THE SYMBOLIC ASSAILANT REVISITED

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Abstract

The well-publicized deaths of several African Americans—Tamir Rice, Philando Castile and Alton Sterling among others—at the hands of police stem from tragic interactions predicated upon well-understood practices and attitudes that police scholars have been writing about for much of the last 50 years. In particular, the symbolic assailant is especially relevant. The symbolic assailant is a construct created by police scholar Jerome Skolnick in the mid-1960s to capture those persons whose behavior and characteristics the police have come to view as threatening. This paper explores the societal roots of the creation of a Black symbolic assailant in contemporary American policing. The construction of African Americans as symbolic assailants is one of the most important factors characterizing police interaction with African Americans. I argue that current strategies for ending police violence do not sufficiently address the prominence of the symbolic assailant in proactive policing strategies. This Article suggests an unusual solution to commonly understood mechanisms of addressing police violence. Based on my experience with police who had productive relationships with crime victims of color, I suggest a reorientation of policing practices and the development of a series of alternate routines predicated on a more reactive model of policing.

Since the shooting of Michael Brown by police officer Darren Wilson in August 2014, the media has reported a number of lightning-fast shootings by police after they receive a 911 call reporting that an individual is carrying a gun. One of the most publicized of these cases

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in November 2014 involved 12-year-old Tamir Rice. Rice was playing with an airsoft-type gun[1] outside the Cudell Recreation Center on Cleveland's West Side.[2] Responding to a 911 call reporting an individual in the park carrying a gun, two Cleveland police officers reported to the scene. Officer Timothy Loehmann shot Rice twice at point blank range within two seconds of arriving at the location.[3] Though Cleveland police officers are trained in first aid, Loehmann made no effort to try to save Rice's life. Rice died the next day.

When they receive a report of a gun, police do not always respond by shooting. Consider the case of E.J. "Junior" Walters which occurred about a month before Rice was shot, on October 23, 2014, just a few states away from Cleveland in Church Hill, Tennessee. Walters, a white man who had previously been arrested for road rage against a detective, cursed at two individuals and accosted them with a pistol tucked into his belt.[4] One of the victims called 911 and gave a description of Walters.[5] Officer David Benton observed Walters, who was reportedly not wearing his seatbelt as he drove his car, cross the center line several times. Officer Benton then signaled for Walters to stop the car and approached Walters' car on foot.[6] Because of the 911 report of the gun, Benton asked Walters to exit the car. Walters allegedly refused, and Benton, accompanied by several other police

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[1] Rice was playing with an airsoft-type gun. These guns, which shoot plastic pellets, are not manufactured to kill or injure.   Though some may resist calling them toys, they are used for play by children, adult recreation, and even by law enforcement for training exercises. Tierney Sneed, *Police Shootings Involving Toy Guns Spur Push for Regulation,* US News & World Report, Nov. 28, 2014, http://www.usnews.com/news/articles/2014/11/28/after-john-crawford-and-tamir-rice-ohio-lawmaker-seeks-to-regulate-toy-guns.

[2] For a discussion of the events surrounding the shooting of Rice see, http://prosecutor.cuyahogacounty.us/en-us/Investigation-Into-Death-of-Tamir-Rice.aspx.

[3] *Id.*

[4] Jeff Bobo, *Man accused of accosting detective in August arrested again for road rage with a gun*, Kingsport (Tennessee) Times-News, October 23, 2014, http://www.timesnews.net/article/9081885/man-who-accosted-detective-in-august-arrested-again-for-road-rage-with-a-gun#ixzz3jCPPIynp.

[5] *Id.*

[6] *Id.*

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officers, physically removed Walters from the vehicle and arrested him.[7] No shots were fired.

These two incidents display drastically different approaches to 911 reports of a male with a gun. In the first, a Black youth with what is essentially a toy gun is shot 2 seconds after police arrive at the scene.[8] In the second incident, a middle-aged white man with a history of assaulting police officers, who threatened someone with an actual firearm, ignored police orders to step out of the car, and was taken into custody without officers discharging their weapons.

One might have assumed that the second case was more threatening. In this Article, I argue that the concept of the symbolic assailant identified by Jerome Skolnick in the mid-1960s[9] is an important factor in the difference between officers' approaches in the first and the second incident. I contend that the police response in the first was predictable, if it is viewed in the context of American policing of Black males as symbolic assailants. The concept of the symbolic assailant is still practiced in police departments around the country, and provides a working explanation for police behavior in a wide variety of cases involving African Americans. In fact, police practices around the country are even worse than those identified by Skolnick in the 1960s. In the Article, I argue that the symbolic assailant has come unmoored from its original empirical underpinnings. Recent shootings of African Americans by the police and other rarely discussed racialized policing activities are clear signs that "blackness" has become the symbolic assailant.

This Article will proceed in the following manner. In Part I, I will describe the 50-year-old concept of the symbolic assailant, an important organizing feature in how scholars have understood police work. Part II will address the idea of race and the symbolic assailant, using research on discriminatory policing practices from around the country to emphasize transformation of the symbolic assailant over the last 50 years. I argue that, due in part to the adoption of "Broken

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[7] *Id.*

[8] The 911 caller suggested that the gun might be a toy, but this was not relayed to police. LA Times Staff, "Hear the 911 call about Tamir Rice: Gun is 'probably fake,' caller says," LA TIMES, November 26, 2014, available at: http://www.latimes.com/nation/nationnow/la-na-nn-tamir-rice-911-call-20141126-htmlstory.html.

[9] Jerome Skolnick, JUSTICE WITHOUT TRIAL (2011).

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Windows" policing, police practices with respect to the symbolic assailant have undergone a transformation since the late 1960s. What was once a layered, empirical approach to policing discrete situations has become a narrow concept relying exclusively on the race of the suspect often to the exclusion of other factors commonly associated with good policing. Part III will focus on solutions aimed at displacing the centrality of the symbolic assailant in policing practices.

PART I. THE CREATION OF THE SYMBOLIC ASSAILANT

A. The sociology of police work

Since the mid-1950s, those who study the police have struggled to understand the conditions under which officers carry out their duties. Empirical work examining the police has focused on police officers, who face the task of maintaining order and insuring citizens' compliance with the law, particularly in the midst of constitutional limits on the use of force.[10] Police difficulty in balancing the challenge of maintaining order while enforcing the law is compounded at various points by the vagueness of the legal dictates which they are charged with enforcing.[11]

In deciding whether to enforce the law against citizens, police scholars have also identified police discretion—the ability of police to decide whether to invoke the law—as critical.[12] Police discretion not to enforce the law is largely accepted because of the assumption that resources prevent the enforcement of the law in every circumstance in which it is violated. For instance, Egon Bittner's investigation of the policing of 'skid row' revealed that patrol officers coped with the difficulty of maintaining order not by invoking the law, but rather by relying on a richly particularized knowledge of the people in the area and using an aggressively personal approach in scrutinizing

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[10] Jeannine Bell, POLICE AND POLICING LAW (2004).

[11] *Id.*

[12] *See, e.g.*, Joseph Goldstein, *Police Discretion not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, THE YALE L. J., 69, 543–94 (1960).

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individuals.[13]   In this regard, the officers' behavior may have been in conflict with constitutional protections.[14] Nonetheless, officers defended their behavior by insisting that their response was appropriate given the particular norms of the (skid row) society they were policing.[15]

Using data collected by the American Bar Foundation, Joseph Goldstein studied the manner in which police officers elect not to enforce the law in three discrete contexts: 1) drug laws; 2) cases of felony sexual assault; and 3) gambling laws. Goldstein found that there are many situations in which the law is not followed. This is not a minor issue. Police decisions to not enforce the law may undermine legislative intent and are largely invisible—unseen by the public, not subject to judicial scrutiny, nor to public policy debates. Goldstein cited the importance of behavior not to enforce the law ultimately, because of this police behavior in this context, "largely determines the outer limits of law enforcement."[16]

Police discretion to enforce the law is an issue of the utmost importance to democratic government. Most democracies, the United States included, mandate equal application of the law. This is particularly true in the case of the criminal law where punishment can result in financial penalty or the loss of one's freedom. If the law that is ultimately enforced is determined by police discretion, it is critical to discern which groups, if any, are disfavored, and tend to find themselves the subject of police scrutiny.

In democratic societies, there is an ideological conflict between the order that officers are charged with maintaining and rules requiring accountability to the rule of law. This conflict means that the police must serve in the alternate roles as rule enforcer, father, friend, social servant, moralist, street fighter, marksman and an officer of the law.[17] The end result is a perfect storm for diminishing officers' adherence to legal rules. Officers' stake in maintaining their authority, their socialization, and the pressure to find violators of the law, combined

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[13] Egon Bittner, *The Police on Skid Row: a Study of Peacekeeping*, 32 AMERICAN SOCIOLOGICAL REVIEW (5): 699 (1967).

[14] *Id.*

[15] *Id*.

[16] Goldstein, *supra* note 12, at 54.

[17] Skolnick, *supra* note 9, at 17.

with the invisibility of the work they perform, all means that the law is less likely to be followed.[18]

B. The role of race in policing

Police scholars studying the role that race plays in policing quickly established that African Americans have been subjected to racially discriminatory policing. Some of the earliest socio-legal research, undertaken in the 1950s and 1960s, revealed that the police enforced the law differently in Black communities than they did in white communities. One example of this research deals with police attitudes toward minorities. Researchers have found that police officers, the majority of whom are white, hold biased views about African Americans.[19]

There is significant contemporary data showing widespread racial discrimination in policing practices documented both by the Justice Department and by police scholars. Since 2010, the Justice Department's pattern or practice investigations have found racial discrimination in police departments around the country, including: East Haven, Ct; Beacon, NY; Orange County, FL; Warren, OH; Cleveland, Ohio; New Orleans, Louisiana; Missoula, Montana; and Seattle, Washington.[20]

One the most recent pattern or practices investigations occurred in Ferguson, Missouri. The Justice Department found that the Ferguson police treated African-Americans differently at every level. They were arrested more. They got more tickets. They even were bitten by police

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[18] *Id.*, at 231.

[19] For early work supporting this, *see, e.g.*, Westley, 1953; Skolnick, 1967; Wilson, 1973.

[20] Rather than being considered a full list, these cities should be considered the tip of the iceberg. This list doesn't include cities like Detroit whose consent decrees started before 2010, or places like Oakland, where 100 plaintiffs in a single lawsuit argued that police violated their rights. Relying exclusively on the Department of Justice (DOJ) determination that there is a pattern and practice of racialized policing is also likely to miss many cities where there has been a problem. For instance, Stephen Rushin argues that the DOJ has been far too conservative, *Structural Reform Litigation in American Police Departments*, 99 Minnesota L. Rev. 1343 (2015).

dogs more. Of the 15 times Ferguson police dogs have bitten people, ALL were African-Americans victims.[21]

In studying police practices in cities and towns around the country scholars found that the practices used by police officers in Ferguson, Missouri existed in other places as well. Numerous studies have found significant racial disparities in police stops all over the United States. These racial disparities are important because of the breadth of locales in which they were found to exist.

Police scholars have identified significant racial disparities in police stops in large, racially diverse American cities such as New York[22] and Los Angeles.[23]   Racially discriminatory policing, however, is not limited to a particular area of the country. Though such procedures may be less surprising in Southern states like Louisiana,[24] they also occur in the Northeast and Mid-Atlantic regions of the country[25] as well as Midwestern cities like Wichita, Kansas,[26] and St. Louis, Missouri.[27] Finally, the type of police department is not necessarily determinative of finding racially disparate treatment. Police scholars have identified racial disparities in investigative stops in established, traditional, ethnic departments like that of Boston[28] and also fairly in

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[21] Mark Berman and Wesley Lowery, *The 12 key highlights from the DOJ's scathing Ferguson report,* WASHINGTON POST, March 4, 2015.

[22] Andrew Gellman, Jeffrey A Sagan & Alex Kiss, *An Analysis of the New York City Police Department's Stop and Frisk Policy in the Context of Claims of Racial Bias* 102 JOURNAL OF THE AMERICAN STATISTICAL ASSOCIATION 813 (2007).

[23] *See*, Ian Ayres and Jonathan Borofsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* (Los Angeles American Civil Liberties Union of Southern California, 2008).

[24] Jim Ruiz and Matthew Woessner, *Profiling Cajun Style: Racial and Demographic Profiling in Louisiana's War on Drugs* 8 INTERNATIONAL JOURNAL OF POLITICAL SCIENCE AND MANAGEMENT 176 (2006).

[25] *See, e.g.*, Peter Verniero & Paul Zoubek, *Interim Report of the State Police Review Team regarding Allegations of Racial Profiling*, New Jersey office of the Atty. Gen., 1999.

[26] Brian Winthrow, *Race-Based Policing: a Descriptive Analysis of the Wichita Stop Study*, POLICE PRACTICE AND RESEARCH 223 (2004).

[27] Jeff Rojek, Richard Rosenfeld, and Scott Decker, *The Influence of Drivers Race on Traffic Stops in Missouri*, POLICE QUARTERLY 126 (2004).

[28] Kate Antonovics & Brian G Knight, *A New Look at Racial Profiling Evidence from Boston Police Department*, 91 REVIEW OF ECONOMICS AND STATISTICS 163 (2009).

progressive reform-oriented police departments in the Kansas City area.

Racially biased policing is at odds not only with the legal mandate for equal protection, but also with social norms prescribing tolerance. In the next section, I argue that such policing can be understood as part of the characterization of the symbolic assailant first identified by police scholar Jerome Skolnick in the 1960s as one of the explanations for police behavior.

C. The symbolic assailant

In his book *Justice Without Trial*, Jerome Skolnick describes the symbolic assailant, its origins and the extent to which police orientation toward criminals is a critical factor in policing.[29] The idea of a symbolic assailant stems from the policeman's view of the world.[30] Because police officers' work required them to be occupied continually with potential violence, they developed shorthand for the kinds of people whose gesture, language, and attire the officers recognized as a prelude to violence.[31]

Skolnick's construction of the symbolic assailant was grounded in his observations of police work in the 1960s. In this context, police work involved officers patrolling the neighborhood and reacting to threats. Threats played a critical role in that they were omnipresent, animating every single encounter. This meant that protecting the officer from danger was of paramount importance. According to Skolnick, officers learned to associate particular situations and types of individuals with danger.

His work stressed that the particular personal history of the suspect the officer encounters is not important to the construction of whether the suspect is seen as suspicious. In fact, he writes that a suspect's personal history is immaterial. The symbolic assailant need only suggest danger either through display of a weapon or "insolence in the demeanor signaled by the way one walks, or dresses."[32]

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[29] Skolnick, supra note 9.
[30] *Id.*, at 42.
[31] *Id.*, at 43.
[32] *Id.*

Individuals who were potentially dangerous fit into a range of categories. Skolnick, who was focusing on police officers' jobs in general, gives a long list of potential activities which the police are taught to use as markers of suspicion.[33] Some of the situations which officers were taught to consider suspicious and should warrant field interrogations include the following:

> 1. Suspicious persons known to the officer from previous arrests, field interrogations and observations.
> 2. Emaciated appearing alcoholics and narcotics users who invariably turn to crime to pay for the cost of habit.
> 3. Person who fits description of wanted suspect as described by radio, teletype, and daily bulletins.
> 4. Any person observed in the immediate vicinity of the crime very recently committed or reported as "in progress."
> 5. Known troublemakers near large gatherings.
> 6. Persons who attempt to avoid or evade the officer.
> 7. Exaggerated unconcern over contact with the officer.
> 8. Visibly "rattled" when near the policeman.
> 9. Unescorted women or young girls in public places, particularly at night in such places as cafes, bars, bus and train depots, or street corners…
> 10. "Lovers" in an industrial area (make good lookouts).
> 11. Persons who loiter about places where children play.
> 12. Solicitors or peddlers in a residential neighborhood.
> 13. Loiterers around public restrooms.
> 14. Lone male sitting in a car adjacent to school grounds with newspaper or book in his lap.
> 15. Lone male sitting in a car near shopping center who pays unusual amount of attention to women, sometimes continuously manipulating rear view mirror to avoid direct eye contact.
> …
> 19. Uniformed "deliverymen" with no merchandise or truck.
> 20. Many others. How about your own personal experiences?[34]

Personal history is irrelevant to the symbolic assailant, as Skolnick constructs him. In other words, for the purposes of the symbolic

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[33] *Id.*, 42-43.
[34] *Id.*

assailant, it does not matter whether the designee has a criminal history. Because the officer is constructing and deciding that an individual is a symbolic assailant prior to running his or her criminal history, a long criminal history has the same impact as an individual with no priors. All that matters is how the situation looks to the officer. Appearance is everything. Skolnick writes:

> Nor, to qualify for the status of symbolic assailant, need an individual to have used violence. For example, a woman backing out of a jewelry store with a gun in one hand and jewelry in the other would qualify even if the gun were toy and woman had never in her life fired a real pistol. To the police officer in the situation, the women's personal history is momentarily immaterial, there is only one relevant sign: a gun signifying danger.[35]

Both in the conception of the symbolic assailant and the list of potentially suspicious activities from the training manual that Skolnick quotes, officers' experience plays an important role in his construction of the symbolic assailant. For instance, take the final category in the list, which insists that there are many other circumstances that are suspicious, and calls officers to reflect on their own personal experiences dealing with suspects.[36] In general terms, the nature of the characteristics in the list are detailed and specific— they seem to narrow the markers of suspicion to a small set of situations in which crime may have occurred in the past. Because police experience is understood to be absolutely critical in identifying suspicion, with "many others," the writer acknowledges that the list cannot capture every suspicious circumstance.[37]

D. Some are more suspicious than others: Race and the Symbolic Assailant

Race is not mentioned at all in Skolnick's characterization of the symbolic assailant. That being said, Skolnick quickly acknowledges the fact that police officers in Westville and most other communities

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[35] *Id.*

[36] *Id.*

[37] Jonathan Simon, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR, (2007) 49.

have come to identify the Black man with danger.[38] He suggests that this perspective comes from the isolation faced by white patrolmen policing Black neighborhoods.[39] He quotes James Baldwin on the isolation that develops because of the tasks with which white policeman in Black neighborhoods are charged.

> ...The only way to police a ghetto is to be oppressive. None of the Police Commissioner's men, even with the best will in the world, have any way of understanding the lives led by the people they swagger about in twos and threes controlling. Their very presence is an insult, and it would be, even if they spent the entire day feeding gumdrops to children. They represent the force of the white world, and that world's criminal profit and ease, to keep the black man corralled up here, in his place. The badge, the gun in the holster, and the swinging club make vivid what will happen should his rebellion become overt.[40]

Baldwin's description of the interaction between law enforcement officers and African-Americans is located in lived experience. Baldwin expects officers to behave in a particular manner because of who they are (white police officers) and the environment in which they are charged with enforcing the law (Black neighborhoods). At least in the passage that Skolnick quotes, Baldwin is sympathetic both to the fact that Blacks are resentful of police presence, and to police officers' worries regarding danger in policing a group of individuals who are suspicious of police as an occupying force.

PART II. THE RISE OF "INTUITION" IN POLICE WORK

At the same time that Skolnick was studying the police in Westville, the administration of President John F. Kennedy was gearing up for a war on crime.[41] Kennedy, Jonathan Simon writes, saw crime as a powerful way to cement the relationship between the chief executive

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[38] Skolnick, supra note 9, at 45.

[39] *Id.*

[40] *Id.*

[41] Jonathan Simon, GOVERNING THROUGH CRIME HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR, (2007) 49.

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and the public.[42] Building this relationship required investment in police and other infrastructure.

> Crime has to be repressed and communities must be protected… But we should be pouring as much, or even more, money, manpower and imagination in preventing those early law violations that start criminal careers.[43]

Throughout the 1960s, 1970s, and 1980s, with little exception, Congress and the Executive Branch kept the nation focused on crime. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act.[44] In addition to issuing wiretapping authority to the Executive Branch, the legislation also authorized $500 million in funds to local police departments to fight crime.[45]   The Johnson and Nixon administrations escalated the war on crime by funding improvements in law enforcement and changing the criminal law in more punitive ways. President Ronald Reagan appointed former trial prosecutor Ed Meese as Attorney General. Meese attacked and tried to undermine Warren Court decisions like *Miranda v. Arizona,[46]* which had helped to establish that criminal defendants were constitutionally entitled to procedural protection.[47]

a.   Broken Windows

It is into this environment that in 1982, George L. Kelling and James Q. Wilson's article in the *Atlantic Monthly*, "Broken Windows: The Police and Neighborhood Safety" was published.[48] Wilson and

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[42] *Id.*

[43] *Id.*, at 51.

[44] Pub. L. 90–351, 82 Stat. 197, enacted June 19, 1968, codified at 42 U.S.C. § 3711.

[45] *Id.*

[46] 384 U.S. 436 (1966) (extending the right to counsel to police interrogation).

[47] *Id.*

[48] James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC MONTHLY, March, pp. 29–38 (1982). The effectiveness of Broken Windows has been criticized on empirical grounds, *see, e.g.*, Bernard E. Harcourt & Jens Ludwig, "Broken Windows: New

Kelling's article called for the return of police to the community through increasing foot patrols and investigation of low-level crime.[49] Wilson and Kelling used the metaphor of a broken window in a neighborhood building, which is left unrepaired and untended. They surmised that when a window is left in such a state, the rest of the windows will soon be broken because disorder gives rise to the perception that further disorder is costless.

Under the Broken Windows theory, disorder begets urban decay, which begets criminal invasion, all of which could be circumvented with the installation of a skilled foot-patrol officer to maintain order.[50] The article places heavy reliance on the assumption that the presence of foot-patrol officers, familiar with neighborhood regulars, will alleviate the anxiety that crime will occur due to an "untended" appearance.[51] After elucidating why order is so crucial, Wilson and Kelling go on to posit how best to maintain it. They call for an increase in foot-patrols and the prevention of minor offenses, noting that motorized patrol officers are inhibited by a barrier, which distances the officer and makes her an alien force within the community.[52]

At base, the philosophy of Broken Windows requires that police search neighborhoods where there exists significant disorder—existing petty crimes, vandalism, etc.—and address it, rather than leaving it alone. In the policing context, an important if not critical fact in combatting crime involves finding lawbreakers. In focusing on disordered neighborhoods, departments around the country focused on minority neighborhoods where the investigation of low-level crime morphed into the low-hanging fruit of stop and frisk, and ultimately a focus on whomever the police could find as they canvassed neighborhoods looking for those responsible for the disorder that plagued these spaces.

b. Broken Windows "on the ground"

Evidence from New York City and a Five-City Social Experiment" UNIVERSITY OF CHICAGO LAW REVIEW, Vol. 73, 2006.

[49] *Id.*

[50] James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC MONTHLY, March, pp. 29–38 (1982).

[51] *Id.*

[52] *Id.*

Broken windows policing was adopted by police departments around the country. One of the most famous sites that adopted Broken Windows policing was New York City. In 1989, George Kelling began working with the New York Transit Authority to apply Broken Windows policing to vandalism that was occurring on the New York City subways.[53] In 1994, when William Bratton—who had worked with Kelling as the head of the New York City Transit Police—became head of the New York Police Department (NYPD), he made Broken Windows a part of standard police practice for city police.[54]

i. Evaluating Broken Windows' empirical claims

The original *Broken Windows* article was based on scant empirical evidence. As could have been expected, scholars quickly moved to investigate Wilson and Kelling's basic claim that general disorder leads to more serious crime.[55] One of the most significant early critiques is that the Broken Windows method of policing has not done much to reduce serious crime.[56]

Professors Bernard Harcourt and Jens Ludwig argued that not only is the Wilson/Kelling supposition that the policing of minor offenses reduced serious crime unfounded, but there is a strong relationship between the rate of arrests for minor offenses and an *increase* in crime rates.[57] The research specifically views the changes in crime during the 1980s and 1990s in New York City, which had adopted a form of Broken Windows policing.[58] The research found:

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[53] George L. Kelling & William H. Sousa, "Do Police Matter? An Analysis of the Impact of New York City's Police Reforms," Civic Report. The Manhattan Institute, No. 22, December 2001, http://www.manhattan-institute.org/pdf/cr_22.pdf.

[54] *See* Kelling and Bratton, infra note 65.

[55] Bratton & Knobler, 1998, Kelling & Sousa, 2001) to significant but smaller (Messner et al., 2007; Rosenfeld et al., 2007).

[56] Messner et al., 2007; Rosenfeld et al., 2007 (police actions play small role in reducing crime); Harcourt and Ludwig (police actions play no role in reducing crime).

[57] Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and A Five-City Social Experiment*, 73 U. Chi. L. Rev. 271 (2006).

[58] *Id.*

> [T]he pattern of crime changes across New York precincts during the 1990s that Kelling and Sousa attribute to Broken Windows policing is more consistent with what statisticians call mean reversion: those precincts that received the most intensive Broken Windows policing during the 1990s are the ones that experienced the largest increases in crime during the city's crack epidemic of the mid-to-late 1980s. Consistent with findings elsewhere from city-level data, jurisdictions with the greatest increases in crime during the 1980s tend to experience the largest subsequent declines as well.[59]

Accordingly, this is an effect of the "most intensive Broken Windows policing."[60] However, Ludwig and Harcourt found no evidence proving that Broken Windows policing reduces either the amount or rate of violent crimes.[61]

ii.   Broken windows claps back

Though William Bratton, New York City's Police Commissioner, firmly supported Broken Windows policing, critical re-examination of Broken Windows and police practices in New York came on July 17, 2014 after Staten Island Police Officers Justin D'Amico and Daniel Pantaleo accosted Eric Garner, a Black man they suspected of selling loose cigarettes.[62] The officers struggled with Garner, who argued with officers and refused to cooperate.[63] One of the officers eventually used a chokehold on him, which along with chest compressions used to subdue him, killed Garner.[64] Both the chokehold (a practice prohibited by police department policy) and Garner's multiple complaints that he could not breathe were caught

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[59] *Id.* at 276.

[60] *Id.*

[61] *Id.* at 315.

[62] Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, THE NEW YORK TIMES, June 13, 2015. Available at: http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0.

[63] *Id.*

[64] *Id.*

on cell phone videotape by a bystander and widely broadcast.[65]

Selling loose cigarettes is not a serious crime. The officers who killed Garner were acting in response to a crackdown on so-called "quality of life" crimes. After Eric Garner's death, George Kelling defended the Broken Windows theory, arguing that Broken Windows received a bad reputation because it was being equated to being a high arrest theory.[66] He claimed that Broken Windows is not meant to purposefully increase the number of arrests that are made.[67] Instead, that has simply been the result of police exercising that type of policing.[68] Kelling, along with Bratton, wrote an article on the public perception of Broken Windows and why New York needed to keep it.[69]

Following Garner's death, the public in New York did not show much support for New York City police and their Broken Windows policing.[70] About 90 percent of African Americans and 71 percent of Latinos did not approve of the way the police handled Garner's situation.[71] Additionally, the overall approval rating of the NYPD fell by nine percent.[72] Despite those numbers, Kelling still felt that the

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[65] *Id.*

[66] George Kelling, *Don't Blame My 'Broken Windows' Theory for Poor Policing*, Politico, March 2015. *See also* Katherine Beckett*, The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 Harv. L. & Pol'y Rev. 77 (2016) ("In sum, recent decades have witnessed the emergence of (at least) two pronounced efforts to shift police organizations' focus toward what were formerly considered relatively unimportant issues and to encourage a more aggressive response to them. The result has been a sharp increase in the arrest and incarceration of drug law violators and misdemeanants generally. And as is now well-known, both of these developments, especially the war on drugs, contributed importantly to the development of mass incarceration and to pronounced racial disparities throughout the criminal justice system.").

[67] George Kelling and William Bratton, *Why We Need Broken Windows Policing*, CITY JOURNAL (2015).

[68] *Id.*

[69] *Id.*

[70] *Id*.

[71] *Id.*

[72] *Id.*

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people have a generally good perception of Broken Windows policing.[73]

> However, even in this highly charged context, support for Broken Windows remained high. African-Americans supported it by 56 to 37 percent, whites by 61 to 33 percent, and Hispanics by the largest margin of all—64 to 34 percent. The poll results reflect the underlying public support from all races for this kind of enforcement.[74]

In addition to demonstrating public support, advocates of Broken Windows also have had to respond to challenges on effectiveness grounds. One study examining policing practices over a 20-year period found that in areas that were policed more assertively, the crime rates were much lower.[75] Kelling and Bratton maintained:

> In 1993 New York's murder rate was 26.5 per 100,000 people. Since 1994, when Broken Windows policing was put into practice citywide, crime has fallen further, faster and for longer than anywhere else in the country. Today the largest and densest city in the U.S. has a lower murder rate, at four per 100,000, than the nation's 4.5 per 100,000. In 1993 New York accounted for about 7.9% of U.S. homicides; last year the city's share was 2.4%. These striking figures are emblematic of broader, historic declines in crime.[76]

In his defense of the program, Kelling also tried to dispel the idea that Broken Windows is the equivalent of or contributes to stop, question, and frisk (SQF).[77] A SQF is described as a "tactical response based on

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[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] George Kelling and William Bratton, *The Assault on Broken Windows*, WALL STREET JOURNAL, December 2014. Available at http://www.wsj.com/articles/william-bratton-and-george-kelling-the-assault-on-broken-windows-policing-1418946183.

[77] Kelling, supra note 69. "An SQF is based on reasonable suspicion that a crime has occurred, is occurring, or is about to occur. An officer observes someone, say, going from car to car looking into the windows. Exercising

reasonable suspicion of possible criminality." In contrast, they describe Broken Windows policing as "a more broadly based policy mandating that police will address disorderly illegal behavior, such as public drinking and drug use, fights, public urination, and other acts considered to be minor offenses, with responses ranging from warning and referral to summons and arrest."[78] Accordingly, they equate the standard for Broken Windows as being closer to a probable cause standard—a higher standard than reasonable suspicion.[79]

iii. Targeting through "intuition"—Black men become the symbolic assailant

As discussed below, current policing practices—routine behaviors for which police officers train, put into practice and for they are later rewarded—establish African American men as symbolic assailants: always suspicious, and always potentially up to no good. In concrete terms, Black men are read as being suspicious when they are engaged in ordinary behavior—walking to school, walking in their neighborhood, walking in a neighborhood that may look like it is not their neighborhood, driving the speed limit, etc. Behaviors that are not considered suspicious when engaged in by whites are considered worthy of investigation when Black men engage in them.

The police construction of the African American symbolic assailant is even more pernicious than simply attaching suspiciousness to being Black. The white symbolic assailant that Skolnick identified was only suspicious, suspicious led to investigation—questioning or other verification before police used a high level of force. Black symbolic assailants—all Black men and even some Black youths—are not just suspicious, but also threatening, prompting police to use deadly force to subdue Black men about whom they have little, if any, actual

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discretion, the officer decides whether to stop the person for questioning. If he suspects that the subject is armed and dangerous, he may frisk him by conducting a pat-down of his outer clothing. If the officer detects an object that may be a weapon, he may reach into the subject's pocket."
[78] *Id.*
[79] *Id.*

evidence of lawbreaking or dangerousness, who are unarmed,[80] have their hands raised in surrender,[81] are subdued by multiple officers,[82] or are running away.[83] When facts come out, when bystander video is released and the body of the innocent Black man is bagged, the idea of the Black man as threatening is deployed to make the shooting seem reasonable and appropriate.

Though the idea of the symbolic assailant originated in the policing of whites, the symbolic Black assailant is very different from Skolnick's original concept. As the concept was identified and delineated by Jerome Skolnick, the facts and circumstances in which an individual finds him or herself are what makes an individual suspicious. Are you waiting in a deserted area at night?   Are you dressed as delivery person but don't have a truck? Are you a lone male sitting in a car near a playground with a book in your lap? Skolnick suggests that each of these behaviors is considered suspicious to the police. For each of the items, however, note how fact specific they are.   In other words, context is everything.

Contrast the level of detail needed in Skolnick's original formulation of symbolic assailant—location of the suspects' behavior and activity in which the suspect is engaged with the requirement for the Black symbolic assailant—blackness. Though it did not provide a Fourth Amendment remedy, the Supreme Court has acknowledged the constitutional issues involved with attaching suspicion to someone's race.[84] Use of the symbolic assailant by police is a shortcut. The downside of using any shortcut to identify criminal behavior is that an individual who is innocent may be accused.

That being said, the impact for whites and blacks of the use of the

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[80] Sherri Lee Keene, Victim or Thug? Examining the Relevance of Stories in Cases Involving Shootings of Unarmed Black Males, 58 How. L.J. 845 (2015).
[81] *Id.*, at 852.
[82] *See* supra note 62.
[83] Michael S. Schmidt & Matt Apuzzo, South Carolina Officer Is Charged With Murder of Walter Scott, THE NEW YORK TIMES, April 7, 2015. Available at., http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html. A South Carolina police officer, Michael Slager shot and killed Walter Scott. Scott was unarmed and running away from Slager at the time that he was shot and killed.
[84] Whren v. U.S., 517 U.S. 806 (1996).

symbolic assailant shortcut varies quite dramatically. Consider the following: a white male college student goes to the park to finish his homework. He finds the parking spot near the toddler playground and begins reading. This wholly innocent behavior, while unusual, is suspicious, given Skolnick's characterization. As a symbolic white assailant, though, police practices are to investigate, question the suspect, and allow his answers to either confirm or deny the officer's suspicion. The innocent college student is hassled by questioning, but he suffers no greater intrusion.

Because it is a broader stereotype—fitting all black men regardless of age or circumstance—the symbolic Black assailant is operationally different. Critical to the symbolic Black assailant are a series of dehumanizing stereotypes—that Blacks are criminals who are simultaneously violent and irrational. In other words the symbolic Black assailant is not just a possible criminal (as in the case of the symbolic white assailant, but is likely a dangerous criminal whose poses a threat to the officers, and to others. Faced with this potential threat, officers may not investigate, or otherwise, read the situation. The symbolic black assailant means that officers are more inclined to respond with deadly force, regardless of whether it is warranted.

c. Creating response to the symbolic Black assailant

The difference in approaches taken by police to symbolic white and symbolic Black assailant evolved out of specific police practices which may or may not have had race neutral origins. One of these was "Broken Windows." With its focus on detecting offenders in disordered neighborhoods, Broken Windows was deployed in a manner that led to the mass targeting of African-Americans in poor communities. No longer was criminality tied to actual specific events indicative of criminal behavior. Instead officers could use increasingly little evidence to justify their suspicions. Song Richardson argues that the watering down of legal standards, like reasonable suspicion by the Supreme Court, may have had a similar effect on police procedures.[85] Implicit biases also play a role. In the absence of procedures, stressing evidence-based markers of

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[85] L. Song Richardson, Police Efficiency and the Fourth Amendment, 87 IND. L.J. 1143 (2012).

suspicion, the empirical underpinnings of the symbolic assailant have been transformed into a system of policing African-Americans under the guise of being intuitively focused on issues of crime control writ large.

The evidence of African American men being symbolic assailants is demonstrated by discriminatory police practices occurring in departments throughout the United States. In some cases, training the police to see African Americans as the symbolic assailant occurs more openly than in others. One of the most vivid examples of police practices reflecting the idea that African-Americans are symbolic assailants was the practice in the North Miami Beach Florida Police Department. In 2015, after National Guard Sgt. Valerie Deant saw a picture of her brother riddled with bullet holes when she was at the firing range, it was revealed that the North Miami Beach Florida's Police Department was using actual mugshots of African-Americans as target practice.[86] Deant's brother, who had completed his time in prison and been released, was part of an array with several other African-American men.[87]

As the North Miami Beach Police department target practice implies, police departmental procedures and institutionalized practices certainly play an important role in guiding stereotype and racializing suspicion. Police researchers have documented how this occurs systematically. Charles Epp, Stephen Maynard-Moody, and Donald Haider-Markel conducted one of the most interesting recent studies in this regard. In their study of more than 2000 individuals in the Kansas City area conducted in the early 2000s, Epp and his co-authors found that "the structure of incentives, training, and policy made it more likely that officers would operate on the basis of bigotry or implicit stereotypes, leading to racial discrimination in outcomes."[88]

Epp and his co-authors focused on police officers' decisions to pull cars over. They divided stops into two groups of stops that can be identified by their character, purpose, and justification: traffic-safety

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[86]Fred Barbash, *Florida police department caught using African American mug shots for target practice*, THE WASHINGTON POST, January 16, 2015.
[87] *Id.*
[88] Charles R. Epp, Steven Maynard-Moody and Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* (2014) 7.

enforcement stop and investigatory stops.[89] Traffic safety stops were undertaken primarily because the driver was speeding or engaged in unsafe behavior. Investigatory stops were premised on the legal ability of the officers to stop cars so long as the officer has reasonable suspicion that the driver is engaged in criminal activity.[90] As the Court noted in *Whren v. United States*,[91] a case in which the driver argued he had been stopped because of racially discriminatory pretext, pretext is irrelevant. Justice Scalia, writing for the majority, scornfully dismisses the idea that pretext could ever matter.

> It would, moreover, be anomalous, to say the least, to treat a statement in a footnote in the *per curiam Bannister* opinion as indicating a reversal of our prior law. Petitioners' difficulty is not simply a lack of affirmative support for their position. Not only have we never held, outside the context of inventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.[92]

Epp and his co-authors find that police patrol officers are taught the law dictates and police departments are exploiting the leeway created by *Whren*.[93] African American drivers bear the brunt of this doctrinal misstep.[94] In their evaluation of likelihood of being stopped for either investigatory or traffic-safety stops, Epp and his co-authors controlled for a variety of factors including age, gender, whether a driver was African American, type of car, and how carefully a driver

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[89] *Id.*, at 59.

[90] Whren v. U.S. 517 U.S. 806 (1996).

[91] *Id.*

[92] *Id.*

[93] Epp suggests that police exploitation of *Whren* is intentional. One California Highway Patrol officer is quoted as bragging, "After *Whren* the game was over. We won." Epp, Supra note 85, at 35.

[94] The Court is careful in *Whren* not to condone racial profiling. Rather, the Court insists that claims that a stop is discriminatory must be brought under the Fourteenth Amendment (which does not have an exclusionary rule) and not the Fourth Amendment.

followed the rules of the road.[95]   In traffic-safety stops, the most important factor to the determination that an individual would be stopped is how they are driving. "The more that people violate the traffic-safety laws the more they are to be stopped, regardless of their race, gender, age or type of the vehicle."[96] According to Epp and his co-authors' research, in enforcing traffic-safety laws, the police did not behave in a racially discriminatory manner; African Americans were no more likely to be stopped in traffic-safety stops than whites.[97]   Investigatory stops present a sharp contrast to this unbiased approach to policing. In investigatory stops, the most important factor was the race of the driver. African Americans faced a 2.7 times greater risk of being stopped that whites, even controlling for other factors.[98]

The construction of the symbolic assailant maps well on to Epp's and his coauthors' results. When police are merely enforcing traffic-safety laws, they pay attention to how individuals drive, how much they are driving above the speed limit, and stop violators without regard to their racial background. In a sense, traffic-safety stops are reactive policing at its best. Police officers actually observed the crime as it occurs—the individual violating the traffic laws—and react to it. When they react in this manner they are able to do it is a manner that is not racially discriminatory.

 In sharp contrast to the reactive nature of traffic-safety stop, investigatory stops are motivated not by crime control, but rather by investigation of crime and the capture of possible offenders.   When officers are making investigatory stops, they aren't catching the perpetrators of crime red-handed, but rather are using the stop as a way of evaluating whether the individual they have in front of them is a criminal.

When Blackness is transformed into a marker of suspicion and threat, investigatory stops for minor crimes can become more dangerous. In the first week of July 2016, two Black men, Alton Sterling in Baton Rouge, LA, and Philando Castile in St. Paul, MN, were stopped by the

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[95] Epp, Supra Note 85 at 65.

[96] *Id.*, at 64.

[97] *Id.*

[98] *Id.*

police for minor crimes.[99] During the encounters both men were shot and killed. Sterling was unarmed, and lying face down when he was shot. In Castile's case, according to Diamond Reynolds, his girlfriend (who was a passenger in the car and witnessed the shooting), Castile was following police orders to provide identification when he was shot.[100]

Though the facts of the cases are slightly different, in both cases if you remove the race of the individual stopped, the men are killed even though do not present any significant danger to the officers who used deadly force against them. Officers are trained on the legal dictates for using deadly force, and normally evaluated on whether the facts demand the use of their weapon to protect themselves or a member of the public. Because these men are African American, the mythology of the symbolic assailant takes over. Officers no longer conduct objective analyses of the situation they are encountering. Black men's race become the reason that they are stopped, and later they are, even in the absence of any weapon brandished by the individual stopped, seen as threatening enough to be shot multiple times.

B. The Creation of the African American Symbolic Assailant

The African American Symbolic Assailant starts early, sometimes as young as early adolescence and high school, as Black students are criminalized and placed into the school-to-prison pipeline. High school-to-prison pipelines plague African American and other minority communities.[101] This issue starts with a high percentage of African American students who are suspended and expelled from school every year.[102]

Lacking resources, facing incentives to push out low-

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[99] Matt Furber & Richard Perez Pena, *President Calls Police Shooting 'American Issue,'* New York Times, July 8, 2016, A1.
[100] *Id.*
[101] Chauncee D. Smith, Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through A Structural Racism Framework, 36 Fordham Urb. L.J. 1009 (2009).
[102] See also, Katherine Kim, Daniel Loosen, and Damon Hewitt, *The School to Prison Pipeline: Structuring Legal Reform* (2009).

> performing students, and responding to public misperceptions about school safety, many schools have embraced draconian school discipline policies, including zero-tolerance rules that automatically impose severe punishments regardless of circumstances. Although the necessity of discipline in schools goes without saying, schools in recent years have begun exercising their disciplinary authority to suspend and expel students more frequently and in far more questionable circumstances.[103]

Many schools have implemented policing policies in order to implement discipline. One of the policies with the most significant effect on African American students was the creation of so called zero tolerance policies.[104] Under such policies, "[r]ates of suspension have increased dramatically in recent years—from 1.7 million in 1974 to 3.1 million in 2000—and have been most dramatic for children of color."[105] This type of excessively punitive disciplinary policy causes students to enter the pipeline and subsequently, the criminal justice system.[106] Often, students who fall into the pipeline do not have anything else to do outside of school.[107] They fall behind in their classes, leading them to become high school dropouts and adult criminals.[108]

 Nationally, African American student make up thirty percent of all 12th grade expulsions.[109] Since these students no longer attend

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[103] *Id.* at 2-3.

[104] American Civil Liberties Union, "Locating the School-To-Prison Pipeline" (2008). Available at https://www.aclu.org/fact-sheet/locating-school-prison-pipeline?redirect=racial-justice/what-school-prison-pipeline.
"Lacking resources, facing incentives to push out low-performing students, and responding to a handful of highly-publicized school shootings, schools have embraced zero-tolerance policies that automatically impose severe punishment regardless of circumstances. Under these policies, students have been expelled for bringing nail clippers or scissors to school."

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* "Many under-resourced schools become pipeline gateways by placing increased reliance on police rather than teachers and administrators to

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schools, they quickly become the targets of criminalization.[110] For example, in New York, Blacks and Latinos make up eighty-five percent of all stop and frisks with Blacks making up fifty-five percent.[111] Thirty percent of all juvenile arrests are blacks, even though they make up on seventeen percent of the juvenile population.[112] Subsequently, blacks make up over sixty percent of juveniles tried and convicted as adults.[113] As far as sentencing is concerned, "black youth are nine times more likely than white youth to receive an adult prison sentence. Cumulatively, 'black juveniles are about four times as likely as their white peers to be incarcerated.'"[114]

One of the biggest issues with students who enter the pipeline is that "it is difficult for them to make the journey in reverse."[115] A lot of the time, it is hard for these students to re-adjust in school as many of them have fallen behind and there are no programs to rehabilitate them. As a repercussion, the vast majority of students never finish high school or complete their education.[116]

Referred to as an "inter-institutional problem", school-to-prison pipelines have one particular standout problem: stop and frisk.[117] As previously mentioned, African Americans make up the majority of

maintain discipline. Growing numbers of districts employ school resource officers to patrol school hallways, often with little or no training in working with youth. As a result, children are far more likely to be subject to school-based arrests—the majority of which are for non-violent offenses, such as disruptive behavior—than they were a generation ago. The rise in school-based arrests, the quickest route from the classroom to the jailhouse, most directly exemplifies the criminalization of school children."

[110] Smith, supra note 56; supra note 59. ("Students pushed along the pipeline find themselves in juvenile detention facilities, many of which provide few, if any, educational services. Students of color — who are far more likely than their white peers to be suspended, expelled, or arrested for the same kind of conduct at school..."). *See also*, Richardson, infra note 87.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*; supra note 59.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 1014.

people who are stopped and frisked. A good amount of these stops lead to arrests, subsequent convictions and imprisonment. Thus, for those Black youths whom have been ejected from the school system either temporarily or permanently, the practice of stop and frisk is life-changing.[118]

C. Officers' explanations for racially biased behavior

Unsurprisingly, police officers strongly deny racialized roots to their behavior. That being said, much of police explanations track what police scholars have long understood about police behavior. For instance, there is significant evidence of Jerome Skolnick's revelation that the policeman's working personality is untrusting, and animated by fear and threat.

When unarmed blacks are shot, officers almost always offer explanations that identify the individuals as representing credible threat. This is true even when the facts of the situation may suggest otherwise. For instance, the police response to 12-year-old Tamir Rice, strongly evokes notions of Rice's blackness, rather than his size having transformed him into a dangerous threat.[119] Tim Loehmann, the 26-year old officer who shot and killed Tamir Rice, told his father, "I was right there and he went for the gun. I had no choice."[120] As if he's reading from Skolnick, Cleveland Police Patrolmen's Association president, Steve Loomis told POLITICO, Tamir Rice was "menacing. He's 5-feet-7, 191 pounds. He wasn't that little kid you're seeing in pictures," "He's a 12-year-old in an adult body."[121] In response to the federal lawsuit, Cleveland city attorneys argued that Rice caused his

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[118] *Id.* at 1012.
[119]   To assume that black children are threatening to adult when they are just children is common behavior. *See*, Philip A. Goff, Matthew C. Jackson, and Brooke Di Leone, et Al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J PERS SOC PSYCHOL. 2014 Apr; (4):526-45.
[120] Jonathan Capehart, *It's Tamir Rice's Fault*, THE WASHINGTON POST, March 2, 2015.
[121] *Id.* Cleveland police officers receive American Red Cross training. Consistent with the idea that Rice was a dangerous threat even after Rice was shot and mortally wounded by Loehmann, the two officers delivered no first aid to Rice who succumbed to his wounds at the hospital the following day.

own death "by the failure . . . to exercise due care to avoid injury,"[122] although he was only a preteen.

Though the original symbolic assailant is heavily context driven, context is irrelevant to the black male symbolic assailant—blackness is all that matters in the officers' decision that an individual is suspicious and in need of further investigation. The Black symbolic assailant means that Black men irrespective of age, class, behavior or contextual factors require investigation.

The importance of the Black man being the symbolic assailant is significant in that the construct is both a marker of suspicion and an automatic threat to officer safety. This was the case with Philando Castile, shot and killed instantly by Officer Jeronimo Yanez, who pulled him over Falcon Heights, MN, on July 6, 2016. Officer Yanez initially indicated that Castile had been pulled over for a cracked taillight. Audio from the police radio indicated prior to the stop officers were insisting that Castile matched the description of a robbery suspect because of "wide-set nose."[123]

PART III. THE COP IN ALL OF US

Police officers' treatment of African Americans as potential assailants prior to any assessment of criminal background or specific facts signaling danger, is strongly at odds with standards in criminal procedure requiring individualized suspicion, and with the deeply held ideals of fairness and non-discrimination. Polling data since the 1960s indicates that Americans believe that individuals should be treated equally by the police. Though there are wide racial divides in whether Americans believe that African Americans are treated fairly

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[122] Wesley Lowery, *Tamir Rice family attorney says 'unbelievable' that city of Cleveland court filing blames Tamir for his own death*, WASHINGTON POST, March 2, 2015.
[123] Ashley Collman, *'The driver looks more like one of our suspects, just because of the wide-set nose': Police audio shows officers thought Philando Castile was a robbery suspect,* DAILY MAIL.COM (July 12, 2016, 10:19 AM), http://www.dailymail.co.uk/news/article-3686599/The-driver-looks-like-one-suspects-just-wide-set-nose-Police-audio-shows-officers-thought-Philando-Castile-robbery-suspect.html.

by the police, the belief, a generalized belief in equality, persists nonetheless.[124]

Though there is a generalized support for equal treatment under the law, in a variety of ways, police use the symbolic Black assailant as an idea that is fully consistent with societal notions of threat and danger posed by African Americans. In other words, police officers get the idea of the African American symbolic assailant from the rest of us.

The African American symbolic assailant looms large in the American consciousness. Even though victim surveys reveal that most whites are victimized by other whites, the assailant that whites dream up when they want to describe themselves as a victim of crime is someone Black. Two famous cases include those of Charles Stuart and Susan Smith. In 1989, Stuart told Boston police that he and his wife Carol were on their way home from a Lamaze class when their car was stopped by a Black man wearing a jogging suit. This assailant, Stuart claimed, with a raspy voice forced his way into their car at a stoplight, ordered him to drive a short distance away, and robbed them. The assailant allegedly then shot Charles in the stomach and Carol in the head.

At least initially, creating a fictional Black robber worked quite well for Stuart. After his police report, police bulldozed their way through Mission Hill, a predominantly Black neighborhood, and rounded up several Black men for a lineup. Stuart picked a Black man who he insisted most resembled the attacker. Upon further investigation, the police shifted their investigation to Charles Stuart, who committed suicide rather than be arrested.

Susan Smith is another example of someone who fictitiously blamed a black victim for a crime that she committed. Smith, a mother of two, alerted authorities that her two small child had been kidnapped by a man who stole her car.[125] The race of the man that she claimed had

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[124] *See*, Deep Divide between Black and White Americans on Criminal Justice System's Racial Equality, available at: http://publicreligion.org/research/2015/05/divide-white-black-americans-criminal-justice-system/.

[125] Don Terry, *A Woman's False Accusation Pains Many Blacks*, N.Y. TIMES Nov. 6,1994 http://www.nytimes.com/1994/11/06/us/a-woman-s-false-accusation-pains-many-blacks.html

kidnapped her children was African American. Smith went to the media pleading for the safe return of her missing children, launching national concern for them.[126]

It took Susan Smith over a week before she confessed. She only did so after authorities had begun to become suspicious of her story.[127] Smith confessed that she had allowed her car to roll into a lake. She confirmed this by taking the authorities to the spot where her children drowned and where police found the bodies.[128] Smith did not explain her reasoning behind naming a Black man as the culprit.[129]

Katheryn Russell-Brown has identified crimes like the Stuart and Smith murders as racial hoaxes. [130] Russell-Brown defines racial hoaxes as situations in which either:

(a) An individual fabricates a crime and blames it on another person because of his or her race; or
(b) An actual crime has been committed and the perpetrator falsely blames someone because of his race.[131]

Russell-Brown scoured news sources and other documents and was able to identify 62 racial hoaxes, in which whites identified Blacks as the assailant, occurring between 1987 and 2006.[132] She insists that the 62 cases she identified is most likely an under count.[133] Interestingly enough, 12% of the cases identified by Russell-Brown involved police officers or some other judicial officer – judges, prosecutors, and court deputies.[134]

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[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] Katheryn Russell-Brown, THE COLOR OF CRIME 100 (2009).)) 100.

[131] *Id.*

[132] *Id.* at 105. Though I only discuss racial hoaxes in which whites blame blacks for the crime they have committed, there are some examples of situations in which Blacks report having been victimized by a crime and blame whites, See *infra* note 137.

[133] *Id.*

[134] *Id.* at 107.

Though the cases of Charles Stuart and Susan Smith are the most famous cases of racial hoaxes, there have been several other cases in the interim that have been extremely well-publicized.[135]   In 2010, Bethany Storro of Vancouver, Washington told police that she was standing outside Starbucks and a black girl in her 20s approached her and said, "Hey, pretty girl, do you want to drink this?" According to Storro's account, the woman then threw acid in Storro's face, causing serious disfigurement. Police searched extensively for the attacker until a newspaper reporter uncovered witnesses who said that Storro was alone when she collapsed on the street. Storro later admitted to fabricating the story and rubbing drain cleaner on her face.[136]

Imaginary black assailants occur not just in the United States, but also in Europe and even as far away as Australia. On November 2, 2007, British student Meredith Kercher was sexually assaulted and stabbed

[135] One notable case from 2008 involves Joseph C. Vignola, Jr. the 21-year-old son of a long-time Philadelphia City councilman and controller. Vignola met a woman on Craigslist, had consensual sex with her and then began to argue with her.   At some point Vignola punched the woman in the throat, and then knocked her unconscious. After she was unconscious he took a knife and made a six-inch slash on the right side of her neck. He then took back the money he paid the woman and fled from the hotel. Vignola initially told police that a light-skinned black man had burst into the room while they were having sex and attacked the woman. He later confessed. Vernon Clark, "*Joseph Vignola Jr. admits attacking woman he met on Craigslist,*" PHILADELPHIA   INQUIRER,   September   21,   2010   available   at: http://articles.philly.com/2010-09-21/news/24977741_1_joseph-c-vignola-hotel-room-sentencing-guidelines. In another instance the same year, Ashley Todd, a campaign worker for US presidential candidate John McCain claimed to have been approached by a black man at a cash machine and robbed of $60. Seeing the McCain sticker on her car, according to Todd, he allegedly became enraged and assaulted her, punching her. Todd insisted that the assailant carved the letter "B" onto her cheek and said "You are going to be a Barack supporter." Police were suspicious when they noticed that the B was backwards as it might be for an individual who is using a mirror. Todd confessed to inventing the story after police reviewed surveillance tapes. Michael A. Fuoco, Jerome L. Sherman & Sadie Gurman, *McCain volunteer admits to hoax,* PITTSBURGH POST-GAZETTE, Oct. 25, 2008.
[136] Christine Roberts, '*In the mirror, I saw a distorted monster,*' N. Y. DAILY NEWS,   Feb,   18,   2013,   available   at   : http://www.nydailynews.com/news/national/woman-threw-acid-face-speaks-gma-article-1.1267001.

to death in the town of Perugia. Her roommate, Amanda Knox told police that Kercher had been killed by Congolese bar owner Patrick Lumumba.[137] Along with Raffaele Sollecito, Knox was arrested and later convicted of killing Kercher.[138]

As an American, it is likely that Amanda Knox learned racial politics and the appropriate scapegoats on which to blame crimes in the United States. That being said, Americans are not the only ones who attribute their criminal behavior to someone Black. Take the case of Sofina Nikat. On April 10, 2016, Nikat, a 22-year-old living in Melbourne, Australia, claimed that she had been pushing her 14-month-old daughter, Sanaya Sahib, in the stroller when she was accosted by a shoeless Black man, between 20 and 30 years old. According to Nikat's story, the man, who smelled like alcohol, pushed her, then grabbed her child and ran off. Sanaya's dead body was found in a nearby creek. After security footage showed the mother casually strolling away with an empty stroller, Nikat was questioned by police and admitted to killing her toddler.[139]

A. White racial hoaxes as a marker of the symbolic assailant

Though Blacks also commit racial hoaxes, white racial hoaxes tend fit different scenarios. Well-publicized Black hoaxes have in the past involved a Black person (falsely) asserting that a racist white person has attacked them. [140]Typically racial hoaxes committed by whites

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[137] After Knox named Lumumba as the assailant, he was taken to the station at dawn and held in custody for two weeks until a university professor provided Lumumba with an alibi.

[138] Knox and Sollecito served four years in prison before an appeals court acquitted them in 2011.

[139] Shannon Deery, *Mum Sofina Nikat charged over murder of toddler Sanaya Sahib*, HERALD SUN, April 13, 2016, available at http://www.heraldsun.com.au/news/law-order/woman-charged-over-murder-of-toddler-sanaya-sahib/news-story /1b01d8bcc8ad6bd9f449787ad14e4a3b.http://www.heraldsun.com.au/news/law-order/woman-charged-over-murder-of-toddler-sanaya-sahib/news-story /1b01d8bcc8ad6bd9f449787ad14e4a3b.

[140] In this context, the case of 15-year-old Tawana Brawley falls into this category. In 1987, Brawley accused four white men, several of whom were

involve a white person committing a crime against themselves or someone else, and selecting a stereotypical trope—the Black man—on which to blame a crime. The choice of a Black perpetrator goes against the general pattern of criminal behavior. Most violent crime is intraracial, both locally and nationally.   In other words, white victims are most likely to have been attacked by other whites.[141]

Naming a Black person as the assailant, as racial hoaxers do, is for most whites an exercise in naming a racial other with whom they have no previous experience. Thus, the choice of the fake Black perpetrator, that is, to name someone Black as the assailant, is to reach outside of a white person's knowledge and experience base. Most whites have social networks that are almost exclusively white. In addition to social segregation, the high level of residential segregation, as described in Part X, infra means that whites have no experience with Blacks as neighbors. Thus, for many whites, their only real life experience with a Black person in the flesh may be at work.

Despite the paucity of contact with flesh and blood Black people, whites around the world have chosen to identify them as criminals. The strangeness of this behavior is often revealed in police investigation of the crimes. One can imagine that police questioning of Joseph Vignola, who attacked the woman he met on Craigslist list and blamed it on someone Black, went something like this…

> Police: What happened?

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police officers and one of whom was a prosecutor, of having raped her. Brawley had been found in a garbage bag covered in feces with racial slurs written on her body in charcoal. A grand jury was convened to consider charges against the men Brawley named as her attackers and concluded in October 1988 that she had not been assaulted as she claimed. Jim Yardley, *After a Decade, Brawley Reappears and Repeats Charges*, N. Y. TIMES, Dec. 3, 1997.

[141] Sarah Becker, *Race and Violent Offender Propensity: Does the Intraracial Nature of Violent Crime Persist on the Local Level?* 9 JUSTICE RESEARCH & POLICY 53, (2007).

> Hoaxer: A black man burst into the room where were having sex, robbed us and slit her throat.[142]
>
> Police: What did he look like?
>
> Hoaxer: Tallish? Light skinned.[143]
>
> Police: What was he wearing?
>
> Hoaxer (wearing jeans and a skull cap): Jeans, and a skull cap.[144]

Perhaps it is unsurprising that hoaxers' lies are often discovered.

In racial hoaxes, the media of course plays a central role in making the other believable. The Stuart case was widely publicized throughout the Boston area. I argue that it is difficult to determine how large a role the media plays, but it is certainly one that is critical to the construction of the symbolic assailant. Sometimes the role that the media plays is relatively invisible. On other occasions, the media contribution to the creation of a symbolic Black assailant is quite apparent. In March 2015, the Iowa Gazette posted two stories about local burglaries, written by the same author and published within one day of each other.[145] One story used yearbook photos of the suspects while the other used mugshots.[146] The only other difference between the two stories was that those who were depicted using the yearbook

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[142] *See, e.g.*, Vernon Clark, *Joseph Vignola Jr. admits attacking woman he met on Craigslist*. PHILADELPHIA INQUIRER, September 21, 2010.

[143] *See, id.*

[144] *See, id.*

[145] David Ferguson, *Charged with same crime, Iowa paper shows black suspects' mug shots but whites get yearbook pics*, RAW STORY (March 31 2015, 3:10 PM),„",″ http://www.rawstory.com/2015/03/charged-with-same-crime-iowa-paper-shows-black-suspects-mug-shots-but-whites-get-yearbook-pics/.

[146] *Id.*

photos were white and those who got the mugshots as pictures in the newspaper were Black.[147]

The discrepancy between the ways in which the Black and white criminals were treated by the media received significant comment. In the paper's defense, the Iowa Gazette editor Zack Kucharski blamed the discrepancy between the two sets of pictures on "police procedure and newsroom policies." "…Our policy is focused on getting the best images and information to the public in a timely manner. Race is never a factor."[148]

A.   Social psychology and the symbolic assailant

Though media and the police may argue that race is never a factor in policing or news creation, social psychologists have long explored the extent to which unconscious racial biases affect decision making. In this regard, research from social psychology provides support for the creation of Black symbolic assailants. The association between Blacks and crime may be as implicit associations – below the level of consciousness. The stereotype of African Americans as violent and criminal has been documented by social psychologists for almost 60 years.

Using experiments, social psychologists have shown that association of Blacks with criminality affects individuals' memory of who has a deadly razor in subway scene.[149] Other research shows that whites' negative evaluation of ambiguously aggressive behavior is much more likely when the research subject is shown someone who is

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[147] *Id. Cf.* When Brock Turner, the Stanford swimmer who was arrested for raping an unconscious woman in January 2015, media outlets used yearbook photo rather than his booking photo.   One discussion of why this occurred was because unlike most cases, the Santa Clara County Sherriff's Office did not post his arrest photo in a public format. Elahe Izadi & Abby Ohlheiser, *Why you are only now seeing the Stanford sex offender's mugshots*
June   7,   2016,   https://www.washingtonpost.com/news/the-intersect/wp/2016/06/06/where-is-stanford-sex-offender-brock-turners-mugshot-here/.
[148] *Id.*
[149] Gordon Allport & Leo Postman, THE PSYCHOLOGY OF RUMOR (1947).

African American.[150] Whites are also much more likely to categorize non-weapons as weapons when they are shown such items in the hands of African Americans.[151] Finally, the speed at which whites decide to shoot an individual holding a weapon is shorter if they are African-American than if they are white.[152]

Police officers, particularly patrol officers, are often forced to make hasty decisions within the course of their jobs. With respect to the use of deadly force, *Tennessee v. Garner* allows police to use deadly force to prevent the escape of a suspect only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or another.[153] As we have seen from the killings of more than 100 unarmed Blacks in 2015 and 2016, errors in calculation—the deadly shooting or killing of an individual who poses no credible threat to the officer— frequently occurred when the potential assailant is African American.[154]

There is conflicting data on whether police officers are more likely to shoot an unarmed black person or an unarmed white person. Census data puts the number of African Americans at 13%[155] and the number of whites at approximately 72% of the U.S. population.[156] With

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[150] Devine, P. G *Stereotypes and prejudice: Their automatic and controlled components*, J PERS SOC PSYCHOL 56, 5–18 (1989); B. L Duncan, *Differential social perception and attribution of intergroup violence: Testing the lower limits of stereotyping blacks*, J PERS SOC PSYCHOL.., 34, 590–598, (1976).

[151] B. Payne, *Prejudice and perception: The role of automatic and controlled processes in misperceiving a weapon*, 81 J PERS SOC PSYCHOL, 1–12(2001).

[152] Correll, J., Park, B., Judd, C. M., & Wittenbrink, B. W. *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, J PERS SOC PSYCHOL 83, 1314–1329 (2002).

[153] Tennessee v. Garner, 471 U.S. 1, 2 (1985)

[154] Example of situations where the individual killed arguably posed no credible threat to the officer include Walter Scott, Jonathan Ferrell and Eric Garner.

[155] Sonya Rastogi, Tallese D. Johnson, Elizabeth M. Hoeffel & Malcolm P. Drewery, *The Black Population 2010*, UNITED STATES CENSUS BUREAU. (2010), https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf.

[156] Lindsay Hixson, Bradford B. Hepler & Myoung Ouk Kim,

respect to the number of shootings of unarmed individuals that occur, a *Washington Post* analysis of unarmed shootings occurring in cities around the U.S. in 2015 revealed that, though a greater number of whites were shot, African Americans were five times more likely to be shot than whites.[157] The Center for Policing Equity (CPE) analyzed records documenting the use of force by police in 12 police departments located in geographically and demographically diverse areas of the U.S.[158] Similar to the *Washington Post*'s analysis, African Americans were more likely to have force used against them. The racial disparity the CPE researchers found in the use of force was present in each of the several categories of use of force—firearm, OC spray, and Taser—studied.[159]

When one moves beyond data regarding the use of force to other measures of police-citizen interaction, the picture that emerges is incontrovertible: police officers treat African Americans differently than they treat whites. [160] The idea of a symbolic assailant at the foremost of police officers' consciousness means that African Americans are more likely to face police violence because of their race. Even the work of Fryer found, not suggested, similar to the work of Charles Epp and his co-authors that African Americans were

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The White Population: 2010, UNITED STATES CENSUS BUREAU," (Nov. 2011) http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf.

[157] Wesley Lowery, *Aren't More White People Than Black People Killed by the Police? Yes but n*o. THE WASHINGTON POST, July 11, 2016, https://www.washingtonpost.com/news/post-

nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-

no/?utm_term=.c4f3d3170c58,https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/?utm_term=.c4f3d3170c58, *Cf* Roland G. Fryer, Jr., . "An Empirical Analysis of Racial Differences in Police Use of Force 5 (","," July 2016) (unpublished draft), 5 (finding no evidence of racial discrimination in officer-involved shootings using police data from three cities in Texas: six large Florida counties and Los Angeles County).

[158] Philip Atiba Goff, Tracey Lloyd, Amanda Geller, Stephen Raphael, & Jack Glaser, *The Science of Justice Race, Arrests and the Police Use of Force,* Center for Policing Equity, http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pd.

[159] Id.

[160] Id.

likely to face more brutality in the context of police encounters. We don't know whether this translates to an increased likelihood of being shot unless we are actually able to observe the encounter between law enforcement officer and citizen prior to the shooting.

Scholars attribute many of the police shootings of African Americans to implicit biases.[161] Social psychologists posit that implicit biases—judgments resulting from subtle cognitive processes—affect individuals in many ways. Not only do implicit biases affect the way a person interprets behavior, but it also affects how a person responds to a particular behavior.[162] L. Song Richardson examined a study of people's reaction to certain behavior: they were shown videos of people shoving each other.[163] One video was of two white people, one of two Black people, and the other of two people from different races. The people saw the behavior as more violent and aggressive when the video was of two Black people and when the aggressor was Black. However, they saw the video as playful when there were two white people and where the aggressor was white. Next, Richardson examined a study revealing that aggression is manifested more towards minorities than to whites.[164] In that study, a group of people were asked to complete a task, in which either a photo of a Black or white person would flash in front of them. This occurred 130 times. When it was time for the last photo, the computer ceased operating and the participants would have to start the process over from the beginning. The participants were angrier and more aggressive if they were shown Black faces instead of white faces.[165] Richardson concluded that:

> These implicit biases have relevance to police-citizen interactions. …[O]fficers engaged in proactive policing are making judgments of criminality based upon their interpretation of a target's ambiguous behaviors. Implicit biases can disadvantage nonwhites because officers are more likely to interpret their ambiguous behaviors as suspicious. Then, when the officer

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[161] L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 271 (2012).

[162] *Id.* at 272.

[163] *Id.* at 272-73.

[164] *Id.* at 273.

[165] *Id.* at 273-74.

> approaches the individual to confirm his suspicions, he may unintentionally and non-consciously act aggressively. When the target responds in-kind, the officer will likely interpret the targets seemingly unprovoked aggressive response as evidence that the target is dangerous. This will make the officer more likely to conduct a frisk for weapons. This series of events can explain why officers often make incorrect judgments of criminality when the target is nonwhite as opposed to white.[166]

There are several repercussions and biases that officers may hold because of these implicit biases. The number of Blacks that cops stop and frisk is significantly higher than the number of whites that cops stop and frisk.[167] Two particularly interesting biases that officers exhibit are shooter bias and attentional bias.[168] Studies show that cops are more likely to shoot an unarmed Black person, especially a Black man, than shoot an armed white person.[169] Attentional bias is a subconscious drawing of attention to Black people and the increase in attention that Black people are shown over white people.[170] These biases are attributed to the idea that Black people are more threatening, more dangerous, and feared more than white people.[171]

These biases lead to police officers interpreting behavior and handling situations involving Black people differently than those with white people.[172] For example, *Terry v. Ohio*[173] is supposed to be a safeguard to keep police officers from being able to stop and frisk

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[166] *Id.* at 274.

[167] L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1149 (2012).

[168] *Id. at* 1150-51.

[169] *Id. at* 1150.

[170] *Id. at* 1151.

[171] *Id.*

[172] *Id.*

[173] In this landmark case, establishing the standard that an officer needed reasonable suspicion to stop and frisk an individual, the officer saw men walking in front of a store and thought they might be trying to rob the place. The officer stopped and frisked the men and found a gun on one of them. Richardson suggests that had the men been white, the officer might not have interpreted their behavior as suspicious. *See Id.*; Terry v. Ohio, 392 U.S. 1 (1968). *See also,* Richardson, supra note 75.

whomever they would like. However, *Terry* does not account for such implicit biases that may cause an officer to interpret the behavior of a non-white person as suspicious.[174]

B. Dehumanization and the Symbolic Assailant: Social psychological support for symbolic assailant

Social psychologists suggests that dehumanization serves as one potential explanation for why police officers treat African Americans so poorly.[175] Dehumanization—"the denial of full humanness"-- allows officers to remove or reduce social or legal protections from those who are dehumanized.[176] Considered not fully human, dehumanized subjects may be seen as less capable of feeling pain, and so make be subjected to greater use of force. Historically, the process of dehumanization is been a requirement for extreme forms of state violence like genocide.[177]

Social psychologist Philip Atiba Goff has studied the effect of implicit dehumanization of African Americans on police.[178] One set of studies by Goff and his colleagues evaluated how dehumanization of African Americans children might affect the use of force.[179] In the first of the studies using police as subjects, Goff and his colleagues gave sixty police officers in a large city computer tests measuring their level of dehumanizing attitudes.[180] Respondents were also given the IAT, a test which measures the degree to which individuals hold implicit biases.[181] Next, the respondents were given a series of crime

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[174] *Id. at* 1152.
[175] Philip Atiba Goff, Matthew Jackson, Brooke Allison Lewis Di Leone, *The Essence of Innocence: The Consequences of Dehumanizing Black Children*, 106 J PERS SOC PSYCHOL.526, 527 (2014).
[176] *Id.*
[177] *Id.*
[178] *Id.*, at 532.
[179] *Id.*, at 527.
[180] *Id.*, at 533. For instance, to measure dehumanization officers were shown pictures of apes and by studying the respondents' eye movements, researchers were able to assess the extent to which officers associated apes with African Americans.
[181] *Id.*

scenarios involving men who were either Black, white, or Latino.[182] Finally, respondents were asked to give the age of the individuals involved, and whether each had actually committed the crime described.[183]

After the officers finished these tasks, with the assistance of the police department's Internal Affairs division, the researchers linked the test results with their use of force history contained in their personnel files.[184] The use of force records contained in the officers' personnel files were required to be completed whenever an officer made any physical contact with a civilian and were ranked in order of the level of severity. The use force incidents ranged from the deployment of takedown/wrist lock to the use of deadly force (firearm or carotid choke hold).[185]

Goff and his colleagues found significant evidence of implicit racial bias. The researchers found that police officers overestimated the ages of Black and Latino crime suspects. Analyzing the use of force and officer's dehumanization, researchers found that the implicit dehumanization of Blacks "was a significant predictor of racial disparities in the use of force against child suspects….. [T]he more officers implicitly associated Blacks with apes, the more officers had used force against Black children relative to children of other races."[186]

Implicit associations between Blacks and criminality may also explain significant divides with respect to race in public opinion data post-Ferguson. The Pew Research Center conducted a survey in early December of 2014.[187] Their results revealed, for instance, that 64% of whites believed that the grand jury's decision not to charge Darren Wilson in the death of Ferguson teenager, Michael Brown, was the

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[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* at 535

[187] Bruce Drake, *Ferguson Highlights Deep Divisions Between Blacks and Whites in America*, PEW RESEARCH CTR. (Nov. 26, 2014), http://www.pewresearch.org/Fact-tank/2014/11/26/ferguson-highlights-deep-divisions-between-blacks-and-whites-in-america/.

right decision.[188] By contrast, 80% of Blacks surveyed felt that the grand jury's refusal to charge Wilson was the wrong decision.[189] Whites' attitudes were also reflected in their evaluation of the legal process. Sixty percent of whites believe that race was not a factor in the grand jury's decision not to charge Wilson.[190] Blacks felt quite differently; 64% of Blacks believed that race was a major factor in the grand jury's decision not to charge Wilson.[191]

C. Eradicating the symbolic assailant

If there is a belief that the boogeyman is Black, our current level of interracial social contact does little to dispel such false notions. Rising tolerance and changing attitudes toward racial intermarriage has not affected our level of social intermixing.[192] In fact, in most contexts, there are massive levels of social separation and physical distance between Black and whites. For many middle and upper class Americans, the majority of the time we spend relaxing is spent in the neighborhoods in which we live—which are segregated spaces. Analysis of the 2010 Census reveals that the typical white person lives in a neighborhood that is 75% white.[193]

Though the survey data on tolerance for housing integration shows that most Americans support removing legal restrictions to housing integration, both the data on housing choice and move-in violence suggest broad support among whites, Asian Americans and Latinos for the (segregated) status quo. The Multicity Study of Urban Inequality in Los Angeles asked whites, African American, Asians, and Latinos who they would feel comfortable living around, regardless of class of the neighborhood. The results revealed that African-Americans are the least preferred neighbor among the races.[194]

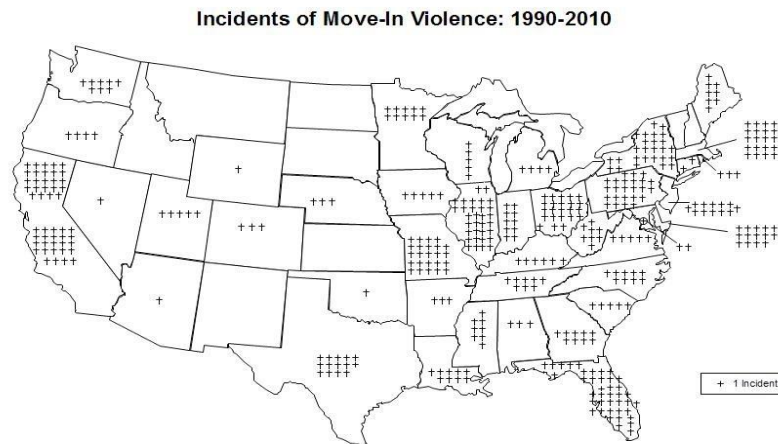
[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id*.

[192] Jeannine Bell, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF SEGREGATION IN AMERICAN HOUSING 86-116 (2013).

[193] John R Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, 3 2011.

[194] *Id*.

Many middle class African Americans understand this hostility that whites feel toward them as neighbors. Some of those who ignore white hostility and end up crossing the color line face move-in violence—acts of harassment and hate crime directed at minorities who have moved to white neighborhoods. This violence, which I have termed "anti-integrationist violence," can take the form of vandalism, cross burning, assault, and arson. It is not limited to any particular area of the country. Between 1990 and 2010, I identified more than 400 reported incidents directed at minorities who had moved to all-white or predominately white neighborhoods, in the North, South, Midwest and Western United States.[195] (See Figure 1).

Figure 1. Incidents of Anti Integrationist Violence 1990-2010

Incidents of Move-In Violence: 1990-2010

Though most workplaces may be more diverse than most neighborhoods, it may be a mistake to see workplaces as a good locale for cross-cultural interaction. Who we interact with in the workplace *matters.* A survey by the Public Religion Research Institute (PRRI)

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[195] *See*, Jeannine Bell, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING (2013).

suggests many whites primarily socialize with other whites. In the Public Religion and Values Survey in 2013, PRRI tried to get a sense of the race of the individuals who comprised respondents' social networks.[196] Respondents were asked the name of two to seven people with whom they had talked about "important matters" in the preceding six months.[197] They were then asked to describe the race, gender, and other demographic identifiers for these individuals.[198]

In the survey, PRRI found that most whites' social networks are overwhelmingly white. With respect to whites, 91% of the individuals who make up their social networks are also white.[199] Just 5% of the individuals with whom whites discussed important matters in the previous six months were people of different races.[200] The differences were not as stark for people of other racial backgrounds. Latinos have the most diverse social networks with 64% of the people in their social networks also being Latino.[201] Nineteen percent of the individuals in Latino social networks were white and 9% were some other race.[202] For African Americans, 83% of individuals who comprise their social networks are also Black, 8% are white and 6% of another racial background.[203]

In a country where negative stereotypes of blackness are so powerfully linked with criminality, racial separation is not neutral. As white homogenous environments become equated with safety, mixed neighborhoods appear dangerous and unsafe. It is clear who is causing the danger. African Americans, regardless of class, become the symbolic assailant, suspect even when headed to their own neighborhoods. They are automatically "out of place" suspicious when they appear unexpectedly in white neighborhoods. Police practices which give credence to the symbolic Black assailant by

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[196] *See*, *Analysis: Race and Americans Social Networks*, PUB. RELIGION RESEARCH INST.,http://publicreligion.org/research/2014/08/analysis-social-network/#.Vae1T-u7595 (last visited Sept. 5, 2015).
[197] *Id.*
[198] *Id*.
[199] *Id*.
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*

stopping African Americans more in white neighborhoods[204] only confirm what neighborhood residents already believe—these Black people in coming into their neighborhood, are always, regardless of the circumstances, potential outsiders.

PART IV. REFORM

Despite the role that the symbolic assailant may play in Americans' subconscious, there have been attempts to address the symbolic assailant. Some of these have been citizen-led efforts in the form of protests; others have been federal, state and local government responses. Below, I detail some of the most significant government responses aimed at police reform.

A. Criminal or Civil Charges against officers

Officers treating African Americans in a manner that whites are not treated violates the Fourteen Amendment. A potentially more robust remedy may be civil rights charges for Fourth Amendment violations or in the alternative, criminal charges against the officers. The logic here is that the threat of charges will serve as a deterrent against bad behavior. Unfortunately, neither of these are likely to lead to significant changes because of the manner in which they are structured. As policing now works, police are granted the discretion to decide that someone is a threat. After someone is killed, if the prosecutor decides to conduct an examination of police behavior, they, and sometimes grand juries, examine the officers' actions.

Activists frequently push for criminally charging officers. In addition to bringing justice in particular cases, many believe that criminal charges against the officers involved will create a disincentive for other officers to engage in brutality. There are a variety of problems with this particular approach. First, the remedy of criminally charging officers would only be used in the most extreme of cases since prosecutors rarely bring criminal charges against police officers who have killed Black civilians.[205] Only a small percentage of police

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[204] *See,* Epp et al., *supra* note 85, at 70-71. (describing officers using suspicionless investigatory stops of African Americans in suburban white neighborhoods).

[205] Kimberly Kindy & Kimbriell Kelly, *Police officers charged in fatal shootings while on duty: 54 cases in the past decade*, THE WASHINGTON POST, April 12,

shootings or killing of unarmed suspects result in criminal charges brought against police officers.[206] One study conducted by researchers and the *Washington Post* found of the thousands of individuals shot by police between 2005 and 2015, just 54 officers were charged.[207] Prosecutors tended to bring charges only in the most extreme of cases, involving individuals who were not just unarmed, but also were shot in the back and with testimony from other officers supporting the charges.[208] Video of the incident also tended to lead to the charges. Even then, officers were likely to escape conviction; the majority of cases did not result in the officers being convicted.[209]

B. Increasing the legitimacy of the police

Arguably, the most comprehensive nationwide policy response was issued by President Obama's 21st Century Task Force on Policing (Task Force). The Task Force convened in December 2014 and heard months of testimony from academics, community members and legal experts. In May of 2015, the Task Force issued its final report, a comprehensive 99-page report with 51 recommendations and more than 70 action items for improving police legitimacy.[210] The recommendations ranged from fairly soft mechanisms designed to increase police legitimacy,[211] to fairly substantial changes that would

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2015, https://www.washingtonpost.com/news/post-nation/wp/2015/04/12/police-officers-charged-in-fatal-shootings-while-on-duty-54-cases-in-the-past-decade/?utm_term=.900c436b5155.

[206] *Id*. Kimberly Kindy & Kimbriell Kelly, *Police officers charged in fatal shootings while on duty: 54 cases in the past decade*, THE WASHINGTON POST, April 12, 2015, https://www.washingtonpost.com/news/post-nation/wp/2015/04/12/police-officers-charged-in-fatal-shootings-while-on-duty-54-cases-in-the-past-decade/?utm_term=.900c436b5155.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST-CENTURY POLICING (May 2015).

[211] Take for instance, Recommendation 1.1. This recommendation called on law-enforcement culture to "embrace a guardian mindset to build public trust in legitimacy. Toward that end, police and sheriffs' departments should adopt procedural justice as the guiding principle for internal and external

drastically affect police procedures around the country.[212]

Several recommendations are specifically aimed at fostering better relationships between police officers and communities. Many of these recommendations consciously reflect the logic of community policing efforts. Community policing encourages law enforcement officers to work with neighborhood residents as community partners in the effort to treat people with more respect. This particular strategy might decrease the number of fatalities – which is, of course, a positive development.

Treating the African American population with more respect and developing community police partnerships are soft measures for changing the way in which police operate. Such measures may improve some encounters between police and citizens, but it is unlikely to be a magic bullet for improving police relations, particularly if racialized policing continues. The problem with calls for increasing the legitimacy of the police through by increasing politeness, respect,[213] and community partnership is that they do not respond to the issue of racialized police practices. There is clear evidence of racialized policing occurring.[214]

A variety of factors suggest that community police partnerships and other "soft" measures are not likely to increase trust between African-Americans and the police. First, and perhaps most importantly, is the sheer number of police killings of unarmed African American men in cities around the country and the activism in response. More citizens are able to see graphic depiction of the death of those killed by police. Videos of a number of police killings of African Americans have been

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policies and practices to guide their interactions with the citizens they serve."

[212] An example of a fairly substantial change in police procedure is Recommendation 2.10. This recommendation states: "law enforcement officers should be required to seek consent before search and explain that a person has a right to refuse consent when there is no warrant or probable cause. Furthermore, officers should ideally obtain written acknowledgment that they have sought consent to search in the circumstances."

[213] *See, e.g.*, Tom Tyler, Trust *and Legitimacy: Policing in the USA and Europe,* 8 European Journal of Criminology 254, 261(July 2011) (Describing gains in trust that can be realized by employing policing procedures that the public view as procedurally fair.

[214] *See infra* Part II.

heavily, and graphically captured and distributed on social media.[215] African-Americans fear the police because many individuals have been killed in routine traffic stops. Politeness and police community partnerships are unlike to cut through the current level of fear. A final indicia of an impediment to the soft measures having significant effect on trust is research exploring the relationship between officer politeness and Black drivers' dislike of racialized policing practice. Charles Epp's research found that most African American drivers took offense at investigatory stops, even though officers who performed them were polite. [216]

Though the reforms in the 21st Century Report might help eliminate some of the difficulties African Americans face with respect to the police, given the poor relationship between African Americans and police, there is a real limit to the ability of the reforms to disrupt the deep level of mistrust many African Americans have for the police. The recommendations in the report also do little to disrupt the empirical fallacies that lead police officers to see every African American as a symbolic assailant.

C.   Reorienting Police Work to Disrupt the Symbolic Assailant

    i.   *End the investigatory stop*

Eradicating the myth of the symbolic assailant begins with changing long-standing practices that have developed that affect the relationship between African Americans and the police. The most significant factor affecting the relationship between African Americans and the police are the spaces in which the majority of African Americans encountered the police.

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[215] Lucy Bayly, Police Shootings Test New Era of Violent Social Media,"NBC News, July 09, 2016, http://www.nbcnews.com/tech/tech-news/police-shootings-test-new-era-violent-social-media-video-n605366 In addition to scholars' accounts, there are a variety of databases now tracking the number of individuals killed by police. The Washington Post database notes that 754 people have been shot by police in 2016. https://www.washingtonpost.com/graphics/national/police-shootings-2016/
[216] *See* Part II, *supra.*

For most African Americans, like Americans of other backgrounds, the most likely place in which they will encounter the police is during a stop made while driving.   As discussed in Part II, these are investigatory stops, and police officers,' power to do them stems from The Fourth Amendment.[217] While the spaces where different races encounter the police are similar, as the research by Chuck Epp and others described in Part II suggests, the experiences of whites and African Americans to take two different racial groups, is dramatically different. African Americans are stopped for reasons that have nothing to do with the manner in which they are driving. Such discriminatory stops affect how African Americans feel about the police in general and their behavior in situations in which the officer has made a legitimate stop.

To improve the relationship between African Americans and the police, Epp and his co-authors suggest that police departments must discontinue the practice of stopping individuals because they are suspicious. Because such stops are allowed under the Constitution such a change in policy would require departments to behave in a manner that is both more restrictive of the police and more protective of suspects' rights than the U.S. Constitution.

It is not outrageous to assume that police departments would elect to behave in a manner more protective of individual rights than the U.S. Constitution requires. There are clear incentives for police to enact reforms that take away officers ability to stop individuals solely for reasons of suspicion. First, and most importantly, stops of African American based on suspicion and not on lawbreaking poison the relationship between the police and community.   In addition, communities with poor police relations are much harder to police. Poor community/police relations make crime investigation more

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[217] The decisions in this context constitute a clear expansion of police rights. *Terry v. Ohio* allows officers to make stops so long as there is reasonable suspicion the individual is engaged in criminal activity. The Court's decision in Utah v. Strieff potentially expands this power by lowering the burden even further. 79 U.S. __, 136 S. Ct. 2056, (2016).   In Strieff, the Court upheld evidence seized after a warrantless stop of an individual made by a police officer without probable cause or reasonable suspicion. The Court, in an opinion by Justice Thomas, reasoned that the evidence seized was attenuated from the illegal activity, so the exclusionary rule should not apply.

challenging. There is also the issue of resources. Investigative stops are based on officers' hunches – their guesses that a particular individual is involved in lawbreaking. These unquantifiable guesses rarely pay off in the form of all evidence. Poor police/community relations may even endanger officers' safety. Some have argued that recent attacks on police officers by individuals who are mentally ill stem from poor relationships between police officers and African Americans.

Resistance to changes of the sort that I have suggested is by no means inevitable. Consider the case of Fayetteville, North Carolina. In 2013 a report of the Fayetteville police revealed that Blacks were stopped more than whites.[218] The resulting controversy led to the departure of the police chief and city manager.[219] The new police chief in Fayetteville, North Carolina, Chief Harold Medlock, elected to have officers eliminate the use of the investigatory stop, instead focusing on violations that "cost lives," speeding and drunk driving.[220] Officers in the department who had a reputation of disproportionately stopping Black drivers were forced out.[221] Such changes drastically changed the rates of differential policing and improved the relationship with the African American community.[222]

ii. Creating the space for "conversion"

Changes such as ending the investigatory stop are a preliminary first step in eradicating the African American symbolic assailant. A more significant step involves changing the ways in which police officers see African Americans. Because of stereotypes, police practices and implicit bias, many police officers view African Americans predominantly as suspects. In order to change the ways in which so many police officers see African Americans, police training must change in a way that allows officers to see African Americans; not as suspects but as crime victims. I describe this process of conversion below.

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[218] Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, NY TIMES, OCT. 24, 2015.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*

I approach the idea of reform from the perspective of a police researcher who has seen officers' productive interactions with people of color. In 1997, I spent six months observing a specialized police hate crime unit in a large white city. Afforded open access to the unit, I spent 10 hours a day with the detectives. I went on investigations with them, had full access to their files and went to court with them.[223]

I have seen white officers transformed by the practice of providing services to victims of color. Through a process I describe as "Conversion" in my book *Policing Hatred*, ordinary police officers, many of whom were white[224] were transformed into committed advocates for victims of color. Officers became victim advocates as they did their work as detectives investigating and responding to crime.

Part of the conversion occurred because of the setting. The detectives often met with victims in their homes and took notes to write a detailed report. Many of the casefiles were filled with reports. Seeing individuals of color in a vulnerable space led to the conversion. You could see this in the perspective of officers who had done the work and also officers who had not.

One white officer who is clearly "converted" said:

> Victims are powerless... The victim has no one on his side. I want to say I'm going to take this injunction and wrap this piece of paper around you. My protection will be with you. I bring my police power to the table to protect victims.[225]

In several comments, the detectives made clear that interacting with families and seeing them experience the pain led to their conversion.

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[223] I did not get to hold a gun like Jerry Skolnick did – in fact, in the only situation that involved danger, they made me stay in the car, but with that one exception I did everything that the cops did for the time that I was with them.

[224] Jeannine Bell, POLICING HATRED: LAW ENFORCEMENT CIVIL RIGHTS AND HATE CRIME (2002). Though there were several officers of color in the unit, most of the officers in the unit were white men.

[225] *Id.*

The political ideology of the officer was not relevant. As one detective noted, "no working cops get involved and don't get converted. No cops leave the unit saying they couldn't do that racial BS; more like they couldn't do police work."[226]

The attitudes the officers displayed towards minorities in the unit were fairly unusual based on what researchers have described in other contexts. Conversion transformed officers. Officers become fiercely attached to victims for two primary reasons. First, the process of becoming converted allowed police officers to learn on the job. They were investigating cases with real bad guys in a manner they believed was really part of police work. This was very important to their identity as cops.[227] Second, the unit's work provided officers an opportunity to see people of color in a very vulnerable space. Crime victims have extraordinary experiences. This not only humanized people of color for officers, it allowed them to assist with finding the individuals who committed the crime against them. Providing this assistance is something that resonated with the officers deeply, because it was connected with something that brought them to the force and something that they considered an essential part of the job.

Most of the detectives in the hate crime unit I studied had dramatically different relationships with the people they served in part because the police citizen interaction was organized so differently. This was reactive policing. The vast majority of the minority police interaction involved police officers investigating crimes that victimized minorities in traumatic ways.

One of the problems with proactive policing is that right now the only space MOST police see Blacks in is as law breakers, who take from their communities. The Broken Windows proactive policing approach has meant that officers' interaction with communities has been focused on preventing crime by seeing African Americans as suspects – not by responding to citizen complaints. If we want to change the

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[226] *Id.*

[227] The police department had a community policing program. The community policing officer was an individual that they described as doing "social work." Higher-ups in the unit insisted that a crime should never be given to the community policing officer because it just wouldn't be taken seriously.

relationship that police officers have with minorities, we need to fundamentally change the roles that police officers have in minority communities. If police departments change the policing of minority communities to a much more reactive model, then police could focus on providing services to citizens. This is an unusual approach, but in my experience, it's the only one that may change how officers actually see African Americans.

If we really want to change the culture of fear and disrupt the policing practices that treat Blackness as a marker of suspicion, police departments must shift their focus from one that relies on proactive policing to socialize officers to one that requires each officer to have some time where they interact with Black victims. Placing officers in situations where their primary functions are to provide services respond to African Americans as victims will teach the officers that African Americans are citizens in need of services from the police.

Though the unit I studied is a hate crime unit, reorienting policing need not focus on hate crime. There is no shortage of African American victims. African Americans are victimized by crimes at incredibly high rates. Officers must be given tasks that allow them to interact with African Americans in the vulnerable space of being victimized.

CONCLUSION

Tamir Rice, Alton Sterling, and Philando Castile are contemporary society's canaries in the coal mine. From the early 1900s until the mid-1980s, coal miners would carry down into the mine tunnels canary cages. If methane or carbon monoxide leaked into the mine, the gases would kill the canary before killing the miners, thus providing a warning to exit the tunnels immediately.

The deaths of Rice, Sterling, and Castile and too many others provide clear evidence to all of American society that Blacks and whites live in radically different worlds.[228] These killings say much about the progress we have made with respect to opportunity and civil rights in this country. What we say, feel, and how we address these shootings, says something about how much progress the American society has made with respect to racial tolerance. From sheer

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[228] *See*, Ruth Peterson & Lauren Krivo, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE (2010).

policing perspective, the symbolic assailant is troubling and dangerous. If the Black man is the symbolic assailant, police are giving a pass to white criminals and police are also turning off some particularized crime fighting knowledge.

Our lack of alarm to recent police violence says something important about who the police have become in 21st Century United States. The increasing number of unarmed Blacks killed by police suggests that as a society we have ceded to the police the power to wield deadly force with significant discretion. Police killings of the marginalized with little explanation are a sign of far greater police influence than we have previously acknowledged. Our focus on the Black symbolic assailant helps divert our attention from the fact that police officers are killing unarmed white civilians too, just not as frequently. These deaths are not reported in the mainstream media. For all of our sake, I hope we will examine whether the bargain we have made with police forces is worth it.