

RACE AND GENDER AND POLICING

Stewart Chang,* Frank Rudy Cooper,** & Addie C.
Rolnick***

TABLE OF CONTENTS

INTRODUCTION	885
I. UNREST AND THE QUESTION OF LOOTING	891
II. THE BLACK PERSPECTIVE ON LOOTING	898
III. POLICING, PROPERTY, AND WHITE PATRIARCHY	904
A. <i>Christian Cooper: White Caller Crime</i>	905
B. <i>Jannie Ligon: The Sexual Non-Privilege of Black Women</i>	910
C. <i>Sandra Bland and Elijah Taylor: Suspicion, Policing, and the Presumption of Black Dangerousness</i>	914
D. <i>Breonna Taylor and Charleena Lyles: Black Women as Collateral Damage of Expanded Police Powers</i>	918
E. <i>George Floyd: Presumptions of Black Dangerousness and the Inherent Violence in Policing Beyond Just One Bad Apple</i>	926
F. <i>Ahmaud Arbery: Community Policing and the White Privilege of Self-Help</i>	930
G. <i>James Scurlock: White Property, Self-Help Policing, and the Question of Looting</i>	940
CONCLUSION	946

INTRODUCTION

The title for this symposium, Race AND Gender AND Policing, is not a typographical or grammatical error. It conceives of race and gender and policing as co-constituted concepts wherein each element mutually constructs the meaning of each of the others in a never-ending circuit. Though some have traditionally thought of each category as separate and distinct, this symposium

* Professor of Law, William S. Boyd School of Law & Co-facilitator, Program on Race, Gender & Policing.

** William S. Boyd Professor of Law & Co-facilitator, Program on Race, Gender & Policing.

*** San Manuel Band of Mission Indians Professor of Law, William S. Boyd School of Law & Co-facilitator, Program on Race, Gender & Policing. The authors thank Victoria Tokar, Gillian Block, and Jazmine Thompson for research assistance; Suzette Malveaux and Catherine Smith for their helpful comments; and Alexis Taitel, John McCormick-Huhn, and the staff of the NEVADA LAW JOURNAL for editorial excellence.

challenges that assumption and argues the three must be considered as an inexorably intersecting whole. This Introduction to the Nevada Law Journal's symposium on race and gender and policing (hereinafter "Introduction") uses that understanding of race, gender, and policing to show how seemingly distinct forms of police violence feed into each other to reinforce a race-gender hierarchy.

The point of perceiving race, gender, and policing as one unified idea is to counter the law's tendency to see identities such as race, gender, sex orientation, and so on as creating different paths of analysis rather than as intersecting. Studying just one path of identity, be it just race or just gender, offers only a limited perspective that blinds us to the existence of other paths. Indeed, the supposedly distinct paths intersect and often tread the same terrain. This is the fundamental insight of Kimberlé Crenshaw's theory of intersectionality.¹ For example, Crenshaw critiques Title VII—the section of the Civil Rights Act of 1964 that prohibits employment discrimination on the basis of race, color, religion, sex, and national origin—because black² women often fall between the cracks when we treat protected categories one dimensionally.³ An employer who hires no black women can be deemed to not have engaged in discrimination if the employer has hired white women, in which case the gender discrimination claim is invalidated, and if they have hired black men, which invalidates the race discrimination claim.⁴ Discrimination is allowed to persist because the law does not recognize being *both black and* a woman as a protected class.⁵ Hence, the experience of black women cannot be captured by looking generally at what happens to blacks in this society, nor is it captured solely by considering a lowest common denominator of women's experiences. Both law and social movements often fail to honor individuals' full senses of self when their subordination is based on the intersection of two or more protected categories.⁶

This Introduction adds to the scholarly discussion of identities by showing how they intersect with the institution of policing. Just as thinking of identities

¹ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–44 (1991).

² Even though race is socially constructed, we will not capitalize "black" (unless it appears in quoted material) because race has profound material effects, so it is "real" enough to not be capitalized.

³ 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.

⁴ See, e.g., *Degraffenreid v. Gen. Motors Assembly Div.*, 413 F. Supp. 142, 144–45 (E.D. Mo. 1976).

⁵ *But see Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994).

⁶ See Crenshaw, *supra* note 1, at 1242 (documenting how the "elision of difference" in movements challenging violence against women "is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class"); see also Crenshaw, *supra* note 3, at 140 (arguing that the "single-axis framework" of anti-discrimination law "erases Black women in the conceptualization, identification, and remediation of race and sex discrimination").

as intersecting allows us to see the unique experiences of black women, it can also help us understand how identities intersect with policing. For black police officers, their racial identity intersects with their role identity.⁷ As with black women, the experiences of black police officers are not encompassed by the general experiences of black people or the general experiences of police. Policing as an institution intersects with identities, as policing is mostly targeted at black and brown communities.⁸ The intersection of race and the institutional practices of the police means that “black and brown community” implies “highly policed” community.⁹ Our argument looks beyond the categories as pairs—race and gender, gender and policing, or policing and race—to suggest that race can never be thought of separately from gender, and *vice versa*, because historically, they have been co-constituted through the vehicle of policing.

This Introduction expands on existing scholarship on intersectionality and policing by tracing specific ways in which subordinated identities and policing mutually construct one another. This co-constitutedness of the intersecting meanings of race, gender, and policing is made especially clear by the fact that the threat of violent crime by blacks has long been deployed as the primary instrument of oppressing white women by limiting their actions in the public sphere.¹⁰ This threat of crime, furthermore, has long been racialized so that black men are the threat, white women are the protected, white men are the protectors, and black women are left unprotected.¹¹ Only when race AND gender AND policing are considered together—tied to one another not so much as points on a triangle converging towards the center, but instead coexisting on the same planar continuum—does the picture become significantly clearer.

Though Crenshaw acknowledges the role of power in effecting subordination, her analysis presumes that power is exercised from linear points. The analogy she uses is that of a street intersection, and she explains:

⁷ See, e.g., Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1979–81 (2018) (reviewing JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017)) (discussing the tricky position of black police); see also David E. Barlow & Melissa Hickman Barlow, *Racial Profiling: A Survey of African American Police Officers*, 5 POLICE Q. 334, 337–39 (2002) (describing how black police officers’ experiences are informed by their police role and their experiences being racially profiled).

⁸ See Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 167, 179–80 (2016).

⁹ See, e.g., 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) (suggesting “high-crime” area is code for “black or brown” community). See generally Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345 (2019) (criticizing police officers’ broad use of “high-crime area”).

¹⁰ See discussion *infra* Section III.A (connecting Amy Cooper’s white-caller crime to history of race-gender hierarchy).

¹¹ See Mia Brett, *Amy Cooper Played the Damsel in Distress. That Trope Has a Troubling History*, WASH. POST (May 28, 2020, 3:00 AM), <https://www.washingtonpost.com/outlook/2020/05/28/amy-cooper-played-damsel-distress-troubling-history-this-trope> [<https://perma.cc/8HF2-J82M>].

Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.¹²

In this metaphor, racism and patriarchy are different subordinating forces that collide to exacerbate oppression of the intersectional individual.¹³ Our contention, however, is that the subordinating forces push on each other on the same plane, like tectonic plates that build into one another. To more fully understand a black woman's subordinated position, we need to consider the larger context of how white patriarchy manufactures white female sexual purity against black female sexuality and deploys it to police black men. Yet at the same time, this relationship allows white patriarchy to police white female sexuality while maintaining black female sexuality as something that can be victimized and exploited.¹⁴

Sociology reinforces the intersectional insight by considering intersectionality's connections to systems of power¹⁵ within larger social structures. In *Intersectionality*, which longtime sociologist of race, gender, and class Patricia Hill Collins co-authored with sociologist Sirma Bilge, the authors define intersectionality's key insight as the recognition that "people's lives and the organization of power in a given society are . . . shaped not by a single axis of social division, be it race or gender or class, but by many axes that work together and influence each other."¹⁶ We take this to mean that the micro-analyses of the identity aspects of individual police killing cases that we conduct in this Introduction should always be linked to the histories of broader social divisions.

Our core argument is that taking an intersectional and co-constitutive approach to recent anti-black violence reveals that policing is broader than we have been led to think.¹⁷ This Introduction discusses a variety of seemingly dis-

¹² Crenshaw, *supra* note 3.

¹³ Others have noted this problem with the metaphor. See, e.g., Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 307–13 (2001). But we see that the overall theory is consistent with our approach. We do not view this as a post-intersectionality analysis because "the systems of discrimination—e.g., racism, sexism, homophobia, and classism—are themselves intersectional." Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 708 (2001); see Nancy Levit, *Introduction: Theorizing the Connections Among Systems of Subordination*, 71 UMKC L. REV. 227, 230–31 (2002) (considering post-intersectionality theory).

¹⁴ Thus, "there is no pure racism or sexism. Rather, power relations of racism and sexism gain meaning in relation to one another." PATRICIA HILL COLLINS & SIRMA BILGE, *INTERSECTIONALITY* 27 (2016).

¹⁵ Collins and Bilge identify four domains of power: "structural, cultural, disciplinary, and interpersonal." *Id.* We will move amongst those realms as dictated by our case studies.

¹⁶ *Id.* at 2.

¹⁷ We recognize that there is a great deal of police violence against Native, Latinx, Asian, and LGBTQ+ communities, some of which overlaps with our focus on black communities and some which does not. See e.g., *Police Killings Against Native Americans Are Off the*

parate recent incidents of policing of blacks to show how they fit together to form a constraining cycle of violence. One might expect a discussion of those incidents to begin with the most famous police killing of 2020, Derek Chauvin kneeling on George Floyd's neck and choking him to death. Instead, we begin with "white-caller-crime," in which white women like Amy Cooper use calls to 9-1-1 to threaten blacks with police violence, as in the case of Christian Cooper.¹⁸ Amy Cooper joins countless other women who have been caught on film making frivolous calls to the police on black people in recent years, including Sarah Braasch; Jennifer Schulte, who has been pejoratively dubbed "Barbeque Becky;" and Alison Ettel, who has been similarly dubbed "Permit Patty."¹⁹ We then examine how police officers use their authority to sexually assault civilians, particularly cisgender and transgender women of color, such as in the stories of Jannie Ligons and an anonymous transgender woman.²⁰ We continue on to other situations that turn deadly because the now predominant proactive form of policing leads to unnecessary encounters with blacks that sometimes turn violent, such as in the stories of Sandra Bland and Elijah McClain.²¹ Our analysis of the cycle of policing violence then turns to encounters where the police use overwhelming force to enter black homes, and black women are killed as collateral damage, as was the case with Breonna Taylor

Charts and Off the Radar, EQUAL JUST. INITIATIVE (Oct. 31, 2016), <https://eji.org/news/native-americans-killed-by-police-at-highest-rate-in-country/> [<https://perma.cc/QR2Z-GE2G>]; Julian Go, *The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century*, 125 AM. J. SOCIO. 1193 (2020) (connecting the origins of modern policing to violence against multiple non-white groups); Letter from Metro. Urb. Indian Dirs. Grp. Regarding George Floyd, to Minneapolis Police (May 29, 2020), <https://lastrealindians.com/news/2020/5/29/metropolitan-urban-indian-directors-group-letter-to-minneapolis-police-regarding-george-floyd> [<https://perma.cc/SXJ8-B93S>] (noting that the American Indian Movement was formed in response to Minneapolis police violence against Native people and noting Derek Chauvin's previous shooting of a Native man). We concentrate on black communities because we believe this moment requires a sustained analysis of the history of police violence against black communities. Being specific in this way allows us to provide an analysis that is cohesive and deep. Our purpose is not to render police violence against non-black people of color invisible; it is to encourage similar contextual and historical analyses of that violence, as is offered by some of the articles in this issue. See, e.g., Theresa Rocha Beardall, *Sovereignty Threat: Loreal Tsingine, Policing, and the Intersectionality of Indigenous Death*, 21 NEV. L.J. 1025 (2021).

¹⁸ See discussion *infra* Section III.A (considering Christian Cooper story).

¹⁹ Katie Reilly, *Black Yale Student Says White Student Who Called Police on Her Should Be 'Held Accountable'*, TIME (May 14, 2018, 12:07 PM), <https://time.com/5276309/yale-police-sarah-braasch-lolade-siyonbola> [<https://perma.cc/SS82-M5AF>]; Christina Zhao, *'BBQ Becky,' White Woman Who Called Cops on Black BBQ, 911 Audio Released: 'I'm Really Scared! Come Quick!'*, NEWSWEEK (Sept. 4, 2018, 5:42 AM), <https://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057> [<https://perma.cc/M78V-QE6F>]; Sam Levin, *California Woman Threatens to Call Police on Eight-Year-Old Black Girl for Selling Water*, GUARDIAN (June 25, 2018, 3:56 PM), <https://www.theguardian.com/us-news/2018/jun/25/permit-patty-eight-year-old-selling-water-san-francisco-video> [<https://perma.cc/RJL3-PTT9>].

²⁰ See discussion *infra* Section III.B (explicating stories).

²¹ See discussion *infra* Section III.C (discussing these stories).

and Charleena Lyles.²² Only then do we finally assess stories like George Floyd's, where black men's assumed dangerousness is used to justify subduing them with deadly force.²³ We note, however, how this type of police violence has private parallels, such as in the case of the stalking and killing of Ahmaud Arbery, again based on assumed dangerousness of black men.²⁴ In this way, white private actors feel empowered to defend their property with deadly force and are shielded from prosecution in much the same way police officers are, as in the initial lack of justice in the case of Black Lives Matter protester James Scurlock.²⁵ Our understanding of these incidents does not end there, though, as the aforementioned white-caller crime is another means of private violence against blacks, and it also reinitiates this cycle of policing violence. White-caller crime also closely links private violence to the public institutions that permit and enable it.

Our case studies show that policing should be understood as anti-black, but anti-blackness should itself be understood as co-constituted with the meanings of whiteness in general and white womanhood in particular. Whiteness is defined not just in opposition to, but in connection with, blackness. Simultaneously, this relationship is gendered, and gender is also performed through institutionalized surveillance and control of black bodies. White womanhood has been defined as dependent on the notion that white women must be saved from black men by white men.²⁶ In this way, the protection of white women becomes the justifier of surveillance and control of the black male body through policing. Meanwhile, black women are left unprotected and expendable, sometimes invisible²⁷ and sometimes vulnerable to similar stereotypes of dangerousness and criminality that justify policing of black men. White women's protection comes at a cost, as they too become subject to white male surveillance and control. The bodies of white women are not completely off-limits; they are off-limits to black men, but not white men. In this narrative, white women's purity demands their protection but also suggests that they should be confined to the private sphere. We seek to free black men and women from oppressive policing, but not by means of leaving white women simultaneously on a pedestal and in a cage.²⁸

²² See discussion *infra* Section III.D (analyzing their deaths).

²³ See discussion *infra* Section III.E (analyzing Floyd's murder).

²⁴ See discussion *infra* Section III.F (analyzing Arbery's murder).

²⁵ See discussion *infra* Section III.G (discussing Scurlock's death).

²⁶ Chloe Angyal, *I Don't Want to Be an Excuse for Racist Violence Anymore*, NEW REPUBLIC (June 22, 2015), <https://newrepublic.com/article/122110/i-don't-want-be-excuse-racist-violence-charleston> [<https://perma.cc/QY52-22T3>].

²⁷ See ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 112 (2017) (revealing pervasiveness of police sexual assaults).

²⁸ See Lauren Moxley Beatty, *Not a Pedestal, but a Cage*, GINSBURG TAPES, at 5:01 (Apr. 1, 2019), <http://ginsburgtapes.com/ep-4-not-a-pedestal-but-a-cage> [<https://perma.cc/7AW3-UH YG>] (using similar formulation).

We say all of this to demonstrate that policing's involvement in the maintenance of race-gender hierarchy is larger in scope than has traditionally been portrayed. Section I of this Introduction understands the recent anti-police violence protests as not a new occurrence, but one that participates in a deeper history. Although the summer of 2020 was a period of awakening for some people, the country has lived through this moment before, and the current expressions of frustration must be understood in light of this history. We specifically turn to the question of looting, not only in the context of the term being used pejoratively in an attempt to discredit the recent anti-black protests, but also in the context of how white property has been created and protected through a history of looting black bodies and black property. Section I chronicles the waves of grievances, attempts at reform, and retrenchment that led up to the current moment. Section II reconsiders the idea of looting from a black and gendered perspective, where laws have historically been designed to protect white property interests (including women) at the expense of black lives, and expounds on the way in which the protection of white femininity has been deployed not only to maintain racial hierarchy, but also a gender hierarchy. The role of watcher and protector is invariably white and male, and the subject of control and scrutiny is everyone else. Section III shows that, even in the present moment, policing is broader than we have been led to believe. It reevaluates the nature of police violence by providing multiple interconnected frameworks for understanding the concept of policing. While this Introduction discusses the intersectionality of race and gender and policing in the context of specific stories, we do so in an inside-out manner of applying the basic theory to the case studies, then drawing theoretical insights at the end of each substantive portion of this Introduction. Our contention in Section III is that policing and vulnerability to violence cannot be understood without looking simultaneously through the lenses of race and gender. Policing, both public and private, is white and male, and it perpetuates the legacy of white looting of black bodies discussed in Section II. Victimization, on the other hand, is variegated across race and gender but always defined against white male positionality. Until we understand police violence in this broader fashion, we cannot really begin to create meaningful change.

I. UNREST AND THE QUESTION OF LOOTING

As we wrote this piece in the summer of 2020, our nation was embroiled in racial strife in the midst of a global pandemic. While we were still wrestling with the first wave of COVID-19, a video surfaced of a black man laying prone on the ground with a police officer kneeling on his neck, being slowly choked to death as he repeatedly called out "I can't breathe."²⁹ His name was George

²⁹ Elliott C. McLaughlin, *Three Videos Piece Together the Final Moments of George Floyd's Life*, CNN (June 23, 2020, 9:14 AM), <https://www.cnn.com/2020/06/01/us/george-floyd-three-videos-minneapolis/index.html> [<https://perma.cc/H4YE-YF2P>].

Floyd. His plea was the same plea repeatedly uttered by Eric Garner, who was choked to death by a police officer in New York six years earlier.³⁰ This phrase would be spoken again and again by dozens of others, including Hector Arreola, Muhammad Abdul Muhaymin, Byron Williams, and Elijah McClain, as they were all being choked to death by police.³¹ They join the hundreds of other unarmed black men, women, and children who have been killed by the police by other means, particularly firearms, with little accountability. The murder of George Floyd, following so soon after the unpunished killings of Ahmaud Arbery and Breonna Taylor, created a tipping point for the black community. Protests erupted as a reaction to the institutionalized violence that has been dispensed upon black bodies on these shores for not only the last decade, but for centuries, since even before the founding of our nation. Some have maligned the unrest as rioting and looting, contending that racial injustice is no excuse for property damage.³² In this Introduction, we hope to unpack how this sentiment reveals the structural inequalities that the uprisings hope to combat.

Racism is an original sin of the United States, and it bears fruit in a cycle of violence and repression about once every generation. We three are law professors who have now lived through at least two major uprisings spurred by racial injustice: Rodney King in 1992 and George Floyd, Ahmaud Arbery, and Breonna Taylor in 2020. We wish to comment on the way in which the laws and systems of justice that are in place continue to fail to address the issue of racial inequity in our generation. Without systemic change, history is doomed to repeat in an unending cycle, which, as Lonnie Brown Jr. has observed, consists of “riots, responsive call for action, and then a return to the status quo.”³³ We hope our criticisms will bring light to the structural causes of police brutality and help stop the cycle of racial violence for generations to come.

For one of us, Stewart Chang, the defining uprising of his youth was the Los Angeles uprising of 1992. He was in his senior year of high school, watching the events of Florence and Normandie unfold in reaction to the acquittal of

³⁰ Ashley Southall, *‘I Can’t Breathe’: 5 Years After Eric Garner’s Death, an Officer Faces Trial*, N.Y. TIMES (May 12, 2019), <https://www.nytimes.com/2019/05/12/nyregion/eric-garner-death-daniel-pantaleo-chokehold.html> [<https://perma.cc/5BNC-K79V>].

³¹ Katie Wedell et al., *George Floyd Is Not Alone. ‘I Can’t Breathe’ Uttered by Dozens in Fatal Police Holds Across U.S.*, USA TODAY (June 25, 2020, 6:58 AM), <https://www.usatoday.com/in-depth/news/investigations/2020/06/13/george-floyd-not-alone-dozens-said-cant-breathe-police-holds/3137373001> [<https://perma.cc/RH8J-S85K>]; Anita Hassan, *When Byron Williams Died Saying ‘I Can’t Breathe,’ Few Protested. Now His Family Is Fighting for Justice.*, NBC NEWS (June 18, 2020, 1:33 AM), <https://www.nbcnews.com/news/us-news/when-byron-williams-died-saying-i-can-t-breathe-few-n1231342> [<https://perma.cc/7EH8-VZGC>].

³² See Morgan Simon, *Stop Focusing on Looting and Start Focusing on Police Accountability*, FORBES (June 1, 2020, 8:45 PM), <https://www.forbes.com/sites/morgansimon/2020/06/01/stop-focusing-on-looting-and-start-focusing-on-police-accountability/?sh=6083273a6c1a> [<https://perma.cc/KUP6-XJAE>].

³³ Lonnie T. Brown, Jr., *Different Lyrics, Same Song: Watts, Ferguson, and the Stagnating Effect of the Politics of Law and Order*, 52 HARV. C.R.-C.L. REV. 305, 312 (2017).

the four white police officers who had brutally beaten a black man, Rodney King.³⁴ As a high schooler, he did not understand the violence. He did not understand how the beating of one black man could justify an entire community revolting in destruction and looting. Indeed, the image seared into our national consciousness at the time was the city on fire, with looters and arsonists running rampant with no law or order in sight. As he watched his city burn, he remembers checking in on his Korean American friends who were freshmen and sophomores at the University of California, Los Angeles (UCLA), many of whom were worried sick about their parents who owned businesses in the affected areas. Their property and their livelihoods were at stake. Over the course of the five days that the unrest lasted, he was mostly concerned with whether the violence would spread to the suburban community to which his single immigrant mother had taken him to provide better opportunities, as many other immigrant parents have done for their children.

Little did he know how those five days of unrest would impact him in the years to come. He revisited those five days as he joined his friends as an undergraduate at UCLA, encountering for the first time ethnic studies courses that would eventually shape his academic foray away from medicine and towards studies of law and race. Years later, he was reminded of those five days as he decided to become a public interest attorney with the Asian Pacific American Legal Center, an organization that had been instrumental in repairing relations between the Asian American and black communities in Los Angeles in the aftermath of the riots and that was still serving communities left impoverished in the wake of the unrest. He was once again reminded of those five days in the summer of 2020, now as a law professor, as he watched multiple cities across the country burn like his hometown did almost thirty years ago. Back then, he did not understand the violence. Today he does.

Though commonplace today, the Rodney King beating was the first instance of police brutality against a black body caught on video and the first to go viral for the world to see.³⁵ The video tape showed clearly and definitively what the black community had been objecting to for decades: continued oppression by a racist superstructure under the color of authority. Many hoped that this evidence would finally produce justice and accountability. But then, the officers were acquitted.³⁶ For those of us outside the black community, it was difficult to reconcile the acquittal and what we had witnessed on the video

³⁴ Angel Jennings & Matt Hamilton, *At the Corner of Florence and Normandie, Marking Causes of L.A. Riots: 'It's Important to Remember What Started It,'* L.A. TIMES (Apr. 25, 2017, 8:20 AM), <https://www.latimes.com/local/lanow/la-me-riots-king-20170425-story.html> [https://perma.cc/2W4P-CZJD].

³⁵ Jon Schuppe, *Rodney King Beating 25 Years Ago Opened Era of Viral Cop Videos*, NBC NEWS (Mar. 3, 2016, 9:38 AM), <https://www.nbcnews.com/news/us-news/rodney-king-beating-25-years-ago-opened-era-viral-cop-n531091> [https://perma.cc/4QJX-XBWN].

³⁶ Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (Apr. 30, 1992), <https://archive.nytimes.com/www.nytimes.com/books/98/02/08/home/rodney-verdict.html> [https://perma.cc/8EBC-TKTR].

with our own eyes. For those of us from within the African American community, however, the verdict represented business as usual. The justifications for the brutality were the same as they had always been. The officers thought he was dangerous.³⁷ He would not stay down. They had heard that people who were high on PCP could have superhuman strength. They had to beat him like that because they were afraid for their safety.³⁸ And the justice system again bought wholesale into that narrative.

So, people took to the streets.³⁹ There was no justice for Rodney King, and so there would be no peace. Their rage exploded into a blaze that would consume the city.⁴⁰ Yet this was not about just one black man. Tensions from a disenfranchised community in Los Angeles, which was but one small microcosm for the rest of the nation, had been simmering for years and boiled over again. Any reform measure achieved by the community was met with a heavier counter-reaction by law enforcement; for instance, after the community successfully lobbied to ban the use of certain chokeholds by police, they were immediately replaced by the steel batons that would eventually be used to beat Rodney King.⁴¹ Most glaring, however, was the unequal justice meted out by the criminal justice system, which was quick and merciless in crowding prisons with black bodies for the most insignificant of crimes, while at the same time allowing a black teenage girl to be gunned down and a black man to be beaten within an inch of his life with the perpetrators unpunished.⁴² Like countless other black bodies brutalized by a racist system before him, King became a rallying point for a black community that had become weary of and fed up with the continued disrespect and devaluation of black lives. And it took violence for the nation to finally take notice.

After five days of unrest, with dozens killed, thousands injured, and a billion dollars in damage, there was some hope for change.⁴³ Los Angeles voters passed Charter Amendment F, which put limitations on the police chief and

³⁷ *See id.*

³⁸ Hugh Dellios, *L.A. Cops Justified in Assuming King Was on PCP, Expert Says*, CHI. TRIB. (Mar. 17, 1993), <https://www.chicagotribune.com/news/ct-xpm-1993-03-17-9303170162-story.html> [<https://perma.cc/6QBC-HQKE>].

³⁹ *See* Jennings & Hamilton, *supra* note 34.

⁴⁰ Ted Soqui, *LA Riot Photos: Capturing the Rage and Flames as the City Burned*, KCRW (Apr. 30, 2020), <https://www.kcrw.com/news/shows/kcrw-features/la-riots-anniversary-photos> [<https://perma.cc/K5KZ-8SG9>].

⁴¹ Richard A. Serrano, *King Beating Suspects to Use Ban of Chokehold as Defense*, L.A. TIMES (May 17, 1991, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1991-05-17-mn-1871-story.html> [<https://perma.cc/38M7-XWGP>].

⁴² James H. Johnson, Jr. & Walter C. Farrell, Jr., *The Fire This Time: The Genesis of the Los Angeles Rebellion of 1992*, 71 N.C. L. REV. 1403, 1406–07 (1993).

⁴³ Anjali Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017, 1:21 PM), <https://www.npr.org/2017/04/26/524744989> [<https://perma.cc/X56E-EG72>].

created increased civilian review of police misconduct.⁴⁴ The focus was on restoring law and order to a police department that had seemingly viewed itself as exempt from these core principles.⁴⁵ Darryl Gates, who had lobbied against the amendment, was forced to resign as police chief, to be replaced by Willie Williams, an African American.⁴⁶ The people of Los Angeles, particularly from the black community, held to a glimmer of hope for reform. But in the end, that change did not come. Five years later, Chief Williams was let go for failing to make meaningful change.⁴⁷ His successor, Bernard Parks, another African American, also did little to effect reform within the department, as his tenure was defined largely by the Rampart scandal, which was popularized in the Denzel Washington film, *Training Day*.⁴⁸ Again, the focus was on internal corruption and the failure of law and order to contain a “few bad apples” within the police department. The problem with the “few bad apples” approach to police brutality, however, is that it overlooks the systemic nature of the problem. This approach also suggested that the police were the only problem. As Lonnie Brown warned, the cycle of racial violence is doomed to repeat unless proactive action is taken beyond piecemeal criminal justice reform, especially when reform means more law and order.⁴⁹ As Brown observed, not much has changed since the 1965 Watts rebellion and the 2014 Ferguson uprising because the response to civil unrest has always focused on restructuring in a way to better accomplish law and order, which ultimately leads to retrenchment.⁵⁰

The efforts for change ultimately did not solve the problems of the communities where the unrest originated. The key statistic cited in relation to the 1992 uprising was that it caused one billion dollars in property damage, and much of the rebuilding effort sought to recoup that economic cost.⁵¹ With heavy media focus on looting and property destruction, business owners were regarded as the primary victims of the unrest, and the majority of resources

⁴⁴ Louis Sahagun & John Schwada, *Measure to Reform LAPD Wins Decisively*, L.A. TIMES (June 3, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-06-03-mn-641-story.html> [https://perma.cc/CPL6-4HW4].

⁴⁵ *Id.*

⁴⁶ Lou Cannon, *L.A. Taps Philadelphia Police Chief*, WASH. POST (Apr. 16, 1992), <https://www.washingtonpost.com/archive/politics/1992/04/16/la-taps-philadelphia-police-chief/f7fd5d57-1f88-43fe-93fc-2a432957ea43> [https://perma.cc/HC5W-RHSC].

⁴⁷ See Joel Rubin, *Willie Williams, Los Angeles Police Chief After the 1992 Riots, Dies at Age 72*, L.A. TIMES (Apr. 27, 2016, 8:26 PM), <https://www.latimes.com/local/obituaries/la-me-willie-williams-obit-20160428-story.html> [https://perma.cc/4JXZ-URLK] (mentioning internal resistance to his proposed reforms).

⁴⁸ David Ayer, *A Story from the Streets*, L.A. TIMES (Sept. 9, 2001, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2001-sep-09-ca-43657-story.html> [https://perma.cc/UQ4W-ARGC].

⁴⁹ Brown, *supra* note 33, at 355.

⁵⁰ *Id.* at 356.

⁵¹ Victor A. Matheson & Robert A. Baade, *Race and Riots: A Note on the Economic Impact of the Rodney King Riots*, 41 URB. STUD. 2691, 2691 (2004).

were devoted to restoring commerce to the area.⁵² Over time, burned businesses were rebuilt, peace and order were restored, but the underlying structures of inequality were left unchanged. Apart from being renamed “South Los Angeles” rather than “South Central Los Angeles” to shed its image as a place of poverty and violence,⁵³ not much has changed in the predominantly African American neighborhood most affected by the 1992 unrest. South Los Angeles residents still have low access to educational and healthcare resources.⁵⁴ Moreover, black unemployment overall in the United States remains three times the national average, and black families are twice as likely as the rest of the country to live under the poverty line.⁵⁵ The criminal justice system continues to disproportionately affect the black community, which makes up 30-40 percent of the prison population,⁵⁶ even though it makes up less than 13 percent of the national population.⁵⁷ South Los Angeles is currently peaceful and seemingly under control. However, the structural factors that led to the uprising all still exist, continuing to accumulate explosive potential, like a powder keg waiting for a spark to ignite again.

More law and order, however, is not the solution and instead perpetuates the problem. Getting rid of the “bad apples” is not effective when the orchard

⁵² Sonari Ginton, *After L.A. Riots, Leaders Failed to Rebuild a Broken City*, NPR (Apr. 28, 2017, 4:31 PM), <https://www.npr.org/2017/04/28/526085043> [<https://perma.cc/CQ63-RNX3>].

⁵³ Calvin Sims, *In Los Angeles, It's South-Central No More*, N.Y. TIMES (Apr. 10, 2003), <https://www.nytimes.com/2003/04/10/us/in-los-angeles-it-s-south-central-no-more.html> [<https://perma.cc/D2SK-7TPN>].

⁵⁴ Veryl Pow, *Rebellious Social Movement Lawyering Against Traffic Court Debt*, 64 UCLA L. REV. 1770, 1781 (2017); Brietta R. Clark, *Hospital Flight from Minority Communities: How Our Existing Civil Rights Framework Fosters Racial Inequality in Health Care*, 9 DEPAUL J. HEALTH CARE L. 1023, 1024 (2005).

⁵⁵ Brenda Stevenson, Opinion, *Twenty Five Years Later, How Did the Riots Transform L.A.? And Has the City Changed Enough?: No Community Can Tolerate Such a Loss, Not in 1992 and Not Now*, L.A. TIMES (Apr. 28, 2017, 3:00 AM), <https://www.latimes.com/opinion/la-oe-los-angeles-riots-voices-updates-20170427-htmistory.html> [<https://perma.cc/2WFY-BPZA>].

⁵⁶ Analyzing 2014 data for state prisons, the Sentencing Project reported that black people were 38 percent of the state prison population. ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITIES IN STATE PRISONS 4 (2016) (citation omitted), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [<https://perma.cc/DM72-3S4U>]. In 2018, black people were 33 percent of the imprisoned but only 12 percent of the national population. John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/> [<https://perma.cc/YL4Z-EZV7>]. The share of black people in federal prisons remains closer to 40 percent. *Inmate Statistics: Inmate Race*, FED. BUREAU OF PRISONS, (Apr. 10, 2021), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [<https://perma.cc/R3P4-V6V2>] (Apr. 10, 2021).

⁵⁷ *Profile: Black/African Americans*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF MINORITY HEALTH (Apr. 19, 2021), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=61> [<https://perma.cc/TDT4-SZDE>].

itself, the structure that holds not only the bad apples but also the good ones, is flawed.⁵⁸ Thus, replacing Darryl Gates with Willie Williams was not going to change anything. This is an example of how failing to think about policing through an intersectional lens creates blind spots that perpetuate injustice. The local Los Angeles community assumed that because Williams is black, he would solve issues the police department had with the black community.⁵⁹ Yet there was too much focus on him as a black man, rather than as a black police officer whose solutions to the policing problem were still limited by a structure that holds a white perspective on the problem. During his tenure as Los Angeles Police Chief, Williams published *Taking Back Our Streets: Fighting Crime in America*. In the book, he identifies an “us-versus-them” bunker mentality in police departments as the primary issue to be solved and advocates for community policing as the solution.⁶⁰ Community policing, though marketed positively as police officers getting to know members of the community better and forming partnerships with them, ultimately equals more policing and surveillance.⁶¹ It suggests increased, rather than decreased, police presence in those communities and calls on civilian community members to engage and participate in surveillance and policing activities.⁶² In other words, Williams’ vision for police reform is an expansion of policing, which is really no different from Mayor Richard Riordan’s campaign pledge to add 3,000 new officers to the 7,600-member police force.⁶³ Though Williams and Riordan disagreed on the specific means, they agreed on the fundamental result, which was increased police presence in communities of color.⁶⁴

The problem that the black community has with policing is not the manner in which it is surveilled or how it gets along with police, but the fact that it is being surveilled and policed in the first place, not only by police officers but also, seemingly, by everyone. Williams’ solution of encouraging black community members to watch out for crime in their communities and report suspicious behavior to the police is tantamount to asking them to behave as white people, such as Gregory and Travis McMichael, Amy Cooper, and George

⁵⁸ Joanna Schwartz has described police reform as focused on bad apples (individual officers) and bad barrels (entire departments). Joanna C. Schwartz, *Systems Failures in Policing*, 51 SUFFOLK U. L. REV. 535, 537 (2018). Here, we focus on the entire orchard.

⁵⁹ JOE DOMANICK, *BLUE: THE LAPD AND THE BATTLE TO REDEEM AMERICAN POLICING* 115 (2015).

⁶⁰ See generally WILLIE L. WILLIAMS & BRUCE B. HENDERSON, *TAKING BACK OUR STREETS: FIGHTING CRIME IN AMERICA* (1996).

⁶¹ See Geoffrey P. Alpert et al., *On the Study of Neighborhoods and the Police*, in *COMMUNITY POLICING: CONTEMPORARY READINGS* 309, 312–13 (Geoffrey P. Alpert & Alex Piquero eds., 1998).

⁶² Ellison Berryhill, *Unintended Consequences: An Analysis of Six Proposals to Reform the U.S. Criminal Justice System*, 58 U. LOUISVILLE L. REV. 485, 496 (2020).

⁶³ Marc Lacey & Richard Simon, *Riordan Steadfast on LAPD Expansion*, L.A. TIMES (July 15, 1993, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1993-07-15-mc-13253-story.html> [<https://perma.cc/W2P7-A2EA>].

⁶⁴ *Id.*

Zimmerman, who were all engaging in precisely the type of community policing of black people that Williams advocated.⁶⁵ All of those white aggressors were monitoring or reporting behavior that they deemed suspicious, which oftentimes reduces to being black in a white neighborhood, or even being black in any neighborhood. The perspective of community policing is never a neutral one, but one that is always white. The object of community policing is never the community at large but is exclusively the black community. Under community policing, police officers are not being trained specially to deal with all communities, they are being trained to better deal with the black community. Police never need to repair their relationships with predominantly white neighborhoods, since white neighborhoods benefit from the surveillance of non-white bodies. Though he might have been a black man, Williams' ability to think like a black man is limited when the perspective he is forced to adopt as police chief is fundamentally white.

II. THE BLACK PERSPECTIVE ON LOOTING

The structural root of the problem is that policing occurs fundamentally from the perspective of white patriarchy, and until we understand it as such, we cannot really engage in meaningful change. The police motto, "to protect and serve," has always been racially and sexually coded.⁶⁶ The questions never asked about this motto are who or what is the object being protected and from whom are they being protected. History shows us that white property and, by extension, white women are almost always the objects of protection, and the suspects from whom they are to be protected are, generally speaking, black men.⁶⁷ The lives and property protected have always focused on those who were initially eligible to possess it. Thus, the presumed vantage point of policing has always been from the white, male perspective.

Protection of property has repeatedly taken center stage in public discourse over civil unrest.⁶⁸ However, if we take looting to mean the mass appropriation of property, then white men have been looting from people of color from the

⁶⁵ Sharon Finegan, *Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations*, 8 U. MASS. L. REV. 88, 88, 105–06 (2013).

⁶⁶ See Carissa M. Harris, Assoc. Professor of Eng., Temple Univ., *Service and Protection: Medieval Knights, the Police, and Sexual Violence*, Reflection at the Arizona Center for Medieval and Renaissance Studies RaceB4Race Roundtable: To Protect and to Serve (July 23, 2020), <https://acmrs.asu.edu/RaceB4Race/Protect-and-Serve> [<https://perma.cc/HR92-BC75>]; Cord J. Whitaker, Assoc. Professor of Eng., Wellesley Coll., *To Protect and Serve: Policing and Chivalric Violence*, Reflection at the Arizona Center for Medieval and Renaissance Studies RaceB4Race Roundtable: To Protect and to Serve (July 23, 2020), <https://acmrs.asu.edu/RaceB4Race/Protect-and-Serve> [<https://perma.cc/QK3U-DMEL>] (tracing racism and sexism in the police motto "to protect and serve" to the Middle Ages).

⁶⁷ Barbara Holden-Smith, *Inherently Unequal Justice: Interracial Rape and the Death Penalty*, 86 J. CRIM. L. & CRIMINOLOGY 1571, 1571 (1996) (book review).

⁶⁸ See Simon, *supra* note 32.

beginning of the nation. White settlers usurped lands from Native Americans during the founding of the nation. The Supreme Court defined Native Americans as outsiders and inferior to white Americans and thus incapable of asserting fully recognizable property rights compared to white citizens, facilitating dispossession on Native lands.⁶⁹ Similarly, black bodies have been looted for centuries, first by the Europeans who brought them to these shores and then by a government that exploited their labor and repeatedly professed them to be worth less than whites. Indeed, the Constitution officially declared that black lives mattered less than white lives, worth only a fraction of what a white person was worth for representation purposes.⁷⁰ For over a century, black lives held value insofar as they were the property of their white kidnapers. In *Dred Scott v. Sandford*, the U.S. Supreme Court affirmed that black lives were worth nothing more than property and were unworthy of citizenship, suggesting that any moves towards emancipation and self-determination were illegal takings of white property.⁷¹ Thus, from the beginning, white property interests and the maintenance of economic hierarchies has remained an integral aspect of the American capitalist system, and policing emerged as an instrumental cog in that machinery. Police protected white ownership of black people and facilitated white encroachment onto Native land.

The origins of police departments in the South lie in slave patrols and night watches commissioned to surveil, catch, and discipline black slaves as a method of protecting the property interests of white slave owners.⁷² These slave patrols were chiefly concerned with the protection of white ownership interests in black slaves, and they deployed violence to deter slaves from running away or revolting.⁷³ During Reconstruction, these patrols were reorganized into police departments whose primary purpose was to keep order over newly emancipated slaves that comprised a “dangerous class” that required surveillance and control.⁷⁴ Police were deployed to enforce newly legislated vagrancy and loitering statutes, known as black codes, so that black bodies were constantly under

⁶⁹ See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 569, 573–77 (1823) (arguing that Christianity and doctrine of waste allowed European usurpation of Indian lands); see also LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICAN DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005); Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

⁷⁰ U.S. CONST. art. I, § 2, cl. 3.

⁷¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 393, 487–90 (1857).

⁷² SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 4 (2d prtg. 2003); see also K. B. Turner et al., *Ignoring the Past: Coverage of Slavery and Slave Patrols in Criminal Justice Texts*, 17 J. CRIM. JUST. EDUC. 181, 186 (2006).

⁷³ See HADDEN, *supra* note 72, at 4.

⁷⁴ Gary Potter, *The History of Policing in the United States, Part 2*, E. KY. UNIV (July 2, 2013), <https://plsonline.eku.edu/insidelook/history-policing-united-states-part-2> [https://perma.cc/QFK2-MMEH].

watch.⁷⁵ Around the same time, nationalist paramilitary forces began organizing into police agencies in the North as a means of controlling immigrants, another “dangerous class.”⁷⁶ Eventually, however, European immigrant groups were able to claim the privileges of whiteness as defined against blackness.⁷⁷

The purpose of the police was to protect whites from blacks and other non-whites. In the era of Jim Crow, a significant function of the police was the enforcement of segregation, as blacks who broke the laws or dared violate hierarchical social norms were subject to arrest and police brutality.⁷⁸ An underlying purpose of segregation was anti-miscegenation, geared at maintaining the racial purity of whites.⁷⁹ In addition, white vigilante groups—such as the Klu Klux Klan—emerged and used violence and terror to further calcify racial hierarchies, and they went almost completely unchecked by the criminal justice system.⁸⁰ Indeed, the local Southern police were usually Klansmen.⁸¹ The trope most often utilized by the Klan to foment violence was the alleged rape of a white woman by a black man.⁸² Nonpunishment of white violence against black persons, together with laws prohibiting black persons from testifying in court against white persons and discriminatory jury selection, demonstrated the devaluation of black lives in the eyes of the criminal justice system.

Even after the Civil War, when black lives were seemingly elevated to the status of whites by amending the Constitution to bestow upon them freedom, citizenship, and the right to vote, political machinations quashed Reconstruction before meaningful progress could be made.⁸³ This paved the way for institutionalized disenfranchisement of the black population through segregation and restrictions on voting, such as literacy tests and poll taxes, which effectively demoted them to second-class citizens.⁸⁴ Furthermore, white violence against

⁷⁵ Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 160 (2001).

⁷⁶ Potter, *supra* note 74.

⁷⁷ KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 26 (2010).

⁷⁸ Steve Martinot, *Police Impunity, Human Autonomy, and Jim Crow*, 28 SOCIALISM & DEMOCRACY 64, 74 (2014).

⁷⁹ See Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321, 1329 (2006) (“[A] fundamental aspect of Jim Crow society was the social and legal prohibition of interracial relationships and interracial marriages.”).

⁸⁰ Marcus R. Nemeth, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 995 n.31 (2019) (“The Ku Klux Klan (‘KKK’) used deceptive appearances as state officers, frequently collaborating with state or local governments, to frighten and murder countless freed slaves and anyone who opposed the KKK’s racist agenda.” (citing Alan W. Clarke, *The Ku Klux Klan Act and the Civil Rights Revolution*, 7 SCHOLAR 151, 154–55 (2005))).

⁸¹ *See id.*

⁸² *See* Holden-Smith, *supra* note 67, at 1571.

⁸³ *See* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 138–44 (rev. ed. 2009).

⁸⁴ *Id.* at 160–61.

black lives – used to discourage the exercise of rights – was left largely unpunished by the justice system, indicating the state’s approval. Thus, black bodies have always been disempowered by the violence of white bodies, whether from the slaveholder’s whip or the Klansman’s noose, and that violence has always been sanctioned, whether officially or tacitly, by the state.

Every time black people dared say that their lives mattered or that they should be counted as equal with white lives, they were silenced with violence. In the wake of the Civil War, as black people were being elected to positions of influence, the white community quashed them with violence and looting. When the ballot failed them, white men used bullets. In 1866, white populations terrorized and disenfranchised the black community through rioting in New Orleans and Memphis, which notably included the participation of white police officers.⁸⁵ For the black community, the police were never the protectors of the peace; they were the protectors of the whites. They protected the property interests of white slaveholders in the era of slavery, and they would protect the position of the white power structure in the era of emancipation. Though the victimization of the black community in New Orleans and Memphis created national sympathy that led to radical Reconstruction,⁸⁶ progress was short lived.

Violence was repeatedly deployed by the white population to resist Reconstruction and prevent African American candidates from assuming office, either through assassination or by suppressing the black vote.⁸⁷ The Ku Klux Klan mobilized violently to prevent the further election of black people to office, with the Camilla Massacre of 1868, the Arkansas Militia Wars from 1868 to 1869, the North Carolina Kirk-Holden War in 1870, and the Colfax Massacre in 1873.⁸⁸ Though African Americans comprised a majority of the population in many of the areas where such violence occurred, they were prevented from political gain by white violence, and the federal government was seemingly powerless to resist the KKK.⁸⁹ Finally, the compromise reached in the contested election of 1876 quashed any hope of meaningful change for African Americans by ending Reconstruction and ushering in the era of Jim Crow.⁹⁰

Later, when black servicemen conscripted to fight in World War I came home from abroad, they returned with a renewed determination to fight injus-

⁸⁵ Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1308–12 (2013).

⁸⁶ Altina L. Waller, *Community, Class and Race in the Memphis Riot of 1866*, 18 J. SOC. HIST. 233, 233 (1984).

⁸⁷ GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 1* (new ed. 2007).

⁸⁸ See generally CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008).

⁸⁹ See generally *id.*

⁹⁰ KEITH IAN POLAKOFF, *THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION* 313–14 (1973).

tice and segregation back at home.⁹¹ If they were American enough to fight and die for the country, they were American enough to enjoy equal protections. Their resistance was met with violence, as white mobs in twenty-six cities across the nation erupted in violence against them in what would be collectively known as the Red Summer Riots of 1919.⁹² This violence, initiated by whites and targeting black lives and black property, was geared towards the specific goal of preserving segregation.⁹³ Legislators let themselves be convinced that the violence was bilateral and that the only lasting solution to racial violence was continued racial segregation.⁹⁴

The most expeditious tool of white supremacy to mobilize violence against the black community was the purity of white women.⁹⁵ This formula is vividly illustrated by one of the worst riots in history, which occurred roughly a century ago: the poorly named “Tulsa Race Riot.”⁹⁶ On May 31, 1921, police arrested Dick Rowland, a black young man who was accused of assaulting a white female teenager in an elevator.⁹⁷ A white lynch mob converged upon the courthouse where Rowland was being held, and the black community of Greenwood, the primarily African American section of Tulsa where Rowland was from, came and offered to assist the sheriff in protecting Rowland.⁹⁸ The police instructed the black community members to leave but made no attempt to de-escalate or disperse the white lynch mob, which eventually grew to more than 200.⁹⁹ The black community members returned later that night, and a fight broke out between one of the white members of the lynch mob and a black World War I veteran, sparking a gunfight that lasted through the night.¹⁰⁰ The next morning, a mob of armed white men that greatly outnumbered the black population descended upon Greenwood and began murdering black residents

⁹¹ See generally ADRIANE LENTZ-SMITH, *FREEDOM STRUGGLES: AFRICAN AMERICANS AND WORLD WAR I* (2009).

⁹² Katrina M. Sanders, *America's Quest for Racial Tolerance*, 2 J. GENDER, RACE & JUST. 99, 100 (1998).

⁹³ Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 HOW. L.J. 499, 504 (2004) (quoting 74 OKLA. STAT. tit. 74, § 8000.1(1) (2013)).

⁹⁴ Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 611 (2003).

⁹⁵ See generally DORA APEL, *IMAGERY OF LYNCHING: BLACK MEN, WHITE WOMEN, AND THE MOB* (2004).

⁹⁶ TIM MADIGAN, *THE BURNING: MASSACRE, DESTRUCTION, AND THE TULSA RACE RIOT OF 1921*, at 95–96 (2001). See generally JAMES S. HIRSCH, *RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY* (2002).

⁹⁷ Alfred L. Brophy, *The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court*, 54 OKLA. L. REV. 67, 68 (2001).

⁹⁸ ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921*, at 33 (2002).

⁹⁹ See *id.* at 38.

¹⁰⁰ Scott Ellsworth, *The Tulsa Race Riot*, in OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT 37, 63 (2001), <https://www.okhistory.org/research/forms/freport.pdf> [<https://perma.cc/NHA7-3FFL>].

and burning and looting their homes and businesses.¹⁰¹ So, it was not really a riot, but a massacre. The Tulsa police stood by and watched, with reports that some participated in the violence and the looting.¹⁰² The swiftness of the police in dispersing the black crowd in Tulsa, and their idleness in the face of exhibitionist white violence against black persons and property, demonstrates how the subject of protection has always been white persons and white property, and the object of policing has always been black bodies.

The massacre of 1923 that occurred in Rosewood, Florida mirrored what happened during the Red Summer Riots of 1919 and the Tulsa Race Riot of 1921. The violence was once again in reaction to a white woman alleging that she was raped by a black man, and again, an extrajudicial white mob was formed to ferret out the suspect, eventually leading to a standoff at a black residence.¹⁰³ The sheriff, though claiming he was unsuccessful in dispersing the white mob, nevertheless refused assistance that the governor offered.¹⁰⁴ The white mob continued to swell in numbers as the standoff continued, fueled largely by a gathering of the Ku Klux Klan in neighboring Gainesville, and the violence spread to churches and other residences until finally, the entire community of Rosewood was razed.¹⁰⁵

In the case of the Rosewood Massacre, the Florida legislature eventually voted in 1995 to allocate \$2.1 million in compensation for the survivors of the riot, making it the first state to offer reparations to victims of racial violence.¹⁰⁶ Congress recently considered HR 40 “The Commission to Study and Develop Reparation Proposals for African-Americans Act,” which was introduced in 2019, but it stalled in subcommittee and did not receive a vote.¹⁰⁷ Currently, there is a lawsuit brought by relatives of the victims of the Tulsa massacre to seek reparations as well.¹⁰⁸ Though reparations would signal a promising first step, they are not enough. As Natsu Saito Taylor has argued, the problem with reparations is that people often see them as a signal of completion, that somehow racial justice has been accomplished in that one gesture.¹⁰⁹ As this Section

¹⁰¹ HIRSCH, *supra* note 96, at 99–116.

¹⁰² Ellsworth, *supra* note 100, at 74.

¹⁰³ R. Thomas Dye, *The Rosewood Massacre: History and the Making of Public Policy*, 19 PUB. HISTORIAN 25, 29–31 (1997).

¹⁰⁴ *Id.* at 31.

¹⁰⁵ *Id.*

¹⁰⁶ Eric A. Posner & Adrian Vermeule, Essay, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 696 tbl.1 (2003); see C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503, 510 (1994).

¹⁰⁷ Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. (2019).

¹⁰⁸ Brakkton Booker, *Oklahoma Lawsuit Seeks Reparations in Connection to 1921 Tulsa Massacre*, NPR (Sept. 3, 2020, 1:47 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/03/909151983> [<https://perma.cc/JG3M-LZ3L>].

¹⁰⁹ Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1, 7–8 (2001).

has recounted, racial injustice is structurally rooted in our history and has been enabled and perpetuated by our laws. The incidents discussed in the following Section demonstrate how these roots continue to flourish.

III. POLICING, PROPERTY, AND WHITE PATRIARCHY

For meaningful change to occur, we must think beyond the confines of individual gestures. Los Angeles in 1992 was not an isolated incident, nor was Watts in 1965, nor Harlem in 1964 and 1935. These uprisings were all responsive to police violence and are part of a deeper, interconnected legacy that is not merely local but, in fact, national in scope. Racial injustice is not individualized but woven into the fabric of our nation. Ending racial violence would require taking apart the assumptions upon which this nation has been built and weaving a new quilt. Consequently, addressing each incident of racial violence and responsive protest individually will continue to fall short because these incidents are not remote, but part of a systemic whole. Specifically, the individual prosecution of Derek Chauvin is insufficient to solve the structural problem that created him in the first place. In the same way that the calls for justice in the case of Rodney King were not about just one black man, responsibility for the injustices in those cases is not about just “one bad cop,” such as Derek Chauvin or Laurence Powell.

The Chicago Commission on Race Relations, the first blue-ribbon commission in the United States to examine racialized policing, understood this when it was tasked with analyzing the causes of the 1919 Chicago Race Riot. Its report finds there was systemic participation in mob violence by the police and that when police officers had the choice to protect black people from white mob violence, they chose to aid and abet white mobs, disarm black people, or arrest black people.¹¹⁰ The Chicago Commission also understood that the local problem came from the national one. The same conclusion was reached by the Mayor’s Commission on Conditions in Harlem following the 1935 unrest¹¹¹ and by the Kerner Commission organized by President Lyndon Johnson following a rash of uprisings in Detroit, Newark, and twenty-three other cities in 1967.¹¹² All the commissions learned that the individual incidents were symptoms of a larger national problem; all the commissions suggested systemic change beyond simple police reform; all the commissions were summarily ignored.

In other words, Los Angeles in 1992 is Watts in 1965, which is Harlem and Rosewood and Tulsa and Colfax—all the way back to Jamestown. Similarly, as

¹¹⁰ See generally CHI. COMM’N ON RACE RELS., THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT (1922).

¹¹¹ See generally MAYOR LAGUARDIA’S COMM’N ON THE HARLEM RIOT, THE COMPLETE REPORT OF MAYOR LAGUARDIA’S COMMISSION ON THE HARLEM RIOT OF MARCH 19, 1935 (1936).

¹¹² See generally NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

this section suggests, George Floyd is Rodney King and is Eric Garner, is Breonna Taylor, is Botham Jean, is Jannie Ligon, is Trayvon Martin, is Emmett Till, is Ahmaud Arbery, is Christian Cooper, and so forth. Each of their stories is connected to the others and is part of a systemic whole built upon the looting and disenfranchisement of black bodies and perpetuated by continuing structures of racism and misogyny. Similarly, Derek Chauvin is Laurence Powell and is Daniel Pantaleo, is Jonathan Mattingly, is Amber Guyger, is Daniel Holzclaw, is George Zimmerman, is Roy and Carolyn Bryant, is William Bryan, and is Amy Cooper. Together the stories demonstrate that regardless of an individual's identity, to police is fundamentally to take the position and perspective of white patriarchy.

A. *Christian Cooper: White Caller Crime*

Amy Cooper is a white woman who was employed by the financial services company Franklin Templeton.¹¹³ Christian Cooper is a black man who is a professional writer and editor, as well as an avid birdwatcher.¹¹⁴ They were both in New York's Central Park when they encountered one another.¹¹⁵ Christian Cooper politely asked Amy Cooper to leash her dog, as that is required in the park.¹¹⁶ Amy Cooper refused, and a verbal argument ensued between them.¹¹⁷ Christian Cooper began recording Amy Cooper.¹¹⁸ She threatened to call the police, saying "I'm going to tell them an African American man is threatening my life."¹¹⁹ She did call the police and said exactly that, but dramatically altered her voice to suggest she was under imminent and serious physical threat.¹²⁰ Unfortunately for Amy Cooper, this happened just hours before George Floyd was killed, and people made a connection between the events.¹²¹ She became a symbol of "the weaponization of white women's tears."¹²²

¹¹³ See Terina Allen, *3 Things Amy Cooper Did in Central Park to Damage Her Reputation and Career*, FORBES (May 29, 2020, 11:42 PM), <https://www.forbes.com/sites/terinaallen/2020/05/29/3-things-amy-cooper-did-in-central-park-that-destroyed-her-life/#3d454a5f6198> [<https://perma.cc/6M57-FUMS>].

¹¹⁴ See *id.* Neither of these two Coopers is any relation to each other or to the co-author of this piece with the same last name. *Id.*

¹¹⁵ *Id.*

¹¹⁶ See *id.* (mentioning Christian Cooper was not aggressive).

¹¹⁷ See *id.* (mentioning Amy Cooper refused).

¹¹⁸ See *id.*

¹¹⁹ See CBS News, *Christian Cooper on Being Racially Targeted While Birdwatching in Central Park*, YOUTUBE (June 9, 2020), <https://www.youtube.com/watch?v=9TXkh9jihUU> [<https://perma.cc/HRR3-D3L3>] (interviewing Christian Cooper, showing footage from his video of Amy Cooper).

¹²⁰ See *id.* (showing Amy Cooper's call).

¹²¹ Allen, *supra* note 113.

¹²² "That Act Was Unmistakably Racist": Christian Cooper Speaks Out After Viral Encounter with White Dog-Walker, CBS NEWS (June 9, 2020, 10:51 PM), <https://www.cbsnews.com>

In reading this incident, we are conscious that policing has served as historical means by which American society separates white women from black men. As we discussed at the start of this Introduction, that has been a primary way that race and gender and policing are co-constituted. Consider, for example, the enforcement of social norms in the famous attempt law case of *McQuirter v. State*. Therein, a white woman in the Jim Crow South perceived a black man to be stalking her because he was near her in multiple places.¹²³ The police arrested him, and the prosecutor charged him with attempted rape.¹²⁴ He was convicted.¹²⁵ In 1953, the Alabama Appeals Court essentially took judicial notice of the cultural standard that black men were not supposed to be in the presence of white women, meaning that it was a widely accepted norm that could not be disputed.¹²⁶ Those Jim Crow rules were indeed strong, but they were also backed up by policing and judicial interpretation.

After the end of Jim Crow, policing became more important to the construction of the meanings of white womanhood and black masculinities. Consider now the famous due process case we teach in Criminal Law, *Papachristou v. City of Jacksonville*, wherein the police used vagrancy laws to harass black men who were with white women.¹²⁷ The implication of their being with each other in public was that they were *with* each other otherwise. Preventing sexual and other relationships between black men and white women has been a foundation of Southern culture—and elsewhere as well—even after the Civil Rights Acts.¹²⁸

While the anti-interracial injunction has weakened, it has also dispersed into other areas. We might consider the general policing of white space by means of killings, such as of Trayvon Martin and Ahmaud Arbery, to also be about protecting white women.¹²⁹ To put white women on a pedestal and in a cage, white men need separate space into which to sequester their women. What looks like policing space might also be about policing sexuality.

m/news/amy-cooper-christian-cooper-speaks-out-that-act-was-unmistakably-racist [https://perma.cc/Y2VY-VYHB].

¹²³ *McQuirter v. State*, 63 So. 2d 388, 388–89 (Ala. Ct. App. 1953).

¹²⁴ *Id.* at 388.

¹²⁵ *Id.*

¹²⁶ *Id.* at 390. We note that the most popular Criminal Law hornbook, Joshua Dressler's *Understanding Criminal Law*, at least superficially treats the racial conclusion as unremarkable. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 379 (7th ed. 2015). The hornbook's text warns against "double inchoate" rules that might allow "convict[ion] on the basis of innocent, albeit suspicious appearing, conduct." *Id.* The footnote provides a parenthetical quoting the Alabama Appellate Court's conclusion that the defendant's suspiciousness was "founded upon racial differences." *Id.* at 390 n.27 (quoting *McQuirter*, 63 So. 2d at 390).

¹²⁷ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156–58 (1972).

¹²⁸ Kenneth James Lay, *Sexual Racism: A Legacy of Slavery*, 13 NAT'L BLACK L.J. 165, 166–70 (1993).

¹²⁹ Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1671 (2019).

A threshold issue involved in the analysis of Amy Cooper's interaction with Christian Cooper is whether her being white and a woman means she has an intersectional identity that is appropriate for the theory. Our summary answer is "yes, but . . ." Everybody has an intersectional identity in the sense that everybody has a race, gender identity, class, sex orientation, religion, and so on. Further, even normative identities like whiteness, maleness, "straightness," and so on, affect people's identities.¹³⁰ Being white and female is an identity distinct from being say, Asian and female or white and male.

Having only one subordinated major identity affects how one perceives both one's subordinated identity and one's normative identities in terms of salience and visibility. Collins describes such salience as follows:

Moreover, because oppression is constantly changing, different aspects of an individual U.S. black woman's self-definitions intermingle and become more salient: Her gender may be more prominent when she becomes a mother, her race when she searches for housing, her social class when she applies for credit, her sexual orientation when she is walking with her lover, and her citizenship status when she applies for a job.¹³¹

The changes in salience of particular identities highlight the need to pay attention to cultural context. Here, Amy Cooper's whiteness and femaleness were co-constituted in that both identities became particularly salient when she was confronted by a black man. Her class was not as significant, since Christian Cooper was a birder with the diction to indicate that he was not appreciably different from Amy Cooper in terms of class.¹³²

Because normative identities convey privilege, though, they are often invisible to their holders. A person can be blissfully unaware of their privileges even as they quietly benefit from them and actually exercise them. The invisibility stems from the fact that the holders of normative identities like whiteness, maleness, and straightness simply do not understand them to be salient. Amy Cooper probably was not thinking about how salient her whiteness had become when she called the police on Christian Cooper because she took her white privilege as a given. She could exercise that privilege without actively thinking, "now I'll flex my whiteness."

But ignoring these privileges can have negative consequences in the form of making a person more likely to accept the status quo as a whole. A person's whiteness might intersect with her femaleness to make her more likely to accept the given hierarchies as a whole since she gets to exercise "compensatory

¹³⁰ See Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 257 (2002) (addressing white women's intersectionality); accord Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER, RACE & JUST. 531, 533 (2013) (contending we must consider white women's intersectionality).

¹³¹ PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 274–75 (2d ed. 2000).

¹³² See CBS News, *supra* note 119 (interviewing Christian Cooper, showing footage from his video of Amy Cooper).

subordination” over others.¹³³ Here, Amy Cooper could use her whiteness against a black man to compensate for the fact that in some contexts, men would use their gender against Amy Cooper.

Amy Cooper’s attempt to regulate Christian Cooper was a move of constructing white womanhood through the co-constitutedness of race and gender and policing. Amy performed her gender by playing damsel in distress. Her whiteness was showing, though, because she played her gender by explicitly mentioning Christian’s race. Note as well that it may be this violation of so-called colorblindness that galled observers the most. If Amy Cooper had not mentioned Christian Cooper’s race, black people would have been clear on what she was up to, but it would have been harder to explain to whites.

Policing was crucial to the gender and race moves involved in this interaction, though, since it played out through a phone call to 911. The police are known to grant whites greater credibility than blacks.¹³⁴ In keeping with the famous criminal law cases noted above, Amy expected Christian’s presence near her to mandate police intervention. The privileges of white womanhood are secured by the ability to call the police if cultural norms are ineffective in effectuating the white woman’s current will about how close black men are to her. And Christian clearly knew he was being threatened by the call to the police.

While the Christian Cooper incident is about the co-constitutedness of race and gender and policing, it is also specifically about the construction of the meaning of black masculinities. The call simultaneously relies on a construction of black manhood as dangerous and as vulnerable. Christian was constructed as dangerous by the very idea that Amy had to call the police on him. Given the history of the black man as always-already suspect,¹³⁵ specifically identifying Christian as an “African American man” triggered the figure of the “Bad Black Man” who is bestial, criminal, and lascivious.¹³⁶

Simultaneously, Amy Cooper’s call assumed that Christian Cooper was vulnerable because of his status as a black man. Amy knew she could rely on the police to take her side, and she knew that Christian expected as much as

¹³³ See Ehrenreich, *supra* note 130, at 291 (defining “compensatory subordination”).

¹³⁴ Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 372 (2019) (“As Professor Sheri Lynn Johnson has established previously, skepticism of Black credibility is a part of a larger, historically created space in which those who are deemed rational, reliable, and worthy of belief are White and male.”); see also Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 865–67 (2020) (discussing incidents of whites calling police on black people for little reason).

¹³⁵ See generally Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339 (2015) (coining term); see also Taja-Nia Y. Henderson, *Property, Penalty, and (Racial) Profiling*, 12 STAN. J. C.R. & C.L. 177, 180 (2016) (referring to “the making of race, specifically blackness, into a proxy for criminality”).

¹³⁶ See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 857 (2006) (defining the “Bad Black Man” image).

well. Being a black man means both being presumed dangerous and being subject to hyper-policing because of that presumption. Amy was using her white privilege to one-up Christian in their dispute about her illegally unleashed dog. She had that advantage because he was a black man, and he was thus presumably, and rightfully, afraid of police abuse.

Despite Christian's vulnerability, though, Amy's gambit failed. Amy's error was to call the police on a black man who was so hard to characterize as a danger. He was, after all, a "birder" and not exactly the traditional black "boogeyman." This incident exemplifies the fact that norms about the meanings of blackness, masculinities, and policing are constantly being constructed and re-constructed in the interplay between law and culture. Socio-legal understandings about the badness of black men are changing. From the era of slavery, through Reconstruction, Jim Crow, and beyond, black manhood simply connoted danger, especially of sexual predation of white women, in the white imagination.¹³⁷ But in the post-civil rights era, not every black man is presumed bad, so some black men must be treated as good.¹³⁸ A birder might be a "respectable" black man. An anxiety thus emerges about how to know the difference between the "Bad Black Man" and the "Good Black Man" within the politics of respectability.

Nonetheless, the still largely unchecked power of police to abuse black men means every white civilian has a power over black people. White civilians call the police on black people, often with full knowledge or willful ignorance of what the police may subsequently do. In the case of Elijah McClain, for instance, the results of a 911 call can be deadly.¹³⁹ This allows the Amy Coopers and Sarah Braaschs¹⁴⁰ of the world to threaten black people with the police. The phenomenon of "Permit Patty," "Barbeque Becky," and so on is so common it has been collectively nicknamed "white-caller crime,"¹⁴¹ which has invited a legal response. For instance, some jurisdictions have passed or considered laws

¹³⁷ See generally MUHAMMAD, *supra* note 77 (tracing development of criminalization of blacks).

¹³⁸ See Cooper, *supra* note 136, at 858 (contending shifting norms about Bad Black Man lead to "post-civil rights anxiety").

¹³⁹ See Lucy Tompkins, *Here's What You Need to Know About Elijah McClain's Death*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [<https://perma.cc/6G3Z-4MP9>] (describing police killing of McClain).

¹⁴⁰ In a story similar to that of Amy Cooper calling the police on Christian Cooper, Sarah Braasch is a white graduate student who called Yale campus police when she encountered a black fellow student, Lolade Siyonbola, sleeping in a dorm common room. See Brakkton Booker, *Amy Cooper, White Woman Who Called Police on Black Bird-Watcher, Has Charge Dismissed*, NPR (Feb. 16, 2021, 1:21 PM), <https://www.npr.org/2021/02/16/968372253> [<https://perma.cc/6N3S-N8LB>]; Cleve R. Wootson, Jr., *A Black Yale Student Fell Asleep in Her Dorm's Common Room. A White Student Called Police.*, WASH. POST (May 11, 2018, 5:07 AM), <https://www.washingtonpost.com/news/grade-point/wp/2018/05/10/a-black-yale-student-fell-asleep-in-her-dorms-common-room-a-white-student-called-police> [<https://perma.cc/9L27-L7PE>].

¹⁴¹ See McNamarah, *supra* note 134, at 335 n.*.

making it a hate crime to make false accusations that are based on race, gender, or religion during a 911 call.¹⁴² While we are not in favor of increasing the number of crimes and punishments on the books, we understand why people feel the need for white-caller crime laws.

The takeaway from the Christian Cooper case study is that centuries of building white male sexual fear into American culture and law has been about the policing of white women's sexuality through the policing of black men's bodies. First, our culture and law embed an abstract perspective that tracks the hegemonic version of whiteness and the hegemonic version of masculinity¹⁴³ This viewpoint incorporates a fear that black men will sexually abuse white women. Historically, white men had reason for such fear, for they constantly raped enslaved black women.¹⁴⁴ Second, this sexuality fear resulted in policing of white women's sexuality. Western thought incorporated a Madonna/whore dichotomy as well as a white/black dichotomy between "good" women and "bad" women. White women could be "good," but only if they closely constricted their sexuality, including by staying out of the public sphere.¹⁴⁵ They were thus on a pedestal but also in a cage. Finally, white men's sexual fear was enacted through the splitting off of black men as the source of a threat to white women's sexuality. The policing of white women is thus linked to the policing of black men. This is why Amy Cooper knew that she could threaten Christian Cooper with police brutality by calling 911. She was exercising the compensatory subordination of using her position on a pedestal as a means of one-upping a member of another subordinated group.

B. *Jannie Ligons: The Sexual Non-Privilege of Black Women*

On June 18, 2014, Oklahoma City Police Officer Daniel Holtzclaw stopped Jannie Ligons for "swerving."¹⁴⁶ He ordered her out of her car and to put her

¹⁴² See GRAND RAPIDS, MICH., MUN. CODE ORDINANCES No. 2019-43, § 1 (2019); see also Sophie Quinton, *State Lawmakers Crack Down on Racially Motivated 911 Calls*, PEW CHARITABLE TRS.: STATELINE (July 14, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/14/state-lawmakers-crack-down-on-racially-motivated-911-calls> [<https://perma.cc/43AG-B9LL>].

¹⁴³ By "hegemonic," we mean dominant by means of persuasion in political and popular discourses. Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling, and Arvizu*, 47 VILL. L. REV. 851, 859 n.53 (2002).

¹⁴⁴ Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51, 80 (2005) ("White men could freely rape enslaved black women without adverse legal consequence.").

¹⁴⁵ Jessica Fink, *Madonnas and Whores in the Workplace*, 22 WM. & MARY J. WOMEN & L. 255, 290 (2016) ("[W]omen fall into one of two roles—either that of the Madonna (pure, pristine, and sexually muted), or that of the whore (sexually promiscuous and often vilified).").

¹⁴⁶ Lorne Fultonberg, *Graphic: Interrogation of Former Oklahoma City Officer Following First Accusation of Sex Crimes*, OKLA. NEWS 4 (Feb. 5, 2016, 9:34 AM), <https://kfor.com/news/watch-police-interrogation-of-daniel-holtzclaw> [<https://perma.cc/9PTC-3H7A>]; KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 210 (2018).

hands on top of the passenger side of his police car.¹⁴⁷ Holtzclaw then groped Ligons under the guise of doing a *Terry* search.¹⁴⁸ He then demanded that Ligons expose herself to him.¹⁴⁹ Ligons pleaded, “[y]ou’re not supposed to do that, sir. . . . You don’t do that.”¹⁵⁰ Holtzclaw then coerced Ligons into performing fellatio on him in the back of his patrol car.¹⁵¹

The subsequent investigation revealed twelve additional women who accused Holtzclaw of sexual misconduct, including sexual intercourse by coercion.¹⁵² All thirteen women were black.¹⁵³ Holtzclaw stopped the women for presumptively innocent activities, such as “walking, sitting in their car, and driving.”¹⁵⁴ Then, he ran the women’s names “through law enforcement databases for existing warrants and to check their arrest record[s].”¹⁵⁵ Some of the women Holtzclaw had sex with¹⁵⁶ had criminal records, including for sex work and substance abuse, harming their credibility if they were to come forward about Holtzclaw.¹⁵⁷ Many were subject to immediate arrest at any moment due to pending warrants for unpaid tickets.¹⁵⁸ Holtzclaw threatened some of the women with arrest if they refused his advances.¹⁵⁹ Police investigator Kim Davis thus concluded that Holtzclaw must have been targeting vulnerable women.¹⁶⁰

The differences between Ligons and the other women suggest why Ligons was the first to file a complaint against Holtzclaw. As a 57-year-old director of

¹⁴⁷ Joseph Diaz et al., *Ex-Oklahoma City Cop Spending 263 Years in Prison for Rape and His Accusers Share Their Stories*, ABC NEWS (Apr. 21, 2016, 9:31 AM), <https://abcnews.go.com/US/oklahoma-city-cop-spending-263-years-prison-rape/story?id=38517467> [<https://perma.cc/9VAQ-NAXY>].

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Ben Fenwick & Alan Schwarz, *In Rape Case of Oklahoma Officer, Victims Hope Conviction Will Aid Cause*, N.Y. TIMES (Dec. 11, 2015), <https://www.nytimes.com/2015/12/12/us/daniel-holtzclaw-oklahoma-police-rape-case.html> [<https://perma.cc/6VPX-HBUT>]. A fourteenth woman who was not part of the criminal case filed a complaint against Holtzclaw in 2013, but the Department did not pursue it. See Jason Silverstein, *Oklahoma City Police Ignored Early Sexual Assault Complaint About Officer Daniel Holtzclaw, Lawsuit Says*, N.Y. DAILY NEWS (Mar. 8, 2016), <https://www.nydailynews.com/news/national/cops-early-complaint-daniel-holtzclaw-lawsuit-article-1.2557135> [<https://perma.cc/XPS8-VDR2>].

¹⁵³ Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1499 (2016).

¹⁵⁴ *Id.* at 1500.

¹⁵⁵ *Id.*

¹⁵⁶ We realize that Holtzclaw assaulted all of these women, but the all-white jury acquitted him on charges relating to five of the thirteen women. See Fenwick & Schwarz, *supra* note 152.

¹⁵⁷ Carbado, *supra* note 153, at 1499–500.

¹⁵⁸ *Id.* at 1499.

¹⁵⁹ *Id.* at 1501.

¹⁶⁰ MANNE, *supra* note 146, at 212.

a day care center in Oklahoma City, she felt able to rely on the criminal justice system.¹⁶¹ An all-white jury convicted Holtzclaw based on the testimony of eight of the thirteen women.¹⁶² Holtzclaw was sentenced to 263 years in prison.¹⁶³

Another story reinforces the message of Ligons' ordeal. In 2019, a black transgender woman, whose identity has remained anonymous, reported to hospital staff at Rush University Medical Center that she was sexually assaulted by a police sergeant.¹⁶⁴ She had been stopped by the sergeant in a neighborhood where sex work is known to take place and accused of being a sex worker, though she denied it.¹⁶⁵ The sergeant threatened to arrest her unless she performed a sex act because, he said, "that's what you do."¹⁶⁶ He then instructed the woman to get into the front seat of the police car, drove her to an alley, exposed himself, and forced her to perform a sex act.¹⁶⁷ She complied because she was afraid.¹⁶⁸ The incident was investigated by the police department, and the officer was ordered to relinquish his police powers, but he was not charged with the crime.¹⁶⁹

How should we understand police sexual assaults in relation to the co-constitutedness of race and gender violence? First, we must recognize that hypersexualization has always been a foundational characteristic in the surveillance of the black female body. Saartjie Baartman, known as the Hottentot Venus, is the first and perhaps quintessential example of how the black female body is eroticized by the white masculine gaze.¹⁷⁰ Patricia Hill Collins argues that historically in the United States, the black woman has been defined by her sexuality, constantly on display and being watched.¹⁷¹ She becomes an ever-available outlet for white men to express sexual desire.¹⁷² Thus, black women were always regarded as sexually exploitable through systems of rape and concubinage and subjected to sex-specific forms of racial violence.¹⁷³ In the mean-

¹⁶¹ *Id.* at 210, 212.

¹⁶² *Id.* at 210; Fenwick & Schwarz, *supra* note 152.

¹⁶³ MANNE, *supra* note 146.

¹⁶⁴ Jeremy Goner, *Chicago Police Investigating If Sergeant Forced Transgender Woman to Perform Sex Act*, CHI. TRIB. (June 17, 2019, 5:00 AM), <https://www.chicagotribune.com/news/breaking/ct-met-chicago-cop-sex-assault-transgender-woman-20190606-story.html> [https://perma.cc/AT66-TTE4].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ RACHEL HOLMES, *AFRICAN QUEEN: THE REAL LIFE OF THE HOTTENTOT VENUS* 3–4 (2007); *see also* Case of the Hottentot Venus [1810] 104 Eng. Rep. 195, 195 (UK).

¹⁷¹ Patricia Hill Collins, *Pornography and Black Women's Bodies*, in *GENDER VIOLENCE: INTERDISCIPLINARY PERSPECTIVES* 389, 389–90 (Laura L. O'Toole et al. eds., 2d ed. 2007).

¹⁷² *See* COLLINS, *supra* note 131, at 145 (defining stereotype's effect).

¹⁷³ *See* YOLANDE M. S. TOMLINSON, *BLACK WOMEN'S BLUEPRINT, INVISIBLE BETRAYAL: POLICE VIOLENCE AND THE RAPES OF BLACK WOMEN IN THE UNITED STATES* ¶ 7 (2014).

time, white women were required to maintain sexual respectability and were permitted to express their sexuality only within the confines of marriage to white men.¹⁷⁴ As Ann Stoler observes, “[w]ho bedded and wedded with whom” has been central to determining hierarchies of race and gender since the era of colonial slavery.¹⁷⁵ White women and black women were set as foils to one another, one sexually hot and the other sexually cold, but both subject to the control of white men. The policing of white female sexuality, to ensure that they were accessible only to white men, came hand in hand with the policing of black men as potential rapists of white women.

Second, against this backdrop, three insights emerge from the Ligons case and that of the anonymous transgender woman. First, Holtzclaw’s behavior was enabled by his role as a police officer. He relied on the fact that courts allow police officers to stop people on flimsy grounds and then issue warrant checks on them. He hoped to confirm that his target was “vulnerable” because she had an outstanding warrant or a criminal record.¹⁷⁶ He would then use that information to threaten the women with arrest if they refused his sexual advances.¹⁷⁷

Next, class played a role in these women’s vulnerabilities. The majority of these women were poor, leaving them with few resources with which to challenge Holtzclaw’s behavior. They could not afford an investigator or lawyer to buttress their potential complaints. Their jobs might also be under threat if a police officer came around asking questions about them.

Finally, as philosopher Kate Manne observes, black women were “perfect targets” for Holtzclaw because, unlike white women like Amy Cooper, they “were least likely to be believed.”¹⁷⁸ Our history of preventing black testimony and the especially virulent stereotype of black women as liars mean that black women are not credible.¹⁷⁹ The jezebel image of black women as lascivious is especially relevant to policing, as black women are profiled as more likely to be sex workers and subject to more sexually invasive searches.¹⁸⁰ Holtzclaw likely played on the fact that his black victims were unlikely to be believed if they complained about his behavior. It is thus no surprise that the first twelve women made no formal complaint until they became witnesses against him in the case spurred by Ligons.¹⁸¹

¹⁷⁴ Ann L. Stoler, *Making Empire Respectable: The Politics of Race and Sexual Morality in 20th-Century Colonial Cultures*, 16 AM. ETHNOLOGIST 634, 636–37, 643 (1989).

¹⁷⁵ *Id.* at 636–37.

¹⁷⁶ Carbado, *supra* note 153, at 1500.

¹⁷⁷ *Id.* at 1501.

¹⁷⁸ MANNE, *supra* note 146, at 212.

¹⁷⁹ Carbado, *supra* note 153, at 1500 n.96.

¹⁸⁰ Sherri Sharma, *Beyond “Driving While Black” and “Flying While Brown”: Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling*, 12 COLUM. J. GENDER & L. 275, 289 (2003).

¹⁸¹ Silverstein, *supra* note 152 (a fourteenth woman who was not part of the criminal case filed a complaint against Holtzclaw in 2013, saying he pinned her against a wall, rubbed his

The takeaway from the Lignons case and the case of the transgender woman is that black women continue to serve as contrast figures for white women. Whereas hegemonic whiteness and hegemonic masculinity continue to see white women as objects for protection, they see black women as objects for sexual gratification. That viewpoint is reflected in policing behavior. As Andrea Ritchie established in her book, *Invisible No More*, police sexual assault is particularly a problem with respect to women of color.¹⁸² This harkens back to the Madonna/whore dichotomy discussed in relation to the Christian Cooper case study. Police protect white women, albeit as part of keeping them in a cage; police prey upon women of color, in keeping with their role as always-already being “fallen” women.

C. Sandra Bland and Elijah Taylor: Suspicion, Policing, and the Presumption of Black Dangerousness

Of course, black women experience more than just sexual violence at the hands of police. As the #sayhername movement has highlighted,¹⁸³ black women are also killed by police at high rates,¹⁸⁴ both intentionally and unintentionally. Yet, as Kimberlé Crenshaw demonstrated in a widely viewed TED talk, most people know the names of black men killed by police, while very few people know the names of the women.¹⁸⁵ In part, this is a result of the invisibility that shrouds black women’s discrimination claims.¹⁸⁶ For many black women, it may also be because their deaths do not fit the script that has been developed to explain deadly interactions between police and black people.¹⁸⁷ That script constructs both black victims and white police officers as masculine and, as explained in the previous Sections, incorporates particular historical stereotypes of black masculine threat to explain police interactions.

crotch against her, and forced her into his car, but the Department did not pursue the complaint).

¹⁸² See generally RITCHIE, *supra* note 27 (making this point).

¹⁸³ KIMBERLÉ WILLIAMS CRENSHAW ET AL., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN I, 4 (2015); see also AFR. AM. POL’Y F., #SayHerName, <https://www.aapf.org/sayhername> [<https://perma.cc/LD59-WFUT>].

¹⁸⁴ Frank Edwards et al., *Risk of Being Killed by the Police in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16793, 16794–95 (2019).

¹⁸⁵ See generally Kimberlé Crenshaw, *The Urgency of Intersectionality*, TED (Oct. 2016), https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality [<https://perma.cc/L33R-R4QK>].

¹⁸⁶ See *supra* notes 1–3, 6 (discussing Crenshaw’s early work on intersectionality); see also CRENSHAW ET AL., *supra* note 183, at 7 (discussing specific instances where media coverage cited statistics about police killings of black people of all genders but described the problem as one affecting only black men).

¹⁸⁷ See Josie Pickens, *Can We Talk About How Black Women Are Treated as Threats Too?*, ROOT (Aug. 24, 2014, 3:03 AM), <https://www.theroot.com/can-we-talk-about-how-black-women-are-treated-as-threat-1790876821> [<https://perma.cc/5BD3-B9DL>] (noting the media invisibility of stories about police violence against black women and the varied ways in which this violence may play out).

Sandra Bland's story may be particularly sad because the initial contact was so unwarranted. Officer Brian Encinia observed Bland driving back from an interview for her dream job at Prairie View A&M University, a historically black university located in Texas.¹⁸⁸ Encinia was suspicious of Bland but did not have the reasonable suspicion necessary to seize her.¹⁸⁹ So he followed her closely, then pulled her over for failing to signal a lane change.¹⁹⁰ He ordered her to put out her cigarette.¹⁹¹ She objected.¹⁹² Encinia quickly escalated the encounter, ordering her out of the car and then starting to drag her out of her car.¹⁹³ He drew a stun gun and infamously proclaimed, "I will light you up!"¹⁹⁴ Two days later, Bland was found dead, hung in her jail cell.¹⁹⁵ The story is seen by some as a suicide induced by Bland's mental illness;¹⁹⁶ we see it as principally about the presumption of black dangerousness.

Malcolm Gladwell convincingly tells the Bland story as the result of a police officer doing what he was taught under "proactive policing" tactics.¹⁹⁷ Gladwell shows that the predominant mode of policing today is to manufacture encounters with suspicious people even when there is no initial basis for stopping them.¹⁹⁸ Police officers are then to watch for "curiosity ticklers" that suggest something is awry.¹⁹⁹ Encinia did what he was taught when he followed Bland for having out-of-state license plates,²⁰⁰ conducted a "concealed interrogation" of Bland,²⁰¹ and sought to assert control over her.²⁰² For Gladwell, Bland's death is a natural product of our current policing methods. We might agree with Gladwell that the current mode of policing in general is problematic, but we specifically blame Bland's death on the way police officers disproportionately fear black people.

Elijah McClain's death in Colorado may help illustrate the interaction between proactive policing and racialized fear. McClain was walking home from

¹⁸⁸ MALCOLM GLADWELL, *TALKING TO STRANGERS: WHAT WE SHOULD KNOW ABOUT THE PEOPLE WE DON'T KNOW* 1 (2019).

¹⁸⁹ *Id.* at 2.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 3.

¹⁹⁴ *Id.* at 4.

¹⁹⁵ *Id.*

¹⁹⁶ See David Montgomery, *The Death of Sandra Bland: Is There Anything Left to Investigate?*, N.Y. TIMES (May 8, 2019), <https://www.nytimes.com/2019/05/08/us/sandra-bland-texas-death.html> [<https://perma.cc/2GZ5-N9Z4>].

¹⁹⁷ GLADWELL, *supra* note 188, at 325–26 (discussing Encinia's actions). See generally NAT'L ACAD. OF SCIS., ENG'G, & MED., *PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES* (2018) (discussing proactive policing).

¹⁹⁸ GLADWELL, *supra* note 188, at 321–22.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 325.

²⁰¹ *Id.* at 328.

²⁰² *Id.* at 333.

the store, listening to music in his headphones, when police ordered him to stop, then grabbed him by the arm.²⁰³ When McClain, who had committed no crime, asked the officer to let him go, the officers tackled and restrained him, subduing him using a carotid choke hold that led to his death.²⁰⁴

While police may investigate a range of calls and complaints proactively, they operate through a different lens when the suspect is black. A caller might describe the person as more menacing or suspicious because of his or her own stereotypes about black people.²⁰⁵ For example, the police who confronted McClain were responding to a 911 caller who said he “looked sketchy.”²⁰⁶ If the caller includes race in the description, the mention of blackness might prime unconscious associations with criminality and violence, heightening the expectation of a dangerous confrontation.²⁰⁷ The history of black interaction with police might also lead the suspect to behave more defensively or even to run.²⁰⁸ An interaction that might otherwise have ended peacefully can instead end in death, even when the person who is killed was not committing any crime or posing any threat in the first place. As in many other high-profile cases, McClain’s killers were not immediately charged or fired.²⁰⁹ Although we believe the officer could have been charged, we attribute the initial failure to charge or convict in such cases to the law’s deference to police assessments of danger once a confrontation begins. The law says little, however, about the behavior of police in creating the confrontation in the first place.

²⁰³ See Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [<https://perma.cc/F4R2-7Y89>] (detailing police killing of McClain).

²⁰⁴ The chokehold rendered him unconscious, and paramedics then injected him with the sedative ketamine. He went into cardiac arrest on the way to the hospital. *Id.* Specifically, he was killed by a lateral vascular neck restraint, a tactic used to subdue and control in which pressure is applied to the carotid artery on the side of the neck. See Ron Martinelli, *Reconsidering Carotid Control*, POLICE MAG. (Jan. 30, 2014), <https://www.policemag.com/341089/reconsidering-carotid-control> [<https://perma.cc/VE7J-DVT9>] (describing different types of neck restraints).

²⁰⁵ Christina Carrega, *‘Because They Can Get Away with It’: Why African-Americans Are Blamed for Crimes They Didn’t Commit: Experts*, ABC NEWS (May 31, 2020, 6:50 AM), <https://abcnews.go.com/US/african-americans-blamed-crimes-commit-experts/story?id=70906828> [<https://perma.cc/VE6N-Z6D6>].

²⁰⁶ Tompkins, *supra* note 203.

²⁰⁷ See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 876 (2004) (discussing priming).

²⁰⁸ See Trevor George Gardner, *Police Violence and the African American Procedural Habitus*, 100 B.U. L. REV. 849, 856 (2020); *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (“[T]he finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt.”).

²⁰⁹ Claire Lampen, *What We Know About the Killing of Elijah McClain*, CUT (Feb. 22, 2021), <https://www.thecut.com/2021/02/the-killing-of-elijah-mcclain-everything-we-know.html> [<https://perma.cc/4TVG-F2X5>]. Eventually, shortly before this issue went to press, the police officers and paramedics involved in McClain’s death were indicted for manslaughter and criminally negligent homicide.

While black men are known to be thought of as inherently dangerous, Bland's story shows how women also can be caught up in that stereotype. Encinia saw Bland as dangerous because of clues of unusual activity for which he had been taught to look. Gladwell points out that the dominant manual on police tactics tells officers to always be looking for signs of suspicion from anyone they encounter, signs that it calls "curiosity ticklers."²¹⁰ Bland's out-of-state license plates initiated Encinia's suspicions, despite the unreasonableness of that assumption.²¹¹ Consistent with proactive policing techniques, Encinia was looking for an excuse to pull over Bland.²¹² Encinia basically admitted that he forced Bland into a violation and then used it to seize her and run a warrant check.²¹³ He then took Bland's anger at being racially profiled and delayed as a sign that she was dangerous.²¹⁴ For McClain and Bland, their understandable indignance at being stopped for a minor or nonexistent infraction and their requests to be let go were interpreted by the police as acts of defiance. Where a white person asking questions might be viewed as merely conversational, a black person asking similar questions upsets the racial hierarchy. Any failure to submit completely may be interpreted by police, and accepted by reviewing prosecutors and courts, as justification for arrest or violence. When Bland lit a cigarette during her encounter with Encinia, says Gladwell, Encinia took this as a challenge to his authority and "snap[ped]."²¹⁵ This snapping at the possibility of challenges to a person's authority is what one of the authors of this Introduction, Frank Rudy Cooper, has called a response to a "masculinity challenge."²¹⁶

The masculinity contest that can arise between police officers and civilians is not limited to male officers dealing with male subjects. As one of our Symposium authors, Ann C. McGinley, has noted, "masculinities are not merely individualized competitive behaviors. Rather, masculinities, as used here, comprise a social structure based in gender and around which many institutions revolve."²¹⁷ Policing is masculine even when the police officer is a woman. Male police officers in particular, but not necessarily exclusively, get a boost to their personal masculine esteem from the masculinity associated with the job.²¹⁸ So the challenge that a female suspect makes to a police officer, especially a

²¹⁰ GLADWELL, *supra* note 188, at 321–22.

²¹¹ *Id.* at 325. Being from out of state, while commonly used by police as a sign of suspicion, does not constitute reasonable suspicion and arguably should have a value of zero since people have a right of mobility between states.

²¹² *Id.*

²¹³ *See id.* at 314 (quoting Encinia not contesting Bland's characterization of what caused the alleged traffic violation); *id.* at 326 n.*.

²¹⁴ *See id.* at 314–16 (discussing Encinia mistakes).

²¹⁵ *Id.* at 316.

²¹⁶ Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 698 (2009).

²¹⁷ Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 239 (2015).

²¹⁸ *Id.* at 247.

male one, can be a challenge to his personal masculine esteem. Hence, Bland's refusal to put out her cigarette did not just prick Encinia's ego; it challenged his role esteem as a police officer and his personal masculine esteem as well.

With the nature of masculinities in mind, we can see that the always-already suspect or "presumed-dangerous" police stereotype of black men does not apply only to black men. As set forth in the *Say Her Name* report:

[M]any killings of Black women could be understood within the existing frames surrounding racial profiling and the use of lethal force. The solution to their absence is not complex; Black women can be lifted up across the movement through a collective commitment to recognize what is right in front of us.²¹⁹

Encinia's interaction with Bland shows that he was suspicious of her from the start. For instance, with no good reason to suspect Bland of being dangerous except that she did not stay absolutely still while he ran his warrant check and that she was black, he approached her the second time as though she was about to shoot him.²²⁰ In assessing the potential for danger, Encinia also drew on the stereotype of "angry black woman."²²¹ Trina Jones and Kimberley Norwood describe this stereotype as "innately intersectional" in the sense that it is only applied to black women, and it draws upon race- and gender-specific tropes about them.²²² According to this stereotype, the black woman is "out of control, disagreeable, overly aggressive, physically threatening, loud (even when she speaks softly), and to be feared. She will not stay in her 'place.' She is not human."²²³ The whole incident was colored by Encinia's presumption that Bland was suspicious, dangerous, and defiant.

D. *Breonna Taylor and Charleena Lyles: Black Women as Collateral Damage of Expanded Police Powers*

Bland's death exemplifies how the expansive role and powers of the police manufacture confrontation and enable violence. It highlights the problem of numbers by showing how solutions focused on "more police" are likely to lead to more confrontations and ultimately increase, not reduce, violence. The story

²¹⁹ CRENSHAW ET AL., *supra* note 183, at 5.

²²⁰ GLADWELL, *supra* note 188, at 329.

²²¹ See Tyina Steptoe, *Sandra Bland, Black Women, and Texas Law Enforcement*, BLACK PERSPS. (July 13, 2018), <https://www.aaihs.org/sandra-bland-black-women-and-texas-law-enforcement> [<https://perma.cc/LXW7-DAPT>] (noting how Encinia used "allegations of inappropriate comportment" to justify his arrest of Bland and linking the encounter to historical treatment of black women by police in East Texas); see also Tara Trower Doolittle, Opinion, *Sandra Bland Is Dead Because She Was 'Uppity'*, DALL. MORNING NEWS (July 27, 2015, 4:06 PM), <https://www.dallasnews.com/opinion/commentary/2015/07/27/tara-trower-doolittle-sandra-bland-is-dead-because-she-was-uppity> [<https://perma.cc/N4YX-L655>] ("At the end of the day . . . Sandra Bland is dead because she was an uppity black woman who did not know her place in East Texas.").

²²² Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2049 (2017).

²²³ *Id.*

of two other black women illustrates the problem of style. The hyper-masculine, military style of modern policing leaves casualties in its wake, even when the police are investigating evidence or assisting people, rather than confronting suspects. As we describe here, black women are particularly vulnerable to becoming casualties, even when they do not leave home.

Breonna Taylor was at home with her partner, Kenneth Walker, when three police officers broke her door open with a battering ram.²²⁴ Believing they were burglars, Walker recovered his firearm and fired at them, hitting one officer in the leg.²²⁵ The officers responded by shooting more than twenty rounds into the house, killing Taylor in her bed and even hitting her neighbor's house.²²⁶ Taylor was not suspected of any crime.²²⁷ Police were not pursuing her, nor did they allege that she acted suspicious or threatening.²²⁸ According to a lawsuit filed by her family, the officers were in plain clothes, drove unmarked cars, and did not knock or announce their presence before entering.²²⁹ The officers' return fire might be described as self-defense in response to the threat posed by

²²⁴ Darcy Costello, *Breonna Taylor's Pregnant Neighbor Is Suing Police Officers, Saying They 'Blindly Fired,'* COURIER J. (June 5, 2020, 3:08 PM), <https://www.courier-journal.com/story/news/local/2020/06/04/breonna-taylors-neighbor-sues-louisville-police-after-shooting/3148434001> [<https://perma.cc/DX3U-6TTK>]. At the time of this writing, three of the officers involved had lost their jobs, including the one believed to have shot Taylor, the one who fired into her neighbor's house, and the one who sought the warrant. Dylan Lovan, *2 Detectives Involved in Breonna Taylor's Death Are Fired*, AP NEWS (Jan. 6, 2021), <https://apnews.com/article/breonna-taylor-cops-fired-910c87438ebc09e74eac8a4f4678fb63> [<https://perma.cc/3JXE-5JL7>]. A grand jury indicted one officer for wanton endangerment of Taylor's neighbor, but no officer was charged for Taylor's death. Bill Hutchinson, *Former Louisville Officer Charged in Breonna Taylor Case Sued over 2018 Sexual Assault*, ABC NEWS (Nov. 11, 2020, 12:29 PM), <https://abcnews.go.com/US/louisville-officer-charged-breonna-taylor-case-sued-alleged/story?id=74146510> [<https://perma.cc/X4HU-K5PZ>]. The Federal Bureau of Investigation is investigating whether to criminally charge the officer for violations of civil rights, and the U.S. Department of Justice opened a civil investigation into the Louisville Police Department. Katie Benner, *Justice Dept. Opens Inquiry into Louisville Police*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/2021/04/26/us/politics/justice-department-louisville-police-investigation.html> [<https://perma.cc/B2UJ-SDUR>]. The city paid \$12 million to settle a civil lawsuit filed by her family. Rukmini Callimachi, *Breonna Taylor's Family to Receive \$12 Million Settlement from City of Louisville*, N.Y. TIMES (Sep. 15, 2020), <https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html> [<https://perma.cc/Y5MZ-7NHS>].

²²⁵ Costello, *supra* note 224.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Complaint at 1–2, *Palmer v. Hankison*, No. 20-CI-002694 (Jefferson Cir. Ct. Apr. 27, 2020). The Louisville Metropolitan Police Department has said its officers did announce themselves. Victoria Albert, *911 Call from Breonna Taylor's Shooting Death Released: "Somebody Kicked in the Door and Shot My Girlfriend,"* CBS NEWS (May 29, 2020, 7:54 AM), <https://www.cbsnews.com/news/breonna-taylor-kenneth-walker-911-call-police-shooting> [<https://perma.cc/VJT8-VEN6>].

Walker, but no narrative of personal threat or suspicion explains why they stormed Taylor's house in the first place.

The police were investigating suspected drug activity by two men who lived several miles away.²³⁰ They had a search warrant that covered Taylor's house because they believed that one of the suspects, Taylor's ex-boyfriend, received drug-related packages at her address.²³¹ The police have never alleged that they believed the targets of the investigation would be at Taylor's house and furthermore, never alleged that they specifically feared violence.

There are striking similarities between Taylor's death and the deaths of other black women who were killed when police wielding firepower burst into their homes, including Korryn Gaines,²³² Charleena Lyles,²³³ Atatiana Jefferson,²³⁴ Tanisha Anderson,²³⁵ and Michelle Cusseaux.²³⁶ Each of these women was at home when police arrived and initiated a confrontation that ended in her death. In some cases, the police were serving warrants, while in others the police were conducting health or safety checks.²³⁷ None of the aforementioned

²³⁰ Michael Levenson, *Prosecutors to Drop Charges Against Boyfriend of Breonna Taylor*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/05/22/us/Breonna-Taylor-Kenneth-Walker.html> [<https://perma.cc/9K5K-NP28>].

²³¹ *Id.*

²³² Staff, *Korryn Gaines: The Six-Hour Police Standoff*, BALT. SUN, <http://data.baltimoresun.com/news/korryn-gaines/> [<https://perma.cc/BNN5-AY5Z>] (collecting documents related to Gaines' death); Rachel Menitoff, *Family of Korryn Gaines, 23-Year-Old Killed by Baltimore County Police in 2016, Wins \$38M Appeal in Wrongful Death Lawsuit*, CBS BALT. (July 1, 2020, 11:45 PM), <https://baltimore.cbslocal.com/2020/07/01/korryn-gaines-wrongful-death-lawsuit-baltimore-county-latest> [<https://perma.cc/63QF-A39Q>].

²³³ Sara Jean Green, *Hundreds Gather to Remember Charleena Lyles, a Black Woman Killed by Seattle Police in 2017, Amid Growing Movement Against Police Violence*, SEATTLE TIMES (Aug. 12, 2020, 11:35 AM), <https://www.seattletimes.com/seattle-news/hundreds-gather-to-remember-charleena-lyles-a-black-woman-killed-by-seattle-police-in-2017-amid-growing-movement-against-police-violence> [<https://perma.cc/PT49-NPYR>].

²³⁴ Stacy M. Brown, *Remembering Atatiana Jefferson: Ex-Fort Worth Police Officer Indicted on Murder Charges*, DALL. WEEKLY (Jan. 15, 2020), <https://www.dallasweekly.com/articles/remember-atatiana-jefferson-ex-fort-worth-police-officer-indicted-on-murder%C2%ADcharges/> [<https://perma.cc/N364-R7CZ>]; Erik Ortiz, *Fort Worth Police Officer Who Fatally Shot Atatiana Jefferson Indicted on Murder Charge*, NBC NEWS (Dec. 20, 2019, 11:02 AM), <https://www.nbcnews.com/news/us-news/fort-worth-police-officer-who-fatally-shot-atatiana-jefferson-indicted-n1105916> [<https://perma.cc/Y4WL-R66F>].

²³⁵ Michelle Dean, *'Black Women Unnamed': How Tanisha Anderson's Bad Day Turned into Her Last*, GUARDIAN (June 5, 2015, 11:49 AM), <https://www.theguardian.com/us-news/2015/jun/05/black-women-police-killing-tanisha-anderson> [<https://perma.cc/Z9RQ-MP4L>] (noting that 7 out of 22 black women killed by police that year were killed in their homes).

²³⁶ Editorial Board, *Opinion, Did Michelle Cusseaux Have to Die?*, AZCENTRAL. (Aug. 22, 2014, 6:09 PM), <https://www.azcentral.com/story/opinion/editorial/2014/08/18/michelle-cusseaux-mental-illness/14266383> [<https://perma.cc/TE6K-PM3C>].

²³⁷ Gaines was killed by police when officers came to her house to serve an arrest warrant. See Menitoff, *supra* note 232. Lyles, Jefferson, Anderson, and Cusseaux were killed after police were called to their respective homes for health or safety checks. See *supra* notes

women were involved in a conflict with police or were under suspicion for a crime prior to the call.

This thread of police violence is showy and broad, not focused on a single target. The widespread use of battering rams, military equipment, and surprise tactics underscore the way policing is permeated with masculine posturing, even outside the context of a one-on-one confrontation. The use of tanks and escalated military tactics in policing is predicated on the fear of hypermasculine blackness, where blackness equals extreme danger that requires extreme precautions. Force in this context is the default response to any situation, directed at anyone who crosses the path of the police and sometimes rendered sloppily. Black women are too often casualties of this performance.

Taylor's death also underscores the absence of any sanctuary from potential police violence.²³⁸ She was killed in her home in the middle of the night.²³⁹ All the women discussed in this section were killed in their homes, many in front of their children.²⁴⁰ The law recognizes that people have a heightened expectation of security in their homes and a correspondingly broader right to defend themselves and their homes.²⁴¹ Indeed, Walker's actions can best be described this way.²⁴² The problem is that when the intruder is a police officer, the

233–36; Andrea J. Ritchie, *Mental Illness Is Not a Capital Crime*, LITERARY HUB (July 31, 2017), <https://lithub.com/mental-illness-is-not-a-capital-crime/> [<https://perma.cc/N8VF-THVB>] (noting that Cusseaux was killed when police came to pick her up for an involuntary mental health commitment and analyzing the way the raced and gendered construction of mental disability facilitates such violent incidents).

²³⁸ Accord Chris Kromm, *From Charleston to Orlando, Sanctuary and Struggle in the South*, FACING S. (June 17, 2016), <https://www.facingsouth.org/2016/06/from-charleston-to-orlando-sanctuary-and-struggle-.html> [<https://perma.cc/3B62-B9LM>] (linking the mass shootings at Mother Emanuel Church in Charleston and the Pulse nightclub in Orlando in that both acts of violence permeated “safe spaces, sanctuaries to build community in a hostile environment”).

²³⁹ Emily Shapiro, *2 Louisville Police Officers Fired for Roles in Breonna Taylor Shooting*, ABC NEWS (Jan. 6, 2021, 11:28 AM), <https://abcnews.go.com/US/louisville-police-officers-fired-roles-breonna-taylor-shooting/story?id=75034979> [<https://perma.cc/8GNS-STKG>].

²⁴⁰ See sources cited *supra* notes 232–36, 239.

²⁴¹ See Jonathan L. Hafetz, “A Man’s Home Is His Castle?”: *Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 180 (2002) (describing how the belief in the sanctity of home underlies common law rules permitting the use of force to defend one’s home and requiring police to announce themselves before they can enter a home, and examining the race and gender specificity of that belief).

²⁴² Walker told police he thought they were burglars and fired in self-defense. See Crystal Bonvillian, *Charges Dropped Against Breonna Taylor’s Boyfriend as Police Chief Retires, FBI Joins Probe*, BOS. 25 NEWS (May 27, 2020, 5:36 PM), <https://www.boston25news.com/news/trending/charges-dropped-against-breonna-taylors-boyfriend-police-chief-retires-fbi-joins-probe/MDUWBEGADNHSVKIWVV3G42BZLA> [<https://perma.cc/4WE3-LE82>]. Nevertheless, he was initially charged with attempted murder before the charges were dropped. *Id.* When compared to the initial unwillingness to charge Jake Gardner and Travis and Gregory and McMichaels (discussed *infra* Sections III.F & III.G), the hasty decision to charge Walker raises questions about black people’s access to self-defense claims. See Shawn E.

justifiable character of defensive force (and the corresponding illegality of the police actions) depends on a complicated network of rules about what police are allowed to do.

To search Taylor's house, police obtained a special kind of warrant known as a "no knock" warrant.²⁴³ Such warrants allow police to skip the typical requirement that they knock, announce their presence, and identify themselves before entering a home to execute a warrant.²⁴⁴ They have their roots in President Nixon's war on drugs, when federal magistrates authorized them on the theory that the "knock and announce" rule allowed drug dealers to destroy evidence before police could enter.²⁴⁵ The U.S. Supreme Court has held that no-knock entries are constitutional in cases where injury to the officer or destruction of evidence is likely or in cases involving escaped prisoners.²⁴⁶ Laws in about thirteen states explicitly authorize them, and many more states permit their use.²⁴⁷ In Taylor's case, it is not clear what the circumstances were that would have justified the need for a no-knock warrant, but a judge approved the request. Police had no reason to believe Taylor's ex-boyfriend was in her house, so the use of a no-knock warrant suggests that they were treating her according to a presumption that she was somehow involved in the drug activity and would likely try to hide or destroy evidence. This makes it more difficult to claim that the police were exceeding the scope of their authority. If prosecutors, judges, and grand juries continue to interpret the officers' actions as legal,²⁴⁸ Taylor's killing will be an unfortunate collateral consequence of policing but will not officially constitute a crime.

Charleena Lyles' story adds another dimension, one that also shaped the fates of Cusseaux and Anderson. Lyles, who according to many accounts was suffering a mental health crisis,²⁴⁹ called the Seattle police to report a burgla-

Fields, *The Elusiveness of Self-Defense for the Black Transgender Community*, 21 Nev L.J. 975 (2021).

²⁴³ Richard A. Opiel, Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/N86N-7ZTD>] (The department later changed the raid orders, instructing officers to knock and announce themselves. The officers claim they did, but neighbors and Taylor's boyfriend say they heard no identification).

²⁴⁴ *Id.*

²⁴⁵ Brian Dolan, *To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing*, 93 ST. JOHN'S L. REV. 201, 211, 219 (2019).

²⁴⁶ See *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

²⁴⁷ Chantal Da Silva, *Where Are No-Knock Warrants Legal? Bipartisan Bill Seeks Ban After Breonna Taylor's Death*, NEWSWEEK (June 12, 2020, 10:30 AM), <https://www.newsweek.com/where-are-no-knock-warrants-legal-bipartisan-bill-seeks-ban-after-breonna-taylors-death-1510478> [<https://perma.cc/3TB3-L6JY>].

²⁴⁸ See *supra* note 224 (describing completed and ongoing legal proceedings).

²⁴⁹ Steve Miletich, *Charleena Lyles Had Long Turned to Seattle Police for Help Before Fatal Confrontation*, SEATTLE TIMES (Aug. 27, 2017, 10:10 AM), <https://www.seattletimes.com/seattle-news/crime/charleena-lyles-had-long-turned-to-seattle-police-for-help-before-fatal-confrontation> [<https://perma.cc/UJW9-JSC5>].

ry.²⁵⁰ According to police accounts, Lyles attacked them with a knife when they arrived.²⁵¹ Although Lyles had a history of calls to the police and of mental illness, the officers did not follow any special mental health protocol when responding.²⁵² Regardless of whether Lyles' call to police was a direct request for help, as her family suggested,²⁵³ or was evidence of confusion and fear associated with mental illness, it seems clear that she was in crisis and in need of help.

Like Amy Cooper, Lyles tried to call on the police to protect her.²⁵⁴ Unlike Amy Cooper, however, she immediately turned into the target of police violence once they arrived at her door. This quick shift is attributable in part to a style of policing that treats every object of policing as an unknown potential enemy. While we might expect police to understand the difference between a dangerous enemy and a person asking for help, black women are a poor racial fit as victims because the object of police protection has always been raced as white and gendered as female.²⁵⁵ Primed for a threat, police can easily mistake victims for enemies. The law, however, defers to officers' split-second assessment of threat.²⁵⁶ It expects that police will sometimes make mistakes, it accepts those mistakes as the price of vigorous policing, and it forgives them in advance for those mistakes. The idea that police are protectors is false for black women, and their deaths as a result of police violence are viewed as expendable casualties of safety and order for others, who are typically white.²⁵⁷ Black women may be dissuaded from calling for help because they know how easily they may be recast as threats, and—as these cases demonstrate—the law gives police near-unlimited discretion to respond to any threat with violence, especially when black bodies are present.

The stereotypes of black people used to justify violence against them are often gender differentiated. The deaths of black men are sometimes justified

²⁵⁰ Police have said the burglary allegation was fake. Memorandum from Brian Maxey, Chief Operating Officer, Seattle Police Dep't, to Seattle City Council (July 13, 2017).

²⁵¹ Like Walker, it is entirely possible that Lyles was afraid of the police when they entered and acted in self-defense. See Miletich, *supra* note 249.

²⁵² According to the Department, it was not dispatched as a crisis call, and the Department's "caution" system, which was supposed to flag people with a history of mental health calls, did not provide enough information to the responding officers. Although one responding officer had been trained in Crisis Intervention Team (CIT) protocol, it was not treated as a CIT call, nor was a special CIT team dispatched. See Memorandum from Brian Maxey to Seattle City Council, *supra* note 250, at 29.

²⁵³ Safia Samee Ali, *Pregnant Mother Shot Dead by Cops Whom She Called for Help*, NBC NEWS (June 19, 2017, 3:56 PM), <http://www.nbcnews.com/news/us-news/pregnant-mother-shot-dead-cops-whom-she-called-help-n774226> [<https://perma.cc/GD7S-B4GR>].

²⁵⁴ See Brett, *supra* note 11 (discussing how Amy Cooper called the police for protection).

²⁵⁵ See *id.* (discussing the history of police as protectors of white womanhood).

²⁵⁶ *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

²⁵⁷ See Julia Azari, *From Wallace to Trump, the Evolution of "Law and Order,"* FIVETHIRTYEIGHT (Mar. 13, 2016, 5:41 PM), <https://fivethirtyeight.com/features/from-wallace-to-trump-the-evolution-of-law-and-order> [<https://perma.cc/73LX-2MGW>].

post hoc by reference to stereotypes of criminality and the assumption that petty crimes, such as shoplifting, will inevitably lead to later violence.²⁵⁸ The deaths of black women are justified post hoc by a different set of stereotypes, one that blames black women for creating crime through their unfitness as mothers and their poor parenting choices. Dating back to the Moynihan Report, which proposed a causal relationship between broken families and criminality among African Americans,²⁵⁹ a common stereotype emerged that presumed absent fathers and single mothers in black families were to blame for poverty and crime in black communities.²⁶⁰ Blame for black criminality and underachievement was laid at the feet of black women and their wrong sexual choices that led to them being single mothers, rather than on the larger structural imbalances that render their families vulnerable.²⁶¹ Black women are blamed for raising morally and culturally defective children who turn into criminals, so the life of a black mother encountered during a tense warrant search is societally regarded as expendable.

High-profile killings, and the widespread shocked and horrified reaction to them, have focused the national media on the experience of black people. However, media coverage usually highlights black men's and boys' fear or the fear that black women feel in their role as mothers or partners of vulnerable black

²⁵⁸ Calvin John Smiley & David Fakunle, *From "Brute" to "Thug:" The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T 350 (2016), <https://doi.org/10.1080/10911359.2015.1129256> [<https://perma.cc/GX8W-9RB> B].

²⁵⁹ See DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LAB., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 38–40 (1965).

²⁶⁰ See Robert D. Hess & Virginia C. Shipman, *Early Experience and the Socialization of Cognitive Modes in Children*, 36 CHILD DEV. 869, 870 (1965); Frank J. Sciara & Richard K. Jantz, *Father Absence and Its Apparent Effect on the Reading Achievement of Black Children from Low Income Families*, 43 J. NEGRO EDUC. 221, 221 (1974); RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 2–3 (2011). *But see* CHARLES A. VALENTINE, *CULTURE AND POVERTY: CRITIQUE AND COUNTER-PROPOSALS* 32–33 (1968); Herbert L. Wasserman, *A Comparative Study of School Performance Among Boys from Broken and Intact Black Families*, 41 J. NEGRO EDUC. 137, 140 (1972); Scott Cummings, *Explaining Poor Academic Performance Among Black Children*, 41 EDUC. F. 335, 341 (1977).

²⁶¹ See Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1493 (2012) (“[S]tate officials apply the myth of [black] maternal irresponsibility to justify placing black children in both juvenile detention and foster care.”); MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 284 (2011); Sinikka Elliott & Megan Reid, *Low-Income Black Mothers Parenting Adolescents in the Mass Incarceration Era: The Long Reach of Criminalization*, 84 AM. SOCIO. REV. 197, 198 (2019). For a contemporary and local example of this, see Mike Blasky, *Man Slain in Summerlin Yard Had Lengthy Record*, L.V. REV. J. (Mar. 22, 2012, 12:13 PM), <https://www.reviewjournal.com/crime/courts/man-slain-in-summerlin-yard-had-lengthy-record> [<https://perma.cc/TP48-UZA8>] (reporting on a Summerlin man's killing of a suspected burglar by noting that the man killed, DeMarcus Carter, “was associated with a gang” and “had a lengthy juvenile record,” and then describing his mother's use of marijuana and her time in jail).

boys and men.²⁶² Many non-black Americans have now heard about “the talk” that parents give their black children about how to navigate the constant threat of violence and stay alive.²⁶³ Some of this coverage has helped non-black people acknowledge the vulnerability of black men and boys in a way they never have before. But black women are vulnerable too, and public analyses of policing and black lives often overlook them. As it is typically discussed, “the talk” does not include instructions for how women like Ligons can avoid sexual assault and women like Taylor can avoid being killed. Sociologist Shannon Malone Gonzalez interviewed black mothers about how they talk to their sons and daughters about police violence.²⁶⁴ She found that mothers constructed boys as primary targets of police violence and girls as collateral targets.²⁶⁵ They discussed their children’s vulnerability in racial terms but only invoked gender to emphasize the heightened vulnerability of sons.²⁶⁶

By repeating the mantra of “making it home,” mothers reinforce double consciousness and marginalize other forms of violence. This mantra is predicated on gendered beliefs that “home” is a safe haven from police and violence. Thus, the masculinization of police violence is reproduced through a focus on lethal force and presumptions about the location of violence. Both reinforce black boys as primary targets.²⁶⁷

Gonzalez notes that even mothers’ efforts to protect their children marginalized the specific experiences of black women and girls. “Not only is black girls’ gendered racial vulnerability negated, but black girls are leveraged to reinforce the gendered racial vulnerability of black boys.”²⁶⁸

²⁶² For example, Ailsa Chang interviewed Teyana Taylor, a black female singer and mother of a black daughter, soon after the June protests. Chang asked Taylor to discuss police and community “violence against Black men,” and Taylor responded by describing the fear she had for her husband. Ailsa Chang, *Teyana Taylor on ‘The Album’ and Asserting Her Creative Vision*, NPR (June 19, 2020, 3:37 PM), <https://www.npr.org/transcripts/880964216> [<https://perma.cc/4GEY-3AC2>].

²⁶³ See Joshua Jamerson, *How ‘the Talk’ Is Evolving Inside Black Families Amid Protests*, WALL ST. J. (Sept. 29, 2020, 12:05 PM), <https://www.wsj.com/articles/how-the-talk-is-evolving-inside-black-families-amid-protests-11601395526> [<https://perma.cc/VTH2-FJNU>] (describing “the talk”).

²⁶⁴ Shannon Malone Gonzalez, *Making It Home: An Intersectional Analysis of the Police Talk*, 33 GENDER & SOC’Y 363, 365 (2019).

²⁶⁵ *Id.* at 371, 377.

²⁶⁶ *Id.* at 377–78; see Shannon Malone Gonzalez, *Black Girls and the Talk? Policing, Parenting, and the Politics of Protection*, SOC. PROBS. 1, 3 (2020) (“[B]lack mothers across social class express concern over black boys’ vulnerability to interactions with law enforcement and criminal justice institutions.”).

²⁶⁷ Gonzalez, *supra* note 264, at 377.

²⁶⁸ *Id.* at 382. Andrea Ritchie has also suggested that black girls need a version of “the talk” that acknowledges their gender-specific vulnerability to violence. Andrea Ritchie (@dreanyc123), TWITTER (June 10, 2018, 10:35 AM), <https://twitter.com/dreanyc123/status/1005866086057865216> [<https://perma.cc/7XA8-8ZP3>]. Some of the women Gonzalez interviewed said they addressed sexual violence by police in a separate talk, one that did not link vulnerability to police conceptions of black women and one that was not given to boys. Gonzalez, *supra* note 264, at 379.

E. George Floyd: Presumptions of Black Dangerousness and the Inherent Violence in Policing Beyond Just One Bad Apple

We could have easily started a discussion of the race-gender cycle of policing violence against black people with an analysis of police officer Derek Chauvin's murder of George Floyd. Floyd's death has the appearance of being the beginning of that cycle because it is a paradigmatic act of police violence against blacks. Our point in placing the Floyd story after four other stories is to show that the threat of violence *precedes* the actual violence, at least in one sense, for the police often have to be summoned before they commit violence. In another sense, white-caller crime *follows* incidents like the murder of George Floyd because that violence inspires white callers to know they can bully blacks with the threat of calling 911. It is thus a cycle of violence in which George Floyd's murder plays an important part.

From various videos,²⁶⁹ we can piece together the last moments of George Floyd's life before police officers murdered him in what we see as a depraved heart murder with accomplice liability.²⁷⁰ At 8:08 PM, responding police officers Thomas Lane and J. Alexander Kueng approached Floyd's car in Minneap-

²⁶⁹ See generally Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/video/us/100000007159353/george-floyd-arrest-death-video.html> [<https://perma.cc/5HU7-X27F>]; *The Death of George Floyd: A Timeline*, CNN, <https://www.cnn.com/videos/us/2020/06/01/george-floyd-death-protests-timeline-sidner-pkg-vpx.cnn> [<https://perma.cc/S8CT-UNKA>]; NBC News, *Video Shows New Angle of George Floyd's Arrest with Multiple Officers*, YOUTUBE (May 29, 2020), <https://youtu.be/oejaHE5jUaA> [<https://perma.cc/Y7NW-A82K>]; Jeremy Stock, *George Floyd Death*, YOUTUBE (May 29, 2020), <https://www.youtube.com/watch?v=thfNlVvve4A> [<https://perma.cc/B5QM-RXSY>].

²⁷⁰ See McLaughlin, *supra* note 29; Rochelle Olson, *What Are the Charges Against Ex-Minneapolis Police Officer Derek Chauvin in the Killing of George Floyd?*, STAR TRIB. (Mar. 18, 2021, 9:47 AM), <https://www.startribune.com/derek-chauvin-charges-trial-george-floyd-murder-manslaughter-police-minneapolis-minnesota/600030691> [<https://perma.cc/UCJ7-JQHE>]; CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 377–78 (4th ed. 2019) (defining depraved heart murder as when a “defendant acted with gross recklessness and manifested an extreme indifference to human life, meaning that the defendant realized that his actions created a substantial and unjustified risk of death and yet went ahead and committed the actions anyway”). On April 20, 2021, a jury agreed with part of this assessment, convicting Chauvin of third degree (depraved heart) murder, second degree (felony) murder, and manslaughter. Verdict, Count II, *Minnesota v. Chauvin*, No. 27-CR-20-12646 (4th Dist. Minn. Apr. 20, 2021); Verdict, Count I, *Minnesota v. Chauvin*, No. 27-CR-20-12646 (4th Dist. Minn. Apr. 20, 2021); Verdict, Count III, *Minnesota v. Chauvin*, No. 27-CR-20-12646 (4th Dist. Minn. Apr. 20, 2021). Judge Cahill sentenced him to 270 months in prison on the second degree murder charge. Sentencing Order, *Minnesota v. Chauvin*, No. 27-CR-20-12646 (4th Dist. Minn. June 25, 2021). At the time of this writing, officers Keung, Lane, and Thao are scheduled to be tried in March 2022 as accomplices to Chauvin's crimes, although they are not currently charged as accomplices to depraved heart murder. Chao Xiong, *Court of Appeals Ruling Puts Third Degree Murder Back into Play in George Floyd Killing*, STAR TRIBUNE (July 1, 2021, 11:04 AM), <https://www.startribune.com/court-of-appeals-ruling-puts-third-degree-murder-back-into-play-in-george-floyd-killing/600074000/?refresh=true> [<https://perma.cc/Y7JK-RL87>].

olis, Minnesota.²⁷¹ Things quickly got serious, as Lane pulled out his gun and ordered Floyd to put his hands on the wheel.²⁷² Lane re-holstered the gun.²⁷³ The drawing of firearms was the first sign that the officers perceived the tall and strong-looking Floyd to be dangerous.²⁷⁴

Nine minutes later, Floyd was in a police SUV, and officers Derek Chauvin and Tou Thao arrived at the scene.²⁷⁵ Chauvin pulled Floyd through the back seat and out onto the street.²⁷⁶ Floyd was face-down on the pavement.²⁷⁷ Footage from a witness showed that Chauvin was kneeling on Floyd's neck, Kueng was kneeling on Floyd's torso, and Lane was kneeling on Floyd's legs.²⁷⁸

Another video shows Thao interacting with the crowd of onlookers as Chauvin choked Floyd to death.²⁷⁹ At the 2:39 mark in that video, Thao responds to a witness of the death by saying they tried to secure Floyd in the car for ten minutes.²⁸⁰ At 2:48, a witness says, "Bro, he ain't fine."²⁸¹ At 3:08, Floyd says, "I can't breathe."²⁸² Thao says, "Ok, he's talking."²⁸³ At 3:22, Floyd appears to lose consciousness.²⁸⁴

At 5:44, the crowd is yelling for the officers to check Floyd's pulse, and at 5:54, Thao says, "He probably OD-ed."²⁸⁵ At 6:50, a paramedic moves from behind Derek Chauvin into frame, kneels down, and tries to check Floyd's pulse.²⁸⁶ Chauvin keeps his knee on George Floyd's neck.²⁸⁷ At 7:53, the paramedic tells Chauvin to lift up his knee.²⁸⁸ Chauvin finally stands up.²⁸⁹ The rest—subsequent worldwide protests against police violence and uprisings in favor of black equality—is history.

We see the George Floyd story as reinforcing the ideas that policing constructs the meanings of race and gender, but race and gender also construct the meanings of policing. As we noted in considering the Christian Cooper incident, black men remain always-already suspect. As criminal justice scholar I.

²⁷¹ See Hill et al., *supra* note 269 (providing video).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *See id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See Stock, *supra* note 269.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

Bennett Capers puts it, “[q]uite simply, black and brown folk are more likely to be watched by the police, stopped by the police, and frisked by the police.”²⁹⁰ That problem continues into prosecution. Race and gender have both been demonstrated to affect plea bargaining, with negative consequences for black men.²⁹¹ When exploring “disparities in charge reductions,” law professor Carlos Bedejo used statistical analysis to find the following: “The charge reduction rate for white females (the group with the highest rate) is more than double that of black males (the group with the lowest rate). White males and black females experience similar charge reduction rates, which fall between those of white females and black males.”²⁹²

This shows that prosecutors are exercising their discretion on the basis of assumed greater male black criminality. Further, legal scholar Joan Howarth has explained that whites’ perceptions of black criminality are strong enough to drive the results in criminal trials.²⁹³

From where does the stereotype of black men as always-already suspect come? Among the sources is the very field that is supposed to neutrally study crime: criminology. For instance, in *Crime and Human Nature*, criminologists James Q. Wilson and Richard Herrnstein, who also co-authored another racist screed, *The Bell Curve*,²⁹⁴ make the entirely unsupported argument that: “[C]riminals on the average differ in physique from the population at large. They tend to be mesomorphic (muscular) and less ectomorphic (linear), with the third component (endomorph) not clearly deviating from normal. Where it has been assessed, the ‘masculine’ configuration called andromorphy also characterizes the average criminal.”²⁹⁵

Wilson and Herrnstein make a preposterous socio-biological argument that people’s body types make them criminals. In case the reader has failed to understand whom Wilson is identifying as criminal, he goes on to say, “Among whites, being a mesomorph is an indicator of a predisposition to crime. Young black males are more mesomorphic . . . than are young white males . . .”²⁹⁶

²⁹⁰ I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1290 (2017).

²⁹¹ Carlos Berdejó, *Gender Disparities in Plea Bargaining*, 94 IND. L.J. 1247, 1256, 1263 (2019).

²⁹² *Id.* at 1250 (footnote omitted) (summarizing results of study).

²⁹³ Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97, 103 (1997) (“To many non-Blacks, crime means Black; Black male means criminal.” (footnote omitted)).

²⁹⁴ See generally RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

²⁹⁵ JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME & HUMAN NATURE: THE DEFINITIVE STUDY OF THE CAUSES OF CRIME* 89 (1985). But see Thomas L. Dumm, *The New Enclosures: Racism in the Normalized Community*, in *READING RODNEY KING: READING URBAN UPRISING* 178, 182 (Robert Gooding-Williams ed., 1993) (critiquing 1980’s political science linking black men’s race to criminal attributes).

²⁹⁶ WILSON & HERRNSTEIN, *supra* note 295, at 469.

Wilson and Herrnstein thus directly attach the label of inherent criminality to black men.

For many people, George Floyd's murder visibly demonstrated that the core function of the police in this country is literally to hold black people down. Our current mode of policing teaches black people, and anyone else who observes police actions toward black people, that black people remain second-class citizens. Though some may argue that Derek Chauvin kneeling on George Floyd's neck was the extreme case, it nevertheless exposes what the whole system represents.

After the George Floyd murder, police are now widely understood to be in the business of social control of black men and other socially marginalized groups. By social control, we mean widespread, targeted institutionalized coercion of socially disfavored groups.²⁹⁷ Social control implies that there is discursive machinery producing an ideology justifying the cabining in of these groups. The policing of black men as always-already suspect is consistent with a conception of policing as the prime means of social control of black men.

We must pay attention to the ways that forms of oppression such as racism, sexism, homophobia, classism, and so on interact in a particular cultural context. We should ask, for instance, how the set of interlocking oppressions played out for George Floyd in the Minneapolis area. The extreme poverty of Floyd's Houston neighborhood may not have existed in the same form in his Minneapolis neighborhood. He likely also faced racial discrimination in Minneapolis, but it was probably of a more subtle, though not necessarily less pernicious, form than in his hometown of Houston. This inquiry fits with Collins's declaration that "[a]ll contexts of domination incorporate some combination of intersecting oppressions, and considerable variability exists from one matrix of domination to the next as to how oppression and activism will be organized."²⁹⁸ Collins calls on us to map the specific social worlds in which policing operates so that we get a sense of how they fit together into a set of interlocking oppressions.

The takeaway from this story is that the co-constitutedness of race and gender violence in policing is significantly predicated on a belief that the black body is always dangerous. Chauvin's defense was similar to that of the Los Angeles police officers who brutalized Rodney King.²⁹⁹ They claimed that after each of the dozens of blows, King's body twitched and thus showed signs that

²⁹⁷ See Frank Rudy Cooper, *A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit*, 73 U. MIA. L. REV. 1, 25–26 (2018) (defining social control).

²⁹⁸ COLLINS, *supra* note 131, at 228.

²⁹⁹ See Sandy Banks, *Column: Derek Chauvin's Race-Baiting Defense Is Rooted in Centuries-Old Stereotypes*, L.A. TIMES (Apr. 3, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-04-03/derek-chauvin-trial-george-floyd-anger> [<https://perma.cc/CPZ4-4BTG>] (arguing that Chauvin's attorneys drew on race-gender stereotypes to paint Floyd as "a big, scary Black demon" and comparing this strategy to the arguments defense attorneys made about King).

he would arise and harm the officers with his bare hands.³⁰⁰ The claim is always that the black victim was superhuman and therefore imminently about to recover and do violence. The perceived danger never ends until the police completely incapacitate the victim to their satisfaction, which often does not occur until the victim dies. That assumption is consistent with James Q. Wilson's aforementioned police "science" contending that black men are biologically predisposed to crime and violence.³⁰¹ These same stereotypes help illustrate the parallels between Chauvin's actions and those of Travis and Gregory McMichael several months earlier and several states away.

F. Ahmaud Arbery: Community Policing and the White Privilege of Self-Help

Ahmaud Arbery left his home and went out for a run around his Georgia neighborhood on February 23, 2020, never to return.³⁰² While running, he was confronted by two white men, father and son Travis and Gregory McMichael, who were driving around the neighborhood in their pickup truck.³⁰³ The men followed Arbery in their truck, pulled over to confront him, accused him of breaking into an abandoned home in the neighborhood, fought with him, and then shot him dead when he tried to run away.³⁰⁴ The fatal shooting was recorded by William Bryan Jr., who was following along with the McMichaels and used his truck to block Arbery from escaping the confrontation.³⁰⁵ Initially, no charges were filed against any of these men in connection with Arbery's death.³⁰⁶ A letter from the Waycross County prosecutor indicated that the office initially determined that there were no grounds on which to arrest any of the

³⁰⁰ See Richard A. Serrano, *King Kept Trying to Get Up, Officers Say: Trial: Two Testify that the Motorist Was Struck Only After Repeatedly Refusing to Submit. But Prosecutors Maintain He Was No Threat.*, L.A. TIMES (Mar. 31, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-03-31-me-284-story.html> [<https://perma.cc/KCQ5-SMC5>].

³⁰¹ See *supra* notes 295–96 and accompanying text (discussing Wilson's black criminality theories).

³⁰² Richard Fausset, *Two Weapons, a Chase, a Killing and No Charges*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2020/04/26/us/ahmed-arbery-shooting-georgia.html> [<https://perma.cc/QS7N-MHY5>].

³⁰³ GLYNN CNTY. POLICE DEP'T, PUBLIC RELEASE INCIDENT REPORT FOR G20-11303 (2020); Fausset, *supra* note 302.

³⁰⁴ GLYNN CNTY. POLICE DEP'T, *supra* note 303; Bill Hutchinson & Rachel Katz, *Ahmaud Arbery Was Struck by Vehicle Before He Was Shot Dead; Suspect Yelled Racial Slur: Investigator*, ABC NEWS (June 4, 2020, 2:57 PM), <https://abcnews.go.com/US/suspects-struck-ahmaud-arbery-vehicle-shot-dead-yelled/story?id=71066667> [<https://perma.cc/85B5-WJVM>].

³⁰⁵ *Newly Released Body Cam Video Proves William 'Roddie' Bryan Lied About His Involvement in Ahmaud Arbery Shooting*, BET (Dec. 15, 2020, 3:55 PM), <https://www.bet.com/news/national/2020/12/15/william-bryan-ahmaud-arbery-shooting-body-camera.html> [<https://perma.cc/AZ6X-TBEW>].

³⁰⁶ Fausset, *supra* note 302.

men, citing Georgia law on self-defense and “hot pursuit.”³⁰⁷ In addition to citing Georgia’s citizen’s arrest and self-defense laws,³⁰⁸ the letter suggested Arbery himself might have been the shooter.³⁰⁹

Arbery’s killing was on the brink of becoming yet another example of the many killings of black people that go unprosecuted and unnoticed due to the allegation of self-defense by white perpetrators. However, a video of the confrontation surfaced months later, sparking national outrage.³¹⁰ Two days after the video was released, the Georgia District Attorney charged Travis McMi-

³⁰⁷ Letter from George E. Barnhill, Dist. Att’y, Waycross Jud. Cir., to Captain Tom Jump, Glynn Cnty. Police Dep’t (on file with NPR), <https://apps.npr.org/documents/document.html?id=6888611-Letter-to-GBI> [<https://perma.cc/2TJG-2D9B>]. Specifically, the letter opined that the McMichaels has “solid first hand probable cause” to believe Arbery committed a burglary and “it appears their intent was to stop and hold this criminal suspect until law enforcement arrived.” *Id.* The letter described the fight as “a struggle over the gun” legally carried by McMichael and opined that “as soon as Arbery grabbed the shotgun, under Georgia law, McMichael was allowed to use deadly force to protect himself.” *Id.*; see also Letter from Blair L. McGowan, Deputy Att’y Gen., Ga. Dep’t of L., to D. Victor Reynolds, Dir., Ga. Bureau of Investigation (May 11, 2020) (on file with NPR), <https://apps.npr.org/documents/document.html?id=6888611-Letter-to-GBI> [<https://perma.cc/X76J-9SYR>] (describing decision not to prosecute and requesting an investigation into prosecutorial misconduct).

³⁰⁸ A Georgia law in effect when the confrontation occurred authorized citizens to arrest a person who commits a crime “in his presence or with his immediate knowledge” or to arrest a fleeing felon “upon reasonable and probable grounds of suspicion.” GA. CODE ANN. § 17-4-60 (West, Westlaw through 2021 Reg. Sess.) (repealed May 10, 2021). That law was changed in the wake of Arbery’s death. Emma Hurt, *In Ahmaud Arbery’s Name, Georgia Repeals Citizen’s Arrest Law*, NPR (May 11, 2021, 12:00 PM), <https://www.npr.org/2021/05/11/995835333/in-ahmaud-arberys-name-georgia-repeals-citizens-arrest-law> [<https://perma.cc/ZL5D-W3A7>]. Georgia law also permits deadly force in self-defense, defense of home, and to stop a forcible felony. See GA. CODE ANN. §§ 16-3-21 (West, Westlaw through 2021 Reg. Sess.) (use of force in self-defense) and 16-3-24(b) (West, Westlaw through 2021 Reg. Sess.) (use of deadly force to prevent commission of a forcible felony). Once a fight starts, a person has no duty to retreat in Georgia before using deadly force. See GA. CODE ANN. § 16-3-23.1 (West, Westlaw through 2021 Reg. Sess.) (no duty to retreat).

³⁰⁹ Letter from George E. Barnhill, *supra* note 307 (“Just as importantly, while we know McMichael had his finger on the trigger, we do not know who caused the firings. Arbery would only had to pull the shotgun approximately 1/16th to 1/8th of one inch to fire weapon himself and in the height of an altercation this is entirely possible. Arbery’s mental health records & prior convictions help explain his apparent aggressive nature and his possible thought pattern to attack an armed man.”). These unfounded suppositions invoke the same superhuman image of black male criminality used to justify the brutal beating of Rodney King and choking of George Floyd. See *supra* notes 299-300 and accompanying text.

³¹⁰ Sarah Mervosh, *Ahmaud Arbery Video Was Leaked by a Lawyer Who Consulted with Suspects*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/us/ahmaud-arbery-video-lawyer.html> [<https://perma.cc/2KW3-M5QV>]. The video surfaced on May 5, 2020. La’Raven Taylor, *Leaked Video of a Deadly Shooting in Coastal Georgia Sparks National Outrage*, GPB NEWS (Aug. 13, 2020, 11:28 PM), <https://www.gpb.org/news/2020/05/07/leaked-video-of-deadly-shooting-in-coastal-georgia-sparks-national-outrage> [<https://perma.cc/VL5C-PMKS>]. Several days later, Attorney Alan David Tucker issued a statement admitting that he released it. Press Release, Alan David Tucker (May 9, 2020) (on file with author).

chael and Gregory McMichael with murder and aggravated assault.³¹¹ Soon after, they charged William Bryan—the man who filmed the leaked video and helped the McMichaels box Arbery in with his truck—with attempted false imprisonment and felony murder.³¹²

When the video leaked, reactions spread like wildfire on social media, leading to protests. In a mass action organized by Arbery's friend and his former football coach, people across the country ran 2.23 miles, documenting the solidarity action with the hashtag #IRunWithMaud.³¹³ Opinion pieces published in the wake of the video's release connected the case, and the larger issue of private vigilante violence, to larger racial injustices that the Black Lives Matter movement was working against:

The Black Lives Matter movement that peaked a few years ago focused activism and protests largely around police killings of black people, but the moment was born of another phenomenon, one present in the [Trayvon] Martin case and again here: anti-black vigilantism. This form of anti-blackness marks black masculinity as menacing, and state laws protect the vigilantes' rights to involve their weapons and their power to end lives.³¹⁴

When mass demonstrations unfolded in the wake of George Floyd's death, activists cited Arbery's death as another example of black vulnerability and the system's failure to punish killers of black people.³¹⁵ But by June 2020, public

³¹¹ Ellen Eldridge, *Father, Son Charged with Murder, Arrested in the Shooting Death of Ahmaud Arbery*, WJCT NEWS (May 7, 2020, 8:24 PM), <https://news.wjct.org/news/2020-05-08/father-son-charged-with-murder-arrested-in-shooting-death-of-ahmaud-arbery> [https://perma.cc/JX7E-FKKEE]; Mervosh, *supra* note 310.

³¹² Press Release, Ga. Bureau of Investigation, Ahmaud Arbery Murder Investigation (May 21, 2020), <https://gbi.georgia.gov/press-releases/2020-05-21/ahmaud-arbery-murder-investigation> [https://perma.cc/GJ2E-FRJ4]. The murder charge against Bryan was based on the theory that, in attempting to contain Arbery with his truck, he committed the felony of false imprisonment and that felonious act resulted in Arbery's death. See STATE WARRANT AND MITTIMUS, <https://atlanta.cbslocal.com/wp-content/uploads/sites/15909812/2020/05/Murder-Warrant.png> [https://perma.cc/9YXH-KCKT]. Under a felony murder theory, the defendant is not charged with intentionally, or even recklessly, causing death; rather, the intent to commit the felony (here, false imprisonment) supplies the intent necessary for a murder charge is death results. See Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 418–421 (2011); see also Brakkton Booker, *Georgia Investigators 'Confident' in Arrests Made in Ahmaud Arbery Case*, NPR (May 22, 2020, 2:05 PM), <https://www.npr.org/2020/05/22/860846105/georgia-investigators-confident-in-arrests-made-ahmaud-arbery-case> [https://perma.cc/AWK9-97V2].

³¹³ Jacey Fortin, *On Ahmaud Arbery's Birthday, Thousands Say #IRunWithMaud*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/2020/05/08/us/run-with-maud-ahmaud-arbery.html> [https://perma.cc/5SAN-CJLL].

³¹⁴ Charles M. Blow, Opinion, *The Killing of Ahmaud Arbery*, N.Y. TIMES (May 6, 2020), <https://www.nytimes.com/2020/05/06/opinion/ahmaud-arbery-killing.html> [https://perma.cc/G5TG-WD85].

³¹⁵ Isaac Chotiner, *A Black Lives Matter Co-founder Explains Why This Time is Different*, NEW YORKER (June 3, 2020), <https://www.newyorker.com/news/q-and-a/a-black-lives-matter-co-founder-explains-why-this-time-is-different> [https://perma.cc/4BBR-RK4H] (interview with Opal Tometi in which she describes activists invoking the names of Floyd, Arbery, and

anger was directed mostly at the police.³¹⁶ There was little analysis of how Arbery's death was related to the larger system of policing. Police reforms advocated and enacted nationwide do not address the circumstances that led to Arbery's killing or the initial failure to prosecute his killers.

The line between state violence (police departments) and private violence (vigilantes) is more porous than is often acknowledged. First, vigilante violence is the path not taken when police are called. That is, the perception of blackness as a threat to white safety and property may be met with either a call to the police or through self-help. If George Floyd's story is one possible outcome of Amy Cooper's assessment of Christian Cooper as a threat, Ahmaud Arbery's story is what would have happened if she called her neighbor instead. Second, racialized policing in America has always involved a partnership between the government and private actors. In the post-Reconstruction era, close partnerships between local law enforcement and powerful private citizens helped to protect the property and power of white communities.³¹⁷ Today, this partnership is embedded in 911 calls and self-defense laws. Blackness, particularly black masculinity, is constructed as a threat to white property, including, especially, white homes and white women.³¹⁸

The law of self-defense protects the private decision to use violence as long as it is connected to "reasonable" fear of imminent violence, and it relaxes the requirement for proving the threat when violence can be tied to the prevention of home invasions.³¹⁹ Under the laws of most states, a person engaged in a confrontation would have a legal right to use deadly force if they reasonably feared

Taylor); *see also* McCleskey v. Kemp, 481 U.S. 279, 280, 286–87 (1987) (holding that evidence that a killing of a white victim is 4.3 more likely to lead to the death penalty than a killing of a black victim is not sufficient to demonstrate race discrimination in a particular case); Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump> [<https://perma.cc/29FH-XJCD>].

³¹⁶ Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/7Q4E-V5Z4>].

³¹⁷ *See* HADDEN, *supra* note 72 (discussing cooperation between local governments, police, and patrollers to enforce slavery and racial hierarchy); Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17, 22 (2004) (detailing "the close connections between the government and private citizens" in 1920s Oklahoma that enabled the Tulsa massacre). Similar dynamics protected white acquisition of land and resources during settlement of the American West. *See generally* NED BLACKHAWK, *VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST* (2008). For a specific account of collusion between local law enforcement and wealthy white citizens in the murder of Osage Indians, *see* DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* 93, 114–15 (2017); *see also* Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017, 9:45 AM), <https://time.com/4779112/police-history-origins> [<https://perma.cc/9VY6-NMBY>].

³¹⁸ Rolnick, *supra* note 129, at 1651. White homes and white womanhood, of course, are also connected. *See, e.g.*, Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 238 (2008).

³¹⁹ Rolnick, *supra* note 129, at 1651.

that the other person posed an imminent threat to their life, was about to commit a non-deadly violent felony against him or her, or was about to break into a home.³²⁰ The McMichaels invoked basic self-defense law in at least two ways. First, they claimed that after they stopped Arbery to confront him about suspected break-ins, he turned violent, leading them to fear for their lives.³²¹ This explanation turns on the same stereotypes of black people as automatically defiant and dangerous that were used to justify police officers' choices to treat George Floyd, Sandra Bland, Elijah McClain, and Charleena Lyles as threats. Second, they told a 911 dispatcher that they had seen someone inside an under-construction home.³²² While they did not clearly say that this person was Arbery,³²³ the suggestion that he was inside a home, even an unoccupied and unfinished one, could be used to support a claim, even before they were engaged in a confrontation, that they believed he was about to break into more homes.³²⁴

³²⁰ *Id.* at 1651–52.

³²¹ Their story eerily echoes that of George Zimmerman, who was acquitted of homicide charges after he followed and shot Trayvon Martin, whom he said he suspected of burglary, through a suburban neighborhood. See Dahlia Lithwick, “Stand Your Ground” Nation, SLATE (Feb. 25, 2014, 11:46 PM), <https://slate.com/news-and-politics/2014/02/stand-your-ground-nation-from-trayvon-martin-to-jordan-davis-how-our-understanding-of-self-defense-is-changing-america.html> [<https://perma.cc/95YC-8F9Z>]. A fight ensued between the two; only one survived, which means only one story survived. Martin’s fear at being followed and any potential self-defense claim by Martin were erased during the trial, where Zimmerman and his defense team portrayed Martin as a scary monster who made him fear for his life. See Patricia J. Williams, *The Monsterization of Trayvon Martin*, THE NATION (July 31, 2013), <https://www.thenation.com/article/archive/monsterization-trayvon-martin/> [<https://perma.cc/UEX3-ZFRX>]; Jelani Cobb, *What the Zimmerman Trial Was About*, NEW YORKER (July 12, 2013), <https://www.newyorker.com/news/news-desk/what-the-zimmerman-trial-was-about> [<https://perma.cc/M5KQ-RASN>]. The McMichaels’ defense team seems to be adopting a similar strategy. See Caroline E. Light & Janae E. Thomas, *Ahmaud Arbery’s Killers Want to Ban the Word Victim at Their Trial*, SLATE (Feb. 22, 2021, 9:35 AM), <https://slate.com/news-and-politics/2021/02/ahmaud-arbery-jury-mcmichael-trial-georgia.html> [<https://perma.cc/MX9C-FY6W>].

³²² Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Feb. 24, 2021), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/C5K9-26QF>].

³²³ *Id.* Surveillance video later revealed that Arbery entered the construction area shortly before he was killed, likely to get water during a break from his run. Jenese Harris & Hollie Silverman, *Surveillance Footage Shows Multiple People Entering Property that Ahmaud Arbery Visited*, NEWS4JAX (May 19, 2020, 1:32 AM), <https://www.news4jax.com/news/local/2020/05/19/surveillance-footage-shows-multiple-people-went-to-home-that-ahmaud-arbery-visited/> [<https://perma.cc/XSQ8-LR6N>].

Scores of other people, including children, had been captured on video going in and out of the construction area over the course of several months, and none of the video clips appeared to show any crimes or illicit activity. *Id.*

³²⁴ It is unlikely that defense of habitation rules could support the use of deadly force to stop a suspect from breaking into an unoccupied home in the absence of any direct threat of violence. See *People v. Ceballos*, 526 P.2d 241 (Cal. 1974). But that has not stopped others from invoking defense of habitation principles to justify protection of unoccupied property. See Rolnick, *supra* note 129, at 1709 n.264–65 and accompanying text (describing homeowner who shot squatters whom he found in an empty building he owned). As this issue

Both the perceived threat of physical violence and the perceived threat of an imminent home break-in would, if believed, support legal killing under most states' basic self-defense and defense of habitation laws.³²⁵

While the law is nominally colorblind in the sense that all violence is ostensibly governed by the same standards, it has never operated this way. Arbery died in Brunswick, Georgia, in a neighborhood called Satilla Shores.³²⁶ In such neighborhoods, black people are often described as “suspicious” or “out-of-place.”³²⁷ When accompanied by vague reports of break-ins in the neighborhood, stereotypes about black criminality coupled with this out-of-placeness can easily be converted into an argument that the person was dangerous or threatening, thus supporting a self-defense claim in any interaction with them.³²⁸ When justifiable homicide claims are premised on the need to protect the home, they represent a version of the same white masculinity represented by police officers in the sense that civilians killers are justified because it is their job to patrol and protect the entire neighborhood's homes.³²⁹ This seems to be what happened to Arbery. Neighborhood residents shared photos and descriptions of an unknown black male in neighborhood groups on social media platforms like Facebook and NextDoor, a neighborhood-based social media app.³³⁰ The McMichaels invoked this alleged rash of break-ins to explain why they were following Arbery in the first place.³³¹

Some states, including Georgia at the time of Arbery's death, explicitly allow civilians to use violence to pursue and apprehend criminals.³³² The McMichaels also invoked this rule; they claimed that they were investigating recent burglaries in the neighborhood and told police that they believed Arbery

went to press, the McMichaels' defense team planned to make both arguments at trial, relying on the citizen's arrest law to justify the killing as a response to suspected break-ins.

³²⁵ Rolnick, *supra* note 129, at 1663.

³²⁶ Richard Fausset & Rick Rojas, *Where Ahmaud Arbery Ran, Neighbors Cast Wary Eyes*, N.Y. Times (May 22, 2020), <https://www.nytimes.com/article/satilla-shores-ahmaud-arbery-killing.html> [https://perma.cc/VJ3R-F3VK].

³²⁷ Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1167, 1174–75, 1179 (2017).

³²⁸ Rolnick, *supra* note 129, at 1649.

³²⁹ Suk, *supra* note 318, at 247–48.

³³⁰ Joe McLean, *A Look at the Satilla Shores Facebook Group Mentioned in the Ahmaud Arbery Investigation*, NEWS4JAX (May 22, 2020, 10:34 PM), <https://www.news4jax.com/news/georgia/2020/05/22/a-look-at-the-satilla-shores-facebook-group-mentioned-in-the-ahmaud-arbery-investigation> [https://perma.cc/3LDN-XDPH].

³³¹ Larry Hobbs, *Dispatcher: ‘What Was He Doing Wrong?’*, BRUNSWICK NEWS (Apr. 29, 2020), https://thebrunswicknews.com/news/local_news/dispatcher-what-was-he-doing-wrong/article_fe51cdd4-3bb6-5815-9dec-ddcdc8f879f8.html [https://perma.cc/YZH8-YWAL].

³³² GA. CODE ANN. § 17-4-60 (2020) (repealed May 10, 2021) (“A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.”).

was connected to them when they saw him running.³³³ One of the district attorneys assigned to the case expressed the view that the killing was likely legal because “[i]t appears their intent was to stop and hold this criminal suspect until law enforcement arrived.”³³⁴ Such rules effectively deputize civilians. However, civilians acting pursuant to them are not covered by the laws that authorize and constrain police conduct. For example, unlike in the case of police, who must at least cite a non-racial justification for stopping someone, there is no law that explicitly prevents private citizens from following, stopping, and confronting someone on the basis of race.³³⁵ Self-defense law plays an important role in shielding racial violence from judicial and public scrutiny because if a plausible self-defense claim is advanced, local authorities often will not arrest or charge the killers.³³⁶ This means that a police officer or prosecutor, not a judge or jury,

³³³ GLYNN CNTY. POLICE DEP’T, *supra* note 303. Although they referenced prior burglaries and indicated to the 911 dispatcher that someone had been seen in an open, under-construction home, local reporters found only one reported burglary in the neighborhood in the months preceding Arbery’s death, and the McMichaels did not indicate to the 911 dispatcher that they had any basis for believing Arbery was involved in it or that he was the person who entered the under-construction home. Hobbs, *supra* note 331.

³³⁴ See Letter from George E. Barnhill, *supra* note 307; see also Cleve R. Wootson, Jr. & Michael Brice-Saddler, *It Took 74 Days for Suspects to be Charged in the Death of a Black Jogger. Many People Are Asking Why It Took So Long*, WASH. POST (May 8, 2020, 6:05 PM), https://www.washingtonpost.com/national/outraged-by-the-delayed-arrests-in-killing-of-black-jogger-protesters-in-georgia-demand-justice/2020/05/08/8e7d212a-90a9-11ea-9e23-6914ee410a5f_story.html [<https://perma.cc/2LSF-VP79>].

³³⁵ See Josephine Ross, *Cops on Trial: Did Fourth Amendment Case Law Help George Zimmerman’s Claim of Self-Defense?*, 40 SEATTLE U. L. REV. 1, 37 (2016) (referring to different sets of rules for police and civilians). Although police must cite another reason, the Court has declared that subjective intent to racially profile is “irrelevant” to Fourth Amendment reasonableness whenever there is probable cause of any offense. *Whren v. United States*, 517 U.S. 806, 813, 818–19 (1996). Race also may be used in combination with other factors, including proximity to the border, to justify a stop. *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976). The *Wardlow* case holds that “high crime area” plus “headlong flight” is sufficient to justify a *Terry* stop. *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000). Many have criticized that case for refusing to acknowledge that there may be many reasons a black person would flee the police. See Herbert, *supra* note 9, at 142–45. While there is not a Supreme Court case directly stating that being racially “out of place” can justify a police stop outside the border context, those two factors, plus any nervousness, evasiveness, furtive behavior, or the like, would likely be approved as the basis for a stop. See I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 667, 667 n.75 (2018). *Whren* has not yet fully erased the need to justify a *Terry* stop with something more than racism. However, police in Las Vegas often use *Whren* to shield a jaywalking or other de minimis charge from scrutiny as racial profiling. Press Release, ACLU of Nev., ACLU of Nevada Responds to Evidence of Improper Stops in West Las Vegas (Aug. 10, 2010), <https://www.aclunv.org/en/press-releases/aclu-nevada-responds-evidence-improper-stops-west-las-vegas> [<https://perma.cc/3VPC-X9LY>].

³³⁶ Georgia law explicitly provides immunity from prosecution. GA. CODE ANN. § 16-3-24.2 (West, Westlaw through 2021 Reg. Sess.). Some states go further, prohibiting police from making an arrest once a colorable self-defense claim is raised, absent probable cause that the force was actually unlawful. See, e.g., FLA. STAT. § 776.032(1) (2017) (“A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action As used in this

may be the one to assess and accept a claim by a white killer that a black person was threatening person or property.

Another troubling aspect of the state/private violence dynamic is the close connection between local law enforcement officials and local property owners. Private property owners can deploy police violence in order to protect their property, and the private/public distinction allows them to disclaim responsibility for any violence that happens when the police do respond.³³⁷ At the same time, police who do not have sufficient evidence to follow or search a suspect, or whose job responsibilities constrain them from acting with explicit racial animosity,³³⁸ can informally deputize private citizens to carry out their dirty work.

subsection, the term ‘criminal prosecution’ includes arresting, detaining in custody, and charging or prosecuting the defendant.”); ALASKA STAT. § 09.65.330(a) (2006) (“A person who uses force in defense of self, other persons, or property as permitted in AS 11.81 is not liable for the death of or injury to the person against whom the force was intended to be used . . .”).

³³⁷ For example, it was reported the clerk who called the police who killed George Floyd was simply “following protocol.” Reg Chapman, *Owner of Cup Foods, Where Police First Encountered George Floyd, Calls for Justice*, CBS MINN. (May 28, 2020), <https://minnesota.cbslocal.com/2020/05/28/owner-of-cup-foods-where-police-first-encountered-george-floyd-calls-for-justice/> [<https://perma.cc/ZQW5-WU24>]. *But see* Adrian Florido, *911 Call Fuels Debate About Store’s Role in Floyd’s Death*, NPR (June 2, 2020, 5:01 AM), <https://www.npr.org/2020/06/02/867578101/911-call-fuels-debate-about-stores-role-in-floyds-death> [<https://perma.cc/FVF9-Z3WE>] (interview with store owner Mahmoud Abumayyaleh, in which he states that the store does not typically call police and that the employee has been fired); Angelina Chapin, *‘If I Would’ve Been Here, George Floyd May Still Be Alive,’* THE CUT (June 2, 2020), <https://www.thecut.com/2020/06/the-owner-of-cup-foods-speaks-about-george-floyds-death.html> [<https://perma.cc/PSK9-AW4N>] (describing Abumayyaleh’s plans to cut ties with police by not calling them and not hiring off-duty officers for security); Mutsafa Bayoumi, *Opinion, Why Did Cup Foods Call the Cops on George Floyd?*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/opinion/george-floyd-arab-muslims-racism.html> [<https://perma.cc/2Q2T-YXHV>] (describing how nuisance abatement laws conscript immigrant businesses into “third party policing”). *See also* Minyvonne Burke, *Owner of Minneapolis Grocery Store Says He Told Employee ‘Call the Police on the Police’ as She Witnessed George Floyd Death*, NBC NEWS (May 28, 2020, 11:04 AM), <https://www.nbcnews.com/news/us-news/owner-minneapolis-grocery-store-says-he-told-employee-call-police-n1216461> [<https://perma.cc/UR53-C7ND>].

³³⁸ Sam Levin, *LA Police Search Black Drivers Most – Even Though White People Have More Drugs, Report Finds*, GUARDIAN (Oct. 8, 2019, 6:06 PM), <https://www.theguardian.com/us-news/2019/oct/08/los-angeles-police-stop-search-black-latino> [<https://perma.cc/DZT4-RJSJ>] (“[The LAPD Chief] added that LAPD ‘has no tolerance for any officer that would use race as a basis for a stop or search.’”); *Police Chief Says He Doesn’t “Believe Racism Plays a Role” in NYPD, as Protesters Fill Streets*, CBS NEWS (June 2, 2020, 11:27 AM), <https://www.cbsnews.com/news/nypd-chief-terence-monahan-racism-new-york-protest> [<https://perma.cc/Z4MS-J464>] (noting that NYPD Chief Terence Monahan has stated his police department is not racist and officers “frequently face repercussions for inappropriate actions”). *But see* Joseph Goldstein & Ashley Southall, *‘I Got Tired of Hunting Black and Hispanic People,’* N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2019/12/06/nyregion/nyc-police-subway-racial-profiling.html> [<https://perma.cc/V8TL-3GKA>] (NYPD officers faced retaliation for exposing company policy that forced them to “hunt[] Black and Hispanic people because of arrest quotas”).

This public-private handoff has a long history of allowing unchecked racial violence. States historically did not prosecute private white-on-black violence.³³⁹ The U.S. Supreme Court, by holding in 1875 that “private” mob violence was beyond the reach of federal civil rights laws because Congress could only legislate with regard to state action,³⁴⁰ ensured that nominally private violence could not be prosecuted federally. That police officers in many cases were part of the vigilante mobs who enacted the “private” violence did not stop the Court from distinguishing between public and private violence.³⁴¹ While private actors can face federal prosecution today under civil rights violation or hate crime laws, civilians still have more legal freedom to surveil, pursue, and confront people they deem “suspicious” because private citizens are not governed by the constitutional limits on stops, seizures, and interrogations that limit police action.

Here, too, the historical parallels in Arbery’s story are chilling. Gregory McMichael was a former police officer and former investigator for the Glynn County district attorney.³⁴² During his career, Gregory McMichael worked closely with the same local prosecutor’s office that initially declined to file charges against him or his son for the killing.³⁴³ The first and second prosecutors assigned to the case passed it on because of McMichael’s close relationship

³³⁹ ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION* 706 (updated ed. 2014).

³⁴⁰ *United States v. Cruikshank*, 92 U.S. 542, 552–53 (1875) (holding that the federal government lacked power to prosecute crimes of violence between private citizens because this was exclusively reserved to the states). The Court strengthened this holding several years later in *United States v. Harris*, holding the anti-Klan conspiracy statute unconstitutional in a case in which a vigilante mob removed four men from a Tennessee county jail and beat them in public, killing one. *United States v. Harris*, 106 U.S. 629, 629, 638–40 (1883).

³⁴¹ In *Harris*, the vigilante mob included the local sheriff, but because he was acting as a private citizen rather than in his official capacity when he carried out the violence, he was charged under a law covering private violence, which the Court struck down because it held that the Fourteenth Amendment only authorized Congress to legislate with regard to acts of the state. *See Harris*, 106 U.S. at 629, 639.

³⁴² Larry Hobbs, *DA Johnson Defends Herself from County Commissioner’s Accusations*, BRUNSWICK NEWS (May 9, 2020), https://thebrunswicknews.com/news/local_news/da-johns-on-defends-herself-from-county-commissioners-accusations/article_27091ea2-600e-560a-b93f-121ad2995268.html [<https://perma.cc/XKS4-5Y8D>].

³⁴³ Cleve R. Wootson, Jr. & Michael Brice-Saddler, *‘This Was Supposed to Go Away’: The Battle to Shape How the World Viewed Ahmaud Arbery’s Killing*, WASH. POST (May 23, 2020, 3:00 AM), https://www.washingtonpost.com/national/this-was-supposed-to-go-away-the-battle-to-shape-how-the-world-viewed-ahmaud-arberys-killing/2020/05/22/089916b8-98f6-11ea-89fd-28fb313d1886_story.html [<https://perma.cc/G8RK-2DUL>]; Michael Brice-Saddler & Cleve R. Wootson Jr., *Ex-Detective Charged in Death of Ahmaud Arbery Lost Power to Make Arrests After Skipping Use-of-Force Training*, WASH. POST (May 14, 2020), <https://www.washingtonpost.com/nation/2020/05/13/ex-detective-accused-death-ahmaud-arbery-lost-power-make-arrests-after-skipping-use-of-force-training/> [<https://perma.cc/R4XG-A836>] (describing prior police work and noting that he repeatedly failed to complete mandatory use-of-force training, eventually losing his certification before retirement).

with the Brunswick County district attorney's office.³⁴⁴ A county official told news outlets that, before recusing herself, the Brunswick D.A. directed investigators not to arrest the McMichaels.³⁴⁵ Before recusing himself, the second prosecutor communicated his assessment that there were no grounds to arrest or charge because, in his view, they had valid defenses under Georgia's self-defense and citizen's arrest laws.³⁴⁶ Both prosecutors made this determination after viewing the same video that leaked to the public months later,³⁴⁷ suggesting that the charges may never have been filed if the case had not come to the public's attention. Indeed, the owner of the house that was under construction in Satilla Shores forwarded some of his surveillance videos, without alleging any criminal activity, to the Glynn County Police months before Arbery was seen there.³⁴⁸ The County responded by advising the owner to contact Gregory McMichael, leading the owner's attorney to tell reporters, "We have gotten very close to a situation that looks like an informal deputization of Greg McMichael."³⁴⁹

The system of policing, then, is functioning in largely the same way it has for more than a century. Private vigilante killings do not present a separate set of issues; they are inextricably linked to the function of the police as protectors of white property. Writing about the deaths of Emmitt Till and Trayvon Martin, Angela Onwuachi-Willig has described how the script for white masculinity, defined in terms of protection of white womanhood, has allowed killers of black youth to evade punishment.³⁵⁰ When white civilians perceive a danger, they are permitted to respond by calling the police, as Amy Cooper did, or by enacting violence themselves. The law regulates both responses through dis-

³⁴⁴ Hobbs, *supra* note 342. Brunswick District Attorney Jackie Johnson recused herself. The State Attorney General then assigned it to Ware County District Attorney George Barhill, who removed himself from the case at the request of Arbery's family because his son worked for the Brunswick County District Attorney. *Id.*

³⁴⁵ Kelly Wiley & Marilyn Parker, *District Attorney Advised Not to Make Arrests on Day of Ahmaud Arbery Shooting, Glynn Spokesperson Says*, NEWS4JAX (May 9, 2020), <https://www.news4jax.com/news/georgia/2020/05/09/district-attorney-advised-not-to-make-arrests-on-day-of-ahmaud-arbery-shooting-glynn-county-spokesperson-says/> [<https://perma.cc/KR5C-7HLC>]. Shortly before this issue went to press, Johnson was indicted for violating her oath and obstructing justice.

³⁴⁶ Letter from George E. Barnhill, *supra* note 307; *see also* Hobbs, *supra* note 331.

³⁴⁷ Hobbs, *supra* note 331.

³⁴⁸ Harris & Silverman, *supra* note 323.

³⁴⁹ *Id.*

³⁵⁰ Angela Onwuachi-Willig, *From Emmett Till to Trayvon Martin: The Persistence of White Womanhood and the Preservation of White Manhood*, 15 DU BOIS REV. 257, 266, 278 (2018). Onwuachi-Willig describes how lawyers in 1955 and 2013 manipulated the narrative of white men protecting white women from black men to secure acquittals for their white male clients. Using the framework of multidimensional masculinities theory, she explains how white male violence against black men is a tool used to exert control over black men and dominance over white women. While the narrative was explicit when Roy Bryant and J.W. Milam were tried for the murder of Emmett Till, Onwuachi Willig shows how it was invoked implicitly in George Zimmerman's trial via the testimony of Olivia Bertalan.

tinct, but similar, doctrinal regimes. Whether the perpetrator of the violence is a police officer or a civilian, the key question that determines whether the violence is legal is whether the perpetrator's perception of danger was credible and reasonable, not whether it was true. As Derek Chauvin did, the McMichaels had the benefit of stereotypes about black dangerousness and blackness as a threat to white property. They could—and did—invoke those stereotypes to take advantage of a legal regime that could potentially authorize their violence.

Arbery's death parallels Trayvon Martin's death in 2012 in the sense that the killers in both cases stood in for police and claimed to be investigating alleged threats to property in majority-white neighborhoods. But it also parallels countless killings of black people by white civilians in the post-Reconstruction and Jim Crow eras, a parallel made even more obvious by the personal connection between McMichael and the local law enforcement community. As before, we might expect that if activists succeed in tightening the legal restrictions on when police officers can use violence, civilians might step into the role of police more often, with a different set of laws shielding them from liability.

G. James Scurlock: White Property, Self-Help Policing, and the Question of Looting

Indeed, during the uprisings of the summer of 2020, civilians did step in; both police and private property owners turned explicitly to violence with the stated goal of protecting businesses and homes from "looting." During the protests that ensued following Floyd's death, people in at least two U.S. cities were killed by police officers.³⁵¹ Those deaths, and the police's use of military tactics and equipment, were explained as necessary to subdue unrest and protect businesses from "looting."³⁵² Private citizens were also preparing to act as auxiliary police, arming themselves to "protect" and "defend" their homes and businesses from what they feared were violent protestors.³⁵³ Indeed, former President

³⁵¹ The Associated Press, *Death Toll Grows as Police, Participants Are Killed During National Protests*, PENN LIVE (June 2, 2020, 7:02 AM), <https://www.pennlive.com/nation-world/2020/06/death-toll-grows-as-police-participants-are-killed-during-national-protests.html> [<https://perma.cc/66U5-CU7M>] (covering death of David McAtee); Dana Gentry, *Lawsuit: Metro Officers Who Killed Protestor May Have 'Simply Overreacted,'* NEV. CURRENT (Feb. 19, 2021), <https://www.nevadacurrent.com/blog/lawsuit-metro-officers-who-killed-protester-may-have-simply-overreacted/> [<https://perma.cc/JPD7-VJC3>]; see also Lois Beckett, *At Least 25 Americans Were Killed During Protests and Political Unrest in 2020*, GUARDIAN (Oct. 31, 2020, 6:00 PM), <https://www.theguardian.com/world/2020/oct/31/americans-killed-protests-political-unrest-acled> [<https://perma.cc/KFZ5-4CQH>].

³⁵² Beckett, *supra* note 351.

³⁵³ While protests in some cities included property destruction, there is little evidence that suburban homeowners were threatened. This reality did not stop speculation and warnings on social media. See Robert Anglen et al., *Fake Social Media Posts Incite Fear of Suburban Marauders, Rape and Murder Across the U.S.*, AZCENTRAL (June 5, 2020, 6:41 AM), <https://www.azcentral.com/story/news/local/arizona-investigations/2020/06/05/fake-social-media-posts-incite-arizona-fear-marauders-rape-and-murder/3125894001> [<https://perma.cc/>

Trump infamously denounced the Minneapolis protests by tweeting “when the looting starts, the shooting starts.”³⁵⁴ This private violence led to deaths too, including the death of James Scurlock in Omaha, Nebraska.³⁵⁵ Scurlock was shot by Jake Gardner, a white bar owner, when Scurlock was protesting on a public street outside Gardner’s bar.³⁵⁶

Like many business owners across the country, Gardner and his father, co-owners of a bar, claimed they intended to protect their business from the property destruction they assumed protestors would carry out.³⁵⁷ Gardner himself had a criminal past, including assault and battery arrests and multiple weapons-related charges.³⁵⁸ The initial altercation occurred when Gardner’s father shoved two protestors away and asked them to leave the vicinity of his bar.³⁵⁹ Gardner then fired several shots into the air.³⁶⁰ Once shots were fired near him, and in response to being shoved, Scurlock jumped on Gardner.³⁶¹ Gardner yelled “get off me” and then shot Scurlock, killing him.³⁶²

D7KX-PD6K]. Adrienne Cutway, *Florida Sheriff Says He’s Encouraging Gun-Toting Residents to Shoot Looters Who Break Into Homes*, CLICKORLANDO.COM (June 2, 2020, 4:33 PM), <https://www.clickorlando.com/news/local/2020/06/02/florida-sheriff-says-hes-encouraging-gun-toting-residents-to-shoot-looters-who-break-into-homes/> [https://perma.cc/YU4T-YHPL]; Bob Brooks, *Residents Stocking Up on Guns Say They’ll Defend Against Looters*, 6ABC PHILA. (June 2, 2020), <https://6abc.com/philadelphia-protest-philly-today-pa/6225789/> [https://perma.cc/EP26-26VU]. Mark and Patricia McCloskey gained national notoriety when they were photographed brandishing guns outside their home in a claimed effort to defend it against protestors. Jessica Lussenhop, *Mark and Patricia McCloskey: What Really Went on in St Louis That Day?*, BBC NEWS (Aug. 25, 2020), <https://www.bbc.com/news/election-us-2020-53891184> [https://perma.cc/GA5U-VG69].

³⁵⁴ Michael S. Rosenwald, *‘When the Looting Starts, the Shooting Starts’: Trump Quotes Miami Police Chief’s Notorious 1967 Warning*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/history/2020/05/29/when-the-looting-starts-the-shooting-starts-trump-walter-headley/> [https://perma.cc/658D-VB2C].

³⁵⁵ Sophie Lewis, *A White Bar Owner in Omaha Shot and Killed a Black Protester. He Won’t Face Charges*, CBS NEWS (June 3, 2020, 6:24 AM), <https://www.cbsnews.com/news/james-scurlock-black-protester-shot-jacob-gardner-white-bar-owner-protest/> [https://perma.cc/F9VC-PCWC].

³⁵⁶ *Id.*

³⁵⁷ *Id.*; see also Todd Cooper & Reece Ristau, *Special Prosecutor: Jake Gardner Was Waiting in His Bar for Looters Before Fatal Encounter*, LINCOLN J. STAR (Sept. 23, 2020), https://journalstar.com/news/state-and-regional/nebraska/special-prosecutor-jake-gardner-was-waiting-in-his-bar-for-looters-before-fatal-encounter/article_e5a05ddb-e224-542d-8dd7-41fe4ab350f6.html [https://perma.cc/766J-98L7].

³⁵⁸ Lewis, *supra* note 355; see also Alia Conley & Erin Duffy, *Omaha Bar Owner Could Still be Charged with Concealed Carry Permit Violation*, OMAHA WORLD HERALD (June 3, 2020), https://omaha.com/news/crime/omaha-bar-owner-could-still-be-charged-with-concealed-carry-permit-violation/article_c9fafdd1-8e7b-51b5-994b-5b1ba1916546.html [https://perma.cc/3ZFB-3NE6].

³⁵⁹ Lewis, *supra* note 355.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

Gardner needed only a standard self-defense claim here: the altercation began as he and his father used force to defend their property from the perceived threat of protestors, but in his telling, the conflict escalated when Scurlock was seen jumping on Gardner.³⁶³ Reviews of self-defense claims often focus on the slice of time giving rise to the death. Because one person is dead, the survivor need only convince the factfinder that he or she believed him or herself to have been in mortal danger in the moment.³⁶⁴ Looking only at that moment, Gardner's shooting of Scurlock would be legal if he reasonably believed he was in mortal danger. Here, the county district attorney's office reviewed the videos and agreed, reporting that "there was a consensus" in his office that the self-defense claim was valid.³⁶⁵ Although Scurlock was unarmed and scarcely more than a teenager, Gardner was initially not charged with any crime.³⁶⁶

But what happened to start the altercation? In this case, it was Gardner who came out brandishing a gun.³⁶⁷ Well before Scurlock jumped onto his back, and even before anyone shoved his father, Gardner started shooting his firearm near the crowd.³⁶⁸ At that point, he was not reacting to any direct threat against him or his father; he was protecting his property.³⁶⁹ While most states' basic self-defense laws do not extend to protection of non-home property, some states do permit deadly force in defense of property.³⁷⁰ Even if Scurlock had not been in-

³⁶³ Alia Conley & Todd Cooper, *No Charges Will Be Filed Against Omaha Bar Owner Who Fatally Shot Protestor*, Don Kleine Says, OMAHA WORLD HERALD (June 1, 2020), https://omaha.com/news/crime/no-charges-will-be-filed-against-omaha-bar-owner-who-fatally-shot-protester-don-kleine/article_8e71702d-d5bf-544e-9fac-26108ac81a24.html [<https://perma.cc/P H2E-JF62>].

³⁶⁴ *Id.* A similar dynamic was at play in Arbery's killing and Trayvon Martin's killing years before. The deaths followed a struggle, and in each case the killers convinced at least some of the factfinders that the victim was the one who escalated the conflict and posed a threat they had to defend against.

³⁶⁵ *Id.*

³⁶⁶ Josh Funk, *White Nebraska Business Owner Charged with Manslaughter in May Shooting of James Scurlock, a Black Protestor*, USA TODAY (Sept. 15, 2020, 10:09 PM), <https://www.usatoday.com/story/news/nation/2020/09/15/james-scurlock-shooting-nebraska-jake-gardner-manslaughter/5812034002> [<https://perma.cc/8P3V-AUV7>].

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ See Statement of Frederick Franklin, Special Prosecutor, Douglas Cnty. (Oct. 26 2020), <https://htv-prod-media.s3.amazonaws.com/files/statement-of-october-26-2020-1603817518.pdf> [<https://perma.cc/HTS4-F86Z>]; Michelle Bandur, *'He Lost His Faith in the Justice System,' Jake Gardner's Best Friend Speaks About His Suicide*, KETV OMAHA (Oct. 5, 2020, 6:25 PM), <https://www.ketv.com/article/he-lost-his-faith-in-the-justice-system-jake-gardners-best-friend-speaks-about-his-suicide/34211653> [<https://perma.cc/X5DF-D6U8>].

³⁷⁰ Nebraska law permits the use of force to defend property and even permits the use of deadly force in some circumstances, including when:

The person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction and either: [used or threatened deadly force]; or [t]he use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm.

volved in any kind of physical altercation with the owners, Gardner likely would have tried to validate his violence under a defense of property theory. Shortly before the shooting, he texted a friend a Twitter post by President Trump including the quote “when the looting starts, the shooting starts.”³⁷¹ This would have been closer to the truth and potentially also legal.

The Douglas County district attorney agreed to requests to submit the case for review by a grand jury.³⁷² Three months later, Gardner was indicted by a grand jury for manslaughter and for attempted assault (for firing the warning shots) and making terrorist threats (for a verbal altercation between Gardner and Scurlock).³⁷³ Evidence from the second investigation undermined his self-defense claim, suggesting instead that his threats and violence began well before his confrontation with Scurlock and that he was not acting in response to any direct threat to his property.³⁷⁴ He was patrolling and shooting in a proactive attempt to fortify his property and economic security. As with Arbery’s killing, the prosecutor’s initial review resulted in a legitimation of the killing, but later reviews determined that the killers threatened to use deadly force well before they were actually involved in any kind of physical altercation with the victims.³⁷⁵ Gardner took his own life shortly after he was indicted.³⁷⁶

Scurlock’s killing implicates the institution of policing in two ways. First, resistance to individual incidents of police violence provided an excuse for police departments across the country to re-escalate their level of violence, as police responded to protestors with riot gear, military vehicles, and non-lethal and sometimes lethal force.³⁷⁷ Second, in the context of mass protests, civilians take on an ancillary law enforcement role, using violence in the name of community

NEB. REV. STAT. § 28-1411 (1975).

³⁷¹ Bandur, *supra* note 369.

³⁷² Todd Cooper, *Veteran Federal Prosecutor to Lead Grand Jury Probe into James Scurlock’s Death*, OMAHA WORLD HERALD (June 8, 2020), https://omaha.com/news/local/veteran-federal-prosecutor-to-lead-grand-jury-probe-into-james-scurlocks-death/article_f2f0f66d-8400-5923-b441-d2f490c512c7.html [<https://perma.cc/39TB-XVDV>].

³⁷³ Azi Paybarah, *White Bar Owner Indicted in Fatal Shooting of Black Man During Protest*, N.Y. TIMES (Sept. 20, 2020), <https://www.nytimes.com/2020/09/15/us/james-scurlock-omaha-indicted.html> [<https://perma.cc/SL3N-66WN>].

³⁷⁴ See Josh Funk, *New Evidence Key to Charges in Nebraska Protestor’s Death*, ABC NEWS (Sept. 16, 2020, 3:31 PM), <https://abcnews.go.com/US/wireStory/evidence-key-charge-s-nebraska-protesters-death-73059253> [<https://perma.cc/7FK4-R47X>].

³⁷⁵ Paybarah, *supra* note 373. The prosecutor explained that the grand jury chose to indict because they were “able to understand that Jake Gardner was threatening the use of deadly force in the absence of being threatened with a concomitant deadly force by James Scurlock or anyone who was associated with him.” *Id.*

³⁷⁶ Bandur, *supra* note 369.

³⁷⁷ Under President Trump, protests were used as a justification when the role of the federal Department of Justice shifted from investigating the police to backing the police. Robert Faturechi, *The Obama Justice Department Had a Plan to Hold Police Accountable for Abuses. The Trump DOJ Has Undermined It.*, PROPUBLICA (Sept. 29, 2020, 5:00 AM), <https://www.propublica.org/article/the-obama-justice-department-had-a-plan-to-hold-police-accountable-for-abuses-the-trump-doj-has-undermined-it> [<https://perma.cc/YG7W-YKM6>].

and property protection. As almost happened with Scurlock's and Arbery's deaths, killings in this context may go quietly unprosecuted while the public's focus remains on the violence of police officers. Coupled with self-defense law, the chatter about protecting property and the mischaracterization of protests as "looting" has a chilling effect on black people's ability to assemble and exercise free speech rights in the public sphere, as participation may imperil their lives.

Even as national attention has focused on other shootings at the hands of police, including those of Taylor and Jacob Blake (the man shot seven times by the police in Kenosha, Wisconsin), a narrow understanding of "the police" has prevented reform efforts from focusing on actions by civilians like Gardner and the drivers who have run vehicles into crowds.³⁷⁸ These actors are either validated as sympathetic civilians or dismissed as isolated lawbreakers, but the analysis misses the way local, state, and national officials have invited private citizens to help police fight protestors and the way that legal doctrine is used and reshaped to ensure that civilians who fight on the side of police are not punished.³⁷⁹ The idea that civilians should work together with police to protect property against "looters" is not confined to social media posts. It is advanced by state and local lawmakers, who have introduced and supported laws aimed at relaxing possible criminal sanctions for civilians who hurt or kill protestors.³⁸⁰

It was also advanced by former President Trump, who took office shortly after widespread protests over police killings of black people in 2016 and during the Dakota Access pipeline protests.³⁸¹ Instead of acting as an intermediary between vigilante civilians and state law justice systems that refused to punish them, the Trump Justice Department envisioned itself as a partner of local law

³⁷⁸ See, e.g., Hannah Allam, *Vehicle Attacks Rise as Extremists Target Protesters*, NPR (June 21, 2020, 7:01 AM), <https://www.npr.org/2020/06/21/880963592/vehicle-attacks-rise-as-extremists-target-protesters> [https://perma.cc/XS9G-4UWD] (reporting at least fifty vehicle rammings of protestors have occurred since May 2020).

³⁷⁹ Or, if they behave so badly that they must be punished, it takes a long time to get there. See Tom McCarthy, *A Tale of Two Videos: Jacob Blake, Kyle Rittenhouse and Two Types of Policing*, GUARDIAN (Aug. 29, 2020, 2:00 PM), <https://www.theguardian.com/us-news/2020/aug/29/two-videos-jacob-blake-kyle-rittenhouse-policing> [https://perma.cc/W8HA-9JHH] (comparing the police reaction to Blake and Kyle Rittenhouse, a white teen who opened fire on protestors and killed two people in the name of protecting property, but later claimed self-defense); Mary Mitchell, *Don't Make 17-Year-Old Kenosha Shooter a Hero*, CHI. SUN TIMES (Aug. 28, 2020, 8:40 PM), <https://chicago.suntimes.com/opinion/2020/8/28/21406302/kenosha-kyle-rittenhouse-no-hero-jacob-blake> [https://perma.cc/25UN-Y2LQ].

³⁸⁰ See Dakin Andone, *These States Have Introduced Bills to Protect Drivers Who Run Over Protesters*, CNN (Aug. 19, 2017, 3:36 AM), <https://www.cnn.com/2017/08/18/us/legislation-n-protects-drivers-injure-protesters> [https://perma.cc/EK72-V48K].

³⁸¹ Jeremy Venook, *Trump's Record on Police Brutality and Peaceful Protests: Making the Problem Worse*, CTR. FOR AM. PROGRESS ACTION FUND (June 15, 2020, 9:00 AM), <https://www.americanprogressaction.org/issues/security/news/2020/06/15/177851/trumps-record-police-brutality-peaceful-protests-making-problem-worse> [https://perma.cc/8TW5-NZY8].

enforcement and asked for civilians to unite with state and federal officials against “the rioter, the looter, [and] the violent disrupter.”³⁸² In the summer of 2020, a white suburban couple, Mark and Patricia McCloskey, armed themselves in anticipation of protestors passing their home.³⁸³ Even though there was no evidence that any protestors came close to them or posed any physical threat, the former President defended the McCloskeys in an interview, saying that if they had not defended their house with guns, “they were going to be beat up badly and the house was going to be totally ransacked or burned down.”³⁸⁴ In saying this, Trump voiced the fear-based argument that undergirded Gardner’s claim and that of countless other civilians preparing to use violence against protestors. His reelection campaign subsequently leveraged the McCloskey incident to play up white suburban fears of disorder.³⁸⁵

The killings described in this Section are all components of the complex network that is policing. Police and victims of police violence are often represented by archetypal characters; for example, Amy Cooper is the seemingly liberal white woman whose true racist character comes out under pressure. Derek Chauvin is the hyper-masculine, racist predator using his official uni-

³⁸² Matt Zapposky, *Trump White House Vows it Won’t Coddle ‘the Rioter, the Looter, or the Violent Disrupter,’* WASH. POST (Jan. 20, 2017, 10:39 AM), <https://www.washingtonpost.com/news/post-nation/wp/2017/01/20/trump-white-house-vows-to-take-on-the-rioter-the-looter-or-the-violent-disrupter> [https://perma.cc/E9J8-95XD]; see also John Shiffman & Brad Heath, *Special Report: How U.S. Justice Department Disarmed Its Police Reform Effort,* REUTERS (Oct. 2, 2020, 9:36 AM), <https://www.reuters.com/article/us-usa-police-justice-specialreport/special-report-how-u-s-justice-department-disarmed-its-police-reform-effort-idUSKBN26N2VE> [https://perma.cc/WCV6-87KJ].

³⁸³ Jeremy Kohler, *The St. Louis Couple Charged with Waving Guns at Protesters Have a Long History of Not Backing Down,* ST. LOUIS POST-DISPATCH (Aug. 19, 2020), https://www.stltoday.com/news/local/metro/the-st-louis-couple-charged-with-waving-guns-at-protesters-have-a-long-history-of/article_281d9989-373e-53c3-abcb-ecd0225dd287.html [https://perma.cc/3RCT-Q77B]; Mairead McArdle, *Police Investigating Protesters After Confrontation with Armed St. Louis Homeowners,* YAHOO NEWS (June 29, 2020), <https://news.yahoo.com/police-investigating-protesters-confrontation-armed-213607583.html> [https://perma.cc/5552-J24R]. Both eventually pled guilty to misdemeanor charges in connection with the incident. Vanessa Romo, *The Couple Who Waved Guns at BLM Protesters Plead Guilty to Misdemeanors,* NPR (June 17, 2021, 9:55 PM), <https://www.npr.org/2021/06/17/1007984646/patricia-mark-mccloskey-waved-guns-blm-protesters-plead-guilty-misdemeanors> [https://perma.cc/NE28-7RJE].

³⁸⁴ The local prosecutor investigating the couple received death threats after the President and the Missouri governor stated their support for the couple. She described the threats as “a modern-day night ride,” linking it to Ku Klux Klan rides through black neighborhoods in the post-Reconstruction era that were unpunished and even encouraged by state and local governments. Meagan Flynn et al., ‘A Modern-Day Night Ride’: *St. Louis Prosecutor Receives Death Threats as Trump Defends Couple Who Pointed Guns at Protesters,* WASH. POST (July 15, 2020, 3:30 PM), <https://www.washingtonpost.com/nation/2020/07/15/trump-st-louis-mccloskeys> [https://perma.cc/D2QS-R3YJ].

³⁸⁵ Emma Green, *The McCloskeys’ Unsubtle Message to White America,* ATLANTIC (Aug. 25, 2020), <https://www.theatlantic.com/politics/archive/2020/08/mccloskeys-trump-suburbs-rnc/615655> [https://perma.cc/4496-FPCD].

form guise to carry out an intentional lynching. It might be tempting to assume that if we could just eliminate or control those outlier bad actors, the system would work. Cooper and Chauvin, however, are part of a much bigger system of policing that involves average white Americans using violence to police the bodies and movements of black Americans and other non-whites. Even if Derek Chauvin is actually a hyper-racist predator, the same framework explains other deaths where the police are not hyper-racist predators. George Floyd is part of a larger network, and we cannot isolate this incident. Thus, prosecuting Chauvin as the “one bad apple” is not going to solve the issue.

While policy responses have adopted the police/civilian distinction, and lawyers invoke different legal frameworks depending on the situation, protestors understood all of these deaths as connected. The phenomenon of policing in America extends far beyond individual officers like Derek Chauvin. It includes white men like Gregory and Travis McMichael, as well as Jake Gardner, who embody masculinity by using violence to exert ownership over neighborhoods, businesses, and cities. It includes white women like Amy Cooper who invoke this network of official and private violence to protect them from imagined threats by black men. Its victims are men like Ahmaud Arbery and George Floyd, who embody that imagined threat; men and women like James Scurlock and Sandra Bland, whose presence is equated with disorder and disobedience; and women like Breonna Taylor and Jannie Ligons, whose experiences show that our system of policing only protects white interests. It also includes the network of laws that can so easily shield killers from the consequences of their actions. The 2020 protests were aimed broadly at an entire system that treats black death as an inevitable and acceptable casualty in the effort to protect white property. As Omaha activist and musician Dominique Morgan wrote of the protests:

We were saying the murder of James Scurlock was unacceptable to us. The murder of Breonna Taylor, the murder of George Floyd, the murder of Ahmaud Arbery, the murder of Nina Pop, the murder of Tony McDade, the murder of so many black folx that we have seen in real time taken from us. We were not okay with it anymore and we were eulogizing them in the streets.³⁸⁶

CONCLUSION

In his address to the American people during the 1992 Los Angeles uprising, President George H.W. Bush contemplated, “None of this is what we wish to think of as American. It’s as if we were looking in a mirror that distorted our better selves and turned us ugly.”³⁸⁷ But the reality is that the mirror is not distorted, and the mirror does not lie. Racism is the portrait of Dorian Gray that

³⁸⁶ Dominique Morgan, *Police Response and Systems of Oppression*, READER (July 14, 2020), <https://thereader.com/voices/police-response-and-systems-of-oppression> [<https://perma.cc/JFT2-RLHG>].

³⁸⁷ Address to the Nation on the Civil Disturbances in Los Angeles, California, 1 PUB. PAPERS 685, 686 (May 1, 1992).

we try to conceal in our attic,³⁸⁸ but the ugliness of its sin is ancient and deeply rooted. Racism shows America the ugliness of its true self, one that has been festering and decaying our national body ever since 1619 when the first African slaves were brought to these shores.³⁸⁹ It is an ugliness that cannot just be covered up, which is what we are wont to do, like makeup on a deep wound. The wound cannot be allowed to rot any longer. It must be healed. Healing, however, cannot be superficial and must be a transformation that reaches deep into the core.

Simple police reform will not prevent more Derek Chauvins or Laurence Powells from engaging in police violence. Mike Moulin, the police lieutenant in charge of the intersection of Florence and Normandie—which was the initial focal point of the 1992 Los Angeles uprising—made the controversial decision to deescalate and withdraw his officers from the area and not return.³⁹⁰ Though criticized by many at the time, including members of ethnic communities most affected by the destruction, as well as his own police chief, his reasoning was that use of force against the community at the time would have led to needless violence and loss of life.³⁹¹ De-escalation measures, such as Moulin’s approach, have been proposed as a reform measure.³⁹² Indeed, in the wake of the Ferguson protests, the Obama administration assembled a Presidential Taskforce on Twenty-First Century Policing, which recommended a de-escalation and guardian approach to policing.³⁹³ The taskforce suggested a shift away from a warrior approach to policing—with a focus on search, chase, and capture—to a guardian approach instead, emphasizing social services and community partnerships and establishing positive contacts.³⁹⁴ Though the guardian approach focuses on ameliorating relationships between the police and black communities, its solution is not very different from the approach Chief Willie Williams attempted to implement in Los Angeles after the 1992 uprising. The guardian approach, in

³⁸⁸ See OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* (1890 ed.).

³⁸⁹ THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 3 (1996).

³⁹⁰ David Whitman, *The Untold Story of the LA Riot*, U.S. NEWS & WORLD REP. (May 23, 1993), <https://www.usnews.com/news/articles/1993/05/23/the-untold-story-of-the-la-riot> [https://perma.cc/W7MH-56CM].

³⁹¹ Daisy Nguyen, *Mike Moulin, Key Police Figure During LA Riots, Dies at 70*, ASSOCIATED PRESS (Aug. 5, 2019), <https://apnews.com/article/2b12b809f2c94769b99f0140f3a9d621> [https://perma.cc/2HM8-7FJR]; see also Lou Cannon, *When the Thin Blue Line Retreated, L.A. Riot Went Out of Control*, WASH. POST (May 10, 1992), <https://www.washingtonpost.com/archive/politics/1992/05/10/when-thin-blue-line-retreated-la-riot-went-out-of-control/2ccf3e5c-c03b-4d82-bce1-0ea43be30cd3> [https://perma.cc/YNE2-FTB6].

³⁹² See Whitman, *supra* note 390.

³⁹³ Press Release, The White House, Fact Sheet: Task Force on 21st Century Policing (Dec. 18, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/18/fact-sheet-task-force-21st-century-policing> [https://perma.cc/2TW4-JCUT]; PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 1–2 (2015).

³⁹⁴ PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 383, at 1, 41; see also Kyle McLean et al., *Police Officers as Warriors or Guardians: Empirical Reality or Intriguing Rhetoric?*, 37 JUST. Q. 1096, 1096 (2020).

the end, was designed to encourage the community to participate in and buy into policing. Again, the solution offered was not diminishing policing, but increasing policing in a different form. The killings of Ahmaud Arbery, James Scurlock, and Trayvon Martin demonstrate the ways in which community participation in policing will inevitably lead to more deaths.

Piecemeal reform will also lead to backlash, which is more systemic in nature and produces deeper entrenchment. For example, the incremental positives of the Obama administration's response to Ferguson led to more severe backlash with the 2016 election and the change in administration.³⁹⁵ The recommendations of the taskforce were swiftly abandoned by the Trump administration before substantive reforms could be made, as they were interpreted as contrary to his new Executive Orders entitled "Task Force on Crime Reduction and Public Safety"³⁹⁶ and "Preventing Violence Against Federal, State, Tribal and Local Law Enforcement Officers,"³⁹⁷ which focused on expanding the scope and severity of law enforcement. The Trump Administration repeatedly invoked the language of law and order to promote its vision of law enforcement as a return to the warrior model that focuses on pursuit, capture, and punishment.³⁹⁸ In the four years since the recommendations of the Taskforce on Twenty-First Century Policing were abandoned, police and law enforcement have become increasingly militarized and increasingly grounded in nativist and white supremacist principles.³⁹⁹

Indeed, we are currently reaping the consequences predicted in the haunting words of the 1967 Kerner Commission: "To pursue our present course will involve the continuing polarization of the American community and, ultimately, the destruction of basic democratic values."⁴⁰⁰ Like Cassandra of Troy, the augurs of the Kerner Commission and all the other commissions on racial violence before and after them were ignored. Now, at the time we are writing this Introduction, we are experiencing exactly what the Kerner Commission prophesied. Our nation is now as polarized and divided as ever, and we are on the verge of a democratic crisis as evidenced by the January 2021 Capitol insurrection, which was met with much milder police presence than the racial justice protests that occurred months earlier.⁴⁰¹ The Capitol insurrection demonstrates radically different treatment for white rioters and black protesters.

³⁹⁵ Jeremy Stahl, *How the Trump Administration Undid Obama's Response to Ferguson*, SLATE (June 2, 2020, 6:17 PM), <https://slate.com/news-and-politics/2020/06/trump-doj-obam-a-policing-reform.html> [<https://perma.cc/N47S-EKEM>].

³⁹⁶ Exec. Order No. 13,776, 82 Fed. Reg. 10,699 (Feb. 9, 2017).

³⁹⁷ Exec. Order No. 13,774, 82 Fed. Reg. 10,695 (Feb. 9, 2017).

³⁹⁸ Giovanna Shay, *Foreword: Symposium on Gender & Incarceration*, 39 W. NEW ENG. L. REV. 369, 370 (2017).

³⁹⁹ Etienne C. Toussaint, Essay, *Blackness as Fighting Words*, 106 VA. L. REV. ONLINE 124, 140–41 (2020).

⁴⁰⁰ NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 112, at 1.

⁴⁰¹ Nicole Chavez, *Rioters Breached US Capitol Security on Wednesday. This Was the Police Response When It Was Black Protesters on DC Streets Last Year*, CNN (Jan. 10, 2021,

While thousands of people in cities across the country who were fed up with police violence were taking to the streets in protest, as they did countless other times in the past, many on the other side were calling for increased use of militarized force to quell it.⁴⁰² Yet the choices need not be polar; they need not be absolute. As also portended in the Kerner Commission report:

The alternative is not blind repression or capitulation to lawlessness. It is the realization of common opportunities for all within a single society. This alternative will require a commitment to national action—compassionate, massive and sustained, backed by the resources of the most powerful and the richest nation on this earth. From every American it will require new attitudes, new understanding, and, above all, new will.⁴⁰³

As we have suggested in this Introduction, for far too long now, the attitude, understanding, and will of the country towards policing has taken the perspective of our founders: white, landowning men who saw capitalization on the lives and labor of racialized and gendered others as the means to thrust our nation into the position of power and wealth that it enjoys now. In order for our nation to cure the wounds that divide us, we must shed this perspective, shed this attitude, and start with, as the Kerner Commission desperately urges, something new.

We are extremely proud to introduce this Symposium issue, which contains nine essays of exceptional insight. They will be useful to scholars of how identities operate in relation to the criminalization system across the fields of law, sociology, and criminal justice. What strikes us most about the collection as a whole is the way it unearths important under told stories. These essays further demonstrate that race and gender and policing are often co-constituted.

Sociologist Theresa Rocha Beardall tells the story of Loreal Tsingine, a twenty-seven year-old Diné (Navajo) mother whom a Winslow, Arizona, police officer shot and killed after a call on suspicion of shoplifting.⁴⁰⁴ After the Maricopa County Attorney's Office cleared the shooter, the Navajo nation requested that the U.S. Justice Department investigate, and they also declined to prosecute. Beardall argues this case demonstrates the invisibility to the media and public of police violence against Native women; an invisibility that makes no sense given that Native women are twice as likely as white women to be killed by police. Beardall demonstrates that Tsingine's indigeneity created an intersectional identity that helps explain why women of color in general, and black and Native women in particular, face disparate police violence. Beardall makes it clear, though, that black women and Native women present different

11:30 PM), <https://www.cnn.com/2021/01/07/us/police-response-black-lives-matter-protest-us-capitol/index.html> [<https://perma.cc/9ZL6-FQYX>].

⁴⁰² Thomas Gibbons-Neff et al., *Aggressive Tactics by National Guard, Ordered to Appease Trump, Wounded the Military, Too*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/politics/national-guard-protests.html> [<https://perma.cc/T4DM-K3HC>].

⁴⁰³ NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 112, at 1.

⁴⁰⁴ Theresa Rocha Beardall, *Sovereignty Threat: Loreal Tsingine, Policing, and the Intersectionality of Indigenous Death*, 21 NEV. L.J. 1025 (2021).

problems for the settler-state. She introduces “sovereignty threat” to explain why Native women’s ongoing relationships with land, place, and tribe threaten to reveal the illegitimacy of the settler-state’s legitimacy claim to sovereignty. Accordingly, Tsingine’s murder is not just an expression of police bias, but of an attempt to ward off sovereignty threat.

Law professor Valena Beety tells the story of Philando Castille—whose girlfriend live tweeted a police officer shooting him to death when Castille said he had a licensed firearm—and the hundreds of victims of police violence every year.⁴⁰⁵ She calls for allowing those victims to recover under the Victims Compensation Funds that already exist in most states. The funds are so important because they cover expenses like funerals and medical or mental health treatment. This is a social justice issue that should trigger international human rights protection because police violence is disproportionately visited upon communities of color. But most families of victims of police violence are prevented from recovering from these funds by the requirement of a police report designating them as victims. Because these funds come from fines and fees of people convicted of crimes, they are a better alternative to the current system of sometimes paying families of victims of police settlements out of taxpayer funds.

Law professor Shawn Fields tells the story of Ky Peterson, a black transgender man who had been brutally raped and faced police indifference to his attempt to file a report.⁴⁰⁶ He thus carried a gun as self-help. When Peterson thwarted a later completed rape attempt by shooting his epithet-hurling attacker to death, the police ignored the rape kit evidence and charged him with robbery, murder, and illegal use of a weapon, even though this was a paradigmatic case of self-defense. Peterson’s defense attorney did not even make a claim under Georgia’s broad Stand Your Ground law, assuming a rural jury would discriminate against his client’s race and gender identity. Fields relates the incredibly high rates of violence against the black transgender community and equally disappointing statistics on police under-protection. He then details the barriers to protection for this community’s use of the generally profligate self-defense and Stand Your Ground rules. Fields thus argues the under-protection of the black transgender community in self-defense law magnifies police criminalization and under-protection.

Criminologists Henry Fradella, Weston Morrow, and Michael White tell the story of how stop and frisk has affected people based on race/ethnicity and sex/gender in New York City.⁴⁰⁷ Following up on the litigation that led to a

⁴⁰⁵ Valena E. Beety, *Legal Support for Victim Compensation Funds for Police Violence Victims*, 21 NEV. L.J. 953 (2021).

⁴⁰⁶ Shawn E. Fields, *The Elusiveness of Self-Defense for the Black Transgender Community*, 21 NEV. L.J. 975 (2021).

⁴⁰⁷ Henry F. Fradella, Weston J. Morrow & Michael D. White, *An Empirical Analysis of the Race/Ethnic and Sex Differences in NYPD Stop-and-Frisk Practices*, 21 NEV. L.J. 1151 (2021).

federal district court finding that the NYPD's *Terry*-stops violated the Fourth Amendment and Fourteenth Amendment Equal Protection, they conduct a study of recent NYPD stops to see if race/ethnicity and sex/gender still infect the stops. They note that NYPD stops have plummeted from over 600,000 in 2011 to a bit over 13,000 in 2019, during which time crime dropped. Their study uses multi-level regression analysis to find the hit rate of discovering contraband has gone up; searches do not appear to be greatly affected by race/ethnicity, but by the decision of whom to stop; and there were disparities in the use of force by race/ethnicity, seemingly because of the disproportionate stops.

Law professor Danielle Jeffries tells the story of the Covid pandemic's effects in the U.S.'s carceral facilities.⁴⁰⁸ She documents that as Covid has ravaged incarcerated populations, administrators have resisted ameliorative measures and doubled down on punitive responses. She then shows that courts have failed to acknowledge this cruel and unusual state of affairs. She concludes that the pandemic has further revealed the U.S. carceral system's normal reasoning: punitiveness is deemed necessary for its own sake and disproportionately is aimed at people of color.

Law professor Kit Johnson tells the story of women of color in immigration enforcement.⁴⁰⁹ She reveals new data showing that while women make up a small percentage of immigration enforcement, more than half of them are of color. She explains how we got to a diversification of female immigration enforcers. She also explains the benefits of diversity among women immigration enforcers and the barriers to expansion of that trend. She concludes by suggesting some ways to continue diversification and calling for further empirical work on women of color in immigration enforcement.

Activist and scholar Karissa Kang and her father, law professor John Kang, tell the story of transgender persons going through Transportation Safety Administration checkpoints.⁴¹⁰ Gender discrimination is built into TSA scanners, which search based on the expected anatomy for the gender the agent assigns a person. This presents problems for transgender persons whose genitalia do not match TSA's expectations. Kang and Kang explore how this dilemma raises Fourth Amendment privacy issues and Fifth Amendment substantive Due Process issues of the right to choose one's identity. Their proposal is to allow transgender persons to provide a card telling the machine what bodily configurations to expect. They also suggest how analysis of race might complicate this issue.

Our colleague Ann C. McGinley tells the stories of black and Latinx people with mental health, intellectual, and sensory perception disabilities who

⁴⁰⁸ Danielle C. Jeffries, *American Punishment and Pandemic*, 21 NEV. L.J. 1207 (2021).

⁴⁰⁹ Kit Johnson, *Women of Color in Immigration Enforcement*, 21 NEV. L.J. 997 (2021).

⁴¹⁰ Karissa J. Kang & John M. Kang, *Anomalous Anatomies: How the TSA Should Screen for Transgender People*, 21 NEV. L.J. 1061 (2021).

are confronted by the police.⁴¹¹ She explains why when race and disability intersect, the chance of police use of force dramatically increases. The essay explores whether Title II of the Americans with Disabilities Act could be used to hold police departments and individual officers responsible for killing or injuring people with disabilities. Nonetheless, McGinley recognizes the limitations of law and calls for social change, such as redirecting police funding towards resources that support individuals with mental health and other disabilities.

Law professor Jyoti Nanda tells the story of youth identified as “at risk” in their schools and enrolled in supervised programs.⁴¹² Nanda demonstrates how these programs’ fail to appropriately balance the risk of future offenses and do not keep kids safe. Instead, they stereotype youth and push them toward future incarceration. By investigating the juvenile system, Nanda shows just how invasive the criminalization system has become. The essay concludes that juvenile probation should be analyzed as being an insidious part of the carceral state.

Each of these pieces advances a nuanced, intersectional critique of policing, understood broadly. We hope that this volume will help readers resist the temptation to oversimplify the problem of police violence and reach for easy reforms, encouraging us instead to create something truly new.

⁴¹¹ Ann C. McGinley, *Enough!: Eliminating Police Abuse of Individuals of Color with Disabilities*, 21 NEV. L.J. 1081 (2021).

⁴¹² Jyoti Nanda, *Web of Incarceration: School-Based Probation*, 21 NEV. L.J. 1117 (2021).