

EXCESSIVE FORCE, BIAS, AND CRIMINAL JUSTICE REFORM: PROPOSALS FOR CONGRESSIONAL ACTION

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INTRODUCTION: A NATIONAL EPIDEMIC OF TARGETED HARASSMENT & KILLINGS

Police violence in America is a modern-day crisis. Even our own allies such as the United Arab Emirates, Bahamas, France,

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United Kingdom, Canada, New Zealand, and Germany have all issued travel-alert warnings to their citizens visiting the U.S., due to the police violence being witnessed here.¹ Yet, what the rest of the world seems to know and acknowledge, has apparently escaped our Congress and, indeed, our elected leaders who have failed to take action. While various communities may suffer from the abuses of excessive police practices, it is America's people of color, particularly Blacks and Latinos, that are targeted disproportionately for police harassment and violence.² Significantly, in 2015: (1) unarmed Black people were "killed at 5x the rate of unarmed whites," (2) "37% of unarmed people killed by police were Black" despite being "only 13% of the U.S. population," and (3) "[p]olice killed at least 102 unarmed black people," nearly two people each week.³ According to the U.S. Bureau of Justice Statistics, Hispanics are over-represented when it comes to traffic searches and arrests, as statistics show:

Hispanics, for example, make up 17.6 percent of the U.S. population but represent 23 percent of all searches and nearly 30 percent of arrests. Among minorities, the rate of police killings for Latinos is second to those of African-Americans. As of today, an estimated 94 Latinos have been killed by police in 2016 alone, making up 16 percent of the 585 police-involved killings this year. In contrast, people who are black or African-American are only 13.3 percent of the U.S. population, but 144 black Americans have been killed by police in 2016. At 25 percent, those deaths represent a disproportionate number of officer-involved fatalities compared to the population. It's worth noting a person can

1. See Angela Walters, *Overseas Travel Warnings About USA Mount*, USA TODAY (Apr. 11, 2016, 2:09 PM), <http://www.usatoday.com/story/news/world/2016/08/11/travel-warnings-united-states/88458238/>.

2. See *Police Killed more than 100 Unarmed Black People in 2015, Unarmed Victims*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/unarmed/> (last visited Mar. 18, 2017) [hereinafter MAPPING POLICE VIOLENCE] ("Only 10 of the 102 cases in 2015 where an unarmed black person was killed by police resulted in officer(s) being charged with a crime, and only 2 of these deaths (Matthew Ajibade and Eric Harris) resulted in convictions of officers involved. Only 1 of 2 officers convicted for their involvement in Matthew Ajibade's death received jail time. He was sentenced to 1 year in jail and allowed to serve this time exclusively on weekends."). However, Tulsa Sherriff's Deputy Robert Bates, who was convicted of second-degree manslaughter in Eric Harris's case, was sentenced to four years. Ariana Pickard & Corey Jones, *Former Reserve Deputy Robert Bates Sentenced to Four Years in Prison for Death of Eric Harris*, TULSA WORLD (June 1, 2016, 12:00 AM), http://www.tulsaworld.com/homepagelatest/former-reserve-deputy-robert-bates-sentenced-to-four-years-in/article_ec042b6d-11d2-5ee1-95d9-cf9e5ee78aba.html.

3. MAPPING POLICE VIOLENCE, *supra* note 2.

be both Latino and black. And sometimes a victim's race may not be disclosed at all, creating potential for incidents involving both Latinos and black Americans to be underreported Many national databases are dependent on self-reported statistics from local and state agencies, making them potentially incomplete.⁴

1. A ROUTINE OCCURRENCE

The headlines paint a more tragic portrait of Latinos and Blacks killed by police fire, including Pedro Villanueva, a 19-year-old man who was gunned down by the California Highway Patrol,⁵ and Melissa Ventura, a mother of three who was killed by police responding to a domestic disturbance.⁶ Then there was Anthony Nuñez, a reportedly suicidal 18-year-old in San Jose who was shot and killed by the police.⁷ From Raul Saavedra-Vargas, Vincent Ramos, and Amadou Diallo, to Patrick Bell, Tamir Rice, Freddie Gray, Michael Brown, Walter Scott, Dontre Hamilton, Renisha McBride, John Crawford, Ezell Ford, Eric Garner, Trayvon Martin, Dante Parker, Tanisha Anderson, Akai Gurley, Marlene Pinnock, Rumain Brisbon, Jerame Reid, Tony Robinson, Philip White, Darrien Hunt, Eric Harris, Philando Castile, Alton Sterling, Terence Crutcher, Keith Lamont Scott, and countless others. The clash between police, authority, and race has also proven to be a virulent, fatalistic, widespread phenomenon in the U.S. that appears to be the same familiar story over and over:

The videos are circulated, becoming viral to the point where news outlets cannot ignore them. Protests and demonstrations ensue, and it doesn't seem to matter how nonviolent they are because somebody will find reasons to

4. Kenya Downs, *Why Aren't More People Talking About Latinos Killed by Police?*, *Race Matters*, PBS NEWS HOUR, (July 14, 2016, 1:21 PM) (quoting Eric Rodriguez, Vice President of the Office of Research, Advocacy, and Litigation, with the National Council of La Raza (NCLR)), <http://www.pbs.org/newshour/rundown/black-men-werent-unarmed-people-killed-police-last-week/>.

5. *Id.* (“[T]wo undercover . . . officers, dressed in plain clothes, chased an unarmed . . . Villanueva. Their unmarked car pursued his pickup truck for 5 miles to a dead-end street. As Villanueva made a U-turn back toward their direction, the officers opened fire. Villanueva was shot several times and died at the scene. A passenger was shot in the arm but survived.”).

6. *Id.* (“[R]eport[edly], the woman opened the door holding a knife as authorities arrived. She was then shot by both deputies and died en route to the hospital.”).

7. *Id.* (“[Nuñez] had already attempted to shoot himself when he turned the gun on . . . police officers who had arrived to talk him down. He was then shot and killed by the officers.”).

label them acts of terrorism or worse. Sometimes there are indictments. Always there are inquiries. Satisfaction from the bereaved is sought, demanded. Demotions or other internal sanctions are often the worst that happens to those responsible. And that's that. Until the next incident. Or the next video surfaces, with even more graphic and irrefutable evidence. Then the ritual begins again. And that question: What can we do?⁸

We have yet to take a serious look at what the nation can do to resolve this disturbingly tragic issue. As a browning nation, of which Latinos, Chicanos, and Hispanics will collectively comprise the majority by the year 2050, we have an urgent need to resolve this concern for future generations because Black and Latino people suffer disproportionately at the hands of the police. Organizations like the National Council of La Raza (NCLR), Voto Latino, and even Black Lives Matter (BLM), are raising awareness because police killings of Latinos go underreported and the use of excessive force in Latino communities is often ignored. As one commentator noted:

In American history, racial conflict has largely played out in black and white. But the history is much more complicated, [leaving] out Native Americans, as well as Asians and Hispanics Americans don't see any kind of historical context when Latinos are victims of state violence, despite the fact that there is historical context there.⁹

2. MYOPIC MENTALITY & DIVISIVE RHETORIC

That historical context is one of racial suppression that manifests itself today time and time again. We have become a nation desensitized, sanitized, and complacent to the evils of racism. Further, in an era of Trump, racism in America has found its voice. We are eager to move on to the next news cycle, the next headline. It would appear ours is a country in the throes of a backlash against having a black president, where racist tweets are retweeted over and over unless they are deleted, and

8. Gene Seymour, Opinion, *In America, Is a White Life Still Worth More than a Black One?*, CNN: SOC. COMMENT. (July 7, 2016, 5:48 PM), <http://www.cnn.com/2016/07/07/opinions/police-shooting-minnesota-seymour/index.html>.

9. Downs, *supra* note 4 (quoting Aaron Fountain, a Historian of youth activism at Indiana University) (internal quotations omitted).

even then are still retweeted to incite racial tension.¹⁰ These go beyond the racist emails circulated about President Obama, which derogatorily depicted him eating watermelon in the White House,¹¹ and Donald Trump questioning his legitimacy and intelligence, by claiming he was born in Kenya and demanding his birth certificate and college transcript.¹² Recall former Representative Joe Walsh’s tweet calling for war on Obama and the BLM Movement. His comments that the Dallas-sniper event signaled this was war, and that Obama and BLM “punks” should look out as “real America” is coming for them, are not only abysmal—they are symptomatic of a binary, myopic mentality.¹³

Another emblematic example of this mentality is the Lt. Governor of Texas, who called the BLM protesters “hypocrites” for protesting the police and then seeking their protection during the sniper attack.¹⁴ He too did not appreciate the distinction between legitimate police protest and misconduct and the duty of the police to protect. The distinction between anti-police *killing* and *brutality*, and *anti-police*, is wholly lost on the Lt. Governor, who would later walk back some of his comments only after

10. See, e.g., *Former Congressman Tells Obama and BLM ‘Punks’ to ‘Watch Out,’ News*, SNOPE.COM (July 8, 2016) [hereinafter ‘*Watch Out*’] (citations omitted), <http://www.snopes.com/2016/07/08/former-congressman-tells-obama-and-blm-punks-to-watch-out/>; Donald Trump (@realDonaldTrump), TWITTER (Sept. 6, 2014, 3:06 AM), <https://twitter.com/realDonaldTrump/status/508194635270062080> (showing that Trump’s “birther” tweet was retweeted more than 10,000 times).

11. See MARTIN A. PARLETT, *DEMONIZING A PRESIDENT: THE “FOREIGNIZATION” OF BARACK OBAMA* 81 (2014) (“In 2009, Dean Grose, Mayor of Los Alamitos, California, resigned after forwarding an email depicting the White House lawn as a watermelon patch, under the title ‘No Easter Egg hunt this year’—further suggesting Obama’s racial difference and anti-Christian administration.”).

12. See Trump, *supra* note 10 (“Attention all hackers: you are hacking everything else so please hack Obama’s college records (destroyed?) and check ‘place of birth.’”).

13. See *Watch Out*, *supra* note 10 (defending his tweet, saying that he was not declaring actual war on Obama, but merely that “[t]here’s a war on against our cops in this country, and I think Obama has fed that war and [BLM] has fed that war . . . [their] words and . . . deeds . . . have gotten cops in this country killed”).

14. See Jessica Chasmar, *Texas Lt. Gov. Dan Patrick Calls Black Lives Matter Protestors Who Ran from Gunfire ‘Hypocrites,’* WASH. TIMES (July 8, 2016), <http://www.washingtontimes.com/news/2016/jul/8/dan-patrick-texas-lieutenant-governor-calls-blm-pr/> (“All those protestors . . . ran the other way expecting the men and women in blue to turn around and protect them. What hypocrites,” he said in a[n] . . . interview with Fox News.”); see also Mary Tuma, *Lt. Gov. Dan Patrick Slams Obama Over Support for Police: In Response, POTUS Reiterates Support for Law Enforcement*, *Daily News*, AUSTIN CHRON. (Jul 14, 2016, 8:30 PM) (citations omitted), <http://www.austinchronicle.com/daily/news/2016-07-14/lt-gov-dan-patrick-slams-obama-over-support-for-police/>.

receiving much criticism.¹⁵ But it is too late. The truth of their poisonous hate has been revealed. Before Walsh's tweet was deleted, before the Lt. Gov.'s comments were retracted, before a spontaneous Donald Trump was placed on a tight script and teleprompter, the ugly truth of racism and hate in America was made known, and it was not caused by Blacks and Latinos blaming Whites for their problems. Rather, America has not learned its lessons from the history of its own racism. When Milwaukee County's African-American Sheriff, David Clarke, mentioned the "good news" of exonerated officers involved in Freddie Grey's death at the Republican National Convention (RNC),¹⁶ and proclaimed that there was no shred of evidence that police target Blacks on CNN,¹⁷ the ignorance could not be more clear. This blanket assertion appears to be unfounded, particularly since the U.S. Department of Justice's (DOJ) findings regarding the Baltimore Police Department's racial targeting of Blacks.¹⁸

15. See Editorial, *Dan Patrick's Response to Ambush Was a Tutorial on What Not to Say in Crisis*, DALLAS MORNING NEWS (July 11, 2016) (citations omitted), <http://www.dallasnews.com/opinion/editorials/2016/07/11/editorial-texas-officials-responses-dallas-ambush-offer-tutorial-say>; Tuma, *supra* note 14.

16. Ryan Grim, *Republican Convention Roars Approval of Baltimore Officer's Acquittal in Freddie Gray Death: A Somber Moment Is Turned into an Applause Line*, HUFFINGTON POST (July 13, 2016, 10:39 PM), http://www.huffingtonpost.com/entry/republican-convention-freddie-gray_us_578d85c5e4b0c53d5cfab360.

17. Leinz Vales, *Wisconsin Sheriff on Recent Baton Rouge Shootings: I Predicted This, Crime & Justice*, CNN (Jul. 18, 2016, 9:37 PM), <http://www.cnn.com/2016/07/18/us/wisconsin-sheriff-david-clarke-i-predicted-this/> (describing a "heated interview with CNN's Don Lemon," in which Clarke denied that police are "more aggressive toward black males than white males," stating that "[t]here is no[] data" to support such a claim, and that "[t]he President has been lying about it").

18. SPECIAL LITIG. SECTION OF THE CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BA. CITY POLICE DEPARTMENT 3 (2016), <https://www.justice.gov/opa/file/883381/download> ("After engaging in a thorough investigation, initiated at the request of the City of Baltimore and BPD, the [DOJ] concludes that there is reasonable cause to believe . . . BPD engages in a pattern or practice of: (1) making unconstitutional stops, searches, and arrests; (2) using enforcement strategies that produce severe and unjustified disparities in the rates of stops, searches and arrests of African Americans; (3) using excessive force; and (4) retaliating against people engaging in constitutionally-protected expression. This pattern or practice is driven by systemic deficiencies in BPD's policies, training, supervision, and accountability structures that fail to equip officers with the tools they need to police effectively and within the bounds of the federal law."); Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, (Aug. 10, 2016) (internal quotations & citations omitted), <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department> ("We found that BPD has engaged in a pattern or practice of serious violations of the U.S. Constitution and federal law that has disproportionately harmed Baltimore's African-American

But perhaps the racial chasm in our society was already clear when Sheriff Clarke ripped the BLM movement as “Black Lies Matter,” or when the Police Benevolence Association (PBA) named him its Man of the Year.¹⁹ Do these officials realize their either/or mentality, their unqualified support of all police, and their derogatory comments on protestors or anyone who shows even slightly less than full-throated support is lumping whole groups together? The irony is that while their narrow cognitive paradigm sees only in terms of either/or as to BLM, these same people are quick to call for nuance when they ask us to disassociate bad-apple actors on the police force from the good ones.

3. COUNTERARGUMENTS TO THE POPULAR RHETORIC

However, what critics fail to understand is that the bad-apple distinction becomes less and less persuasive when a national phenomenon emerges. Furthermore, they miss the point that there is a reality where far too many good officers turn a blind eye toward, or fall silent about, the bad cops on the force. The camaraderie, the loyalty, and the “silent blue wall” of complicity engendered by their closeness to their brothers and sisters in blue impedes their ability to speak out against, to prosecute and to remove, bad apples until it is too late. Furthermore, the culture and the law themselves do not favor transparency.²⁰ They do not recognize that Black men are more

community and eroded the public’s trust in the police . . .”).

19. See Jennifer Fermino et al., *Milwaukee County Sheriff David Clarke is PBA’s Person of the Year*, N.Y. DAILY NEWS (Aug. 26, 2016, 12:22 AM), <http://www.nydailynews.com/new-york/milwaukee-county-sheriff-david-clark-pba-man-year-article-1.2765494>.

20. See, e.g., *In re Whitley v. N.Y. Cty. Dist. Attorney’s Office*, 955 N.Y.S.2d 42, 43 (N.Y. App. Div. 2012) (citations omitted) (“[The police department] correctly determined that disclosure of the requested documents would have interfered with petitioner’s then-pending criminal appeal and any subsequent proceedings in the underlying criminal case.”); *In re Legal Aid Soc’y v. N.Y.C. Police Dep’t*, 713 N.Y.S.2d 3, 7–8 (N.Y. App. Div. 2000) (citations omitted) (“We are persuaded that . . . disclosure of records to a defendant in a pending criminal prosecution . . . would not only ‘interfere with the orderly process of disclosure’ . . . , it would also create a substantial likelihood of delay in the adjudication of that proceeding . . . , thereby effecting a chill on that prosecution . . .”), *appeal denied*, 745 N.E.2d 389 (N.Y.); *In re Pittari v. Pirro*, 696 N.Y.S.2d 167, 169 (N.Y. App. Div. 1999) (citing N.Y. PUBLIC OFFICER’S LAW § 87(2)(e)(i) (McKinney 2008 & Supp. 2014)) (finding that the petitioner’s Freedom of Information Law “requests, made while the criminal proceeding was still pending . . . , were properly denied pursuant to . . . § 87(2)(e)(i),” a statute that “exempts from disclosure those records ‘compiled for law enforcement

targeted than others.²¹ Some find inane arguments as to why protesting against police killings is somehow anti-law enforcement or anti-white.²² Moreover, some bad apple officers seem to always find some justifications for the killings that could have been avoided. Some good apple cops will find ways to cover up or look the other way from the horrific acts of bad apples on the force in allegiance to that silent blue wall. As John F. Kennedy observed, “[T]he only thing necessary for the triumph of evil is for good men to do nothing.”²³

4. EVEN WHEN THE OFFICER IS A MINORITY, IT IS STILL INSTITUTIONALLY ENFORCED RACIAL OPPRESSION

Far too many on the force are silent, and the bad apple response we hear each time in this narrative seems to belie the disturbing fact that there is a larger systematic problem in the exercise of force and power across America. This is the case whether the officer is Caucasian, Asian, Mexican, or African-American. That violence to the body happens even when it is tan, beige, or burnt sienna. It happens by police who are Black, White, Asian, and Hispanic. I’ve witnessed this truth myself. As an example, one day, in the intersection of Babylon Avenue and Sunrise Highway in Merrick, New York, White and Latino police officers stopped our car right there on the street, and forcibly removed my mother, stepfather, brother, and me. They held us at gunpoint spread-eagle against the car. Well, actually, it was just my brother Neal and me who were held spread-eagle across

purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings”), *appeal denied*, 723 N.E.2d 567 (N.Y.).

21. Paul Butler, *Black Male Exceptionalism? The Problems and Potential of Black Male-Focused Interventions*, 10 DU BOIS. REV. 485, 490–91 (2013) (citations omitted), scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2323&context=facpub (“One conservative commentator suggested that referring to African American males as an ‘endangered species’ was misleading, in part because Whites are often the victims of crimes perpetrated by Black males.’ [While another commentator] argued that social science research on African American men is usually put in ‘crisis terms’ . . . [, and] was critical of an ‘unquestioned assumption of endangered masculinity’ . . .”).

22. See Neil Munro, *Cop Deaths Double in 2016, Amid Obama’s Anti-Cop Rhetoric*, BREITBART NEWS (July 20, 2016), <http://www.breitbart.com/2016-presidential-race/2016/07/20/cop-deaths-double-2016-amid-obamas-anti-cop-rhetoric/>. (construing police-violence critique as responsible for anti-law-enforcement shootings).

23. John F. Kennedy, President, U.S., Address Before the Canadian Parliament in Ottawa (May 17, 1961) (citations & internal quotations omitted) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=8136>).

the car hood, while the rest of my family were ordered to freeze. I recall so vividly at the age of fifteen what this rookie white cop looked like trembling with nerves as he held a gun to the back of my brother's head while the gun shook in his hand, pressed precariously against my brother's brain.

My brother Neal, being 6'2", got the brunt of it because he was certainly making this cop nervous just by being born genetically tall and by being a brown man in the wrong place at the wrong time. Apparently, our car and the group of us supposedly matched the description of another vehicle also carrying people of the same hue as us. The actual suspects were involved in robbing a store. But we were the unlucky ones to be stopped. Indeed, I recall how lucky my brother and I were: he, that the cop never nervously pulled the trigger as he held his gun against the back of my brother's skull, and I, that I did not have to watch, standing so close next to him, his brain matter splatter all over me.

I saw the terror in his eyes, and tears running down his cheek as he tried to sob without moving. I saw my mother pleading that Neal stay absolutely still and not move, but being just as utterly powerless to do anything as I was. We were frozen by fear and force all at once, frozen like vulnerable ice statues awaiting a blistering fate based entirely on a circumstance not of our own choosing and entirely outside our control. In a blink of an eye, in a split of a millisecond, and with the seeming arbitrariness of a coin flip, the fate of my brother's life was in the trembling hands of this cop's ever-shaking trigger finger. In each second that seemed like an eternity, I knew his life could be easily snubbed out, and that they would find a way to justify it.

After twenty-five minutes of a harrowing, terrifying nightmare in broad daylight, the police finally let us go, without an apology, without remorse, but just disgust that we apparently wasted their time merely by being who we were—not criminals, but innocent human beings stripped of our dignity. I knew the fragility of life, the randomness of it, and the frightful thought that, at any moment, our lives as de facto second-class citizens could be extinguished senselessly.

5. BRAINWASHED & WHITE WASHED: SOCIETAL & MEDIA PERCEPTIONS OF RACE & CRIMINALITY

It is a strain on the head and heart to feel that one day, this fear, distrust, hate, or resentment for the "other" would come for

me. I saw the White onlookers stare at us with disapproval yet pleasing satisfaction that we had been apprehended for their supposed protection, policing the spaces we too had called home but to which we did not belong. They never second-guessed our innocence with their contemptible grimaces. After all, we were just another confirmed stereotype of criminality. We were the confirmation of Nixon's intentionally-racist campaign to flood the nightly news with Black criminality to subvert sympathy for Black protesters against the Vietnam War.²⁴ Nixon had two principal enemies: the antiwar left and Black people, according to former Nixon Domestic Policy Chief John Ehrlichman. He stated:

You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And then criminalizing both heavily, we could disrupt those communities We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.²⁵

Like this candid confession, we were the images of criminality vilified night after night, standing in that intersection. Whenever someone types "three black teenagers" as the search query on Google, we are the images of police mug shots that appear, which stands in stark contrast to the J. Crew-looking ads when the words "three white teenagers" are entered instead. In their minds, I imagine the matching description was not unlike the description that comes to mind when one types "three black teenagers" into Google.²⁶ Latinos and Blacks are vilified in the mainstream press that permeates the American psyche, and I believe I paid the price for that mass mental conditioning.

When we asked the cops what was the matching description sent over their APB, the police couldn't be bothered to say a word

24. See Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN: POLITICS (Mar. 24, 2016, 3:14 PM), <http://www.cnn.com/2016/03/23/politics/john-ehrichman-richard-nixon-drug-war-blacks-hippie/>.

25. *Id.*

26. Jessica Guynn, *Three Black Teenagers' Google Search Sparks Outrage*, USA TODAY (June 9, 2016, 1:10 PM; updated June 10, 2016, 11:06 AM), <http://www.usatoday.com/story/tech/news/2016/06/09/google-ima-search-three-black-teenagers-three-white-teenagers/85648838/> ("Google image searches for 'three black teenagers' and 'three white teenagers' get very different results, raising troubling questions about how racial bias in society and the media is reflected online.").

and ordered us to stop blocking the intersection in which they had stopped us. Was this experience traumatic? Yes—absolutely unforgettable, but I recognized we were, undoubtedly, one of the lucky few. If only Anthony Nuñez, Raul Saavedra-Vargas, Vincent Ramos, Terence Crutcher, and Keith Lamont Scott were so lucky. Officers need to learn to de-escalate conflict, and—only if necessary—reach for the taser rather than the gun. Imagine in each scenario how much life could have been preserved if simply this were done. Imagine that Amadou Diallo would have still been alive if the officers of the New York Police Department, who were exonerated, took time to use a taser, rather than the guns that shot at him forty-one to forty-six times.

For Amadou

They claimed they saw him reach for a weapon
 41 shots they fired, 19 took him to up to heaven

Was it a ricochet effect or merely a cop's accidental trip
 That compelled them to empty their glock nine clip?
 48 hours of media silence helped fine tune their tale
 To justify how they took the life of another unarmed black male.
 Sharpton is raising hell again down in front of federal court

As Mayor Gooliani practices damage control—
 a savvy media stunt.
 But snapshots of angry raised black fists,
 and grieving mother's cries
 Don't survive evening news sound bites
 and public relation lies
 Change of venue are defense attorneys' choice of menu
 Anything will do to remove justice from her racial milieu,
 To pluck vindication from Harlem's bosom,
 Safe away from juries that are Black, Ethiopian or Muslim
 To a crisp white judge and jury in rural upstate

That moves to acquit murder and redeem the fate
 Oh how we contort tragedy into fanciful fiction
 Only when the victim is of a darker complexion
 Behold my brethren see this tragic scene repeat,
 In every Black ghetto & American street,

In these lamenting streets of sorrow
 Rest assured, each year, more Black bodies will follow
 For no resting peace awaits for fallen
 Amadou Diallo²⁷

27. Maurice R. Dyson, *For Amadou*, in VOICES OF THE APOCRYPHA: COLLECTED POEMS 28, 28 (2009); see *Amadou Diallo*, N.Y. TIMES, <https://www>.

6. THE COLOR OF OUR MENTAL SKY: PROTECTIVE FATHERS & ENDANGERED SONS

In light of the killing of Amadou Diallo and the long line of cases of police killings, with Terence Crutcher and Keith Lamont Scott being the most recent at the time of this writing, the parent of a child of color has to teach that there are very real limitations and dangers to police encounters, while at the same time reminding them that those limitations are just obstacles that can and will be overcome with perseverance. I was reminded of Dr. King's *Letter From a Birmingham Jail*, where he spoke of the rampant racism and how he feared such bigotry and hatred would distort his daughter's mental sky:

[W]hen you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see the tears welling up in her little eyes when she is told that Funtown is closed to colored children, [you begin to] see the depressing clouds of inferiority begin to form in her little mental sky²⁸

That was not just poetic prose designed to convince the white clergy in the South—it was the wisdom of a protective father letting his daughter know there were real limits. Yes, the child has a clear canvas on which to paint; and as King's letter alludes, it is as if there is a clear-blue expansive sky of wonder and the excitement of possibility and potentiality. It was a sky without clouds, ominous dark tones, or piercing lighting that would darken to the mentality of the downtrodden.

No, the clear mental sky that we would say is most often associated with growing up white is a sky that has not been told that it will fall, a sky that has no reason to believe it would be second guessed with clouds, vilified with lightning, or poisoned with the hateful gale-force winds of bigotry. It was a mental sky in which, with just a little imagination, one could fly. As the late

nytimes.com/topic/person/amadou-diallo (“The officers . . . acknowledged firing 41 shots that night, but said they thought that Mr. Diallo was carrying a gun. Mr. Diallo, who came to America more than two years before from Guinea and worked as a street peddler in Manhattan, was hit by 19 bullets while standing in the doorway of his Bronx apartment building.”).

28. *Martin Luther King Jr.'s 'Letter from Birmingham Jail,' Politics*, ATLANTIC (Apr. 16, 2013), <https://www.theatlantic.com/politics/archive/2013/04/martin-luther-kings-letter-from-birmingham-jail/274668/>.

Muhammad Ali once proclaimed insightfully, “The man who has no imagination has no wings.”²⁹ Ali was not just a great man, but also an example. As pastor Cosby noted at Ali’s funeral, “Before James Brown said ‘I’m Black and I’m proud,’ Muhammad Ali said ‘I’m Black and I’m pretty.’”³⁰ He was not a New Black that shuns race pride or, for that matter, denies or downplays the role of white subjugation.³¹ But he embraced a mental sky that could soar beyond his circumstance. I suppose it was this mental sky that my parents wanted for me so I could soar with wings further than they could. I was not raised to be Black or White. I was raised with spiritual principles of humanity, brotherhood, loving, and giving back to one’s community and that community was those who were downtrodden.

For the early part of my life, before formal schooling took hold, my parents tried to instill in me a sense of limitless possibility, while still being grounded in my history and culture. I realized for many growing up that was simply not the case. I recall the passage in James Baldwin’s *The Fire Next Time* where he was an inquisitive and daring child.³² As a child, he began to think beyond the limit of race only to have the stern father slap the “Black back into him,” so to speak. It was a parent’s nightmare that their child, not knowing their place in a racist world, would cross some invisible but very real racial line and transgress a boundary where Blacks were not welcome.

At first, I thought how cruel of Baldwin’s father to do that to his son, much as the son also initially thought. How cruel to smack and unilaterally, violently, and unceremoniously impose such limits in his child’s mind, to poison his mind. In other words, how dare he distort and cloud his child’s precious innocent mental sky. But as Baldwin would explain, that abrupt, violent wake-up smack was done in love to protect the child from

29. *Muhammad Ali Dies, His Inspirational Quotes*, ORIJO REP. (June 4, 2016), <http://www.orioreporter.com/muhammad-ali-dies-his-inspirational-quotes/>.

30. *Before James Brown Said ‘I’m Black and I’m Proud,’* BBC: NEWS HOUR (June 10, 2016), <http://www.bbc.co.uk/programmes/p03xyxr1>.

31. There are various conceptions of the “New Black,” but often it is characterized by an under emphasis if not outright denial of the role of white racism as an oppressive barrier to social mobility, or a de-emphasis of one’s African-American heritage in preference for a broader self-identifying label. See, e.g., Jason Parham, *The Curious Case of the “New Black”: A Conversation*, GAWKER (Oct. 14, 2014, 11:00 AM) (citations omitted), <http://gawker.com/the-curious-case-of-the-new-black-a-conversation-1649462578>.

32. See JAMES BALDWIN, *THE FIRE NEXT TIME* 104–05 (Vintage Int’l ed., 1993) (1962).

crossing that invisible, but palpable, color line.

The Fire Next Time is reminiscent today of what every Black parent has to warn their child about whenever they step outside the safety of their home to encounter the dangers of a racialized police state. It is a police state where officers use tear gas and rubber bullets in White or affluent neighborhoods to subdue suspects, while they shoot first with lethal force in Black ones.³³ It is a police state where body cameras fall off of officers in Black towns, where self-serving and convenient narratives are created before or after the videos surface to fine-tune a justification.³⁴ It is a police state where grand juries refuse to indict,³⁵ or where prosecutors, working with the police, present prejudicial evidence to a grand jury.³⁶ That same color line that W.E.B. Dubois

33. See Aviva Shen, *Police Said They Shot a Man Because He Pointed a Gun at Them: Video Shows He Had His Hands Up*, THINKPROGRESS (July 10, 2016), <http://thinkprogress.org/justice/2016/07/10/3796941/alva-braziel/> (“Another black man was shot and killed by Police in Texas . . . Houston Police said Alva Braziel was waving a gun around and pointed it at them when they opened fire. But surveillance footage from a nearby gas station suggests otherwise. The video . . . shows Braziel walk out toward an intersection. When the squad car arrives, he appears to put his hands in the air and turn around, standing still for a few seconds before police shoot him . . . Police protocol in most U.S. cities encourages officers to use lethal force if they feel someone is threatening them, but there are often many other tools and opportunities to de-escalate the situation. For example, in a majority-white neighborhood of Houston . . . , an armed suspect fired seven rounds at police officers. Yet police managed to end the standoff with gas and other non-lethal means without killing the man.”).

34. See *Coroner Says Man Shot by BRPD Multiple Times in Chest, Back; Officer Body Cameras Fell Off*, WBRZ (July 5, 2016, 4:11 PM) [hereinafter WBRZ], <http://www.wbrz.com/news/coroner-says-man-shot-by-brpd-multiple-times-in-chest-back-officer-body-cameras-fell-off/> (“The East Baton Rouge Coroner’s Office says [Alton Sterling] . . . died from multiple gunshot wounds to the chest and back. State Rep. C. Denise Marcelle, who had a conversation with Police Chief Carl Dabadie, confirmed . . . that both body cameras that the officers involved in the shooting were wearing fell off during the incident. According to BRPD Cpl. L’Jean Mckneely, the cameras are still in the pilot program and the footage is still useful.”).

35. See Ben Norton, *No Charges: Grand Jury Refuses to Indict Policeman in Fatal Shooting of 12-Year-Old Tamir Rice*, SALON (Dec. 28, 2015, 1:45 PM), http://www.salon.com/2015/12/28/no_charges_grand_jury_refuses_to_indict_policemen_in_fatal_shooting_of_12_year_old_tamir_rice/ (“A grand jury declined . . . to indict the police officer who shot and killed 12-year-old Tamir Rice in a Cleveland park in November, 2014 . . . This ruling comes just one week after a grand jury also refused to indict anyone involved in the death of Sandra Bland in police custody in Texas. The decision echoes those made by grand juries about the police killings of other unarmed black Americans.”).

36. See Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447, 1449–50, 1450 nn.7–8 (2016) (citing Brian Beutler, *The NYC Cop Who Strangled Eric Garner to Death Is Free Thanks to a Legal Flaw. Here’s How Voters Can Fix It*, NEW

indicated would be the quintessential question of the twentieth-century could very well be the difference between life and death.

Although it seemed that slap was cruel and unwarranted to outside eyes, to the protective father who needs to impose the realities of a racist world, it was a message that said: I need you

REPUBLIC (Dec. 3, 2014), <http://www.newrepublic.com/article/120478/eric-garner-police-officer-shouldve-been-investigated-independently>; Paul Butler, Opinion, *The System Must Counteract Prosecutors' Natural Sympathies for Cops*, N.Y. TIMES (Apr. 28, 2015, 12:26 PM), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garners-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops>; Paul Cassell, *Who Prosecutes the Police? Perceptions of Bias in Police Misconduct Investigations and a Possible Remedy*, WASH. POST: VOLOKH CONSPIRACY (Dec. 5, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy>; Erwin Chemerinsky, Opinion, *Police Dodge Accountability for Deaths*, ORANGE COUNTY REG. (Dec. 7, 2014, 12:00 AM), <http://www.oregister.com/articles/police-644400-officers-jury.html>; Sally Kohn, *First Mike Brown, Then Eric Garner: Prosecutors Can't Be Trusted to Try Cops, Justice Denied*, DAILY BEAST (Dec. 3, 2014, 2:55 PM), <http://www.thedailybeast.com/articles/2014/12/03/the-eric-garner-case-should-have-gone-to-trial.html>; Kate Levine, *The Ultimate Conflict: Local Prosecutors Should Not Decide Whether to Criminally Charge Police Officers Like Ferguson's Darren Wilson*, JURISPRUDENCE: THE LAW, LAWYERS AND THE COURT, SLATE (Sept. 11, 2014, 2:50 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/local_prosecut_or_bob_mcculloch_should_not_be_the_one_to_decide_whether_to.html; Howard Wasserman, *Prosecuting Police: The Role of the Grand-Jury Pool*, PRAWFSBLAWG: L. & POL. (Dec. 4, 2014, 5:41 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2014/12/prosecuting-police-the-role-of-the-grand-jury-pool.html>; see also *id.* at 1450 n.10 (citing Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 309–13 (2001); Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Justice Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 719 (1996) (“Local Prosecutors who ordinarily work closely with the police face an impossible conflict of interest between their desire to maintain working relationships and their duty to investigate and prosecute police brutality.”); Susan N. Herman, *Double Jeopardy All over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 630 (1994) (“[I]f multiple prosecutions were prohibited in all cases, unscrupulous state actors could immunize a favored defendant (perhaps a fellow state or city employee, like a sheriff or police officer) from further prosecution by instituting a sham state prosecution.”); Jon V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 791; Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 511 (1994) (“The Rodney King beating trials have prompted discussion on a number of issues, including the appropriate forum in which to pursue criminal prosecutions against police officers for violating citizens’ constitutional rights. There has been a renewed call for federal prosecutors to take the lead in these prosecutions.”); Laurie L. Levenson, *High-Profile Prosecutors & High-Profile Conflicts*, 39 LOY. L.A. L. REV. 1237, 1255–56 (2006); Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 22 (2001) (“[P]rosecutors often enjoy too close of a relationship with local police and are therefore reluctant to turn against those with whom they have worked.”)).

to learn this now, learn from my own hand, so that you do not have to learn at the hand of the white man. His hand was a slap, but the hand of a white man could mean a coffin if you did not know your place. But is this act of parental concern one that does a disservice even if it is motivated by compassion and informed by a real-world context? We live in a country that has the slim, vanishing veneer of freedom for Latino and Black people. As actor Jesse Williams stated in accepting BET's Humanitarian Award for his civil-rights activism:

[T]his award—this is not for me. This is for the real organizers all over the country—the activists, the civil rights attorneys, the struggling parents, the families, the teachers, the students that are realizing that a system built to divide and impoverish and destroy us cannot stand if we do. It's kind of basic mathematics—the more we learn about who we are and how we got here, the more we will mobilize. Now, this is also in particular for the black women . . . who have spent their lifetimes dedicated to nurturing everyone before themselves. We can and will do better for you. Now, what we've been doing is looking at the data and we know that police somehow manage to deescalate, disarm, and not kill white people every day. So what's going to happen is we are going to have equal rights and justice in our own country or we will restructure their function and ours. Yesterday would have been young Tamir Rice's 14th birthday so I don't want to hear anymore about how far we've come when paid public servants can pull a drive-by on [a] 12-year-old playing alone in the park in broad daylight, killing him on television then going home to make a sandwich. Tell Rekia Boyd how it's so much better . . . to live in 2012 than . . . 1612 or 1712. Tell that to Eric Garner. Tell that to Sandra Bland. Tell that to Dorian Hunt. Now the thing is, though, all of us in here getting money—that alone isn't gonna stop this. Alright, now dedicating our lives . . . to getting money just to give it right back for someone's brand on our body when we spent centuries praying with brands on our bodies, and now we pray to get paid for brands on our bodies. There has been no war that we have not fought and died on the front lines of. There has been no job we haven't done. There is no tax they haven't levied against us—and we've paid all of them. But freedom is somehow always conditional here. "You're free," they keep telling us, but she would have been alive if she hadn't acted so . . . free. Freedom is always coming in the hereafter, but you know what, though, the hereafter is a

hustle. We want it now. And let's get a couple things straight, just a little sidenote—the burden of the brutalized is not to comfort the bystander. That's not our job, alright—stop with all that. If you have a critique for the resistance, for our resistance, then you better have an established record of critique of our oppression We've been floating this country on credit for centuries, and we're done watching and waiting while this invention called whiteness uses and abuses us, burying black [and Latino] people out of sight and out of mind while extracting our culture, our dollars, our entertainment like oil—black gold, ghettoizing and demeaning our creations then stealing them, gentrifying our genius and then trying us on like costumes before discarding our bodies like rinds of strange fruit. The thing is . . . just because we're magic doesn't mean we're not real.³⁷

7. CRIMINALIZING OUR YOUTH: SROS & POLICING IN SCHOOLS

The words ring true for people of color across America and it is indeed correct to note that now is the time to mobilize political support for the kind of reforms proposed herein. Because police presence and their self-appointed surrogates (such as George Zimmerman and anti-immigrant militia)³⁸ often exacerbate, rather than alleviate, racial tensions, time is of the essence. Even more pressing is the fact that policing conditions more greatly affect our youth of color as well.

Young people of color bear the burden of oppressive policing tactics in school. The troubling phenomenon of school resource

37. Jesse Williams, Acceptance Speech at 2016 BET Awards (June 26, 2016), quoted in Megan Lasher, *Read the Full Transcript of Jesse Williams' Powerful Speech on Race at the BET Awards*, *Entertainment: Awards*, TIME (June 27, 2016), <http://www.time.com/4383516/jesse-williams-bet-speech-transcript/>.

38. See, e.g., Tim Murphy, *The Meltdown of the Anti-Immigration Minuteman Militia: Why the Self-Appointed Border Patrollers Are Nowhere to Be Seen*, MOTHER JONES (Aug. 4, 2014, 5:00 AM) (quoting Chris Davis, a “Texas-based militia commander”), <http://www.motherjones.com/politics/2014/08/minuteman-movement-border-crisis-simcox>; Adam Weinstein et al., *The Trayvon Martin Killing, Explained: The Latest on How a Teenager Armed with Skittles and Iced Tea Got Gunned Down by an Overeager Neighborhood Watch Captain*, MOTHER JONES (Mar. 18, 2012, 12:42 PM), <http://www.motherjones.com/politics/2012/03/what-happened-trayvon-martin-explained> (“Trayvon Martin—an unarmed 17-year-old African American student—was confronted, shot, and killed near his home by George Zimmerman, a neighborhood watch captain in Sanford, Florida . . . [T]he case has drawn national outcry and sparked hot debate over racial tensions, vigilantism, police practices, and gun laws.”).

officers (SROs) that are heavily populated in urban-minority schools is quixotic when one considers the incidents at majority-white suburban schools like Columbine and Sandy Hook.³⁹ Even the statistics coming out of the Bureau of Justice acknowledge that, while students of color disproportionately feel threatened at school, “White students are more likely to report having access to a loaded gun” than all other students.⁴⁰ Most communities of color are keenly aware of this fact (as would be anyone who watches the news), so the question of being suspect as a racial minority with a heavy law-enforcement presence already looms larger than it ever should in the mind of teens of color. This reality permeates the mind, attitude, culture, and very essence for students of color who have to navigate the difficulties of adolescence and racial identity.

There is the tension one must modulate, between acting hard as a means of survival among peers and falling prey to racial profiling and harassment. The latter often occurs as the result of being perceived to be a threat by SROs. Consequently, the fear of arrest, juvenile court, and the criminal justice system are often not far behind. Will SROs reinforce the radicalized space of Black males for instance, treating them always as a threat that must be checked? Will Black and Latino male students in a predominately-minority school be forced to act White, for fear that the failure to do so might result in targeting through racial profiling by the SRO?

Even still, it is not clear in every instance that the performance of racial-identity work, even if possible, could have made any difference in some of the long list of victims previously mentioned. After all, an officer confusing a gun for his own taser, or mistaking an unarmed man’s pill bottle as a gun, does not bode well for the dubious argument that racial identity can be

39. See Richard Florida, *Gun Violence Is an Everywhere Issue: Americans Can No Longer Pretend that Shooting Deaths Are a Problem Relegated to the Inner City*, ATLANTIC: CITYLAB (Dec. 15, 2012) (citations omitted), <http://www.citylab.com/politics/2012/12/gun-violence-everywhere-issue/4176/> (“[M]ore than 80 percent of America’s 21 worst mass killings . . . took place in suburban towns or rural areas, including each and every one of . . . the five ‘worst school massacres in U.S. history.’ More than two-thirds of the 61 mass shootings that occurred between 1982 and 2012 . . . can also be traced to a suburban or rural location.”).

40. SARAH E. REDFIELD & JASON P. NANCE, AM. BAR. ASS’N, *SCHOOL-TO-PRISON PIPELINE: PRELIMINARY REPORT 33 & n.167* (2016) (citing SIMONE ROBERS ET AL., BUREAU OF JUSTICE STATISTICS, *INDICATORS OF SCHOOL CRIME AND SAFETY: 2012*, at 154 tbl.14.4 (2013) (showing the percentage of students ages 12–18 who reported having access to a loaded gun in 2007, 2009, and 2011)).

effectively navigated to foreclose violent racially predicated conflict. Simply being in the wrong place at the wrong time with the wrong skin hue is an operative factor in these tragedies and it raises a deeply troubling, but important, revelation.

It would seem no amount of covering, reverse covering, or racial-identity-performance work will completely stop these tragedies from occurring. Already, national headlines are made about the excessive use of force and tragedies involving students of color and SROs.⁴¹ The hyper-criminalized context of public schools in minority neighborhoods that may serve as a major feeder to alternative schools, jails, and the juvenile-justice system we know as the school-to-prison pipeline cannot be underestimated.⁴² One commentator illustrated the devastating impact of the school-to-prison pipeline:

- Two million children are sent to juvenile detention every year;
- 70% of students involved in in-school arrests or referred to law enforcement are Black or Latino;
- State prisons add inmates at a rate three times faster than our nation adds people;
- 60,000 Americans 18 and younger are living in detention facilities each year at a cost of \$88,000 per year;
- 75% of juveniles in detention are for non-violent offenses;
- 66% of those detained never return to school;
- By a 5 to 1 margin there are more youths incarcerated in the United States than any other nation.⁴³

41. *See, e.g.*, Press Release, Univ. of Tex. Sch. of Law, Three Students File Lawsuit Alleging Excessive Use of Force by Abilene ISD School Resource Officer (Apr. 28, 2016), <https://law.utexas.edu/clinics/2016/04/28/lawsuit-force-against-schoolchildren/> (“Three schoolchildren, through their parents, filed a lawsuit in federal court . . . alleging that a [SRO] . . . violently assaulted them on three separate occasions without justification, while they were attending school . . . [by] us[ing] a ‘pain compliance’ maneuver called an arm-bar against a six-year-old kindergarten student, a chokehold against a twelve-year-old student, and repeatedly slam[ming] a fifteen-year-old student against the wall and to the ground.”).

42. *See School to Prison Pipeline Must Be Dismantled, Stakeholders Tell ABA, ABA News Archives*, A.B.A. (Feb. 7, 2015, 9:59 AM) (citations omitted), <http://www.americanbar.org/news/abanews/aba-news-archives/2015/02/school-to-prisonpip.html>.

43. *Id.*

In the tragic aftermath of school shootings at Columbine and Sandy Hook Elementary School, “The use of in-school police known as SROs has been on the rise with no sign of stopping.”⁴⁴ Approximately \$150 million in grants was awarded to states to hire new law enforcement officers and fill SRO vacancies in school districts through President Obama’s Community Oriented Policing Services (COPS) Office for the COPS Hiring Program (CHP).⁴⁵ While the nation’s public schools become browner in demographics, the dearth of research on the program’s efficacy and its effect on educational outcomes should give us pause, especially given the significant investment of federal and state dollars.

Simply placing law enforcement in schools of color without proper culturally- and racially-sensitive training, or without changing the paradigm of racial bias in the law enforcement community spells a recipe for tragic disasters we have seen time and time again. If police could mistake a black wallet for a gun in a building vestibule in deciding to exercise lethal force with forty-one shots, why should we not conclude that the same might happen to a student using a black cell phone in the school cafeteria?

One can see then that this is not merely a remote, hypothetical concern. Oklahoma County, and other jurisdictions, hire correctional officers to fill SRO positions in schools.⁴⁶ It is no easy feat to mediate between this world of SROs and that of honors teachers’ expectations, where appearing “hard” can also inflict social costs upon cultivating relationships with those teachers that might be necessary for college recommendations. It

44. One can find a significant increase in the number of SROs on the nation’s public-school campuses. See AMANDA PETTERUTI, JUSTICE POLICY INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 1 (2011) (citations omitted), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf (“According to the [DOJ], the number of [SROs] increased 38 percent between 1997 and 2007. Some cities, like New York City, employ more officers in schools than many small cities’ entire police force.”).

45. See Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 952 & n.161 (2016) (citing THE WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT’S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 11 (2013), https://obamawhitehouse.archives.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf (“COPS Hiring Grants, which help police departments hire officers, can already be used by departments to fund [SROs]. [Also, t]he Administration is proposing a new Comprehensive School Safety Program, which will . . . give \$150 million to school districts and law enforcement agencies to hire [SROs], school psychologists, social workers, and counselors.”)).

46. See PETTERUTI, *supra* note 44, at 2.

seems reformers, policymakers, scholars, and lawyers have little practical idea about what our youth must actually negotiate to survive, if not thrive, in the public school context.

8. POLICE BIAS & RACIAL IDENTITY

It would seem that our police and criminal justice system have been reduced to stayed doctrines with inadequate recognition of the racial bias that has permeated it. For instance, one night after leaving my parked car in Baldwin, New York, I was in the process of closing my door when I felt it rip away from my hands and saw it summersault into the air. Glass shards scoured my arm and legs. I was within an inch of my life being snuffed out by a young, white, intoxicated woman named Stephanie. When she finally stopped and got out of her car, she asked, "What are we going to do?" No apologies, no realization that I was almost killed. I was stunned, yet I had composed myself to draw up an answer, "We need to call a police officer." She immediately started dumping Budweiser cans into the garbage can.

With no police officer on site and no cell-phone cameras at the time to document the incriminating evidence and behavior, I was disadvantaged. But exactly how much of that disadvantage was due to my being a person of color did not become apparent until the cop arrived. Having told the officer what I just witnessed, he blew me off. In light of what I saw, I told him the fact that this woman just blew my door off a parked car on an isolated street at 1:30 a.m. by coming too close to the right side of the road should be evidence that her judgment was impaired and seriously off.

I kindly asked the officer to give her a breathalyzer to which he responded, "Shut the fuck up you dirty spic, (a derogatory term reserved for Hispanics). Don't tell me how to do my job, you've been watching too much Law and Order!" To this officer, I was not Black or biracial but rather viewed as another Hispanic on the street. Until that time, I had not heard that derogatory term used outside of my school playground, let alone from an officer, but it summed it all up. To this officer, at that moment, even though I was the victim; even though I was the one who had not been drinking; even though I was the one who was almost killed; and even though I was a well-groomed young man, who had a bright future at Columbia ahead of him, I was seen as the pariah. My face was all the confirmation he needed to see to

conclude I was nothing more than a dirty spic in this social and political context that was not of my making. I was not myself, but an interpretation imposed upon me by ignorance.

As one commentator has noted:

[R]ace must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics. In other words, social meanings connect our faces to our souls. Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.⁴⁷

We often entertain the fantasy that we are a colorblind society and by extension that rationale would apply to our criminal justice and policing practices. But that is indeed a fantasy. We see race, even if we do not acknowledge it or are unconscious of it, as implicit biases.⁴⁸ We all see race and ethnicity. Those supposedly colorblind individuals see race the same as the actual colorblind, and even the blind see one's color in terms of race.⁴⁹ Even our government sees and classifies us in terms of race. Society has taken its cue from the politically constructed and legally imposed racial categories. American constitutional law justifies granting heightened protection against discrimination to certain classes of individuals based on historical discrimination of that class.⁵⁰ Yet, the law's

47. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994).

48. See PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION app. B, at B-2 (2012), http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx ("Unlike *explicit bias* (which reflects the attitudes or beliefs that one endorses at a conscious level), *implicit bias* is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.") (emphasis in original).

49. See OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND 60 (2014) ("Put simply, race is understood and experienced by blind people as it is by those who are sighted: visually."). Professor Obasogie started his research, the full extent of which is published in his book, by interviewing 110 individuals who were born blind. See *id.* at 3. The professor mentioned that some of the individuals he interviewed took offense at the notion that sighted people think blind people are unaware of race, and that not being aware of race somehow made blind people morally superior. See *id.* at 58, 63.

50. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360–61 (1978) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)) (plurality opinion)

classification of race as an immutable characteristic to justify heightened scrutiny seems to contradict our understanding of race as a primarily social construct.⁵¹

The law has yet to harmonize this contradiction within our society. This leaves us with a persistent dilemma—how can we move to a society of racial equality while perpetuating race recognition? The role of colorblindness has been a fantasy in American law and society as a panacea for solving all racial difficulties.⁵² But as courts and commentators have long recognized, when the law has excluded others based on their race, the law then has a duty to ensure it rectifies those wrongs to those races excluded, whether it is a court order for desegregation or classroom diversity.⁵³ Race as a prevailing social construct in

(“[R]ace, like gender and illegitimacy . . . is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not *per se* invalid because it divides classes on the basis of an immutable characteristic . . . it is nevertheless true that such divisions are contrary to our deep belief that legal burdens should bear some relationship to individual responsibility or wrongdoing.”); *Loving v. Virginia*, 381 U.S. 1, 11 (1967) (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) (“Over the years, this Court has consistently repudiated ‘(d)istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the ‘most rigid scrutiny’ . . . , and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.”).

51. Compare *Bakke*, 438 U.S. at 360–61, with Megan Gannon, *Race Is a Social Construct, Scientists Argue: Racial Categories Are Weak Proxies for Genetic Diversity and Need to Be Phased Out*, SCI. AM. (Feb. 5, 2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue/> (“Today, the mainstream belief among scientists is that race is a social construct without biological meaning [M]odern genetics research is operating in a paradox, which is that race is understood to be a useful tool to elucidate human genetic diversity, but on the other hand, race is also understood to be a poorly defined marker of that diversity and an imprecise proxy for the relationship between ancestry and genetics”), and Angela Onwuachi-Willig, Opinion, *Race and Racial Identity Are Social Constructs*, N.Y. TIMES: ROOM FOR DEBATE (Sept. 6, 2016, 5:28 PM), <http://www.nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity/race-and-racial-identity-are-social-constructs> (“Race is not biological. It is a social construct.”).

52. See E. Christi Cunningham, *The “Racing” Cause of Action and the Identity Formerly Known as Race: The Road to Tamazunchale*, 30 RUTGERS L.J. 707, 727–29 (1999) (citations omitted); Reginald Leamon Robinson, *“Expert” Knowledge: Introductory Comments on Race Consciousness*, 20 B.C. THIRD WORLD L.J. 145, 160–63 (2000) (citations omitted).

53. See, e.g., *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (citations omitted) (“It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents’ school system ‘Where inability to

our society is a necessary context for there to be true accountability in rectifying the racial academic-achievement gap.⁵⁴ Race exists because race persists.

I have come to understand that race is neither hereditary nor an inheritance that is passed down.⁵⁵ How could it be? Both

speaking and understanding the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.”), *abrogated by Bakke*, 438 U.S. 265; *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 213–14 (1973) (citations omitted) (“[R]espondent School Board having been found to have practiced deliberate racial segregation in schools attended by over one-third of the Negro school population, that crucial finding establishes a prima facie case of intentional segregation in the core city schools If respondent Board fails to rebut petitioners’ prima facie case [on remand], the District Court must . . . decree all-out desegregation of the core city schools.”); *see generally Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955); *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954); *see also* ROBERT MAYNARD HUTCHINS, *THE HIGHER LEARNING IN AMERICA* 18 (Transaction Publishers ed. 1995) (1936) (“Our notion of democracy leads us to the view that everybody is entitled to the same amount and to the same kind of education.”); Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 187, 187 (Gary Orfield & Michal Kurlaender eds., 2001), <http://files.eric.ed.gov/fulltext/ED456199.pdf> (“[In] 2010, one out of every three Americans [was] Latino, African American, Asian American, or Native American This demographic shift suggests that the role of higher education will remain essential in training a work force that can both economically sustain communities and forge relationships across the diverse populations that make up American society. Educating a diverse student body remains central to this educational purpose.”).

54. *See* George W. Bush, President, U.S., Remarks at the National Institute of Health: President Bush Discusses No Child Left Behind & “Reading First” (May 12, 2004) (transcript available at <https://georgewbush-whitehouse.archives.gov/news/releases/2004/05/20040512-8.html>) (“[A]s part of the new accountability system, the No Child Left Behind Act, we break out based upon race. It’s really essential we do that. It’s really important. If you don’t do that, you’re likely to leave people behind. And that’s not right. There’s . . . an achievement gap in America that will be closed. It must be closed, and will be closed. It won’t be closed unless you’re honest about the achievement gap, unless you’re able to see clearly who needs help”); George W. Bush, President, U.S., Remarks at Hyde Park Elementary: President Bush Discusses the “No Child Left Behind Act” in Florida (Sept. 9, 2003) (transcript available at <https://georgewbush-whitehouse.archives.gov/news/releases/2003/09/20030909-3.html>) (“[W]e want to know whether or not Hispanic students are learning, whether or not the African American students are learning. We want to know if every child is learning”).

55. *See, e.g.,* López, *supra* note 47, at 38 (“Race is not hereditary; our parents do not impart to us our race. Instead, society attaches specific significance to our ancestry and appearance, and in that system of meanings lie the origins of our

of my brothers identify themselves quite differently, with one asserting his white identity and the other claiming both aspects of his biracial identity, even though we all grew up in the same household. In contrast to an essentialist outlook, which “assumes that the experience of being a member of the group . . . is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts,”⁵⁶ my context was fluid and evolving.

9. POLICING RACIAL IDENTITY IN THE LAW

As historian Barbara Fields once wrote, “[I]f race lives on today, it does not live on because we have inherited it from our forebears of the seventeenth century or eighteenth or nineteenth, but because we continue to create it today.”⁵⁷ As the foregoing discussion has shown, our law and policing practices enforce segregated racial spaces between communities. But this is not all. As this section explains, we are seeing the regulation of racial identity and the use of racial classifications, not only in the courts to undermine racial equality, but also in policing practices and prosecutions within the criminal justice system.

While recognition of the impact of race is important on the one hand, enforcing monoracial categories of identity in contradiction to the reality in our society is a different matter, particularly when those classifications are used for nefarious purposes. This is significant, because—as previously noted—this may also lead to the underreporting of police violence in Latino and Black communities or those which are comprised of both. It is ironic that some of the courts, including the U.S. Supreme Court, frown upon the use of race to provide remedies to discrimination in education, but it seems perfectly fine to take race into account explicitly when it comes to identifying and tracking people in the U.S. and in our criminal justice system. Today we can see racial segregation in prisons as a remedy to gang presence in prisons,⁵⁸ and the racial assignment of police

race.”).

56. Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 19 (1995).

57. Barbara J. Fields, *Slavery, Race and Ideology in the United States of America*, VERSOBOOKS.COM (July 8, 2016), <http://www.versobooks.com/blogs/2763-slavery-race-and-ideology-in-the-united-states-of-america>.

58. See Bob Walsh, *The California Crisis: Why Racial Segregation in Prisons Isn’t About Race*, CORRECTIONSONE.COM (Aug 26, 2014), <https://www.correctionsone.com/officer-safety/articles/7497711-Why-racial-segregation-in-prisons-isnt-about-race/>.

officers based on neighborhood racial demographics, even though there appears to be little empirical support for the belief of better policing of Black communities by Black officers.⁵⁹ One study found that, “In general, White officers . . . were more likely to arrest suspects than Black officers, but Black suspects were more likely to be arrested when the decision maker was a Black officer.”⁶⁰ These policing practices that rest on racial classifications simply mirror what our legal system enforces in terms of racial identity and classification.

Indeed, the federal government has used census data not only for recording, counting, and reporting, but also for nefarious purposes such as locating, and rounding up, Japanese-Americans for internment during World War II.⁶¹ The legislative use of racial categories is rampant in the law. One need only look at federal affirmative-action plans, state-redistricting plans, assistance to minority businesses in low-income areas, enforcement of federal antidiscrimination statutes, education grants, public health programs, mortgage lending, low-income-housing tax credits, voting rights, Equal Credit Opportunity Act enforcement, employment rights, food stamp and veteran-benefit apportionment, and monitoring and enforcement of desegregation plans in public schools. The same monoracial classifications also apply in family law regarding adoptions and custody determinations.⁶²

59. Robert A. Brown & James Frank, *Race and Officer Decision Making: Examining Differences in Arrest Outcomes Between Black and White Officers*, 23 JUST. Q. 96, 96 (2006), <http://www.unctsu.edu/Documents/Criminal-Justice/Brown2.pdf>.

60. *Id.*

61. See Haya El Nasser, *Papers Show Census Role in WWII Camps*, USA TODAY: NATION (Mar. 30, 2007, 1:33 AM), http://usatoday30.usatoday.com/news/nation/2007-03-30-census-role_N.htm; JR Minkel, *Confirmed: The U.S. Census Bureau Gave up Names of Japanese-Americans in WW II—Government Documents Show that the Agency Handed over Names and Addresses to the Secret Service*, SCI. AM. (Mar. 30, 2007), <https://www.scientificamerican.com/article/confirmed-the-us-census-b/>.

62. See Julie C. Lythcott-Haims, Note, *Where Do Mixed Babies Belong? Racial Classification in America and its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L. L. REV. 531, 531–32 (1994) (citations omitted) (“The transracial adoption debate in this country centers around the controversial practice of ‘race-matching,’ whereby adoptable children wait in foster homes or institutions, sometimes for years, until parents of the same race as the child can be found . . . [R]ace matching *cannot* work . . . because millions of children are born not merely of one race. Instead, they comprise two, three, or more races and ethnicities. As such, they do not fit neatly into one category.”) (emphasis in original); see also *DeWees v. Stevenson*, 779 F. Supp. 25, 26, 28–29 (E.D. Pa. 1991) (upholding denial of white foster parents’ petition to adopt biracial child because parents believed race had

In this regard, it seems not much has changed since the nineteenth-century's system of determining race by a census taker's "visual inspection."⁶³ Although self-identification has transplanted the old fashioned census taker's observations for recording race based on phenotype,⁶⁴ there nonetheless remains

no impact in developing the child's identity and, thus, they had not demonstrated the "particular sensitivity, awareness and skills . . . necessary for a successful trans-racial adoption of a young child," and further noting that, "[i]n making adoption decisions, state agencies cannot ignore the realities of the society in which children entrusted to them for placement will be raised, or the affect [sic] on children of those realities as documented by professional studies"); *In re R.M.G. & E.M.G.*, 454 A.2d 776, 791–93 (D.C. 1982) (discussing relevant considerations for determining suitability of child's adoptive parents, such as exposure to child's race, noting that race is relevant to identity formation, and, therefore, suggested that the same-race parent was probably more suitable); *In re L.L.*, 459 N.W.2d 489, 496–97 (Iowa 1990) (upholding termination of black father's parental rights to his biracial child, and placing child with white foster parents, noting that "the foster parents are . . . sensitive to this issue. They live in a racially mixed neighborhood, and L.L. will attend a racially mixed school").

63. See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1186 (1997) (citations omitted) ("By 1890, the [census] enumerators were instructed to categorize . . . among different artificially constructed categories of Black 'The word 'black' [was] used to describe those persons who ha[d] three-fourths or more of black blood; 'mulatto,' those persons who ha[d] three-eighths to five-eighths black blood; 'quadroon,' those persons who ha[d] one-fourth black blood; and 'octoroon,' those persons who ha[d] one-eighth or any trace of black blood.' The enumerators were instructed to become, in effect, clairvoyant gene counters."); see also Kenneth E. Payson, Comment, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1252 (1996) (citations omitted); Naomi Zack, *American Mixed Race: The U.S. 2000 Census and Related Issues*, 17 HARV. BLACKLETTER L.J. 33, 34 (2001) ("Racial categorization first appeared in the 1850 census, when under the general group of free persons, whites were not counted by race under 'Color' and mulattos were counted separately from blacks."). The 1850 revision itself relied on census takers' perceptions of race as black, white, or mulatto according to physical appearance. See Lisa Pomeroy, Comment, *Restructuring Statistical Policy Directive No. 15: Controversy over Race Categorization and the 2000 Census*, 32 U. TOL. L. REV. 67, 71 (2000) (citations omitted) ("The 1850 revisions proclaimed that a respondent's appearance would be used to determine blood quantum levels.").

64. See Pomeroy, *supra* note 63, at 68 & n.15 (citing Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782, 58785 (Oct. 30, 1997) [hereinafter Revisions]) ("[T]he Office of Management and Budget (OMB) revised the classification standards for the 2000 Census. The OMB's revisions specifically state that a census participant's racial selection is to be based on individual choice, and . . . [that] the One Drop Rule is no longer used by the U.S. Census Bureau for racial classification, unless a census participant chooses the rule as a guideline for self-identification."); Zack, *supra* note 63, at 36 ("In question nine, the phrase 'considers himself/herself to be' clearly bases racial categorization on self-identification.").

significant discretion with the census to define one's race.⁶⁵ Through its Office of Management and Budget, the federal government issued Directive No. 15 in 1977, to standardize "race" in the public and private sectors.⁶⁶ While the Census Bureau has since revised its race categories, this standardized method is still in use and continues to define racial identity.⁶⁷

Unlike President Obama's proclamation at a Howard University commencement speech that there is no one way to identify one's race or ethnicity, it would seem that the federal government would rather define race in narrow, straightjacket terms than allow individuals to define themselves.⁶⁸ Census statistics that employ these racial categories help organize, define, and perpetuate how people develop their racial identity and its relation to others.⁶⁹ Similar to the ways that the assignment of police, and policing practices in communities and prisons perpetuate racial classifications, the U.S. Census Bureau

65. See Tanya Katerí Hernández, *The Interests and Rights of the Interracial Family in a "Multiracial" Racial Classification*, 36 BRANDEIS J. FAM. L. 29, 30 (1998) (citations omitted) ("The public dissemination of census data invites battles over how human beings will be known. One census battle that has been at the forefront of the public debate is the demand for a 'multiracial' category The stated aim of [which] is to obtain a more specific census count of the number of mixed-race persons in the [U.S.]. Yet, the recent governmental recommendation to count mixed-race persons, by authorizing for the first time the checking of more than one racial category, is viewed as unacceptable to Multiracial Category Movement (MCM) spokespersons, because of the absence of an actual multiracial category. Thus, an OMB decision to permit multiple box checking as a mechanism for counting mixed-race persons will not terminate the MCM census battle.").

66. See Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting (May 12, 1977) [hereinafter Directive No. 15], reprinted in Standards for the Classification of Federal Data on Race and Ethnicity, 59 Fed. Reg. 29831, 29834 app. (June 9, 1994) [hereinafter 1994 Standards] ("This Directive provides standard classifications for recordkeeping, collection, and presentation of data on race and ethnicity in Federal program administrative reporting and statistical activities.").

67. See Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 81 Fed. Reg. 67398, 67398 (Sept. 30, 2016); see also Revisions, *supra* note 64, at 58782; 1994 Standards, *supra* note 66, at 29832–34.

68. See Directive No. 15, *supra* note 66 ("The basic racial and ethnic categories . . . are defined as follows: a. *American Indian or Alaskan Native* b. *Asian or Pacific Islander* c. *Black* d. *Hispanic* [and] e. *White*") (emphasis in original).

69. See Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1710 (2003) ("[T]he census . . . helped define and popularize the categories by which Americans would assess and judge both the emerging nation and themselves.").

tracks, categorizes, and helps to perpetuate race as well.⁷⁰

Compounding the problem is that for far too long multiracial classification has been plagued with inaccuracy as our society is increasingly diverse and multiracial. As noted earlier, this could lead to underreporting of crimes against Latino and other mixed individuals. This inaccuracy dates at least as far back as the seventeenth and early-eighteenth centuries in the upper South.⁷¹ In an effort to discourage interracial mating and with the increasing need to link free mulattoes with enslaved mulattoes and Blacks, laws were designed to preserve “White privilege,” and thus the one-drop rule was born. The lower south, however, opted to treat mulattoes as a distinct third racial class, above Blacks.⁷² Perhaps in an attempt to address this historical inaccuracy, the 2000 Census now permits the identification of one or more races as an indication of racial identity.⁷³ Nonetheless, race is part of our government operations when it comes to tracking and classifying people of color or forcing them to choose categories it imposes that are anything but colorblind. Both the courts and Congress police racial identity and classification much in the same way law enforcement officers police communities and prisons based on these racial categories. In short, our laws, criminal justice system, and society are anything but colorblind.

Yet, when it comes to helping to eliminate the legacy of racism, there is another story entirely. Presumably, the collection of racial data is supposed to help us allocate resources and measure effectiveness of outreach programs, and can be used to determine if racial profiling or adverse effects are resulting from a given policy. Such racial classifications can help

70. See HEATHER M. DALMAGE, *TRIPPING ON THE COLOR LINE: BLACK–WHITE MULTIRACIAL FAMILIES IN A RACIALLY DIVIDED WORLD* 143 (2000) (“As the U.S. Census Bureau tracks individuals according [to] race, it creates race.”).

71. See Hickman, *supra* note 63, at 1186–87 (citations omitted) (“Even the Census Bureau admitted that the data collected under the [visual-perception] method was ‘of little value,’ and, with an almost audible sigh of relief, . . . stated that the data was especially misleading ‘as an indication of the extent to which the races have mingled.’”); see also Payson, *supra* note 63 (citations omitted) (“From 1790 to 1840, the census distinguished only White and Negro. In 1850, Negro was divided into Mulatto and Black. In 1860, Indian and Chinese categories were added, with Japanese added in 1870.”).

72. See Payson, *supra* note 63 (citations omitted).

73. Zack, *supra* note 63, at 35 (citations omitted) (“During the early 1990s, advocates for the federal recognition of mixed race identities succeeded to the extent that the ‘check only one box’ rule for race was rescinded in the Census 2000. This appeared to be the beginning of official recognition of mixed race in the United States.”).

determine whether special-language ballots are needed in a certain voting district, how much block-grant funding should be granted to minority schools, or whether agricultural subsidies or USDA loan and assistance programs disproportionately discriminate against Black farmers. Indeed, collecting data based on racial categories could be a powerful tool to identify and prove systematic racism wherever it occurs. It can also be used to determine whether there is impermissible racial profiling by police.

Nevertheless, our courts have often turned a blind eye to systematic racism or institutionalized discrimination in favor of an impossibly-heightened bar where one must find a discernible smoking gun of intentional discriminatory purpose in the mind of the policymaker for legal redress to be possible. This is known as the “intent doctrine” of *Washington v. Davis*.⁷⁴ There, the Court noted that, in addition to proving a discriminatory effect, a plaintiff must prove discriminatory motive on the state actor’s part to receive redress under the Constitution.⁷⁵ So, the lesson is: any policy actor wishing to hide their discriminatory purpose could simply refuse to memorialize the reasons for their decision in any writing that could be remotely interpreted as discriminatory. This lesson seems to have been learned all too well by prosecutors who use peremptory strikes to eliminate minority jurors for any reason besides race that can constitute cause without running afoul of the 14th Amendment’s equal protection clause or *Batson v. Kentucky*.⁷⁶ But even this presupposes that the racial pretext for juror dismissal is intentional racism when, in fact, the same result could obtain when there is unconscious racial bias.⁷⁷ In one study, for

74. 426 U.S. 229 (1976).

75. *See id.* at 239, 246 (“[While i]t is . . . true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the [U.S.] from invidiously discriminating between individuals or groups . . . [.] our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact . . . Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the[ir] constitutional rights . . .”) (emphasis in original).

76. 476 U.S. 79 (1986). In a 7–2 decision, the Court held that the state is not permitted to use its peremptory challenges to automatically exclude potential members of the jury because of their race. *See id.* at 81, 97–98.

77. *See* Jennifer K. Robbennolt & Matthew Taskin, *Judicial Notebook: Jury Selection, Peremptory Challenges and Discrimination*, MONITOR ON PSYCHOL., Jan. 2009, at 18, <http://www.apa.org/monitor/2009/01/jn.aspx> (citations omitted).

instance, juror race influenced attorney and lay participants' peremptory strikes even though few participants mentioned race as a factor, which is consistent with "the psychology of social judgment, social desirability and unconscious bias."⁷⁸ Consider also *Fisher v. Texas*.⁷⁹ There, the Court allowed the use of race, presumably because it had in actuality little effect.⁸⁰ Consequently, race is designed to be, metaphorically speaking, stuck between a rock and a hard place. That is, if race is too outcome determinative, it is illegal, yet if race is too minimal in effect, it can be seen as wholly unnecessary. The Goldilocks bed of constitutionality rests somewhere in between two extremes. But is it really two extremes?

Again, the minimal affect race had in Texas's admission plan was the principle justification that the Supreme Court used to uphold it. If it were otherwise, white privilege would be too far put upon. Perhaps in *Fisher*, Justice Kennedy, as the once affirmative action skeptic, realized that Chief Justice Roberts's semantically attractive, but practically naïve, argument that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" is rendered meaningless in the subtle reality of institutionalized racism.⁸¹ Instead, our society would do well to abide by Justice Sonia Sotomayor's maxim: "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."⁸² Sotomayor's maxim is an important lesson for our criminal justice system where, because institutional racism pervades, greater transparency and candid dialogue is needed to address its unfortunate effects.

This law's hostility to race exists because courts are often

78. Robbennolt & Taskin, *supra* note 77.

79. 136 S. Ct. 2198 (2016), *aff'g* 758 F.3d 633 (5th Cir. 2014), *on remand from* 133 S. Ct. 2411 (2013).

80. *Id.* at 2212 (citations omitted) ("[P]etitioner argues that considering race was not necessary because such consideration has had only a "minimal impact" in advancing the [University's] compelling interest' [But], the record does not support this assertion[; rather, it] show[s] that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class.").

81. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

82. *See Schuette v. Coal. to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (plurality opinion).

admonished to not engage in racial balancing, an impermissible social engineering they say.⁸³ Yet little do they commit to initiatives designed to reverse centuries of social engineering enforced by slavery, the convict-leasing program, Black codes, sharecropping, Jim Crow, voter intimidation, police killings, discriminatory testing, tracking, zoning, redlining, restrictive covenants, segregation plans, mass expulsions, and mass incarceration. These types of social engineering, which are enforced by law, are done just to avoid any accountability to racial justice. These are general societal ills according to conservative elites, but this stance simply denies the truth that these ills have been the direct result of an exclusionary monopoly of white power over the state in criminal penal codes and civil-rights matters. That is the America in which I live. It is my home, yet this country 'tis of thee, sweet land of supposed liberty will only pretend to accommodate me until I begin to make substantive demands that threaten the social and economic order of the racial status quo. Nowhere is this seen more clearly in recent times than with the rise of the so-called white-nationalist

83. See *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (“Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation.”); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (plurality opinion) (citing *Local 28 of Sheet Metal Workers’ Int’l Ass’n v. Equal Emp’t Opportunity Comm’n*, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring in part and dissenting in part) (plurality opinion)); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (plurality opinion). Moreover, the Court in *Grutter v. Bollinger* expressly stated that “outright racial balancing” is “patently unconstitutional.” 539 U.S. 306, 330 (2003) (citing *Freeman*, 503 U.S. at 494; *City of Richmond*, 488 U.S. at 507). Allowing racial balancing as a compelling interest would “effectively assur[e] that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ . . . will never be achieved.” *City of Richmond*, 488 U.S. at 495 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 319–20 (1986) (Stevens, J., dissenting) (plurality opinion) (“We should not lightly approve the government’s use of a race-based distinction. History teaches the obvious dangers of such classifications.”), *reh’g denied mem.*, 478 U.S. 1014). An interest “linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture.” *Metro Broad., Inc. v. Fed. Commc’ns Comm’n*, 497 U.S. 547, 614 (O’Connor, J., dissenting) (citing *City of Richmond*, 488 U.S. at 507) (“We cannot deem to be constitutionally adequate an interest that would support measures that amount to the core constitutional violation of ‘outright racial balancing.’”), *reh’g denied mem.*, 497 U.S. 1050, and *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995) (quoting *City of Richmond*, 488 U.S. at 493 (plurality opinion); *Hirabayashi v. United States*, 320 U.S. 81, 100–01 (1943)).

alt-right movement in the Trump era.⁸⁴ This reality, however, is not the true spirit of diversity. As William Chace once put it:

Diversity . . . is not polite accommodation. Instead, diversity is, in action, the sometimes painful awareness that other people, other races, other voices, other habits of mind, have as much integrity of being, as much claim upon the world, as you do. No one has an obligation greater than your own to change, or yield, or to assimilate into the mass Being strong in life is being strong amid differences while accepting the fact that your own self can be a considerable imposition upon everyone you meet. I urge you to consider your own oddity before you are troubled or offended by that of others. And I urge you, amid all the differences present to the eye and mind, to reach out and create the bonds that will sustain the commonwealth that will protect us all. We are meant to be here together.⁸⁵

10. THERE IS A PLACE & NEED FOR LEGAL REFORM

Today, little is being done to change the status quo. Body cameras are not worn, police engage in stop and frisk, prosecutors still fail to turn over exculpatory evidence, unreliable scientific evidence is used to convict, jury deliberations are subject to bias, while peremptory challenges leave them more racially unbalanced, the writ of habeas corpus has been crippled, and police violence continues.⁸⁶ Black people may be perceived as a threat, even if they are not armed, under a white officer's radical

84. See Jessica Roy, *Neo-Nazi 'Alt-Right' Crowd Cheers the President-Elect with 'Hail Trump,'* L.A. TIMES (Nov. 21, 2016, 4:58 PM), <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-neo-nazi-alt-right-crowd-cheers-the-1479774847-htm1story.html> (quoting Richard Spencer, President and Director of the National Policy Institute) (“A newly released video shows a room full of people doing the Hitler salute and yelling ‘Hail Trump!’ after listening to a speech about white nationalism that invokes Nazi terminology White supremacists have credited Trump’s win with sparking a new interest in their movement.”).

85. William M. Chace, *The Language of Action*, WESLEYAN, Fall 1989, at 36, 36.

86. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 16–18 (2010); Paul Butler, *The System Is Working the Way It Is Supposed to: Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1474 n.366 (2016) (citing *Stop-and-Frisk Data, Issues: Racial Justice*, N.Y.C.L. UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Mar. 18, 2017)); WBRZ, *supra* note 34; see also *Herrera v. Collins*, 506 U.S. 390, 416–17 (1993), *reh’g denied mem.*, 507 U.S. 1001; *Wainwright v. Sykes*, 433 U.S. 72, 87–88, 88 n.12 (1977) (quoting *Fay v. Noia*, 372 U.S. 391, 439 & n.44 (1963)) (discussing the limitations of federal habeas review), *reh’g denied mem.*, 434 U.S. 880), *overruling in part Fay*, 372 U.S. 391.

perception of reasonably foreseeable danger.⁸⁷ While the problems with the criminal justice system extend beyond the law to culture, bias, and training, this should not mean there are no legal reforms that can be addressed. For example, many scholars now recognize that, despite the broader societal issues, there is a place for legal redress.⁸⁸ To this end, the law can still remain a resourceful tool to curb racial profiling.⁸⁹ Accordingly, below are some concrete proposals that should be adopted by Congress to address the systematic institutional racism that dominates our criminal justice system. This Act is not intended as a panacea of all solutions, but it would go far to redress many of the systematic problems that arise in our criminal justice system.

11. A PROPOSED LEGISLATIVE SOLUTION

A PROPOSED ACT: THE STOP POLICE VIOLENCE & CRIMINAL JUSTICE REFORM ACT

BE IT ENACTED:

(1) It shall be the duty of any police or peace officer to use at all times and to ensure, to the extent practicable under the circumstances, a proper functioning body camera and, or, dash-

87. See, e.g., *Loch v. City of Litchfield*, 689 F.3d 961, 966 (8th Cir. 2012) (quoting *Billingsley v. City of Omaha*, 277 F.3d 990, 995 (8th Cir. 2002)) (“Even if a suspect is ultimately ‘found to be unarmed, a police officer can still employ deadly force if objectively reasonable.”); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (citing *United States v. Sanchez*, 914 F.2d 1355 (9th Cir. 1990), *cert denied*, 499 U.S. 978 (1991)) (“Even unarmed, [the defendant] was not harmless; a car can be a deadly weapon [R]ather than confronting the roadblock, he could have stopped his car and entered one of the neighboring houses, hoping to take hostages.”); *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991) (“Also irrelevant is the fact that [the suspect] was actually unarmed.”).

88. See Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 502 (2003) (citations omitted); *but see* Butler, *supra* note 86, at 1466–68, 1467 n.328, 1476 & n.381, 1477 & n.384 (citing Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 85, 85–87 (Kimberlé Crenshaw et al. eds., 1995) (citations omitted); Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1777 (1990); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161, 1225–31 (2015); Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES (Oct. 30, 2015), <http://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html>).

89. See *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 667 & n.783 (S.D.N.Y. 2013) (quoting Charles M. Blow, Opinion, *The Whole System Failed Trayvon Martin*, N.Y. TIMES: OPINION PAGES (July 15, 2013), <http://www.nytimes.com/2013/07/16/opinion/the-whole-system-failed.html>).

camera unit before engaging in police actions. No officer shall take any action to intentionally turn off, disable, deactivate, dislodge, dislocate, or otherwise render useless their camera unit, to the extent practicable under the circumstances. No officer shall take any action to intentionally remove, delete, obscure, block, or to otherwise render useless the probative value of video footage obtained, or that could have been obtained, from their body or dash camera unit, to the extent practicable under the circumstances. Whosoever commits an offense in violation of this provision or aids, abets, counsels, commands, induces, or procures its commission is punishable in their individual capacities without regard to qualified or absolute immunity, and shall be subject to a fine of not less than five thousand dollars (\$5,000 USD) nor more than one hundred thousand dollars (\$100,000 USD), or by imprisonment in jail not less than three (3) years nor more than ten (10) years, or by both such fine and imprisonment.

(2) If any police or peace officer violates the foregoing provision outlined in Section (1) that results in a homicide or significant disabling injury that imperils or impairs a major life activity (as defined by 42 U.S. Code § 12102 et seq.) to a person accosted, apprehended, harassed, or detained by said officer, a rebuttable presumption hereby arises under the Federal Rules of Evidence that the officer is culpable under the law. A police officer shall be entitled to rebut such presumption through proof beyond a reasonable doubt. Notwithstanding Section (1) above, if a person that is accosted, apprehended, harassed, or detained by said officer, expires or sustains a significant disabling injury that imperils or impairs a major life activity (as defined by 42 U.S. Code § 12102 et seq.) during or as a result of such police encounter or while in police custody, a rebuttable presumption hereby arises under the Federal Rules of Evidence that the officer is culpable under the law. Criminal and civil vicarious liability, both jointly and severally, shall attach to the officer and the police department she or he belongs to in the event that the officer involved is found guilty in a court of law of having violated this provision. Whosoever commits an offense in violation of this provision or aids, abets, counsels, commands, induces or procures its commission is punishable in their individual capacities without regard to qualified or absolute immunity, and shall be subject to a fine of not less than one hundred thousand dollars (\$100,000 USD) nor more than one hundred million dollars (\$100,000,000 USD), or by imprisonment in jail not less than ten years (10) years nor more than eighty (80) years, or by both such

fine and imprisonment. As expected, the officer shall not be entitled to any severance, pension, or any compensation for police service rendered on the force whatsoever from any third-party individual, partnership, corporation, association, or other legal entity, union, or group of individuals associated in fact, including police unions, insurance companies, donors, or “super” PAC entities organized under 501(c)(4) of the Internal Revenue Code et seq. Any such compensation remitted in violation hereunder, either directly or indirectly, shall be remanded forthwith to the victims or the estate of said victims of any unauthorized use of force prohibited under this Act. Furthermore, the police department shall be subject to the mandatory withholding of any federal financial assistance for no less than a period of five (5) years, unless waived or modified by the U.S. Attorney General for exigent circumstances. In order to ensure remedial correction of any violation of this provision during this period of federal financial assistance withholding, the U.S. Department of Justice shall supervise and retain court jurisdiction over the police department in order to implement and enforce any consent decree or resolution agreement entered into in connection herewith. Any consent decree or resolution that is subject to this provision shall hereby create or shall be construed to create an express or implied private right of action for the public to enforce in the event there is evidence of substantial non-compliance or under-enforcement of said decree or resolution. Notwithstanding the foregoing, or in the absence of any consent decree or resolution, any violation of this provision shall independently create, or shall be construed to create an express or implied private cause of action enforceable in Article III courts.

(3) It shall be the duty of a police or peace officer to de-escalate a confrontation or an encounter, whenever possible, to the extent practicable under the circumstances. It shall be unlawful for any police or peace officer to discharge his or her firearm or employ force designed to inflict serious bodily harm or death without first employing a department-issued taser to subdue a suspect, unless actual and imminent deadly force is threatened to the officer under the circumstances. The authorized use of taser force shall be reasonably calculated to preserve human life, for both the suspect and officer. In the absence of an actual and imminent threat of deadly force, and in the event an officer fails to employ the use of a taser for a reasonable period of time calculated to subdue the suspect before the use of deadly force, a rebuttable presumption hereby arises

under the Federal Rules of Evidence that the officer is culpable under the law, unless extenuating circumstances exist. A police officer shall be entitled to rebut such presumption through proof beyond a reasonable doubt. In the absence of deadly force or force that would inflict serious bodily harm that is either used or threatened against the officer under the circumstances, no officer shall employ use of excessive force, a taser or deadly weapon for mere failure to comply with an unlawful order, for a minor statutory traffic misdemeanor or in the absence of committing a crime, or a crime not punishable by no less than six-months imprisonment. Criminal and civil vicarious liability, both jointly and severally, shall attach to the officer and the police department that she or he belongs to in the event that the officer involved is found guilty in a court of law of having violated this provision. Whosoever commits an offense in violation of this provision or aids, abets, counsels, commands, induces, or procures its commission is punishable in their individual capacities without regard to qualified or absolute immunity, and shall be subject to a fine of not less than one hundred thousand dollars (\$100,000 USD) nor more than one hundred million dollars (\$100,000,000 USD), or by imprisonment in jail not less than ten (10) years nor more than eighty (80) years, or by both such fine and imprisonment. As expected, that officer shall not be entitled to any severance, pension, or any compensation whatsoever for service rendered on the police force from any third-party individual, partnership, corporation, association, or other legal entity, union, or group of individuals associated in fact including police unions, insurance companies, donors, or “super” PAC entities organized under 501(c)(4) of the Internal Revenue Code et seq. Any such compensation remitted in violation hereunder, either directly or indirectly, shall be remanded forthwith to the victims or the estate of said victims of any unauthorized use of force prohibited under this provision. Furthermore, the police department shall be subject to the mandatory withholding of any federal financial assistance for no less than a period of five (5) years, unless waived or modified by the U.S. Attorney General for exigent circumstances. In order to ensure remedial correction of any violation of this provision during this period of federal financial assistance withholding, the U.S. Department of Justice shall supervise and retain court jurisdiction over the police department in order to implement and enforce any consent decree or resolution agreement entered into in connection herewith. Any consent decree or resolution that is subject to this provision shall hereby create or shall be construed to create an express or

implied private right of action for the public to enforce in the event there is evidence of substantial non-compliance or under-enforcement of said decree or resolution. Notwithstanding the foregoing, or in the absence of any consent decree or resolution, any violation of this provision shall independently create, or shall be construed to create an express or implied private cause of action enforceable in Article III courts.

(4) If any police or peace officer is called to respond to an incident involving a confrontation or stand off with a person having a mental disease or defect, or other cognitive disability or impairment, and knows or has reason to know the person is suffering from such a condition, the responding officer must cease and desist all police action in forbearance, and in favor, of personnel or specialists trained in emergency mental-hygiene-crisis management to respond, engage, and if possible, apprehend said person, unless there is irrefutable evidence, that the individual possesses a deadly weapon and presents an actual and imminent danger to their self or to third persons. In such a case, the use of deadly force is authorized. In the absence of any evidence the person possesses a deadly weapon or poses a deadly threat to his or her self or to others, the officer shall only employ the use of a department-issued taser to subdue the person in accordance with the above and no deadly force shall be authorized or deemed lawful under the circumstances. Criminal and civil vicarious liability, both jointly and severally, shall attach to the officer and the police department that she or he belongs to in the event that the officer involved is found guilty in a court of law of having violated this provision. Whosoever commits an offense in violation of this provision or aids, abets, counsels, commands, induces, or procures its commission is punishable in their individual capacities without regard to qualified or absolute immunity, and shall be subject to a fine of not less than one hundred thousand dollars (\$100,000 USD) nor more than one hundred million dollars (\$100,000,000 USD), or by imprisonment in jail not less than ten (10) years nor more than eighty (80) years, or by both such fine and imprisonment. As expected, that officer shall not be entitled to any severance, pension, or any compensation whatsoever from any third-party individual, partnership, corporation, association, or other legal entity, union or group of individuals associated in fact including police unions, insurance companies, donors, or “super” PAC entities organized under 501(c)(4) of the Internal Revenue Code et seq. Any such compensation remitted in violation hereunder, either directly or

indirectly, shall be remanded forthwith to the victims or the estate of said victims of any unauthorized use of force prohibited under this Act. Furthermore, the police department shall be subject to the mandatory withholding of any federal financial assistance for no less than a period of five (5) years, unless waived or modified by the U.S. Attorney General for exigent circumstances. In order to ensure remedial correction of any violation of this provision during this period of federal financial assistance withholding, the U.S. Department of Justice shall supervise and retain court jurisdiction over the police department in order to implement and enforce any consent decree or resolution agreement entered into in connection herewith. Any consent decree or resolution that is subject to this provision shall hereby create or shall be construed to create an express or implied private right of action for the public to enforce in the event there is evidence of substantial non-compliance or under-enforcement of said decree or resolution. Notwithstanding the foregoing, or in the absence of any consent decree or resolution, any violation of this provision shall independently create, or shall be construed to create an express or implied private cause of action enforceable in Article III courts.

(5) Whosoever is in violation of any of the provisions set forth in this Act that acts as a conspiratorial enterprise shall be subject to liability under the Racketeer Influenced and Corrupt Organization Act (RICO) 18 U.S.C.A. § 1962(c) (West 1984). As such, any persons operating through the conspiracy, including, but not limited to, conducting lawless activities, illegal searches and seizures, fabricating documents, paying off witnesses, suborning perjury, preparing false governmental reports, fabricating evidence against various individuals, tampering with crime scenes, testimony or evidence, concealing or obstructing body camera and or dash-camera footage or conducting other unlawful activities shall be deemed to act pursuant to an unlawful RICO enterprise.

(6) The fact that a police or peace officer is of the same race, ethnicity, national origin (or other protected category as provided under 42 U.S.C. § 1981) as the victim of police misconduct including, but not limited to, the use of excessive force, shall have no probative value under the Federal Rules of Evidence and shall not be construed against any party alleging discrimination or retaliation on such basis or in favor of any party contesting such acts in any matter adjudicated before any court, tribunal or administrative proceeding unless the context otherwise clearly

requires.

(7) All civilian-complaint review boards that are charged with receiving or processing civilian complaints against a police or peace officer must comprise an equal and proportionate number of public members elected from the local community as the number of officers represented on said board. All officers subject to Section 9 of this Act shall be disqualified to serve on such boards. All complaints lodged against the police and any evidence the police department has in its possession in connection therewith must promptly be made available to the public before any internal departmental review commences or concludes its investigation. In the event of any violation hereof, the police department shall be subject to the mandatory withholding of any federal financial assistance for no less than a period of five (5) years, unless waived or modified by the U.S. Attorney General for exigent circumstances. In order to ensure remedial correction of any violation of this provision during this period of federal financial assistance withholding, the U.S. Department of Justice shall supervise and retain court jurisdiction over the police department in order to implement and enforce any consent decree or resolution agreement entered into in connection herewith. Any consent decree or resolution that is subject to this provision shall hereby create or shall be construed to create an express or implied private right of action for the public to enforce in the event there is evidence of substantial non-compliance or under-enforcement of said decree or resolution. Notwithstanding the foregoing, or in the absence of any consent decree or resolution, any violation of this provision shall independently create, or shall be construed to create an express or implied private cause of action enforceable in Article III courts.

(8) All video-camera footage, including those obtained from body cameras and police dash-board units, which document all police actions involving a homicide, racial profiling or an allegation of excessive use of force must be made available within five (5) business days of filing a police-incident report to be posted on a national online-video database for purposes of public inspection and for a period of no less than ten (10) years after which time it shall be archived and maintained at the U.S. Library of Congress. In the event of any violation hereof, the police department shall be subject to the mandatory withholding of any federal financial assistance for no less than a period of five (5) years, unless waived or modified by the U.S. Attorney General for exigent circumstances.

In order to ensure remedial correction of any violation of this provision during this period of federal financial assistance withholding, the U.S. Department of Justice shall supervise and retain court jurisdiction over the police department in order to implement and enforce any consent decree or resolution agreement entered into in connection herewith. Any consent decree or resolution that is subject to this provision shall hereby create or shall be construed to create an express or implied private right of action for the public to enforce in the event there is evidence of substantial non-compliance or under-enforcement of said decree or resolution. Notwithstanding the foregoing, or in the absence of any consent decree or resolution, any violation of this provision shall independently create, or shall be construed to create an express or implied private cause of action enforceable in Article III courts.

(9) No department shall allow any police or peace officer that has been adjudicated or disciplined for excessive use of force, racial profiling, discrimination or harassment, unjustified searches and seizures, unjustified homicide or who has been the subject of repeated complaints or investigation of the same to serve in active duty where use of a firearm is permitted or required. As a matter of public safety and accountability, officers found to be involved in any of the foregoing matters shall have their names and photos included in a public online registry for public inspection and to ensure transparency and compliance with this provision. In the event of any violation hereof, the police department shall be subject to the mandatory withholding of any federal financial assistance for no less than a period of five (5) years, unless waived or modified by the U.S. Attorney General for exigent circumstances. In order to ensure remedial correction of any violation of this provision during this period of federal financial assistance withholding, the U.S. Department of Justice shall supervise and retain court jurisdiction over the police department in order to implement and enforce any consent decree or resolution agreement entered into in connection herewith. Any consent decree or resolution that is subject to this provision shall hereby create or shall be construed to create an express or implied private right of action for the public to enforce in the event there is evidence of substantial non-compliance or under-enforcement of said decree or resolution. Notwithstanding the foregoing, or in the absence of any consent decree or resolution, any violation of this provision shall independently create, or shall be construed to create an express or implied private cause of

action enforceable in Article III courts.

(10) All police academies must ensure every graduating cadet and every police department must ensure every officer has received intensive instruction, training, or re-training on collaborative-community policing, appropriate use of force, conflict resolution, tactical training in the de-escalation of conflict, mental-health-crisis management, cultural competency, racial-sensitivity training, racial implicit bias as well as cognitive and policing methods to overcome it. As with all professionals, police and peace officers shall be subject to a credential-licensing and continuing-education-credit requirement which shall be every two years in order to renew their license to continue to serve as a police or peace officer. The provisions hereunder shall also apply to those serving as school-resource officers (SROs) in public district, magnet and charter schools and those private schools receiving federal financial assistance. At no time shall a juvenile offender or minor be subject to solitary confinement which shall constitute cruel and unusual punishment in prohibition of the Eighth Amendment to the United States Constitution. Due to the inherent unreliability and repeated occurrence of false confessions based upon implying false evidence exists, no officer shall use the tactics of presenting or implying false evidence exists to obtain confessions from minors during the interrogation process. In the event of any violation hereof, the police department shall be subject to the mandatory withholding of any federal financial assistance for no less than a period of five (5) years, unless waived or modified by the U.S. Attorney General for exigent circumstances. In order to ensure remedial correction of any violation of this provision during this period of federal financial assistance withholding, the U.S. Department of Justice shall supervise and retain court jurisdiction over the police department in order to implement and enforce any consent decree or resolution agreement entered into in connection herewith. Any consent decree or resolution that is subject to this provision shall hereby create or shall be construed to create an express or implied private right of action for the public to enforce in the event there is evidence of substantial non-compliance or under-enforcement of said decree or resolution. Notwithstanding the foregoing, or in the absence of any consent decree or resolution, any violation of this provision shall independently create, or shall be construed to create an express or implied private cause of action enforceable in Article III courts.

(11) It shall be a police or peace officer's continuing ethical duty in order to maintain their policing-license credential (as outlined in Sec 10 hereof) to report any police misconduct she or he witnesses, or knows or has reason to know occurred to the local civilian-review board and internal affairs promptly, accurately, and completely. Whosoever commits an offense in violation of this provision or aids, abets, counsels, commands, induces, or procures its commission is punishable in their individual capacities without regard to qualified or absolute immunity, and shall be subject to a fine of not less than one hundred thousand dollars (\$100,000 USD) nor more than one million dollars (\$1,000,000 USD), or by imprisonment in jail not less than five (5) years nor more than ten (10) years, or by both such fine and imprisonment.

(12) It shall be the attorney's continuing ethical duty, pursuant to the disciplinary rules of professional responsibility, whether acting as prosecutor or counsel for defendant, to ensure a jury or a grand jury empaneled is racially balanced and diverse to ensure a fair and impartial deliberation by one's peers. Peremptory strikes for whatever reason proffered that substantially imbalance, reduce or eliminate all racial diversity or representation from the jury when the defendant belongs to a racial-minority group shall be construed as per se evidence of impermissible racial discrimination in violation of the Fourteenth Amendment's Equal Protection Clause as well as the Procedural and Substantive Due Process rights secured by the Fifth and Fourteenth Amendments. Prosecutors shall ensure and pledge not to withhold exculpatory evidence from defense counsel. The Department of Justice shall conduct criminal prosecutions that are fair in their process and outcome to ensure that testimony about forensic evidence presented in court is scientifically valid in order to ensure, not only that guilty individuals are convicted, but that innocent individuals are not. In accordance with this mandate, the Department of Justice shall adopt forthwith the recommendations of the report of the Executive Office of the President President's Council of Advisors on Science and Technology entitled "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods" (incorporated herein by reference). To ensure that those incarcerated have a robust right to challenge through the writ of federal habeas corpus any gross constitutional violations in state convictions, the 1996 Antiterrorism and Effective Death Penalty Act is hereby amended to grant Article III courts authority to

hear challenges to state convictions which represent a manifest injustice under the Constitution. Whosoever commits an offense in violation of this provision or aids, abets, counsels, commands, induces, or procures its commission is punishable in their individual capacities without regard to qualified or absolute immunity, and shall be subject to a fine of not less than one hundred thousand dollars (\$100,000 USD) nor more than one million dollars (\$1,000,000 USD), or by imprisonment in jail not less than five (5) years nor more than ten (10) years, or by both such fine and imprisonment.

(13) All departments shall have the affirmative duty and obligation to reduce the heightened militarization of police actions as well as the police equipment and apparatus of military grade. This provision shall codify into law Executive Order 13688, issued on January 16, 2015, by President Barack Obama entitled “Federal Support for Local Law Enforcement Equipment Acquisition” (EO), to identify actions that can improve Federal support for the appropriate use, acquisition, and transfer of controlled equipment by State, local, and Tribal law-enforcement agencies (LEAs) to ensure the appropriate use of police equipment.

(14) The use of all stop-and-frisk tactics, racial profiling, or other methods of policing which lead to the disproportionate harassment or incarceration of people of color shall be affirmed as unlawful and terminated immediately forthwith. In the event of any failure by government or any political subdivision thereof to comply with this provision, the state and police department of said jurisdiction shall be subject to the mandatory withholding of any federal financial assistance for no less than a period of five (5) years, unless waived or modified by the U.S. Attorney General for exigent circumstances. In order to ensure remedial correction of any violation of this provision during this period of federal financial assistance withholding, the U.S. Department of Justice shall supervise and retain court jurisdiction over the police department in order to implement and enforce any consent decree or resolution agreement entered into in connection herewith. Any consent decree or resolution that is subject to this provision shall hereby create or shall be construed to create an express or implied private right of action for the public to enforce in the event there is evidence of substantial non-compliance or under-enforcement of said decree or resolution. Notwithstanding the foregoing, or in the absence of any consent decree or resolution, any violation of this provision shall independently create, or shall

be construed to create an express or implied private cause of action enforceable in Article III courts.

(15) The U.S. Department of Homeland Security (which houses approximately 62% of all federal prisoners) shall incorporate the policies recently promulgated by the U.S. Justice Department (incorporated herein by reference) that henceforth terminate the governmental relationship with all for-profit private prison-management companies. The federal government, all states, and the political subdivisions thereof shall take additional steps to effectively and promptly terminate its relationship with said companies in the provision of supervisory services (such as probation, pre-trial release) as well as in the production of goods or commodities produced by inmate labor.

(16) All courts, including juvenile-justice courts, as well as all correctional institutions shall adopt and implement strategies that effectively promote rehabilitation rather than retributive punishment among youth and inmates. Further, they shall ensure, through monitoring and continual assessment, that such strategies have made demonstrable progress on measurable annual benchmarks to ensure the same. Alternative sentencing and inmate counseling, training, and education shall be reasonably calculated to produce a marketable skills and a pathway to successful emotional, social and economic reintegration in mainstream society with adequate post-release support. In the event of noncompliance with any provision hereof, the correctional institution shall be subject to the mandatory withholding of any federal financial assistance for no less than a period of five (5) years, unless waived or modified by the U.S. Attorney General for exigent circumstances. In order to ensure remedial correction of any violation of this provision during this period of federal financial assistance withholding, the U.S. Department of Justice shall supervise and retain court jurisdiction over said institution in order to implement and enforce any consent decree or resolution agreement entered into in connection herewith. Any consent decree or resolution that is subject to this provision shall hereby create or shall be construed to create an express or implied private right of action for the public to enforce in the event there is evidence of substantial non-compliance or under-enforcement of said decree or resolution. Notwithstanding the foregoing, or in the absence of any consent decree or resolution, any violation of this provision shall independently create, or shall be construed to create an express or implied private cause of action enforceable in Article III courts.

(17) Except as otherwise provided herein, no police or peace officer or agent acting either directly or indirectly on behalf of any police department or law-enforcement agency shall make any statement to the public, release prejudicial information or engage in speculation or supposition about the character of any victim of police misconduct that will prejudice, or tends to create prejudice, in the minds of prospective jurors or take any steps that shall prejudicially poison any potential-juror pool before the case is adjudicated in a competent court of law. Whosoever commits an offense in violation of this provision or aids, abets, counsels, commands, induces, or procures its commission is punishable in their individual capacities without regard to qualified or absolute immunity, and shall be subject to a fine of not less than one hundred thousand dollars (\$100,000 USD) nor more than one million dollars (\$1,000,000 USD), or by imprisonment in jail not less than five (5) years nor more than ten (10) years, or by both such fine and imprisonment.

(18) All evidence mandated hereunder to be obtained, collected and, or, stored under this Act shall be timely presented in full to the Committee on The Elimination of Racial Discrimination as the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) Treaty to which the United States is a signatory.

(19) One-half (1/2) of any fine(s) imposed upon the federal government, a state or any political subdivision thereof as a result of a violation of this Act shall be directed to the local public defender offices (and Innocence projects programs where DNA evidence is the basis of the conviction) in the county that gave rise to the violation. Such funds shall be used exclusively in cases on behalf of the defendant, where the defendant alleges, in good faith and as supported by credible and competent evidence, that she or he is a victim of police or prosecutorial misconduct or any act prohibited under this Act. The receiving office shall give a true, accurate and complete accounting of the use of such funds for public inspection and shall be subject to periodic audit by the state comptroller or Attorney General's office, whichever the case may be.

(20) All police departments shall proactively and regularly engage in the collaborative planning of community-policing initiatives and coordinate joint efforts with local community leaders to ensure the most effective, safe and respectful policing

of all communities. The police departments shall ensure continual community outreach that is designed to build and restore well-founded trust and cooperation between the police and the local community. Further, the police department and local community shall ensure through monitoring and continual assessment that such cooperative strategies have made demonstrable progress on measurable annual benchmarks to ensure the same. It shall be unlawful under the rules and regulations promulgated by the Federal Communications Commission and in violation of the U.S. Constitution for states and police departments to utilize, whether overtly or covertly, social-media-surveillance software, cell-phone “stingray” devices that capture private cell-phone calls, other secretive-surveillance tools, tactics, or measures to target, track, surveil, profile, or harass persons lawfully exercising their First Amendment right to video record, advocate, petition, or protest against the improper or excessive use of force exercised by some police officers. It is understood such surveillance measures and tactics undermine the spirit and intent of community trust and police accountability that is the objective of this provision and Act. Whosoever commits an offense in violation of this provision or aids, abets, counsels, commands, induces or procures its commission is punishable in their individual capacities without regard to qualified or absolute immunity, and shall be subject to a fine of not less than one hundred thousand dollars (\$100,000 USD) nor more than one million dollars (\$1,000,000 USD), or by imprisonment in jail not less than five (5) years nor more than ten (10) years, or by both such fine and imprisonment. In the event of repeated and continued noncompliance with any provision hereof, the state and police department shall also be subject to the mandatory withholding of any federal financial assistance for no less than a period of five (5) years, unless waived or modified by the U.S. Attorney General for exigent circumstances. In order to ensure remedial correction of any violation of this provision during this period of federal financial assistance withholding, the U.S. Department of Justice shall supervise and retain court jurisdiction over said institution in order to implement and enforce any consent decree or resolution agreement entered into in connection herewith. Any consent decree or resolution that is subject to this provision shall hereby create or shall be construed to create an express or implied private right of action for the public to enforce in the event there is evidence of substantial noncompliance or under-enforcement of said decree or resolution. Notwithstanding the foregoing, or in

the absence of any consent decree or resolution, any violation of this provision shall independently create, or shall be construed to create an express or implied private cause of action enforceable in Article III courts.

CONCLUSION

These are constructive changes that can make a difference on policing and race in America. These changes are needed to curb the raw violence exacted against black and brown bodies that reinforce racism and racial oppression in America. The thoughtful author Ta-Nehisi Coates says that race is the “child of racism, not its father.”⁹⁰ Race is certainly the handiwork of those who have socially constructed its meaning to disempower, ridicule, humiliate, and kill. It has taken on a life that has had inescapable repercussions that must be confronted head on in our society. In many households across America, the conversation about police violence is not merely intellectual or a societal critique from the luxury of afar. It is a necessary and solemn conversation in families of color to protect sons and daughters, nieces and nephews from potential police encounters. Their warnings, like those issued by foreign governments as travel alerts to those visiting the U.S., have sadly become a necessary fact of life.⁹¹ It is the reality King had to confront with his daughter, that Baldwin had to confront with his father, and that Coates as a father is forced to confront with his son, writing to him:

[R]acism is a visceral experience, . . . it dislodges brains, blocks airways, rips muscles, extracts organs, cracks bones, breaks teeth. You must never look away from this. You must always remember that the sociology, the history, the economics, the graphs, the charts, the regressions all land, with great violence, upon the body.⁹²

90. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 7 (2015).

91. See Walters, *supra* note 1 (“Government travel advisories are common for war-torn, disease-ravaged nations, but a growing number of countries are warning their citizens about taking trips to the [U.S.] The concerns include mass shootings, police violence, anti-Muslim and anti-LGBT attitudes and the Zika virus.”).

92. Ta-Nehisi Coates, *Letter to My Son*, “Here Is What I Would Like for You to Know: In America, It Is Traditional to Destroy the Black Body—It Is Heritage,” *ATLANTIC: POL.* (July 4, 2015), <https://www.theatlantic.com/politics/archive/2015/07/tanehisi-coates-between-the-world-and-me/397619/> (“The destroyers are merely men enforcing the whims of our country, correctly interpreting its heritage and legacy. This legacy aspires to the shackling of black bodies. It is hard to face this. But

Likewise, America must never look away from this reality. If meaningful change is to occur, America must address its deeply entrenched, often racially oppressive, policing practices and culture with transparency, humility, and understanding. The time for change has come and it is long overdue.

all our phrasing—*race relations*, *racial chasm*, *racial justice*, *racial profiling*, *white privilege*, even *white supremacy*—serves to obscure that racism is a visceral experience”) (emphasis in original).