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Race, Policing, and Technology

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RACE, POLICING, AND TECHNOLOGY*

I. BENNETT CAPERS**

This Essay argues that if we truly care about making policing egalitarian and fair to everyone, then that could mean more policing, not less. It advocates harnessing technology, including surveillance technology, to help deracialize policing. This turn to technology will not be cost free. Indeed, one cost will be the redistribution of privacy. This cost, especially to those who already enjoy a surfeit of privacy, might seem great. But even greater should be the possibility that technology can move society closer to egalitarian, race-free policing, and to the goal of true equality before the law.

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Note from the Editors: this work is characterized as an Essay and contains claims that stem from the author’s own experiences and perspectives, and accordingly, the *North Carolina Law Review* has departed from its standard citation practices.

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INTRODUCTION

I am a black man. I say this up front because, like Patricia Williams, I am convinced that subject position is everything in my analysis of the law.¹ I say this up front, too, because when it comes to policing, my blackness means that I am a disturbing statistic. After all, as recently as 2013, one in three black men could expect to go to prison during his lifetime.² A prosecutor is more likely to seek higher charges against me,³ and a jury is more likely to convict me than a white defendant based on similar evidence.⁴ According to the United States Sentencing Commission, if I am sent to prison, I will likely receive a sentence nearly twenty percent longer than a white offender for the same crime.⁵ I live in a world in which “[y]oung + [b]lack + [m]ale” too often “= [p]robable

1. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 3 (1991) (“Since subject position is everything in my analysis of the law, you deserve to know that it’s a bad morning.”).

2. THE SENTENCING PROJECT, *REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 1 (Aug. 2013), http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf [<https://perma.cc/TWG2-SXG7>].

3. *See, e.g.*, BESIKI KUTATELADZE, WHITNEY TYMAS & MARY CROWLEY, *VERA INST. OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN* 3 (2014), https://storage.googleapis.com/vera-web-assets/downloads/Publications/race-and-prosecution-in-manhattan/legacy_downloads/race-and-prosecution-manhattan-summary.pdf [<https://perma.cc/TXQ2-WUB2>] (finding race to be a statistically significant factor in case outcomes); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 16–17 (1998) (discussing how prosecutorial discretion is a cause of racial injustice).

4. *See, e.g.*, Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 *OHIO ST. J. CRIM. L.* 187, 189–90 (2010) (finding that mock jurors possessed an implicit association between “black” and “guilty”); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 *PSYCHOL. PUB. POL’Y & L.* 201, 217 (2001) (finding that white jurors demonstrated racial bias in non-race salient cases).

5. *See* U.S. SENTENCING COMM’N, *REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING* 108 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf#page=55 [<https://perma.cc/9X89-B3LP>]; Joe Palazzolo, *Racial Gaps in Men’s Sentencing*, *WALL ST. J.* (Feb. 14, 2013, 5:36 PM), <http://www.wsj.com/articles/SB10001424127887324432004578304463789858002> [<https://perma.cc/4QDB-7ZKY>].

[c]ause[.]”⁶ and where, as Professor Randall Kennedy has observed, there is a “racial tax[.]”⁷ I accordingly carry myself knowing that I will be watched by the police, scrutinized by the police, and that at any point I can be stopped by the police.⁸ As much as I might hope that my status as an academic might insulate me from racialized policing, my own experience and the experiences of numerous black professors suggest otherwise.⁹ After all, the police do not see an academic. They see only what they want to see, “figments of their imagination[.]”¹⁰ “woven . . . out of a thousand details, anecdotes, stories[.]”¹¹ reducible to this: a black man. So, I am a black man. But not tragically so.¹² In a sense, I am that black male because this is how I have been socially constructed.¹³ Change the construction and liberation should be possible. There is a final reason to foreground my blackness, here on this black and white page: I want to make an argument that might seem counterintuitive, that might rile libertarians and progressives, and that might even give pause to a few black folk. What I want to argue is that, if we truly care about making policing egalitarian and fair to everyone, then that might mean more policing, not less. More to the point, it will mean redistributing privacy.

6. See generally Elizabeth A. Gaynes, Essay, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621 (1993) (discussing how young black men are disproportionately targeted in the criminal justice system).

7. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159 (1997).

8. See *infra* Section I.C.

9. As I have detailed elsewhere, a number of “law-abiding minority professors”—Cornel West, William Julius Wilson, Paul Butler, and Devon Carbado, to name just a few—have been subjected to police stops. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 18 (2011).

10. RALPH ELLISON, *INVISIBLE MAN* 3 (rev. ed. 2002).

11. FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 111 (Charles Lam Markmann trans., 1967).

12. See ZORA NEALE HURSTON, *How It Feels to Be Colored Me*, in *I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE* 152, 152 (Alice Walker ed., 1979) (“But I am not tragically colored.”).

13. Race has little inherent meaning but is largely a social construct, a point recognized by both critical race scholars and geneticists. See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 55 (2d ed. 1994) (describing racial formation as the “sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed”); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 774 (1994) (“[R]ace is neither a natural fact simply there in ‘reality,’ nor a wrong idea, eradicable by an act of will.”); 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, 6 (1994) (critiquing “existing theories of race” and advancing “a new theory of race as a social complex of meanings we continually replicate in our daily lives”). Ta-Nehisi Coates perhaps put it most elegantly: “[R]ace is the child of racism, not the father.” TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 7 (2015).

Before elaborating, I should say that this Essay is only indirectly about police violence, the issue most associated with the Black Lives Matter movement and which is now part of the national zeitgeist,¹⁴ though of course that issue is an important one. In 2015 alone, police killed over 224 unarmed men and women, almost half of them black like me.¹⁵ Video images, captured on cellphones and dashboard cameras, have become the nightly news in my brain, playing in an endless, “spirit-murder[ing]”¹⁶ loop. Still, as someone who has thought and written about policing for a decade now, I know that police violence is not the disease, but rather a symptom of the far larger problem of racialized policing more generally.¹⁷ Every police shooting, after all, begins with a look, a suspicion, or an encounter. We can do little to address racialized police violence if we do nothing to address the far broader issue of racialized looks and encounters.¹⁸

This Essay is accordingly about police looks and police encounters. It is also about technology and how harnessing technology can help deracialize policing. To be sure, the technology this Essay proposes comes at a cost. In exchange for a reduction of hard surveillance of people of color, it will require an increase in soft surveillance of

14. See, e.g., John Eligon, *One Slogan, Many Methods: Black Lives Matter Enters Politics*, N.Y. TIMES (Nov. 18, 2015), <http://www.nytimes.com/2015/11/19/us/one-slogan-many-methods-black-lives-matter-enters-politics.html> [<https://perma.cc/B9GN-TRPF>] (discussing the formation of the Black Lives Matter movement and its evolving relationship with national politics).

15. See *The Counted: People Killed by Police in the US*, GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [<https://perma.cc/9X7K-KL65> (staff-uploaded archive)].

16. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129–30 (1987) (examining racism as a crime and describing it as “spirit-murder”).

17. See, e.g., I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 849–53 (2008) [hereinafter Capers, *Crime, Legitimacy, and Testifying*] (discussing the undemocratic policing and inegalitarianism of racial profiling); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 45 (2009) [hereinafter Capers, *Policing, Race, and Place*] (examining how current policing methods contribute to residential segregation); Bennett Capers, *Policing, Technology, and Doctrinal Assists*, 69 FLA. L. REV. (forthcoming 2017) (manuscript at 29–32) [hereinafter Capers, *Policing, Technology, and Doctrinal Assists*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2760388 [<https://perma.cc/N5K6-CNBA> (staff-uploaded archive)] (discussing how black and Hispanic individuals are stopped and frisked more commonly than white individuals); Capers, *supra* note 9, at 18 (discussing racial profiling by police officers).

18. Devon Carbado makes a similar point. As he notes, “‘front-end’ police contact (which Fourth Amendment law enables) is often the predicate to ‘back-end’ police violence (which Fourth Amendment law should help to prevent).” Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Violence*, 105 CALIF. L. REV. (forthcoming 2017) (manuscript at 103), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2844312 [<https://perma.cc/856T-3NRL> (staff-uploaded archive)].

everyone.¹⁹ In short, it will require a redistribution of privacy. This might seem too much of a sacrifice for some. It is certainly unlikely to sit well with those who are unwilling to adopt, even temporarily, a Rawlsian “veil of ignorance”²⁰ and imagine what type of policing would be fair if they themselves were black or brown.²¹ Absent some “interest convergence,”²² white Americans who currently enjoy a surfeit of privacy might balk at ceding some privacy to those who are black like me.²³ But hear me out. I do think I can make a persuasive and utilitarian argument, even to the naysayers.

I begin, in Part I, by limning some of the problems with policing, with a particular focus on racial profiling. But lest anyone think I am unfairly singling out the police, I make clear that some courts have been anything but innocent bystanders when it comes to racialized policing. The Supreme Court, time and time again, has in effect aided and abetted

19. See Gary T. Marx, *Soft Surveillance: The Growth of Mandatory Volunteerism in Collecting Personal Information—“Hey Buddy Can You Spare a DNA?”*, in SURVEILLANCE AND SECURITY 37, 37–38 (Torin Monahan ed., 2006). The term “soft surveillance” comes from sociologist Gary T. Marx, who uses it to refer to surveillance that relies on persuasion to achieve compliance, increased inclusiveness of the targeted class, and an emphasis on the needs of society as a whole over individual needs. See *id.* Hard surveillance, by contrast, is marked by more direct police interaction, such as individual surveillance, stops, and frisks. *Id.*

20. See JOHN RAWLS, A THEORY OF JUSTICE 12, 136–42 (1971). In his highly influential book, Rawls propounds a thought experiment in which citizens are behind a “veil of ignorance” that blinds them to what attributes they might have, such as their race, sex, or wealth. See *id.* at 137. Rawls writes:

It is assumed, then, that . . . no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology . . . More than this, I assume that the parties do not know . . . [their society’s] economic or political situation, or the level of civilization and culture it has been able to achieve.

Id. From this “original position” of innocence, citizens would be better positioned to imagine a system of justice that is free from self-interest. See *id.* at 19.

21. For more on how such “switching” exercises—what I have elsewhere termed “cross dressing”—might lead to a more egalitarian criminal justice system, see I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 4 (2008) (arguing that “the imaginative act of cross dressing others” can “disrupt inappropriate biases in the criminal arena”).

22. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (noting that the interest of minorities in achieving equality is accommodated only when it converges with the interest of the majority).

23. I am not the first to write about the unequal distribution of privacy along lines that implicate race. See, e.g., Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 407–12 (2003) (arguing that privacy is unequally distributed, benefiting those with property and money in ways that correlate with race); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1265–67 (1999) (similar).

racialized policing. Far from furthering a goal of equality before the law, the Supreme Court has contributed to that goal's very opposite, in effect invoking a type of policing exceptionalism.²⁴ This background informs my argument that it is time to look elsewhere to address policing problems. That elsewhere, as Part II makes clear, is technology. In short, there are ways to harness technology to reduce racialized policing. Such "techno-policing," Part III acknowledges, will come as a cost. It will involve widespread soft surveillance, for a start. And it will mean the redistribution of privacy: many will have to cede some of the privacy that they currently enjoy. Part III accordingly makes the argument that this redistribution is a net good that ultimately will redound to everyone's benefit. More than that, the cost could be necessary if we care about "mak[ing] America what America must become"²⁵—"fair, egalitarian, responsive to the needs of all of its citizens, and truly democratic in all respects, including its policing[.]"²⁶

I. RACE AND THE WAY WE POLICE NOW

For many Americans, the recent spate of police acts of violence against those of us who are black and brown has been, quite simply, an education. Captured on cellphones and dashboard cameras, these acts of violence have become part of the national news, sparking a national conversation about policing and race.

But for other Americans, for those of us of a darker hue, for those of us on "the bottom[.]"²⁷ for those of us marked as policed, the spate of police violence is not news. Nor is it new. Such acts of violence are part of our "pools of knowledge[.]"²⁸ talked about in barbershops and hair salons, on church pews and on street corners, and yes, in prisons. Such racialized police violence is "a constant reminder of the space between

24. See *infra* Section I.D.

25. JAMES BALDWIN, *THE FIRE NEXT TIME* 9 (Modern Library ed. 1995) (1962) ("[G]reat men have done great things here, and will again, and we can make America what America must become.").

26. Capers, *Crime, Legitimacy, and Testifying*, *supra* note 17, at 880.

27. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) ("Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise [of a neutral application of the law]—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.").

28. See David R. Maines, *Information Pools and Racialized Narrative Structures*, 40 SOC. Q. 317, 319–20 (1999) (noting that information is often race based, with blacks being privy to certain information that is largely unknown by whites, and vice versa); see also Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1120 (2008) ("In general, black and white people obtain information through different informational networks, which results in racialized pools of knowledge.").

freedom and ‘unfreedom,’ where the contested citizenship of African Americans is held.”²⁹ It is why so many black and brown parents teach their kids that, when it comes to policing, the notion that we are all equal before the law might be someone’s reality. But it is not theirs.

For those of us who are black and brown, it is hard to imagine a time when there was not a problem with police violence, whether it was the casual cruelty of overseers,³⁰ the violence inflicted by slave patrols,³¹ or the extralegal justice in the form of lynchings that lasted well into the 1950s.³² But it is the problem of policing in the last half-century that I focus on here. Below, I briefly discuss three of those problems—police violence, underenforcement, and racial profiling—with particular attention to racial profiling. I then turn to the subordinating role the Supreme Court has played with respect to these issues. Far from furthering its claimed goal of a color-blind Constitution,³³ the Court has effectively given its blessing to the opposite.³⁴

A. *Police Violence*

On October 13, 2015, at a Democratic primary presidential debate, each of the candidates responded to a recorded question on whether “[b]lack lives . . . matter.”³⁵ Vermont Senator Bernie Sanders responded, “The reason those words matter is the African-American community knows that on any given day some innocent person like Sandra Bland can get into a car and then three days later she’s going to end up dead in

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

30. EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 14–18 (First Vintage Books ed. 1976) (1972).

31. Scholars have noted that “the targeting of African Americans in particular is reminiscent of the slave patrols that demanded ‘passes’ from blacks found in public spaces.” SALLY E. HADDEN, SLAVE PATROLS 117 (2001); see also ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT 106 (2006) (discussing slave patrols); Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101, 102 (1991) (discussing public sites of discrimination).

32. EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 5 (2d ed. 2015) (determining that 4,075 racial terror lynchings occurred in twelve southern states between 1877 and 1950); see also NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES: 1889–1918, at 7–8 (1919) (determining that 3,224 people were killed by lynching mobs between 1889 and 1918).

33. For an examination and a critique of cases claiming this ideal, see generally Neil Gotunda, *A Critique of “Our Constitution Is Color-Blind”*, 44 STAN. L. REV. 1 (1991) (arguing that the United States Supreme Court’s use of color-blind constitutionalism fosters white racial domination).

34. See *infra* Section I.D.

35. Reena Flores, *Democratic Debate: Do Black Lives Matter?*, CBSNEWS.COM (Oct. 13, 2015, 11:50 PM), <http://www.cbsnews.com/news/democratic-debate-do-black-lives-matter/> [<https://perma.cc/K9UA-3NF4>].

jail or their kids are going to get shot[.]”³⁶ He added, “We need to combat institutional racism from top to bottom and we need major, major reforms in a broken criminal justice system.”³⁷ Former Maryland Governor Martin O’Malley also weighed in, agreeing that “[b]lack lives matter” and adding, “[W]e have a lot of work to do to reform our criminal justice system and to address race relations in our country.”³⁸ For her part, Hillary Clinton, who had previously met with Black Lives Matter activists, advocated for the more widespread adoption of police-worn body cameras.³⁹

There is a reason why “black lives matter” has become part of the national conversation, and it has much to do with acts of police violence captured on video. These acts include the fatal death of Eric Garner, who died after being placed in a prohibited chokehold by Officer Daniel Pantaleo in Staten Island, New York, on July 17, 2014.⁴⁰ Garner’s *crime* was selling loose cigarettes on the street.⁴¹ They include the police shooting death of Walter Scott, who was shot in the back by police officer Michael Slager in North Charleston, South Carolina on April 4, 2015.⁴² Scott’s *crime* was having a “broken brake light.”⁴³ They include the police shooting of Laquan McDonald, the seventeen-year-old teenager who was recorded getting shot in the back sixteen times in fifteen seconds by police officer Jason Van Dyke on October 20, 2014.⁴⁴ McDonald’s *crime* was walking down the block with a knife with his back to the police.⁴⁵ They include the video of Dajerria Becton, the fifteen-year old teenage girl who was body slammed to the ground by a

36. *Id.*

37. *Id.*

38. *Id.*

39. Eric Bradner & Dan Merica, *Clinton on Facebook: “Black Lives Matter” and Other Takeaways*, CNN (July 21, 2015, 2:53 PM), <http://www.cnn.com/2015/07/20/politics/hillary-clinton-facebook-black-lives-matter/index.html> [<https://perma.cc/EK38-4SZZ>].

40. Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0 [<https://perma.cc/5V3X-XUPB>].

41. *Id.*

42. Dana Ford, *South Carolina Ex-Police Officer Indicted in Walter Scott Killing*, CNN (June 8, 2015, 5:30 PM), <http://www.cnn.com/2015/06/08/us/south-carolina-slager-indictment-walter-scott/> [<https://perma.cc/E3EE-QLY2>].

43. *Id.*

44. Wayne Drash, *The Killing of Laquan McDonald: The Dashcam Video vs. Police Accounts*, CNN (Dec. 19, 2015, 12:32 AM), <http://www.cnn.com/2015/12/17/us/laquan-mcdonald-video-records-comparison/> [<https://perma.cc/2MKE-NASX>]. Video of this shooting is available online. *Warning, Graphic Content: Laquan McDonald Shooting Dash-Cam Video*, CHI. TRIBUNE, <http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-police-dashboard-short-video-premiumvideo.html> [<https://perma.cc/ECU8-EYG5>].

45. *Id.*

Texas police officer at a graduation pool party.⁴⁶ Becton's *crime* was crashing the pool party with other teenagers.⁴⁷ And they include the cellphone-captured video of Shakara,⁴⁸ the sixteen-year-old foster student who was flipped out of her desk and dragged across a room by Senior Deputy Ben Fields, a school resource officer.⁴⁹ Her *crime* was not putting away her cell phone in class quickly enough.⁵⁰

For those of us who are black or brown, these acts of violence are anything but new. After all, even before the advent of ubiquitous smartphones, dashboard cameras, and body worn cameras, video recordings existed, though they were rare. For example, in 1991, videotaped images of several Los Angeles police officers beating Rodney King with billy clubs, kicking him, and stunning him with a Taser "stun gun" were captured on a neighbor's camcorder.⁵¹ There was also the 2005 police beating of sixty-four-year-old Robert Davis in Louisiana, which happened to be caught on camera by an Associated Press television news crew.⁵² But even when police violence was not caught on tape, even when there was no "white witness" (to borrow Lolita Buckner Inniss's term for the role cameras now play),⁵³ those of us

46. Carol Cole-Frowe & Richard Fausset, *Jarring Image of Police's Use of Force at Texas Pool Party*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/mckinney-tex-pool-party-dispute-leads-to-police-officer-suspension.html> [https://perma.cc/6TW8-5H2J].

47. *Id.*

48. Jenny Jarvie, *Girl Thrown from Desk Didn't Obey Because the Punishment Was Unfair*, ATTORNEY SAYS, L.A. TIMES (Oct. 29, 2015, 11:53 AM), <http://www.latimes.com/nation/la-na-girl-thrown-punishment-unfair-20151029-story.html> [https://perma.cc/F6EV-NYFZ (staff-uploaded archive)] (noting that her attorney identified the minor by her first name, Shakara).

49. Alan Blinder, *Ben Fields, South Carolina Deputy, Fired over Student Arrest*, N.Y. TIMES (Oct. 29, 2015), http://www.nytimes.com/2015/10/29/us/south-carolina-deputy-ben-fields-fired.html?_r=0 [https://perma.cc/TV8D-DFJR]; Polly Mosendz, *Report: South Carolina Student Flipped by Police Officer Is in Foster Care*, NEWSWEEK (Oct. 28, 2015, 4:29 PM), <http://www.newsweek.com/south-carolina-student-flipped-police-officer-foster-care-388119> [https://perma.cc/NXQ7-NMLY].

50. *Id.*

51. See Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1; Hector Tobar & Richard Lee Colvin, *Witnesses Depict Relentless Beating*, L.A. TIMES, Mar. 7, 1991, at B1. As a result of this beating, King suffered eleven broken bones at the base of his skull, a fractured cheekbone, and a broken leg. *The Rodney King Affair*, L.A. TIMES (Mar. 24, 1991), http://articles.latimes.com/1991-03-24/local/me-1422_1_king-s-injuries-officer-laurence-m-powell-beating [https://perma.cc/MFL7-AJNG].

52. See Christine Hauser & Christopher Drew, *3 Police Officers Deny Battery Charges After Videotaped Beating in New Orleans*, N.Y. TIMES, Oct. 11, 2005, at A16.

53. As Lolita Buckner Inniss observes,

[v]ideo surveillance sometimes provides much needed valorization for...less regarded private people [those possessing little power or authority]. This is because private people are far more often lied about, lied to and deemed liars. Hence private people often lose in battles of opposing narratives with public people about what has

who are black and brown *knew*. Even absent a tape, we knew about and felt viscerally the fatal shooting of Amadou Diallo, an unarmed immigrant from Guinea, who was shot forty-one times while attempting to identify himself by displaying his wallet.⁵⁴ Even without a video, we fretted over the shooting of Sean Bell by police officers the day before his wedding.⁵⁵ In 1999, no one recorded Officer Justin Volpe sodomizing Abner Louima with a broomstick in a station house bathroom, requiring three operations and two months of hospitalization, because the officer mistakenly believed Louima had punched him earlier, but still we shuddered.⁵⁶ Nor were there cameras to capture the police shooting of sixty-six-year old Eleanor Bumpurs, an arthritic woman who resisted being evicted from her apartment.⁵⁷ When Bumpurs refused to open the door, the police broke the door and tried to subdue her, eventually shooting her twice with a 12-gauge shotgun.⁵⁸ Even now, we know, even if other Americans do not, that most police violence continues to go unrecorded⁵⁹ and that the common denominator is the color blue, not black or white.⁶⁰ We know police violence is far more widespread than

occurred. In such cases, video surveillance becomes a mostly neutral, unlikely to lie, legitimizing witness. For many of these private people, especially women, people of color or other relatively powerless people, especially women, people of color or other relatively powerless people in society, video surveillance is the modern day white witness.

Lolita Buckner Innis, *Video Surveillance as White Witnesses*, AIN'T I A FEMINIST LEGAL SCHOLAR TOO? (Sept. 30, 2012), <http://innissfls.blogspot.com/2012/09/video-surveillance-as-white-witnesses.html> [<https://perma.cc/7NJJ-ZFXA>].

54. See Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, N.Y. TIMES, Feb. 5, 1999, at A1; Amy Waldman, *A Hard Worker with a Gentle Smile*, N.Y. TIMES, Feb. 5, 1999, at B5; Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), <http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html> [<https://perma.cc/DK5P-YYUA>].

55. See William K. Rashbaum & Al Baker, *50 Bullets, One Dead, and Many Questions*, N.Y. TIMES, Dec. 11, 2006, at B1.

56. See David Barstow, *Officer, Seeking Mercy, Admits to Louima's Torture*, N.Y. TIMES, May 26, 1999, at A1; Joseph P. Fried, *Volpe Sentenced to a 30-Year Term in Louima Torture*, N.Y. TIMES, Dec. 14, 1999, at A1; Leonard Levitt, *The Louima Verdicts: Some Splits, But Blue Wall Stands*, NEWSDAY, June 9, 1999, at A4. Officer Justin Volpe eventually pleaded guilty to sodomizing Louima; a second officer was convicted aiding in the assault. See Fried, *supra*, at A1.

57. Selwyn Raab, *Officer Indicted in Bumpurs Case*, N.Y. TIMES (Feb. 1, 1985), <http://www.nytimes.com/1985/02/01/nyregion/officer-indicted-in-bumpurs-case.html> [<https://perma.cc/P4PX-RYMJ>].

58. *Id.*

59. See, e.g., *Black, White, and Blue: Americans' Attitudes on Race and Police*, ROPER CTR. (Sept. 22, 2015), <http://ropercenter.cornell.edu/black-white-blue-americans-attitudes-race-police/> [<https://perma.cc/XDZ5-LR8A>].

60. Minority officers are not exempt from engaging in racial profiling or using excessive force, as demonstrated by the shooting of Sean Bell by minority officers, the more recent

the videos that, through the happenstance of a camera or witnesses, make the evening news.⁶¹ This police violence surrounds us, at least those of us who are black or brown. To us, we look forward to the day when police violence is, in fact, “news.”⁶² Now, it is only new to those too young to know that there is not yet equality under the law. So we tell our sons and daughters, but especially our sons: “It’s unlikely but possible that you could get killed today. Or any day. I’m sorry, but that’s the truth. Black maleness is a potentially fatal condition.”⁶³ We tell them, as Ta-Nehisi Coates tells his son in his brutally honest *Between the World and Me*,

the police departments of your country have been endowed with the authority to destroy your body. It does not matter if the destruction is the result of an unfortunate overreaction. It does not matter if it originates in a misunderstanding. It does not

shooting of Keith Lamont Scott in Charlotte, North Carolina, and prosecution of officers in the Freddie Gray case. See, e.g., *Sean Bell Shooting: Lessons from a Tragedy*, NEWSWEEK (Apr. 24, 2008, 8:00 PM), <http://www.newsweek.com/sean-bell-shooting-lessons-tragedy-86351> [<https://perma.cc/JF4U-2KMR>]; see also Richard Fausset & Alan Blinder, *Charlotte Officer ‘Justified’ in Fatal Shooting of Keith Scott*, N.Y. TIMES (Nov. 30, 2016), <http://www.nytimes.com/2016/11/30/us/charlotte-officer-acted-lawfully-in-fatal-shooting-of-keith-scott.html> [<https://perma.cc/59ST-HVSP>] (noting that the officer who fired the fatal shot is black); Derek Hawkins, Lynh Bui & Peter Hermann, *Baltimore Prosecutors Drop All Remaining Charges in Freddie Gray Case*, WASH. POST (July 27, 2016), https://www.washingtonpost.com/local/public-safety/baltimore-prosecutors-drop-all-remaining-charges-in-freddie-gray-case/2016/07/27/b5c10f34-b655-4d40-87e6-80827e2f0e2d_story.html?utm_term=.8f3f6662a23e [<https://perma.cc/9GCP-8WMR>] (observing that three of the six charged officers are black). Nor should this be surprising. Social cognition research suggests that almost everyone, regardless of race, has implicit biases. See Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 752–54 (2001). Performance theory provides a second explanation. In short, to make themselves acceptable to fellow officers, minority officers may “perform” as they believe majority officers would. See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1792–93 (2003) [hereinafter Carbado & Gulati, *Critical Race Theory*] (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)). For more on performance theory and how it rewards minorities who engage in assimilationist and “comfort strategies” to fit in, including strategies that are harmful to their minority group, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1300–01 (2000) [hereinafter Carbado & Gulati, *Working Identity*]. Also, employers are more likely to hire minority officers who are “racially palatable” and accept majority norms. Carbado & Gulati, *Critical Race Theory*, *supra*, at 1793. For more on this phenomenon, see *id.* at 1792–93.

61. For an aggregation of statistics on police violence, see MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/> [<https://perma.cc/S4QJ-GMNQ>] (last updated Jan. 1, 2017).

62. See *News*, MERIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/news> [<https://perma.cc/56DN-RZM8>] (designating “news” as meaning “previously unknown information”).

63. Touré, *How to Talk to Young Black Boys about Trayvon Martin*, TIME (Mar. 21, 2012), <http://ideas.time.com/2012/03/21/how-to-talk-to-young-black-boys-about-trayvon-martin/> [<https://perma.cc/2L92-VUTN>].

matter if the destruction springs from a foolish policy. Sell cigarettes without the proper authority and your body can be destroyed. Resent the people trying to entrap your body and it can be destroyed. Turn into a dark stairwell and your body can be destroyed. The destroyers will rarely be held accountable. Mostly they will receive pensions. And destruction is merely the superlative form of a dominion whose prerogatives include friskings, detaining, beatings, and humiliations. All of this is common to black people. And all of this is old for black people. No one is held responsible.⁶⁴

B. Underenforcement

For those of us of a darker hue, there is another issue we know intimately: the issue of underenforcement, or the failure of the state to provide communities with equal protection of the criminal laws.⁶⁵ It is an issue that Jill Leovy, a white journalist, recently explored in her widely praised exposé, *Ghettoside*.⁶⁶ But again, for black and brown folk, the problem is an old one. Even before Professor Randall Kennedy observed that “the principle injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws[,]”⁶⁷ the group Public Enemy was rapping “911 is a Joke[,]”⁶⁸ Tracy Chapman was singing in “Behind the Wall” that “the police always come late/If they come at all[,]”⁶⁹ and James Baldwin was noting that the police “certainly do not protect the lives or property of Negroes[.]”⁷⁰ In short, black and brown folk have known that underenforcement pervades every level of criminal justice.

64. COATES, *supra* note 13, at 9.

65. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1716–22 (2006); see also DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 139–41 (2008) (“[I]nadequate policing can be as much a threat to democracy as overly harsh policing.”). This underenforcement can take numerous forms, including the failure to diligently investigate and prosecute cases involving minority victims, and the failure to seek adequate punishment in cases involving minority victims. This underenforcement contributes to what Monica Bell describes as “legal cynicism,” the feeling shared by many African Americans that they are “essentially stateless, unprotected by the law and its enforcers, marginal to the project of making American society.” Monica C. Bell, *Police Reform and the Dismantling of Legal Cynicism*, 126 YALE L.J. (forthcoming 2017) (manuscript at 1–2) (on file with author).

66. JILL LEOVY, *GHETTOSIDE* 8–12, 316–19 (2015) (using a homicide in South Los Angeles to explore the larger issue of homicide rates in poor, black communities, larger society’s historical indifference to such homicides, and arguing for greater state intervention in providing the type of policing that provides justice to these black victims).

67. KENNEDY, *supra* note 7, at 19.

68. PUBLIC ENEMY, *911 Is a Joke*, on FEAR OF A BLACK PLANET (Def Jam Records 1990).

69. TRACY CHAPMAN, *Behind the Wall*, on TRACY CHAPMAN (Elektra Records 1988).

70. James Baldwin, *Fear of the Police*, PAGEANT, Dec. 1964, at 188–89.

And studies validate our “pools of knowledge.”⁷¹ Consider capital punishment, often considered an example of overenforcement by white progressives.⁷² Black and brown communities also understand capital punishment as yet another example of underenforcement.⁷³ In a sense, the Baldus study of death penalty prosecutions in Georgia confirmed what those of us who are black and brown already knew: prosecutors were less likely to seek the death penalty in cases involving minority victims, and even when they did seek it, jurors were less likely to recommend death.⁷⁴ We might have not realized the magnitude of the disparity—that, even after taking into account non-racial variables, “defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.”⁷⁵ But that black and brown lives were not valued like white lives, even in courts of law—that we knew.

Studies have revealed similar patterns of underenforcement in rape cases. For example, there is Gary LaFree’s oft-cited study, *Rape and Criminal Justice*.⁷⁶ Examining the impact of race in processing decisions in 881 forcible sex offenses reported to the Indianapolis police during a three-year period, LaFree found that although black men accused of assaulting black women accounted for forty-five percent of the reported rapes, they accounted for only seventeen percent of all men who received sentences of six years or more.⁷⁷ By contrast, black men accused of assaulting white women accounted for “[fifty] percent of all men who received sentences of six or more years.”⁷⁸ That black victims were comparatively undervalued remained true even when LaFree

71. Robinson, *supra* note 28, at 1120.

72. See, e.g., Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty*, 63 VAND. L. REV. 307, 323 (2010) (considering the possibility of the death penalty being overenforced in wealthy localities).

73. Cf. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391–93 (1988) (observing that race of victim disparities in capital punishment prosecutions indicate a devaluation of black victims and that black communities are “disadvantaged by the relative leniency extended to killers of blacks”).

74. DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 4 (1990) (“[O]ur research convinces us that in the absence of some . . . system of oversight, a substantial level of arbitrary and discriminatory death sentencing under the laws as currently drawn is inevitable.”); see also Barbara O’Brien et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990–2009*, 94 N.C. L. REV. 1997, 2000 (2016) (“The analysis here strongly suggests that in death-eligible murder cases with at least one white victim, defendants are more likely to be sentenced to death than all other cases.”). The Baldus study is cited and formed the basis for the challenge to the death penalty in *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

75. *McCleskey*, 481 U.S. at 287.

76. GARY LAFREE, RAPE AND CRIMINAL JUSTICE (1989).

77. *Id.* at 129, 133.

78. *Id.*

controlled for other factors, including whether the defendant and victim were strangers.⁷⁹

Again, this underenforcement permeates every aspect of the criminal justice system when it comes to victims who are black or brown, whether they are victims of burglary or vandalism, assault or fraud.⁸⁰ As Alexandra Natapoff has observed, all of this has the expressive effect of “send[ing] an official message of dismissal and devaluation.”⁸¹

C. Racial Profiling

Though the two problems I have discussed so far—police violence and underenforcement—are important, I want to focus on a third problem, although I will return to the first two later. I focus on this third problem, racial profiling, for several reasons. One, it seems clear that isolated incidents of police violence, while problems in themselves, are also symptomatic of a much larger problem of racialized policing in general. To put this differently, acts of police violence tend to begin with racialized encounters, stops, frisks, and arrests.⁸² Two, to the extent the problem of underenforcement is one of resources and priorities, it might be that the best way to counter that problem is by first addressing aggressive racial profiling tactics so that resources can be redirected to tackle actual crime. Three, I focus on racial profiling because the evidence here is abundant and points in one direction. The data discussed below confirm what black and brown communities long ago dubbed “Walking While Black” and “Driving While Black[.]”⁸³ When it comes to racial profiling, the numbers *are* the argument.

79. See *id.* at 135–43.

80. Natapoff, *supra* note 65, at 1722–31. Even 911 response times might depend on the race of the neighborhood, as a recent internal report of the Milwaukee Police Department demonstrated. See Colleen Henry, *MPD Report Says South Side 911 Calls Answered Twice as Fast as North Side*, WISN (Nov. 19, 2015), <http://www.wisn.com/article/mpd-report-says-south-side-911-calls-answered-twice-as-fast-as-north-side/6329541> [<https://perma.cc/33HH-AMSU>].

81. Natapoff, *supra* note 65, at 1749.

82. This connection between front-end policing and back-end police violence has not been lost on scholars. See, e.g., Carbado, *supra* note 18 (manuscript at 103); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. (forthcoming 2017) (manuscript at 10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847300 [<https://perma.cc/Y24G-6DS3> (staff-uploaded archive)] (discussing the short, “thin blue line from an initial police-civilian encounter to an officer’s authorization to use deadly force”).

83. For one of the early and seminal discussions of these phenomena, see David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 265 (1999). For Latinos, there is also the phenomenon known as “Driving While Brown[.]” Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 1–3 (2005) (discussing the profiling of Latinos).

Consider the numbers from *Floyd v. City of New York*,⁸⁴ a recent class-action suit challenging the New York City police department's aggressive stop-and-frisk practices as violating the Fourth Amendment and the equal protection clause.⁸⁵ Between January 2004 and June 2012, the New York City Police Department made over 4.4 million forcible stops of individuals, 83% of whom were black or Hispanic.⁸⁶ To put this in perspective, stops of whites, if spread across the population of New York City, would amount to stops of approximately 2.6% of the white population.⁸⁷ By contrast, stops of blacks spread across the population of New York City would amount to stops of approximately 21.1% of the population.⁸⁸

Nor is New York alone. Studies have found evidence of racial profiling in Los Angeles: a study by Professor Ian Ayres found that the stop rate was 3,400 stops higher per 10,000 residents for blacks than for whites, and almost 360 stops higher for Hispanics than for whites, even after controlling for variables such as the rate of violent and property crimes.⁸⁹ In Philadelphia, a recent review of pedestrian stops found that 80.23% of the stops were of minorities, far greater than their representation in the population.⁹⁰ In Minnesota, a study found that black drivers were stopped 214% more than expected and Latino drivers 95% more than expected.⁹¹ In Maryland, a report by the Maryland State Police found that African-Americans comprised 72.9% of all of the

84. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

85. *Id.* at 556.

86. *Id.* at 556, 558. This number is likely conservative, since officers sometimes neglect to document each stop. *See id.* at 559; *see also* First Report of the Monitor, *Floyd v. City of New York* at 5, No. 1:08-cv-01034 (S.D.N.Y. July 9, 2015), <https://ccrjustice.org/sites/default/files/attach/2015/07/Floyd%20Monitors%20Report%207%209%202015.pdf> [<https://perma.cc/9GLQ-SSLB>] (“NYPD has conducted several precinct audits and concluded that some stops were made but not documented.”).

87. *See* Press Release, *Analysis of New NYPD Stop-and-Frisk Data Reveals Dramatic Impact on Black New Yorkers*, ACLU N.Y. (Nov. 26, 2007), <http://www.aclu.org/racialjustice/racialprofiling/33095prs20071126.html> [<https://perma.cc/DE9B-XN34>]; *cf.* *Floyd*, 959 F. Supp. 2d at 558–59 (describing the number of blacks stopped in New York City between 2004 and 2012).

88. *See id.*

89. IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT 27 (Oct. 2008), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf> [<https://perma.cc/U9GK-7BTU>].

90. *See* Plaintiff's Fifth Report to Court and Monitor of Stop and Frisk Practices, *Bailey v. City of Philadelphia* at 13, C.A. No. 10-5952 (E.D. Pa. Feb. 24, 2015), <https://www.clearinghouse.net/chDocs/public/PN-PA-0013-0005.pdf> [<https://perma.cc/W52Y-8NCV>].

91. David Montgomery, *Data Dive: Racial Disparities in Minnesota Traffic Stops*, TWINCITIES.COM (July 8, 2016, 5:46 PM), <http://www.twincities.com/2016/07/08/data-dive-racial-disparities-in-minnesota-traffic-stops/> [<https://perma.cc/FER2-797D>].

drivers stopped and searched along a stretch of I-95, even though they comprised only 17.5% of the drivers violating traffic laws on the road.⁹² In Boston, an analysis of more than 200,000 Boston Police Department records of police-citizen encounters (which include observations, interrogations, stops, frisks, and searches) revealed that blacks were subjected to 63% of these encounters even though they make up just 24% of Boston's population.⁹³ In Texas, an analysis of fifteen million traffic stops showed that Hispanic drivers were 33% more likely to be subjected to searches than whites.⁹⁴ In New Jersey, statistician John Lamberth's study revealed that black drivers along I-95 were 4.85 times as likely to be stopped as similarly situated whites.⁹⁵ In Greensboro, North Carolina, an analysis of tens of thousands of traffic stops and arrest data also found "wide racial difference in measure after measure of police conduct."⁹⁶ Even a liberal enclave like San Francisco is not immune. There, a U.S. Department of Justice study recently found that black drivers were 24% more likely to be stopped than their proportional representation in the population would suggest.⁹⁷ Similar

92. See JOHN LAMBERTH, *ACLU IN THE COURTS: REPORT OF JOHN LAMBERTH, PH.D.* (Oct. 4, 2000), <https://www.clearinghouse.net/chDocs/public/PN-MD-0003-0006.pdf> [<https://perma.cc/DRD9-FCSC>]; see also *Review of Federal Asset Forfeiture Program: Hearing Before the Legis. and Nat'l Sec. Subcomm. of the Comm. on Gov't Operations*, 103d Cong. 356-71 (1993) (discussing a study from Florida that showed that eighty percent of drivers whose cars were searched in 1991 were black or Hispanic).

93. AM. CIVIL LIBERTIES UNION, *BLACK, BROWN, AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007-2010*, at 1 (Oct. 2014), <https://aclum.org/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf> [<https://perma.cc/JD43-5VJG>].

94. Eric Dexheimer, *DPS Searches Hispanics More, Finds Less, Statesmen Analysis Shows*, AUSTIN AM.-STATESMEN (Dec. 5, 2015, 1:53 PM), <http://www.mystatesman.com/news/crime--law/dps-searches-hispanics-more-finds-less-statesman-analysis-shows/VClFavaf6lzhsv4jKuFbaK/> [<https://perma.cc/G3QJ-G53F>].

95. See John Lamberth, *Driving While Black: A Statistician Proves That Prejudice Still Rules the Road*, in RACE, ETHNICITY, AND POLICING 32, 32-33 (Stephen K. Rice & Michael D. White eds., 2010).

96. See Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [<https://perma.cc/FTH9-JEMJ>]. For more evidence of racial profiling in North Carolina, see Frank R. Baumgartner et al., *Targeting Young Men of Color for Search and Arrest During Traffic Stops: Evidence from North Carolina, 2002-2013*, POLITICS, GROUPS, AND IDENTITIES 5-17 (Apr. 13, 2016), <https://www.unc.edu/~fbaum/articles/PGI-2016-Targeting.pdf> [<https://perma.cc/2464-V9SM>].

97. CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, *COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF THE SAN FRANCISCO POLICE DEPARTMENT* 76 (Oct. 2016), <https://ric-zai-inc.com/Publications/cops-w0817-pub.pdf> [<https://perma.cc/X5ZP-VTQZ>]; Matt Zapotosky, *Justice Department Report Blasts San Francisco Police*, WASH. POST (Oct. 12, 2016), <https://www.washingtonpost.com/world/national-security/justice-department-report-blasts-san-francisco-police/2016/10/12/becb841c-90a2-11e6-a6a3-d50061aa9fae>

racial disparities have been found in a host of other jurisdictions, both large and small.⁹⁸

D. Juridical Subordination

Standing alone, any one of these problems—police violence, underenforcement, and racial profiling—would be disconcerting and at odds with our goal of equality before the law. But it is the role that the Supreme Court has played in this state of affairs that warrants further scrutiny. The Court has not been an innocent bystander to unequal policing. Rather, the Court has been a facilitator, engaging in what Roy Brooks refers to as “juridical subordination[.]”⁹⁹

The Supreme Court’s facilitation of unequal policing is certainly true with respect to police violence. Confronted with evidence of systemic police violence, the Court has repeatedly erected roadblocks. For example, when confronted with a class action suit seeking injunctive relief against police brutality, the Court in *Rizzo v. Goode*¹⁰⁰ held that, despite the past pervasiveness of police brutality, similar future behavior was too speculative to warrant injunctive relief.¹⁰¹ The Court then reaffirmed this holding in *Los Angeles v. Lyons*.¹⁰² And in *Graham v. Conner*,¹⁰³ the Court ruled that the amount of force officers are entitled to use must be construed “from the perspective of a reasonable officer on the scene,”¹⁰⁴ a standard that is by definition self-serving and easily

_story.html?hpid=hp_hp-more-top-stories_sanfran-1030pm%3Ahomepage%2Fstory [https://perma.cc/2FA3-Q8YK].

98. See Capers, *Crime, Legitimacy, and Testifying*, *supra* note 17, at 850–51 & n.86 (citing to jurisdictions); see also Harris, *supra* note 83, at 277–88 (describing reports from several states).

99. See ROY L. BROOKS, *STRUCTURES OF JUDICIAL DECISION-MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY* 188 (1st ed. 2002) (defining the term to mean “structural limitations that disadvantage outsiders”).

100. 423 U.S. 362 (1976).

101. *Id.* at 375–76.

102. 461 U.S. 95, 103–05 (1983) (holding lower court lacked jurisdiction to entertain Lyon’s claim for injunctive relief barring the use of chokeholds by Los Angeles officers; prior use of chokeholds, including against Lyons, could not establish a real and immediate threat that police would again use a chokehold against Lyons personally). In 1994, Congress restored some potential for injunctive relief by enacting 42 U.S.C. § 14141 as part of the Violent Crime Control and Law Enforcement Act of 1994, which empowers the U.S. Attorney General to seek injunctive relief against police departments based on a pattern or practice of misconduct depriving persons of rights, privileges, or immunities secured by the Constitution. See 42 U.S.C. § 14141 (2012). For more on the application of this provision, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 525–33 (2004).

103. 490 U.S. 386 (1989).

104. *Id.* at 396.

manipulated to benefit police officers.¹⁰⁵ Perhaps most troubling, in *Screws v. United States*,¹⁰⁶ the Court read 18 U.S.C. § 242 (formerly 18 U.S.C. § 52), which prohibits depriving a person's rights under the color of law, as requiring proof that a police officer had "a specific intent to deprive a person of a federal right made definite by decision or other rule of law[.]"¹⁰⁷

The Court has played a similar role with respect to underenforcement. In *DeShaney v. Winnebago County Department of Social Services*,¹⁰⁸ the Court effectively shut down the main avenue for citizens to protest underenforcement through the court system when it made clear that there is no due process "right" to state protection from

105. For example, police are often trained to assume that lethal force may be used when a dangerous person is within twenty-one feet of an officer. See John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 175–76 (2016). This twenty-one feet rule, familiar to officers, thus may be invoked to justify a shooting as "reasonable" even where the facts standing alone do not lend themselves to reasonableness. See *id.* For a discussion of how this rule allows police to be hyper-defensive and serves to "justify" shootings, see Nancy C. Marcus, *Out of Breath and down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOWARD L.J. 5, 11 (2015). See also Gross, *supra*, at 169–76.

106. 325 U.S. 91 (1945).

107. *Id.* at 103. In *Screws*, a Georgia sheriff, along with two deputies, bludgeoned to death a handcuffed black man. *Id.* at 92–93. When local authorities failed to investigate the killing, federal authorities stepped in and charged the sheriff with violating 18 U.S.C. § 242 (formerly 18 U.S.C. § 52), which prohibits violence under color of law. *Id.* at 93. However, the Supreme Court vacated the conviction, finding that the statute was impermissibly vague and that to save the statute from unconstitutionality, a "specific intent to deprive a person of a federal right made definite by decision or other rule of law" must be read into the statute. *Id.* at 103. As commentators have noted, on remand, the jury was presented with the same evidence but this time was instructed that it must find that the sheriff, in bludgeoning the handcuffed prisoner to death, had the specific intent to deprive the prisoner of a constitutional right. See ROBERT K. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS* 114–15 (1947); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2186 & n.329 (1999). Faced with this hurdle, the jury was reported to have acquitted. *Id.* Since *Screws*, prosecutions of officers under § 242 have been rare, in part because of the difficulty in proving that an officer acted with the requisite *mens rea*, as Paul Chevigny has observed of § 242 prosecutions:

To get a conviction, the [federal] prosecution must prove "specific intent" on the part of the local official to violate a federal right, as distinct, for example, from an intent simply to assault the victim. . . . The usual difficulties in prosecuting police in any system, combined with the high standard of intent and the deference to local prosecutors, mean that federal criminal law contributes little to the accountability of local police for acts of violence.

PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 107–08 (1995). For more on the impact of *Screws*, see Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 722 (1996); David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 19–20 (1999).

108. 489 U.S. 189 (1999).

private violence,¹⁰⁹ a ruling that certainly disadvantages the poor and minorities who are least likely to be able to afford private protection. The Court reaffirmed that decision in *Town of Castle Rock v. Gonzales*,¹¹⁰ a suit brought by a brown woman¹¹¹ after the police ignored her calls that her husband had violated a restraining order and kidnapped her children; during the several hours the police ignored her calls, her husband killed the children.¹¹² The Court reiterated that she did not have a right to protection and thus could not claim a due process violation.¹¹³

All of these cases exacerbate the problem of underenforcement in minority communities. That minority communities do not receive the same protection from the police that other communities receive might be unfair. But it is not actionable under the due process clause. Nor is it likely to fare better under the equal protection clause, given the Court's decisions in *United States v. Armstrong*,¹¹⁴ which required plaintiffs to meet the exacting burden of establishing that similarly situated individuals of a different race were treated differently and that such different treatment was motivated by a discriminatory purpose;¹¹⁵ and in *McCleskey v. Kemp*,¹¹⁶ which essentially insulated unequal treatment from review in deference to prosecutorial discretion.¹¹⁷ In a society of negative rights,¹¹⁸ the Court has made it clear that minorities should not expect recourse through the judicial system.

109. *Id.* at 195. Although *DeShaney* involved the failure of a state agency to protect a child from abuse, the Court's holding was broad. The Court stated that "nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.*

110. 545 U.S. 748 (2005).

111. The suit was brought by Jessica Gonzales, who identifies as "a Latina and Native woman[.]" See *Testimony of Jessica Lenahan*, INTER-AM. COMM'N ON HUMAN RIGHTS 1, 5 (Oct. 22, 2008), <http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Gonzalesdocs/jess%20statement%20merits%20hearing.pdf> [<https://perma.cc/P9LA-DYFW>].

112. *Town of Castle Rock*, 545 U.S. at 768–69 (holding that the Fourteenth Amendment "did not create a system by which police departments [can be] generally held financially accountable for crimes that better policing might have prevented"); see also David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1280–87 (1999) (describing traditional view that police protection is immune from due process claims).

113. *Town of Castle Rock*, 545 U.S. at 768.

114. 517 U.S. 456 (1996).

115. See *id.* at 465.

116. 481 U.S. 279 (1987).

117. See *id.* at 297.

118. The negative rights theory to constitutionalism, which the Supreme Court has repeatedly endorsed, posits that the state is under no constitutional obligation to provide services to its polity. See Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 983 (1996) (quoting *Jackson v. City of Joliet*, 715

It is the Court's role in enabling racial profiling, however, that has had the most pernicious effect on unequal policing. Consider *Terry v. Ohio*.¹¹⁹ The issue before the Warren Court was a straightforward one: Did the police violate the Fourth Amendment when they detained Terry and his companion, both African-American,¹²⁰ in the absence of probable cause to believe that they had committed a crime?¹²¹ On its face, such a seizure of Terry and his companion—an officer had observed them engaged in the noncriminal act of peering in a store window—would seem to violate the Fourth Amendment, which at the time was understood as requiring probable cause as the predicate to a search or seizure.¹²² To get around this hurdle, the Court began one of its earliest shifts to focusing on the reasonableness clause of the Fourth Amendment.¹²³ By doing so, the Court was able to assert that the Fourth Amendment, rather than containing a blanket probable cause requirement, permitted courts to balance the needs of the police against the intrusions to the individual.¹²⁴ With this judicial legerdemain, the Court noted rising crime rates and used that as a justification to permit officers to conduct forcible stops, even in the absence of probable cause.¹²⁵ Rather, a standard less than probable cause—a standard entirely absent from the text of the Fourth Amendment—would

F.2d 1200, 1203 (7th Cir. 1983)) (describing the negative liberties approach to constitutionalism).

119. 392 U.S. 1 (1968).

120. Interestingly, the Court made no mention of the race of Terry or his companion. Even if race was not surfaced, however, it was clearly just below the surface. For an analysis of the Court's decision to elide race in *Terry*, see Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 967–68 (1999).

121. See *Terry*, 392 U.S. at 11.

122. It is telling, for example, that the draft opinion Chief Justice Warren circulated to his colleagues analyzed the case in terms of whether the officer had probable cause. See John Q. Barrett, *Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause*, in CRIMINAL PROCEDURE STORIES 295, 304–05 (Carol S. Steiker ed., 2006). Similarly, it is telling that Justice Douglas, in his dissent from the final opinion, noted that the majority's decision was “water[ing] down constitutional guarantees and giv[ing] the police the upper hand.” *Terry*, 392 U.S. at 39 (Douglas, J., dissenting). For a discussion of the Court's abandonment of the normal probable cause requirement, see Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1278 (1998); see also Paul Butler, “A Long Step Down the Totalitarian Path”: Justice Douglas's Great Dissent in *Terry v. Ohio*, 79 MISS. L.J. 9, 22 (2009) (noting that the court declined to apply the relatively high standard of probable cause in *Terry*).

123. See *Terry*, 392 U.S. at 20–21 (citing *Camara v. Municipal Court*, 387 U.S. 523, 534–37 (1967)); Butler, *supra* note 122, at 20–21 (discussing the shift to a “reasonable suspicion” standard in *Terry*).

124. See *Terry*, 392 U.S. at 20–21.

125. See *id.* at 23–24.

suffice.¹²⁶ So long as an officer could articulate reasonable suspicion to believe that “criminal activity may be afoot[,]” the officer could conduct a forcible limited detention.¹²⁷ The Court used a similar concern about crime and officer safety to justify another watering down of the Fourth Amendment: if the officer also had reasonable suspicion that a person was armed or dangerous, the officer could add a pat down for weapons—in other words, a stop and frisk.¹²⁸

Importantly, in deciding *Terry* as it did, the Court explicitly recognized that stop-and-frisk practices were not race neutral and that its *Terry* decision was likely to have a disproportionate impact on racial minorities.¹²⁹ Indeed, the reason the officer focused on Terry and his companion and concluded that “they just didn’t look right to me at the time”¹³⁰ likely had much to do with race.¹³¹ However, this was a trade off the Court was willing to make. In weighing the needs of the police on one side and the privacy interests of racial minorities and goal of race-blind policing on the other, the Court came down on the side of the police. Indeed, lest there be any doubt that there was a police exception to the notion that the state should be color blind, the Court clarified this point a few years later: the police may consider race and ethnicity in

126. In emphasizing reasonableness, the Court engaged in doctrinal drift, allowing a reasonableness approach that it had just adopted in the administrative search context in *Camara*, 387 U.S. 523, to find a home in the law enforcement context. *Terry*, 392 U.S. at 21. As Joshua Dressler and Alan Michaels have written of this adoption, “[i]f *Camara* cracked the Fourth Amendment monolith, *Terry v. Ohio* broke it entirely.” See 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 17.01, at 277–79 (4th ed. 2006).

127. *Terry*, 392 U.S. at 30.

128. *Id.* at 27.

129. See *id.* at 14 n.11. The Court noted:

While the frequency with which “frisking” forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the “stop and frisk” of youths or minority group members is “motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.”

Id. (quoting LAWRENCE P. TIFFANY, DONALD M. MCINTYRE, JR. & DANIEL L. ROTENBERG, DETECTION OF CRIME 47–48 (Frank J. Remington ed., 1967)).

130. Brief for Petitioner at 6, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 93600, at *6.

131. That race likely played a role in the stop in *Terry* has not been lost on other commentators. See, e.g.; Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1574 (2011) (noting that “it is not unreasonable to conclude Officer[] McFadden’s comments were racially inflected”). See generally Thompson, *supra* note 120 (providing an overview of the use of race under the *Terry* standard).

deciding whom to stop during border stops.¹³² Many lower courts have interpreted this case to permit the use of race as a factor in stop-and-frisk decisions.¹³³

Equally important, in embracing a standard far weaker than probable cause, and one that only need be articulated *ex post*, the Court implicitly sanctioned a category that is “so malleable that reasonable suspicion is often reconfigured into whatever a law enforcement officer wants it to be at any given moment.”¹³⁴ This weak standard has been a windfall to law enforcement officers, who can and do categorize almost anything as suspicious. Justice Thurgood Marshall observed as much when he noted that the Drug Enforcement Administration’s drug courier profile could apply to almost anyone agents wanted to stop without discrimination based on the type of ticket the passenger had purchased, the amount of luggage the passenger carried, where the passenger was seated on the plane, or how the passenger behaved.¹³⁵

There is one further problem with *Terry* that scholars have only recently begun to analyze. In creating an articulable reasonable suspicion standard,¹³⁶ the Court failed to foresee that its malleable standard would result not only in individual stops and frisks that could be separately analyzed for their constitutionality but also the wholesale

132. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 563–64 (1976) (allowing race as a permissible factor in conducting border stops); *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (also allowing race as a permissible factor in conducting border stops).

133. See, e.g., *United States v. Pena-Cantu*, 639 F.2d 1228, 1228–29 (5th Cir. 1981) (discussing how officers stopped vehicles containing entirely adult male Hispanics); *United States v. Hernandez-Lopez*, 538 F.2d 284, 285 (9th Cir. 1976) (discussing how an officer stopped a driver because he was dressed “like a Mexican cowboy”); *United States v. Travis*, 837 F. Supp. 1386, 1391 (E.D. Ky. 1993) (discussing how officers believed that focusing on minorities was an effective use of law enforcement resources). For a discussion of lower courts permitting the use of race as a factor in stop-and-frisk decisions, see Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 232–33 (1983); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2068–69 (2011); Randall S. Susskind, Note, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 324, 336–38 (1994). For a sampling of cases allowing the use of racial incongruity as a factor in determining reasonable suspicion, see Capers, *Policing, Race, and Place*, *supra* note 17, at 66 n.148.

134. Capers, *Crime, Legitimacy, and Testifying*, *supra* note 17, at 860.

135. *United States v. Sokolow*, 490 U.S. 1, 13–14 (1989) (Marshall, J., dissenting) (citing over a dozen federal cases that fit the DEA’s broad drug courier profile, including instances where “suspect was first to deplane[,]” the “last to deplane[,]” or “deplaned from the middle”; where suspects had “one-way tickets[,]” “round-trip tickets[,]” “non-stop flights[,]” or “changed planes”; suspects with “no luggage” or “new suitcases”; suspects who were “traveling alone” or “traveling with [a] companion”; and suspects who “acted nervously” or “acted calmly”).

136. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

use of such tactics across entire communities.¹³⁷ It is the systemic use of stops and frisks that are the problem du jour. What was really at issue in New York City, for example, was not so much the constitutionality of individual stops, or stops at the retail level. Rather, the problem was an entire program, referred to as New York's aggressive stop-and-frisk policy, instituted as a top-down approach and supported by then-Mayor Michael Bloomberg and then-Police Commissioner Raymond Kelly.¹³⁸ As Tracy Meares observes, these are "programmatically stops . . . imposed from the top down" on a massive scale.¹³⁹ *Terry*, as a case, is still inadequate for addressing this problem. And this is to say nothing of inefficiency of stop and frisk as a police tactic¹⁴⁰ or evidence that stop-and-frisk policing could even contribute to an increase in law breaking rather than a diminution.¹⁴¹

Terry, however, was not the Court's only decision to contribute to racialized policing and sacrifice the privacy interests of racial minorities. Equally detrimental was its decision in *Whren v. United States*.¹⁴² Faced

137. See Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 162 (2015).

138. See 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-e2aaf55a5f84_story.html?utm_term=.ea89ff51f6e9 [<https://perma.cc/KR5K-NKQ7>]; Jessica Chasmar, *NYPD Commissioner Raymond Kelly Defends 'Essential' Stop-and-Frisk*, WASH. TIMES (July 23, 2013), <http://www.washingtontimes.com/news/2013/jul/23/nypd-commissioner-raymond-kelly-defends-essential/> [<https://perma.cc/ZZ9V-JVQN>].

139. Meares, *supra* note 137, at 162.

140. See, e.g., Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop-and-Frisk as a Modality of Urban Policing*, 100 MINN. L. REV. (forthcoming 2017) (manuscript at 15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845540 [<https://perma.cc/WH9S-GBEX> (staff-uploaded archive)] (reviewing studies and concluding that the "empirical case for a crime-control benefit from [stop-and-frisk practices] . . . does not stand on strong foundations").

141. See Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1282 (2004) (observing that "racial profiling on the highways may well increase the amount of profiled crime and costs associated with police searches, resulting in numerically more white motorists offending because of a perceived sense of immunity"); see also K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 271 (2009) (demonstrating that aggressive policing could ultimately be criminogenic in part because of legitimacy failures and that victims of profiling will perceive the system as illegitimate and feel less obligated to obey the law). For a discussion of how aggressive policing in general can increase crime, see Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. & CRIMINOLOGY 335, 338 (2011) ("[T]he local policing practices currently favored in much of America not only have hidden costs for effective crime prevention but also can directly undermine sound responses to the threat of terrorism.").

142. 517 U.S. 806 (1996).

with a case in which vice-squad officers observed two black men in a Pathfinder, decided to follow them, and pulled them over after observing them turn without signaling, the Court held that it was irrelevant whether the police stopped the vehicle on a pretext.¹⁴³ Writing for the entire Court, Justice Scalia concluded that the subjective motivations of the officers, *even if race based*,¹⁴⁴ are irrelevant under the Fourth Amendment.¹⁴⁵ Rather, so long as the traffic stop itself is based on a traffic violation, such stops will be permissible.¹⁴⁶ In doing so, the Court gave another windfall to law enforcement officers and dealt another blow to the notion of race-free policing.¹⁴⁷ Indeed, the law enforcement community quickly hailed *Whren* as a victory and adopted police tactics to maximize the decision's impact.¹⁴⁸ The police training manual, *Tactics for Criminal Patrol*, reflects this adoption.¹⁴⁹ In its "Criminal Patrol Pyramid," the manual instructs officers to do the following:

1. Develop suspicion (or, typically, merely curiosity) about a driver.
2. Discover a legal justification to stop the driver (typically this justification is some minor violation of the traffic laws or vehicle code), and make the stop.
3. Decide, after making the stop, whether to seek to search the vehicle based on the close observation of the vehicle and its

143. See *id.* at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

144. The Court suggested that racial animus or discrimination, irrelevant to a Fourth Amendment claim, might be relevant to a claim based on the equal protection clause. *Id.* However, given the hurdles the Court has erected to frustrate equal protection claims, including a discovery hurdle erected the same term as *Whren*, this alternative route is practically impassable. See *United States v. Armstrong*, 517 U.S. 456, 468–71 (1996) (requiring that defendants seeking discovery to show a pattern of racial discrimination first provide actual evidence consistent with race-based decision making); Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1860–61 (2004).

145. See *Whren*, 517 U.S. at 813.

146. See *id.* at 810.

147. See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 340 (1998).

148. See, e.g., CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, *PULLED OVER 35* (2014). Law enforcement responded to *Whren* with increased enrollments in training to use profiles in connection with pretext stops; one California highway patrol training officer was quoted as saying, "After *Whren* the game was over. We won." *Id.*; see also Carbado, *supra* note 18 (manuscript at 155–56); Kenneth Gavsie, Note, *Making the Best of "Whren": The Problems with Pretextual Traffic Stops and the Need for Restraint*, 50 FLA. L. REV. 385, 394 (1998) (positing that "law enforcement has taken full advantage of the Court's liberal interpretation of the Fourth Amendment in *Whren*").

149. See CHARLES REMSBERG, *TACTICS FOR CRIMINAL PATROL: VEHICLE STOPS, DRUG DISCOVERY AND OFFICER SURVIVAL* 9 (1995).

visible contents and dialogue with the driver (and passengers). Officers use this dialogue to assess the truthfulness of the driver.

4. Search the vehicle (“usually by consent”).
5. Discover contraband and weapons.
6. Make an arrest.
7. Seek “bonus benefits” (forfeiture of vehicles, cash, etc.; information about additional criminal offenses).¹⁵⁰

There is a final case worth mentioning that normalized and gave legitimacy to racialized policing. That case is *United States v. Mendenhall*,¹⁵¹ which introduced the Court’s “free to leave” test.¹⁵² Faced with the question of whether the police stop of Sylvia Mendenhall, a young woman disembarking from a flight at the Detroit Metropolitan Airport, was an unconstitutional stop because the police lacked either probable cause or even reasonable suspicion of criminal activity, Justice Stewart ruled that the Fourth Amendment was simply inapplicable.¹⁵³ Creating the fiction¹⁵⁴ that a reasonable person would have felt “free to end the conversation in the concourse and proceed on her way,”¹⁵⁵ Justice Stewart wrote that the Fourth Amendment was not implicated at all, since *as a matter of law* there was never a seizure.¹⁵⁶ It was no excuse that the police officer never advised Sylvia Mendenhall, whom the Court described as “a female and a Negro,”¹⁵⁷ that she was free to leave.¹⁵⁸ The putative reasonable person, apparently civic-

150. *See id.* at 9.

151. 446 U.S. 544 (1980).

152. *See id.* at 554.

153. *See id.* at 555.

154. *See* Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 521–22 (2001) (describing the “free to leave” test as involving a legal fiction since few individuals would in fact feel free to leave when accosted by a police officer); *cf.* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 153 (describing the “free to leave” test). Alice Ristroph adds that, in viewing such encounters as consensual, courts tend to ignore the unstated power of the officers’ position as an agent of the state. *See* Alice Ristroph, *Regulation or Resistance? A Counter-Narrative to Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1611–16 (2015). This position tips the balance of power, rendering fictional the notion that most individuals feel on equal footing such to refuse a request. *See id.*

155. *Mendenhall*, 446 U.S. at 555.

156. *See id.* at 558.

157. *Id.*

158. *Id.* at 555 (“Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed.”). Although the Court acknowledged that the encounter might “reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated

educated and schooled in the Fourth Amendment, would simply know this. The Court extended and broadened this “free to leave” test in subsequent cases such as *Florida v. Bostick*,¹⁵⁹ *United States v. Drayton*,¹⁶⁰ and *INS v. Delgado*.¹⁶¹ As a result, many police stops and the accompanying questions—“Where are you going?” “Do you live nearby?” “Are you visiting someone here?” “Can I see some identification?”—are no longer categorized as stops regulated by the Fourth Amendment at all but rather are deemed consensual encounters.¹⁶² Consider what this means. In the context of stop-and-frisk data, for example, the data tell us virtually nothing about the number of

from high school[.]” *id.* at 558, the Court’s subsequent decisions have de-emphasized, or ignored entirely, similar characteristics. For example, in *Florida v. Bostick*, 501 U.S. 429 (1991), in which the Court intimated that a youth on a bus was “free to leave” when confronted by an officer, *id.* at 432, the majority made no mention of Bostick’s race at all. One has to read the dissent to find any indication that Bostick was black. *See id.* at 441 n.1 (Marshall, J., dissenting). In *INS v. Delgado*, 466 U.S. 210 (1984), the Court concluded that when between twenty and thirty federal agents entered a factory and conducted a sweep to check the immigration status of factory workers, the workers were free to leave notwithstanding that the agents were armed, carried handcuffs, and manned the exits. *Id.* at 212–13. At no point does the Court address the role that ethnicity, class, or even immigration status might have played in whether a reasonable person would have felt free to leave. Joshua Dressler and Alan C. Michaels’ observation about the race language in *Mendenhall* is revealing. Dressler and Michaels note that ultimately the Justices “concluded that the racial aspects of the case were not determinative, and the Court has never found them so in the quarter century since.” DRESSLER & MICHAELS, *supra* note 126, at § 7.03(C)(3), at 116.

159. 501 U.S. 429, 435–37 (1991) (suggesting that youth who was confronted by two sheriff’s deputies who boarded a bus to question passengers was not seized since a reasonable person would have felt free “to decline the officers’ requests or otherwise terminate the encounter”).

160. 536 U.S. 194, 197–98, 207 (2002) (noting that bus passenger who was questioned when three officers entered a bus—one remaining near the exit while a second stood at the back of the bus—was not seized since a reasonable person would have felt free to leave or terminate the encounter).

161. 466 U.S. 210, 212–13, 218 (1984) (discussing how factory workers were not seized even though several federal agents entered factory, blocked exits, and conducted an immigration sweep, since the factory workers were not seized since a reasonable person would have felt free to discontinue contact with the federal agents).

162. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 35 (1996) (stating that officer’s continued questioning of driver after issuing a warning deemed a consensual encounter and thus did not require legal justification). As Devon Carbado recently observed, it matters little that actual reasonable people would not feel free to leave or that they could terminate the encounter: “[T]he free-to-leave framework is a normative inquiry rhetorically disguised as an empirical one.” Carbado, *supra* note 18 (manuscript at 118). The test becomes even more problematic when race and class are added to the equation. Cynthia Lee has been even more blunt in stating “[a] young black male who has grown up in South Central Los Angeles knows that if he is stopped by a police officer, he should do whatever the officer says and not talk back unless he wants to kiss the ground.” Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1152 (2012).

individuals who were deemed consensually encountered.¹⁶³ And once again, since officers do not need probable cause or even reasonable suspicion, the brunt of such encounters is disproportionately experienced by racial minorities, who are often deemed “always already” criminal.¹⁶⁴

None of this is to say that the Court’s role in subordinating the goal of equality before the law to law enforcement objectives always goes unacknowledged. Consider Justice Stevens’s candid dissent in *California v. Acevedo*,¹⁶⁵ a case essentially reaffirming the authority of police officers to search cars without a warrant:¹⁶⁶

In the years [from 1982 to 1991], the Court has heard argument in 30 Fourth Amendment cases involving narcotics. In all but one, the government was the petitioner. All save two involved a search or seizure without a warrant or with a defective warrant. And, in all except three, the Court upheld the constitutionality of the search or seizure.

In the meantime, the flow of narcotics cases through the courts has steadily and dramatically increased. No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes

163. For example, officers with the City of New York Police Department are required to document “forcible” stops for data-collection purposes, but there is no requirement that they document consensual encounters. See N.Y. STATE OFFICE OF ATT’Y GEN., STOP AND FRISK REPORT 63 (2003), http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf [<https://perma.cc/55VP-EFG4>]; see also Ristroph, *supra* note 82 (manuscript at 16 n.57) (noting that many jurisdictions “do not track stops, let alone . . . near-seizures,” Ristroph’s term for consensual encounters); *Police Practices and Civil Rights in New York City, Chapter 5: Stop, Question, and Frisk*, U.S. COMM’N ON CIVIL RIGHTS (Aug. 2000), <http://www.usccr.gov/pubs/nypolice/ch5.htm> [<https://perma.cc/MR3R-D4FJ>] (“Accordingly, if a person is stopped and questioned without official use of force and gives his or her name, a UF-250 is not required, provided that the individual is neither frisked nor arrested by NYPD officers.”).

164. For a discussion of what it means to be “always already” criminal, see Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-Incarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185, 1187–88 (2013) (discussing disparities in policing of men of color and stating that “[t]he mainstream’s depiction of black men as always already imprisoned disciplines us into the never-finished quest to prove we are a ‘Good Black Man,’ rather than a ‘Bad Black Man’”). See also LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY* 85, 119 (2001) (“[I]deology has always-already interpellated individuals as subjects, . . . Hence individuals are ‘abstract’ with respect to the subjects which they always-already are.”).

165. 500 U.S. 565 (1991) (holding that police can search a container within a car if they have probable cause to believe that container holds evidence of a crime).

166. See *id.* at 573.

today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime.¹⁶⁷

Such honesty and transparency, however, are rare. More often, the Court's role in facilitating unequal and racialized policing goes unnoticed and unremarked upon.

To be sure, there are many more cases that reflect the Court's juridical subordination of equality goals. In the end though, everything, including *Whren* and *Mendenhall*, is traceable to *Terry*. *Terry*, after all, is the case in which the Court most significantly began its shift from a warrant-centric view of the Fourth Amendment to a reasonableness-centric view.¹⁶⁸ More importantly, it is the case in which the Warren Court, long viewed as a champion of defendant rights,¹⁶⁹ first began to sacrifice those individual rights, including the right to equal treatment before the law, in favor of the interests of law enforcement and crime control.¹⁷⁰ As I wrote some years ago, "[I]f the Fourth Amendment itself has a poisonous tree, its name is *Terry v. Ohio*."¹⁷¹

II. RACE, TECHNOLOGY, AND THE WAY WE COULD POLICE TOMORROW

The racialized policing problems discussed above—police violence, underenforcement, and racial profiling—are not unsolvable. However, given the Court's role in enabling the state of affairs we are in, the solution I am proposing has little to do with seeking recourse through courts. Instead, it has everything to do with technology, specifically with harnessing technology in ways that can deracialize policing. Though I will return to the problems of police violence and underenforcement, I begin below with technology that can combat racial profiling. The cost, again, is that there will be more policing, not less. The cost, too, is that

167. *Id.* at 600–01 (Stevens, J., dissenting) (citations omitted).

168. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 18.01, at 291–93 (3d ed. 2002).

169. See A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 254 (1968). As described by Earl Dudley, the law clerk who worked for Chief Justice Warren on *Terry v. Ohio*, external factors played a significant role in the outcome of the case. See Earl C. Dudley, Jr., *Terry v. Ohio, The Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 892–93 (1998). Not only was there civil unrest in many cities, but in addition, the Court had been a target during the 1964 presidential campaign for defending individual rights at the expense of law enforcement and was expected to become a target again in the 1968 campaign. *Id.* For more on the attacks against the Court at the time, see FRED P. GRAHAM, THE SELF-INFLECTED WOUND 8–15 (1970).

170. For a contrary view, see Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 4 (2010) (arguing that the Warren Court's criminal procedure cases were not marked by egalitarianism).

171. Capers, *supra* note 9, at 32.

many Americans will have to surrender some of the privacy they now enjoy. The technology I have in mind might rile civil libertarians and progressives, and even some black folk. But again, hear me out. Allow me to again channel Ralph Ellison's nameless narrator: "[b]ear with me."¹⁷²

I mentioned earlier that the police in New York City recorded 4.4 million forcible stops between 2004 and 2012, and that over eighty-three percent of those stopped were either black or brown, a number far greater than their representation in the population.¹⁷³ But these numbers tell only part of the story. As statistician and criminologist Jeffrey Fagan noted, the percentage of black and brown people stopped is high even after accounting for crime rates.¹⁷⁴ Other numbers speak to what I have termed "*Terry* innocen[ce]."¹⁷⁵ For every twenty individuals stopped, a full nineteen were found *not* to be engaged in activity warranting an arrest.¹⁷⁶ In other words, the error rate was around ninety-five percent. And even this understates the true error rate, since research has shown that nearly half of all arrests resulting from these stop-and-frisk encounters do not result in a conviction.¹⁷⁷ The error rate rises even more, spectacularly more, when one considers the oft-stated objective of aggressive stop-and-frisk practices: to get illegal firearms out of the hands of criminals.¹⁷⁸ According to the NYPD's own data, officers find one firearm for every 1,000 stops, which translates into an error rate of over 99.9%.¹⁷⁹ To put this in perspective, this result is on par with the

172. See ELLISON, *supra* note 10, at 12.

173. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556, 584 (S.D.N.Y. 2013); see *supra* note 86 and accompanying text.

174. See Report of Jeffrey Fagan, Ph.D. at 3, *Floyd*, 959 F. Supp. 2d 540 (No. 08-CV-01034), http://ccrjustice.org/sites/default/files/assets/files/Expert_Report_JeffreyFagan.pdf [<https://perma.cc/6TWL-4NZ3>].

175. I use the term "*Terry* innocent" to describe the individuals who are not found to be engaged in criminal activity warranting an arrest. Capers, *Policing, Technology, and Doctrinal Assists*, *supra* note 17 (manuscript at 32 n.163).

176. *Cf. Floyd*, 959 F. Supp. at 558 (concluding that only around six percent of all forcible stops resulted in an arrest). It is possible that even Justice Scalia would have found this accuracy rate unacceptable. See *Navarette v. California*, 134 S. Ct. 1683, 1695 (2014) (Scalia, J., dissenting) (suggesting that a hit rate of less than five percent, or one in twenty, would be insufficient to justify reasonable suspicion).

177. See ERIC T. SCHNEIDERMAN, N.Y. STATE OFFICE OF THE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 3, 10 fig.7 (Nov. 2013), https://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf [<https://perma.cc/4HEE-LMNE>].

178. RUDOLPH W. GIULIANI & WILLIAM J. BRATTON, POLICE STRATEGY NO. 1: GETTING GUNS OFF THE STREETS OF NEW YORK 3 (1994); Barry Paddock, *Kelly: Stop-and-Frisk Saves Lives*, N.Y. DAILY NEWS (Apr. 4, 2013), <http://www.nydailynews.com/new-york/kelly-stop-and-frisk-saves-lives-article-1.1306828> [<https://perma.cc/T3RX-ECRJ>].

179. Paddock, *supra* note 178.

success rate for when officers engage in purely random searches.¹⁸⁰ Moreover, evidence suggests that racialized policing, rather than contributing to accuracy, adds to error. In New York, for example, stopped blacks were actually *less* likely to have a weapon than stopped whites.¹⁸¹ In Maryland, the “hit rate” was also lower for searched blacks than for searched whites.¹⁸² Similar results come from New Jersey, where troopers found evidence of criminal activity in 13% of their searches of black motorists compared to in 25% of their searches of white motorists.¹⁸³

The foregoing suggests more than merely a racialized policing problem in which “[s]kin color becomes evidence[.]”¹⁸⁴ It points to more than what social scientists have long confirmed: that we all suffer from biases, and many of those biases are about race and criminality.¹⁸⁵ It suggests more than simply the fact that stop-and-frisk practices have a breadth that disproportionately affects those who are *Terry* innocent. It suggests a fundamental flaw with the way we police now, a flaw that undermines, with every racially inflected look, encounter, stop, or frisk, our protestations that we are all equal before the law. Instead of a color-blind government, it suggests a color-dependent government. It is certainly at odds with Chief Justice Roberts’ insistence that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁸⁶

In critical race theory, it is not uncommon to invoke the trope of using the master’s tools “to dismantle the master’s house[.]”¹⁸⁷ Here, I

180. See Second Supplemental Report of Jeffrey Fagan, Ph.D at 35, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08-CV-01034), <http://ccrjustice.org/sites/default/files/assets/files/FaganSecondSupplementalReport.pdf> [<https://perma.cc/WNA3-P5AQ>].

181. *Floyd*, 959 F. Supp. 2d at 661 n.760.

182. See DAVID A. HARRIS, *PROFILES IN INJUSTICE* 80 (2002).

183. *Id.*

184. Harris, *supra* note 83, at 268.

185. See, e.g., Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004) (describing how study participants classified positive words faster after seeing the word “White” than after seeing the word “Black”); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 881 (2004) (noting that participants who saw a black face were quicker to identify “crime-relevant objects” than those who saw none); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1508–14 (2005) (summarizing studies that measure bias in racial meanings); Richardson, *supra* note 133, at 2036 (“The science of implicit social cognition . . . can contribute much to the understanding of police behavior, especially as it relates to the treatment of nonwhites.”).

186. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

187. See, e.g., Paul Butler, *Racially-Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995) (“Through jury nullification, I want to dismantle the master’s house with the master’s tools.”). Interestingly, the source of the trope posited the

have little interest in the tools of law, especially since those tools are ultimately in the control of a Court that routinely subordinates the interests of those who are black and brown to the interests of those who are not. But I am interested in another tool: technology. Specifically, I am interested in the way technology can deracialize and de-bias policing. I am interested in the way technology can say to those who claim that racial biases are inevitable in policing, “Think again.” I am interested in technology that will lay bare not only the truth of how we police now but also how those of us who are black or brown live now.

What I am advocating for first are *more* public surveillance cameras. I say more because already there are many.¹⁸⁸ Public surveillance cameras are already integral to law enforcement. For example, New York City aggregates and analyzes data from approximately 3,000 surveillance cameras around the city and allows the police to scan license plates, cross-check criminal databases, measure radiation levels, “and more[.]”¹⁸⁹ Washington, D.C., is in the process of consolidating over 5,000 cameras into one network called the Video Interoperability for Public Safety.¹⁹⁰ Chicago, with at least 2,250 surveillance cameras, has Operation Virtual Shield, which includes biometric technology.¹⁹¹ Baltimore has CitiWatch, which includes over 400 cameras equipped with low light, pan, tilt, and zoom capabilities.¹⁹²

opposite, that the master’s tools can never destroy the master’s house. See AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in SISTER OUTSIDER 110, 110–12 (1984).

188. See Steve Henn, *In More Cities, a Camera on Every Corner, Park and Sidewalk*, NPR (June 20, 2013, 2:57 AM), <http://www.npr.org/sections/alltechconsidered/2013/06/20/191603369/The-Business-Of-Surveillance-Cameras> [<https://perma.cc/A29W-PLCL>].

189. See Joe Coscarelli, *The NYPD’s Domain Awareness System Is Watching You*, N.Y. MAG.: DAILY INTELLIGENCER (Aug. 9, 2012, 8:50 AM), <http://nymag.com/daily/intelligencer/2012/08/nypd-domain-awareness-system-microsoft-is-watching-you.html> [<https://perma.cc/CQ83-BEXK>]; Rocco Parascandola & Tina Moore, *NYPD Unveils New \$40 Million Super Computer System That Uses Data from Network of Cameras, License Plate Readers and Crime Reports*, DAILY NEWS (Aug. 8, 2012, 8:50 PM), <http://www.nydailynews.com/new-york/nypd-unveils-new-40-million-super-computer-system-data-network-cameras-license-plate-readers-crime-reports-article-1.1132135> [<https://perma.cc/P3EB-A4XW>].

190. *D.C. Police Set to Monitor 5000 Cameras*, WASH. TIMES (Apr. 9, 2008), <http://www.washingtontimes.com/news/2008/apr/9/dc-police-set-to-monitor-5000-cameras/> [<https://perma.cc/D7F9-PFCM>].

191. BILGE YESIL, VIDEO SURVEILLANCE: POWER AND PRIVACY IN EVERYDAY LIFE 38 (2009). Biometric technology uses physical and behavioral features to identify and monitor individuals. See *Definition of Biometrics*, BIOMETRICS INST. (2017), <http://www.biometricsinstitute.org/pages/definition-of-biometrics.html> [<https://perma.cc/D5PK-BQYL>]. Examples include the use of retina scans, voice recognition, and surveillance cameras that identify an individual by his gait. See *Types of Biometrics*, BIOMETRICS INST. (2017), <http://www.biometricsinstitute.org/pages/types-of-biometrics.html> [<https://perma.cc/4BLQ-857W>].

192. YESIL, *supra* note 191, at 35.

Finally, consider this description of the Real Time Crime Center in Fresno, California:

On 57 monitors that cover the walls of the center, operators zoomed and panned an array of roughly 200 police cameras perched across the city. They could dial up 800 more feeds from the city's schools and traffic cameras, and they soon hope to add 400 more streams from cameras worn on officers' bodies and from thousands of local businesses that have surveillance systems.¹⁹³

Even small towns have turned to surveillance cameras. A survey from just over a decade ago listed over 200 towns in thirty-seven states that were either using or planning to use public surveillance cameras.¹⁹⁴ But for the most part, these cameras tend to be clustered in communities that are poor, black and brown,¹⁹⁵ or at the opposite extreme, areas that

193. Justin Jouvenal, *The New Way Police Are Surveilling You: Calculating Your Threat 'Score'*, WASH. POST (Jan. 10, 2016), https://www.washingtonpost.com/local/public-safety/the-new-way-police-are-surveilling-you-calculating-your-threat-score/2016/01/10/e42bccac-8e15-11e5-baf4-bdf37355da0c_story.html [<https://perma.cc/DR3A-2DAX>].

194. See Lisa Hoffman, *Under Surveillance: Government Spy Cameras Proliferate*, PRISON PLANET (June 22, 2006), <http://www.prisonplanet.com/articles/june2006/230606Surveillance.htm> [<https://perma.cc/GBK4-8GNR>] (“A Scripps Howard News Service tally found that at least 200 towns and cities in 37 states now employ video cameras—or are in the process of doing so—to watch sidewalks, parks, schools, buses, buildings and similar community locales.”); see also Matt Cagle, *Communities Under Surveillance*, ACLU N. CAL. (Nov. 21, 2014), <https://www.aclunc.org/blog/communities-under-surveillance-california> [<https://perma.cc/HA9G-NPZR>] (noting that “surveillance technology is frequently and disproportionately used on minority communities without their knowledge or consent”); N.Y. CIVIL LIBERTIES UNION, WHO’S WATCHING? VIDEO CAMERA SURVEILLANCE IN NEW YORK CITY AND THE NEED FOR PUBLIC OVERTSIGHT 5, 10 (2006), https://www.nyclu.org/sites/default/files/publications/nyclu_pub_whos_watching.pdf [<https://perma.cc/D6Q8-G3SG>] (noting that surveillance cameras are used in a manner that targets people based on race and that 3,100 surveillance cameras operated by the NYPD’s VIPER unit are focused on communities of color); Charlie Savage, *US Doles Out Millions for Street Cameras*, BOS. GLOBE (Aug. 12, 2007), http://www.boston.com/news/nation/washington/articles/2007/08/12/us_doles_out_millions_for_street_cameras/ [<https://perma.cc/WNU6-TB6F>] (“The Department of Homeland Security is funneling millions of dollars to local governments nationwide for purchasing high-tech video camera networks . . .”).

195. See N.Y. CIVIL LIBERTIES UNION, *supra* note 194, at 10; see also *Cameras Installed at Bridgeport Public Housing*, NEWS 12 CONN. (Mar. 23, 2016), <http://connecticut.news12.com/news/security-cameras-installed-at-bridgeport-public-housing-complexes-1.11610221> [<https://perma.cc/S29E-FTNP>]; Megan Cottrell, *Will 3,000 Cameras Make Chicago's Public Housing Safer*, CHICAGONOW: ONE STORY UP (July 20, 2009, 7:55 AM), <http://www.chicagonow.com/blogs/one-story-up/2009/07/will-3000-cameras-make-chicagos-public-housing-safer.html> [<https://perma.cc/4E47-PUH5>]; Alice Speri, *Newark Public Housing Installs Surveillance Cameras as Part of Massive Security Initiative*, N.J.COM (Aug. 21, 2011, 11:45 AM), http://www.nj.com/news/index.ssf/2011/08/newark_public_housing_boosts_s.html [<https://perma.cc/C6QC-CV5U>]. This contemporary racialized surveillance has prompted cultural scholar John Fiske to remark that “today’s seeing eye is white[.]” John Fiske, *Surveilling the City: Whiteness, the Black Man and Democratic Totalitarianism*, 15 THEORY CULTURE & SOC’Y 67, 69 (1998).

are rich and that the state wants to protect from an entirely different group of brown folk. By this, I mean that cameras are most prevalent in areas around public housing projects and around potential terrorist targets such as the New York Stock Exchange, the Chicago Board of Trade, Times Square, and Washington, D.C.¹⁹⁶ But cameras should not be limited to these areas. Cameras, like CCTV in Britain,¹⁹⁷ should be extended to virtually all public spaces. If we are going to watch some people, then all of us should be watched.

Along with public surveillance cameras, law enforcement should add facial recognition technology, which is already in use by over fifty police departments¹⁹⁸ and is at the center of the FBI's Next Generation Identification Project, which has been "creating a trove of fingerprints, iris scans, data from facial recognition software and other sources."¹⁹⁹ The technology should not only be limited to comparing faces to available arrest photos but also to driver's license photos and photos on social media sites like Facebook and Instagram. And law enforcement should add access to "Big Data"²⁰⁰ to the equation. Already the

196. See, e.g., *Chicago Expands Surveillance Cameras Network*, HUFFINGTON POST (Aug. 15, 2011), http://www.huffingtonpost.com/2011/06/15/chicago-expands-surveilla_n_877681.html [<https://perma.cc/FJG3-GM92>] (surveillance at the Chicago Board of Trade); Suzanne Choney, *Lawmakers Want More Surveillance on the Ground—and in the Sky*, NBC NEWS (Apr. 20, 2013), https://usnews.newsvine.com/_news/2013/04/20/17830619-lawmakers-want-more-surveillance-on-the-ground-and-in-the-sky [<https://perma.cc/P6TY-KV3P>] (surveillance in Washington, D.C.); Chris Francescani, *NYPD Expands Surveillance Network to Fight Crime as Well as Terrorism*, REUTERS (June 21, 2013), <http://www.reuters.com/article/usa-ny-surveillance-idUSL2N0EV0D220130621> [<https://perma.cc/64XK-MUMT>] (surveillance at the New York Stock Exchange).

197. David Barrett, *One Surveillance Camera for Every 11 People in Britain, Says CCTV Survey*, TELEGRAPH (July 10, 2013, 6:30 PM), <http://www.telegraph.co.uk/technology/10172298/One-surveillance-camera-for-every-11-people-in-Britain-says-CCTV-survey.html> [<https://perma.cc/HH7M-XFRP>].

198. Sabrina A. Lochner, Note, *Saving Face: Regulating Law Enforcement's Use of Mobile Facial Recognition Technology & Iris Scans*, 55 ARIZ. L. REV. 201, 202 (2013).

199. Jouvenal, *supra* note 193.

200. Defining "Big Data" is notoriously difficult. The technical definition usually constrains Big Data to "[w]here the data volume, acquisition velocity, or data representation limits the ability to perform effective analysis using traditional relational approaches or requires the use of significant horizontal scaling for efficient processing." Frank Konkel, *Sketching the Big Picture on Big Data*, FCW (Apr. 15, 2013), <http://fcw.com/articles/2013/04/15/big-experts-on-big-data.aspx?m=1> [<https://perma.cc/VUJ4-DABJ>]; see also *Big Data: What It Is and Why It Matters*, SAS, http://www.sas.com/en_us/insights/big-data/what-is-big-data.html [<https://perma.cc/2PVJ-A2MT>] ("The concept gained momentum in the early 2000s when industry analyst Doug Laney articulated the now-mainstream definition of big data as the three Vs: Volume[,] . . . Velocity[,] . . . [and] Variety."). More recently, scholars have turned to thinking of Big Data as a social phenomenon rather than merely a technical one. See, e.g., Neil M. Richards & Jonathan H. King, *Big Data Ethics*, 49 WAKE FOREST L. REV. 393, 394 (2014) ("We prefer to define big data and big data analytics socially, rather than technically, in terms of the broader societal impact . . ."). The definition offered in a recent book on Big Data is

information available (from credit card transactions to credit history, from Facebook likes to Twitter feeds, from favorite bands to favored political candidates) is vast. Consider a report from just a few years ago:

[I]n 2013 the amount of stored information in the world is estimated to be about 1,200 exabytes, of which less than 2 percent is non-digital.

There is no way to think about what this size of data means. If it were all printed in books, they would cover the entire surface of the United States some 52 layers thick. If it were played on CD-ROMS, and stacked up, they would stretch to the moon in five separate piles.²⁰¹

Indeed, merely from Facebook alone, which is used by nearly two billion people, the accessible information is significant.²⁰² As the *Washington Post* recently reported, Facebook collects ninety-eight data points on each of its users.²⁰³ As the writer Sue Halpern put it,

[a]mong this ninety-eight are ethnicity, income, net worth, home value, if you are a mom, if you are a soccer mom, if you are married, the number of lines of credit you have, if you are interested in Ramadan, when you bought your car, and on and on and on.²⁰⁴

Elizabeth Joh adds, “[S]oon it will be feasible and affordable for the government to record, store, and analyze nearly everything people do.”²⁰⁵ Quite simply, whether it involves tracking location history by remotely accessing and analyzing metadata on our phones (including the data that “radiate[s]” from our phones and other smart devices),²⁰⁶ or

perhaps useful. It defines Big Data as referring “to things one can do at a large scale that cannot be done at a smaller one, to extract new insights or create new forms of value, in ways that change markets, organizations, the relationship between citizens and governments, and more.” VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* 6 (2013).

201. MAYER-SCHÖNBERGER & CUKIER, *supra* note 200, at 9.

202. Caitlin Dewey, *98 Personal Data Points That Facebook Uses to Target Ads to You*, WASH. POST: INTERSECT (Aug. 19, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/08/19/98-personal-data-points-that-facebook-uses-to-target-ads-to-you/?utm_term=.c78ea3701b02 [<https://perma.cc/4RH7-6UH9>].

203. *Id.*

204. Sue Halpern, *They Have, Right Now, Another You*, N.Y. REV. OF BOOKS, (Dec. 22, 2016), <http://www.nybooks.com/articles/2016/12/22/they-have-right-now-another-you/> [<https://perma.cc/77RY-23SZ>].

205. Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL’Y REV. 15, 15–16 (2016).

206. Andrew Guthrie Ferguson, *The “Smart” Fourth Amendment*, 102 CORNELL L. REV. (forthcoming 2017) (manuscript at 1, 61–63), <https://papers.ssrn.com/sol3/papers.cfm?abstract>

accessing surveillance camera data (both public and private), or turning to commercial data aggregators, we should give the police technological tools so that, with a click of a button, “unknown suspects can be known[.]”²⁰⁷ Police departments are already purchasing swaths of information about citizens from data analysis firms.²⁰⁸

Finally, police should be equipped with terahertz scanners. Recall that one goal of stop-and-frisk practices is to get firearms out of the hands of criminals,²⁰⁹ a goal which has led to the targeting of those of us who are black or brown.²¹⁰ In fact, terahertz scanners, which measure terahertz radiation, can scan for concealed weapons without the need for a stop or frisk.²¹¹ The device is small enough to be placed in a police vehicle or even mounted like a surveillance camera.²¹² As the New York City Police Commissioner put it during a public announcement,

[t]he device reads a specific form of natural energy emitted by people and objects known as terahertz. If something is obstructing the flow of that radiation, for example a weapon, the device will highlight that object. Over the past twelve months, we’ve been working with the vendor and the London Metropolitan Police to develop a tool that meets our requirements. We took delivery of it last week.

One of our requirements was that the technology must be portable . . . we’re able to mount it in a truck.²¹³

[_id=2752788 \[https://perma.cc/HJ5A-SCXZ \(staff-uploaded archive\)\]](https://perma.cc/HJ5A-SCXZ) (discussing such data and arguing for an “informational curtilage” framework for addressing Fourth Amendment concerns).

207. Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PENN. L. REV. 327, 351 (2015). One can imagine access to data being limited to nonintimate information. For a discussion of this possibility, see generally Note, *Data Mining, Dog Sniffs, and the Fourth Amendment*, 128 HARV. L. REV. 691 (2014) (arguing that data mining poses a threat to traditional notions of privacy).

208. Darwin Bond-Graham & Ali Winston, *Forget the NSA, the LAPD Spies on Millions of Innocent Folks*, L.A. WEEKLY (Feb. 27, 2014, 4:00 AM), <http://www.laweekly.com/news/forget-the-nsa-the-lapd-spies-on-millions-of-innocent-folks-4473467> [https://perma.cc/95X2-5TCT]; Halpern, *supra* note 204; Quentin Hardy, *The Risk to Civil Liberties of Fighting Crime with Big Data*, N.Y. TIMES (Nov. 6, 2016), http://www.nytimes.com/2016/11/07/technology/the-risk-to-civil-liberties-of-fighting-crime-with-big-data.html?_r=0 [https://perma.cc/8BU8-5A3T].

209. GIULIANI & BRATTON, *supra* note 178, at 3.

210. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (concluding that police had a policy and practice of targeting black and Hispanic men for forcible stops, in violation of the equal protection clause).

211. See John Del Signore, *NYPD “Takes Delivery” of Portable Body Scanners to Detect Concealed Weapons on the Street*, GOTHAMIST (Jan. 23, 2013, 12:46 PM), http://gothamist.com/2013/01/23/nypd_takes_delivery_of_van-mounted.php [https://perma.cc/S95N-HG8L].

212. *Id.*

213. *Id.* Assuming the device could only reveal the presence of a concealed weapon, using the device would not constitute a Fourth Amendment search under current precedent. See

To be clear, all of this might sound precariously close to George Orwell's "Big Brother[.]"²¹⁴ But such technology can also deracialize policing. After all, cameras and terahertz scanners do not have implicit biases.²¹⁵ Nor do they suffer from unconscious racism.²¹⁶ Rather,

generally *United States v. Jacobsen*, 466 U.S. 109 (1984) (treating searches that can only reveal the presence or absence of contraband as nonsearches under the Fourth Amendment); *United States v. Place*, 462 U.S. 696 (1983) (treating searches that can only reveal the presence or absence of contraband as nonsearches). This should be true even where one is licensed to carry a firearm, at least in areas where having a license is uncommon, just as canine sniffs for narcotics are nonsearches, *Place*, 462 U.S. at 707, even where one, say, has a medical marijuana license. *But see* Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U.L. REV. 1, 5 (2015) (arguing that, given expanding protections of the Second Amendment, possession of a handgun without more could be inadequate to justify a Fourth Amendment stop).

214. See GEORGE ORWELL, 1984, at 2 (Secker & Warburg 1999) (1949). The specter of "Big Brother" has not escaped the Court. In *Florida v. Riley*, 488 U.S. 445 (1988), a case holding that helicopter surveillance of an individual's back yard was not a "search" within the meaning of the Fourth Amendment, Justice Brennan quoted a passage from *1984* in his dissent:

The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.

Id. at 466 (Brennan, J., dissenting) (quoting ORWELL, *supra*, at 2). For an interesting discussion of the Big Brother metaphor, see Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1413–19 (2001).

215. Of course, algorithms are only as reliable as the inputs and can reflect the biases of their programmers. See Claire Cain Miller, *When Algorithms Discriminate*, N.Y. TIMES: THE UPSHOT (July 9, 2015), http://www.nytimes.com/2015/07/10/upshot/when-algorithms-discriminate.html?action=click&pgtype=Homepage&version=Mothers-Visible&module=inside-nyt-region®ion=inside-nyt-region&WT.nav=inside-nyt-region&_r=1&abt=0002&abg=1 [<https://perma.cc/83EZ-RPWX>]. Sociologist Gary Marx raises another concern: because these technologies are often below the radar or invisible, citizens are denied the opportunity to complain or offer resistance. See Marx, *supra* note 19, at 45. This is a weighty problem, and it might be that excluding all biases is a Sisyphean endeavor. Relatedly, there is the problem of whether the police will selectively deploy such technology in ways that replicate and exacerbate unequal policing. See Joh, *supra* note 205, at 15–16. But certainly any such biases and selective use can be minimized and monitored. One such method would be through periodic audits along the lines of what Professor Robin Lenhardt and others have proposed in the race context. See R. A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1544–50 (2011); cf. Jessica Erickson, *Racial Impact Statements: Considering the Consequences of Racial Disproportionalities in the Criminal Justice System*, 89 WASH. L. REV. 1425, 1455–56 (2014) (describing how "states should consider more concrete standards for data collection"). Another possible solution is to solicit more community involvement in the use of technologies, a solution for which Barry Friedman and Maria Ponomarenko advocate. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1846 (2015) (noting the issues with the lack of availability for public comment or public rulemaking regarding police rules).

technology can move us closer to *real* reasonable suspicion. Technology can improve policing so that looks, encounters, stops, and frisks turn on actual reasonable suspicion of criminality rather than the proxy of race. Put differently, having access to at-a-distance weapons scanners, facial recognition software, and Big Data can mean the difference between “[y]oung + [b]lack . . . = [p]robable [c]ause”²¹⁷ and race-blind policing. It would certainly mean a drastic reduction in the number of stopped minorities and indeed a reduction in the number of all stops. Terahertz scanners would tell the police that the bulge in a black teenager’s jacket is nothing more than a bulky cellphone, but that white tourist who looks like he is from Texas really does have a gun. Facial recognition technology combined with Big Data would tell the police that the brown driver repeatedly circling the block in fact works in the neighborhood and is probably looking for a parking space and that the clean-cut white dude reading a paper on a park bench is in fact a sex offender who, just by being near a playground, is violating his sex offender registration. It would tell the police that the black kid running down the street is simply that, a kid running down the street.²¹⁸ It would tell them, in a way that is less intrusive or embarrassing, whether someone is a troublemaker casing a neighborhood or a student returning home with a bag of Skittles and an iced tea;²¹⁹ a loiterer up to no good, or a father waiting to pick up

216. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing unconscious racism). Lawrence writes:

Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

Id. at 322.

217. Gaynes, *supra* note 6, at 621.

218. For example, relying solely on “commonsense[.]” the Court has long held that flight from police in a high crime area, standing alone, provides reasonable suspicion to justify a stop. See *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). In fact, empirical evidence demonstrates the opposite: “that in high-crime urban communities where the population is disproportionately minority, flight from an identifiable police officer is a very poor indicator that crime is afoot.” See Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 792 (2000).

219. The reference is to Trayvon Martin, the unarmed black youth shot by a neighborhood watchman. See Charles M. Blow, Opinion, *The Curious Case of Trayvon Martin*, N.Y. TIMES (Mar. 16, 2012), <http://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html> [<https://perma.cc/RH59-F3TL>]. Access to Big Data, for example, would

his children from school;²²⁰ a burglar about to commit a home invasion, or a Harvard professor entering his own home;²²¹ a thug with a gun, or a police chief;²²² a trespasser attempting to enter the Capitol Building, or a Republican senator;²²³ a mugger looking for his next victim, or the future United States Attorney General;²²⁴ a thief about to burgle a laboratory, or the world renowned astrophysicist Neil DeGrasse Tyson, guilty only of “JBB (just being black).”²²⁵ And it would tell that the white kid from New Jersey driving into Harlem is not there to score drugs, but to see his black girlfriend.²²⁶

I promised earlier to make the argument that deploying technology to aid in policing—alarming as it might seem at first—can also play a role in tackling the other problems we associate with racialized policing. The role public surveillance cameras, weapons scanners, and Big Data

likely have told the police that Martin’s father’s girlfriend lived at the gated community, explaining Martin’s presence there. See Edward J. Blakely, *In Gated Communities, Such as Where Trayvon Martin Died, A Dangerous Mindset*, WASH. POST (Apr. 6, 2012), https://www.washingtonpost.com/opinions/in-gated-communities-such-as-where-trayvon-martin-died-a-dangerous-mind-set/2012/04/06/gIQAwWG8zS_story.html?utm_term=.7b3acc664fba [https://perma.cc/U99C-FDV6]. Had Martin had a history of thefts or break-ins, this too would be “known” through technology. For an interesting legal analysis of the shooting and the case that followed, see generally Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) (describing the shooting and the legal case); see also Cynthia Lee, *(E)Racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91 (2014) (same).

220. See Joanna Rothkoff, “*I’m Not Your Brother!*”: Video Reveals Police’s Stunning Double-Standard for Black Americans, SALON (Aug. 29, 2014, 4:45 PM), http://www.salon.com/2014/08/29/st_paul_cops_tase_and_arrest_black_man_for_waiting_to_pick_his_kids_up_from_preschool/ [https://perma.cc/PS42-UW3X].

221. The reference is to the arrest of Henry Louis Gates after an officer suspected him of burglary. See Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES (July 20, 2009), <http://www.nytimes.com/2009/07/21/us/21gates.html> [https://perma.cc/NR4X-NMNL]. As I have detailed elsewhere, a number of “law-abiding minority professors”—Cornel West, William Julius Wilson, Paul Butler, and Devon Carbado—have been subjected to police stops. Capers, *supra* note 9, at 18.

222. See Geoffrey Gardner, *White Cop Disciplined for Profiling Black Police Chief*, NPR (May 13, 2008, 5:55 PM), http://www.npr.org/sections/newsandviews/2008/05/nypd_disciplines_white_officer.html [https://perma.cc/7QEU-3T74].

223. See Louis Nelson, *Sen. Tim Scott Reveals Incidents of Being Targeted by Capitol Police*, POLITICO (July 13, 2016, 7:04 PM), <http://www.politico.com/story/2016/07/tim-scott-capitol-racism-senate-225507> [https://perma.cc/75EV-84PV].

224. See Gene Demby, *Two Tales of Profiling, from the Highest Offices in the Land*, NPR: CODE SWITCH (July 19, 2013, 7:20 PM), <http://www.npr.org/blogs/codeswitch/2013/07/19/203715163/two-tales-of-profiling-from-the-highest-offices-in-the-land> [https://perma.cc/M6MK-3R8Y] (describing Attorney General Eric Holder’s experience being profiled by the police).

225. See NEIL DEGRASSE TYSON, *THE SKY IS NOT THE LIMIT: ADVENTURES OF AN URBAN ASTROPHYSICIST* 134 (2004).

226. As I have documented elsewhere, whites are often targeted for stops in predominantly minority neighborhoods on the assumption that they are drug purchasers. See Capers, *Policing, Race, and Place*, *supra* note 17, at 66 n.148.

can play in combatting police violence could even be obvious. Scanners, for example, could immediately tell officers that a suspect is unarmed, often enough to obviate the need for deadly force. Big Data could also tell officers whether a suspect has a history of violence or resisting arrest.²²⁷ Beyond that, public surveillance cameras can capture and make visible police use of excessive force. Indeed, they could even have advantages over recordings from body-worn cameras or police vehicle dashboard cameras. Body-worn cameras and dashboard cameras show police citizen interactions from the police officer's perspective.²²⁸ While this perspective is important, especially in cases where officers claim they acted with honest and reasonable belief, it is not the only perspective, let alone the most objective one.²²⁹ On top of that, there is legitimate concern that the police, both *ex ante* and *ex post*, have the ability to control and edit the resulting film.²³⁰ Indeed, there is evidence that the officer who shot Laquan McDonald in Chicago tampered with his dashboard camera²³¹ and evidence that an officer involved in the shooting of Keith Lamont Scott in Charlotte failed to activate his camera, in violation of departmental police rules.²³² All of this might undermine the goal of objectivity or capturing the full picture.²³³ Public

227. Cf. Jouvenal, *supra* note 193 (discussing the use of technology to evaluate the threat a person poses).

228. For a discussion of the impact of perspective on objective truth, see Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. (forthcoming 2017) (manuscript at 16–18), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2773886 [<https://perma.cc/BY3D-Y4JE> (staff-uploaded archive)].

229. On the role perspective and angle play in determining the “truth” of video evidence, see Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1335–36 (2010).

230. As one observer put it, the current system, in which the police themselves control footage of police citizen interactions, is like “the fox guarding the henhouse.” Sarah Lustbader, *The Real Problem with Police Video*, N.Y. TIMES (Dec. 2, 2015), http://www.nytimes.com/2015/12/02/opinion/the-real-problem-with-police-video.html?_r=0 [<https://perma.cc/55YX-V7QU>]; see also Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 403 (2016) (“[D]espite its name, community policing efforts remain in control of the police . . .”).

231. Sebastian Murdock, *The Cop Who Killed Laquan McDonald Had Broken His Dashcam on Purpose, Report Says*, HUFFINGTON POST (Jan. 27, 2016, 8:42 PM), http://www.huffingtonpost.com/entry/chicago-police-damaged-dashcam-microphones_us_56a952f6e4b0d82286d4e101?utm_hp_ref=black-voices&&utm_hp_ref=black-voices [<https://perma.cc/8CG8-ERXB>].

232. Welsey Lowery, *Charlotte Officer Did Not Activate Body Camera Until After Keith Scott Had Been Shot*, WASH. POST (Sept. 26, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/09/26/charlotte-officer-did-not-activate-body-camera-until-after-keith-scott-had-been-shot-2/?utm_term=.b9c4a0d2021a [<https://perma.cc/2ZVK-5UW9>].

233. For these reasons, copwatching groups often have strict requirements about how members should film the police. See Simonson, *supra* note 230, at 396.

surveillance cameras, if done properly with public input and control, bypass these problems.

The role technology can play in addressing underenforcement is less direct but important too. Quite simply, to the extent technology can increase accuracy and efficiency in policing, it can free officers to engage in the work that those of us who are black and brown *and white* want them to do: actual policing. Just consider one statistic: police in this country fail to make an arrest in about one-third of all murders in this country.²³⁴ Allow me to say this again: a full one-third of all murders go unsolved. And this does not even begin to get at other unsolved crimes, including violent crimes and financial and property crimes.²³⁵ Now imagine if officers, instead of focusing their resources on black and brown people who are *Terry* innocent, redirected their resources to solve real crimes.

There is much more to be said about using technology to rethink policing. But for now, here are just a few observations. Technology, in the form of public surveillance cameras, could very well deter officers from committing Fourth Amendment violations,²³⁶ much in the way they deter other law breaking. Of equal importance, because public surveillance cameras are specular, they have the potential to educate judges about how the Fourth Amendment is really being applied and thus counter myopic perspectives that already tip the scales in favor of the police. This last point cannot be overstated since such an education has the potential to “help change constitutional meaning.”²³⁷ Technology, to borrow from Professors Lani Guinier and Gerald Torres, can serve “demosprudence[.]”²³⁸

I end this Part by returning to the case that, in effect, gave its blessing to racialized policing, *Terry v. Ohio*. As another policing and

234. See *Getting Away with Murder*, ECONOMIST (July 4, 2015), <http://www.economist.com/news/united-states/21656725-police-fail-make-arrest-more-third-nations-killings-getting-away> [<https://perma.cc/RYT2-4N93>]; Martin Kaste, *Open Cases: Why One-Third of Murders in America Go Unresolved*, NPR (Mar. 30, 2015, 5:04 AM), <http://www.npr.org/2015/03/30/395069137/open-cases-why-one-third-of-murders-in-america-go-unresolved> [<https://perma.cc/Z7V2-CG28>].

235. See, e.g., FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2013, at 2 (2013), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/clearances/clearancetopic_final [<https://perma.cc/WB95-QJK3>] (noting, among other things, that in 2013 only 48.1% of violent crime and 19.7% of property crimes were cleared by arrest or similar disposition).

236. See Simonson, *supra* note 230, at 425.

237. *Id.*

238. See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749–50 (2014) (coining the term “demosprudence” to describe action, instigated by “ordinary people[.]” to change “the people who make the law and the landscape in which that law is made”).

technology scholar recently observed, were the facts of *Terry* to occur today, an officer would be able to use facial recognition technology and a data search to learn that Terry—who was observed with his companion repeatedly peering into a store window—has a prior criminal record and several prior arrests.²³⁹ The detective would learn through pattern matching links that Terry associates with a known local gangster, Billy Cox.²⁴⁰ And the detective would learn that Terry, unlike the typical window shopper, has a substance abuse problem.²⁴¹ Add to this a long-range scanner, and Detective McFadden would also know that both Terry and his companion were armed. In short, this information, combined with the detective's observation of behavior consistent with casing a store, would make the detective's finding of articulable, reasonable suspicion far stronger and far more reliable. This is the beauty of using technology to aid policing.

But there is another beauty that is equally important. It can reduce racialized policing. Two men taking turns looking into a store window might indicate that criminal activity “may be afoot[,]”²⁴² but then again it might not. The two men might instead be my shopping buddy and I, admiring a Marc Jacobs overcoat or a Paul Smith suit in the window of Barney's. My shopping buddy and I are black men after all, Terry and his companion redux. Given the ubiquity of surveillance cameras in the world I envision, the officers should realize that it is unlikely either of us would publicly engage in criminal activity, especially something so public as robbing a store. They would certainly already know that neither one of us is armed, assuming the officers had already scanned the entire street with their terahertz scanners. In any event, facial recognition software and access to data would be able to assure police of our *Terry* innocence in seconds. They would learn that I am a law professor who writes extensively about policing and that I am a former federal prosecutor.²⁴³ There would be no need for me to be “grabbed” or

239. Ferguson, *supra* note 207, at 377 (citing Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 728–29 (1998)).

240. *Id.* For an excellent discussion of how social networking algorithms are already being used by Chicago police to know an individual's connection to other individuals, including individuals who might not be involved in criminal activity, see Joh, *supra* note 203, at 25–27.

241. Ferguson, *supra* note 207, at 377. This information could be “available” through arrest records, prison intake records, social services records, or a panoply of other records.

242. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

243. They might even learn that I served as chair of the Academic Advisory Council created under *Floyd* and that I recently served as a commissioner on New York's Civilian Complaint Review Board. The officers would presumably learn that my shopping buddy is a vice president at an advertising agency. They might even learn that I do not suffer fools lightly.

“spun . . . around” or “patted down[.]”²⁴⁴ The two of us, like other law-abiding citizens, would be allowed to shop—or at least window shop.

Lest this sound like I subscribe to a “politics of distinction[.]”²⁴⁵ this technology would also benefit black and brown folk who cannot claim the advantages I have. It can benefit the kid from the projects who is young and black and whose “hat’s real low”²⁴⁶ and who, because of racialized policing and overcriminalization, has even been busted for marijuana use a couple of times and jumping a turnstile once, but who dreams of one day making enough to buy the same Marc Jacobs coat I am eyeing. Instead of relying on heuristics and implicit biases and race as a proxy for criminality to conclude that “[y]oung + [b]lack + [m]ale = [p]robable [c]ause[.]”²⁴⁷ officers would already know from their earlier scan of the street that the kid is unarmed. Facial recognition technology and access to data should similarly tell them that there is insufficient basis for a forcible stop. Recreational drug use and turnstile jumping are not probative of casing a place. Even if they chose to approach the kid and attempt a consensual encounter or “near-seizure,”²⁴⁸ public surveillance cameras would capture this, making a record that can later be used to educate judges, and police officers themselves, about discriminatory policing and thus potentially “help change constitutional meaning.”²⁴⁹ Even for black and brown folk who do not share my advantages, this has to be better than the status quo.

But the larger point is this: With the technology I am advancing, none of us would need to be singled out because of race. Or more accurately, everyone else would be subjected to the same soft surveillance. The Asian woman with the briefcase. The white businessman trying to hail a cab. The messenger on his bike. The elderly

244. See *Terry*, 392 U.S. at 7.

245. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1260 n.20 (1994) (“The position I adopt closely resembles a strand of thought within African-American communities that Professor Regina Austin terms the ‘politics of distinction.’ This school of thought stresses ‘the difference that exists between the “better” elements of [the African American community] and the stereotypical “lowlifes” who richly merit the bad reputations the dominant society accords them.’”) (quoting Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1772 (1992)).

246. The reference, of course, is to the lyrics in “99 Problems.” See Jay-Z, *99 Problems*, on THE BLACK ALBUM (Def Jam Records 2003).

247. Gaynes, *supra* note 6, at 621.

248. See Ristroph, *supra* note 82 (manuscript at 12) (using the term “near-seizure” to describe what courts deem consensual encounters and outside the Fourth Amendment, but which in fact tend to be experienced as coercive and anything but consensual).

249. Simonson, *supra* note 230, at 425.

woman walking her poodle. Everyone. Certainly, this gets us closer to equality before the law.

III. THE REDISTRIBUTION OF PRIVACY

Still, I can imagine the hesitation, especially from civil libertarians and progressives. What I am proposing, after all, is more policing, not less. In exchange for deracialized policing, there will have to be more policing of everyone, albeit in the form of soft surveillance. I am essentially proposing that some people cede some of the privacy that they currently enjoy for the greater good of everyone. My task, then, is to show that the sacrifice will be worth it. In doing so, I will have to expose a raw truth: that privacy has always been unequal, and it is past time that it was redistributed. But first, I turn to a far more conventional argument to support my proposals: that equalizing privacy can support perceptions of legitimacy and counter legal cynicism.

A. *Legitimacy and Legal Cynicism*

As Tom Tyler demonstrated decades ago in his highly influential *Why People Obey the Law*,²⁵⁰ punishment plays a relatively minor role in inducing compliance with the law.²⁵¹ Far more important are the roles societal and community norms play in policing behavior.²⁵² More important too are perceptions of legitimacy.²⁵³ The more individuals believe that the law is both fair and fairly applied, the more likely it is that those individuals will comply with the law.²⁵⁴ Tyler's Chicago study is a case in point. At its most basic, his longitudinal study of randomly selected Chicago residents found that heightened perceptions of legitimacy increase compliance with the law.²⁵⁵ Tyler has also examined the role legitimacy plays among blacks and Hispanics with a particular focus on "high-risk" individuals, namely black and Hispanic males between the ages of eighteen and twenty-five.²⁵⁶ His findings were consistent: perceptions of legitimacy play a significant role in voluntary compliance with the law.²⁵⁷ Janice Nadler's research adds another data point to legitimacy theory.²⁵⁸ Her research suggests that, just as

250. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–4 (1990).

251. See *id.*

252. See, e.g., Capers, *Crime, Legitimacy, and Testifying*, *supra* note 17, at 838.

253. TYLER, *supra* note 250, at 57.

254. See TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW* 67–68 (2002).

255. See TYLER, *supra* note 250, at 8–15.

256. See Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 376 (2001).

257. *Id.* at 375–82.

258. See Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1400 (2005).

perceptions of legitimacy contribute to voluntary compliance with the law, perceptions of illegitimacy contribute to its very opposite, noncompliance.²⁵⁹ Indeed, her research is consistent with Judge Brandeis's intuition in his oft-cited dissent in *Olmstead v. United States*,²⁶⁰ a case involving the government's use of wiretaps, without first obtaining a warrant, to listen in on conversations.²⁶¹ Judge Brandeis wrote, "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."²⁶²

The perception of illegitimacy has particular consequences for the problems of police violence, underenforcement, and racial profiling. Law enforcement's very prevalence in black and brown communities contributes to the perception that the police are "above the law[,]""just another gang[,]""²⁶⁴ an occupying force.²⁶⁵ Instead of inducing compliance with the law, racialized policing contributes to minorities feeling less obliged to obey the law or defer to legal authorities.²⁶⁶ Equally troubling, it might induce law breaking.²⁶⁷ It is thus unsurprising that the *Final Report of the White House Task Force on 21st Century Policing* from May 2015 emphasizes increasing legitimacy as crucial to police reform.²⁶⁸ Even more recently, Monica Bell has built upon the insights of legitimacy theory to add "legal cynicism"—the feeling shared by many of us who are black and brown that we are "essentially stateless, unprotected by the law and its enforcers, marginal to the

259. See *id.* at 1410–11. Other scholars have made similar arguments. See DAVID COLE, NO EQUAL JUSTICE 171–72 (1999); James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, in INVISIBLE PUNISHMENT 150, 150–51 (Marc Mauer & Meda Chesney-Lind eds., 2002) (arguing that inner city youth respond to racial profiling and other undemocratic policing by disregarding authority).

260. 277 U.S. 438 (1928).

261. See *id.* at 455.

262. *Id.* at 485 (Brandeis, J., dissenting).

263. See generally JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993) (referring to the language used in the title).

264. See David K. Shipler, *Living Under Suspicion*, N.Y. TIMES (Feb. 7, 1997), <http://www.nytimes.com/1997/02/07/opinion/living-under-suspicion.html> [<https://perma.cc/NSST-5XBR>].

265. See generally NAACP, BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES (1995) (describing how police use excessive force in minority communities).

266. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 247 (2008) (testing the hypothesis that "the link between legitimacy and cooperation differs across ethnic groups").

267. See Nadler, *supra* note 258, at 1401; see also Capers, *Crime, Legitimacy, and Testifying*, *supra* note 17, at 862–66.

268. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 9 (May 2015), https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf [<https://perma.cc/PCN7-R3D3>].

project of making American society.”²⁶⁹ Bell’s legal cynicism theory thus identifies another barrier to equal policing and, in turn, equal citizenship.

The point here is straightforward. To the extent technology can deracialize policing, it can increase perceptions of legitimacy, which in turn can increase voluntary compliance with the law. So here is the first argument for using technology to deracialize policing: it can reduce crime. Of equal importance, it can counter the feeling of legal cynicism that pervades many minority communities and thus further the goal of belonging and equal citizenship. And that, in turn, benefits everyone.

B. *The Redistribution of Privacy*

My primary argument to support more technology to deracialize policing turns on the redistribution of privacy. But an emendation could be useful. Instead of thinking of it as the redistribution of privacy, it might help to think of it as the equalizing of privacy. Because this is the hard truth: privacy has never been distributed equally.²⁷⁰ Those who are privileged have always enjoyed a surfeit. And if we care about equality, then we should also care about equalizing privacy. I will return to this point in a minute. First, I should elaborate on what I mean when I say that privacy has never been equal. I begin with a news item that will be familiar to many but strikes a particular chord with those of us who are black or brown.

On January 23, 2012, Senator Rand Paul was attempting to board a flight from Nashville to Washington, D.C., when he refused a Transportation Security Administration (“TSA”) security pat down and, as one newspaper put it, set off “a mini-firestorm[.]”²⁷¹ It mattered little that the actual incident was quickly resolved.²⁷² His father, then Representative Ron Paul, at the time engaged in his own presidential bid, took to his campaign’s official Twitter account and stated: “My son

269. Bell, *supra* note 65 (manuscript at 2).

270. Professor Bill Stuntz made this point some years ago. See Stuntz, *supra* note 23, at 1266 (“Fourth Amendment law makes wealthier suspects better off than they otherwise would be, and may make poorer suspects worse off.”). Younger scholars have expressed a renewed interest in exposing and challenging unequal privacy. See Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOKLYN L. REV. 1389, 1389–90 (2012); Mary Anne Franks, *Democratic Surveillance*, HARV. J.L. & TECH. (forthcoming 2017) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2863343## [<https://perma.cc/MMT8-A6RP> (staff-uploaded archive)].

271. Kathleen Hennessey, *Sen. Rand Paul Refuses TSA Pat-Down, Is Kept Off Flight*, L.A. TIMES (Jan. 24, 2012), <http://articles.latimes.com/2012/jan/24/nation/la-na-rand-paul-tsa-20120124> [<https://perma.cc/FY3Y-AW7L>].

272. *Id.* Senator Rand Paul found another flight and was “rescreened without incident[.]” *Id.*

@SenRandPaul being detained by TSA for refusing full body pat down after anomaly in body scanner in Nashville.”²⁷³ The elder Paul also vowed to dismantle the TSA if he were elected president, stating,

The police state in this country is growing out of control. One of the ultimate embodiments of this is the TSA that gropes and grabs our children, our seniors, and our loved ones and neighbors with disabilities. The TSA does all of this while doing nothing to keep us safe.²⁷⁴

This was not the first time someone had complained about TSA screenings and privacy. Prior to Senator Paul’s incident, Texas Governor Rick Perry had pushed a state bill that would criminalize “intrusive” airport pat downs.²⁷⁵ The Alaska State Legislature, after a “humiliating” pat down of one of its members, had passed a resolution, declaring that “no one should have to sacrifice their dignity in order to travel.”²⁷⁶ There had even been a “Don’t Touch My Junk” movement after a passenger posted a YouTube video of himself refusing a TSA pat down with the words, “If you touch my junk, I’m gonna have you arrested.”²⁷⁷

The point here is not to trivialize calls for less intrusive airport searches, a topic I have addressed in other work.²⁷⁸ Rather, the point is to situate these calls against the reduced privacy routinely experienced a million times over²⁷⁹ by those of us who are black or brown and who are driving,²⁸⁰ or simply exercising the “right of locomotion.”²⁸¹ Viewed

273. Ron Paul (@RonPaul), TWITTER (Jan. 23, 2012, 10:22 AM), <https://www.twitter.com/RonPaul/status/161468829996826625> [<http://perma.cc/T6AN-VFGV>].

274. Hennessey, *supra* note 271.

275. Stephen Ceasar, *Texas Gov. Rick Perry Revives TSA Pat-Down Bill*, L.A. TIMES (June 25, 2011), <http://articles.latimes.com/2011/jun/25/nation/la-na-texas-tsa-20110626> [<https://perma.cc/PJP8-HR9V>].

276. See H.R. Res. 8, 37th Leg., 1st Sess. (Alaska 2011); Kim Murphy, *Alaska Legislator’s ‘No’ to TSA Pat-Down Wins Praise at Home*, L.A. TIMES (Feb. 24, 2011), <http://articles.latimes.com/2011/feb/24/nation/la-na-tsa-screening-20110225-1> [<https://perma.cc/ST9Q-3V5V>].

277. Chris McGreal, *‘Don’t Touch My Junk’ Passenger Sparks Revolt Against Airport Searches*, GUARDIAN (Nov. 19, 2010, 11:00 AM), <http://www.guardian.co.uk/world/2010/nov/19/dont-touch-junk-airport-searches> [<https://perma.cc/7R5Y-LZKU>] (describing the “revolt” resulting from John Tyner’s refusal to submit to a pat-down search).

278. See I. Bennett Capers, *Unsexing the Fourth Amendment*, 48 U.C. DAVIS L. REV. 855, 873–75 (2015).

279. These frisks have also been criticized as sexual, both by law professor Paul Butler and by rap groups. See, e.g., Paul Butler, *Stop and Frisk: Sex, Torture, Control*, in LAW AS PUNISHMENT/LAW AS REGULATION 155, 166 (Austin Sarat et al. eds., 2011); N.W.A., *Fuck the Police*, on STRAIGHT OUTTA COMPTON (Ruthless/Priority 1988) (complaining about police “grabbing his nuts”).

280. Those of us who are black and brown are far more likely, following a “routine” traffic stop, to be asked to exit the vehicle, to be asked for consent to search the vehicle, and to be treated as criminal suspects. See Capers, *supra* note 9, at 16 (citing studies about minorities being stopped at traffic stops).

against this larger backdrop, the assault on privacy felt by Senator Rand Paul and others reveals itself to be one of the many ways that privacy is distributed *unequally*. To Senator Paul and others, to be delayed and patted down at an airport was unprecedented and humiliating. For those of us of a darker hue (including those who appear to be Arab or Muslim), such looks, stops, and frisks are part of the way we live now and have lived for a long time.²⁸²

A similar observation can be made about the outcry that greeted Edward Snowden's revelations about the U.S. government's domestic spying program²⁸³ or even more recent discussions about the government's efforts to force Apple to de-encrypt its iPhones.²⁸⁴ The Snowden revelation sparked a national conversation about domestic surveillance, privacy, and even tools for evading surveillance.²⁸⁵ But as Mary Anne Franks observes, "The privacy movement . . . has tended to center on the concerns of the privileged."²⁸⁶ Jane Bailey, a critical feminist, is even more blunt:

It seems to me that [the response to NSA spying] has arisen because privileged white men feel exposed now. And for some reason it annoys me that they are acting like they've "discovered" surveillance for the first time and when they do it's almost always with a myopic civil libertarian focus on state power. The fact of the matter is members of subordinated groups have known the power and technologies of surveillance for some time. For these

281. See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1259–60 (1990).

282. See, e.g., Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215, 217–18 (2005) ("[T]he title [*Walking While Muslim*] suggests that certain people are being targeted for no legitimate purpose.").

283. See, e.g., Janet Reitman, *Snowden and Greenwald: The Men Who Leaked the Secrets*, ROLLING STONE (Dec. 4, 2013), <http://www.rollingstone.com/politics/news/snowden-and-greenwald-the-men-who-leaked-the-secrets-20131204> [<https://perma.cc/A342-JWZD>].

284. See Ellen Nakashima, *Apple Vows to Resist FBI Demand to Crack iPhone Linked to San Bernardino Attacks*, WASH. POST (Feb. 17, 2016), https://www.washingtonpost.com/world/national-security/us-wants-apple-to-help-unlock-iphone-used-by-san-bernardino-shooter/2016/02/16/69b903ee-d4d9-11e5-9823-02b905009f99_story.html [<https://perma.cc/N662-4E62>].

285. For a discussion of surveillance evasion, see Elizabeth E. Joh, *Privacy Protests: Surveillance Evasion and Fourth Amendment Suspicion*, 55 ARIZ. L. REV. 997, 998 (2013).

286. Franks, *supra* note 270 (manuscript at 4); see also David Lyon, *Surveillance as Social Sorting: Computer Codes and Mobile Bodies*, in SURVEILLANCE AS SOCIAL SORTING 13, 19 (David Lyon ed., 2003) ("Lower socio-economic groups and women have long been accustomed to the gaze of various surveillants.").

groups, surveillance is and always has been inescapably noticeable because it is part of everyday life.²⁸⁷

That we have a history of unequal privacy might surprise those who have always taken privacy for granted. But for the rest of us, again, this lack of privacy is nothing new. Indeed, to some extent, unequal privacy is all that we have ever known. This is especially true of what I term “unequal private privacy.” Black slaves were certainly denied the luxury of privacy. They certainly could not assert the right to be “secure in their persons, houses, papers, and effects[.]”²⁸⁸ As persons, or more accurately “chattels personal[.]”²⁸⁹ security was entirely foreign. They were simply commodities, bought and sold, auctioned based on their bodies to better determine their value,²⁹⁰ raped, and, like chattel, bred.²⁹¹ As for papers, “one of the unifying tenets of slave codes was that blacks should not read[.]”²⁹² a tenet that was codified in several states, including North Carolina.²⁹³ To have paper with writing on it was enough to subject slaves to corporal punishment, including whipping, branding, and, in some cases, amputation.²⁹⁴ And as far as the papers that were occasionally allowed—passes or free papers—these were subject to inspection and rejection at any time by slave patrols.²⁹⁵ As for houses and effects, as property themselves, slaves had none to claim as their own. Above all, these slaves were subjected to constant monitoring, as the common practice of using overseers and slave patrols—one of the

287. Jane Bailey, “Gendering Big Brother”: What Should a Feminist Do? 4 (May 12, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605481 [<https://perma.cc/9BPM-PU2Z> (staff-uploaded archive)].

288. See U.S. CONST. amend IV.

289. See KENNETH M. STAMP, *THE PECULIAR INSTITUTION 197* (1956). Of course, there was a contradiction in the notion that slaves were at once property and responsible and liable as persons for their acts. For more on this contradiction, see GENOVESE, *supra* note 30, at 30–31; A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The “Law Only as an Enemy”: The Legitimization of Racial Powerlessness through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 971–75 (1992).

290. See WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* 20 (1999).

291. See I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 865 (2013); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 81–82, 81 n.297 (1999); Thelma Jennings, “*Us Colored Women Had to Go Through a Plenty*”: *Sexual Exploitation of African-American Slave Women*, 1 J. WOMEN’S HIST. 45, 46 (1990) (describing the forced “breeding” of slaves).

292. I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 19 (2006).

293. See, e.g., An Act to Prevent All Persons from Teaching Slaves to Read or Write, the Use of Figures Excepted, ch. 6, 1830–1831 N.C. Sess. Laws 11, 11; Capers, *supra* note 289, at 19.

294. Capers, *supra* note 292, at 20.

295. See HADDEN, *supra* note 31, at 117; TASLITZ, *supra* note 31, at 106.

precursors to the modern day police²⁹⁶—attests to. Such unequal privacy was not limited to the South. In New York City, for example, there were lantern laws, or ordinances “For Regulating Negroes and Slaves in the Night Time.”²⁹⁷ Under these lantern laws, blacks on streets “an hour after Sun-set” had to be accompanied by “some White Person[.]”²⁹⁸ Otherwise, they must carry a “[lantern] and lighted Candle in it, so as the light thereof may be plainly seen[.]”²⁹⁹ As Simone Browne observes, these lantern laws “made it possible for the black body to be constantly illuminated from dusk to dawn, made knowable, locatable, and contained within the city.”³⁰⁰

Even today, unequal private privacy is the norm. Those of us who are black or brown continue to be subjected to private surveillance by other citizens when shopping,³⁰¹ when driving,³⁰² when flying,³⁰³ when walking,³⁰⁴ and even when entering our own homes.³⁰⁵

296. As Carol Steiker has persuasively argued, the modern police force is traceable to the “slave patrols,” which developed many of the aspects of modern policing that we recognize, such as uniforms, arms, and military drilling. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 839 (1994); see also KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA* 63–65 (3d ed. 2015) (“[T]he South developed distinctive policing practices . . . [c]alled ‘slave patrols,’ ‘alarm men,’ or ‘searchers[.]’ . . .”).

297. See City of New York, *A Law for Regulating Negroes and Slaves in the Night Time* (Apr. 22, 1731), <https://digitalcollections.nypl.org/items/8ebdde86-d7f2-c140-e040-e00a18060af7> [<https://perma.cc/VK4B-F8B5>].

298. *Id.*

299. *Id.* For more on New York’s lantern laws, see SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 76–83 (2015).

300. BROWNE, *supra* note 299, at 79.

301. See Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1074–78 (2017) (documenting instances of private surveillance and erroneous accusations); Dana Farrington, *Macy’s To Pay \$650,000 in Settlement over Alleged Racial Profiling*, NPR (Aug. 20, 2014, 8:30 PM), <http://www.npr.org/sections/thetwo-way/2014/08/20/342005509/macys-to-pay-650-000-in-settlement-over-alleged-racial-profiling> [<https://perma.cc/D5HQ-CQ8F>]; J. David Goodman, *Profiling Complaints by Black Shoppers Followed Changes to Stores’ Security Policies*, N.Y. TIMES (Oct. 29, 2013), http://www.nytimes.com/2013/10/30/nyregion/black-shoppers-at-barneys-and-macys-say-they-were-profiled-by-security.html?_r=0 [<https://perma.cc/77QA-992X>]; Michelle Singletary, *Shopping While Black*, WASH. POST (Oct. 31, 2013), http://www.washingtonpost.com/business/economy/shopping-while-black/2013/10/31/5c7129d4-41a4-11e3-a751-f032898f2dbc_story.html [<https://perma.cc/W7KP-THAG>].

302. See, e.g., *Oliveira v. Mayer*, 23 F.3d 642, 644 (2d Cir. 1994) (describing how a “private motorist” summoned the police when he observed “three dark-skinned males, handling an expensive video recorder” while driving through an affluent neighborhood). The Hispanic men were handcuffed, searched spread eagle, and only let go when a canvass of the neighborhood failed to reveal a robbery. *Id.*

303. See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577 (2002). Recently, the comedian Aasif Mandvi shared his “rules” for flying while brown, highlighting the hyper-scrutiny often given to those who appear Muslim. *Aasif Mandvi Shares His Flight Safety Rules for Brown People*, HUFFINGTON POST (Nov. 23, 2016, 8:18 AM), <http://www.huffingtonpost>

But it is the problem of what I term “unequal *public* privacy,” or privacy vis-à-vis the government, that is my focus. It is one thing when citizens treat each other unequally. It is another thing entirely when the state engages in such unequal treatment,³⁰⁶ though the two are linked and reinforce one another.³⁰⁷ Quite simply, black and brown folk are more likely to be watched by the police, stopped by the police, and frisked by the police. In the everyday world of policing, we are treated as the “panoptic sort,”³⁰⁸ and as “always already suspect.”³⁰⁹ Scholars refer to this phenomenon as “hypervisibility[.]”³¹⁰ But this term is only partly accurate and obscures an important predicate. To be sure, those of us who are black or brown are often hyper-visible vis-à-vis the police. But this is largely because the police subject us to hyper-surveillance, or to repurpose a legal term, “heightened scrutiny.”

Allow me to end with an example that serves as a bookend to the example I started with involving Senator Rand Paul. Consider the story of Tunde Clement, a black man who was traveling from New York City to Albany, New York, and was carrying a backpack, which alone apparently was enough to subject him to a racially inflected look, stop, and encounter.³¹¹ According to news reports, the officers “cornered Clement and began peppering him with questions.”³¹² The officers then handcuffed him, at which point

[h]e was taken to a station to be strip-searched and then to a hospital, where doctors forcibly sedated him with a cocktail of powerful drugs A camera was inserted in his rectum, he was

[.com/entry/aasif-mandvi-flight-safety-brown-people_us_58358ea0e4b000af95ed4f22?section=us_comedy](https://perma.cc/5W7Q-JKXP) [https://perma.cc/5W7Q-JKXP].

304. See Capers, *Policing, Race, and Place*, *supra* note 17, at 60.

305. See Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 959–62 (2002) (describing his own experience being surrounded by the police and pinned against a wall at gunpoint outside his sister’s apartment after a neighbor reported seeing several black men enter the apartment); see also Goodnough, *supra* note 221 (describing the arrest of Harvard professor Henry Louis Gates, Jr. while entering his own home after a white neighbor called the police suspecting a possible break-in).

306. One such consequence is the perception of unequal citizenship. See AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP* 158–59 (2014).

307. Capers, *Policing, Race, and Place*, *supra* note 17, at 68.

308. This is a play on Oscar Gandy’s term about database marketing. See OSCAR GANDY, *THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION* 1 (1993).

309. See Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1363 (2015).

310. See GEORGE YANCY, *BLACK BODIES, WHITE GAZES: THE CONTINUING SIGNIFICANCE OF RACE* 75 (2008).

311. Brendan J. Lyons, *Harsh, Unwarranted Tactics?: Outcry over Sheriff’s Department Search Methods*, TIMES UNION (May 14, 2008), <http://www.informationliberation.com/?id=25252> [https://perma.cc/3LEJ-MDFK].

312. *Id.*

forced to vomit and his blood and urine were tested for drugs and alcohol. Scans of his digestive system were performed using X-ray machines, according to hospital records obtained by the *Times Union*. The search, conducted without a warrant, came up empty.³¹³

After ten hours in custody, Clement was given an appearance ticket for resisting arrest and released; the charge was later dismissed.³¹⁴ According to the local defense bar, Clement's experience was far from unique. As one defense lawyer put it, pursuant to Albany police interdiction policy, "every black man who came through the bus station was being literally grabbed and dragged into the men's room and searched Occasionally, of course, they would get lucky and find some drugs. But the vast, overwhelming majority of black men searched were clean."³¹⁵

So this is the hard truth. For many Americans, being subjected to "heightened scrutiny" when they go through airport surveillance might be new, humiliating, and unsettling. But for those of us of the darker hue, there is a different story entirely. My final argument then is this: although the technology I have been advancing could mean that Americans who currently enjoy privacy might have to cede some in terms of more widespread soft surveillance, this more widespread surveillance will have the benefit of distributing privacy more equally. For this too is the hard truth: the goal of true equality will be an exercise in futility if we are only talking about the poor, about the downtrodden, and about those of us who are black and brown. We must also talk about those who are privileged and what privileges must be shared by all. In short, to the same extent that technology can deracialize and de-bias policing, it can also redistribute privacy among citizens in a way that is more egalitarian and consistent with our democratic ideals. Indeed, it could even have the potential to better distribute privacy between citizens and the police, since there too lies a troubling imbalance.

To be sure, the techno-policing I am advocating will not be a complete cure-all in terms of leveling privacy imbalances and making policing more fair, especially given how interconnected and how networked³¹⁶ every aspect of our criminal justice system is. But of this much I am sure: it is a significant step in the right direction.

313. *Id.*

314. *Id.*

315. *Id.*

316. For a discussion of network theory, see Bennett Capers, *Crime, Legitimacy, Our Criminal Network, and The Wire*, 8 OHIO ST. J. CRIM. L. 459, 468 (2011).

CONCLUSION

I am a black man. For me, the personal is the political. It is inseparable from how I think about the Fourth Amendment, how I think about policing, and how I think about the way we live now. That is why I have tried to make an argument for more technology in policing, even if it means, or perhaps I should say especially if it means, the redistribution of privacy. The costs, especially to those who already enjoy an abundance of privacy, might seem great. But even greater should be possibility of what we can become. A fairer society. A more just society. A society where, just possibly, all of us, including those of us who are black and brown, can be equal before the law. In short, a society that gets us closer to the dream the Founders could not have imagined but was there all along in the text, waiting to be born. Or to be truly read. But already, I am getting ahead of myself. So for now, in this liminal moment, allow me to return to policing. If the goal is equality in policing, if the goal is efficiency and transparency and crime reduction, this Essay maps a route there.