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Who Killed Oscar Grant?: A Legal-Eulogy of the Cultural Logic of Black Hyper-Policing in the post-Civil Rights Era

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ABSTRACT

To explain the appalling shooting death of African American Oscar Grant, on January 1, 2009, one must break free of the ‘crime and punishment’ paradigm to reckon the extra-punitive function of American policing as an instrument for the management of dispossessed and dishonored groups. The recent upsurge in **B**lack violence related to policing results from the crisis of the legal system as device for caste control and the correlative need for a substitute apparatus for the containment of lower-class African Americans. This article places policing, and the shooting of Oscar Grant, in the historical sequence of *peculiar institutions* that have shouldered the task of defining, confining, and controlling African American’s legal identity alongside slavery, Jim Crow, and the American prison system. In the post-Civil Rights era, the vestiges of policing **B**lack bodies alongside the rhetoric of law and order have become linked by a triple relationship of race, policing, and the law spawning a legal continuum that entraps a population of younger **B**lack men rejected by the deregulated wage-labor market. The resulting mesh not only perpetuates socioeconomic marginality and symbolically taints the value of policing the **B**lack sub-proletariat; it also feeds the runaway growth of American incarceration. Perhaps more importantly, post-Civil Rights policing plays a pivotal role in the remaking of ‘race’, the redefinition of the citizenry vis-à-vis the U.S. constitution, and the construction of a hyper-policed Black people in the post-Civil Rights era.

Who Killed Oscar Grant?:
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Hyper-Policing in the post-Civil Rights Era

Donald F. Tibbs*

A people who have suffered so much for so long at the hands of a racist society must draw the line somewhere.

*Huey P. Newton, Executive Mandate No. 1*¹

You may hurl a man so low beneath the level of his kind, that he loses all just ideas of his natural position, but elevate him a little, and the clear conception of rights rises to life and power, and leads him onward.

Frederick Douglass²

What kind of society is this which creates this hall of horrors where jail is allowed to turn into freedom and freedom into jail?

Angela Y. Davis³

INTRODUCTION

* Associate Professor of Law, Drexel University Earle Mack School of Law, J.D., University of Pittsburgh, Ph.D., Arizona State University, LL.M., University of Wisconsin Law School. This article is based on a presentation delivered at the Southern University Law Center for the inaugural symposium of the Journal of Race, Gender, and Poverty, STATE OF THE UNION: THE PROGRESS REPORT. I owe special thanks to all of the student's, faculty, and staff at Southern and Drexel for their inspiration, hard work, and commitment to both my discussion as well as this article. I owe special thanks to Editorial Board and staff of the Journal of Race, Gender, and Poverty for conceptualizing, organizing, and hosting a marvelous symposium that was as intellectually fulfilling as it was spiritually rejuvenating. I would also like to thank my dean, Roger Dennis, Earle Mack School of Law, who encourages me to be "tough minded" in my scholarship in pursuit of racial justice. Finally, I owe special thanks to my muse whose love inspires me far greater than any other earthly experience.

¹ Huey P. Newton, Executive Mandate No. 1, May 2, 1967, *reprinted in* TO DIE FOR THE PEOPLE: THE WRITINGS OF HUEY P. NEWTON 7 (Toni Morrison ed., 1995).

² FREDRICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 150 (Collier Books 1962) (1881).

³ Angela Y. Davis, *Keynote Address*, 43 STAN. L. REV. 1175, 1180 (1991).

On January 1, 2009, Oscar Grant, a young Black⁴ man in his early-20's, was fatally shot, following an evening of innocent celebrations welcoming in the New Year in the San Francisco Bay area, California.⁵ Responding to an anonymous tip that there was a fight between 12 people, who were reportedly all “hammered and stoned,”⁶ Bay Area Rapid Transit (BART) officers halted Grant’s train at the Fruitvale Station while it was inbound from San Francisco.⁷ With no specific details of the disturbance, which coincidentally turned out to be nothing more than raucous celebration; no description of the alleged culprits; and no information that the train stopped was the one containing the disturbance; BART officers, acting without an inkling of police corroboration, singled out Grant and three of his friends, all young men of color, among a train that was as racially mixed as it was economically diverse.⁸

Grant tried to avoid exiting the train, perhaps because he knew nothing good happens when police charge young Black men with militarized-style force,⁹ but BART

⁴ Professor Kimberlé Crenshaw has explained that “Black” deserves capitalization because “Blacks like Asians [and] Latinos . . . constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (citing Catharine A. MacKinnon, *Feminism, Marxism, Method and State: An Agenda for Theory*, 7 Signs 515, 516 (1982)). Additionally, Professor Neil Gotanda contends that the capitalization of Black is appropriate since it “has deep political and social meaning as a liberating term.” Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 4 (1991). I take the position that Professors Crenshaw and Gotanda are correct for both stated reasons, therefore throughout this article when I reference people of African descent, individually or collectively, the word “Black” will be presented as a proper noun .

⁵ Demian Bulwa, Wyatt Buchanan & Matthew Yi, *Behind Murder Charge Against ex-BART Officer*, S.F. CHRON., Jan. 15, 2009, at A1.

⁶ Demian Bulwa, *BART’s Shooting Probe Missteps*, S.F. CHRON., Jan. 30, 2009, at A1; Demian Bulwa, *Skeptical Judge Grants Bail to Former BART Cop*, S.F. CHRON., Jan. 30, 2009, at A1; Jill Tucker, Kelly Zito & Heather Knight, *Deadly BART Brawl – Officer Shoots Rider*, 22, S.F. CHRON., Jan. 2, 2009, at A1.

⁷ *Family Files Claim in BART Shooting: Officer ID’d*, KPIX TV, Jan. 6, 2009, <http://cbs5.com/local/oakland.BART.shooting.2.901215.html>.

⁸ Bulwa, *BART’s Shooting Probe Missteps*, *supra* note 6.

⁹ *Id.* For further scholarship on police violence, see, [for example](#), Carl B. Klockars, *The*

officer Tony Pirone dragged him outside. In what was less than a permissible stop, even at the lowest levels of Fourth Amendment analysis,¹⁰ the officers forced Grant and his friends to the ground and up against a wall, amid a curious display of police over-excitement and unprovoked violence.¹¹ Three minutes later, after Grant pleaded with

Dirty Harry Problem, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 33 (1980); David Jacobs & Robert M. O'Brien, *The Determinants of Deadly Force: A Structural Analysis of Police Violence*, 103 AM. J. SOC. 837 (1998) (analysis of police killings of Blacks show that cities with more Blacks and a recent growth in the Black populations have higher police killing rates of Blacks). For historical literature, see, for example, Albert Bergesen, *Race Riots 1967: An Analysis of Police Violence in Detroit and Newark*, 12 J. BLACK STUD. 261 (1982).

¹⁰ The Fourth Amendment of the United States Constitution guarantees that every citizen is free from unreasonable searches and seizures that are not supported by probable cause that the defendant might, will, or has engaged in illegal activity. The language of the Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

However, in 1968, the landmark Supreme Court decision in *Terry v. Ohio*, 392 U.S. 1 (1968), reduced the burden previously placed upon the police to demonstrate probable cause to a lower standard of reasonable suspicion, which the Court describes as more than a mere hunch but less than a high probability (as required in traditional probable cause analysis), that the defendant might, has, or will engage in illegal activity. Although *Terry*, and its progeny, represent the lowest level of analysis for constitutional searches and seizures, the officer must still be able to produce an articulable suspicion based upon some objective fact(s) that would encourage a reasonable officer to believe that the defendant might, has, or will engage in some criminally punishable activity. *Id.*

In the Grant case, the officers did not have reasonable suspicion that Grant specifically was engaged in illegal activity because the information they relied upon was incomplete and uncorroborated, thereby making their physical assault upon him unconstitutional. Thus, upon arrival at the Fruitvale Station, even under a traditional *Terry* analysis, the BART officers at most were required to corroborate the anonymous tip that Grant and his friends might, were, or had, acted illegally; which in this case they did not. For excellent discussions of the standards required under *Terry* to produce a reasonable suspicion and how it intersects with racial analysis, see Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998). See also David Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975 (1998); Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145 (1996); Adina Schwartz, "Just Take Away Their Guns": *The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317 (1996); George C. Thomas III, *Terry v. Ohio in the Trenches: A Glimpse at How Courts Apply "Reasonable Suspicion"*, 72 ST. JOHN'S L. REV. 1025 (1998).

¹¹ Several witnesses testified at the preliminary hearing of Officer Johannes Mehserle that they began recording because they believed that BART officers were acting too aggressively. The video recordings later provided the evidence that both led to the arrest of the shooting officer,

raised hands while following police directives, he was shoved to the ground, placed in a prone position with his hands behind his back, and forced to surrender to police authority.¹²

Next, despite Grant posing no threat to the safety of the officers, others, or himself, BART officer Johannes Mesherle, stood over Grant's prone body, while Officer Pirone placed his knee in Grant's neck and could audibly be heard calling Grant a "bitch-ass nigger."¹³ Amid the excitement, namely while Grant was pleading with the officers not to use a taser on him, Mesherle unlocked his weapon from his holster, removed his Sig Sauer 9mm, pointed it at Grant, and fired one single bullet into his back.¹⁴ The bullet exited through Grant's chest, but because he was lying prone on the concrete platform, it ricocheted and re-entered his body fatally puncturing his lung.¹⁵

Johannes Mesherle, and supported the \$25 million lawsuit filed by Grant's family. See, e.g., Paul Rosynsky, *Videos Spur Emotion in First Day of Hearing for BART Killing*, OAKLAND TRIBUNE, Aug. 19, 2009, available at http://www.insidebayarea.com/oakland-bart-shooting-headlines/ci_12395559.

¹² Elliot C. McLaughlin, Augie Martin & Randi Kaye, *Video of California Police Shooting Spurs Investigation*, CNN.COM, Jan. 7, 2009, <http://www.cnn.com/2009/CRIME/01/06/BART.shooting/>. In fact, the video of the incident clearly shows that Grant was thrown against the wall and then kned in the face by Officer Pirone who claimed that he was provoked because Grant tried to knee him in the groin and hit Officer Marysol Domenechi's arm away when she tried to handcuff one of Grant's friends. However, there is no evidence of Grant doing such and clearly the video captured Grant conducting himself in a compliant manner. See, e.g., *25 Million Claim by Family of Man Killed by BART Police*, SAN JOSE MERCURY NEWS, Jan. 6, 2009, available at https://www.lexis.com/research/retrieve?_m=c50c62f2b5dcb4cc9f6f0d227b873c1d&csvc=bl&cf orm=searchForm& fmtstr=FULL&docnum=1& startdoc=1&wchp=dGLbVzz-zSkAb& md5=dea646c067f430eee560939778c8a89c (last visited, Mar. 3, 2010); Bob Egelko & Marisa Logos, *Lawyer: Cop Who Hit BART Victim was Provoked*, S.F. CHRON., Jan. 28, 2009, at B-1; John Upton, *Passengers File Claim against BART*, S.F. EXAMINER, Feb. 5, 2009, available at <http://www.sfxaminer.com/local/Passengers-file-claim-against-BART39124617.html>.

¹³ Phillip Matier & Andrew Ross, *BART "N-Word" Bombshell Waiting to Go Off*, S.F. CHRON., June 29, 2009, at B1. Officer Pirone claimed that he was parroting an epithet that Grant said to him. *Id.*

¹⁴ [Demian Bulwa & Henry K. Lee](#), *Bart Shooting Victim's Family Files Claim*, S.F. CHRON., Jan. 7, 2009, at A6.

¹⁵ Petti Fong, *Was Shooting a Fatal Error?*, TORONTO STAR, Jan. 10, 2009, at A03. See also Elliot C. McLaughlin, Augie Martin & Dan Simon, *Spokesman: Officer in Subway Shooting*

As train passengers openly gasped at what they had just witnessed, Grant lay bleeding on the ground, and you could hear him yell, “you just shot me . . . I have a 4-year-old daughter,” before taking his final breath.¹⁶ In the final act of their extra-legal violence and unconstitutional conduct, BART officers attempted to illegally seize, by snatching, the video cell phones and cameras from witnesses who were recording the entire event.¹⁷ But, ultimately they were not successful. The train pulled away from the Fruitvale Station leaving its passengers to watch a dead Oscar Grant disappearing in the distance. Later that evening, the entire event was posted on Internet websites and the world learned about the shooting death of Oscar Grant.¹⁸

But, questions abound; some specific, others general. Why were the police acting so violently towards these young men when they had no police corroborated information that they had committed a crime? Acting with no description, why were four young men of color singled out on a train, occupied by passengers of different racial and economic backgrounds, although a raucous involving twelve people was reported? Why was Grant

Has Resigned, CNN.com, Jan. 5, 2009,
<http://www.cnn.com/2009/CRIME/01/07/BART.shooting/>.

¹⁶ *Man’s Fatal Shooting by San Francisco Subway Police Prompts Probe, Plans for \$25M Lawsuit*, FoxNews.com, Jan. 16, 2009,
<http://www.foxnews.com/story/0,2933,476644,00.html>.

¹⁷ *Id.* See also, *Home Video Surfaces of Oakland BART Shooting*, KPIX TV, Jan. 3, 2009,
<http://cbs5.com/crime/oakland.BART.shooting.2.899444.html>; *BART: Video Doesn’t Show Shooting*, ABC NEWS.COM, Jan. 1, 2009, available at
http://abclocal.go.com/kgo/story?section=news/local/east_bay&id=6581281; *Conflicting Stories Surround Fruitvale BART Shooting*, KTVU.com, Jan. 2, 2009,
<http://www.ktvu.com/news/18394595/detail.html#->.

¹⁸ Rosynsky, *supra* note 11; Elliot C. McLaughlin, Augie Martin & Dan Simon, *Spokesman: Officer in Subway Shooting Has Resigned*, CNN.COM, Jan. 5, 2009,
<http://www.cnn.com/2009/CRIME/01/07/BART.shooting/>.

For the best video capture of the Oscar Grant shooting, see TheDirtyNews, *Police Shooting at BART Station—Oscar Grant (Train Angle 2)*, YOUTUBE (Jan. 6, 2009),
<http://www.youtube.com/watch?v=8Tmh9B8LVxM>.

forced to lie prone when he had already raised his hands and submitted to police authority? And most importantly, why was Oscar Grant killed?

While it appears that these questions provoke varied answers, this article suggests they do not. Rather, the answer lies somewhere between disbelief, shock, and dismay juxtaposed against a historical reality that has dogged African-American men for centuries: the cultural logic of Black hyper-policing in African American communities. More specifically, the answers force us to reconcile how mere anecdotal evidence of Black encounters with the American police transforms into empirical historiography on race and police brutality. However, in order to fully understand how historical moments of race and police brutality occur, as in Grant's case as well as countless others,¹⁹ we must divorce our collective memory from the 'crime and punishment' paradigm that dominates American culture in order to reckon the extra-punitive function of American policing as an instrument for the management of dispossessed and dishonored groups.²⁰

¹⁹ The numerous incidents of police brutality are best captured by an Internet collection of cases cataloguing a plethora of news stories, available at Wikipedia.org, http://en.wikipedia.org/wiki/List_of_cases_of_police_brutality#References (last visited Jul. 31, 2010). While this author would not normally cite Wikipedia as a reliable source for historical information, I would suggest that the reader review the list of news articles that appear in the References section for a more thorough and accurate reporting of the modern incidences of police brutality for the past four decades. Beyond the news accounts, some excellent academic articles accounting police brutality are Richard Mora, *¡Ya Basta!: Confronting Police Brutality*, 14 BERKELEY LA RAZA L.J. 161 (2003), Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999); Susan Bandes, *Tracing the Pattern of No Pattern: Stories of Police Brutality*, 34 LOY. L.A. L. REV. 665 (2001); Vincent J. Rinella, Jr., *Police Brutality and Racial Prejudice*, 45 J. URB. L. 773 (1967-68).

²⁰ For detailed discussions on how race affects police perceptions, see, for example, Cynthia Lee, *But I Thought He Had a Gun: Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POV. L.J. 1 (2004); Vincent J. Webb & Chris E. Marshall, *The Relative Importance of Race and Ethnicity on Citizen Attitudes Toward the Police*, 14 AM. J. POLICE 45 (1995); Ronald Weitzer, *Citizen's Perceptions of Police Misconduct: Race and Neighborhood Context*, 16 Just. Q. 819 (1999); Sandra Lee Browning, Francis T. Cullen, Liqun Cao & Renee Kopache, *Race and Getting Hassled by the Police: A Research Note*, 17 POLICE STUD.: INT'L REV. POLICE DEV. 1 (1994); Daniel J. Bell, *Police Attitudes: Based on Beliefs or Race*, 6 POLICE STUD.: INT'L REV. POLICE DEV. 21 (1983-84).

In exchange, we must confront, head-on, that the law as it is written differs significantly from the law as it is practiced.²¹ In this new paradigm, the law is not a discreet system of rules and regulations, but rather a site of conflict and tension, a legal dialectic that pits constitutional sufficiency and proposition against functional realities and lived experiences.²² In this sense, law becomes a terrain of political struggle, a site for legal contestation, not over its formation and meaning, but over its cultural production and practice – or the social and legal production of hegemony.²³ Thereby, this article, which

²¹ Law and Society scholars have vexed the supposition that the law as it is written is not the same as the law as it operates. Law schools, such as the University of Wisconsin School of Law and the Seattle University School of Law, have considered this dialectic as a centerpiece for critically examining the law in its social context. See, e.g., Paul D. Carrington & Erika King, *Law and the Wisconsin Idea*, 47 J. LEGAL EDUC. 297 (1997). Further insight on the University of Wisconsin Law School's commitment to law-in-action can be found on the Official University of Wisconsin Law School Website, <http://www.law.wisc.edu/law-in-action/davislawinactionessay.html> (last visited Mar. 1, 2010). I am particularly committed to that tradition of legal scholarship through my appointment as the 2004-2005 William H. Hastie Fellow in Law Teaching. During my tenure as a Hastie Fellow I completed a study of formal legal rules as practiced in a prison setting. For further elaboration of my research and experience, see Donald F. Tibbs, *Peeking Behind the Iron Curtain: How Law "Works" Behind Prison Walls*, 67 S. CAL. INTER. L.J. 137 (2006).

Beyond the work of law-in-action as an analytical tool, legal scholars have written furiously about this dichotomy. A few worth reading, and particularly relevant to this article, are, Paul Sayre, *Law in Action*, 39 IOWA L. REV. 63 (1953); James I. Ellmann, *Law in Action v. Law in Books*, 39 COM. L.J. 323 (1934); David Nelken, *Law in Action or Living Law? Back to the Beginning in Sociology of Law*, 4 LEGAL STUD. 157 (1984). For articles related to law in action and policing, see, for example, Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000); Tovah Renee Calderon, *Race-Based Policing from Terry to Wardlow: Steps Down the Totalitarian Path*, 44 HOW. L.J. 73 (2000); Jonathan Bender, *Illinois v. Wardlow: The Supreme Court Dodges the Race Bullet in Fourth Amendment Terry Stops*, 78 DENV. U. L. REV. 125 (2000).

²² James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985); A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795 (1987); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994).

²³ Maclin, *supra* note 22. See also Larry Cata Backer, *Chroniclers in the Field of Cultural Production: Courts, Law, and the Interpretive Process*, 20 B. C. THIRD WORLD L. J. 291 (2000).

Two leading scholars on the cultural production of hegemony are Stuart Hall and bell hooks. Their work is worth examining by anyone interested in thinking about how law fits into the paradigm of creating hegemony by producing cultural meanings of legal subjects. See, e.g., Brennon Wood, *Stuart Hall's Cultural Studies and the Problem of Hegemony*, 49 BRIT. J. SOC. 399 (1998); Janice Peck, *Itinerary of a Thought: Stuart Hall, Cultural Studies, and the*

is written as a legal-eulogy to Oscar Grant, suggests that legal practitioners, pundits, and scholars, as well as the advocates of “tough on crime” approaches to American criminal justice, devote, perhaps, less time evaluating law as a system of rules and opinions that construct and fix our collectively legal identities, and instead, reckon law as a site for being as much the problem of race and policing as it is the solution to legally disjointed parties.²⁴ Only after re-framing policing, whereby we first expunge the irrationality of evaluating crime containment and eradication through a policing and punishment paradigm, can we arrive at a site where we understand policing’s cultural logic in the post-Civil Rights era.

II. RE-FRAMING POLICING: THE CULTURAL LOGIC OF POLICING

The cultural logic of policing, as producing and fortifying hegemony in American law, has three components: 1) it is a profoundly cultural and psychological phenomenon; 2) it is gratuitous; and 3) it is an *a priori* condition for the law: it precedes law, rather than follows it.²⁵ Approaching policing within this context recognizes what Dr. Tryon

Unresolved Problem of the Relation of Culture to “Not Culture,” 48 CULTURAL CRITIQUE 200 (2001); Stuart Hall, *The Emergence of Cultural Studies and the Crisis of the Humanities*, 53 HUMAN. SOC. TECH. 11 (1990); bell hooks, *A Revolution of Values: The Promise of Multi-Cultural Change*, 26 J. OF THE MIDWEST MODERN LANGUAGE ASS’N 4 (1993).

A review of Hall’s and hooks’ works would be incomplete without reading their seminal texts, STUART HALL, REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PLACES (1997); bell hooks, BLACK LOOKS: RACE AND REPRESENTATION (1992); and bell hooks, TALKING BACK: THINKING FEMINIST, THINKING BLACK (1989). hooks’ most famous book, however, and the one she is perhaps most celebrated for is, bell hooks, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM (1994).

²⁴ See, for example, Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227 (1994); Kahei Rokumoto, *Law and Culture in Transition*, 49 AM. J. COMP. L. 545 (2001); Edson R. Sunderland, *Law as a Culture Study*, 4 MICH. L. REV. 3 (1906); Richard A. Falk, *The Relation of Law to Culture, Power, and Justice*, 72 ETHICS 12 (1961); Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J. L. & HUMAN. 575 (1998); Lawrence Friedman, *Legal Culture and Social Development*, 4 LAW & SOC’Y REV. 29 (1969).

²⁵ I owe a great deal of debt to my good friend, co-author, and colleague in the struggle for social justice, Dr. Tryon P. Woods, Assistant Professor of Crime and Criminology, Sonoma State University for this layout of the components of law and policing as a cultural production.

Woods refers to as a *justice contradiction* under the law. The contradiction recognizes one contemporary reality, that most of the harm in our society, particularly in terms of financial loss, bodily injury, and premature death – can be attributed to white collar or corporate crime, not urban-street deviance.²⁶ Financially, the losses attributed to street crime represent a miniscule amount of the total losses as compared to white-collar crime. Unfortunately, the total losses of injury and premature death are harder to calculate in this paradigm because we don't usually classify those as crime, but if we calculated the injuries and premature deaths related to foreseeable,²⁷ and therefore preventable, workplace accidents, environmental pollution, medical negligence and malpractice, and the living-deaths related to loss of retirement savings or preventing the accumulation of wealth, the vantage point for assessing justice shifts considerably.²⁸

Dr. Woods used this relationship while explaining policing to my Fall 2009 Criminal Procedure class and has graciously allowed me to 'sample' his thoughts in the article.

²⁶ Randall A. Gordon *et al.*, *Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant's Race on Simulated Juror Decisions*, 128 J. OF SOC. PSYCHOL. 191 (1988); David Lee, *White Collar Crime and the Financial Sector*, 19 COMMW. L. BULL. 1932 (1993).

²⁷ The concept of foreseeability under the law emanates from the landmark [New York Court of Appeals](#) case in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). This concept is particularly important to establishing a duty of care based on foreseeable risks in Tort law, but the foreseeability is also imported into other areas of law, namely Criminal Law. *See, e.g.*, Benjamin C. Zipursky, *The Many Faces of Foreseeability*, 10 KAN. J.L. & PUB. POL'Y 156 (2000); Patricia K. Fitzsimmons & Bridget Genteman Hoy, *Visualizing Foreseeability*, 45 ST. LOUIS. U. L.J. 907 (2001). For relation of the concept of foreseeability to criminal law see, for example, Corey Mostafa, Comment, *The Implied Warranty of Habitability, Foreseeability, and Landlord Liability for Third-Party Criminal Acts against Tenants*, 54 UCLA L. REV. 971 (2007).

²⁸ *See, e.g.*, THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 66 (Steven R. Donziger ed., 1996). In the chapter on *Fear, Politics, and the Prison-Industrial Complex*, the Commission explodes the myths of crime by stating:

Myth #4: Street Crime Costs More Than Corporate Crime

Reality: Corporate crime, like the savings and loan scandals, cost Americans far more than street crime. According to the Department of Justice, all personal crimes and household crimes cost approximately \$19.1 billion in 1991. The comparable cost of white-collar crime is between \$130 billion and \$472 billion – seven to twenty-five times as much as street crime. Moreover, many more people die from pollution than from homicide. There are six times as many work-related deaths as homicides. *Id.* at 66.

Additionally, the *policing problem* is not a *crime problem*, namely because criminality as a human behavior easily escapes the categorical boundaries of race, gender, and class. All members of society participate in crime, from minor infractions, such as exceeding the speed limit or stealing workplace property, to major infractions such as homicide, rape, and murder. Yet, when cut across racial categories, whites and the non-poor go relatively un-policed. For example, respected sociologists and criminologists have produced compelling books, such as Steven Donziger's *The Real War on Crime* and Marc Mauer's *Race to Incarcerate*,²⁹ detailing the dysfunctionality of our criminal justice system and the manner in which we think about how crime is disproportionately policed. From both books, and numerous articles on the subject,³⁰ we learn that of all illegal drug users, a greater percentage are white as opposed to Black, Latino, and other. However, Black and Latino men constitute more drug-related arrests, represent the largest percentage of the prison population as compared to the percentage in the American population, and represent a larger percentage of people under the current control of the American criminal justice system through prison, jail, probation, and parole.³¹ Meanwhile, the American government, especially past presidents, continuously

²⁹ MARC MAUER, RACE TO INCARCERATE: THE SENTENCING PROJECT (1999).

³⁰ Marc Mauer, *Thinking About Prison and its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607 (2005); Marc Mauer, *Politics, Crime Control, . . . and Baseball?: "Three Strikes and You're Out,"* 9 CRIM. JUST., Fall 1994, at 30; Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, 31 HUM. RTS. 16 (2004); Marc Mauer, Ryan Scott King & Tracy Huling, *An Analysis of the Economics of Prison Siting in Rural Communities*, 3 CRIMINOLOGY & PUB. POL'Y 453 (2004).

³¹ According to the 2008 mid-year report on the American prison population, which includes persons under the direct control of the criminal justice system, state and federal correctional authorities had jurisdiction or legal authority over 1,610,584 prisoners and an additional 785, 556 inmates were held in custody in local jails. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *Growth in Prison and Jail Populations Slowing*, (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/press/pimjim08stpr.cfm> (last visited May 9, 2010).

exacerbates this problem either through politically staged drug arrests³² or through an increase in tougher sentencing laws.³³

This means that essentially there is a *policing identity*, a population of persons who are policed not for what they do, but for who they are. This identity is fortified by the fact that one in every twenty Black men over the age of eighteen is in a state or federal prison, as opposed to occupying seats in university classrooms or workplace cubicles, compared to one in every 180 whites.³⁴ Some states, five to be exact, sadly claim that between one in thirteen and one in fourteen Black men are in prison.³⁵

This shifting paradigm, which departs from the *crime and punishment* dialogue that dominates popular memory for understanding policing, calls for a departure that destabilizes our assumptions about the law, in order to create a small window of

³² Maureen Dowd, *White House Set Up Drug Buy in the Park for Bush TV Speech*, N.Y. TIMES, Sept. 23, 1989, at A1. According to Dowd, the elder George Bush made a national television speech where he held up a bag of crack cocaine that was sold to an undercover agent across the street from the White House in Lafayette Park. It was, indeed, a ratings ploy as the nineteen-year old male was approached in his neighborhood and told to meet the agent in the park for the sale. The young man queried, “Where is that?? And he was told, “Its across the street from the White House.” The nineteen-year old, who had grown up in D.C., said, “Where’s the White House?” thereby making it unlikely that he was a drug dealer in D.C.’s most politically powerful and drug-free part of the District.

³³ See Mauer, *supra* note 31, at 68-69. Mauer makes clear that racial bias in the criminal justice system did not emerge in 1980 when President Ronald Reagan and his administration declared a war on drugs. Instead, race and the criminal justice system have been intimately intertwined throughout the history of this country. See, e.g., DIANA GORDON, THE RETURN OF THE DANGEROUS CLASSES: DRUG PROHIBITION AND POLICY POLITICS (1994); DAVID F. MUSTO, THE AMERICAN DISEASE: THE ORIGINS OF NARCOTICS CONTROL (1999).

When the Clinton administration came into office in 1992 discussing the need for a balanced approach to the disparity in drug sentencing laws, the administration pushed for more drug treatment and tough sentencing laws. See, e.g., MAUER, *supra* note 31, at 68-69. As Mauer points out, by the time that President Clinton left office, we would have about fifty percent more people in the national prisons than when he began in 1992. And he was correct. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 507 tbl.6.27 (2001).

³⁴ Human Rights Watch, *Racial Disparities in the War on Drugs*, http://www.hrw.org/legacy/reports/2000/usa/Rcedrg00-01.htm#P149_24292 (last visited Mar. 1, 2010).

³⁵ *Id.*

opportunity to examine police misconduct from a cultural perspective rather than a legalist one. Instead, if we seek virtue and honesty in our criminal justice system, we should *re-frame* policing in a historical sequence of what historian Kenneth Stampp, in describing the institution of Slavery, referred to as a *Peculiar Institution*.³⁶ These peculiar institutions have shouldered the task of historically defining, confining, and controlling African American's legal identity through the African slave trade,³⁷ Jim Crow segregation,³⁸ and the building of the American Prison Industrial Complex.³⁹ In the post-Civil Rights era, and now what we propose is a post-Racial era, it is perhaps best to

³⁶ KENNETH M. STAMPP, *PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1989). The picture that Stampp paints is one that slavery was a malignant growth on the South. He illustrates that one must understand the past, in order to properly situate the present. According to Stampp, "racist doctrine did not die with slavery." Rather, "The southern 'race problem' grew out of such external differences as skin pigmentation, it has always been an artificial problem created by white men who . . . made an obsession of these racial superficialities." See also Fitzhugh Brundage, *American Slavery: A Look Back at The Peculiar Institution*, 15 J. OF BLACKS IN HIGHER EDUC. 118 (Spring, 1997); Loren Schweninger, *Slavery and Southern Violence: County Court Petitions and the South's Peculiar Institution*, 85 J. OF NEGRO HIST. 33 (2000); Russell Olwell, *New Views of Slavery: Using Recent Historical Work to Promote Critical Thinking About the "Peculiar Institution,"* 34 THE HISTORY TEACHER 459 (2001), available at, <http://www.historycooperative.org/journals/ht/34.4/olwell.html>.

³⁷ ARLENE R. KEIZER, *BLACK SUBJECTS: IDENTITY FORMATION IN THE CONTEMPORARY NARRATIVE OF SLAVERY* (2004); RON EYERMAN, *CULTURAL TRAUMA: SLAVERY AND THE FORMATION OF AFRICAN AMERICAN IDENTITY* (2001); IYUNOLU FOLAYAN OSAGIE, *THE AMISTAD REVOLT: MEMORY, SLAVERY, AND THE POLITICS OF IDENTITY IN THE UNITED STATES AND SIERRA LEONE* (2000); ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* (2000).

³⁸ JAMES C. COBB, *THE BROWN DECISION, JIM CROW, AND SOUTHERN IDENTITY* (2005); Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905*, 24 L. & SOC. INQUIRY 377 (1999). See also DAVID OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1997).

³⁹ Julia Sudbury, *Celling Black Bodies: Black Women in the Global Prison Industrial Complex*, 70 FEMINIST REVIEW 57 (2002) (arguing that the prison industrial complex is a complex matrix of race, gender, class, and nationality that meshes with contemporary globalized geo-political and economic realities for women of color); ANGELA Y. DAVIS, *Race and Criminalization: Black Americans and the Punishment Industry*, in THE ANGELA Y. DAVIS READER 61-74 (Joy James ed., 1998); ANGELA Y. DAVIS, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System*, in THE ANGELA Y. DAVIS READER, *supra*, at 74-96 (Joy James ed., 1998). For a timeless historical article on the connections between race and punishment, see, [for example](#), Blake McKelvey, *Penal Slavery and Southern Reconstruction*, 20 J. OF NEGRO HIST. 153 (1935).

consider seriously the age-old mantra that *the more things change; the more they stay the same*. The vestiges of policing Black bodies alongside the rhetoric of law and order has become linked by a triple relationship of race, policing, and the law, spawning a legal continuum that entraps a population of younger Black men rejected by the deregulated wage-labor market.⁴⁰ This mesh is solidified by recent trends in legal protection, which once reshaped policing during America's rights revolution,⁴¹ resulting in either non-existent or unappreciated rights for Black Americans. The resulting mesh between race, policing, and the law, not only perpetuates socioeconomic marginality and symbolically taints the Black proletariat, it also feeds the runaway growth of American incarceration.⁴²

⁴⁰ Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526 (2002); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004).

⁴¹ By "rights revolution," I am referring to both the Civil Rights revolution that fostered important changes eradicating American racism through the landmark SCOTUS decision in *Brown v. Board of Education* 347 U.S. 483 (1954), the Civil Rights Act of 1964 (public accommodations), the Voting Rights Act of 1965 (minority inclusion in voting), and the Civil Rights Act of 1968 (fair housing); as well as the revolution in American criminal procedure that produced landmark decisions in *Terry v. Ohio* 392 U.S. 1 (1968), *Katz v. United States*, 389 U.S. 347 (1967), *Gideon v. Wainwright* 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); and *Miranda v. Arizona*, 384 U.S. 436 (1966). The combination of these series of legal decisions, and acts, together produced a revolution in American law that on one level addressed the inequalities present in racial discrimination, and, on the other, provided greater rights to defendants in police investigations. Since African Americans were disproportionately affected by the confluence of race and the criminal justice system, both revolutions were important to stake a claim for Black citizenship and legal democracy.

⁴² The term 'Prison Industrial Complex' refers to a dynamic set of relations, exchanges, and non-antagonistic conflicts between hegemonic institutions in state and civil society. The judiciary, police, private industry, elected officials, law-and-order community groups and lobbyists (i.e. 'victim's rights' and anti-immigrant groups), along with the prison apparatus itself generate a political symbiosis that simultaneously mystifies and rationalizes imprisonment as a way of life. The nexus of these multiple entities – what enables the complex articulation between structures, people, and places under the expanding rubric of imprisonment – is *the practice* of state power. Violence is the core value of this practice, particularly as state power enunciates domination over (and ownership of) human bodies as the measure of peace, security, and social order. Social justice, criminologists, and cultural theorists have been forthcoming on evaluating the significance of the prison industrial complex and its influence on law, order, and policing in the United States. See, e.g., Dylan Rodriguez, *(Non)Scenes of Captivity: The Common Sense of Punishment and Death*, 96 RADICAL HIST. REV. 9 (2006); Dylan Rodriguez, *State Terror and the Reproduction of Imprisoned Dissent*, 9 SOC. IDENTITIES 183 (2003); Avery F. Gordon, *Globalism*

Perhaps more poignant, policing plays three pivotal roles that I will discuss in more detail in the latter pages: (1) it re-makes how we understand ‘race;’ (2) it re-defines the “citizenry” protected under the United States Constitution; and (3) it re-creates a hyper-policed Black community at the dawn of the 21st century.

Further, the institution of policing reaffirms the omnipotence of a legal Leviathan in the restricted domain of public order maintenance symbolized by continuous battles against street delinquency – to which I am thinking, for example, about Broken Windows⁴³ styles of policing and its usage by the modern metropolis to address major

and the Prison Industrial Complex: An Interview with Angela Davis, 40 RACE & CLASS 145 (1998); Mumia Abu Jamal, *The Industry of Fear*, 27 SOC. JUST. 22 (2000); Julia Sudbury, *Transatlantic Visions: Resisting the Globalization of Mass Incarceration*, 27 SOC. JUST. 133 (2000). Legal scholars, unfortunately, save a few, have been relatively silent on the rise of the Prison Industrial Complex as a social and political machine as well as its fortification through law. See, e.g., Chris Weaver & Will Purcell, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349 (1998); Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex’s Impact on Women’s Health*, 18 BERKELEY WOMEN’S L.J. 40 (2003); Cassandra Shaylor, “*It’s Like Living in a Black Hole*”: *Women of Color and Solitary Confinement in the Prison Industrial Complex*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385 (1998).

Perhaps, a partial explanation for the dearth in legal scholarship related to the prison industrial complex flows from a lack of legal scholar’s ability to accept that punishment, just like policing, is the *a priori* condition for the law – meaning that it precedes law rather than follows it.

For the international dimensions on the Prison Industrial Complex and its intersection with race, gender, and class, see GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON INDUSTRIAL COMPLEX (Julia Sudbury ed., 2005).

⁴³ Broken Windows Thesis [hereinafter BWT] was developed by criminologists George Kelling and James Q. Wilson in 1982 to explain a theory for crime deviance and maintenance-order policing. According to BWT, crime follows a developmental sequence from non-serious disorder to serious crimes. Failure to fix broken windows in a community communicates disorder and thereby, leads to crime. However, fixing the broken windows produces the exact opposite: communicates order, and either prevents or preempts more serious crimes. Therefore, the focus of Broken Windows styles of policing is on minor, petty offenses that impact the quality of life in economically distressed communities. Addressing the misdemeanors allows the more serious crimes to ‘take care of themselves.’ See, e.g., George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY Mar. 1982, at 29-38.

However, there are serious conceptual flaws related to BWT, namely that, although the theory has a kind of intuitiveness, there is no evidence for the developmental sequence upon which it relies: disorder does not produce crime. Rather, the focus of BWT is on the visible signs of decay and disorder, rather than the actual danger or safety, which leaves law enforcement to police citizen’s perceptions. Finally, since the police don’t repair houses or conduct renovation

political dysfunction.⁴⁴ A fine example of this resides in the city of Chicago's attempts to employ anti-gang statutes to sweep Black communities, in an effort to "move along" groups of 3-4 Black men who loiter.⁴⁵ Although this practice was encouraged by Chicago's political machine, namely its local and state government, its prosecutors, and

work in the community, it is imperative to translate BWT into human terms: policing 'broken' people, such as disorderly people, or persons who otherwise represent the stereotypical signs of decay, disorder, and danger – namely young Black men.

For legal scholars critique of BWT, see, for example, Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249 (1998); D.W. Miller, *Poking Holes in the Theory of 'Broken Windows,'* CHRON. HIGHER EDUC. Feb. 9, 2001, at A14; Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998).

⁴⁴ Samuel Walker, *Broken Windows and Fractured History: The Use and Misuse of History in Recent Police Patrol Analysis*, 1 JUST. Q. 75 (1984); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and the Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006). For greater insight into precisely how BWT fails to prevent crime and in fact, creates more crime, see, for example, Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. ON POVERTY L. & POL'Y 419 (2007).

⁴⁵ In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place.

The ordinance stated in pertinent part: (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section. (b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang. (c) As used in this section: (1) 'Loiter' means to remain in any one place with no apparent purpose. (2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. . . . (5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned. (e) Any person who violates this Section is subject to a fine of not less than \$100 and not more than \$500 for each offense, or imprisonment for not more than six months, or both. "In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to section 1—4—120 of this Code." Chicago Municipal Code § 8-4-015 (added June 17, 1992), *reprinted in* App. to Pet. for Cert. 61a—63a.

Jesus Morales, who was arrested by the ordinance, and was not even a gang member, sued to have the ordinance declared unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See Chicago v. Morales*, 527 U.S. 41 (1999).

its judiciary, this style of policing was ultimately declared unconstitutional in the SCOTUS case *Chicago v. Morales*.⁴⁶ Speaking for the Court, Justice Stevens declared that “broad sweeps [of the law] violate the requirement that a legislature establish minimum guidelines to govern law enforcement,” and any ordinance that “encompasses a great deal of harmless behavior,” is unconstitutional.⁴⁷

Curiously, this happens just when poverty stricken Black communities demonstrate an incapability of stemming the decomposition of wage labor or bridling the hyper-mobility of global capital and fall victim to the elitist prey of urban gentrification.⁴⁸ And, as I, and numerous others, have argued elsewhere – this is not mere coincidence; rather **this** is “common sense” – a way of comprehending, explaining and acting in the world,⁴⁹ only to the extent that we invest our morphology with racial meaning.⁵⁰ It is precisely because American legal elites having converted to the ideology of colorblind formalistic approaches to the law⁵¹ while state elites have either reduced or abandoned

⁴⁶ *Morales*, 527 U.S. at 41 (1999)

⁴⁷ *Id.*

⁴⁸ Richard Schaffer & Neil Smith, *The Gentrification of Harlem?*, 76 ANNALS ASS'N AM. GEOGRAPHERS 347 (1986) (urban gentrification in Harlem will displace Black residents at the expense of the wealthy white elite); Scott C. McDonald, *Does Gentrification Affect Crime Rates?*, 8 CRIME & JUST. 163 (1986) (gentrification leads to some eventual reduction in personal crime rates but that it has no significant effect on rates of property crime).

⁴⁹ See, e.g., Donald F. Tibbs & Tryon P. Woods, *The Jena Six and Black Punishment: Life and Raw Life in the Domain of Nonexistence*, 7 SEATTLE J. SOC. JUST. 235 (2008); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960'S TO THE 1980'S 62 (1986); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 5 (1994). For an extended discussion of “common sense” in the construction of radical identities, see Stuart Alan Clarke, *Fear of a Black Planet: Race, Identity Politics, and Common Sense*, 21 SOCIALIST REV. 37 (1991).

⁵⁰ Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 96 (1990).

⁵¹ Ian F. Haney Lopez, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008); Khaled Ali Beydoun, *Without Color of Law: The Losing Race Against*

their work in those legal and social matters affecting their most distressed constituencies,⁵² that the post-Civil Rights America finds itself curiously comforted with the ideology of reducing young Black men to a sole criminal dimension.⁵³

III: The Oscar Grant Shooting: Three Alternative Explanations

A. African American History and Policing

The Oscar Grant shooting occurred for all the number of reasons pertaining to the history of African Americans and policing.⁵⁴ Because of the subordinate positions

| *Color Blindness in Michigan*, 12 MICH. J. RACE & L. 465 (2007); Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483 (2003).

For a more precise view of how colorblindness affects policing, see, for example, Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk,"* 50 OKLA. L. REV. 451 (1997).

| ⁵² Edward S. Shihadeh & Graham C. Ousey, *Metropolitan Expansion and Black Social Dislocation: The Link Between Suburbanization and Center-City Crime*, 75 SOC. FORCES 649 (1996).

| ⁵³ John Dilulio, Jr., *White Lies About Black Crime*, 118 PUB. INTEREST, Jan. 1, 1995, at 30, 30-44; Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears – On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994); Angela Anita Allen-Bell, *The Birth of Crime: Driving While Black*, 25 S.U. L. REV. 195 (1997).

| For an excellent work on racial stereotypes, Black men, and the criminal dimension, see, for example, JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (2000) [Hereinafter NEGROPHOBIA].

| ⁵⁴ The literature connecting African American historiography and policing is vast and varied. Every scholarly discipline hosts a series of excellent articles and books on the subject. Some, that accurately place race and policing in historical context, are especially worth reading. See, e.g., OUT OF ORDER?: POLICING BLACK PEOPLE (Ellis Cashmore & Eugene McLaughlin eds., 1991); RACE AND CRIMINAL JUSTICE (Michael J. Lynch & Britt Patterson eds., 1991); INSTITUTE OF RACE RELATIONS, POLICING AGAINST BLACK PEOPLE (1987); MICHAEL ROWE, POLICING, RACE, AND RACISM (2004); PAUL CHEVIGNY, THE EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS (1995). For insight into the international dimensions connecting race to policing, see, for example, JOHN D. BREWER, BLACK AND BLUE: POLICING IN SOUTH AFRICA (1994); GAVIN CAWTHRA, POLICING SOUTH AFRICA: THE SOUTH AFRICAN POLICE AND THE TRANSITION FROM APARTHEID (1993); GERRY NORTHAM, SHOOTING IN THE DARK: RIOT POLICE IN BRITAIN (1988).

Excellent articles on the subject include, R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009); Tovah Renee Calderon, *Race-Based Policing from Terry to Wardlow: Steps Down the Totalitarian Path*, 44 HOW. L.J. 73 (2000); Roberts, *supra* note 36; Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing*

created by the structure of American race relations during Slavery; the unjust economic enrichment of white supremacy during Jim Crow; and the structure of domination concealed by the false promise of equal protection during Civil Rights, African American communities remain overwhelmingly characterized by dizzying social disparities endemic to mass poverty, wage labor desocialization, and neoliberal economic destabilization.⁵⁵

Meanwhile, the unavoidable growth of criminal violence has been framed as the main blight of the metropolitan city, and white Americans have rushed to the suburbs to escape the face of Black crime.⁵⁶ Resultantly, the main economic dictators of most American cities, which happen to be their downtowns and inner city marketplaces, have suffered; and in response, politicians have rushed to save their cities by adopting Mayor Rudolph Giuliani's 'zero-tolerance' styles of urban policing.⁵⁷ However, urban policing, is paradoxical; it seeks to deploy *more police* in the realm of state force and violence to remedy the generalized rise of American insecurity that is itself caused by *less police* on

Race in Affirmative Action, the Census, and a Color-Blind Society, 11 MICH. J. RACE & L. 367 (2006).

⁵⁵ George Lipsitz, *World Cities and World Beat: Low Wage Labor and Transnational Culture*, 68 PAC. HIST. REV. 213 (1999); George Lipsitz, "Swing Low, Sweet Cadillac": *White Supremacy, Antiracist Racism, and the New Historicism*, 7 AM. LITERARY HIST. 700 (1995); George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the "White" Problem in American Studies*, 47 AM. QUARTERLY 369 (1995).

⁵⁶ Joseph Parvin, *The Effect of Race on the Flight to the Suburbs*, 83 J. POL. ECON. 865 (1975); BECKY M. NICOLAIDES, *MY BLUE HEAVEN: LIFE AND POLITICS IN THE WORKING CLASS SUBURBS OF LOS ANGELES, 1920-1965* (2002); ROBERT O. SELF, *AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND* (2003); JOSH SIDES, *L.A. CITY LIMITS: AFRICAN AMERICAN LOS ANGELES FROM THE GREAT DEPRESSION TO THE PRESENT* (2006); CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996).

⁵⁷ Chris Cunneen, *Zero Tolerance Policing and the Experience of New York City*, 10 CURRENT ISSUES CRIM. JUST. 299 (1999); Roger Hopkins Burke, *Zero Tolerance Policing: New Authoritarianism or New Liberalism?*, 11 NOTT. L.J. 20 (2002); Roger Hopkins Burke, *Socio-Political Context of Zero Tolerance Policing Strategies*, 21 POLICING: INT'L J. POLICE STRATEGY & MGMT. 666 (1998); Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L. J. 407 (2000); Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129 (2000); Harcourt, *supra* note 47.

America's economic and social front;⁵⁸ not because more police is particularly efficient – indeed, we know it is not – but because it is ideally suited to publicly dramatize renewed commitments to slay the monster of urban crime that readily fits the negative stereotypes of young Black men who are everywhere portrayed as the main source of street deviance and violence.⁵⁹

The diffusion of firearms and the explosive development of an organized drug economy linked to international trafficking, in which the criminal underworld and the American police are deeply intertwined,⁶⁰ have resulted in the propagation of a false truth – that street-level crime, more than any other epoch (namely white collar and corporate

⁵⁸ Alexander B. Smith & Harriet Pollack, *Less, Not More: Police, Court, Prisons*, 36 FED. PROBATION 12 (1972); Loïc Wacquant, *The Penalization of Poverty and the Rise of Neo-Liberalism*, 9 EUR. J. CRIM. POL'Y. & RES. 401 (2001). According to Wacquant:

The harsh police practices and extended prison measures adopted today . . . are indeed part and parcel of a wider transformation of the state, a transformation which is itself called for by the mutation of wage labour and precipitated by the overturning of the inherited balance of power between the classes and groups fighting over control of both employment and the state. *Id.* at 401.

⁵⁹ Vance McLaughlin & Steve Smith, *The Rodney King Syndrome*, 9 J. FIREARMS & PUB. POL'Y 51 (1997); Lawrence Vogelmann, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571 (1993). The Rodney King case is particular to the issue of stereotyping Black men because it proffered a moment to witness a police assault on an African American man without obstruction of the evidence or justice in any form. Curiously, the prosecution of the officers in the King case was a serious disappointment as the jury determined that their violence was legally justified. *See, e.g.*, Frank Tuerkheimer, *The Rodney King Verdict: Why and Where to From Here?*, 1992 WIS. L. REV. 849 (1992). The end result of the verdict touched off the worst riot in Los Angeles history since the 1965 Watts riot. Interestingly, some scholars have detailed that Rodney King was not the phenomenon that everyone believed, but rather it was more indicative of a continuation of a brutal past of race and police in the African American community. *See, e.g.*, Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?*, 10 HARV. BLACKLETTER L.J. 67 (1993). *See also* Kimberlé Crenshaw & Gary Peller, *Real Time/Real Justice*, in *READING RODNEY KING, READING URBAN UPRISING* 56-70 (Robert Gooding-Williams ed., 1993). According to Crenshaw and Peller, “The community doesn't need formal equality from the police, but actual control over the police—as well as other public institutions.” *Id.* at 69.

⁶⁰ GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* (1988). Marx's book is perhaps one of the best sources to critique undercover policing and the shared legal and moral responsibility with the police deceiving the deceivers.

crime), is everywhere; and more police, equipped with high-tech military-style weapons and armor, are not simply the best solution; indeed they are the **ONLY** solution.⁶¹ Yet, we acknowledge that, in the absence of a ‘real’ safety net assembled around enhanced quality-of-life services like accessible health care, drug counseling, and HIV education, it is certain that young African American men crushed by the weight of poor education, chronic unemployment and underemployment, and the massive incarceration of their Black fathers, will continue to look to the streets for the means to survive and realize the values of the masculine code of honor, and perhaps escape the grind of daily destitution.⁶²

B. The Role of State Violence

Beyond historiography, the Oscar Grant shooting occurred because criminal insecurity, by which I refer to perpetration and victimization, in the United States is *particular* in that it is not attenuated but clearly *aggravated* by the intervention of law-enforcement forces. The routine use of lethal and non-lethal violence against African American men by city police, who illegally stop, detain, frisk, and force confessions,⁶³ all

⁶¹ Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1 (1997); Peter Andreas & Richard Price, *From War Fighting to Crime Fighting: Transforming the American National Security State*, 3 INT’L STUD. REV. 31 (2001).

⁶² William Oliver, “*The Streets*”: *An Alternative Black Male Socialization Institution*, 36 J. OF BLACK STUD. 918 (2006). In his article, Oliver closely explains why the “streets” have become the alternative to the family, church, and other community based institutions as sites for Black male socialization. Drawing from the work of Useni Perkins, Oliver, too, believes that the “streets . . . constitute an institution in the same way the church, school, and family are conceived as institution.” *Id.* at 919. *See, e.g.*, USENI EUGENE PERKINS, HOME IS A DIRTY STREET: THE SOCIAL OPPRESSION OF BLACK CHILDREN 26 (1975).

⁶³ One of the leading scholars on race and the Fourth Amendment is Professor Tracey Maclin, who has written prolifically on the tensions between policing, legal doctrine, and young Black men. I cite, here, primarily to Professor Maclin’s work not only because it is historically grounded, theoretically driven, and legally accurate, but because his groundbreaking work blazed the trail for the plethora of critical Fourth Amendment scholarship that followed. *See, e.g.*, Maclin, *supra* note 22; Tracey Maclin, “*Black and Blue Encounters*”- *Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991) [hereinafter *Black and Blue Encounters*]; Maclin, *supra* note 10; Tracey Maclin, *Race and*

occur in order to maintain a climate of respect for police authority amassed through terror and brutality, all the while banalizing such at the heart of the state. There is considerable empirical and anecdotal evidence where Black men – due to their otherwise non-violent activity intersecting with over-zealous policing guided by negative racial stereotypes, racial profiling, and supremely poor professional judgment – have either been: 1) murdered by a police bullet,⁶⁴ 2) murdered through protracted police violence,⁶⁵ 3) beaten beyond recognition,⁶⁶ 4) sodomized in police stationhouses;⁶⁷ or 5) harassed for violating social custom related to racial stigmas built around white community values and then accused of being an angry-crazed-Negro despite a profile as one of the most eminent race scholars in the world.⁶⁸

Perhaps more disturbing is the reality that much of this violence is discreetly hidden: shielded from public scrutiny and recourse under the law. When the video cameras are not rolling, the police are comforted by the fact that they are protected by

the Fourth Amendment, 51 VAND. L. REV. 333 (1998); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

⁶⁴ Michael Cooper, *Officers in Bronx Fire 41 Shots, And an Unarmed Man Is Killed*, N.Y. TIMES, Feb. 5, 1999, at A1; Robert D. McFadden, *Police Kill Man After a Queens Bachelor Party*, N.Y. TIMES, Nov. 26, 2006, at A1; Jill Tucker et al., *supra* note 6.

⁶⁵ *Man's Beating Death is Protested in Detroit*, N.Y. TIMES, Nov. 9, 1992, at A10; *Ex-Officer Admits That He Beat Detroit Man*, N.Y. TIMES, Aug. 8, 1993, at 135; *5 Police Officers in Pittsburgh Facing Charges in Beating Death*, N.Y. TIMES, Nov. 5, 1995, at 134; *No Federal Charges In Motorist's Death*, N.Y. TIMES, Feb. 21, 1999, at 126.

⁶⁶ Seth Mydans [et al.](#), *Seven Minutes In Los Angeles - A special report.; Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1; Seth Mydans, *Rodney King Testifies on Beating: 'I Was Just Trying to Stay Alive'*, N.Y. TIMES, Mar. 10, 1993, at A1.

⁶⁷ David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody*, N.Y. TIMES, Aug. 13, 1997, at B1; Alan Feuer, *Three are Guilty of Cover-Up Plot in Louima Attack*, N.Y. TIMES, Mar. 7, 2000, at A1.

⁶⁸ Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES, July 20, 2009, at A13; [Katie Zezima & Abby Goodnough](#), *Harvard Scholar Won't Be Charged*, N.Y. TIMES, July 21, 2009, at A12.

immunity,⁶⁹ covered by the prosecutors,⁷⁰ and fortified by a judiciary who as elected officials don't want to appear "soft on crime."⁷¹ But, even when exposed, as in the case of Oscar Grant, police, individually and collectively, dig in their heels in the worse way. They claim their legal malfeasance was "harmless error."⁷² rely on prosecutors who withhold exculpatory evidence,⁷³ pull up the "Big Blue Wall" and then they "test-a-lie"⁷⁴

⁶⁹ Frank J. Menetrez, *Lawless Law Enforcement: The Judicial Intervention of Absolute Immunity for Police and Prosecutors in California*, 49 SANTA CLARA L. REV. 393 (2009); Stephen B. O'Connell, *Police Officers Who Give False Testimony Have Absolute, Unqualified Immunity from Section 1983 Liability*, 13 Tex. Tech. L. Rev. 1527 (1982).

⁷⁰ Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305 (2001); Felice Guerrieri, *Law and Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. ILL. U. L. J. 353 (2001), Stephen P. Kennedy, *Prosecutors and Police. Their Common Bond*, 49 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 367 (1958); Catherine Ferguson-Gilbert, Comment, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283 (2001).

⁷¹ Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776 (1995) (claiming that as the public debate on crime and its solutions has become increasingly one-sided and vacuous, the death penalty has become the ultimate litmus test for demonstrating that one is not "soft on crime."); see also Kurt E. Scheuerman, Note, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 481 (1993) (noting that an Oregon Supreme Court justice's defeat demonstrated how judicial elections can turn, not on qualifications, or even jurisprudence, but on political issues and results of individual cases).

⁷² See, *Brecht v. Abrahamson*, 507 U.S. 619 (1993), where the Supreme Court set forth the "harmless error" standard in which a defendant is entitled to habeas corpus relief, but only if the defendant can establish that "actual prejudice" resulted. The problem with this standard, however, is that "harmless error" is itself a lie. See, e.g., JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE 175 (2000). This "lie" is used to absolve police officers and prosecutors of misconduct. *Id.* at 172. This lie is a dangerous one – especially to innocent defendants who have been convicted in cases involving police and prosecutor misconduct. *Id.*

In sixty-three percent of the convictions the Cardozo Innocence Project studied that were reversed through the use of DNA evidence to exonerate innocent defendants, misconduct "played an important role in the convictions." *Id.* at 175.

⁷³ See, e.g., *Strickler v. Greene*, 527 U.S. 263, 273-75 (1999) (finding that state suppressed exculpatory evidence that key witnesses against the capital petitioner had "muddled memories," had not accurately identified him as the perpetrator before trial, and was shown a picture of the victim just before testifying, to jog her memory); *Kyles v. Whitley*, 514 U.S. 419, 441-45 (1995) (overturning conviction based on prosecutorial suppression of evidence revealing, in part, that eyewitnesses who confidently identified petitioner at trial as the attacker had originally described a different perpetrator).

⁷⁴ Matt Lait & Scott Glover, *LAPD Chief Calls for Mass Dismissal of Tainted Cases*, L.A. TIMES, Jan. 27, 2000, at A1 (discussing "Ramparts" scandal in Los Angeles Police Department training scores of convictions based on evidence that police officers frequently

(as opposed to testify) while neither admitting nor accepting accountability for their indiscreet, unconstitutional, state-sponsored violence. Instead, what we hear is a myriad of 1) attempted cover-ups, (as in snatching the video phones from citizen-observers in the Grant case);⁷⁵ 2) falsified arrests reports (as in the Ramparts case);⁷⁶ or 3) blatant denial that their actions were wrong (as in the Gates case);⁷⁷ or otherwise justified as in the cases of Rodney King, Sean Bell, Generalow Wilson, Amadou Diallo, Bernard Monroe, Malice Green, Johnny Gammage, and the Jena 6 to name but a few.⁷⁸ Paradoxically, this “wild-west-cowboy” style of policing, which survives because of police “hero” claims,⁷⁹

framed defendants); Bill Moushey, *Win at all Costs: Government Misconduct in the Name of Expedient Justice*, PITT. POST-GAZETTE, Nov. 22-Dec. 13, 1998 (ten-part series documenting misconduct by prosecutors and law enforcement personnel resulting in prosecution and conviction of innocent persons); Katherine Shaver & Steven Gray, *Lawyers Seek Names of Officers Who Lied; Montgomery Verdicts May be in Doubt*, WASH. POST, Oct. 20, 1999, at B1 (discussing eight officers in Montgomery County, Maryland, who repeatedly lied in court over a five-year period, affecting numerous cases).

⁷⁵ Fong, *supra*, note 15.

⁷⁶ See, e.g., EDWARD J. ESCOBAR, RACE, POLICE, AND THE MAKING OF A POLITICAL IDENTITY: MEXICAN AMERICANS AND THE LOS ANGELES POLICE DEPARTMENT, 1900-1945 (1999). “Escobar explain why the politically insulated LAPD began “over-policing” Mexican American communities in the early 1940’s and describes how organized, highly vocal responses by Mexican American community group facilitated police reforms following the 1943 Zoot Suit riots. While these events marked the community’s “coming of age,” and thus were a crucial turning point in terms of effective political voice, the LAPD successfully thwarted substantive changes in its autonomy. The shocking Ramparts Division scandal was the consequence of this deeply rooted departmental intransigence.” (quoting Katherine Underwood, *Race, Police, and the Making of a Political Identity: Mexican Americans and the Los Angeles Police Department, 1900-1945*, 70 PAC. HIST. REV. 508, 509 (2001) (book review); See, e.g., *LAPD’s Anti-Gang Unit is Disbanded Following Widespread Corruption Scandal* (CNN television broadcast Mar. 12, 2000) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0003/12/sm.01.html>).

⁷⁷ Abby Goodnough, *Sergeant Who Arrested Professor Defends Actions*, N.Y. TIMES, July 23, 2009, at A3.

⁷⁸ *Supra* notes 68-70. See also, Shaila Dewan, *Georgia Man Fights Conviction as Molester*, N.Y. TIMES, Dec. 19, 2006, at 22; Campbell Robertson, *An Officer Shoots, a 73-Year-Old Dies, and Schisms Return*, N.Y. TIMES, Feb 14, 2010, at A9; Richard G. Jones, *In Louisiana, a Tree, a Fight and a Question of Justice*, N.Y. TIMES, Sept. 19, 2007, at 14.

⁷⁹ Diane Cardwell, *Mayor Backs Away From Questioning Dead Officer’s Heroism*, N.Y. TIMES, Oct. 31, 2007, available at <http://www.nytimes.com/2007/10/31/nyregion/31hero.html>; Alison Gendar, *Awards ceremony pays tribute to NYPD’s Finest, including 9/11 heroes*, N.Y.

systemically creates and exacerbates already tense conditions between the police and the Black community, while the police, curiously, aims to ameliorate the same through community outreach programs. And racist mottos and mantra, such as the NYPD's self-brand that "We Own the Night,"⁸⁰ certainly don't help either. It creates paranoia that *feeds* the very culture of mistrust and the outright defiance of constitutional authority that it fosters; while *feeding off of* racial stereotypes, racial profiling, and our inability to cut through the complexity of our "secret desires" to be safe and live free.

But, we do not live free. Instead, we co-exist under a dysfunctional system of criminal justice that thrives on "haunting" African Americans with the memory of captured, maimed, and destroyed Black spirits in the least, and sacrificed and desecrated Black bodies, at most.⁸¹ This, by far, is the absolute record of policing Black people in

DAILY NEWS, June 9, 2009, *available at*

http://www.nydailynews.com/ny_local/2009/06/10/2009-06-10_awards_honor_nypd_finest.html.

⁸⁰ David Kocieniewski, *Success of Elite Police Unit Exact a Toll on the Street*, N.Y. TIMES, Feb. 15, 1999, at A1. According the first line in Kocieniewski's narrative, "They are known as the commandos of the New York Police Department, an elite squad of nearly 400 officers who are dispatched into menacing neighborhoods each night to chase down rapists, muggers and dangerous fugitives, and above all, to get illegal guns off the streets." *Id.* Their motto is "we own the night," but their work is more like dominate the night through state-sponsored violence. This is the same "elite" force that shot and killed Western African immigrant Amadou Diallo.

One citizen, Francisco Gonzalez, who also served as the district manager of Community Board No. 9, thought the unit's work was less than perfect. "[P]eople are being stopped for no reason, thrown against a fence and searched. Their cars are stopped without probable cause. Sometimes there's vulgar language to people who are just minding their business. What some of the officers are doing is just creating an atmosphere of fear." *Id.*

A movie brandishing the same name, and carrying the same theme, was produced in 2007 and starred Mark Walberg, Joaquin Phoenix, and Eva Mendes. *See, e.g., WE OWN THE NIGHT* (2929 Productions 2007), trailer *available at* www.weownthenightmovie.com (last visited Mar. 1, 2010).

⁸¹ AVERY F. GORDON, *GHOSTLY MATTERS: HAUNTING AND THE SOCIOLOGICAL IMAGINATION* (2nd ed. 2008). In a unique blend of history, literary theory, and the law, Gordon details how laws such as the Fugitive Slave Act of 1850, coupled with the haunting history of African Slavery, caused one escaped slave, Margaret Garner, to intentionally take the life of her own daughter rather than have her transported back to the slave holding states. *Id. at 146.*

the United States.⁸² This police violence partakes of centuries-old traditions of forcibly controlling the dispossessed: issued from slavery through Civil Rights conflicts – reinforced by decades of legal dictatorship during which the war against Black social movements disguised itself as the fight against ‘internal subversion’ and the repression of Black delinquency.⁸³ It is backed up by a hierarchical, paternalistic conception of citizenship based on the cultural opposition between identifying the ‘savages’ and the ‘cultivated’, which tends to assimilate African Americans as the immutable face of crime, so that the enforcement of the public order and the racial order discretely merge. And when African Americans complain, they are branded in the worst possible way. The comfort of having a voice in the American democratic process is silenced by white supremacy’s powerful ability to *flip-the-script* by claiming that Black retorts are either racist, Anti-American, unpatriotic, unappreciative, divisive, polarizing, or reverse discrimination;⁸⁴ and in some of the most virulent white supremacist rant, African

⁸² See Davis, *supra*, note 63; FRANKIE Y. BAILEY & ALICE P. GREEN, LAW NEVER HERE: A SOCIAL HISTORY OF AFRICAN AMERICAN RESPONSES TO ISSUES OF CRIME AND JUSTICE (1999).

⁸³ See, e.g., Peniel E. Joseph, *Black Liberation Without Apology: Reconceptualizing the Black Power Movement*, 31 BLACK SCHOLAR 2 (2001); FRANK J. DONNER, THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA’S POLITICAL INTELLIGENCE SYSTEM, 212-232 (1980); KENNETH O’REILLY, RACIAL MATTERS: THE FBI’S SECRET FILE ON BLACK AMERICA, 1960-1972, 292-324, (1989). Both the works from Donner and O’Reilly tell a compelling historiography of government sponsored violence against African American social movements that was premised upon racist, sexist, and classed democratic relations in American government. Most notably was the infamous FBI’s Counter Intelligence Program, codenamed COINTELPRO, which targeted everyone from W.E.B. Du Bois through Martin Luther King, Jr. and Malcolm X, but notably rested with the total annihilation of the Black Panther Party – its organization, its members, and its programs.

⁸⁴ W. Bediako Lamouse-Smith, *The Myth of Black Racism in the US*, 43 TRANSITION 26 (1973); Richard Pérez-Peña, *Site for Blacks Attracts Slurs After Arrest of Professor*, N.Y. TIMES, July 26, 2009, at B5; Editorial, *Beyond a 'Compton Cookout': UC San Diego's racial problems are not limited to one incident. And other UC campuses show troubling signs of intolerance.*, L.A. TIMES, Mar. 1, 2010, available at http://www.latimes.com/news/opinion/editorials/la-ed-ucsd2-2010mar02_0,4102439.story; Larry Gordon, *Student apologizes for UC San Diego noose incident, claims no racist intent*, L.A. NOW, Mar. 1, 2010,

Americans are told to ‘go back to Africa’⁸⁵ if they don’t appreciate the racial favor done for them, ironically, through the world’s worst act of genocide – the African slave trade.⁸⁶

<http://latimesblogs.latimes.com/lanow/2010/03/student-apologizes-for-ucsd-noose-says-no-racist-intent.html>; Christina Hoag, *Racist incidents, protests spread at UC campuses*, Mar. 2, 2010, available at http://www.huffingtonpost.com/2010/03/03/racist-incidents-protests_n_483436.html; Mark Potok, *Rage on the Right: The Year in Hate and Extremism*, INTELLIGENCE REPORT, Spring 2010, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/spring/rage-on-the-right>.

⁸⁵ The “back to Africa” language has some historical roots and legitimacy in African American history. The idea of a Black exodus that would return African Americans, who were direct descendants of the Atlantic African Slave Trade, is grounded in Jamaican-born Mosiah Marcus Garvey, Jr. and his unique global mass movement known as Garveyism. Garveyism promoted a pan-African philosophy that inspired global recognition of his organization known as the Universal Negro Improvement Association and African Communities League (UNIA-ACL). The intention of Garvey’s movement was for those of African ancestry to “redeem” Africa and the European colonial powers to leave it. Garvey’s movement became so powerful that he was targeted by FBI director J. Edgar Hoover, who was at the time just a Special Assistant to the Attorney General, but, as Hoover wrote, “Unfortunately, . . . [Garvey] has not yet violated any federal law whereby he could be proceeded against on the grounds of being an undesirable alien, from the point of view of deportation.” Memorandum from J. Edgar Hoover, Director, Fed. Bureau of Investigation, to Special Agent Riley (Oct. 11, 1919), in 2 THE MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION PAPERS, AUGUST 27, 1919 – AUGUST 31, 1920, (Robert A. Hill ed., Univ. of Cal. Press 1983), available at http://www.pbs.org/wgbh/amex/garvey/filmmore/ps_fbi.html. See, e.g., FEDERAL SURVEILLANCE OF AFRO-AMERICANS (1917-1925): THE FIRST WORLD WAR, THE RED SCARE, AND THE GARVEY MOVEMENT (Theodore Kornweibel, Jr., ed., 1985); THEODORE G. VINCENT, BLACK POWER AND THE GARVEY MOVEMENT (2006).

However, the government eventually proceeded against Garvey and convicted him of mail fraud associated with his campaign to solicit donations for the purchase of his Black Star Line, in connection with stock sales in the liner that had not yet been purchased. Garvey, sentenced to five years in prison, maintained his innocence, but ultimately penned his well known “First Message to the Negroes of the World from Atlanta Prison,” where he claimed:

Look for me in the whirlwind or the storm, look for me all around you, for, with God’s grace, I shall come and bring with me countless millions of black slaves who have died in American and the West Indies and the millions in Africa to aid you in the fight for Liberty, Freedom and Life.

Marcus Garvey, First Message to the Negroes of the World from Atlanta Prison (Feb. 10, 1925), available at http://www.pbs.org/wgbh/amex/garvey/filmmore/ps_wind.html.

In 1983, Professor Judith Stein, made a plea in a November 5, 1983 New York Times article, to pardon Garvey, calling it a “political trial.” Judith Stein, *Pardon Marcus Garvey by Judith Stein*, N.Y. TIMES, Nov. 5, 1983, at 5. President Calvin Coolidge eventually commuted Garvey’s sentence, and upon his release on November 1927, he was deported via New Orleans to Jamaica, where his arrival was celebrated by a large crowd at Orrett’s Wharf in Kingston.

My reference to the white supremacist rant to “Go Back to Africa,” however, is not grounded in celebrating the life and work of Marcus Garvey. Rather, I am referring to use of

C. Legal Hierarchies and Ethno-Stratification: Connecting the Dots of Law and Policing

A third reason the Oscar Grant shooting occurred is related to the close relationship between how law deeply affects Black hyper-policing as a *crime control mechanism*. The union lies, unfortunately, somewhere between the close alignment of legal hierarchies and the ethno-racial stratification of color discrimination endemic to the shared relationship between policing and legal doctrine.⁸⁷ It is known, for example, that in the United States, particularly in the South, African-Americans suffer from the special vigilance of the police using law as a means to gain otherwise illegal access to the privacy interests of Black citizens.⁸⁸ Since the 1968 landmark decision in *Terry v. Ohio*, the courts have processed legal doctrine authorizing a virtual license for police to behave badly, violate the laws in the most duplicitous ways, and then jettison accountability under the cover of judicially-created exceptions that benefit their behavior: for example the Good-Faith Doctrine.⁸⁹ It matters not that the police stop and detain Black men for

racialized language that seeks to dominate the racial discourse from African Americans by inferring that they do not have a voice in American democracy because of their position as a captured race during the African slave trade. Further, claims to “go back to Africa,” are used, most often, against Blacks when they seek to openly resist white supremacy either through discourse, direct action protest, or otherwise, which in many instances are all one in the same. See, e.g., Ron Matus, *Teacher who told student to "go back to Africa" may be suspended by state*, TAMPABAY.COM, Feb. 25, 2009, <http://blogs.tampabay.com/schools/2009/02/teacher-who-tol.html>; Dennis Hevesi, *Blacks, to Jeers of Whites, Protest Racism in Brooklyn*, N.Y. TIMES, Jan. 3, 1988, at 124, available at <http://www.nytimes.com/1988/01/03/nyregion/blacks-to-jeers-of-whites-protest-racism-in-brooklyn.html>.

⁸⁶ Hishaam D. Aidi, *Slavery, Genocide and the Politics of Outrage: Understanding the New Racial Olympics*, 234 MIDDLE EAST REPORT, 40 (2005).

⁸⁷ See, e.g., Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999).

⁸⁸ Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, *supra* note 72; [Zezima & Goodnough, Harvard Scholar Won't Be Charged](#), *supra* note 72.

⁸⁹ Robert A. Harvie, *The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison*, 14 LOY. L.A. INT'L & COMP. L. REV. 779 (1992). The Good Faith exception to the Fourth Amendment exclusionary rule arose in the 1984 case of *United States v. Leon*, 468 U.S. 897 (1984), where the Court admitted evidence of illegal drugs seized by

no particular reason, or that they arrest and search them without probable cause or even the slightest articulation of reasonable suspicion; as long as the courts turn a blind eye to the reality of race and policing.⁹⁰ In this paradigm Black men remain the racial scapegoat for all that is imperfect about American law and order.

It is not criminal activity that captures most Black men in the web of police violence, but rather the racial stereotypes of crime and criminality, coupled with a police exacerbation of racial profiling, that has long accompanied the presence of Black policing.⁹¹ This structure of dominance is perhaps best captured in the humorous lyrics of General Larry Platt's musical rant on American Idol:

Pants on the Ground, Pants on the Ground, You're Looking Like a Fool With
Your Pants on the Ground. Gold in your Mouth, Hat Turned Sideways, . . .
Looking Like a Fool with your Pants on the Ground. Get 'em up!!⁹²

the police pursuant to a warrant although it failed to establish probable cause. The *Leon* decision, and its underlying rationale, particularly in relation to policing, has been extensively criticized. See, e.g., Wayne R. LaFare, "*The Seductive Call of Expediency*": *United States v. Leon, Its Rationale and Ramification*, 1984 U. ILL. L. REV. 895 (1984); Donald Dripps, *Living with Leon*, 95 YALE L.J. 906 (1986); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing Law*, 70 GEO. L.J. 365 (1981). Scholars have long argued that, given the ease at which a totality of the circumstances criteria for determining probable cause was established in *Illinois v. Gates*, 462 U.S. 213 (1983), good faith will rarely be used.

⁹⁰ See ARMOUR, NEGROPHOBIA, *supra* note 57.

⁹¹ Steven Wu, Comment, *The Secret Ambition of Racial Profiling*, 115 YALE L.J. 491 (2005); Brandon Garret, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815 (2000); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002); David Harris, "*Driving While Black*" and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); James D. Ward, *Race, Ethnicity, and Law Enforcement Profiling: Implications for Public Policy*, 62 PUB. ADMIN. REV. 726 (2002).

⁹² While it may be debatable whether or not Larry Pratt is actually a General, he introduced himself as such during his Atlanta audition for Season nine. Pratt's song, which he claimed he penned himself, can be seen in its entirety at http://www.americanidol.com/videos/season_9/memorable_auditions/larry_platt/ (last visited, March 1, 2010).

What perhaps is not so humorous about Platt's racist portrayal of Black youth, is that this is precisely the manner in which young Black men are continuously stereotyped in the worse possible way by the American media and mainstream pop-culture; then have those stereotypes passed on to us, the American public; who witness them so much that we begin to accept them as true; rather than challenge their social construction.⁹³ Our final act of citizen vigilance then transforms into a request at most, or acquiescence at least, to have the all-powerful hand of law and order address this social construction at any and all costs. But, what is more frightening is that young Black men have no legal recourse when the police act upon those stereotypes and violate the law;⁹⁴ not simply because the law works to their disfavor, but because law's power is positioned besides

⁹³ The idea that race is socially constructed, as opposed to biologically determined, or determinative, is grounded in the scholarship of Critical Race Theory and embraced by scholars ranging from law to sociology. Additionally, geneticists have also produced biological evidence that there is no intellectual value to either claiming that there is a "race gene" or that you can make accurate predictors about present or future behavior based solely on someone's racial identity. See, e.g., Lopez, *supra* note 53; Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1 (1996); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Pilar Ossorio & Troy Duster, *Race and Genetics: Controversies in Biomedical, Behavioral, and Forensic Sciences*, 60 AM. PSYCHOLOGIST 115 (2005); Audrey Smedley and Brian D. Smedley, *Race as Biology is Fiction, Racism as a Social Problem is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCHOLOGIST 16 (2005); D.J. Witherspoon et al., *Genetic Similarities Within and Between Human Populations*, 176 GENETICS 351 (2007) ("the proportion of human genetic variation due to differences between populations is modest, and individuals from different populations can be genetically more similar than individuals from the same population").

Some scholars have even argued that the Supreme Court's construction of race under the law is not accidental, but designed to legitimize racial inequality and domination. See, Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389 (1991).

⁹⁴ *Panel Urges Remedies to Abuses by Police*, N.Y. TIMES, Nov. 4, 2000, at A18, available at <http://www.nytimes.com/2000/11/04/us/panel-urges-remedies-to-abuses-by-police.html>; *Fighting Police Abuse: A Community Action Manual*, ACLU.ORG, Dec. 1, 1997, http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/fighting-police-abuse-community-ac.

other institutional needs unique to Black males: namely incarceration.⁹⁵ Since Black men have difficulty getting access to legal aid, and face heavier sentences imposed on them as compared to their white counterparts for the same crimes, post-Civil Rights policing, thereby, reaffirms the dominance of white supremacy in a manner that is as *legal* as it is *extra-legal*.⁹⁶

A perfect example of this resides in the shooting death of Bernard Monroe in Homer, Louisiana.⁹⁷ Less than two months after the BART police murdered Oscar Grant, the Homer, Louisiana, police turned its guns on a 73-year-old Black man on February 20, 2009, while this former cancer survivor was innocently sitting on his front lawn. Similar to Grant's case, the Homer police returned us to the era predating the criminal procedure revolution all the while reminding us of the law's inability to control police misconduct. Acting without a warrant, probable cause, or reasonable suspicion, the Homer police stormed into Monroe's home looking for his son despite the law's declaration that "at the

⁹⁵ Anthony E.O. King, *African-American Males in Prison: Are They Doing Time or Is the Time Doing Them*, 20 J. SOC. & SOC. WELFARE 9 (1993); Weaver & Purnell, *supra* note 45, Kim Gilmore, *Slavery and Prisons: Understanding the Connections*, 27 SOCIAL JUSTICE 195 (2000); Angela Y. Davis, *Political Prisoners, Prisons, and Black Liberation*, in THE ANGELA Y. DAVIS READER 39-53 (Joy James ed., 1998); Angela Y. Davis, *Racialized Punishment and Prison Abolition*, in THE ANGELA Y. DAVIS READER 96-111 (Joy James ed., 1998); Barbara Ransby, *US: The Black Poor and the Politics of Expendability*, 38 RACE & CLASS 1 (1996).

⁹⁶ To claim that the law act in a manner that is "extra-legal" means that it, either expressly or implicitly, takes into account subjective factors, such as age, race, gender, and class, and imports them into an otherwise objective process – trials and legal decision-making. Scholars have pointed out that "extra-legality" has an impact on such items as such the decisions to arrest, prosecute, and sentence, most notably affecting young Black males. *See, e.g.*, John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 L. & SOC'Y. REV. 357 (1974); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Maclin, *Black and Blue Encounters*, *supra* note 67.

⁹⁷ I learned of the Bernard Monroe case through the heroic work of the Southern Poverty Law Center, which has filed a lawsuit on behalf of the estate of Mr. Monroe on February 10, 2010. The petition is located at http://www.splcenter.org/sites/default/files/downloads/case/monroe_petition021010.pdf (last visited, March 1, 2010).

very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free of unreasonable governmental intrusion.”⁹⁸ And when Monroe approached to check on the safety of his elderly wife and reproached the police’s constitutional misconduct, he was shot through the front screen of his own front door.⁹⁹ When asked about the shooting officer’s action, who was a 2 ½ week veteran of the police force, Homer Police Chief Russell Mills openly declared to the *Chicago Tribune*:

If I see three or four young black men walking down the street, I have to stop them and check their names. I want them to be afraid every time they see the police that they might get arrested. We’re not out there trying to abuse and harass people – we’re trying to protect the law-abiding citizens locked behind their doors in fear.¹⁰⁰

It is precisely this sort of silver-tongued, double-talk about “abusing without harassing,” and about “young Black men” as different from “law-abiding citizens,” and about police protecting those “locked behind their doors in fear,” through unconstitutional police conduct that itself creates fear, that the adoption of these 21st century – ‘zero-tolerance’—styles of policing bend to justifying street-sweeping tactics reserved solely for Black communities. More problematically, police chiefs are not only intrepid about openly admitting constitutional violations to the mass media, they will also call for the outright execution of Black life as in the case of Philadelphia Police

⁹⁸ Silverman v. United States, 365 U.S. 505, 511 (1961).

⁹⁹ According to Morris Dees, Chief Trial Counsel for the Southern Poverty Law Center, “these officers were out of control when they stormed onto Mr. Monroe’s property.” *SPLC Sues Homer, La., and Former Police Officers in Fatal Shooting of Elderly Black Man*, Feb. 14, 2010, <https://secure.splcenter.org/get-informed/news/splc-suit-seeks-justice-in-police-shooting-of-elderly-louisiana-man>.

¹⁰⁰ Howard Witt, *Race May Be Factor in Police Shooting of Unarmed Elderly Man*, CHICAGO TRIBUNE, Mar. 13, 2009, available at <http://www.chicagotribune.com/news/nationworld/chi-race-shootings-webmar13,0,7686526.story>.

Commissioner Charles Ramsey who, in a moment that some might claim was emotionally driven but I would argue was more precisely clairvoyant, told the general public that he wished his police “would have shot and killed” a fleeing suspect,¹⁰¹ or that he wishes he could have “pushed the button” at the death penalty execution of the District of Columbia sniper John Allan Muhammad.¹⁰² Meanwhile, officers from his own police force are caught on videotape viciously stomping and punching three Black men in the street after pulling them from their cars based on a mistaken belief that they were involved in a triple shooting earlier that evening. Worse however, and this is precisely how hegemonic forces within society operate to maintain law’s status quo,¹⁰³ is that

¹⁰¹ Ramsey: *‘This Insanity Has to Stop,’* CBS NEWS, Sept. 29, 2008, <http://cbs3.com/topstories/parole.board.philadelphia.2.828477.html>. The news article cited above does not contain the language in this article; rather Ramsey’s language was captured in his news conference which is available at CBS video on file with the author. Further, Ramsey has approved an upgrade of officer’s weapons, which will make it easier to “neutralize” a suspect with fewer rounds of ammunition. For the newscast of the story, see *Man Shot by Police in Philadelphia* (ABC television broadcast Dec. 5, 2008), available at http://abclocal.go.com/wpvi/story?section=news/take_action&id=6540952.

Ramsey’s declaration about shooting fleeing suspects is perhaps more inflammatory because said conduct is allowed in very limited circumstances, but otherwise unconstitutional according to the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985) (a law enforcement officer in pursuing a fleeing suspect may use deadly force to prevent escape if the officer has probable cause to believe that the suspect might pose a significant threat of death or serious physical injury to the officer or others).

¹⁰² In an interview with Larry King, Philadelphia Police Commission Charles Ramsey, who first admits that he has never witnessed a death penalty execution, claims that he would gladly attend the execution of John Alan Muhammad and that he would “gladly push the button” after claiming that Muhammad would be “shaking hands with Satan pretty soon.” *Larry King Live* (CNN television broadcast Nov. 10, 2009), available at <http://www.youtube.com/watch?v=LR5aOmY7UHU>.

¹⁰³ The concept of hegemony is grounded in the political, economic, ideological or cultural power exerted by a dominant group over other groups, regardless of the explicit consent of the latter. Although the term, whose etymology is Greek for “leader,” referred to the political dominance of certain ancient Greek city-states over their neighbors, the term has been shaped to include a cultural context particularly related to Marxist philosopher Antonio Gramsci’s theory of cultural hegemony. Gramsci’s concept of cultural hegemony argues that social class exerts cultural “leadership” or dominance over other classes to maintain the socio-political status quo. In this sense, cultural hegemony identifies and explains domination and the maintenance of power and how the (hegemon) leader class “persuades” the subordinated social classes to accept and

despite the overwhelming evidence of the police violence, a Philadelphia grand jury, mostly comprised of Blacks, turned a blind-eye to the reality of this police misconduct despite an intensive 14-month investigation. “We found that the design of the force applied by the police was helpful rather than hurtful;” claimed the jury, and “the kicks and blows, in other words, were aimed not to inflict injury but to facilitate quick and safe arrests.”¹⁰⁴ Commenting on the grand jury’s decision, president of the Fraternal Order of Police John McNesby, the decision reflected that the officers had their “day in court” – implying the process was completely fair and untainted. Philadelphia District Attorney Lynne M. Abraham claims “the video, in fact, did not speak for itself,” reinforcing a no-fear attitude for police to behave badly even in front of news video cameras.¹⁰⁵

More complexly, race is not alone in this equation. Rather, the deregulation of the market economy; the disjointed institutions of the criminal justice system; the escalation of both violent criminality and police abuse; the criminalization of the poor; a significant increase in support for illegal measures of control; the pervasive obstruction of the principle of legality; and the unequal and uneven distribution of citizen rights are also

adopt the ruling-class values of bourgeois hegemony. *See, e.g.,* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS, lxxxix (1971).

Gramsci’s concept of hegemony was perhaps best articulated in Edward Said’s 1978 groundbreaking book *ORIENTALISM*. In explaining hegemony, Said claims, “In any society not totalitarian, then, certain cultural forms predominate over others, just as certain ideas are more influential than others; the form of this cultural leadership is what Gramsci has identified as *hegemony*, an indispensable concept for any understanding of cultural life in the industrial West.” EDWARD SAID, *ORIENTALISM*, 7 (1978).

¹⁰⁴ To view the video, as well as the details of the incident, see *Grand Jury Frees Philly Cops* (FOX television broadcast Aug. 7, 2009), available at <http://www.youtube.com/watch?v=FRO6IQRp66g>.

¹⁰⁵ Allison Steele, *Punishment Cut for 8 Officers in Televised Beating*, THE PHILADELPHIA INQUIRER, Mar. 13, 2010, at A1, available at http://www.philly.com/philly/news/20100313_Punishment_cut_for_8_officers_in_televised_beating.html.

critically important to *re-framing Black policing*.¹⁰⁶ Finally, add to that the fractured nature of legal doctrine,¹⁰⁷ and the evils roads that young Black men encounter in their difficult journey towards democracy, which interestingly remains a legal, social, and political façade in the post-Civil Rights era, and the impact of Black hyper-policing becomes more transparent. These grim realities are well-known and agreed among legal scholars and students of crime and justice – though they have been steadfastly ignored or minimized by the courts, who have yet to register the enormously disruptive impact that policing has on low-income Black communities.¹⁰⁸ What remains in dispute, however, are the causes and mechanisms driving the ‘darkening’ which has turned American policing into the yet another *peculiar institution* dominating the lives of Black Americans.

Most analysts have focused on trends in crime in effort to deconstruct the source of Black hyper-policing by sorting and sifting through patterns of criminality, bias in arrests, prosecution, and prior criminal records.¹⁰⁹ A few have expanded their compass to

¹⁰⁶ Don Wycliff, *Blacks and Blue Power*, N.Y. TIMES, Feb. 8, 1987, at A22. According to Wycliff, “A dangerous, humiliating, sometimes fatal encounter with the police is a rite of passage for a black man in the United States.” *Id.*

¹⁰⁷ See Maclin, *supra* note 22.

¹⁰⁸ Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723 (1992); John William, *Marshall’s Law*, in EIGHT MEN AND A LADY 125 (1990). For an accounting of why Maclin claims that Justice Marshall took the Fourth Amendment seriously, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 224 (2004). In one account of a Southern trip, [Marshall] told how he had stopped off at a small Mississippi town and was contemplating an overnight stay: “I was out there on the train platform, trying to look small, when this cold-eyed man with a gun on his hip comes up. ‘Nigguh,’ he said, ‘I though you oughta know the sun ain’t nevah set on a live nigguh in this town.’ So, I wrapped my constitutional rights in cellophane, tucked ‘em in my hip pocket . . . and caught the next train out of there.” *Id.*

¹⁰⁹ For a simple, yet lucid reading of the problem of bias in many aspects of the criminal justice system, see KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS (2d. ed. 2008).

measure the influence of non-judicial variables: such as the size of the Black population, poverty rates, unemployment, inflation, income, value of welfare payments, and even lack of religious and political party affiliation.¹¹⁰ Worse, some believe that Black dysfunctionality, credited to low educational attainment, low self-esteem, poor socialization and work habits, inner-city gang violence, paternal abandonment, and non-marital childbearing, are to blame more than institutional discrimination.¹¹¹ Yet, none of these factors, taken either separately or jointly, accounts for the sheer magnitude, swiftness, and timing of the over-racialization of police brutality, especially considering that crime rates have been flat and later declining over the past two decades.¹¹²

But, the worst reason for why Oscar Grant was killed, and I am ashamed to say this as a lawyer and professor of Criminal Procedure, is yet again, the routine violence present in the law itself; ranging from inconsistent legal doctrine that either fails to comport with racial-realities or provide a clear line of demarcation between the extent of citizen rights (vis-à-vis the U.S. Constitution) and the encumbrances placed on police investigatory tactics (curiously, vis-à-vis the U.S. Constitution).¹¹³ In its present state,

¹¹⁰ T. David Evans, Francis T. Cullens, R. Gregory Dunaway & Velmer S. Burton, Jr., *Religion and Crime Reexamined: The Impact of Religion, Secular Controls, and Social Ecology on Adult Criminality*, 33 CRIMINOLOGY 195 (1995).

¹¹¹ Ethnographies on crime have challenged traditional theories of crime and deviant behavior by studying crime comparatively across community settings that vary across the time and space of recent history. See, e.g., ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* (1990); JOHN M. HAGEDORN, *PEOPLE AND FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY* (1988); FELIX M. PADILLA, *THE GANG AS AN AMERICAN ENTERPRISE* (1992); MERCER L. SULLIVAN, "GETTING PAID": YOUTH CRIME AND WORK IN THE INNER CITY (1989). See also Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

¹¹² *Violent Crime Rate in America Continues Steep Decline*, CAPITAL TIMES, Sept. 9, 2002, at 10A.

¹¹³ Here, I am referring to the first ten amendments to the United States Constitution, known as the Bill of Rights. Originally passed in 1791, the Bill of Rights provides an enormous amount of protection to American citizens. Specifically, it prohibits Congress from making any law respecting an establishment of religion or prohibiting the free exercise thereof, forbids

law is not a liberator, and neither is it an equalizer nor a protector. Those days are long gone. While white liberals beat their chest over their work to eradicate 1950's racial segregation, the post-Civil Rights era has seen a curious decrease in social justice lawyering, and consciousness, at the expense of American capitalism.¹¹⁴ But, more is owed to African Americans than the passage of *Brown v. Board of Education*,¹¹⁵ which only "raised the dust" of American racism so that we could all see what was underneath. Recall, it took the Court three tries to get desegregation right¹¹⁶ and it still failed until

infringement of "...the right of the people to keep and bear Arms...", and prohibits the federal government from depriving any person of life, liberty, or property, without due process of law. In federal criminal cases, it requires indictment by grand jury for any capital or "infamous crime", guarantees a speedy public trial with an impartial jury composed of members of the state or judicial district in which the crime occurred, and prohibits double jeopardy. In addition, the Bill of Rights states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,"[3] and reserves all powers not granted to the federal government to the citizenry or States. Most of these restrictions were later applied to the states by a series of decisions applying the due process clause of the Fourteenth Amendment, which was ratified in 1868, after the American Civil War.

Specifically, the Fourth, Fifth, and Sixth Amendments proscribe police investigations by protecting privacy interests, the right against self-incrimination, and the right to have an attorney present during custodial interrogations as well as during trials.

¹¹⁴ Every year, thousands of law students apply to law schools to work for justice, but graduate into corporate practice to stave the massive loan payments they have accumulated. ABA Commission on Loan Repayment and Forgiveness, *Lifting the Burden: Law Student Debt as a Barrier to Public Service* (2003), available at <http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf>; Jonathan D. Glater, *Harvard Law, Hoping Students Will Consider Public Service, Offers Tuition Break*, N.Y. TIMES, Mar. 18, 2008, at A14.

¹¹⁵ 347 U.S. 483 (1954). *Brown*, or *Brown I* as it became known, was the first in a series of legal decisions that declared state laws establishing separate public schools for **B**lack and white students inherently denied **B**lack children equal educational opportunities. Historically, it is recognized as the benchmark legal decision that reversed segregation legalized under *Plessy v. Ferguson*, 163 U.S. 537 (1896). As a result, de jure segregation was declared in violation of the Equal Protection Clause of the Fourteenth Amendment, thereby paving the way for integration and the charge of the American Civil Rights Movement.

¹¹⁶ Following the backlash against the *Brown I* decision, American school districts were unable to stave the resistance by white families to have their children share classrooms with African Americans. The school boards, which declared they were integrating but it would take time, was challenged in *Griffin v. County School Board*, 377 U.S. 218 (1964), which became known as *Brown II*. In *Griffin*, the Court ordered that school districts desegregate with "all deliberate speed," *id.* at 221, and the struggle to desegregate was revisited in 1978 when the Topeka school system was sued for its policy on "open enrollment" that would create both

seventeen years after *Brown* when it finally issued its ruling in *Swann v. City of Charlotte Mecklenburg School System* (1971).¹¹⁷ And even that was a struggle rife with racial conflict.¹¹⁸

Instead, when you closely examine all of the illegal constitutional violations present in the shooting death of Oscar Grant,¹¹⁹ and the death and brutality visited upon countless others, you are left with only one conclusion: that the manner in which we currently use law and policing only serves to aggravate the instability and poverty of the lives whose members it confines. Neither the planned expansion of police powers – which emanates from the militarization of the police force during Reagan’s War on Drugs¹²⁰ – nor its indispensable violence, through which the police rely on an expanding power to stop and frisk, and treat with disrespect and malcontent, any and every Black

predominantly African American and predominantly European American schools in the district. *Brown III*, as it became known, was finally settled when a 1989 three-judge panel of the Tenth Circuit found that the vestiges of segregation remained with respect to student and staff assignment. For an excellent read of the *Brown* decisions, see, for example, KLUGER, *supra* note 112; CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION* (2004); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

¹¹⁷ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (bussing is the appropriate remedy for addressing the problem of racial imbalance in public schools). *See also* DAVIDSON M. DOUGLAS, *READING, WRITING, AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS* (1995); R. Kenneth Godwin, Suzanne M. Leland, Andrew D. Baxter & Stephanie Southworth, *Sinking Swann: Public School Choice and the Resegregation of Charlotte’s Public Schools*, 23 *REV. OF POL’Y RES.* 983 (2006).

¹¹⁸ For an excellent discussion of the racial struggle for post-*Brown* integration and white elitism, see Davidson M. Douglas, *The Quest for Freedom in the Post-Brown South: Desegregation and White Self-Interest*, 70 *CHI.-KENT L. REV.* 689, 689–758 (1994).

¹¹⁹ To name a few, illegal search and seizure, wrongful death, false arrest, and excessive force are the main constitutional violations present in the Grant case. In addition to the wrongful death case filed against BART, Grant’s friends, Nigel Bryson, Jackie Bryson, Michael Greer, Carlos Reyes, and Fernando “June” Anticete (sic), have also filed a civil suit for \$1.5 million for the violation of their constitutional rights. *See, e.g.*, Upton, *supra* note 12.

¹²⁰ Michael Tonry, *Race and the War on Drugs*, 1994 *U. CHI. LEGAL F.* 25 (1994); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 *J. GENDER RACE & JUST.* 253 (2002); John P. Walters, *Race and the War on Drugs*, 1994 *U. CHI. LEGAL F.* 107 (1994); Kevin S. Toll, Comment, *The Ninth Amendment and America’s Unconstitutional War on Drugs*, 84 *U. DET. MERCY L. REV.* 417 (2007).

person they so choose, is remedied by how the politicization of judicial posturing impacts those occupying the lowest levels of our legal system.

CONCLUSION

The shooting of Oscar Grant, thus, serves as a lesson, *another inconvenient truth*,¹²¹ and a rather pricey one indeed. His death is a sad moment in time that captures how post-Civil Rights policing and colorblind formalism in the law serve as the twin devices for caste control and its correlative apparatus for keeping (unskilled) African American's 'in their place' -- physically, socially, politically, and symbolically.¹²² As mentioned earlier, this relationship spawns a *policing continuum* that ensnares an enormous population of young Black men who are solidified by two sets of concurrent and interrelated changes: on the one end, the sweeping economic, political, and legal forces of the new millennium that *make race more policable*; and, on the other end, the presence of ineffective law, to which I refer to legal decisions, statutes, and policies, that jettisons race from the decisional framework *making policing (race) less legal*.¹²³

The resulting symbiosis between this modern mesh of race-law-policing, not only enforces and perpetuates the socio-economic marginality and the symbolic taint upon urban Blacks in ways that encourages police violence; but it is also pivotal in *remaking*

¹²¹ I borrow the phrase, *An Inconvenient Truth*, from the groundbreaking 2006 documentary on the impact of global warming on the environment directed by Davis Guggenheim and former United States Vice President Al Gore. *AN INCONVENIENT TRUTH* (Paramount Classics 2006).

¹²² For an excellent discussion, that is historically grounded and theoretically relevant, of the symbolic and actual oppression experienced by African Americans through the American punishment system, see, for example, Davis, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System*, *supra* note 43.

¹²³ In this dichotomy, when race become easier to police, through the criminal justice system's failure to acknowledge how race disparately influences the law, police, prosecutors, and judges, yet the law fails to account for said disparity, by promoting colorblind formalistic approaches to legal analysis, policing race becomes less legal as law fails to provide the overwhelming protection that it once did during the Civil Rights era.

‘race’ and the redefinition of ‘the people’ protected against unreasonable searches and seizures vis-à-vis the Fourth Amendment.¹²⁴ Thus, just as the “color line“ inherited from the Slave era directly determined the shape of America’s ‘semi-welfare state’ in the formative years of the New Deal,¹²⁵ the handling of ‘Black men’ through the convergence of race, policing, and the law (namely, the Fourth, Fifth, and Sixth Amendments) at the close of the 20th century is key to fashioning the appearance of crime-control success at the site of race in the post-Civil Rights era.¹²⁶ And, to join Cornel West’s claim, since “race [still] matters,”¹²⁷ we cannot not possibly advance as a post-Racial America. I repeat my earlier claim: the more things change, the more they stay the same.

Rest in Peace, Oscar Grant. I am sorry this happened to you.

¹²⁴ [United States](#) v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (‘people’ is a term of art and refers to class of people who either: 1) are part of our national community; or 2) have sufficient connection with this country). Although, Verdugo-Urquidez was a Mexican citizen and resident of Mexico, the ‘people’ referenced in this article are clearly not. Thereby, African Americans qualify as ‘the people’ protected under the constitutional guarantees scribed in the Fourth Amendment.

¹²⁵ WILLIAM R. BROCK, *WELFARE, DEMOCRACY, AND THE NEW DEAL* (1988); Deborah C. Malamud, “*Who They Are – Or Were*”: *Middle-Class Welfare in the Early New Deal*, 151 U. PA. L. REV. 2019 (2003).

¹²⁶ Christian Parenti, *Crime as Social Control*, 27 SOC. JUST. 43 (2000).

¹²⁷ CORNELL WEST, *RACE MATTERS* (2001).