RACE AND GENDER AND POLICING

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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

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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 black women often fall between the cracks when we treat protected categories one dimensionally.2 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.3 Discrimination is allowed to persist because the law does not recognize being both black and a woman as a protected class.4 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.5

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

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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.
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. 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. The intersection of race and the institutional practices of the police means that “black and brown community” implies “highly policed” community. 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. 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. 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:


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

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.\textsuperscript{12}

In this metaphor, racism and patriarchy are different subordinating forces that collide to exacerbate oppression of the intersectional individual.\textsuperscript{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.\textsuperscript{14}

Sociology reinforces the intersectional insight by considering intersectionality’s connections to systems of power\textsuperscript{15} within larger social structures. In \textit{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.”\textsuperscript{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.\textsuperscript{17} This Introduction discusses a variety of seemingly dis-

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\item \textsuperscript{12} Crenshaw, supra note 3.
\item \textsuperscript{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, \textit{Intersectionality} 27 (2016).
\item \textsuperscript{15} Collins and Bilge identify four domains of power: “structural, cultural, disciplinary, and interpersonal.” \textit{Id.} We will move amongst those realms as dictated by our case studies.
\item \textsuperscript{16} \textit{Id.} at 2.
\item \textsuperscript{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., \textit{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.\footnote{See discussion infra Section III.A (considering Christian Cooper story).} 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.”\footnote{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-siyombola/ [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-Q56F]; 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].} 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.\footnote{See discussion infra Section III.B (explicating stories).} 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.\footnote{See discussion infra Section III.C (discussing these stories).} 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.

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and Charleena Lyles. 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. 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. 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. 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 reintimates 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. 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 invisible 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.

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).
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.” His name was George

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. 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. 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. 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.” 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


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-XIAE].

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.

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. 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. And the justice system again bought wholesale into that narrative.

So, people took to the streets. 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. 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. 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. 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. Los Angeles voters passed Charter Amendment F, which put limitations on the police chief and

37 See id.
39 See Jennings & Hamilton, supra note 34.
created increased civilian review of police misconduct. The focus was on restoring law and order to a police department that had seemingly viewed itself as exempt from these core principles. Darryl Gates, who had lobbied against the amendment, was forced to resign as police chief, to be replaced by Willie Williams, an African American. 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. 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*. 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. 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.

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. 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

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45 Id.


49 Brown, supra note 33, at 355.

50 Id. at 356.

were devoted to restoring commerce to the area. 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, 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. 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. The criminal justice system continues to disproportionately affect the black community, which makes up 30-40 percent of the prison population, even though it makes up less than 13 percent of the national population. 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

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).
itself, the structure that holds not only the bad apples but also the good ones, is flawed.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{58} Joanna Schwartz has described police reform as focused on bad apples (individual officers) and bad barrels (entire departments). Joanna C. Schwartz, \textit{Systems Failures in Policing}, 51 Suffolk U. L. Rev. 535, 537 (2018). Here, we focus on the entire orchard.

\textsuperscript{59} \textbf{Joe Domanick, Blue: The LAPD and the Battle to Redeem American Policing} 115 (2015).


\textsuperscript{64} \textit{Id.}
Zimmerman, who were all engaging in precisely the type of community policing of black people that Williams advocated. 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 nonwhite 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. 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. 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. However, if we take looting to mean the mass appropriation of property, then white men have been looting from people of color from the...
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. 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. For over a century, black lives held value insofar as they were the property of their white kidnappers. 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. 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. 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. 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.


70 U.S. CONST. art. I, § 2, cl. 3.


73 See HADDEN, supra note 72, at 4.

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

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. An underlying purpose of segregation was anti-miscegenation, geared at maintaining the racial purity of whites. 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.

Indeed, the local Southern police were usually Klansmen. The trope most often utilized by the Klan to foment violence was the alleged rape of a white woman by a black man. 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. 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. Furthermore, white violence against

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

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

87 GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 1 (new ed. 2007).
89 See generally id.
tice and segregation back at home.\textsuperscript{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.\textsuperscript{92} This violence, initiated by whites and targeting black lives and black property, was geared towards the specific goal of preserving segregation.\textsuperscript{93} Legislators let themselves be convinced that the violence was bilateral and that the only lasting solution to racial violence was continued racial segregation.\textsuperscript{94}

The most expeditious tool of white supremacy to mobilize violence against the black community was the purity of white women.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{100} The next morning, a mob of armed white men that greatly outnumbered the black population descended upon Greenwood and began murdering black residents

\textsuperscript{91} See generally Adriane Lentz-Smith, Freedom Struggles: African Americans and World War I (2009).
\textsuperscript{92} Katrina M. Sanders, America’s Quest for Racial Tolerance, 2 J. Gender, Race & Just. 99, 100 (1998).
\textsuperscript{97} Alfred L. Brophy, The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court, 54 Okla. L. Rev. 67, 68 (2001).
\textsuperscript{98} Alfred L. Brophy, Reconstructing the Dreamland: The Tulsa Riot of 1921, at 33 (2002).
\textsuperscript{99} See id. at 38.
and burning and looting their homes and businesses.\textsuperscript{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.\textsuperscript{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.\textsuperscript{103} The sheriff, though claiming he was unsuccessful in dispersing the white mob, nevertheless refused assistance that the governor offered.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{107} Currently, there is a lawsuit brought by relatives of the victims of the Tulsa massacre to seek reparations as well.\textsuperscript{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.\textsuperscript{109} As this Section

\begin{flushleft}
\textsuperscript{101} Hirsch, supra note 96, at 99–116.
\textsuperscript{102} Ellsworth, supra note 100, at 74.
\textsuperscript{104} Id. at 31.
\textsuperscript{105} Id.
\end{flushleft}
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.109 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 unrest110 and by the Kerner Commission organized by President Lyndon Johnson following a rash of uprisings in Detroit, Newark, and twenty-three other cities in 1967.111 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

109 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 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 Ligons, 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 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.\textsuperscript{113} Christian Cooper is a black man who is a professional writer and editor, as well as an avid birdwatcher.\textsuperscript{114} They were both in New York’s Central Park when they encountered one another.\textsuperscript{115} Christian Cooper politely asked Amy Cooper to leash her dog, as that is required in the park.\textsuperscript{116} Amy Cooper refused, and a verbal argument ensued between them.\textsuperscript{117} Christian Cooper began recording Amy Cooper.\textsuperscript{118} She threatened to call the police, saying “I’m going to tell them an African American man is threatening my life.”\textsuperscript{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.\textsuperscript{120} Unfortunately for Amy Cooper, this happened just hours before George Floyd was killed, and people made a connection between the events.\textsuperscript{121} She became a symbol of “the weaponization of white women’s tears.”\textsuperscript{122}

\textsuperscript{114} See id. Neither of these two Cooopers is any relation to each other or to the co-author of this piece with the same last name. Id.
\textsuperscript{115} Id.
\textsuperscript{116} See id. (mentioning Christian Cooper was not aggressive).
\textsuperscript{117} See id. (mentioning Amy Cooper refused).
\textsuperscript{118} See id.
\textsuperscript{120} See id. (showing Amy Cooper’s call).
\textsuperscript{121} Allen, supra note 113.
\textsuperscript{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. The police arrested him, and the prosecutor charged him with attempted rape. He was convicted. 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. 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. 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.

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. 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].

122 Id. at 388.
123 Id.
124 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).
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

132 See CBS News, supra note 119 (interviewing Christian Cooper, showing footage from his video of Amy Cooper).
subordination” over others.\textsuperscript{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.\textsuperscript{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,\textsuperscript{135} specifically identifying Christian as an “African American man” triggered the figure of the “Bad Black Man” who is bestial, criminal, and lascivious.\textsuperscript{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

\textsuperscript{133} See Ehrenreich, supra note 130, at 291 (defining “compensatory subordination”).

\textsuperscript{134} Chan Tov McNamarah, White Caller Crime: Racialized Police Communication and Existing White 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).

\textsuperscript{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”).

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.  

But in the post-civil rights era, not every black man is presumed bad, so some black men must be treated as good. 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. This allows the Amy Coopers and Sarah Braaschs 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,” which has invited a legal response. For instance, some jurisdictions have passed or considered laws

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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”).
141 See McNamah, supra note 134, at 335 n.8.
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

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).”)
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

148 Id.
149 Id.
150 Id.
151 Id.
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.\textsuperscript{161} An all-white jury convicted Holtzclaw based on the testimony of eight of the thirteen women.\textsuperscript{162} Holtzclaw was sentenced to 263 years in prison.\textsuperscript{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.\textsuperscript{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.\textsuperscript{165} The sergeant threatened to arrest her unless she performed a sex act because, he said, “that’s what you do.”\textsuperscript{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.\textsuperscript{167} She complied because she was afraid.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{171} She becomes an ever-available outlet for white men to express sexual desire.\textsuperscript{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.\textsuperscript{173} In the mean-

\textsuperscript{161} Id. at 210, 212.
\textsuperscript{162} Id. at 210; Fenwick & Schwarz, supra note 152.
\textsuperscript{163} MANNE, supra note 146.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{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).
\textsuperscript{172} See COLLINS, supra note 131, at 145 (defining stereotype’s effect).
\textsuperscript{173} See YOLANDE M. S. TOMLINSON, BLACK WOMEN’S BLUEPRINT, INVISIBLE BETRAYAL: POLICE VIOLENCE AND THE RAPE 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. 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. 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. He would then use that information to threaten the women with arrest if they refused his sexual advances.

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.” Our history of preventing black testimony and the especially virulent stereotype of black women as liars mean that black women are not credible. 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. 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.

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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.
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 Ligons 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.\(^\text{182}\) 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,\(^\text{183}\) black women are also killed by police at high rates,\(^\text{184}\) 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.\(^\text{185}\) In part, this is a result of the invisibility that shrouds black women’s discrimination claims.\(^\text{186}\) 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.\(^\text{187}\) 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.

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\(^\text{182}\) See generally Ritchie, supra note 27 (making this point).


\(^\text{184}\) 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).


\(^\text{186}\) 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).

\(^\text{187}\) See Josie Pickens, Can We Talk About How Black Women Are Treated as Threats Too?, Root (Aug. 24, 2014, 3:03 AM), https://www.thedoystick.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. Encinia was suspicious of Bland but did not have the reasonable suspicion necessary to seize her. So he followed her closely, then pulled her over for failing to signal a lane change. He ordered her to put out her cigarette. She objected. Encinia quickly escalated the encounter, ordering her out of the car and then starting to drag her out of her car. He drew a stun gun and infamously proclaimed, “I will light you up!” Two days later, Bland was found dead, hung in her jail cell. The story is seen by some as a suicide induced by Bland’s mental illness; 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. 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. Police officers are then to watch for “curiosity ticklers” that suggest something is awry. Encinia did what he was taught when he followed Bland for having out-of-state license plates, conducted a “concealed interrogation” of Bland, and sought to assert control over her. 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.
198 Gladwell, supra, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{205} For example, the police who confronted McClain were responding to a 911 caller who said he “looked sketchy.”\textsuperscript{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.\textsuperscript{207} The history of black interaction with police might also lead the suspect to behave more defensively or even to run.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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-elah-mccain.html [https://perma.cc/F4R2-7Y89] (detailing police killing of McClain).

\textsuperscript{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).


\textsuperscript{206} Tompkins, supra note 203.


\textsuperscript{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.”).

\textsuperscript{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-mccain-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

\[\text{Gladwell, supra note 188, at 321–22.} \]
\[\text{Id. at 325. Being from out of state, while commonly used by police as a sign of suspicion, does not constitute reasonable suspicion and arguably should have a value of zero since people have a right of mobility between states.}\]
\[\text{Id.}\]
\[\text{See id. at 314 (quoting Encinia not contesting Bland’s characterization of what caused the alleged traffic violation); id. at 326 n.8.}\]
\[\text{Id. at 314–16 (discussing Encinia mistakes).}\]
\[\text{Id. at 316.}\]
\[\text{Frank Rudy Cooper, “Who’s the Man?”; Masculinities Studies, Terry Stops, and Police Training, 18 Colum. J. Gender & L. 671, 698 (2009).}\]
\[\text{Ann C. McGinley, Policing and the Clash of Masculinities, 59 How. L.J. 221, 239 (2015).}\]
\[\text{Id. at 247.}\]
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. 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. In assessing the potential for danger, Encinia also drew on the stereotype of “angry black woman.” Trina Jones and Kimberley Norwood describe this stereotype as “inately intersectional” in the sense that it is only applied to black women, and it draws upon race- and gender-specific tropes about them. 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.” 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.”).
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. Believing they were burglars, Walker recovered his firearm and fired at them, hitting one officer in the leg. The officers responded by shooting more than twenty rounds into the house, killing Taylor in her bed and even hitting her neighbor’s house. Taylor was not suspected of any crime. Police were not pursuing her, nor did they allege that she acted suspicious or threatening. 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. The officers’ return fire might be described as self-defense in response to the threat posed by

225 Id.
226 Id.
227 Id.
228 Id.
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. 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. 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, Charleena Lyles, Atatiana Jefferson, Tanisha Anderson, and Michelle Cusseaux. 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. None of the aforementioned

231 Id.
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).
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. She was killed in her home in the middle of the night. All the women discussed in this section were killed in their homes, many in front of their children. 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. Indeed, Walker’s actions can best be described this way. 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-THV8] (noting that Casseaux 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”). 


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 WST. & 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/MDUNWEGADNH5SVKTVV3H42BZLA [https://perma.cc/4WE3-L8JH]. 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-
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 Mileitch, 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.


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).


post hoc by reference to stereotypes of criminality and the assumption that petty crimes, such as shoplifting, will inevitably lead to later violence. 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, a common stereotype emerged that presumed absent fathers and single mothers in black families were to blame for poverty and crime in black communities. 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. 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

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boys and men.\textsuperscript{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.\textsuperscript{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.\textsuperscript{264} She found that mothers constructed boys as primary targets of police violence and girls as collateral targets.\textsuperscript{265} They discussed their children’s vulnerability in racial terms but only invoked gender to emphasize the heightened vulnerability of sons.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{268}

\textsuperscript{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 [http s://perma.cc/4GEY-3AC2].


\textsuperscript{265} Id. at 371, 377.

\textsuperscript{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.”).

\textsuperscript{267} Gonzalez, supra note 264, at 377.

\textsuperscript{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 (@dreany123), TWITTER (June 10, 2018, 10:35 AM), https://twitter.com/dreany123/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, 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. At 8:08 PM, responding police officers Thomas Lane and J. Alexander Kueng approached Floyd’s car in Minneap-


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

Nine minutes later, Floyd was in a police SUV, and officers Derek Chauvin and Tou Thao arrived at the scene. Chauvin pulled Floyd through the back seat and out onto the street. Floyd was face-down on the pavement. 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.

Another video shows Thao interacting with the crowd of onlookers as Chauvin choked Floyd to death. 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. At 2:48, a witness says, “Bro, he ain’t fine.” At 3:08, Floyd says, “I can’t breathe.” Thao says, “Ok, he’s talking.” At 3:22, Floyd appears to lose consciousness.

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.” At 6:50, a paramedic moves from behind Derek Chauvin into frame, kneels down, and tries to check Floyd’s pulse. Chauvin keeps his knee on George Floyd’s neck. At 7:53, the paramedic tells Chauvin to lift up his knee. Chauvin finally stands up. 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.

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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.”

That problem continues into prosecution. Race and gender have both been demonstrated to affect plea bargaining, with negative consequences for black men. When exploring “disparities in charge reductions,” law professor Carlos Bedejó 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.”

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.

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, 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 (endomorphy) not clearly deviating from normal. Where it has been assessed, the ‘masculine’ configuration called andromorphy also characterizes the average criminal.”

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 . . .”

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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)).
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. 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.”

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. They claimed that after each of the dozens of blows, King’s body twitched and thus showed signs that

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298 Collins, supra note 131, at 228.

he would arise and harm the officers with his bare hands.\textsuperscript{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.\textsuperscript{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.

\section*{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{305} Initially, no charges were filed against any of these men in connection with Arbery’s death.\textsuperscript{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

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\textsuperscript{301} See supra notes 295–96 and accompanying text (discussing Wilson’s black criminality theories).


\textsuperscript{303} GLYNN CNTY, POLICE DEPT’, PUBLIC RELEASE INCIDENT REPORT FOR G20-11303 (2020); Fausset, supra note 302.


\textsuperscript{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 unpunished 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 McMih-

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\(^{307}\) 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-arberrys-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 on 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 males criminality used to justify the brutal beating of Rodney King and choking of George Floyd. See supra notes 299-300 and accompanying text.

Michael and Gregory McMichael with murder and aggravated assault. 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.

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. 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.

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. But by June 2020, public

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anger was directed mostly at the police.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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
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.


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.
328 Rolnick, supra note 129, at 1649.
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.\footnote{GLYNN CNTY. POLICE DEPT., 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.} 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.”\footnote{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].} 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.\footnote{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 ajaywalking 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.aclu.org/en/press-releases/aclu-nevada-responds-evidence-improper-stops-west-las-vegas [https://perma.cc/3VPC-X9LY].} 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.\footnote{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} This means that a police officer or prosecutor, not a judge or jury,
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. 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, 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 . . . .”).


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

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.
with the Brunswick County district attorney’s office. A county official told news outlets that, before recusing herself, the Brunswick D.A. directed investigators not to arrest the McMichaels. 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. Both prosecutors made this determination after viewing the same video that leaked to the public months later, 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. 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 depunitization of Greg McMichael.”

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. 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.
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 Emmitt 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. Those deaths, and the police’s use of military tactics and equipment, were explained as necessary to subdue unrest and protect businesses from “looting.” 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. Indeed, former President

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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.”

This private violence led to deaths too, including the death of James Scurlock in Omaha, Nebraska. Scurlock was shot by Jake Gardner, a white bar owner, when Scurlock was protesting on a public street outside Gardner’s bar.

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. Gardner himself had a criminal past, including assault and battery arrests and multiple weapons-related charges. The initial altercation occurred when Gardner’s father shoved two protestors away and asked them to leave the vicinity of his bar. Gardner then fired several shots into the air. Once shots were fired near him, and in response to being shoved, Scurlock jumped on Gardner. Gardner yelled “get off me” and then shot Scurlock, killing him.


Id.


Lewis, supra note 355.

Id.

Id.

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-

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 Id.
368 Id.
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." 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. 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). 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. He was patrolling and shooting in a proac-
tive 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. Gardner took his own life shortly after he was indicted.

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

371 Bandur, supra note 369.
372 Todd Cooper, Veteran Federal Prosecutor to Lead Grand Jury Probe into James Scur-
lock’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,
a- indicted.html [https://perma.cc/SL3N-66WN].
374 See Josh Funk, New Evidence Key to Charges in Nebraska Protesters’ 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 Abus-
es, The Trump DOJ Has Undermined It., PROPUBLICA (Sept. 29, 2020, 5:00 AM), https://ww
w.propublica.org/article/the-obama-justice-department-had-a-plan-to-hold-police-accountabl
e-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 unpunished 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. 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 protesters.

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. Instead of acting as an intermediary between vigilant civilians and state law justice systems that refused to punish them, the Trump Justice Department envisioned itself as a partner of local law


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].


enforcement and asked for civilians to unite with state and federal officials against “the rioter, the looter, [and] the violent disrupter.” In the summer of 2020, a white suburban couple, Mark and Patricia McCloskey, armed themselves in anticipation of protestors passing their home. Even though there was no evidence that any protestors came close to them or posed any physical threat, the former President defended the McCloskey’s 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.”

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.

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-

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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-Reconstructions 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-mccloskeykeys [https://perma.cc/D2QS-R3YJ].

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, protesters 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

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, 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. 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 desensitize and withdraw his officers from the area and not return. 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. De-escalation measures, such as Moulin’s approach, have been proposed as a reform measure. 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. 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. 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

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388 See OSCAR WILDE, THE PICTURE OF DORIAN GRAY (1890 ed.).
391 Daisy Nguyen, Mike Moulin, Key Police Figure During LA Riots, Dies at 70, ASSOCIATED PRESS (Aug. 5, 2019), https://apnews.com/article/2b12b809f6c94769b99f14of3a9d621 [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.
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 protestors.

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. 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.

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. 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


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

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. 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. 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. Following up on the litigation that led to a

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. 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. 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. 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

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are confronted by the police.\textsuperscript{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.\textsuperscript{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.
