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# Crime, Legitimacy, and Testilying

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# Crime, Legitimacy, and Testilying<sup>†</sup>

I. BENNETT CAPERS\*

## INTRODUCTION

*United States v. Restrepo*<sup>1</sup> is not a famous case. It applied no new law. The facts are not unusual. The defendants were drug dealers. They were arrested in the act. They made motions to dismiss, some of which were granted, some of which were denied. And most of the defendants were convicted following guilty pleas. In many ways, *Restrepo* is a typical case. But its very typicality is what makes it interesting. Interesting, and illustrative of a much larger problem of over-enforcement and under-enforcement, and of crime, legitimacy, and “testilying.”

Here are the facts: one of the defendants, Jose Francisco Guevara, was arrested because he was allegedly driving sixty-five miles per hour in a fifty-five miles per hour speed zone. Except the traffic stop involved not only an officer issuing Guevara a “courtesy warning,” but also asking Guevara whether he was “Mexican” and summoning an additional officer to the scene. The officers then asked Guevara, who was traveling with his wife and two small children, for consent to search his vehicle. Though Guevara later disputed the scope of his consent, what was not disputed was that a search in fact occurred, and that approximately sixty kilograms of cocaine were found secreted within the side panels of Guevara’s car. The problem arose during the motion to suppress. As Judge Weinstein later put it:

Defendant Guevara, with the aid of an interpreter, testified that he was driving slowly at the time he was stopped because he was looking for a place for his family to have breakfast. This was confirmed by [Guevara’s eleven-year-old son] Rodolfo. The defendant further confessed to the court that he was purposely driving under the speed limit because, knowing that he was carrying drugs in his vehicle, he did not want to attract the attention of police.

Rodolfo, the young boy, acted as an interpreter between his father and the officer. Both the child’s and the defendant’s testimony at the suppression hearing

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1. 890 F. Supp. 180 (E.D.N.Y. 1995) (Weinstein, J.).

contradicted the police's version as to whether and how valid consent was obtained for a full search of the vehicle. Also troubling was proof of the incentive for these officers to trim their testimony because of the way in which asset forfeitures could directly benefit their local police department.

Based on the totality of the evidence presented, a violation of the Fourth Amendment was found. The officer did not have a proper basis for conducting a traffic stop. The court could not tolerate this evident abuse of the Fourth Amendment.<sup>2</sup>

Judge Weinstein concluded that the officers had not stopped Guevara for the legitimate reasons they claimed—that he was driving ten miles per hour above the speed limit—but instead “because he was driving a car with out-of-state license plates and appeared to be Hispanic.”<sup>3</sup> In making this factual determination, the court also made a credibility finding that the first and second officer at the stop lied.<sup>4</sup> The result: the government's sole evidence against Guevara was suppressed, and the charges against Guevara were withdrawn.

This typical case illustrates over-enforcement insofar as it exemplifies the disproportionate targeting of people of color; that is, the undemocratic policing and inegalitarianism of racial profiling which has been the focus of much of the critical literature. It also illustrates a type of under-enforcement. As a result of judicially created exclusionary rules, the government was compelled to forego prosecution of an individual found in possession of illegal narcotics. These rules, which are viewed by many as inhibiting the apprehension and conviction of offenders, thus contribute to an under-enforcement of the law. Here, too, the literature is substantial.

But *Restrepo* also illustrates the convergence of over-enforcement and under-enforcement in another respect, one that has not been sufficiently attended to by scholars, but one that would be readily apparent by following Mari Matsuda's suggestion of “looking to the bottom” and adopting the perspective of those who have experienced discrimination.<sup>5</sup> From this (disad)vantage point, it is not only the fact that Guevara was apparently a victim of racial profiling that is relevant, but also the fact that the officers apparently lied about their true motivation for stopping Guevara.

For many people of color and members of other politically vulnerable groups, neither of these facts comes as a surprise. Nor should the fact that the first and second officers misrepresented the facts come as a surprise to others. In New York, the Mollen Commission found that perjury was “so common in certain precincts that it has spawned its own word: ‘testilying.’”<sup>6</sup> Judge Alex Kozinski of the Ninth Circuit has

2. Honorable Jack B. Weinstein & Mae C. Quinn, Terry, *Race, and Judicial Integrity: The Court and Suppression During the War on Drugs*, 72 ST. JOHN'S L. REV. 1323, 1337–38 (1998) (citations omitted).

3. 890 F. Supp. at 194.

4. *Id.* at 191.

5. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

6. COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, CITY OF NEW YORK, COMMISSION REPORT 36 (1994) (Milton Mollen, Chair) [hereinafter MOLLEN COMMISSION REPORT]; see also Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1.

observed that it is “an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers.”<sup>7</sup> Nor is testifying’s attendant circumstance, the environment that allows testifying to flourish, surprising. Despite the common knowledge that law enforcement perjury occurs, prosecutions are extremely rare. Viewed from this perspective, in *Restrepo*, it was not only Guevara who evaded criminal punishment and thus benefited from under-enforcement, but also the first and second officers.

At its broadest level, this Article examines how the zone of law enforcement, once the mirror is turned, is also a zone of under-enforcement.<sup>8</sup> Except in the most egregious cases—those involving brutality or death, for example—law enforcement officers can engage in otherwise sanctionable and criminal behavior usually without fear of consequences. The point of this Article, however, is not to engage in a jeremiad against police wrongdoing. Rather, the point of this Article is to articulate an argument, acceptable to those on the left and those on the right, to civil libertarians and law and order advocates, and ultimately to the police themselves, for why there should be a more democratic policing of police officers.<sup>9</sup> Essentially, this Article builds upon legitimacy theory to make a utilitarian argument: more policing of the police, far from tying the hands of law enforcement, can actually work to reduce crime in the general community.

This Article proceeds as follows: Part I of this Article begins the argument by reviewing the research of social psychologist Tom Tyler on legitimacy and compliance, as well as subsequent work by other scholars. Collectively, this literature reveals that perceptions of legitimacy play a critical role in inducing compliance with the law, and conversely, that perceptions of illegitimacy induce non-compliance. As should be evident, legitimacy theory has particular implications when it comes to under-enforcement and the police, which implications are taken up in Part II. Specifically, Part II “looks to the bottom” by examining the perception, especially prevalent in minority and poor communities, that police benefit from a double standard: that they are our designated enforcers of the law, but too often function outside of the law themselves. In short, the perception is that the police themselves engage in undemocratic policing and, indeed, that this illegitimacy is enabled by the courts. Building upon these points, Part III returns to the argument that increased policing of the police—by holding them accountable for unlawful actions—would contribute to community acceptance of the law as legitimate and, as a consequence, increase voluntary compliance with the law. Of course, there should be increased policing of the police across the board: from officers who violate traffic regulations

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7. Stuart Taylor, Jr., *For the Record*, AM. LAW., Oct. 1995, at 72.

8. In using the term “zones,” this Article borrows from the work of Gerald Neuman, as well as the work of Alexandra Natapoff. See Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1721 (2007) (noting that “the United States is peppered with all sorts of underenforcement zones, arenas in which underenforcement has reached systemic proportions that affect the local quality and meaning of lawfulness.”); Gerald L. Neuman, *Anomalous Zones*, 48 *STAN. L. REV.* 1197, 1201 (1996) (identifying Guantanamo, formal “red light districts,” and the District of Columbia as “anomalous zones” in which “certain legal rules, otherwise regarded as embodying policies of the larger legal system, are locally suspended.”).

9. See generally David Alan Sklansky, *Police and Democracy*, 103 *MICH. L. REV.* 1699 (2005).

(and the officers who give fellow officers a pass by declining to ticket them) to officers who engage in unjustified acts of violence. However, as a case in point, Part III returns to “testilying,” documenting the perception of its prevalence, and proposes reforms to increase the policing of testilying. Because this Article challenges the status quo of under-enforcing crimes committed by law enforcement officers, as well as the status quo of granting prosecutors unlimited discretion, it is almost certain that there will be arguments raised in opposition. Part IV anticipates and addresses those arguments, and marshals the many countervailing arguments that support reform.

The conclusion, which again should be acceptable to liberals and conservatives alike, is that the collateral benefits to righting the under-enforcement imbalance—and there are many—far outweigh the drawbacks. In fact, this Article’s proposal would not only benefit communities by reducing crime; it would also benefit the police themselves. Quite simply, it is a win-win proposal.

## I. LEGITIMACY AND CRIME

### *A. Legitimacy and Crime Reduction*

The general assumption is that individuals comply with the law to avoid punishment. The more severe and certain the punishment associated with a particular crime, the more individuals will desist from engaging in that crime.<sup>10</sup> Or so the thinking goes. This deterrence-based theory of compliance, however, now seems to be only partially true. Rather, at least equally important are the roles societal and community norms play in policing behavior and compliance with the law. In its simplest terms, if a person believes that a particular law makes sense and is fair, for example, a law prohibiting stealing, that person is likely to comply whether punishment is likely or not. Conversely, if a person believes that a particular law does not make sense, or is arbitrary or unfair, for example, a law prohibiting jaywalking, that person may be more likely to disregard the law entirely. A similar result occurs if a fair law is perceived to be unfairly applied.

Perhaps no scholar has been more influential in exploring the limits of punishment as a criminal deterrent than social psychologist Tom Tyler. In his highly influential *Why People Obey the Law*,<sup>11</sup> as well as in his more recent work on motive-based trust,<sup>12</sup> Tyler explores the extent to which normative factors, including perceptions of legitimacy, influence compliance with the law. His extensive research suggests that, by increasing respect for the law as both fair and fairly applied, lawmakers can in fact increase voluntary compliance with the law.<sup>13</sup>

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10. Economist Gary Becker, for example, characterizes criminal sanctions as “prices” and suggests that criminals weigh whether the benefit to be obtained from engaging in criminal activity exceeds its price. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 194–96 (1968); see also George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970).

11. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

12. See, e.g., TOM R. TYLER, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361 (2001); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 49–96 (2002).

13. See TYLER & HUO, *supra* note 12, at 67–68.

This is not to suggest that Tyler's legitimacy argument is entirely new or without antecedents. As Tyler acknowledges, previous sociological studies could be interpreted as broadly supporting the conclusion that normative support for a legal system leads to compliant behavior.<sup>14</sup> Legal philosophers had also theorized a link between perceptions of fairness and compliance. For example, H.L.A. Hart noted that punishment must be proportionate to the severity of the crime; otherwise, there was a risk "of either confusing common morality or flouting it and bringing the law into contempt."<sup>15</sup> Paul Robinson and John Darley have noted that public compliance with the law is tied to community norms about what should be punished, and to what extent: the more the law is in line with such community norms, the more likely it is that community members will voluntarily comply with the law.<sup>16</sup>

Tyler's contribution lies in his attention to citizen/police interactions and the process by which laws are enforced—what Tyler terms "procedural justice"—and his use of empirical evidence to support the theory that legitimacy enhances compliance. Tyler's Chicago study, which he has since replicated elsewhere, is illustrative. Tyler compiled data collected in a longitudinal study of randomly selected Chicago residents to explore the question of whether legitimacy affects compliance.<sup>17</sup> At its most basic, the study found a zero-order relationship between compliance and legitimacy.<sup>18</sup> The more an individual regarded legal authorities as exercising legitimate authority, the more that individual was likely to obey the law.<sup>19</sup> Indeed, by assigning legitimacy scores and computing levels of compliance, the study found that the relationship between legitimacy and compliance is linear: as legitimacy increases, so does compliance, even when regression analysis is used to control for other factors.<sup>20</sup>

The Chicago study also found that the interviewee's experience with police officers influenced his or her view of the legitimacy of legal authority. Specifically, the study suggests that approximately five percent of the variance in people's views about legitimacy can be explained by the nature of a recent experience with law enforcement.<sup>21</sup> The significance of this cannot be overstated. As Tyler notes:

Personal experience does have political impact. The judgments of adults about their obligation to follow legal authorities respond to their experiences with particular police officers and judges. Because experience influences legitimacy, legal authorities cannot take citizens' allegiance for granted. It can be eroded by unsatisfactory experiences with police officers or judges. And legitimacy will be eroded if the legal system consistently fails to meet citizens' standards. On the

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14. *See id.* at 3–9.

15. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 25 (1968).

16. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. Rev.* 453, 497–99 (1997).

17. The study, conducted in two waves, focused on information gathered from telephonic interviews with respondents who had had personal experiences with legal authorities. TYLER, *supra* note 11, at 8–15.

18. *Id.* at 57.

19. *Id.*

20. *See id.* at 57–60.

21. *Id.* at 106.

other hand, the existing reserve of legitimacy can be increased over time by positive personal experiences with police officers and judges.<sup>22</sup>

Tyler's legitimacy theory has particular significance when it comes to race, given the grossly disproportionate offending and incarceration rates of blacks and Hispanics.<sup>23</sup> As part of his continuing legitimacy research, Tyler recently examined the views of blacks and Hispanics, with a particular focus on a subcategory of "high risk" individuals, namely black and Hispanic males between the ages of 18 and 25.<sup>24</sup> His findings were consistent with his Chicago study: the perception of procedural justice plays a significant role in shaping the willingness of blacks, Hispanics, and "high risk" individuals to defer to authority.<sup>25</sup> His findings have not gone unnoticed. Several scholars—Tracey Meares, for example—have done interesting work in advocating the incorporation of legitimacy theory in approaches to crime control in minority communities.<sup>26</sup>

But legitimacy and compliance are only part of the equation. A separate question is the converse: can perceptions of illegitimacy contribute to non-compliance? This question is equally important.

### *B. Legitimacy and Increased Crime*

If the perception of legitimacy contributes to voluntary compliance with the law and social norms, does it follow that the perception of illegitimacy contributes to non-compliance? While the research in this area is in its nascent stages, clearly this makes intuitive sense. Indeed, Justice Brandeis argued as much in his oft-cited dissent in *Olmstead v. United States*: "If the Government becomes a lawbreaker, it breeds

22. *Id.* Tyler has identified three relational judgments as being important: neutrality, trustworthiness, and status recognition.

First, people react to the neutrality of the decision maker. This includes assessments of that person's evenhandedness, their lack of bias, and their willingness to make factual, objective decisions. Second, they react to their inferences about the trustworthiness of the decision maker's motives, that is, whether they believe that the authority is benevolent and caring. Finally, they react to the respectfulness of their treatment by the decision maker (i.e., the degree to which their status is recognized through polite treatment and respect for their rights).

Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 991 (2000).

23. As the Sentencing Project has recently noted, "one in three black males born today can expect to spend time in prison during his lifetime" as opposed to a one in seventeen chance for white males. MARC MAUER & RYAN S. KING, *UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 2* (2007), available at [http://sentencingproject.org/Admin/Documents/publications/rd\\_stateratesofinbyraceandethnicity.pdf](http://sentencingproject.org/Admin/Documents/publications/rd_stateratesofinbyraceandethnicity.pdf).

24. See generally Tyler, *supra* note 12.

25. Tyler, *supra* note 12, at 375–82.

26. See, e.g., Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391 (2000); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

contempt for law; it invites every man to become a law unto himself; it invites anarchy."<sup>27</sup>

Legal scholars have also assumed a link between perceptions of illegitimacy and increased crime. David Cole, for example, has long argued that the belief that the criminal justice system is unfair in fact contributes to lawbreaking.<sup>28</sup> James Forman has also made this argument.<sup>29</sup> Empirical support for this proposition, however, has been lacking.

Scholars such as Janice Nadler are now beginning the process of filling this empirical gap. Terming the perceived link between illegitimacy and non-compliance the "Flouting Thesis,"<sup>30</sup> Nadler conducted experiments in which she exposed individuals to instances of legal injustice and then measured their willingness to break the law in their everyday lives. For example, in one experiment, she provided participants with several news stories, three of which discussed proposed laws. Half of the participants were provided stories designed to elicit a perception that the proposed laws were just; the other half were provided stories designed to elicit a perception that the proposed laws were unjust.<sup>31</sup> Although the participants were told that researchers were interested in their emotional reactions to the quality of the writing and the style of journalism, upon reviewing the news stories, the participants were also asked to complete a questionnaire. Nadler designed the questionnaire to elicit the likelihood that participants would engage in a variety of petty crimes.<sup>32</sup> The results indicated that participants primed with stories designed to elicit an unjust perception of the law were significantly more willing to disregard the law or conventions in their own lives by parking illegally, copying unlicensed software, consuming grocery items without paying, and pocketing office supplies.<sup>33</sup>

Janice Nadler's research does have its limitations. Expressing a willingness to engage in petty crime does not necessarily translate into actually engaging in petty crime. Nor does expressing a willingness to engage in petty crime necessarily indicate a willingness to engage in more serious crime. These limitations aside, Janice Nadler's research does substantiate a converse legitimacy theory, as do other studies.<sup>34</sup> And

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27. 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

28. See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 171–72 (1999).

29. See generally James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 150 (Marc Mauer & Meda Chesney-Lind eds., 2002) (arguing that inner city youth respond to racial profiling and other undemocratic policing by disregarding authority).

30. Janice Nadler, *Flouting the Law*, 83 *TEX. L. REV.* 1399, 1401 (2005).

31. *Id.* at 1410–13. The "unjust" news stories discussed actual civil forfeiture laws, proposed income tax legislation, and proposed legislation to permit landlords to conduct warrantless searches of tenants' apartments. *Id.* at 1412–13. The first and third stories emphasized civil liberties concerns, while the income tax story emphasized the negative impact the proposed legislation would have on those in the middle class. *Id.* The "just" stories discussed the same proposed legislation, but were slanted to emphasize their positive and beneficial aspects. See *id.*

32. *Id.* at 1413–14.

33. *Id.* at 1414–15.

34. For example, a recent study of parking tickets issued to United Nations diplomats found



while Nadler's focus was on how individuals respond to unfair laws, there is reason to believe that a similar result would obtain in a study of responses to the unfair application of otherwise fair laws.<sup>35</sup>

The foregoing suggests that just as perceptions of legitimacy contribute to voluntary compliance with the law, perceptions of illegitimacy contribute to non-compliance. Or to put it more simply, there is a causal link between the perception of the law and levels of compliance. Unfortunately, the perception in many poor and minority communities is that the law, as exemplified by the police, is illegitimate, a perception that encourages non-compliance. This perception holds true of white and minority officers alike.<sup>36</sup> This Article contends that changing this perception will in fact lead to a reduction in crime. However, a prerequisite to changing this perception is understanding it. This task is taken up below.

## II. THE PERCEPTION OF LAW ENFORCEMENT AS ILLEGITIMATE

Allow a digression which, perhaps is not a digression at all: the O.J. Simpson case, which continues to engender controversy. A case ingrained in the public memory. The "live coverage" of the police chasing O.J. Simpson's Bronco in hot pursuit. The

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a correlation between the number of unpaid tickets run up by a diplomat and his country's views of U.S. laws. As one of the Columbia University researchers noted, "It's much easier to flout the law if you tell yourself that the government that is making these laws or enforcing these laws lacks legitimacy." See David B. Caruso, *Not-So-Friendly Diplomats Park Where They Please*, MIAMI HERALD, July 7, 2006, at 7A.

35. In the domestic violence context, for example, offenders who felt they were treated unfairly by the police were thirty-six percent more likely to be reported for subsequent acts of domestic violence against the same victim within six months. Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQ. 445, 463 (1993) (citing study); see also Raymond Paternoster, Robert Brame, Ronet Bachman, & Lawrence W. Sherman, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 176-82 (1997).

36. Minority officers are not beyond engaging in racial or class-based profiling, or testilying, or using excessive force, as the recent shooting of Sean Bell by minority officers demonstrates. One explanation for minority officer offending is that minorities internalize many of the negative perceptions of the dominant culture. Indeed, these internalized negative perceptions were evidenced in Kenneth Clark's "doll study," which was one impetus for the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). See Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 169-78 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947). More recent social cognition research confirms the persistence of internalized biases. Performance theory provides a second explanation. In short, to make themselves acceptable to fellow officers, minority officers "perform" as they believe majority officers would. For more on performance theory and how it rewards minorities who engage in assimilationist and "comfort strategies" to fit in, including strategies that are harmful to their minority group, see generally Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000). For an analogous argument in the gender context, see Ramit Mizrahi, Note, "Hostility to the Presence of Women": *Why Women Undermine Each Other in the Workplace and the Consequences for Title VII*, 113 YALE L.J. 1579, 1602-03 (2004). Third, employers are more likely to hire minority officers who are "racially palatable" and accept majority norms. For more on this phenomenon, see Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1792-93 (2003) (book review).

witness stand image of Mark Fuhrman, the cop who found the bloody glove, and who lied about making racist remarks.<sup>37</sup> O.J. Simpson himself, his hand squeezed too tightly in the aforementioned glove; and O.J. Simpson not himself, but darkened for the cover of *Time* magazine.<sup>38</sup> Nicole Simpson Brown's bruised and battered face. The look of shock, surprise, relief on Simpson's face when the jury, after 252 days of trial and less than five hours of deliberating, returned a not guilty verdict on all counts. And the repeated images of black jubilation over Simpson's acquittal, and the contrasting images of white anguish.

This reference to the Simpson case is not to weigh in on actual guilt or innocence. Rather, the Simpson case serves as an entry point for drawing attention to the chasm between black and white perceptions about the fairness of the criminal justice system in general.<sup>39</sup> Poll after poll showed that the majority of blacks believed Simpson to be innocent, and the majority of whites believed him to be guilty.<sup>40</sup> The trial and the polls also revealed to the public at large the view shared by many blacks and other minorities that the system itself is illegitimate and undemocratic, especially when it comes to the police, the most public face of the criminal justice system. This different view of the system was so significant that President Clinton addressed the matter,<sup>41</sup> as did former Attorney General Janet Reno. As she later noted during a speech on police misconduct, "[T]he perception of too many Americans is that police officers cannot be trusted . . . Especially in minority communities residents believe the police have used excessive force, that law enforcement is too aggressive, that law enforcement is biased, disrespectful, and unfair."<sup>42</sup> Again, this perception holds true of white and minority officers.

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37. Under oath, Fuhrman denied using the word "nigger" in the past decade. Audiotape recordings of Fuhrman using the word contradicted his denial. See Jeffrey Toobin, *A Horrible Human Event*, NEW YORKER, Oct. 23, 1995, at 40, 41-42.

38. *Time Magazine Darkens and Blurs O.J. Simpson Mug Shot*, ASSOCIATED PRESS, June 21, 1994; Howard Kurtz, *Time's 'Sinister' Simpson: Cover Photo Was Computer-Enhanced*, WASH. POST, June 22, 1994, at D1; see also Peter Arenella, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System—Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1258 (1996).

39. In fact, the acquittal of O.J. Simpson encapsulates the impact jurors' perceptions of illegitimacy can have on the outcome of criminal cases. Jurors who believe that officers lie under oath, for example, or plant evidence, are more likely to have reasonable doubt about the defendant's guilt. The police evidence is given less weight in light of their mistrust, and opposing evidence, such as the non-fitting glove in the Simpson case, is given more weight than it might otherwise receive.

40. For example, a Harris Poll dated February 11, 1995, found that sixty-eight percent of blacks believed Simpson was innocent while sixty-one percent of whites believed Simpson was guilty. See *Racial Split Grows on Guilt, Innocence of O.J., Poll Finds*, COM. APPEAL (Memphis), Feb. 11, 1995, at A2.

41. See Paul Richter, *Clinton to Address Split Reaction to Simpson Trial: Race Relations: President Says He's 'Very Concerned' About Apparent Racial Gulf*, L.A. TIMES, Oct. 11, 1995, at A4.

42. *Reno Urges Officers to Try to Regain Trust; Department to Gather Data on Police Brutality*, BALT. SUN, Apr. 16, 1999, at A7.

Consider a few other polls: a 2000 Gallup Poll found that sixty-four percent of blacks believe that the police treat blacks less fairly than whites.<sup>43</sup> Nearly a quarter of blacks indicate that they have very little confidence in the police.<sup>44</sup> And forty-two percent of blacks report that they are sometimes afraid they will be arrested for a crime they have not committed, as compared to sixteen percent of whites.<sup>45</sup> But where does this perception of illegitimacy come from?

What follows are a few of the sources. While several of these sources have been explored by scholars before, this Article goes a step further to reveal how these sources, all but one of which are ostensibly examples of over-enforcement, also serve as examples of under-enforcement when it comes to the police themselves. In other words, minorities and the poor are victimized twice: they are victims of over-enforcement, and also victims of a system that allows their victimizers to victimize with impunity, in short, to operate in a zone of under-enforcement. In addition, this Article demonstrates how these sites of illegitimacy also signal doctrinal gaps, or what this Article terms “responsiveness problems.”

#### A. Excessive Force

Perhaps nothing has tainted the image of the police—at least from the perspective of those “on the bottom,” to again borrow from Mari Matsuda—as much as highly publicized instances of excessive force and brutality. The videotaped images of several LAPD officers beating Rodney King with billy clubs, kicking him with their heels, stunning him with a 50,000-volt Taser “stun gun,”<sup>46</sup> and the initial acquittal of those officers on brutality charges by an all-white jury,<sup>47</sup> were enough to spark riots resulting in forty-four deaths and an estimated billion dollars in property damage.<sup>48</sup> Before Rodney King, there was the highly publicized beating death of Arthur McDuffie, an insurance salesman, in Miami.<sup>49</sup> And since Rodney King, the fatal beating of Nathaniel

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43. DAVID A. HARRIS, *PROFILES IN INJUSTICE* 119 (2002).

44. BUREAU OF JUSTICE STATISTICS, 2002 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 116 tbl.2.13 (2002).

45. *Id.* at 123 tbl.2.25; see also KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* 35 (1998) (discussing other related surveys).

46. See Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1; Hector Tobar & Richard Lee Colvin, *Witnesses Depict Relentless Beating; Police: Accounts of Rodney Glen King's Arrest Describe Repeated Striking and Kicking of the Suspect. LAPD Officers Said King's Actions Justified the Treatment*, L.A. TIMES, Mar. 7, 1991, at B1. As a result of this beating, King suffered eleven skull fractures, a crushed cheekbone, a broken ankle, and brain damage.

47. See Richard A. Serrano & Carlos V. Lozano, *Jury Picked for King Trial; No Blacks Chosen*, L.A. TIMES, Mar. 3, 1992, at A1. The officers were acquitted in state court, see *People v. Powell*, No. BA 035498 (Super. Ct. L.A. County 1991), but retried in federal court where two were convicted. Their sentencing departures were appealed to the Supreme Court, which affirmed in *Koon v. United States*, 518 U.S. 81, 81–84 (1996).

48. See Tom Mathews, *The Siege of L.A.*, NEWSWEEK, May 11, 1992, at 30.

49. McDuffie was beaten to death by several officers after he was cornered by police following a high-speed chase for an alleged traffic violation. The police initially reported that McDuffie's injuries were the result of McDuffie crashing his motorcycle during the chase, but

Jones in Cincinnati, also videotaped;<sup>50</sup> the police beating of Robert Davis in New Orleans, also videotaped;<sup>51</sup> the fatal shooting of Amadou Diallo in New York—forty-one shots, for attempting to identify himself by displaying his wallet;<sup>52</sup> the sodomizing of Abner Louima, with a broomstick, in New York;<sup>53</sup> the shooting deaths of two men and wounding of four others by New Orleans police during the immediate aftermath of Hurricane Katrina;<sup>54</sup> and the shooting death of Sean Bell by New York police the day before his wedding.<sup>55</sup>

Although there is no way to determine with mathematic certainty how widespread incidents of police brutality are,<sup>56</sup> the very fact that most victims of police brutality are

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later recanted this report. Based on the immunized testimony of three officers, five other officers were indicted on charges relating to McDuffie's death. Those officers were acquitted by an all-white jury, setting off riots that left eighteen people dead and an estimated \$100 million in property damage. See *Ex-Officer Tells Court of Role in Miami Cover-Up*, N.Y. TIMES, Dec. 13, 1980, at A11.

50. See Brenna R. Kelly, *Man Dies After Brawl with City Police Officers*, CINCINNATI ENQUIRER, Dec. 1, 2003, at 1A; Stephanie Simon, *City Tense After Death in Arrest*, L.A. TIMES, Dec. 2, 2003, at A22. At the time, Cincinnati was undergoing police reform efforts as part of a settlement of a federal investigation of its police practices pursuant to 42 U.S.C. § 14141 (2000), a provision allowing the federal government to monitor and combat systematic misconduct within local police departments.

51. The police beating of Davis, 64, was captured on videotape by an Associated Press Television News crew detailed in New Orleans following Hurricane Katrina and resulted in battery charges being filed against the officers for using excessive force. See Christine Hauser & Christopher Drew, *3 Police Officers Deny Battery Charges After Videotaped Beating in New Orleans*, N.Y. TIMES, Oct. 11, 2005, at A16.

52. Diallo, an unarmed immigrant from Guinea, was standing in the vestibule of his apartment building when he was shot by an all-white squad of the NYPD's street crime unit. See Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man is Killed*, N.Y. TIMES, Feb. 5, 1999, at A1; Amy Waldman, *A Hard Worker with a Gentle Smile*, N.Y. TIMES, Feb. 5, 1999, at B5.

53. Abner Louima was held down in a station house bathroom by a police officer while another officer rammed a broken broomstick in his rectum. Louima required three operations and two months of hospitalization. Officer Justin Volpe pleaded guilty to sodomizing Louima, and Officer Charles Schwarz was convicted by a jury of aiding in the assault. See David Barstow, *Officer, Seeking Some Mercy, Admits to Louima's Torture*, N.Y. TIMES, May 26, 1999, at A1; Joseph P. Fried, *Volpe Sentenced to a 30-Year Term in Louima Torture*, N.Y. TIMES, Dec. 14, 1999, at A1; Leonard Levitt, *The Louima Verdicts, Some Splits, but Blue Wall Stands*, NEWSDAY, June 9, 1999, at A4.

54. See Shaila Dewan, *Police Officers Charged in Deaths in Hurricane's Aftermath*, N.Y. TIMES, Dec. 29, 2006, at A18.

55. See William K. Rashbaum & Al Baker, *50 Bullets, One Dead, and Many Questions*, N.Y. TIMES, Dec. 11, 2006, at B1.

56. Findings by the NAACP, based on hearings conducted in minority communities across the country following the police beating of Rodney King, indicate that many minorities do not file formal complaints against officers out of fear of reprisal, or discouragement, or the belief that their complaints will not be believed. See CHARLES OGLETREE, JR., MARY PROSSER, ABBE SMITH, & WILLIAM TALLEY, JR., *BEYOND THE RODNEY KING STORY* 4–9 (1995). Studies by Human Rights Watch and Amnesty International confirm that police brutality is in fact widespread. See AMNESTY INT'L, *AI REPORT 1998: UNITED STATES OF AMERICA* (1998), <http://www.amnesty.it/Ailibtop/1996/AMR/2510-3696.htm>; HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES* (1998),

members of poor and minority communities<sup>57</sup> should be cause for concern, and contributes to the perception that the police are more likely to engage in force when dealing with a minority suspect than when dealing with a non-minority suspect, a perception for which there is evidentiary support.<sup>58</sup> Certainly, polls indicate that minorities consider police brutality more of a problem than whites.<sup>59</sup> In black and Hispanic communities in New York, for example, it is generally believed that officers would not have fired upon Amadou Diallo had he been white, an assumption supported by recent social cognition research examining implicit biases and the use of force.<sup>60</sup>

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<http://www.hrw.org/reports98/police/usp06.htm>. A study of Bronx residents reported that twenty-five percent of a cross-section of residents reported witnessing police brutality or harassment during an arrest. See James R. Davis, *A Comparison of Attitudes Toward the New York City Police*, 17 J. POLICE SCI. & ADMIN. 233 (1990).

57. Bureau of Justice Statistics from 1996, for example, show that black and Hispanics made up half of the documented cases of police brutality across the country, notwithstanding the fact that they represented only about twenty percent of the population. Roberto Suro, *Study Says Cops Used Force v. 500,000*, CHI. SUN-TIMES, Nov. 24, 1997, at 21; Mydans, *supra* note 46, at A1 (“Court documents from several misconduct cases show that nearly all the victims of maulings by Los Angeles police dogs in the last seven years were black or Hispanic—although whites committed nearly a third of the crimes in which dogs are usually deployed.”); see also NEW YORK CITY CIVILIAN COMPLAINT REVIEW BD., STATUS REPORT 66 (Jan.–June 2003) (noting that fifty-one percent of complainants alleging police misconduct between January and June 2003 identified themselves as black). For more on police brutality and race, see Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in POLICE VIOLENCE 129–49 (William A. Geller & Hans Toch eds., 1996).

58. There is evidence that police are more likely to use deadly force during encounters with minority suspects. Such evidence was brought to the Supreme Court’s attention in *Tennessee v. Garner*, 471 U.S. 1 (1985), in which the Court analyzed Fourth Amendment limitations on the use of deadly force. See Brief for Appellee-Respondent at 23–26, *Tennessee v. Garner*, 471 U.S. 1 (1985) (Nos. 83-1035, 83-1070) (citing statistical data showing “significant disparities in the use of deadly force based on the race of the shooting victim/suspect and that virtually all of this disparity occurs as a result of the Memphis policy that allows officers to exercise their discretion to shoot fleeing property crime suspects”).

59. For example, a poll released by the Joint Center for Political and Economic Studies found that forty-three percent of blacks believe police brutality and harassment are serious problems. Among the general public, only thirteen percent agree with this belief. See Michael A. Fletcher, *Study Tracks Blacks’ Crime Concerns: African Americans Show Less Confidence in System, Favor Stiff Penalties*, WASH. POST, Apr. 21, 1996, at A11. This is not to suggest that blacks are the only minority group victimized by police brutality. See, e.g., COMM. AGAINST ANTI-ASIAN VIOLENCE, POLICE VIOLENCE IN NEW YORK CITY’S ASIAN AMERICAN COMMUNITIES, 1986–1995, at 4–11 (1996) (noting the annual increase in reports of police violence against Asian Americans). Gays and lesbians, especially those of color and those who fail to conform to gender expectations, have also been the victims of police brutality.

60. Recent social cognition research supports the conclusion that racial schemas—racial meanings that are activated by racial categories we map onto individuals based on their racial group—play a role in the use of deadly force. For example, in social cognitionist Joshua Correll’s gun study, Correll and his colleagues asked participants to play a videogame in which they were tasked with determining whether a suspect was holding a gun or an innocuous object. The participants received points for shooting (in self-defense) the suspects brandishing guns; they lost points for shooting suspects who were unarmed. The study found that participants were more likely to shoot unarmed suspects who were black than unarmed suspects who were white and less likely to shoot armed suspects who were white than armed suspects who were black.

Beyond this research, the shooting of Timothy Stansbury, Jr., a black youth, supports this perception. On January 23, 2004, Stansbury was taking a shortcut across the rooftop of his building when he was fatally shot by a police officer who apparently was startled upon seeing a black youth on the roof.<sup>61</sup> That same day, the police responded to a call that an individual on a subway platform was brandishing a gun. The police who responded to the call were met with a barrage of gunfire when they attempted to confront the individual, Kevin Tester. Rather than returning fire, the police retreated, called for back up, and later talked Tester into surrendering. The police did not fire a single shot at Tester, a white male.<sup>62</sup> Community members duly noted the different results in these encounters that occurred on the same day.<sup>63</sup>

The point is not only that the use of excessive force and police shootings contribute to the perception of illegitimate over-enforcement, but that the use of excessive force simultaneously points to the corollary of under-enforcement when it comes to police offenders. The common perception is that the State is unlikely to bring indictments against officers. For example, the State did not bring an indictment against the officer who shot and killed Stansbury; his discipline from the police department was a mere thirty-day suspension and the surrender of his firearm.<sup>64</sup> Even when the government does bring indictments, such indictments rarely result in convictions. The initial acquittal of the officers charged in the Rodney King beating is the rule, not the exception. Even when the officers were retried on federal charges, only two of the four were convicted, and at sentencing the court granted their motions for sentencing departures, a decision the Supreme Court affirmed in part in *Koon v. United States*.<sup>65</sup> The officers in the Diallo shooting were acquitted of all charges.<sup>66</sup> Despite

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Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–19 (2002). Significantly, there was no correlation between shooter bias and explicit bias, as determined by a questionnaire to ascertain the participant's personal views about blacks. However, there was a correlation between shooter bias and implicit bias, as ascertained by the participant's assessment of how *other* whites viewed blacks. *Id.*; see also John A. Bargh, Mark Chen & Lara Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–239 (1996) (showing the automatic effect of the African American stereotype on social perception does not vary as a function of level of consciously expressed prejudice). For further discussion of these and other social cognition experiments suggesting the pervasiveness of implicit racial bias, and the resulting real-world consequences, see generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

61. See Sheryl McCarthy, *Once Again, Living While Black Proves Fatal*, NEWSDAY, Jan. 28, 2004, at A36. The officer who shot and killed Stansbury was not prosecuted. See Imani Henry, *Cop Goes Free in Stansbury Slaying*, WORKER'S WORLD, Mar. 4, 2004, at 3.

62. See Daryl Khan & Joshua Robin, *Cops Fired Upon, Make Arrest Without Firing*, NEWSDAY, Jan. 26, 2004, at A39.

63. Indeed, the different responses to black and white offenders continue to be discussed and debated. See, e.g., *The Brian Lehrer Show: Role of Race in Racism* (New York Public Radio broadcast Jan. 3, 2007).

64. See Daryl Khan, *Officer in 2004 Shooting is Given a 30-Day Suspension*, N.Y. TIMES, Dec. 31, 2006, at A25.

65. 518 U.S. 81, 113–14 (1996).

66. See Jane Fritsch, *4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1.

overwhelming evidence of complicity by other officers, only two officers were convicted of charges related to the sodomy of Louima. This suggests—and certainly contributes to the perception—that officers themselves operate in a zone of under-enforcement.

In addition, the use of excessive force and police shootings point to a doctrinal responsiveness problem. 42 U.S.C. § 1983, which ostensibly provides a cause of action against state actors for civil rights deprivations, has repeatedly proven inadequate to address problems of police brutality.<sup>67</sup> In *Rizzo v. Goode*,<sup>68</sup> the Supreme Court held that future acts of police brutality, regardless of past pervasiveness, were too speculative to warrant injunctive relief, a holding the Court essentially reaffirmed in *City of Los Angeles v. Lyons*.<sup>69</sup> Municipalities themselves are normally immune from civil liability—absent evidence of deliberate indifference to the risk of brutality.<sup>70</sup> In *Malley v. Briggs*,<sup>71</sup> the Court held that officers are entitled to qualified immunity so long as their actions are objectively reasonable. Under *Graham v. Connor*,<sup>72</sup> the amount of force officers are in fact entitled to use is construed “from the perspective of a reasonable officer on the scene,”<sup>73</sup> and as Cynthia Lee has observed, this is almost by definition a problematic standard.<sup>74</sup> And officers themselves, often judgment proof, are in any event usually indemnified by local authorities.<sup>75</sup> Thus, when there are costs, they tend to be borne by the taxpayers, not by the offenders.

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67. See generally Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1504–1514 (1993) (discussing the inability of private civil rights actions to curb urban police abuse); Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753 (1993) (discussing major weaknesses in § 1983 actions and the effectiveness of such actions in deterring police officers from overstepping the bounds of their power).

68. 423 U.S. 362, 379–80 (1976).

69. 461 U.S. 95, 112–13 (1983) (holding lower court lacked jurisdiction to entertain Lyons’s claim for injunctive relief barring the use of chokeholds by Los Angeles officers; prior use of chokeholds, including against Lyons, could not establish a real and immediate threat that police would again use a chokehold against Lyons personally). In 1994, Congress restored some potential for injunctive relief by enacting 42 U.S.C. § 14141 as part of the Violent Crime Control and Law Enforcement Act of 1994. It empowers the U.S. Attorney General to seek injunctive relief against police departments based on a pattern or practice of misconduct depriving persons of rights, privileges, or immunities secured by the Constitution. 42 U.S.C. § 14141 (2000). For more on the application of this provision, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 525–33 (2004).

70. See *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 415–16 (1997).

71. 475 U.S. 335, 344–46 (1986).

72. 490 U.S. 386 (1989).

73. *Id.* at 396.

74. CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 180 (2003) (noting that the reasonable man standard in excessive force cases can incorporate negative social attitudes, biases, and racial prejudice); see also Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994).

75. Armacost, *supra* note 69, at 473.

Criminal actions fare no better, in part due to the doctrinal hurdles the Supreme Court erected in *Screws v. United States*.<sup>76</sup> In *Screws*, which involved charges against a Georgia sheriff in connection with the beating death of a handcuffed black defendant, the Court read 18 U.S.C. § 242, which prohibits violence under color of law, as requiring proof that the defendant had “a specific intent to deprive a person of a federal right made definite by decision or other rule of law.”<sup>77</sup> Thus, in terms of courts, there is a responsiveness problem. All of this contributes to the perception of illegitimate and undemocratic policing.

### B. Racial Profiling

Many minority community members also believe that the police are more likely to target them than white community members for pretextual traffic stops, that is, investigative stops to search for drugs or other contraband, a practice the Supreme Court gave its imprimatur to in *Whren v. United States*.<sup>78</sup> Indeed, a Gallup Poll found that forty percent of blacks who had been pulled over for traffic stops believed that the police had targeted them because of their race.<sup>79</sup> The percentage is even higher when it comes to young black men: seventy-five percent believe they have been victims of racial profiling.<sup>80</sup> For these target groups, the perception is that being black or Hispanic alone carries a penalty: the taint of suspicion, the risk of a traffic stop, the risk of a canine sniff, the risk of a search. Or as Randall Kennedy argues, when it comes to citizen-police encounters, there is a “racial tax.”<sup>81</sup>

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76. 325 U.S. 91, 103 (1945). In *Screws*, a Georgia sheriff, along with two deputies, bludgeoned to death a handcuffed black man. When local authorities failed to investigate the killing, federal authorities stepped in and charged the sheriff with violating 18 U.S.C. § 242, which prohibits violence under color of law. However, the Supreme Court vacated the conviction, finding that the statute was impermissibly vague, and that to save the statute from unconstitutionality, a “specific intent to deprive a person of a federal right made definite by decision or other rule of law” must be read into the statute. On remand, the jury was presented with the same evidence, but this time instructed that they must find that the sheriff, in bludgeoning his handcuffed prisoner to death, had the specific intent to deprive the prisoner of a constitutional right. Faced with this hurdle, the jury acquitted. For more on the impact of *Screws*, see generally Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677 (1996) (addressing sentencing as a critical part of the criminal justice process that bears on police brutality); David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999) (attributing much of the difficulty in prosecuting police brutality to the overwhelming power of the stories mainstream American culture tells about the encounters leading to police violence).

77. *Screws*, 325 U.S. at 103.

78. 517 U.S. 806, 819 (1996).

79. See HARRIS, *supra* note 43, at 119–20.

80. See Will Lester, *Most in Poll Think Police Racially Profile Motorists*, ARIZ. REPUB., Dec. 11, 1999, at A1 (citing Gallup poll finding that seventy-three percent of young black males believe they have been targeted by the police because of their race).

81. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159 (1997). None of this is to suggest that racial profiling is a new phenomenon. As other scholars have pointed out, racial profiling dates back to the 1700s and the slave patrols of that period. See generally SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001) (examining the



This perception also has factual support. A report by the Maryland State Police found that African Americans comprised 72.9% of all of the drivers that were stopped and searched along a stretch of Interstate 95, even though they comprised only 17.5% of the drivers violating traffic laws on the road.<sup>82</sup> And while race-based policing is usually justified, at least by those who engage in it, on the grounds that minorities are more likely to be engaged in criminal activity,<sup>83</sup> the evidence from traffic stops does not bear this out. The Maryland Report found that the hit rates for blacks who had been stopped and searched was in fact statistically identical to the hit rates for whites who had been stopped and searched: the hit rate for when officers searched black motorists was 28.4%; the hit rate when officers searched white motorists was 28.8%.<sup>84</sup> The results of a study conducted by the New Jersey State Police in 2000 are even starker. The New Jersey study found that blacks and Hispanics comprised seventy-eight percent of the motorists stopped and searched. In terms of hit rates, the troopers found evidence of criminal activity in thirteen percent of their searches of black motorists, and in five percent of their searches of Hispanic motorists. By contrast, when officers searched white motorists, they found evidence of criminal activity twenty-five percent of the time.<sup>85</sup> Similar studies in other jurisdictions have produced similar data.<sup>86</sup>

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public regulation of slavery in Virginia and the Carolinas by focusing on slave patrols during the period 1700 to 1865); ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURES, 1789–1868* (2006) (exploring the history of the Fourth Amendment during slavery and Reconstruction); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meanings, 602–1791*, at 432–54 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (available through UMI Dissertation Services) (discussing statutory searches and seizures in the Southern Colonies to the year 1760).

82. See *Wilkins v. Md. State Police*, Civil No. MJG-93-468 (D. Md. 1993); see also David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 563–66 (1997). The report found that 93.3% of the drivers on Interstate 95 were violating traffic laws and thus were eligible to be stopped by the State Police. Of the violators, 17.5% were black, and 74.7% were white. See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 350 (1998) (quoting expert report of Dr. John Lambert); Michael Schneider, *State Police I-95 Drug Unit Found to Search Black Motorists 4 Times More Often Than White*, BALT. SUN, May 23, 1996, at B2.

83. In New Jersey, for example, the superintendent of the New Jersey State Police justified targeting minority motorists with the claim that minorities were responsible for most of the drug trade. See Joe Donohue, *Trooper Boss: Race Plays Role in Drug Crimes—but He Says Race Is a Factor in Drug Crimes*, STAR-LEDGER (Newark, N.J.), Feb. 28, 1999, at A1.

84. See HARRIS, *supra* note 40, at 80.

85. *Id.*; see also John Lamberth, *Driving While Black; A Statistician Proves that Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C1; Michael Raphael & Kathy Barrett Carter, *State Police Reveal 75% of Arrests Along Turnpike Were of Minorities*, STAR-LEDGER (Newark, N.J.), Feb. 10, 1999, at 1.

86. See, e.g., Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 677–79 (2002) (finding that a study of traffic stops revealed racial imbalance indicative of profiling); Kathleen Gorman, *Avon Police Target Black, Hispanic Drivers, Report Says*, HARTFORD COURANT, Apr. 13, 1994, at A1 (noting practice of targeting blacks and Hispanics in Avon, Connecticut and that the supervising sergeant had instructed his officers to find a reason to stop black and Hispanic motorists); Joseph Neff & Pat Stith, *Highway Drug Unit Focuses on Blacks*, NEWS & OBSERVER (Raleigh, N.C.), July 28, 1996, at A1 (finding a particular squad of the North Carolina Highway Patrol targeted blacks for pretextual stops); Roger Roy & Henry Pierson Curtis, *When Cops Stop*

Racial profiling is not merely limited to those in cars. Studies have shown that black women are targeted for searches when flying.<sup>87</sup> And a disproportionate number of blacks and Hispanics are subjected to stops while simply walking, a problem which the Supreme Court touched on without directly addressing in *Kolender v. Lawson*.<sup>88</sup> For example, NYPD citywide stop and frisk data between 1998 and 2000 revealed that eighty-four percent of the individuals stopped and frisked in New York City were black or Hispanic.<sup>89</sup> Between 1997 and 1998, NYPD's elite street crime unit conducted nearly 40,000 frisks that revealed no contraband at all.<sup>90</sup> Most troubling,

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*Blacks, Drug Search Often Follows: Orange County Deputies Deny Race Plays a Role in Stops on the Turnpike, but Some Police Officials Agree Blacks Have a Right to Be Unhappy*, ORLANDO SENTINEL, June 8, 1997, at A1 (finding that the Criminal Patrol Unit of the Orange County Sheriff's Office was six and a half times more likely to search black motorists than white motorists); Brian M. Trotta, *Report: Avon Police Targeted Minorities; Internal Probe Supports Ex-Officer's Discrimination Claims*, HARTFORD COURANT, Nov. 22, 1994, at A1. For more on the pretextual stops of Hispanics, see generally Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000) (discussing racial profiling broadly as the use of race to develop an understanding of an individual).

87. A report released by the U.S. General Accounting Office found that black women traveling internationally were nine times more likely than white women to be subjected to x-rays or strip searches by U.S. Customs officials, even though they were less than half as likely to be carrying contraband. Such targeting prompted a class action suit against officials. See John Gibeaut, *Marked for Humiliation*, 85 A.B.A. J. 46 (1999); *Black Women Searched More, Study Finds*, N.Y. TIMES, Apr. 10, 2000, at A17; David Johnston, *U.S. Changes Policy on Searching Suspected Drug Smugglers*, N.Y. TIMES, Aug. 12, 1999, at A14.

88. 461 U.S. 352 (1983). In *Kolender*, the defendant was arrested on fifteen separate occasions for violating a California statute requiring persons who loiter or wander on the streets to provide "credible and reliable" identification and to account for their presence when requested by a police officer. The Supreme Court held that the statute was unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment because it failed to clarify what is contemplated by "credible and reliable identification" and thus encouraged arbitrary enforcement. *Id.* at 360-62. Although never discussed in the Supreme Court's opinion, in fact, the defendant was a law-abiding black male with a penchant for evening strolls. See also Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990) (arguing that the substantial discretion given to police officers in their confrontations with citizens has severely restricted the liberty to walk the streets and move about the country free from government intrusion).

89. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 523 (2003) (citing NEW YORK CITY POLICE DEPT., CITYWIDE STOP AND FRISK DATA 1998, 1999, AND 2000 (2001)). More recent data are equally dire. Reports released in February 2007 of New York Police Department Citywide Stop and Frisk Data 2006 reveal that blacks and Hispanics continue to be stopped in numbers grossly disproportionate to their representation in the general public. Of the 508,540 reported stops in 2006, 55% were black, 30% were Hispanic, and 11% were white. Christopher Dunn, *Civil Rights and Civil Liberties: NYPD Stops and Frisks and the Fourth Amendment*, N.Y.L.J., Feb. 27, 2007, at 3. Similar findings have been made in other jurisdictions. See, e.g., Tim Roche & Constance Humburg, *Stops Far Too Routine for Many Blacks*, ST. PETERSBURG TIMES (Fla.), Oct. 19, 1997, at 1A.

90. See David Kocieniewski, *Success of Elite Police Unit Exact a Toll on the Streets*, N.Y. TIMES, Feb. 15, 1999, at A1; Greg B. Smith, *NYPD Hit on Stop-&-Frisk Report: Minorities Targeted*, N.Y. DAILY NEWS, Dec. 1, 1999, at 3.

these rates for blacks and Hispanics remain disproportionately high even when numbers are adjusted to reflect higher offending rates in particular neighborhoods.<sup>91</sup>

Regardless of whether this race-based policing is intentional or not, there is the continuing perception, supported by evidence, that police treat citizens differently based on their race.<sup>92</sup> Indeed, often the activities of the police seem unimaginable against whites. In discussing the police beating of a black motorist for driving with a suspended license, *New York Times* columnist Bob Herbert put it this way: “[T]he charge was driving with a suspended license. This was not John Gotti the cops had in custody. But then, Gotti would never have been treated like that.”<sup>93</sup> The black driver’s injury resulted in permanent paralysis from the neck down. Or as an article in *Essence* magazine declared while discussing racial profiling generally: “despite the decades of enormous Black success and achievement, police continue to view Black skin itself as ‘probable cause.’”<sup>94</sup>

As with the use of excessive force, the pervasiveness of race-based profiling suggests both over-enforcement and under-enforcement. Over-enforcement with respect to the targets of profiling; under-enforcement with respect to the perpetrators of profiling. Profiling also signals a responsiveness gap. Quite simply, the law, for the most part, fails to protect individuals who are the victims of profiling and fails to ensure democratic policing. So long as police claim targeting is not based on race alone, courts tend to treat the action as beyond the purview of the Equal Protection Clause.<sup>95</sup> Moreover, after *United States v. Armstrong*, the complainant must show not

91. See Kevin Flynn, *Racial Bias Shown in Police Searches, State Report Asserts*, N.Y. TIMES, Dec. 1, 1999, at A1 (citing New York State Attorney General report which shows higher search rates of blacks and Hispanics, even when numbers are adjusted to reflect higher crime rates in some minority communities). Since 9/11, individuals who appear Middle Eastern, Arab, or Muslim have also faced disproportionate questioning, detention, and suspicion. See Andrea Elliott, *After 9/11, Arab-Americans Fear Police Acts, Study Finds*, N.Y. TIMES, June 12, 2006, at A15. For more on the targeting of people who appear Middle Eastern, Arab, or Muslim, see Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1578–80 (2002).

92. See Andy Alford & Tony Plohetski, *Traffic Stop Data Hint at Racial Bias—Austin Police Numbers Show Minorities More Likely to Be Searched, Whites More Likely to Have Contraband*, AUSTIN AMERICAN-STATESMEN (Tex.), Mar. 16, 2003; Jack Ludwig, *Americans See Racial Profiling as Widespread*, GALLUP POLL TUESDAY BRIEFING, May 13, 2003.

93. Bob Herbert, *Savagery Beyond Sense*, N.Y. TIMES, Oct. 18, 1996, at A37.

94. Les Payne, *Up Against the Wall; Black Men and the Cops*, ESSENCE, Nov. 1992, at 134; see also Ann Belser, *Suspect Black Men Are Subject to Closer Scrutiny from Patrolling Police, and the Result Is Often More Fear, Antagonism Between Them*, PITT. POST-GAZETTE, May 5, 1996, at A15 (discussing stop and search policies in Homestead, Pa.); Charles N. Jamison, Jr., *Racism: The Hurt That Men Won’t Name*, ESSENCE, Nov. 1992, at 63 (discussing the particularly demoralizing impact of racism on black men).

95. See e.g., *United States v. Avery*, 137 F.3d 343, 350–52 (6th Cir. 1997) (rejecting statistics showing that blacks were disproportionately targeted and finding that because the officers had a plausible, non-rationally based decision for detaining the defendant, defendant’s equal protection claim could not be sustained); *United States v. Weaver*, 966 F.2d 391, 394–96 (8th Cir. 1992) (permitting race as a factor in profiling so long as other factors are present); see also *Bingham v. City of Manhattan Beach*, 329 F.3d 723, 731–32 (9th Cir. 2003) (affirming summary judgment because appellant failed to provide any evidence sufficient to counter officer’s testimony that the traffic stop was not race-motivated); *Johnson v. Crooks*, 326 F.3d 995, 999–1000 (8th Cir. 2003) (denying relief because plaintiff could not provide affirmative

only a discriminatory effect but also discriminatory purpose to make out a claim of discriminatory enforcement<sup>96</sup> This doctrinal requirement is of course unresponsive to the concerns raised by critical race scholars of unconscious racism and implicit biases.<sup>97</sup>

### C. Under-Enforcement on the Streets

The use of excessive force and racial profiling are clear examples of how over-enforcement and under-enforcement converge and reinforce one another, thus contributing to the perception of law enforcement illegitimacy. The targets of excessive force and racial profiling, the majority of whom are innocent of any wrongdoing, are victims of over-enforcement. At the same time, the officers who target them benefit from under-enforcement, since their actions more often than not go unchecked.

The next source for the perception of law enforcement illegitimacy is less intuitive than profiling or excessive force, and does not involve over-enforcement against minorities and the poor at all. Rather, it involves a type of under-enforcement—what this author terms “under-enforcement on the streets” for the purpose of clarity—with respect to poor and minority victims of crime.

As Alexandra Natapoff has recently shown, poor and minority communities can suffer simultaneously from over-enforcement (for example, when it comes to profiling) and under-enforcement (when it comes to the allocations of resources to respond to crime).<sup>98</sup> Members of these communities are again victimized twice, but this time differently. They are victims of under-enforcement to the extent that law enforcement is under-responsive to crime in their communities, and they are victims again to the extent that the law provides no recourse to remedy this under-enforcement.

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evidence of discrimination to counter the officer’s justification for the traffic stop); *Bradley v. United States*, 299 F.3d 197, 205–07 (3d Cir. 2002) (requiring plaintiff to prove customs officials had a discriminatory effect and were motivated by a discriminatory purpose). Mounting a successful equal protection claim is made even more difficult by the fact that courts have accepted racial incongruity, for example, the presence of a black person in a white neighborhood, as a constitutionally permissible ground for an encounter or limited detention. For more on the high standard of proof required to sustain a viable racial profiling claim under the Fourth Amendment, see generally Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *FORDHAM L. REV.* 2257 (2002).

96. 517 U.S. 456, 465 (1996) (rejecting claim of race-based selective prosecution and demand for discovery). *Armstrong* has since been applied to claims of race-based selective enforcement. *See, e.g.*, *United States v. Bullock*, 94 F.3d 896, 899 (4th Cir. 1996); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996). For a critique of *Armstrong*’s intent-based test, see Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 42–50 (1998).

97. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987) (reconsidering the doctrine which requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law’s enactment or administration).

98. Natapoff, *supra* note 8, at 1722–1744.

Further elaboration is in order. For a host of reasons, crime perpetrators are often imagined as black or Hispanic,<sup>99</sup> and crime victims as white.<sup>100</sup> In reality, four-fifths of violent crimes are intraracial.<sup>101</sup> Whites are nearly six times more likely to be murdered by another white than by a minority.<sup>102</sup> Similarly, most victims of crimes committed by black and Hispanic perpetrators are black and Hispanic themselves. As of 2002, for example, blacks were victims of rape at a rate more than three times that of whites, and victims of robbery at a rate more than twice that of whites.<sup>103</sup> Blacks were also victims of property crimes at a higher rate.<sup>104</sup> Accordingly, Randall Kennedy has argued that “the principal injury suffered by African-Americans in relation to criminal matters is not over-enforcement but under-enforcement of the laws.”<sup>105</sup> The concomitant problem is that police are often less diligent in responding to crimes committed in minority and poor neighborhoods and devote fewer resources to solving crimes against minorities and the poor, a socio-legal normative phenomenon that Alexandra Natapoff addresses.<sup>106</sup> Research certainly confirms that “police seem to offer less service to victims (they are less prone to offer assistance to residents and less likely to file incident reports)” in minority communities as compared to “higher status neighborhoods with lower crime rates.”<sup>107</sup> This “under-enforcement on the streets” is endemic and must be addressed. The point here though is to focus on how “under-

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99. See Armour, *supra* note 74, at 787 (“[I]t is unrealistic to dispute the depressing conclusion that, for many Americans, crime has a black face.”); see generally Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375 (1997) (asserting that social psychological theories of social stereotyping are used to generate a series of predictions about the conditions under which whites’ stereotypes of blacks are likely to bias their evaluations of blacks in the context of crime). Part of this is also based on societal priming. For example, it is four times more likely that local news will show a mug shot of the accused when the accused is black rather than white, two times more likely that local news will show the accused physically restrained when the accused is black rather than white, and two times less likely that local news will show the name of the accused when the accused is black rather than white. See generally ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* (2000) (examining the intricate patterns of racial depiction in the mass media and how those patterns shape ambivalent attitudes of whites toward blacks).

100. D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 499 (1993) (“[C]riminals are stereotyped as black and the innocent victims are stereotyped as white.”).

101. See KENNEDY, *supra* note 81, at 19.

102. See U.S. DEP’T OF JUST., *CRIME IN THE UNITED STATES 2004*, at 18 tbl.2.7 (2004).

103. BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002*, at 191 tbl.3.4 (2002).

104. *Id.* at 204, tbl.3.25.

105. KENNEDY, *supra* note 81, at 19. Of course, historically, it was white on black crime that was usually ignored, as Randall Kennedy details in his examination of the failure to protect slaves from assault, rape, and murder in the antebellum South, *id.* at 30–36; the failure to protect blacks from lynchings during Reconstruction and the Jim Crow era, *id.* at 36–63; and the failure to seek justice against perpetrators of racially motivated murders, assaults, bombings, and beatings during the Civil Rights movement, *id.* at 63–69.

106. See generally Natapoff, *supra* note 8.

107. Sara E. Stoutland, *The Multiple Dimensions of Trust in Resident/Police Relations in Boston*, 38 J. RES. CRIME & DELINQ. 226, 231 (2001).

enforcement on the streets” contributes to the perception of undemocratic and hence illegitimate policing. Specifically, the perception is that whites generally benefit from more responsive law enforcement, whether it is the speed with which the police respond to a 9-1-1 call, or the number of officers assigned to a case, or having a police department offer a cash reward for information.<sup>108</sup> Furthermore, this disparity in police response to crime has the expressive effect of “send[ing] an official message of dismissal and devaluation.”<sup>109</sup>

This is ostentatiously true in high profile cases, where media attention also influences the allocation of police resources.<sup>110</sup> For example, Susan Brownmiller, in her analysis of newspaper coverage of rape, found that “although New York City police statistics showed that black women were more frequent victims of rape than white women, the favored victim in the tabloid headline . . . was young, white, middle class and ‘attractive.’”<sup>111</sup> The Central Park jogger case is but one example.<sup>112</sup> The case dominated the media for months. In fact, there were 3,254 other reported rapes that year, including “one the following week involving the near decapitation of a black woman in Fort Tryon Park and one two weeks later involving a black woman in Brooklyn who was robbed, raped, sodomized, and thrown down an air shaft of a four story building.”<sup>113</sup> These rapes, however, were simply not newsworthy. This attention to white female victims of crime and comparative inattention to black female victims of crime only fuels the perception prevalent in poor and minority communities that, when it comes to receiving protection, minority victims simply are not as important as nonminority victims.<sup>114</sup> It is relatively easy to summon the names of white female

108. Cheryl Harris has persuasively written about whiteness itself as having a kind of property value, as having its own currency, its own cachet:

In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed sought to attain—by fraud if necessary. Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law. Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.

Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1713–14 (1993) (footnote omitted).

109. Natapoff, *supra* note 8, at 1479.

110. See Michael Brick, *Awaiting Verdict, Victim's Family Feels 2003 Killing Is Eclipsed Again*, N.Y. TIMES, Mar. 23, 2006, at B1 (noting that it is “almost redundant to say,” but allocation of police resources has to do with “social status, wealth and race”).

111. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

112. Indeed, the Central Park jogger case also signals a zone of under-enforcement. Several youths were wrongly convicted based on their false confessions. The officers who obtained those false confessions, however, suffered no consequences, and thus continue to operate in a zone of under-enforcement. I thank Laura Appleman for this observation.

113. JOAN DIDION, *AFTER HENRY* 255 (1992).

114. See Derrick K. Baker, *Many Black Women Are Missing – And So Is Media Coverage For Them*, AUGUSTA CHRONICLE (Ga.), Sept. 2, 2005, at A5; Jessica Heslam, *Media Frenzy Absent in this Brutal Story*, BOSTON HERALD, May 5, 2006, at 4; Erin Teixeira, *An Unconscious*

victims: Nicole Simpson Brown, Natalee Holloway, Elizabeth Smart, Laci Peterson, and Chandra Levy.<sup>115</sup> Even though black women are several times more likely to be victims of crime, their victimization often remains invisible. More significantly, just as increased media attention results in an increase in police resources, this under-attention by the media to crimes against minority victims translates into a reduced allocation of resources deployed to respond to such crimes. This in turn increases the perception of undemocratic policing.

As with the use of excessive force and profiling, this under-enforcement on the streets also signals a doctrinal gap and a responsiveness problem. Simply put, in a society of negative rights,<sup>116</sup> minority members and other politically vulnerable groups that receive unequal protection from law enforcement have little recourse. Put simply, absent proof of intentional racial discrimination, or other unconstitutional basis for discrimination, the deployment of resources, including police resources, in unequal measure is not actionable.<sup>117</sup> Because of a doctrinal failure, jurisdictions can continue to deploy resources disproportionately. All of this contributes to the perception of illegitimate policing.

#### D. The Courts

What this Article has attempted to do is set forth just some of the sources for the perception that the police themselves lack legitimacy. Unfortunately, one of the consequences of this perception is that many residents of high-crime communities—the communities where we are most in need of community-police cooperation—“have come to see the police as just another gang,”<sup>118</sup> an occupying force.<sup>119</sup> Tellingly, this perception is supported not only by polls and the work of other scholars, but also by

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*Bias*?, RICHMOND TIMES DISPATCH (Va.), June 20, 2005, at A4 (“To be blunt, blond white chicks who go missing get covered, and poor, black, Hispanic or other people of color who go missing do not get covered.”); *Women of Color Ignored in Media Coverage of Missing Women, Girls*, MEDIA REP. TO WOMEN, Apr. 1 2005, available at 2005 WL 8936837.

115. It is perhaps telling that the black females who come to mind are Tawana Brawley and the accuser in the Duke Lacrosse team rape case, both famously discredited as non-victims.

116. The negative rights theory to constitutionalism, which the Supreme Court has repeatedly endorsed, holds that the state is under no constitutional obligation to provide services to its polity. See Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1010–11 (1996) (describing the “negative liberties” approach to constitutionalism).

117. Cf. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 198–203 (1988) (holding that the state could not be held liable in a failure to protect case, since nothing in the due process clause requires the state to protect citizens against private actors); see also *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 768–79 (2005) (“[T]he Fourteenth Amendment . . . did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented.”); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1280–87 (1999) (describing traditional view that police protection is immune from due process claims).

118. David K. Shipler, *Living Under Suspicion*, N.Y. TIMES, Feb. 7, 1997, at A33.

119. See generally CHARLES J. OGLETREE, JR., CRIMINAL JUSTICE INST. AT HARVARD LAW SCH., NAACP & WILLIAM MONROE TROTTER INST., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES (1995).

those members of the “black CNN,”<sup>120</sup> hip hop artists and stand-up comics. From Jay-Z rapping about overzealous cops in “99 Problems”<sup>121</sup> to N.W.A. rapping about police brutality in “Fuck the Police”<sup>122</sup> to Public Enemy proclaiming “911 Is a Joke.”<sup>123</sup> From Chris Rock’s satiric self-help video “How to Not Get Your Ass Kicked by the Police”<sup>124</sup> to Dave Chappelle’s comedic routine about the advantages of driving while white.<sup>125</sup>

This Article focuses on the police more than other arms of justice for a reason. The police, more than the courts, more than the legislature, and more than prosecutors, are the public face of the law.<sup>126</sup> But this does not mean that courts are excluded from

120. Chuck D of the rap group Public Enemy coined this phrase in the 1980s. Public Enemy – Biography, [http://www.hiponline.com/artist/music/p/public\\_enemy/index.html](http://www.hiponline.com/artist/music/p/public_enemy/index.html).

121. In “99 Problems,” Jay-Z raps about being pulled over by the cops because “I’m young and I’m black and my hat’s real low,” though the cop claims it is because he is doing “fifty-five in a fifty-four.” When the cop tries to conduct a search, Jay-Z asserts his rights, leading to the title of the song:

Well my glove compartment is locked so is the trunk and the back  
 And I know my rights so you gon’ need a warrant for that  
 “Aren’t you sharp as a tack, you some type of lawyer or somethin’?  
 Or somebody important or somethin’?”  
 Nah I ain’t pass the bar but i know a little bit  
 Enough that you won’t illegally search my shit  
 “We’ll see how smart you are when the K-9 come”  
 I got 99 Problems but a bitch ain’t one.

JAY-Z, *99 Problems*, on THE BLACK ALBUM (Def Jam Records 2003). The lyrics have been featured on the Volokh Conspiracy law blog, and are available at [http://volokh.com/archives/archive\\_2004\\_12\\_19-2004\\_12\\_25.shtml](http://volokh.com/archives/archive_2004_12_19-2004_12_25.shtml).

122. Lyrics include:

Young nigga got it bad cuz I’m brown  
 And not the other color so police think  
 They have the authority to kill a minority  
 Fuck that shit, cuz I ain’t tha one  
 For a punk muthafucka with a badge and a gun  
 To be beatin on, and throwin in jail  
 We could go toe to toe in the middle of a cell  
 Fuckin with me cuz I’m a teenager  
 With a little bit of gold and a pager  
 Searchin my car, lookin for the product  
 Thinkin every nigga is sellin narcotics

N.W.A., *Fuck tha Police*, on STRAIGHT OUTTA COMPTON (Ruthless/Priority 1988) (lyrics available at <http://www.lyricsdepot.com/n-w-a/fuck-tha-police.html>).

123. PUBLIC ENEMY, *911 Is a Joke*, on FEAR OF A BLACK PLANET (Def Jam Records 1990).

124. *The Chris Rock Show: How to Not Get Your Ass Kicked by the Police* (HBO 2002), available at <http://www.ifilm.com/ifilm/detail/2458063>.

125. *Dave Chappelle: Killin’ Them Softly* (HBO 2000).

126. For example, one of the recurring complaints in minority communities in the 1990s concerned the devastating impact the 100 to 1 crack/cocaine ratio was having on communities of color. See, e.g., STEVEN B. DUKE & ALBERT C. GROSS, AMERICA’S LONGEST WAR 12–26 (1994) (discussing impact of war on drugs and crack/cocaine disparity on certain minority groups). However, while the legislature was responsible for this ratio, and prosecutors were responsible for prosecuting these cases, law enforcement officers were seen as the ones



criticism. As discussed previously, doctrinal gaps signal responsiveness problems, for the most part denying recourse to victims of profiling, excessive force, and street under-enforcement. If the police are often perceived, especially in poor and minority communities, as an occupying force, the courts are often perceived as an enabling force.<sup>127</sup>

As an illustration of this point, consider *Terry v. Ohio*.<sup>128</sup> In *Terry*, the Court considered for the first time whether a person could be detained in the absence of probable cause to believe that he had committed a crime. On its face, such a seizure seemed to violate the clear language of the Fourth Amendment. However, acknowledging rising crime rates, the Court held that as long as an officer had specific and articulable facts, that is, reasonable suspicion, to believe that “criminal activity may be afoot,”<sup>129</sup> the Fourth Amendment permitted a limited detention and questioning of the person. Expressing concern for the safety of officers,<sup>130</sup> the Court also went a step further: If the officer also had reasonable suspicion that a person was armed and dangerous, the officer could couple the limited detention and questioning with a pat down for weapons—in common parlance, a stop and frisk.<sup>131</sup>

responsible for arrests and for the rise in incarceration rates.

127. Lindsay N. Kendrick, *Alienable Rights and Unalienable Wrongs: Fighting the “War on Terror” Through the Fourth Amendment*, 47 *How. L.J.* 989, 1031 (2004) (“If citizens feel that members of the community are wrongfully targeted by the police and that there is no recourse in the courts, it may appear that the branches of government are working together—law enforcement acts according to bias and the courts condone it.”).

128. 392 U.S. 1 (1968).

129. *Id.* at 30.

130. As the Court put it:

We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.

*Id.* at 23. The Court went on to note that “every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.” *Id.* That police safety was crucial to Chief Justice Warren’s thinking in *Terry* is also documented in two biographies. See ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 466–68 (1997); BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 686 (1983).

131. In fact, Chief Justice Warren’s majority opinion paid only cursory attention to the authority of officers to engage in stops. Rather, the crux of the Court’s opinion dealt with the authority of officers to engage in frisks. The Court adopted the following standard for frisks where probable cause is lacking:

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or “hunch,” but to the specific

Interestingly, the Warren Court explicitly recognized that stop and frisk practices, which the police had engaged in for years,<sup>132</sup> were not race-neutral, and were likely to have a disproportionate impact on disadvantaged groups. Indeed, both Terry and his codefendant were black,<sup>133</sup> though the Court's opinion elides this fact. Moreover, the Court implicitly acknowledged that as a consequence of its decision, this disproportionate impact on disadvantaged groups would continue. In a nutshell, the Warren Court balanced the need of law enforcement officers to engage in aggressive police tactics to root out crime against the right of minority communities to be free from race-based practices. And poor communities as well. The simple fact is that police also treat individuals differently based on their perceived status in society, which status is often determined by class. Studies confirm, for example, that police officers are significantly less likely to search vehicles driven by those with above-average incomes than vehicles driven by those with below-average incomes.<sup>134</sup> With the scale calibrated this way, law enforcement won. And though this is still debated,<sup>135</sup>

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reasonable inferences which he is entitled to draw from the facts in light of his experience.

*Terry*, 392 U.S. at 27 (citation omitted).

132. John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 758 (1998).

133. See Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 729 (1998). Perhaps not surprisingly, the arresting officer could not say what initially attracted his attention to Terry and his companion—he described them as two Negroes—other than to say that he “just didn't like ‘em.” *Id.* at 730 (quoting Detective McFadden). For an argument that traces the Court's insensitivity to racial targeting in *United States v. Whren* to the Court's tactical decision to minimize the issue of race in *Terry v. Ohio*, see Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

134. See, e.g., Donald T. Campbell & H. Laurence Ross, *The Connecticut Crackdown on Speeding: Time-Series Data in Quasi-Experimental Analysis*, 3 LAW & SOC'Y REV. 33 (1968); Patrick T. Kinkade & Matthew C. Leone, *The Effects of “Tough” Drunk Driving Laws on Policing: A Case Study*, 38 CRIME & DELINQ. 239 (1992); Stephen D. Mastrofski & R. Richard Ritti, *You Can Lead a Horse to Water . . . : A Case Study of a Police Department's Response to Stricter Drunk Driving Laws*, 9 JUST. Q. 465 (1992). Of course, disaggregating status from race from class is often difficult. The civil rights activist Bayard Rustin noted as much in describing New York's stop and frisk law, which had been implemented in the 1960s pre-*Terry*:

Whatever its provisions or its purposes, this law is a nefarious example of class legislation, for its effect is to permit harassment of the poor. No police are going to stop and frisk well-dressed bankers on Wall Street—but they don't hesitate to stop well-dressed Negro businessmen in Harlem and go through their attaché cases. That kind of brusque police action is reserved for the poor and minorities like Negroes and Puerto Ricans.

NAT'L CTR. ON POLICE & CMTY. RELATIONS, A NATIONAL SURVEY OF POLICE AND COMMUNITY RELATIONS 18 (1967) (quoting Bayard Rustin).

135. Dan Kahan and Tracey Meares, for example, have argued that the institutionalized racism that prompted our existing criminal procedure regime is a thing of the past, and that what is needed now is a regime that allows police more discretion—such as was allowed in *Terry*—not less. Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998). Dorothy Roberts, on the other hand, argues for a return to criminal procedure safeguards to combat race-based policing. Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. LAW & CRIMINOLOGY 775 (1999).

many believe minorities and the poor lost. Which is why scholars such as Tracey Maclin and Adina Schwartz<sup>136</sup> have criticized the trade-off the Court sanctioned in *Terry* and its impact on disadvantaged communities.

But this is not the only way the Court enabled police to engage in discriminatory practices. The Court also enabled police by endorsing an amorphous category short of probable cause called "reasonable suspicion." This category is so malleable that reasonable suspicion is often reconfigured into to whatever a law enforcement officer wants it to be at any given moment. Or to borrow from Justice Thurgood Marshall, articulating reasonable suspicions is little more than a "'chameleon-like way of adapting to any particular set of observations.'"<sup>137</sup> This is especially true when it comes to profiling, where race is always present, even if unstated. Justice Marshall's string cite of cases in which a suspect matched one of the DEA's profiles speaks volumes:

Compare, e.g., *United States v. Moore*, 675 F.2d 802, 803 (CA6 1982) (suspect was first to deplane), with *United States v. Mendenhall*, 446 U.S. 544, 564 (1980) (last to deplane), with *United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 (CA2 1980) (deplaned from middle); *United States v. Sullivan*, 625 F.3d 9, 12 (CA4 1980) (one-way tickets), with *United States v. Craemer*, 555 F.2d 594, 595 (CA6 1977) (round-trip tickets), with *United States v. McCaleb*, 552 F.2d 717, 720 (CA6 1977) (non-stop flight), with *United States v. Sokolow*, 808 F.2d 1366, 1370 (CA9 1987), vacated, 831 F.2d 1413 (CA9 1987) (changed planes); *Craemer, supra*, at 595 (no luggage), with *United States v. Sanford*, 658 F.2d 342, 343 (CA5 1981) (gym bag), with *Sullivan, supra*, at 12 (new suitcase); *United States v. Smith*, 574 F.2d 882, 883 (CA6 1978) (traveling alone), with *United States v. Fry*, 622 F.2d 1218, 1219 (CA5 1980) (traveling with companion); *United States v. Andrews*,

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136. E.g., Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1278 (1998) ("One of the flaws of *Terry* was that this shift [to a reasonableness standard rather than a probable cause standard] was implemented without a full examination of the consequences for blacks and other disfavored persons . . . [and] provided a springboard for modern police methods that target black men and others for arbitrary and discretionary intrusions. . . . For this reason alone, the result in *Terry* deserves censure."); Adina Schwartz, "Just Take Away Their Guns": *The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317, 365-73 (1996) (summarizing studies of the impact of *Terry* on minority communities); see also Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk,"* 50 OKLA. L. REV. 451 (1997) (concluding that *Terry* and its progeny have resulted in discriminatory practices against blacks).

137. *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (quoting *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987)). Randall Kennedy makes a similar point in discussing race and reasonable suspicion:

Reasonableness, then, is not a definite, arithmetic, objective quality that is independent of aims and values. It is a concept that is considerably more subtle, complex, malleable, and mysterious than the simplistic model of decision making relied upon by those who accept at face value the "reasonableness" or "rationality" of conduct that not only expresses controversial moral and political judgments but that also deep-seated, perhaps unconscious, affections, fears, and aversions.

KENNEDY, *supra* note 81, at 144-45.

600 F.3d 563, 566 (CA6 1979) (acted nervously), with *United States v. Himmelwright*, 551 F.2d 991, 992 (CA5 1977) (acted too calmly).<sup>138</sup>

To make matters worse, the Court continued this implicit sanctioning of race-based practices in *Whren v. United States*,<sup>139</sup> in which the Court rejected a Fourth Amendment challenge to a pretextual car stop designed to search for drugs and other contraband. In *Whren*, the defendants, who had caught the attention of vice-squad officers of the D.C. Metropolitan Police Force, were pulled over after the officers observed them turn without first signaling. The vice-squad officers apparently saw this as an opportunity to conduct a stop, and perhaps secure a consent search.<sup>140</sup> As things turned out, a consent search was unnecessary since one of the officers testified that when he approached the vehicle after pulling it over, he “immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren’s hands.”<sup>141</sup> The occupants later challenged their arrest on the ground that the stop was

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138. *Sokolow*, 490 U.S. at 13–14.

139. 517 U.S. 806 (1996).

140. Again, perhaps I’m being overly generous, or just naïve, in speculating that the officers hoped to secure consent. It’s possible that they planned to order the driver out of the car, which officers have an automatic right to do under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), and then observe a bulge, permitting them to frisk the driver under *Terry*. Or even conduct a frisk without seeing a bulge, simply because they were black men in a Pathfinder. After all, in *United States v. Michelletti*, 13 F.3d 838 (5th Cir. 1994) (en banc), the Fifth Circuit upheld a frisk of a man with an open can of beer in one hand and his other hand in his pocket, reasoning:

[The officer’s] concern for his safety, dramatized by the recent loss of his friend [a fellow officer killed in the line of duty], is hardly groundless in this day and age.

The number of officers killed annually in the line of duty has tripled since *Terry* was decided; the numbers of those assaulted and wounded have risen by a factor of twenty. Surely the constitutional legitimacy of a brief patdown . . . may and should reflect the horrendously more violent society in which we live, twenty-five years after *Terry*.

*Id.* at 844 (footnote omitted). Or maybe the officers planned to arrest the driver and occupant, thus allowing them to conduct a search of their persons, as a search incident to arrest, see *United States v. Robinson*, 414 U.S. 218 (1973), and the interior of the car as the “grab area,” see *New York v. Belton*, 453 U.S. 454 (1981). Of course, afterwards, the officers could search the rest of the Pathfinder as an inventory search. See *Colorado v. Bertine*, 479 U.S. 367 (1987). Or in the alternative, the police could have simply detained the driver under *Terry* until a canine dog could be brought over, since canine sniffs of vehicles don’t require a warrant, *United States v. Place*, 462 U.S. 696 (1983), and *Terry* itself does not contain a time limit. *United States v. Sharpe*, 470 U.S. 675 (1985). And if the dog alerted, the officers would probably have enough to conduct a warrantless search of the car under the *Carroll* doctrine. *Carroll v. United States*, 267 U.S. 132 (1925). Or maybe the officers hoped the occupants would toss any contraband out of the car, thus abandoning any Fourth Amendment interest in the contraband. The possibilities are endless. Indeed, the Court has given officers so much leeway—sometimes explicitly, sometimes by merely looking the other way—that Justice Stevens has lamented the Court has become “a loyal foot soldier in the Executive’s fight against crime.” *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

141. *Whren*, 517 U.S. at 809. The story of the officers is a story in itself. Both officers have been the subject of repeated misconduct allegations, including allegations of planting evidence, providing false testimony, and using excessive force. For more on their story, including one

pretextual and based solely on the fact that they were black men in a Pathfinder. Justice Scalia, writing for the Court, rejected this argument, and concluded that so long as the stop itself was based on an actual traffic violation, the subjective motivation of an officer in singling out a particular motorist is irrelevant under the Fourth Amendment.<sup>142</sup> By so holding, the Court essentially green-lighted the police practice of singling out minorities for pretextual traffic stops in the hope of discovering contraband, a practice that was repeated, without comment from the Court, in the recent case of *Illinois v. Caballes*.<sup>143</sup> A practice that minorities know as being penalized for driving while black, driving while brown.

As Tracey Maclin,<sup>144</sup> David Harris,<sup>145</sup> and Devon Carbado<sup>146</sup> have well documented, these race-based encounters in turn are often fraught with intimidation, harassment, and disrespect. The Court, as enabling these practices, thus becomes "law as microaggression."<sup>147</sup>

None of this is good for criminal justice, let alone for reducing crime. To borrow from Angela Davis, "When people of color experience injustices that are tolerated and even sanctioned by courts and other criminal justice officials, they develop distrust and disrespect for the justice system."<sup>148</sup> And this has significant consequences for levels of crime that exist in communities.

### III. ILLEGITIMACY AND TESTIFYING

#### *A. Illegitimacy and Small Rebellions*

As discussed in Part II, the Court in *Terry v. Ohio* acknowledged that its decision was likely to have a disproportionate impact on disadvantaged communities. It also

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officer's subsequent indictment on perjury charges, see Kevin R. Johnson, *The Story of Whren v. United States: The Song Remains the Same*, at 20–21, in *RACE AND THE LAW STORIES* (Devon Carbado & Rachel F. Moran eds., 2006).

142. *Whren*, 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). The Court expressly left open the possibility that such discriminatory conduct might be sanctionable under the Equal Protection Clause. *Id.* But see David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271. This, however, amounted to an empty gesture given the hurdles the Court has erected to frustrate equal protection claims. For more on these hurdles, see Wayne R. LaFave, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1860–61 (2004).

143. 543 U.S. 405 (2005). Officers ostensibly pulled over Caballes, a Hispanic male, for driving seventy-one miles per hour in a sixty-five miles per hour speed zone, and used the traffic stop as an opportunity to conduct a canine sniff of the vehicle. The Court held that the canine sniff did not require reasonable suspicion. *Id.* at 409.

144. *E.g.*, Maclin, *supra* note 82.

145. *E.g.*, David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 679–81 (1994).

146. *E.g.*, RACE AND THE LAW STORIES, *supra* note 141.

147. I borrow this term from Peggy Davis who uses it to describe the ways in which minorities are often perceived in the legal system, which in turn has led many minorities to view the legal system as biased. Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1576 (1989).

148. Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 442 (1997).

recognized the larger negative impact this disparate treatment might have on crime overall. Allowing the police more discretion to conduct stops and frisks, and hence engage in discriminatory treatment, came with a risk: that those most discriminated against would respond not with submission or deference, but with civil unrest. Thus, at a certain level, the Warren Court was aware of the relationship between legitimacy and crime. As the Court noted in two footnotes:

While the frequency with which “frisking” forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the “stop and frisk” of youths or minority group members is “motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.”<sup>149</sup>

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We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.<sup>150</sup>

Although scholars have interpreted the second footnote differently, what seems clear is that Chief Justice Warren was concerned about civil unrest and violence. The period leading up to the Court’s decision in *Terry* saw not only the assassinations of President John F. Kennedy and Dr. Martin Luther King, but repeated rioting in urban centers.<sup>151</sup> That many of the riots were reactions against mistreatment by the police did not escape the Court. In fact, it could be argued that Chief Justice Warren was simply articulating delicately what his law clerk, in a memo concerning the NAACP Legal Defense and Educational Fund, Inc.’s amicus brief to the court, had put more bluntly. That memo asserted in the clearest terms possible that “the power of the police on the basis of suspicion to interfere with an individual’s freedom of movement and right of privacy . . . [is] not unconnected with the rioting which has plagued the Nation’s cities in recent years.”<sup>152</sup> Moreover, just three months prior to the Court’s ruling in *Terry v. Ohio*, the Kerner Commission released its findings on the causes of recent urban

149. *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968) (citation omitted).

150. *Id.* at 17 n.14.

151. See, e.g., *Looting . . . Arson . . . Death . . . As Riots Swept U.S. Cities*, U.S. NEWS & WORLD REP., Apr. 15, 1968, at 10; *Mobs Run Wild in the Nation’s Capital*, U.S. NEWS & WORLD REP., Apr. 15, 1968, at 8; *Widespread Disorders*, N.Y. TIMES, Apr. 5, 1968, at 1. For a more thorough discussion of the “long hot summers” of riots in the years leading up to *Terry*, see STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 158–69 (1997).

152. See Barrett, *supra* note 132, at 771.

riots.<sup>153</sup> Their findings were unambiguous and to the point: hostility between the police and minority communities was not only a contributing factor to urban unrest and violence—in some places, it was the sole factor. As the Commission put it, “Negroes firmly believe that police brutality and harassment occur repeatedly in Negro neighborhoods. This belief is unquestionably one of the major reasons for intense Negro resentment against the police.”<sup>154</sup>

The Warren Court was well aware of these events,<sup>155</sup> and cited the findings of an earlier commission, the President’s Commission on Law Enforcement and Administration of Justice, in its decision.<sup>156</sup> On its face, then, *Terry* was concerned about a potentially extreme consequence of its decision: civil unrest and disobedience through violence.

In one respect, the Warren Court saw not only the small picture (the immediate disparate treatment minorities would continue to face) but the large picture (the potential for civil unrest). In another respect, however, the Warren Court may have been blind to the other ramifications of its *Terry* decision in particular and of police practices in general. I say this for two reasons. First, the practice of discriminatory stops was, and continues to be, only one of many sources of distrust of the police in poor and minority communities. This is not to suggest that discriminatory stops are insignificant. Far from it. Much discontent, especially from law-abiding members of poor and minority communities, can be traced to discriminatory stops. After all, as the driving-while-black studies demonstrate, most of the minorities targeted by the police

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153. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter KERNER COMMISSION REPORT].

154. *Id.* at 302. A prior commission reached a similar conclusion to the Kerner Commission, finding that:

Misuse of field interrogation . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt “aggressive patrol” in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident. The Michigan State survey found that both minority group leaders and persons sympathetic to minority groups throughout the country were almost unanimous in labeling field interrogation as a principle problem in police community relations.

U.S. PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

155. As described by Earl Dudley, the law clerk who worked for Chief Justice Warren on *Terry v. Ohio* and its companion cases, the historical setting of *Terry* played a significant role. There was the backdrop of the Civil Rights movement, opposition to the Vietnam War, and, just two months before *Terry* was decided, the outbreak of riots in many cities, including Washington, D.C. In addition, the Court had repeatedly come under attack for championing individual rights at the expense of law enforcement. Moreover, the Court had become a target during the 1964 presidential campaign, and was expected to become a target again in the 1968 campaign. Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court, and the Fourth Amendment: A Law Clerk’s Perspective*, 72 ST. JOHN’S L. REV. 891, 892–93 (1998). For more on the attacks on the Court during this period and the political climate at the time, see FRED P. GRAHAM, THE SELF-INFLICTED WOUND 8–15 (1970).

156. *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968).

are in fact law-abiding citizens penalized simply for having the “wrong” skin color.<sup>157</sup> But discriminatory stops are only one aspect of discriminatory policing.

Second, the Warren Court was blind to the larger ramification insofar as the only non-compliance it imagined was further rioting, something akin to the riots that occurred in Los Angeles in 1992 following the acquittal by an all-white jury of officers charged with beating Rodney King. But of course non-compliance can take more subtle forms, and one of the ambitions of this Article is to impress that when there is a failure of legitimacy—for example, when the police themselves operate in and benefit from a protective zone of under-enforcement—there are smaller rebellions. Not assisting the police by providing information about a crime. Disregarding jury duty, or serving but voting to acquit a guilty defendant to send a message about police practices. Disregarding the law. Believing laws exist to be broken. And while the possibility of a big rebellion is obviously cause for concern, society should also be concerned with these small rebellions. After all, it is these small rebellions that lead to higher crime levels. And higher crime levels in turn impact economic levels and civic involvement.

Is there evidence that the perception of illegitimacy leads to small rebellions? Consider the following. Recall the fatal shooting of Amadou Diallo, an unarmed immigrant from Guinea, by an all-white squad of the NYPD’s street crime unit in February 1999. At the time, crime in New York City was on the decline.<sup>158</sup> But a review of crime trends during the first quarter of 1999 reveals a month-long spike in crime across the board following the Diallo shooting,<sup>159</sup> then a resumption of a decline in crime following the officers’ indictment on murder charges.<sup>160</sup> Their acquittal in February 2000 is also interesting—again, another spike in crime, this time lasting several months.<sup>161</sup> And while there are many possible explanations for this pattern, certainly one is that there is a correlation between the perception of legitimacy and levels of crime.

Again, the point is that the perception of illegitimacy may result in an increase in crime overall. Which means that, to the extent crime reduction is a goal, one place to begin is law enforcement legitimacy.

New York City began this process with its Courtesy, Professionalism, and Respect campaign in 1996, supplemented in 1999, following the Diallo shooting, with courtesy

157. See *supra* note 79 and accompanying text.

158. Andy Newman, *Crime Rate in New York City Fell 8 Percent in Early '99*, *F.B.I. Says*, *N.Y. TIMES*, Nov. 22, 1999, at B5.

159. See CRIME ANALYSIS UNIT, OFFICE OF MANAGEMENT ANALYSIS AND PLANNING, STATISTICAL REPORT, COMPLAINTS AND ARRESTS 6 (2001) [hereinafter STATISTICAL REPORT]. While the police attributed this spike to a downturn in aggressive patrolling after the Diallo shooting, critics dismissed this explanation noting, among other things, that the level of patrolling could not explain a spike in domestic violence arrests, or that the greatest spike occurred in Brooklyn, not the Bronx where the Diallo shooting occurred. See Kevin Flynn, *Experts Wonder if Crime Drop Is Near End*, *N.Y. TIMES*, Dec. 12, 1999, at A1; Kevin Flynn, *Rebound in City Murder Rate Puzzling New York Officials*, *N.Y. TIMES*, Nov. 5, 1999, at A1.

160. STATISTICAL REPORT, *supra* note 159, at 6; see also David Barstow, *After Officers' Indictment in Diallo Case, Arrests Drop in New York City*, *N.Y. TIMES*, May 6, 1999, at B3 (noting number of arrests in April 1999 fell to 30,134 from 35,813 in March 1999).

161. STATISTICAL REPORT, *supra* note 159, at 6.



cards, little reminders to officers to act courteously.<sup>162</sup> This was a step in the right direction, and crime rates have generally dropped since the NYPD initiated the program. Still, the program is arguably mostly cosmetic. Legitimacy theory suggests that crime rates could drop even more if substantive changes were made.

This of course begs the question of where to begin. After all, as discussed in Part II, there are numerous reasons for the perception that police officers benefit from a double standard, are unfair, and are biased. To change how those in high crime communities perceive the police, all of these sources of perceived illegitimacy, from those that may seem innocuous (such as cops, including off-duty cops, getting a pass when they violate the traffic laws without justification)<sup>163</sup> to those that truly shock the conscience (such as sodomizing Abner Louima), must eventually be addressed. Moreover, the realm of policing as a zone of complete under-enforcement should end. This requires a paradigm shift in how society treats law enforcement officers who cross the line, as well as doctrinal changes both large and small.

### *B. Beginning the Paradigm Shift*

In the remainder of this Article, I hope to begin this process of changing how society responds to law enforcement wrongdoing by narrowing my focus to one area of illegitimacy. It is the area this Article opened with, an area that often signals over-enforcement against civilians, particularly minorities and others politically disadvantaged, as well as under-enforcement against police officers: testilying.

There are several reasons to begin with testilying. First, testilying undergirds other areas where there is the perception of illegitimacy. Police brutality persists, at least in part, because officers are aware that they can misrepresent the truth with impunity.<sup>164</sup> And racial profiling thrives, at least in part, because officers know they can misrepresent their motives for conducting stops without consequences.<sup>165</sup> This suggests that a reduction in testilying might have the collateral effect of contributing to a reduction in brutality and profiling.

The second reason for beginning with testilying is that, relatively, it is an easier fix. As demonstrated above, there are a plethora of doctrinal hurdles that make eradicating the use of excessive force and racial profiling difficult. Some scholars—Richard Banks comes to mind—have even argued that racial profiling is so ingrained that it cannot be eradicated.<sup>166</sup> These hurdles are considerably fewer and lower when it comes to testilying, a point this Article expands upon in Part III.C.

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162. Michael Cooper, *Cue Cards Offered to Remind Officers of Good Manners*, N.Y. TIMES, Apr. 7, 1999, at A1.

163. This occurs more frequently than many realize. See, e.g., David Kidwell & Dan Keating, *Cops and Crashes: The Unwritten Rule*, MIAMI HERALD, Oct. 13, 1996, at A1 (examining crash reports involving officers and finding that police departments almost never ticket their own officers, even when they are clearly at fault).

164. See INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 9–15 (1991).

165. Perhaps for this reason, Tracey Maclin has described perjury as “part and parcel of the process used to deny black motorists their substantive rights under the Fourth Amendment.” See Maclin, *supra* note 82, at 381–82.

166. R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L.

There is a third reason to begin with testifying: the relative ease in building consensus. The line between legitimate use of force and excessive force is often a gray one; racial profiling, however publicly maligned, is often privately tolerated; and there are legitimate reasons for allocating police resources unequally. As such, it may be difficult to build consensus around curbing excessive force, profiling, or under-enforcement on the streets. Testifying, by contrast, tends to be more uniformly condemned. Indeed, independent of the utilitarian argument put forward in this Article for reducing testifying, there is another, more fundamental argument: testifying is morally wrong. As such, it should be easier to unite legislators, courts, and the bar in addressing testifying in a meaningful way.

Finally, there is another reason to begin with testifying. Testifying implicates not only those who engage in it, but those who permit it to exist. As ministers of justice, prosecutors—the attorneys who are positioned to enable testifying—have a duty to truth.<sup>167</sup> Their role is not only to prosecute the guilty, but to protect the innocent. Indeed, as the Court made clear in *Mooney v. Holohan*,<sup>168</sup> a prosecutor violates due process when she knowingly introduces false testimony: “[D]eliberate deception of court and jury by the presentation of testimony known to be perjured . . . is . . . inconsistent with the rudimentary demands of justice.”<sup>169</sup> Due process is also violated when a prosecutor fails to correct false testimony.<sup>170</sup> Moreover, a host of ethical rules prohibit prosecutors from knowingly introducing false testimony. Rule 3.4(b) of the American Bar Association’s Model Rules of Professional Conduct provides that “[a] lawyer shall not . . . counsel or assist a witness to testify falsely.”<sup>171</sup> Similarly, Standard 3-5.6(a) of the American Bar Association Standards Relating to the Administration of Criminal Justice, The Prosecution Function, provides that a prosecutor “should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.”<sup>172</sup> Combating testifying is not only the utilitarian and practical thing to do, but also the right and ethical thing to do.

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REV. 571 (2003) (arguing that policymakers should abandon efforts to eliminate racial profiling because such efforts will prove futile, and should focus on addressing the race-related consequences of the practice).

167. *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The prosecutor’s] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); *see also* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 3-1.2(c) (3d ed. 1993); MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); MODEL CODE OF PROF’L RESPONSIBILITY EC 7–13 (1981).

168. 294 U.S. 103 (1935); *see also* *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942) (holding allegation of knowing use of perjured testimony sufficiently charged a deprivation of due process rights).

169. *Mooney*, 294 U.S. at 112.

170. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (“[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.”)

171. MODEL RULES OF PROF’L CONDUCT R. 3.4(b) (1998).

172. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 3-5.6(a) (3d ed. 1993).

### C. *The Pervasiveness of Testilying*

Officers telling “white lies”—or what this Article terms “blue lies”—is nothing new. Indeed, blue lies have existed as long as there have been restraints on police activity. Consider, for example, how the police responded to the Supreme Court’s decision in *Mapp v. Ohio*.<sup>173</sup> Prior to *Mapp*, the police for the most part could violate the Fourth Amendment without jeopardy to a criminal case; the remedy for a defendant whose rights had been violated, absent state protections, was a suit in trespass for damages, or in replevin for the return of items seized. The Supreme Court changed that with *Mapp* and imposed an exclusionary rule, previously applicable only in federal cases,<sup>174</sup> on the states: evidence seized in violation of the Fourth Amendment would henceforth be excluded. Officers responded to *Mapp* not only by criticizing it; they also circumvented it by manipulating the facts and telling blue lies. All of a sudden, there were more “dropsy” cases. Instead of the evidence being found on the suspect, it had been dropped by the suspect, and hence abandoned, making it admissible notwithstanding *Mapp*. Just a few years after the Court decided *Mapp*, Irving Younger, a former prosecutor and criminal court judge, described the sea change this way:

Before *Mapp*, the policeman typically testified that he stopped the defendant for little or no reason, searched him, and found narcotics on his person. This had the ring of truth. It was an illegal search . . . but the evidence was admissible . . . . Since it made no difference, the policeman testified truthfully. After the decision in *Mapp*, it made a great deal of difference. For the first few months, New York policemen continued to tell the truth about the circumstances of their searches, with the result that the evidence was suppressed. Then the police made the great discovery that if the defendant drops the narcotics on the ground, after which the policeman arrests him, then the search is reasonable and the evidence is admissible. Spend a few hours in the New York City Criminal Court nowadays, and you will hear case after case in which a policeman testifies that the defendant dropped the narcotics on the ground, whereupon the policeman arrested him. Usually the very language of the testimony is identical from one case to another.<sup>175</sup>

Other observers also noted the sharp rise in dropsy cases following *Mapp*,<sup>176</sup> which again suggests that perjury, or telling blue lies, is not new. To borrow from Morgan Cloud, perjury “is a national problem and has been for decades.”<sup>177</sup>

173. 367 U.S. 643 (1961).

174. In *Weeks v. United States*, 232 U.S. 383 (1914), the Court held for the first time that the Fourth Amendment barred the use at trial of evidence secured through an unlawful search or seizure. However, its decision, which was based essentially on the Court’s supervisory power over federal courts, was limited at the time to federal prosecutions.

175. Irving Younger, *The Perjury Routine*, NATION, May 8, 1967, at 596–97.

176. Michael Juviller, another prosecutor, reached the same conclusion:

Before *Mapp*, the gamblers and addicts would have the contraband in their mouths or on their persons, and this stuff was seized from the suspects’ mouths or waistbands, but in 1961, after *Mapp*, the criminal community started much more than before to drop these items to the ground, abandoning them and obviating [the need for] probable cause.

Michael R. Juviller, *A Prosecutor’s Perspective*, 72 ST. JOHN’S L. REV. 741, 742–43 (1998). The

Nor is perjury any real secret. In the early 1970s, the Knapp Commission investigated the NYPD and concluded that corruption was causing officers to testify falsely and prepare false investigative reports.<sup>178</sup> Two decades later, the Mollen Commission was impaneled to study the same problem: police corruption in the NYPD. Not only did the Mollen Commission find that perjury was still a problem, but also it found that “the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: ‘testilying.’”<sup>179</sup> The Mollen Commission also identified perjury as “probably the most common form of police corruption facing the criminal justice system,” especially in drugs and weapons cases.<sup>180</sup> The Commission found a litany of manufactured tales:

For example, when officers unlawfully stop and search a vehicle because they believe it contains drugs or guns, officers will falsely claim in police reports and under oath that the car ran a red light (or committed some other traffic violation) and that they subsequently saw contraband in the car in plain view. To conceal an unlawful search of an individual who officers believe is carrying drugs or a gun, they will falsely assert that they saw a bulge in a person’s pocket or saw drugs and money changing hands. To justify unlawfully entering an apartment where officers believe narcotics or cash can be found, they pretend to have information from an unidentified civilian informant or claim they saw the drugs in plain view after responding to the premises on a radio run. To arrest people they suspect are guilty of dealing drugs, they falsely assert that the defendants had drugs in their possession when, in fact, the drugs were found elsewhere where the officers had no lawful right to be.<sup>181</sup>

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increase in “dropsy” cases is also discussed in Note, *Effect of Mapp v. Ohio on Police Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 94–96 (1968). Empirical data confirms the increase in “dropsy” cases following *Mapp*. See Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960–62*, 4 CRIM. L. BULL. 549, 549–50 (1968).

177. Morgan Cloud, *Judges, “Testilying,” and the Constitution*, 69 S. CAL. L. REV. 1341, 1347 (1996).

178. COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE CITY’S ANTI-CORRUPTION PROCEDURES, THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 83–84, 96–97 (1972) [hereinafter KNAPP COMMISSION REPORT].

179. This term was apparently coined by police officers. See MOLLEN COMMISSION REPORT, *supra* note 6.

180. *Id.*

181. *Id.* at 38. This is not to suggest that testilying does not exist in other situations. As others have mentioned, testilying also occurs in the interrogation context. See H. RICHARD UVILLER, *TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR’S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE* 116 (1988); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1038–39 (1996). An officer might manipulate the truth as far as the timing of when he administered *Miranda* warnings, or whether he scrupulously honored a suspect’s invocation of the right to counsel as required by *Edwards v. Arizona*, 451 U.S. 477 (1981), or right to silence as required by *Michigan v. Mosley*, 423 U.S. 96 (1975). In the alternative, an officer might lie about whether he conveyed any threats or promises that might implicate due process concerns. Finally, an officer might tell blue lies about the substance of a statement, especially as to what facts were offered by the suspect as opposed to suggested by the officer, which is one reason why false statements are often difficult to uncover. Finally, officers might tell blue lies in the context of whether and how consent was obtained, one of the

Blue lies are so pervasive that even former prosecutors have described them as “commonplace”<sup>182</sup> and “prevalent.”<sup>183</sup> Surveyed prosecutors, defense attorneys, and judges believed perjury was present in approximately twenty percent of all cases.<sup>184</sup> A separate survey of police officers was even more sobering. Seventy-six percent of responding officers agreed that officers shade the facts to establish probable cause; forty-eight percent believed judges were often correct in disbelieving police testimony.<sup>185</sup> Alan Dershowitz maintains that “almost all” officers lie.<sup>186</sup> And as *Restrepo*—the case this Article opened with—demonstrates, perjury continues to be a problem.

The long-term consequences to a society that fosters a culture where blue lies are tolerated should give everyone cause for concern. As the Mollen Commission noted, “When the police lose their credibility, they significantly hamper their own ability to fight crime and help convict the guilty.”<sup>187</sup> Again, the Simpson case is instructive. Immediately following the Mark Fuhrman revelation, a study of prospective jurors in New York found across-the-board skepticism about police testimony.<sup>188</sup> As Michael Vecchione, the Deputy in Charge of Trials in the Brooklyn District Attorney’s Office put it, “Our prosecutors now have to begin their cases defending the cops. Prosecutors have to bring the jury around to the opinion that cops aren’t lying. That’s how much the landscape has changed.”<sup>189</sup>

The reluctance of jurors to credit police testimony and resulting acquittals may be the least of our problems. This is because legitimacy theory suggests that the less legitimate police appear to be, the less likely it is that citizens will voluntarily comply

issues Judge Weinstein found problematic in *United States v. Restrepo*, 890 F. Supp. 180 (E.D.N.Y. 1995).

182. Younger, *supra* note 175, at 596.

183. UVILLER, *supra* note 181, at 116.

184. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992).

185. Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050–51 & n.129 (1987).

186. ALAN M. DERSHOWITZ, *THE BEST DEFENSE*, at xxi (1982) (“Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.”); *see also* Alan Dershowitz, *Controlling the Cops: Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17 (discussing widespread police perjury in New York City).

187. MOLLEN COMMISSION REPORT, *supra* note 6, at 36.

188. *See* Joe Sexton, *Jurors Question Honesty of Police*, N.Y. TIMES, Sept. 25, 1995, at B3. The comments from prospective jurors ranged from the assessment that “‘depending on what’s at stake, the police will lie,’” to the sentiment that officers would now have to prove they were telling the truth. *Id.* As one prospective juror put it, she would listen to an officer’s testimony, but now reserve judgment until she had determined “‘just how bogus a story he was telling.’” *Id.*

189. *Id.*; *see also* David Kocieniewski, *Perjury Dividend—A Special Report: New York Pays a High Price for Police Lies*, N.Y. TIMES, Jan. 5, 1997, at A1 (noting, among other things, the difficulty of finding jurors who believe police accounts and that the resulting distrust is especially acute in minority communities); Clifford Krauss, *Bratton Announces Plan to Train Officers to Testify*, N.Y. TIMES, Nov. 15, 1995, at B3 (noting that the “perception that police officers make false arrests, tamper with evidence and commit perjury has led to scores of acquittals . . . [and] was reinforced during the O.J. Simpson trial, when [Detective Fuhrman] was found to have boasted about tampering with evidence and lying in court to win convictions”).

with the law and with social norms of behavior. Indeed, illegitimacy, or more specifically the perception of illegitimacy, not only reduces voluntary compliance. It signals and induces non-compliance. For many, the perception of illegitimacy means one thing: If the police break the law, so can I. This might help explain the correlation between communities where the police are perceived to function outside of the law and communities that have high crime rates. Clearly, our response to testifying needs rethinking. The next section attempts to do just that.

#### *D. Testifying: A Modest Proposal*

To date, the proposed remedies for police abuses have focused on disciplinary actions, either internal or external, and civil actions. Robert Batey, for example, has argued that the best way to remedy police abuses is through internal police disciplinary reform.<sup>190</sup> More recently, Judge Keenan of the Southern District of New York has advocated a slight variation: external discipline based on a sliding scale of penalties.

If the police are misbehaving to the degree suggested . . . why could not a system be devised whereby, depending upon the seriousness of the constitutional violation by the police, the individual officer could be penalized? The penalty could range all the way from dismissal from the force, the most extreme, through fines, down to loss of vacation time, or merely a reprimand for the less serious violations. If we have been able to create a sentencing grid of forty-three levels with six criminal history categories for the scores and scores of criminal violations in the United States Code, I don't see why we could not grade the degree of violation by the law enforcement official. This punishment would result in the admission of the evidence and the punishment of the two guilty parties: The criminal defendant and the offending policeman. I recognize, obviously, that this suggestion is controversial, but I submit that if there is a real desire to curb police excesses in the Fourth Amendment area, this might be the way to do it rather than to penalize society by suppressing guns, narcotics and other contraband.<sup>191</sup>

Neither of these solutions is satisfactory. Internal discipline alone is an inadequate remedy, especially given the blue wall of silence and the brotherhood of loyalty among officers.<sup>192</sup> There is also evidentiary support to believe that internal sanctions, standing alone, are insufficient to deter police from misconduct. The Mollen Commission found evidence of police supervisors instructing their officers how to lie so that evidence obtained in violation of the Constitution would not be suppressed.<sup>193</sup> Other examples

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190. Robert Batey, *Deterring Fourth Amendment Violations Through Police Disciplinary Reform*, 14 AM. CRIM. L. REV. 245, 252–56 (1996); see also Carl McGowan, *Rule Making and the Police*, 70 MICH. L. REV. 659, 690 (1972) (discussing internal discipline).

191. Hon. John F. Keenan, *The Proper Balance: Exclusion of Evidence or Expulsion of Police Officers*, 72 ST. JOHN'S L. REV. 1376, 1380 (1998).

192. For more on the "code of silence" followed by officers to protect fellow officers, and evidence of officers lying to protect their brethren, see ANTHONY V. BOUZA, *THE POLICE MYSTIQUE: AN INSIDER'S LOOK AT COPS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM* 83 (1990).

193. MOLLEN COMMISSION REPORT, *supra* note 6, at 40–41; see also JONATHAN RUBINSTEIN, *CITY POLICE* 386–88 (1973) (describing the role supervisors play in abetting the submission of false search warrant applications).

of supervisors expressing their unwillingness to investigate and discipline officers abound.<sup>194</sup> The likelihood that these same supervisors would willingly and fully cooperate in an internal disciplinary regime is doubtful at best.

More to the point, any regime based solely on a disciplinary procedure, be it internal or external, suffers from a more fundamental flaw: it reifies a double standard. The civilian witness who commits perjury and is found guilty will face criminal sanctions that will likely include imprisonment, not to mention collateral consequences such as loss of employment and disenfranchisement. On the other hand, under an internal-sanction-only regime, an officer who commits the same or similar crime—by telling blue lies and thus committing perjury—will face a reprimand, loss of vacation time, fines, or at worst, dismissal from the force. Such a regime would only add fodder to the perception, already prevalent in poor and minority communities, that the police benefit from an undeserved immunity, get a pass when they violate the law, and that the shields they wear are shields in more ways than one.<sup>195</sup> In short, the police themselves operate in an under-enforcement zone.

Others, including Akhil Amar and Christopher Slobogin, have suggested employing a damages regime to curb police abuses.<sup>196</sup> Slobogin, who has focused specifically on testilying, has been most vocal in this regard. Under Slobogin's proposal, courts would be more flexible in determining probable cause, allowing officers more discretion and hence reducing the need some officers feel to bend the truth to justify their actions. At the same time, Slobogin advocates an abolition of the exclusionary rule and the creation of a liquidated damages remedy.<sup>197</sup> Borrowing from Robert Davidow, Slobogin proposes that jurisdictions create ombudsmen to receive and investigate complaints against the police.<sup>198</sup> An officer found in bad faith violation of the Constitution would be liable for a percentage of his salary, while the government would pay an equivalent sum for good-faith violations.<sup>199</sup> At bottom, Slobogin's argument is that officers will be deterred from violating the Constitution if they are the ones to suffer consequences, and if those consequences affect their wallets. Even setting aside the myriad problems with abolishing the exclusionary rule, the concern with Slobogin's proposed remedy as applied to testilying is similar to the concern with any remedy predicated on internal discipline. While it is a step in the right direction of

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194. See, e.g., Williams C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 350 (1991) (providing as an example a police executive who stated "he was reluctant to invoke internal discipline against deliberate violators who do not act in a clearly arbitrary fashion and do not cause substantial harm").

195. Cf. DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 100 (1994) (discussing how confidentiality of internal affairs investigations "affects the externally perceived legitimacy of the internal review system").

196. Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811–16 (1994) (proposing damages regime); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (proposing a damages regime as an alternative to the exclusionary rule).

197. To be sure, Slobogin does not reject perjury prosecutions, but rather believes perjury prosecutions would be less effective in deterring wrongdoing than a damages regime. Slobogin, *supra* note 196, at 402–05.

198. *Id.* at 387.

199. *Id.* at 387–90.

penalizing officers for telling blue lies, it is ultimately an insufficient step since again it reifies a double standard. Put differently, it would only contribute to the perception that the criminal justice system is unfair and that its very agents are permitted to function outside of the law. While such a double standard might on the surface give law enforcement more leeway in fighting crime, legitimacy theory suggests that this double standard might actually disadvantage society in reducing crime.

This Article puts forward a different proposal, radical perhaps in its simplicity. We should police the police. An officer witness who commits perjury by telling blue lies should be investigated and prosecuted to the same extent a civilian witness would be. The advantage of this approach is that it does not require an abandonment of the exclusionary rule or any other overhaul of Fourth Amendment jurisprudence. Nor does it require the creation or appointment of ombudsmen to investigate complaints. It does not even require new criminal statutes, since statutes already exist to punish police officers who engage in blue lies. In the federal system, several statutes come to mind that could be used to prosecute officers who engage in blue lies.<sup>200</sup> Analogous statutes exist in state jurisdictions.<sup>201</sup>

One can imagine Christopher Slobogin's response to this proposal. Or rather anticipate his response, since his work on testifying suggests that punishing officers with perjury convictions would not reduce testifying. Indeed, he suggests that it might "well reinforce the 'us-against-them' attitude that encourages further deceit."<sup>202</sup> But even assuming perjury convictions would not have a deterrent effect (already a questionable proposition) the second part of Slobogin's argument—that increased policing of the police "may well reinforce the 'us-against-them' attitude [and] encourage further deceit"—is problematic. After all, from the point of view of members of poor and minority communities—that is, the communities that most matter under legitimacy theory—not policing the police reinforces an "us-against-them" attitude. Actually policing the police by holding them to the same standard as civilians, by contrast, is likely to instill the belief that the law applies to everyone: rich and poor, black and white, brown and yellow, regardless of whether the individual is wearing a blue uniform.<sup>203</sup>

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200. See, e.g., 18 U.S.C. §§ 242, 1001, 1621, 2236 (2000). Section 1001, which governs statements generally, makes it a crime to knowingly and willfully make any material false statement or representation in any matter within the jurisdiction of any agency of the United States, essentially covering statements made in federal criminal proceedings. Section 1621, which proscribes perjury, makes it a crime to willfully testify, or subscribe to written testimony such as an affidavit, falsely. Section 242 makes it a crime, under color of law, to deprive someone of rights protected by the Constitution by reason of his color or race; § 2236 makes it a crime to conduct a warrantless search of a dwelling or to maliciously and without probable cause search any other property.

201. See, e.g., CAL. PENAL CODE § 118 (West 1970); MASS. ANN. LAWS ch. 268, § 1 (Michie 1968); N.J. STAT. ANN. § 2A:131-1 (West 1969); N.Y. PENAL LAW § 210.15 (McKinney 1975); see also MODEL PENAL CODE § 241.1(1) (1980).

202. Slobogin, *supra* note 181, at 1055.

203. Policing the police should also make the system more transparent, which again would ultimately contribute to better policing. Cf. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 916 (2006) (noting that the "gulf between criminal justice insiders and outsiders . . . hinders public monitoring of agency costs . . . leaving insiders too much room to indulge their own preferences at the expense of outsiders' interests").



A more legitimate concern is that prosecutors, invoking prosecutorial discretion, will not prosecute. After all, statutes already exist on the books, and yet have not resulted in anything more than isolated perjury cases. As Irving Younger has observed, a “policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven.”<sup>204</sup> Which is not surprising. Prosecutors need cases. Officers make cases. A priori, prosecutors need officers.<sup>205</sup> It’s like a marriage—one that runs smoothly most of the time but occasionally devolves into accusations, recriminations, infidelities, retaliations, and reconciliations.<sup>206</sup> Prosecutors have a disincentive to cause a rift by bringing perjury charges.<sup>207</sup>

However, again there are two simple remedies: One, where there is reasonable suspicion that an officer has engaged in testifying, investigation should be mandatory and two, where the investigation establishes probable cause to believe that testifying occurred, prosecution should be mandatory. In the federal system, Department of Justice policy already limits the discretion of prosecutors to decline prosecution in certain cases.<sup>208</sup> States have also moved toward limiting prosecutorial discretion, notably in the area of domestic violence.<sup>209</sup> Compulsory prosecution is also a common

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204. Younger, *supra* note 175, at 596.

205. See, e.g., Jay S. Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 358 n.75 (1994) (“The institutional tendency to tolerate police perjury likely stems from the prosecutor’s interest in maintaining smooth working relations with police, who gather the government’s evidence and are often its most important witnesses at trial, and from the prosecutor’s own competitive drive to win and advance professionally.”). Monroe Freedman made this point back in the 1960s. See Monroe Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967).

206. I saw this several times when I was a prosecutor. Things would be going fine, and then all of a sudden a tiff would develop between us and some agency. The tiff could be about anything, and on occasion involved our view that an officer assigned to a joint task force was not being truthful. Sometimes we worked things out immediately. Other times, like a married couple, there would be accusations, then the silent treatment. If things got really bad, the agency would stop bringing us cases, and instead take their cases to the District Attorney’s Office or to the U.S. Attorney’s Office for the Eastern District of New York. And since cases were our lifeline, the basis for our federal funding, we would find a way to kiss and make up.

207. See BOUZA, *supra* note 192, at 71; Armacost, *supra* note 69, at 466 (noting that prosecutors may be sensitive to the need to maintain a good working relationship with officers); Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 263 (1998) (similar).

208. See, e.g., U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL § 9-27.400 (2007) (requiring prior approval before dismissing readily provable charges). Prosecutorial discretion has also been circumscribed by mandatory minimum sentences. See, e.g., 18 U.S.C. § 924(c) (2000) (prescribing mandatory five-year consecutive sentence for use of gun during a crime of violence or drug trafficking crime); 21 U.S.C. § 841 (2000 & Supp. II 2002) (prescribing five- and ten-year mandatory sentences for narcotics offenses).

209. See, e.g., FLA. STAT. ANN. § 741.2901 (West 2003) (establishing a “pro-prosecution” policy for domestic abuse cases, even when the victim objects); WIS. STAT. ANN. § 968.075 (West 2004) (requiring mandatory arrests). For a discussion of such policies, see Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence*,

feature of regulatory agencies<sup>210</sup> and European jurisdictions.<sup>211</sup> Nor would requiring mandatory investigation and prosecution in cases involving testifying be difficult.<sup>212</sup> And as Erik Luna has persuasively argued, less discretion would in fact contribute to democratic policing.<sup>213</sup> Finally, the advantage of mandating investigation and, where probable cause is established, prosecution, is that officers would be less likely to blame, and hence retaliate against, prosecutors, especially where separate prosecutors are designated to handle such cases. After all, under this regime the prosecutors would lack the discretion *not* to investigate.

As for what events should trigger a mandatory investigation, this Article suggests a two-tiered approach. Where a judicial officer makes an adverse credibility determination about a law enforcement officer, a mandatory investigation should be automatic. However, since judges, for numerous reasons, are often loath to make such findings,<sup>214</sup> any grant of a suppression motion should also trigger some type of investigation, or at least some oversight mechanism before such an investigation can be declined. Here, the peer reviews suggested by Barbara Armacost, albeit in a different context, could be extremely effective.<sup>215</sup> Such oversight could even include subjecting certain officers to routine polygraph exams following the grant of suppression motions, to build on a proposal made by Donald Dripps.<sup>216</sup> In addition,

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*and the Conservativization of the Battered Women's Movement*, 42 HOUS. L. REV. 237 (2005); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999). Similar restrictions on prosecutorial discretion exist with respect to drug cases. See, e.g., N.Y. CRIM. PROC. LAW § 220.10 (McKinney 1999) (restricting prosecutor's discretion with respect to mandatory drug sentences).

210. KENNETH CULP DAVIS, ADMINISTRATIVE LAW 216–35 (2d ed. 1975).

211. For example, in Germany, prosecutors are required by statute to “take action in case of all acts which are punishable by a court and capable of prosecution,” and failure to so prosecute is itself a crime. See Strafprozeßordnung [StPO] [Code of Criminal Procedure] § 152, translated in 10 THE AMERICAN SERIES OF FOREIGN PENAL CODES 87 (Gerhard O.W. Mueller ed., Horst Niebler trans., 1965).

212. And should this prove inadequate, legislatures could always enact penal statutes to specifically target testifying. For example, legislatures could make it a crime for any law enforcement officer to willfully make a false statement in any judicial proceeding.

213. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1120 (2000) (arguing for “systematic visibility of policing decisions and concomitant justifications” as a means of making law enforcement more democratic and trustworthy).

214. Judges are often reluctant to make adverse credibility determinations against an officer “on the record.” Instead, judges tend to grant suppression motions on the “more acceptable” ground that, even crediting the officer’s testimony, the evidence was insufficient to establish reasonable suspicion or probable cause. I thank my colleague Alafair Burke for reminding me of this practice. On the reluctance of judges to make adverse credibility determinations against officers generally, even in the face of overwhelming evidence of perjury, see Dershowitz, *supra* note 186.

215. See Armacost, *supra* note 69, at 533–54. Although Armacost advocates the use of peer reviews for responding to citizen complaints against officers, her proposal would also work for reviews of decisions to decline prosecutions following a grant of a suppression motion where officer credibility has been called into question. Under such a peer review system, a committee comprised of prosecutors, defense lawyers, and judges not affiliated with the case would participate in reviewing declinations of prosecution.

216. See Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 703 (1996).

although this may be harder to implement, a mandatory and automatic investigation should be required in the case of “repeat offenders”—those cases where an officer’s testimony has repeatedly led to the granting of suppression motions. Indeed, it may be that by focusing on “repeat offenders,” prosecutors can maximize reducing the perception of illegitimacy. This is because while many officers may tell blue lies, the most egregious offenders—and the ones that drive the perception of illegitimacy—are probably in a small minority.<sup>217</sup>

One can anticipate another response to this proposal: that perjury cases are difficult to prove. The response here is twofold. First, while some cases are difficult to prove, this is not a reason to forego investigations or prosecutions. Rather, it provides a check to ensure that the actual prosecutions that proceed against officers for testifying are the cases that can be proved and that such prosecutions do not function as an over-deterrent, but instead encourage police to do the work they do best—fighting crime. By the same token, requiring a mandatory investigation, as well as mandatory prosecution where probable cause is established, will ensure that prosecutors do not look the other way when faced with evidence of blue lies. Finally, just as the public understands that not all cases of perjury are provable, the public will understand that not all cases of police perjury will be provable.<sup>218</sup>

Second, the fact of the matter is that perjury cases are not always difficult. Mark Fuhrman was quickly convicted of perjury. Furthermore, prosecutions in these cases would have the expressive function of demonstrating a commitment to eradicating the zone of under-enforcement in which police officers are perceived to operate. Consider the recent shooting of Katherine Johnson, an elderly woman, in Atlanta, Georgia, during the execution of a search warrant.<sup>219</sup> After obtaining a “no knock” warrant by

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217. As Malcolm Gladwell recently pointed out, the common perception is that police troubles have a normal distribution, “that if you graphed them the result would look like a bell curve, with a small number of officers at one end of the curve, a small number at the other end, and the bulk of the problem situated in the middle.” The Christopher Commission’s investigation into excessive force in the L.A.P.D. following the Rodney King beating proved this assumption false. Studying allegations of excessive force made between 1986 and 1990, the Christopher Commission found that most officers had never been accused of anything. Rather, only a small fraction were “repeat offenders.” Of approximately 8500 officers, only 183 had four or more complaints against them, forty-four had six or more complaints, sixteen had eight or more, and one had sixteen complaints. As Gladwell put it, if you were to graph the troubles of the L.A.P.D., “it wouldn’t look like a bell curve. It would look more like a hockey stick,” or what statisticians refer to as a “power law” distribution. This suggests a small concentration of problem officers, and suggests that removing this small concentration could result in a mostly clean police department, especially since these outliers often influence the culture of their precincts. Viewed in this way, this Article’s proposal is a modest one indeed. For more on problem officers and power law distribution, see Malcolm Gladwell, *Million-Dollar Murray: Why Problems Like Homelessness May Be Easier to Solve Than to Manage*, NEW YORKER, Feb. 13, 2006, at 96.

218. The point here is again one of transparency. The mere fact that communities will see that some cases are being prosecuted, while others are not, and will understand why, will contribute to trust and legitimacy, allowing “community members and law enforcement [to dispel] harmful misperceptions” and move beyond “fingerpointing.” Luna, *supra* note 213, at 1193.

219. Shaila Dewan, *Fatal Raid Linked to Lies for Warrant in Drug Case*, N.Y. TIMES, Jan.

claiming that the target had security cameras outside the house, officers surrounded Ms. Johnson's home, pried open her burglar bars and broke down the door.<sup>220</sup> Apparently afraid she was being burgled, Ms. Johnson responded with gunfire.<sup>221</sup> The officers returned fire, killing her.<sup>222</sup> This tragedy was compounded during a subsequent investigation into the police shooting that revealed the police lied repeatedly to obtain the warrant. Believing that a kilogram of cocaine was in the house—based on the statement of a recent drug arrestee—the officers tried to get an informant into the house to make a drug buy.<sup>223</sup> When that failed, they simply lied. They drew up a warrant, claiming that a drug buy had been made from a dealer named “Sam” at the target house, and that a “no knock” warrant was needed because Sam had security cameras outside of the house.<sup>224</sup> None of this was true. On top of this, after the shooting, the police approached an informant and asked him to claim, falsely, that he had bought crack cocaine from Ms. Johnson's home.<sup>225</sup> The informant told federal investigators of the attempted cover up, and one of the members of the search team has told federal investigators of the lies made in the search warrant application.<sup>226</sup> Some cases are easy. One of the ambitions of this Article is to induce prosecutors to pursue them.

#### IV. ON LEGITIMACY AND UTILITARIANISM

The concern of this Article is larger than blue lies. Rather, the main concern of this Article is reducing crime by inducing voluntary compliance with the law. One way to accomplish this goal is by eliminating the double standard that allows the perception that law is illegitimate. Put differently, we should not turn a blind eye when officers engage in misconduct. To the contrary, we should hold police accountable for the utilitarian reason that this would result in a reduction of crime in the general population.

There is a counter-argument that will be made: that policing the police for anything but the most egregious abuses—like sodomizing Abner Louima—will tie the hands of the police, deal a blow to law enforcement, and allow bad guys to remain on the street. And intuitively, this counter-argument has some appeal and may even be right. In the short term.

But consider the long term. After all, legitimacy theory suggests that increased policing of the police would increase the perception that the criminal justice system is fair, and result in a significant diminution of crime in a host of ways. One, and perhaps most importantly, individuals who perceive the system to be fair will be more likely to voluntarily comply with the law and social norms. Two, individuals who perceive the system to be fair will be more likely to “perform their duty as citizens” and voluntarily assist the police in maintaining an ordered society.<sup>227</sup> Too often in poor and minority

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12, 2007, at A17.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. This is particularly important when it comes to enlisting the aid of Muslims and others

communities, police attempts to gather information about past or ongoing crimes are met with silence and hostility, not because community members support crime, but because they distrust the police and question the fairness of the justice system. Sadly, this community “wall of silence” occurs even when a cop has been shot in the line of duty and the police are attempting to locate the perpetrator. The same reluctance plays out in other stages of the criminal process, from not crediting police testimony, to voting to acquit defendants notwithstanding proof beyond a reasonable doubt of guilt.<sup>228</sup> Three, increased policing of the police might even have a positive impact on criminal defendants themselves. Consider the following. Over thirty years ago, the New York State Joint Legislative Committee on Crime (the “Hughes Committee”) conducted a study of prison inmates in maximum security facilities in New York. Despite the passage of time, their findings, especially with regard to the attitudes of inmates, is still instructive. They found that most inmates believed that they had not received adequate representation and believed that they had been treated unfairly by the justice system. But the Hughes Committee also found that efforts to rehabilitate inmates were being frustrated because of the inmates’ experience with the justice system. The Hughes Committee concluded that no program of rehabilitation could be effective on a “prisoner who is convinced in his own mind that he is in prison because he is the victim of a mindless, undirected, and corrupt system of justice.”<sup>229</sup> This suggests that changing the perception that the police are above the law could actually aid in the rehabilitation of prisoners.

There is another counter-argument: that increased policing of the police would in fact contribute to a perception of illegitimacy by *exposing* police wrongdoing. This argument has some merit, but not enough. Quite simply, it assumes that prosecuting officers who engage in wrongdoing will *reveal* corruption. But while this may be true for those who have little or no contact with the criminal justice system, this will hardly be the case with those in high crime communities where perceptions of illegitimacy and undemocratic policing are already strongly held. In these communities especially, police wrongdoing is treated as “how life is,” not news. Given that it is precisely these communities where a reduction of crime could have the most impact, the concern that policing the police would exacerbate problems by “outing” public wrongdoing seems misplaced.

Moreover, there are numerous other collateral advantages to increased policing of the police. Consider the “broken windows” approach to crime reduction. First advanced by James Wilson and George Kelling, the approach is predicated on the hypothesis that eliminating visible signs of disorder will deter more serious crime.<sup>230</sup>

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of Middle Eastern and South Asian origin in assisting law enforcement in fighting terrorism, as others have already noted. *See, e.g.,* Tanya E. Coke, *Racial Profiling Post-9/11: Old Story, New Debate*, in *LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM* 91, 105–07 (Cynthia Brown ed., 2003).

228. Paul Butler has famously advocated such race-based jury nullifications. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677 (1991). Judge Weinstein of the Eastern District of New York has also written about the relationship between distrust of law enforcement officers and jury nullification. *See* Jack B. Weinstein, *The Many Dimensions of Jury Nullification*, 81 *JUDICATURE* 168, 171 (1998).

229. *See* Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 *FORDHAM URB. L.J.* 621, 627 (1993).

230. James Q. Wilson & George L. Kelling, *Broken Windows*, *ATLANTIC MONTHLY*, Mar. 1982, at 29.

The approach has gained so much currency that many champion it with contributing to falling crime rates across the nation.<sup>231</sup> But taking the approach seriously also means that policing the police across the board, including for “smaller” offenses like testifying, might actually reduce the occurrence of more “serious” offenses such as fabricating evidence or engaging in brutality. This possibility is too important to dismiss.

Increased policing of the police will also weed out the few “bad apple” officers who are responsible for much of the negative perception about law enforcement. This could yield a couple positive results. One, that more police-citizen encounters will be with good cops, that is, that people will have fewer interactions with bad cops. If this holds, their perception of law enforcement will adjust accordingly, resulting in greater respect for law enforcement, and quite possibly greater safety for officers.<sup>232</sup> Two, such a weeding out process would also likely change the culture of many station houses, addressing the organizational feature of police misconduct that Barbara Armacost has identified.<sup>233</sup> Instead of corruption breeding corruption,<sup>234</sup> there could be honesty breeding honesty, adherence to the law breeding adherence to the law.

Increased policing of the police could even contribute to a more diverse police force. Unfortunately, police forces in large cities continue to be disproportionately white, not to mention disproportionately male,<sup>235</sup> while the individuals they target continue to be disproportionately people of color. The lack of minority representation is especially acute in the upper echelons of departments. To use New York again, as recently as 2001, only nine of the NYPD’s 465 police captains were African-American.<sup>236</sup> Part of the lack of diversity stems from hostility to minorities.<sup>237</sup> But part

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231. See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998).

232. Unfortunately, negative police-citizen encounters often have a lasting impact. See Amy Waldman & Michael Cooper, *When a Badge Is Seen, Views Vary; After Louima, New Yorkers Are Split on Police Progress*, N.Y. TIMES, July 24, 2001, at B1.

233. On the importance of attending to police culture in order to address police misconduct, see Armacost, *supra* note 69.

234. See Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer-Fall 1982, at 40, 42 (noting that one reason perjury is “systematic” is because “police know that other police are perjuring themselves”).

235. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 55 tbl.1.58 (2003) (showing ratio of minority officers to minority residents in large city police departments).

236. See C.J. Chivers, *For Black Officers, Diversity Has Its Limits*, N.Y. TIMES, Apr. 2, 2001, at A1. There are signs of change of course. The most recent class of police recruits in New York City was comprised mostly of minorities, a first in New York. See Jennifer Lee, *In Police Class, Blue Comes in Many Colors*, N.Y. TIMES, July 8, 2005, at B1.

237. See STEPHEN LEINEN, BLACK POLICE, WHITE SOCIETY (1984); Susan Ehrlich Martin, “Outsider Within” the Station House: *The Impact of Race and Gender on Black Women Police*, 41 SOC. PROBS. 383 (1994); C.J. Chivers, *Alienation Is a Partner for Black Officers*, N.Y. TIMES, Apr. 3, 2001, at A1. For a discussion of the historic hostility of police to increased diversity, see Liyah Kaprice Brown, *Officer or Overseer?: Why Policing Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Police in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 775-79 (2005). See also W. MARVIN DULANEY, BLACK

of this is also attributable to the perception, especially prevalent in poor and minority communities, that the police are the bad guys—they administer the law unfairly, and themselves function outside the law. Given this perception, it should come as no surprise that lack of diversity is a problem.<sup>238</sup>

Perhaps most importantly, each of these results could quite possibly reinforce the other. A more diverse force could contribute to increased respect for the cops and vice versa, which in turn could contribute to police safety, which in turn could reduce occasions for the police to use excessive force, changing the culture of police departments.

#### CONCLUSION

This Article has attempted to make a cogent argument, palatable to civil libertarians, crime control advocates, and perhaps most importantly, to the police themselves, that increased policing of the police across the board can actually result in a reduction of crime in the general population and better, safer policing.

Still, one can imagine the hesitation. One can even sense the gut reaction: that the focus is all wrong, that if we want to reduce crime, we have to focus on “getting the bad guys.” And this is true. Criminals should be punished as part of a larger goal of reducing crime. That being said, focusing on the bad guys does not mean that we should not also focus on law enforcement officers, especially when the two overlap. And especially when focusing on both can quite possibly benefit society at large by reducing crime overall.

Crime rates are still too high for us to become complacent about thinking through new approaches to crime reduction. We need more ideas. And once we think through new ideas, we need to implement them. The ideas may not all succeed. Great experiments may fail. But if we are to take seriously the possibility of reducing crime, and take seriously the prospect of “mak[ing] America what America must become”<sup>239</sup>—fair, egalitarian, responsive to needs of all of its citizens, and truly democratic in all respects, including its policing—we must at least try. This Article is about making a start.

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POLICE IN AMERICA 19 (1996) (noting that racism is “still the primary factor limiting the number of African-American police officers”).

238. A NYPD recruiter has noted this precise difficulty in recruiting minorities to the force. “Everywhere we go, there is at least one person who has a derogatory comment about the NYPD, and that person is almost always an African-American . . . . We don’t get it nearly as much from Hispanics, and just about never from whites. Out there on the streets, young blacks are as wary of us as can be.”

Chivers, *supra* note 237, at A1.

239. JAMES BALDWIN, *THE FIRE NEXT TIME* 24 (1963) (“[G]reat men have done great things here, and will again, and we can make America what America must become.”).