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## Dead Canaries in the Coal Mines: The Symbolic Assailant Revisited

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## **DEAD CANARIES IN THE COAL MINES: THE SYMBOLIC ASSAILANT REVISITED**

**Jeannine Bell\***

### ABSTRACT

The well-publicized deaths of several African-Americans—Tamir Rice, Philando Castile, and Alton Sterling among others—at the hands of police stem from tragic interactions predicated upon well-understood practices analyzed by police scholars since the 1950s. The symbolic assailant, a construct created by police scholar Jerome Skolnick in the mid-1960s to identify persons whose behavior and characteristics the police view as threatening, is especially relevant to contemporary policing. This Article explores the societal roots of the creation of a Black symbolic assailant in contemporary American policing. The construction of African-American men as symbolic assailants is one of the most important factors characterizing police interaction with African-American males. This is not a one-size-fits-all approach to Blackness. As the Article discusses, police officers' treatment of African-American women is also fraught, and in some cases police treat Black women in a way that, while still disparaging, is markedly different from the way that Black men are treated. I argue that current strategies for ending police violence do not sufficiently address the prominence of the symbolic assailant in proactive policing strategies. This Article suggests an unusual solution to commonly understood mechanisms of

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addressing police violence. Based on my experience with police who had productive relationships with crime victims of color, I suggest a reorientation of policing practices predicated on a more reactive model of policing.

## INTRODUCTION

Since police officer Darren Wilson shot Michael Brown in August 2014,<sup>1</sup> the media has reported a number of lightning-fast shootings by police after they receive a 911 call reporting that an individual is carrying a gun.<sup>2</sup> One of the most publicized cases occurred in November 2014 and involved twelve-year-old Tamir Rice.<sup>3</sup> Rice was playing with an airsoft-type gun<sup>4</sup> outside the Cudell Recreation Center on Cleveland's West Side.<sup>5</sup> Responding to a 911 call reporting an individual in the park carrying a gun, two Cleveland police officers reported to the scene.<sup>6</sup> Officer Timothy Loehmann shot Rice twice at point-blank range within two seconds of arriving at the location.<sup>7</sup> Though Cleveland police officers are trained in first

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1. Kashmiri Gander, *Michael Brown Shooting: What Happened in Ferguson?*, INDEPENDENT (Aug. 11, 2015, 2:55 PM), <http://www.independent.co.uk/news/world/americas/michael-brown-shooting-what-happened-in-ferguson-10450257.html> [https://perma.cc/4U4T-MUPH].

2. Kimberly Kindy & Marc Fisher, *Year of Reckoning: Police Kill Nearly 1,000*, WASH. POST (Dec. 26, 2015, 5:42 PM), [http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/?utm\\_term=.1ea638496ebb](http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/?utm_term=.1ea638496ebb) [https://perma.cc/3D9L-THEA].

3. See TIMOTHY J. MCGINTY, CUYAHOGA COUNTY PROSECUTOR'S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE 2 (2015), [http://prosecutor.cuyahogacounty.us/pdf\\_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf](http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf) [https://perma.cc/K6WP-GCXS ] (discussing the events surrounding the shooting of Rice).

4. Tierney Sneed, *Police Shootings Involving Toy Guns Spur Push for Regulation*, U.S. NEWS & WORLD REP. (Nov. 28, 2014, 7:00 AM), <http://www.usnews.com/news/articles/2014/11/28/after-john-crawford-and-tamir-rice-ohio-lawmaker-seeks-to-regulate-toy-guns>. Airsoft guns, which shoot plastic pellets, are not manufactured to kill or injure. Jacob Gurney, *Law Enforcement Train for Active Shooter Situation*, ADVERTISER-TRIB. (July 23, 2017), <http://www.advertiser-tribune.com/news/local-news/2017/07/law-enforcement-train-for-active-shooter-situation>. Though some may resist calling them toys, they are used for play by children, for adult recreation, and also for law enforcement training exercises. *Id.*

5. MCGINTY, *supra* note 3, at 2.

6. *Id.* at 4.

7. Shaila Dewan & Richard A. Oppel, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal->

aid, Loehmann made no effort to try to save Rice's life.<sup>8</sup> Rice died the next day.<sup>9</sup>

When they receive a report of a gun, police do not always respond by shooting. Consider the case of E.J. "Junior" Walters, which occurred about a month before Rice was shot, on October 23, 2014, just a few states away from Ohio in Church Hill, Tennessee.<sup>10</sup> Walters, a White man who had previously been arrested for road rage against a detective, cursed at two individuals and accosted them with a pistol tucked into his belt.<sup>11</sup> One of the victims called 911 and gave a description of Walters.<sup>12</sup> Officer David Benton observed Walters, who was reportedly not wearing his seatbelt as he drove his car, cross the centerline several times.<sup>13</sup> Officer Benton then signaled for Walters to stop the car and approached Walters' car on foot.<sup>14</sup> Because of the 911 report of the gun, Benton asked Walters to exit the car.<sup>15</sup> Walters allegedly refused, and Benton, accompanied by several other police officers, physically removed Walters from the vehicle and arrested him.<sup>16</sup> No shots were fired.<sup>17</sup>

These two incidents display drastically different approaches to 911 reports of a male with a gun. In the first, a Black youth with what was essentially a toy gun was shot two seconds after police arrived at the scene.<sup>18</sup> In the second incident, a middle-aged White man with a

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one.html?mtrref=www.google.com&gwh=C63C114E1AE2A39EC690B9F28767EE26&gwt=pay [https://perma.cc/42HK-HFPC].

8. *Id.* See also MCGINTY, *supra* note 3, at 8–9.

9. *Id.* at 5.

10. Jeff Bobo, *Man Accused of Accosting Detective in August Arrested Again for Road Rage with a Gun*, KINGSPOINT TIMES NEWS (Oct. 23, 2014, 4:21 PM), <http://www.timesnews.net/News/2014/10/23/Man-accused-of-accosting-detective-in-August-arrested-again-for-road-rage-with-a-gun> [https://perma.cc/K9JW-XTYH].

11. *Id.*

12. *Id.*

13. *Id.*

14. See *id.*; see also *Hawkins Man Arrested in "Road Rage" Toward Deputy*, ROGERSVILLE REV. (Sep. 3, 2014), [http://www.therogersvillereview.com/news/article\\_92d1786e-32e7-11e4-96cb-0019bb2963f4.html](http://www.therogersvillereview.com/news/article_92d1786e-32e7-11e4-96cb-0019bb2963f4.html) [https://perma.cc/RED4-EKLP].

15. Bobo, *supra* note 10.

16. *Id.*

17. See *id.*

18. MCGINTY, *supra* note 3, at 4; *Hear the 911 Call About Tamir Rice: Gun is 'Probably Fake,' Caller Says*, L.A. TIMES (Nov. 26, 2014, 5:59 PM), <http://www.latimes.com/nation/nationnow/la-na-nn->

history of assaulting police officers, who threatened someone with an actual firearm, ignored police orders to step out of the car and was taken into custody without officers discharging their weapons.<sup>19</sup>

Officers' duty to the public, and to themselves, is to preserve life. In keeping with this goal, one might assume that officers base the use of force they employ on the level of danger presented by the situations that they encounter. Take the two situations reported above involving Tamir Rice and E.J. Walters. Considering all the facts of each case known to the two officers as they approached the potentially dangerous situations, one might have assumed that the second case, involving Walters, was more threatening than the case involving Rice, and thus required a higher level of force. In Walters' case, the actions known to the officer included the behavior of the suspect and the criminal history of violence.<sup>20</sup>

The two different outcomes—the violent man with a history of assault and known for threatening both police officers and civilians escaping harm,<sup>21</sup> and the twelve-year-old without a record being shot dead instantly<sup>22</sup>—seem inexplicable. Pure racism on the officers' part is just too simple an explanation for their behavior. The overall purpose of this Article is to explain the difference in the Ohio and Tennessee officers' behavior by placing each of the reactions to the suspects squarely in the context of policing. For both Black and White suspects, the outcomes in their treatment depend heavily on how racialized policing has developed in the twenty-first century.

The roots of the explanation for the difference in police behavior lie deep within constructs that have developed over the last fifty years. One of the most important constructs in this regard is the concept of the symbolic assailant identified by Jerome Skolnick in the mid-1960s.<sup>23</sup> In this Article, I argue policing constructs

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tamir-rice-911-call-20141126-htmlstory.html [https://perma.cc/PB6K-XEZ3]. The 911 caller suggested that the gun might be a toy, but this was not relayed to police. *Id.*

19. Bobo, *supra* note 10.

20. *Id.*

21. *Id.*

22. MCGINTY, *supra* note 3, at 4.

23. JEROME SKOLNICK, JUSTICE WITHOUT TRIAL 45–46 (4th ed. 2011).

developed in response to the idea of the Black symbolic assailant are crucial factors in the difference between officers' approaches to Rice and to Walters. Given police practices that have developed undergirded by the idea of the symbolic assailant, I contend that the instantaneous police shooting of Tamir Rice was predictable. At the same time, the "kid gloves" approach to Walters was understandable. Though police practices around the country have worsened toward African-Americans since the 1960s, when the concept of the symbolic assailant was born, in the Article, the idea of the symbolic assailant still has a practical life in police department procedures around the country.<sup>24</sup> The symbolic assailant provides a working explanation for police behavior in a wide variety of cases involving African-Americans. That being said, I argue that the symbolic assailant—a useful concept in its day—has come unmoored from its original empirical underpinnings, particularly with respect to African-Americans. Recent shootings of African-Americans by the police—and other rarely discussed racialized policing activities—are clear signs that "Blackness" has become the symbolic assailant.

This Article will proceed in the following manner. In Part I, I will describe the fifty-year-old concept of the symbolic assailant, an important organizing feature in how scholars have understood police work. Part II will address the idea of race and the symbolic assailant, using research on discriminatory policing practices from around the country to emphasize transformation of the symbolic assailant over the last fifty years. I argue that, due in part to the adoption of "Broken Windows" policing, police practices with respect to the symbolic assailant have undergone a transformation since the late 1960s. What was once a layered, empirical approach to policing

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24. See JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 1116–70 (2d ed. 2000). The authors discuss various racialized police practices that collectively have worsened toward African-Americans since the 1960s to today. *Id.* Some of these police practices include the following: (1) the unequal use of excessive force, which ranges from the use of chokeholds to the use of weapons; (2) the unequal enforcement of stop and frisk policies; (3) disparate traffic stops and disparate searches of those vehicles once stopped; (4) the unequal enforcement of quality of life crimes, such as public nuisance and loitering offenses; (5) the disparate use of search warrants; and (6) the use of racial profiling. *Id.*

discrete situations has become a narrow concept relying exclusively on the race of the suspect, often to the exclusion of other factors commonly associated with good policing. Part III will focus on solutions aimed at displacing the centrality of the symbolic assailant in policing practices.

### *I. The Creation of the Symbolic Assailant*

#### *A. The Sociology of Police Work*

Since the mid-1950s, those who study the police have struggled to understand the conditions under which officers carry out their duties. Empirical work examining police officers, who face the task of maintaining order and insuring citizens' compliance with the law, particularly in the midst of constitutional limits on the use of force.<sup>25</sup> Police difficulty in balancing the challenge of maintaining order while enforcing the law is compounded by the vagueness of the legal dictates which they are charged with enforcing.<sup>26</sup>

In deciding whether to enforce the law against citizens, police scholars have also identified police discretion—the ability of police to decide whether to invoke the law—as critical.<sup>27</sup> Police discretion not to enforce the law is largely accepted because of the assumption that resources prevent the enforcement of the law in every circumstance in which it is violated.<sup>28</sup> For instance, Egon Bittner's investigation of the policing of "skid row" revealed that patrol officers coped with the difficulty of maintaining order not by invoking the law, but rather by relying on a richly particularized knowledge of the people in the area and using an aggressively personal approach in scrutinizing individuals.<sup>29</sup> In this regard, the

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25. JEANNINE BELL, *POLICE AND POLICING LAW* xi (2004).

26. *Id.*

27. See, e.g., Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543, 546–86 (1960).

28. See, e.g., JOHN KLEINIG, *THE ETHICS OF POLICING* 86 (1996).

29. Egon Bittner, *The Police on Skid Row: A Study of Peacekeeping*, 32 *AM. SOC. REV.* 699, 714 (1967).

officers' behavior may have been in conflict with constitutional protections.<sup>30</sup> Nonetheless, officers defended their behavior by insisting that their response was appropriate given the particular norms of the (“skid row”) society they were policing.<sup>31</sup>

Using data collected by the American Bar Foundation, Joseph Goldstein studied the manner in which police officers elect not to enforce the law in three discrete contexts: (1) drug laws; (2) cases of felony sexual assault; and (3) gambling laws.<sup>32</sup> Goldstein found that there are many situations in which police do not follow the law.<sup>33</sup> This is not a minor issue. Police decisions to not enforce the law may undermine legislative intent and are largely invisible—unseen by the public, not subject to judicial scrutiny or to public policy debates.<sup>34</sup> Goldstein cited the significance of not enforcing the law, ultimately because police behavior in this context “largely determines the outer limits of law enforcement.”<sup>35</sup>

Police discretion to enforce the law is an issue of utmost importance to a democratic government. Most democracies, the United States included, mandate equal application of the law.<sup>36</sup> This is particularly true in criminal law, where punishment can result in a financial penalty or the loss of one’s freedom.<sup>37</sup> If the law that is ultimately enforced is determined by police discretion, it is critical to discern which groups, if any, are disfavored and tend to find themselves the subject of police scrutiny.

In democratic societies, there is an ideological conflict between the order that officers are charged with maintaining and the rules requiring accountability to the rule of law. This conflict means that the police must serve in alternate roles as rule enforcers, fathers, friends, social servants, moralists, street fighters, marksmen, and

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30. *See id.* at 714–15.

31. *Id.* at 715.

32. Goldstein, *supra* note 27, at 554.

33. *Id.*

34. *Id.* at 550–51, 562.

35. *Id.* at 543.

36. *See, e.g.*, U.N. GAOR, 67th Sess., 3d plen. mtg. at 2, U.N. Doc. A/67/L.1 (Sept. 19, 2012).

37. *See* Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL’Y REV. 53, 63–64 (2003).



officers of the law.<sup>38</sup> The result is a perfect storm for officers' diminishing adherence to legal rules. Officers' stake in maintaining their authority, their socialization, and the pressure to find violators of the law, combined with the invisibility of the work they perform, all mean that the law is less likely to be followed.<sup>39</sup>

### B. *The Role of Race in Policing*

Police scholars studying the role that race plays in policing quickly established that African-Americans have been subjected to racially discriminatory policing. Some of the earliest socio-legal research, undertaken in the 1950s and 1960s, revealed that the police enforced the law differently in Black communities than they did in White communities.<sup>40</sup> One example of this research deals with police attitudes toward minorities. Researchers have found that police officers, the majority of whom are White, hold biased views about African-Americans.<sup>41</sup>

There is significant contemporary data showing widespread racial discrimination in policing practices documented both by the Justice Department and by police scholars.<sup>42</sup> Since 2010, the Justice Department's "pattern or practice" investigations have found racial discrimination in police departments around the country, including: East Haven, Connecticut; Beacon, New York; Orange County,

38. SKOLNICK, *supra* note 23, at 17.

39. *Id.* at 231.

40. George L. Kelling & William H. Sousa, Jr., CTR. CIVIC INNOVATION, *Do Police Matter? An Analysis of the Impact of New York City's Police Reforms*, 22 MANHATTAN INST. CIVIC REP. 1, 1–2 (Dec. 2001).

41. See, e.g., VICTOR E. KAPPELER, RICHARD D. SLUDER, & GEOFFREY P. ALPERT, FORCES OF DEVIANCE: UNDERSTANDING THE DARK SIDE OF POLICING 53 (2d ed. 1998); John Van Maanen, *The Asshole*, in POLICING: A VIEW FROM THE STREET 221 (Peter K. Manning & John Van Maanen eds., 1978); Jennifer Hunt, *Police Accounts of Normal Force*, 13 J. CONTEMP. ETHNOGRAPHY 315, 315 (1985); *Police Department Race and Ethnicity Demographic Data*, GOVERNING.COM, <http://www.governing.com/gov-data/safety-justice/police-department-officer-demographics-minority-representation.html> [https://perma.cc/5RS7-CQUC] (last visited Sept. 29, 2017).

42. E.g., Sendhil Mullainathan, *Police Killings of Blacks: Here Is What the Data Say*, N.Y. TIMES (Oct. 16, 2015), <https://www.nytimes.com/2015/10/18/upshot/police-killings-of-blacks-what-the-data-says.html> [https://perma.cc/TL3N-2YLE].

Florida; Warren, Ohio; Cleveland, Ohio; New Orleans, Louisiana; Missoula, Montana; and Seattle, Washington.<sup>43</sup>

One of the most recent pattern or practice investigations occurred in Ferguson, Missouri. The Justice Department found that the Ferguson police treated African-Americans differently at every level. They were arrested more.<sup>44</sup> They got more tickets.<sup>45</sup> They were even bitten by police dogs more.<sup>46</sup> Of the fifteen times Ferguson police dogs bit people, *all* were African-American victims.<sup>47</sup>

In studying police practices in cities and towns around the country, scholars found that the practices used by police officers in Ferguson, Missouri, existed in other places as well. Numerous studies have found significant racial disparities in police stops all over the United States.<sup>48</sup> These racial disparities are important because of the breadth of locales in which they were discovered.

Police scholars have identified significant racial disparities in police stops in large, racially diverse American cities such as New York<sup>49</sup> and Los Angeles.<sup>50</sup> Racially discriminatory policing,

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43. CIVIL RIGHTS DIV. DEP'T OF JUSTICE, THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT (2017). Rather than being considered a full list, these cities should be considered the tip of the iceberg. This list does not include cities like Detroit, whose consent decrees started before 2010. *See generally* *United States v. Detroit*, No. 03-72258, 2014 WL 197730 (E.D. Mich. Jan. 16, 2014). The list also does not include places like Oakland, where 100 plaintiffs in a single lawsuit argued that police violated their rights. *See generally* *Allen v. Oakland*, No. 3:00-cv-04599-TEH (N.D. Ca. Jan. 27, 2012). Relying exclusively on the Department of Justice (DOJ) determination that there is a pattern and practice of racialized policing is also likely to miss many cities where there has been a problem. For instance, Stephen Rushin argues that the DOJ has been far too conservative. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347, 1415–16 (2015).

44. Mark Berman & Wesley Lowery, *The 12 Key Highlights from the DOJ's Scathing Ferguson Report*, WASH. POST (Mar. 4, 2015), [https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-doj-s-scathing-ferguson-report/?utm\\_term=.023aaf174dcf](https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-doj-s-scathing-ferguson-report/?utm_term=.023aaf174dcf) [<https://perma.cc/AY2G-WEZL>].

45. *Id.*

46. *Id.*

47. *Id.* “Despite making up 67% of the population, African Americans accounted for 85% of FPD’s traffic stops, 90% of FPD’s citations, and 93% of FPD’s arrests from 2012 to 2014.” *Id.*

48. Ted. R. Miller et al., *Perils of Police Action: A Cautionary Tale from U.S. Data Sets*, 23 PAC. INST. FOR RES. & EVALUATION 1–4 (2016); Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 835 (2003); Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089, 1098–99, 1102–03, 1106 (2005).

49. *See, e.g.*, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL POLICING CANNOT WORK 13

however, is not limited to a particular area of the country. Though such procedures may be less surprising in Southern states like Louisiana,<sup>51</sup> they also occur in the Northeast and Mid-Atlantic regions of the country,<sup>52</sup> as well as Midwestern cities like Wichita, Kansas,<sup>53</sup> and St. Louis, Missouri.<sup>54</sup> Finally, the type of police department is not necessarily determinative of finding racially disparate treatment. Police scholars have identified racial disparities in investigative stops conducted by established, traditional, ethnic departments like that of Boston,<sup>55</sup> and progressive reform-oriented police departments in the Kansas City area.<sup>56</sup>

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

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(2002); Andrew Gellman, Jeffrey A. Sagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 814 (2007); David Weisburd, Cody W. Telep & Brian A. Lawton, *Could Innovations in Policing Have Contributed to the New York City Crime Drop Even in a Period of Declining Police Strength?: The Case of Stop, Question and Frisk as a Hot Spots Policing Strategy*, 31 JUST. Q. 129, 147 (2014); Michael D. White, *Preventing Racially Biased Policing Through Internal and External Controls: The Comprehensive Accountability Package*, in RACE, ETHNICITY AND POLICING: NEW AND ESSENTIAL READINGS 468, 482–83 (Stephen K. Rice & Michael D. White eds., 2010).

50. See IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT 5 (2008).

51. Jim Ruiz & Matthew Woessner, *Profiling, Cajun Style: Racial and Demographic Profiling in Louisiana's War on Drugs*, 8 INT'L J. POLICE SCI. & MGMT. 176, 186 (2006).

52. See, e.g., PETER VERNIERO & PAUL H. ZUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 26–27 (1999).

53. Brian Winthrow, *Race-Based Policing: A Descriptive Analysis of the Wichita Stop Study*, 5 POLICE PRAC. & RES. 223, 223–24 (2004).

54. Jeff Rojek, Richard Rosenfeld & Scott Decker, *The Influence of Driver's Race on Traffic Stops in Missouri*, 7 POLICE Q. 126, 135 (2004).

55. Kate Antonovics & Brian G. Knight, *A New Look at Racial Profiling: Evidence from the Boston Police Department*, 91 REV. ECON. & STAT. 163, 163 (2009).

56. Ian Cummings, *NAACP's Warning of Racial Profiling, Abuse in Missouri Gives Would-Be Travelers Pause*, KAN. CITY STAR (Aug. 3, 2017, 5:10 PM), <http://www.kansascity.com/news/local/article165307012.html> [<https://perma.cc/GE72-KEUK>].

C. *The Symbolic Assailant*

In his book, *Justice Without Trial*, Jerome Skolnick describes the symbolic assailant, its origins, and the extent to which police orientation toward criminals is a critical factor in policing.<sup>57</sup> The idea of a symbolic assailant stems from the policeman's view of the world.<sup>58</sup> Because police officers' work required them to be occupied continually with potential violence, they developed shorthand for the kinds of people whose gesture, language, and attire the officers recognized as a prelude to violence.<sup>59</sup>

Skolnick's construction of the symbolic assailant was grounded in his observations of police work in the 1960s.<sup>60</sup> In this context, police work involved officers patrolling the neighborhood and reacting to threats.<sup>61</sup> Threats played a critical role because they were omnipresent, animating every single encounter. This meant that protecting the officer from danger was of paramount importance. According to Skolnick, officers learned to associate particular situations and types of individuals with danger.<sup>62</sup>

His work stressed that the particular personal history of the suspect the officer encounters is not important to the construction of whether the suspect is seen as suspicious.<sup>63</sup> In fact, he writes that a suspect's personal history is immaterial.<sup>64</sup> The symbolic assailant need only suggest danger either through display of a weapon or "insolence in the demeanor" signaled by the way one walks or dresses.<sup>65</sup>

Individuals who were potentially dangerous fit into a range of categories.<sup>66</sup> Skolnick, who focused on police officers' jobs in general, gives a long list of potential activities which the police are

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57. See generally SKOLNICK, *supra* note 23.

58. *Id.* at 42.

59. *Id.* at 43.

60. *Id.* at 45–46.

61. *Id.* at 48.

62. *Id.* at 47.

63. See SKOLNICK, *supra* note 23, at 45–46.

64. *Id.* at 46.

65. *Id.* at 46–47.

66. See *id.* at 46–47.

taught to use as markers of suspicion.<sup>67</sup> Some of the situations which officers were taught to consider suspicious, and should warrant field interrogations, include the following:

- (1) Suspicious persons known to the officer from previous arrests, field interrogations, and observations.
- (2) Emaciated appearing alcoholics and narcotics users who invariably turn to crime to pay for the cost of their habit.
- (3) Person who fits description of wanted suspect as described by radio, teletype, and daily bulletins.
- (4) Any person observed in the immediate vicinity of the crime very recently committed or reported as “in progress.”
- (5) Known troublemakers near large gatherings.
- (6) Persons who attempt to avoid or evade the officer.
- (7) Exaggerated unconcern over contact with the officer.
- (8) Visibly “rattled” when near the policeman.
- (9) Unescorted women or young girls in public places, particularly at night in such places as cafes, bars, bus and train depots, or street corners.
- (10) “Lovers” in an industrial area (make good lookouts).
- (11) Persons who loiter about places where children play.
- (12) Solicitors or peddlers in a residential neighborhood.
- (13) Loiterers around public restrooms.
- (14) Lone male sitting in a car adjacent to school

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67. *See id.* at 45–46.

- grounds with newspaper or book in his lap.
- (15) Lone male sitting in a car near shopping center who pays unusual amount of attention to women, sometimes continuously manipulating rear view mirror to avoid direct eye contact.
- ...
- (19) Uniformed “deliverymen” with no merchandise or truck.
- (20) Many others. How about your own personal experiences?<sup>68</sup>

Personal history is irrelevant to the symbolic assailant as Skolnick constructs him. In other words, for the purposes of the symbolic assailant, it does not matter whether the designee has a criminal history. Because the officer is constructing and deciding that an individual is a symbolic assailant prior to running the individual’s criminal history, a long criminal history has the same impact as an individual with no prior convictions.<sup>69</sup> All that matters is how the situation looks to the officer. Appearance is everything. Skolnick writes:

Nor, to qualify for the status of symbolic assailant, need an individual ever have used violence. A man backing out of a jewelry store with a gun in one hand and jewelry in the other would qualify even if the gun were a toy and he had never in his life fired a real pistol. To the policeman in the situation, the man’s personal history is momentarily immaterial. There is only one relevant sign: a gun signifying danger.<sup>70</sup>

In both the conception of the symbolic assailant and the list of potentially suspicious activities from the training manual that

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68. *Id.* at 46.

69. *See* SKOLNICK, *supra* note 23, at 46.

70. *Id.* at 46.

Skolnick quotes, officers' experiences play an important role in their construction of the symbolic assailant. For instance, take the final category in the list, which insists there are many other circumstances that are suspicious and calls officers to reflect on their own personal experiences dealing with suspects.<sup>71</sup> In general terms, the nature of the characteristics in the list are detailed and specific—they seem to narrow the markers of suspicion to a small set of situations in which a crime may have occurred in the past. Because police experience is understood to be absolutely critical in identifying suspicion, by using the phrase “many others,” the writer acknowledges that the list cannot capture every suspicious circumstance.<sup>72</sup>

*D. Some Are More Suspicious than Others: Race and the Symbolic Assailant*

Skolnick's characterization of the symbolic assailant does not mention race at all. That being said, Skolnick quickly acknowledges the fact that police officers in Westville and most other communities have come to identify the Black man with danger.<sup>73</sup> He suggests this perspective comes from the isolation faced by White patrolmen policing Black neighborhoods.<sup>74</sup> He quotes James Baldwin on the isolation that develops because of the tasks with which White policemen in Black neighborhoods are charged:

The only way to police a ghetto is to be oppressive. None of the Police Commissioner's men, even with the best will in the world, have any way of understanding the lives led by the people they swagger about in twos and threes controlling. Their very presence is an insult, and it would be, even if they spent the entire day feeding gumdrops to children. They represent the force of the white world, and

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71. *See id.*

72. *Id.* at 46.

73. *Id.* at 49.

74. *See id.* at 50.

that world's criminal profit and ease, to keep the black man corralled up here, in his place. The badge, the gun in the holster, and the swinging club make vivid what will happen should his rebellion become overt.<sup>75</sup>

Baldwin's description of the interaction between law enforcement officers and African-Americans derives from lived experience. Baldwin expects officers to behave in a particular manner because of who they are (White police officers) and the environment in which they are charged with enforcing the law (Black neighborhoods).<sup>76</sup> At least in the passage that Skolnick quotes, Baldwin is sympathetic both to the fact that Blacks are resentful of police presence, and to police officers' worries regarding danger in policing a group of individuals who are suspicious of police as an "occupying" force.<sup>77</sup>

## *II. The Rise of "Intuition" in Police Work*

At the same time that Skolnick was studying the police in Westville, the administration of President John F. Kennedy was gearing up for a war on crime.<sup>78</sup> Kennedy, Jonathan Simon writes, saw crime as a powerful way to cement the relationship between the chief executive and the public.<sup>79</sup> Building this relationship required investment in police and other infrastructure.<sup>80</sup> President Kennedy said, "Crime has to be repressed and communities must be protected . . . . But we should be pouring as much, or even more, money, manpower[,] and imagination in preventing those early law violations that start criminal careers."<sup>81</sup>

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75. SKOLNICK, *supra* note 23, at 49.

76. *See id.*

77. *See id.*

78. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 49 (2007); *see also* SKOLNICK, *supra* note 23, at 13.

79. SIMON, *supra* note 78, at 51.

80. *Id.*

81. *Id.*



Throughout the 1960s, 1970s, and 1980s, with little exception, Congress and the Executive Branch kept the nation focused on crime.<sup>82</sup> In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act.<sup>83</sup> In addition to issuing wiretapping authority to the Executive Branch, the legislation also authorized \$50 million in funds to local police departments to fight crime.<sup>84</sup> The Johnson and Nixon administrations escalated the war on crime by funding improvements in law enforcement and changing the criminal law in more punitive ways.<sup>85</sup> President Ronald Reagan appointed former trial prosecutor Ed Meese as Attorney General.<sup>86</sup> Meese attacked and tried to undermine Warren Court decisions like *Miranda v. Arizona*,<sup>87</sup> which helped to establish that criminal defendants were constitutionally entitled to procedural protection.<sup>88</sup>

#### A. Broken Windows

It was in this environment, in 1982, that the *Atlantic Monthly* published George L. Kelling and James Q. Wilson's article *Broken Windows: The Police and Neighborhood Safety*.<sup>89</sup> Wilson and Kelling's article called for the return of police to the community through increasing foot patrols and investigations of low-level

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82. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 33, 234, 242 (2011).

83. See Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 42 U.S.C. § 3711 (1984)).

84. *Id.*; NANCY E. MARION, *A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-1993* 61 (1994).

85. See STUNTZ, *supra* note 82, at 238–39.

86. Debra Cassens Moss, *The Policy and Rhetoric of Ed Meese*, 73 A.B.A. J. 64, 64 (1987); *Attorney General: Edwin Meese, III*, U.S. DEP'T OF JUST., <https://www.justice.gov/ag/bio/meese-edwin-iii> [<https://perma.cc/CQA2-MW6S>] (last visited Sept. 29, 2017).

87. See Moss, *supra* note 86, at 64.

88. *Miranda v. Arizona*, 384 U.S. 436, 463 n.33 (1966) (extending the right to counsel to police interrogation).

89. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/PH5V-DVJA>]. The effectiveness of Broken Windows has been criticized on empirical grounds. See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272–75 (2006).

crime.<sup>90</sup> Wilson and Kelling used the metaphor of a broken window in a neighborhood building, which is left unrepaired and untended, to show the link between disorder and crime.<sup>91</sup> They surmised that when a window is left in this state, the rest of the windows will soon be broken because disorder gives rise to the perception that further disorder is costless.<sup>92</sup>

Under the Broken Windows theory, disorder begets urban decay, which begets criminal invasion. This chain could be broken with the installation of a skilled foot patrol officer to maintain order.<sup>93</sup> The article places heavy reliance on the assumption that the presence of foot patrol officers, familiar with neighborhood regulars, will alleviate the anxiety that crime will occur due to an “untended” appearance.<sup>94</sup> After elucidating why order is so crucial, Wilson and Kelling posit how best to maintain it. They call for an increase in foot patrols and the prevention of minor offenses, noting that motorized patrol officers are inhibited by a barrier, which distances officers and makes them an alien force within the community.<sup>95</sup>

At its base, the philosophy of Broken Windows requires that police search neighborhoods where significant disorder—petty crimes, vandalism, etc.—exists and address it, rather than leave it alone.<sup>96</sup> In the policing context, an important, if not critical, fact in combatting crime involves finding lawbreakers. In focusing on disordered neighborhoods, departments around the country fixated on minority neighborhoods where the investigation of low-level crime morphed into the low-hanging fruit of “stop and frisk.”<sup>97</sup> Ultimately, departments focused on whomever the police could find as they

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90. Kelling & Wilson, *supra* note 89.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Kelling & Wilson, *supra* note 89; see also 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, 305–06 (1998).

97. See, e.g., Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. POVERTY L. & POL’Y 419, 419–22 (2007).

canvassed neighborhoods looking for those responsible for the disorder that plagued these spaces.<sup>98</sup>

### B. Broken Windows “On the Ground”

Broken Windows policing was adopted by police departments around the country.<sup>99</sup> One of the most famous examples was New York City. In 1989, George Kelling began working with the New York Transit Authority to apply Broken Windows policing to vandalism that was occurring on the New York City subways.<sup>100</sup> In 1994, when William Bratton—who had worked with Kelling as the head of the New York City Transit Police—became head of the New York Police Department (NYPD), he made Broken Windows a part of standard police practice for city police.<sup>101</sup>

#### 1. Evaluating Broken Windows’ Empirical Claims

The original *Broken Windows* article was based on scant empirical evidence.<sup>102</sup> As could have been expected, scholars and policy makers quickly moved to investigate Wilson and Kelling’s basic claim that general disorder leads to more serious crime.<sup>103</sup> One of the most significant criticisms of this policing practice is that the Broken Windows method of policing has done little to reduce serious crime.<sup>104</sup>

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98. *Id.*

99. See Harcourt & Ludwig, *supra* note 89, at 272 (stating that New York, Chicago, and Los Angeles have all adopted some aspect of the Broken Windows theory).

100. Kelling & Sousa, *supra* note 40, at 2.

101. *Id.*; see also Lauren Kirchner, *Breaking Down the Broken Windows Theory*, PAC. STANDARD (Jan. 7, 2014), <https://psmag.com/breaking-down-the-broken-windows-theory-bbe9c06ae2a2#tuo8pxyv6> [<https://perma.cc/Q9ZD-A5QD>].

102. Harcourt & Ludwig, *supra* note 89, at 273.

103. See WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 177–78, 180 (1998) (explaining that proactive policing strategies significantly reduced serious crime); see also Kelling & Sousa, *supra* note 40, at 10 (arguing that over 60,000 violent crimes were prevented by Broken Windows policing).

104. Elizabeth R. Groff et al., *Does What Police Do at Hot Spots Matter? The Philadelphia Policing Tactics Experiment*, 53 CRIMINOLOGY 23, 43–45 (2015) (explaining that foot patrols led to no significant reduction in crime); Kenneth J. Novak et al., *The Effects of Aggressive Policing of Disorder on Serious Crime*, 22 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 171, 186 (1999) (finding that

Professors Bernard Harcourt and Jens Ludwig argued that not only is Wilson and Kelling's supposition that the policing of minor offenses reduced serious crime unfounded, but there is a strong relationship between the rate of arrests for minor offenses and an *increase* in crime rates.<sup>105</sup> The research specifically reviews the changes in crime during the 1980s and 1990s in New York City, which had adopted a form of Broken Windows policing.<sup>106</sup> The research found:

[T]he pattern of crime changes across New York City precincts during the 1990s that Kelling and Sousa attribute to broken windows policing is equally consistent with mean reversion: those precincts that received the most intensive broken windows policing are the ones with the largest increases and levels of crime during the city's crack epidemic [of the mid-to-late 1980s]. Consistent with findings elsewhere from city-level data, jurisdictions with the greatest increases in crime during this period tend to experience the largest subsequent declines as well.<sup>107</sup>

Accordingly, this change is likely an effect of the "most intensive broken windows policing."<sup>108</sup> However, Ludwig and Harcourt found no evidence proving that Broken Windows policing reduces either the amount or rate of violent crimes.<sup>109</sup>

## 2. *Broken Windows Claps Back*

Though William Bratton, New York City's Police Commissioner, firmly supported Broken Windows policing, critical re-examination of Broken Windows and police practices in New York came on July

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police actions play no role in reducing robbery and burglary).

105. Harcourt & Ludwig, *supra* note 89, at 296.

106. *Id.* at 315.

107. *Id.*

108. *Id.*

109. *Id.* at 316.

17, 2014, after Staten Island police officers Justin D’Amico and Daniel Pantaleo accosted Eric Garner, a Black man they suspected of selling loose cigarettes.<sup>110</sup> The officers struggled with Garner, who argued with the officers and refused to cooperate.<sup>111</sup> One of the officers eventually used a chokehold on Garner, which, along with chest compressions used to subdue him, killed Garner.<sup>112</sup> Both the chokehold (a practice prohibited by police department policy) and Garner’s multiple complaints that he could not breathe were caught on cell phone video by a bystander and widely broadcast.<sup>113</sup>

Selling loose cigarettes is not a serious crime. The officers who killed Garner were acting in response to a crackdown on so-called quality-of-life crimes.<sup>114</sup> After Garner’s death, George Kelling defended the Broken Windows theory, arguing that Broken Windows received a bad reputation because it was considered a high-arrest theory.<sup>115</sup> He claimed that Broken Windows is not meant to increase the number of arrests made.<sup>116</sup> Instead, the increase has simply been the result of police exercising that type of policing.<sup>117</sup> Kelling, along with Bratton, wrote an article on the public perception of Broken Windows and why New York needed to keep it.<sup>118</sup>

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110. Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), [http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?\\_r=0](http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0) [https://perma.cc/7RP6-77SU].

111. *See id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. George Kelling, *Don’t Blame My ‘Broken Windows’ Theory for Poor Policing*, POLITICO (Aug. 11, 2015), <http://www.politico.com/magazine/story/2015/08/broken-windows-theory-poor-policing-ferguson-kelling-121268> [https://perma.cc/G5SY-WYZ5]; *see also* Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL’Y REV. 77, 83–84 (2016) (“In sum, recent decades have witnessed the emergence of (at least) two pronounced efforts to shift police organizations’ focus toward what were formerly considered relatively unimportant issues and to encourage a more aggressive response to them. The result has been a sharp increase in the arrest and incarceration of drug law violators and misdemeanants generally. And as is now well-known, both of these developments, especially the war on drugs, contributed importantly to the development of mass incarceration and to pronounced racial disparities throughout the criminal justice system.”).

116. Kelling, *supra* note 115.

117. *Id.*

118. *See generally* George L. Kelling & William J. Bratton, *Why We Need Broken Windows Policing*, CITY J. (2015), <https://www.city-journal.org/html/why-we-need-broken-windows-policing-13696.html> [https://perma.cc/TCL6-A5GV].

Following Garner's death, the public in New York did not show much support for New York City police and their Broken Windows policing.<sup>119</sup> About 90% of African-Americans and 71% of Latinos did not approve of the way the police handled Garner's situation.<sup>120</sup> Additionally, the overall approval rating of the NYPD fell by 9%.<sup>121</sup> Despite those numbers, Kelling still seemed to believe that minorities living in New York supported Broken Windows policing. Kelling maintained:

[E]ven in this highly charged context, support for Broken Windows remained high. African-Americans supported it by 56[%] to 37[%] . . . , whites by 61[%] to 33[%] . . . , and Hispanics by the largest margin of all—64[%] to 34[%] . . . . The poll results reflect the underlying public support from all races for this kind of enforcement.<sup>122</sup>

In addition to demonstrating public support, advocates of Broken Windows also have had to respond to challenges on effectiveness grounds. One study examining policing practices over a twenty-year period found that, in areas policed more assertively, the crime rates were much lower.<sup>123</sup> Kelling and Bratton maintained:

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

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

striking figures are emblematic of broader, historic declines in crime.<sup>124</sup>

In his defense of the program, Kelling also tried to dispel the idea that Broken Windows is the equivalent of, or contributes to, stop, question, and frisk (SQF).<sup>125</sup> An SQF is a “tactical response based on reasonable suspicion of possible criminality.”<sup>126</sup> In contrast, Kelling and Bratton describe Broken Windows policing as “a more broadly based policy mandating that police will address disorderly illegal behavior, such as public drinking and drug use, fights, public urination, and other acts considered to be minor offenses, with responses ranging from warning and referral to summons and arrest.”<sup>127</sup> Accordingly, they equate the standard for Broken Windows as being closer to a probable cause standard—a higher standard than reasonable suspicion.<sup>128</sup>

### 3. Targeting Through “Intuition”—Black Men Become the Symbolic Assailant

As discussed below, current policing practices—routine behaviors that police officers train for, put into practice, and are later rewarded for—establish African-American men as symbolic assailants: always suspicious and always potentially up to no good. To be clear, it is not that any of the practices described are harmful in and of themselves. As described below, the racialization of particular practices makes them harmful. In concrete terms, police and members of the public

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124. William Bratton & George L. Kelling, *The Assault on ‘Broken Windows’ Policing*, WALL ST. J. (Dec. 19, 2014), <http://www.wsj.com/articles/william-bratton-and-george-kelling-the-assault-on-broken-windows-policing-1418946183> [<https://perma.cc/23ZZ-AYCY>].

125. Kelling & Bratton, *supra* note 118 (“An SQF is based on reasonable suspicion that a crime has occurred, is occurring, or is about to occur. An officer observes someone, say, going from car to car looking into the windows. Exercising discretion, the officer decides whether to stop the person for questioning. If he suspects that the subject is armed and dangerous, he may frisk him by conducting a pat-down of his outer clothing. If the officer detects an object that may be a weapon, he may reach into the subject’s pocket.”).

126. *Id.*

127. *Id.*

128. *Id.*

read Black men as being suspicious when they are engaged in ordinary behavior—walking to school, walking in their neighborhood, walking in a neighborhood that may look like their own, driving the speed limit, etc. Behaviors that are not considered suspicious when engaged in by Whites are worthy of investigation when Black men engage in them.

The police construction of the African-American symbolic assailant is even more pernicious than simply attaching suspiciousness to being Black. The White symbolic assailant that Skolnick identified was only suspicious; suspicion led to investigation—questioning or other verification before police used a high level of force.<sup>129</sup> Black symbolic assailants—all Black men and even some Black youths—are not just suspicious, but also threatening. This prompts police to use deadly force to subdue Black men about whom they have little, if any, actual evidence of lawbreaking or dangerousness, who are unarmed,<sup>130</sup> have their hands raised in surrender,<sup>131</sup> are subdued by multiple officers,<sup>132</sup> or are running away.<sup>133</sup> When facts are disclosed, when bystander video is released, and when the coroner bags the body of the innocent Black man, police deploy the idea of the Black man as threatening to make the shooting seem reasonable and appropriate.<sup>134</sup>

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129. See SKOLNICK, *supra* note 23, at 46–47, 227.

130. Sherri Lee Keene, *Victim or Thug? Examining the Relevance of Stories in Cases Involving Shootings of Unarmed Black Males*, 58 HOW. L.J. 845, 851–53 (2015).

131. *Id.* at 852.

132. Baker, Goodman & Mueller, *supra* note 110; Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> [<https://perma.cc/4PS4-DK9E>]. A South Carolina police officer, Michael Slager, shot and killed Walter Scott. *Id.* Scott was unarmed and running away from Slager at the time that he was shot and killed. *Id.*

133. Schmidt & Apuzzo, *supra* note 132.

134. The media's disproportionate coverage of Ferguson's reaction to Michael Brown's shooting, rather than the shooting itself, exemplifies this idea. See WESLEY LOWERY, "THEY CAN'T KILL US ALL": FERGUSON, BALTIMORE, AND A NEW ERA IN AMERICA'S RACIAL JUSTICE MOVEMENT 8–9 (2016) ("Yet another police shooting in a working-class black neighborhood, even the breaking of a young black body left on public display, didn't catch the gaze of the national media. It was the community's enraged response—broken windows and shattered storefronts—that drew the eyes of the nation."); see also Holly Yan, Joshua Berlinger & Faith Robinson, *Baton Rouge Officer: Alton Sterling Reached for a Gun Before He Was Shot*, CNN (July 13, 2016, 7:59 AM), <http://www.cnn.com/2016/07/12/us/police->



Though the idea of the symbolic assailant originated in the policing of Whites, the symbolic Black assailant is very different from Skolnick's original concept.<sup>135</sup> As the concept was identified and delineated by Jerome Skolnick, the facts and circumstances in which an individual finds him or herself are what makes an individual suspicious.<sup>136</sup> Are you waiting in a deserted area at night? Are you dressed as a delivery person but do not have a truck? Are you a lone male sitting in a car near a playground with a book in your lap? Skolnick suggests that each of these behaviors is considered suspicious to the police.<sup>137</sup> For each of the items, however, note how fact-specific they are. In other words, context is everything.

Contrast the level of detail needed in Skolnick's original formulation of symbolic assailant—location, behavior, and activity are all considered—<sup>138</sup> with the lone requirement for the Black symbolic assailant—Blackness. Though it did not provide a Fourth Amendment remedy, the Supreme Court has acknowledged the constitutional issues involved with attaching suspicion to someone's race.<sup>139</sup> Use of the symbolic assailant by police is a shortcut. The downside of using any shortcut to identify criminal behavior is that an individual who is innocent may be accused.

Additionally, the impact of the symbolic assailant shortcut on Whites and Blacks varies quite dramatically. Consider the following: A White male college student goes to the park to finish his homework. He finds a parking spot near the toddler playground and begins reading. This wholly innocent behavior, while unusual, is suspicious, given Skolnick's characterization.<sup>140</sup> As a symbolic White assailant, police practices are to investigate, question the suspect, and allow his answers to either confirm or deny the officer's

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shootings-investigations/ [https://perma.cc/NVX3-8W43].

135. See SKOLNICK, *supra* note 23, at 45–46.

136. *Id.*

137. *Id.* at 46.

138. *Id.* at 45–46.

139. See *Whren v. United States*, 517 U.S. 806, 813 (1996).

140. See SKOLNICK, *supra* note 23, at 45–46.

suspicion.<sup>141</sup> The innocent college student is hassled by the questioning, but he suffers no greater intrusion.

Because the Black symbolic assailant is a broader stereotype—fitting all Black men regardless of age or circumstance—it is operationally different. Critical to the symbolic Black assailant is a series of dehumanizing stereotypes—that Blacks are criminals who are simultaneously violent and irrational.<sup>142</sup> In other words, the symbolic Black assailant is not just a possible criminal (as in the case of the symbolic White assailant), but is likely a dangerous criminal who poses a threat to the officers and to others. Faced with this potential threat, officers might not investigate or otherwise read the situation. The symbolic Black assailant means that officers are more inclined to respond with deadly force, regardless of whether it is warranted.

### *C. Creating a Response to the Symbolic Black Assailant*

The difference in police approaches to symbolic White and symbolic Black assailants evolved out of specific police practices which may or may not have had race-neutral origins. One of these police practices was Broken Windows. With its focus on detecting offenders in disordered neighborhoods, the Broken Windows manner of deployment led to the mass targeting of African-Americans in poor communities.<sup>143</sup> No longer was criminality tied to specific events indicative of criminal behavior. Instead, officers could use

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141. *Id.*

142. For a discussion of the historical development of the association between Blackness and criminality, see KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME AND THE MAKING OF MODERN URBAN AMERICA* 1, 4 (2010); and KELLY BROWN DOUGLAS, *Introduction to STAND YOUR GROUND: BLACK BODIES AND THE JUSTICE OF GOD* XII–XV (2015).

143. Collins, *supra* note 97, at 426 (citing BALT. CITY COUNCIL PUB. SAFETY SUBCOMM., *REPORT ON THE POLICE PERFORMANCE ENHANCEMENT PROGRAM AND RECOMMENDATIONS TO IMPROVE THE PROCESS FOR EXPUNGEMENT OF ARREST WHEN NO CHARGES ARE FILED* 12 (Sept. 2005)) (noting Broken Windows policing's disproportionate effect on African-Americans in Baltimore). The Supreme Court contributed to this in *Illinois v. Wardlow*, a case in which the Court upheld the stop of individuals who were fleeing in high-crime areas. 528 U.S. 119, 119–21 (2000). The Court was clear about the fact that flight alone was not indicative of suspicious activity, but rather that such actions in a high crime neighborhood did constitute the level of suspicion necessary for the stop. *Id.*

increasingly little evidence to justify their suspicions.<sup>144</sup> L. Song Richardson argues that the Supreme Court's watering down of legal standards, such as reasonable suspicion, may have had a similar effect on police procedures.<sup>145</sup> Implicit biases also play a role. In the absence of procedures stressing evidence-based markers of suspicion, the empirical underpinnings of the symbolic assailant have been transformed into a system of policing African-Americans under the guise of being intuitively focused on issues of crime control at large.<sup>146</sup>

Discriminatory police practices occurring in departments throughout the United States demonstrate the evidence of African-American men as symbolic assailants. In some cases, training the police to see African-Americans as the symbolic assailant occurs more openly than in other cases. One of the most vivid examples of police practices reflecting the idea that African-Americans are symbolic assailants was the North Miami Beach Police Department's police practice in Florida.<sup>147</sup> In 2015, after National Guard Sergeant Valerie Deant saw her brother's picture riddled with bullet holes at the firing range, she discovered that the North Miami Beach Police Department used actual mugshots of African-Americans as target practice.<sup>148</sup> Deant's brother, who completed his time in prison and had been released, was part of an array with several other African-American men.<sup>149</sup>

As the North Miami Beach Police Department target practice implies, police departmental procedures and institutionalized practices certainly play an important role in guiding stereotypes and

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144. Collins, *supra* note 97, at 434.

145. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1155–64 (2012); see also David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994).

146. Richardson, *supra* note 145, at 1153, 1155.

147. See Fred Barbash, *Florida Police Department Caught Using African American Mug Shots for Target Practice*, WASH. POST (Jan. 16, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/01/16/florida-police-department-caught-using-african-american-mug-shots-for-target-practice/?utm\\_term=.baf16a3debc](https://www.washingtonpost.com/news/morning-mix/wp/2015/01/16/florida-police-department-caught-using-african-american-mug-shots-for-target-practice/?utm_term=.baf16a3debc).

148. *Id.*

149. *Id.*

racializing suspicion. Police researchers have documented how this occurs systematically. Charles Epp, Stephen Maynard-Moody, and Donald Haider-Markel conducted one of the most interesting recent studies in this regard. In their study of more than 2,000 individuals in the Kansas City area, conducted in the early 2000s, Epp and his co-authors found that “the structure of incentives, training, and policy in contemporary policing makes it more likely that officers will act on the basis of bigotry or implicit stereotypes, leading to racial disparities in outcomes.”<sup>150</sup>

Epp and his co-authors focused on police officers’ decisions to pull cars over. They divided stops into two groups based on their character, purpose, and justification: traffic-safety enforcement stops and investigatory stops.<sup>151</sup> They found the officers undertook traffic-safety stops primarily because the driver was speeding or engaged in unsafe behavior.<sup>152</sup> They also found the officers undertook investigatory stops when they had reasonable suspicion that the driver was engaged in criminal activity.<sup>153</sup> As the Court noted in *Whren v. United States*, a case in which the driver argued he had been stopped because of racially discriminatory pretext, pretext is irrelevant.<sup>154</sup> Justice Scalia, writing for the majority, scornfully dismisses the idea that pretext could ever matter:

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

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150. CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 7 (2014).

151. *Id.* at 59.

152. *Id.*

153. *Id.*

154. *Whren v. United States*, 517 U.S. 806, 812 (1996).

Amendment; but we have repeatedly held and asserted the contrary.<sup>155</sup>

Epp and his co-authors find that police patrol officers are taught that the law dictates, and police departments exploit, the leeway created by *Whren*.<sup>156</sup> African-American drivers bear the brunt of this doctrinal misstep.<sup>157</sup> In their evaluation of the likelihood of being stopped for either investigatory or traffic-safety stops, Epp and his co-authors controlled for a variety of factors, including age, gender, whether a driver was African-American, type of car, and how carefully a driver followed the rules of the road.<sup>158</sup> In traffic-safety stops, the most important factor in determining if an individual would be stopped was how they were driving.<sup>159</sup> “The more that people violate the traffic laws the more likely they are to be stopped, regardless of their race, gender, age, or type of the vehicle.”<sup>160</sup> According to Epp and his co-authors’ research, the police did not behave in a racially discriminatory manner in enforcing traffic-safety laws; African-Americans were no more likely to be stopped in traffic-safety stops than Whites.<sup>161</sup> Investigatory stops, however, present a sharp contrast to this unbiased approach to policing. In investigatory stops, the most important factor was the race of the driver.<sup>162</sup> African-Americans faced a 2.7 times greater risk of being stopped than Whites, even when controlling for other factors.<sup>163</sup>

The construction of the symbolic assailant maps well onto Epp and his coauthors’ results. When police merely enforce traffic-safety

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155. *Id.*

156. Epp, Maynard-Moody and Haider-Markel suggest that police exploitation of *Whren* is intentional. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 150, at 35. One California Highway Patrol Officer is quoted as bragging, “[a]fter *Whren* the game was over. We won.” *Id.*

157. *Id.* The Court is careful in *Whren* not to condone racial profiling. Rather, the Court insists that claims that a stop is discriminatory must be brought under the Fourteenth Amendment (which does not have an exclusionary rule) and not the Fourth Amendment. *Whren*, 517 U.S. at 813.

158. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 150, at 65.

159. *Id.* at 64.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

laws, they pay attention to how individuals drive and how far above the speed limit they drive, and they stop violators regardless of their racial background.<sup>164</sup> In a sense, traffic-safety stops are reactive policing at its best. Police officers actually observe the crime as it occurs—the individual violating the traffic laws—and react to it. When they react in this manner, they are able to police in a way that is not racially discriminatory.

In sharp contrast to the reactive nature of traffic-safety stops, investigatory stops are motivated not by crime control, but rather by investigation of crime and the capture of possible offenders.<sup>165</sup> When officers make investigatory stops, they do not catch the perpetrators of crime red-handed, but rather use the stop as a way of evaluating whether the individual in front of them is a criminal.<sup>166</sup>

When Blackness is transformed into a marker of suspicion and threat, investigatory stops for minor crimes can become more dangerous. In the first week of July 2016, police stopped two Black men, Alton Sterling in Baton Rouge, Louisiana, and Philando Castile in St. Paul, Minnesota, for minor crimes.<sup>167</sup> During the encounters, police shot and killed both men.<sup>168</sup> When police shot Sterling, he was unarmed and lying face down.<sup>169</sup> In Castile's case, according to his girlfriend Diamond Reynolds (who was a passenger in the car and witnessed the shooting), Castile was following police orders to provide identification when he was shot.<sup>170</sup>

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164. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 150, at 65.

165. *Id.* at 36.

166. *Id.*

167. Matt Furber & Richard Pérez-Peña, *After Philando Castile's Killing, Obama Calls Police Shootings 'an American Issue,'* N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html?mcubz=1> [<https://perma.cc/8E3N-9ZN4>]; Abigail Hauslohner & Ashley Cusick, *Alton Sterling's Relatives Weather Scrutiny, Call for Justice*, WASH. POST (July 13, 2016), [https://www.washingtonpost.com/national/alton-sterlings-relatives-weather-scrutiny-call-for-justice/2016/07/13/dbf0ba60-490f-11e6-bdb9-701687974517\\_story.html?utm\\_term=.6f4084f8d717](https://www.washingtonpost.com/national/alton-sterlings-relatives-weather-scrutiny-call-for-justice/2016/07/13/dbf0ba60-490f-11e6-bdb9-701687974517_story.html?utm_term=.6f4084f8d717) [<https://perma.cc/3ZFK-R4NF>].

168. Furber & Pérez-Peña, *supra* note 167; Hauslohner & Cusick, *supra* note 167.

169. *Update: Police Shooting Deaths of Alton Sterling and Walter Scott*, INGLEWOOD TODAY (May 4, 2017), <http://www.inglewoodtoday.com/index.php/breaking-news/community/item/1028-update-police-shooting-deaths-of-alton-sterling-and-walter-scott>.

170. *Id.* The officer who shot Castile was ultimately charged in his killing but was acquitted. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017),

Though the facts of the cases are slightly different, in both cases if you remove the stopped individual's race, law enforcement officers killed the men even though they did not present any significant danger to the officers who used deadly force against them. Through training, officers learn the legal dictates for using deadly force, and they are normally evaluated on whether the facts demanded using a weapon to protect themselves or a member of the public.<sup>171</sup> Because these men were both African-American, the mythology of the symbolic assailant takes over. Officers no longer conduct objective analyses of the situations they encounter. A Black men's race becomes the reason officers stop Black men and see them as threatening enough to shoot them multiple times, even in the absence of the men brandishing any weapon.

#### *D. The Creation of the African-American Symbolic Assailant*

The creation of the African-American symbolic assailant starts early, sometimes as young as early adolescence and high school, as Black students are criminalized and placed into the "school-to-prison pipeline." School-to-prison pipelines plague African-American and other minority communities.<sup>172</sup> This issue starts with a high percentage of African-American students who are suspended and expelled from school every year.<sup>173</sup> Schools' strict discipline procedures have been described as the following:

Lacking resources, facing incentives to push out low-performing students, and responding to public misperceptions about school safety, many schools have embraced draconian school discipline policies, including

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<https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html>  
[<https://perma.cc/VY9F-KT8Y>].

171. MCGINTY, *supra* note 3, at 35.

172. Chancee D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1012 (2009).

173. See CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 2 (2010).

[zero tolerance] rules that automatically impose severe punishments regardless of circumstances. Although the necessity of discipline in schools goes without saying, schools in recent years have begun exercising their disciplinary authority to suspend and expel students more frequently and in far more questionable circumstances.<sup>174</sup>

Many schools have implemented policing policies to discipline students. One of the policies with the most significant effect on African-American students was the creation of so-called zero tolerance policies.<sup>175</sup> Under such policies, “[r]ates of suspension have increased dramatically in recent years—from 1.7 million in 1974 to 3.1 million in 2000—and have been most dramatic for children of color.”<sup>176</sup> This type of excessively punitive disciplinary policy causes students to enter the pipeline, and subsequently, the criminal justice system.<sup>177</sup> Often, students who fall into the pipeline do not have anything else to do outside of school.<sup>178</sup> They fall behind in their classes, contributing to them becoming high school dropouts and adult criminals.<sup>179</sup>

Nationally, African-American students are expelled at a rate three times higher than that of White students.<sup>180</sup> Because these students no

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174. *Id.* at 2–3.

175. AM. CIVIL LIBERTIES UNION, LOCATING THE SCHOOL-TO-PRISON PIPELINE 1 (2008), [https://www.aclu.org/sites/default/files/images/asset\\_upload\\_file966\\_35553.pdf](https://www.aclu.org/sites/default/files/images/asset_upload_file966_35553.pdf) [<https://perma.cc/C3JJ-5WXA>] (“Lacking resources, facing incentives to push out low-performing students, and responding to a handful of highly-publicized school shootings, schools have embraced *zero-tolerance policies* that automatically impose severe punishment regardless of circumstances. Under these policies, students have been *expelled* for bringing nail clippers or scissors to school.”).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. DEP’T OF EDUC. OFFICE OF CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE (Mar. 2014), <http://blogs.edweek.org/edweek/rulesforengagement/CRDC%20School%20Discipline%20Snapshot.pdf> [<https://perma.cc/4V5Y-HQ8Y>]; *see also* AM. CIVIL LIBERTIES UNION, *supra* note 175 (“Many under-resourced schools become pipeline gateways by placing increased reliance on police rather than teachers and administrators to maintain discipline. Growing numbers of districts employ school resource officers to patrol school hallways, often with little or no training in working with youth. As a result, children are far more likely to be subject to school-based arrests—the majority of which are for non-violent offenses, such as disruptive behavior—than they were a



longer attend schools, they quickly become the targets of criminalization.<sup>181</sup> For example, in New York, Blacks and Latinos make up 85% of all stop and frisks, with Blacks alone making up 55%.<sup>182</sup> Thirty percent of all juvenile arrests are Blacks, even though they make up only 17% of the juvenile population.<sup>183</sup> Subsequently, Blacks make up over 60% of juveniles tried and convicted as adults.<sup>184</sup> As far as sentencing is concerned, “. . . black youth are nine times more likely than white youth to receive an adult prison sentence. Cumulatively, ‘black juveniles are about four times as likely as their white peers to be incarcerated.’”<sup>185</sup>

One of the biggest issues for students who enter the pipeline is that “it is difficult for them to make the journey in reverse.”<sup>186</sup> Often, it is hard for these students to re-adjust to school because many of them have fallen behind, and there are no programs in the juvenile detention centers to rehabilitate them.<sup>187</sup> As a repercussion, the vast majority of students never finish high school or complete their education.<sup>188</sup>

Referred to as an “inter-institutional system,” school-to-prison pipelines have one particular standout problem: stop and frisk.<sup>189</sup> As previously mentioned, African-Americans make up the majority of people who are stopped and frisked.<sup>190</sup> A good amount of these stops lead to arrests, subsequent convictions, and imprisonment.<sup>191</sup> Thus, for those Black youths ejected from the school system either

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generation ago. The rise in school-based arrests, the quickest route from the classroom to the jailhouse, most directly exemplifies the criminalization of school children.”)

181. AM. CIVIL LIBERTIES UNION, *supra* note 175 (“Students pushed along the pipeline find themselves in *juvenile detention facilities*, many of which provide few, if any, educational services. Students of color . . . are far more likely than their white peers to be suspended, expelled, or arrested for the *same kind* of conduct at school . . .”); Smith, *supra* note 172, at 1011–12.

182. Smith, *supra* note 172, at 1012.

183. *Id.*

184. *Id.*

185. *Id.*; *see also* AM. CIVIL LIBERTIES UNION, *supra* note 175.

186. AM. CIVIL LIBERTIES UNION, *supra* note 175.

187. *Id.*; KIM, LOSEN & HEWITT, *supra* note 173, at 3.

188. AM. CIVIL LIBERTIES UNION, *supra* note 175; KIM, LOSEN & HEWITT, *supra* note 173, at 3.

189. Smith, *supra* note 172, at 1014.

190. *Id.* at 1012.

191. *Id.*

temporarily or permanently, the practice of stop and frisk is life-changing.<sup>192</sup>

*E. Officers' Explanations for Racially Biased Behavior*

Unsurprisingly, police officers strongly deny a racial basis for their behavior.<sup>193</sup> Nonetheless, much of police explanations track what police scholars have long understood about police behavior. For instance, there is significant evidence of Jerome Skolnick's revelation that the policeman's working personality is untrusting and animated by fear and threat.<sup>194</sup>

When officers shoot unarmed Blacks, they almost always offer explanations that identify the individuals as representing credible threats.<sup>195</sup> This is true even when the facts of the situation may suggest otherwise. For instance, the police response to twelve-year-old Tamir Rice strongly evokes notions of Rice's Blackness, rather than his size, having transformed him into a dangerous threat.<sup>196</sup> Tim Loehmann, the twenty-six-year-old officer who shot and killed Tamir Rice, told another officer, "[Rice] didn't give me a chance . . . [Rice] reached for the gun and he gave me no choice."<sup>197</sup> As if reading from Skolnick, Cleveland Police Patrolmen's Association President, Steve Loomis, told *Politico* that Tamir Rice was "menacing. He's 5-feet-7, 191 pounds. He wasn't that little kid you're seeing in pictures. He's a 12-year-old in an adult body."<sup>198</sup> In response to the federal lawsuit,

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192. *Id.*

193. Karen S. Glover, *Police Discourse on Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 239, 242 (2007).

194. See SKOLNICK, *supra* note 23, at 232.

195. Kimberly Kindy & Kimbriell Kelly, *Police Officers Charged in Fatal Shootings While on Duty: 54 Cases in the Past Decade*, WASH. POST (Apr. 12, 2015), [https://www.washingtonpost.com/news/post-nation/wp/2015/04/12/police-officers-charged-in-fatal-shootings-while-on-duty-54-cases-in-the-past-decade/?utm\\_term=.900c436b5155](https://www.washingtonpost.com/news/post-nation/wp/2015/04/12/police-officers-charged-in-fatal-shootings-while-on-duty-54-cases-in-the-past-decade/?utm_term=.900c436b5155) [<https://perma.cc/5L4R-7YE7>].

196. See Philip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 526–28 (2014). To assume that Black children are threatening to adults when they are just children is common behavior. See *id.*

197. MCGINTY, *supra* note 3, at 60.

198. Jonathan Capehart, *It's Tamir Rice's Fault*, WASH. POST (Mar. 2, 2015), [https://www.washingtonpost.com/blogs/post-partisan/wp/2015/03/02/its-tamir-rices-fault/?utm\\_term=.d7d747e87e43](https://www.washingtonpost.com/blogs/post-partisan/wp/2015/03/02/its-tamir-rices-fault/?utm_term=.d7d747e87e43) (internal quotation marks omitted). Consistent with the idea that Rice

Cleveland city attorneys argued that Rice caused his own death through “the failure . . . to exercise due care to avoid injury,”<sup>199</sup> although he was only a preteen.

Though the original symbolic assailant is heavily context-driven,<sup>200</sup> context is irrelevant to the Black male symbolic assailant—Blackness is all that matters in officers’ decisions that an individual is suspicious and in need of further investigation. The Black symbolic assailant means that Black men—irrespective of age, class, behavior, or contextual factors—require investigation.

The importance of the Black man being the symbolic assailant is significant because the construct is both a marker of suspicion and an automatic threat to officer safety. This construct proved true when Officer Jeronimo Yanez instantly shot and killed Philando Castile after pulling Castile over in Falcon Heights, Minnesota, on July 6, 2016.<sup>201</sup> Officer Yanez initially indicated that Castile had been pulled over for a cracked taillight.<sup>202</sup> Audio from the police radio indicated that, prior to the stop, officers were insisting that Castile matched the description of a robbery suspect because of his “wide-set nose.”<sup>203</sup> In a similar manner, police officers in Tulsa, Oklahoma, called Terrence Crutcher “a bad dude” as they hovered over him in a helicopter.<sup>204</sup>

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was a dangerous threat even after Rice was shot and mortally wounded by Loehmann, the two officers delivered no first aid to Rice who succumbed to his wounds at the hospital the following day. Richard A. Oppel, Jr., *Police Gave Boy No Aid After Shooting in Cleveland*, N.Y. TIMES (Jan. 8, 2015), <https://www.nytimes.com/2015/01/09/us/police-in-cleveland-boys-fatal-shooting-did-not-give-medical-aid.html>.

199. Wesley Lowery, *Tamir Rice Family Attorney Says ‘Unbelievable’ That City of Cleveland Court Filing Blames Tamir for His Own Death*, WASH. POST (Mar. 2, 2015), [https://www.washingtonpost.com/news/post-nation/wp/2015/03/02/tamir-rice-family-attorney-says-unbelievable-that-city-of-cleveland-court-filing-blames-tamir-for-his-own-death/?utm\\_term=.862d27540c85](https://www.washingtonpost.com/news/post-nation/wp/2015/03/02/tamir-rice-family-attorney-says-unbelievable-that-city-of-cleveland-court-filing-blames-tamir-for-his-own-death/?utm_term=.862d27540c85).

200. See, e.g., SKOLNICK, *supra* note 23, at 46–47.

201. Pat Pheifer & Claude Peck, *Aftermath of Fatal Falcon Heights Officer-Involved Shooting Captured on Video*, STAR TRIB. (July 7, 2016), <http://www.startribune.com/aftermath-of-officer-involved-shooting-captured-on-phone-video/385789251/#1>.

202. *Id.*

203. Ashley Collman, *The Driver Looks More Like One of Our Suspects, Just Because of the Wide-Set Nose’: Police Audio Shows Officers Thought Philando Castile Was a Robbery Suspect*, DAILY MAIL (July 12, 2016, 11:19 AM), <http://www.dailymail.co.uk/news/article-3686599/The-driver-looks-like-one-suspects-just-wide-set-nose-Police-audio-shows-officers-thought-Philando-Castile-robbery-suspect.html>.

204. Liam Stack, *Video Released in Terence Crutcher’s Killing by Tulsa Police*, N.Y. TIMES (Sept. 19, 2016), <https://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa>.

Police video later showed that Crutcher had his hands raised and was walking when Officer Bettye Shelby shot and killed him.<sup>205</sup>

*F. Black Women and the Police*

In the previous section, I identified the symbolic assailant as a Black male.<sup>206</sup> This paradigm does not mean that police see Black women as innocent of criminal wrongdoing or as deserving of the same care and concern that White women receive. In some ways, stereotypes about Black women increase the likelihood they will be subjected to police violence.<sup>207</sup> When police officers confront Black women, femininity increases Black women's gendered vulnerability.<sup>208</sup> In some cases, Black women's gender may provide them a small amount of "protection" from race-based violence, at least compared to that which Black men face. Officers may not fear Black women automatically or consider them suspicious or threatening to officer safety. This perception may mean that officers are less likely to immediately react with the highest level of force by shooting.<sup>209</sup>

Though the same threat level may not be present when officers encounter Black women as when they encounter Black men, officers do not investigate the circumstances in cases involving Black women. The fatal cases involving Black women suggest that although officers may see Black women as less harmful to their

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police.html?\_r=0.

205. *Id.*

206. See discussion *supra* Part I.D.

207. See Nnennaya Amuchie, "The Forgotten Victims" *How Racialized Gender Stereotypes Lead to Police Violence Against Black Women and Girls: Incorporating an Analysis of Police Violence Into Feminist Jurisprudence and Community Activism*, 14 SEATTLE J. FOR SOC. JUST. 617, 629 (2016).

208. Black women's gendered vulnerability can expose them to sexual violence at the hands of police, as in the case of Devon Holtzclaw, a former Oklahoma police officer convicted of sexually assaulting thirteen Black women. Dave Phillips, *Former Oklahoma City Police Officer Found Guilty of Rapes*, N.Y. TIMES (Dec. 10, 2015), [https://www.nytimes.com/2015/12/11/us/former-oklahoma-city-police-officer-found-guilty-of-rapes.html?\\_r=0](https://www.nytimes.com/2015/12/11/us/former-oklahoma-city-police-officer-found-guilty-of-rapes.html?_r=0).

209. See *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2017/> (last visited Oct. 5, 2017) (showing that as of October 2017, seven Black women have been killed by police so far in 2017, compared to seven hundred forty-eight total victims of police shootings in the same time period).

safety, officers often exercise little care or concern when interacting with them.<sup>210</sup> In other words, officers harm and even kill many Black women by using a high level of force to respond to situations in which Black women are nonthreatening and mentally ill<sup>211</sup> or simply refuse to follow police officers' orders.<sup>212</sup>

Although Black women are not seen as threats in the same way, the lack of care and concern police demonstrate toward Black women may result in injury or even death in situations in which women display vulnerability, such as illness, advanced age, and when they are in the presence of young children. For instance, in July 2014, just weeks after NYPD officers choked Eric Garner to death, Brooklyn police officers used a chokehold on Rosan Miller, a Black woman who was five months pregnant.<sup>213</sup> Miller attracted the attention of officers because she was barbecuing in front of her house.<sup>214</sup> In August 2014, Denise Stewart, a forty-eight-year-old Black grandmother, responded when police knocked on her door by telling the police they had the wrong address, but the officers dragged her into the hallway of her apartment building half naked and held her for

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210. See Al Jazeera English, *Fault Lines—The Lives of Black Women*, YOUTUBE (Oct. 18, 2016), [https://www.youtube.com/watch?v=qKh2Xp0m\\_QE](https://www.youtube.com/watch?v=qKh2Xp0m_QE). The documentary describes Betty Jones's killing from the threshold of her home in Chicago. *Id.* Officer Robert Rialmo claims that he was shooting another person in self-defense and killed Jones by accident. *Id.* The lawyer for the family's suit against the city, however, presents pictures showing the doorway sprayed with bullets and a cluster of bullet casings found twenty feet away from the home. *Id.* He states "[s]he never should have been placed at risk of any injury, let alone death, when she's in her apartment and the officer knows she's there." *Id.*

211. See Alan Feuer, *Fatal Police Shooting in Bronx Echoes One from 32 Years Ago*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/nyregion/fatal-police-shooting-in-bronx-echoes-one-from-32-years-ago.html> (describing the shootings of Deborah Danner and Eleanor Bumpers); Hetty Chang, *Woman Fatally Shot by Torrance Police Had Bipolar Disorder*, NBC L.A. (Nov. 2, 2016), <http://www.nbclosangeles.com/news/local/Family-of-Woman-Shot-by-Torrance-Police-Speaks-Out-399604311.html> (describing the shooting of Michelle Shirley in Torrance, CA); Kate Abbey-Lambertz, *These 15 Black Women Were Killed During Police Encounters. Their Lives Matter, Too*, HUFFINGTON POST (May 26, 2016), [http://www.huffingtonpost.com/2015/02/13/black-womens-lives-matter-police-shootings\\_n\\_6644276.html](http://www.huffingtonpost.com/2015/02/13/black-womens-lives-matter-police-shootings_n_6644276.html) (describing the killings of Tanisha Anderson in Cleveland, Miriam Carey in Washington, D.C., and Shereese Francis in New York City).

212. See Amuchie, *supra* note 207, at 652.

213. KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA* 19 (AK Press 3d ed. 2015).

214. *Id.*

several minutes.<sup>215</sup> Police also dragged Stewart's four children into the hallway, handcuffing them.<sup>216</sup>

Though Stewart survived, not all Black women who encounter the police do. In some cases, officers' reckless disregard for the welfare of Black women leads to their deaths. For example, in July 2012, officers reported to the home of Alecia Thomas to arrest her for child abandonment.<sup>217</sup> Alecia Thomas had dropped off her children at a Los Angeles police station because she could no longer care for them.<sup>218</sup> As Officer Mary O'Callaghan arrested Thomas, Officer O'Callaghan struck the handcuffed woman in the throat and kicked her in the groin a number of times.<sup>219</sup> In the back of the police car, Thomas lost consciousness and was pronounced dead soon after arriving at the hospital.<sup>220</sup> While the coroner determined cocaine intoxication was "likely a major factor in Thomas' death," the coroner listed Thomas' official cause of death as "undetermined" because it was impossible to determine what role the struggle with officers played in her death.<sup>221</sup>

When Black women encounter police officers, officers may treat them as suspects, rather than victimized women. This treatment may occur despite facts that suggest the Black woman is clearly a victim and not a perpetrator. In a number of cases, officers reported to the

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215. *Id.*; John Marzulli et al., *Naked Brooklyn Woman Dragged from Apartment, Left Topless in Hallway for Minutes by NYPD Officers Who Say She Beat 12-Year-Old Daughter*, N.Y. DAILY NEWS (Aug. 1, 2014, 11:25 PM), <http://www.nydailynews.com/new-york/brooklyn/nypd-officers-drag-naked-brooklyn-woman-apartment-video-article-1.1889292>.

216. Marzulli et al., *supra* note 215.

217. Marisa Gerber, *Arrest Video Played in Trial of LAPD Officer Accused in Woman's Death*, L.A. TIMES (May 20, 2015, 2:09 PM), <http://www.latimes.com/local/lanow/la-me-ln-mary-ocallaghan-opening-statements-20150519-story.html>.

218. *Id.*

219. *Id.*

220. *See id.* Although Stewart and Miller's cases did not result in officer charges, authorities charged Thomas' assailant, O'Callaghan, with assault and convicted her on June 5, 2015. Anthony Kurzweil & Karen Wynter, *LAPD Officer Found Guilty of Assault in Arrest of Woman Who Died in Custody*, KTLA5 (June 25, 2015, 7:43 PM), <http://ktla.com/2015/06/05/verdict-reached-in-trial-of-lapd-officer-accused-of-assault-in-womans-death/>.

221. *Id.*

scene of a domestic violence situation and ended up shooting the Black women who were the victims of domestic violence.<sup>222</sup>

### III. *The Cop in All of Us*

Police officers' treatment of African-Americans as potential assailants, prior to any criminal background assessment or specific facts signaling danger, is strongly at odds with criminal procedure standards requiring individualized suspicion and with the deeply held ideals of fairness and nondiscrimination.<sup>223</sup> Polling data since the 1960s indicates that Americans believe individuals should be treated equally by the police.<sup>224</sup> Though there are wide racial divides in whether Americans believe that African-Americans are treated fairly by the police, a generalized belief in equality persists nonetheless.<sup>225</sup>

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

The African-American symbolic assailant looms large in the American consciousness. Even though victim surveys reveal most Whites crime victims are victimized by White perpetrators,<sup>226</sup> when Whites want to describe themselves as a victim of crime, the assailant

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222. E.g., Kirsten West Savali, *Aura Rosser: Police Kill Mich. Woman After Responding to Domestic Violence Call*, NEWSONE (Nov. 13, 2014), <https://newsone.com/3070659/aura-rosser-police-kill-mich-woman-after-responding-to-domestic-violence-incident/>; Claire Scholl, *Woman Killed in Oxnard Officer Involved Shooting Identified*, KEYT (Mar. 20, 2015, 8:54 AM), <http://www.keyt.com/news/ventura-county/woman-killed-in-oxnard-officer-involved-shooting-identified/65274203>; Fred Clasen-Kelly, *The Seconds Before the Shots*, CHARLOTTE OBSERVER (Mar. 21, 2015, 7:46 PM), <http://www.charlotteobserver.com/news/local/crime/article15728675.html>; Austin McCoy, *Viewpoint: One Year Since Aura Rosser's Death and Still No Justice*, MICH. DAILY (Nov. 5, 2015, 7:38 PM), <https://www.michigandaily.com/section/viewpoints/viewpoint-one-year-aura-rossers-death>.

223. See, e.g., Rosenthal, *supra* note 37, at 92–95.

224. See generally Daniel Cox & Robert P. Jones, *Deep Divide Between Black and White Americans in Views of Criminal Justice System*, PUB. RELIGION RES. INST. (May 7, 2015), <http://publicreligion.org/research/2015/05/divide-white-black-americans-criminal-justice-system/>.

225. *Id.*

226. See, e.g., KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 102–07 (2d ed. 2009).

that they dream up is someone Black.<sup>227</sup> Two famous cases include those of Charles Stuart and Susan Smith. In 1989, Stuart told Boston police that he and his wife Carol were on their way home from a Lamaze class when a Black man wearing a jogging suit stopped their car.<sup>228</sup> Stuart claimed an assailant with a raspy voice forced his way into their car at a stoplight, ordered him to drive a short distance away, and robbed them.<sup>229</sup> The assailant allegedly then shot Charles in the stomach and Carol in the head.<sup>230</sup>

At least initially, creating a fictional Black robber worked quite well for Stuart. After his police report, police bulldozed their way through Mission Hill, a predominantly Black neighborhood, and rounded up several Black men for a lineup.<sup>231</sup> Stuart picked a Black man who he insisted most resembled the attacker.<sup>232</sup> Upon further investigation, the police shifted their focus to Charles Stuart, who committed suicide rather than face arrest.<sup>233</sup>

Susan Smith is another example of someone who fictitiously blamed a Black assailant for a crime that she committed. Smith, a mother of two, notified authorities that a man stole her car and kidnapped her two small children.<sup>234</sup> The race of the man that she claimed kidnapped her children was African-American.<sup>235</sup> Smith went to the media pleading for the safe return of her missing children, launching national concern for them.<sup>236</sup>

It took Susan Smith over a week to confess.<sup>237</sup> She only did so after authorities had become suspicious of her story.<sup>238</sup> Smith

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227. *Id.* at 98–101, 106–07.

228. JOE SHARKEY, *DEADLY GREED: THE RIVETING TRUE STORY OF THE STUART MURDER CASE THAT ROCKED BOSTON AND SHOCKED THE NATION* 111, 141 (2017).

229. *Id.* at 140.

230. *Id.*

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

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Harrison Cahill, *Susan Smith: 20 Years Later, Case Still a Shocker*, STATE (Oct. 18, 2014, 6:48 PM), <http://www.thestate.com/news/local/crime/article13900058.html>.

237. *Id.*

238. *Id.*



confessed that she allowed her car to roll into a lake.<sup>239</sup> She confirmed this by taking the authorities to the spot where her children drowned and where police then found their bodies.<sup>240</sup> Smith did not explain her reasoning behind naming a Black man as the culprit.<sup>241</sup>

Katheryn Russell-Brown has identified crimes like the Stuart and Smith murders as racial hoaxes.<sup>242</sup> Russell-Brown defines racial hoaxes as situations in which either “[an] individual fabricates a crime and blames it on another person because of his or her race; or [an] actual crime has been committed and the perpetrator falsely blames someone because of his race.”<sup>243</sup>

Russell-Brown scoured news sources and other documents and was able to identify sixty-two racial hoaxes, in which Whites identified Blacks as the assailant, occurring between 1987 and 2006.<sup>244</sup> She insists that the sixty-two cases she identified are most likely an undercount.<sup>245</sup> Interestingly enough, 12% of the cases Russell-Brown identified involved police officers or some other judicial officer—judges, prosecutors, and court deputies.<sup>246</sup>

Though the cases of Charles Stuart and Susan Smith are the most famous cases of racial hoaxes, several other cases in the interim have been extremely well-publicized.<sup>247</sup> In 2008, the twenty-one-year-old

239. *Id.*

240. *Id.*

241. *See id.*

242. RUSSELL-BROWN, *supra* note 226, at 100.

243. *Id.*

244. *Id.* at 105. Though I only discuss racial hoaxes in which Whites blame Blacks for the crime they have committed, there are some examples of situations in which Blacks report having been victimized by a crime and blame Whites. *Id.* at xcvii.

245. *Id.* at 102.

246. *Id.* at 107.

247. One notable case from 2008 involves Ashley Todd, a campaign worker for U.S. presidential candidate John McCain, who claimed to have been approached by a Black man at a cash machine and robbed of \$60. Michael A. Fuoco, Jerome L. Sherman & Sadie Gurman, *McCain Volunteer Admits to Hoax: ‘B’ on Her Cheek, Black Eye Were Likely Self-Inflicted*, PITTSBURGH POST-GAZETTE (Oct. 25, 2008, 4:00 AM), <http://www.post-gazette.com/local/neighborhoods/2008/10/25/McCain-volunteer-admits-to-hoax/stories/200810250133>. Seeing the McCain sticker on her car, according to Todd, he allegedly became enraged and assaulted her, punching her. *Id.* Todd insisted that the assailant carved the letter “B” onto her cheek and said, “[y]ou are going to be a Barack supporter.” *Id.* Police were suspicious when they noticed that the B was backwards as it might be for an individual who is using a mirror. *Id.* Todd confessed to inventing the story after police reviewed surveillance tapes. *Id.*

son of long-time Philadelphia city councilman and controller Joseph Vignola admitted he beat and cut the throat of a woman he met on Craigslist, and falsely accused a Black man of the crime.<sup>248</sup> In 2010, Bethany Storro of Vancouver, Washington, told police that she was standing outside of a Starbucks when a Black girl in her twenties approached her and said, “[h]ey, pretty girl, do you want to drink this?”<sup>249</sup> According to Storro’s account, the woman then threw acid in Storro’s face, causing serious disfigurement.<sup>250</sup> Police searched extensively for the attacker until a newspaper reporter uncovered witnesses who said that Storro was alone when she collapsed on the street.<sup>251</sup> Storro later admitted to fabricating the story and rubbing drain cleaner on her face.<sup>252</sup>

Imaginary Black assailants occur not just in the United States, but also in Europe and even as far away as Australia. On November 2, 2007, someone sexually assaulted and stabbed British student Meredith Kercher to death in the town of Perugia.<sup>253</sup> Her roommate, Amanda Knox, told police that Congolese bar owner Patrick Lumumba killed Kercher.<sup>254</sup> Authorities arrested Knox, along with

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248. Vernon Clark, *Joseph Vignola Jr. Admits Attacking Woman He Met on Craigslist*, PHILA. INQUIRER, Sept. 21, 2010, [http://www.philly.com/philly/news/local/20100921\\_Joseph\\_Vignola\\_Jr\\_admits\\_attacking\\_woman\\_he\\_met\\_on\\_Craigslist.html](http://www.philly.com/philly/news/local/20100921_Joseph_Vignola_Jr_admits_attacking_woman_he_met_on_Craigslist.html). Vignola, Jr. met the woman on Craigslist, had consensual sex with her, and then began to argue with her. *Id.* At some point, Vignola, Jr. punched the woman in the throat and then knocked her unconscious. *Id.* After she was unconscious, he took a knife and made a six-inch slash on the right side of her neck. *Id.* He then took back the money he paid the woman and fled from the hotel. *Id.* Vignola, Jr. initially told police that a light-skinned Black man had burst into the room while they were having sex and attacked the woman. *Id.* He later confessed to the crime. *Id.*

249. ‘I Am Totally Sorry’: Acid Attack ‘Victim’ Who Gained World’s Sympathy Sentenced After Admitting It Was Hoax, DAILY MAIL (Apr. 10, 2011, 12:59 PM), <http://www.dailymail.co.uk/news/article-1375208/Acid-attack-victim-Bethany-Storro-sentenced-admitting-hoax.html>.

250. *Id.*

251. *Id.*

252. *Prosecutor: Clear Evidence of Crimes in Acid Attack Hoax*, NBC NEWS (Sept. 21, 2010, 1:18 PM), [http://www.nbcnews.com/id/39278904/ns/us\\_news-crime\\_and\\_courts/t/prosecutor-clear-evidence-crimes-acid-attack-hoax/#.WaXX9sh96Uk](http://www.nbcnews.com/id/39278904/ns/us_news-crime_and_courts/t/prosecutor-clear-evidence-crimes-acid-attack-hoax/#.WaXX9sh96Uk).

253. *Amanda Knox Trial Ordeal Is Over, but Meredith Kercher Murder Mystery Remains*, WASH. POST (Oct. 6, 2011), [https://www.washingtonpost.com/national/amanda-knox-trial-ordeal-is-over-but-meredith-kercher-murder-mystery-remains/2011/10/05/gIQAFevEQL\\_story.html?utm\\_term=.fa62dfc339ec](https://www.washingtonpost.com/national/amanda-knox-trial-ordeal-is-over-but-meredith-kercher-murder-mystery-remains/2011/10/05/gIQAFevEQL_story.html?utm_term=.fa62dfc339ec).

254. Mark Townsend & Daniel Boffey, *Amanda Knox Is Free Because She’s Rich and American, Says Patrick Lumumba*, GUARDIAN (Mar. 28, 2015, 10:43 AM), <https://www.theguardian.com/us-news/2015/mar/28/amanda-knox-free-rich-american-patrick-lumumba-meredith-kercher-murder>. After

Raffaele Sollecito, and a court later convicted them of killing Kercher.<sup>255</sup>

As an American, it is likely that Amanda Knox learned racial politics and the appropriate scapegoats for crimes in the United States. Americans are not the only ones who attribute their criminal behavior to someone Black. For example, on April 10, 2016, Sophina Nikat, a twenty-two-year-old living in Melbourne, Australia, claimed that a shoeless Black man accosted her while she was pushing her fourteen-month-old daughter, Sanaya Sahib, in a stroller.<sup>256</sup> According to Nikat's story, the man, who smelled like alcohol, pushed her, grabbed her child, and ran off.<sup>257</sup> Authorities found Sanaya's dead body in a nearby creek.<sup>258</sup> After security footage showed the mother casually strolling away with an empty stroller, police questioned Nikat, and she admitted to killing her toddler.<sup>259</sup>

#### A. *White Racial Hoaxes as a Marker of the Symbolic Assailant*

Though Blacks also commit racial hoaxes, White racial hoaxes tend to fit different scenarios. In the past, well-publicized Black hoaxes have involved a Black person (falsely) asserting that a racist White person attacked them.<sup>260</sup> Typically, racial hoaxes committed

Knox named Lumumba as the assailant, he was taken to the station at dawn and held in custody for two weeks until a university professor provided Lumumba with an alibi. Priya Joshi, *Amanda Knox Admits She Struggles with Guilt for Accusing Patrick Lumumba of Meredith Kercher Murder*, INT'L BUS. TIMES (Feb. 8, 2014, 8:26 PM), <http://www.ibtimes.co.uk/amanda-knox-admits-she-struggles-guilt-accusing-patrick-lumumba-meredith-kercher-murder-1435683>.

255. *Amanda Knox "Full of Joy" After Conviction Overturned*, CBS NEWS (Mar. 27, 2015, 5:50 PM), <https://www.cbsnews.com/news/conviction-overturned-for-amanda-knox-again/>. Knox and Sollecito served four years in prison before an appeals court acquitted them in 2011. *Italy Court: Knox and Kercher Fought Before Murder*, SEATTLE TIMES (Apr. 30, 2014, 7:30 AM), <http://www.seattletimes.com/seattle-news/italy-court-knox-and-kercher-fought-before-murder/>.

256. Shannon Deery, *Mum Sofina Nikat Charged Over Murder of Toddler Sanaya Sahib*, HERALD SUN (Apr. 13, 2016, 2:58 AM), <http://www.heraldsun.com.au/news/law-order/woman-charged-over-murder-of-toddler-sanaya-sahib/news-story/1b01d8bcc8ad6bd9f449787ad14e4a3b>.

257. *Id.*

258. *Id.*

259. *Id.*

260. The case of fifteen-year-old Tawana Brawley falls into this category. In 1987, Brawley accused four White men, several of whom were police officers and one of whom was a prosecutor, of raping her. Michael Gartland, *Pay-Up Time for Brawley: '87 Rape-Hoaxer Finally Shells Out for Slander*, N.Y. POST (Aug. 4, 2013, 4:00 AM), <http://nypost.com/2013/08/04/pay-up-time-for-brawley-87-rape-hoaxer->

by Whites involve a White person committing a crime against themselves or someone else, and selecting a stereotypical trope—the Black man—on which to blame the crime.<sup>261</sup> The choice of a Black perpetrator goes against the general pattern of criminal behavior. Most violent crime involves victims and perpetrators of the same racial background.<sup>262</sup> In other words, White victims are most likely to be attacked by other Whites.

Naming a Black person as the assailant, as racial hoaxers do, is for most Whites an exercise in naming a racialized “other” with whom they have little to no previous experience. Thus, the choice of the fake Black perpetrator, that is, to name someone Black as the assailant, is to reach outside of a White person’s knowledge and experience base. Most Whites have social networks that are almost exclusively White.<sup>263</sup> In addition to social segregation, the high level of residential segregation, as described in Part D, means that Whites have no experience with Blacks as neighbors.<sup>264</sup> Thus, for many Whites, their only real-life experience with a Black person in the flesh may be at work.<sup>265</sup>

Despite the paucity of contact with flesh and blood Black people, Whites around the nation have chosen to identify them as criminals. Police investigation of the crimes often reveal the strangeness of this behavior. One can imagine that the police questioning of Joseph Vignola, who attacked the woman he met on a Craigslist and blamed it on someone Black,<sup>266</sup> went something like the following: Police

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finally-shells-out-for-slander/. Brawley had been found in a garbage bag covered in feces with racial slurs written on her body. *Id.* A grand jury was convened to consider charges against the men Brawley named as her attackers and concluded in October 1988 that she had not been assaulted as she claimed. Jim Yardley, *After a Decade, Brawley Reappears and Repeats Charges*, N.Y. TIMES (Dec. 3, 1997), <http://www.nytimes.com/1997/12/03/nyregion/after-a-decade-brawley-reappears-and-repeats-charges.html>.

261. See RUSSELL-BROWN, *supra* note 226.

262. Sarah Becker, *Race and Violent Offender “Propensity”: Does the Intra-racial Nature of Violent Crime Persist on the Local Level?*, 9 JUST. RES. & POL’Y 53, 77 (2007).

263. See Daniel Cox et al., *Race, Religion, and Political Affiliation of Americans’ Core Social Networks*, PUB RELIGION RES. INST. (Aug. 3, 2016), <http://publicreligion.org/research/2014/08/analysis-social-network/#.Vae1T-u7595>.

264. See Becker, *supra* note 262 at 77.

265. See Cox, *supra* note 263.

266. Clark, *supra* note 247. See accompanying text in footnote.

ask, “What happened?” The hoaxer responds, “A Black man burst into the room where we were having sex, robbed us and slit her throat.”<sup>267</sup> Police further inquire, “What did he look like?” The hoaxer responds, “Tallish? Light skinned.”<sup>268</sup> Finally, police ask, “What was he wearing?” The hoaxer (wearing jeans and a skull cap) responds, “Jeans, and a skull cap.”<sup>269</sup> Perhaps unsurprisingly, authorities discover hoaxers’ lies.

In racial hoaxes, the media, of course, plays a central role in making the hoaxer believable. The media widely publicized the Stuart case throughout the Boston area.<sup>270</sup> It is difficult to determine how large a role the media plays, but it is certainly one that is critical to the construction of the symbolic assailant. Sometimes, the role that the media plays is relatively invisible. On other occasions, the media contribution to the creation of a symbolic Black assailant is quite apparent. In March 2015, the Iowa *Gazette* posted two stories about local burglaries written by the same author and published within one day of each other.<sup>271</sup> One story used yearbook photos of the suspects while the other used mug shots.<sup>272</sup> The only other difference between the two stories was that the writer depicted Whites using yearbook photos and Blacks with mug shots as their pictures in the newspaper.<sup>273</sup>

The discrepancy between how the media treated Black and White criminals received significant commentary.<sup>274</sup> In the paper’s defense,

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267. See, e.g., *id.*

268. See *id.*

269. See *id.*

270. SHARKEY, *supra* note 228.

271. David Ferguson, *Charged with Same Crime, Iowa Paper Shows Black Suspects’ Mug Shots but Whites Get Yearbook Pics*, RAW STORY (Mar. 31, 2015, 3:10 PM), <http://www.rawstory.com/2015/03/charged-with-same-crime-iowa-paper-shows-black-suspects-mug-shots-but-whites-get-yearbook-pics/>.

272. *Id.*

273. *Id.* When reporting on Brock Turner, the Stanford swimmer who was arrested for raping an unconscious woman in January 2015, media outlets used a yearbook photo rather than his booking photo. Cf. Elahe Izadi & Abby Ohlheiser, *Why You Are Only Now Seeing the Stanford Sex Offender’s Mugshots*, WASH. POST (June 7, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/06/06/where-is-stanford-sex-offender-brock-turners-mugshot-here/>. One reason why this may have occurred was because, unlike most cases, the Santa Clara County Sheriff’s Office did not post his arrest photo in a public format. *Id.*

274. Ferguson, *supra* note 271.

the Iowa *Gazette* editor Zack Kucharski blamed the discrepancy between the two sets of pictures on “police procedure and newsroom policies.”<sup>275</sup> “Our policy is focused on getting the best images and information to the public in a timely manner. Race is never a factor.”<sup>276</sup>

### B. *Social Psychology and the Symbolic Assailant*

Though media and the police may argue that race is never a factor, social psychologists have long explored the extent to which unconscious racial biases affect decision-making. In this regard, research from social psychology provides support for the creation of Black symbolic assailants. The association between Blacks and crime may be an implicit association—below the level of consciousness. Social psychologists have documented the stereotype of African-Americans as violent and criminal.<sup>277</sup>

Using experiments, social psychologists have shown that association of Blacks with criminality affects individuals’ memory of who is holding a deadly razor in a depiction of a subway scene.<sup>278</sup> Other research shows that Whites’ negative evaluation of ambiguously aggressive behavior is much more likely when the research subject sees someone who is African-American.<sup>279</sup> When Whites see nonweapons in the hands of African-Americans, they are more likely to categorize such items as weapons.<sup>280</sup> Finally, in studies involving White community participants and trained officers, the

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275. Adam Carros & Zack Kucharski, *Gazette, KCRG-TV9 Photos Explained*, GAZETTE (Apr. 3, 2016, 9:18 AM), <http://www.thegazette.com/subject/opinion/guest-columnists/gazette-kcrg-tv9-photos-explained-20150403>.

276. *Id.*

277. See, e.g., Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5–16 (1989); Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL., 590, 590–97 (1976); Goff et al., *supra* note 196, at 530; RUSSELL-BROWN, *supra* note 226, at 98.

278. L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 288 (2012).

279. Devine, *supra* note 277, at 7; Duncan, *supra* note 277, at 591.

280. B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL., 181, 181 (2001).

speed at which White participants and officers decide to shoot an individual holding a weapon is shorter if the individual is African-American than if the individual is White.<sup>281</sup>

Police officers, particularly patrol officers, are often forced to make hasty decisions within the course of their jobs. Concerning the use of deadly force, *Tennessee v. Garner* allows police to use deadly force to prevent the escape of a suspect only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or another.<sup>282</sup> As we have seen from the killings of more than 100 unarmed Blacks between 2015 and 2016, errors in calculation—the deadly shooting or killing of an individual who poses no credible threat to the officer—frequently occurred when the potential assailant was African-American.<sup>283</sup>

There is conflicting data on whether police officers are more likely to shoot an unarmed Black person or an unarmed White person. Census data puts the number of African-Americans at approximately 13%<sup>284</sup> and the number of Whites at approximately 72% of the United States' population.<sup>285</sup> Concerning the number of shootings of unarmed individuals, a *Washington Post* analysis of unarmed shootings occurring in cities around the United States in 2015 revealed that though police shot a greater number of Whites, African-Americans were five times more likely to be shot than Whites.<sup>286</sup> The

281. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL., 1314, 1314 (2002); Joshua Correll et al., *The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS, 201, 206 (2014).

282. *Tennessee v. Garner*, 471 U.S. 1, 2 (1985).

283.

*2015 Unarmed Victims*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/unarmed/> (last visited Sept. 29, 2017). Examples of situations where the individual killed arguably posed no credible threat to the officer include Walter Scott, Jonathan Ferrell, and Eric Garner. See, e.g., Baker, Goodman & Mueller, *supra* note 110; Schmidt & Apuzzo, *supra* note 132; Kindy & Kelly, *supra* note 195.

284. SONYA RASTOGI, TALLESE D. JOHNSON, ELIZABETH M. HOEFFEL & MALCOLM P. DREWERY, U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010 (Sept. 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

285. LINDSAY HIXSON, BRADFORD B. HEPLER & MYOUNG OUK KIM, U.S. CENSUS BUREAU, THE WHITE POPULATION: 2010 (Sept. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf>.

286. Wesley Lowery, *Aren't More White People Than Black People Killed by the Police? Yes but No*,

Center for Policing Equity (CPE) analyzed records documenting the use of force by police in twelve police departments located in geographically and demographically diverse areas of the United States.<sup>287</sup> Similar to the *Washington Post*'s analysis, the study found African-Americans were more likely to have force used against them than Whites.<sup>288</sup> The racial disparity the CPE researchers found in the use of force was present in each of the several categories of use of force—firearm, pepper spray, and Taser—studied.<sup>289</sup>

When one moves beyond the use of force data to other measures of police-citizen interaction, the picture that emerges is incontrovertible: police officers treat African-Americans differently than they treat Whites.<sup>290</sup> The idea of a symbolic assailant at the forefront of police officers' consciousness means that African-Americans are more likely to face police violence because of their race. Similar to Charles Epp and his co-authors, Fryer found through his work that African-Americans were likely to face more brutality in the context of police encounters.<sup>291</sup> We do not know whether this translates to an increased likelihood of being shot unless we can observe the encounter between the law enforcement officer and citizen before the shooting.

Scholars attribute many of the police shootings of African-Americans to implicit biases.<sup>292</sup> Social psychologists posit that implicit biases—judgments resulting from subtle cognitive processes—affect individuals in many ways. Not only do implicit biases affect the way a person interprets behavior, but they also affect

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WASH. POST (July 11, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/?utm\\_term=.c4f3d3170c58](https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/?utm_term=.c4f3d3170c58); cf.

Roland G. Fryer, Jr., Nat'l Bureau of Econ. Research, An Empirical Analysis of Racial Differences in Police Use of Force 5, tbl. 10 (2016) (unpublished manuscript) (on file with Georgia State University Law Review) (finding no evidence of racial discrimination in officer-involved shootings using police data from three cities in Texas, six large Florida counties, and Los Angeles County).

287. PHILIP ATIBA GOFF ET AL., CTR. FOR POLICE EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS AND POLICE USE OF FORCE 4 (July 2016), [http://policingequity.org/wp-content/uploads/2016/07/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf).

288. *Id.* at 4.

289. *Id.*

290. *Id.* at 13, 14, 16–19, 22, 24.

291. See Fryer, *supra* note 286, at 3–4.

292. See Richardson, *supra* note 278, at 271–72.



how a person responds to a particular behavior.<sup>293</sup> L. Song Richardson examined a study of people's reactions to certain behavior: participants saw videos of people shoving each other;<sup>294</sup> one video was of two White people, one of two Black people, and the other of two people from different races.<sup>295</sup> Participants saw the behavior as more violent and aggressive when the video was of two Black people and when the aggressor was Black.<sup>296</sup> However, they saw the video as playful when there were two White people and where the aggressor was White.<sup>297</sup> Next, Richardson examined a study revealing that aggression is manifested more towards minorities than towards Whites.<sup>298</sup> In that study, a group of people were asked to complete a task in which either a photo of a Black or White person would flash in front of them.<sup>299</sup> Researchers flashed the photos 130 times.<sup>300</sup> When it was time for the last photo, the computer ceased operating, and the participants would have to start the process over from the beginning.<sup>301</sup> When participants saw Black faces instead of White faces they were angrier and more aggressive.<sup>302</sup> Richardson concluded that:

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

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293. *Id.* at 272.

294. *Id.* at 272–73.

295. *Id.*

296. *Id.*

297. *Id.*

298. Richardson, *supra* note 278, at 273.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 273–74.

unintentionally and non-consciously act aggressively. When the target responds in-kind, the officer will likely interpret the targets seemingly unprovoked aggressive response as evidence that the target is dangerous. This will make the officer more likely to conduct a frisk for weapons. This series of events can explain why officers often make incorrect judgments of criminality when the target is nonwhite as opposed to white.<sup>303</sup>

Officers may face several repercussions and biases because of these implicit biases. Cops stop and frisk a significantly higher number of Blacks than Whites.<sup>304</sup> Officers exhibit two particularly interesting biases: shooter bias and attentional bias.<sup>305</sup> Shooter bias refers to studies that show cops are more likely to shoot an unarmed Black person, especially a Black man, than shoot an armed White person.<sup>306</sup> Attentional bias is a subconscious drawing of attention to Black people and the increase in attention that Black people are shown over White people.<sup>307</sup> These biases are attributed to the idea that Black people are more threatening, more dangerous, and more feared than White people.<sup>308</sup>

Police officers may interpret behavior and handle situations involving Black people differently than those with White people because of these biases.<sup>309</sup> For example, *Terry v. Ohio* is supposed to be a safeguard to keep police officers from being able to stop and frisk unless they have a reasonable suspicion that the person has, will, or is going to commit a crime, or they have a reasonable belief the person is armed and dangerous.<sup>310</sup> However, *Terry* does not

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303. *Id.* at 274.

304. Richardson, *supra* note 145, at 1145.

305. *Id.* at 1149–50.

306. *Id.* at 1149.

307. *Id.* at 1150.

308. *Id.* at 1150–51.

309. *Id.*

310. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). In this landmark case, establishing the standard that an officer needed reasonable suspicion to stop and frisk an individual, the officer saw men walking in front of a store and thought they might be trying to rob the place. *Id.* at 5–7, 27. The officer stopped and

account for such implicit biases that may cause an officer to interpret the behavior of a non-White person as suspicious.<sup>311</sup>

*C. Dehumanization and the Symbolic Assailant: Social Psychological Support for Symbolic Assailant*

Social psychologists suggest that dehumanization serves as one potential explanation for why police officers treat African-Americans so poorly.<sup>312</sup> Dehumanization—“the denial of full humanness”—allows officers to remove or reduce social or legal protections for those who are dehumanized.<sup>313</sup> Police officers may see dehumanized subjects, considered not fully human, as less capable of feeling pain and may subject them to greater use of force.<sup>314</sup> Historically, the process of dehumanization has been a requirement for extreme forms of state violence like genocide.<sup>315</sup>

Social psychologist Philip Atiba Goff studied the effect of implicit dehumanization of African-Americans on police.<sup>316</sup> One set of studies by Goff and his colleagues evaluated how dehumanization of African-American children might affect the use of force.<sup>317</sup> In the first study using police as subjects, Goff and his colleagues gave sixty police officers in a large city computer tests measuring their level of dehumanizing attitudes.<sup>318</sup> Goff and his colleagues also gave respondents the Implicit Association Test (IAT), a test which measures the degree to which individuals hold implicit biases.<sup>319</sup> Next, Goff and his colleagues gave the respondents a series of crime

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frisked the men and found a gun on one of them. *Id.* at 7. Richardson suggests that had the men been White, the officer might not have interpreted their behavior as suspicious. *See* Richardson, *supra* note 145, at 1152.

311. Richardson, *supra* note 145, at 1152.

312. Philip Atiba Goff et al., *supra* note 196, at 527.

313. *Id.*

314. *See, e.g., id.*

315. *Id.*

316. *Id.* at 532–33.

317. *See id.* at 527.

318. Philip Atiba Goff et al., *supra* note 196, at 533, 537. For instance, to measure dehumanization, researchers exposed officers to photographs of apes to assess the extent to which officers associated apes with African-Americans. *See id.* at 527–28.

319. *Id.* at 530–31.

scenarios involving men who were either Black, White, or Latino.<sup>320</sup> Finally, Goff and his colleagues asked respondents to give the age of the individuals involved and whether each had actually committed the crime described.<sup>321</sup>

With the assistance of the police department's Internal Affairs Bureau, the researchers linked the test results with each officer's use of force history contained in their personnel files.<sup>322</sup> The use of force records in the officers' personnel files documented whenever an officer made any physical contact with a civilian.<sup>323</sup> The researchers ranked the use of force records in order of the level of severity.<sup>324</sup> The use of force incidents ranged from the deployment of a wristlock takedown to the use of deadly force (firearm or carotid choke hold).<sup>325</sup>

Goff and his colleagues found significant evidence of implicit racial bias. The researchers found that police officers overestimated the ages of Black and Latino crime suspects.<sup>326</sup> Analyzing the use of force and the officer's dehumanization of those pictured in the study, researchers found that the implicit dehumanization of Blacks, which involves associating Blacks with nonhuman animals, "was a significant predictor of racial disparities in the use of force against child suspects . . . . [T]he more officers implicitly associated Blacks with apes, the more officers had used force against Black children relative to children of other races."<sup>327</sup>

Implicit associations between Blacks and criminality may also explain significant divides with respect to race in public opinion data post-Ferguson. The Pew Research Center conducted a survey in early

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320. *Id.* at 531.

321. *Id.*

322. *Id.* at 533.

323. Philip Atiba Goff et al., *supra* note 196, at 533.

324. *Id.*

325. *Id.*

326. *Id.* at 535.

327. *Id.* Goff et al. describe the history of dehumanization and how "individuals tend to associate out-groups and out-group members with nonhuman animals more than they do members of their in-group." *Id.* at 527. Their research, which resulted in White participants implicitly associating Black people with apes, is an example of this type of dehumanization. *Id.*

December of 2014.<sup>328</sup> Their results revealed, for instance, that 64% of Whites believed that the grand jury's decision not to charge Darren Wilson in the death of Ferguson teenager, Michael Brown, was the right decision.<sup>329</sup> By contrast, 80% of Blacks surveyed felt that the grand jury's refusal to charge Wilson was the wrong decision.<sup>330</sup> Whites' attitudes were also reflected in their evaluation of the legal process. In the survey 84% of Whites believed that race was not a factor in the grand jury's decision not to charge Wilson.<sup>331</sup> Blacks felt quite differently; 64% of Blacks believed that race was a major factor in the grand jury's decision not to charge Wilson.<sup>332</sup>

#### *D. Eradicating the Symbolic Assailant*

If there is a belief that the boogeyman is Black, our current level of interracial social contact does little to dispel such false notions. Rising tolerance and changing attitudes toward racial intermarriage has not affected our level of social intermixing.<sup>333</sup> In fact, in most contexts, there are massive levels of social separation and physical distance between Blacks and Whites.<sup>334</sup> For many middle and upper-class Americans, the majority of the time we spend relaxing is spent in the neighborhoods in which we live—which are segregated spaces.<sup>335</sup> Analysis of the 2010 Census reveals that the typical White person lives in a neighborhood that is 75% White.<sup>336</sup>

Though the survey data on tolerance for housing integration shows that most Americans support removing legal restrictions to housing

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328. *Sharp Racial Divisions in Reactions to Brown, Garner Decisions*, PEW RES. CTR. (Dec. 8, 2014), <http://www.people-press.org/2014/12/08/sharp-racial-divisions-in-reactions-to-brown-garner-decisions/>.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF SEGREGATION IN AMERICAN HOUSING* 95 (2013).

334. *Id.*

335. *Id.* at 97.

336. JOHN R. LOGAN & BRIAN J. STULTS, *US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS* 3 (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf>.

integration,<sup>337</sup> both the data on housing choice and move-in violence—acts of harassment and hate crimes directed at people of color who have moved into White neighborhoods—suggest broad support among Whites, Asian-Americans, and Latinos for the (segregated) status quo. The Multicity Study of Urban Inequality in Los Angeles asked Whites, African-Americans, Asians, and Latinos who they would feel comfortable living around, regardless of class of the neighborhood.<sup>338</sup> The results revealed that African-Americans are the least preferred neighbor among the races.<sup>339</sup>

Many middle-class African-Americans understand this hostility that Whites feel toward them as neighbors.<sup>340</sup> Some of those who ignore White hostility and end up crossing the color line face move-in violence—acts of harassment and hate crimes directed at minorities who have moved to White neighborhoods.<sup>341</sup> This violence, which I have termed “anti-integrationist violence,” can take the form of vandalism, cross burning, assault, and arson.<sup>342</sup> It is not limited to any particular area of the country. Between 1990 and 2010, I identified more than 400 reported incidents directed at minorities who had moved to all-White or predominately White neighborhoods in the North, South, Midwest, and Western United States.<sup>343</sup> (See Figure 1.)

Though most workplaces may be more diverse than most neighborhoods,<sup>344</sup> it may be a mistake to see workplaces as a good locale for cross-cultural interaction. Who we interact with within the workplace matters. A survey by the Public Religion Research Institute (PRRI) suggests many Whites primarily socialize with other

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337. BELL, *supra* note 333, at 97.

338. *Id.* at 100.

339. *Id.* at 102.

340. *See id.* at 113.

341. *Id.* at 89.

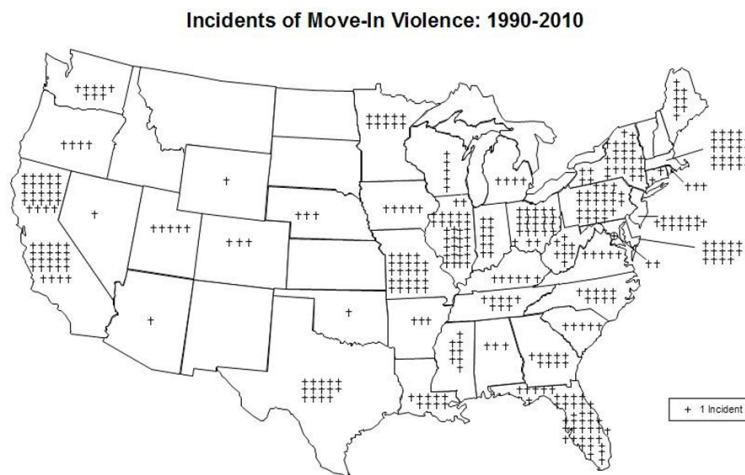
342. *Id.*

343. BELL, *supra* note 333, at 67.

344. *See id.* at 100; *see also* Crosby Burns et al., *The State of Diversity in Today's Workforce*, CTR. FOR AM. PROGRESS 3 (July 2012), [http://cdn.americanprogress.org/wp-content/uploads/issues/2012/07/pdf/diversity\\_brief.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2012/07/pdf/diversity_brief.pdf).

Whites.<sup>345</sup> In the 2013 Public Religion and Values Survey, PRRI tried to get a sense of the race of the individuals who comprised respondents' social networks.<sup>346</sup> Respondents were asked the name of two to seven people with whom they had talked about "important matters" in the preceding six months.<sup>347</sup> They were then asked to describe the race, gender, and other demographic identifiers for these individuals.<sup>348</sup>

Figure 1. Incidents of Anti Integrationist Violence 1990–2010<sup>349</sup>



In the survey, PRRI found that most Whites' social networks are overwhelmingly White.<sup>350</sup> With respect to surveyed Whites, 91% of the individuals who make up their social networks are also White.<sup>351</sup> Just 5% of the individuals with whom Whites discussed important

345. See Cox et al., *supra* note 263.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

matters in the previous six months were people of different races.<sup>352</sup> The differences were not as stark for people of other racial backgrounds. Latinos have the most diverse social networks with 64% of the people in their social networks also being Latino.<sup>353</sup> In Latino social networks 19% of the individuals were White and 9% were some other race.<sup>354</sup> For African-Americans, 83% of individuals who comprise their social networks are also Black, 8% are White, and 6% are of another racial background.<sup>355</sup>

In a country where negative stereotypes of Blackness are so powerfully linked with criminality, racial separation is not neutral. As White homogenous environments become equated with safety, mixed neighborhoods appear dangerous and unsafe. It is clear who is causing the danger. African-Americans, regardless of class, become symbolic assailants, suspects even when headed to their own neighborhoods. They are automatically “out of place” and suspicious when they appear unexpectedly in White neighborhoods. Police practices, which give credence to the symbolic Black assailant by stopping African-Americans more in White neighborhoods,<sup>356</sup> only confirm what neighborhood residents already believe—these Black people coming into their neighborhood are always potential outsiders.

#### *IV. Reform*

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

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352. Cox et al., *supra* note 263.

353. *Id.*

354. *Id.*

355. *Id.*

356. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 150, at 70–72 (describing officers using suspicionless investigatory stops of African-Americans in suburban White neighborhoods).



### A. *Criminal or Civil Charges Against Officers*

Officers who treat African-Americans differently than Whites violate the Fourteenth Amendment.<sup>357</sup> More robust potential remedies may be civil rights charges for Fourth Amendment violations or, in the alternative, criminal charges against the officers. The logic here is that the threat of charges will serve as a deterrent against bad behavior. Unfortunately, because of the structure of these remedies, neither is likely to lead to significant changes. Based on current policing practices, police have discretion to decide when someone is a threat.<sup>358</sup> After an officer kills a person, if the prosecutor decides to conduct an examination of police behavior, the prosecutor, and sometimes grand juries, examine the officer's actions.<sup>359</sup>

Activists frequently push for criminally charging officers.<sup>360</sup> In addition to bringing justice in particular cases, many people believe that criminal charges against the officers involved will create a disincentive for other officers to engage in brutality.<sup>361</sup> A variety of problems exist with this particular approach. First, the remedy of criminally charging officers would only be used in the most extreme cases because prosecutors rarely bring criminal charges against police officers who have killed Black civilians.<sup>362</sup> Only a small percentage of police shootings or killings of unarmed suspects result in criminal charges against the police officers.<sup>363</sup> The *Washington Post* and other researchers conducted a study which found only fifty-four officers were criminally charged between 2005 and 2015, despite thousands of police-instigated shootings.<sup>364</sup> Prosecutors tended to bring charges only in the most extreme cases, those involving individuals who were not just unarmed, but who were also

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357. See generally Rosenthal, *supra* note 37, at 55.

358. *Id.*

359. See generally BELL, *supra* note 25, at 79.

360. *Id.*

361. *Id.*

362. See Kindy & Kelly, *supra* note 195.

363. *Id.*

364. *Id.*

shot in the back, and where testimony from other officers supported the charges.<sup>365</sup> Video of the incident also made charges more likely.<sup>366</sup> Even when charges were brought, officers were unlikely to be sanctioned; the majority of cases did not result in the officers being convicted.<sup>367</sup>

When officers are charged, the idea of Black criminality looms large and is frequently too much for jurors, or even a judge, to dismiss. Even in cases that may seem straightforward enough to result in prosecutors bringing charges, these cases do not result in convictions. Three high-profile cases in 2016 occurred in Baltimore, Charleston, and Cincinnati, where officers shot and killed unarmed Black men and faced charges, but they were not convicted. Prosecutors charged six officers after the death of Freddie Gray, which the medical examiner ruled a homicide; Judge Barry Williams acquitted three officers.<sup>368</sup> The trial of Ray Tensing, the officer who shot and killed Samuel DuBose in Cincinnati, ended in a mistrial because the jury of two Blacks and ten Whites could not agree on a conviction.<sup>369</sup> In the case of Michael Slager, the Charleston police officer who shot Walter Scott, a jury of one Black and eleven White jurors also resulted in a mistrial.<sup>370</sup>

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365. *Id.*

366. BELL, *supra* note 25.

367. *Id.*

368. Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (July 27, 2016, 8:57 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html> (describing prosecutor Marilyn Mosby dropping charges against Officer Garrett Miller, Officer William Porter, and Sergeant Alicia White after Judge Barry G. Williams acquitted three other officers charged in Gray's death).

369. Kevin Grasha, Sharon Coolidge, Chris Graves & Mark Curnutte, *After Tensing Mistrial, What Will Deters Do Next?*, CINCINNATI.COM (Nov. 12, 2016, 8:10 AM), <http://www.cincinnati.com/story/news/tenzing/2016/11/12/tenzing-jury-continue-deliberations-saturday/93671484/> (describing the mistrial of Officer Ray Tensing, who shot Samuel DuBose); Andy Newman, *Jury Deadlocks in Trial of Ex-Officer in Killing of Unarmed Black Driver in Cincinnati*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/us/ray-tenzing-samuel-dubose-trial-deadlock.html?mcubz=0&mcubz=0>.

370. Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), [https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html?\\_r=0](https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html?_r=0) (detailing the events leading to the mistrial of former officer Michael Slager, who shot Walter Scott); Alan Blinder, *Charleston Jury Gets Case of Officer Who Killed Walter Scott*, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/us/michael-slager-walter-scott-killing.html?mcubz=0>. Slager eventually pled guilty to a federal charge of violating Scott's civil rights in May 2017. Jaweed

A fourth case involving Terrence Crutcher, mentioned earlier in this Article, illustrates the power of the Black symbolic assailant among both police and ordinary citizens.<sup>371</sup> Crutcher was unarmed, and Officer Betty Shelby shot him while he was walking away.<sup>372</sup> Shelby testified that she shot Crutcher because she reasonably feared for her life.<sup>373</sup> A jury of eight women and four men, including four African-Americans, accepted this defense and acquitted Shelby.<sup>374</sup>

The failure to convict officers accused of shooting unarmed Black civilians, even in high-profile cases like these mentioned, suggest that criminal charges against officers may not provide the deterrence that advocates of these solutions believe they provide.

### *B. Increasing the Legitimacy of the Police*

Arguably, President Obama issued the most comprehensive nationwide policy response when he created the Task Force on 21st Century Policing (Task Force). The Task Force convened in December 2014 and heard months of testimony from academics, community members, and legal experts.<sup>375</sup> In May 2015, the Task Force issued its final report: a comprehensive ninety-nine-page report with fifty-one recommendations and more than seventy action items for improving police legitimacy.<sup>376</sup> The recommendations ranged from fairly soft mechanisms designed to increase police legitimacy<sup>377</sup>

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Kaleem, *Michael Slager, Officer Who Fatally Shot Walter Scott in South Carolina, Pleads Guilty in Federal Case*, L.A. TIMES (May 2, 2017, 6:00 PM), <http://www.latimes.com/nation/la-na-michael-slager-walter-scott-2017-story.html>.

371. Lucia Walinchus & Richard Pérez-Peña, *White Tulsa Officer Is Acquitted in Fatal Shooting of Black Driver*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/white-tulsa-officer-is-acquitted-in-fatal-shooting-of-black-driver.html>.

372. *Id.*

373. *Id.*

374. *Id.*

375. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), [https://cops.usdoj.gov/pdf/taskforce/TaskForce\\_FinalReport.pdf](https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf).

376. *Id.*

377. *See, e.g., id.* at 11. Recommendation 1.1, for instance, called on law enforcement culture to “embrace a guardian mindset to build public trust and legitimacy. Toward that end, police and sheriffs’ departments should adopt procedural justice as the guiding principle for internal and external policies and practices to guide their interactions with the citizens they serve.” *Id.*

to fairly substantial changes that would drastically affect police procedures around the country.<sup>378</sup>

Several recommendations specifically aim at fostering better relationships between police officers and communities. Many of these recommendations consciously reflect the logic of community policing efforts. Community policing encourages law enforcement officers to work with neighborhood residents as community partners in the effort to treat people with more respect.<sup>379</sup> This particular strategy might decrease the number of fatalities—an undeniably positive development.

Treating the African-American population with more respect and developing community police partnerships are soft measures for changing the way police operate. Such measures may improve some encounters between police and citizens, but these measures will not magically improve police relations, particularly if racialized policing continues. The problem with calls for increased politeness, respect, and community partnership to improve police legitimacy is that these measures do not respond to the issue of racialized police practices.<sup>380</sup> Clear evidence shows the occurrence of racialized policing.<sup>381</sup>

A variety of factors suggest that community-police partnerships and other “soft” measures are not likely to increase trust between African-Americans and the police. First, and most important, is the sheer number of unarmed African-American men killed by police in cities around the country and the reciprocal activism. More citizens can watch graphic deaths of those killed by police. Videos of numerous police killings of African-Americans have been heavily

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378. See, e.g., *id.* at 27. Recommendation 2.10 states: “[l]aw enforcement officers should be required to seek consent before a search and explain that a person has the right to refuse consent when there is no warrant or probable cause. Furthermore, officers should ideally obtain written acknowledgment that they have sought consent to search in these circumstances.” *Id.*

379. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 375, at 3.

380. See Tom Tyler, *Trust and Legitimacy: Policing in the USA and Europe*, 8 EUR. J. CRIMINOLOGY 254, 261 (2011) (describing gains in trust that can be realized by employing policing procedures that the public view as procedurally fair); Tom Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO J. CRIM. L. 231, 264–65 (2008).

381. See discussion *supra* Part II.

and graphically captured and distributed on social media.<sup>382</sup> African-Americans fear the police because many individuals have been killed during routine traffic stops.<sup>383</sup> Politeness and police-community partnerships are unlikely to cut through the current level of (understandable) fear that African-Americans have of the police. A final indication that soft measures have little effect on trust is research exploring the relationship between officer politeness and Black drivers' dislike of racialized policing. Epp found that most African-American drivers took offense at investigatory stops, even though officers who performed them were polite.<sup>384</sup>

Though the reforms in the 21st Century Report might help eliminate some of the difficulties African-Americans face with respect to the police, given the poor relationship between African-Americans and police, reforms have a limited ability to disrupt this deep level of mistrust. The report's recommendations also do little to disrupt the empirical fallacies that lead police officers to see every African-American as a symbolic assailant.<sup>385</sup>

### C. *Reorienting Police Work to Disrupt the Symbolic Assailant*

#### 1. *End the Investigatory Stop*

Eradicating the myth of the symbolic assailant begins with changing long-standing practices that affect the relationship between African-Americans and the police. The most significant factor affecting this relationship is the space in which the majority of African-Americans encounter the police.

For most African-Americans, like Americans of other backgrounds, the most likely place in which they will encounter the

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382. Lucy Bayly, *Police Shootings Test New Era of Violent Social Media Video*, NBC NEWS (July 9, 2016, 9:25 AM), <https://www.nbcnews.com/tech/tech-news/police-shootings-test-new-era-violent-social-media-video-n605366>.

383. See, e.g., Collman, *supra* note 203 (describing the killing of Philando Castile during a "routine traffic stop" for a broken tail-light).

384. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 150, at 2.

385. See discussion *supra* Part III.

police is during a stop made while driving.<sup>386</sup> As discussed in Part II, these are investigatory stops, and police officers' power to conduct them stems from the Fourth Amendment.<sup>387</sup> Although the spaces where different races encounter the police are similar, the research by Charles Epp and others described in Part II suggests that the experiences of Whites and African-Americans (to take two different racial groups) are dramatically different.<sup>388</sup> Many African-Americans are stopped for reasons that have nothing to do with the manner in which they are driving.<sup>389</sup> Such discriminatory stops affect how African-Americans feel about the police in general and their behavior in situations where the officer has made a legitimate stop.

To improve the relationship between African-Americans and the police, Epp and his co-authors suggest that police departments must discontinue the practice of stopping individuals because they are suspicious.<sup>390</sup> Because such stops are allowed under the Constitution, this policy change would require departments to behave in a manner that is both more restrictive of the police and more protective of suspects' rights than the United States Constitution.

It is not outrageous to assume that police departments would elect to behave in a manner more protective of individual rights than the Constitution requires. Clear incentives encourage police to enact reforms that take away officers' ability to stop individuals solely for

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386. Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html?mcubz=1>.

387. See discussion *supra* Part II. The decisions in this context constitute a clear expansion of police rights. *Terry v. Ohio* allows officers to make stops so long as there is reasonable suspicion the individual is engaged in criminal activity. 392 U.S. 1, 27 (1968). The Court's decision in *Utah v. Strieff* potentially expands this power by lowering the burden even further. In *Strieff*, the Court upheld evidence seized after a warrantless stop of an individual made by a police officer without probable cause or reasonable suspicion. 136 S. Ct. 2056, 2062 (2016). The Court, in an opinion by Justice Thomas, reasoned that the evidence seized was attenuated from the illegal activity, so the exclusionary rule should not apply. *Id.* at 2063.

388. See generally EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 150.

389. *Id.* at 72.

390. *Id.* at 153, 164 (“[The] message is simple: the benefits of investigatory stops are modest and greatly exaggerated, yet their costs are substantial and largely unrecognized. It is time to end this failed practice. Investigatory stops fail because they violate a widely shared norm of fair treatment. This norm requires that people should be treated as equal, respected members of society and not as second-class outsiders . . .”).

reasons of “suspicion.”<sup>391</sup> First, as Epp’s work shows, African-Americans know that they have been stopped without just cause, and this fact is upsetting.<sup>392</sup> Stops of African-Americans—due to purely race-based suspicion and not lawbreaking—poison the relationship between the police and the community.<sup>393</sup> In addition, communities with poor police relations are much harder to police. Poor community-police relations make crime investigation more challenging.<sup>394</sup> Investigative stops are based on officers’ hunches—their guesses that a particular individual is involved in lawbreaking.<sup>395</sup> These unquantifiable guesses rarely pay off in the form of evidence.<sup>396</sup> If stops require manpower but do not reliably yield evidence, as a crime fighting tool, they are a poor use of scarce police department resources. Finally and most importantly, unwarranted investigative stops can potentially have a terrible human cost. Poor police and community relations may even endanger officers’ safety.<sup>397</sup> Some have argued that recent attacks on police officers by mentally ill individuals stem from poor relationships between police officers and African-Americans.<sup>398</sup>

Resistance to changes of the sort I have suggested is by no means inevitable. Consider the case of Fayetteville, North Carolina. In 2013, a Fayetteville police report revealed police stopped Blacks more than Whites.<sup>399</sup> The resulting controversy led to the departure of the police

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391. The issue is not the level of suspicion that the law requires under *Terry v. Ohio*, but rather, as Epp and others have noted, the failure of officers to conform to the law’s dictates. If officers are conducting investigatory stops because they believe Blacks are more likely to be engaged in criminal behavior, these are race-based stops.

392. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 150, at 119–20 (describing the offense that drivers take from being targeted because of their race).

393. See Collins, *supra* note 97, at 419 (illustrating that bad relationships form between officers and communities when officers stop citizens with “only vague suspicions of misconduct”).

394. *Id.* at 426.

395. *Terry*, 392 U.S. at 49–50.

396. See *id.* at 22. Courts’ consistent refusal to endorse searches based solely on officers’ hunches suggests that traffic stops based on such hunches are also disallowed by courts. *Id.*

397. See Tyler, *supra* note 380, at 261.

398. See Feuer, *supra* note 211 (describing a case where a mentally ill African-American woman was shot and killed by police, causing widespread outrage in the city’s African-American community and leading to other similar incidents).

399. LaFraniere & Lehren, *supra* note 386.

chief and city manager.<sup>400</sup> The new police chief in Fayetteville, North Carolina, Chief Harold Medlock, elected to have officers eliminate the use of the investigatory stop and instead focus on violations that “cost lives,” like speeding and drunk driving.<sup>401</sup> The department forced out officers who had a reputation of disproportionately stopping Black drivers.<sup>402</sup> Such changes drastically affected the rates of differential policing and improved the relationship with the African-American community.<sup>403</sup>

## 2. *Creating the Space for “Conversion”*

Changes such as ending the investigatory stop are a preliminary first step in eradicating the African-American symbolic assailant. A more significant step involves changing how police officers see African-Americans. Because of stereotypes, police practices, and implicit bias, many police officers view African-Americans predominantly as suspects.<sup>404</sup> To change how so many police officers see African-Americans, police training must change in a way that allows officers to see African-Americans as crime victims, not suspects. I describe this process of conversion below.

I approach the idea of reform from the perspective of a police researcher who has seen officers’ productive interactions with people of color. In 1997, I spent six months observing a specialized police hate crime unit in a largely White city. Afforded open access to the unit, I spent ten hours a day with the detectives. I went on investigations with them, had full access to their files, and went to court with them.<sup>405</sup>

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400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. Denise Cummins, *Are Police Shootings Racially Biased?*, PBS NEWSHOUR (July 13, 2016, 5:08 PM), <http://www.pbs.org/newshour/updates/police-shootings-racially-biased/>.

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



I have seen White officers transformed by the practice of providing services to victims of color. A process I describe as “conversion” in my book *Policing Hatred*<sup>406</sup> transformed ordinary police officers, many of whom were White, into committed advocates for victims of color.<sup>407</sup> Officers became victim advocates as they did their work as detectives investigating and responding to crime.

Part of the conversion occurred because of the setting. The detectives often met with victims in their homes and took notes to write a detailed report. Reports filled many of the case files. Seeing individuals of color in a vulnerable space led to the conversion. You could see this in the perspective of officers who had done the work and also officers who had not done the work. One White officer who is clearly “converted,” said:

Victims are powerless . . . . The victim has no one on his side. I want to say I’m going to take this injunction and wrap this piece of paper around you. My protection will be with you. I bring my police power to the table to protect victims.<sup>408</sup>

In several comments, the detectives made clear that interacting with families and seeing them experience pain led to their conversion. The political ideology of the officer was not relevant. One detective noted, “no working cops get involved and don’t get converted. No cops leave the unit saying they couldn’t do that racial BS; more like they couldn’t do police work.”<sup>409</sup>

The attitudes the officers displayed towards minorities in the unit were fairly unusual based on what researchers have described in other contexts. Conversion transformed officers. Officers become fiercely attached to victims for two primary reasons. First, the

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406. JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME* 127–29 (2002).

407. *Id.*

408. *Id.* at 127.

409. *Id.* at 129.

process of becoming converted allowed police officers to learn on the job. They were investigating cases with real bad guys in a manner they believed was really part of police work. This work was very important to their identity as cops.<sup>410</sup> Second, the unit's work provided officers an opportunity to see people of color in a very vulnerable space. Crime victims have extraordinary experiences. This practice not only humanized people of color for officers, but it also allowed officers to assist with finding the individuals who committed the crime against them. Providing this assistance is something that deeply resonated with the officers because it connected them to the force and something that they considered an essential part of the job.

Most of the detectives in the hate crime unit I studied had dramatically different relationships with the people they served, in part because of police-citizen interaction organization. This organization was reactive policing.<sup>411</sup> The vast majority of the minority police interaction involved police officers investigating crimes that victimized minorities in traumatic ways.

One of the problems with proactive policing is that right now most police see Blacks only in the context of lawbreakers who take from their communities.<sup>412</sup> The Broken Windows proactive policing approach has meant that officers' interaction with communities focuses on preventing crime by seeing African-Americans as suspects—not by responding to citizen complaints.<sup>413</sup> If we want to change the relationship that police officers have with minorities, we need to fundamentally change the roles that police officers have in minority communities. This change will have to be a big shift because it is far more complicated than the current policing of Black neighborhoods suggests, in which police officers often do little

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410. BELL, *supra* note 406. The police department had a community-policing program. *Id.* The community-policing officer was an individual that they described as doing “social work.” *Id.* Higher-ups in the unit insisted that a crime should never be given to the community-policing officer because it just would not be taken seriously. *Id.*

411. *Id.* at 120–23. Reactive policing, described earlier in this article, occurs when police observe a crime and respond to it in the moment. *See, e.g.,* EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 150, at 65 (describing traffic stops that occur in a discriminatory manner).

412. *See* Tyler, *supra* note 380, at 256–57.

413. *Id.*

investigation of serious crimes involving Black victims, including murder.<sup>414</sup> If police departments change the policing of minority communities to a much more reactive model, then police could focus on providing services to citizens. This change is an unusual approach, but in my experience, it is the only one that may change how officers actually see African-Americans.

This Article has argued that police frequently approach Black men as symbolic assailants. As intersectionality theory suggests, the case of Black women is more complicated.<sup>415</sup> Though officers may not perceive Black women to be as threatening as Black men, in several instances they have been harmed and have even been killed by police.<sup>416</sup> If we really want to change the culture of fear and disrupt the policing practices that treat Blackness as a marker of suspicion or lack of respect, police departments must shift their focus from one that relies on proactive policing to socialize officers to one that requires each officer to interact with Black victims. Placing officers in situations where their primary functions are to provide services and respond to African-Americans as victims will teach the officers that African-Americans are citizens in need of services from the police.

Though the unit I studied is a hate crime unit, reorienting policing need not focus on hate crime. There is no shortage of African-American victims. Criminals victimize African-Americans at incredibly high rates.<sup>417</sup> Officers must interact with African-Americans in the vulnerable space of being victimized.

#### CONCLUSION

Tamir Rice, Terrence Crutcher, Alton Sterling, and Philando Castile are contemporary society's canaries in the coal mine. From

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414. Jennifer Gonnerman, *Jill Leovy's 'Ghettoside'*, N.Y. TIMES (Jan. 21, 2015), <https://www.nytimes.com/2015/01/25/books/review/jill-leovys-ghettoside.html>.

415. Amuchie, *supra* note 207, at 619–20.

416. *Id.* at 617–18.

417. Kelling & Bratton, *supra* note 118.

the early 1900s until the mid-1980s, coal miners would carry canary cages down into the mine tunnels.<sup>418</sup> If methane or carbon monoxide leaked into the mine, the gases would kill the canary before killing the miners, thus providing a warning to exit the tunnels immediately.<sup>419</sup>

The deaths of Rice, Sterling, Castile, and too many others provide clear evidence to all of American society that Blacks and Whites live in radically different worlds.<sup>420</sup> These killings say much about the progress we have made with respect to opportunity and civil rights in this country. What we say, what we feel, and how we address these shootings says something about how much progress American society has made with respect to racial tolerance. From a sheer policing perspective, the symbolic assailant is troubling and dangerous. If the Black man is the symbolic assailant, police may be giving a pass to White criminals, and police may also be turning off some particularized crime fighting knowledge.

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

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418. Lani Guinier & Gerald Torres, *The Miner's Canary*, NATION (Jan. 31, 2002), <https://www.thenation.com/article/miners-canary/>.

419. *Id.*

420. See RUTH D. PETERSON & LAUREN J. KRIVO, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE 50 (2010) ("These divergent communities of color reflect the entrenched inequalities found in a racially structured society in which whites are highly privileged compared to other populations.").

