
BOOK REVIEW

KEEPING TRACK: SURVEILLANCE, CONTROL, AND THE EXPANSION OF THE CARCERAL STATE

PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP. By Charles R. Epp, Steven Maynard-Moody & Donald Haider-Markel. Chicago; University of Chicago Press. 2014. Pp. xvii, 253. \$25.00.

ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY. By Alice Goffman. Chicago; University of Chicago Press. 2014. Pp. xiv, 277. \$25.00.

THE ETERNAL CRIMINAL RECORD. By James B. Jacobs. Cambridge, Mass.; Harvard University Press. 2015. Pp. xv, 396. \$39.95.

Reviewed by Kathryne M. Young and Joan Petersilia***

INTRODUCTION

After decades as a divisive political touchstone, American criminal justice is now characterized by widespread, bipartisan agreement that the system is “broken” in significant ways. The Brennan Center recently published a report in which many of the 2016 presidential candidates outlined their reform ideas on crime, policing, and incarceration.¹ In contrast to previous election cycles, Democratic and Republican candidates have voiced support for many of the *same* criminal justice reforms.² Meanwhile, conservative reform advocates such as those who launched Right on Crime have been joined by bipartisan alliances pushing for change, most notably the Coalition for Public Safety, which unites the Koch brothers and the ACLU in an unlikely political collaboration. As the *Huffington Post* opined: “[T]here

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¹ BRENNAN CTR. FOR JUSTICE, SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE (Inimai Chettiar & Michael Waldman eds., 2015), http://www.brennancenter.org/sites/default/files/publications/Solutions_American_Leaders_Speak_Out.pdf [<http://perma.cc/J3JM-WGB9>].

² Compare, e.g., *id.* at 27 (citing reform of mandatory minimum sentences as one of Hillary Clinton’s proposals), *with id.* at 33 (same for Ted Cruz).

is one issue that may have enough cross-party appeal to break through the logjams. That issue is criminal justice reform.”³

Variouly motivated by arguments about morality, racial injustice, economic inefficiency, or the squandering of human capital, the agreement about the need for criminal justice reform has coalesced largely around two substantive issues. First, highly publicized police killings of civilians, such as Michael Brown in Ferguson, Missouri, and Eric Garner in Staten Island, New York, have raised awareness about when and how police are permitted to use deadly force in the line of duty. Second, the United States has the highest incarceration rate of any industrialized nation, holding close to a quarter of the world’s prisoners, and there is a growing consensus that we imprison a large number of people who, from a public safety perspective, don’t need to be there.⁴

But while overincarceration and police brutality are serious problems themselves, they bespeak flaws that lie even deeper within the system, suggesting a criminal justice regime gone seriously awry. A meaningful prescription for reform must include solutions for mass incarceration and police brutality, but must also look beyond them to address the everyday interactions and social processes that underpin the problems virtually everyone now agrees are troubling.

Before delving into our argument about social processes, it is worth taking a moment to discuss the role of racial bias and other forms of social inequality in the criminal justice system. In summer 2015, President Barack Obama gave a speech to the NAACP in which he called American criminal justice “broken,” arguing that “[w]e can’t close our eyes anymore” to the system’s ails, and citing the disproportionate numbers of minority men in prison and videos of police brutality as evidence of bias built into the system.⁵ Indeed, the brunt of overincarceration and police brutality is borne by poor people and racial minorities, most significantly black men. Statistics show dramatic racial disparities: blacks comprise 13% of the U.S. population,⁶ use and sell drugs at similar rates to people of other races,⁷ yet account for

³ Ryan Grim et al., *The Dark-Horse Policy Reform that Has Both Obama and Some GOPers Optimistic*, HUFFINGTON POST (Nov. 10, 2014, 4:07 PM), http://www.huffingtonpost.com/2014/11/10/criminal-justice-reform_n_6133454.html [<http://perma.cc/Y7A8-8XSP>].

⁴ See generally COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

⁵ Peter Baker, *Obama Calls for Effort to Fix a “Broken System” of Criminal Justice*, N.Y. TIMES (July 14, 2015), <http://www.nytimes.com/2015/07/15/us/politics/obama-calls-for-effort-to-fix-a-broken-system-of-criminal-justice.html>.

⁶ *USA QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Dec. 2, 2015) [<http://perma.cc/GH4V-2HQ6>].

⁷ See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., PUB. NO. 14-4863, *RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 26* (2014) (“There were no sta-

30% of people arrested for drug law violations and nearly 40% of people in state or federal prison for drug law violations.⁸ Additionally, as Professor Marie Gottschalk points out, certain underlying economic and social factors sustain similarly punitive policies “for certain whites, Latinos, immigrants, and members of other demographic groups.”⁹ She notes that “the United States would still have an incarceration crisis even if African Americans were sent to prison and jail at ‘only’ the rate at which whites in the United States are currently locked up.”¹⁰ In fact, even if people of *all* races were represented proportionally at every level of the system, we would still have some big problems on our hands. Incarceration rates are increasing faster for women than for men, and the United States now “incarcerates almost one-third of the 625,000 women and girls confined to jails and prisons worldwide.”¹¹ People in the lowest income brackets, and with the least edu-

tistically significant differences in the rates of current illicit drug use between 2012 and 2013 for any of the racial/ethnic groups.”); Leah J. Floyd et al., *Adolescent Drug Dealing and Race/Ethnicity: A Population-Based Study of the Differential Impact of Substance Use on Involvement in Drug Trade*, 36 AM. J. DRUG & ALCOHOL ABUSE 87, 87–91 (2010) (finding no evidence of a significant disparity in drug-dealing rates between black and white youths).

⁸ DRUG POLICY ALL., THE DRUG WAR, MASS INCARCERATION AND RACE 1 (2015), http://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf [<http://perma.cc/MQ3A-WHQL>]. As Professor Michelle Alexander has famously put it, these extraordinary racial disparities suggest that mass incarceration is “the new Jim Crow.” MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

⁹ MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 4 (2015).

¹⁰ *Id.* Gottschalk also points out that the problem includes, but extends beyond, young black men caught up in the War on Drugs. *See id.* at 6. Most prisoners are not incarcerated for drug offenses. In 2012, only 20.5% of all sentenced state and federal prisoners (combined) were convicted of a drug crime. *Incarcerated Felon Population by Type of Crime Committed, 1974–2012*, PROCON.ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=004339> (last updated Jan. 28, 2015) [<http://perma.cc/7W55-4KAU>].

¹¹ GOTTSCHALK, *supra* note 9, at 4. The rising rate of contact with the criminal justice system is particularly acute for low-income white women. *See id.* at 5–6. Although smaller in number than black men, many other populations are overrepresented in the system as well, including LGBTQ youth, Native Hawaiians, and people with developmental disabilities and mental illness. *See* Angela Irvine, “We’ve Had Three of Them”: Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System, 19 COLUM. J. GENDER & L. 675, 676–77 (2010); OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM (2010), http://www.justicepolicy.org/uploads/justicepolicy/documents/10-09_rep_disparatetreatmentofnativehawaiians_rd-ac.pdf [<http://perma.cc/4QAC-4Y6A>]; DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), <http://www.bjs.gov/content/pub/pdf/mhppji.pdf> [<http://perma.cc/C3SW-2BE6>]. To make matters worse, these populations are also disproportionately likely to be victimized while in prison. *See* ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 18 (2013), <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [<http://perma.cc/FGQ4-B9Q5>]; Cynthia L. Blitz et al., *Physical Victimization in Prison: The Role of Mental Illness*, 31 INT’L J.L. & PSYCHIATRY 385 (2008); Joan R. Petersilia, *Crime Victims with Developmental Disabilities*, 28 CRIM.

cation, are also vastly overrepresented. Class bias not only compounds the effects of race, but also exerts effects of its own. While about 23% of non-incarcerated men between the ages of twenty-seven and forty-two earn less than \$18,000 annually, nearly 60% of incarcerated men between the ages of twenty-seven and forty-two earned less than \$18,000 annually prior to their incarceration — an economic trend that carries across racial groups.¹² While racial bias in the criminal justice system is extremely pronounced, and has deservedly been (and should remain) at the forefront of policy conversations, it is also important to realize the complexity of the inequalities, including class-based inequalities, that have long been welded into the girders of our system.

When we look at the processes that comprise the day-to-day functioning of the criminal justice system, it is important to hold two questions in our minds: What are the underlying social mechanisms, systems of control, and interpersonal interactions that constitute American criminal justice? And how do criminal justice processes create, reflect, perpetuate, and amplify bias? The questions are closely related, but each is important in its own right. Note, too, that neither question can be answered solely, or even primarily, by statistical data. While numbers are useful in helping us realize that we *have* particular problems, we need to delve beneath them in figuring out how we got here and what we can do about it.

This Review argues that an important root cause of our criminal justice ails can be found in the social *processes* that comprise the system's daily activities and forms of control over individual Americans — processes largely taken for granted. To explore the ground-level interpersonal interactions that underpin the criminal justice system, we engage three recent books: *Pulled Over: How Police Stops Define Race and Citizenship* by Professors Charles Epp, Steven Maynard-Moody, and Donald Haider-Markel; *On the Run: Fugitive Life in an American City* by Professor Alice Goffman; and *The Eternal Criminal Record* by Professor James Jacobs. Substantively and methodologically, the books might first seem an odd trio. But together, they reveal the importance of a key phenomenon: “surveillance” in the word's broadest sense — *keeping track* of people's movements, histories, relationships, homes, and activities.

JUST. & BEHAV. 655 (2001); Toshio Meronek, *Islands in the Sand: Why Thousands of Hawaiian Prisoners Are Languishing in the Arizona Desert*, HYPHEN MAG., Spring 2013, at 36.

¹² See BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, PRISONS OF POVERTY: UNCOVERING THE PRE-INCARCERATION INCOMES OF THE IMPRISONED fig.7 (2015), <http://www.prisonpolicy.org/reports/income.html> [<http://perma.cc/5TQQ-AFX7>]. And the causal relationship between poverty and imprisonment goes both ways. Increasingly, research shows that imprisonment — whether someone is imprisoned herself or has a family member in prison — is an important cause of poverty. See generally DONALD BRAMAN, DOING TIME ON THE OUTSIDE (2004).

In the criminological literature, the term “correctional control” usually refers to Americans under direct, formal supervision: incarceration, parole, or probation.¹³ But many more millions of Americans are under informal criminal justice control. These Americans include people who have been incarcerated, charged, or arrested in the past, those who are stopped or searched, those about whom police have collected information (even if they have no criminal records), witnesses to crimes, and people questioned by police in connection with loved ones’ involvement in the system. When we broaden the scope of criminal justice control to take these additional groups into account, the effect of the system’s everyday operations becomes more far-reaching. A complete understanding of the system requires an examination of these many species of interaction between citizens and law enforcement officials. We use the terms “control,” “keeping track,” and “surveillance” in this Review interchangeably, to signify the manifold ways in which the criminal justice system shapes people’s everyday lives.

We argue that in the forms these books catalog, the constant surveilling presence of the criminal justice system has several corrosive consequences, including fostering mistrust of the police, amplifying existing inequalities, and most significantly for our purposes, creating a kind of “liminal,” “second-class,” or “peripheral” citizenship from which it is difficult to escape. In important ways, the modern criminal justice apparatus destabilizes lives, particularly those lived in poor and minority communities. Instead of helping people gain stability, the system actually frustrates people’s chances of getting jobs, keeping their housing, and staying out of trouble. It makes criminal justice something to overcome — something people may succeed *in spite of*, not *with the help and protection of*. How do we understand what is going on, and how can we use this new knowledge to take advantage of this moment for policy change?

Pulled Over describes a world in which police and other criminal justice officials are “trackers” rather than investigators, and in which particular people and places are the primary foci of investigation. The result is a system that excels at discovering “low-hanging fruit,” and for which the continued discovery of this fruit not only comes to “justify” police-citizen contact, but also shapes the identities of citizens subject to it. *On the Run* exemplifies qualitative work’s ability to reach beyond the numbers and expand our understanding of on-the-ground social processes. Drawing on several years of ethnographic research, Goffman documents how “the moral world that people weave around the courts, the police, and the threat of prison involves suspicion, be-

¹³ See, e.g., Mary D. Fan, *The Political Climate Change Surrounding Alternatives to Incarceration*, HUM. RTS., Summer 2011, at 6, 6.

trayal, and disappointment” (p. 139). She explains how being labeled “dirty” — wanted by, or under the control of, the criminal justice system — shapes a person’s life and bars access to key institutions. Lastly, *The Eternal Criminal Record* provides the first comprehensive examination of the production, proliferation, and use of criminal records in the United States. The buildup of the prison system, coupled with technological advances permitting widespread and open access to criminal records, renders it nearly impossible for some individuals to overcome their pasts and rejoin society.

We discuss each book in turn, underscoring how various forms of surveillance facilitate the production and maintenance of a second-class citizenry that exists in a liminal, even pseudo-carceral, state. In a final section, we explain how these authors’ illumination of criminal justice processes can help us think about legal and policy reform.

I. PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP

Pulled Over is the most thorough and comprehensive study that has ever been done on traffic stops in the United States. The authors draw on detailed data from more than 2300 drivers in the Kansas City metropolitan area, analyzing a wide variety of characteristics about these drivers’ experiences of being stopped by the police (pp. 20, 168–72). The analyses include multiple variables related both to the driver (for example, race, age, gender) and to the stop itself (for example, vehicle type, location of stop), as well as interviews with a small portion of the drivers (thirty-five to be exact) and a discussion of the patterns in these drivers’ narratives.

A. *The Investigative Stop*

Epp, Maynard-Moody, and Haider-Markel argue that vehicle stops fall into two basic genres. Routine “enforcement” or “traffic safety” stops are designed to enforce a particular law: a person blows through a stop sign or drives fifteen miles per hour above the speed limit, the police see her, and she gets pulled over (pp. 53, 59–62, 93). Enforcement stops occur for behavior that is fairly egregious — the kind that most people would agree merits a stop in and of itself: swerving erratically, ignoring a red light, or some other clearly unsafe behavior. Most importantly, the police officer’s subjective purpose in making an enforcement stop is the regulation of the behavior that provoked the stop.

The second category of stops, which the authors call “investigatory” stops, are not motivated chiefly by a violation of the law (p. xv), but

rather are intended to seek evidence of other wrongdoing.¹⁴ Technically, these stops must have a legal justification: a driver's taillight might be broken, she might not have signaled before changing lanes, or she might have been going four miles per hour over the speed limit. But for an investigatory stop, the violation of law is not the officer's subjective motive for pulling over the driver (pp. 7–9). Under *Whren v. United States*,¹⁵ investigatory stops are perfectly legal as long as they are based on an objective violation of the law, no matter how minor that violation — even if that violation was not the officer's true motivation for making the stop.¹⁶ Subsequent cases have expanded *Whren*'s reasoning,¹⁷ and minor legal violations are commonly used by police as “pretexts to seek evidence of more serious criminal wrongdoing” (p. 35).

The chief purpose of investigatory stops is gathering information. Instead of simply being ticketed and sent on her way, a citizen is asked about her purpose for being on the road, or in the neighborhood. Questions might include: Where are you coming from? Where are you going? Whom are you planning to see? While asking these questions, an officer might peer through the car window to look for evidence of wrongdoing. Whether or not anything seems amiss, the officer may ask for consent to search the vehicle. Answering questions at an investigatory stop or consenting to a search is nominally “voluntary,” although practically speaking, empirical evidence suggests that most people do not feel free to refuse either request.¹⁸

The best predictor of whether a police officer will make an enforcement stop in a particular situation is how a citizen is driving. “When police are engaged in traffic-safety enforcement, they make stops without regard to the driver's race” or other characteristics (p. 72). But the best predictor of whether a police officer will make an investigatory stop turns out to be the driver's personal characteristics. Youth, race (especially blackness), and gender (maleness) provoke the

¹⁴ The authors are describing general categories, and we might imagine a variety of stops that fall somewhere between these two.

¹⁵ 517 U.S. 806 (1996).

¹⁶ *Id.* at 813. While the *Whren* Court held that a traffic stop *was* illegal if the defendant could prove an officer had intentionally used race as the primary reason for the stop, *id.*, it is difficult to imagine how a stop would ever be invalidated on *Whren* grounds short of an officer's own admission of his or her racist motivations.

¹⁷ For example, more recently in *Heien v. North Carolina*, 135 S. Ct. 530 (2014), the Supreme Court held that a stop is legitimate even if police base it on a misunderstanding of the law, as long as that misunderstanding is reasonable. *Id.* at 534.

¹⁸ See generally Kathryn M. Young & Christin L. Munsch, *Fact and Fiction in Constitutional Criminal Procedure*, 66 S.C. L. REV. 445 (2014). Moreover, as Young and Munsch find, rights assertion in police-citizen encounters differs based on social class background: lower socioeconomic status is associated with a greater reluctance to assert constitutional rights in interactions with the police. *Id.* at 476.

most stops, and the combination of these factors results in young black men being stopped most frequently of all (p. 66). Low-value vehicles are also more likely to be stopped than higher-value vehicles, even when other variables are controlled (p. 68).

Notably, the authors did *not* find similar racial disparities in enforcement stops (p. 72). It appears that when police officers concentrate solely on enforcing traffic laws, they do not reach racially disparate results. But when they “investigate” people more broadly, the disparities are striking. As the authors describe in their review of the literature on stereotyping and implicit bias, Americans generally believe that crime is perpetrated at higher rates by black Americans (pp. 42–44). And these cognitive frameworks, which police officers bring with them to the job, are not easily dismantled. Even officers who try assiduously to combat these implicit racial biases are likely to be affected by them in making the kinds of split-second, gut-level decisions required of law enforcement officials every day.¹⁹

Strictly speaking, many investigatory stops police officers make are probably unconstitutional (p. 9);²⁰ for example, police officers may have no objective justification for a stop, then may create one after the fact only if necessary. But *Whren* gives officers a wide berth, and a stop’s legality is virtually guaranteed to be upheld in court if an officer can explain his actions effectively²¹ — something the police are trained to do. In the absence of a meaningful disincentive, police continue to conduct these stops regularly. After all, investigatory stops have virtually no downsides for police officers, but do have occasional upsides, since they sometimes result in arrests, and arrests are seen as a major goal of policing. Officers who make lots of them are perceived as doing their jobs well (pp. 29–30).

Although investigatory stops have been around for decades, they did not rise to popularity as an enforcement technique until the 1980s (p. 8). The impetus was a popular sense that effective law enforcement required police officers to have a finger on the community’s pulse (p. 9). Run-of-the-mill, everyday contact with the people who lived in a neighborhood was a means of gathering information that might eventually yield investigative fruit. In the decades that followed, these investigatory practices resulted in more police-citizen contact and

¹⁹ See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 885–88 (2004).

²⁰ The authors cite Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315 (2004).

²¹ See *United States v. Arvizu*, 534 U.S. 266, 277 (2002). Immediately after *Whren*, *Police Chief* magazine wrote that *Arvizu* “preserve[s] officers’ ability to use traffic stops to uncover other criminal activities” (p. 35) (quoting Michael J. Whalen, *Supreme Court Rulings Acknowledge Practical Considerations of Law Enforcement*, POLICE CHIEF, Apr. 2002, at 11).

came to be “viewed not only as effective, but as *professionally right and proper*” (p. 12). From the same ethos grew practices such as “stop-and-frisks”²² and “knock-and-talks.”²³ Another crucial innovation was the retention and use of information from one encounter to the next. A young man stopped on the street might be frisked, asked whom he is dating, where he lives, and where he works or what school he is attending. Even if the stop turns up no whiff of illegal activity, the information is recorded and stored. A record of someone’s relationships and daily activities may be kept for months or years regardless of whether he has done anything illegal — a theme that reverberates through *On the Run*, the next book we will discuss, even more resoundingly. One might wonder, then, what distinguishes this kind of generalized “investigation” from “surveillance.” We are hard-pressed to find a distinction that is not mostly semantic.

B. Policing and Citizenship

The demographic patterns that show up in police stops are problematic in their own right, but become even more complicated when the authors explain the social and psychological consequences of these patterns:

Disproportionate levels of investigatory stops of African Americans, in turn, encourage these drivers to bring to their encounters with police expectations of unequal and intrusive treatment, and to leave these stops deeply distrusting the fairness of the police and doubting their own equal status and liberty in society. The comparative freedom of whites from these stops encourages them to view police stops as a legitimate form of traffic enforcement. (pp. 50–51)

A black driver is more likely to attribute a given stop, accurately or not, to racial motives, and is more likely to question the stop’s legitimacy. The reasons for this attribution abound. For one, personal experience is a powerful teacher: not only are blacks much more likely than whites to have been subject to investigatory stops in the past, but they are also more likely to “have heard friends or family members describe their experiences in these stops” (p. 47). More generally, “[b]lacks, especially black men, older blacks, and lower-income blacks, believe that whites hold negative racial attitudes about them” (p. 47). This phenomenon — people’s beliefs about other groups’ perceptions about members of their own group — is known as “meta-stereotyping.” Meta-stereotyping is particularly likely to be activated in the racialized context of policing, where black-white relationships

²² See, e.g., *Terry v. Ohio*, 392 U.S. 1, 10 (1968).

²³ See, e.g., *United States v. Cormier*, 220 F.3d 1103, 1106 (9th Cir. 2000); *United States v. Jerez*, 108 F.3d 684, 691 n.7 (7th Cir. 1997); see also Craig M. Bradley, “*Knock and Talk*” and the Fourth Amendment, 84 IND. L.J. 1099 (2009).

and black racial identity are both very salient (p. 47). As Epp, Maynard-Moody, and Haider-Markel write: “Based on personal and shared experiences, blacks believe that the police are *constantly watching* them and treat them as if they don’t belong; blacks fear that every small offense will result in a stop and that every encounter with the police can escalate and turn ugly” (p. 47).²⁴ That is, not only is it a fact that certain drivers are “kept track of” more than others through investigatory stops, but they subjectively experience this surveillance in a heightened way — as an explicitly racial event that increases their awareness of race as well as the salience of their racial self-identification.

The authors of *Pulled Over* found that black and white drivers are both more likely to believe that a stop was illegitimate if they think an officer behaved rudely (p. 129), a finding consistent with the procedural justice literature.²⁵ But while white drivers’ doubts about a stop’s legitimacy are tempered if they are given a warning rather than a ticket, this is not the case for black drivers, “for whom being let off without a ticket is not a meaningful measure of whether the stop was problematic” (p. 131).²⁶ More meaningful for black drivers is whether the stop fell under the “enforcement” or “investigatory” category (p. 129). Though black drivers are less likely than white drivers to view any given stop as legitimate, it is noteworthy that for black drivers, there is a significant difference in the perceived legitimacy of investigatory versus enforcement stops, with investigatory stops perceived as less legitimate (for whites, no significant difference exists) (pp. 129–33).²⁷ Black drivers may understand information-gathering stops as a form of race-based regulation and surveillance — that is, as a way of policing *who* they are rather than *what* they are doing. This interpretation is consistent with black drivers’ heightened awareness of how police perceive them in the geographic context of where they are driving. Forty percent of black respondents said that they “sometimes” or “often” avoided driving in certain neighborhoods for fear they would be targeted by the police, compared to only 12% of white respondents (pp. 145–46).

²⁴ Emphasis has been added.

²⁵ See Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men’s Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 768–69 (2014).

²⁶ Interestingly, black drivers *are* more likely to perceive a stop as legitimate if the officer who pulled them over gives them a lecture about traffic safety, which made no significant difference to white drivers’ perceptions (pp. 129–31). The authors hypothesize that this is because black, but not white, drivers are looking for clues about whether a stop is chiefly for purposes of traffic safety or chiefly investigatory. A lecture about safety may send a message that the officer is mostly concerned with enforcing traffic regulations.

²⁷ We should note, though, that from the authors’ data set, it is somewhat difficult to discern whether a given stop is investigatory or for traffic safety.

Police-citizen encounters resulting from investigatory stops of black drivers are psychologically destructive at both an individual and a societal level. Regardless of whether the officer who stopped her was “polite,” a black driver tends to leave a traffic stop, particularly an investigatory stop, feeling like a second-class citizen (pp. 124–27); for this individual, her very status as an American has been diminished. More broadly, investigatory stops undercut the core legitimacy of police and law enforcement in the eyes of black Americans, eroding their trust in the police (p. 143). This decreased perception of legitimacy has negative consequences for future interactions with law enforcement, and may have negative consequences for other kinds of civic involvement that uphold law and order.²⁸

The authors of *Pulled Over* also argue that white drivers’ cognitive frames “reflect their history and, regardless of social and economic status, are based on white privilege. Whites begin their encounters with police assuming that they have full citizen rights and leave these experiences with their status undiminished” (pp. 47–48).²⁹ While this assertion makes a kind of intuitive sense, we are not fully persuaded by the data they present. After all, these conclusions are based on patterns the authors identify in the narratives. While thirty-five interviews can offer a somewhat substantial look at the differences between two racial groups, we are skeptical that this sample is large enough to detect nuanced patterns in social class (or the interaction of race and class). And while interviewees were chosen to represent different ages and races, there is no evidence that the authors tried to gather narratives that represent any sort of economic diversity. Indeed, other research suggests that more nuanced patterns may be at work. The only empirical study to examine rights assertion and social class suggests that not only do people of all races make similar assumptions about the rights they possess, but that social class *does* affect a person’s willingness to assert his or her rights in an encounter with the police.³⁰ That is, the idea that all whites equally “begin their encounters with police assuming that they have full citizen rights” seems to us a larger claim than

²⁸ See Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 525–26 (2003); Kathryn M. Young, *Everyone Knows the Game: Legal Consciousness in the Hawaiian Cockfight*, 48 LAW & SOC’Y REV. 499, 524–25 (2014). Political scientists Amy E. Lerman and Vesla M. Weaver argue convincingly that aggressive surveillance by police and other criminal justice authorities is gradually disempowering large segments of the U.S. population. Ultimately, this will undermine participatory government and American democracy. See generally AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP* (2014).

²⁹ A footnote has been omitted.

³⁰ See Young & Munsch, *supra* note 18, at 476–82. This study also suggests that there is a direct correlation between socioeconomic status and the willingness to assert rights, which means that the burden of unnecessarily intrusive searches may fall even more disproportionately on poor people. *Id.*

the authors' data can support. Still, this critique does not diminish the authors' point about the effects of black versus white identity on drivers' experiences of police-citizen encounters.

The culturally embedded biases and assumptions that lead police officers to make more investigatory stops of black drivers, coupled with black drivers' ability to recognize these stops and tendency to view them as illegitimate, have created a policing practice that systematically and destructively undermines black citizens' sense of themselves as equal citizens. The authors ultimately conclude that "[i]nvestigatory stops are procedurally poisoned at their core" (p. 133).

As we will see in the discussion of *On the Run* that follows, the patterns *Pulled Over* details are not limited to this particular form of police-citizen interaction. Indeed, it is characteristic and symptomatic of a more pervasive problem: a world in which police and other criminal justice officials work as "surveillors," keeping track of particular types of people and geographic areas. A culture of policing that considers investigatory stops a cornerstone of information gathering and places a great deal of value on making arrests, combined with a legal structure that gives police broad discretion to make pretextual stops³¹ and arrest people for even minor infractions,³² has created an environment of surveillance and control in which black citizens are made to feel culturally and legally subordinate, and in which young, black, male, and lower-socioeconomic-status citizens are subject to greater investigatory surveillance. *On the Run* gives us a closer look at the shape and social consequences of that surveillance.

II. ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY

In approaching criminal justice reform, President Barack Obama has said: "[P]art of the challenge is going to be making sure, number one, that we humanize what so often on the local news is just a bunch of shadowy characters, and tell their stories . . ." ³³ In the tradition of ethnographies like Professor Mitchell Duneier's *Sidewalk*³⁴ and Professor Elijah Anderson's *Code of the Street*,³⁵ *On the Run* does precisely this. The book synthesizes years of participant-observation research

³¹ See *Whren v. United States*, 517 U.S. 806 (1996).

³² See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

³³ The White House, *A Conversation With President Obama and The Wire Creator David Simon* at 8:34, YOUTUBE (Mar. 26, 2015), <https://www.youtube.com/watch?v=xWY79JCfhjw&t=8m34s>; see also Anna Silman, *Obama Geeks Out to "The Wire": The Complete Transcript of His Interview with David Simon*, SALON (Mar. 27, 2015, 10:29 AM), http://www.salon.com/2015/03/27/obama_interviews_the_wire_creator_david_simon_on_the_war_on_drugs_the_full_transcript [<http://perma.cc/QR8D-H8AP>].

³⁴ MITCHELL DUNEIER, *SIDEWALK* (1999).

³⁵ ELIJAH ANDERSON, *CODE OF THE STREET* (1999).

that sociologist Alice Goffman conducted in a Philadelphia neighborhood she calls “6th Street.”³⁶ While not one of the city’s poorest black neighborhoods, 6th Street is far from middle class. Its residents are more likely to experience prison than college, and drug deals, violence, and police action are constants of neighborhood life. Goffman details how the criminal justice apparatus, from stop-and-frisks to mass incarceration to parole supervision, affects people’s day-to-day lives. “[P]oor Black neighborhoods,” she argues, are becoming “communities of suspects and fugitives. A climate of fear and suspicion pervades everyday life, and many residents live with the daily concern that the authorities will seize them A new social fabric is emerging . . . woven in suspicion, distrust, and the paranoid practices of secrecy, evasion, and unpredictability” (p. 8).

A. *Keeping Track*

In the same decades that investigatory stops have become a cornerstone of policing, law enforcement has seen unprecedented advances in data-gathering technology. Information is shared between counties, states, and the federal government; moreover, shared data does not come just from law enforcement agencies, or even just from the legal system. As Goffman’s interviews with police officers in Philadelphia reveal, law enforcement officials in search of information about a particular individual may also access records as varied as social security data, hospital admission records, employment information, and gas and electric bills (p. 19). The virtually ubiquitous availability of personal information to law enforcement, coupled with the advent of the investigatory stop, has radically altered the landscape of policing.

In tracking down any suspect who lives on 6th Street, even one with no criminal record, police may already have enough information on file about him to go to his girlfriend’s or his mother’s house, to his workplace, or to see his friends. As Goffman documents, these kinds of visits may themselves turn into new “investigatory” encounters that parallel the investigatory stops detailed in *Pulled Over* and have the goal of gathering and stockpiling information.

³⁶ For a sociology book initially published with a university press, *On the Run* has received a tremendous amount of attention — accompanied by a hefty dose of criticism. The only critique that strikes us as especially meritorious is an ethical one: at the end of the book, Goffman discloses her own apparent willingness to commit a felony, accompanying one of her subjects on an armed hunt to find another’s killer (p. 260). From her account, it seems that her role as aggrieved friend got too close to her role as researcher. This level of enmeshment is an ethical minefield for ethnographers, and Goffman crossed a line. Still, the admission offers us no grounds for questioning the veracity of the details she relates. The allegations that she fabricated data or exaggerated claims have received a fair amount of media attention, but at this point strike us as so poorly founded that they are not worth debating here.

Goffman recounts one such incident in which police are looking for one of her research subjects, Mike, whose parole officer has issued a warrant for his arrest because Mike returned after curfew one night to the halfway house where he was staying. Based on their existing information about Mike, police go to the home of Mike's mother, Miss Regina, which Goffman is visiting. When Goffman and Miss Regina explain that they don't know Mike's whereabouts, police search Miss Regina's house aggressively, even slashing open the couch cushions. They tell Goffman that if she doesn't give up Mike's whereabouts, it will be *her* fault when Miss Regina's house is trashed (p. 62).³⁷ These interrogations and physical searches, which Goffman describes numerous times in *On the Run*, may not bear fruit immediately. However, law enforcement officials have come to see information gathering as a valuable goal in and of itself for its potential to contribute to an investigation or the apprehension of a suspect at some point in the future. Records of a person's relationships and daily activities may be kept for months or years, regardless of whether he has done anything illegal.

B. "Dirtiness," *Dipping, and Dodging*

On 6th Street, *any* police interest in a man is sufficient to render him "dirty." A "clean" man, on the other hand, is one in whom the police have no official interest: he is not on parole, has no warrants out, and is not wanted for questioning (pp. 5–6).³⁸ It is hard to overstate the salience of the clean/dirty label in ordering neighborhood life — it is the distinction between "those able to make it safely through a police stop, and those likely to be seized" (p. 198). Dirty men cannot move freely, without fear of being taken in by the police. No matter how minor the legal violation for which they are (or believe they are) wanted, they cannot apply for a driver's license or legal identification, face great difficulty in finding and holding a legal job, cannot call the police if they are victimized, and cannot make use of social services that would improve their situations.

One of the book's most compelling lessons is the thinness of the line between "cleanliness" and "dirtiness." Simply occupying a particular social position can make it exceedingly easy for a person to suddenly find himself in the latter category. Chuck, one of the book's central figures, starts a fistfight his senior year of high school when another boy calls Chuck's mother a "crack whore" and Chuck pushes the boy's

³⁷ Whether or not their actions were technically legal, they were probably legally defensible. (Presumably, this intrusive search is legally "allowed" because Mike could have hidden something related to the crime in the cushions.)

³⁸ As Goffman makes clear, the "dirty" world also creates a large amount of illegal activity in the ostensibly "clean" one — for example, the robust, informal illegal economies in jails and prisons, in which many corrections officials are involved (pp. 159–62).

face into the snow (p. 11). The fight results in no serious injury, but instead of the weeklong suspension that might be doled out at a middle-class suburban school, Chuck is charged with aggravated assault. Despite a decent GPA and membership on the school basketball team, Chuck lands in county jail. Though most of the charges are dropped, he ends the year with a criminal record rather than a diploma, and the school refuses to re-enroll him the next fall. When he can't afford the court fees that result from the case, a judge issues a warrant for Chuck's arrest (p. 12).

Throughout the book, we see the domino effect of this single incident on Chuck's life and the lives of those around him.³⁹ Goffman's point isn't that one charging decision will inevitably ruin a man's life, but that difficulty and disadvantage beget difficulty and disadvantage in complex, nonobvious ways. At times, *On the Run* reads like a particularly dispiriting version of the popular children's book *If You Give a Mouse a Cookie*⁴⁰: court costs may result in a warrant; a warrant may result in the inability to get a state-issued ID; the inability to get a state-issued ID may result in the inability to get a legal job; the inability to get a legal job may result in a financial need to do some form of illegal work; doing some form of illegal work may result in additional criminal charges; and so on. Even the smallest amount of contact with the criminal justice system can derail a person's chances of educational and material success.

Some of the most important social processes detailed in the book involve the social and psychological consequences of becoming dirty. Dirty men must devote a great deal of mental energy to eluding the police. One subject explains: "If you hear the law coming, you [run away] . . . You don't be having time to think okay, what do I got on me, what they going to want . . . 'Cause whoever they looking for, even if it's not you, nine times out of ten they'll probably book you" (pp. 23–24).⁴¹ Having an outstanding warrant, being on probation or parole, or being wanted for questioning in connection with a crime are all seen as reasons to elude the police. Young men facing such pressures learn to cultivate a lifestyle known as "dipping and dodging" (p. 6). This "lifestyle of secrecy and evasion" shapes the legal consciousness of dirty men and affects their interactions with others in their community (p. 196).

³⁹ Chuck's little brother, for example, ceases speaking for months when his big brother is away in jail, and the boy's own first arrest comes not long afterward (pp. 11–12).

⁴⁰ LAURA NUMEROFF, ILLUSTRATED BY FELICIA BOND, *IF YOU GIVE A MOUSE A COOKIE* (1985).

⁴¹ Practicing running from the police is even a pastime for neighborhood kids — something on which boys tutor their younger brothers (pp. 9, 23–24).

While these “dipping and dodging” practices are widely understood by 6th Street residents as necessary, they give rise to mistrust between men and the people in their social and familial lives. Having a dirty status leads men to “see those closest to them as potential informants” (p. 196) because police commonly rely on intimates for information about dirty men’s activities or whereabouts (p. 55). For this reason, it behooves these men to lie to friends, relatives, and other intimates about where they have been or where they are going. In any given situation, a man might lie to someone he believes will give information to the police, *or* he might lie to someone he loves and wants to protect (to spare that person from having to decide whether to give the police information about him) (pp. 39, 197–98). When a woman’s boyfriend is vague about where he is staying that night, or when a son lies to his mother about where he will be at a certain time, the dirty man’s loved one will not necessarily know the motivation for the lie. Unsurprisingly, this dynamic strains interpersonal trust and weakens social, familial, and romantic relationships.

A related dipping and dodging technique involves moving frequently from place to place. It is not uncommon for young men to sleep in cars or on the street if they believe police might be looking for them, even when a warm couch or bed is offered to them by a loved one (pp. 14, 52–53, 196–97). Again, a young man’s elusiveness can breed ambiguity about how strong a given relationship really is, and social ties are weakened as a result. In this way, intentionally or not, police surveillance shapes the social reality of those who are being “kept track of.” This type of policing practice contributes to social breakdown and mistrust by creating a group of people whose behaviors and identities are defined by their status as subjects of policing.

It is worth noting, too, the other ways in which dirty men’s intimates are affected by policing patterns. Some officers threaten neighborhood residents who refuse to provide information about men for whom the police are looking (pp. 19–20, 63–65). At various points in *On the Run*, Goffman recounts threats of arrest, eviction, loss of child custody, physical harm, and even destruction of property (pp. 19–20, 62–66, 87). Someone whose son, father, brother, or lover is dirty constantly faces pressure to make impossible choices: Should she risk her housing or risk her son being taken into custody? What can she tell police so that they won’t call child services? Goffman writes that any woman living on 6th Street quickly “learns that her children and her home aren’t safe, nor are the other people she holds dear. She begins to see her daily life as an almost endless series of crimes, for which she may be arrested at any moment the police see fit” (p. 87). Goffman explains how this policing practice contributes to neighborhood breakdown:

[T]he police’s strategy of arresting large numbers of young men by turning their mothers and girlfriends against them goes far in creating a culture of

fear and suspicion, overturning women's basic understandings of themselves as good people and their lives as reasonably secure, and destroying familial and romantic relationships that are often quite fragile to begin with. (p. 90)

When police make these threats, they may or may not be telling the truth (and have no specific legal obligation to do so⁴²). The officers Goffman details lie about their power to end a person's government housing benefits, or tell her that her boyfriend is cheating on her even if he is not, or falsely claim that her son has told them she is storing illegal drugs in her apartment. Sussing out whom to believe and when is extremely difficult for a person who is trying to hold onto her home, children, personal relationships, and own clean status.⁴³

Just as investigatory stops befall some kinds of drivers more than others, the kinds of policing techniques Goffman describes are not practiced with equivalent frequency in all geographic areas. Whether a 6th Street resident is clean or dirty, the clean/dirty distinction shapes his interactions with the police, as well as his social experiences with others in the neighborhood. Poorer neighborhoods are easier to police: more people have records, they are vulnerable to threats because they are receiving government benefits, a lesser sense of entitlement means that questionable practices are unlikely to provoke consequences for the officers who carry them out, people are less likely to assert their rights, and a lack of private space means that illegal activities are more likely to occur in plain view. As the authors of *Pulled Over* emphasize: "[M]aking arrests and big busts will always be easier in the disorderly context of poor urban neighborhoods than in wealthier urban and suburban neighborhoods. Official efforts at crime control,

⁴² Officer deception is an extremely common investigative practice, and is generally permitted as long as the deception does not render a person's consent "involuntary" — a high bar, indeed. See Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 813 (1997).

⁴³ The clean/dirty distinction and pervasive influence of overcriminalization affect 6th Street's clean residents, too. One of Goffman's subjects, Josh, is clean nearly the entire span of the study. But living on 6th Street, it is not practical for him to associate *solely* with other clean people, particularly if he wants to have male friends. Nonetheless, Josh stays out of trouble and focuses on his education (p. 181). Eventually, his "clean" status leads to his being approached for favors such as gun buying, loans, and help interacting with authorities (pp. 184–85). Goffman writes: "Being on intimate terms with legally compromised young men also presented him with a series of ethical dilemmas that those with their own legal entanglements didn't face, and which at times caused him considerable distress" (p. 186). Josh turns down most of these requests and moves to a different neighborhood, but he eventually shields a younger boy from harm by giving him temporary shelter. This decision, and his affiliation with "dirty" men, contributes to Josh's loss of a management job, and he ends up moving back to 6th Street (pp. 182–83, 186).

therefore, will inevitably focus on poorer neighborhoods” (Epp et al., p. 30).⁴⁴

C. *The Creation of Liminal Citizenship*

Being subject to high levels of scrutiny by law enforcement also shapes 6th Street residents’ ability to use the governmental, social, and private institutions often taken for granted as markers of “normal” citizenship and community participation. These sites are perceived as risky places for men who are reluctant to be subject to police information gathering; having an established identity is seen as dangerous.

One risky place is the hospital, where visiting a friend or seeking medical attention becomes fraught. Goffman’s subjects explain that police regularly “run the names” of hospital visitors and admitted patients (p. 34).⁴⁵ Goffman writes: “Sitting in the ER waiting room, I often watched police officers walk Black young men out the glass double doors in handcuffs” (p. 34).⁴⁶ For example, when Alex goes to see his girlfriend give birth to their child, he is arrested “along with two other men on the delivery room floor” because there was a warrant out on him for a minor parole violation: driving with a revoked license (p. 34). Alex learns his lesson; later, when he receives serious injuries to his face and jaw from a pistol-whipping, he refuses to go to the hospital (p. viii). If the police were to run his name, he decides, they might find a parole violation, or take him in for questioning (pp. viii–ix). For Alex, neglecting his physical health has real consequences, but these seem worth paying in order to avoid the chance of being sent back to prison.

As men on 6th Street learn, interacting with any government authorities can backfire. At one point, Mike reports a robbery to the police (p. 29). Later, when a warrant is out for his arrest, the police find

⁴⁴ The authors cite JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (3d ed. 1994); and MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011).

⁴⁵ Goffman has been criticized for making this claim; a few reviewers have suggested that this practice does not really occur. See, e.g., Dan McQuade, *Alice Goffman’s Book on “Fugitive Life” in Philly Under Attack*, PHILADELPHIA (June 11, 2015, 2:25 PM), <http://www.phillymag.com/news/2015/06/11/alice-goffman-book-philadelphia-on-the-run-criticism> [<http://perma.cc/N8VX-32FQ>]. However, as Professor Philip Cohen points out, Goffman makes no empirical assertion about the prevalence of this policing strategy (though she notes that multiple officers told her “it is standard practice” (p. 34)); her point is that the 6th Street boys *believed* this was so, and that this belief, proliferated in their social circles, affected their behavior and their relationship to institutions. See Jennifer Schuessler, *Alice Goffman’s Heralded Book on Crime Is Disputed*, N.Y. TIMES (June 5, 2015), <http://www.nytimes.com/2015/06/06/books/alice-goffmans-heralded-book-on-crime-disputed.html>.

⁴⁶ She adds: “Some police come to the hospitals to investigate shootings and to question the witnesses who arrive there; others come because the men they have beaten while arresting them require medical care before they can be taken to the precinct or the county jail” (p. 34).

him because he had reported this crime and honestly answered the police's questions about himself (p. 30). Mike's friends had predicted this outcome, criticizing his decision to use the police to solve his problems (pp. 29–30). On 6th Street, the vindication of wrongs often falls to the victim himself, or to the victim's friends or family. If his car is stolen or his house is robbed, calling the police is thought to do more bad than good. As Goffman writes: "The police are everywhere, but as guarantors of public safety, they are still out of reach" (p. 31).

Many other institutions are out of reach as well, and it is conventional wisdom on 6th Street that even nongovernmental institutions are best avoided. As described above, hospitals are seen as potential arrest sites, so men go to great lengths to avoid them, even if their medical need is serious and their "dirtiness" is minor (pp. 34–35). Conventional banks are also off limits, partly because giving an institution information about oneself is practically tantamount to giving it to the police, and partly because it is difficult to get a bank account without proper identification. Some families keep cash hidden at home in their walls, rendering it vulnerable to theft or seizure (pp. 76, 95, 126).⁴⁷

Men like Alex and Mike are trapped in an odd, suspended civic space. Mentally and physically, they are not free to live like "normal" citizens, yet they are not institutionalized. Instead, they dip and dodge, constantly "using fake names, looking over their shoulder, and living with the genuine fear that those closest to them may bring them into the hands of the police" (p. 195). The term "liminal citizenship" has been used to describe immigrants to the United States who are not fully documented,⁴⁸ and in some ways, the residents of 6th Street have an analogous experience. They *are* American citizens, but their citizenship exists in an uncomfortable and precarious state; as a practical matter, they are prevented from taking part in community institutions. Their citizenship is caught in a suspended, liminal state from which it is exceedingly difficult to emerge. "[L]iving on the run is akin to treading water — continual motion without getting anywhere" (p. 197).

Nor are these "dirty" individuals few in number. Goffman is not speaking of a handful of "bad apples or of people who have fallen

⁴⁷ Interestingly, bail offices are sometimes used as a kind of informal "bank"; after the close of a case, the refundable portion of a bail fee (80%) may be left unclaimed for up to a year (p. 95). Many of Goffman's subjects left bail money untouched for months, particularly if they lacked a secure place to keep it. Goffman cites this strategy as an example of how her subjects used government institutions to their own advantage — and no doubt it is. But this "informal credit" (p. 96) lacks the advantages of using formal institutions, such as building a credit score or earning interest.

⁴⁸ See, e.g., Rebecca Maria Torres & Melissa Wicks-Asbun, *Undocumented Students' Narratives of Liminal Citizenship: High Aspirations, Exclusion, and "In-Between" Identities*, 66 PROF. GEOGRAPHER 195 (2014).

through the cracks” (p. 194). Instead, she is talking about entire chunks of poor, largely black neighborhoods that have been transformed by overcriminalization, mass incarceration, and policing (p. 194). Here, it is important to underscore the parallel between the people in poor neighborhoods like 6th Street and the black drivers subject to investigatory stops in *Pulled Over*. For both groups, police surveillance powerfully influences their understanding of who they are in a social sense. As *Pulled Over* details, in this way the actions of law enforcement are crucial in constructing race and citizenship. Social class, too, figures importantly into this creation of liminal citizenship.⁴⁹

As we point out in our discussion of *The Eternal Criminal Record* in the next section, the clean/dirty distinction is neither something that is solely internal to individuals, nor something that is restricted to their social or community lives. Nor does it cease to be important when a person has served his time. Instead, the clean/dirty distinction and the government’s propensity for “keeping track” of certain groups continues to affect people’s experiences as citizens well beyond their own neighborhoods, powerfully shaping the kinds of futures they can build for themselves.

III. THE ETERNAL CRIMINAL RECORD

James Jacobs’s *The Eternal Criminal Record* is the first comprehensive examination of the production, proliferation, and use of criminal records in the United States. The buildup of the prison system, coupled with technological advances permitting widespread access to criminal records, means it is nearly impossible for an individual to overcome his or her criminal past. Jacobs writes that “[c]riminal background checking has become a routine feature of American life” (p. 5), and concludes that, “[f]or a large segment of the U.S. population, a criminal record has become *the most important* marker of public identity” (p. xiii).⁵⁰

Walking out the prison gate or jailhouse door is the beginning of an often Herculean struggle to earn a living. Having been absent from society during their incarceration, however brief, these Americans have lost connections to family and community, fallen behind in their trade

⁴⁹ As we know from other sociological research, social class powerfully affects the sense of entitlement that people bring into different situations. See Annette Lareau, *Invisible Inequality: Social Class and Childrearing in Black Families and White Families*, 67 AM. SOC. REV. 747 (2002). This does not undercut the importance of race in experiences of policing; rather, it is an additional dimension that is sometimes overlooked — partly because it is difficult to study, partly because the racial dynamics in American policing are *so* strong, and partly because many studies of policing have justifiably focused on poor urban neighborhoods with large concentrations of minority residents.

⁵⁰ Emphasis has been added.

or profession, and, according to our current laws and cultural standards, become forever suspect as employees and colleagues. The legal bonds keeping former prisoners from overcoming their pasts are harsh. But tens of millions of Americans are also haunted by a digital footprint, a neon criminal record accessible to anyone, potentially inaccurate, and dispersed at will to would-be employers by a thriving, for-profit industry. Unfettered by meaningful regulation, this industry perpetuates the stain of incarceration long after a sentence is served, locking ex-offenders in a lifelong struggle to shed their pasts and become the productive, self-supporting community citizens we expect them to be. The state of uncertainty these Americans face as members of their communities echoes the sense of second-class citizenship described in *Pulled Over* and *On the Run*. They are “free” citizens, yet the ways in which they continue to be kept track of suspend them in a pseudo-carceral state characterized by both official and nonofficial restrictions.

A. A “*Negative Curriculum Vitae*” with No Expiration Date

An estimated seventy-eight million Americans — approximately one third of the adult population in the United States — possess some form of recorded criminal arrest history.⁵¹ Most arrests are for relatively minor or nonviolent offenses. According to the FBI, of the arrests made in the United States in 2009, only 4% were for the most serious types of violent crime (for example, murder, rape, robbery, and aggravated assault).⁵² Another 10% were for simple assaults, 18% were for property crimes, 12% were for drug offenses, and fully 56% were for other offenses (for example, drunkenness, vagrancy, driving under the influence, and weapons violations).⁵³ Over the last forty years, more and more people have been entered into criminal record repositories,⁵⁴ paralleling the data-amassing practices of police officers in investigatory car stops and highly policed neighborhoods. And like

⁵¹ Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

⁵² Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, NIJ J., June 2012, at 42, 43 & fig.1, <https://www.ncjrs.gov/pdffiles1/nij/238488.pdf> [<http://perma.cc/JVU2-NAXM>].

⁵³ *Id.* Researchers examining data from a sixteen-year-long U.S. Bureau of Labor Statistics survey found that more than 40% of the randomly selected male subjects had been arrested at least once by age twenty-three. Fields & Emshwiller, *supra* note 51. The arrest rate was highest for blacks at 49%, and was 44% for Hispanics and 38% for whites. *Id.*

⁵⁴ Because of the racialization of criminal justice, the proportion of black men with a criminal record approaches 80% in some major U.S. cities, and they become marginalized as part of what Alexander calls “a growing *undercaste*, permanently locked up and locked out of mainstream society.” ALEXANDER, *supra* note 8, at 7 (emphasis added).

the strategies detailed in the first two books we discussed, extensive recordkeeping, particularly of mere arrests and minor infractions, is a form of “keeping track” of populations who come into contact with the criminal justice system. In the case of criminal records, though, advances in technology have made those records accessible to the public — most notably to prospective employers. The overrepresentation of minorities and citizens of low socioeconomic status means that the trends Jacobs describes have taken an especially heavy toll on these communities.

The United States is unique in making criminal records public. Jacobs writes: “The accessibility of an individual’s criminal history, due to publicly accessible court records, legislatively authorized access to rap sheets, and agencies’ information-sharing policies is a striking example of American exceptionalism” (p. 5). And the computerization of court records has made them more widely accessible, exacerbating the stigmatizing effects. In short, everyone’s past is now public. By contrast, most European countries treat criminal records as personal data entitled to privacy protection (pp. 159–60).

Jacobs also writes about the explosion of quasi-criminal “intelligence” databases that are now treated much like criminal record files (p. 20). These additional databases — covering sex offenders, immigration violators, suspected gang members, and suspected terrorists — have expanded significantly since the attacks of September 11, 2001 (pp. 18–25). Congress has enacted broad security legislation providing funding for a better national infrastructure to maintain and share such records (pp. 18–26, 40–51). Lawmakers have also expanded the number of public and private companies that can access FBI records, and mandated that such information be used in some employment decisionmaking (pp. 42–45). The Patriot Act alone required background checks for an estimated 3.5 million additional employees (p. 43). Federal and state agencies have created hundreds of criminal and quasi-criminal databases with the express intention of capturing more information and sharing it with other law enforcement groups — but also with licensing agencies, financial regulators, and a wide variety of other parties. Meanwhile, the private market for criminal background checks has also exploded, creating a thriving industry that provides for-profit background-check services to employers, insurance companies, government agencies, neighbors, and curious onlookers. Today, learning anyone’s criminal past is just an inexpensive click away.⁵⁵

⁵⁵ Perhaps surprisingly, Jacobs does not unequivocally endorse “banning the box” — a popular movement to eliminate questions about prior convictions from job applications (pp. 271–73, 312). Instead, he envisions a society where an “applicant’s full criminal record is disclosed” to employers who take a mature perspective on past criminality and are equipped to recognize the value that ex-felons have to offer (p. 312). Somewhat in line with this viewpoint, Jacobs does not favor

These “negative curricul[a] vitae” (p. 2) often contain information that is incomplete or inaccurate (pp. 134–39). Rap sheets, for example, log arrests even for minor crimes. Local police departments record arrests, and forward totals and descriptions to state and national rap sheet databases. But since courts have no real incentive (or funding) to do the same type of accounting, whatever happened *after* an arrest may be left off the formal rap sheet. Therefore, some people who were arrested but never convicted,⁵⁶ or charged but acquitted, appear in background checks alongside people who were convicted of major crimes.⁵⁷ Police records and rap sheets are also hard for laypeople to interpret because they incorporate police jargon and complex legal information (p. 52). For example, different jurisdictions use different names or offense categories to describe similar events, and people unfamiliar with crime categories can misinterpret crimes as being much worse than the underlying facts warrant (p. 52).⁵⁸ Readers can also draw the wrong conclusion about someone based on a mismatch of his or her records. This frequently happens if the person has a common name, has used aliases, has moved around a lot, or has been the subject of identity theft.⁵⁹

Jacobs acknowledges that, as long as the information is accurate, there are good reasons for permitting access to a person’s criminal past. For example, police can run a background check from a module in their patrol car to find out if a motorist is a fugitive or violent felon. Banks can review criminal records to avoid hiring people convicted of financial fraud. But these kinds of public purposes should be weighed against a former convict’s need to move ahead with his or her life and reintegrate into society. While schools and daycare centers should arguably screen out any applicants who have *ever* victimized children, it is less clear that someone who passed bad checks twenty years ago should be prevented from working as a teacher’s aide. As Professor

expungement, partly because it “rewrites history,” and partly because it is unlikely to be wholly effective, given the availability and longevity of information online (pp. 130–32).

⁵⁶ The Bureau of Justice Statistics, using data from felony filings in the seventy-five largest counties, for example, shows that one-third of felony arrests never lead to conviction. *See* THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 1 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluco6.pdf> [<http://perma.cc/P53J-GNHV>].

⁵⁷ According to Gottschalk: “Half of these FBI records are inaccurate or missing critical information, most notably the disposition of an arrest.” GOTTSCHALK, *supra* note 9, at 244.

⁵⁸ For example, statutory rape can in some places stem from consensual sex between a nineteen-year-old and a sixteen-year-old.

⁵⁹ For example, Jose Gabriel Hernandez was wrongfully accused of sexually assaulting two young girls. It was a case of mistaken identity, but Hernandez “learned that the burden was on him to clear his record,” and that he would need to hire an attorney to assist him. Fields & Emshwiller, *supra* note 51. He also was held in jail on bond, and had to borrow money to pay a bail bondsman, forfeiting a 15% bond fee even when he was freed. *Id.*

Bryan Stevenson has often said: “Each of us is more than the worst thing we’ve ever done.”⁶⁰ Yet the mark of a criminal record, no matter how small, has no expiration date. And once information has been released and incorporated into online databases, it is virtually impossible to stuff the genie back in the bottle. In the next section, we will discuss the enduring effects of having a criminal record — both the direct legal consequences and the collateral consequences that make it difficult for this group of citizens to move forward.

B. Second-Class Citizenship and an Enduring Scarlet Letter

Under federal law and the laws of every state, a criminal record carries lifelong consequences. The American Bar Association identifies more than 38,000 punitive provisions that “apply to people convicted of crimes, pertaining to everything from public housing to welfare assistance to occupational licenses.”⁶¹ Former felons are often legally barred from the vote, financial aid for higher education, and government benefits such as Social Security.⁶²

In addition to these direct consequences, the public accessibility of criminal records produces many collateral consequences — most notably, barriers to employment. In a 2009 survey, 73% of employers required criminal background checks for all hires (p. 6). The “mark of a criminal record” predicts a person’s employment prospects more accurately than any other characteristic, and is particularly harmful to black Americans. Even after controlling for job category, Professor Devah Pager found that most employers are unwilling to probe into the specifics of an offense and simply use the presence of any criminal background as a reason to eliminate job candidates.⁶³ These obstacles to gainful employment, coupled with restrictions on housing and public benefits, create formidable barriers to staying crime-free. This ech-

⁶⁰ BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17–18 (2014) (emphasis omitted).

⁶¹ Alfred Blumstein & Kiminori Nakamura, Opinion, *Paying a Price, Long After the Crime*, N.Y. TIMES (Jan. 9, 2012), <http://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html>.

⁶² Jacobs discusses this topic in detail in Part IV of *The Eternal Criminal Record*. To take one specific example: “California has 4,800 additional penalties for having a criminal record. Most (73 percent) are lifetime bans, and 58 percent restrict employment.” Susan Burton, Opinion, *Prop. 47 Giving Future Back to Low-Level Felons*, L.A. DAILY NEWS (May 8, 2015, 2:23 PM), <http://www.dailynews.com/opinion/20150508/prop-47-giving-future-back-to-low-level-felons-guest-commentary> [http://perma.cc/67V4-9M96]. Further, “[m]ore than two-thirds of the states allow hiring and professional-licensing decisions to be made on the basis of an arrest alone.” Blumstein & Nakamura, *supra* note 61.

⁶³ Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 956 (2003). According to survey research, three in four people released from prison are still jobless a year after release. See JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 119 (2003).

oes Goffman's description of several 6th Street men in *On the Run* who turned to selling drugs after spending weeks or months trying to land a legal job — even one that paid only minimum wage (Goffman, p. 15).⁶⁴

Even if they manage to land jobs, ex-offenders can still face termination for their old criminal records. In 2015, Apple Inc. fired several construction workers upon learning of their prior felony convictions, including at least one who had been employed successfully in construction for years.⁶⁵ According to Apple's policy, anyone with a felony conviction or facing felony charges fails *per se* to "meet owner standards."⁶⁶ Apple later reversed its blanket policy due to public pressure,⁶⁷ but the episode serves as a powerful example of how a criminal record can frustrate a person's ability to re-enter society long after he or she has been fully "rehabilitated" (even though, after five to eight years of staying clean, an individual with a prior conviction poses no greater risk of committing another crime than other individuals of the same age⁶⁸).

Additionally, having previous arrests or convictions, or appearing on a "suspicious persons" database, provides stronger cause for stop-and-frisk policies and other police attention, which can mark someone's entry into the "usual suspect" category — branding a former felon for life and, in Goffman's parlance, rendering him permanently "dirty." A record influences every subsequent justice processing decision, including charges, sentencing enhancements, and eligibility for parole release. This is not to suggest that police *shouldn't* be allowed to take priors into account in investigating crimes — they certainly should. But it is important to realize that "[t]he criminal justice system

⁶⁴ This account conflicts with popular rhetoric about people who "choose" to sell drugs. While career dealers certainly exist, plenty of people opt in only in dire financial straits.

⁶⁵ See Wendy Lee, *Felons Barred from Constructing Apple's Campus*, SFGATE (Apr. 4, 2015, 7:59 PM), <http://www.sfgate.com/business/article/Felons-barred-from-constructing-Apple-s-campus-6178429.php> [<http://perma.cc/9US9-DV8J>].

⁶⁶ *Id.* (quoting documents obtained from construction companies).

⁶⁷ Wendy Lee, *Apple Changes Policy, No Longer Bars Felons for Construction Jobs*, SFGATE (Apr. 9, 2015, 3:58 PM), <http://www.sfgate.com/business/article/In-policy-change-Apple-no-longer-bars-felons-for-6189987.php> [<http://perma.cc/76LM-XZ7P>].

⁶⁸ Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327, 335–50 (2009). For this reason, Jacobs also proposes that "forever rules" (permanently excluding felons from certain benefits and jobs) be replaced by rules that expire with time clean. Some states have begun limiting the availability and use of stale criminal records. Under a 2010 law, for example, Massachusetts will restrict employers' access to information about convictions: five years for misdemeanors and ten years for felonies (with some legitimate exceptions). The law also protects employers from liability if someone they hire in accord with these restrictions commits a further offense. See 2010 *Mass. Acts 1064*; ASSOCIATED INDUS. OF MASS., *EMPLOYMENT LAWS FOR MASSACHUSETTS COMPANIES: A REFERENCE GUIDE* 1–3 (2014), http://www.aimnet.org/userfiles/files/2014_EmploymentLawsforMassCompanies_wb.pdf [<http://perma.cc/6EET-TC3R>].

feeds on itself,”⁶⁹ creating “harder lines between those who have been convicted and those who haven’t, a ‘we and them’ culture.”⁷⁰ The result is a large, “criminally stigmatized underclass” that is screened by law, policy, and common practice out of legitimate opportunities to rejoin society as “regular” citizens.⁷¹ In this way, the stigma of a criminal record has become a “scarlet letter” that marks another kind of liminal or second-class citizenship, created and perpetuated by the criminal justice system’s efforts to keep track of those it encounters.

IV. SURVEILLANCE, CITIZENSHIP, AND CRIMINAL JUSTICE REFORM

We began this Review by discussing the unprecedented bipartisan agreement coalescing around the need for criminal justice reform. Popular conversation tends to center on overincarceration and police brutality — and with good reason, as both exemplify the system’s worst tendencies: biased, expensive, disproportionately harsh, and violent. But suppose that through police training and selective decarceration, we successfully curtailed these problems. We would have fewer people in prison and fewer needless civilian deaths at the hands of police. Both outcomes would be positive, and thousands of lives would be improved or even saved. At the same time, we should not mistake the elimination of negative outcomes for the repair of a broken system. It is akin to trying to fix healthcare by developing affordable medicines to cure the most severe diseases. While the medicines *should* be developed because they would heal many people, we should not mistake their development for changing the way healthcare itself operates. Similarly, if we do not repair the most basic, day-to-day processes that comprise the criminal justice system, we can expect new problems to take root.

Collectively, the books we’ve discussed in this Review depict a criminal justice system that devotes a great deal of time and energy to keeping track of people. *Pulled Over* explains how the phenomenon of the investigatory stop allows police to legally target and collect information about any drivers they want to detain — and how the burden of this surveillance falls disproportionately on black drivers, young drivers, drivers of low-value vehicles, and drivers in the “wrong” neighborhoods. *On the Run* shows how easy it is to become “dirty” in a low-income neighborhood and demonstrates the powerful ways dirt-

⁶⁹ James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 387 (2006).

⁷⁰ Ruth Graham, *How Criminal Records Hold Americans Back*, BOS. GLOBE (Mar. 8, 2015), <https://www.bostonglobe.com/ideas/2015/03/08/how-criminal-records-hold-americans-back/bFnOmPhZKeimlafcPU5mmI/story.html> (quoting Jacobs interview).

⁷¹ Jacobs, *supra* note 69, at 387.

iness shapes social relationships and interaction with institutions. *The Eternal Criminal Record* shows how people are “kept track of” long after they’ve done their time and illustrates the extreme difficulty of getting out from under a criminal record. Each type of interaction with the criminal justice system that these books examine — car stops, home searches, on-the-street interactions, post-release recordkeeping, and so on — marks a different way that the criminal justice system acts as a surveillant of people’s lives. And as methodologically and substantively diverse as these three books are, they give strikingly similar accounts of the power of criminal justice control to create an enduring sense of second-class or liminal citizenship.

It is an apt moment to think about reform. The emerging political consensus may be paving the way for new and significant shifts in crime policy. Prison populations have stabilized and reform-minded politicians from both sides of the aisle have begun passing legislation to divert drug and property offenders from prisons, limit mandatory sentencing, and strengthen community alternatives.⁷² The most far-reaching and effective reforms, however, will be those that not only address our system’s outcomes, but also rewire the social processes that comprise the system’s inner workings — helping law enforcement be effective without allowing the criminal justice system to become something that poor communities must “overcome.”

We devote the remainder of this section to considering some of the shapes reform might take, rethinking the processes the criminal justice system uses to keep track of people and the ways it interacts with citizenship. These recommendations were chosen not because they are all-encompassing, nor because they are panaceas, but rather because they are practical, would result in dramatic improvements, and can be implemented now. Most are within the control of individual agencies.

A. Modes of Surveillance

1. *Disallow Surveillance Tactics that Make Police Less “Trustworthy.”* — Particularly in the wake of Ferguson, a great deal of public attention has been paid to policing and trust: why certain groups have less trust in the police than other groups, as well as how to change police-citizen interactions to engender greater feelings of trust. This approach to policing reform draws heavily on the procedural justice literature, and was discussed at length in the report of a recent presi-

⁷² The most far-reaching legislation to reduce prison populations and invest in community alternatives is California’s Public Safety Realignment Act of 2011, 2011 Cal. Stat. 271, popularly known as AB 109. Realignment shifted responsibility for nearly all lower-level property and drug offenders from state prison to California’s fifty-eight counties. For a complete description of AB 109 and its effects, see Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL’Y REV. 327 (2014).

dential task force on policing. That report states: “[P]eople are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority. The public confers legitimacy only on those whom they believe are acting in procedurally just ways.”⁷³ Respectful language, thoughtful dialogue, and police participation in community events are among the reforms prescribed.⁷⁴ At the heart of this approach is a focus on making citizens feel that police act fairly, which will make them trust the police and view the police as more legitimate, which in turn will result in greater compliance with the law.⁷⁵ We agree that trust is key for effective policing, and that procedural justice approaches are important to thinking about reform. Initiatives such as community members’ involvement in police training can go a long way toward building trust and establishing legitimacy.

At the same time, structuring interactions such that people emerge with more trust in police strikes us as less important than ensuring that, particularly in heavily policed and surveilled neighborhoods, police are substantively *worthy* of citizens’ trust.⁷⁶ Relatedly, while we support the philosophy behind community policing, it is vulnerable to misuse. “Getting to know the community” can create trust, safety, and legitimacy. But it can also open the door to the kinds of increased surveillance and information gathering that lead to second-class citizenship. It is important that community policing not be overly intrusive or “come back to bite” the communities being policed.

Implementing measures that enhance trust in the police must be coupled with a *decrease* in policing methods that erode trust and disrespect equal citizenship. This is a formidable challenge under current legal regulations; while aggressive policing tactics, such as slicing open Miss Regina’s couch cushions (Goffman, p. 61), may have only a small upside, they have virtually *no* downside for police officers. In practice, when a destructive, unconstitutional search fails to unearth evidence of illegal activity, the victim rarely has any meaningful remedy.⁷⁷ One approach would be to preserve citizens’ dignity by making them

⁷³ PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<http://perma.cc/JJ5W-DAP6>] [hereinafter FINAL REPORT].

⁷⁴ *See id.* at 45.

⁷⁵ *See id.* at 1–2.

⁷⁶ These approaches are not mutually exclusive. The Task Force’s report outlines several means of improving policing — of which procedural justice is only the first “pillar.” *Id.* at 2–4.

⁷⁷ Empirical evidence also suggests that there is a direct correlation between socioeconomic status and the willingness to assert rights, which means that the burden of unnecessarily intrusive searches may fall even more disproportionately on poor people. Young & Munsch, *supra* note 18, at 446.

“whole” in such situations. For example, we might ask: Why should innocent community members bear the cost of fruitless searches, such as having to replace their belongings or clean up their homes? Why not mandate — via robust, proactive legislation that does not rely on underresourced litigants to file costly, complex civil rights lawsuits — that an innocent citizen’s property be left in no worse shape than before the search?⁷⁸ Making citizens whole is not an indictment of the police, but merely a way to preserve the dignity of people like Miss Regina.⁷⁹

Particularly when it comes to investigating relatively minor offenses, we need to think carefully about the kinds of discretion police have, and the kinds of threats or promises we let them make in order to get people to cooperate with them.⁸⁰ One particularly problematic police practice along these lines is threatening reluctant informants with eviction (Goffman, p. 65). Given the current difficulty of securing housing in both urban⁸¹ and rural areas,⁸² this is a particularly dire threat. To make matters worse, any grounds the police cite for eviction need not be legally accurate⁸³ (and even accurate grounds are often attributable to poverty, such as minor health code violations). While we do not dispute that police should report harmful or egregious health code violations, perhaps the decision to report such violations should not hinge, for example, on a person’s willingness to consent to a search

⁷⁸ If searches fell upon wealthy white men with the same frequency, it is hard to imagine that they would be expected to “lump it.” See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 14–15 (1983).

⁷⁹ And to the extent that searches are sometimes used as a control tactic or means of intimidation, this kind of small restorative measure might provide a disincentive. As *Pulled Over* tells us, even investigatory stops carried out in good faith are distributed unevenly, both in their existence and in their social consequences. In an (admittedly further-fetched) extension of the same idea, we might imagine some kind of compensatory regime for fruitless stop-and-frisks.

⁸⁰ Police behavior can be constrained in various ways: constitutional criminal procedure, state law, departmental policy, and so on. In this section, we do not take a position on *how* these changes should be implemented. In the next section, we will discuss the role of federal constitutional law in regulating the police.

⁸¹ See CASSI FELDMAN, CTR. FOR AN URBAN FUTURE, AFFORDABLE HOUSING GAPS IN HIGH COST URBAN AREAS 8 (Andrew Breslau ed., 2007), https://nycfuture.org/pdf/Affordable_Housing_Gaps_in_High_Cost_Urban_Areas.pdf [<http://perma.cc/668W-JQUS>].

⁸² See Gillian B. White, *Rural America’s Silent Housing Crisis*, THE ATLANTIC (Jan. 28, 2015), <http://www.theatlantic.com/business/archive/2015/01/rural-americas-silent-housing-crisis/384885> [<http://perma.cc/XC7W-XNNP>].

⁸³ Theresa Langley, Comment, *Living Without Protection: Nuisance Property Laws Unduly Burden Innocent Tenants and Entrench Divisions Between Impoverished Communities and Law Enforcement*, 52 HOUS. L. REV. 1255, 1278–79 (2015); cf. Slobogin, *supra* note 42; William E. Underwood, *A Little White Lie: The Dangers of Allowing Police Officers to Stretch the Truth as a Means to Gain a Suspect’s Consent to Search*, 18 WASH. & LEE J. C.R. & SOC. JUST. 167 (2011); Rebecca Strauss, Note, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868 (2002).

of her home or to turn in her son for a minor parole violation. Threatening eviction renders people — particularly poor people — unduly vulnerable.

Along the same lines, threats of child removal also have tremendous manipulative potential. If police believe a child is in danger, they should take the necessary steps to secure the child's safety. But a child's well-being should not be available for use as a bargaining chip (Goffman, pp. 65–66). Police use these baseless threats to capitalize on their suspects' impoverished circumstances — a practice that demonstrates a lack of respect for family relationships in poor communities. Ultimately, threats of child removal and eviction breed mistrust of law enforcement and further corrode social and familial ties (Goffman, p. 66). In designing investigative regulations and thinking about how to approach reform, we must weigh the value of any tactic against its propensity for perpetuating second-class citizenship, including potential losses of individual dignity, decreases in family and community cohesiveness, and diminishing trust in law enforcement.⁸⁴ It is not simply that people need to feel that individual encounters with police are fair, but that, in a broader sense, they are not subject to a system of control that relegates them to lesser personhood.⁸⁵

2. *Recognize the Important Role of Constitutional Criminal Procedure in Regulating Police Behavior.* — Increasingly, legal scholars have expressed skepticism about the centrality of Fourth, Fifth, and Sixth Amendment law in bringing about criminal justice reform. For example, scholars like Professor Paul Butler have suggested that *Gide-*

⁸⁴ Dashboard cameras and police officer body cameras are garnering attention as law enforcement tools, particularly in the wake of several police shootings in which video evidence might have been helpful in reaching a just verdict. Several studies have shown that cameras can produce positive outcomes for both citizens and police. See Barak Ariel et al., *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 524 (2015) (reporting an 88% one-year reduction in public complaints against officers and a 58.3% one-year decline in officers' use of force when police in Rialto, California, wore body cameras); see also CHARLES M. KATZ ET AL., ARIZ. STATE UNIV., CTR. FOR VIOLENCE PREVENTION & CMTY. SAFETY, EVALUATING THE IMPACT OF OFFICER WORN BODY CAMERAS IN THE PHOENIX POLICE DEPARTMENT 37 (2014) (reporting an increase in processing and prosecution of domestic violence cases when police wore body cameras). And some scholars have argued that body cameras will increase police accountability, which in turn will make people more likely to trust the police. But it is important to note that body cameras are no panacea. Indeed, they raise legitimate concerns about citizen privacy, among other issues. See THE CONSTITUTION PROJECT, THE USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT app. B at 7–8 (2015).

⁸⁵ Along these lines, we are not entirely enamored of the President's Task Force recommendation that police be taught to abandon a "warrior" mentality in favor of a "guardian" mentality. See FINAL REPORT, *supra* note 73, at 1. While we agree that a warrior mentality is problematic because it positions police officers as opponents of those they are policing, calling police "guardians" is somewhat paternalistic, and seems to suggest that police officers know better than civilians. A metaphor that connotes partnership or equality would, perhaps, be more apt.

on v. Wainwright's⁸⁶ role as the cynosure of equal access to criminal defense counsel has blinded people to more productive means of improving the plight of the poor in the criminal justice system.⁸⁷ Along similar lines, Professor Rachel Harmon has written that constitutional rights cannot "set the agenda for policing reform."⁸⁸

While we agree that the rights-based focus of constitutional criminal procedure cannot be the be-all and end-all of effective reform, we think it has a key role to play in regulating police behavior. Most importantly, constitutional law is more difficult to change than state regulations or departmental policies; it sets a baseline for regulating police behavior. It's true that policies brought about through other, more local means can be implemented quickly and creatively, and can be tailored to local needs. But when the winds of criminal justice shift and crime rates rise, these policies can also be scaled back quickly. Constitutional criminal procedure is more resilient; it is our backstop, and it is important to have a strong one.⁸⁹

Professor Tracey Meares suggests that placing additional constitutional constraints on police discretion may increase crime. Under what she describes as the "more lawfulness" view (the idea that police behavior should be regulated through stricter legal constraints), Meares writes: "[P]olice adherence to strict dictates that constrain their discretion generally results in less policing and more liberty for individuals. The higher level of crime that might result from less policing is simply a price citizens pay for more freedom in society."⁹⁰ This strikes us as a false dichotomy. Greater constraints on police discretion would not necessarily result in a net loss of the overall *amount* of policing, though they would (ideally) shift policing's emphasis. For example, if officers were not allowed to arrest people for minor infractions such as the failure to wear a seatbelt,⁹¹ this restriction would reduce police discre-

⁸⁶ 372 U.S. 335 (1963).

⁸⁷ See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2190–98 (2013).

⁸⁸ Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 816 (2012); see also *id.* at 817 ("The problem of policing instead requires an account of when law enforcement should harm individual interests for societal ends, given the risks to human dignity and the costs and benefits of law enforcement activity. Such an account necessarily goes beyond constitutional rights.")

⁸⁹ To be clear, we are not making an assertion that constitutional litigation is the "best" road to criminal justice reform in some empirical sense. Nor do we have adequate space here to detail litigation strategies that might eventually secure broader Fourth, Fifth, and Sixth Amendment protections. Our point is a simpler one: that in the rush to embrace body cameras and procedural justice measures, we should not forget about the Constitution.

⁹⁰ TRACEY L. MEARES WITH PETER NEYROUD, HARVARD KENNEDY SCH. & NAT'L INST. OF JUSTICE, NCJ 248411, RIGHTFUL POLICING 4 (2015), <http://www.hks.harvard.edu/content/download/74084/1679313/version/4/file/RightfulPolicing.pdf> [http://perma.cc/6BZ4-GMSS].

⁹¹ Current law permits such arrests. See, e.g., *Atwater v. Lago Vista*, 532 U.S. 318 (2001).

tion — and yet the officers who would otherwise have made these arrests would still be out “policing.” Indeed, perhaps they would be freer to use their investigative expertise to concentrate on higher-priority crimes.⁹²

Pulled Over’s empirical documentation of the inequality so prevalent in investigatory stops is a strong argument for disallowing these stops altogether. While more research needs to be done on whether other police-citizen encounters, such as stop-and-frisks, are empirically similar to driver stops,⁹³ *Pulled Over* strongly suggests that not all forms of police discretion operate identically. Allowing police to stop people only for “clear evidence of criminal behavior” (p. 161) and requiring probable cause for each and every search, even when the person stopped consents to being searched, would limit the kinds of surveilling discretion that lead to unequal outcomes, feelings of second-class citizenship, and mistrust of police.

Of course, disallowing investigatory stops is only one way that constitutional criminal procedure might be used to regulate police behavior. There are many others, including requiring officers to inform people of their right to refuse a consent search.⁹⁴ The key is creating meaningful guidelines for police to maximize their professional effectiveness, while minimizing the time they spend engaging in general surveillance, gathering information unrelated to the enforcement of a specific, high-priority crime, and amassing arrests for minor offenses. As we alluded to in the previous section, many possible improvements to policing do not involve courts at all. But while it is crucial to remember that constitutional criminal procedure is only *one* possible avenue for pursuing change to the criminal justice system, it is an important one. Moreover, as new empirical data about policing practices

⁹² We agree with Meares, though, that legal compliance should not necessarily be our metric for measuring “good” policing. See MEARES WITH NEYROUD, *supra* note 90, at 2–3. After all, perfectly lawful actions by the police could still erode trust and perceptions of legitimacy, which can have harmful consequences.

⁹³ One suggestion by the President’s Task Force on Policing would be particularly helpful in this regard. That report recommends: “Law enforcement agencies should be encouraged to collect, maintain, and analyze demographic data on all detentions (stops, frisks, searches, summons, and arrests).” FINAL REPORT, *supra* note 73, at 24. We agree. Data from a decade’s worth of stop-and-frisks in New York City show similar patterns to those documented in *Pulled Over*. See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁹⁴ Of course, this could be done as a matter of departmental policy, but again, would have more staying power if it was decided as a constitutional matter. The Supreme Court has had several opportunities to extend such a right, and thus far has neglected to do so. See, e.g., *United States v. Drayton*, 536 U.S. 194 (2002). The President’s Task Force on Policing recently recommended: “Law enforcement officers should be required to seek consent before a search and explain that a person has the right to refuse consent when there is no warrant or probable cause. Furthermore, officers should ideally obtain written acknowledgement that they have sought consent to a search in these circumstances.” FINAL REPORT, *supra* note 73, at 27.

continue to emerge, it is crucial to assess the implications of this evidence for litigating issues of constitutional criminal procedure.

3. *Think Critically About Policing Tactics that Focus on Particular People and Places, as Opposed to Particular Types of Crime.* — In designing policing strategies, it is important to think carefully about the ends we want police to reach, and to design policies in accordance with those ends, recognizing the connection between the carceral state we want to dismantle and the surveillance state that's largely invisible to Americans who don't come into regular contact with it.

Currently, police and other criminal justice officials often track and investigate particular people and regions, as opposed to particular types of crime. In part, this is because “getting arrests,” regardless of what the arrests are for, is seen as a mark of an officer's skill and effectiveness.⁹⁵ Thus, officers in some departments have an incentive to pursue “low-hanging fruit,” regardless of whether targeting certain law-breaking behaviors — for example, drug crimes and parole violations — is the best use of their expertise. As policing experts Professors Cynthia Lum and Daniel S. Nagin note: “[M]ore than 80 percent of arrests made in the U.S. are for misdemeanors and ordinance violations,” and “there is no good evidence . . . that arrests for minor legal infractions are effective in preventing more serious crime.”⁹⁶ They recently recommended: “Crimes averted, not arrests made, should be the primary metric for judging police success in meeting their objective to prevent crime and disorder.”⁹⁷

Measuring arrests, of course, is easier than measuring crimes averted. To some extent, thinking about police work in terms of prevention rather than apprehension requires a framework shift. For years, “hot-spot” policing — that is, focusing on particular high-crime geographic areas — has been seen as an important means of crime reduction.⁹⁸

⁹⁵ In fact, some law enforcement agencies require officers to write a minimum number of tickets or citations, or to make a minimum number of arrests — a practice that the President's Task Force on Policing has recently condemned. See FINAL REPORT, *supra* note 73, at 26–27.

⁹⁶ Cynthia Lum & Daniel S. Nagin, *Reinventing American Policing*, THE CRIME REP. (June 24, 2015, 8:20 AM), <http://www.thecrimereport.org/news/articles/2015-06-reinventing-american-policing-a-seven-point-blueprin> [<http://perma.cc/94XE-7BZD>].

⁹⁷ *Id.*

⁹⁸ Hot-spot policing garnered attention when Professors Lawrence Sherman, Patrick Gartin, and Michael Buerger found that just 3% of addresses in Minneapolis produced half of all calls to the police. See Lawrence W. Sherman, Patrick R. Gartin & Michael E. Buerger, *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 27, 37 (1989). Numerous follow-up studies found similar evidence of crime hot spots, ultimately leading to a number of randomized experiments to test the effects of concentrating police resources on these geographic areas. For a review, see Anthony A. Braga & David L. Weisburd, *The Effects of “Pulling Levers” Focused Deterrence Strategies on Crime*, CAMPBELL SYSTEMATIC REVIEWS, Apr. 2012, at 7–8, http://www.campbellcollaboration.org/lib/download/1918/Braga_Pulling_Levers_Review.pdf [<http://perma.cc/94M5-3BPH>].

But while this approach has merit, in practice it can end up looking more regulatory than investigative. Particularly coupled with a policing culture that highly values arrests, hot-spot policing can encourage constant surveillance of poor neighborhoods. These neighborhoods are easier to police as well, raising fewer physical barriers to observation and offering more “usual suspects.” Unsurprisingly, urban drug deals are easier to police than suburban state-tax fraud. But it is important to determine enforcement priorities (and reevaluate them regularly) and *then* design investigative tactics, rather than letting tried-and-true investigative tactics determine what kinds of crimes people are arrested for.⁹⁹

B. Encouraging Full Citizenship

1. *Facilitate Access to Key Institutions.* — As Goffman details, dirty men are not just running from the police, but also from “the information in the police database that designates them as arrestable on sight” (p. 196). The liminality of being “on the run” often entails constant physical movement while facing an economic and social standstill: on one hand, many of Goffman’s subjects cannot sleep in the same place for more than a few nights in a row; on the other, “warrants and court cases and probation and parole sentences loom over them as barriers to advancement” (p. 196). Certain institutions are rendered legally or practically inaccessible, and employers are reluctant to hire people with pending court cases. This liminal state parallels the experiences of people with criminal records. As Jacobs describes, their barriers to employment (p. 291), coupled with the inability to participate in civic life, can pose a lifelong obstacle to fully rejoining society. Jacobs and Goffman are talking about different (albeit overlapping) populations, but whether someone is a probation or parole violator, a probationer or parolee, or a perpetual arrestee living in a low-income neighborhood, the ways his information is gathered and used relegate him to second-class citizenship partly by barring his access to key institutions. A regime that effectively prevents large swaths of people from using hospitals, opening bank accounts, or picking up paychecks, and prevents anyone with a criminal record from

⁹⁹ In contemplating the relationship between policing theory and policing practice, it is worth thinking about the well-known technique of “broken windows” policing as a cautionary tale. The original idea behind broken windows policing was to be vigilant about small signs of disorder in a neighborhood (so-called “broken windows”) as a means of discouraging more serious crime. Eventually, the technique was used to justify numerous arrests and vigilant, punitive policing of minor crimes — which was never the intention of its creators. See George Kelling, *Don’t Blame My “Broken Windows” Theory for Poor Policing*, POLITICO MAG. (Aug. 11, 2015), <http://www.politico.com/magazine/story/2015/08/broken-windows-theory-poor-policing-ferguson-kelling-121268.html> [http://perma.cc/LV5E-4263].

voting, getting government assistance with housing, or securing legal employment, is untenable.

We might imagine several ways to facilitate access to key institutions for these populations. For one, certain institutions might be “informationally decoupled” from law enforcement — off limits except in dire or urgent circumstances. We might imagine that police *should* be allowed to monitor the funeral of an armed robbery suspect’s grandmother in an effort to find the suspect; at the same time, perhaps police should not be allowed to attend funerals simply to gather general information about the social ties in a community, even if some of those ties include parolees, probationers, or gang members. While it seems reasonable for police to arrest a murder suspect at a hospital even if he is there to have his appendix out, perhaps they should not be permitted to camp out for hours to “run names” of visitors.¹⁰⁰ We might imagine a regime in which, for most purposes, hospital records were decoupled from law enforcement.¹⁰¹

Informational decoupling would free those with minor probation or parole violations to pick up paychecks at work, visit friends at the hospital, or attend funerals free from worry that they might be arrested.¹⁰² The decoupling approach merits more detailed investigation, but has the potential to encourage participation in important institutions — something people who come into contact with the criminal justice system tend to avoid. Empirical evidence suggests that this is particularly the case for “*surveilling* institutions, specifically, medical, financial, educational, and labor market institutions.”¹⁰³ Notably, this institutional avoidance does not just characterize people who have been convicted of crimes or are on parole, but even those who have

¹⁰⁰ Some critics have alleged that these hospital arrests are nothing more than urban legend, and have no basis in fact. *See, e.g.,* McQuade, *supra* note 45. We have found no comprehensive study on police investigative practices at Philadelphia hospitals, nor on Philadelphia hospital visitor and admission recordkeeping, so at this point, we continue to give Goffman the benefit of the doubt. If police arrests at hospitals turn out to be extremely rare, then there seems even less reason to oppose such a prohibition — it would not be detrimental to very many police investigations anyway.

¹⁰¹ We might even imagine that information gathered in violation of this decoupling policy could not be used against an offender, even if it is gathered by happenstance, in pursuit of a valid law enforcement goal.

¹⁰² Of course, on any given day, perhaps 15–20% or so of parolees are on “abscond” status — sometimes suspected of serious crimes. *See* BRYN A. HERRSCHAFT WITH ZACHARY HAMILTON, CTR. FOR COURT INNOVATION, RECIDIVISM AMONG PAROLEES IN NEW YORK CITY, 2001–2008, at 4 (2011) (examining recidivism among New York City parolees between 2001 and 2008 and finding that “15% of all parolees abscond” within the first year of release, and 20% within the first two years). Certainly, in these more serious cases, public safety is the more important consideration.

¹⁰³ Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOC. REV. 367, 379 (2014) (emphasis added).

merely been *stopped* by police.¹⁰⁴ This suggests that even the feeling of second-class citizenship experienced by those subject to the investigatory stops described in *Pulled Over* has not just psychological consequences, but also far-reaching social consequences that go beyond eroding trust in the police. Institutional avoidance, stemming from the impact of surveillance on a person's belief about herself as a citizen, unites the subjects of *Pulled Over*, *On the Run*, and *The Eternal Criminal Record*. As Sarah Brayne puts it: "[S]ystem avoidance is a potential mechanism through which the criminal justice system contributes to social stratification: it severs an already marginalized subpopulation from institutions that are pivotal to desistance from crime and their own integration into broader society."¹⁰⁵ This means, for example, that someone with a warrant out for a minor offense, such as failure to pay a court fee, is unlikely to call the police if they are in trouble,¹⁰⁶ in turn leading to systematic underreporting of more serious crimes like assault, child abuse, and domestic violence.¹⁰⁷

Certainly, there would be numerous challenges in implementing decoupling. How do we encourage people to start using institutions they have long been socialized to avoid? How, precisely, do we restrict the sharing and gathering of information without hindering the police's ability to investigate serious crime? These questions merit more discussion and empirical investigation. To start, we might think about weighing the *gravity* of a person's status against the need for reasonable access to these institutions. We might imagine official levels or gradations of "wantedness" that could facilitate police decisionmaking or guide policy decisions about who may and may not be arrested in certain circumstances. For example, at one point in *On the Run*, Reggie was wanted for robbing a convenience store and Alex was wanted for a parole violation that involved driving with a revoked license (pp.

¹⁰⁴ *Id.* at 386.

¹⁰⁵ *Id.* at 367. Additionally, foreclosing the use of formal social institutions has ripple effects. For one, the need for goods and services such as painkillers or medical treatment, or for commodities such as cars, results in an underground economy of staggering breadth. By taking some of these "privileges" away as punishment, or by making them unavailable as a result of parole conditions, we are strengthening the informal economy and allowing money, skill, and attention to be pumped into a system that supports the liminal status of hundreds of thousands of Americans. Or, as Goffman puts it: "[A] highly punitive approach to crime control . . . criminaliz[es] so much of daily life as to foster widespread illegality as people work to circumvent it. Intensive policing and the crime it intends to control become mutually reinforcing" (p. 200).

¹⁰⁶ Recall Mike reporting a robbery to the police and being honest about his identity, only to have the police find him later because he reported this crime (Goffman, p. 30).

¹⁰⁷ We might imagine a similar decoupling of information *within* a police department; for example, perhaps information learned about someone when she is the *victim* of a crime should be forbidden from being used against her later, in an unrelated matter. (Unless, of course, such information would have been discovered anyway in the investigation — a kind of parallel to the inevitable-discovery doctrine.)

34–36). If both men are at the hospital for the birth of a child, perhaps it makes sense that police should seize upon the opportunity to arrest Reggie, but not Alex. The solution is not simple, but the right balance would minimize system avoidance while allowing police to investigate serious crime. Indeed, combined with changes such as restricting arrest discretion and eliminating investigatory stops, we might imagine that facilitating people’s access to institutions would encourage police to focus more energy and attention on higher-priority concerns.

2. *Implement Clear, Realistic Parole Expectations.* — While parolees represent only a subset of the surveilled second-class citizens we are talking about, it is a significant subset. At any given time, about 853,000 adults are on parole in the United States, or about 1 in every 286 adult residents.¹⁰⁸ Each year, an estimated 9.3% of all parolees have their parole revoked,¹⁰⁹ and recent estimates suggest that half of the people in U.S. jails, and more than one third of those entering prison, have been incarcerated as a result of revocation.¹¹⁰ One of the most meaningful reforms would involve ensuring that parole expectations are specific, tailored to the individual, and realistically attainable.

First, it makes sense to grant parole agents a certain amount of discretionary latitude, but some states’ statutes are so vague that *anyone* would have difficulty figuring out how to follow or enforce them. For example, Alabama requires parolees to “abandon evil associates and ways.”¹¹¹ Texas can require parolees to avoid “places of disreputable or harmful character.”¹¹² Is a biker bar “disreputable”? What about a wine bar? A rodeo? If a person’s friends are also on parole, does this make them “evil associates”?¹¹³

¹⁰⁸ See ERINN J. HERBERMAN & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, NCJ 248029, PROBATION AND PAROLE IN THE UNITED STATES, 2013, at 3 (rev. 2015), <http://www.bjs.gov/content/pub/pdf/ppus13.pdf> [<http://perma.cc/FDC6-D48J>].

¹⁰⁹ See *id.* at 9.

¹¹⁰ See PEGGY BURKE ET AL., PEW CTR. ON THE STATES, WHEN OFFENDERS BREAK THE RULES: SMART RESPONSES TO PAROLE AND PROBATION VIOLATIONS 1 (2007), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/conditionviolatorsbriefingpdf.pdf [<http://perma.cc/2556-QS7Q>]. The number of offenders reincarcerated for violating parole or other release conditions increased more than sevenfold between 1980 and 1998. PETERSILIA, *supra* note 63, at 148.

¹¹¹ ALA. CODE § 15-22-29(b)(4) (2011).

¹¹² TEX. DEP’T OF CRIMINAL JUSTICE, PAROLE DIV. & TEX. BD. OF PARDONS & PAROLES, PAROLE IN TEXAS 65 (2011), https://www.tdcj.state.tx.us/documents/parole/PIT_English.pdf [<http://perma.cc/6UfK-3BU6>]; see also TEX. CODE CRIM. PROC. ANN. art. 42.12, § 11(a)(3) (West 2015).

¹¹³ There are no national data on whether these conditions are actually used to return offenders to prison, but a comprehensive study of parole revocation in California revealed that once case seriousness and prior record were statistically controlled for, the parolees’ race was not significantly related to prison returns for *technical* violations (but race did affect the likelihood that *criminal* violations resulted in reimprisonment). Practical constraints, such as prison crowding and the availability of community treatment programs, along with a community’s political

In addition to their vagueness, many parole regulations are also patently unrealistic. In California, a few days' stay with a friend who lives a mile away can be a violation if that friend lives in a different county.¹¹⁴ In Pennsylvania, nine in ten parolees are barred from drinking altogether; the same number are not allowed to enter bars.¹¹⁵ The idea that a young man of twenty-five can reasonably be expected to forego alcohol use and meet curfew seven nights a week, among other conditions, for six months, a year, or even longer, is unrealistic. As one of the guards at Mike's halfway house told Goffman:

These men are locked up because they didn't pay their court fees, or they . . . failed [their piss test]. They've been locked up since they were kids. Then they come home to this shit [the halfway house], sleeping one on top of the other, no money, no clothes. And the rules they have to follow — nobody could follow those rules. It's a tragedy. (p. 161)¹¹⁶

Holding parolees to higher standards than we would expect of all law-abiding citizens¹¹⁷ is politically appealing, but probably unrealistic.¹¹⁸ And while we might legally categorize these requirements as “regulatory,” and their violations might technically result in “parole revocation” rather than “punishment,” this is not how the men and women ensnared in this cycle experience it. Instead, they are forever dirty, forever in violation of *some* rule, with no access to the key institutions of citizenship¹¹⁹ and no meaningful way to break free of the cycle.¹²⁰ Parole reform represents one of the most straightforward means of scaling down inessential surveillance and encouraging meaningful reestablishment of a person's full citizenship.¹²¹

punitiveness, were the factors that affected the likelihood that technical parole violators were re-imprisoned. See Jeffrey Lin, Ryken Grattet & Joan Petersilia, “Back-End Sentencing” and Reimprisonment: Individual, Organizational, and Community Predictors of Parole Sanctioning Decisions, 48 *CRIMINOLOGY* 759, 783–85 (2010).

¹¹⁴ *Parolee Conditions*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/Parole/Parolee_Conditions [<http://perma.cc/FEF7-XULQ>] (“You must ask for and get a travel pass from your parole agent before you leave the county for more than two days.”).

¹¹⁵ Jessica Glazer, *Why It Might Be Time to Rethink the Rules of Parole*, FIVETHIRTYEIGHT (Nov. 13, 2014, 6:00 AM), <http://fivethirtyeight.com/features/why-it-might-be-time-to-rethink-the-rules-of-parole> [<http://perma.cc/42FJ-B4AL>].

¹¹⁶ Alterations appear in the original source.

¹¹⁷ For example, Montana parolees are not permitted to gamble, even if it would otherwise be legal. MONT. ADMIN. R. 20.25.702(1)(j) (Westlaw 2015).

¹¹⁸ Of course, we would feel differently about restrictions that are closely tied to the underlying offense. For example, if someone is on parole for a DUI or DWI offense, requiring him to pass a urine test might be reasonable.

¹¹⁹ For example, after Chuck violates his curfew, he skips going to the hospital when his child is born because he is afraid that he will be arrested like Alex was arrested (Goffman, p. 35). Consequently, Chuck's relationship with the mother of his child is weakened.

¹²⁰ It is worth noting, too, that lengthy parole periods also strengthen underground economies — for example, the sale of clean urine (Goffman, p. 148).

¹²¹ Somewhat related to parole conditions, debts — including debts to the criminal justice system in the form of restitution or court fees — are often due immediately, or shortly after, release.

3. *Allow People to Exercise More Control Over Their Records.* — Just as “dirtiness” marks the men of 6th Street, the criminal record has become “the most important marker of public identity” for as many as one in four Americans (Jacobs, p. xiii). It is a stubborn cloud that hovers over an ex-offender’s life and represents a constant threat to economic and social stability.¹²²

Perhaps counterintuitively, many of Jacobs’s recommendations for restoring the full citizenship of those with criminal records and increasing their access to employment, housing, and other institutions involve having *more* information about them available, not less.¹²³ He argues that making records unavailable becomes virtually impossible once they are online and in the hands of private companies. But rather than allowing a former offender’s criminal record to comprise his or her entire digital footprint, deserving ex-offenders could be given the tools to create and distribute more positive profiles. For example: “Governments could provide transitional employment after termination of sentence. A credible government-run work program could certify that an ex-offender had performed successfully for a period, say a year. Supervisors and foremen could serve as future references for those ex-offenders who worked under their supervision” (p. 312).¹²⁴

Setting aside money to pay these fees is difficult while trying to secure a job, a place to live, and basic necessities such as groceries. In some states, unpaid debt can also result in driver’s license suspension, wage garnishment, foreclosure, and civil judgment (which are seriously detrimental to a person’s credit score). See Shaila Dewan, *Driver’s License Suspensions Create Cycle of Debt*, N.Y. TIMES (Apr. 14, 2015), <http://www.nytimes.com/2015/04/15/us/with-drivers-license-suspensions-a-cycle-of-debt.html>. While unpaid debt *might* be a sign that someone is not rehabilitating, there are many other possible explanations. Why not offer six months or a year of forbearance to allow a person to get back on his or her feet, just as we allow recent graduates with student loans to do?

Goffman also describes instances in which people are saddled with various “court fees” simply for being processed by the justice system. While this approach has some intuitive appeal, it suggests that defendants are imposing on the government rather than the other way around. Court fees also have a disproportionate impact on people living in poverty. A failure to pay court fees means that a person becomes “dirty” — a category we should be seeking to shrink and refine, not expand. Ultimately, *not* passing court costs on to the people subject to adjudication may also encourage greater judiciousness about whom we arrest and process, and for what kinds of crime.

¹²² Like being dirty, having a criminal record should not be treated as a simple is-or-is-not proposition; doing so erases the important distinctions between *types* of offenses, arrests, and criminal records — cementing people’s second-class status not only through “keeping track” of people in the group, but through the government-endorsed homogenization of the group itself.

¹²³ One necessary step involves making sure that criminal records are accurate in the first place. People should have easy access to their rap sheets to ensure that any information about their criminal history is correct and complete. If inaccuracies are discovered, local law enforcement should develop processes by which individuals can promptly challenge and ultimately correct the content of their records.

¹²⁴ Jacobs also cautions: “However, for these recommendations to be credible, *they need to be earned*, not just handed out automatically” (p. 312).

Jacobs also favors awarding certificates of rehabilitation¹²⁵ to especially deserving ex-offenders, making the process for obtaining one clearer and less cumbersome, and attaching these certificates to criminal records so that they automatically come up in criminal record searches (pp. 126–29). Similarly, many states award inmates certificates of program completion for positive things they do in prison, such as volunteering, mentoring other inmates, or earning GEDs. Currently, there is no systematic way for anyone outside prison to learn about those achievements, but they could easily be incorporated into digital profiles if they were recorded on rap sheets or put on the public-information websites maintained by many state and federal prisons.¹²⁶

Whether the inclusion of this positive information would make a difference in hiring decisions remains an open empirical question. But currently, employers, landlords, and other gatekeepers who use criminal record databases have no meaningful way to distinguish one criminal record from another.¹²⁷ Part of re-integrating ex-offenders into society should be giving them the tools to convert their “eternal criminal record” into a living document, a truer reflection of their present selves that better equips them to regain their footing in the world.

V. THE CHALLENGES OF IMPLEMENTING REFORM

While we believe our policy suggestions will enhance police-community relations and facilitate ex-offender reintegration, the big-

¹²⁵ These state-issued documents differ in their specifics from place to place, but essentially they are used to verify that previously convicted persons have stayed out of trouble and to override certain barriers to employment and licensing that otherwise apply to people with records. Several states, including New York, North Carolina, and Ohio, now issue such certifications. NAT'L EMP'T LAW PROJECT, SENTENCING PROJECT & NAT'L HIRE NETWORK, STATE REFORMS PROMOTING EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS: 2010–11 LEGISLATIVE ROUND-UP 2, 6–7 (2011), <http://www.nelp.org/content/uploads/2015/03/PromotingEmploymentofPeoplewithCriminalRecords.pdf> [<http://perma.cc/M47T-BRYD>].

¹²⁶ Going further, Jacobs wonders why we couldn't ask commercial vendors to develop an accessible “rehabilitated offenders database” that background-checking companies would be required to search as part of their service. Such a system could also include all earned certificates (p. 128).

¹²⁷ Of course, as Jacobs points out, landlords, employers, and other members of the public would need a meaningful way to interpret an expanded digital footprint, since it would incorporate so much new information. To give consumers a systematic way to weigh a record's seriousness, Jacobs suggests the creation of a “criminal record score” similar to the familiar FICO consumer credit score (pp. 74–75). The consumer-lending industry manages risk by using predictive analytics to create a financial credit score ranging from 300 to 850. Anyone can get a copy of his or her score, and scores can change over time as a person becomes more or less financially responsible. *See generally* FICO, UNDERSTANDING YOUR FICO SCORE (2011), http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf [<http://perma.cc/29S7-NAMD>]. An analogous score could correspond to a person's propensity for criminal activity, automatically improving as time from last arrest or conviction increased. Offenders would not only be provided their raw score, but also offered ways to improve it (for example, by paying off victim restitution or maintaining stable housing) (pp. 74–75).

gest obstacle to improving criminal justice in America is often not the absence of good ideas, but rather the inability to *implement* them. In 1967, the President's Crime Commission published a landmark report, *The Challenge of Crime in a Free Society*, containing dozens of recommendations for improving what was then seen as the "crisis over crime and the police."¹²⁸ Strikingly, President Obama's Task Force on 21st Century Policing just released its final report, which contained fifty-five recommendations¹²⁹ — many nearly identical to recommendations made almost five decades ago.¹³⁰

All public institutions face implementation challenges, but researchers suggest that none is more impervious to change than law enforcement. In 1979, Dorothy Guyot analyzed the then-new strategies for reforming police rank structure in order to enhance managerial flexibility and concluded that such attempts were akin to "bending granite."¹³¹ Policing expert Professor Wesley Skogan documented similar implementation failures years later, attributing the problem to resistance by rank-and-file officers and police unions, insufficient funding, failure of interagency cooperation, leadership turnover, and political interference.¹³² But the blame also rested in an unrealistic demand for lightning-quick results and an intolerance for failures and setbacks that resulted from trial-and-error implementation strategies. New programs are often quick to garner support, are quickly heralded as the newest fad, then are just as quickly dismantled when the program fails to swiftly solve our criminal justice ills. Reform efforts then reappear some years later, many conjuring a heavy dose of *déjà vu*. This history of reform — initial enthusiasm followed by disappointment and abandonment of the idea — is not unique to policing, but has been documented in all aspects of criminal justice.¹³³

¹²⁸ Samuel Walker, *Between Two Worlds: The President's Crime Commission and the Police, 1967–1992*, in *THE 1967 PRESIDENT'S CRIME COMMISSION REPORT: ITS IMPACT 25 YEARS LATER* 23 (John A. Conley ed., 1994).

¹²⁹ FINAL REPORT, *supra* note 73.

¹³⁰ Compare, e.g., *id.* at 16–17 (recommending hiring a diverse police force), with PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, at ix, 101–02 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf> [<http://perma.cc/DYP8-LKXW>] ("All departments with substantial minority populations should make special efforts to recruit minority group officers and to deploy and promote them fairly.")

¹³¹ See Dorothy Guyot, *Bending Granite: Attempts to Change the Rank Structure of American Police Departments*, 7 J. POLICE SCI. & ADMIN. 253 (1979).

¹³² See Wesley G. Skogan, *Why Reforms Fail*, 18 POLICING & SOC'Y 23 (2008).

¹³³ See generally THOMAS J. BERNARD & MEGAN C. KURLYCHEK, *THE CYCLE OF JUVENILE JUSTICE* (2d ed. 2010) (juvenile justice); ANN CHIH LIN, *REFORM IN THE MAKING: THE IMPLEMENTATION OF SOCIAL POLICY IN PRISON* (2000) (prison reform); JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003) (sentencing and parole); Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149 (1997) (probation).

If we want today's reform efforts to produce fundamental change, we would be well advised to heed Greg Berman and Aubrey Fox's warnings in their award-winning book, *Trial & Error in Criminal Justice Reform*.¹³⁴ They argue that many previous reform attempts might have been successful if we had stayed the course rather than pulling the plug when instant results failed to materialize. We should expect and plan for serious implementation challenges, commit to a sustained reform agenda, and nurture flexible organizations prepared to learn from failure. In short, by moving at a slower and more deliberate pace, we create a promising path for criminal justice reform in America.

CONCLUSION

As a group, these three books demonstrate the importance of methodological diversity in law-related research generally and criminal justice research more specifically. These books show the power of qualitative methods in illuminating the on-the-ground processes that numbers alone cannot reach: the complexities of interpersonal dynamics, the inner workings of legal consciousness, the interactions that underpin social embeddedness. Quantitative data is often less well suited for these purposes — not because it is inferior or less “rich,” but simply because different methods have different purposes and answer different questions. Methodological variety is crucial in designing creative policy solutions. We need to understand how “data points” live, breathe, make friends, and walk down the street. In sociological terms, we need to understand social embeddedness and social milieu — the social psychological realities of how criminal justice impacts people in their everyday lives. By meeting people where they are, we can start to understand how they see and experience the world, and design policy initiatives that align with people's lived reality.

Understanding the interaction between our psychological landscapes, social worlds, and material circumstances is also key in “humanizing” the arrestees we see on the news. Consider the case of Walter Scott, a black South Carolina man stopped by police for a burned-out brake light on April 4, 2015. Scott was fifty, had four children, and was engaged to be married. His police record indicated ten prior arrests, mostly for owed child support (a jailable offense in South Carolina). Still, Scott ran from the police, who shot him four times in

¹³⁴ GREG BERMAN & AUBREY FOX, *TRIAL & ERROR IN CRIMINAL JUSTICE REFORM* (2010).

the back.¹³⁵ Following the tragic murder, one of the questions news media asked was: why did Walter Scott run? But his split-second decision becomes more understandable when we think about liminal citizenship. If we think of Scott as living in a pseudo-carceral state, we realize that running may have been less a “decision” than a lifetime of training and well-honed instinct.

The current bipartisan moment in criminal justice reform offers us many reasons to be optimistic, and a rare opening to think about the shape we want the system to take for decades to come. We need to think about the mark we want the criminal justice system to leave on those who come into contact with it. This means shaping not just its outcomes, but also its most essential processes. In understanding police-citizen interactions, we must confront the fraught interpersonal social reality of people’s encounters with the criminal justice system.

Information gathering, surveillance, and recordkeeping are all key functions of criminal justice, but they do not come without a cost. As *Pulled Over*, *On the Run*, and *The Eternal Criminal Record* demonstrate, one particularly important and often-overlooked consequence is Americans’ sense of their citizenship. Our criminal justice system creates and maintains a vast group of second-class citizens who exist in a pseudo-carceral state that has far-ranging consequences, from decreased trust in the police to psychological harm to decreased participation in key social and community institutions. In this way, the system’s varied modes of surveillance corrode and undermine the protective and restorative potential of American criminal justice.

¹³⁵ Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>.