I do not see this as a particularly profound point for two reasons.

First, the idea of a meeting of minds, if “conspiracy” seems too inflammatory, about using the criminal process to treat black male conduct is hardly unprecedented in U.S. history. Three years after *Terry* was decided, Daniel Patrick Moynihan, then an aide to President Nixon, wrote a memo to the president identifying African-American men as public enemy number one. Moynihan wrote:

The incidence of anti-social behavior among young black males continues to be extraordinarily high. Apart from white racial attitudes, this is the biggest problem black Americans face, and in part it helps shape white racial attitudes. Black Americans injure one another. Because blacks live in de facto segregated neighborhoods, and go to de facto segregated neighborhoods, the socially stable elements of the black population cannot escape the socially pathological ones. Routinely their children get caught up in the anti-social patterns of the others.<sup>203</sup>

“[Nixon] emphasized that you have to face the fact that the whole problem is really the blacks,” wrote Haldeman, Nixon’s Chief of Staff. “The key is to devise a system that recognizes this while not appearing to.”<sup>204</sup>

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200. *Id.* at 95.

201. *Id.* at 50.

202. *Id.* at 48.

203. Memorandum for the President from Daniel P. Moynihan to President Nixon 4 (Jan. 16, 1970), <https://www.nixonlibrary.gov/virtuallibrary/documents/jul10/53.pdf> [<https://perma.cc/BSA6-S8E5>].

204. Roger Casement, Comment to *Nixons’s Drug War—Re-Inventing Jim Crow, Targeting The Counter Culture*, THOM HARTMANN PROGRAM (Sept. 21, 2012, 10:47 AM), <http://www.thomhartmann.com/forum/2012/09/nixons-drug-war-re-inventing-jim-crow-targeting-counter-culture#sthash.yO6ZEQvY.dpuf> [<https://perma.cc/XDE2-JVEP>].

Soon thereafter, the Nixon administration implemented the “war on drugs.” John Ehrlichman, White House counsel to President Nixon, explained the rationale:

Look, we understood we couldn’t make it illegal to be young or poor or black in the United States, but we could criminalize their common pleasure. . . . We understood that drugs were not the health problem we were making them out to be, but it was such a perfect issue . . . that we couldn’t resist it.<sup>205</sup>

Nowadays the racial intent likely would not be set forth as directly, but that does not mean it has gone away.

Second, the concept of providing the police power to control black men does not have to be thought of as a malign plot against African-Americans. The Court is responding to a common perception that black men are prone to violence and law-breaking. In this light, it is not surprising that the Court would want the police to have appropriate power to control black men, and even, per Articulation 2, that the Court could see this control as a racial justice intervention.<sup>206</sup> Reasonableness is the touchstone of the Court’s Fourth Amendment analysis.<sup>207</sup> **My modest suggestion is that the Court has a different point of view about the kind of policing that is reasonable for black people than is reasonable for white people.**

The following account of super power cases is far from exhaustive. I select these cases because they authorize the kinds of police practices that the Ferguson Report criticized and that the Wilson Report embraced.

A. *SCOTT V. HARRIS*: SUPER POWER TO KILL<sup>208</sup>

Victor Harris was nineteen years old when the police tried to pull over his car in Atlanta, Georgia for speeding.<sup>209</sup> He was going seventy-three miles per hour in a fifty-five miles per hour zone.<sup>210</sup> Harris should have stopped, but he sped away instead.<sup>211</sup> The officers gave chase, and pursued Harris down a two-lane highway for several minutes.<sup>212</sup> Finally, one of the cops used his car to deliberately ram Harris’s car off the road.<sup>213</sup> The car crashed down a steep ravine and overturned.<sup>214</sup> Harris survived, but was rendered a quadriplegic.<sup>215</sup>

205. Larry Gabriel, *Joining the Fight*, DETROIT METRO TIMES (Aug. 10, 2011), <http://www.metrotimes.com/detroit/joining-the-fight/Content?oi=2148184> [<https://perma.cc/FEF6-GDN2>].

206. See *supra* Section I.B.

207. See *Terry v. Ohio*, 392 U.S. 1, 18–23 (1968).

208. *Scott v. Harris*, 550 U.S. 372 (2007).

209. *Id.* at 397 (Stevens, J., dissenting).

210. *Id.* at 374 (majority opinion).

211. *Id.*

212. *Id.* at 374–75.

213. *Id.* at 375.

214. *Id.*

215. *Id.*

Are the police allowed to use deadly force simply to enforce a traffic law? If they have to choose between letting somebody get away with speeding or killing him to make sure he does not get away, are they really supposed to kill him? Those questions made it all the way to the United States Supreme Court, which answered “yes,”<sup>216</sup> even though the police could have ended the danger simply by stopping the chase. They already had Harris’s license plate number, so they could have identified and found him later.<sup>217</sup> The Court nevertheless ruled that the police had acted reasonably because Harris’s evasion of the police created a danger to other drivers.<sup>218</sup>

B. *WHREN V. UNITED STATES*: SUPER POWER TO RACIALLY PROFILE<sup>219</sup>

District of Columbia police officers stopped a car containing two young African-American men for minor traffic offenses, including waiting too long at a stop sign.<sup>220</sup>

When the police approached the car, they saw crack cocaine and arrested the occupants.<sup>221</sup> The men argued that the traffic violation was pretextual and the real reason for the stop was a drug investigation, for which the police did not have lawful grounds to detain the car.<sup>222</sup> **The Court ruled unanimously that as long as the police have probable cause to make a stop, their subjective intent does not matter.**<sup>223</sup>

In *Whren*, the Court acknowledged the potential for its decision to lead to racial profiling, but suggested that that was an equal protection issue rather than a Fourth Amendment issue.<sup>224</sup> The American Civil Liberties Union, in a brief filed in *Virginia v. Moore*, noted the flaws in the Court’s position that discrimination should be tackled under the Equal Protection Clause, stating:

In *Whren*, the Court suggested the possibility of an equal protection challenge to address discriminatory searches or seizures. That possibility has turned out to be more theoretical than real. A plaintiff cannot successfully challenge a pattern of discriminatory arrests under the Equal Protection Clause without meeting the very demanding burden of proving intentional racial discrimination. For this reason, equal protection challenges will “almost always fail.” For a dramatic example of how easily a plaintiff’s discrimination claim can be dismissed despite substantial evidence of discriminatory enforcement, see *Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001).<sup>225</sup>

216. *Id.* at 386.

217. *See id.* at 375.

218. *Id.* at 386.

219. *Whren v. United States*, 517 U.S. 806 (1996).

220. *Id.* at 808.

221. *Id.* at 808–09.

222. *Id.* at 809.

223. *Id.* at 811, 819.

224. *Id.* at 813.

225. Virginia ACLU Brief, *supra* note 191, at 32 n.19 (internal citations omitted).

C. *ATWATER V. CITY OF LAGO VISTA*: SUPER POWER TO ARREST<sup>226</sup>

Gail Atwater was driving her pickup truck in Lago Vista, Texas. Her two kids were in the front seat and nobody was wearing a seat belt. Texas has a mandatory seat belt law, and Officer Bart Turek pulled her over, jabbed his finger at her face, and told her she was going to jail. The officer put handcuffs on Atwater, placed her in back of his squad car, and took her to jail. At the station, she was searched, had her mug shot taken, and was then locked up until she made bail.<sup>227</sup>

In Texas, if you are guilty of driving without a seat belt, you cannot be sent to prison.<sup>228</sup> The maximum punishment is a \$50 fine.<sup>229</sup> Atwater thought, not unreasonably, that you should not be able to be arrested and put in jail for an offense for which you could not be locked up when you are found guilty of it.

**But the Supreme Court did not agree. It said that the police can take you to jail for any crime—no matter how minor, and even if punishment for the crime does not include any prison time.**<sup>230</sup>

The *Atwater* dissent noted the broad application of the majority's per se rule.<sup>231</sup> Their concern was not with the decision to enact or enforce fine-only misdemeanors, but rather the manner in which the enforcement might occur.<sup>232</sup> Specifically, the dissent highlighted the applications of *Whren* under this per se rule.<sup>233</sup> They feared that when racial profiling occurred, a minor traffic infraction might serve as an excuse to stop and harass an individual.<sup>234</sup> Because of the *Whren* decision, an officer's motivations are beyond the Court's purview, and "it is precisely because [those] motivations are beyond [the Court's] purview that [the Court] must vigilantly ensure that officers' poststop actions—which are properly within [the Court's] reach—comport with the Fourth Amendment's guarantee of reasonableness."<sup>235</sup>

226. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

227. *Id.* at 324–26. It is noteworthy that, on the ride to the station, the officer did not put a seatbelt on Ms. Atwater.

228. *See id.* at 323.

229. *See id.*

230. *See id.* at 354.

231. *See id.* at 371 (O'Connor, J., dissenting) ("A broad range of conduct falls into the category of fine-only misdemeanors. In Texas alone, for example, disobeying any sort of traffic warning sign is a misdemeanor punishable only by fine, see Tex. Transp. Code Ann. § 472.022 (1999 and Supp. 2000–2001), as is failing to pay a highway toll, see § 284.070, and driving with expired license plates, see § 502.407.")

232. *See id.* at 372 (O'Connor, J., dissenting) ("[I]f a traffic violation [occurs], the officer may stop the car, arrest the driver, see *ante*, at 1557, search the driver, see *United States v. Robinson*, 414 U.S., at 235, 94 S. Ct. 467, search the entire passenger compartment of the car including any purse or package inside, see *New York v. Belton*, 453 U.S., at 460, 101 S. Ct. 2860, and impound the car and inventory all of its contents, see *Colorado v. Bertine*, 479 U.S. 367, 374, 107 S. Ct. 738, 93 L.Ed.2d 739 (1987); *Florida v. Wells*, 495 U.S. 1, 4–5, 110 S. Ct. 1632, 109 L.Ed.2d 1 (1990).")

233. *See id.*

234. *See id.*

235. *Id.*

In *Atwater*, the ACLU filed an amicus brief highlighting the dangers of a ruling in favor of the police officers.<sup>236</sup> The dissenting opinion, written by Justice O'Connor, also references race.<sup>237</sup> But the majority opinion follows the familiar pattern, in which the Court either ignores the racial consequences, discounts them, or acknowledges them but states that it is powerless to prevent them.<sup>238</sup>

We see this same dynamic with other legal mechanisms that adversely impact African-Americans in the criminal justice system. For example, when lawmakers pass harsh sentencing laws, they are often warned that there will be an adverse impact. They pass the laws anyway and then the racial effect occurs.<sup>239</sup> This dynamic also occurs in response to strategies like order maintenance policing or criminal laws like drug prohibition or mandatory seat belt laws that give the police broad enforcement discretion.

Some people have suggested that one reason American criminal justice is so harsh is that many people, especially white people, do not understand how it works. If white people really understood how the system works, and how it impacts blacks, they would want to change it, the theory goes. Some intriguing new research suggests that the opposite is true. **When white people learn that criminal justice policies have an adverse impact on blacks, it makes them support the policies more.**<sup>240</sup>

This finding should not be surprising. Polls suggest that the majority of white people think that blacks are violent.<sup>241</sup> Another study found that white people imagined men with stereotypically black names like “Jamal” or “Darnell” to be larger, more dangerous, and violent than men with stereotypically white names like “Connor” or “Wyatt.”<sup>242</sup> In many controversies involving use of force against African-Americans, polls usually demonstrate that most white Ameri-

236. See Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondents at 9, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408), 2000 WL 1341276 (“[T]he fear that excessive grants of discretion will lead to racially discriminatory law enforcement is more than hypothetical. Historical prejudices against minorities, as well as more recent cultural prejudices against immigrants, find expression in unbridled discretion.” (internal citations omitted)).

237. See *Atwater*, 532 U.S. at 372 (O’Connor, J., dissenting).

238. For a persuasive critique of the majority opinion’s constitutional analysis in *Atwater*, see Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 STAN. L. REV. 987 (2014).

239. See generally MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

240. See Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949, 1952 (2014).

241. See ASSOC. PRESS, *RACIAL ATTITUDES SURVEY* (2012), [http://surveys.ap.org/data%5CGfK%5CAP\\_Racial\\_Attitudes\\_Topline\\_09182012.pdf](http://surveys.ap.org/data%5CGfK%5CAP_Racial_Attitudes_Topline_09182012.pdf) [https://perma.cc/XC3E-8HM5].

242. Colin Holbrook, Daniel M.T. Fessler & Carlos David Navarrete, *Looming Large in Others’ Eyes: Racial Stereotypes Illuminate Dual Adaptations for Representing Threat Versus Prestige as Physical Size*, 37 EVOLUTION & HUM. BEHAV. 67, 69–71 (2016).

cans support the police.<sup>243</sup>

Thus far, I have described a dynamic in which a holding by the Supreme Court is foreseen to disproportionately and adversely impact blacks, the Court nonetheless decides the case that way, and that prediction comes true. The evidence is that most whites favor these kinds of results.<sup>244</sup> This is what I mean by describing these cases as a “racial project” by the Court. The members of the Court who vote in the majority understand and intend the racial consequences of the Court’s decisions. Most white people will also agree with these consequences. These cases would come out differently if the main people who suffered the police powers were white.

I understand that it is difficult to prove my claim in a lawyerly way. Nowadays there is rarely smoking gun evidence of race-based intent. But that is only the test the Supreme Court itself has created to construct discrimination, a test that, critical race scholars have observed, does not capture how racial subordination actually works.<sup>245</sup> Despite my disagreement with an intent-based test for race discrimination, I have attempted to demonstrate, through arguments presented to the Supreme Court, that it was fully aware of the racial consequences of the super power cases, and consistent with its majoritarian inclinations, supportive of these consequences.

Recalling Klarman’s analysis, the difference between the era of which Klarman wrote and now is not that the Court has suddenly started doing race work, but only the kind of race work it is doing.

In the end, although I think I have good legal evidence that the system is working the way it is supposed to, I want to acknowledge that this kind of evidence, for example an intent-based standard for racial discrimination, “cements an already predominate and problematic understanding about race in public and legal discourse: one that is distressingly dehistoricized and desocialized.”<sup>246</sup>

My claim that the system is working the way it is supposed to is as much an observation about history and social science, about racial inequality, and the

243. See Bruce Drake, *Divide Between Blacks and Whites on Police Runs Deep*, PEW RES. CTR. (Apr. 28, 2015), <http://www.pewresearch.org/fact-tank/2015/04/28/blacks-whites-police/> [<https://perma.cc/Y4SM-U6TK>].

244. See Hetey & Eberhardt, *supra* note 240.

245. See *Washington v. Davis*, 426 U.S. 229, 239–47 (1976) (holding that discriminatory intent must be shown to prove unlawful racial discrimination and an Equal Protection Clause violation); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1505–06 (2005) (outlining how mental processes concerning race are often formed “without conscious intention and outside of our awareness,” in turn making one’s racial motivations invisible); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318, 321–24 (1987) (discussing how *Washington v. Davis*’s discriminatory purpose test fails to account for unconscious racism and thus is insufficient at guarding against unlawful racial discrimination).

246. Issa Kohler-Hausmann, *Detecting Discrimination in Policing (or, the Dangers of Counterfactual Causal Thinking. . .)*, B ALKINIZATION BLOG (Aug. 13, 2015, 8:30 AM), <http://balkin.blogspot.com/2015/08/detecting-discrimination-in-policing-or.html> [<https://perma.cc/WL3E-XWSR>].



lived experiences of black, brown, and white people, as it is a legal argument.<sup>247</sup> Because of the super power cases, it is legal for the police to arrest Michael for saying his name is Mike.<sup>248</sup> It is legal for the police to arrest a woman for an occupancy permit violation after she has called the police to report domestic violence.<sup>249</sup> These cases empower the Ferguson police to stop African-Americans for “walking along [the] roadway.”<sup>250</sup> They allow the police to kill Eric Garner, if they reasonably believed that he was presenting a serious danger to them by resisting arrest for selling a cigarette.<sup>251</sup>

These cases have created a legal platform for black lives not to matter as much to the police. I should point out, however, that there is a difference between saying that the Court intentionally has given the police powers to be employed mainly against African-Americans, and saying that the Court is racist. If one subscribes to Articulation 2, the construct that the main crisis in race and policing stems from underenforcement of law, providing the police with more resources to enforce law in communities of color can actually be viewed as a racial justice intervention. This also responds to the concern that the super power cases sometimes commanded the support of some of the more liberal justices of the Supreme Court. One need not have overt biases against blacks to think that the police need more power to patrol African-American communities.<sup>252</sup>

#### IV. PATTERN AND PRACTICE INVESTIGATIONS

As we have seen, critical race theory also suggests the possibility of ratchets legal interventions that improve racial justice. But ratchets have been undertheorized in critical race theory jurisprudence. There is not an expansive literature of how reform relates to the crits’ expansive critiques of law. Kimberlé Crenshaw started this inquiry, but it has not been continued in the way that her seminal work warrants.<sup>253</sup> In this Part, I consider whether federal investigations of local police departments might serve as ratchets.

247. See Maya Sen & Omar Wasow, *Race as a ‘Bundle of Sticks’: Designs that Estimate Effects of Seemingly Immutable Characteristics*, 19 ANN. REV. POL. SCI. 499, 517 (2016), [http://scholar.harvard.edu/files/msen/files/race\\_causality.pdf?m=1412546675](http://scholar.harvard.edu/files/msen/files/race_causality.pdf?m=1412546675) [<https://perma.cc/S458-VQLN>].

248. See *supra* note 2 and accompanying text.

249. See *supra* note 3 and accompanying text.

250. See *supra* note 11 and accompanying text.

251. See *supra* note 23 and accompanying text.

252. For readers who are not persuaded that the Court is engaged in the kind of racial project I have described, there is another way of understanding the super power cases that still points to the limits of reform. Even if the Court had come out the other way and limited police power in the cases I discuss, instead of expanding it, the police still would have been afforded substantial discretion. Whenever actors have discretion it is susceptible to being deployed in a way that reflects and reinforces biases. This is essentially the liberal critique described in Articulation 3. It suggests that even if these cases had come out the “right” way, unfairness in law enforcement would persist. This understanding might push liberals to the more ambitious solutions of the radical critique, because it illustrates that even changing the rules will not sufficiently fix the system.

253. Crenshaw, *supra* note 164.



I focus on Department of Justice (DOJ) investigations because they are probably the most sought after legal remedy for complaints about the police. In high profile cases of allegations of police misconduct, there are almost always calls for the federal government to intervene. When the federal government acts, these investigations are the action it undertakes. I also focus on these cases because there is a limited set of data that lends itself to analysis more than some other kinds of remedies. These cases have only been done since 1995. In the last twenty years, there have been sixty-seven investigations and just sixteen cases in which the DOJ has imposed its strongest oversight.<sup>254</sup>

The question is whether this response is a ratchet—like affirmative action or the Voting Rights Act—that can prove effective? Or is reforming criminal justice more like desegregating public schools, an effort many critical race theorists describe as a massive failure?

#### A. HOW PATTERN AND PRACTICE INVESTIGATIONS WORK

As part of the Violent Crime Control and Law Enforcement Act of 1994, Congress included a provision that made it illegal for police departments to engage in “a pattern or practice” of unconstitutional conduct.<sup>255</sup> This statute allows the DOJ to “seek injunctive or equitable relief to force police agencies to accept reforms aimed at curbing misconduct.”<sup>256</sup> The DOJ selects its cases by monitoring existing civil litigation, media reports, and research studies that indicate widespread misconduct within a police department.<sup>257</sup> The DOJ then engages in a preliminary inquiry, followed by a formal investigation.<sup>258</sup> This investigation has the potential to lead to a negotiated settlement in the form of a consent decree; there is also the possibility of an appointed monitor to supervise the department’s implementation of required reforms.<sup>259</sup>

#### B. RESULTS OF PATTERN AND PRACTICE INVESTIGATIONS

The DOJ has conducted investigations of sixty-seven police departments over the last twenty years.<sup>260</sup> The results are:

- 9 incomplete
- 24 closed without reform agreement

254. See Kimbriell Kelly, Sarah Childress & Steven Rich, *Forced Reforms, Mixed Results*, WASH. POST (Nov. 13, 2015), <http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/> [https://perma.cc/R7NV-Q6XM].

255. 42 U.S.C. § 14141(a) (2012).

256. Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3191 (2014).

257. *See id.* at 3219–22.

258. *See id.* at 3224–26.

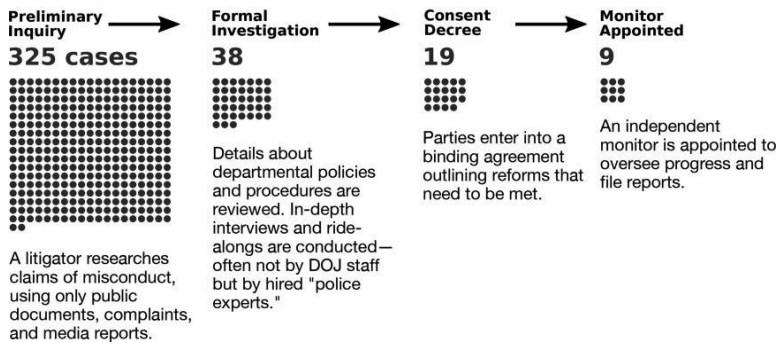
259. *See id.* at 3226.

260. *See Kelly et al., supra* note 254.

- 8 settled out of court with no independent oversight
- 26 binding agreements tracked by monitors

The pace of DOJ investigations increased during the Obama administration, as reflected in the chart below.

#### Violent Crime Control and Law Enforcement Act Cases, 2000–2013



The Washington Post obtained data about the use of force in ten of these departments. In five, use of force increased during and after the agreement. In five, use of force stayed the same or declined.<sup>261</sup>

The investigation of Los Angeles is often presented as a success story. In the aftermath of high-profile incidents of police brutality, Los Angeles entered into a consent decree with the DOJ. A study conducted from 2002 to 2008 (the consent decree was lifted in 2009) revealed lower crime and fewer use-of-force incidents.<sup>262</sup> Both property crimes (down 53%) and violent crimes (down 48%) decreased in Los Angeles more than in several adjacent communities.<sup>263</sup>

During this time, the level of law enforcement increased. Stops increased by 49% from 2002 to 2008.<sup>264</sup> Pedestrian stops nearly doubled and motor-vehicle stops increased by almost 40%.<sup>265</sup> Still, there was a dramatic increase in the proportion of stops resulting in arrests, suggesting that police officers “stopped people for good reasons and were willing to have the District Attorney scrutinize those reasons.”<sup>266</sup>

261. *See id.*

262. *See* CHRISTOPHER STONE, TODD FOGLESONG & CHRISTINE M. COLE, HARV. KENNEDY SCH., *POLICING LOS ANGELES UNDER A CONSENT DECREE: DYNAMICS OF CHANGE AT THE LAPD* (2009).

263. *Id.* at 6.

264. *Id.* at 22.

265. *Id.*

266. *Id.* at 24.

An extensive survey of Los Angeles residents conducted after the decree found: “Public satisfaction is up, with 83 percent of residents saying the LAPD is doing a good or excellent job.”<sup>267</sup> The number of satisfied residents includes more than two-thirds of Hispanic and African-American residents.<sup>268</sup>

Over the course of the consent decree period, “the incidence of categorical force used against Blacks and Hispanics decreased more than such force used against Whites.”<sup>269</sup> At the same time, black residents remained a disproportionate percentage of individuals arrested and injured in the course of a use-of-force incident.<sup>270</sup>

Pittsburgh also reformed its police department in compliance with a federal consent decree. As in Los Angeles, crime decreased (although crime decreased across many cities during the 1990s). In Pittsburgh, between 1994 and 2000, arrests decreased by over 40%.<sup>271</sup> Moreover, the proportion of African-Americans among those arrested for serious crimes declined.<sup>272</sup> A survey of Pittsburgh residents “showed that public opinion of the police has improved in a number of respects, although improvements are generally larger among whites than among blacks.”<sup>273</sup>

Cincinnati too is often cited as one of the success stories of the pattern and practice approach. A recent report on the Cincinnati reform effort indicates:

Between 1999 and 2014, Cincinnati saw a 69 percent reduction in police use-of-force incidents, a 42 percent reduction in citizen complaints, and a 56 percent reduction in citizen injuries during encounters with police....Violent crimes dropped from a high of 4,137 in the year after the riots, to 2,352 last year. Misdemeanor arrests dropped from 41,708 in 2000 to 17,913 [in 2014].<sup>274</sup>

Because of the consent decree, “CPD officers . . . chose to use less harmful methods of force to make arrests.”<sup>275</sup> There is also evidence that police–community relations improved over the course of the implementation of the consent decree.<sup>276</sup> At the same time, these results were not easy to achieve. It took years “to get police to actually buy into the reforms,” and “the federal

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267. *Id.* at i.

268. *See id.* at ii.

269. *Id.* at 34.

270. *See id.* at 37.

271. ROBERT C. DAVIS, CHRISTOPHER W. ORTIZ, NICOLE J. HENDERSON, JOEL MILLER, & MICHELLE K. MASSIE, VERA INST. OF JUSTICE, TURNING NECESSITY INTO VIRTUE: PITTSBURGH’S EXPERIENCE WITH A FEDERAL CONSENT DECREE 55, (2002).

272. *See id.* at 57.

273. *Id.* at ii.

274. Semuels, *supra* note 72.

275. Elliot Harvey Schatmeier, *Reforming Police Use-of-Force Practices: A Case Study of the Cincinnati Police Department*, 46 COLUM. J.L. & SOC. PROBS. 539, 562 (2013).

276. *See* GREG RIDGEWAY ET AL., POLICE-COMMUNITY RELATIONS IN CINCINNATI 89–90 (2009), [http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND\\_MG853.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG853.pdf) [<https://perma.cc/GSG7-995E>].

government had to apply constant pressure, reminding all parties about the need to stay vigilant about reform.”<sup>277</sup> Moreover, “Cincinnati is not completely free of police shootings or citizen complaints. In 2014, police officers shot and killed three people—all black males.”<sup>278</sup> Community activists assert that there is still substantial distrust between police and the black community in Cincinnati.<sup>279</sup>

The investigations are expensive. The Los Angeles investigation is estimated at \$300 million.<sup>280</sup> The difficulty of achieving meaningful reform raises doubts about whether this success is sustainable and can be reproduced in other cities. For example, because the DOJ only investigates a few departments per year, it may be difficult for pattern and practice investigations to produce large-scale change.<sup>281</sup> There are, after all, over 18,000 police departments in the United States.<sup>282</sup> Even in cities where there have been reduced disparities in arrests and use-of-force incidents, institutionalizing reform has been a challenge.<sup>283</sup>

Significantly, while focusing on use-of-force policies and community engagement strategies is important, federal investigations do not directly address issues like overcriminalization, prosecutorial discretion, and sentencing disparities.

To summarize, federal investigations work, some of the time, to reduce police violence and to improve community perceptions about the police. They are expensive and the benefits may be only short term. But, in the jurisdictions where the federal intervention is successful, fewer people are killed or beat up by the police, and that is a good thing.

Reform does not, however, do the work of transformation. It does not bring about the kind of change that the radical critics are seeking.

The point I am making about reform is unremarkable to critical theorists.<sup>284</sup> For example, Kimberlé Crenshaw has made a similar observation about antidiscrimination law, noting that it “has largely succeeded in eliminating the symbolic manifestations of racial oppression, but has allowed the perpetuation of material subordination of Blacks.”<sup>285</sup> Critical legal theorists and critical race theorists have criticized reform as a liberal tactic that does not lead to substantial transformation. Central to this critique is a reconceptualization of the law: critics reject the notion that the law “is a neutral force for change and that simply

277. Semuels, *supra* note 72.

278. Nathalie Baptiste, *Urban Policing, Without Brutality*, AM. PROSPECT, (Summer 2015).

279. *See id.*

280. Kelly et al., *supra* note 254.

281. *See* Rushin, *supra* note 256, at 3235 (“[E]ven when internal policies favor aggressive enforcement of § 14141, the DOJ has only initiated around three new investigations per year.”).

282. Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/> [https://perma.cc/PR5M-4SZ2].

283. *See* Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57 (2012).

284. *See* Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1882–84 (1981).

285. Crenshaw, *supra* note 164, at 1331–32.

reforming parts of the law will result in social progress.”<sup>286</sup> Framing legal criteria as “objective” or neutral “merely sanitized the racial power that was at play in determining what counted, whose interests would be privileged, and what mechanisms would serve them.”<sup>287</sup> Instead, the law “is not separate from patriarchal power, from the power of whiteness, from class interests, or from heteronormativity.”<sup>288</sup>

Because the law is not neutral or objective but actually perpetuates white supremacy, seeking change through liberal legal reform will result in “ephemeral” victories and “substantial” risks.<sup>289</sup> **Incremental progress through reform can lead to a backlash and further repression, a phenomenon highlighted by Kimberlé Crenshaw.**<sup>290</sup> In addition, reforms are often inadequate because reformers often underestimate the pervasiveness of racism and other biases ingrained in the law: “While mainstream civil rights reformers assume that racism is a product of ignorance and can be overcome by education, critical race theorists insist that racism is pervasive and immutable . . . .”<sup>291</sup> Given reformers’ misunderstanding of the centrality of race in society, incremental reforms are unlikely to fundamentally alter an institution like the criminal justice system, which has racialized control at its core.<sup>292</sup>

### C. IMPLICATIONS FOR FERGUSON

In March 2016, the United States Department of Justice and the City of Ferguson entered into a consent decree regarding the allegations in the Ferguson Report.<sup>293</sup> The Ferguson City Council approved the agreement after it was sued by the Justice Department.<sup>294</sup> The city had originally declined to go along with

286. Margaret Davies, *Legal Theory and Law Reform: Some Mainstream and Critical Approaches*, 28 ALTERNATIVE L.J. 168, 170 (2003).

287. Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1286 (2011).

288. Davies, *supra* note 286, at 170.

289. Crenshaw, *supra* note 164, at 1335.

290. *Id.*; see also Carbadó, *supra* note 138, at 1607–08.

291. Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 792 (1999).

292. See Bill Keller, *Congress Prepares to Deliver (a Little) Criminal Justice Reform*, THE MARSHALL PROJECT (Oct. 21, 2015), <https://www.themarshallproject.org/2015/10/21/congress-prepares-to-deliver-a-little-criminal-justice-reform> [https://perma.cc/UY7R-JK8V] (describing criminal justice advocates’ disappointment with the criminal justice reform bill being considered in the Senate); Seung Min Kim & Burgess Everett, *Time Running Out for Major Criminal Justice Bill*, POLITICO (Apr. 20, 2016), <http://www.politico.com/story/2016/04/senate-justice-crime-bill-222225> [https://perma.cc/4KAU-KCBQ] (noting the authors of the criminal justice reform bill have made changes to placate “tough-on-crime conservatives,” including “enhanced mandatory sentences for crimes involving Fentanyl, an opioid drug”).

293. Consent Decree, *United States v. City of Ferguson*, 4:16-cv-00180 (E.D. Mo. Apr. 19, 2016), <https://www.justice.gov/opa/file/833431/download> [https://perma.cc/45VX-YEC9] [hereinafter Decree].

294. John Eligon, *Ferguson Approves a Federal Plan to Overhaul Police and Courts*, N.Y. TIMES (Mar. 15, 2016), <http://www.nytimes.com/2016/03/16/us/ferguson-approves-a-federal-plan-to-overhaul-police-and-courts.html> [https://perma.cc/ALK2-ZWEC].

the settlement proposed by the Justice Department because of concerns it would bankrupt the city.<sup>295</sup> Since the Michael Brown shooting, Ferguson has had an operating deficit of approximately 2.5 million per year, and the city's finance director estimated that complying with the agreement would cost almost 4 million dollars the first year, and 3 million dollars in future years.<sup>296</sup> The city approved the settlement after the Justice Department said it would "work with" the city to "keep the costs of the changes in check."<sup>297</sup> City officials hoped that some of the funding to cover the agreement would come from proposed property and sales tax increases. In April 2016, the city voters approved the sales tax increase, but vetoed the property tax hike, "leaving city officials with a mixed, uncertain result."<sup>298</sup>

After the Ferguson consent decree was approved, Vanita Gupta, the head of the DOJ's Civil Rights division, said that the city had taken "an important step towards guaranteeing all of its citizens the protections of our Constitution."<sup>299</sup>

In reality, however, the consent decree provides Ferguson residents far more protection than does the Constitution. The consent decree can be read as an implicit critique of the Supreme Court's race project as described in this Article. The following examples are illustrative.

In *United States v. Whren*, as discussed *infra*, the Supreme Court held that the Fourth Amendment does not prohibit the police from making pretextual stops. The Ferguson consent decree bars pretextual stops other than in limited circumstances.<sup>300</sup>

In *Atwater v. City of Lago Vista*, as discussed *infra*, the Supreme Court stated that the police can arrest for minor offenses, even if the offenses themselves do not carry jail time. The Ferguson consent decree limits the offenses for which people can be arrested.<sup>301</sup>

In *Pennsylvania v. Mimms*, the Supreme Court granted the police the power during a traffic stop to automatically order the driver out of the car.<sup>302</sup> The Ferguson consent decree, on the other hand, requires an "articulable basis" in order for police to command the driver to leave the car.<sup>303</sup>

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295. *Id.*

296. *Id.*

297. *Id.*

298. Monica Davey, *Ferguson Voters Give Split Result on Funding Police Overhaul*, N.Y. TIMES (Apr. 6, 2016), <http://www.nytimes.com/2016/04/06/us/ferguson-voters-give-split-result-on-funding-police-overhaul.html> [<https://perma.cc/5ZQN-QCYY>].

299. Eligon, *supra* note 294.

300. Decree, *supra* note 293, at §§ 76(c), 80, which prohibits the police from pretextual stops to check for warrants and only allows pretextual stops for felony investigations.

301. Decree, *supra* note 293, at § 93.

302. *Pennsylvania v. Mimms*, 434 US 106 (1977).

303. Decree, *supra* note 293, at § 82.

The Supreme Court has never required any showing of suspicion for the police to seek consent to a search.<sup>304</sup> The Ferguson decree prohibits officers from seeking consent for a search unless they have reasonable suspicion.<sup>305</sup>

In *Schneckloth v. Bustamonte*<sup>306</sup> and *United States v. Drayton*<sup>307</sup> the Supreme Court ruled that suspects do not have to be informed that they have the right to refuse consent. The Ferguson decree requires that officers inform suspects of this right.<sup>308</sup>

In sum, the consent decree prohibits the Ferguson police from exercising the scope of the super powers that the Supreme Court has granted them. This is more evidence that the crisis occurred in Ferguson because the system was working as it is supposed to, i.e. the police were exercising their powers authorized by the Supreme Court. In order to try to prevent the Ferguson police from treating African-American residents unfairly, their constitutional powers have to be curtailed. Not only is the Constitution, as interpreted by the Supreme Court, insufficient to protect black people from police abuse, it actually aids and abets the abusers.

Even if the changes provided for in the consent decree are implemented, the question remains, will they be enough? The DOJ has never done a quantitative analysis of whether its interventions in local police departments are successful.<sup>309</sup> *The Washington Post* looked at available data about use of force after DOJ interventions. It found that use of force decreased in half of the departments and stayed the same or increased in the other half.<sup>310</sup>

The DOJ's Ferguson Report identified several major problems with the city's police department.<sup>311</sup> These problems included (1) a focus on revenue rather than public safety needs, (2) racial discrimination leading to a disparate impact on African-American residents, and (3) mistrust between the community and the police resulting from overly aggressive officers.<sup>312</sup>

Evidence from previous DOJ investigations suggests that federal oversight could make a difference in at least the second and third categories. The police departments of Los Angeles, Pittsburgh, and Cincinnati, for example, all experienced changes that reduced some race disparities and, the data from Los Angeles suggests, made their citizens of color feel better about the police.<sup>313</sup>

304. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”).

305. Decree, *supra* note 293, at § 85.

306. *Schneckloth*, 412 U.S. at 232, 234.

307. 536 U.S. 194, 196 (2002).

308. Decree, *supra* note 293, at § 86.

309. Kelly et al., *supra* note 254.

310. See *id.*

311. *Ferguson Report*, *supra* note 2, at 1–2.

312. *Id.*

313. See *supra* notes 262–78 and accompanying text.

Institutionalization of reforms—as the case of Cincinnati shows—often takes many years, so the durability of progress might depend on continuing federal oversight. As Stephen Rushin points out, enforcement of “pattern or practice” authority varies significantly according to the presidential administration.<sup>314</sup> So meaningful progress in Ferguson might depend on whether the next president and attorney general remain committed to exercising the DOJ’s “pattern or practice” authority.

The DOJ might be able to require the FPD to institute practices that will make it less violent and treat its citizens of color with more respect. The Ferguson consent decree requires that “all FPD officers and employees must have an unwavering commitment to protecting human life, and to upholding the value and dignity of every person.”<sup>315</sup> The decree has fifteen pages that govern new standards for the use of force. It requires that the police “use de-escalation techniques and tactics to minimize the need to use force.”<sup>316</sup> Likewise, after federal takeover of the Prince George’s County Maryland police department, citizens’ complaints about use of force went down.<sup>317</sup> These practices could lead to Ferguson community members feeling better about the police.

Some of the citizen complaints described in the Ferguson Report are about the way the police conduct stops and arrests. It is worth noting that this is largely unregulated by constitutional law. As Bill Stuntz put it:

For every reported decision discussing the law of deadly force, dozens discuss the rules that govern automobile searches. And amazingly, there is virtually no case law governing the use of *nondeadly* force. No one knows what the Fourth Amendment requires before an officer strikes a suspect because courts do not discuss the issue—they are too busy discussing the terms under which officers can open paper bags found in cars.<sup>318</sup>

As I have suggested throughout this Article, the constitutional law actually promotes the ways that the FPD has been doing its work. The “occupancy permit violation” arrest of the woman who called the police to report domestic violence was not illegal.<sup>319</sup> The police were probably within the legal limits of their authority in arresting Michael for telling them his name was “Mike” and for not wearing a seat belt, even though he was seated in a park car.<sup>320</sup> The law authorized the police to stop Michael Brown for “walking in the roadway” and, as the Wilson Report found, to kill him when he resisted arrest.<sup>321</sup>

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314. Rushin, *supra* note 256, at 3232–34.

315. Decree, *supra* note 293, at § 128.

316. *Id.* at § 128(b).

317. See Kelly et al., *supra* note 254.

318. William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043–44, 1046 (1995).

319. See *supra* note 3 and accompanying text.

320. See *supra* note 2 and accompanying text.

321. See *supra* notes 11–14 and accompanying text.



The DOJ often requires local police departments to take steps, such as adopting body cameras for police officers, that go beyond constitutional requirements. The point is that if after the DOJ intervention ends the Ferguson Police Department backslides into its old ways many of those old ways would not be illegal.

D. TENSION BETWEEN REFORM AND TRANSFORMATION: A CAUTION ABOUT PROCEDURAL JUSTICE

The fact that pattern and practice investigations may somewhat work sometimes is a reason that they should be encouraged, because “somewhat work sometimes” in this context means that the police kill and hurt fewer people.

The police–community relations articulation of the crisis is addressed, in an imperfect, possibly short term, and expensive way, by the DOJ’s interventions in local police departments. Reformers should continue to press for these investigations, fully aware of their shortcomings. They are ratchets. In the policing context, the work that ratchets do is both essential and a stopgap. They prevent some people from being beaten and killed by the police, but they will not resolve the articulation of the problems identified by the movement for black lives. Pattern or practice investigations, and other liberal reforms, will not bring about the extreme change in American criminal justice necessary to end overpolicing, mass incarceration, and vast racial disparities.

Indeed, in some instances, ratchets get in the way of change because they placate and take energy and focus away from the actual transformative work. Professors Carol Steiker and Jordan Steiker have made a related point about the death penalty—efforts to make implementation of capital punishment more “fair” may have the perverse consequence of furthering what is a fundamentally unjust practice.<sup>322</sup> Further, recall Los Angeles, for example, where after the DOJ intervention, more than two thirds of the black and Latino citizens felt that the police are doing a good or excellent job.<sup>323</sup>

Despite this newly placated response to policing, the statistics suggest that the level of policing in Los Angeles has increased substantially since the DOJ intervention.<sup>324</sup> In essence, the police are still serving as the government for the black and Latino residents of the city.<sup>325</sup> Those residents remain disproportionately the victims of police violence. In this sense, the LAPD is not doing good or excellent work for the black and Latino citizens they are supposed to serve and protect.

322. Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 92–94 (James R. Acker et al. eds., 2014).

323. Stone et al., *supra* note 262, at i.

324. *Id.* at 22.

325. AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* (Univ. of Chicago Press 2014).

A related dynamic occurred in Prince George's County Maryland. As discussed above, after the DOJ intervention, the number of complaints about use of force decreased. At the same time, however, the use of force by the police actually increased. In other words, the police used force more and received fewer complaints about it.<sup>326</sup>

One concern about reform is that it has a pacification effect. It calms the natives even when they should not be calm.<sup>327</sup> "False consciousness" is the term some theorists have used to describe the tendency of liberal reforms to "dupe[] those at the bottom of the social and economic hierarchy" with promises of "equality, fairness, and neutrality."<sup>328</sup>

In the context of civil rights and anti-discrimination law, Kimberlé Crenshaw warned that the "limited gains" of civil rights legislation could "hamper efforts of African-Americans to name their reality and to remain capable of engaging in collective action in the future."<sup>329</sup> Even though civil rights laws passed in the 1960s succeeded in breaking down some formal barriers, subtle and invidious forms of discrimination persisted. Moreover, the *perception* of progress may have mollified communities of color and sapped the energy needed for a continued push for substantive equality.

Some criminal justice scholars and policy makers have focused on perceptions of the fairness of the criminal process. A newsletter from the Department of Justice's Community Oriented Policing Services office, entitled "The Case for Procedural Justice: Fairness as a Crime Prevention Tool," describes the work of the leading procedural justice scholar:

Professor Tom Tyler of Yale Law School, ha[s] identified several critical dimensions of procedural fairness: (1) *voice* (the perception that your side of the story has been heard); (2) *respect* (perception that system players treat you with dignity and respect); (3) *neutrality* (perception that the decision-making process is unbiased and trustworthy); (4) *understanding* (comprehension of the process and how decisions are made); and (5) *helpfulness* (perception that system players are interested in your personal situation to the extent that the law allows).<sup>330</sup>

326. Kelly et al., *supra* note 254.

327. See Crenshaw, *supra* note 164, at 1336, 1346–49.

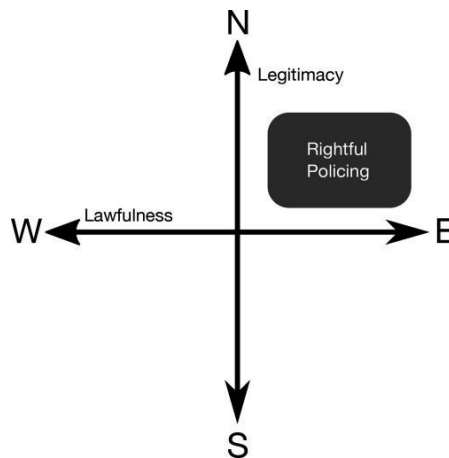
328. Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 85, 86 (Kimberlé Crenshaw et al. eds., 1996); see also Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1777 (1990) ("[S]ubordination can obscure as well as illuminate self-knowledge.").

329. Crenshaw, *supra* note 164, at 1349.

330. U.S. Dep't of Justice, Cmty. Oriented Policing Servs. Office, *The Case for Procedural Justice: Fairness as a Crime Prevention Tool*, 6 E-NEWSLETTER 1 (2013), [http://cops.usdoj.gov/html/dispatch/09-2013/fairness\\_as\\_a\\_crime\\_prevention\\_tool.asp](http://cops.usdoj.gov/html/dispatch/09-2013/fairness_as_a_crime_prevention_tool.asp) [<https://perma.cc/XG2V-CEMV>].

The problem with reform that is focused on improving perceptions about the police is that it can cloak aggressive policing in enhanced legitimacy, and it has the potential to blunt the momentum for rising up against overcriminalization, wealth inequality, and white supremacy.

Some procedural justice scholars have warned about the potential of “perception” based reform to make citizens feel better even about police conduct that is unconstitutional. Tracey Meares argues that we should encourage “rightful policing”—police officers should not only obey every constitutional requirement and administrative rule; they should also “comport themselves in ways that confer dignity on those with whom they interact and otherwise treat people with respect.”<sup>331</sup> In this framing, the ideal form of policing is both lawful and legitimate.<sup>332</sup>



In the above chart, the x-axis is lawfulness, the y-axis is legitimacy, and the optimal policing approach “Rightful Policing” is both lawful and legitimate.<sup>333</sup>

Of course, Professor Meares is correct that police officers should be polite and comply with the law in their encounters with citizens. But lawfulness and legitimacy are not enough. If existing law is too tolerant of police violence, then “rightful policing” might fail to address the substantive shortcomings of the criminal justice system. Any procedural justice reforms need to be accompanied by substantive reforms if they are to have an impact beyond public relations.

331. Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 WM. & MARY L. REV. 1865, 1878 (2013).

332. See *id.* at 1879 (presenting a graph with “Lawfulness” on the x-axis, “Legitimacy” on the y-axis, and “Rightful Policing” in the top right quadrant).

333. *Id.*

President Obama’s Task Force on 21st Century Policing (Task Force) provides a way forward. The proposals in the final report were a mix of procedural justice and more substantive proposals.

First, the Task Force urged “law enforcement agencies [to] adopt procedural justice as the guiding principle . . . for . . . their interactions with rank and file officers and with the citizens they serve.”<sup>334</sup> The first of the report’s six “pillars” was “Building Trust & Legitimacy,” and the Task Force proposed a number of procedural justice reforms, from transparency measures to tracking the level of trust in the community.<sup>335</sup>

At the same time, the final report included a number of substantive proposals or, at least, acknowledgements of deeper issues. Examples include independent investigations of deadly force incidents, bans on racial profiling, and the establishment of civilian review boards.<sup>336</sup> Moreover, the Task Force acknowledged that the criminal justice system “alone cannot solve many of the underlying conditions that give rise to crime” and that policymakers must “address the core issues of poverty, education, health, and safety.”<sup>337</sup>

#### E. THEORIZING BLACK RESISTANCE PRACTICES: THREE QUESTIONS

If, as this Article has suggested, the system is working the way it is supposed to, as a means to control African-Americans and devalue their lives, the system should be resisted. The Movement for Black Lives is attempting to do so, but aspects of its resistance platform are under-theorized. This is not surprising in a social justice movement that is both new and explicitly decentralized in terms of leadership and decision making.<sup>338</sup>

I want to pose three questions for participants in the Movement for Black Lives and other scholars and activists who seek to transform U.S. criminal justice. I do not intend these questions to be comprehensive, but I think they raise important first principle issues.

#### 1. Question 1: What is the Role of Violence in the Movement?

One of the things we most remember about activists in the last major black civil rights campaign in the United States is their stance on violence. Martin Luther King Jr. and his followers famously advocated non-violence. On the other hand, Malcolm X and black nationalist formations like the Black Panther Party embraced self-defense “by any means necessary” and specifically

334. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 101, at 1.

335. *Id.* at 9, 16.

336. *Id.* at 2, 19–29.

337. *Id.* at 8.

338. See Jelani Cobb, *The Matter of Black Lives*, THE NEW YORKER (Mar. 14, 2016), <http://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed> [https://perma.cc/DYG7-UE7L].

disavowed the pacifism of King.<sup>339</sup>

An implicit (or not so implicit) threat of violence has animated a range of political and cultural responses to the police treatment of blacks. In Ferguson and Baltimore, where urban insurrections occurred, these threats may have been productive, in the sense that after the violence, activists won some concessions, including federal intervention in Ferguson and prosecution of police officers in Baltimore.<sup>340</sup>

Activism by radicals invariably posits that unless there is change, there will be violence against the state. The threat could be descriptive or it could be normative. “What happens to a dream deferred?,” the famous Langston Hughes poem asks. “Does it dry up like a raisin in the sun? . . . *Or does it explode?*”<sup>341</sup> Radicals in the Movement for Black Lives should build consensus on what their comfort level is with the threat of violence as part of their protest politics.

## 2. Question 2: Focus on Improving Criminal Justice or Ending White Supremacy?

A number of organizations in the Movement for Black Lives were created in response to police or private violence against African-Americans. Both the Black Lives Matter formation and One Million Hoodies for Justice sprung up in reaction to George Zimmerman’s killing of Trayvon Martin.<sup>342</sup> The platforms of these organizations have broadened to radical critiques of the structure of the state and, especially, of white supremacy.<sup>343</sup> Activists should consider how much of their focus should be on improving the criminal justice system versus ending white supremacy. It is possible to do the former without the latter. As the political scientist Marie Gottschalk has noted, “[m]ajor decarcerations” in other countries happened because of “comprehensive changes in penal policy over the short term, not sustained attacks on structural problems and the root causes of crime.”<sup>344</sup>

## 3. Question 3: What is the Role of Law Reform?

Some Black Lives Matter activists have championed liberal reforms like federal investigations of police departments and local or federal prosecutions of

339. See, e.g., Sunday Book Review, Stanley Crouch, *By Any Means Necessary*, N.Y. TIMES (Sept. 10, 2006), [http://www.nytimes.com/2006/09/10/books/review/crouch.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/09/10/books/review/crouch.html?pagewanted=all&_r=0) [https://perma.cc/G3ZA-VH33].

340. See Kelly et al., *supra* note 254.

341. LANGSTON HUGHES, HARLEM (1951).

342. Cobb, *supra* note 338; *About*, MILLION HOODIES: MOVEMENT FOR JUSTICE, <http://millionhoodies.net/about/> [https://perma.cc/87N4-P46V].

343. See, e.g., Brandon M. Terry, *After Ferguson*, THE POINT MAG (2015), <http://thepointmag.com/2015/politics/after-ferguson> [https://perma.cc/8CXQ-XDHY].

344. Marie Gottschalk, *America Needs a Third Reconstruction: The Problem of Mass Incarceration is a Problem of High Inequality*, THE ATLANTIC (Sept. 18, 2015), <http://www.theatlantic.com/politics/archive/2015/09/americas-need-for-a-third-reconstruction/405799/> [https://perma.cc/47FL-4XQH].

police officers.<sup>345</sup> But, as I have demonstrated, that kind of liberal reform does not address the central problems the Movement for Black Lives has articulated; indeed in some ways liberal reforms exacerbate the problems.

What should radicals expect the law to accomplish with regard to police reform? This Article has been somewhat skeptical about the potential of law to create the kind of transformation sought by radical activists. This does not necessarily mean, however, that legal reform does not have a place in the movement. Legal strategies, for example, may help enroll activists. Michael Klarman has observed, “[n]ot only did the civil rights movement have to overcome black hopelessness and fearfulness, but sometimes it was necessary as well to undo the psychological damage that the ideology of white supremacy had inflicted on those blacks who had internalized its lessons.”<sup>346</sup>

Likewise, thinking about the Supreme Court’s first set of “racial origin” criminal procedure cases, Klarman noted:

It is possible, however, that these Supreme Court decisions and the litigation that produced them were more important for their intangible effects: convincing blacks that the racial status quo was not impervious to change; educating them about their rights; providing a rallying point around which to organize a protest movement; and perhaps even instructing oblivious whites as to the egregious nature of Jim Crow conditions.<sup>347</sup>

This could also be true of legal interventions that defeat the kind of false consciousness I have described among the African-American and Latino residents of Los Angeles who think the police are doing good or excellent work.<sup>348</sup> Accordingly, using legal tactics might have important psychic benefits to inspire the community mobilization that is likely necessary for the radical activists to achieve their goals. My suggestion, then, is not that the Movement for Black Lives abandon the law; rather, activists should have a coherent perspective about what the law can and cannot do in terms of achieving the movement’s ultimate goals.

#### 4. A Respectful Suggestion About Division of Labor Among Activists

For many years, civil rights organizations like the NAACP were reluctant to address criminal justice issues. For example, as head of the NAACP Legal Defense Fund, Thurgood Marshall initially “allowed the NAACP to represent only defendants whom he believed to be innocent.”<sup>349</sup> In 1943, he “declined to represent a black sixteen year old who had been sentenced to death for rape and who had participated in a jail break” because the boy was “not the type of

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345. See Akbar, *supra* note 102, at 355.

346. Klarman, *supra* note 195, at 88–89.

347. *Id.* at 88.

348. See Stone et al., *supra* note 262, at i.

349. Kennedy, *supra* note 60, at 20.

person to justify our intervention.”<sup>350</sup> According to Randall Kennedy, this cautiousness was motivated by respectability politics: “for a stigmatized racial minority, successful efforts to move upward in society must be accompanied at every step by a keen attentiveness to the morality of means, the reputation of the group, and the need to be extra-careful in order to avoid the derogatory charges lying in wait in a hostile environment.”<sup>351</sup> As Khalil Gibran Muhammad has discussed in the context of the Progressive Era, “the statistical rhetoric of the ‘Negro criminal’ became a proxy for a national discourse on black inferiority,” resulting in “discriminatory public policies and social welfare practices.”<sup>352</sup>

By “distan[cing] as many blacks as far as possible from negative stereotypes used to justify racial discrimination against all Negroes,” civil rights organizations sought to strengthen the reputation of at least some African-Americans and take away some of the rationale for discriminatory policies.<sup>353</sup> Regina Austin has described this method of respectability politics as the “politics of distinction.”<sup>354</sup> Because “lawless behavior by some blacks stigmatizes all and impedes collective progress,” some elements of the black community sought to “repudiate[] those who break the law and proclaim[] the distinctiveness . . . of those who do not.”<sup>355</sup>

Other scholars have also described the silence of traditional civil rights organizations on issues related to criminal justice and mass incarceration. In *The New Jim Crow*, Michelle Alexander calls out the “relative quiet” of the “civil rights community’s response to the mass incarceration of people of color.”<sup>356</sup> She also criticizes these organizations’ concentration on affirmative action in college admissions, arguing that this emphasis on affirmative action benefits middle-class blacks and ignores “those trapped in the new racial undercaste.”<sup>357</sup> In the lead up to the Rockefeller drug laws passed in the late 1960s, the NAACP Citizens’ Mobilization Against Crime and other voices in the black community called for harsher prison sentences and a more punitive approach to drug dealing.<sup>358</sup> Given this advocacy by the Harlem NAACP and others, it was not only “white conservatives” who pushed for “more punitive crime policy.”<sup>359</sup>

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350. *Id.* at 20–21.

351. *Id.* at 20.

352. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 8 (2010).

353. Kennedy, *supra* note 58, at 17.

354. Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1772 (1992).

355. *Id.* at 1772–73.

356. ALEXANDER, *supra* note 89, at 224.

357. *Id.* at 234.

358. See VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 150–51 (2009).

359. Forman, *supra* note 68, at 23; *but see* Elizabeth Hinton et al., *Did Blacks Really Endorse the 1994 Crime Bill?*, N.Y. TIMES (Apr. 13, 2016), <http://www.nytimes.com/2016/04/13/opinion/did-blacks->

It should be noted that the Black Panther Party was a major exception; advocating for criminal justice reform was one of its major platforms from its inception in 1966.<sup>360</sup> Articles about police, intelligence agencies, and criminal justice dominated its newsletter, averaging about 30–40% of the content.<sup>361</sup>

In the 1990s some civil rights organizations began openly criticizing the war on drugs. Kweisi Mfume, the president of the NAACP, was one of the signatories on an open letter to the Secretary General of the United Nations, calling for a public health rather than criminal approach to drug abuse.<sup>362</sup> The campaign to end the sentencing disparity between crack and powder campaign enrolled most of the major civil rights organizations, including the NAACP, the NAACP Legal Defense Fund, the ACLU, the National Council of La Raza, the Leadership Conference on Civil Rights, and the Lawyers Committee for Civil Rights Under Law.<sup>363</sup> Now traditional civil rights organizations have embraced the cause of reforming the police.<sup>364</sup>

The police–community relations articulation more closely corresponds with civil rights remedies. The Movement for Black Lives’ claims more closely correspond with Critical Race Theory. This leads to a suggestion about how labor might be employed in the most efficient way that capitalizes on various activists’ strengths and resources. **Let the traditional civil rights organizations focus on liberal reform.** Groups like the NAACP, the NAACP LDF, National Council of La Raza, Mexican American Legal Defense and Educational Fund, the ACLU, and the Center for Constitutional Rights should be at the forefront of advocating for these kinds of interventions. **The Movement for Black Lives, on the other hand, should focus on the broader scale transformation, such as imagining and advocating prison abolition.**<sup>365</sup> In the final section of this Article, I suggest a framework for this project.

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really-endorse-the-1994-crime-bill.html [https://perma.cc/B5SG-CJ7L] (arguing that many African-Americans did not support harsh sentencing policies).

360. CHARLES EARL JONES, *THE BLACK PANTHER PARTY (RECONSIDERED)* 200–07 (1998).

361. *Id.*

362. *UNGASS: Public Letter to Kofi Anna—Signatories*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/publications-resources/sign-letters/public-letter-kofi-annan-signato> [https://perma.cc/8FZQ-SDZA]; see also Christopher S. Wren, *Anti-Drug Effort Criticized as More Harm Than Help*, N.Y. TIMES (June 9, 1998), <http://www.nytimes.com/1998/06/09/world/anti-drug-effort-criticized-as-more-harm-than-help.html> [https://perma.cc/N4QD-NC32].

363. *Over 75 Groups and Law Professors Push Congress to Eliminate 100-to-1 Crack Sentencing Disparity*, ACLU (Apr. 29, 2009), <https://www.aclu.org/news/over-75-groups-and-law-professors-push-congress-eliminate-100-1-crack-sentencing-disparity> [https://perma.cc/C6VV-4DE5].

364. See, e.g., *Justice*, NAACP, <http://www.naacp.org/programs/entry/justice> [https://perma.cc/YXB-5Y8HK] (advocating for “smarter results-based criminal justice policies” and “an end to racial disparities at all levels of the [criminal justice] system”); *Civil Rights & Criminal Justice*, NAT. COUNCIL OF LA RAZA, <http://www.nclr.org/issues/civil-rights/> [https://perma.cc/2EZV-YWHW]; *Criminal Law Reform*, ACLU, <https://www.aclu.org/issues/criminal-law-reform> [https://perma.cc/JHA3-WRX4].

365. See Allegra M. McLeod, *Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109 (2013).



## CONCLUSION: TOWARD THE THIRD RECONSTRUCTION

To bring racial justice to criminal justice, the police must stop the practices that many black and brown people protest. They must end the practice of proactive stop and frisk. They have to stop arresting so many people. They must stop using violence disproportionately against African-Americans and Latinos. One goal of activists has to be making the police stop policing in ways that devalue the lives of people of color.

Lest this sound hopelessly romantic and naive, a version of this happened in New York. There had been widespread dissatisfaction in the African-American and Latino communities with the police. The concern centered on the NYPD's "stop, question, and frisk" initiative. There was a federal lawsuit challenging the practice. There were also public demonstrations and acts of civil disobedience by protestors at police stations.

In 2013, the number of stop and frisks dramatically declined (as pictured in the table below).<sup>366</sup>

**Table 2:**

2011	685,724
2012	532,911
2013	191,558
2014	46,235
2015	13,604

Significantly, the stops began falling well before August 2013, when a federal judge issued an opinion requiring the police to stop unconstitutional proactive stop and frisks.<sup>367</sup> It is likely that some combination of the activism, political protests, and litigation made the police reduce the number of stop and frisks. The effect of litigation alone gets less credit when one recalls that there had been an earlier case, *Daniels v. City of New York*, which required the police to reform the way they carried out stop and frisk in minority neighborhoods.<sup>368</sup> Yet, this case failed to make the police stop in the way that the social movement to end stop and frisk did. Activists need to capture and transport the factors that led to success in New York to the broader national campaign of criminal justice transformation.

The historian Aldon Morris, investigating why the Montgomery Bus Boycott sparked the civil rights movement when other kinds of interventions had not, identified the concept of "frame alignment." Frame alignment is "the notion that the movement was buoyed and pushed forward by a rhetoric that created a broad consensus on the relevant frame. That frame organized the actions,

366. *Stop-and-Frisk Data*, NEW YORK CIVIL LIBERTIES UNION (NYCLU) (2016), <http://www.nyclu.org/content/stop-and-frisk-data> [<https://perma.cc/VF3C-8WQN>].

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

368. 138 F. Supp. 2d 562, 565 (2001).

rhetoric, and aspirations of countless individuals into a singular movement against racial injustice. The correction to this racial injustice was intervention in the social and legal arena to bring about new relationships premised on equal citizenship.”<sup>369</sup>

I want to support a frame alignment around the term “Third Reconstruction,” which some activists and scholars have used to refer to a coordinated effort to address institutional racism and inequality. The term is evolving to describe not only changes in public policy and legal doctrines, but also a broad-based social movement focused on racial justice.

Tracey Meares has noted both the promise and the limits of the earlier reconstructions in U.S. history:

The First Reconstruction, while widely considered to be a failure, did establish a constitutional legal framework upon which the Second Reconstruction (led by the Civil Rights Movement) built: establishing voting rights for African Americans and banning legal segregation of schools and commercial establishments. It is nonetheless true that the moment in which we find ourselves today shows clear evidence of the failures of the Second Reconstruction.<sup>370</sup>

The Third Reconstruction, then, would continue the fight for equal justice for African Americans. It would seize this moment in U.S. history, which Professor Meares has written “is about the nature of racial inequality and hierarchy in the contemporary United States and what steps we might take to address this.”<sup>371</sup>

The third reconstruction frame already has inspired both activists and scholars. One of the leaders of the Moral Monday protests in North Carolina has used the term “Third Reconstruction” to describe the goal of recent activism in the state.<sup>372</sup> In North Carolina, hundreds of people protested at the North Carolina statehouse after the conservative legislature passed laws restricting voting rights and cutting social programs.<sup>373</sup> In a recent book, Reverend William Barber II presented the elements of a Third Reconstruction movement, highlighting the importance of public policy, coalition-building, activism on social media, voter registration and education, and legal “mobilizing in the courtroom.”<sup>374</sup> Last year, *The Nation* magazine held a forum of writers, activists, and scholars entitled “Toward a Third

369. Crenshaw, *supra* note 287, at 1259.

370. Tracey Meares, *A Third Reconstruction?*, BALKINIZATION BLOG (Aug. 14, 2015, 8:30 AM), <http://balkin.blogspot.com/2015/08/a-third-reconstruction.html> [<https://perma.cc/GQG3-LGC2>].

371. *Id.*

372. THE REVEREND DR. WILLIAM J. BARBER II, *THE THIRD RECONSTRUCTION: MORAL MONDAYS, FUSION POLITICS, AND THE RISE OF A NEW JUSTICE MOVEMENT* 127 (2016).

373. See Ari Berman, *Thousands March in North Carolina to Protest Voter Suppression*, THE NATION (Feb. 13, 2016), <http://www.thenation.com/article/thousands-march-in-north-carolina-to-protest-voter-suppression/> [<https://perma.cc/F6AS-PN6E>].

374. BARBER II, *supra* note 372, at 127–30.

Reconstruction.”<sup>375</sup> One of the participants, the historian Eric Foner, described the need for “a combination of grassroots radicalism and political leadership.”<sup>376</sup>

A few legal scholars have begun to think about whether legal reform might help bring about a Third Reconstruction. Tracey Meares has stated: “Against my better judgment, I remain convinced law has a role to play here. The Civil Rights movement is a perfect example of the way in which social movements leverage law to achieve change.”<sup>377</sup> The legal scholar Bruce Ackerman has advocated “a Third Reconstruction in which the constitutional order would move beyond spherical limits to guarantee equal protection to broad classes of people mired in poverty or confronting systematic stigmatization.”<sup>378</sup> Achieving these goals would require a “constitutional moment” focused on widespread equality and “winning election after election until . . . demands for social justice are vindicated in the name of We the People.”<sup>379</sup> Professor Rhonda Magee Andrews has criticized “the failure of the courts to interpret the Fourteenth Amendment consistently with the reach of the provision as envisioned by its progenitors,” calling instead for a Third Reconstruction to devote more “attention to the substantive affirmative requirements of the government in ensuring the treatment of former slaves as full human beings as to the procedural and negative requirements,” a transformation essential to achieving the “norm of post-racial human dignity.”<sup>380</sup> In this way, constitutional law would not be simply a source of police “super powers,” but could provide a legal path to ameliorating the effects of white supremacy.

The broader, more transformative call for the police to “stop it” would be a demand for society to stop addressing violence and crime in African-American and Latino communities primarily through criminal justice, and instead treat those issues as they would if they were primarily associated with white people. We can expect that there would be more affirmative and less oppressive interventions. We can see this in the different response to the heroin epidemic now and the crack cocaine epidemic of the 1980s.<sup>381</sup>

Making the police “stop it” would also be consistent with a Third Reconstruction vision of prison abolition. As the activist Mychal Denzel Smith notes, “the language of ‘reconstruction’ can’t be employed without considering what pre-ceded it—abolition. We abolished the institution of slavery. We abolished legalized segregation. If we want a third Reconstruction

375. *Toward a Third Reconstruction*, THE NATION (Mar. 23, 2015), <http://www.thenation.com/article/toward-third-reconstruction/> [<https://perma.cc/QJK9-UC4D>].

376. *Id.*

377. Meares, *supra* note 370.

378. Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104, 3128 (2014).

379. *Id.* at 3132.

380. Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 502 (2003).

381. See, e.g., Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES (Oct. 30, 2015), <http://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html> [<https://perma.cc/M5S2-HGV2>].

to take place, the abolition of prisons should be on the table.”<sup>382</sup>

I realize that this goal may strike some as unsophisticated. But, as the legal scholar Allegra McLeod, observes:

If prison abolition is conceptualized as an immediate and indiscriminate opening of prison doors—that is, the imminent physical elimination of all structures of incarceration—rejection of abolition is perhaps warranted. **But abolition may be understood instead as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.**<sup>383</sup>

The role of law, then, in the Third Reconstruction is to imagine and create those “radically different legal and institutional regulatory forms.”<sup>384</sup>

The Third Reconstruction frame brings together (as did the first and second reconstructions in U.S. history) the sometimes-divergent projects of liberals and radicals, and there may be some tension between those distinct visions of Third Reconstruction transformation. Allegra McLeod observes an important difference between prison abolitionists, whose “radical call for change appropriately captures the intensity that ought to be directed” at changing the criminal justice system and reformers, who “in tolerating with relative comfort imprisonment and punitive policing, do[] not register the need for change with as much urgency.”<sup>385</sup> This is not unlike the tension this paper has identified between liberals, who endorse traditional civil rights tactics and goals, and activists in the Movement for Black Lives, whose means and objectives are more radical in nature. As I have suggested, there are ways that liberals and activists can work together, especially understanding that abolition is, in McLeod’s words, “a gradual project of decarceration.”<sup>386</sup> One example of a liberal project that would advance abolition is the suggestion, by Marc Mauer of the Sentencing Project, to reduce the maximum punishment for any federal crime to twenty-one years.<sup>387</sup>

As I hope this Article has demonstrated, Barack Obama was wrong when he said, “[w]hat happened in Ferguson may not be unique, but it’s no longer

382. Mychal Denzel Smith, *The Senate’s Bipartisan Criminal Justice Reform Bill Only Tackles Half the Problem*, THE NATION (Oct. 14, 2015), <http://www.thenation.com/article/the-senates-bipartisan-criminal-justice-reform-bill-only-tackles-half-the-problem/> [<https://perma.cc/YY3Q-K96A>].

383. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015).

384. *Id.* at 1161, 1224–32.

385. *Id.* at 1208.

386. *Id.* at 1161.

387. Dana Goldstein, *Too Old to Commit Crime?*, THE MARSHALL PROJECT (Mar. 20, 2015, 1:00 PM), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime#.zMDq0QBIm> [<https://perma.cc/4863-KLAR>].

endemic. It's no longer sanctioned by law or by custom."<sup>388</sup> What happened in Ferguson is both endemic and sanctioned by law. President Obama came closer to the truth in the very same speech about race, one made on the 50<sup>th</sup> anniversary of the "Bloody Sunday" police violence in Selma, Alabama. He said:

What greater expression of faith in the American experiment than this, what greater form of patriotism is there than the belief that America is not yet finished, that we are strong enough to be self-critical, that each successive generation can look upon our imperfections and decide that it is in our power to remake this nation to more closely align with our highest ideals?<sup>389</sup>

"Remaking" the country sounds more like a radical project than a liberal one. Yet, it is exactly what must be done for people of color to be as free as white people. The system is now working the way it is supposed to, and that makes black lives matter less. That system must be crushed, and the United States of America must, in President Obama's words, be "remade."

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388. President Barack Obama, Remarks by the President at the 50<sup>th</sup> Anniversary of the Selma to Montgomery Marches (Mar. 7, 2015), <https://www.whitehouse.gov/the-press-office/2015/03/07/remarks-president-50th-anniversary-selma-montgomery-marches> [<https://perma.cc/D9MK-H2Y4>].

389. *Id.*