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Intersectionality, Police Excessive Force, and Class

Frank Rudy Cooper*

ABSTRACT

Recent uprisings over the failure to hold police officers responsible for killing civilians—from Ferguson, Missouri to nationwide George Floyd protests—show the importance of excessive force as a social problem. Some scholars have launched racial critiques of policing as resulting from explicit or implicit racial bias. Others blame the United States Supreme Court’s permissive excessive force doctrine. This Article is the first to demonstrate that an intersectional analysis of both race and class helps explain both aggressive policing and the Court’s deference.

A key contribution of this Article is to reveal several takeaways from intersectionality theory’s basic insight that unique senses of self-identity and unique stereotypes form at places where categories of identity meet. First, seemingly distinct identities, such as race, gender, class, and so on, mutually construct one another such that, for example, racial discourses both influence and are influenced by gender discourses. Second, the categories of identity correspond with systems of social power, such as racism, sexism, classism, and so on. Third, those systems also intersect with and mutually construct one another, resulting in interlocking hierarchies of identities. Fourth, an individual’s social location—where they are in the map of categories of identity and systems of social power—interacts with social institutions, such as policing, in ways that exacerbate or ameliorate oppression. Considering the interactions between social locations and social institutions is an undertheorized aspect of intersectionality theory. This Article thus applies intersectionality theory to better understand how race and class come together to produce police excessive force.

This Article’s new insight is to use intersectionality theory to connect the scholarly literature on class that critiques the Western neoliberal economic order to the scholarly literature on police excessive force. Neoliberalism includes these components: (1) economic deregulation; (2) emphasis on individual re-

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sponsibility; (3) slashing welfare; and (4) expansion of punitive apparatuses. It has created a “centaur state,” which, like the mythological creature, is a comely human on top and a beast on the bottom. The centaur state is easy on the top of society through economic deregulation and emphasis on individual responsibility; however, neoliberalism’s economic deregulation and dismantling of the social safety net leaves behind a vulnerable population known as the “precariat.” The centaur state is hard on the bottom of society, as it seeks to push most of the precariat into low-wage, low-security jobs by slashing welfare and to incapacitate the remainder by increasing incarceration. The neoliberal economic order’s need to incarcerate the precariat thus led to aggressive new forms of policing.

This Article argues that three phenomena found by intersectional analysis of race and class help explain disparate policing of poor black and brown neighborhoods versus that in rich white neighborhoods. First, the post-Warren Court has cooperated with a neoliberally inspired politics of law and order by deregulating the police through, *inter alia*, permissive excessive force doctrine. Second, the “new policing”—aggressive intrusions based on predictive data to prevent rather than solve crime—applies the aggressive “warrior cop” mode in poor black and brown neighborhoods and the more protective “guardian officer” mode in rich white neighborhoods. Third, the potential for excessive force that inheres in warrior policing is what enhances boundaries between “good” and “bad” neighborhoods, whites and certain racial minorities, and the rich and the poor. In light of these linkages and dichotomies, this Article calls for further intersectional studies of policing that consider class as an equal factor with race, among other identities.

TABLE OF CONTENTS

INTRODUCTION 1454

I. THE COURT’S ACCEPTANCE OF POLICE EXCESSIVE FORCE 1461

 A. *Garner’s More Protective Approach*..... 1461

 B. *Graham and Scott as a Stealth Overturning of Garner* 1463

 C. *The Problem* 1468

II. CLASSING UP POLICING SCHOLARSHIP 1469

 A. *Racial Critiques* 1469

 B. *Takeaways from Intersectionality Theory*..... 1475

 C. *Class Analysis*..... 1485

III. THE “NEW POLICING” AS BOUNDARY MANAGEMENT .. 1490

 A. THE COURT’S DEREGULATION OF THE POLICE 1491

 B. *Race, Class, and the Warrior Mindset* 1496

 1. Understanding the Warrior Cop Mentality 1496

 2. “New Policing” as Warrior Policing 1500

 C. *Boundary Management* 1503

IV. OBJECTIONS AND IMPLICATIONS 1503

CONCLUSION 1511

INTRODUCTION

President Barack Obama’s Task Force on 21st Century Policing makes a useful distinction between “warrior” cops and “guardian” police officers.¹ The warrior cop views himself² “as a crime-fighter battling evil.”³ He is the “thin blue line” between good people and bad ones.⁴ He emphasizes physical control of suspects.⁵ He is more prone to use violence.⁶ The guardian police officer sees herself as a protector of the constitutional rights and dignity of civilians.⁷ She emphasizes verbal persuasion.⁸ She uses procedural justice—transparent explanations for her actions⁹—to convince civilians to comply.¹⁰ This Article will explore the underappreciated role of incentives to reinforce the class structure in explaining why poor black¹¹ and brown neighborhoods get warrior policing.¹²

1 PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1 (2015) (“Law enforcement culture should embrace a guardian—rather than a warrior—mindset to build trust and legitimacy both within agencies and with the public.”); see also Kyle McLean, Scott E. Wolfe, Jeff Rojek, Geoffrey P. Alpert & Michael R. Smith, *Police Officers as Warriors or Guardians: Empirical Reality or Intriguing Rhetoric?*, 37 JUST. Q. 1096, 1097 (2020) (distinguishing warrior and guardian mindsets); Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 612 (2016) (defining warrior cop).

2 There is some debate over whether female cops are less prone to violence. See, e.g., Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 585 (2001) (proposing, inter alia, hiring more female police in response to police beating of Rodney King).

3 McLean et al., *supra* note 1, at 1097; accord Stoughton, *supra* note 1, at 612.

4 Stoughton, *supra* note 1, at 635.

5 See McLean et al., *supra* note 1, at 1101.

6 See Stoughton, *supra* note 1, at 634.

7 See *id.* at 614.

8 See McLean et al., *supra* note 1, at 1097.

9 The following are key elements of procedural justice: “(1) how much voice and opportunity to be heard the party believes she has experienced, (2) neutrality of the forum, (3) the trustworthiness of the decisionmaker, and (4) the degree to which the individual has been treated with dignity and respect.” Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 135 (2011).

10 See PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 1, at 10 (calling for procedural justice in internal and external police methods). The guardian police officer is thus “more likely to partner with the community, emphasize communication rather than physical control during officer-citizen encounters, and view their authority as based on the consent of the public.” McLean et al., *supra* note 1, at 1097; see also Stoughton, *supra* note 1, at 614 (defining guardian officer).

11 I do not capitalize “black.” Although race is socially constructed, which suggests capitalizing all races to highlight that they have no biological meaning, race also has profound material effects in society, so it is “real” enough to not be capitalized. I usually discuss “black and brown people” because Latinx and some Asian-Americans in urban areas are policed at rates approaching the targeting of blacks.

12 In short, “class” is an identity created by the economic structuring of society that in-

As an example of how class works with race to influence the nature of policing,¹³ compare the practices in Summerlin, Las Vegas with those on the Westside of Las Vegas.¹⁴ Summerlin is much more white and much richer than Las Vegas as a whole, while the Westside is much more black and brown and much poorer than Las Vegas as a whole.¹⁵ In Summerlin, the police are relatively invisible; on the West-

volves a person's sense of who they are as a worker and consumer, and is expressed through behaviors such as dress, speech, and what one buys. See Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 LAW & CONTEMP. PROBS. 37, 38 (2009) (using similar concept). See generally Laura T. Kessler, *Getting Class*, 56 BUFF. L. REV. 915 (2008) (critiquing inattention to class in feminist legal theory); Lisa R. Pruitt, *The Women Feminism Forgot: Rural and Working-Class White Women in the Era of Trump*, 49 U. TOL. L. REV. 537 (2018) (discussing whiteness and class intersectionally). Class is simultaneously material and symbolic. See Harris, *supra*, at 38. The material component is the way resources, such as money, are distributed. See *id.* Class is thus the result of our capitalist commitments to the unequal distribution of goods based on market forces. See *id.* at 37. The symbolic component is the way social relations are represented. See *id.* at 38–39. Class thus differentiates kinds of laborers with varying degrees of public affirmation for their work. See *id.* at 39–40. Class is also an identity in that it influences how we see ourselves, how we are seen by others, and the ways we can negotiate between those perceptions, or, perform our identities. See Ann C. McGinley & Frank Rudy Cooper, *Intersectional Cohorts, Disability, and Class Actions*, 47 FORDHAM URB. L.J. 293, 326–34 (2020) (distinguishing facets of identity); see also Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 708 (2001) (discussing, inter alia, “identity intersectionality”). See Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473 (2020) for a different type of intersection of class into jurisprudence; namely, the argument for a democracy-expanding perspective that learns from poor people.

¹³ I define “policing” as surveillance and control of civilians on behalf of the state. Policing is usually rationalized as addressing crime. It is ultimately directed by elites and ostensibly assented to by a large segment of society. It also seems that some people—the white middle- and upper-classes—deem the police to be acting specifically on behalf of their property and particularly against certain populations—the poor as well as black and brown people.

¹⁴ A caveat is in order: this Article is a theory piece, not ethnography. I do not conduct a thick analysis of the social dynamics in these communities nor use detailed statistical analyses to drive my conclusions.

¹⁵ Compare *Race and Ethnicity in Summerlin North, Las Vegas, Nevada (Neighborhood)*, STAT. ATLAS, <https://statisticalatlas.com/neighborhood/Nevada/Las-Vegas/Summerlin-North/Race-and-Ethnicity> [<https://perma.cc/ZA4Q-6VSE>] (describing demographics of Summerlin), and *Household Income in Summerlin North, Las Vegas, Nevada (Neighborhood)*, STAT. ATLAS, <https://statisticalatlas.com/neighborhood/Nevada/Las-Vegas/Summerlin-North/Household-Income> [<https://perma.cc/Y7ZN-WZX8>] (detailing Summerlin household incomes), with *Race and Ethnicity in West Las Vegas, Las Vegas, Nevada (Neighborhood)*, STAT. ATLAS, <https://statisticalatlas.com/neighborhood/Nevada/Las-Vegas/West-Las-Vegas/Race-and-Ethnicity> [<https://perma.cc/J28J-DU4J>] (describing demographics of West Las Vegas), and *Household Income in West Las Vegas, Las Vegas, Nevada (Neighborhood)*, STAT. ATLAS, <https://statisticalatlas.com/neighborhood/Nevada/Las-Vegas/West-Las-Vegas/Household-Income> [<https://perma.cc/5DGR-JL43>]. See also *Race and Ethnicity in Las Vegas, Nevada (City)*, Stat. Atlas, <https://statisticalatlas.com/place/Nevada/Las-Vegas/Race-and-Ethnicity> [<https://perma.cc/97S4-WVSU>] (detailing demographics of City of Las Vegas); *Household Income in Las Vegas, Nevada (City)*,

side, the police are ever-present and stop civilians for jaywalking.¹⁶ This visible presence, or absence, of police in neighborhoods is one aspect of disparate policing.

Disparate policing can have tragic consequences. For instance, a fifty-year-old unarmed black man, Byron Williams, was stopped on the Westside by the Las Vegas Metropolitan Police Department in the early morning for riding a bike at night without a proper light.¹⁷ The *Terry* stop of Williams for lack of a bike light is the type of policing that happens to residents of the Westside but not to residents of Summerlin. On this occasion, Williams fled briefly, then surrendered and was suffocated to death.¹⁸ Legal scholars have suggested that disparate police excessive force stems from doctrinal flaws¹⁹ or racial bias.²⁰ This

STAT. ATLAS, <https://statisticalatlas.com/place/Nevada/Las-Vegas/Household-Income> [<https://perma.cc/9MXW-M5VM>] (reporting household income in the City of Las Vegas).

When I moved to Summerlin from Cambridge, Massachusetts, I wondered, “Where the heck are the police?” I came from a racially and economically heterogeneous neighborhood where we saw the police all the time. In Summerlin, people often speed 60 miles an hour in a 45 mile-per-hour zone in a residential area—no police. This relative absence of police is not the only way the Las Vegas Metropolitan Police Department acts as guardians in Summerlin; they are also more prone to provide assistance in Summerlin in ways that are absent from the warrior policing on the Westside. Note that these are my observations as a resident of Las Vegas; many people agree with me, but I did not conduct an empirical study of policing here.

¹⁶ A police officer who was a neighbor in Summerlin reported that he frequently *Terry*-stopped people for jaywalking on the Westside so that he could run warrant checks on them. A *Terry* stop, or stop and frisk, refers to a police officer’s brief detention, questioning, and limited search or pat down of a person for a concealed weapon when the officer has a reasonable suspicion that the person has committed or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Neither a warrant nor probable cause is required for a *Terry* stop. *Id.* On pretextual stops and warrant checks, see generally *Whren v. United States*, 517 U.S. 806, 817 (1996) (allowing pretextual intrusions), and *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016) (absolving constitutional violations followed by discovery of a warrant).

At the conference preceding this symposium issue, socio-legal scholar Monica Bell challenged the idea that the only difference between policing in rich white neighborhoods and poor black and brown neighborhoods is the absence of policing in the former. I am aware that police are often quite present in rich white neighborhoods, though in ways that reinforce the privilege of those residents. My point is that in Las Vegas, and likely elsewhere as well, *one primary means* of privileging residents of rich white neighborhoods is the absence of pervasive surveillance and intrusions.

¹⁷ Rio Lacanlale, *Review Examines Death of Man in Police Custody Who Said, ‘I Can’t Breathe,’* L.V. REV.-J. (Oct. 2, 2020, 4:39 PM), <https://www.reviewjournal.com/crime/homicides/review-examines-death-of-man-in-police-custody-who-said-i-cant-breathe-2134932/> [<https://perma.cc/4LGE-JY8H>].

¹⁸ *Id.*

¹⁹ See, e.g., Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 637 (criticizing state use-of-force statutes that focus solely on the honesty or reasonableness of an officer’s beliefs, and proposing model statute on police use of deadly force that requires a fact finder to consider whether the officer engaged in de-escalation measures and whether any conduct of the

is the first piece to show how incentives created by the class structure have influenced politics, doctrine, and police behavior in ways that exacerbate the problem.²¹

Intersectionality theory is the scholarly approach that will help us understand how class combined with race lead to warrior policing in poor black and brown neighborhoods. Many scholars would say that intersectionality theory is the most important development in the social sciences over the last thirty years.²² Yet there is surprisingly little legal scholarship applying intersectionality theory to policing.²³

Intersectionality theory is based on the insight that unique senses of self-identity and unique stereotypes form at places where identities

officer increased the risk of a deadly confrontation); Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425, 427 (2019) (discussing the Court's endogenous analysis of use-of-force policies, which assumes their reasonableness, then constitutionalizes their standards); Megan Quattlebaum & Tom Tyler, *Beyond the Law: An Agenda for Policing Reform*, 100 B.U. L. REV. 1017, 1022 (2020) (debunking the Court's factual description of police work as involving "split-second judgments" (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989))).

20 See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1529 (2016) (identifying some causes of police excessive force against blacks); see also Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 961 (2020) (reporting study finding that black suspects are more than twice as likely to be killed by police than are persons of other racial or ethnic groups, even controlling for numerous factors).

21 *But cf.* Aya Gruber, Commentary, *Policing and "Bluelining,"* 58 HOUS. L. REV. 867, 894 (2021) (likening police focus on black neighborhoods to bank redlining); Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1736 (2019) (asserting rise of "preventive policing" shows police's goal of controlling broadly defined "dangerous classes"); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. STATE L.J. 759, 828 (2005) (arguing capitalism's creation of social marginality is increasingly being addressed through social control rather than social welfare).

22 Intersectionality theory has grown from being considered by some to be a subfield of feminist theory or black feminist critique of antiracist politics to a broad field of its own that provides perspective on myriad aspects of the social world, not least of which are race, gender, sexuality, gender identity, class, and so on. See generally PATRICIA HILL COLLINS & SIRMA BILGE, *INTERSECTIONALITY* 1–2 (2d ed. 2020) (discussing intersectionality theory's impact).

23 *But see* Carbado, *supra* note 20, at 1514–15 (discussing masculinity effects on policing); Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 242–62 (2015) (applying masculinities studies to police violence against men of color); Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009) (applying masculinities studies to *Terry* stops and frisks); Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735, 736 (2015) (stating goal of considering impact of identities on policing); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 131–35 (2014) (applying masculinities studies to psychological study of police violence); Symposium, *Race and Gender and Policing* 21 NEV. L.J. (forthcoming Nov. 2021) (collecting intersectional analyses of policing); Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization*, 59 UCLA L. REV. 1418 (2012) (collecting discussions of police treatment of women of color).

such as race, gender, and class intersect.²⁴ Among the implications of that insight is that supposedly distinct identities mutually construct one another—for example, racial discourses both influence and are influenced by gender discourses.²⁵ Another important thing to note is that categories of identity correspond with systems of oppression, such as racism, sexism, classism, and so on. Moreover, those systems also intersect and mutually construct one another, resulting in interlocking hierarchies of identities.²⁶ This Article’s version of intersectionality theory thus emphasizes that an individual’s social location—where they are in the map of identities and systems of oppression—at a given time in a given context interacts with social institutions, such as policing, in ways that exacerbate or ameliorate oppression.

This Article’s signature insight is that the United States’s shift toward a neoliberal political-economic order created a “centaur state”²⁷

²⁴ See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (critiquing employment discrimination law’s failure to recognize black women’s intersectional position); PATRICIA HILL COLLINS, *INTERSECTIONALITY AS CRITICAL SOCIAL THEORY* 23 (2019) (arguing for thinking of intersectionality theory as a “critical social theory in the making”). Elsewhere, I have explicated the ways that masculinities—the gender performances traditionally associated with cisgender men—exacerbate police-civilian tensions. See Cooper, *supra* note 23, at 675 (defining masculinities in light of policing). Police officers, including women, may feel they have to prove their masculine esteem by aggressively controlling situations and punishing disrespect. But civilians may sometimes feel they too have to project masculine esteem by resisting domination. Meanwhile, often under the hashtag #SayHerName, scholars have pointed out that women of color are disproportionately victims of police violence, not just black men. See ANDREA J. RITCHIE, *INVISIBLE NO MORE 2* (2017). Further, rampant police sexual assaults of cisgender and trans women are a form of excessive force. Because race and gender are imbricated in one another, an analysis of racially disparate policing must recognize the *racially engendered* intersectional influences on police-civilian encounters.

²⁵ See Patricia Hill Collins, *Intersectionality’s Definitional Dilemmas*, 41 ANN. REV. SOCIO. 1, 2 (2015) (“The term intersectionality references the critical insight that race, class, gender, sexuality, ethnicity, nation, ability, and age operate not as unitary, mutually exclusive entities, but as reciprocally constructing phenomena that in turn shape complex social inequalities.”); HILLARY POTTER, *INTERSECTIONALITY AND CRIMINOLOGY* 76 (2015) (canvassing meanings of intersectionality theory and concluding “*intersectionality perspective* and *intersectionality theory* denote the supposition (perspective) or proposition (theory) that individuals have multiple intertwined identities that are developed, organized, experienced, and responded to within the context of the social structure and its dis/advantaged ordering”).

²⁶ See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 218 (2d ed. 2009) (referring to a “matrix of domination”).

²⁷ See Loïc Wacquant, *The Wedding of Workfare and Prisonfare in the 21st Century: Responses to Critics and Commentators*, in *CRIMINALISATION AND ADVANCED MARGINALITY* 243, 252 (Peter Squires & John Lea eds., 2012) (explicating “centaur state”). As sociologist of crime and poverty Loïc Wacquant says, “[T]he expansion and glorification of the police, the courts and the penitentiary are a response not to crime trends but to the diffusion of social insecurities . . .” *Id.* at 237.

that spawned “law and order” politics,²⁸ judicial deregulation of the police,²⁹ and a “new policing”³⁰ aimed at boundary management between “good” and “bad” neighborhoods.³¹ Neoliberalism has at least these four features: (1) economic deregulation; (2) an emphasis on a culture of individual responsibility; (3) cutting welfare; and (4) expansion of punitive apparatuses.³² The United States is now a neoliberal centaur state in that, like the mythical creature, it is humane on top and a beast on the bottom.³³ The centaur state is friendly to the top of society through deregulation of markets and emphasizing individual responsibility, but it tramples on the bottom of society through limiting welfare and hyper-incarceration.³⁴ Because the centaur state produces a “precariat”—those whose lives are made precarious by low wage jobs that lack security of position—it must generate ways to supervise and control the precariat, such as through aggressive policing.³⁵

The centaur state pushes policing toward the warrior mode in three steps. First, the post-Warren Court cooperates with a neoliberally inspired politics of law and order by deregulating the police

²⁸ See Frank Rudy Cooper, *A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit*, 73 U. MIA. L. REV. 1, 47–53 (2018) (analyzing “law and order” discourse).

²⁹ In providing advice on this piece, Seth Stoughton, professor of law, criminology, and criminal justice, pointed out that the police may never have been fully “regulated.” I note that the Court used to at least make gestures toward regulating police behavior.

³⁰ See Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 422–40 (2000) (describing emergence of preventive, proactive, and data-driven policing strategies that currently predominate); see also Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33 (2017) (linking prevalent use of fines and fees for social control to “new policing”). The features of the “new policing,” being about twenty years old, are not really “new,” but describe the premises of most contemporary policing.

³¹ Professor of law and sociology Monica Bell uses a similar concept. See Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 696–98 (2020) (describing “techniques of border patrol”). I emphasize that when police are in warrior mode, they maintain boundaries, both literally and figuratively, by what they do at borders and what they do within poor black and brown communities.

³² See Peter Squires & John Lea, *Introduction: Reading Loïc Wacquant—Opening Questions and Overview*, in CRIMINALISATION AND ADVANCED MARGINALITY 1, 6 (Peter Squires & John Lea eds., 2012).

³³ See LOÏC WACQUANT, PUNISHING THE POOR 43 (2009) (defining centaur state).

³⁴ See *id.* For more on hyper-incarceration, and why “it is crucial for scholars to start referring to so-called ‘mass incarceration’ as ‘hyper-incarceration,’” see Frank Rudy Cooper, *Hyper-incarceration as a Multidimensional Attack: Replying to Angela Harris Through The Wire*, 37 WASH. U. J.L. & POL’Y 67, 67–68 (2011). See also Loïc Wacquant, *Racial Stigma in the Making of America’s Punitive State*, in RACE, INCARCERATION, AND AMERICAN VALUES 57, 59 (2008), for an argument that “mass incarceration” is better characterized as “hyper-incarceration of . . . lower-class black men.”

³⁵ See Squires & Lea, *supra* note 32, at 1, 2.

through, inter alia, permissive excessive force doctrine.³⁶ Second, the “new policing”—aggressive intrusions based on predictive data to prevent rather than solve crime—applies the warrior cop mode in poor black and brown neighborhoods and the “guardian officer” mode in rich white neighborhoods.³⁷ Third, the potential for excessive force that inheres in warrior policing is what enhances boundaries between “good” (rich and white) and “bad” (poor and black or brown) neighborhoods.³⁸

Part I of this Article describes the problem: the Court’s deregulation of the police enables police use of excessive force. That Part traces how the *Graham v. Connor*³⁹ doctrine absolves police of liability for almost all uses of force. Part II intervenes in current scholarly approaches to police excessive force. Section II.A shows that critical race theories of excessive force doctrine are useful⁴⁰ but do not alone account for police boundary management of neighborhoods. Section II.B then proposes that policing scholars adopt intersectionality theory as a means of understanding how race and class mutually construct one another by means of policing.⁴¹ Part II closes by introducing the theory of the neoliberal centaur state as having a big influence on policing. Part III demonstrates the utility of an intersectional approach that highlights both race and class. Section III.A suggests a theory of Court deregulation of the police as an explanation for excessive force doctrine.⁴² Section III.B explains how the tendency of “new policing” to produce a warrior mindset is mutually constructed by both race and class. Section III.C considers why police use their powers of excessive force⁴³ to manage boundaries between rich white

³⁶ See *infra* Section III.A (providing theory of Court’s deregulation of the police).

³⁷ See *infra* Section III.B (showing how race and class mutually construct policing practices).

³⁸ See *infra* Section III.C (concluding police manage boundaries between rich white neighborhoods and poor black or brown ones).

³⁹ 490 U.S. 386 (1989).

⁴⁰ For discussions of policing of racial minorities as social control of disfavored groups, see the following sources: Bell, *supra* note 31, at 673, 695, 744; I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 840 (2008); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 130 (2017); Cooper, *supra* note 28, at 25.

⁴¹ See Stewart Chang, Frank Rudy Cooper & Addie C. Rolnick, *Race and Gender and Policing*, 21 NEV. L.J. (forthcoming Nov. 2021), for a discussion of the mutual construction of race, gender, and policing.

⁴² See *infra* Section III.A; see also Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 995, 998 (2017) (discussing emergence of Court deference to police).

⁴³ Professor Stoughton refers to these as police powers of violence. See Seth Stoughton,

neighborhoods and poor black and brown ones.⁴⁴ Part IV addresses some potential objections and identifies some implications of this analysis.

A caveat is in order. This Article does not conduct a comprehensive review of every way the intersectionality of race and class affects policing. It does not, for instance, collect evidence on how the police treat poor whites or rich blacks. Its goal is more modest: to start a conversation about the intersectional analysis of class, race, and policing through a discussion of excessive force.

I. THE COURT'S ACCEPTANCE OF POLICE EXCESSIVE FORCE

A key factor in disparate policing in rich white neighborhoods versus poor black and brown communities is that United States Supreme Court doctrine grants police excessive discretion, which the police use differently in different places. The Court practically encourages disparate policing with its excessive force rulings. Section I.A begins by suggesting that the criminal procedure revolution survived in some forms into the mid-1980s, when the Court sought to regulate police uses of force in *Tennessee v. Garner*.⁴⁵ Section I.B reviews the Court's deregulation of excessive force in 1989's *Graham* and 2007's *Scott v. Harris*,⁴⁶ which created a nearly impenetrable barrier to plaintiffs' claims.⁴⁷ Section I.C discusses the recent use of *Graham* and *Scott* to de facto overturn *Garner*.

A. *Garner's More Protective Approach*

To understand the Court's current approach to police use of force, it is important to note that the Court has abandoned a more constraining rule for police shootings, which had been set down in the *Garner* case.⁴⁸ In *Garner*, white policeman Edward Hyman saw a five-foot-four, fifteen-year-old black child fleeing a house that had likely

How the Fourth Amendment Frustrates the Regulation of Police Violence, 70 EMORY L.J. 521, 524 n.10 (2021).

⁴⁴ This is, therefore, a structural argument. See Wendy A. Bach, *Poor Support / Rich Support: (Re)viewing the American Social Welfare State*, 20 FLA. TAX REV. 495, 500 (2017) ("Turning the inquiry toward the structures (rather than the actors) helps us move past notions of intentional discrimination and toward a way to unmask systems that privilege some and subordinate others."); Carbado, *supra* note 20, at 1482–83 (calling for seeing police violence as a structural phenomenon).

⁴⁵ 471 U.S. 1 (1985).

⁴⁶ 550 U.S. 372 (2007).

⁴⁷ See Lee, *supra* note 19, at 641–53 (naming key cases).

⁴⁸ *Garner*, 471 U.S. at 11–12.

been robbed.⁴⁹ The officer called out “police, halt,” but Garner started to scale a fence and Hymon figured that if he got over the fence, he would escape.⁵⁰ Hymon shot Garner in the back of the head, killing him.⁵¹ A Tennessee law empowered Hymon to take Garner’s life as part of using “all the necessary means” to prevent any felon’s escape.⁵² In the ensuing 42 U.S.C. § 1983 action, the district court twice absolved Hymon of responsibility, but the court of appeals eventually reversed.⁵³

The *Garner* Court’s first step was to abandon the prior four-part substantive due process test.⁵⁴ Instead, it declared that the Fourth Amendment addresses *how* seizures are made, not just *when* they may be made⁵⁵ because “one of the factors” in the Fourth Amendment reasonableness balancing test “is the extent of the intrusion.”⁵⁶ The Court next showed that deadly force was inappropriate on these facts.⁵⁷ It stated that shooting people just to deter others from attempting to escape is unjustified,⁵⁸ especially because a majority of police departments across the nation barred use of deadly force on nonviolent potential felons.⁵⁹ The Court then stated a rule:

Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . .

. . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to

⁴⁹ *Id.* at 3–4, 4 n.2.

⁵⁰ *Id.* at 4. Hymon said that his partner was “late coming around” and Hymon was too slow to catch Garner. *Id.* at 4 n.3.

⁵¹ *Id.* at 4. Hymon also used hollow point bullets, *id.* at 6, which are especially deadly, see Robin Coupland & Dominique Loye, *The 1899 Hague Declaration Concerning Expanding Bullets: A Treaty Effective for More than 100 Years Faces Complex Contemporary Issues*, 85 INT’L REV. RED CROSS 135, 135, 137–39 (2003).

⁵² *Garner*, 471 U.S. at 4 (quoting TENN. CODE ANN. § 40-7-108 (1982)).

⁵³ *Id.* at 5–6.

⁵⁴ See *id.* at 7–8.

⁵⁵ *Id.*; see also U.S. CONST. amend. IV (barring “unreasonable” searches and seizures, and requiring “probable cause” for issuing warrants). My point here is not that *Garner* was really a substantive due process case, but that substantive due process was at that time enough of a possibility as a framework for police uses of force that the Court had to begin by disavowing that potential framework.

⁵⁶ *Garner*, 471 U.S. at 8.

⁵⁷ *Id.* at 9–11.

⁵⁸ *Id.* at 9–10.

⁵⁹ *Id.* at 10–11.

prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.⁶⁰

One would think that rule should apply to all excessive force cases.⁶¹

The *Garner* rule could have had several sanguine effects of police trigger-happiness. First, it appears to prohibit shooting someone just to stop them from escaping. After all, the burglary committed in *Garner* is sometimes thought to be a serious crime. At common law, it could be the basis for the death penalty.⁶² Nonetheless, the *Garner* Court required independent indicia of a threat.⁶³ Second, the rule implies that even suspects who pose a threat may not therefore be killed unless that threat reaches the potentially high bar of being a “serious” threat.⁶⁴ Third, it implies a default “deadly weapon” rule because it requires a threat by a “serious” means.⁶⁵ Fourth, even when a shooting is justified, the *Garner* holding values life by suggesting that, when feasible, a warning should be given before shooting someone.⁶⁶

Although the Court has sometimes treated the *Garner* opinion with respect, its rationale is almost totally undercut by the *Graham* reasoning.⁶⁷ We know that the future *Graham* and *Scott* cases are not just distinguishments of nondeadly force cases from the *Garner* situation because *Graham* essentially adopts Justice O’Connor’s approach in her *Garner* dissent.

B. *Graham and Scott as a Stealth Overturning of Garner*

In *Graham*, a black Charlotte, North Carolina police officer initiated an investigative stop simply because the black eventual-plaintiff,

⁶⁰ *Id.* at 11–12.

⁶¹ Some suggest that *Garner* was strictly a rule for deadly force cases. My point is that, when the *Garner* rule was created, it was not clear it could not be applied to all use of force cases, which is why many lower courts used it as a general rule. See W. Kip Viscusi & Scott Jeffrey, *Damages to Deter Police Shootings*, 2021 U. ILL. L. REV. 741, 758 (contending Scalia’s interpretation of *Garner* “upend[ed] years of precedent and understanding of *Garner* by claiming that *Garner* did not establish a rule”).

⁶² See, e.g., CYNTHIA LEE & ANGELA P. HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 401 (4th ed. 2019) (referring to death penalty for all felonies).

⁶³ See *Garner*, 471 U.S. at 11–12.

⁶⁴ *Id.* at 6, 10–11.

⁶⁵ See *id.* at 11–12 (referring to threat “with a weapon”).

⁶⁶ *Id.*

⁶⁷ See, e.g., *Whren v. United States*, 517 U.S. 806, 818 (1996) (noting *Garner*-type seizure-by-death as exception to blanket acceptance of pretextual bases for actions).

Graham, had quickly entered and left a convenience store.⁶⁸ The officer was told that Graham was having a “sugar reaction,” but he proceeded to hold Graham and call for backup.⁶⁹ When Graham exited his vehicle and passed out, a group of police officers physically abused him, resulting in a broken foot and bruised forehead, and also denied him access to needed sugar.⁷⁰ Eventually realizing he was telling the truth, the officers returned Graham to his home.⁷¹ Graham sued, and the district court and court of appeals concluded that as a matter of law, the above behavior did not constitute excessive force.⁷²

Chief Justice Rehnquist, writing for the Court, cites *Garner* when, in three sentences, he dismisses the possibility that Graham could also have a substantive due process claim.⁷³ He then deceptively invokes *Garner* for the rule that the reasonableness balancing test takes into account the “severity” of the crime, whether the suspect is an “immediate threat” to the police or others, and whether they are resisting or evading arrest.⁷⁴ The Rehnquist opinion references pages eight and nine of *Garner*, but those pages make no explicit mention of “severity” of the crime as a factor.⁷⁵ That idea actually comes from Justice O’Connor’s *Garner* dissent, which asserts the balancing test weighed in favor of letting Hymon shoot Garner in the back of the head to prevent escape because of “the serious nature of the crime.”⁷⁶ This Article thus considers the *Graham* opinion to be a stealth overturning of the *Garner* decision.

Importantly, Justice Rehnquist’s *Graham* opinion also inserts two poison pills into the reasonableness balancing test. First, reasonableness, though theoretically objective, is judged from a police officer’s perspective.⁷⁷ This element waters down the test, as the classic reasonable person test assumes a typical person with none of the characteristics of the party in question.⁷⁸ Thus, Justice Rehnquist’s test is actually

⁶⁸ *Graham v. Connor*, 490 U.S. 386, 389 (1989).

⁶⁹ *Id.*

⁷⁰ *Id.* at 389–90.

⁷¹ *Id.* at 389.

⁷² *Id.* at 390.

⁷³ *Id.* at 395.

⁷⁴ *Id.* at 396.

⁷⁵ *See id.*; *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985).

⁷⁶ *Garner*, 471 U.S. at 26 (O’Connor, J., dissenting).

⁷⁷ *Graham*, 490 U.S. at 396.

⁷⁸ *See* LEE & HARRIS, *supra* note 62, at 360–62 (discussing reasonable person test). Preeminent legal scholar Cynthia Lee has pointed out to me that one could argue a reasonable police officer standard really *should* be a higher standard than a reasonable person standard because

an objective-subjective test.⁷⁹ Justice Rehnquist also slides in a conclusory and unsupported statement that the balancing test must therefore always make “allowance” for the speed with which officers sometimes make decisions.⁸⁰ The speed of decision factor is also from Justice O’Connor’s *Garner* dissent.⁸¹

The *Graham* Court’s second poison pill is the assertion that courts must ignore any actual bad motivations for police officers’ actions. Citing his insidious *United States v. Robinson*⁸² opinion, which spawned the *Whren v. United States*⁸³ pretext and racial profiling rule, Justice Rehnquist asserts that even an officer’s “evil intentions” cannot make an action constitutionally unreasonable.⁸⁴ This contradicts our common sense understanding of what is reasonable. If a teacher lawfully docks a student’s grade, but only because of an improper purpose—such as to punish the student for disagreeing with her or to induce the student to do something for him—we would have no trouble calling that action “unreasonable,” even though it was permissible. Yet the *Graham* test bars any consideration of the officer’s actual motivations. The combined effect of requiring objective reasonableness while judging it from an officer’s perspective and in disregard of the officer’s motivations is to tip the scales heavily against finding police misconduct.

We can also see that *Graham* is a stealth overturning of *Garner* in Justice Rehnquist’s use of references to *Garner* to bury that older case. His statement of the rule clearly contradicts *Garner*’s holding. *Garner* downplayed the significance of the decedent being suspected of burglary, required a “serious” threat not just an “immediate” one, and flatly barred seizure-by-death to avoid escape in certain situations

the average police officer is trained in the use of deadly force and therefore should be able to discern more accurately when there is a true threat.

⁷⁹ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.05(A), at 225–29 (8th ed. 2018) (discussing standard in *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986)). Some refer to viewing a situation objectively and yet simultaneously from the police officer’s point of view as “subjective objectivity.” See, e.g., SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 86 (2020).

⁸⁰ *Graham*, 490 U.S. at 396–97.

⁸¹ See *Garner*, 471 U.S. at 23 (O’Connor, J., dissenting) (emphasizing “difficult, split-second decisions police officers must make”); see also *id.* at 26 (assuming uses of deadly force necessarily involve “swift action predicated upon the on-the-spot observations of the officer” (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968))).

⁸² *United States v. Robinson*, 414 U.S. 218 (1973). In *Robinson*, the Court declared that the search incident to arrest power includes a bar on considering the officer’s state of mind. See *id.* at 236.

⁸³ *Whren v. United States*, 517 U.S. 806 (1996).

⁸⁴ *Graham*, 490 U.S. at 397.

rather than making both resistance and escape “factor[s].”⁸⁵ In that sense, *Graham*’s treatment of *Garner* bears some resemblance to Justice Rehnquist’s “upholding” of the *Miranda v. Arizona*⁸⁶ rule in *Dickerson v. United States*⁸⁷ while saddling the *Miranda* rule with decisions that explicitly sought to undermine it.⁸⁸ After *Graham*, one is technically protected from a few specific forms of excessive force, but the doctrine is actually useless in most cases.

Today, the Court analyzes police excessive force under the *Scott* approach.⁸⁹ The *Scott* case adopted the *Graham* rule that a claim of excessive force when seizing a suspect must be analyzed under the Fourth Amendment’s “objective reasonableness” standard.⁹⁰ The *Scott* decision, however, further skews the reasonableness analysis against police misconduct claims by adding a culpability analysis and encouraging courts to judge the facts in advance of a jury trial.⁹¹

The key fact in *Scott* is that there was a police video of the plaintiff, Victor Harris, speeding away from pursuing police cars.⁹² The lead police officer got supervisor permission to “take him out.”⁹³ The lead officer then applied his push bumper to plaintiff’s car, throwing the car off the roadway and down an embankment.⁹⁴ This rendered the plaintiff a quadriplegic.⁹⁵

The result turned on an evaluation of the video. The federal district court and Eleventh Circuit judges denied the defendant summary judgment on grounds that, viewing the facts in a light most favorable to the plaintiff, a reasonable jury could find a constitutional viola-

⁸⁵ Compare *Garner*, 471 U.S. at 11–12, with *Graham*, 490 U.S. at 396.

⁸⁶ 384 U.S. 436 (1966). In *Miranda*, the Court required police warnings about the right to silence and right to counsel before custodial interrogation. See *id.* at 444–45.

⁸⁷ 530 U.S. 428 (2000). In *Dickerson*, the Court declined to find that *Miranda* warnings were a subconstitutional rule. Cf. *id.* at 441.

⁸⁸ See Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 33–36 (2001) (treating *Dickerson* as a stealth overturning of *Miranda*).

⁸⁹ See *Scott v. Harris*, 550 U.S. 372, 386 (2007) (concluding the videotape of a police chase of speeding vehicle required summary judgment against plaintiff).

⁹⁰ *Id.* at 381 (citing *Graham*, 490 U.S. at 388).

⁹¹ *Id.* at 384, 386. Importantly, the *Scott* Court rejected Victor Harris’s argument that it should follow *Garner*, “recasting *Garner* as simply an application of Fourth Amendment reasonableness balancing rather than a bright-line rule for police officers contemplating the use of deadly force against a fleeing felon.” Lee, *supra* note 19, at 648.

⁹² *Scott*, 550 U.S. at 375–78.

⁹³ *Id.* at 375.

⁹⁴ *Id.*

⁹⁵ *Id.*

tion.⁹⁶ The Court would not stand for that. Justice Scalia held that the plaintiff’s endangerment of innocent bystanders required summary judgment in the deputy’s favor as a matter of law.⁹⁷ Relying on the video of the chase, the Court found there was no “genuine” dispute about the facts.⁹⁸

For the *Scott* Court, a police misconduct case is simply about whether the officer’s “actions were objectively reasonable” under the balancing test.⁹⁹ Here, the *Scott* Court concluded that there was a strong law enforcement interest because the videotape showed the plaintiff to have been an “actual and imminent threat” to hypothetical pedestrians,¹⁰⁰ other civilians, and the police.¹⁰¹ The Court construed the victim’s interests to be weaker here because this involved only a “high likelihood” of death that fell short of the “near *certainty*” in *Garner*.¹⁰²

The *Scott* Court goes on, though, to make two points that are particularly damaging to the future of excessive force claims. First, it says the balancing test should take into account the “culpability” of the parties.¹⁰³ This view slants excessive force analysis decidedly in the aggressive police officer’s favor, as they will often be dealing with someone whom they could at least reasonably have believed to be a felon. A suspected felon will always be “culpable” to some degree, thus undermining their claim.

Second, the *Scott* Court encourages resolving excessive force cases prior to trial. The Court laid down a rule: “A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amend-

⁹⁶ *Id.* at 376.

⁹⁷ *Id.* at 372.

⁹⁸ *Id.* at 380.

⁹⁹ *Id.* at 381.

¹⁰⁰ *Id.* at 384. Such pedestrians would be strolling next to or crossing a two-lane highway in the “dead of night.” *Id.* at 379; *accord id.* at 389–91 (Stevens, J., dissenting) (describing the video as showing little danger, including no pedestrians). Ultimately, the videotape in *Scott* is to blame for these dangerous assumptions about reasonableness. As preeminent scholar of law and film Jessica Silbey says, “In *Scott v. Harris*, the Court fell victim to the widespread and dangerous belief—to the degree of enshrining this belief in our national jurisprudence—that film captures reality.” Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17, 18 (2008) (critiquing judiciary’s uncritical use of video in police misconduct cases). It is a strange and dubious proposition for appellate courts to overturn a district court’s determinations of the state of the facts on the basis of the appellate court’s independent opinion of a videotape.

¹⁰¹ *Scott*, 550 U.S. at 384.

¹⁰² *Id.*

¹⁰³ *Id.*

ment”¹⁰⁴ Such a categorical presumption that chase cases should be dismissed prior to trial is a big step. Ironically, many police departments memorialize their determinations that it is unwise to conduct high speed car chases at all, let alone in the dangerous manner of the *Scott* case.¹⁰⁵ As we will see, the Court listens to the police when their policies determine their own actions to have been reasonable but upholds officers’ actions even when they violate internal police regulations.¹⁰⁶

C. *The Problem*

This Part of the Article has argued that *Graham* and *Scott* stealthily overturned *Garner*’s more strenuous review of police excessive force. That *Garner* has effectively been overturned is established by looking at one of the Court’s cases that declined to extend *Garner*, as well as numerous lower court cases that acknowledge that *Garner* no longer guides analysis. First, in *Mullenix v. Luna*,¹⁰⁷ the Court’s per curiam opinion suggests that *Garner* applies very differently in different factual situations.¹⁰⁸ The opinion describes *Garner* as a “general” test that is “mistaken.”¹⁰⁹ That is not exactly what the Court had said earlier.¹¹⁰ With its language in *Mullenix*, the Court gave the impression that *Garner* had been overturned without actually making that declaration.

Lower federal courts have picked up on the fact the Court has covertly overturned *Garner*. For instance, in *Johnson v. City of Philadelphia*,¹¹¹ the Third Circuit went so far as to say the *Scott* opinion “abrogates our use of special standards in deadly-force cases and rein-

¹⁰⁴ *Id.* at 386.

¹⁰⁵ See Hugh Nugent, Edward F. Connors, III, J. Thomas McEwen & Lou Mayo, U.S. DEP’T OF JUST., NCJRS 122025, RESTRICTIVE POLICIES FOR HIGH-SPEED POLICE PURSUITS (1990) (noting proposed policies of U.S. Department of Justice).

¹⁰⁶ See *infra* Section II.A (reviewing critiques of excessive force doctrine); see also Obasogie & Newman, *supra* note 19, at 431 (revealing judicial deference to police determinations of reasonableness); Ayesha Bell Hardaway, *The Supreme Court and the Illegitimacy of Lawless Fourth Amendment Policing*, 100 B.U. L. REV. 1193, 1201 (2020) (asserting that the Court, “by dismissing police procedures and rules as ‘trivialities,’” “prioritized fulfilling its role in the War on Drugs over rigorously evaluating law enforcement conduct with an eye to protecting individuals from erratic conduct not supported by police training or administrative rules” (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996))).

¹⁰⁷ 577 U.S. 7 (2015) (per curiam).

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.* at 13 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)).

¹¹⁰ See *Brosseau*, 543 U.S. at 199 (per curiam).

¹¹¹ 837 F.3d 343 (3d Cir. 2016).

states ‘reasonableness’ as the ultimate—and only—inquiry.”¹¹² That negation of *Garner* is consistent with the Court’s *Mullenix* language.

The problem created by the de facto overturning of *Garner* in *Graham* and *Scott* is that the Court seems to have given permission to the police to use excessive force. It is easy to read those cases as taking a “hands off” approach to police uses of force. As will be detailed in Section III.A of this Article, the *Graham* and *Scott* cases show that the Court has deregulated police excessive force. And, as Section III.B of this Article will discuss, there is good reason to believe that the “new policing” has led police officers to act as warriors in poor black and brown communities. The Court’s deregulation of the police enables police uses of excessive force for that purpose.

II. CLASSING UP POLICING SCHOLARSHIP

The preceding explication of *what* the Court did to excessive force doctrine leads to the question of *why* the Court has deregulated the police with respect to excessive force. Certainly, theories abound as to that answer. Racial critiques are especially useful here, as both the police and the courts may share historic and ongoing explicit and implicit bias with the general population.¹¹³ Section II.A of this Article reviews those critiques. Section II.B argues for an intersectional approach to studying policing that could analyze the impact of the overlap of categories of identities. Section II.C proposes that understanding the incentives created by the neoliberal centaur state through an intersectional approach will help us better understand policing.

A. Racial Critiques

To understand how race in particular influences police decisions to use excessive force and the Court’s acquiescence thereto, this Sec-

¹¹² *Id.* at 349.

¹¹³ Implicit biases have been found to be:

- 1. Pervasive;
- 2. Strong in magnitude (as compared to explicit biases, measured by anonymous self-reports and put onto the same statistical units);
- 3. Related to, but not the same as, explicit biases that are introspectively accessible but may be shielded from public view; and
- 4. Predictive of behavior in real-world circumstances.

Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 629–30 (2015) (footnotes omitted); see also Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 198 (2018) (arguing “the current rigid dichotomy between explicit and implicit bias seems a peculiarly inapt description of contemporary discrimination”).

tion considers whether race provides the “why” of differentiated policing in Summerlin versus the Westside of Las Vegas. Some background on the racial dynamics in Las Vegas will be helpful. Summerlin is functionally a white suburb on one end of the highly diverse City of Las Vegas while the historic Westside of Las Vegas is where black people have tended to live. Summerlin was a 25,000-acre tract of land to the west of Las Vegas bought in 1952 by Howard Hughes.¹¹⁴ Beginning in 1991, it was developed as a group of planned communities.¹¹⁵ The communities are mostly gated and are clustered around commercial malls.¹¹⁶ In contrast, the Westside is a typical urban community that developed ad hoc over the last hundred years.¹¹⁷ It became the black neighborhood in the 1930s, when the City’s white leaders forced black businesses to move there as a condition of licensure.¹¹⁸ It is where famous black entertainers stayed while they performed for whites in the resorts of Las Vegas, which were racially segregated well into the 1960s.¹¹⁹

The continuing effects of race in Las Vegas are seen in the present demographics of Summerlin and the Westside. Summerlin South, a Census recognized neighborhood, is about 68% white, 13% Asian, 11% Hispanic/Latino, and 5% black.¹²⁰ The growing Summerlin North area has a slightly higher percentage of blacks but is still basically a white neighborhood.¹²¹ Meanwhile, the Westside is about 44% black, 39% Latino, 9% white, and 4% Asian.¹²²

¹¹⁴ Amanda Finnegan, *Summerlin: Past and Present*, L.V. SUN (Aug. 18, 2008, 3:54 PM), <https://lasvegassun.com/news/2008/aug/18/summerlin-past-and-present/> [<https://perma.cc/5ZDL-MS2>].

¹¹⁵ *See id.*

¹¹⁶ *See id.*

¹¹⁷ *See* Claytee D. White & Peter Michel, *How the Westside Began*, DOCUMENTING AFR. AM. EXPERIENCE L.V., <http://digital.library.unlv.edu/aae/westside-history-spotlight> [<https://perma.cc/WD87-BWA8>].

¹¹⁸ *See id.*

¹¹⁹ *See Question of the Day*, ANTHONY CURTIS’ L.V. ADVISOR (Apr. 26, 2018) <https://www.lasvegasadvisor.com/question/vegas-segregation/> [<https://perma.cc/89Q9-U39V>] (describing Las Vegas as “the Mississippi of the West”).

¹²⁰ *See QuickFacts: Summerlin South CDP*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/summerlinsouthcdpnevada> [<https://perma.cc/5H9X-BRRQ>].

¹²¹ Summerlin North is about 63% white. *See Race and Ethnicity in Summerlin North, Las Vegas, Nevada (Neighborhood)*, *supra* note 15.

¹²² *See Race and Ethnicity in West Las Vegas, Las Vegas, Nevada (Neighborhood)*, *supra* note 15. The City of Las Vegas as a whole is about 44% white, only 33% Hispanic/Latino, 12% black, and 7% Asian. *See QuickFacts: Las Vegas City, Nevada*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/lasvegascitynevada> [<https://perma.cc/QA3Q-WV5B>].

Summerlin feels white because it is more than 20% whiter than Las Vegas as a whole.¹²³ It is also almost 30% less black and Latinx than Las Vegas.¹²⁴ More important, Summerlin is figuratively white. Blacks, Latinx, and Asian-Americans who live in Summerlin are relatively assimilated, even before considering that the racial minorities here are financially relatively well off. Though it is statistically less white than some neighborhoods in the East and Midwest, Summerlin is perceived to be white. Perhaps the difference in policing between Summerlin and the Westside is a function of race.

A basic fact requires inquiry into the racial dimensions of police excessive force: blacks and, to a lesser extent, Latinx, are statistically significantly more likely to be shot dead by the police than whites. Professor of law and epidemiology Jeffrey Fagan and lawyer Alexis Campbell document that problem in their recent article, *Race and Reasonableness in Police Killings*.¹²⁵ They studied 3,993 reported police killings and found that blacks were as much as 1.25 times as likely to be killed by police as whites.¹²⁶ Latinx were 1.29 times as likely to be killed by police as whites if neither armed nor having a mental health issue.¹²⁷ But Latinx were statistically significantly less likely than whites to be killed if only armed, and they were roughly equally likely to be killed when only having a mental health issue or both armed and having a mental health issue.¹²⁸ Although the authors break down many permutations of the data, they clearly conclude that being black is a significant factor in police killings and that being Latinx is sometimes so.¹²⁹ Consequently, the costs of deadly uses of force “may fall disproportionately on nonwhites in a variety of contexts during encounters with the police.”¹³⁰

Many scholars have explored the ways racial bias affects police excessive force. Some scholars point to explicit bias, such as the pervasive police belief that racial minorities are especially crime-prone.¹³¹

¹²³ See *supra* notes 121–22 and text accompanying note 120.

¹²⁴ See *supra* notes 121–22 and text accompanying note 120.

¹²⁵ Fagan & Campbell, *supra* note 20, at 961.

¹²⁶ See *id.* at 990–92.

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ *Id.* at 1001.

¹³¹ See, e.g., Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495, 1543 (2014) (noting police belief that blacks are crime-prone); cf. Liyah Kaprice Brown, *Officer or Overseer?: Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 764 (2005) (stating that “some Black

This bias is reflected in police targeting of black and brown communities. A prime example is *Floyd v. City of New York*,¹³² in which a federal district court found as fact that the New York City Police Department (“NYPD”) had a policy and practice of targeting young black and Latinx men for investigative stops.¹³³

Critical race theorist, criminal procedure scholar, and law professor Devon Carbado complicates the question of whether Fagan and Campbell’s results are the product of explicit bias by focusing on “blue-on-black violence” as a structural phenomenon.¹³⁴ To him, the key is that social forces lead to increased police contacts with blacks, which in turn exposes blacks to more police violence. Professor Carbado’s six-part model of the causes has the following components: (1) social forces, including broken windows policing and racial stereotypes, result in greater police surveillance and contact with blacks; (2) the very frequency of police contact increases blacks’ risks of experiencing excessive force; (3) police culture and training encourages excessive force; (4) legal actors then shield that violence as justified; (5) qualified immunity and indemnification mean officers very rarely face personal consequences for excessive force; and (6) this structure means individual officers are disincentivized from exercising care.¹³⁵ Though Professor Carbado discusses both explicit and implicit bias in selecting individual suspects, the starting point of the process is inten-

scholars contend that Black-on-Black crime outweighs the harm of police-on-Black crime, and thus believe that the police must have broad discretion in order to combat crime in Black neighborhoods”). *But see* William Wilbanks, *The Myth of a Racist Criminal Justice System*, 3 J. CONTEMP. CRIM. JUST. 88, 93 (1987) (claiming that evidence of racism in the criminalization system is weak and contradictory).

¹³² 959 F. Supp. 2d 540 (S.D.N.Y.), *appeal dismissed*, 770 F.3d 1051 (2d Cir. 2013).

¹³³ *Id.* at 562, 603.

¹³⁴ Carbado, *supra* note 20, at 1483.

¹³⁵ *See id.* at 1483–84. I emphasize the gender element of Professor Carbado’s formulation. As Carbado acknowledges, policing is hypermasculine as an institution. *See id.* at 1514–15 (discussing masculinity effects on policing); *see also* Cooper, *supra* note 23, at 675–76 (applying masculinities studies to *Terry* stops and frisks); McGinley, *supra* note 23, at 242–62 (applying masculinities studies to police violence against men of color); Richardson & Goff, *supra* note 23, at 131–35 (applying masculinities studies to psychological study of police violence). Carbado locates hypermasculinity as primarily a problem of police culture, i.e., as a tendency to be violent that is trained into officers. *See* Carbado, *supra* note 20, at 1514. I would also locate it as a social force that encourages police interactions. Police officers seek out certain targets because they are young, black or brown, and male on the theory that these are the most likely criminals. *See, e.g., Floyd*, 959 F. Supp. 2d at 560, 562 (noting young black and brown males were much more likely to be stopped and frisked). Police officer hypermasculinity is also linked to officers’ decisions to make contact with civilians for the purposes of sexual assault. *See* Carbado, *supra* note 20, at 1498–502 (discussing Officer Daniel Holtzclaw’s sexual assaults); *see also* RITCHIE, *supra* note 24 (documenting pervasiveness of police sexual assaults).

tional targeting of black and brown neighborhoods.¹³⁶ Further explicit bias can be seen in the use of conservative sociologist James Q. Wilson's broken windows theory,¹³⁷ which spawned the *Floyd* approach and contemporary preventive policing.¹³⁸

Other scholars link selective enforcement more directly to implicit bias, such as unconscious stereotypes that blacks are more dangerous. Professor and legal scholar Cynthia Lee, who co-wrote the critical race theory textbook on criminal procedure,¹³⁹ has applied this idea to excessive force doctrine by showing that "reasonable fear" of suspects is infused with racial stereotypes.¹⁴⁰ As will be discussed, police excessive force might be an expected result of the excessive contacts with black and brown poor people that the centaur state has encouraged with its war on crime.

Indeed, the Court's doctrine seems to endorse police activity based on explicit and implicit biases. Racial profiling is not only pervasive, but it is tacitly encouraged by the Court's pretext doctrine, which generally finds racially motivated stops reasonable under the Fourth Amendment when there was also probable cause that the suspect committed any offense.¹⁴¹ Pretext doctrine contributes to police officers' senses that they can force contact with black and brown people with impunity.¹⁴² The legal doctrines governing excessive force

¹³⁶ See *Floyd*, 959 F. Supp. 2d at 560. Seth Stoughton reminds me that while police *do* intentionally target racial minority neighborhoods, they *understand* themselves as doing so in a race-neutral way. In theory, police data-driven patrol allocation methods use crime rates, not racial demographics. But because police significantly affect crime rates through their selective enforcement of laws, police crime statistics are not a race-neutral measure.

¹³⁷ See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982) <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/G6ED-EB7S>].

¹³⁸ See Cooper, *supra* note 28, at 58–59 (discussing Wilson's racism).

¹³⁹ See Cynthia Lee, L. Song Richardson & Tamara Lawson, *Criminal Procedure: Cases and Materials* (2d ed. 2017).

¹⁴⁰ See Lee, *supra* note 19, at 645 (pointing to black-as-criminal stereotype).

¹⁴¹ Compare *Whren v. United States*, 517 U.S. 806, 813 (1996) ("But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."), with *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) ("Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."). See also David Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 547–48 (1997) (detailing how pretext doctrine allows racial profiling).

¹⁴² The Court effectively makes racism *irrelevant* to the determination of whether an intrusion is "unreasonable" under the Fourth Amendment. See, e.g., *Whren*, 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); see also *id.* at 817 ("It is of course true that in principle every Fourth Amendment case, since it turns

might thus be more of a cause of real world excessive force than the implicit or explicit biases of police officers.¹⁴³

The broad reason to believe doctrine is at least as much of a factor in excessive force as bias finds root in the theory of the “endogenous Fourth Amendment.” This theory argues that in excessive force doctrine, “constitutional meaning is created from the ground up by federal courts’ deference to use-of-force policies that reflect police officers’ perspectives and preferences, rather than from the ‘top down’ by judicial interpretation of the Constitution.”¹⁴⁴ Excessive force doctrine is endogenous because courts are merely looking at actual police department policies and finding them reasonable rather than judging those policies against an external standard.¹⁴⁵

The narrower reason to believe legal doctrine generates police excessive force is that the *Graham* decision took certain options for reform off the table. The *Graham* opinion’s disavowal of Due Process analysis in favor of the Fourth Amendment took “structural and race-conscious” remedies off the table.¹⁴⁶ Because the fundamental problem of excessive force doctrine is structural racial disparity, the move to the individual-centered Fourth Amendment sapped much of the force out of police misconduct claims.¹⁴⁷

The Court’s doctrine is not just flawed, but it also undermines reform efforts on the ground.¹⁴⁸ The Court’s doctrine encourages police rule-breaking by justifying violations of state law or department policy as nonetheless Constitutionally reasonable.¹⁴⁹ The Court’s doctrine allows police officers to violate department policies and even state law, which is a principal reason departments cannot discipline officers or do not even bother attempting to do so.¹⁵⁰

Scholarship shows that police racial bias combines with judicial indifference to produce excessive force. Still, this research does not rule out nonracial influences on police excessive force.¹⁵¹ Section II.B makes the case for simultaneously considering class and race as fac-

upon a ‘reasonableness’ determination, involves a balancing of all *relevant* factors.” (emphasis added)). Implicitly, then, it makes police racism “reasonable.”

¹⁴³ See Osagie K. Obasogie, *More than Bias: How Law Produces Police Violence*, 100 B.U. L. REV. 771, 783 (2020).

¹⁴⁴ See *id.* at 775.

¹⁴⁵ See Obasogie & Newman, *supra* note 19, at 427.

¹⁴⁶ Obasogie, *supra* note 143, at 779.

¹⁴⁷ Cf. *id.* at 777.

¹⁴⁸ See Hardaway, *supra* note 106, at 1193.

¹⁴⁹ See *id.* at 1204 (criticizing doctrinal inflexibility).

¹⁵⁰ See *id.* at 1213.

¹⁵¹ See Carbado, *supra* note 40, at 128.

tors in producing police excessive force. The way to do so is to adopt intersectionality theory.

B. Takeaways from Intersectionality Theory

Having reviewed the Court's undercutting of doctrinal protections against police excessive force through a racial lens, it will be helpful to consider intersectionality theory's ability to incorporate class analysis. In brief, when categories of identity—such as race, gender, class, sex orientation, religion, ability, and age—intersect, that creates unique senses of self-identity and unique attributed identities.¹⁵² How we see ourselves and how we are seen both vary based on our particular intersection of identities.¹⁵³ That idea is a simple one with complicated implications.¹⁵⁴

Legal scholar Kimberlé Crenshaw is the progenitor of intersectionality theory. She introduced the concept in a 1989 article about employment discrimination.¹⁵⁵ She demonstrated that numerous cases treated black women as though they could not be representative of

152 As preeminent sociologist of race, gender, and class Patricia Hill Collins says, "Individuals and groups differentially placed within intersecting systems of power have different points of view on their own and others' experiences . . ." See Collins, *supra* note 25, at 14.

153 See McGinley & Cooper, *supra* note 12, at 329.

154 Indeed, there is a lively debate as to whether the related "multidimensionality theory" adds distinctive value to intersectionality theory. I conclude that multidimensionality theory has fleshed out some important ideas that were nascent in intersectionality theory. See, e.g., Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 291 (2001); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 9–10 (1999); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 566 (1997); Elizabeth M. Iglesias & Francisco Valdes, Afterword, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 509 (1998). Legal scholar Athena Mutua has provocatively declared that "early interpretations of intersectionality theory, its groundings in the analyses of women's lives, and the way in which women's lives were both understood and examined, limited intersectionality's intuitive power in analyzing men as gendered beings for some legal scholars." Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 342–43 (2013). However, as Professor Ann C. McGinley and I noted in an earlier publication, "Juliet Williams pointed out that there are political reasons for making people aware of the intersectional roots of multidimensionality, not least of which is to avoid displacement of the critical race feminist roots of intersectionality. We agree that multidimensionality theory makes the most sense when it is explained in light of its roots in intersectionality theory." Ann C. McGinley & Frank Rudy Cooper, *Identities Cubed: Perspectives on Multidimensional Masculinities Theory*, 13 NEV. L.J. 326, 335 (2013) (footnote omitted). On the basis of the last sentence of that quote, I now disagree with my earlier self and conclude that "intersectionality theory" as originally conceived contained all of the insights needed to capture the issues I am trying to illuminate.

155 Crenshaw, *supra* note 24, at 140; see also Kimberlé Crenshaw, *Mapping the Margins:*

the class of women in general or blacks in general because of racial and gender difference but refused to recognize a category of discrimination at the intersection of race and gender.¹⁵⁶ Intersectionality theory recognizes compound identities like black-woman, and explores their implications for legal and social analysis.

Put simply, there are three phases of identity: self-identity, attributed identity, and identity negotiation (also known as identity performance).¹⁵⁷ Respectively, these are how one thinks of oneself in one's head, how others perceive an individual, and how one behaves in social interactions. In the last of those three aspects of identities, individuals try to negotiate between how they see themselves and how the world sees them by performing their identity, i.e., behaving, in ways that may alter how they are seen.¹⁵⁸ Professors Devon Carbado and Mitu Gulati call this concept “working identity” because people do work in terms of their behavior and dress in order to affect how they are seen.¹⁵⁹ Although this Section does not purport to be a comprehensive review of intersectionality theory, it does explore several relevant takeaways from intersectionality theory.¹⁶⁰

Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1243–44 (1991) (defining and explicating intersectionality).

¹⁵⁶ Crenshaw, *supra* note 24, at 141–50.

¹⁵⁷ See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1264–65, 1268 (2000) (explicating relationship between sense of self, stereotypes, and identity performance).

¹⁵⁸ McGinley & Cooper, *supra* note 12, at 329.

¹⁵⁹ Carbado & Gulati, *supra* note 12, at 701, 705–06 (2001); see generally Carbado & Gulati, *supra* note 157, at 1264–65 (discussing identity performance). Law professor Kenji Yoshino refers to the similar concept of “covering,” whereby people who are known to be different from the norm attempt to make themselves more palatable through behavior and dress. See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (describing covering in relation to gay legal history).

¹⁶⁰ Patricia Hill Collins identifies a number of assumptions that are prevalent in intersectionality scholarship. She says that one or more of these assumptions is always present, though some may be absent, and the configuration varies. See Collins, *supra* note 25, at 14. Here is a summary of her list:

- “Race, class, gender, sexuality, age, ability, nation, ethnicity, and similar categories . . . are best understood in relational terms”;
- Categories of identity create power relations—racism, sexism, classism, and related prejudices—that are interrelated;
- The power relations influence social formations that are organized around unequal distribution of material relations and social experiences;
- Social formations are “historically contingent and cross-culturally specific,” varying across times and places;
- Individuals differentially positioned “within intersecting systems of power” develop “different points of view on their own and others’ experiences”;

First, specific categories of identity, such as race, gender, class, and so on, are not just relationally constructed, but also mutually constructed. To say that race is relationally constructed is simply to say that whiteness gains meaning from its opposition to blackness.¹⁶¹ Going further, sociologist of race, gender, and class Patricia Hill Collins's four fundamental premises of intersectionality include recognition that race, gender, class, and related categories of identities "mutually construct" one another.¹⁶² That is, discourses that are primarily about the social meaning of one identity are nonetheless affected by discourses about other identities.

The black-male-as-criminal discourse that undergirds white supremacy reveals both the specificity of the identity at the intersection of blackness and maleness and also how race and gender are mutually constructed. The "Black + Male = Criminal" stereotype shares some ideas with assumptions about black female sexuality, such as the notion that blacks are aggressive,¹⁶³ but is distinct from those assumptions in its presumption of a willingness to commit physical violence. Moreover, the intersectional identity black-male is co-constituted with other intersectional identities. Part of the meaning of race in the Jim Crow era—black men as incipient rapists—was constructed in relation to other intersectional identities—white-females as in need of white-males' protection.¹⁶⁴ In that ongoing stereotype, the meaning of race is that black maleness is linked to rapacious desire and white femaleness is innocent and idealized. Meanwhile, black women were not given access to that Victorian femininity. During black chattel bondage, white men purported to protect white women by locking them into the private sphere while also allowing themselves to rape black women.¹⁶⁵

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- Social formations of inequality "are fundamentally unjust," thus sparking "engagements that uphold or contest the status quo."

Id. For further thinking on how to conceptualize intersectionality theory, see Collins's six themes in the topics of intersectional analyses. *See id.* at 11–13.

¹⁶¹ *See generally* MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (3d ed. 2015) (discussing relational nature of race).

¹⁶² COLLINS, *supra* note 24, at 48.

¹⁶³ *See* COLLINS, *supra* note 26, at 89 (noting that even "black lady" stereotype assumes black women are too assertive).

¹⁶⁴ *See* Chang et al., *supra* note 41, at 23 (discussing how race and gender mutually construct one another).

¹⁶⁵ *See, e.g.,* Andrea J. Ritchie, #sayhername: *Racial Profiling and Police Violence Against Black Women*, 41 *HARBINGER* 187, 191 (2016) (referring to "a systemic arc of police brutality and state-sanctioned violence against Indigenous, Black and Brown women and gender nonconforming people, beginning with the first colonizing armies and the advent of slave patrols, and continuing through the systematic rape, denial of reproductive autonomy, and theft of children of Indigenous and African descended women").

Hence, the racial meaning of black-male-as-criminal has been constructed through the simultaneous construction of the meaning of gender.¹⁶⁶ A central assumption about race, the idea that black men have a proclivity to assault white women, turns on a central assumption about gender, that white women's innocence requires them to be sheltered away from black men.¹⁶⁷ That formulation simultaneously constructs black men as in need of surveillance,¹⁶⁸ white women as on a pedestal and in a cage,¹⁶⁹ and white men as off the hook for their violence against black women.¹⁷⁰ The racial hierarchy has implied a gender hierarchy, and vice versa. In that sense, race and gender are mutually constructed. As Section II.C and Part III of this Article demonstrate, people's class statuses also intersect with and mutually construct other identities, such as race and gender.¹⁷¹

Second, another takeaway from intersectionality theory is that categories of identity—race, gender, class, and so on—correspond with systems of social power—racism, sexism, classism, and so on. It is because there is racial categorization that there can be racism. This is

¹⁶⁶ *Id.*

¹⁶⁷ The Jim Crow lynching machinery also created a quandary for white women: "If they didn't lie about being raped by a black man, they were labeled whores and liars; if they cried rape and played their role in the system of domination over black men, they were in fact liars." Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 22 (1998).

¹⁶⁸ See, e.g., I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1272 (2017) (noting that surveillance cameras are currently concentrated in black and brown communities).

¹⁶⁹ See Chang et al., *supra* note 41, at 25 (describing white women as "on a pedestal, but also in a cage").

¹⁷⁰ See Ritchie, *supra* note 165, at 191 (linking white men's rapes during black chattel bondage to present day police rapes).

¹⁷¹ Consider, for example, the mutual construction of class and whiteness in politics. See, e.g., Pruitt, *supra* note 12, at 585–86 (criticizing "the Left" for blaming white women for Hillary Clinton's 2016 presidential election loss); Maureen Johnson, *Separate but (Un)equal: Why Institutionalized Anti-Racism Is the Answer to the Never-Ending Cycle of Plessy v. Ferguson*, 52 U. RICH. L. REV. 327, 365 (2018) (discussing resurgence of white supremacy through class politics); Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1530–31 (2019) (explaining white voters' turn from President Barack Obama to President Donald Trump); Gregory S. Parks & Derek S. Hicks, "How Much a Dollar Cost?" *Political Ideology, Religion, and Poverty Policy Through the Lens of Kendrick Lamar's Music*, 28 S. CAL. REV. L. & SOC. JUST. 197, 246 (2019) (contending that working-class whites became more fatalistic about class mobility during the Trump campaign); JOAN C. WILLIAMS, *WHITE WORKING CLASS* 74 (2017) (dissecting why working-class whites supported Trump); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 653 (2009) (discussing then-California Governor Ronald Reagan's "welfare queen" myth); Lisa R. Pruitt, *Welfare Queens and White Trash*, 25 S. CAL. INTERDISC. L.J. 289, 290–91 (2016) (arguing "welfare queen" phenomenon hurts both whites and blacks).

not to say that race is merely a social construct that does not exist. Rather, *race is socially constructed but materially consequential*.¹⁷² We must attend to categories of identities because they have taken root in systems of social power.

Third, systems of social power themselves intersect, creating the set of interlocking hierarchies that influences how individuals are treated. The systems of social power—racism, sexism, classism, and so on—that correspond with identities interlock because they are part of an overall system of oppressions.¹⁷³ For instance, during the Enlightenment, Western thinkers were obsessed with classifying and hierarchizing everything, including bodily characteristics.¹⁷⁴ They created the “scaling of bodies,”¹⁷⁵ which classified people—male over female, white over black, Christian over others, and so on—such that individuals could be ranked along various axes.¹⁷⁶ Systems of social power take many forms, such as racism, sexism, classism, and so on, but what makes oppression a system is the shared principle of those somewhat distinct systems of classification: that there must be rankings of people. The resulting system could be referred to as “the interlocking hierarchies.”¹⁷⁷

One simple way to understand how the interlocking hierarchies create identities is to analogize a person’s particular intersectional social location—where they are in the map of categories of identity and systems of social power—to the Myers-Briggs personality types. The Myers-Briggs Type Indicator test asks people to consider which side of

¹⁷² See, e.g., Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama’s Feminine Side*, 86 DENV. U. L. REV. 633, 643 (2009).

¹⁷³ See COLLINS, *supra* note 26, at 137–38 (discussing matrix of domination).

¹⁷⁴ IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 123–24, 130 (2011).

¹⁷⁵ *Id.* at 128.

¹⁷⁶ See *id.* at 123–24. That is not to say that all oppressions operate in the same manner.

¹⁷⁷ Patricia Hill Collins used to refer to a similar concept as the “matrix of domination,” but she no longer does so. Compare COLLINS, *supra* note 26, *passim* (using term), with COLLINS, *supra* note 24, at 10, 239 (eschewing term, using it only once, and stating, “I analyze power relations not by emphasizing domination, but rather by developing the concept of intellectual resistance and exploring intersectionality’s connections to it”). Collins’s point in describing a “matrix of domination” was to model supposedly distinct systems of social power as intersecting. See COLLINS, *supra* note 26, at 221–38 (comparing older model of race, class, and gender to intersectionality). But see Jennifer C. Nash, ‘Home Truths’ on Intersectionality, 23 YALE J.L. & FEMINISM 445, 462 (2011) (criticizing Collins’s “matrix of domination” framework as implying a stable set of hierarchies). I see the matrix of domination as a tool for describing how hierarchies are working in a particular cultural context at a particular moment, not as a rigid metaphor. Recognizing the difficulty, though, I refer to what Collins might have called “the matrix of domination” as “the interlocking hierarchies.” This term provides more of a sense that hierarchies are overlapping and constantly shifting.

the continuum they fall on within four categories: being an Extrovert (“E”) versus an Introvert (“I”), a Senser (“S”) of the world rather than someone who relies on Intuition (“N”), a Thinker (“T”) versus a Feeler (“F”), and a Judger (“J”) rather than a Perceiver (“P”).¹⁷⁸ It then identifies people based on their positions within the categories. Hence, someone who is an Extrovert, relies on Intuition, is a Thinker, and is a Perceiver, would be identified as an “E-N-T-P” type of person.¹⁷⁹ The Myers-Briggs test assumes that knowing that specific combination of characteristics will tell us something important about an individual’s personality.¹⁸⁰ This Article contends that knowing the specific combination of major identities of a person also tells us something important about them.¹⁸¹

The point here is that people’s social locations significantly influence how they are likely to see themselves, to be seen, and to need to perform their identities to fit into particular contexts. In the category of race, whites are generally ranked over Asians, Latinx, blacks, Native peoples, and other non-whites. In the category of gender, men are ranked over women and other gender identities. In the category of class, the rich are ranked over the poor, but United States society contains myriad gradations of economic status. Each of those identity hierarchies also intersects with the other identity hierarchies.

Now imagine that, at least at a given time and in a given social context, everybody has specific identities within the various categories. So, one might be black, female, professional-class, straight, disabled, and middle-aged. We could say that a person’s specific combination of identities is likely to influence how they see themselves, how they are seen, and the types of identity performance work they would need to do to fit into particular contexts. As Kimberlé Crenshaw demonstrated, the intersection of black and female has some overlap with black men and white women, but is a unique social position. We are all intersectional in this sense, as even those in the privileged posi-

178 See *MBTI Basics*, MYERS & BRIGGS FOUND., <https://www.myersbriggs.org/my-mbti-personality-type/mbti-basics/> [<https://perma.cc/B9TY-VJTW>] (defining the Myers-Briggs approach).

179 See *id.* (identifying sixteen personality types).

180 See *id.*

181 For instance, scholars have demonstrated that a person’s status as a “white-male-professional-homosexual” may cause him to prioritize his privileged identities over his subordinated one(s) by joining conservative groups. See generally Mary F. Rogers & Phillip B. Lott, *Backlash, the Matrix of Domination, and Log Cabin Republicans*, 38 SOCIO. Q. 497 (1997) (explaining why Republicans’ anti-gay stance did not dissuade gay men). For a discourse analysis of the intersection of sexuality, gender, and race in another context, see Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463 (2009) (analyzing media coverage of black men loving men on “the DL”).

tion in many categories, such as white men of the upper-classes who are heterosexual, Christian, able-bodied, and young adults, will have their senses of self and attributed identities shaped by that social location.¹⁸² However, the low ranking of both blackness and womanhood in the scaling of bodies makes people at the social location “black-woman” confront different challenges than individuals at other locations. Ultimately, we need to reject the scaling of bodies, but for now we must acknowledge that the scaling of bodies creates specific social locations for people that influence how they see themselves and how they are treated, at least at a given time and in a given social context.

Four insights emerge from the analogy between social locations and the Myers-Briggs personality types. First, as with personality, people’s own and others’ senses of their identities can change over time. Second, likewise, senses of self, attributed identities, and the possibilities for identity performance change in different social contexts. For example, a black-male-heterosexual might see himself and be seen in one way in a mostly white environment, another way in a mostly black environment, and in other ways at a barbeque in the ‘hood, at the opera, and in a classroom. That is, different aspects of one’s identities may be more or less salient in different contexts. Third, the seemingly distinct identities that intersect with one another to create social locations are themselves co-constituted. As was noted, the meaning of race has been influenced by, and has influenced, the meaning of gender.¹⁸³ Lastly, and most important for our current purposes, social structures—such as the state’s criminalization system—interact with identities to influence the outcomes of social interactions. In the United States, police tend to selectively enforce the laws in specific ways because of how our particular social structure interacts with people’s social locations. It is the social location of poor black and brown people that creates the phenomenon of racial profiling.¹⁸⁴

A fourth takeaway from intersectionality theory is that the interlocking hierarchies themselves interact with social institutions to exac-

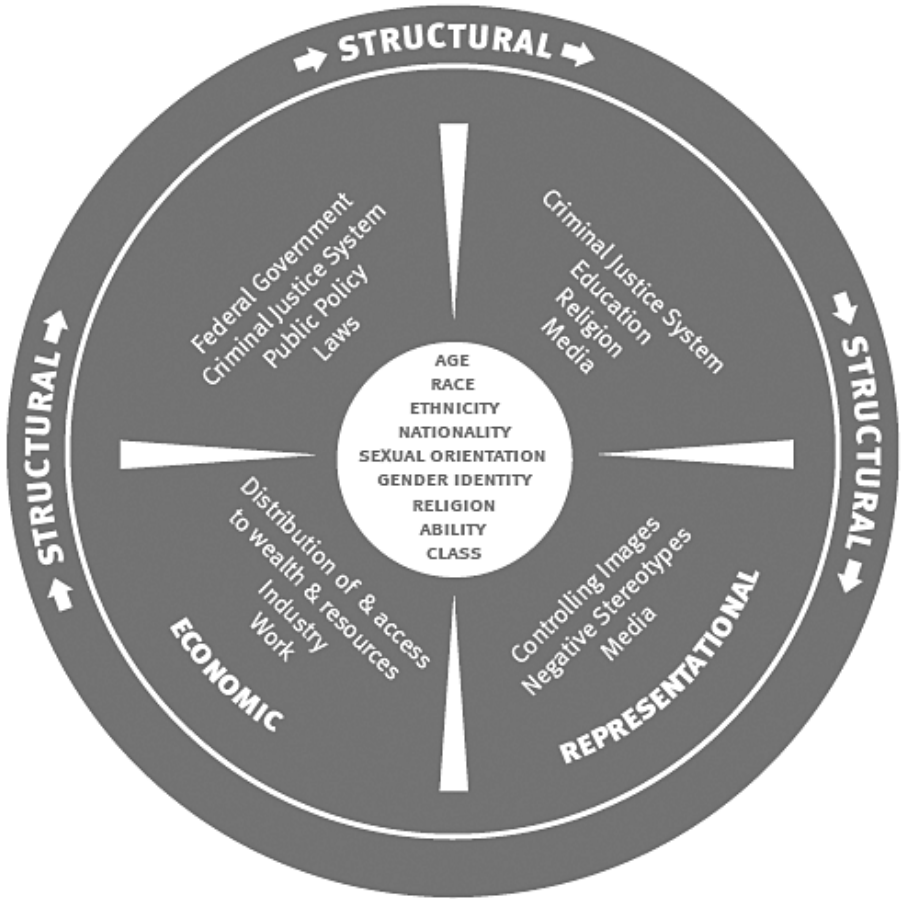
¹⁸² See generally Rogers & Lott, *supra* note 181, at 497 (explaining Log Cabin Republicans).

¹⁸³ See Chang et al., *supra* note 41, at 21 (using Alabama case, *McQuirter v. State*, 63 So. 2d 388 (Ala. Ct. App. 1953), concerning a purported attempted rape, as an example of mutual construction of race and gender).

¹⁸⁴ Again, the same identity may be privileged in some contexts and subordinated in others. For example, the NYPD targeted young black and brown men for programmatic stop and frisk. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013). It was marginally better to be a woman for those purposes even though men are generally accorded more privilege than women. This is not to say that black and brown women do not suffer from police targeting and violence—they do.

erbate or reduce oppression. The figure below presents a simple model of how social structures meet identities:¹⁸⁵

THE INTERSECTIONAL APPROACH MODEL FOR POLICY & SOCIAL CHANGE



Briefly, this illustration helps us understand “[t]he interplay between structures and identities” in ways that allow us to illuminate why certain people are policed in particular ways.¹⁸⁶ Of note is the way that the wheel shows the identities at the core of the figure as being influenced by structural factors. However, because the identities also cluster into particular intersectional configurations, not unlike Myers-Briggs personality types, the social context will have different effects

¹⁸⁵ C. NICOLE MASON, *WOMEN OF COLOR POL’Y NETWORK, LEADING AT THE INTERSECTIONS* 6 (Colleen Coffey ed., 2010).

¹⁸⁶ Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 *UCLA L. REV.* 1418, 1449 (2012) (contending intersectional perspective helps better understand social control of women of color).

on different people. The figure thus fails to illustrate a necessary understanding that the identities at its core intersect with, and mutually construct, one another. Nonetheless, the interaction of the social structure with those intersecting and mutually constructed identities can exacerbate or ameliorate issues created by a person's social location.

Based on this fourth takeaway about intersectionality, we must recognize that all social encounters take place within a complex world of hierarchy. What seems like a simple interaction between two people is overdetermined by both the ways the meanings of particular identities have already been formed for us and the interplay of those identities with social structures that are well beyond our individual control. Most people have a complicated position in the interlocking hierarchies; they are both subordinated along some axes and privileged along others.¹⁸⁷ Being socially located at different places in the interlocking hierarchies and confronting different social institutions leads to different results. Part III of this Article helps demonstrate the interlocking nature of identity hierarchies by showing that both race and class play significant roles in why a specific social institution, the police, selectively enforces the law differently in different neighborhoods.

Another implication of the fourth takeaway is that intersectionality theory helps reveal that social institutions themselves can intersect in ways that exacerbate subordination. Law professor and scholar of race and gender Dorothy Roberts emphasizes this point by concentrating on the way social *systems* are intersectional.¹⁸⁸ She says, "The analysis of the roles black mothers play in both the prison and foster care systems reveals that these systems intersect with each other jointly to perpetuate unjust hierarchies of race, class, and gender."¹⁸⁹ Kimberlé Crenshaw accentuates systems intersectionality by connecting it to the interlocking hierarchies of identities. For her, social institutions "situate women of color within contexts structured by various

¹⁸⁷ For instance, men are generally privileged, but also usually subordinated in some way. See Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 22 (2010) ("Penalty status is the condition of already having something about your identity that makes your masculinity suspect. For example, if the idealized masculinity is heterosexual, white, and upper-middle-class (and, arguably, Christian), then men who do not fit all of those categories know their quest to measure up to the ideal is already hampered." (footnote omitted)).

¹⁸⁸ Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1491 (2012).

¹⁸⁹ *Id.*

social hierarchies and that render them disproportionately available to certain punitive policies and discretionary judgments that dynamically reproduce these hierarchies.”¹⁹⁰ Consequently, the “co-constitutedness” of intersectional identities and intersectional social systems can make people all the more vulnerable to oppression.

For instance, legal scholar and community activist Priscilla Ocen tells the tale of the partnership between the Antioch, California police department and local residents of predominantly white neighborhoods.¹⁹¹ Civilians were encouraged to report potential housing code violations by poor people using housing vouchers to obtain entry into these neighborhoods.¹⁹² The targeted people were, unsurprisingly, overwhelmingly black and female.¹⁹³ That example reminds us to remain aware that the institution of policing itself can overlap with other social systems to exacerbate subordination.

A final implication of the fourth takeaway from intersectionality theory is that it can be a method for analyzing how identities, culture, and law combine to produce specific results. Patricia Hill Collins has cited cultural studies pioneer Stuart Hall for the proposition that intersectionality can be used both to conduct a genealogy of how a certain worldview became a hegemonic discourse at a particular moment, as well as how other discourses do, or might, struggle against that view.¹⁹⁴ I make a similar argument in my article, *A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit*.¹⁹⁵ Therein, I contend that macro-level cultural discourses like calls for “law and order”¹⁹⁶ lead to meso-level ideological narratives like “backlash criminology”¹⁹⁷ and conservative judicial doctrines, which, in turn, produce day-to-day micro-level police practices like programmatic stop and frisk.¹⁹⁸ As I say there:

The basic question is how does a big picture idea that has gained society-wide traction influence what the police do on the street? The answer is that big picture discourses fight for

¹⁹⁰ See Crenshaw, *supra* note 186, at 1427 (explicating systems intersectionality).

¹⁹¹ Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1544–45 (2012).

¹⁹² *Id.*

¹⁹³ See *id.*

¹⁹⁴ Collins, *supra* note 25, at 15.

¹⁹⁵ Cooper, *supra* note 28, at 1.

¹⁹⁶ *Id.* at 47 (“Law enforcement justifies this ‘New Jim Crow’ through calls for law and order.”); see also *id.* at 47–53 (detailing growth of this discourse and its effects).

¹⁹⁷ *Id.* at 58–63 (linking criminological theories to racial profiling through programmatic stop and frisk).

¹⁹⁸ See *id.* at 39 (providing illustration of these relationships).

hegemony on the macro level of society and, if they achieve it, promulgate discipline-specific discourses at the meso level that may then be translated into specific micro-level practices.¹⁹⁹

Part III of this Article thus uses intersectionality as a method for understanding the disproportionate application of warrior policing in poor black and brown neighborhoods.

Together, these takeaways paint a picture of people as complex and of the institution of policing as necessarily affected by that complexity. Although race is obviously important to policing, intersectionality theory encourages consideration of the ways other factors, such as the class structure, work with race to produce outcomes. Section II.C hones in on the effects of the United States' current economic structure.

C. Class Analysis

We have seen that race does not operate by itself, so now we need to see how it intersects with the class structure. To make the impact of the class structure concrete, consider the income levels in Summerlin and the Westside. In Summerlin, the median annual household income is \$91,200.²⁰⁰ On the Westside, the median annual household income is about \$32,500.²⁰¹ The median annual household income in Las Vegas as a whole is \$52,600.²⁰² The stark economic disparities between Summerlin and the Westside provide reason to believe that disparate policing in those communities is about class as well as race. To better understand policing, we need to better understand class.

Although this Article will not provide a comprehensive review of the application of all class theories to law, it is important to note the way our current neoliberal economy organizes social relations.²⁰³ Neoliberalism leads to a centaur state that is soft on the top of society through deregulation of markets and stressing individual responsibility, but hard on the bottom of society through a punitive approach to

¹⁹⁹ *Id.* at 35.

²⁰⁰ *Household Income in Summerlin North, Las Vegas, Nevada (Neighborhood)*, *supra* note 15.

²⁰¹ *Race and Ethnicity in West Las Vegas, Las Vegas, Nevada (Neighborhood)*, *supra* note 15.

²⁰² *Household Income in Las Vegas, Nevada (City)*, *supra* note 15.

²⁰³ ClassCrit scholars have led the discussion of class in legal scholarship. See, e.g., Harris, *supra* note 12, at 39–40; Kessler, *supra* note 12, at 915; Pruitt, *supra* note 12, at 541; Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 *BUFF. L. REV.* 859, 880 (2008).

those who need welfare or get designated as criminals.²⁰⁴ The incentives created by the centaur state thus influence the structure of policing.

Sociologist of poverty and crime, Loïc Wacquant, identifies these four features of neoliberalism: (1) economic deregulation; (2) an emphasis on a culture of individual responsibility; (3) welfare cutbacks; and (4) expansion of punitive apparatuses.²⁰⁵ First, neoliberalism's emphasis on free markets harkens back to the *laissez faire* capitalism of the late nineteenth and early twentieth centuries. That first Gilded Age foundered when it created the Great Depression, and labor's demands for a welfare state were finally realized.²⁰⁶ Nonetheless, beginning in the 1960s, calls for neoliberalism and a new Lochnerism arose as a response to perceived excessive regulation by the growing welfare state.²⁰⁷ Today, neoliberalism promotes the canard that deregulated markets are naturally efficient and makes the maximization of shareholder profit a corporation's prime directive.²⁰⁸ The "public interest" is identified with, or subordinated to, maximizing market freedom.²⁰⁹ Free market deregulatory agendas like those championed by President Ronald Reagan and British Prime Minister Margaret Thatcher are a hallmark of neoliberalism.²¹⁰ In the United States, deregulation was not halted by President Bill Clinton's eight years in office, which essentially accepted conservative economic principles.²¹¹ By 2000, the neoliberal economy was basically a built-in feature of the United States' economic and social policies.²¹²

²⁰⁴ See WACQUANT, *supra* note 33, at 43 (defining centaur state).

²⁰⁵ Squires & Lea, *supra* note 32, at 6.

²⁰⁶ This is, of course, a simplification. See Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 993 (2020).

²⁰⁷ For a consideration of the Court's *Lochner* Era and "New Lochnerism," see Areto A. Imoukhuede, *Gun Rights and the New Lochnerism*, 47 SETON HALL L. REV. 329, 330 (2017) (arguing the recent creation of gun rights applies "the same libertarian bias that has undermined constitutional law's fundamental rights doctrine").

²⁰⁸ See Kevin Stenson, *The State, Sovereignty, and Advanced Marginality in the City, in CRIMINALISATION AND ADVANCED MARGINALITY* 41, 50 (Peter Squires & John Lea eds., 2012).

²⁰⁹ *Id.*

²¹⁰ See Kenneth R. Hoover, *The Rise of Conservative Capitalism: Ideological Tensions Within the Reagan and Thatcher Governments*, 29 COMPAR. STUD. SOC'Y & HIST. 245, 245 (1987).

²¹¹ See Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 37 (1999) (declaring that "the new regime that Reagan introduced was consolidated during subsequent administrations," including Clinton's); John W. Burns & Andrew J. Taylor, *A New Democrat? The Economic Performance of the Clinton Presidency*, 5 INDEP. REV. 387, 387-89 (2001).

²¹² See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 5-39 (2005).

Next in Wacquant's identification comes the symbolic and ideological dimension of neoliberalism. Feminist legal scholar of criminalization Aya Gruber calls out neoliberalism "as 'a *political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites' by reconceptualizing individualism and capitalism as *moral* imperatives and denigrating distributive justice as encouraging moral failure."²¹³ The combined effect of Clinton-era workfare and crime bills was to define "the idea of the poor as a problem self-generated by pathological culture."²¹⁴ This is neoliberalism seeking to persuade the middle- and upper-classes that punitive management of the precariat is necessary through the "penal pornography" of depictions of the poor as inherently criminal.²¹⁵ It also tries to persuade the poor themselves to accept their lot in life as their own fault.²¹⁶ All of this is part of neoliberalism's promotion of an individualistic culture where greed is good and the poor deserve their fate.

Third, although neoliberalism purports to shrink the state through deregulation and minimizing social welfare, it is actually producing a new state with different characteristics than the 1960s welfare state. The neoliberal state is "fundamentally hostile to the social welfare system and has taken an active role in attacks on its intellectual and political credibility."²¹⁷ As a result, there have been selective reductions in state spending.²¹⁸ The reductions focus on its provision of social services but generally exclude the military, punitive apparatuses, and corporate welfare. The retraction and recomposition of social welfare that had been initiated by President Reagan actually accelerated during the Clinton years, as President Clinton turned welfare into "workfare."²¹⁹ Workfare says that people should be forced to

²¹³ Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211, 3216 (2015) (quoting HARVEY, *supra* note 212, at 19).

²¹⁴ See Squires & Lea, *supra* note 32, at 12 (discussing Lynn Hancock & Gerry Mooney, *Beyond the Penal State: Advanced Marginality, Social Policy, and Anti-welfarism*, in *CRIMINALISATION AND ADVANCED MARGINALITY* 107, 173 (Peter Squires & John Lea eds., 2012)).

²¹⁵ *Id.* at 2; see also Wacquant, *supra* note 27, at 250 (listing depictions of criminals as unredeemable and worthy of hatred).

²¹⁶ Squires & Lea, *supra* note 32, at 2.

²¹⁷ White, *supra* note 21, at 820.

²¹⁸ Squires & Lea, *supra* note 32, at 1.

²¹⁹ See Bill Clinton, Opinion, *How We Ended Welfare, Together*, *N.Y. TIMES* (Aug. 22, 2006), <https://www.nytimes.com/2006/08/22/opinion/22clinton.html> [<https://perma.cc/4G5P-DWBQ>]; see also KAARYN S. GUSTAFSON, *CHEATING WELFARE* 43–52 (2011) (contending that cutting welfare is part of neoliberal economic movement).

work low-wage, insecure jobs, with distributive justice existing only as a last resort.²²⁰

Finally, punitiveness is built into the neoliberal state. Neoliberalism is “not the retreat of the state but the development of new techniques of coercion and social control.”²²¹ Chief among these new techniques is a hyper-incarceration strategy that essentially “warehouses” those whom neoliberalism fails to employ.²²² President Clinton also takes deserved blame for maintaining the Reagan Drug War and doubling down on hyper-incarceration through his draconian crime bills.²²³

Ultimately, the United States’ neoliberal centaur state “weds the ‘invisible hand’ of the market to the ‘iron fist’ of the penal state.”²²⁴ Moreover, it is precisely because the centaur state both weakens the position of the underemployed and compromises their social safety net that it must encourage a punitive state. The reasons for this can be characterized as follows:

[T]he neoliberal state leaves economic growth to the working of the market but intervenes strongly to make labour attractive to mobile global capital and create[s] cities and regions as ‘business-friendly’ environments. . . . [Risks to civilians’ health, safety, and general welfare are treated] as matters of personal responsibility and insurance while concentrating on security from another set of risks presented by the poor and the structurally unemployed to the middle classes and securely employed working class.²²⁵

The neoliberal state is most concerned with appealing to global capital. But the flipside of the free reign of capital—a fundamental part of neoliberalism—is the need for the state to manage the populations that become marginalized, which occurs largely because of neoliberal-

220 See GUSTAFSON, *supra* note 219, at 43–52.

221 Squires & Lea, *supra* note 32, at 1.

222 See *id.* at 6–7 (commenting on Stanley Cohen, *Ideology? What Ideology?*, 10 CRIMINOLOGY & CRIM. JUST. 387 (2010)); see also *id.* at 12–13 (considering Vincenzo Ruggiero, *Illicit Economies and the Carceral Social Zone*, in CRIMINALISATION AND ADVANCED MARGINALITY 173 (Peter Squires & John Lea eds., 2012)).

223 See Wacquant, *supra* note 27, 245–46; see also Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019, 2:30 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis> [https://perma.cc/9VUR-XT6X]; *A Brief History of the Drug War*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> [https://perma.cc/6S4G-YYUY].

224 Wacquant, *supra* note 27, at 247.

225 John Lea & Simon Hallsworth, *Bringing the State Back in: Understanding Neoliberal Security*, in CRIMINALISATION AND ADVANCED MARGINALITY 19, 21 (Peter Squires & John Lea eds., 2012).

ism's economic agenda. This marginalized population is called "the precariat" because their state of advanced marginality makes their lives insecure or precarious.²²⁶

The neoliberal state has a core assumption that the precariat will be supervised and controlled through workfare and prison.²²⁷ This management of the precariat is a result of the social agenda that comes along with the neoliberal economic agenda: the rolling back of the state's former social welfare agenda and undermining of those institutions. Formerly, the Keynesian political-economic agenda sought full employment, social cohesion, and social mobility through providing education and a social safety net.²²⁸ But now the neoliberal state's political-economic agenda of mobility of capital at the global level promotes pushing down labor costs, which dismantles the prior cooperation between labor and capital and makes most forms of employment insecure.²²⁹

A significant reason that neoliberalism has come to focus on the precariat is racial. The neoliberal state no longer believes in the Keynesian ideal of social cohesion. Consequently, "the move to the market state has generated the notion that minorities need not be assimilated."²³⁰ Simultaneously, racism ratchets up neoliberalism's mistreatment of the poor.²³¹ The poor, who are disproportionately racial minorities and figuratively blackened, become both unnecessary to assimilate and undesirable to assimilate. They become unnecessary to assimilate because the neoliberal economy tolerates higher unemployment, and undesirable to assimilate because of long-standing and unresolved racism. This is another way that race and class mutually construct one another.

The fact that the precariat are blackened in the popular mind makes it easier to pursue certain policing strategies. The "new policing," sometimes known as preventive policing, proactive policing, or aggressive patrol,²³² is built upon the foundation of James Q. Wilson's

226 See GUY STANDING, GREAT TRANSITION INITIATIVE, THE PRECARIAT: TODAY'S TRANSFORMATIVE CLASS? 6–7, <https://greattransition.org/images/Standing-The-Precariat.pdf> [<https://perma.cc/QKD4-XEJ2>].

227 See Squires & Lea, *supra* note 32, at 1, 2.

228 See Lea & Hallsworth, *supra* note 225, at 19.

229 See *id.* at 20–21.

230 George A. Martínez, *Bobbitt, the Rise of the Market State, and Race*, 18 J. GENDER, SOC. POL'Y & L. 587, 594 (2010).

231 See White, *supra* note 21, at 819 ("Race aggravates both marginality and its effects, thereby enhancing the sense of threat and the felt need to reject the welfare state for ever more coercive and punitive forms of control.").

232 See generally Heymann, *supra* note 30, 422–40 (defining and discussing "new policing");

broken windows theory and zero tolerance methods.²³³ The prime elements of this method are the pervasive stopping and frisking of young brown and black men in certain neighborhoods for weapons and the use of pretextual de minimis offenses to target the same cohort for searches for drugs.²³⁴ Wilson himself was dubious; a believer in race-linked criminality.²³⁵ His theory was worse, as it assumed aggressive policing would primarily be visited upon black and brown people and did not care.²³⁶ “It would be more accurate to describe forms of police activity carried out on behalf of ‘zero tolerance’ as strategies of selective intolerance,” says one commentator.²³⁷

If intolerance lies at the heart of the “new policing,” that is because such policing is connected to neoliberalism’s centaur state. We see this in the fact that neoliberalism positions the police as those who help separate the unwilling from the marginal workers, thereby beginning the process of warehousing the resisters in prison. Welfare “reforms” push people into low-wage, insecure jobs. Simultaneously, the “new policing” warehouses those unable or unwilling to conform to the neoliberal social order by means of hyper-incarceration. Selective enforcement of criminalization laws thus manifests the broader selective intolerance of the neoliberal state. This leads to the conclusion that police excessive force, and the Court’s tacit endorsement thereof, fits with neoliberalism’s punitive approach to the poor. In sum, our neoliberal class structure is significantly incentivizing the harsh policing that has mostly been analyzed as a primarily racial phenomenon.

III. THE “NEW POLICING” AS BOUNDARY MANAGEMENT

Part II of this Article reviewed scholarship on excessive force and proposed that scholars use an intersectional approach to policing that emphasizes the mutual construction of race and class. To demonstrate the utility of this approach, Part III will connect the Court’s grant of discretion to use excessive force with police choices to use excessive force against poor black and brown communities. Ultimately, it argues that class-race incentives lead deregulated warrior cops to maintain

see also MALCOLM GLADWELL, TALKING TO STRANGERS 324, 341 (2019) (using terminology “proactively policing” and “aggressive policing”).

²³³ See generally Kelling & Wilson, *supra* note 137.

²³⁴ See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d. 540 (S.D.N.Y. 2013) (detailing NYPD focus on young black and brown males).

²³⁵ See Cooper, *supra* note 28, at 59.

²³⁶ See *id.* at 10, 58–61.

²³⁷ Valeria Vegh Weis, *Criminal Selectivity in the United States: A History Plagued by Class & Race Bias*, 10 DEPAUL J. SOC. JUST. 1, 22 n.111 (2017).

boundaries between rich white neighborhoods and poor black and brown ones by means of the threat of excessive force.

Section III.A explains how the neoliberal economic agenda leads to a politics of law and order that draws the Court into a role of “loyal foot soldier[s]” in wars on crime.²³⁸ Section III.B shows that there is a warrior mindset amongst police that is largely applied to poor black and brown neighborhoods by means of the preventive, proactive, and predictive methods of the “new policing.” In other words, the police are increasingly adopting the warrior model over the guardian approach. That Section shows how both class and race influence the move to warrior policing. Section III.C critiques the “new policing” as a means of boundary management that splits rich white neighborhoods from poor black and brown ones.

A. *The Court’s Deregulation of the Police*

The Court’s excessive force doctrine can be understood as a movement from a Court that sought to regulate police behavior to one that sought to deregulate the police. There has long been a sense that criminal procedure developed out of the Court’s concerns about rampant police abuses, especially those against blacks.²³⁹ For instance, in *Brown v Mississippi*,²⁴⁰ the Court expressed disapproval for admittedly abusive police tactics against blacks.²⁴¹ The Court also expressed its general displeasure about the use of “third degree” tactics: beatings to produce confessions.²⁴² And these cases began to take on a role as civil rights advancements for blacks subjected to harsh police tactics. They were a way to regulate police excessive force, which was concentrated on blacks from its inception.²⁴³

²³⁸ *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting); see also Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 755, 756 (2002).

²³⁹ See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1157 (1998) (“Although rarely acknowledged by the Court, the racial dimension of these cases was not lost on contemporary observers.”).

²⁴⁰ 297 U.S. 278 (1936).

²⁴¹ *Id.* at 284–85 (1936) (“It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, ‘Not too much for a negro; not as much as I would have done if it were left to me.’ . . . The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state’s prosecuting attorney and the trial judge presiding.”).

²⁴² See *id.*; see also RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 46 (2008) (discussing “third degree” abusive interrogation tactics).

²⁴³ See Sekhon, *supra* note 21, at 1722 (“The dominant view among scholars of why crimi-

It certainly looks like the Court has now deregulated the police. The question is, why? The first potential factor is race, especially as seen in the racialization of the wars on drugs.²⁴⁴ Presidents Nixon and Reagan each merged their wars on drugs with narratives about black deviance. For Nixon, this meant making law and order an issue in such a way as to associate blacks with crime.²⁴⁵ As Nixon aide John Erlichman said, “We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.”²⁴⁶ For the Reagan Administration, the war on drugs was explicitly understood to be likely to focus on blacks.²⁴⁷ It also aimed its rhetoric and actions at blacks.²⁴⁸

The wars on drugs dramatically ramped up the use of the criminalization system to make the United States the world’s foremost jailer of its own people—by far.²⁴⁹ The ongoing war on drugs is especially responsible for hyper-incarceration. The Court played such a significant role in that ramp up that former Justice John Paul Stevens accused his colleagues of becoming “loyal foot soldier[s]” in the war on drugs.²⁵⁰ We should thus understand the Court’s deregulation of

nal procedure has failed to restrain the police is that an increasingly conservative Supreme Court put the brakes on the Warren Court’s ‘revolution in criminal procedure.’”).

²⁴⁴ The United States’ history of race-based drug wars goes back to at least 1850. *See generally* Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227 (2015) (providing history and critique of U.S. drug wars).

²⁴⁵ *See* Erik Sherman, *Nixon’s Drug War, an Excuse to Lock Up Blacks and Protestors, Continues*, FORBES (Mar. 23, 2016, 6:00 AM), <https://www.forbes.com/sites/eriksherman/2016/03/23/nixons-drug-war-an-excuse-to-lock-up-blacks-and-protestors-continues/#48b312342c88> [<https://perma.cc/7T9G-2XE8>].

²⁴⁶ *Id.*

²⁴⁷ *See* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was A “War on Blacks,”* 6 J. GENDER, RACE & JUST. 381, 390–91 (2002) (declaring racial disparities in Drug War policing “are the consequences of deliberate decisions; first, to fight a ‘war’ on drugs, and second, to fight that war against low-level street dealers in communities populated by people of color”).

²⁴⁸ *Id.* at 390–91 (“Reagan’s anti-drug rhetoric was skillfully designed to tap into deeply held cultural attitudes about people of color and their links to drug use and other illicit behavior.”).

²⁴⁹ *See Countries with the Most Prisoners 2021*, STATISTA (July 30, 2021) <https://www.statista.com/statistics/262961/countries-with-the-most-prisoners/> [<https://perma.cc/L6QS-7KPX>] (charting U.S. dominance in incarceration); *see also* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020) <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/YAK4-695S>] (criticizing U.S. approach to incarceration).

²⁵⁰ *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting); *see also* Luna, *supra* note 238, at 755 (declaring “the judiciary has become ‘a loyal foot soldier’ in the war on

the police as stemming from the wars on drugs, which, as was suggested in Section II.C, emanated from neoliberalism's imperative to lock up large numbers of people.²⁵¹ "One of the key consequences of the War on Drugs," scholars have noted, "is that courts have relaxed their oversight of the police."²⁵² This Article connects that deregulatory impulse to not just race but also class incentives created by neoliberalism's restructuring of society.

The second potential factor in the deregulation of the police is our changed political-economic climate. The West in general, and the United States in particular, are caught up in a neoliberal economic approach that reimagines the relationship between the government and civilians. Neoliberalism's deregulatory ideal harkens back to the first Gilded Age, when the Court enforced the economic ideology of "hands off" the markets.²⁵³ But the more recent neoliberal movement took off in the 1960s.²⁵⁴ The story of neoliberalism includes the rise of a group of intellectuals who championed then-radical ideas of an unregulated free market.²⁵⁵ A central part of that movement was a set of University of Chicago scholars of economics and law, including eventual influential Supreme Court Justice Antonin Scalia.²⁵⁶ They sought to roll back the achievements of the welfare state and the 1960s revolution in criminal procedure.²⁵⁷ As the Warren Court was proounding controversial decisions such as *Miranda*,²⁵⁸ the law-and-order narrative was being developed.²⁵⁹ The idea of taking a "hands off" the police approach developed rather simultaneously with the ne-

drugs" (quoting *Acevedo*, 500 U.S. at 601); *id.* at 756 nn.14–15 (citing various Justices acknowledging Court's acquiescence to Drug War).

²⁵¹ See *supra* Section II.C (linking neoliberalism to hyper-incarceration).

²⁵² Nunn, *supra* note 247, at 402.

²⁵³ See Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 993 (2020) (discussing "a tendency to naturalize private market distributions").

²⁵⁴ See Wacquant, *supra* note 27, at 237–38, 245.

²⁵⁵ See Stenson, *supra* note 208, at 41, 49–50.

²⁵⁶ Michael Avery & Danielle McLaughlin, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* 21 (2013); see also Jean Stefancic & Richard Delgado, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* (1996) (describing rise of conservative legal ideology).

²⁵⁷ See Stenson, *supra* note 208, at 49 (referencing the University of Chicago's influence).

²⁵⁸ See generally Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 621–22 (1996).

²⁵⁹ See Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 323 (2012) ("'Law and order' became a potent theme in American politics in the 1960s. . . . Calling for law and order became a shorthand way of expressing contempt for everything that was wrong with the modern permissive society and calling for a return to the discipline and values of the past. The law and order rallying cry also signified intense

oligeral economic movement. Deep-pocketed conservative institutions seized upon the intellectual movement toward free markets.²⁶⁰ Deregulation of the economy led to deregulation of the police.

Together, the race and class factors appear to have generated judicial obsequiousness to law enforcement. Consider that when the police were accused of using third degree tactics to obtain confessions in the early to mid-twentieth century, law enforcement's answer was twofold: they didn't use third degree tactics, and they also could not do their jobs without third degree tactics.²⁶¹ At that time, the Court did not believe the denial, and regulated police tactics.²⁶² Today, the Court seems to accept both sides of the police response to the charge of using inappropriate tactics. It supports the idea that excessive force is not a significant problem²⁶³ yet also implicitly considers it necessary to allow police to use excessive force.²⁶⁴ The Court's deference to the police can be read as a belief that the police must be granted whatever tools they feel they need.

In an unpublished manuscript, criminal procedure scholar Eric Miller discusses the Court's general deregulation of criminal procedure.²⁶⁵ He stresses that from the late 1930s through the 1960s, the Court had operated in terms of a rule-based, due process-oriented model of regulation.²⁶⁶ But then the post-Warren Courts moved to a "bottom-up, rather than top-down discretion."²⁶⁷ That is, they deferred to police expertise rather than imposing standards of constitutional behavior.²⁶⁸ For Miller, then, "The Court's deregulatory method is to: (1) establish that some constitutional right applies but then (2) delegate enforcement elsewhere, so long as (3) the official manifests some not-incompetent response"²⁶⁹ This Article agrees

opposition to the Supreme Court's expansion of the constitutional rights of accused criminals."); Cooper, *supra* note 28, at 47–53.

²⁶⁰ *Id.* at 49–50.

²⁶¹ See LEO, *supra* note 242, at 43, 45.

²⁶² See *id.* at 45.

²⁶³ See *Hudson v. Michigan*, 547 U.S. 586, 589–90 (2006) (lauding increasing police professionalism as a purportedly sufficient bulwark against police abuse).

²⁶⁴ See *id.* at 594 (endorsing police abuse of police shooters).

²⁶⁵ Eric J. Miller, *De-Regulating Criminal Procedure 2* (undated, unpublished manuscript) (on file with author).

²⁶⁶ See *id.*

²⁶⁷ *Id.*

²⁶⁸ See *id.*; see also Obasogie & Newman, *supra* note 19, at 427, 444–45 (defining "the endogenous Fourth Amendment" as federal courts allowing police to make "constitutional rules for themselves" by "ceding to police understandings of excessive force in defining the scope of Fourth Amendment protections" (emphasis omitted)).

²⁶⁹ Miller, *supra* note 265, at 4.

with Miller but accentuates the fact that this is not so much a deregulation of criminal procedure as a deregulation of the police, which necessarily required a general deregulation of criminal procedure.

In accord with this deregulation of policing thesis is legal scholar Anna Lvovsky, who has argued that courts have created a police-as-experts narrative.²⁷⁰ The courts moved from sometimes accepting police officers as experts on certain vice issues to taking them to be experts on all suppression issues.²⁷¹ Simultaneously, police departments engaged in a move toward greater professionalism than the departments that had regularly engaged in third degree interrogations. But this consisted at least as much of a publicity campaign to endear themselves to the judiciary as of real change.²⁷² The concerted campaign included techniques such as inviting judges to tour police academies.²⁷³ Eventually, courts began seeing police officers as experts on all things law enforcement.²⁷⁴ Lvovsky correctly characterizes this trend as “undercut[ting] a core safety net against overdeference in the Fourth Amendment context.”²⁷⁵

We should think of judicial overdeference to police as deregulation because that helps link weak use of force doctrine to economic incentives. As the neoliberal movement toward small government (really, government reprioritized toward global business interests) took hold, so too did a smaller judicial role. Those trends are related. The centaur state’s creation of a deregulated economy produces a precariat that cannot be managed through the shrinking social safety net, and thus incentivizes hyper-incarceration. The precariat must either accept low-wage, low-security jobs or be warehoused through imprisonment. Deregulating the police accomplishes the goal of warehousing economic resisters. Section III.B will show that deregulation of the police has also led to the warrior style of policing.

²⁷⁰ See Lvovsky, *supra* note 42, at 2018–19, 2028–29.

²⁷¹ See *id.* (connecting these trends); see also Seth Stoughton, *Evidentiary Rulings as Police Reform*, 69 U. MIA. L. REV. 429 (2015) (proposing altering evidence law as means of police reform).

²⁷² See Lvovsky, *supra* note 42, at 2008–11 (discussing professionalism movement).

²⁷³ *Id.* at 2010–11.

²⁷⁴ See *id.* at 2070–71.

²⁷⁵ *Id.* at 2071. Even in a strong critique of Lvovsky’s piece, legal scholar Barry Friedman agrees, “It is a very, very serious problem. Judicial deference to police expertise has caused a soup of *societal* deference to the police, which has led to vast overpolicing.” Barry Friedman, Response, *Why Do Courts Defer to Cops?*, 130 HARV. L. REV. F. 323, 330 (2017).

B. *Race, Class, and the Warrior Mindset*

The police are increasingly being thought of as divided by a warrior mindset versus a guardian mindset. This way of thinking about policing emphasizes the importance of a law enforcement officer's psychological inclinations about how to police.²⁷⁶ A recent study by criminologists Kyle McLean, Scott E. Wolfe, Jeff Rojek, Geoffrey P. Alpert, and Michael R. Smith found the warrior and guardian constructs to be distinct.²⁷⁷ In short, warrior cops see themselves as more endangered by the communities they patrol and are more prone to see righteous violence as a solution to noncompliance.²⁷⁸ Guardian police officers see themselves as more in partnership with communities and turn to communication as a means of persuading civilians to comply.²⁷⁹ The question at hand is: Why is warrior policing concentrated upon poor black and brown communities?

1. *Understanding the Warrior Cop Mentality*

The contrast figure for the warrior cop is the guardian officer. Guardian police officers view their authority as emanating from the consent of the public and stress the use of communication skills rather than physical force.²⁸⁰ Qualities of the guardian include (1) respect for human dignity, (2) empathy, (3) patience, (4) inclusivity, and (5) introspection.²⁸¹ Although the warrior and guardian mindsets can coexist in one officer,²⁸² police excessive force is most related to the warrior cop mentality.²⁸³ Hence, we need to better understand what motivates the warrior mindset.

Policing scholar and former police officer Seth Stoughton identifies four aspects of the warrior mentality. First is honor, the pursuit of

²⁷⁶ McLean et al., *supra* note 1, at 1098.

²⁷⁷ *See id.* at 1108, 1110 (determining that “the argument that there is little distinction between the warrior and guardian mindsets is incorrect,” but also noting that the two constructs are “distinct, but not mutually exclusive”).

²⁷⁸ *See* Stoughton, *supra* note 1, at 612 (“It has promoted a self-image of officers as soldiers on the front lines in the never-ending battle to preserve order and civilization against the forces of chaos and criminality . . .”); *id.* at 634 (discussing belief in “the gift of aggression”).

²⁷⁹ *See id.* at 667 (identifying the guardian mindset as emphasizing community partnership); McLean et al., *supra* note 1, at 1104 (asserting the guardian mindset prioritizes communication and de-escalation).

²⁸⁰ McLean et al., *supra* note 1, at 1097.

²⁸¹ Stoughton, *supra* note 1, at 668.

²⁸² *See* McLean et al., *supra* note 1, at 1108, 1110.

²⁸³ *See* Stoughton, *supra* note 1, at 634 (discussing warrior mentality's proclivity for violence).

right over wrong.²⁸⁴ That approach turns on the idea that law enforcement is engaged in “never-ending battle to preserve order and civilization against the forces of chaos and criminality.”²⁸⁵ With warriors believing they serve “as the line between good and evil,” it should be no surprise they feel their job makes them honorable.²⁸⁶ They come to believe their self-created press clippings that they are the “thin blue line” holding back the barbarian hordes.²⁸⁷

There are several race-class dimensions of the thin blue line attitude. Foremost in the thin blue line narrative is racial bifurcation. Almost everybody knows the police are mostly white and that they concentrate on black and brown neighborhoods.²⁸⁸ The obvious implication of the thin blue line narrative is that law enforcement serves the function of separating black and brown people from whites. From the point of view of class analysis, the police do indeed preserve order, the order dictated by capitalist elites. The police can serve as a buffer between the rich and the poor by protecting property. In the warrior mindset, this role is elevated as the need for order is magnified and internalized. When the police manage boundaries between rich white neighborhoods and poor black and brown ones, their sense of honor allows them to take pride in their role.

This leads to the second component of the warrior mindset: duty. Warrior cops view the job as a calling.²⁸⁹ That means they can feel special for doing this job. Indeed, being part of an exclusive club is an important aspect of law enforcement’s appeal.²⁹⁰ As a consequence, they often see themselves as separate from the communities they ostensibly serve. The job-as-calling attitude fosters a sense of self that is superior to civilians.

The primary way the race-class structure is reflected in the warrior cop’s sense of duty is in their attraction to being part of an exclusive club. The police are primarily drawn from white communities, not

²⁸⁴ *Id.* at 632–33.

²⁸⁵ *Id.* at 612.

²⁸⁶ McLean et al., *supra* note 1, at 1099.

²⁸⁷ See Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621, 634–35 (discussing link between thin blue line attitude and police resistance to criticism).

²⁸⁸ See POTTER, *supra* note 25, at 30–31 (describing professional- and middle-classes as seeing police as working for them); *Police Officers*, DATA USA, <https://datausa.io/profile/soc/police-officers#demographics> [<https://perma.cc/UJ4X-GARH>] (describing police demographics); Cooper, *supra* note 287, at 654.

²⁸⁹ Stoughton, *supra* note 1, at 633.

²⁹⁰ See *id.* at 636.

the black and brown neighborhoods that they concentrate upon.²⁹¹ The job is a calling, but it is also a source of racial esteem. It primarily involves bullying black and brown people as a means of maintaining command presence.²⁹² Police are also primarily drawn from the working classes, not the poor or the upper classes.²⁹³ For these police officers, the job is a stepping stool into the middle classes. Coming from the class that is just above the poor may also lead them to feel a sense of superiority over the poor, whom they spend most of their time surveilling and controlling. Given the phenomenon of fear of falling down a peg in the class system, one would expect working-class cops to have heightened resentment of the poor.²⁹⁴ The job is a calling, but one with race-class benefits.

The third component of the warrior mindset is resolve, which requires having the mental strength to sustain endless war.²⁹⁵ The very training of police, both formal and informal, suggests they are soldiers in a war. The job-as-calling attitude can support a view of civilians as “know-nothings,” a belief discovered in earlier studies of police culture.²⁹⁶ Civilians are “know-nothings” because they do not see the underside of society and thus cannot understand law enforcement’s actions.²⁹⁷ This view also supports a belief that the “know-nothings” have no business telling the police how to do their job.²⁹⁸ Because police see themselves as the experts in crime-fighting, they can come to see themselves as “beyond reproach.”²⁹⁹ As was noted in Section III.A, the police have succeeded in getting the judiciary to defer to their expertise.

The fact that the police resolve to do the job their way implicitly accepts that there is a race-class structure. It implies that the poor black and brown people, whom the police most often surveil and control, need to be disciplined with a strong hand. That is the most logical motivation for their racial profiling and disproportionate uses of force against poor racial minorities. The police display their resolve when

²⁹¹ See Cooper, *supra* note 23, at 725–26 (noting disconnect between who polices and who is policed).

²⁹² See *id.* at 674–75 (discussing importance of command presence to policing).

²⁹³ *Id.* at 692.

²⁹⁴ See *id.* at 691 (explaining that working class men exhibit hypermasculinity by belittling or harassing weaker, lower-class men as an attempt to regain social status).

²⁹⁵ Stoughton, *supra* note 1, at 633–34.

²⁹⁶ McLean, *supra* note 1, at 1099.

²⁹⁷ See *id.*

²⁹⁸ See *id.*; see also Cooper, *supra* note 287, at 639 (linking police resistance to criticism to cop fragility).

²⁹⁹ McLean, *supra* note 1, at 1099.

they explicitly or implicitly tell the “know-nothings” that, having instructed the police to maintain order, they should stay out of the way of police.³⁰⁰ The police thus steel themselves to control the underworld by any means necessary.

A fourth component of the warrior mindset, therefore, is righteous violence. Warriors must be willing to use aggression to accomplish their goals.³⁰¹ Warrior cops believe force is often necessary to do the job. For example, the McLean, Wolfe, Rojek, Alpert, and Smith study found a significant cohort of police officers who agreed with the statement, “It is sometimes necessary to use more force than is technically allowable.”³⁰² Further, even though the warrior and guardian mindsets sometimes coexist, “Only the warrior construct . . . was associated with greater prioritization of physical control.”³⁰³

This fourth component is underwritten by the police role as buffer between racial minorities and whites as well as the rich and the poor. Seeing their role as “the Thin Blue Line” between mainstream society and the underworld empowers police officers’ uses of force.³⁰⁴ The “know-nothings” in the middle and upper classes may be out of touch, but the police are there to protect society from the underworld.³⁰⁵ Police targeting of poor black and brown neighborhoods tells you who they think is the group that needs to be preserved and from whom they must be protected.

Finally, this Article’s focus on the intersection of race and class allows us to extricate a fifth component of the warrior cop’s mentality—belief in the inevitability of evil. This belief is why they see a need for righteous violence—sometimes expressed as excessive force—in the first place.³⁰⁶ Stoughton crystalizes the problem with an assumption of evil: “[O]fficers separate themselves and the darkness of their working reality from *real* society—they are on the fringes, in the trenches, fighting the disorder that threatens to spill over to the ‘good’ neighborhoods and the families that are worth protecting.”³⁰⁷

³⁰⁰ See *id.* The warrior mentality leads police to become resistant to criticism. Stoughton, *supra* note 1, at 662–66. Elsewhere, I have described this as “cop fragility,” which is their sense that only the police can judge the validity of their actions and a concomitant digging in against critics. Cooper, *supra* note 287, at 648.

³⁰¹ Stoughton, *supra* note 1, at 634.

³⁰² McLean et al., *supra* note 1, at 1105.

³⁰³ *Id.* at 1110.

³⁰⁴ Stoughton, *supra* note 1, at 638.

³⁰⁵ See McLean et al., *supra* note 1, at 1099 (discussing police self-conceptions).

³⁰⁶ See Stoughton, *supra* note 1, at 634 (discussing righteous violence).

³⁰⁷ *Id.* at 638.

That statement of a fifth component of the warrior mindset should be chilling, for it has several negative implications for how the police see the people they police.

First, the statement suggests that members of law enforcement believe that the poor racial minority neighborhoods they patrol are inherently bad, a cancerous chaos that they must stop from spreading into “good” white neighborhoods. To those who follow this view, the communities that law enforcement most frequently patrol are seemingly full of savages with whom police battle for the maintenance of civilization. This view justifies the oft-held, even more often claimed, police belief that danger lurks around every corner.³⁰⁸ If the threat of violent noncompliance is thought to be nascent in every situation, police will always stand ready with responsive violence. This constant vigilance cannot help but put them on edge and leave them always coiled to strike.

An additional problem with belief in the inevitability of evil is that it easily rationalizes police misconduct—including excessive force—as a necessary means of fighting the “war” on crime.³⁰⁹ Because this is a war of right and wrong, attempts to constrain police behavior can be seen as obstacles to be overcome.³¹⁰ If criminals represent evil, they can be fought by any means necessary. The belief in evil rationalizes in advance police uses of excessive force.

Finally, the transformation of crime control into a battle of good and evil fits the neoliberal blueprint. Neoliberalism translates a lack of economic success into a moral failing.³¹¹ The warrior cop’s belief in the inevitability of evil translates petty crimes into moral failings. The precariat thus become blameworthy for their status as such, and the warrior cop’s willingness to use excessive force serves the purpose of keeping this incipient evil at bay.

2. “New Policing” as Warrior Policing

The “new policing” uses *Terry* stops and pretextual arrests to regulate who belongs in particular neighborhoods.³¹² The “new policing” is “a mixture of ‘community policing,’ problem-solving theory, and

³⁰⁸ See *id.* at 639–40.

³⁰⁹ See *id.* at 658–62 (connecting warrior mentality to police misconduct).

³¹⁰ See *id.* at 658.

³¹¹ See *supra* Section II.C (explicating neoliberal ideas).

³¹² See I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 60–72 (2009) (discussing how pretextual stops are used to regulate boundaries between racial neighborhoods).

preventive hot-spots policing.”³¹³ That means police are supposed to get out into the community to interact with suspects.³¹⁴ It also assumes law enforcement will be using data-driven techniques to determine how to deploy officers.³¹⁵ More specifically, it usually comes in the form of aggressively stopping and frisking suspects in areas where crime is believed to be most likely to occur.³¹⁶ Analysis of the Sandra Bland story helps illustrate how the “new policing” is related to the warrior mindset.

White police officer Brian Encinia saw black woman Sandra Bland driving near the historically black college campus, where she had just gotten a job, and had a feeling that she might be a drug mule, but he lacked even reasonable suspicion that his hunch was true.³¹⁷ Based on techniques taught to law enforcement throughout the country, Encinia took advantage of the *Whren* pretext doctrine by following Bland closely until she committed a traffic violation of failing to signal a lane change.³¹⁸ So he stopped Bland.³¹⁹ When Encinia ordered Bland to put out her cigarette, things quickly got out of hand.³²⁰ Encinia proceeded to order Bland to exit her car and threatened to “light [her] up!” with a stun gun.³²¹ Bland was reported to be found hung dead in her cell two days later.³²²

Social critic Malcolm Gladwell is correct that the Bland confrontation resulted from “proactive policing” tactics often associated with the “new policing.”³²³ Police are taught to force encounters with suspicious people by turning their hunches into pretextual arrests and, sometimes, searches incident to arrest.³²⁴ They are then to watch for

³¹³ Bell, *supra* note 31, at 690 n.185 (2020) (citing Heymann, *supra* note 30, at 422–40). The features of the “new policing,” being about twenty years old, are not really “new,” but describe the premises of most contemporary policing.

³¹⁴ *Id.* at 711.

³¹⁵ *See id.* at 714–16; Rachel A. Harmon & Andrew Manns, *Proactive Policing and the Legacy of Terry*, 15 OHIO ST. J. CRIM. L. 49, 57 (2017).

³¹⁶ *See* Harmon & Manns, *supra* note 315, at 56. (“The newer forms of proactive strategies are premised on the idea that, if the desirable outcome of policing is public safety and order, officers should be out there *preventing* problems from emerging, not just stopping them when they do.”).

³¹⁷ GLADWELL, *supra* note 232, at 2–4, 324–26.

³¹⁸ *Id.*

³¹⁹ *Id.* at 2.

³²⁰ *Id.*

³²¹ *Id.* at 4.

³²² *Id.*

³²³ *Id.* at 324–26; *see also* Harmon & Manns, *supra* note 315, at 56 (discussing effects of proactive policing).

³²⁴ *See* Gladwell, *supra* note 232, at 321.

“curiosity ticklers” that suggest something is awry.³²⁵ Encinia was doing the job as intended by higher-ups when he followed Bland based on a mere hunch—the insufficient suspiciousness of her having out-of-state license plates.³²⁶ He was also doing as he had been taught by asserting control over Bland.³²⁷ Bland’s death was thus an outgrowth of preventive and proactive policing. Regardless of how exactly Bland died days later, Encinia’s use of “new policing” techniques was a but-for cause of her death. Proactive policing led Encinia to stop Bland for no good reason; the stop led to her getting dead.

Encinia’s actions are consistent with the warrior mindset. He felt duty-bound to force encounters. He also felt entitled to use righteous violence to enforce his commands. He likely thought Bland to be a drug mule because of her race. He also seems to have considered her car’s undistinguished status and clutter to have been signs of her being a drug mule.³²⁸ That is an assumption that overlaps substantially with class. Gladwell goes so far as to say the primary problem with Encinia stopping Bland was that she was not in a “high crime area.”³²⁹ In that sense, however, Gladwell tacitly endorses warrior policing and merely opposes its application in respectable neighborhoods.³³⁰

As Gladwell’s focus on “high crime areas” would suggest, the predictive nature of the “new policing” creates race-class problems. The practice of using past arrest statistics to determine future police assignments is bound to result in overpolicing of poor black and brown neighborhoods. There is a “ratchet effect” whereby past arrests based on bias magnify the racial profiling problem as police then use the biased arrest statistics to choose where to look for future crime.³³¹ That means predictive policing will lock in past racial bias and justify further racial profiling, usually against neighborhoods that are also poor. This tendency of predictive policing toward racial profiling was amply demonstrated by the comprehensive study that led to the banning of racial profiling in New York City.³³² The *Floyd* Court made findings of fact that the NYPD both had a policy of stopping young

³²⁵ *See id.*

³²⁶ *See id.* at 325.

³²⁷ *See id.* at 333–34.

³²⁸ *See id.* at 323 (noting factors police use to suspect drug mules).

³²⁹ *Id.* at 340–42.

³³⁰ *See id.* (questioning use of proactive policing tactics in the particular location).

³³¹ *See generally* Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 *FED. SENT’G REP.* 237, 237 (2015) (critiquing predictive policing methods).

³³² *See, e.g., Floyd v. City of New York*, 959 F. Supp. 2d. 540, 577 (S.D.N.Y. 2013).

black and brown males and based its decisions of where to allocate police officers on that goal.³³³

It is important to note that the “new policing” is born of and facilitates the drive toward boundary management. Predictive policing easily lends itself to the goal of rounding up the usual (racial minority) suspects. We would also expect racial profiling to be especially vigorous in poor neighborhoods, which are less able to defend themselves through political power.³³⁴

C. *Boundary Management*

Section III.C highlights ways that excessive force doctrine and the “new policing” through warrior cop methods lead to police boundary management along intersecting lines of race and class. Simply, the police execute their duties differently in different neighborhoods.³³⁵ To understand which locations will get which types of policing, it is helpful to link the warrior and guardian qualities to other dichotomies. Police tend to operate as warriors in ghettos and guardians in gated communities.³³⁶ They are more likely to act as warriors against black and brown people and to greet white people as guardians.³³⁷ The poor get warrior policing, the rich get guardians. Put simply, the police do not police the same in rich white neighborhoods as they do in poor black and brown communities.³³⁸ This Section identifies ways that po-

³³³ See *id.* at 562.

³³⁴ See POTTER, *supra* note 25, at 31–32 (describing poor people’s relation to police).

³³⁵ Police also treat different people differently. I have long since tired of asking my white female students how police treat them when they are traffic stopped. When they are young, and especially if they are conventionally deemed attractive, they have many stories of being given warnings instead of tickets. My female students of color have far fewer such stories. As a black male, I experienced my first “I’m just going to give you a warning” well into my forties. Certainly not all women or white women or conventionally attractive women receive preferential treatment in traffic stops. Nonetheless, although this is anecdotal evidence of disparate policing, it is consistent with many people’s understandings of how police operate. See, e.g., I. India Thusi, *On Beauty and Policing*, 114 Nw. U. L. REV. 1335, 1375–76 (2020) (asserting qualitative study shows “the police officers seemed to commodify beauty in a way that correlated with how and where they targeted policing efforts across the various red-light districts”).

³³⁶ See generally Stoughton, *supra* note 1, at 612–14, 634 (distinguishing warrior and guardian policing); Capers, *supra* note 312, at 60–72 (discussing disparate policing by neighborhood and race); Bell, *supra* note 31, at 650, 696–98 (describing police as enforcing segregation).

³³⁷ See sources cited *supra* note 336.

³³⁸ Disparate policing stems in part from the advent of the predictive aspect of policing, which expanded its scope. From the *Terry* opinion forward, the Court has endorsed stopping criminals before they commit crime. Although there is some logic to the idea that police need not stand idly by while a crime is being committed, the preventive approach can go too far. The police are now empowered to proactively seek out crime. Given the realities of police explicit and implicit racial bias, it is inevitable that seeking out crime will result in disparate policing of

lice excessive force functions to maintain boundaries between neighborhoods defined as rich, white, and “good” and those defined as poor, black or brown, and “bad.”

Legal scholar and sociologist Monica C. Bell’s recent article, *Anti-Segregation Policing*, provides evidence of police boundary management.³³⁹ She details “[m]echanisms of [p]ro-[s]egregation [p]olicing,” which demonstrate that “forms and qualities of policing are intimately linked with neighborhood characteristics, especially but not exclusively neighborhood racial composition and poverty levels.”³⁴⁰ Bell’s contribution is to demonstrate that “geographically concentrated, intensive, prevention-focused policing”³⁴¹—the “new policing”—reinforces residential race-class segregation.³⁴² Although Bell focuses on how the police reinforce the pernicious effects of the United States’ long history of residential segregation, this Article puts emphasis on how these policing tactics are linked to both the warrior mindset and incentives provided by the class-race structure.

A fundamental piece of the “new policing” is the saturation of particular black and brown neighborhoods.³⁴³ The programmatic stop and frisk practices of the “new policing” mean that police will have frequent contact with young black and brown people in the targeted neighborhoods.³⁴⁴ It is this racially disparate saturation that reinforces segregation, for it identifies poor black and brown neighborhoods as “high crime areas,” which makes the housing less desirable.³⁴⁵ The undesirability of the housing has negative effects on poor racial minorities: “When groups of people are cordoned off into stigmatized places, ‘correlated adversity’ or ‘compounded deprivation’ emerges, affecting

racial minorities. That point was made by the NAACP in its *Terry* amicus brief and admitted, but sidestepped in the opinion itself. See *Terry v. Ohio*, 392 U.S. 1, 14 (1968) (arguing Court is “powerless” to stop police harassment of racial minorities); Brief for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae at 4–5, *Sibron v. New York*, 392 U.S. 40 (1968) (No. 63), 1967 WL 113672, at *4–5 (arguing stop and frisk disproportionately visited upon blacks). One way the police use their expanded preventive powers is to force contacts with vaguely suspicious people. As critical race theorist, criminal procedure scholar, and law professor Devon Carbado notes, those excess contacts lead to a higher risk that racial minorities will be victims of police excessive force. Carbado, *supra* note 20, at 1491–93.

³³⁹ Bell, *supra* note 31 at 687–88.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 690.

³⁴² *Id.* at 653.

³⁴³ See Carbado, *supra* note 20, at 1490–95 (contending certain racially defined areas receive more aggressive policing).

³⁴⁴ See Cooper, *supra* note 28, at 18 (“The fourth key characteristic of programmatic stop and frisk is further micro-targeting of young black and Latinx males in urban environments.”).

³⁴⁵ See Capers, *supra* note 312, at 55.

family formation, school test scores, mental and physical health, crime, employment, and even speech patterns.”³⁴⁶ Intensive policing thus marks neighborhoods as “bad,” leaving them increasingly black, brown, and poor.³⁴⁷ Police saturation of poor black and brown neighborhoods has the aforementioned “ratchet effect”: it increases the number of arrests that will be made in those neighborhoods, thus allowing police to rationalize more saturation policing there in the future.³⁴⁸

Meanwhile, in rich white neighborhoods, police boundary management supplements private white boundary management. The police concentrate on surveilling and controlling people who are racially or otherwise “out of place.”³⁴⁹ Such boundary management is a key part of what police do. Hence, Bell labels keeping racial minorities out of white neighborhoods a “core aspect” of policing.³⁵⁰ Police boundary management also supplements what critical race theorist Addie Rolnick calls “defending white space.”³⁵¹ Civilians in rich white spaces spend a lot of time monitoring the presence and actions of black and brown people. For instance, this is what the killers of Ahmaud Arbery were doing.³⁵² Whites also simply call the police to have black and brown people punished for small infractions. The phenomenon is so

³⁴⁶ Bell, *supra* note 31, at 672 (footnotes omitted) (first quoting Matthew Desmond & Bruce Western, *Poverty in America: New Directions and Debates*, 44 ANN. REV. SOCIO. 305, 308–09 (2018); and then quoting Kristin L. Perkins & Robert J. Sampson, *Compounded Deprivation in the Transition to Adulthood: The Intersection of Racial and Economic Inequality Among Chicagoans, 1995–2013*, RUSSELL SAGE FOUND. J. SOC. SCI., Nov. 2015, at 1, 35). But, to the extent that neighborhood effects produce greater crime, the society that segregates these people and then overpolicing them may be morally responsible for the effect. See David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 388 (1976) (arguing that a decision to convict should include a determination of whether “society’s own conduct in relation to the actor entitles it to sit in condemnation of him with respect to the condemnable act” (footnote omitted)).

³⁴⁷ See Bell, *supra* note 31, at 653, 672.

³⁴⁸ This is not to say that saturation policing is actually justified. It is based on a double misrepresentation: crime numbers produced by racial profiling are used to rationalize saturating neighborhoods, which then do become more crime-prone, allowing further rationalization of more saturation, and so on. Moreover, because there is crime everywhere in the United States, choosing where to look for it games the system. Imagine that police swept college dorms for illegal drug use. Would we then hear about the need to target rich white kids?

³⁴⁹ See Capers, *supra* note 312, at 62, 66 (“Our methods of policing also serve to limn out and maintain racialized spaces.”).

³⁵⁰ Bell, *supra* note 31, at 696 (calling pushing out racial minorities a “core aspect[] of police work”).

³⁵¹ Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639 *passim* (2019) (discussing ways private violence protects white space).

³⁵² See Chang et al., *supra* note 41, at 48 (noting killers’ claim that they were investigating local crimes).

pervasive it has a name: “white caller crime.”³⁵³ The cofacilitators of the Program on Race, Gender & Policing at the University of Nevada, Las Vegas, Stewart Chang, myself, and Rolnick, have analyzed a recent spate of killings of blacks in order to demonstrate that there is a “cycle of violence” against black and brown people that cuts across multiple domains.³⁵⁴

The “new policing” is also class-based in that its aggressive methods are primarily applied in poor neighborhoods. In fact, “[e]conomic separation has drastically increased, with the well-off corralling themselves into enclaves of increasingly concentrated affluence.”³⁵⁵ Indeed, some scholars argue that class is more important than race in the distribution of aggressive policing.³⁵⁶ Further, the neighborhoods that get the “new policing” are defined not just by race, but by poverty.³⁵⁷ At the least, warrior tactics are behaviors more easily imposed on the poor, who are not often politically empowered to resist unwanted policies.³⁵⁸

The “new policing” differentiates rich white neighborhoods from poor black and brown ones on the basis of both race and class. This Article adds to Bell’s point about policing and racial segregation by highlighting the way warrior policing is the means of marking poor black and brown neighborhoods as disfavored. The “new policing” lends itself to warrior policing. The warrior’s sense of honor is linked to serving as the “thin blue line” between order and chaos.³⁵⁹ The “new policing” accepts “thin blue line” reasoning by saturating poor black and brown neighborhoods. As the example of Summerlin and the Westside in Las Vegas demonstrates, saturation in “tha ‘hood” means fewer resources for surveillance and control in “the ‘burbs.”³⁶⁰ That is not to say there is no policing in the suburbs, but it is a friendlier policing.

³⁵³ See generally Chan Tov McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335 (2019) (detailing incidents of white civilians regulating perceived black misbehavior).

³⁵⁴ Chang et al., *supra* note 41, at 4–5 (referencing “cycle of violence”); see also Carbado, *supra* note 40, at 128 (referring to “circuits of violence”).

³⁵⁵ Bell, *supra* note 31, at 662.

³⁵⁶ See Reed Collins, Note, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. ON POVERTY L. & POL’Y 419, 426 (2007).

³⁵⁷ See Bell, *supra* note 31, at 732 (“Segregation creates a dynamic in which communities that are largely Black and largely poor are viewed as in need of ‘special’ forms of governance.”).

³⁵⁸ See *id.* at 732–33.

³⁵⁹ McLean et al., *supra* note 1, at 1099.

³⁶⁰ But see *supra* note 16 (noting Bell’s declaration there is sometimes more policing in suburbs).

Ultimately, warrior policing as boundary management leads to disproportionate police excessive force against poor black and brown people. The key to the violence is the warrior cop's belief in the inevitability of evil. The warrior cop believes they are the "thin blue line" between chaos and order. They believe the people whose neighborhoods they patrol—poor black and brown people—are the chaos. The chaos rationalizes a willingness to use righteous violence. Being on edge for evil from these people, police are trigger happy. Consequently, boundary management by the application of "new policing" methods with a warrior policing mindset should be expected to lead to disproportionate excessive force against poor black and brown people.³⁶¹

IV. OBJECTIONS AND IMPLICATIONS

This Article proposes a different scholarly approach to policing. Considering warrior cops' uses of force as boundary management between rich white neighborhoods and poor black and brown ones illustrates the utility of applying intersectionality theory to policing. First, we must note that the police and courts are affected by incentives created by the United States' neoliberal centaur state.³⁶² Most notable amongst those incentives for our purposes is the creation of a precariat who tend to be managed through the criminalization system. Second, we can then note the warrior cop's feelings of a duty to serve as the "thin blue line" between order and chaos by means of an assumption of evil and a willingness to use righteous violence. The "new policing," especially in its preventive and predictive techniques, encourages warrior behaviors.³⁶³ Finally, because boundary management between rich white neighborhoods and poor black and brown ones is a core function of policing, it becomes unsurprising that poor black and brown people get warrior policing.³⁶⁴ Warrior policing leads to disparate policing, including through the differential application of excessive force to poor black and brown people.

A potential objection to this analysis is that this Article does not prove that police treat rich blacks and browns or poor whites differently than poor blacks and browns. It is true that this Article has not tried to address all potential facets of class and policing, but it does not need to do so. The argument here demonstrates the general utility

³⁶¹ See Carbado, *supra* note 20, at 1491–92.

³⁶² See *supra* Section II.C (explicating concept of centaur state).

³⁶³ See *supra* Section III.B (discussing effects of warrior/guardian policing dichotomy).

³⁶⁴ See *supra* Section III.C (linking police enforcement of segregation to warrior mode).

of intersectionality theory and class analysis by showing that neoliberalism incentivizes the warrior/guardian dichotomy and police boundary management between rich white neighborhoods and poor black and brown ones. It leaves analysis of policing of the white poor and upper-class black and brown people for future projects. It may be that examination of those other groups will reveal somewhat different patterns of policing. This objection does not thwart this project, but it does present a case for following up on this analysis.

Another potential objection is that neoliberalism does not create crime and is thus morally neutral. First, the premise may be incorrect. Bell and others have argued that isolating people in ghettos leads to negative consequences, including heightened crime.³⁶⁵ Indeed, neoliberalism's fostering of a precariat class practically guarantees there will be "stigmatized places"³⁶⁶ characterized by "compounded deprivation."³⁶⁷ To the extent that neighborhood effects produce greater crime, the society that segregates these people and then overpolicing them may be morally responsible for the effect.³⁶⁸

Moreover, neoliberalism is hardly morally neutral when it comes to crime. Neoliberalism's drive for ever-increasing profit by means of deregulating businesses and cutting social welfare spawns a precariat. Except during times of an unusually expansive economy, when the precariat serve as needed surplus labor,³⁶⁹ something must be done with them. Neoliberalism's answer is to force most of the precariat into insecure labor and warehouse the rest in prison.³⁷⁰ Hyper-incarceration is one of neoliberalism's responses to the precariat *regardless* of crime levels. For example, as crime went down in the 2000s, incarceration dramatically increased.³⁷¹ Far from being morally neutral as

³⁶⁵ Bell, *supra* note 31, at 672.

³⁶⁶ *Id.*

³⁶⁷ *Id.* (quoting Perkins & Sampson, *supra* note 346, at 35).

³⁶⁸ See Bazelon, *supra* note 346, at 388 (arguing that a decision to convict should include a determination of whether "society's own conduct in relation to the actor entitles it to sit in condemnation of him with respect to the condemnable act" (footnote omitted)).

³⁶⁹ See Nunn, *supra* note 247, at 439 (defining surplus labor).

³⁷⁰ See *supra* Section II.C.

³⁷¹ See generally DON STEMEN, VERA, THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER (2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [<https://perma.cc/VLT9-XY3U>]; see also Joanna Laine, *From Criminalization to Humanization: Ending Discrimination Against the Homeless*, 39 HARBINGER 1 (2015) ("Americans also have an overstated fear of violent crime in general: a survey found that most Americans believe that violent crime has increased in recent years, even though it has steadily decreased.").

to boundary management through policing, neoliberalism is an important cause thereof.

Over and above allowing critique of the United States' centaur state, applying intersectionality theory to policing will also open us to other important insights. For instance, popular desire for race and class disparities in policing can be implied from those disparities' enduring prevalence. It should be obvious that police do not act against the interests and will of elites.³⁷² It takes social power to make something a law, so the police are doing what those in power wish them to do. Just as laws are not made without the implicit support of elites, elites cannot impose their will over the objection of a majority of the voting population. The economic elite may heavily influence political elites, but they cannot overcome a majority vote. Because the police have little desire or ability to override the will of economic elites, political elites, and political majorities, we should assume that, at least over the long run, the policing we are getting is the policing those constituencies want.³⁷³ Sadly, that implies that many people want race- and class-differentiated policing.

Further, the deregulation of the police by the post-Warren Courts may have an economic source: neoliberalism. Neoliberalism's destruction of the social safety net leaves many people in precarious positions. There is thus a strong structural incentive to invent wars on crime and other means of incapacitating people who are (economically) unwanted. Doctrinal deregulation of the police serves racialized social control, but it also serves marginalization of the poor. Consequently, we need an intersectional analysis of policing that provides a full account of class as well as race and other identities.

Consider as well that the centaur state's deregulation of the police may serve the typical police officer's class interests. That officer is often white, but he is not rich.³⁷⁴ In fact, there is a thin line between him and the poor black and brown people he spends his day arresting. Future scholarship should compare and contrast formerly marginalized groups "class jumping" via the police force. If the police officer needs a foil so he does not "fall" too far down the class ladder, he finds ready-made contrast figures in the precariat.

Finally, acknowledging the link between race-class boundary management and police excessive force reinforces the long-standing

³⁷² See POTTER, *supra* note 25, at 32–33 (discussing social construction of crime).

³⁷³ See *id.* at 33 (pointing to power of political majorities).

³⁷⁴ *Police Officers*, DATA USA, <https://datausa.io/profile/soc/police-officers#demographics> [<https://perma.cc/W3Q7-M2R9>].

call for structural analysis of racism.³⁷⁵ Although the class structure does not make police commit excessive force against poor racial minorities, it does channel officers' behavior toward certain actions. So, the Court and law enforcement officers do not need to act with purposeful intent to systematically deprive poor black and brown people of rights.³⁷⁶ Instead, those actors seem to have been conscious of a risk that deregulating the police and "new policing" tactics would lead to disparate uses of excessive force, and to have subconsciously desired it or simply did not care.³⁷⁷ In other words, the system—from political elites who propounded the centaur state to courts that deregulated the police to policymakers who support warrior tactics—has at least a reckless mental state about police abuse of poor black and brown people. At every stage, social structures that are suffused with the interlocking hierarchies nudge processes, and thus individual actors, toward particular results. This structural analysis opposes those who would contend that police excessive force is the result of a few "bad apples" among police.³⁷⁸ If we are to achieve equitable policing, we have to fight the combined forces of the United States' race-class structure.

Ultimately, police officers' physical brutality is on behalf of elites. The Court does violence through words by deregulating, and thus rationalizing, police excessive force as a necessary part of police discretion.³⁷⁹ The current focus on police officers' excessive force actually deflects attention from elites' structural violence against the precariat through housing laws, environmental racism, and other forms of white-collar crime. We should blame the United States' adhesion to a

³⁷⁵ See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324–26, 371 (1987) (arguing intent standard ignores much racism).

³⁷⁶ Cf. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting) (calling the Court out as fearing "too much justice" for constructing Equal Protection as requiring purposeful intent).

³⁷⁷ We might state this conclusion as follows:

The question is not whether the actors imbedded within these systems, or even those who participate in their design, mean to discriminate. They may well and likely in many circumstances do, but here the inquiry is different. If the administrative systems result in discriminatory effects, privileging some and subordinating others, what are the mechanisms by which structural discrimination is effectuated?

Bach, *supra* note 44, at 501–02. That is, it does not take intentional bias and coordination to generate disparate results. See *id.*

³⁷⁸ See, e.g., Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069, 1072–73 (2020) (discussing FRANKLIN E. ZIMRING, *WHEN POLICE KILL* (2017)).

³⁷⁹ See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1622 (1986).

neoliberal class structure for the violence police officers commit to maintain the status quo—not just the racism in which the violence is embedded.

CONCLUSION

This Article’s central insight is that incentives created by the class structure lead police to go into warrior mode and reinforce racialized class boundaries through excessive force. That brings us back to the way policing is differentiated between the rich and white Summerlin, Las Vegas and the poor and black and brown Westside of Las Vegas. Police boundary management makes these places into “good” and “bad” neighborhoods. An intersectional analysis of policing that considers class as well as race helps us see that phenomenon.