
BOOK REVIEW

THE BLACK POLICE: POLICING OUR OWN

LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA. By James Forman Jr. New York, N.Y.: Farrar, Straus and Giroux. 2017. Pp. 306. \$27.00.

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INTRODUCTION

Since Darren Wilson shot and killed Michael Brown in 2014,¹ the problem of police violence against African Americans has been a relatively salient feature of nationwide discussions about race. Across the ideological spectrum, people have had to engage the question of whether, especially in the context of policing, it's fair to say that black lives are undervalued. While there is both a racial and a political divide with respect to how Americans have thus far answered that question, the emergence of Black Lives Matter movements² has made it virtually impossible to be a bystander in the debate.

Separate from whether racialized policing against African Americans is, in fact, a social phenomenon, is the contestable question about solutions: Assuming that African Americans are indeed the victims of over-policing, meaning that by some metric they end up having more interactions with the police and more violent encounters than is normatively warranted, what can we do about it? And here, the answers range from abolishing police officers altogether, to training them, to diversifying police departments. It is on the last of these proposed solutions — the diversification of police departments — that we focus in this essay. The central question we ask is: What are the dynamics that might shape how African American police officers police other African Americans? Asked another way, what do existing theories about race and race relations,

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¹ See Danielle Cadet, *Darren Wilson Identified as Officer who Fatally Shot Michael Brown*, Huffington Post (Aug. 15, 2014, 9:47 AM), https://www.huffingtonpost.com/2014/08/15/darren-wilson-michael-brown_n_5681340.html [<https://perma.cc/H22G-VJE6>].

² *Find a Chapter*, BLACK LIVES MATTER, <https://blacklivesmatter.com/take-action/find-a-chapter/> [<https://perma.cc/7H58-G9WF>].

and historical and empirical studies on race and policing, suggest about how African Americans will police our own?

Our point of departure is a review of Professor James Forman's *Locking Up Our Own*. Though not framed in precisely this way, Forman's book is, in many ways, about the relationship between diversity and governance. Forman is particularly interested in the role African Americans have played across different sites of governance — as city council members, mayors, governors, prosecutors, police officers — in facilitating and legitimizing the mass incarceration of African Americans. The story he tells is largely a story about choices under constraints — but choices that produced consequences for which African Americans bear some, though not the bulk, of the responsibility. Which is to say, Forman is clear to describe how African American leaders contributed to and participated in the war on drugs, clear to emphasize that many of those leaders had unsuccessfully advocated for interventions, even beyond criminal justice-oriented or law enforcement-oriented ones, to address the growing drug epidemic in African American communities, and clear to highlight the broader racial and political context in which African American leaders acted.

Some might deploy Forman's book to advance the proposition that race has played less of a role in the mass incarceration of African Americans than liberals and progressives like to admit. After all, black people have been agents, and not just victims, of mass incarceration. Our own view is that Forman's thesis is more nuanced than the preceding account suggests. Forman's focus on African American governance is a way of complicating our understanding of *how* race has mattered in the mass incarceration of African Americans. His analysis of African American decisionmaking across various domains of the criminal justice apparatus reminds us that the persistence of racial inequality in the United States derives from problems of power and structure, rather than simply individual choice and identity.

To recognize the existence of power is not to deny the possibility of agency or the space African American leaders might have had to exercise at least some meaningful control over their choices. The point is rather that the phenomenon of African Americans exercising governance does not eliminate the racial barriers to combating racial inequality. If the two-term presidency of Barack Obama teaches us anything on this issue, it is that the racial identity of a leader — even a President of the United States — is not enough to dismantle or meaningfully mitigate the racial inequality of a society. Does this mean liberals and progressives are wrong to argue for racial diversity? No. It means that if racial diversity is the only game in town we are in civil rights trouble. That, we think, is one of the most important lessons to be drawn from Forman's book: racial diversity without meaningful reallocations or redistributions of power might not only limit the possibilities for social transformation but also potentially reproduce and legitimize the very

forms of inequality the pursuit of racial diversity was intended to address. At least implicitly, Forman advances that insight with respect to the mass incarceration of African Americans. Our focus is on a slice of that criminal justice problem — policing.

Specifically, drawing on empirical, historical, and theoretical literatures, we examine how, if at all, black police officers' race might shape how they police other African Americans. Fundamental to our approach is a Du Boisian conceptualization of race and professional identity — namely, that African American police officers have to negotiate and reconcile two historically distinct strivings — the strivings to be “blue” and the strivings to be “black” — in one “dark body.”³ As we will explain, how they perform that negotiation and reconciliation is not simply a matter of individual choice, individual agency, and individual commitment. Structural factors are at play as well, in much the same way that structural factors shaped, though certainly did not fully determine, how the black leaders Forman describes mobilized various dimensions of the criminal justice apparatus to address the proliferation of crime and drug usage in African American communities.

The remainder of the essay proceeds as follows. Part I summarizes Forman's book, paying particular attention to where in Forman's account he focuses on individual agency and where he pays closer attention to structure. Part II builds on that summary to discuss the black police. Part of our aim here is to show that the very factors — including Fourth Amendment law, explicit and implicit biases,⁴ and racial anxiety⁵ — that explain why white police officers might systematically overpolice and deploy violence against African Americans arguably implicate black police officers as well. Moreover, the pressures black police officers likely experience to fit into their departments potentially compound the problem. Some black officers may believe that their failure to share and display fellow officers' racial assumptions about African Americans will engender the perception that black officers are “soft” on crime and criminality and “hard” on racial affiliation and loyalty. That perception would create an incentive for black officers to “work their identities”⁶ to disconfirm assumptions that they will insufficiently identify with being “blue”⁷ and overly identify with being “black.” Overpolicing other African Americans would be one way for black officers to

³ W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 45 (Signet Classic 1969) (1903).

⁴ See L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2038–39 (2011).

⁵ See Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2237 (2017) (defining the concept of “racial anxiety” in the context of interracial relations).

⁶ On the theory of working identity, or intentionally signaling certain traits or identities, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

⁷ See, e.g., Jerome H. Skolnick, *Corruption and the Blue Code of Silence*, 3 POLICE PRAC. & RES. 7, 7 (2002) (describing the idea of an internal code of loyalty among police officers that can

perform that work.⁸ We conclude by suggesting that just as the pursuit of diversity in the context of higher education has not eradicated the racial dimensions of educational inequality, the pursuit of diversity in the context of policing will not, without more, fundamentally change how African Americans experience the police.⁹

I. LOCKING UP OUR OWN

In his groundbreaking and insightful book, Forman traces how the incremental decisions made by African Americans as “citizens, voters, mayors, legislators, prosecutors, police officers, . . . and community activists” in Washington, D.C., over a forty-year period shaped criminal justice policy and contributed to the mass incarceration of African Americans (p. 10). To understand how and why African Americans participated in the “punishment binge” (p. 10), Forman foregrounds two issues: the desire of African Americans to protect black lives from the surge in violence and crime ravaging their communities during the 1960s and beyond (pp. 10, 217–18), and the role racism played in limiting their options to do so (pp. 11–13). The African Americans he highlights in the book always intended to address the root causes of crime, including education and employment (pp. 11–12, 64, 76–77). The tough-on-crime responses were simply an expedient and readily available means of tackling the devastating effects of crime and violence in the short term. However, “the incremental and diffuse way the war on crime was waged made it difficult for some African American leaders to appreciate the impact of the choices they were making” (p. 13). Over decades, their decisions helped to create a criminal justice system that became grossly more punitive for indigent African Americans (p. 14), while the social programs they envisioned never came to fruition. In sum, Forman’s account recognizes how “racism’s enduring role” constrained not only African Americans’ options at the front end but also the possibilities at the back end (p. 12). Thus, despite his focus on the role of African Americans, Forman cautions against “minimiz[ing] the role of whites or of racism in the development of mass incarceration” (p. 11).

Were we to offer any overarching criticisms of Forman’s book, we would note two limitations to his analysis. First, Forman could have

have both beneficial and harmful effects); Louise Westmarland, *Police Ethics and Integrity: Breaking the Blue Code of Silence*, 15 POLICING & SOC’Y 145, 155–57 (2005) (explaining how survey results support the existence of an informal police code of conduct).

⁸ Cf. Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 163–65 (2016) (delineating the systemic factors leading to overpolicing of African Americans).

⁹ See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 127–28 (2017) (discussing the multiple ways in which African Americans are exposed to police contact and violence).

done more, quite a bit more, to highlight that his book is not first and foremost about black agency and social responsibility. As we have already said and want to emphasize again here, Forman unequivocally states that his book means to take seriously the structural conditions under which black decisionmakers promulgated policy and governed. However, Forman's near-exclusive focus on *what* these actors did, with scant attention to the *conditions* under which they acted, leaves readers with the daunting challenge of articulating those structural factors for themselves.¹⁰

Second, Forman's analysis does not engage with or evidence a normative sensibility about intersectionality.¹¹ Which is to say, for the most part, throughout Forman's book, men figure as *the* racial subjects of the war on drugs and mass incarceration. The centralization of men in this way elides the particularities of black women's experiences across sexual orientation and gender/sexual identity. Significantly, in naming this intersectional shortfall we are not simply advancing an argument about inclusion and exclusion — that is, that excluding black women from the analysis further obscures their experiences under “the new Jim Crow”¹² and compounds the difficulty advocates continue to have including black women's voices in antiracist contestations of criminal justice. Our point is rather that, as black feminists such as Professors Kimberlé Crenshaw, Priscilla Ocen, and Andrea Ritchie have noted,¹³ an engagement of black women's experiences with policing, state violence, and

¹⁰ See Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L.J. (forthcoming 2018) (reviewing JAMES FORMAN JR., *LOCKING UP OUR OWN* (2017)) (expressing concern that readers might interpret Forman's argument as a critique of or challenge to antiracist contestations of the criminal justice system).

¹¹ For a definition of intersectionality, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991); and see also Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS 811, 845 (2013).

¹² MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

¹³ See generally JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011); ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* (2017); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1312 (2012); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1583 (2012); KIMBERLÉ WILLIAMS CRENSHAW & ANDREA J. RITCHIE WITH RACHEL ANSPACH ET AL., *AFRICAN AM. POLICY FORUM & CTR. FOR INTERSECTIONALITY & SOC. POLICY STUDIES, COLUMBIA LAW SCH., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN* (2015), <http://www.aapf.org/sayhernamereport/> [<https://perma.cc/FF44-NVZZ>]. Of course, there is a broader literature that highlights how black women experience the criminal

incarceration puts into sharp relief otherwise hidden racialized dimensions of the criminal justice system, particularly how that system collaborates with and expresses itself through various parts of the welfare state.¹⁴ We should be clear to say that we will not, in the remainder of this essay, elaborate on the preceding two criticisms because we do not mean for them to overshadow what we perceive to be the central contribution of *Locking Up Our Own* — a heretofore largely unarticulated story of how black leaders participated in and negotiated their relationship to regimes of crime and punishment. What we will do instead, then, in the rest of this Part, is summarize Forman's book, pausing in places to mark its important interventions and the careful archival research that enabled them.

In Part I of *Locking Up Our Own*, Forman describes the origins of the tough-on-crime stance taken by many African Americans during the period from 1975 through 1978 in Washington, D.C. He explains that many black religious, government, political, and community leaders rallied against marijuana decriminalization and advocated for harsher gun regulations because of their overriding concern to protect black lives from the scourge of drugs and violence decimating their communities (pp. 43–46, 51–57). With the benefit of hindsight, it seems inconceivable that African American leaders would advocate against marijuana decriminalization and for increased penalties for gun-related crimes given the contributions both have made to the mass incarceration of black civilians. Yet, by highlighting the broader context and constraints under which these decisions were made, Forman makes sense of these decisions. “In both cases, elected officials and other community leaders identified an issue plaguing the community, focused on its racial dimensions, and led a political response that emphasized prohibition” (p. 75).

When marijuana decriminalization was proposed in Washington, D.C., the black community was still reeling from the devastating effects of the heroin epidemic. Many black leaders worried that decriminalization would keep drugs in their communities and encourage drug use,

justice system. See generally, e.g., ANGELA Y. DAVIS, *ANGELA DAVIS: AN AUTOBIOGRAPHY* (1988); ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT* (2016); ANGELA Y. DAVIS, *THE MEANING OF FREEDOM* (2012); BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* (2012); BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996); *INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN'S PRISONS* (Robin Levi & Ayelet Waldman eds., 2011); PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* 4–6 (2003); Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45 (2007); Natalie J. Sokoloff, *The Effect of the Prison-Industrial Complex on African American Women*, in *RACIALIZING JUSTICE, DISENFRANCHISING LIVES: THE RACISM, CRIMINAL JUSTICE, AND LAW READER* 73 (Manning Marable et al. eds., 2007); Julia Sudbury, *Women of Color, Globalization and the Politics of Incarceration*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN* 219 (Barbara Raffel Price & Natalie J. Sokoloff eds., 3d ed. 2004).

¹⁴ See Carbado, *supra* note 9, at 164 (framing this phenomenon as part of a broader problem of mass criminalization).

leading to more “crime . . . and degradation” (p. 33). Forman relates that many leaders operated on the assumption that criminal punishment would drive drugs and the dealers who sold them out of the community (pp. 31–32). Furthermore, some were suspicious that whites wanted to encourage drug use amongst blacks in order to keep them passive (pp. 35–37). In their view, decriminalization would primarily help white individuals, who could bounce back from addiction to lead productive lives, whereas racism would prevent blacks from ever overcoming the effects (pp. 37–39). The black leaders who opposed decriminalization, many of whom were seen as “guardians of the black community” and “were among the black community’s most dogged defenders” (p. 44), did not foresee the impact their decision to oppose decriminalization would have on the very black lives they were trying to save (p. 45), especially because at the time, most people who were arrested for drug crimes were neither convicted nor incarcerated (p. 45).

Forman explains that Washington, D.C.’s gun control movement was also animated by concerns over protecting black lives. In the 1970s and 1980s, some black leaders sought an expedient solution to the massive increase in violent gun-related crimes destroying their communities (pp. 54–57). Their goals were twofold: to protect black communities from the ravages of guns and to rid the community of the small group of criminals who were terrorizing it (p. 61). To do so, black leaders advocated stricter gun laws and more punitive sentences, including mandatory minimums (pp. 56, 60–61). While they acknowledged that blacks would bear the brunt of these law enforcement responses, they believed it was necessary to pay this price in order to rid neighborhoods of the criminals limiting the communities’ economic viability, safety, and social mobility (p. 61). Black supporters of gun control “insisted that they had not abandoned the struggle against inequality and racial injustice” (p. 63). Rather, gun control was a useful first step (p. 63). Forman explains that while there was a century-old tradition of gun ownership within the black community to protect against the tyranny of white violence (pp. 64–73), the salient problem facing black communities was not racial “genocide” but rather “racial suicide” (p. 73). In the end, “by a 12–1 vote, Washington, D.C., passed one of the nation’s strictest gun control laws” (p. 71).

As we see today, the irony of these decisions is that neither marijuana criminalization, nor gun control, nor more punitive sentences curbed crime and violence in black and brown communities. Instead, homicide rates and drug crime continued to rise while those falling victim to increased penalties and imprisonment were primarily black and brown

(pp. 77, 143).¹⁵ Black supporters of the aforementioned three responses did not envision that their short-term calls for law enforcement solutions to crime and violence would become the sole response, while the long-term solution of addressing the social problems that gave rise to the problems in the first place would not follow. As Forman writes:

African Americans wanted more law enforcement, but they didn't want *only* law enforcement. Many adopted what we might think of as an all-of-the-above strategy. . . . But because African Americans are a minority nationally, they needed help to win national action against poverty, joblessness, segregation, and other root causes of crime. The help never arrived. . . . So African Americans never got the Marshall Plan — just the tough-on-crime laws. (pp. 12–13)

Forman ends Part I of the book with a discussion of black police. One of the major goals of the civil rights movement was to enlist black police officers (pp. 84–88). The purpose was twofold: to end discrimination in the police force and to curb police brutality against the black community. However, neither goal was realized. Forman highlights structural constraints as well as how class-based and ideological divisions between those advocating for more black police and the citizens signing up to be police created mismatched or opposing goals (pp. 100–01).

Black civil rights advocates made assumptions about the attitudes of black officers and the role they would play to combat discrimination. “The case for black police had always been premised on the unquestioned assumption of racial solidarity between black citizens and black officers” (p. 107). However, Forman’s account reveals that the “blacks who joined police departments had a far more complicated set of attitudes, motivations, and incentives than those pushing for black police had assumed” (p. 107). The reality of employment discrimination meant that many black officers signed up to obtain a good job that was stable, secure, and offered good benefits (pp. 89–90, 110–11). These officers did not conceive of their role within the police departments as an extension of the civil rights movement (p. 111). Indeed, according to Forman, some did not view their work as racially significant (pp. 109–10).

Forman also highlights the racism that many black officers faced in the department. In the 1940s, black officers were segregated in separate and unequal facilities and did not have the same police powers as white officers. For instance, in Atlanta and other police departments across the country, black officers could not exercise power over whites and could only patrol black neighborhoods (pp. 86–87). Both the racism that

¹⁵ Drug prosecutions increased by 300% from 1982 to 1984, and arrests for sales, as opposed to possession, increased from 3% to 45% of drug arrests between 1980 and 1984 (pp. 143–44). The same people were being arrested, but now prosecutors were charging them with more serious offenses, and the harsher sentencing guidelines increased pressure on them to plead guilty (pp. 144). During the crack cocaine epidemic of the late 1980s, homicide rates tripled over one seven-year period (p. 160).

limited the job prospects of blacks and the racism that existed within police forces “made it less likely that [black officers] would do what many reformers hoped they would: buck the famously powerful police culture. The few who tried paid a high price” (p. 111). “Even those black officers inclined to use their political capital to fight police brutality would often find themselves in the minority. Most of their colleagues — black or white — wanted to fight for wages, benefits, and an equal shot at promotions” (p. 111).

In his discussion of the black police officer, Forman illuminates the influence of class differences within black communities. He argues that middle-class blacks would often advocate for more policing against the lower-class blacks who were engaged in crime (pp. 108–10). Citing a handful of studies showing that black police were just as physically abusive as their white colleagues and sometimes even harsher, Forman concludes that “[i]t turned out that a surprising number of black officers simply didn’t like other black people — at least not the poor blacks they tended to police” (p. 108).¹⁶ Despite this observation, Forman also acknowledges that, “[o]f course, most black officers didn’t share those views. But even those who saw themselves as pro-black . . . engaged in aggressive tactics against black citizens whom they saw as a threat to law and order. In part, their conduct reflected class divisions within the black community” (p. 108). He notes that “[w]hen some blacks (usually middle class) demanded action against others (usually poor), many ‘pro-black’ officers responded with special enthusiasm” (p. 108). We think the issues are more complicated than that, as we discuss in more detail below. But Forman is entirely right to note that black-on-black policing was not characterized by intraracial harmony. The end result was that while many police forces eventually integrated, the goal of reducing police violence against black communities was largely unattained.

In Part II of the book, Forman highlights how the tough-on-crime choices made by some African American leaders reshaped the criminal justice system in ways that contributed to mass incarceration and utterly failed to address the crime and violence decimating black communities. Over and over again, some black leaders responded to crime within their communities with harsher policing practices and more severe punishments (p. 165). Yet violent crime rates continued to rise (p. 178).¹⁷

Black leaders’ actions helped usher in a new era of policing and programs that affected primarily indigent African American communities in negative ways and helped to create a “culture of . . . intrusion[] into

¹⁶ Forman references a study conducted by the University of Michigan that found some level of anti-black prejudice in 28% of black officers in precincts in Boston, Chicago, and Washington, D.C., as well as a report put out by the Katzenbach Commission (p. 108).

¹⁷ Many African American leaders adopted the “war” rhetoric, and some requested troops be sent to their streets while others asked President Ronald Reagan “to declare a state of emergency and to deploy the National Guard” (pp. 165–66).

the daily lives of black citizens" (p. 171). Police stepped up their weaponry and tactics and adopted "operations" throughout the country to battle drugs and violence (p. 167).

One example, Washington, D.C.'s antidrug initiative, Operation Clean Sweep, gave officers power "to clear corners, establish roadblocks, make undercover purchases, seize cars, and condemn apartments" (p. 167). Clean Sweep also created specialized units, such as the Rapid Deployment Unit (RDU), to carry out these practices (p. 170). RDU officers would conduct aggressive and usually demeaning stops of black citizens, often cursing or yelling at citizens, performing warrantless searches, and giving unlawful orders (pp. 170-71). While one might assume that these officers were white, more than fifty percent of the officers involved in Clean Sweep were black (p. 168).

A majority of black citizens saw Clean Sweep and asset forfeiture as a positive way to regain control of the streets (p. 173). However, rather than targeting kingpins, these measures treated users and street-level dealers harshly, stymieing their ability to vote, find employment, obtain housing, and attend college (p. 174). Furthermore, Clean Sweep completely failed to suppress the drug trade or reduce violence. Instead, murder rates continued to rise (pp. 176-79). By 1995, the murder rate was still three times what it had been in the years before the crack epidemic (p. 194), and "blacks experienced violent victimization at rates fifty percent higher than those for whites" (pp. 194-95).

Once again, the response of many black leaders was to rely on the criminal justice system. The National Organization of Black Law Enforcement Executives (NOBLE), while calling for the creation of solutions that would address the root causes of crime, also supported the war on drugs and mandatory minimum sentences (p. 114). Furthermore, then-United States Attorney Eric Holder, a highly respected African American prosecutor, advocated the use of pretext stops (pp. 202-03). This controversial policing practice trained police officers to identify suspicious vehicles and to find a reason to search them (pp. 212-13). Holder felt that pretext stops would reduce violence in the short term by getting guns out of the hands of young black men (p. 203). While Holder acknowledged that black drivers would be much more likely to be stopped, searched, and arrested than white drivers, he also knew that ninety-four percent of black homicide victims were slain by black assailants, and thus the concerns about discrimination were outweighed by the need to protect blacks from crime (pp. 202-03). Forman explains that pretext stops continue today and have become an integral part of racially disparate policing throughout the United States (pp. 211-13). This is particularly frustrating, Forman argues, because ending pretextual stops is one of the easiest and most direct ways to combat racial disparities in the criminal justice system (p. 213).

Forman's account of the decisions made by African American leaders to protect their communities from drugs and violence illuminates the

dangers of failing to attend to power and structure. They relied upon criminal justice system responses with the belief that more systemic solutions to address the root causes of crime would follow. In hindsight, their choices seem naïve. The question is whether we are being similarly naïve in advocating for racial diversity in policing as a solution to discriminatory and violent policing. Our answer is “yes.” We elaborate below.

II. POLICING OUR OWN

Discussions about race and policing almost always have as their predicate the idea that the agents of racial profiling and police violence are white. The notion, at least implicitly, seems to be that black police officers are not implicated in the race and policing problems we have witnessed from Ferguson to New York to Los Angeles to Chicago, among other places. Broadly articulated, our goal in this part is to challenge that assumption. In the context of doing so, we explore what role, if any, black police officers can play in mitigating, if not eliminating, the overpolicing of African Americans.

Our starting point is the observation that, over the past few decades, the police departments in American inner cities have undergone significant demographic shifts. This demographic change is one of the reasons why Professor David Sklansky has suggested that modern departments are “not your father’s police department.”¹⁸ Consider the data below.¹⁹

Table 1: Representation of Minority Police Officers

Police Department	All Minorities	Black	Latino	Asian
Chicago PD	47.9%	24.7%	18.8%	0.3%
Houston PD	54.9%	22.8%	25.3%	6.0%
Los Angeles PD	64.6%	11.6%	43.4%	7.1%
New York PD	47.8%	16.1%	26.1%	5.5%
Philadelphia PD	43.2%	33.4%	8.2%	1.5%

¹⁸ David Alan Sklansky, *Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209 (2006).

¹⁹ GOVERNING, DIVERSITY ON THE FORCE: WHERE POLICE DON’T MIRROR COMMUNITIES 7–10 (2015), <http://media.navigatored.com/documents/policediversityreport.pdf> [<https://perma.cc/GZJ5-UBSP>] (gathering data about black, Hispanic, and Asian police officers across major American cities); see also *Police Department Race and Ethnicity Demographic Data*, GOVERNING, <http://www.governing.com/gov-data/safety-justice/police-department-officer-demographics-minority-representation.html> [<https://perma.cc/7PRL-ZVKG>]. For 2015 demographic statistics in New York, Chicago, Los Angeles, and Houston, see Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America’s Police Departments*, N.Y. TIMES (Apr. 8, 2015), <https://nyti.ms/2jVoad2> [<https://perma.cc/B49T-NSHS>].

Table 1 reveals that in many police departments across the country, and certainly in police departments that are often at the epicenter of debates about race and policing, people of color are part of the force — and in nontrivial numbers. The Los Angeles Police Department, for example, is now a majority-minority police department; 64.6% of the officers are nonwhite.²⁰ In Chicago, 24.7% of the officers are black and 18.8% are Latino. Police departments in Houston, Philadelphia, and New York similarly have relatively robust levels of racial diversity. This demographic backdrop, even without more, militates against framing racial profiling and police violence solely with respect to white police officers.²¹ Other reasons also caution against the conclusion that racialized policing is solely a white officer phenomenon.²²

First, the legal backdrop against which police officers act is the same for black and white officers. In particular, like white officers, black officers can draw on Fourth Amendment law as a source of empowerment to target other African Americans.²³ Second, conscious or unconscious racial biases might lead black police officers to aggressively police other African Americans. Think of these biases as “same-race biases” or “intraracial biases,” because both the victims and the perpetrators of these biases have the same racial identity.²⁴ Third, black police officers, like white police officers, might experience a set of anxieties or vulnerabilities that increase the likelihood that they will mobilize violence against other African Americans. An example of what we mean is “masculinity threat.”²⁵ A relatively new body of research demonstrates that police officers who feel that their masculinity is being challenged or undermined in the context of a particular interaction are more likely to use violence than officers who do not experience that masculinity threat.²⁶ Another example is “racial anxiety.” Research on this concept shows that police officers who worry that they will be perceived as racist in

²⁰ The data excludes all non-Hispanic whites, but it is worth noting that some of the officers captured in the “Latino” column above may also be white.

²¹ In 2007, black officers represented 11.9% of officers in local police departments across the nation. Jeff Rojek, Richard Rosenfeld & Scott Decker, *Policing Race: The Racial Stratification of Searches in Police Traffic Stops*, 50 CRIMINOLOGY 993, 995 (2012) (citing BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 231174, LOCAL POLICE DEPARTMENTS, 2007, at 14 (2010), <https://www.bjs.gov/content/pub/pdf/lpdo7.pdf> [<https://perma.cc/T9PA-DP73>]).

²² For a more extended analysis, see Carbado & Rock, *supra* note 8, at 163–65.

²³ See *infra* section II.E, pp. 2015–23.

²⁴ See *infra* section II.A, pp. 1992–95.

²⁵ L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 128 (2014).

²⁶ *Id.* at 130–31. Masculinity threat further exacerbates racial violence because “black men are perceived as more masculine than men from other racial groups.” *Id.* at 136; see *id.* at 135–38.

particular interactions are more likely to use force against black citizens than officers who do not experience racial anxiety.²⁷

Still another reason to believe that black police officers might end up racially targeting African Americans relates to some structural features of policing. If police officers are specifically deployed to proactively police communities in which African Americans live — and if their performance evaluations, pay increases, and promotions are tied to, among other measures, the number of stops and frisks they conduct, the number of citations they issue, and the number of arrests they effectuate — black police officers, like white police officers, will end up having significant contact with African Americans.²⁸

A final reason to expect that black police officers will be implicated in the range of race and policing scenarios with which the United States has been grappling in the wake of Ferguson is this: to fit into and become a part of the law enforcement community of “blue,” black police officers may have to marginalize the concerns of and disassociate themselves from the community of “black.”²⁹

We should be clear to note that, notwithstanding what we have said thus far, at the end of the day, the question of whether and how black officers are implicated in racially motivated policing against other African Americans is an empirical question. One of the reasons our arguments are largely, though not entirely, theoretical is because the empirical evidence on the racial quality and effects of black policing points in contradictory directions.³⁰ In this respect, our goal in the rest of this Part is relatively modest: to suggest that it cannot be so readily assumed that, with respect to African American communities, black policing and white policing look fundamentally different. We begin with a discussion of same-race biases.

²⁷ Godsil & Richardson, *supra* note 5, at 2248–51.

²⁸ See Saki Knafo, *A Black Police Officer's Fight Against the N.Y.P.D.*, N.Y. TIMES MAG. (Feb. 18, 2016), <https://nyti.ms/2jVQZXA> [<https://perma.cc/F9CG-UPFQ>].

²⁹ See, e.g., KENNETH BOLTON JR. & JOE R. FEAGIN, BLACK IN BLUE: AFRICAN-AMERICAN POLICE OFFICERS AND RACISM 202–04 (2004) (noting that officers who stood up to injustice were viewed as oversensitive, troublemakers, or radical); R. ALAN THOMPSON, CAREER EXPERIENCES OF AFRICAN AMERICAN POLICE EXECUTIVES: BLACK IN BLUE REVISITED 73 (2003) (explaining the view of some black officers that “speaking out on sensitive issues had the potential to limit future opportunities for promotion”).

³⁰ See THOMPSON, *supra* note 29, at 81–83 (discussing early studies and their limitations); see also, e.g., Joscha Legewie & Jeffrey Fagan, *Group Threat, Police Officer Diversity and the Deadly Use of Police Force* 33–36 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-512, 2016), <https://ssrn.com/abstract=2778692> [<https://perma.cc/G987-6T3T>] (reporting no conclusive finding regarding the overall influence of black officers in the department on the rate of officer-involved killings of black civilians); Sean Nicholson-Crotty et al., *Will More Black Cops Matter? Officer Race and Police-Involved Homicides of Black Citizens*, 77 PUB. ADMIN. REV. 206, 211–12 (2017) (finding no significant relationship between proportion of black officers and police-involved killings of black civilians in 2014, but finding a significant — and *positive* — relationship in 2015).

A. Same-Race Biases

The basic point here is that African Americans (and other people of color) have some of the same racial biases against other African Americans that white people have. Think of these as “same-race” or “intra-racial” biases (an intragroup phenomenon analogous to same-sex sexual harassment). Consider, for example, the phenomenon of implicit biases. In order to make sense of our world and our experiences, our minds have developed mental processes that operate automatically, unintentionally, and without our conscious awareness.³¹ Research in the field of social psychology reveals that humans have developed unconscious, that is, implicit, associations related to race that consist of stereotypes and attitudes about racial groups that often conflict with their consciously held thoughts and feelings.³² These implicit associations can shape people’s perceptions, judgments, and behaviors in both positive and negative ways.

Over four decades of research reveals that both whites and African Americans unconsciously associate black people with negative values and white people with positive ones.³³ That is to say, African Americans often have negative “attitudes” about other African Americans. Second, both whites and African Americans generally hold negative stereotypes of other black people, including stereotypes of black people as criminally inclined, violent, and dangerous.³⁴ Professors Sandra Graham and Brian Lowery, for instance, found that priming words related to the category “black” promoted more negative trait ratings of a hypothetical adolescent offender.³⁵ Importantly, this effect emerged among both black and nonblack police and probation officers.³⁶ Moreover, the participants’ responses to the prime were not impacted by the participants’ consciously held attitudes toward blacks,³⁷ suggesting that even well-meaning, racially egalitarian officers may still fall prey to these biases. At least implicitly, then, black police officers likely feel just as unsafe

³¹ For a more robust discussion of implicit biases, see generally Richardson, *supra* note 4, at 2052–56 (describing how implicit biases can affect interactions between police officers and citizens).

³² See *id.* at 2042–43.

³³ That is, they associate blackness with negativity and whiteness with positivity. See, e.g., John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 897–98 (2004) (finding that forty percent of blacks show implicit negativity toward their ingroup, contrasted with less than ten percent of whites).

³⁴ See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 486–87 (2004); Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 278 (2007) (“[A] clear majority of both Whites and Blacks agreed with the statement ‘blacks are aggressive or violent.’”).

³⁵ Graham & Lowery, *supra* note 34, at 487.

³⁶ See *id.* at 493 (police officers); *id.* at 496 (probation officers).

³⁷ *Id.* at 496–97.

around the average young black man in the inner city as do white police officers.

Studies reveal that police officers are not immune from these implicit racial biases. There is no good reason a priori why we would expect them to be. Moreover, implicit biases are most likely to influence behaviors and judgments in situations where decisionmaking is highly discretionary, information is limited and ambiguous, and individuals are cognitively depleted.³⁸ These are the conditions under which most police officers, including black police officers, operate on the street.

As an indication of the kind of empirical evidence that bears out the implicit biases of police officers, consider the shooter-bias line of research. In these studies, subjects, including police officers, watch a video that contains photographs of either black men or white men posed in front of different backgrounds and holding either guns or crime-irrelevant objects such as cell phones.³⁹ Participants are asked to quickly decide whether the men are armed by pressing buttons labeled “shoot” or “don’t shoot.”⁴⁰ These shooter-bias studies typically result in subjects mistakenly “shooting” unarmed blacks more often than unarmed whites.⁴¹ They also “shoot” armed targets more quickly when they are black versus white.⁴² Studies similarly demonstrate that officers who work in neighborhoods with high percentages of black individuals are more likely to exhibit shooter bias.⁴³

Relevant for our purposes is the fact that African Americans, including African American police officers, evince shooter bias as well. Multiple studies have shown that white and nonwhite officers do not differ in racial bias on shooting tasks, either with respect to response time (for example, how quickly they “shoot” a black man as opposed to a white target with a weapon) or with respect to stereotype-consistent mistakes (for example, their propensity to “shoot” a black man without a weapon or to “not shoot” a white man who is armed).⁴⁴

³⁸ See, e.g., Joshua Correll et al., *The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS 201, 210 (2014); Tiffani J. Johnson et al., *The Impact of Cognitive Stressors in the Emergency Department on Physician Implicit Bias*, 23 ACAD. EMERGENCY MED. 297, 302 (2016).

³⁹ Correll et al., *supra* note 38, at 202–03; Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1009–10 (2007).

⁴⁰ Correll et al., *supra* note 38, at 203.

⁴¹ See *id.* at 206 (summarizing prior research).

⁴² See, e.g., Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 EUR. J. SOC. PSYCHOL. 1102, 1103 (2007).

⁴³ Correll et al., *supra* note 38, at 202.

⁴⁴ See Correll et al., *supra* note 39, at 1011 & n.3 (finding that white and nonwhite officers did not differ in response times); Melody S. Sadler et al., *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286, 299 (2012) (finding that Latino officers did not differ from white officers in response time or accuracy); see also Joshua

Moreover, evidence shows that police departments with more black officers engage in more racial profiling than those with fewer black officers.⁴⁵ Consistent with that, the Department of Justice (DOJ) uncovered extensive racial bias in the predominantly black New Orleans Police Department.⁴⁶ According to the DOJ, police officers in New Orleans failed to articulate sufficient facts to justify stops, searches, and arrests.⁴⁷ Finally, data indicates that black officers are just as likely as their white colleagues to form nonbehavioral suspicions⁴⁸ about black suspects, and that black officers who stop a black man are more likely to arrest him than they are to arrest a stopped white suspect.⁴⁹ The foregoing might explain why there is only limited evidence that police forces with more minority officers show more equitable patterns of policing.⁵⁰

This brings us back to our more central point: as a result of implicit racial biases, officers are more likely to focus their attention on black, rather than white, individuals.⁵¹ This is true even when the officers are consciously egalitarian, reject racial profiling, or are black themselves.⁵² Finally, these implicit biases may cause officers to evaluate any ambiguous behaviors they observe as more consistent with threat and criminality than innocence and may influence how quickly officers identify, or misidentify, weapons.⁵³ In sum, the study of implicit bias demonstrates that race influences who will capture an officer's attention and, once that attention is captured, whose ambiguous behaviors will be perceived as violent and dangerous.

Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1324 (2002). These studies show no difference between white and nonwhite participants in community samples.

⁴⁵ Vicky M. Wilkins & Brian N. Williams, *Black or Blue: Racial Profiling and Representative Bureaucracy*, 68 PUB. ADMIN. REV. 654, 660-61 (2008).

⁴⁶ See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011). The DOJ noted that the record of arrests in New Orleans "reflected on [its] face apparent constitutional violations." *Id.* at viii.

⁴⁷ See *id.*

⁴⁸ A nonbehavioral suspicion includes such criteria as the suspect's location or appearance, and, according to Professor Geoffrey Alpert and his colleagues, "do[es] not necessarily provide a clear justification for a stop." Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407, 419 (2005).

⁴⁹ Robert A. Brown & James Frank, *Race and Officer Decision Making: Examining Differences in Arrest Outcomes Between Black and White Officers*, 23 JUST. Q. 96, 119 (2006).

⁵⁰ See generally *id.* at 97 (discussing the lack of evidence of behavioral differences between minority and white officers).

⁵¹ For more in-depth analysis of the concepts discussed in this section, see Richardson, *supra* note 4, at 2085-86.

⁵² See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 886-87 (2004).

⁵³ See Correll et al., *supra* note 39, at 1013-15; see also Correll et al., *supra* note 44, at 1325-26.

On some level, the fact that implicit biases influence black and white officers alike should not surprise us, particularly because the nature of police work requires officers to think about crime. Researchers have found that simply thinking about crime is sufficient to trigger unconscious racial biases in police officers and that these biases influence their behaviors in ways that disadvantage blacks.⁵⁴ The very nature of policing, then, is effectively a racial prime for blackness. Understood in this way, the fact that, across many American cities, black police officers, like white officers, spend a considerable amount of time policing majority-minority communities means that they are always effectively rehearsing the “black as criminal” stereotype. This is important to note because practicing associations — racial or otherwise — strengthens them. This might explain why officers working in these majority-minority areas exhibit higher levels of implicit bias than those who do not.⁵⁵

That we have focused on implicit bias in this way is not to suggest that explicit biases are not also at play. Quite likely they are. Our point is to suggest that, even assuming explicit biases away, the existence of implicit biases still leaves African Americans vulnerable to overpolicing.

B. Black Officer “Self-Threats”

In this section, we explain how a host of “self-threats” can create conditions that increase the likelihood of officers, including black officers, aggressively targeting black civilians. Both of us have elsewhere laid out the main perceived threats that cause officers to overpolice black men. The analysis here draws on those frameworks and applies portions of them to black police officers to illuminate how they, too, are susceptible to these self-threats.⁵⁶ Here, as there, we focus on four main threats: social dominance threat, stereotype threat, masculinity threat, and racial solidarity threat.

1. *Social Dominance Threat.* — For more than twenty years, social psychologists have been developing and providing empirical support for what they call “social dominance theory.” The basic idea is that the persistence of social inequality derives in part from people’s endorsement of hierarchy-promoting ideologies⁵⁷ that effectively lock in extant

⁵⁴ Eberhardt et al., *supra* note 52, at 876–77, 883.

⁵⁵ Cf. Correll et al., *supra* note 39, at 1021 (noting that officers “who reported working in communities with . . . high proportions of minority residents showed particularly strong patterns of bias”).

⁵⁶ See Carbado & Rock, *supra* note 8, at 175–85; Godsil & Richardson, *supra* note 5; Richardson & Goff, *supra* note 25. We are immensely grateful to our respective coauthors in those articles for their contributions to this essay.

⁵⁷ Felicia Pratto et al., *Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes*, 67 J. PERSONALITY & SOC. PSYCHOL. 741, 741 (1994) (“The theory postulates that societies minimize group conflict by creating consensus on ideologies that promote the

advantages and disadvantages.⁵⁸ Under the theory, people who endorse such ideologies are said to have a social dominance orientation, or SDO.⁵⁹

Although scholars typically describe SDO as an individual difference variable, empirical evidence suggests that it is also a group-based phenomenon. In other words, where one is located in a particular social hierarchy partly determines one's SDO. Members of high-status groups generally have a stronger SDO than members of lower-status groups.⁶⁰ For example, men tend to have a higher SDO than women,⁶¹ while whites evidence a higher SDO than blacks or Latinos; similarly, police officers evidence a stronger SDO than civilians, even after controlling for a range of other characteristics, such as gender, social class, age, and educational background.⁶² A particular feature of the social dominance literature that bears emphasis is the finding that people's SDO orientation increases when their sense of relative status in society is threatened.⁶³

Social dominance theory likely applies to policing. Even beyond police officers' elevated SDO, police cultures and trainings are fundamentally hierarchical.⁶⁴ Moreover, "the criminal justice system is itself hierarchically ordered, with suspects at the bottom, police officers somewhere in the middle, and judges at the top."⁶⁵ Compounding matters is the fact that, "historically, race has been the most perniciously

superiority of one group over others. . . . To work smoothly, these ideologies must be widely accepted within a society, appearing as self-apparent truths; hence we call them hierarchy-legitimizing myths." (emphasis omitted) (citation omitted)).

⁵⁸ Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31, 33 (2003).

⁵⁹ Pratto et al., *supra* note 57, at 741-42.

⁶⁰ *Id.* at 758.

⁶¹ *Id.* at 747.

⁶² Jim Sidanius et al., *Social Dominance Orientation, Hierarchy Attenuators and Hierarchy Enhancers: Social Dominance Theory and the Criminal Justice System*, 24 J. APPLIED SOC. PSYCHOL. 338, 348-51 (1994); see also Carbado & Rock, *supra* note 8, at 176.

⁶³ Eric D. Knowles et al., *On the Malleability of Ideology: Motivated Construals of Color Blindness*, 96 J. PERSONALITY & SOC. PSYCHOL. 857, 860, 863-64 (2009). The researchers contrasted the distributive justice colorblindness principle (the belief that one's race should not matter for outcomes in life) with the procedural justice colorblindness principle (the belief that race should not be a factor in how individuals are treated, even in situations where inequality exists and differential treatment could ameliorate it). *Id.* at 859. While the former has the potential to effect change, the latter tends to entrench inequality. Professor Eric Knowles and colleagues found that whites who perceived more threat from blacks tended to endorse procedural colorblindness more strongly. *Id.* at 862. Moreover, asking whites to identify their ethnicity, which was shown in pretesting to cause whites to think about racial threat, was associated with spontaneous generation of procedural (as opposed to distributive) descriptions of what colorblindness is. *Id.* at 860. The authors interpreted these findings as evidence that whites feeling threatened would selectively endorse ideologies that maintained their high social status. *Id.* at 863.

⁶⁴ See Carbado & Rock, *supra* note 8, at 177 (citing Sidanius et al., *supra* note 62, at 342).

⁶⁵ *Id.*

enforced hierarchy in the United States.”⁶⁶ Finally, “the criminal justice system and on-the-ground policing have functioned as significant sites in which state actors have enforced this hierarchy.”⁶⁷

As one of us has argued elsewhere, the preceding factors could coalesce to create a law enforcement investment in “social dominance policing”⁶⁸ — in other words, “policing that consciously or unconsciously maintains the officer’s sense of authority, control, and power *and* the officer’s sense of the suspect’s vulnerability, diminished agency, and powerlessness.”⁶⁹ To put the point another way, “social dominance policing is predicated upon police/civilian encounters in which the police and the suspect know who is in charge, know where power and vulnerability reside, and know how to conduct themselves in ways that affirm and re-inscribe this hierarchy.”⁷⁰

Various features of police training instantiate norms of social dominance. For example, officers are instructed to maintain control over every interaction because any threat to their authority is potentially dangerous. They are taught to do so by enacting “command presence,” which involves “tak[ing] charge of a situation” and “projecting an aura of confidence and decisiveness.”⁷¹ This command presence interactional technique is expressly designed to establish and signal the officer’s hierarchical position, a position of dominance that African Americans can “threaten” in any number of ways.

For one thing, simply asserting rights could undermine the hierarchy upon which social dominance policing rests. This is precisely why many black parents expressly instruct their children to overcomply during their engagements with the police.⁷² For another, questioning an officer’s authority more directly challenges that dominance and could prompt the officer to express his power by arresting the black citizen.⁷³

⁶⁶ *Id.*

⁶⁷ *Id.* at 178.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 674 (2009) (citing Mary Newman, Comment, *Barnes v. City of Cincinnati: Command Presence, Gender Bias, and Problems of Police Aggression*, 29 HARV. J.L. & GENDER 485, 491 (2006)); see also Geoffrey P. Alpert, Roger G. Dunham & John M. MacDonald, *Interactive Police-Citizen Encounters that Result in Force*, 7 POLICE Q. 475, 476 (2004) (explaining the difference between “dominating force” and “accommodating force”); L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 80 (2017).

⁷² See Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1020 (2002) (describing this as “surplus compliance”).

⁷³ See, e.g., CHRISTY E. LOPEZ, AM. CONSTITUTION SOC’Y FOR LAW & POLICY, DISORDERLY (MIS)CONDUCT: THE PROBLEM WITH “CONTEMPT OF COP” ARRESTS 2 (2010) (“There is abundant evidence that police overuse disorderly conduct and similar statutes to arrest people who ‘disrespect’ them or express disagreement with their actions.”); Douglas A. Smith & Christy A.

Still a third way an African American might threaten an officer's social dominance is through some form of confrontation. As one scholar observes:

[B]y approaching people from a dominance perspective, police officers encourage resistance and defiance, create hostility, and increase the likelihood that confrontations will escalate into struggles over dominance that are based on force. The police may begin a spiral of conflict that increases the risks of harm for both the police and for the public.⁷⁴

Although not as robust as that of white officers, black police officers typically evidence relatively high levels of SDO.⁷⁵ Yet such an orientation does not, a priori, guarantee that black police officers would be committed to social dominance policing. Indeed, research suggests that high-SDO, low-status individuals will show bias in favor of the high-status group only when they believe that the hierarchy on which that group's high status is based is legitimate.⁷⁶ One way to understand this in the context of policing would be to say that black police officers are unlikely to manifest social dominance-oriented policing against other black men unless they perceive the policing practices of their police department to be legitimate. A range of incentives exist for black police officers to view their departmental practices in precisely this way.⁷⁷

Visher, *Street-Level Justice: Situational Determinants of Police Arrest Decisions*, 29 SOC. PROBS. 167, 175 (1981) ("Police work involves controlling people, and this task is facilitated by the inequality of power and authority between police and the public. Some of our findings suggest that police act in ways to maintain this disparity."); see also Carbado & Rock, *supra* note 8, at 178.

⁷⁴ Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 369 (2001).

⁷⁵ See Sidanius et al., *supra* note 62, at 350 ("[E]ven after the effects of ethnicity were accounted for, police officers were still found to be significantly and quite strongly more dominance oriented than civilians . . ."). Note that the social dominance literature deals in relative endorsement of statements used to gauge SDO, rather than absolute endorsement, limiting what is known about exactly how strongly officers, or civilians, openly endorse dominance attitudes.

⁷⁶ Shana Levin et al., *Social Dominance Orientation and Intergroup Bias: The Legitimation of Favoritism for High-Status Groups*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 144, 149–50 (2002).

⁷⁷ A closely related theory to social dominance theory, system justification theory, explores why some low-status group members would endorse hierarchy-enhancing ideologies and engage in other behavior that runs counter to their group interests. For instance, research suggests that low-income individuals tend not to support income redistribution efforts, a perplexing phenomenon. For further discussion of this point, see John T. Jost, *System Justification Theory as Compliment, Complement, and Corrective to Theories of Social Identification and Social Dominance*, in SOCIAL MOTIVATION 223 (David Dunning ed., 2011). This sort of behavior is problematic in the context of classic psychological theories like social identity theory, which predict that individuals will generally act to elevate the status and esteem of themselves and their group. See generally Michael A. Hogg, *Social Identity Theory*, in CONTEMPORARY SOCIAL PSYCHOLOGICAL THEORIES 111 (Peter J. Burke ed., 2006) (for an overview); Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, in THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33 (William G. Austin & Stephen Worchel eds., 1979) (for the original formulation of the theory). For a more in-depth discussion of system justification theory and its applications to law, see Gary Blasi & John T. Jost,

First, to view policing practices as illegitimate is to tell oneself that one is doing life-and-death work for a system that is not simply unjust but racially unjust.⁷⁸ Second, people are more likely to justify systems and organizational cultures when they have a desire to create a common or shared experience.⁷⁹ The fact that both police culture and formal training emphasize uniformity in attitudes and behavior⁸⁰ means that black police officers likely experience pressure to integrate themselves within and reproduce the department's epistemic and cultural community. Third, individuals who are dependent on an organization or system tend to justify it.⁸¹ To the extent that black and white police officers alike rely on police authority to maintain their safety, they may take comfort in seeing that system as legitimate and well constructed.⁸² Finally, black officers' explicit and implicit biases of other African

System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice, 94 CALIF. L. REV. 1119, 1126–44, 1155–62 (2006). The particular overlaps and distinctions between system justification theory and social dominance theory are beyond the scope of this paper. For excellent discussions of the two theories, see Jost et al., *supra* note 33, at 888; Jost, *supra*; Felicia Pratto et al., *Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward*, 17 EUR. REV. SOC. PSYCHOL. 271 (2006); and Jim Sidanius et al., *Social Dominance Theory: Its Agenda and Method*, 25 POL. PSYCHOL. 845, 868–70 (2004).

⁷⁸ Our reference to life and death here is particularly relevant because system justification is predicted by mortality salience, such that individuals who consider their own death frequently tend to system justify more than those who do not. Erin P. Hennes et al., *Not All Ideologies Are Created Equal: Epistemic, Existential, and Relational Needs Predict System-Justifying Attitudes*, 30 SOC. COGNITION 669, 671, 675–77 (2012).

⁷⁹ *Id.* at 675–77.

⁸⁰ Eugene A. Paoline III, *Taking Stock: Toward a Richer Understanding of Police Culture*, 31 J. CRIM. JUST. 199, 203 (2003).

⁸¹ See Aaron C. Kay & Justin Friesen, *On Social Stability and Social Change: Understanding When System Justification Does and Does Not Occur*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 360, 361 (2011).

⁸² This should not be taken to suggest that black and white officers experience system justification similarly, however. To the contrary, an important element of system justification theory is that system justification operates fundamentally differently for high- as opposed to low-status individuals. Specifically, for high-status individuals, system justification motives and group esteem motives act in concert, such that believing one's group to be highly motivated or talented (and thus legitimately deserving of high status) is complemented by the belief that one's system works effectively and fairly to reward deserving parties. Note how different a calculus is necessary for low-status individuals, however. For these individuals, system justification motives act counter to group esteem motives. For a Latina woman, for instance, believing that the system is just requires that she endorse the view that women, Latinos, and particularly Latina women are less able or less motivated (and thus less deserving of high status) than whites, men, and particularly white men. Likewise, maintaining a high opinion of her group's worth demands that she reject the system as unjust and ineffective at elevating appropriate parties to high-status positions, a rejection which may cause her substantial anxiety. Thus, whereas for high-status members of a social system, endorsement of legitimizing myths like meritocracy should be relatively consistent across individuals and situations, for low-status members, the theory dictates that contextual or personal factors will predict whether legitimizing myths are endorsed. See, e.g., Arnold K. Ho et al., *Social Dominance Orientation: Revisiting the Structure and Function of a Variable Predicting Social and Political Attitudes*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 583, 584–85 (2012) (suggesting that SDO is more accurately conceived of as two component parts: a preference for unequal social relations

Americans would matter here as well.⁸³ These perceptions would legitimize the utilization of aggressive policing tactics against a group that is presumptively perceived to be violent and dangerous — African Americans generally and black men in particular.⁸⁴

2. *Stereotype Threat.* — Another threat that could impact how black officers police other African Americans relates to stereotype threat. Stereotype threat refers to the anxiety that occurs when people are concerned about confirming a negative stereotype about a social group they value and to which they belong.⁸⁵ People can experience stereotype threat even when they do not endorse the stereotype or believe it applies to them. All that is required is that individuals are aware of the negative stereotype and are in a situation that raises concerns that they will be judged in terms of that stereotype.⁸⁶

Across a number of studies, researchers have learned that police officers experience stereotype threat arising from the concern that they will be perceived as racist by the civilians they encounter.⁸⁷ Disturbingly, these concerns can result in racial violence. Studies demonstrate

(SDO-E, for equality) and a preference for some groups to dominate over others (SDO-D, for dominance); see also John T. Jost & Erik P. Thompson, *Group-Based Dominance and Opposition to Equality as Independent Predictors of Self-Esteem, Ethnocentrism, and Social Policy Attitudes Among African Americans and European Americans*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 209, 222–23, 229–31 (2000) (demonstrating for the first time that these concepts are related to one another differently for high- as opposed to low-status groups).

⁸³ To appreciate how explicit biases might be operating here, it is helpful to distinguish between intentional discrimination on the basis of animus and discrimination on the basis of stereotype. For the most part, black police officers will not harbor racial animus toward other African Americans. That is, blacks do not, on average, associate blackness with negativity and whiteness with positivity. See, e.g., Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. J. SOC. PSYCHOL. 1, 17 (2007). This claim, however, can be understood fully only in context: whereas blacks on average do not show an implicit bias against their group, they also do not (on average) show an implicit bias toward their group. Rather, they show no evaluative preference at all, which contrasts them with whites, who show a strong implicit preference for their own group. *Id.* But, for some of the reasons we have already discussed, blacks may harbor racial stereotypes that could cause them both to use violence against other African Americans, on the one hand, and to legitimize the practice more generally, on the other. All of this is to say that high-SDO, low-status individuals will sometimes push back against systems that enhance hierarchy. However, there are reasons to think that this “push-back” dynamic may have little impact on the policing of black police officers.

⁸⁴ See sources cited *supra* note 34. One study of police officers found that an exception to the racial tension that existed between black and white officers was when they came to each other’s aid. According to the author, police officers of both races “viewed the public as a common enemy.” THOMPSON, *supra* note 29, at 37.

⁸⁵ See Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 614 (1997); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995). For an in-depth discussion of stereotype threat, see Richardson & Goff, *supra* note 25, at 124–28.

⁸⁶ See Steele & Aronson, *supra* note 85, at 798.

⁸⁷ E.g., PHILLIP ATIBA GOFF ET AL., PROTECTING EQUITY: THE CONSORTIUM FOR POLICE LEADERSHIP IN EQUITY REPORT ON THE SAN JOSE POLICE DEPARTMENT 1–3 (2013).

that the more officers experience stereotype threat, the more likely they are to use greater force against black suspects relative to individuals of other racial groups, both in the lab and in the real world.⁸⁸

One of us has previously theorized that the reason stereotype threat is associated with greater uses of force against black civilians is because it influences officers' perceptions of their moral authority, that is, their sense of self-legitimacy, and thus, their confidence that they can control a potentially threatening situation in noncoercive ways.⁸⁹ After all, if officers believe that civilians do not respect their authority, they will be quicker to think that words alone will be insufficient to control the situation and be more likely to use physical force as a result. In fact, one study found that when officers believed that civilians did not respect them and did not view them as legitimate, officers were more likely to believe that interactions with these individuals would be more dangerous.⁹⁰ That finding is particularly problematic for African Americans. Because the "police-are-racist" negative stereotype is most salient with reference to black civilians, African Americans are more likely than any other group to generate stereotype threat in police officers,⁹¹ including officers who are black.⁹²

Recent research provides evidence to support this theory. The study we have in mind involved 514 police officers from a large urban police department.⁹³ Researchers found that officers' perceptions of their own legitimacy is tied to their views of how citizens perceive them.⁹⁴ The more officers experienced stereotype threat, the less likely they were to perceive themselves as legitimate.⁹⁵ Furthermore, officers who experienced stereotype threat felt less confident in their authority.⁹⁶ Finally, the study found that the less legitimate officers viewed themselves to be, the more resistant they were to their department's use-of-force policies, the more approving they were of unreasonable uses of force, and the less

⁸⁸ *Id.* at 3.

⁸⁹ Richardson & Goff, *supra* note 25, at 127–28.

⁹⁰ Phillip Atiba Goff et al., *Illegitimacy Is Dangerous: How Authorities Experience and React to Illegitimacy*, 4 *PSYCHOLOGY* 340, 342–43 (2013).

⁹¹ Godsil & Richardson, *supra* note 5, at 2251–52.

⁹² GOFF ET AL., *supra* note 87, at 5 (observing that nonwhite officers frequently mentioned occasions when citizens of the same race accused them of racism).

⁹³ Rick Trinkner & Phillip Atiba Goff, *The Force of Fear: Police Stereotype Threat, Self-Legitimacy, and Support for the Use of Force* 3 (2017) (unpublished manuscript) (on file with the Harvard Law School Library) (citations omitted).

⁹⁴ *Id.*

⁹⁵ *Id.* at 5.

⁹⁶ *Id.*

supportive they were of using procedurally just policing tactics in interactions with citizens.⁹⁷ The officers' race did not predict these experiences of stereotype threat.⁹⁸

Importantly, researchers have not found significant differences between black and white officers' experiences of stereotype threat.⁹⁹ Since stereotype threat influences both black and white officers, simply having more diversity in police departments may not, in and of itself, reduce uses of force against black citizens.

3. *Masculinity Threat.* — Another phenomenon that may influence police officers regardless of their race is masculinity threat. Masculinity threat refers to the fear of being perceived as insufficiently masculine.¹⁰⁰ Masculinities theorists have rejected the notion of gender as being simply about “biological” differences between sexes, focusing instead on gender as a social construct.¹⁰¹ Viewed this way, gender is not about one's innate characteristics, but rather about performing societal expectations of “what it means to be a man.”¹⁰² To put all of this another way, “[o]ne must learn to be a man in this society because manhood is a socially produced category.”¹⁰³ Far from being an existential given, “[m]anhood is a performance. A script. It is accomplished and re-enacted in everyday relationships.”¹⁰⁴ Precisely because men do not perceive of their manhood or masculinity “as a developmental guarantee, but as a status that must be earned,”¹⁰⁵ men often experience a kind of masculinity precarity, or what we have been calling masculinity threat.¹⁰⁶ This sense of precarity is compounded to the extent that men work in hypermasculine environments, where exaggerated displays of

⁹⁷ *Id.*

⁹⁸ *Id.* at 5–6.

⁹⁹ GOFF ET AL., *supra* note 87, at 5. As Professor Phillip Goff notes, the study's findings could be attributed either to the small sample size of nonwhite officers or to the concerns white officers may have had with admitting to a fear of being judged to be racist. *Id.*

¹⁰⁰ For an in-depth discussion of masculinity threat, see Richardson & Goff, *supra* note 25, at 128–31.

¹⁰¹ Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125, 137 (1987); see also Richardson & Goff, *supra* note 25, at 128.

¹⁰² Deborah Kerfoot & David Knights, “*The Best Is Yet to Come?*”: *The Quest for Embodiment in Managerial Work*, in MEN AS MANAGERS, MANAGERS AS MEN 78, 86 (David L. Collinson & Jeff Hearn eds., 1996); see also Richardson & Goff, *supra* note 25, at 128.

¹⁰³ Devon W. Carbado, *Straight out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 93–94 (2000).

¹⁰⁴ *Id.* at 94.

¹⁰⁵ Jonathan R. Weaver et al., *The Proof Is in the Punch: Gender Differences in Perceptions of Action and Aggression as Components of Manhood*, 62 SEX ROLES 241, 242 (2010).

¹⁰⁶ Joseph A. Vandello et al., *Precarious Manhood*, 95 J. PERSONALITY & SOC. PSYCHOL. 1325, 1335 (2008) (“When faced with feedback that they did not measure up to others of their gender, men (but not women) showed increased anxiety- and threat-related thoughts Given that manhood is precarious, requiring action and success in all ‘manly’ endeavors, it is not surprising that many men feel anxiety over what they perceive as an unattainable standard.” (citations omitted)).

physical strength and aggression are glorified and rewarded as a means of demonstrating and maintaining one's masculinity. In those contexts, when a man's masculinity is threatened, he will often respond with violence¹⁰⁷ because "physical aggression is part of men's cultural script for sustaining and restoring manhood."¹⁰⁸

In police departments, "[h]ypermasculinity amongst the rank and file is encouraged, reinforced, and policed in numerous ways."¹⁰⁹ The departments that do highlight gender diversity often do so in a manner that foregrounds women's "outsider" status;¹¹⁰ some scholars have even posited that police academies have "an informal 'hidden curriculum' about masculinity,"¹¹¹ wherein "[m]en learn[] to disparage women by verbally denigrating and objectifying them";¹¹² these academies also emphasize physical fighting and violence inside and outside the classroom.¹¹³ Compounding all of this is the fact that policing is still a male-dominated profession,¹¹⁴ and "police work is still viewed by police themselves and the public as a masculine pursuit best characterized by aggressive macho crime fighting."¹¹⁵ Finally, "officer training continues to emphasize physical strength, danger, and the physical aspects of the job, all of which codes policing as hypermasculine."¹¹⁶

Against the backdrop of the gendered dimensions of the practices and perceptions of policing, male officers comment on the necessity of proving their masculinity through performance of a straight, macho identity.¹¹⁷ For instance, patrol officers may not call for help out of concerns that they will be viewed as insufficiently masculine in the eyes

¹⁰⁷ See Jennifer K. Bosson & Joseph A. Vandello, *Precarious Manhood and Its Links to Action and Aggression*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 82, 83 (2011); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 784–85 (2000) (identifying this phenomenon in the instance of class dynamics); Vandello et al., *supra* note 106, at 1334.

¹⁰⁸ Weaver et al., *supra* note 105, at 247.

¹⁰⁹ Richardson & Goff, *supra* note 25, at 131; see also Michael F. Aiello, *Policing the Masculine Frontier: Cultural Criminological Analysis of the Gendered Performance of Policing*, 10 CRIME, MEDIA, CULTURE 59, 59–60 (2014).

¹¹⁰ See Aiello, *supra* note 109, at 72–74. Seven of the twenty-two departments studied overtly highlighted these gender differences. *Id.* at 74; see also Richardson & Goff, *supra* note 25, at 132 & n.104.

¹¹¹ Anastasia Prokos & Irene Padavic, "There Oughtta Be a Law Against Bitches": *Masculinity Lessons in Police Academy Training*, 9 GENDER, WORK & ORG. 439, 440 (2002).

¹¹² *Id.* at 452.

¹¹³ *Id.* at 449; see also Richardson & Goff, *supra* note 25, at 132.

¹¹⁴ Susan L. Miller & Emily Bonistall, *Gender and Policing: Critical Issues and Analyses*, in ROUTLEDGE HANDBOOK OF CRITICAL CRIMINOLOGY 315, 316 (Walter S. DeKeseredy & Molly Dragiewicz eds., 2012).

¹¹⁵ Richardson & Goff, *supra* note 25, at 133 (quoting Miller & Bonistall, *supra* note 114, at 316).

¹¹⁶ *Id.* (first citing Jennifer Brown et al., *Appropriate Skill-Task Matching or Gender Bias in Deployment of Male and Female Police Officers?*, 3 POLICING & SOC'Y 121, 121 (1993); then citing Aiello, *supra* note 109, at 70–71).

¹¹⁷ See Susan L. Miller et al., *Diversity in Blue: Lesbian and Gay Police Officers in a Masculine Occupation*, 5 MEN & MASCULINITIES 355, 369 (2003).

of other officers. As one veteran officer shares, “officers who ‘call for help’ are seen as weak, as vulnerable, and as feminine. . . . The subculture dictates that ‘real men’ will never need to call for help; those who do are often subjected to ridicule and scorn after having done so.”¹¹⁸ All of this helps to explain why male officers may feel vulnerable to their colleagues perceiving them as wanting in masculinity.

Researchers have found that masculinity threat predicts uses of force by police against black men both in the lab and in the field.¹¹⁹ One study found that the more officers were insecure in their masculinity, the more likely they were to use greater force against blacks relative to other racial groups.¹²⁰

As a theoretical matter, there are reasons to think that black officers are not immune to the masculinity threat phenomenon we have described. Indeed, one might theorize that black officers have a stronger incentive than white officers to defend their masculinity (1) if they are subject to racism within their police departments,¹²¹ or (2) if they believe that their white or nonblack colleagues will think that they are prone to be “soft” on black suspects out of a sense of racial loyalty or kinship.

As an empirical matter, at least one line of research indicates that black police officers experience masculinity threat at similar rates to white officers.¹²² Another line suggests that black officers may experience greater levels of masculinity threat. Professors Kimberly Hassell and Steven Brandl, for example, found, in a study of over a thousand Milwaukee Police Department officers, that black officers were more likely than their white colleagues to report that their peers underestimated their physical ability to do police work, an experience of doubt that has clear implications for masculinity.¹²³ While research in the area

¹¹⁸ Thomas Nolan, Essay, *Behind the Blue Wall of Silence*, 12 MEN & MASCULINITIES 250, 255 (2009).

¹¹⁹ GOFF ET AL., *supra* note 87, at 11 (referring to the phenomenon that we call “masculinity threat” as “male gender role stress”); *see also* Phillip Atiba Goff et al., *Voices of Dominance, Deaf to the Death of the Dying Dehumanized* (unpublished manuscript) (on file with the Harvard Law School Library).

¹²⁰ GOFF ET AL., *supra* note 87, at 11.

¹²¹ This is all the more likely given that being exposed to racism can cause black men to engage in compensatory performances of masculinity. Phillip Atiba Goff et al., *Racism Leads to Pushups: How Racial Discrimination Threatens Subordinate Men's Masculinity*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1111, 1111, 1113 (2012).

¹²² PHILLIP ATIBA GOFF & KARIN DANIELLE MARTIN, UNITY BREEDS FAIRNESS: THE CONSORTIUM FOR POLICE LEADERSHIP IN EQUITY REPORT ON THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT 20–21 (2012), [http://fliphtml5.com/sgkv/vlgl/basic/\[https://perma.cc/2Y9L-7HNQ\]](http://fliphtml5.com/sgkv/vlgl/basic/[https://perma.cc/2Y9L-7HNQ]) (finding no racial differences in responses to a masculine gender role stress scale).

¹²³ Kimberly D. Hassell & Steven G. Brandl, *An Examination of the Workplace Experiences of Police Patrol Officers: The Role of Race, Sex, and Sexual Orientation*, 12 POLICE Q. 408, 417–20 (2009).

of masculinity threat remains relatively new, the bottom line for our purposes is that the phenomenon likely impacts black officers.

4. *Racial Solidarity Threat: A Version of Racism Stereotype Threat.* — Black police officers may also experience a version of racism threat that we call “racial solidarity threat.”¹²⁴ The notion is that black police interactions with black men potentially threaten these officers’ sense of racial identity and kinship. More precisely, the threat is that the black men with whom they interact will perceive black police officers to be “sellouts,”¹²⁵ “Uncle Toms,”¹²⁶ or people who disidentify with or disassociate from other black people.¹²⁷

There are two reasons to posit that racial solidarity threat could engender aggressive policing. First, a black police officer could expect that black suspects, more than suspects of other races, should understand the difficult position in which black police officers find themselves. These suspects should thus make their encounters with the black police officer go as smoothly as possible by performing a kind of surplus compliance. In the absence of such compliance, the black officer may feel a reduced sense of kinship with his racial group. He may come to believe that the very fact that the black suspect is being noncompliant means that racial affinity or solidarity is doing no work and that the black suspect is invested in giving the black police officer a hard time. Under these circumstances, the officer would not be able to trade on a racially specific form of moral authority — same-race affinity or community. He would thus — consciously or unconsciously — default to a more authoritarian form of engagement.

Second, black officers could think that the reason the black suspect is giving the black officer a hard time is because the suspect believes

¹²⁴ For arguments about the importance of racial solidarity in the context of the black community, see Stephen L. Carter, *The Black Table, the Empty Seat, and the Tie*, in *LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION* 55, 66–67 (Gerald Early ed., 1993), which argues that racial solidarity is essential for the professional success of the black community in modern America; and David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 *MD. L. REV.* 1502, 1556–62 (1998).

¹²⁵ For a thoughtful discussion of the politics of this term among the black community, see generally RANDALL KENNEDY, *SELLOUT: THE POLITICS OF RACIAL BETRAYAL* (2008), which details the suspicion of racial betrayal in the black community and examines its manifestations in contemporary politics and culture.

¹²⁶ The phrase “Uncle Tom” is a derogatory term that refers to African Americans who betray the black community through their relationships with whites. See Jacquelyn L. Bridgeman, *Defining Ourselves for Ourselves*, 35 *SETON HALL L. REV.* 1261, 1265–68 (2005). See generally BRANDO SIMEO STARKEY, IN *DEFENSE OF UNCLE TOM: WHY BLACKS MUST POLICE RACIAL LOYALTY* (2015) (tracking the historical development of the term “Uncle Tom” in black communities).

¹²⁷ THOMPSON, *supra* note 29, at 44 (citing JOHN L. COOPER, *THE POLICE AND THE GHETTO* 116–19 (1980)) (“The competing demands of emotional separation versus the expected role of representing the ghetto community’s views thus caused black officers to eventually withdraw and turn their backs on racial peers just as Judas Iscariot was depicted in his betrayal of Christ.”).

that the black officer has in fact “sold out.” This perception could engender anger or frustration on the part of the black officer (particularly if the officer himself worries that he has “sold out”), either of which could produce more aggressive police conduct. Although preliminary evidence suggests that black officers worry about being perceived as racist as much as white officers do,¹²⁸ whether racial solidarity threat exists in the specific form we have described remains to be empirically determined.¹²⁹

C. “Fitting In” as Police Officers

Even assuming that black police officers don’t have implicit or explicit biases against other African Americans and are not subject to the various “threats” we have described, there is a strong incentive for them to engage in various forms of racially motivated policing: to fit into the culture of their workplace. Like other employees in workplaces, how black officers are perceived by their peers matters. Indeed, within law enforcement, where cohesion and ability to work with one’s partner are emphasized as critical elements of effective policing,¹³⁰ their peers’ perceptions are likely to shape not only black officers’ experiences in the workplace but also their sense of legitimacy and authority as police officers. Thus, it behooves black police officers to get along with their colleagues, to be good team players, and to fit into their work environment. In short, black police officers have an incentive to “work their identities” to demonstrate that they belong.¹³¹

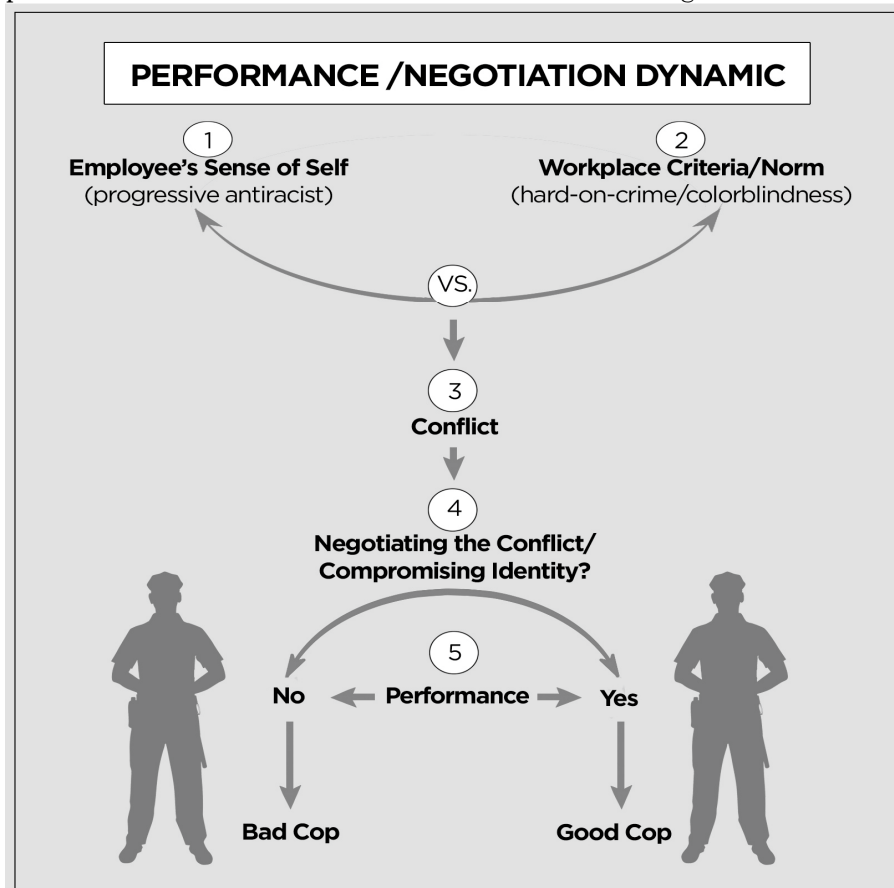
¹²⁸ GOFF & MARTIN, *supra* note 122, at 17.

¹²⁹ Black officers might experience even *more* threat when confronted by African American community members who make it known that they view the officer as a race traitor and a sellout, as in THOMPSON, *supra* note 29, at 43 (citing COOPER, *supra* note 127, at 111). One study provides evidence of this: researchers found that when officers believed that civilians did not respect them and did not view them as legitimate, officers experienced concerns that interactions with these civilians would be more dangerous than interactions with civilians who they believed respected their authority and their legitimacy. Goff et al., *supra* note 90, at 343.

¹³⁰ See, e.g., Andrew Hawkes, *Camaraderie on Patrol: A Recipe for Success*, POLICEONE.COM (Jan. 26, 2012), <http://www.policeone.com/police-jobs-and-careers/articles/4976250-Camaraderie-on-patrol-A-recipe-for-success/> [<https://perma.cc/8P6S-YWJB>].

¹³¹ Professors Devon W. Carbado and Mitu Gulati developed this theory on “working identity” in the context of theorizing workplace discrimination. See DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA* 21–45 (2013); Carbado & Gulati, *supra* note 6, at 1267–78.

But there are racial constraints on their capacity to do so that could lead them to engage in various forms of racially motivated policing. In part, this bias derives from a potential tension that exists between a black officer's sense of self and sense of his normative commitments, on the one hand, and his sense of what police cultures require, on the other. The effect of this tension is that race — the very thing that might lead one to surmise that black police officers can change the racial culture of policing — might limit their capacity to do so. The schematic below provides an indication of what this tension might look like.¹³²



Point One in the Model represents the black officer's sense of self as a person with racial community ties and kinship who is committed to a progressive antiracist agenda. At Point Two, the black police officer forms a view about the criteria his police department values: in this case, a racially targeted hard-on-crime sensibility. At Point Three, the black police officer experiences a conflict between his sense of identity and his

¹³² This decision tree was first developed, though not in the context of police officers, in Carbadó & Gulati, *supra* note 6, at 1267.

sense of the criteria that the institution values. This conflict has to be negotiated. This takes us to Point Four. Here, the officer has to decide whether to compromise his sense of identity. If he chooses not to do so, he will produce a performance that, from the perspective of what our hypothetical police department values, renders him a “bad cop” — a black police officer with a progressive antiracist/soft-on-crime identity. On the other hand, the officer may decide to compromise his sense of self. Under the terms of the model, this would render him a “good cop” — that is, a black police officer with a hard-on-crime approach to policing.

With the foregoing model in mind, and to make the discussion more specific, imagine that, while driving in a patrol car, a black police officer and a white police officer observe a car change lanes without signaling. Stipulate that the driver of the car is a black male in his twenties. Assume that the white officer says to the black officer, “let’s go check things out.” The black officer is inclined not to do so. Because the officers had observed many white drivers commit traffic infractions and the white officer had not suggested stopping any of them, the black police officer experiences the white police officer’s “let’s go check things out” as an invitation to engage in racially targeted policing. On the flip side, the black officer also believes that if he refuses to stop the black driver, his white colleague will perceive him to be racially conscious and soft on crime. The officer is experiencing Point Three in the model — the conflict — and has to decide how to negotiate it (Point Four).

The table below suggests that this conflict negotiation likely is a more salient dynamic than we have thus far discussed in that there are likely multiple moments of conflict between norms that a police department might value and stereotypical perceptions about black police officers.¹³³

Table 2: Institutional Norms and Racial Stereotypes

<i>Institutional Culture/Norm</i>	<i>Black Racial Stereotype</i>
Hard on crime	Soft on crime
Colorblind/Racially neutral	Color conscious/ Racially sensitive or biased
Qualified	Unqualified
Status quo oriented	Anti-institutional
Law abiding	Law breaking
Institutional loyalty	Racial group loyalty

¹³³ This table, too, is drawn from previous research on negotiating racial identity in the workplace. See CARBADO & GULATI, *supra* note 131, at 36.

Cooperative institutional citizen	Uncooperative institutional complainer
Police (Blue-) centered identity	Race (Black-) centered identity
Trustworthiness (code of silence)	Untrustworthiness (breaking code of silence)

As the table reveals, each institutional norm of our hypothetical police department is negatively associated with a stereotype about race. For example, the norm of law abidingness is positioned against the stereotype of blacks as lawbreakers. Similarly, the norm of cooperative institutional citizenship is positioned against the racial stereotype of blacks as uncooperative institutional complainers. These oppositional dualities create an incentive for black police officers to align themselves with the norms that the institution values and signal that they do not have the qualities that are in opposition to those values. This could lead black police officers to engage in racially targeted policing, not because they have implicit or explicit biases, but because of a pragmatic desire to survive, fit into, and thrive within a particular institutional setting — police departments.¹³⁴

One could imagine these dynamics affecting other officers of color for similar reasons. Think, for example, about the kind of pressure a Muslim law enforcement official would feel to racially profile other Muslims in the immediate aftermath of 9/11. Think as well about the pressures Latino border patrol agents must experience to racially profile people based on their “apparent Mexican ancestry.”¹³⁵

Elements of the model we have described have been substantiated by psychological research. First, work by Professors Jenessa Shapiro and Steven Neuberg supports the idea that officers of color likely feel a conflict between their own values and those of the white majority, and that they may strategically express bias in order to gain esteem among white peers. The researchers found that black men, more than white men, assumed that facially egalitarian white men were likely to hold unstated racial prejudice.¹³⁶ Black men further expressed the belief that publicly matching white men’s presumed-racist views would be socially rewarded.¹³⁷ Moreover, the researchers found that black men would engage in public displays of bias in contexts where they believed their

¹³⁴ BOLTON & FEAGIN, *supra* note 29, at 193–95 (providing accounts of black officers who stood up to racial injustice being viewed as oversensitive, troublemakers, or radicals); *id.* at 202–04 (observing that black officers are reluctant to report brutality for fear of retaliation and ostracism).

¹³⁵ *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975).

¹³⁶ Jenessa R. Shapiro & Steven L. Neuberg, *When Do the Stigmatized Stigmatize? The Ironic Effects of Being Accountable to (Perceived) Majority Group Prejudice-Expression Norms*, 95 J. PERSONALITY & SOC. PSYCHOL. 877, 881 (2008).

¹³⁷ *Id.* at 882–83.

behavior toward a fellow person of color would be the basis of social evaluation by whites.¹³⁸ In other words, though not specifically demonstrated in a police population, this research suggests that blacks engage in precisely the kind of value comparison we describe in Point Two of the model, and further that the choice to engage in bias nonetheless (Point Four) represents a compromising of their true attitudes.

Even more alarming, recent research suggests that racially biased policing by black officers seeking approval from white peers may in fact increase the expression of bias among white officers in the department. Professor Ines Jurcevic and colleagues have found that whites who observe a black person putting down a fellow black person will in turn derogate that target too.¹³⁹ Using the ruse that participants would be helping on a hiring committee, the researchers showed white participants negative evaluations of a job applicant, ostensibly provided by a member of a hiring committee.¹⁴⁰ They varied the race of the applicant as well as the race of the committee member and found that participants rated a black candidate more negatively after hearing a black committee member derogate him than after hearing a white committee member give an identical evaluation.¹⁴¹ In a follow-up study, they demonstrated the mechanism by which this occurred: hearing a black committee member give a negative evaluation, it turned out, reduced whites' concern about appearing prejudiced, which in turn predicted whites' own (lower) ratings of the candidate.¹⁴²

While none of what we have said conclusively establishes that black police officers engage in racial profiling, at the very least the above cautions against framing the problem solely with respect to white police officers. Black officers and other officers of color likely racially profile as well. They should thus figure more prominently in our discussions of the problem and the interventions we fashion to eliminate it.

* * *

Thus far, we have argued that explicit and implicit biases, a number of different “identity threats” — social dominance threat, stereotype threat, masculinity threat, and racial solidarity threat — and the pressures black police officers likely feel to fit into their departments and the culture of “blue” may cause black police officers to police their own — that is to say, other African Americans — aggressively. Below we add

¹³⁸ *Id.* at 883–88.

¹³⁹ Ines Jurcevic et al., *Using Racial Minorities' Opinions to Justify Prejudice Expression* (June 2014) (paper presented at the tenth biennial convention for the Society for the Psychological Study of Social Issues) (on file with the Harvard Law School Library).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

two additional factors: (1) the structure and organization of police departments, including how those departments allocate work; and (2) the legal backdrop against which police officers act. With respect to this second factor, our particular focus is on the Fourth Amendment. As we will explain, Fourth Amendment law permits police officers to force interactions with civilians with little or no basis. Black police officers, and not just white police officers, likely take advantage of this power.

D. *The Structure and Organization of Police Work*

Many people would be surprised to learn that police departments are sometimes run like businesses. There are bottom lines, quotas, and benchmarks that must be met. One of the most pernicious examples of this dynamic can be found in Ferguson, Missouri. A DOJ investigation into Ferguson's Police Department revealed that city officials placed enormous pressure on the police to generate revenue through their enforcement practices.¹⁴³ In fact, the city made revenue generation the police department's top priority, over and above public safety concerns.¹⁴⁴ Patrol officers were pressured to increase their "productivity" by writing more citations to enforce the municipal code.¹⁴⁵ Supervisors monitored "productivity," provided incentives to increase it, and made it one of the most important criteria for promotions.¹⁴⁶ Moreover, additional officers were hired, and shifts were extended to increase opportunities for municipal code enforcement.¹⁴⁷ These practices occurred primarily in Ferguson's black neighborhoods.¹⁴⁸

Throughout the nation, policing has become a numbers game, with departments focusing their energies on the "objectification and quantification of police work."¹⁴⁹ In police departments across the country, officers are routinely evaluated and rewarded for the number of arrests they make, how many tickets they write,¹⁵⁰ and how many stops and frisks they log.¹⁵¹ This type of proactive policing is typically carried out in indigent, minority neighborhoods.¹⁵²

¹⁴³ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/5AFD-WEJV>].

¹⁴⁴ *Id.* at 9–11.

¹⁴⁵ *Id.* at 2, 10.

¹⁴⁶ *Id.* at 11.

¹⁴⁷ *Id.* at 10, 13–14.

¹⁴⁸ *Id.* at 2, 16, 62–78.

¹⁴⁹ JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 189 (1993); *see also id.* at 189–90.

¹⁵⁰ *Id.* at 189–90.

¹⁵¹ *See, e.g.,* *Floyd v. City of New York*, 959 F. Supp. 2d 540, 601 (S.D.N.Y. 2013).

¹⁵² *See id.* at 602–03.

Recall that in his book, Forman highlights how violent crime rates led many African American leaders to embrace tough-on-crime measures, including proactive policing (pp. 202–14). They were not the only ones to do so; on the contrary, those officials were trading on a much broader law-and-order impulse, the intellectual precursors of which were manifested, among other places, in a 1982 essay by Professors James Wilson and George Kelling titled *Broken Windows: The Police and Neighborhood Safety*.¹⁵³ Kelling and Wilson argued that police could reduce major crimes by focusing on minor crimes that signaled physical and social disorder such as public urination and drinking, loitering, and panhandling.¹⁵⁴ The broken windows theory of policing captured the attention of police chiefs around the country. In cities such as New York, trespassing, marijuana possession, and other low-level offenses went from the least enforced to the most enforced criminal charges, especially in communities of color.¹⁵⁵

Officers quickly learned that enforcing low-level crimes in neighborhoods of color would benefit their careers. For instance, in a program known as “Operation Impact,” the New York Police Department (NYPD) assigned rookie officers to flood “hot spots,” which could sometimes consist of areas as small as a single housing project, in order to conduct stops, frisks, interrogations, and arrests.¹⁵⁶ At the end of these officers’ shifts, they were evaluated on their arrest record and the number of citations they had issued.¹⁵⁷ These rookies learned early on to engage in these policing practices as a means of moving up in the department.¹⁵⁸ These pressures undoubtedly influenced rookies of all races.

Indeed, in August 2015, twelve black and Latino police officers filed a class action lawsuit against New York City and the NYPD on behalf of minority police officers, alleging that the department forced them to carry out precisely the kind of arrest quotas we have described.¹⁵⁹ They

¹⁵³ James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

¹⁵⁴ *Id.* at 29–30.

¹⁵⁵ M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding “Zero-Tolerance” Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 376–77 (2011). Scholars suggest that broken windows “policing is not about disorderly places, nor about improving the quality of life, but about policing poor people in poor places.” Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 457 (2000).

¹⁵⁶ Fabricant, *supra* note 155, at 384.

¹⁵⁷ *Id.* at 392–93.

¹⁵⁸ *See id.* at 395.

¹⁵⁹ Selim Algar & Josh Saul, *NYPD Set Arrest Quotas for Minority Cops in Their Own Communities: Suit*, N.Y. POST (Sept. 1, 2015, 1:59 PM), <https://nypost.com/2015/09/01/cop-suing-over-minority-arrest-quotas-says-he-faced-retaliation/> [https://perma.cc/XFB3-8AES]; Knafo, *supra* note 28.

claimed that an illegal quota system forced them to issue summonses “regardless of whether any crime or violation” had occurred and to focus disproportionately on areas in which minorities resided.¹⁶⁰ The lawsuit also alleged that the predetermined “performance goals” were used to deny officers vacation, overtime, and career advancement.¹⁶¹ Edwin Raymond, the lead plaintiff in the lawsuit, claimed that the NYPD essentially required officers to meet fixed numerical goals for arrests and court summons each month, a policy fundamentally discriminatory against minorities.¹⁶² The lawsuit asserted that commanders would use euphemisms such as “get more activity” or “be more proactive” to try to sidestep the quota ban that had been put in place.¹⁶³ The amended complaint gave the example that “a police officer from a precinct [sic] located in a predominantly white residential area will receive a positive evaluation while a police officer from a precinct [sic] located in a predominantly minority area will receive a negative evaluation for the same exact number of enforcement actions.”¹⁶⁴

Although the city and NYPD explicitly denied such a quota, in 2017 the city agreed to send out department-wide notifications to reiterate its policy that quotas were banned and that officers facing retaliation for failing to comply with quotas should notify the department’s Internal Affairs Bureau.¹⁶⁵ NYPD Commissioner Bill Bratton also wrote in a 2016 *New York Daily News* editorial that if the NYPD’s motivation to record enforcement encounters, issue summons, or effect arrests had ever been “driven by numbers and quotas, today’s NYPD is not.”¹⁶⁶ The lawsuit, *Raymond v. City of New York*, is still being litigated.

¹⁶⁰ Benjamin Weiser, *New York City to Pay up to \$75 Million over Dismissed Summonses*, N.Y. TIMES (Jan. 23, 2017), <https://nyti.ms/2jR44V5> [<https://perma.cc/GT25-RP2L>]; see also *Raymond v. City of New York*, No. 15-CV-6885, 2017 WL 892350 (S.D.N.Y. Mar. 6, 2017).

¹⁶¹ John Surico, *A Former Cop Describes Racist Police Quotas in New York*, VICE (Apr. 4, 2016, 12:00 AM), https://www.vice.com/en_us/article/yvix8v7/a-former-cop-describes-racist-police-quotas-in-new-york [<https://perma.cc/RS2R-98GV>].

¹⁶² Knafo, *supra* note 28.

¹⁶³ *Id.*

¹⁶⁴ Amended Class Action Complaint and Jury Demand at 12, *Raymond*, No. 15-CV-6885 (S.D.N.Y. Dec. 10, 2015), ECF No. 31.

¹⁶⁵ Weiser, *supra* note 160.

¹⁶⁶ Bill Bratton, *The NYPD: Winning the War on Crime*, N.Y. DAILY NEWS (Jan. 20, 2016, 4:00 AM), <http://www.nydailynews.com/new-york/nypd-winning-war-crime-article-1.2502562> [<https://perma.cc/ZRP3-U5ZZ>]; see also Conor Friedersdorf, *The NYPD Officers Who See Racial Bias in the NYPD*, THE ATLANTIC (Jan. 7, 2015), <https://www.theatlantic.com/national/archive/2015/01/the-nypd-officers-who-see-racial-bias-in-the-nypd/384106/> [<https://perma.cc/88FG-GZNS>]; Rocco Parascandola & Thomas Tracy, *NYPD Demands All Uniformed Officers Undergo “No Quota” Training for Arrests, Tickets*, DAILY NEWS (Feb. 15, 2018, 8:24 PM), <http://www.nydailynews.com/new-york/nypd-demands-uniformed-officers-undergo-no-quota-training-article-1.3823160> [<https://perma.cc/68AG-2MP7>].

Supervisors also face enormous pressure to promote these proactive policing practices in minority communities.¹⁶⁷ One primary reason is the managerial program known as CompStat. Short for “compare statistics,” CompStat identifies areas of heightened criminal activity for targeted enforcement of quality-of-life offenses.¹⁶⁸ In monthly CompStat, NYPD precinct commanders would be grilled and bullied on whether they were able to decrease crime in their jurisdiction.¹⁶⁹ These meetings are infamous for “excoriat[ing precinct commanders] over the crime numbers in their districts.”¹⁷⁰ Because CompStat gathered data on each unit and each officer in the city as well as tracked the number of stops and frisks, vertical patrols, arrests, and so on, it created enormous pressure on commanders to worry about the activity of every single officer within their department.¹⁷¹ Thus, managers and supervisors put pressure on their officers to increase their productivity because managers’ promotions were also reliant on how well their precinct performed.¹⁷² Again, these pressures existed regardless of the race of the individual manager.

In sum, though the names of these policing strategies have changed, one common thread remains the same — they create incentives for officers who seek to rise within the ranks of their departments to over-police African American communities. Given our earlier point about the pressures black officers likely feel to fit into their departments, these officers may experience stronger incentives than white officers to proactively police. Whether we are right in this respect is less important than our broader takeaway — namely, that the structure and organization of police work shapes the policing of all officers, not just those who are white.

The same is true of Fourth Amendment law. Its impacts, too, transcend the race of individual officers. Like the organization and structure of police work, Fourth Amendment law creates conditions of possibilities for police officers across races to aggressively police African American communities.

¹⁶⁷ For an example of contemporary policing practices in one major city, Boston, including CompStat, see Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 *FORDHAM URB. L.J.* 539, 543–44, 611–14 (2016).

¹⁶⁸ Fabricant, *supra* note 155, at 375 (citing Adam Benforado, *The Geography of Criminal Law*, 31 *CARDOZO L. REV.* 823, 860 n.144 (2010)); see also GRAHAM A. RAYMAN, *THE NYPD TAPES: A SHOCKING STORY OF COPS, COVER-UPS, AND COURAGE* 19 (2013).

¹⁶⁹ RAYMAN, *supra* note 168, at 19–20.

¹⁷⁰ *Id.* at 20; see also ELI B. SILVERMAN, *NYPD BATTLES CRIME* 97–124 (1999).

¹⁷¹ RAYMAN, *supra* note 168, at 23.

¹⁷² JOHN A. ETERNO & ELI B. SILVERMAN, *THE CRIME NUMBERS GAME* 109–21 (2012).

E. The Legal Backdrop for Police Conduct

The Fourth Amendment prohibits the government from engaging in “unreasonable searches and seizures.”¹⁷³ Because of the narrow way in which the Supreme Court has interpreted this prohibition, however, Fourth Amendment law operates more as a source of police empowerment than as a meaningful constitutional constraint.¹⁷⁴ More precisely for our purposes, consistent with Fourth Amendment law, police officers can make any of us — and certainly African Americans — feel *insecure* in our persons, houses, papers, and effects. Consider, for example, the list one of us has compiled indicating the kinds of interactions that the Supreme Court has said are not seizures:

- Following a person
- Approaching a person
- Questioning a person along any of the following lines:
 - What’s your name?
 - What are you doing here?
 - Where do you live?
 - Where are you going?
 - What’s in your bag?
 - Do you have any drugs?
 - Are you an “illegal”?
 - Do you have ties to terrorism?¹⁷⁵

The fact that an officer follows a person onto a bus, or into a home, in order to ask some or all of the preceding questions would not change the analysis. The Court would still conclude that those engagements do not rise to the level of a seizure.¹⁷⁶

The Court’s jurisprudence on what constitutes a seizure is important to foreground. Police officers need no evidence of wrongdoing — none whatsoever — to engage in conduct that the Court concludes is something other than a seizure.¹⁷⁷ In this respect, the greater the number of instances in which the Court concludes that police conduct is not a seizure, the greater the forms of contact police officers, including African American officers, can make without any justification.

¹⁷³ U.S. CONST. amend. IV.

¹⁷⁴ Of course, the Fourth Amendment is not the only legal constraint on police conduct. We focus on the Fourth Amendment to highlight dimensions of stop-and-frisk jurisprudence to which scholars have paid insufficient attention.

¹⁷⁵ See Carbado, *supra* note 9, at 132–49.

¹⁷⁶ See *id.* at 135–37 (bus); *id.* at 139–44 (home, via “voluntary interviews”).

¹⁷⁷ See *Terry v. Ohio*, 392 U.S. 1, 11 & n.5 (1968) (distinguishing between a limited stop and a seizure, and noting that “the right to stop and inquire is to be justified for a cause less conclusive than that which would sustain an arrest,” *id.* at 11 n.5 (quoting *People v. Rivera*, 201 N.E.2d 32, 35 (N.Y. 1964))). This logic applies to searches as well: police officers need no evidence of wrongdoing to engage in conduct that is not a search.

If the problem with Fourth Amendment law were only that it permits police officers to perform the kinds of interactions we have described without any evidence of wrongdoing, things would be bad enough. But the reality is worse in that the Court's conclusions about when searches and seizures are reasonable make it relatively easy for officers to justify them. Below we elaborate on this point. We pay particular attention to stops and frisks and the constitutional doctrines that underwrite both practices.

* * *

Fifty years ago, the Court in *Terry v. Ohio*¹⁷⁸ held that officers could detain individuals and conduct a limited frisk for weapons based on reasonable suspicion.¹⁷⁹ While Chief Justice Warren hoped that the standard would adequately balance individuals' desires to be free from invasion against police officers' desire to deal effectively with perceived threats,¹⁸⁰ the standard has been more of a sword for police officers than a shield for civilians.¹⁸¹ Five reasons explain why.¹⁸²

First, reasonable suspicion is a low evidentiary bar that police officers can easily satisfy. Thus, police officers end up having tremendous discretion with respect to deciding whom to subject to stops and frisks. Second, implicit and explicit biases likely shape how and when police officers of all races exercise that discretion.¹⁸³ Third, assuming that an officer stops an individual, those very same biases will shape whether the officer interprets the person's behavior as evidence that the individual could be dangerous or carrying a weapon; this might lead the officer to conduct a search that not only invades the individual's privacy but also humiliates him publicly.¹⁸⁴ Fourth, recall our earlier points concerning identity threats. Once a police encounter is staged, the sense of threat that both police officers and black people experience can feed off each other in ways that increase the likelihood that a particular officer

¹⁷⁸ 392 U.S. 1.

¹⁷⁹ *Id.* at 30–31; see also Richardson, *supra* note 71, at 82.

¹⁸⁰ The decision authorizes officers to conduct stops and frisks as long as they can “point to specific and articulable facts,” *Terry*, 392 U.S. at 21, that “lead[them] reasonably to conclude . . . that criminal activity may be afoot,” *id.* at 30, and that the individual with whom they are interacting is “armed and dangerous,” *id.* at 27.

¹⁸¹ Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1537–42 (2017).

¹⁸² This analysis draws from work that each of us has done separately, and in particular relies on insights from a 2017 article by Dean Richardson. For a fuller discussion of these systemic factors and how they influence police officers more broadly, see generally Richardson, *supra* note 71.

¹⁸³ For a more complete articulation of some of the interaction between implicit biases and reasonable suspicion, see Richardson, *supra* note 4, at 2059–72; and Richardson, *supra* note 71, at 75–81.

¹⁸⁴ Richardson, *supra* note 4, at 2080.

will conclude that a particular African American poses a risk of harm to the officer. Finally, consistent with current Supreme Court doctrine, police officers across race can easily manufacture the very reasonable suspicion that should preexist their decision to stop and frisk a person.

As a reminder, our overarching aim in this section is to suggest that the impact of the *Terry* regime on African Americans is more a function of the power that body of law allocates to police officers than the racial identity of police officers. We elaborate below.

1. *Implicit Bias and Reasonable Suspicion.* — There are a number of ways in which implicit and explicit biases and reasonable suspicion interact to increase the likelihood that police officers will stop and frisk African Americans. First, as a result of racial biases that suppose African Americans are both criminally suspect and dangerous, officers' attention will be drawn more quickly to blacks than to whites.¹⁸⁵ Second, "the reasonable suspicion test actually permits, rather than prevents, actions based upon racial hunches."¹⁸⁶ It does so by providing officers with the interpretive space to evaluate the ambiguous behaviors of black civilians as aggressive, violent, or suspicious. (We will say more about this dimension of the doctrine later.)

Third, while the reasonable suspicion standard requires officers to justify their suspicions by pointing to the "specific articulable facts" that formed the basis for their suspicion,¹⁸⁷ courts, including the Supreme Court, have watered down that requirement to mean very little indeed. Because an officer can rely on an individual's appearance and demeanor, as well as the neighborhood in which he is located, those factors can easily function as the rhetorical means through which implicit or explicit biases are both expressed and legitimized. The end result is that reasonable suspicion can provide constitutional cover for both conscious and unconscious biases.

2. *Reasonable Suspicion and Identity Threats.* — The points we made earlier about identity threats also help to reveal the racially fraught dimensions of the *Terry* doctrine. Consider, for example, stereotype threat. During any given encounter, stereotype threat may cause both officers and individuals to exhibit behaviors that the other party will interpret as signs of danger, suspicion, or aggression.¹⁸⁸ To appreciate how this dynamic might arise, let's focus first on the civilian's sense of threat.

¹⁸⁵ *Id.* at 2062 (noting that implicit bias can cause officers to notice activity in black individuals that "go[es] unnoticed" in white individuals).

¹⁸⁶ *Id.* at 2063.

¹⁸⁷ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

¹⁸⁸ For a comprehensive discussion of how stereotype threat might influence police-citizen interactions, see Godsil & Richardson, *supra* note 5, at 2247–53.

In the context of a police interaction, an African American civilian might worry that he will be the victim of police racism, leading him to anticipate harsh treatment or even excessive force being used against him.¹⁸⁹ That person might also be concerned that the officer will perceive him as a criminal because of the deeply entrenched black-crime stereotype discussed earlier. Under these conditions, the black individual may go into the police interaction with a heightened sense of anxiety.¹⁹⁰ That sense of racial anxiety has cognitive and physiological effects.¹⁹¹ “It can cause individuals involved in interracial interactions to feel self-conscious, and to become hyper-vigilant” during these encounters.¹⁹² “Additionally, the stress of racial anxiety is associated with a variety of physiological responses including sweating, increased heart rate, facial twitches, fidgeting, and avoiding eye contact.”¹⁹³

Let’s turn now to the police officer’s sense of threat. To begin with, the officer might interpret the black person’s behavioral manifestations of anxiety — fidgeting, eye-contact avoidance, and sweating — as signs, reasonable-suspicion signs, that the individual poses a threat.¹⁹⁴ This is not at all farfetched. After all, the very behaviors we have just described

¹⁸⁹ Richardson, *supra* note 71, at 80; see TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 139–65 (2002).

¹⁹⁰ See Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 590 (1976) (finding that humans “tend to perceive what [they] . . . expect to perceive”); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098–99 (1979); Richardson, *supra* note 71, at 80.

¹⁹¹ See Jennifer A. Richeson & J. Nicole Shelton, *Stereotype Threat in Interracial Interactions*, in STEREOTYPE THREAT 231, 236–37 (Michael Inzlicht & Toni Schmader eds., 2012).

¹⁹² Richardson, *supra* note 71, at 78 (first citing Derek R. Avery et al., *It Does Not Have to Be Uncomfortable: The Role of Behavioral Scripts in Black-White Interracial Interactions*, 94 J. APPLIED PSYCHOL. 1382, 1383 (2009); and then citing Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316, 318–19 (2007)); see also Mary C. Murphy & Valerie Jones Taylor, *The Role of Situational Cues in Signaling and Maintaining Stereotype Threat*, in STEREOTYPE THREAT, *supra* note 191, at 17, 18–19; Richeson & Shelton, *supra* note 191, at 232–34, 236–37.

¹⁹³ Richardson, *supra* note 71, at 79 (first citing Jennifer L. Eberhardt, *Imaging Race*, 60 AM. PSYCHOLOGIST 181, 182 (2005); then citing J. Nicole Shelton, *Interpersonal Concerns in Social Encounters Between Majority and Minority Group Members*, 6 GROUP PROCESSES & INTERGROUP REL. 171, 178–79 (2003); then citing Sophie Trawalter et al., *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 PERSONALITY & SOC. PSYCHOL. REV. 243, 244 (2009); and then citing *id.* at 252, 256).

¹⁹⁴ Philip Atiba Goff & Rachel Godsil, *The Moral Ecology of Policing: A Mind Science Approach to Race and Policing in the United States*, in THE ROUTLEDGE HANDBOOK OF CRIMINAL JUSTICE ETHICS 348, 358 (Jonathan Jacobs & Jonathan Jackson eds., 2017) (citing Cynthia J. Najdowski, *Stereotype Threat in Police Encounters: Why African Americans Are at Risk of Being Targeted as Suspects* (2012) (unpublished Ph.D. dissertation, University of Texas at El Paso) (on file with the Harvard Law School Library)).

are among the ones police officers are trained to interpret as suspicious.¹⁹⁵ That interpretation could lead the officer to effect “command presence,” a posture police officers are encouraged to assume in the face of a possible threat.¹⁹⁶ More particularly, the officer might attempt to take control of the situation by exercising precisely the kind of dominance we previously discussed.¹⁹⁷

But the officer’s show of dominance and control can compound the individual’s sense of anxiety and increase the likelihood that the individual will challenge the officer’s authority.¹⁹⁸ Any such challenge on the part of the individual could end up confirming the officer’s initial stereotypical view of the person as non-law abiding and dangerous. Through all of this, the officer may have no sense of the role he played, nor the role of background racial biases, including stereotypes, in producing this recursive dynamic.

The short of what we are saying is that (1) the ease with which police officers can satisfy reasonable suspicion, and (2) the potential for identity threats on the part of both the civilian and the officer create feedback loops and signals about racism, criminality, dangerousness, and authority. These loops and signals increase not only the likelihood of stop-and-frisk contact between African Americans and the police, but also the possibility that those moments of contact will escalate into violence. Admittedly, there are racial particularities to the identity-threat dynamics we have described (recall, for example, that black officers, but not white officers, will experience racial solidarity threat). Put those to one side. Our broader point is that the recursive feedback loop between African Americans and police officers transcends the racial identity of the officers.¹⁹⁹

¹⁹⁵ See Lucy Akehurst et al., *Lay Persons’ and Police Officers’ Beliefs Regarding Deceptive Behaviour*, 10 APPLIED COGNITIVE PSYCHOL. 461, 467–68 (1996); Richard R. Johnson & Mark A. Morgan, *Suspicion Formation Among Police Officers: An International Literature Review*, 26 CRIM. JUST. STUD. 99, 108 (2013); Richardson, *supra* note 71, at 80; see also Nick Jacobellis, *How to Spot a Concealed Firearm*, POLICE MAG. (Nov. 1, 2007), <http://www.policemag.com/channel/patrol/articles/2007/11/how-to-spot-a-concealed-firearm.aspx> [<https://perma.cc/F6AA-RY3X>].

¹⁹⁶ L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2969 (2015) (quoting Cooper, *supra* note 71, at 674).

¹⁹⁷ Cooper, *supra* note 71, at 674; see also Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 301–03 (2008); Richardson, *supra* note 71, at 80; Richardson, *supra* note 196, at 2969.

¹⁹⁸ Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men’s Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 269–70 (2010).

¹⁹⁹ One of us has observed elsewhere:

Research confirms that racial anxiety can increase the likelihood that force will be used during an interaction. In one study involving the police, researchers found that officers experience racial anxiety, regardless of their race. They also discovered that the experience

3. *Promoting Negative Interactions and Constructing Suspicion.* — Rather than constraining police behaviors, post-*Terry* doctrine allows officers to construct the very reasonable suspicion they require to justify seizing a person in the first place.²⁰⁰ The ostensible right of every citizen to avoid police contact so long as police do not have reasonable suspicion or probable cause²⁰¹ rings hollow for people of color living in communities made up predominantly of racial minorities. To appreciate why, it's helpful to know that the Supreme Court has given police officers license to view an individual's decision not to engage with an officer as *suspicious*.²⁰² The relevant case here is *Michigan v. Chesternut*.²⁰³

In *Chesternut*, the Supreme Court found nothing problematic with officers' pursuing people even in the absence of reasonable suspicion or probable cause.²⁰⁴ In that case, Chesternut ran away upon observing four officers in a patrol car; the officers pursued him (for an unspecified amount of time) until they established probable cause to arrest him for drug possession.²⁰⁵ Chesternut argued that the police had effectively seized him during the chase, doing so without either reasonable suspicion or probable cause.²⁰⁶ The Court disagreed,²⁰⁷ opining:

[T]he police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement. . . . While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, . . . [it] was not "so intimidating" that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business.²⁰⁸

Consistent with this decision, officers seem free to pursue individuals "based solely on a mere hunch of criminality."²⁰⁹ Given all that we have

of racial anxiety predicted uses of force against black men. The more officers were concerned with appearing racist, the more likely they were to have used greater force against black individuals, relative to individuals of other racial groups, in the previous two years.

Richardson, *supra* note 71, at 81 (citing GOFF ET AL., *supra* note 87, at 3–5, 11, 15–16).

²⁰⁰ For a fuller discussion, see Richardson, *supra* note 71, at 84–88.

²⁰¹ *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (plurality opinion) ("[The] 'right to remove from one place to another according to inclination' [is] 'an attribute of personal liberty' protected by the Constitution." (quoting *Williams v. Fears*, 179 U.S. 270, 274 (1900))).

²⁰² See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("Headlong flight — wherever it occurs — is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."). But see *Florida v. Royer*, 460 U.S. 491, 498 (1983) ("[R]efusal to listen or answer does not, without more, furnish . . . grounds [for reasonable suspicion]."). *Royer*'s asserted protection, however, is rendered all but meaningless in light of police officers' wide latitude to identify other actions as purportedly "suspicious."

²⁰³ 486 U.S. 567 (1988).

²⁰⁴ *Id.* at 575–76.

²⁰⁵ *Id.* at 569.

²⁰⁶ *Id.* at 570.

²⁰⁷ *Id.* at 572–73.

²⁰⁸ *Id.* at 575–76 (citations omitted).

²⁰⁹ Richardson, *supra* note 71, at 86.

said about explicit and implicit biases, police officers will be more likely to pursue black civilians, rather than white civilians, when acting in the absence of reasonable suspicion or probable cause.²¹⁰

The problem is worse given the factors on which police officers may base their reasonable suspicion. In *Illinois v. Wardlow*,²¹¹ officers were patrolling a so-called “high crime area” in search of criminal activity.²¹² When officers noticed Wardlow running, they pursued him.²¹³ While the Court did not quite rule that fleeing in a high-crime area gives rise to reasonable suspicion, it came quite close, expressly identifying “the relevant characteristics of a location” and “evasive behavior” as part of the reasonable suspicion determination.²¹⁴

Nothing in the above analysis changes if, prior to the civilian’s flight, the police did not have sufficient cause or suspicion to seize the civilian. Thus, in “high-crime neighborhoods,” officers can create the reasonable suspicion necessary to act on their racial hunches simply by goading people into fleeing. Doing so is easier than you might think. Exhibiting aggressive behavior, without more, may cause people to flee. Ordering people to stop might cause people to flee. And using lights and sirens to follow people walking down the street might cause people to flee. Obviously, this is not an exhaustive list. The point is that, without much difficulty, officers can increase the likelihood that any particular person will flee. The more aggressive their behaviors, the greater the likelihood that people will flee. In and of itself, that’s one of the troubling dimensions of *Wardlow*.

The other is that, if a person runs away, then officers have effectively created reasonable suspicion to conduct a forcible seizure. Recall that at the outset of the encounter, the officer did not have reasonable suspicion and therefore could not have legally seized the person. The officer created that reasonable suspicion by provoking the person into running. In sum, “in high crime neighborhoods, officers can easily transform their inchoate racial hunches into reasonable suspicion to conduct a seizure simply by engaging in aggressive shows of force that scare people into fleeing.”²¹⁵

For reasons alluded to in the preceding sections, officers’ ability to construct reasonable suspicion in this way is easier with black individuals than white individuals. Consider, for example, the fact that the phrase “high-crime area” is primarily used to describe urban, majority-

²¹⁰ *See id.*

²¹¹ 528 U.S. 119 (2000).

²¹² *Id.* at 124.

²¹³ *Id.* at 121–22.

²¹⁴ *Id.* at 123–24.

²¹⁵ Richardson, *supra* note 71, at 86.

minority neighborhoods.²¹⁶ Which is to say, the designation is not typically based on objective measures but on the attribution of criminality to black and brown communities.²¹⁷ Indeed, empirical evidence demonstrates that people view majority-black neighborhoods as more disordered than majority-white neighborhoods, whether or not those neighborhoods are otherwise similarly situated.²¹⁸

The history and contemporary realities of racialized law enforcement offer another reason why police officers may have an easier time developing reasonable suspicion for African Americans than white Americans — because black Americans, from a young age, learn not to trust the police.²¹⁹ Black people’s longstanding contestatory relationship with the police creates an incentive for them to avoid police contact altogether. Fleeing, of course, is one way for them to do so. But against the backdrop of stereotypes of black criminality, fleeing reinscribes the perception of black non-law abidingness. As Justice Scalia put it, quoting Proverbs, “[t]he wicked flee when no man pursueth.”²²⁰

Perhaps the solution, then, is for African Americans to walk rather than run away? Presumably, there is nothing “wicked” about that. And indeed, police officers may not, at least as a formal matter, draw an adverse inference from a person’s decision to walk (rather than run) away. That, it’s fair to say, is the good news.

The bad news is that if the individual chooses to walk away, the officer may follow him, even without evidence that the person has done

²¹⁶ Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135, 136 (2002); see also Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 44) (on file with the Harvard Law School Library) (concluding that the NYPD’s use of high-crime areas is “virtually uncorrelated with actual crime rates” and that “[t]he suspect’s race, the racial and socioeconomic composition of the area, and the identity of the officer are all stronger predictors of whether an officer deems an area high-crime than the actual crime rate itself”).

²¹⁷ See Grunwald & Fagan, *supra* note 216, at 44.

²¹⁸ Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCHOL. Q. 319, 330–33 (2004) (“[T]he contextual effect of racial composition is largely independent of the observer’s ethnicity. Specifically, blacks were *not* significantly more or less likely than whites to view predominately black neighborhoods as high in disorder” *Id.* at 332.); see also Richardson, *supra* note 71, at 86.

²¹⁹ In fact, negative “[a]ttitudes toward the police begin crystallizing during adolescence when youths have greater opportunities for direct and indirect contact with officers” Jamie L. Flexon et al., *Exploring the Dimensions of Trust in the Police Among Chicago Juveniles*, 37 J. CRIM. JUST. 180, 181 (2009); see also Craig B. Futterman et al., *Youth/Police Encounters on Chicago’s South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125, 125–26. And this distrust can be born not only of personal experience, but also through secondhand trauma. For instance, one study found that when high school students simply “observed other youths [being] stopped and treated with disrespect,” they were less likely to trust police. Flexon et al., *supra*, at 185–86. The bottom line is that while fleeing from police on the part of African Americans is completely consistent with innocence, the *Terry* doctrine permits police officers to draw an adverse inference from the practice.

²²⁰ *California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991) (quoting *Proverbs* 28:1 (King James)).

something wrong. Remember: following a person is not considered a seizure. In other words, when a police officer follows you, you are technically free to ignore the officer and go about your business. You are, in the parlance of Fourth Amendment doctrine, “free to leave.”²²¹ At the same time, the officer is free to follow and even question you! That is the meaning of Fourth Amendment freedom.

This logic of ostensible freedom also, as we have discussed, applies when the officer’s decision to follow you takes the form of a chase. Here, too, you are technically free to leave — in this instance by running away. Recall, though, that if you are fleeing in a high-crime area, the officer ends up having what he did not have at the outset of the interaction: reasonable suspicion. Armed with reasonable suspicion, the officer is now *legally* empowered to seize and possibly even frisk you. When one adds the fact that officers are more likely to use physical force against black individuals after a chase,²²² it becomes clear that the *Terry* regime exposes African Americans not only to being stopped and frisked by the police, but also to being shot and killed by the police.²²³

As we have already said and want to repeat here, black police officers are potentially — even likely — implicated in the doctrinal state of affairs we have described. Our analysis of the racial boundaries of *Terry v. Ohio* and its progeny is not first and foremost about white police officers. That is to say, our aim has been to highlight police power, not the racial identity of police officers. When one incorporates into our discussion of *Terry* our earlier points about implicit biases, identity threats, and the organization and structure of policing, the vulnerability of African Americans to police contact and violence — including at the hands of black police officers — is put into even sharper relief.

CONCLUSION

This brings us back to a central theme in Forman’s book — namely, that diverse governance is not necessarily enough to disrupt patterns of inequality. We’ve advanced that claim vis-à-vis the racial dimensions of policing. We have done so because it is critically important to intervene in the debate about the racial diversity (or lack thereof) of

²²¹ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *see also Florida v. Bostick*, 501 U.S. 429 (1991).

²²² *See* Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014, 11:00 AM), <https://www.motherjones.com/politics/2014/12/science-of-racism-prejudice/> [<https://perma.cc/84RW-9F43>].

²²³ *See* Carbado, *supra* note 181; *see also Illinois v. Wardlow*, 528 U.S. 119, 127 n.1 (2000) (Stevens, J., concurring in part and dissenting in part) (“The resentment engendered by [this] intrusion is aggravated, not mitigated, if the officer’s entire justification for the stop is the belief that the individual is simply trying to avoid contact with the police or move from one place to another — as he or she has a right to do (and do rapidly).”).

police officers given that one of the solutions people continue to proffer for police officers' racial profiling of and violence against African Americans is the diversification of police departments.²²⁴

At the same time, we should be perfectly clear to note that we are not arguing against efforts to diversify the police. Our point is that it would be a mistake to stop there. As we have explained, there are broader factors, factors that transcend the racial identity of police officers, that explain the exposure of African Americans to police contact and violence. We will not in this conclusion even gesture in the direction of articulating our own solution to a problem whose history is rooted in perhaps the most pernicious system of racial inequality — slavery.²²⁵ Instead, we will conclude by noting that just as the diversity rationale has not ended racial inequality in the context of education,²²⁶ the redeployment of the rationale in the context of policing will not fundamentally change how African Americans experience the police. Which is to

²²⁴ Typically, people do not advance diversity as the sole solution. We should be clear about that. At the same time, the diversity rationale quite often figures as one of the solutions. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 16–18 (2015); U.S. DEP'T OF JUSTICE & EQUAL EMP'T OPPORTUNITY COMM'N, ADVANCING DIVERSITY IN LAW ENFORCEMENT (2016); Mary D. Fan, *Violence and Police Diversity: A Call for Research*, 2015 BYU L. REV. 875, 876–77; Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 794 (2016); Sklansky, *supra* note 18, at 1239–41; Yamiche Alcindor & Nick Penzenstadler, *Police Redouble Efforts to Recruit Diverse Officers*, USA TODAY (Jan. 21, 2015, 9:07 PM), <http://www.usatoday.com/story/news/2015/01/21/police-redoubling-efforts-to-recruit-diverse-officers/21574081/> [<https://perma.cc/C7GN-ZZZ8>]; Ashkenas & Park, *supra* note 19; Shaila Dewan, *Mostly White Forces in Mostly Black Towns: Police Struggle for Racial Diversity*, N.Y. TIMES (Sept. 9, 2014), <https://nyti.ms/2ktsYqL> [<https://perma.cc/Q2LR-4JKY>].

²²⁵ For discussions of the extent to which modern policing is rooted in slave patrols, see generally SALLY E. HADDEN, SLAVE PATROLS (2001); MITCHEL P. ROTH, CRIME AND PUNISHMENT: A HISTORY OF THE CRIMINAL JUSTICE SYSTEM (2005); NEIL WEBSDALE, POLICING THE POOR: FROM SLAVE PLANTATION TO PUBLIC HOUSING (2001); Marlese Durr, *What Is the Difference Between Slave Patrols and Modern Day Policing? Institutional Violence in a Community of Color*, 41 CRITICAL SOC. 873, 874–75 (2015); Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51 (1988); Margaret Vandiver et al., *The Tennessee Slave Code: A Legal Antecedent to Inequities in Modern Capital Cases*, 4 J. ETHNICITY CRIM. JUST. 67 (2003); and Stephen L. Carter, *Policing and Oppression Have a Long History*, BLOOMBERG VIEW (Oct. 29, 2015, 6:19 PM), <https://www.bloomberg.com/view/articles/2015-10-29/policing-and-oppression-have-a-long-history> [<https://perma.cc/4CC8-BX25>].

²²⁶ The diversity rationale emerged from Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 315–20 (1978) (opinion of Powell, J.). For decades, scholars have criticized the rationale for insufficiently attending to the structural problems of education inequality. See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 102–22, 147–61 (1987); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 189–214 (2005); John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345 (1995); see also Derrick A. Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980); Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995).

For an effort to infuse diversity with more progressive possibilities, see Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130 (2013).

say, whether or not police officers are policing their own, if the broader structural forces we have discussed remain the same, the racial dimensions of policing with which the nation continues to grapple are likely to persist.