

THE MYTHS OF EFFECTIVE LAW ENFORCEMENT AND THE DEMAND TO DEFUND THE POLICE

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* Clinical Professor of Law, Northwestern Pritzker School of Law, Director of the Community Justice Clinic. For extraordinary research assistance, I am grateful to Elizabeth Ames, Olga Cosme Toledo, Barrett Cooney, Brigid Carmichael, Ishani Chokshi, and Terah Tollner. For inspiring this article and for all they do to get us all free, I am grateful to Chicago’s Black and brown abolitionist organizers, including those who organize with Black Lives Matter Chicago, BYP100, Organized Communities Against Deportation, the Chicago Torture Justice Center, Good Kids/Mad City, the Black Abolitionist Network, the Erase the Database Coalition, No Cop Academy, and the Let Us Breathe Collective. I am thankful to Vanessa del Valle, Jasson Perez and Kofi Ademola who provided valuable feedback and critique. Special thanks to Rhiannon Bronstein and the Stanford Journal of Civil Rights & Civil Liberties editorial staff for their excellent feedback and suggestions

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INTRODUCTION

The Federal Constitution has failed to curb racialized police violence. Over-policing and mass imprisonment have not created safe, healthy, peaceful communities—to the contrary, these phenomena leave individuals traumatized and communities destabilized. For these reasons, organizers and scholars have long proposed that the police must be abolished.¹ Most recently, the 2020 uprisings that demanded justice for George Floyd, who was murdered by a Minneapolis police officer, and Breonna Taylor, who was killed by the police in Louisville, popularized the demand to defund the police.² Critics dismiss the demand as

1. Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://perma.cc/ZHW7-W2AE>; Alexis Hoag, *Abolition As the Solution: Redress for Victims of Excessive Police Force*, 48 FORDHAM URB. L.J. 721, 743 (2021) (using the historic failures of the justice system to deliver justice for Black survivors of state violence and arguing that “[t]o meaningfully address harm and prevent it from reoccurring, we must look outside the carceral system. Instead, abolition can provide a pathway toward justice.” Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1786 (2020) (arguing that scholarship focused on reforming police ignores “fundamental questions about the proper role and scale of policing in a hierarchical landscape barren of social provision and about the centrality of an institution that relies on violence to the state and its political economy”); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 122 (2019) (analyzing the relationship between prison abolition and the Constitution and concluding that “abolitionists might imagine a new freedom constitutionalism to guide and govern the radically different society they are creating”).

2. Sam Levin, *What Does ‘Defund the Police’ Mean? The Rallying Cry Sweeping the US – Explained*, GUARDIAN (June 6, 2020, 1:00 PM), <https://perma.cc/NAH7-S8BQ>.

nothing but a snappy hashtag, and describe it as a recipe for anarchy and lawlessness.³ But defund critics ignore the demand's animating principles: investments in policing and the tools of the carceral state do not reduce violence; but investments in people and communities do.⁴ Fourth Amendment jurisprudence made the defund demand inevitable, because the courts have refused to engage with the realities of policing and have instead perpetuated myths about any positive correlations between policing and public safety. Put another way, the courts have failed to meaningfully curb police power to harm and kill and have mistakenly assumed that police create safe communities.

Fourth Amendment jurisprudence is animated by three policing-related myths: 1) the public good created by policing outweighs any harm; 2) policing can be “color blind”; and 3) police are better equipped to accurately evaluate threats than members of the public. Accepting these myths as true, courts frequently conclude that the Constitution allows morally unjustifiable police violence and humiliating state intrusion. Current Fourth Amendment jurisprudence is simply not grounded in the realities of policing because it entirely fails to consider the significant risk of harm police officers pose to community members and the minimal public safety benefits derived from the police.

This article argues that courts must truly reckon with the realities of policing—instead of basing analysis on false assumptions—and then impose a “least intrusive, least harmful requirement” under the Fourth Amendment. A broad application of the least intrusive, least harmful requirement will reduce police power and presence—and thus require police defunding. Resources should then be diverted from police departments that harm Black and brown communities with impunity into those same communities to create safety and wellness.

First, this article examines and deconstructs the myths about policing that are implicit (and sometimes explicit) in Fourth Amendment jurisprudence—relying on public health and public safety data to demonstrate the limited, reactive role police play in creating safe communities and the risk of both physical and emotional harm that police pose in Black and brown communities. Second, this article builds out the “least intrusive, least harmful” Fourth Amendment balancing test, tracing its origins to prior scholarship proposing a “least intrusive means” analysis for police searches, and describes how “least intrusive, least harmful” policing would result in police defunding. Third and finally, this article describes how money diverted from police departments should fund successful, non-carceral, community-based approaches to public safety.

I. THE SUPREME COURT'S FOURTH AMENDMENT JURISPRUDENCE IS BASED ON

3. See, e.g., Rebekah Warwick, Opinion, *Politicians Are Inviting Anarchy in Cities Such as Dallas If They Defund the Police*, FORT WORTH STAR-TELEGRAM (Sept. 15, 2020, 10:47 AM), <https://bit.ly/3joSiQs> (writing that “anarchy will result” from “having no police” and warning “[v]iolent riots in Portland, Minneapolis, and Kenosha are previews of what communities like ours can experience when police are vilified, defunded, and dismantled”).

4. SUJATHA BALIGA ET AL., WHAT'S NEXT? SAFER AND MORE JUST COMMUNITIES WITHOUT POLICING 2 (Mariame Kaba ed., 2020).

MYTHOLOGY ABOUT POLICE AND POLICING

The Supreme Court's view of police violence has remained unchanged for decades. A close reading of the three leading cases authorizing police violence reveals that the Court litters its decisions with incorrect assumptions about the nature of policing—and is largely silent about the racialized nature of policing. But where the Courts fail, hip hop music triumphs. As described by Professor Paul Butler, hip hop artists are “ground level” reporters on “how the criminal justice system really works.”⁵ Professor Butler asserts that hip hop is “created by the people who know the system the best” and is created by artists who instruct how we can be “safer and more free.”⁶ For these reasons, I have relied on hip hop artists to fill in the gaps about policing too often ignored by the courts. Each section of this paper begins with hip hop lyrics that either vividly describe a particular policing-related harm or describe a way we can all get free.⁷

A. *Terry v. Ohio*: Empowering police intrusion

*They see me rollin’
They hatin’
Patrollin’ and tryna catch me ridin’ dirty . . .
Thinkin’ they’ll catch me on the wrong, they keep tryin’
Keep steady denyin’ that it’s racial profiling
Houston, Texas you can check my tags
Pull me over try to check my slab
The glove compartment, gotta get my cash
‘Cause the crooked cops’ll try to come up fast
And bein’ the baller that I am, I talk to them
Givin’ a damn about them not feelin’ my attitude
When they realize I ain’t even ridin’ dirty*

5. See *Former Prosecutor Pens a Hip-Hop Theory of Justice*, NPR (Nov. 19, 2009, 12:00 PM), <https://perma.cc/ZEA7-JPAD> for more on the connections between hip hop, policing, and mass imprisonment.

6. *Id.*; see also Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 985 (2004); Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the “War on” Paradigm*, 15 J. GENDER, RACE & JUST. 47, 60 (2012); Donald F. Tibbs, *Hip Hop and the New Jim Crow: Rap Music’s Insight on Mass Incarceration*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 209, 213(2015).

7. See DEAD PREZ, *Police State, on LET’S GET FREE* (Loud Records 2000) (“I want to be free to live, able to have what I need to live/Bring the power back to the street where the people live”); see also PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009). In Professor Butler’s book, named in homage to hip hop, he makes recommendations about changes needed in the criminal legal system based on his experience as an Ivy League-educated federal prosecutor and also a defendant in a criminal case. Among other changes, Professor Butler argues for alternatives to prison and increased investments in Black and brown communities.

*Bet you'll be leavin' with an even madder mood.*⁸

In “Ridin’,” Chamillionaire raps about the well-documented phenomenon of driving while Black, risking an encounter with a law enforcement officer who engages in racial profiling and stops Black people for pretextual reasons.⁹ Decades of data make clear that “Driving while Black” is an objectively measurable phenomenon.¹⁰ In Chamillionaire’s telling, police leave encounters with Black motorists who are not riding dirty (those who are in compliance with all applicable laws) “even madder,” presumably because the officer’s attempt to racially profile failed to result in an arrest.

The Supreme Court’s landmark decision in *Terry v. Ohio* lays the foundation for police intrusion into the lives of people who have violated no law—but whom officers merely perceive as a threat.¹¹ And the Court’s decision in *Terry v. Ohio* fueled the premise of Chamillionaire’s “Ridin’” lyrics. In this case, the U.S. Supreme Court first articulated the standard permitting officers to stop and search any person about whom the officer forms reasonable suspicion.¹² This practice has become commonly known as “stop and frisk.”

The events that led to the creation of the “*Terry* stop” began on Halloween 1963 in Cleveland, Ohio.¹³ The arrest report describes that the officer observed “two colored men” standing on a corner walking back and forth in front of a business. The officer reported that each man took three “trips” by this business. The officer then observed the “colored” men speaking to a white man. After observing the men’s second conversation with a white man, the officer approached, identified himself as a police officer and searched each man. The officer recovered guns and bullets in the pockets of both Black men. The white man was reportedly unarmed.¹⁴ When later asked to justify the stop and search of these men, the officer testified that he “didn’t like their actions” and that he suspected them of “casing a job, a stick-up.”¹⁵

After one of the men, John Terry, was convicted of carrying a concealed weapon,¹⁶ he appealed his conviction, arguing that his arrest was unlawful and that the court should have therefore suppressed any evidence found during the

8. CHAMILLIONAIRE, *Ridin’*, on *THE SOUND OF REVENGE* (Universal 2005).

9. See, e.g., David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997).

10. Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://perma.cc/7YWR-JHS6>.

11. See *Terry v. Ohio*, 392 U.S. 1 (1968).

12. *Id.* at 10.

13. Martin J. McFadden, *63/10/31 Police Report for Arrest of John W. Terry, Richard D. Chilton and Carl*

Katz, CUYAHOGA CNTY. CT. C.P. (1963), <https://perma.cc/WH3Q-GR63>.

14. *Id.*

15. *State v. Terry*, 214 N.E.2d 114, 116 (Ohio Ct. App. 1966).

16. *Id.*

arrest.¹⁷ The Court of Appeals of Ohio affirmed Mr. Terry's conviction, characterizing law enforcement's stop of a suspicious person as "a minor interference with personal liberty" that would "touch the right of privacy only to serve it well."¹⁸ The court further found this "minor interference" consistent with the purpose of policing, writing that "[t]he business of the police is not only to solve crimes after they occur, but to prevent them from taking place whenever it is legally possible."¹⁹ The court supported this finding by affirming that "[i]n the instant case, this officer of thirty-nine years experience [sic] reasonably suspected that the defendant was 'casing' a store with robbery in mind. It was also logical for this experienced detective to presume that the defendant was armed and dangerous."²⁰

Mr. Terry appealed his case to the U.S. Supreme Court, which affirmed the Ohio Court.²¹ Writing for the Court, Justice Warren characterized "stop and frisk" policing as a "sensitive area of police activity."²² The Court also noted that stop and frisk policing exacerbates "police-community tensions in the crowded centers of our Nation's cities."²³ But the Court found that in service of "effective crime prevention and detection" a police officer may seize a person for the purpose of investigating "possibly criminal behavior" even in the absence of probable cause for an arrest.²⁴ Based on the facts here, the Court noted it would have "been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further."²⁵

Terry was not just about an officer's power to seize a person without probable cause—it was also about the power of the police to search a seized person. In this inquiry, the Court prioritized police officers' need to protect themselves against "American criminals" who (according to the Court) have "a long tradition of armed violence" targeting law enforcement.²⁶ The Court recognized that stop and frisk is a "serious intrusion"²⁷ and notes that Black communities largely and disproportionately bear the burden of this intrusion.²⁸ Nevertheless, the Court found that risk of harm to police officers, and the benefit of allowing them to conduct a brief protective pat down outweighed any racially disparate intrusion into individuals' Fourth Amendment rights.²⁹

17. *Id.*

18. *Id.* at 118 (citation and internal quotation marks omitted).

19. *Id.*

20. *Id.* at 120.

21. *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

22. *Id.* at 9-10.

23. *Id.* at 12.

24. *Id.* at 22.

25. *Id.* at 23.

26. *See id.*

27. *Id.* at 17.

28. *See id.* at 14.

29. *See id.* at 26.

The Court established a standard that on the one hand defers significantly to officer discretion and experience—but on the other recognizes that officers will most certainly make mistakes. The Court noted that, prior to initiating a search, an officer “need not be absolutely certain that the individual is armed” and that instead, an officer merely needs to have a “reasonably prudent” belief that the person under arrest poses a threat.³⁰

In a striking dissent, Justice Douglas wrote of the “powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand.”³¹ He noted that this pressure “has probably never been greater than it is today” but nonetheless found that stop and frisk would only be permissible with a constitutional amendment because the Fourth Amendment bars such government intrusion.³² Perhaps because of this pressure, the majority created a standard that allowed significant police intrusion—especially on Black and brown communities—based simply on an officer’s “hunch.”

1. The *Terry* court’s policing myths: Suggesting that race doesn’t matter, lionizing police “experience,” and overstating the risk of harm to police officers

The Court considered *Terry v. Ohio* against the backdrop of social unrest and uprisings in the Black community—often motivated by police violence. As described by Professor Renée McDonald Hutchins, “Race riots during the middle and latter part of the decade set whites further on edge, as the imagery of armed Black militants and cities in flames enhanced the perception that the nation’s streets were dangerous and in need of greater policing.”³³ Unlike the other two cases discussed below, the *Terry* Court explicitly addressed the issue of policing and race. The decision makes references to policing in cities (which is likely an

30. *Id.* at 27. Justice Harlan concurred and found that an officer’s right to protect himself is automatically triggered once an officer stops an individual for the purpose of preventing or investigating a crime. *Id.* at 33 (Harlan, J., concurring)..

31. *Id.* at 39. (Douglas, J., dissenting).

32. *Id.* . Justice Douglas added that he would require officers to meet the probable cause requirement prior to making any seizure. *Id.* at 35 (Douglas, J., dissenting). Justice Douglas reasoned that “to give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.” *Id.* at 38-39 (Douglas, J., dissenting).

33. Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal to Limit Terry Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 883, 887 (2013); *see also id.* at 891 (“In the midsummer of 1968, a gun battle in Cleveland between the police and members of the Black Power Movement appeared to mark a new chapter in the nation’s history of racial violence, namely a potential shift from the then-prevailing property-oriented mode of mass violence. The Cleveland riots stemmed from an initial instance of person-on-person racial violence—white police officers and black militants—and ended with more total white casualties than black. Within the first hour of shooting alone, seven were left dead and fifteen had been wounded, of these at least fifteen were white.”).

opaque reference to policing Black communities). The Court references police tensions “in the crowded centers of our Nation’s cities”³⁴ and therefore implicitly recognizes that allowing police officers to engage in what have become known as *Terry* stops would create racially disparate outcomes.³⁵ In footnote 11, the Court describes the findings of the President’s Commission on Law Enforcement and Administration of Justice, which described how “field interrogations” create “friction” between the police and Black and brown communities especially when, during stop and frisk, police attempt to “maintain the power image of the beat officer” and use tactics that can humiliate Black and brown youth.³⁶

Yet, despite the historical context and its acknowledgements of the inherently racially charged nature of policing, the *Terry* Court failed to engage with the complicated, specific racialized issues present during Mr. Terry’s arrest and pat down.³⁷ The officer who stopped, frisked, and arrested Mr. Terry developed his reasonable suspicion in part because two Black men interacted with a white man.³⁸ The police officer himself acknowledged this when he testified that the two Black men “didn’t look right” to him and that he stopped the men because he “didn’t like them” and was just “attracted” to them.³⁹ The officer also testified that he proceeded to search the men because he “felt as though they were going to pull a stick-up and they may have a gun.”⁴⁰ The officer’s race-based decision-making extended to the white man involved in the incident—the officer went so far as to stop, frisk, and arrest him even for merely speaking with the two Black men the officer suspected of “casing” a business establishment.⁴¹

34. *Terry*, 392 U.S. at 12.

35. For a discussion of how *Terry* stops have shaped racialized policing practices, see Sharad Goel et al., *Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-and-Frisk Policy*, 10 ANNALS OF APPLIED STAT. 365, 387 (2016) (concluding Black and brown people were “subject to stops conducted on the basis of less suspicion than similarly situated” white people based on a statistical study of stop-and-frisk searches in New York City); Floyd v. City of New York, 959 F. Supp. 2d 540, 574 (S.D.N.Y. 2013) (finding New York City liable for Fourth and Fourteenth Amendment violations in relation to New York Police Department stop-and-frisk policies, stating that “[i]n practice, officers are directed, sometimes expressly, to target certain racially defined groups for stops”).

36. *Terry*, 392 U.S. at 15 n.11 (internal quotation marks omitted).

37. Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio’s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1533 (2017) (stating that the *Terry* decision resulted in a “legal regime” that “provided police officers with a constitutional mechanism” to engage in the “wholesale harassment” of Black people).

38. See McFadden, *supra* note 13 (describing how the officer who arrested Terry developed reasonable suspicion in part because of the two Black men engaged with a white man on a public street).

39. Brief for the NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae, *Sibron v. New York*, 392 U.S. 40 (1968) (Nos. 63, 74, 67), 1967 WL 113672, at *44-45 [hereinafter LDF Brief]. See Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 966 (1999), for an analysis of how race and racial biases played out during the criminal trial at issue in *Terry v. Ohio*.

40. *State v. Terry*, 214 N.E.2d 114, 120 (Ohio Ct. App. 1966) (internal quotation marks omitted).

41. *Id.* (internal quotations omitted).

The amicus brief filed by the NAACP-LDF explains the danger of the Court's race-blind approach:

"The policeman on patrol in the inner city has little understanding of the way of life of the people he observes, and he believes (with considerable justification) that they are hostile to him. The result is inevitable. The patrolman . . . probably in most communities, has come to identify the black man with danger"⁴²

The NAACP LDF cautioned the Court that affirming stop and frisk would encourage a particular kind of racialized state violence. The *Terry* Court allowed police officers to exercise powerful control over people about whom officers form reasonable suspicion. These intrusive, humiliating pat downs are themselves, alone, an act of violence and harm. The amicus brief filed by the NAACP-LDF in *Terry* describes this harm as "an act of dominion by the Fuzz, a thinly veiled threat of force."⁴³

The Court here simply ignores the officer's clearly raced-based decision-making, and instead provides a reframing: the officer was not motivated by race, but instead was acting on his years of law enforcement experience and his training.⁴⁴ Without any supportive evidence, the *Terry* Court assumes that police officers receive training, guidance, and experience sufficient to allow them to exercise discretion in an objective manner.⁴⁵ The Court makes much of the fact that the officer who stopped Mr. Terry spent thirty years on the force and, as a result, could be relied upon to exercise the tremendous discretion awarded to him fairly and in a manner that would protect communities from harm.⁴⁶ Yet, as described further below, no evidence suggests that police training and experience better equip officers to make such judgements. To the contrary, there is significant evidence demonstrating that officers may be worse than members of the general public when it comes to evaluating threats.⁴⁷ In justifying its decision based on the "long history" of American criminals who seek to harm police officers, the *Terry* Court also furthered the widely debunked myth that policing is

42. LDF Brief, *supra* note 39, at *44-45 (internal quotations omitted).

43. *Id.* at *35.

44. See Thompson, *supra* note 39, at 971 ("The 'police officer as expert' narrative allowed the Court in *Terry* to present a coherent, raceless narrative about why McFadden acted as he did.").

45. *Terry v. Ohio*, 392 U.S. 1, 23 (1968) ("It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.").

46. *Id.*

47. Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 160-61 (2016) ("There is reason to believe that 'shooter bias' might be even more pronounced among police officers. A body of research suggests that people are particularly prone to the kind of error 'shooter bias' reflects when they are in mortality-salient circumstances—that is, circumstances in which they are made to think about their death. Because it is reasonable to frame everyday policing as a mortality-salient context, the higher rates of identification error associated with mortality-salient scenarios may be endemic to police officer life.").

an inherently dangerous profession.⁴⁸

Most fundamentally, the *Terry* Court's analysis hinges on the idea that policing is an effective means to reduce crime.⁴⁹ Americans for Effective Law Enforcement (AELE), a group "generally concerned with the problems of crime and the effective administration of justice," submitted an amicus brief urging the Court to approve stop and frisk. Their brief conceded that, because the "criminal process" more often operates against Black people than people of other races, police will—either by "design or mistake" target Black communities with stop and frisk tactics.⁵⁰ But the brief also argued passionately that Black people would benefit most from stop and frisk policing. According to AELE, an alternative to permitting stop and frisk policing would be to allow police to withdraw from Black communities altogether. The group suggested this would be tolerable, if only "criminals" lived in Black communities.⁵¹ But because "innocent, law-abiding American citizens" comprise the "overwhelming majority" of Black communities, the Court must allow stop and frisk to protect innocents from "criminal marauders." According to AELE, Black people "suffered enough—discrimination, poverty, lack of education, appalling conditions of housing, and community alienation. Must they also be deprived of their right to the protection of the law as well?"⁵² Neither the AELE nor the Court questioned whether the legitimate government interest of creating peaceful communities could be better accomplished through means other than stop and frisk policing. The AELE brief cites data suggesting that violent crime is more likely to occur in Black communities—but also acknowledges that Black communities contend with the destabilizing consequences of white supremacy and the continual aftershocks of slavery and Jim Crow. The brief fails to make the connections between under-resourced communities and violence⁵³—and thus fails to make recommendations about re-

48. See *Terry v. Ohio* 392 U.S. 1, 11 (1968). The Supreme Court has also regularly overstated the danger police officers face in the line of duty. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., NEWS RELEASE: NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2019 3 (2019) (showing fatal work injury rates for several occupations that are more dangerous than police officer, including farmer, truck driver, and grounds maintenance worker); see also Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 640 (2019) (finding that a conservative estimate of the likelihood of a felonious killing during a routine traffic stop is as low as 1 in every 6.5 million stops). The danger of policing has also decreased dramatically over the past 45 years. See Michael D. White et al., *Assessing Dangerousness in Policing: An Analysis of Officer Deaths in the United States, 1970–2016*, 18 CRIMINOLOGY & PUB. POL'Y 11, 15 (2019) (using data from 1970 to 2016 to find the number of line-of-duty deaths declined by 75%); Wesley Bruer, *Police Fatality Report: Car Accidents Among Top Cause of Death*, CNN (July 29, 2016, 8:54 PM), <https://perma.cc/5PLX-RJAJ>.

49. See *Terry*, 392 U.S. at 22 (explaining the government's interest in allowing officers to conduct some stops is "that of effective crime prevention and detection").

50. Brief for Americans for Effective Law Enforcement as Amicus Curiae, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 93602, at *16.

51. *Id.* at *28.

52. *Id.* at *28-29.

53. Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black*

sourcing communities, instead of the police, in an effort to create safer communities. The AELE brief also fails to account for the ways in which violent policing contributes to intercommunal violence.⁵⁴

The *Terry* Court does not cite the AELE brief, but adopts its primary conclusion—that effective law enforcement and safe communities require a police force empowered to engaged in acts of violence and humiliation, more often than not targeted at Black and brown communities.⁵⁵

The policing myths perpetuated by the *Terry* Court in the stop and frisk context are recycled and adopted throughout the Court’s Fourth Amendment jurisprudence—including in the two landmark cases focused on police use of force discussed in the next two sections.

B. *Tennessee v. Garner*: Normalizing police violence & threat perception

*I already know the deal, but what the fuck do I tell my son?
I want him livin’ right, livin’ good, respect the rules
He’s five years old and he still thinkin’ cops is cool
How do I break the news that when he gets some size
He’ll be perceived as a threat or see the fear in they eyes
It’s in they job description to terminate the threat
So, 41 shots to the body is what he can expect
The precedent is set, don’t matter if he follow the law⁵⁶*

*Enemy on the borderline
Who’ll be the next to fire*

Social Isolation on the Rates of Black Urban Violence, 74 SOC. FORCES 1325, 1325 (1996) (finding a correlation between segregation in Black communities and rates of violence); Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, 93 AM. J. SOCIO. 348, 348 (1987) (“Persistently high rates of [B]lack crime appear to stem from the structural linkages among unemployment, economic deprivation, and family disruption in urban [B]lack communities.”); Ronald C. Kramer, *Poverty, Inequality, and Youth Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 123, 128 (2000) (preventing crime requires redressing the “underlying structural conditions” in communities that struggle with violence, including inequality, poverty and social exclusion).

54. Marcus Burrell et al., *Depicting “The System”: How Structural Racism and Disenfranchisement in the United States Can Cause Dynamics in Community Violence Among Males in Urban Black Communities*, 272 SOC. SCI. & MED. 1, 14 (2021) (excessive force in policing contributes to community violence); Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. REV. 857, 859 (2016) (concluding that after high profile instances of police violence against Black people, Black community members are less likely to rely on the criminal legal system).

55. *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (“Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”).

56. TALIB KWELI, *The Proud, on QUALITY* (Rawkus 2002).

*Forty-one shots by Diallo's side?
 You said he reached sir
 But he didn't have no piece sir
 But now he rest in peace sir
 In the belly of the beast sir
 You guys are vampires
 In the middle of the night
 Suckin' on human blood
 Is that your appetite?⁵⁷*

Activist, entrepreneur, and hip hop artist Talib Kweli's 2002 song "The Proud" describes the "talk,"⁵⁸ the conversation that Black (and occasionally brown) parents have with their children about the violence and serious risk of harm that is inherent in police interactions. The lyrics discuss the ways in which police perceive Black people as inherent threats—regardless of how Black people conduct themselves. Kweli's lyrics are also a meditation on the violence of policing—officers will respond with violence based on their own fear because their mandate is to "terminate the threat." As Kweli references in "The Proud," in the absence of such checks and balances, police officers will engage in horrific acts of violence. For an illustrative example, Kweli references the 41 shots New York City police officers used to shoot and kill Amadou Diallo in 1999.⁵⁹ While Mr. Diallo reached for his wallet, presumably to show the officers his identification, officers assumed he was reaching for a gun and shot him 41 times.⁶⁰ A NYPD internal review found that the officers complied with relevant policies.⁶¹ The officers were indicted on second degree murder charges, but were ultimately acquitted.⁶² Haitian-American hip hop artist Wyclef Jean immortalized Diallo in

57. WYCLEF JEAN, *Diallo*, on *THE ECLEPTIC: 2 SIDES II A BOOK* (Columbia 2000).

58. See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them."); German Lopez, *Black Parents Describe "The Talk" They Give to Their Children About Police*, VOX (Aug. 8, 2016, 11:40 AM), <https://perma.cc/G7U8-FLNV>; Pria Mahadevan et al., *'The Talk' Is A Rite Of Passage In Black Families. Even When the Parent is a Police Officer*, GA. PUB. BROAD. (June 26, 2020, 6:41 PM), <https://perma.cc/LS4A-XCEH>.

59. See Christian Red, *Years Before Black Lives Matter, 41 Shots Killed Him*, N.Y. TIMES (July 19, 2019), <https://perma.cc/4JU8-5H92>.

60. *Id.*

61. Robert D. McFadden, *Police Dept. Rejects Punishment for Officers in Diallo Shooting*, N.Y. TIMES (Apr. 27, 2001), <https://perma.cc/MG5R-V2WZ>. One of the officers who shot and killed Mr. Diallo was promoted from officer to sergeant in 2015. Tina Moore & Bob Fredericks, *Cop Involved in Amadou Diallo Shooting is Promoted*, N.Y. POST (Dec. 16, 2015, 3:50 PM), <https://perma.cc/QA9B-6APM>.

62. Tom Hays, *N.Y. Cops Acquitted in Diallo Case*, ASSOCIATED PRESS (Feb. 25, 2000), <https://perma.cc/D3QS-SHZC>. Acting Attorney General Eric Holder declined to file federal charges against the officers. *Statement by Acting Attorney General Eric H. Holder Jr. Regarding the Closing of the Amadou Diallo Case*, U.S. DEP'T OF JUST., <https://perma.cc/6EHX->

his tribute to the slain man, questioning whether the police officers had an “appetite” for blood.” But before there was Amadou Diallo, there was Edward Garner.

In 1974, Memphis police shot and killed Edward Garner, a Black fifteen-year-old who his attorneys described as “slender of build” and an “obvious juvenile.”⁶³ The night Edward was killed, police responded to a call regarding a burglary in progress. According to the officers, after they arrived at the scene, they found the complaining witness pointing towards a house and informing the officer that “[t]hey are breaking inside.”⁶⁴ While the officers went to investigate, they encountered Edward, who was “crouched” next to a fence in the backyard of a home.⁶⁵ An officer testified that he was “reasonably sure” Edward was unarmed.⁶⁶ Nonetheless, when Edward attempted to flee from the officers and jump over the fence, the officer shot Edward. He did not die at the scene—when the paramedics arrived, Edward was “holding his head and just thrashing about on the ground” and “hollering . . . from the pain.”⁶⁷ Edward later died while in surgery. Police recovered ten dollars and a coin purse from Edward—which were reported missing from the home.⁶⁸

Edward’s father sued individual officers and the city of Memphis under the Fourth, Eighth and Fourteenth Amendments. Garner’s legal team argued that his killing at the hands of Memphis police was not an anomaly. Of the people suspected of property crimes killed by the Memphis police, 84% were Black—but only 70% of those arrested for property crimes were Black.⁶⁹ Controlling for differential involvement in property crimes, Memphis police were twice as likely to shoot at Black people, four times more likely to wound Black people, and 40% more likely to kill Black people.⁷⁰

At the time, Tennessee state law provided that an officer “may use all the necessary means to effect the arrest” of a fleeing felon.⁷¹ Relying on this provision, the trial court dismissed the case, finding that the officers’ good faith reliance on state law defeated any constitutional claims.⁷² The Sixth Circuit Court of Appeals affirmed, interpreting state law to authorize the deadly use of force against “fleeing felons suspected of property crimes not endangering human life, as well as life-endangering crimes, and to felons who pose no threat of bodily

QYEF (last visited Aug. 26, 2021).

63. Brief for Respondent at 1, *Tennessee v. Garner*, 471 U.S. 1 (1985) (Nos. 83-1035, 83-1070), 1984 WL 566020, at *1 [hereinafter *Garner Brief*].

64. *Id.* at *3 (internal quotation marks omitted).

65. *Id.* at *4.

66. *Id.* at *5 (internal quotations omitted).

67. *Id.* at *9 (internal quotations omitted).

68. *Id.* at *9.

69. *Id.* at *98.

70. *Id.*

71. *Garner v. Memphis Police Dep’t*, 600 F.2d 52, 54 (6th Cir. 1979) (internal quotation marks omitted).

72. *Id.*

harm to others, if not apprehended immediately, as well as felons who may be dangerous to others if left at large.”⁷³ The appellate court remanded questions about the state law’s constitutionality and other issues related to the city of Memphis’s policies and practices to the district court.⁷⁴

After a remand, where the district court found that Tennessee state law regarding officer use of force was constitutional and the officer who acted in conformity with the law did so lawfully, the Sixth Circuit took up the case again.⁷⁵ Grounding its conclusion in an analysis of common law, and noting that many people suspected of felonies present no danger to the public, the appellate court held that “[i]t is inconsistent with the rationale of the common law to permit the killing of a fleeing suspect who has not committed a life endangering or other capital offense and who we cannot say is likely to become a danger to the community if he eludes immediate capture.”⁷⁶ The Sixth Circuit also articulated the standard for deadly force used by police departments today that empowers officers to use lethal force against suspects when officers “have probable cause to believe [the suspect] is armed or that he will endanger the physical safety of others if not captured.”⁷⁷

The Supreme Court affirmed the Sixth Circuit and held that police officers may only use lethal force when the “officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”⁷⁸ The Court reaffirmed the Fourth Amendment balancing test pitting “the nature and quality of the intrusion” against the “governmental interests alleged to justify the intrusion.”⁷⁹ The Court also affirmed that the reasonableness of a “seizure” (or use of force) will be evaluated based on “how it is carried out.”⁸⁰

The Court framed the lethal force balancing test in stark terms. It noted that “the use of deadly force . . . frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.”⁸¹ But, according to the Court, these interests must be measured against the “governmental interests in effective law enforcement.”⁸² The Court never defines “effective law enforcement.” But it did reject Tennessee’s argument that using lethal force against people suspected of committing property offenses “is a condition precedent to the state’s entire system of law enforcement.”⁸³

73. *Id.*

74. *Id.* at 54-55.

75. *Garner v. Memphis Police Dep’t*, 710 F.2d 240, 248 (6th Cir. 1983), *aff’d and remanded sub nom. Tennessee v. Garner*, 471 U.S. 1 (1985).

76. *Id.* at 245.

77. *Id.* at 246.

78. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

79. *Id.* at 8 (internal quotation marks omitted).

80. *Id.*

81. *Id.* at 9.

82. *Id.*

83. *Id.* at 9-10.

Whatever effective law enforcement might mean, the Court found that using lethal force against non-violent suspects is not a “sufficiently productive means” of achieving that goal.⁸⁴ *Tennessee v. Garner* limited police power to kill non-violent people, while affirming the right of officers to use lethal force when the officer has “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”⁸⁵

The officer who shot and killed Edward himself testified that he did not believe that Edward was armed and that he shot him only to prevent his escape.⁸⁶ The Court’s decision here hinged almost entirely on the officer’s perception that Edward did not present a threat to him or anyone else.⁸⁷ The *Garner* Court made clear that the officer violated the Constitution because—and only because—he did not perceive Edward as threatening. But had the officer testified that he perceived Edward as threatening—even if Edward ultimately was in fact unarmed and/or non-violent—the Court would have endorsed the officer’s actions.⁸⁸

1. The *Tennessee v. Garner* myths: Police can evaluate threats without bias and violence will quell violence

Despite being a win for Edward’s family, the legacy of *Tennessee v. Garner* permits police to justify lethal force based on often ill-founded, racially charged perceptions.⁸⁹ The *Garner* Court perpetuated the myth of color-blind policing by failing to reference race at all. Each court that considered this case had before it powerful evidence of the racial disparities in the Memphis Police Department’s use of lethal force.⁹⁰ But none of the courts considering this matter engaged with this data or used it to question whether police officers can reliably evaluate threats—particularly when threats are perceived from Black people. The Supreme Court brief filed by Edward’s family explains that Memphis police were twice as likely to shoot Black people suspected of property crimes than white people and that 50% of the Black people shot by MPD officers were unarmed.⁹¹ The brief argued for finding that the Tennessee fleeing felon law violated the Equal Protection Clause.

84. *Id.*

85. *Id.* at 3.

86. *Id.* at 21.

87. *Id.*

88. *See, e.g.,* *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (granting qualified immunity to an officer who used lethal force against a woman experiencing mental illness—and who posed no actual threat—because the officer perceived her to be a threat).

89. Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 975 (2020)

(“[R]acial bias shapes judgments of suspicion leading to the predicate civilian stops that result in shootings and fatalities. These interaction dynamics, influenced by implicit bias and anxiety on the one hand and by explicit bias on the other, contribute to the risks of excessive or lethal force by police.”).

90. *Garner* Brief, *supra* note 63, at 99.

91. *Id.*

The National Bar Association (“NBA”) filed an amicus brief explaining that Memphis police shoot and kill Black youth at rates higher than white adults and youths combined and that the majority of Black youth killed by the police were suspected of non-violent property crimes.⁹² The NBA argued that the state law permitting lethal force against fleeing people suspected of a felony was racially neutral yet resulted in the police shooting at Black people far more frequently than people of any other race.⁹³ The NBA also questioned the connection between using lethal force against non-violent people and community safety, arguing that “[m]urdering a significantly disproportional number of [B]lacks bears no rational relationship to a state objective to preserve the peace within a community and apprehend all felony suspects.”⁹⁴

Interestingly, the Police Foundation made similar arguments in its amicus brief. While the Police Foundation brief did not address race squarely, it did argue that the Tennessee statute would lead officers to use lethal force in arbitrary ways and cited to studies demonstrating that police officers disproportionately use force against Black and Latinx people.⁹⁵ Despite the evidence of racial discrimination, the Supreme Court erased Edward’s Blackness and focused solely on his status as person suspected of a non-violent crime. This omission creates an impression that—despite statistical evidence suggesting the contrary—Edward’s race was immaterial to the officer who shot and killed him.

The Court both ignored Edward’s race and the issues of racial disparities in police shooting writ large, and amplified the notion that police officers—because of training and experience—can accurately and impartially evaluate who constitutes a threat. But the record should have led to the opposite result. Evidence presented to the district court reflected that Memphis police officer training omitted any guidance regarding “alternatives that should be exhausted before resorting to deadly force to stop unarmed fleeing felony suspects.” MPD officers were instructed “that the use of deadly force to stop fleeing felony suspects is left to the individual officer’s discretion: recruits are simply told that they must live with themselves if they kill a person.”⁹⁶ And because police are far more likely to perceive Black people as a threat, these training failures resulted in Black people bearing the brunt of police violence.⁹⁷

92. Brief for Florida Chapter of the National Bar Ass’n, on behalf of The National Bar Ass’n, as Amici Curiae Supporting Respondent, *Tennessee v. Garner*, 471 U.S. 1 (1985) (Nos. 83-1035, 83-1070), 1984 WL 566023, at *12.

93. *Id.* at *12.

94. *Id.*

95. See Brief for Police Foundation, as Amici Curiae in Support of the Respondent-Appellee, *Tennessee v. Garner*, 471 U.S. 1 (1985) (Nos. 83-1035, 82-1070), 1984 WL 566025, at *26, *37.

96. *Garner* Brief, *supra* note 63, at *16-17.

97. Fagan & Campbell, *supra* note 89, at 1001 (police “mistakes” related to use of lethal force “may fall disproportionately on nonwhites in a variety of contexts during encounters with police”); Keon L. Gilbert & Rashawn Ray, *Why Police Kill Black Males with Impunity: Applying Public Health Critical Race Praxis to Address Determinants of Policing Behaviors*, 93 J. URB. HEALTH 122, 132 (2015) (“Psychologists have found that whites are more likely to

Finally, the Court's decision here affirmed that violence is a necessary, essential component of "effective law enforcement." The Court made clear that lethal force is permissible if an officer has probable cause to believe that a suspect poses a threat of physical harm to another person or has committed a crime involving the infliction or "threatened infliction" of serious physical harm. The Court considered, but ultimately rejected, the argument that "overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee."⁹⁸ The Court relied on evidence that the use of deadly force against non-violent people fails to "improve the crime fighting ability of law enforcement agencies."⁹⁹ While the Court prohibited the use of lethal force against people who are non-violent, its decision affirmed that, in the view of the Court, police violence is one tool that helps ensure "effective law enforcement." The Court noted that the majority of law enforcement entities across the country have prohibited the use of deadly force against non-violent people.¹⁰⁰ This fact was significant to the Court. The Court made clear it would not hamper "effective law enforcement" by declaring popular police practices "unreasonable."¹⁰¹

Justices O'Connor, Burger, and Rehnquist dissented from the majority and rejected the Court's reliance on the "popularity" of a police practice to determine its constitutionality.¹⁰² Justice O'Connor, writing for the dissent, found that burglary is a serious crime and would have held that a person does not have a "right to flee unimpeded from the scene of a burglary."¹⁰³ The dissent also found that while the officer who shot and killed Edward may have been able to take more preferable actions, the Constitution does not require the police to take the least harmful action in a given circumstance.¹⁰⁴ This idea has wound its way into Fourth Amendment jurisprudence, and courts regularly find that the Constitution does not require police to take the least violent, more "preferable" approach to force.¹⁰⁵

perceive black men as aggressive, describe having a similar fear of Black men as they do of snakes and spiders, and are more likely to quickly pull the trigger of a gun on an unarmed, black man compared to an unarmed, white man, and even at times an armed white man.").

98. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

99. *Id.*

100. *Id.* at 18-19.

101. *Id.* at 19.

102. *Id.* at 28 (O'Connor, J., dissenting).

103. *Id.* at 29 (O'Connor, J., dissenting).

104. *Id.* at 29-30 (O'Connor, J., dissenting).

105. *City of Ontario v. Quon*, 560 U.S. 746, 763 (2010) ("This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."); *Cassidy v. Chertoff*, 471 F.3d 67, 80 (2d Cir. 2006) (The Supreme Court has "repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means" to accomplish the government's ends.); *James v. Chavez*, 830 F. Supp. 2d 1208, 1236 (D.N.M. 2011), *aff'd*, 511 Fed. Appx. 742 (10th Cir. 2013) (unpublished) ("To avoid a 'Monday morning quarterback' approach, the Fourth Amendment does not require the use of the least, or even a less, forceful or intrusive

The *Tennessee v. Garner* decision encouraged police officers around the country to perpetuate the stereotype of dangerous, threatening Black and brown people. Because the decision allows officers to engage in lethal force based on the officers' perception of a threat, officers frequently go to great lengths to describe the Black people they kill as possessing superhuman, animalistic strength. The legacy of *Tennessee v. Garner* was ever-present during the criminal trial of Derek Chauvin, the Minneapolis police officer who killed George Floyd by kneeling on his neck as Mr. Floyd lay prostrate begging for his life. Officer Chauvin's counsel described the officer's actions as reasonable in light of Mr. Floyd's large physical size, strength, and his potential to act in unpredictable ways because of alleged drug use.¹⁰⁶ While this argument may offend common sense, it is squarely rooted in the language of the Supreme Court. Similarly, the next and final case discussed below, *Graham v. Connor*, super-charges the reasonable officer standard and further empowers officers to use violence as a policing tactic in situations that defy logic.

C. *Graham v. Connor*: Affirming the notion of a reasonable police officer

*I seen it happen before, and it could happen again
You on a block mine on your own and then you left by your friends
Cuz they ain't down to scrap, just wanna ride in your Benz
But when the cops is on the beat, that's when the party begins
Like a karate picture, the way they mop the floor with ya
All caught up in the heat, not a doctor can stitch you¹⁰⁷*

In the song "Protective Custody," Mr. Khaliyl paints a picture of the realities of police violence. He describes driving with his friends, "minding his own business" when encountering police officers who engage in violence for sport. His lyrics are a testament to the ever-present nature of police violence in Black communities. Violent policing is not new to him—he's seen it happen before and he knows it can happen again. Mr. Khaliyl tells the story of Dethorne Graham, the

alternative to effect custody, so long as the use of force is reasonable under *Graham v. Connor*. The Fourth Amendment requires only that the defendant officers chose a 'reasonable' method to end the threat that the plaintiff posed to the officers in a force situation, regardless of the availability of less intrusive alternatives."); *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1222 (10th Cir. 2005) (affirming district court's ruling that "[t]he Fourth Amendment does not require police officers to use the least intrusive amount of force"); *Turner v. City of Champaign*, 979 F.3d 563, 568 (7th Cir. 2020) (holding that the Fourth Amendment did not require officers to engage in de-escalation); *Forrett v. Richardson*, 112 F.3d 416, 420 ("The Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force.").

106. Unofficial Transcript of Defense's Closing Argument, *State v. Derek Chauvin*, 27-CR-20-12646 (Minn. Super. Ct. Apr. 19, 2021), available at <https://perma.cc/AHD5-Z9E9>.

107. TALIB KWELI *Protective Custody, on HIP HOP FOR RESPECT* (Rawkus 2000).

man at the center of the most cited Supreme Court decision¹⁰⁸ on police violence and whose own police encounter is reflected in use of force policy in most police departments throughout the country.¹⁰⁹

Dethorne Graham was a Black man who was a lifelong resident of North Carolina. He grew up on a tobacco farm and, while he was the first Black student admitted to Duke University, he went to Fayetteville State, a Historically Black College, to avoid fueling racial tensions.¹¹⁰ As an adult, he worked for the City of Charlotte's Department of Transportation—on his days off from the City he moonlighted as a car mechanic.¹¹¹ On November 12, 1984, he was working on a car with a friend when he asked his friend to take him to the store so he could get some orange juice to stave off an oncoming diabetic episode.¹¹² Mr. Graham's friend drove him to the store, but when Mr. Graham entered, the line was too long so he immediately left.¹¹³

A police officer observed Mr. Graham's actions, followed the men away from the store and pulled them over, asking for an explanation of Mr. Graham's "erratic" behavior at the store.¹¹⁴ The men told the officer Mr. Graham was having "a sugar reaction."¹¹⁵ But that explanation was apparently unsatisfactory to the officer, who ordered the men to wait in the car until he could "find out what [Mr. Graham] did in the store."¹¹⁶ During the stop, when Mr. Graham began to understand that he was not free to leave and that he would not be receiving the care he needed for his condition, he left the car and ran in circles around it.¹¹⁷ The police interpreted this behavior as drunken antics, but refused to look at Mr. Graham's medical card to verify his claims of diabetes.¹¹⁸

Eventually, the officers tried to handcuff Mr. Graham and made clear that they did not believe his behavior was related to diabetes, despite the insistence of Mr. Graham's friend.¹¹⁹ An officer at the scene expressed "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with

108. According to Westlaw, over 26,000 cases cite the Supreme Court's decision in *Graham*, and just over 17,000 cite the *Garner* decision.

109. See *Use of Force Policy Database*, POLICE USE OF FORCE PROJECT, <https://perma.cc/R33K-7UXH> (last visited Aug. 26, 2021); *Use of Force Report Writing Guide*, AMS. FOR EFFECTIVE L. ENFORCEMENT, <https://perma.cc/TV3S-D9AT> (last visited Aug. 26, 2021).

110. More Perfect, *Mr. Graham and the Reasonable Man*, WYNC (Nov. 30, 2017), <https://perma.cc/XJQ6-GMG6>.

111. Joint Appendix, *Graham v. Connor*, 490 U.S. 386 (1989) (No. 87-6571), at 11–12 [hereinafter Trial Tr.].

112. *Id.* at 12.

113. *Id.* at 13.

114. *Id.* at 56.

115. *Id.* at 14.

116. *Id.* at 14.

117. *Id.* at 40.

118. *Id.* at 17.

119. *Id.* at 41.

the M.F. but drunk. Lock the S.B. up.”¹²⁰

While the police attempted to handcuff Mr. Graham, he tried to provide the officers with proof of his diabetic condition, which he kept in his wallet.¹²¹ He reached for his wallet to prove to the officers that he wasn’t “drunk.”¹²² Mr. Graham testified that an officer told him to shut up—and that he responded “don’t tell me to shut up because I’m trying to tell you what’s wrong with me.”¹²³ At this point, an officer grabbed Mr. Graham from behind and “slammed [his] head” on the hood of the car.¹²⁴ Four officers then carried him—each taking one of his limbs—and “threw [him]” in the police car like a “bag of potatoes.”¹²⁵

A crowd began to gather at the scene and another friend of Mr. Graham realized that he needed juice to address his diabetes. This friend ran to a nearby store, purchased juice and brought it to the scene to give to Mr. Graham.¹²⁶ The officers took the juice and Mr. Graham testified that when he requested the juice, an officer responded, “I’m not giving you shit.”¹²⁷ The officers at the scene later claimed that Mr. Graham resisted being placed in the police car by kicking and that he twice declined medical attention from the police.¹²⁸ Mr. Graham denied resisting arrest or declining medical attention.

Eventually, the officers determined that Mr. Graham had done nothing wrong at the store. Once they made this determination, they kept Mr. Graham handcuffed in the back of the police car and drove him home. Mr. Graham suffered a broken foot and missed over a month of work.¹²⁹ Mr. Graham testified that “there was a large place over my left eye that the skin was gone. I think the concrete did that because it wasn’t cut. It wasn’t bruised. All the skin was just off.”¹³⁰ He also reported injuries to his wrists and shoulders, and constant ringing in his ears.¹³¹ In an interview, Mr. Graham’s daughter describes her reaction to her father’s injuries: “When I saw my father the way that he was, on crutches, bruised and beaten up, it was unbelievable. It was hurtful. I really felt bad.”¹³²

Mr. Graham sued the five officers who were involved in the incident, alleging that they subjected him to excessive force. He also filed a *Monell* policy and practice claim against the city of Charlotte, alleging that the city “failed to train

120. *Id.* at 42.

121. *Id.* at 16-17.

122. *Id.* at 17.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 18.

127. *Id.*

128. *Id.* at 49-50.

129. *Id.* at 22, 26-27.

130. *Id.* at 23.

131. *Id.* at 23-24.

132. Nate Morabito, *Before George Floyd Changed the World, Dethorn Graham Changed Use of Force as We Know it*, WCNC (June 10, 2020, 12:45 PM), <https://perma.cc/YM5X-7F9U>.

its police officers to respond appropriately to a medical emergency.”¹³³ The trial court granted a directed verdict for the Defendant officers, finding that the force applied “was a good faith effort to maintain or restore order in the face of a potentially explosive situation and was not applied maliciously or sadistically for the very purpose of causing harm.”¹³⁴ The court also found that Mr. Graham failed to meet his burden on his *Monell* claims.¹³⁵

The Fourth Circuit Court of Appeals affirmed and began its analysis by noting that Officer Connor “observed a man in a state of obvious agitation run into a convenience store, exit almost immediately, enter a car and drive rapidly away. Under those circumstances, reasonable suspicion would justify at least a brief investigative stop of that vehicle.”¹³⁶

The appellate court noted that an “unruly” crowd had gathered around Mr. Graham and the officers. Because of the crowd, the appellate court found that “removing” Mr. Graham was an “expedient method of avoiding further confrontation.”¹³⁷ Interestingly, the Fourth Circuit does not describe Mr. Graham as being detained or arrested, and instead asserts that he was “removed”—a law enforcement action for which there is no clearly articulable standard. In other words, in the legal context, an officer “removing” someone is not a thing. Yet, the court did not use the legally defined words of detention or arrest, likely because it recognized that there was no legal basis for Mr. Graham’s detention and arrest. The appellate court also failed to acknowledge that at the time of Mr. Graham’s arrest, he had a right to resist his unlawful arrest.¹³⁸

The Fourth Circuit also affirmed that the trial court applied the correct standard; it analyzed whether the officer’s actions were “applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.”¹³⁹ Applying this stringent standard to the facts as interpreted by the appellate court, Mr. Graham lost his case once again.

The U.S. Supreme Court granted cert and focused its review on whether the Fourth Amendment’s “objective reasonableness” standard applies to police officers’ use of force—or if the subjective due process standard applies. The Supreme Court framed the issue as relating to an officer’s use of “physical force”

133. *Graham v. City of Charlotte*, 827 F.2d 945, 947 (4th Cir. 1987), *vacated sub nom. Graham v. Connor*, 490 U.S. 386 (1989) (Mr. Graham also alleged that the officers discriminated against him on the basis of his disability when they failed to accommodate his medical emergency.).

134. *Id.* at 948.

135. *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

136. *Graham*, 827 F.2d at 949.

137. *Id.*

138. *Keziah v. Bostic*, 452 F. Supp. 912, 915-16 (W.D.N.C. 1978) (“The right to resist an unlawful arrest is recognized in North Carolina, but only such force may be used as reasonably appears to be necessary to prevent the unlawful restraint. If the arrest is authorized by statute or by legal process facially adequate, the arrest does not give rise to a right to resist.”).

139. *Graham*, 827 F.2d at 948.

during the course of an “investigatory stop.”¹⁴⁰ The Court reaffirmed the balancing test that animates Fourth Amendment jurisprudence. Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing of “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.”¹⁴¹ This balancing test requires an analysis of what has widely been referred to as the three *Graham* factors: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the officers or others; and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.¹⁴²

But it is not the *Graham* factors that animate most modern post-incident analyses of police violence. Instead, it is this language contained in dicta:

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.¹⁴³

Here, the Court turbo-charged the reasonable officer standard. It also made clear that no constitutional standard would permit police officers to be second-guessed. And it once again affirmed the violence inherent in the policing function. This language is repeated verbatim in police use of force policies throughout the country.¹⁴⁴ This precise language has also been used by prosecutors to decline to prosecute police officers in police shootings, including the police

140. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

141. *Id.* at 395.

142. *Id.* at 396.

143. *Id.* at 396-97.

144. See *Use of Force Policy Database*, POLICE USE OF FORCE PROJECT, <https://perma.cc/R33K-7UXH> (last visited Aug. 26, 2021) (compiling police department use of force policies); see also *Use of Force Report Writing Guide*, AMS. FOR EFFECTIVE L. ENFORCEMENT, <https://perma.cc/TV3S-D9AT> (last visited Aug. 26, 2021).

shootings of Tamir Rice,¹⁴⁵ Jacob Blake,¹⁴⁶ and Alton Sterling.¹⁴⁷ The police accountability apparatus uses this language to defend police action and to credit police perception of threat. But as discussed further below, the *Graham* standard is built on fatal flaws regarding the very nature of policing.

1. *Graham* myths: Police violence is reasonable and race neutral

In *Graham v. Connor*, the Court affirmed for the first time that the Fourth Amendment prohibited police officers from using “excessive force.” At the time, the *Graham* decision was lauded as a victory for civil rights litigants and described as a meaningful check on police violence.¹⁴⁸ But in reality, the decision provided a roadmap for police officers to use when they write incident reports to ensure that their acts of violence will be considered in full compliance with the U.S. Constitution.¹⁴⁹

The courts that considered this case erred by not beginning at the beginning. Each court assumed—without fully analyzing—that Officer Connor had reasonable suspicion to stop Mr. Graham in the first place because of his “erratic” behavior at the grocery store. While the Fourth Circuit does not cite *Terry v. Ohio* to support this conclusion, it borrows heavily from that decision in endorsing

145. *Justice Department Announces Closing of Investigation into 2014 Officer Involved Shooting in Cleveland, Ohio*, U.S. DEP’T OF JUST. (Dec. 29, 2020), <https://perma.cc/S62U-KLQQ> (“The law requires that the reasonableness of an officer’s use of force on an arrestee be judged from the perspective of a reasonable officer on the scene, rather than with added perspective of hindsight . . . Although Tamir Rice’s death is tragic, the evidence does not meet these substantial evidentiary requirements. In light of this, and for the reasons explained below, career federal prosecutors with both the Civil Rights Division and the U.S. Attorney’s Office concluded that this matter is not a prosecutable violation of the federal statutes.”).

146. CNTY. OF KENOSHA DIST. ATT’Y, REPORT ON THE OFFICER INVOLVED SHOOTING OF JACOB BLAKE 35 (2021) (declining to file criminal charges against the officer who shot and killed Mr. Blake because, “in judging the reasonableness of a particular use of force, the focus must be on ‘the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight’”).

147. *Federal Officials Close Investigation into Death of Alton Sterling*, U.S. DEP’T OF JUST. (May 3, 2017), <https://perma.cc/3KL8-QRRW> (“The law requires that the reasonableness of an officer’s use of force on an arrestee be judged from the perspective of a reasonable officer on the scene, rather than with added perspective of hindsight . . . Given the totality of the circumstance—that the officers had been fighting with Sterling and had attempted less-than-lethal methods of control; that they knew Sterling had a weapon; that Sterling had reportedly brandished a gun at another person; and that Sterling was much larger and stronger than either officer—the Department cannot prove either that the shots were unconstitutional or that they were willful.”).

148. Charles Lane, *A 1989 Supreme Court Ruling is Unintentionally Providing Cover for Police Brutality*, WASH. POST (June 8, 2020, 3:57 PM), <https://perma.cc/PFD7-ZSQK>; Osagie K. Obasogie, *The Bad-Apple Myth of Policing*, ATLANTIC (Aug. 2, 2019), <https://perma.cc/6PRX-L7YS>.

149. *See Use of Force Policy Database*, POLICE USE OF FORCE PROJECT, <https://perma.cc/R33K-7UXH> (last visited Aug. 26, 2021) (compiling police department use of force policies); *see also Use of Force Report Writing Guide*, AMS. FOR EFFECTIVE L. ENFORCEMENT, <https://perma.cc/TV3S-D9AT> (last visited Aug. 26, 2021).

police intrusion based on an officer's suspicious interpretation of innocuous behavior. However, despite the Fourth Circuit's assertions, the state of the case law in 1984 was very clear—the officer who stopped Mr. Graham lacked the reasonable suspicion required before a lawful stop.¹⁵⁰ Police officers are prohibited from stopping people in the absence of a “particularized and objective basis for suspecting the particular person stopped of criminal activity.”¹⁵¹ And Officer Connor had no particularized or objective basis for stopping Mr. Graham because the record did not suggest that his behavior conformed to any pattern of criminal activity.¹⁵² Mr. Graham did not challenge the lawfulness of the initial police stop, so the court never completed a full analysis of its legality. In the 36 years since Officer Connor pulled Mr. Graham over, this author could find no other reported case where behavior analogous to his was found sufficient to give rise to reasonable suspicion. By simply assuming the officer's suspicions of Mr. Graham were reasonable—and ignoring any meaningful analysis—the appellate court ignored the foundational harm suffered by Mr. Graham—the unreasonable stop and seizure. The Court's analysis should have begun the moment the police officer stopped Mr. Graham—not at the moment the physical violence began.

Further, while the record is unclear regarding exactly how long Mr. Graham and his friend were detained, it is clear that the detention went far beyond the brief, investigatory stop authorized by *Terry v. Ohio*. Mr. Graham was detained long enough for Officer Connor to call backup officers, for the officers to arrive, for a crowd to gather, for a friend to run to a nearby store and purchase orange juice, and for dispatch to warn the officers that Mr. Graham had guns in his home.¹⁵³ Immediately after stopping the vehicle, when Mr. Graham's friend informed the officer that Mr. Graham was having an episode related to his diabetes, reasonable suspicion should have evaporated.¹⁵⁴ Instead, the officer inverted the burden of proof and detained Mr. Graham until he received confirmation from the store that Mr. Graham had not engaged in criminal activity during his brief time in the store.¹⁵⁵ When officers handcuffed Mr. Graham, placed him in the police car, and refused to allow him to leave, he was clearly under arrest without

150. *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (finding that reasonable suspicion cannot exist when based on characteristics that “describe a very large category of presumably innocent [people], who would be subject to virtually random seizures.”).

151. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

152. *See Graham v. Connor*, 490 U.S. 386, 389 (“[The officer] “saw Graham hastily enter and leave the store. The officer became suspicious that something was amiss and followed Berry's car”).

153. *Id.* at 389.

154. Judge Butzner dissented from the majority, writing that “minutes after the investigatory stop the police knew they were dealing with a seriously ill man who was innocent of any crime. Whether the scope and conduct of their seizure violated the reasonableness requirement of the Fourth Amendment clearly presented a question for the jury to determine in accordance with the principles explained in *Terry* and *Garner*.” *Graham v. City of Charlotte*, 827 F.2d 945, 952 (4th Cir. 1987).

155. *Graham*, 490 U.S. at 389.

probable cause.¹⁵⁶

Here, police violence followed an arguably meritless stop. The invalidity of the stop should have cast doubt on the validity of the officers' subsequent actions. Instead, the courts—including the U.S. Supreme Court—credited the officers' actions when stopping Mr. Graham as reasonable and ignored the well-established legal principles that should have cast doubt on the officers' intentions when they proceeded to use violence. By failing to fully analyze whether the officers had any legitimate interest in engaging with Mr. Graham in the first place, the courts ignored the rights violations that occurred as a result of mere police intrusion—even in the absence of violence.

In ignoring this abuse of power and focusing its analysis solely on the officers' actions during the moments they used violence against Mr. Graham, the courts failed to engage with the realities of policing—and the racialized power differentials that occur when a police officer stops and exerts control over Black and brown people.¹⁵⁷ More fundamentally, by failing to begin the analysis at the moment Mr. Graham encountered the police, the courts were ill-equipped to conduct the balancing test required by the Fourth Amendment. Does effective law enforcement require stopping and detaining an individual who rushes out of a grocery store? Without grappling with this question, the Court's analysis is incomplete.

In *Graham*, the Supreme Court made explicit that officers will make mistakes when choosing to use violence—but the Constitution will forgive a reasonable officer's misjudgment because of the nature of policing and because officers are better equipped than others to evaluate harm. The *Graham* standard, which describes how police officers must make “split second judgements—in circumstances that are tense, uncertain and rapidly evolving” suggests that police officers face a grave risk of harm¹⁵⁸ and that their policing experience will allow them to make the right call. But the opposite is true. As explained by Professor Hutchins:

“A sociological study of the mid-1960s found that the average police officer is more suspicious than the average American. “Policemen are indeed specifically trained to be suspicious, to perceive events or changes in the physical surroundings that indicate the occurrence or probability of disorder.” In addition, studies have found that an officer's decision to seize an individual is governed in large part by the officer's perception of the subject as disrespectful toward the police.”¹⁵⁹

And like *Tennessee v. Garner*, the Court in *Graham v. Connor* ignored the fact that Mr. Graham was a Black man. The lower court made findings that have

156. *Michigan v. Summers*, 452 U.S. 692, 700 (1981) (“Every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause.”).

157. See LDF Brief, *supra* note 39, at *35.

158. *Graham*, 490 U.S. at 397.

159. Hutchins, *supra* note 33, at 901.

clear racial implications—finding that the officer’s actions in detaining and “re-mov-ing” Mr. Graham were reasonable because the crowd surrounding his vehi-cle became “unruly.”¹⁶⁰ While the race of those in the crowd is omitted, it is a safe assumption that officers deemed a crowd of Mr. Graham’s Black friends—concerned about their friend’s treatment at the hands of the police—“unruly.”¹⁶¹ The legacies of these three decisions echo throughout police policy and practice today. They animate calls for police accountability and are considered by juries during criminal trials of police officers accused of murder and other forms of police violence.. Taken together, these decisions have propped up powerful myths about the policing function—including that law enforcement is race-neu-tral, and that police officers are better equipped at evaluating threats than mem-bers of the general public.

The most enduring myth perpetuated by these cases is that the police are an effective means of creating public safety and that the benefits of policing out-weigh the harms. None of these three decisions consider evidence regarding what legitimate governmental interests are furthered by the police. Instead, the courts assume—with no evidence whatsoever—that “effective law enforcement” re-sults in a public good and is therefore a legitimate governmental interest. But the evidence demonstrates that harms of policing significantly outweigh any benefits and therefore policing (otherwise known as “effective law enforcement”) does not—and cannot—constitute a legitimate governmental interest.

II. FOURTH AMENDMENT JURISPRUDENCE & THE FICTION OF “EFFECTIVE LAW ENFORCEMENT”

*Stiffer stipulations attached to each sentence
Budget cutbacks but increased police presence
And even if you get out of prison still living
Join the other 5 million under state supervision.*¹⁶²

Mos Def raps about the approaches to public safety that have dominated public policy during the last few decades. Jurisdictions cut funding to schools,

160. *Graham v. City of Charlotte*, 644 F. Supp. 246, 249 (W.D.N.C. 1986), *aff’d*, 827 F.2d 945 (4th Cir. 1987), *vacated sub nom. Graham v. Connor*, 490 U.S. 386 (1989).

161. For a discussion of the history of policing Black people in public spaces, see Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156 (2001). Most recently, law enforcement’s violent response to the largely peaceful summer 2020 uprisings compared with the de-escalation officers used during the violent Jan. 6, 2021 insurrection at the Capitol vividly demonstrates how Black bodies are policed in public spaces. *See, e.g.*, Aaron Morrison, *Race Double Standard Clear in Rioters’ Capitol Insurrection*, ASSOCIATED PRESS (Jan. 7, 2021), <https://perma.cc/F29W-5Z6P> (comparing police treatment of Capitol insurrectionists with excessive force shown to largely peaceful crowds at Black Lives Matter protests in 2020).

162. MOS DEF, *Mathematics, on BLACK ON BOTH SIDES* (Rawkus 1999).

mental health services and other pro-social investments—only to increase funding in policing, prisons and other tools of the carceral state. As detailed below, this approach fails to create safe communities. But the notion that law enforcement creates healthy and safe communities is baked into both policymakers' agendas and Fourth Amendment jurisprudence.

The Supreme Court does not define “effective law enforcement” but repeatedly asserts this governmental interest to justify police intrusion and harm.¹⁶³ *Terry*, *Graham*, and *Garner* form the holy trinity of case law governing police officer intrusion and use of violence. In each decision, the Court assumes—with no evidence in the record—that policing represents a governmental interest so sacrosanct that it almost always trumps individual interest to be free from police-related harm.¹⁶⁴ But what exactly is “effective law enforcement?” Scholars have attempted to provide some objective measures for this term by suggesting that

163. See, e.g., *California v. Acevedo*, 500 U.S. 565, 574 (1991) (prohibiting officers from conducting warrantless searches of containers incidentally found inside of vehicles during a search which inhibit “effective law enforcement”); *Florida v. Royer*, 460 U.S. 491, 513 (1983) (Brennan, J., concurring) (“We must not allow our zeal for effective law enforcement to blind us to the peril to our free society that lies in this Court’s disregard of the protections afforded by the Fourth Amendment.”); *Payton v. New York*, 445 U.S. 573, 602 (1980) (finding a New York state law that permitted warrantless entry into the homes of suspected felons was unconstitutional in part because there was no evidence that “effective law enforcement” suffered in states that required a warrant for such entries); *United States v. Mendenhall*, 446 U.S. 544, 565 (1980) (Powell, J., concurring) (“The jurisprudence of the Fourth Amendment demands consideration of the public’s interest in effective law enforcement as well as each person’s constitutionally secured right to be free from unreasonable searches and seizures.”); *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (“[G]iven the initial intrusion, the seizure of an object in plain view . . . does not convert the search into a general or exploratory one. As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement.”). The appellate courts also frequently refer to the term “effective law enforcement” but fail to define it. See, e.g., *United States v. Kerr*, 817 F.2d 1384, 1387 (9th Cir. 1987) (“[W]e recognize that effective law enforcement is often predicated on hunches developed from a police officer’s years of experience in detecting criminal activity. However, underlying every [F]ourth [A]mendment analysis is a balancing between two competing concerns—society’s interest in effective law enforcement and the individual’s privacy and liberty interests.”); *Sullivan v. Murphy*, 478 F.2d 938, 966 (D.C. Cir. 1973) (“The Fourth Amendment establishes a principle of reason under which the individual’s privacy and freedom from official interference must be weighed against society’s need for effective law enforcement.”); *Patrick v. City of Detroit*, 906 F.2d 1108, 1115 (6th Cir. 1990) (“The reasonableness standard requires balancing the extent of the intrusion on the fourth amendment interests of the person arrested against the government’s interest in effective law enforcement.”).

164. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (determining the reasonableness of a seizure “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake” (internal quotations and citation omitted)); *Terry v. Ohio*, 392 U.S. 1, 10-11 (1968) ([A] a ‘stop’ and a ‘frisk’ amount to a mere ‘minor inconvenience and petty indignity,’ which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer’s suspicion.” (citation omitted)); *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (“The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement.”).

clearance rates (i.e., the rates at which police officers “solve” crimes by making an arrest) and conviction rates can help measure police effectiveness.¹⁶⁵ Arguably, effective law enforcement should not be measured by the number of people processed through the criminal legal system at every stage—but instead by outcomes. For effective law enforcement to be meaningful, it should result in decreased violence and increases in measures of healthy, safe, peaceful communities. But the courts make no inquiry to determine if “effective law enforcement” actually works to keep communities safe.

Instead, the Court has furthered the notion that effective law enforcement is a legitimate government interest by making three assumptions about policing: 1) that policing is unbiased; 2) that police officers can rely on training and experience to make decisions regarding police intrusion and use of violence; and 3) that policing activities result in violence reduction and contribute to safe, healthy communities. As further described below, none of these assumptions hold up when compared to the realities of policing.

A. The Court assumes policing is (and can be) color-blind

Terry, *Garner*, and *Graham* each centered on Black people who alleged that police violated their rights. Yet, the Court declined to identify the race of these plaintiffs and in each decision failed to adequately contend with the ways racial discrimination, racial disparities, and white supremacy intersect with the institution of policing in the United States. In the decades since these cases have been decided, the racial implications of policing have become undeniable. While the history and origins of policing are beyond the scope of this article, scholars have increasingly and persuasively drawn connections between modern police forces and the slave patrols.¹⁶⁶ In short, policing has never been the race-neutral governmental function that the Supreme Court describes in these decisions.

In a 2018 study, researchers Rory Kramer and Brianna Remster used data from over two million police stops in New York City to conclude that Black and white people “experience fundamentally different interactions with police.”¹⁶⁷

165. See David L. Carter & Jeremy G. Carter, *Effective Police Homicide Investigations: Evidence from Seven Cities with High Clearance Rates*, 20 HOMICIDE STUD. 150, 150 (2016) (studying the effect of “strong community policing presence, collaboration with external agencies, and an innovative culture” on “homicide clearance”); Hyunseok Jang et al., *Effect of Broken Windows Enforcement on Clearance Rates*, 36 J. CRIM. JUST. 529, 537 (2008) (studying the relationship between clearance rates and broken windows enforcement.).

166. See, e.g., Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108 (2020) (tracing the racist history of police from slave patrols, to enforcers of Jim Crow laws, to modern police who disproportionately target and kill Black people and arguing that the Thirteenth Amendment should be used to abolish racially discriminatory policing that exists today); Liyah Kaprice Brown, *Officer or Overseer?: Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757 (2005) (describing the racist origins and history of modern-day police and arguing that desegregation of the police force is an inadequate solution to racist, oppressive, and violent law enforcement).

167. Rory Kramer & Brianna Remster, *Stop, Frisk, and Assault? Racial Disparities in*

The study examines the various rationales for racial disparities—including civilian behavior, criminal involvement and contextual factors. Perhaps most importantly here, Kramer and Remster concluded that even controlling for “criminal behavior,” Black people have 29% higher odds of experiencing force than white people.¹⁶⁸ Kramer and Remster also found that police are far less likely to find contraband on Black people than on white people.¹⁶⁹ The researchers argue that their data analysis “indicates that more instances of force against [B]lack civilians are unexplained by contextual or behavioral differences than instances of force against white civilians.”¹⁷⁰ In other words, even when a Black person is not—to quote Chamillionaire—“ridin’ dirty” and/or poses no threat to an officer, police are far more likely to use force. Similarly, a 2017 study uses data from the United States Department of Justice to demonstrate that, per capita, police are approximately five times more likely to use lethal force against a Black person than a white person.¹⁷¹ After analyzing data from 213 metropolitan areas, this study also concluded that officers used deadly force more frequently against Black suspects than white suspects even when controlling for alleged crime.¹⁷² In other words, Black people are not harmed or killed more frequently by the police because they engage in more criminal, dangerous conduct—but because they are Black.¹⁷³

The United States Department of Justice has conducted in-depth investigations of police departments throughout the country in an attempt to document and redress patterns and practices of unconstitutional policing.¹⁷⁴ The DOJ’s findings regarding racial discrimination and racial bias in police departments from coast to coast provide a vivid description of the racialized nature of policing.

In Ferguson, the DOJ found significant evidence of intentional discrimination by police against Black communities. The Department documented that

Police Use of Force During Investigatory Stops, 52 L. & SOC’Y REV. 960, 960 (2018).

168. *Id.* at 979.

169. *Id.* at 981.

170. *Id.*

171. Kendra Scott et al., *A Social Scientific Approach Toward Understanding Racial Disparities in Police Shooting: Data from the Department of Justice (1980–2000)*, 73 J. SOC. ISSUES 701, 702 (2017).

172. *Id.* at 716.

173. See also Fagan & Campbell, *supra* note 89, at 951 (analyzing data on police killings to explore the interaction between race and reasonableness in fatal shootings and arguing that although the *Graham* standard purports to be objective, racial disparities in police killings evidence the subjective interpretation of what is reasonable based on the suspect’s race and the relevant social context—specifically, data shows that across circumstances of police killings and their levels of objective reasonableness, Black suspects are more than twice as likely to be killed by police than are suspects from other racial and ethnic groups).

174. For a discussion of DOJ pattern and practice investigations, see Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016).

Black people were disproportionately targeted by police and that 90% of the people experiencing police use of force were Black.¹⁷⁵ When federal officials brought these issues to the attention of their local counterparts, Ferguson officials attributed the disparities to a “lack of personal responsibility” within the Black community.¹⁷⁶ DOJ investigators uncovered emails demonstrating racial animus, including multiple emails describing President Obama in racist terms, and an email stating “[a]n African-American woman in New Orleans was admitted into the hospital for a pregnancy termination. Two weeks later she received a check for \$5,000. She phoned the hospital to ask who it was from. The hospital said, ‘Crimestoppers.’”¹⁷⁷ Unsurprisingly, Black residents in Ferguson reported that police use racial slurs during policing activity.¹⁷⁸

In Chicago, the DOJ documented that the Chicago Police Department “uses force almost ten times more often against blacks than against whites. As a result, residents in [B]lack neighborhoods suffer more of the harms caused by breakdowns in uses of force, training, supervision, accountability, and community policing. . . . CPD has tolerated racially discriminatory conduct that not only undermines police legitimacy, but also contributes to the pattern of unreasonable force.”¹⁷⁹ DOJ investigators reported that a CPD sergeant told them “if you’re Muslim, and 18 to 24, and wearing white, yeah, I’m going to stop you. It’s not called profiling, it’s called being pro-active.”¹⁸⁰ Black youth reported that CPD officers routinely addressed them with racial slurs and called them “animals” or “pieces of shit.”¹⁸¹ According to the DOJ report:

“[s]uch statements were confirmed by CPD officers. One officer we interviewed told us that he personally has heard coworkers and supervisors refer to Black individuals as monkeys, animals, savages, and ‘pieces of shit.’ Residents reported treatment so demeaning they felt dehumanized. One Black resident told us that when it comes to CPD, there is ‘no treating you as a human being.’”¹⁸²

In New Orleans, DOJ analysis of use of force data revealed that between January 2009 and May 2010, NOPD used lethal force exclusively against Black people. When the DOJ sampled arrest reports regarding use of force from the same time period, it found that 81 of the 96 uses of force (84%) were against Black people.¹⁸³ A criminal court judge told investigators that “[i]f you are a [B]lack teenager and grew up in New Orleans, I guarantee you have had a bad

175. U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4-5 (2015) [hereinafter FPD REPORT].

176. *Id.* at 5 (internal quotation marks omitted).

177. *Id.* at 72 (internal quotation marks omitted).

178. *Id.* at 73.

179. U.S. DEP’T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 15 (2017) [hereinafter CPD REPORT].

180. *Id.* at 144 (internal quotation marks omitted).

181. *Id.* at 146 (internal quotation marks omitted).

182. *Id.*

183. U.S. DEP’T OF JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 39 (2011) [hereinafter NOPD REPORT].

incident with the police.”¹⁸⁴

In Baltimore, DOJ documented that “[r]acially disparate impact is present at every stage of BPD’s enforcement actions, from the initial decision to stop individuals on Baltimore streets to searches, arrests, and uses of force. These racial disparities, along with evidence suggesting intentional discrimination, erode the community trust that is critical to effective policing.”¹⁸⁵

DOJ investigators uncovered overwhelming evidence of racial disparities and significant evidence of intentional discrimination within every police department that has been subject to an investigation.¹⁸⁶ These investigations tell a truth about policing—that in police departments large and small, police violence and racial disparities (and often outright racial discrimination) cannot be disentangled. The DOJ investigations demonstrated that in city after city, when police departments fail to adhere to the meager requirements of federal law, Black and brown communities bear the brunt of these failures through lives lost to police violence and other forms of police harm.

Recent events also rebut the notion that policing is race-neutral. During the summer of 2020, protesters throughout the United States participated in widespread protests against police violence.¹⁸⁷ Police departments around the country responded with brutal violence.¹⁸⁸ According to a report by Amnesty International:

[L]aw enforcement repeatedly used physical force, chemical irritants such as tear gas and pepper spray, and kinetic impact projectiles as a first resort tactic against peaceful protesters rather than as a response to any sort of actual threat or violence. Violations of people’s rights occurred during arrests and detentions as well. The use of tear gas during the COVID-19 pandemic is especially reckless.¹⁸⁹

The violence documented during the Summer 2020 uprisings was particularly racialized because almost all of the Black Lives Matter Protests were peaceful.¹⁹⁰ In sharp contrast, when a violent mob of white Trump supporters attempted an insurrection at the U.S. Capitol on January 6, 2021, law enforcement responded with restraint—often using de-escalation and other tactics to avoid the

184. *Id.* at 35 (internal quotation marks omitted).

185. U.S. DEP’T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 7 (2016) [hereinafter BCPD REPORT].

186. *See, e.g., id.* at 62; CPD REPORT, *supra* note 179, at 15; FPD REPORT, *supra* note 175, at 62.

187. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://perma.cc/3VDB-GRRF>.

188. Talia Buford et al., *We Reviewed Police Tactics Seen in Nearly 4,000 Protest Videos. Here’s What We Found*, PROPUBLICA (July 16, 2020), <https://perma.cc/C84J-6Y5H>.

189. USA: Law Enforcement Violated Black Lives Matter Protesters’ Human Rights, Documents Acts of Police Violence and Excessive Force, AMNESTY INT’L, <https://perma.cc/ZDP9-BE9B> (Aug. 4, 2020, 10:00 AM).

190. *Demonstrations & Political Violence in America: New Data for Summer 2020*, ARMED CONFLICT LOCATION & EVENT DATA PROJECT (Sept. 3, 2020), <https://perma.cc/S6K4-2AEX>.

use of force.¹⁹¹

Despite the widely documented racialized nature of policing and the widely accepted notion that implicit bias infects the decision-making of all actors,¹⁹² courts almost always evaluate police officer actions through a fictitious, race-neutral lens. An evaluation of whether a police officer has violated the Constitution when using force or conducting a stop is a fact-specific inquiry. But in the landmark jurisprudence that created the checks and balances on police power (and most of the subsequent cases interpreting these decisions) the fact of race—and the racial bias that is inseparable from assumptions regarding who is “dangerous” and who is “suspicious”—is markedly missing.¹⁹³ Had the courts made another choice and analyzed police power through the lens of the racial disparities and discrimination that infect all aspects of policing, the courts would have been forced to significantly limit the police power to kill and to harm. Reckoning with race and policing would require a recognition that officers do not function separately from the systems that employ them—and that those systems have long histories of racism and violence. Further, as explained in the next section, reckoning with race would force courts to confront the fact that individual officers are simply not better equipped to evaluate threats in an unbiased manner. To the contrary, reasonable police officers are often explicitly trained to engage in racialized acts of violence.

B. The Court assumes police officer training and experience enables officers to

191. See, e.g., Kiara Brantley-Jones et al., ‘Extraordinary Dichotomy’ in *Police Response to Black Lives Matter Protests, Capitol Chaos: DC Attorney General*, ABC NEWS (Jan. 8, 2021, 10:48 AM), <https://perma.cc/D4DT-5WNW>; Shaila Dewan, *Police Response to Capitol Mob is in Striking Contrast to Protests after George Floyd Killing*, N.Y. TIMES (Jan. 6, 2021), <https://perma.cc/QC3E-75WF>; Brakktton Brooker, *Protests in White and Black, and the Different Response of Law Enforcement*, NPR (Jan. 7, 2021, 7:36 PM), <https://perma.cc/ZZF4-C954>.

192. B. Keith Payne & Heidi A. Vuletich, *Policy Insights from Advances in Implicit Bias Research*, 5 POL’Y INSIGHTS FROM BEH. & BRAIN SCIS. 49, 53 (2018) (“The prevalence of implicit bias means that decision makers should recognize that the potential for biased decisions is the normal default condition in most situations. Recognizing that bias is the baseline means that colorblind strategies focused just on avoiding discrimination are unlikely to be effective at reducing disparities.”); Lorie Fridell & Hyeyoung Lim, *Assessing the Racial Aspects of Police Force Using the Implicit- and Counter-Bias Perspectives*, 44 J. CRIM. JUST. 36, 36 (2016) (discussing studies concluding that some police officers function with an implicit bias associating Black people with criminality).

193. See Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465, 1465 (2018) (“[T]he Supreme Court in *Graham* made a particular doctrinal choice in analyzing constitutional questions regarding police violence under the Fourth Amendment (which has an individualizing effect) instead of the Fourteenth Amendment’s Equal Protection Clause and its *potential* to allow group-based and structural analysis—a move that did not reflect a preexisting trend or consensus in the federal courts. The Court’s doctrinal choice in *Graham* has contributed to the perpetuation of police excessive use of force in many communities of color.”).

fairly evaluate danger and suspicion

The Supreme Court's Fourth Amendment jurisprudence relies on the assumptions that police officers receive training and gain experience equipping them to evaluate (better than a lay person) whether a person presents a danger or is engaging in criminal activity. The reasonable police officer standard requires an assumption that police officer training and experience is sufficient to allow courts to defer to police officer judgement when evaluating the constitutionality of officer conduct. There is no record to evaluate the specific training (or the relevant experiences) of the officers whose conduct was relevant in *Graham*, *Garner* and *Terry*. Yet, in each instance, the Court determined that officers must have had training sufficient to justify their actions.¹⁹⁴ But numerous investigations related to police training in multiple jurisdictions demonstrate that training is often untethered to the law, delivered by officers who themselves are frequently accused of violating the civil rights of community members. Further, some departments employ training curricula promulgated by entities that promote junk science and an "officer is always right" approach to use of force.

During its investigations into law enforcement policy and practice failures, the United States Department of Justice has uncovered striking failures in police training from law enforcement entities large and small. In a 2009 investigation, the DOJ found that the Maricopa County Sheriff's Office failed to train officers on how to avoid engaging in biased policing and lacked training sufficient for officers to understand their obligations under the Fourth Amendment.¹⁹⁵ Similarly, the East Haven Police Department "offers its officers minimal training in policing, and virtually no training on matters related to bias-based policing."¹⁹⁶ In Chicago, the DOJ found:

[CPD] does not provide officers or supervisors with adequate training and does not encourage or facilitate adequate supervision of officers in the field. These shortcomings in training and supervision result in officers who are unprepared to police lawfully and effectively; supervisors who do not mentor or support constitutional policing by officers; and a systemic inability to proactively identify areas for improvement, including Department-wide training needs and interventions for officers engaging in misconduct.¹⁹⁷

In Chicago, New Orleans, Springfield, Massachusetts, Puerto Rico, and Ville Platte, Louisiana, officers received very little post-academy, in-service

194. *See also* *Ornelas v. United States*, 517 U.S. 690, 700 (1996) (noting that when an officer had searched roughly 2,000 cars for narcotics, his judgment should be deemed credible).

195. Letter from Thomas E. Perez, Assistant Att'y Gen., C.R. Div., U.S. Dep't of Just., to Bill Montgomery, Cnty. Att'y, Maricopa Cnty. 12, 13, 18 (Dec. 15, 2011) (on file with the Department of Justice).

196. Letter from Thomas E. Perez, Assistant Att'y Gen., C.R. Div., U.S. Dep't of Just., to Hon. Joseph Maturo, Jr., Mayor, East Haven, Conn. 13 (Dec. 19, 2011) (on file with the Department of Justice).

197. CPD REPORT, *supra* note 179, at 10.

training.¹⁹⁸

Sometimes officer training endorses police behavior clearly in violation of the Constitution. An investigation of the Los Angeles Sheriff's Department revealed an incident where a Training Lieutenant reviewed a video of four male officers, each over 200 pounds, attempting to search a much smaller woman. When the woman refused to be searched by the men, "[t]wo deputies secured the woman's legs as a third deputy held her on the mat . . . One of the deputies who had secured her legs was kneeling on the woman's back and struck her once on the jaw with his fist."¹⁹⁹ The Training Lieutenant concluded that "the use of a strike to the face of a female handcuffed drunk was not likely the best option available."²⁰⁰ The DOJ referred to this response as "tepid language" used by a training official "to describe a clear instance of unreasonable force."²⁰¹ In another instance in the same department, a training officer was found to have engaged in an act of racial profiling himself.²⁰² In Portland, a training officer used as an "exemplary" model a use of force that involved an officer shooting a bean bag gun at an unarmed twelve-year-old girl who was suspected of trespassing and resisting arrest.²⁰³ Eventually, following the DOJ's recommendation, the department discontinued use of that example in its training.²⁰⁴

In Chicago, Baltimore, Newark, and New Orleans, the DOJ uncovered training on use of force and police stops that incorrectly stated the law.²⁰⁵ Unsurprisingly, the vast majority of CPD recruits could not accurately describe the standards for use of force, and officers in New Orleans could not describe the appropriate standard for stops.²⁰⁶ In Cleveland, officers reported to DOJ investigators that they did not understand the department's use of force policies.²⁰⁷

In some instances, police training serves to encourage police officers to engage in unlawful violence and other forms of rights violations. In New Orleans,

198. *Id.*; NOPD REPORT, *supra* note 183, at 54-60; U.S. DEP'T OF JUST., INVESTIGATION OF THE SPRINGFIELD, MASSACHUSETTS POLICE DEPARTMENT'S NARCOTICS BUREAU 27 (2020); U.S. DEP'T OF JUST., INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT 65 (2011); U.S. DEP'T OF JUST., INVESTIGATION OF THE VILLE PLATTE POLICE DEPARTMENT AND THE EVANGELINE PARISH SHERIFF'S OFFICE 13 (2011).

199. Letter from Thomas E. Perez, Assistant Att'y Gen., C.R. Div., U.S. Dep't of Just., to Leroy D. Baca, Sheriff, L.A. Cnty. Sheriff's Dep't 33-34 (June 28, 2013) (on file with the Department of Justice).

200. *Id.* at 34 (internal quotation marks omitted).

201. *Id.*

202. *Id.* at 38-39.

203. Letter from Thomas E. Perez, Assistant Att'y Gen., C.R. Div., U.S. Dep't of Just., to Sam Adams, Mayor, City of Portland 17 n.19 (Sept. 12, 2012) (on file with the Department of Justice).

204. *Id.*

205. See NOPD REPORT, *supra* note 183, at 10; U.S. DEP'T OF JUST., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 10 (2014); CPD REPORT, *supra* note 179, at 95; BCPD REPORT, *supra* note 185, at 101.

206. CPD REPORT, *supra* note 179, at 95; NOPD REPORT, *supra* note 183, at 27-29.

207. U.S. DEP'T OF JUST., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 45 (2014).

the DOJ found “direct links between inadequate training and serious, systemic problems in use of force; stops, searches, and arrests; supervision; interacting with and building partnerships with members of the community; and racial, ethnic, and gender bias in policing.”²⁰⁸ The police training deficiencies in Baltimore create circumstances where officers “end up in unnecessarily violent confrontations with these vulnerable individuals.”²⁰⁹ And in Albuquerque, New Mexico, the DOJ concluded that training included an “over-emphasis on using force, especially weapons, to resolve stressful encounters, and insufficient emphasis on de-escalation techniques. Much of the training leads officers to believe that violent outcomes are normal and desirable.”²¹⁰

Some police departments seek out controversial training that has been linked to high profile instances of police violence. Force Science Institute (FSI) claims to conduct “empirical research in behavioral science and human dynamics,” and also administers training for police officers in human performance and behavior in high-stress situations.²¹¹ Force Science boasts that it has trained 15,000 law enforcement professionals from 2,400 agencies in the U.S. and across the globe.²¹² But courts roundly reject it as an actual science²¹³ and critics note it encourages police officers to harm first and ask questions later. Force Science and its controversial founder, Bill Lewinski, have been criticized for using flawed and biased “research” to support police officers accused of misconduct. An editor for *The American Journal of Psychology* has called Lewinski’s work “pseudoscience.”²¹⁴ The Justice Department denounced his findings as “lacking in both foundation and reliability.”²¹⁵ In Canada, British Columbia’s Office of

208. NOPD REPORT, *supra* note 183, at xiv.

209. BCPD REPORT, *supra* note 185, at 8.

210. Letter from Jocelyn Samuels, Acting Assistant Att’y Gen., C.R. Div., U.S. Dep’t of Just., to Hon. Richard J. Berry, Mayor, City of Albuquerque 30 (Apr. 10, 2014) (on file with the Department of Justice).

211. *Our Mission*, FORCE SCI. INST., <https://perma.cc/5T9S9-A5JC> (last visited Aug. 26, 2021).

212. *Id.*

213. See *Green v. City of Mission*, No. 18-CV-49, 2019 WL 3217033, at *4 (S.D. Tex. July 17, 2019) (striking a Force Science Institute related expert’s testimony because the purported expert failed to provide any “‘objective, independent validation of the expert’s methodology’ of the techniques relied upon by the Force Science Institute in general or in the specific certification course completed” by the investigator); *Dominguez v. City of Los Angeles*, No. CV 17-4557 (PLAx), 2018 WL 6164278, at *7 (C.D. Cal. Oct. 9, 2018) (striking a Force Science related testimony, “because inter alia, . . . [d]efendants claim that the Force Science Institute, and its founder William Lewinski, have published peer reviewed articles on perception reaction time, they do not provide those articles . . . The Court’s review of Lewinski’s *curriculum vitae* reveals that he has presented at only one peer-reviewed conference and written only one peer-reviewed article on any topics that might include “‘perception reaction time’”); *Jones v. Allen*, No. 15-1173, 2016 WL 9443772, at *4 (D. Md. Oct. 24, 2016) (barring Force Science related opinions because the purported expert could not support these opinions with “‘reasonably reliable scientific work’”).

214. Matt Apuzzo, *Training Officers to Shoot First, and He Will Answer Questions Later*, N.Y. TIMES (Aug. 1, 2015), <https://perma.cc/ZJ4R-NLU6>.

215. *Id.*

the Police Complaint Commissioner has stated that it will never consult with Lewinski again because Lewinski is “biased towards the police.”²¹⁶

Officers involved in two high profile killings relied on concepts taught by Force Science when they pulled the trigger.²¹⁷ The Minneapolis officers who killed George Floyd and the Aurora police officers who killed Elijah McClain defend their actions relying in part on the concepts of “excited delirium.”²¹⁸ Excited delirium is described as the “sudden onset of aggression and distress,” but it is not a condition that is recognized by any medical association.²¹⁹ Despite the serious questions about whether excited delirium is an actual condition, FSI trains officers that “an officer who confronts a subject in the throes of excited delirium stands nearly a 90% chance of ending up on the ground in a struggle with potentially serious consequences.”²²⁰ FSI also promotes the scientifically unfounded claim that “suspects can draw a gun more quickly than an officer can draw from a holster and aim, so police are justified in reacting before they see a gun.”²²¹

Police officers may be worse—not better—at evaluating perceived threats than lay persons. This conclusion is bolstered by in-depth investigations into deficient police officer trainings throughout the U.S., examination of widely available police training that encourages officers to use violence, and data around police officer bias. There is thus no factual basis for the courts’ assumption that a “reasonable police officer” has the training and experience to predict when a person is dangerous. But there is significant evidence to demonstrate that police officer training itself is a source of racialized, unnecessary, and even unconstitutional police violence. Courts mythologize police training and experience in order to justify violent police power. In reality, police officer training often promotes the kind of unreasonable police violence the Fourth Amendment should protect against. If the courts truly considered this evidence, its decisions could not privilege police officer perceptions based on training and experience. Courts might still allow police officers to engage in violence and harm based on assumptions that doing so would increase community safety. But that assumption is also proven false.

216. Curt Petrovich, *B.C. Police Watchdog Bars Use of Psychologist*, CBC NEWS (Aug. 30, 2012), <https://perma.cc/Q36E-2BJD>.

217. Jie Jenny Zou et al., *Critics Say Police Training from Minnesota Company is Ineffective, Fosters Fear Among Officers*, L.A. TIMES (June 19, 2020 5:28 PM), <https://perma.cc/3FHP-P3F5>; Joshua Budhu et al., *How “Excited Delirium” is Misused to Justify Police Brutality*, BROOKINGS INST. (Aug. 10, 2020), <https://perma.cc/Q4ZR-QHLF>.

218. Zou et al., *supra* note 217.

219. Budhu et al., *supra* note 217.

220. Chuck Remsberg, *New Study: Perils & Protections in Dealing with Excited Delirium*, FORCE SCI. INST. (Sept. 4, 2018), <https://perma.cc/W6WS-QQGP>.

221. Sarah Zhang, *Police Training is Seriously Lacking in Actual Science*, WIRED (Aug. 17, 2015, 7:00 AM), <https://perma.cc/ZV79-4TXG>.

C. The Court assumes that policing reduces harm and creates safety

Finally, but perhaps most importantly, Fourth Amendment jurisprudence is animated by an assumption that policing results in a net good. In reality, policing produces a tremendous amount of harm—particularly for Black and brown communities. And policing accomplishes comparatively very little in terms of creating the conditions that lead to safe communities.

1. Policing creates harm

Policing as an institution is inherently violent.²²² In all three cases discussed above, the Court assumes without question that policing and violent harm must co-exist. Living with the constant threat of police harassment and surviving stop and frisk leaves people with serious mental and emotional harm. One study found that stop and frisks “exact serious physical, psychological and social costs.”²²³ Living in an “aggressively policed environment is a risk factor for men’s health” and “those who experienced more frequent negative encounters with the police had higher incidences of psychological distress and mental health issues.”²²⁴ A 2014 survey of young men in New York City who experienced police interactions found that those “who reported more police contact also reported more trauma and anxiety symptoms, associations tied to how many stops they reported, the intrusiveness of the encounters, and their perceptions of police fairness.”²²⁵

The harm is not only individual—it is also experienced collectively throughout communities. The ongoing fear of “arbitrary physical intrusions by police” can result in “poor health effects at the community level.”²²⁶ Stop and frisk may actually contribute to future law breaking. One study found that Black and Latino high school students who were stopped by the police were more likely to report “lawbreaking behavior” after their police encounters. This was true even for teenagers who had little history of lawbreaking prior to their police encounters.²²⁷ The study attributed the increase in law breaking behavior to the psychological distress the young people suffered because of police interaction.²²⁸ Another study found that teenagers’ exposure to police violence results in lower grades,

222. Barry Friedman, *Disaggregating the Police Function* (N.Y.U. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 20-03, 2020).

223. Susan A. Bandes et al., *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAVIORAL SCIS. & L. 176, 179 (2019).

224. *Id.*

225. Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321 (2014).

226. Bandes et al., *supra* note 223, at 184, 176-194.

227. Juan Del Toro et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PROC. NAT’L ACAD. SCIS. 8261, 8272 (2019).

228. *Id.*

a decreased chance of attending college, and increased rates of mental illness.²²⁹

And, of course, the harm created by police can result in physical injury and even death. “Police violence is a leading cause of death for young men in the United States. Over the life course, about 1 in every 1,000 black men can expect to be killed by police.”²³⁰ In 2020, police throughout the U.S. killed over 1000 people.²³¹ From 2015-2020, police around the country used force against hundreds of thousands.²³²

As most people who watched the murders of George Floyd and Laquan McDonald can attest, people do not themselves have to experience harm to be harmed by the institution of policing. People who learn about deadly police encounters on social media experience symptoms consistent with post-traumatic stress disorder.²³³ Policing creates significant, quantifiable harms on both the individual and collective levels. But these harms do not correlate with any significant, quantifiable benefits related to public safety. In short, as a result of U.S. policing practices, people are harmed; but as described in detail below, our communities are no safer.

2. Policing does not create safe communities

While the courts acknowledge the harm and violence inherent in policing, with rare exceptions, they do not question whether policing actually furthers its purported government interest. In short, the courts assume—without evidence or analysis—that police contribute to public safety. It is this assumption, perhaps more than any other, that empowers the police function and animates courts’ deference to police officer judgement. But there is little evidence to support this assumption and significant evidence to suggest that alternatives to policing—alternatives that are less harmful—would be far more effective at creating safe communities. Police most often fail to both stop and to deter crime. And even when police “solve” crime and help convict and sentence a person to prison, the public safety benefits of a prison sentence are negligible.

229. Desmond Ang, *The Effects of Police Violence on Inner-City Students* 1 (Harv. Kennedy Sch. Faculty Rsch. Working Paper Series, Paper No. RWP20-016, 2020).

230. Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116, 116 PROC. NAT’L ACAD. SCIS. 16793, 16794 (2019).

231. *Police Violence Map*, MAPPING POLICE VIOLENCE (June 20, 2021), <https://perma.cc/5D9E-CHM4>.

232. *Use of Force Dashboard 2015-Present*, CHI. POLICE DEP’T, <https://perma.cc/2UKJ-4W4F> (last visited Aug. 26, 2021) (showing that CPD officers reported force used against 21,824 people from 2015-2020); see also *Annual Use of Force/Firearms Discharge Report Data Tables*, N.Y. POLICE DEP’T, <https://perma.cc/7TFF-T34A> (last visited Aug. 26, 2021) (providing data showing that NYPD reported force used against 23,843 people from 2017-2019).

233. Felicia Campbell & Pamela Valera, “*The Only Thing New is the Cameras*”: A Study of U.S. College Students’ Perceptions of Police Violence on Social Media, 51 J. BLACK STUD. 654, 654 (2020).

Police often fail at their purported primary functions of stopping crime and apprehending those who engage in crime. Professor Shima Baradaran Baughman's analysis of fifty years of national crime data reveals that "police are much less effective than we think at solving all major crimes and have not significantly improved in the last thirty years."²³⁴ The same study also concludes that "less than half of crimes that occur are reported to the police."²³⁵ These findings are consistent with the DOJ's conclusions that some of the most troubled, abusive police departments across the country struggle to solve crime—particularly violent crime.²³⁶ And, contrary to the common perception of police officers spending time tracking down people who engage in acts of violence, police officers in cities frequently perceived as violent spent less than 4% of their time responding to violent crime.²³⁷ Professor Friedman documents that "much of many cops' time is unproductive altogether. When not filling out reports or taking personal time, a lot of an officer's working time—easily upwards of 30%—is spent on patrol. In most places this is motorized patrol. This itself is remarkable, because it's long been accepted that not much is accomplished by random motorized patrol."²³⁸ Some scholars suggest that police departments' inability to solve crime—and particularly violent crime affecting people of color, women, members of the LGBTQ+ communities—calls into question the ultimate legitimacy of the policing function.²³⁹

The end game for responsive policing is frequently prison sentences for those convicted of violent acts. Policing is the pathway to prison; an arrest begins the formal legal criminal process. But incarcerating people is not a clear path to safe communities. Incarceration is inherently harmful to the individuals who are

234. Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 53 (2020).

235. *Id.* at 80.

236. CPD REPORT, *supra* note 179, at 4 ("Homicide clearance rates, the rate at which police identify the suspected killer, continued their years-long slide, with CPD clearing only 29% of all homicides, less than half the national clearance rate."); NOPD REPORT, *supra* note 183, at xii (NOPD's lack of capacity to serve communities [with limited English proficiency] "undermines public safety, crime prevention, and crime-solving, and results in inferior police services to LEP community members"); BCPD REPORT, *supra* note 185, at 14 ("Baltimore has experienced violent crime rates relatively higher than many other large cities.").

237. Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (June 19, 2020), <https://perma.cc/852M-ZHFK> (finding that police officers spend the vast majority of their time responding to routine calls instead of violent crime).

238. Friedman, *supra* note 222, at 23.

239. Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1154 (2018) (describing "a long, shameful history of states failing to protect vulnerable populations from violence"); see also ALEX S. VITALE, *THE END OF POLICING* (2017) (explaining that many criminal cases are not investigated, much less solved by the police and situating the inability of policing to solve crimes in its emergence as a function to preserve slavery and quash dissent).

confined in U.S. prison and jails. Prison conditions are often violent²⁴⁰ and prison administrators frequently deny people in their custody adequate medical and mental health care.²⁴¹ A 2015 study found that conditions in prison are so detrimental to the individual that each year spent in prison corresponds with a two-year reduction in life expectancy.²⁴² Incarceration exacerbates the trauma often experienced by those living in over-policed communities and also fails to address collective concerns about public safety. Approximately 40% of the people in custody are there for relatively minor offenses for which alternatives to prison would be more effective.²⁴³ Put simply, more people in prison does not increase community safety. To the contrary, a Brennan Center study examining over forty years of crime data concluded that “increased incarceration has been declining in its effectiveness as a crime control tactic since before 1980.”²⁴⁴ An analysis of data from 1994–2014 demonstrates that five states that most significantly decreased incarceration also achieved the most significant reduction in crime rates. States that led efforts to reduce incarceration reduced their crime rates by an average of 45%.²⁴⁵ Criminologists have long known that while imprisonment may temporarily incapacitate people who commit property crimes, there is very little relationship between incarceration rates and violent crime.²⁴⁶

Some researchers posit that decreased incarceration rates led to a decrease in crime rates because mass imprisonment is inherently harmful and actually creates the conditions that allow crime and violence to flourish. According to Professor Don Stemen:

[H]igh rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system; thus, as high incarceration

240. Dave Gilson, *What We Know About Violence in America's Prisons*, MOTHER JONES (2016), <https://perma.cc/D6ND-F3DM> (19% of all men in prison report that they have been assaulted by another prisoner; 21% report being assaulted by a correctional officer; over 180,000 people in custody have been sexually assaulted).

241. Dora M. Dumont et al., *Public Health and the Epidemic of Incarceration*, 33 ANN. REV. PUB. HEALTH 325, 331(2012) (concluding that prisons and jails fail to adequately provide treatment for chronic medical and mental health needs of people in custody). The medical care crisis behind bars is perhaps best illustrated by the high rates of mortality for people in custody during the COVID-19 pandemic. People in custody were over five times more likely to contract the virus and significantly more likely to die from COVID-19 than people living outside of prison. See Brendan Saloner et al., *Research Letter: COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS'N 602, 602-03.

242. Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 AM. J. PUB. HEALTH 523, 523-528.

243. JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUST., HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 26 (2016).

244. OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUST., WHAT CAUSED THE CRIME DECLINE? 4 (2017).

245. *Prison and Crime: A Complex Link*, PEW CHARITABLE TRUSTS (2014), <https://perma.cc/5DUG-U263>.

246. ROEDER ET AL., *supra* note 244, at 1, 7, 24.

becomes concentrated in certain neighborhoods, any potential public safety benefits are outweighed by the disruption to families and social groups that would help keep crime rates low.²⁴⁷

Because of this, other scholars conclude once incarceration rates reach a certain level, high crime rates will co-occur.²⁴⁸ Some researchers suggest that imprisonment creates a collective good by incapacitating those prone to violence.²⁴⁹ But a longitudinal study of people convicted of felonies in Michigan concluded that “imprisonment is an ineffective long-term intervention for violence prevention as it has, on balance, no rehabilitative or deterrent effects after release.”²⁵⁰ As a result of these findings, researchers concluded that alternatives to prison may be more successful in building safe communities, in part because of the high collective costs and collateral consequences of imprisonment.²⁵¹

But does police presence significantly reduce crime before it happens? Here too, the research suggests that the answer is no. As early as 1996, most scholars who studied the issue concluded that “police have little or no impact on crime.”²⁵² A commonly held perception is that a strong police presence will deter criminal activity. But a study of people arrested in the seventy-five counties responsible for the majority of U.S. crime found that greater police presence does not affect perceived risk of arrest and thus cannot serve as a deterrent.²⁵³ These findings are consistent with a study of the NYPD’s stop and frisk practices conducted by the New York State Office of the Attorney General. As explained by Professor Tracey Meares:

“[J]ust 6% of stops during the observation period from 2009 to 2012 resulted in an arrest. Half of those, or 3%, resulted in a conviction of any kind, whether crime or violation. Less than half of those, about 1.5%, led to jail or prison time, and to the extent that any incarceration resulted from a conviction following a stop, the sentence was for 30 days or less. Just 0.15% of stops during the observation period resulted in a prison sentence, that is, a term for a year or more, which is a rough measure of more serious crime. Numbers such as these call into the question the idea that [stop and frisk] is a sure or even reasonable method of detecting serious offenders who drive up crime in cities.²⁵⁴”

247. DON STEMEN, VERA INST. OF JUST., *THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER* 2 (2017).

248. Raymond V. Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 *CRIMINOLOGY & PUB. POL’Y* 245, 245 (2006).

249. Alex R. Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime?* 23 *J. QUANT. CRIMINOLOGY* 267, 268 (2007).

250. David J. Harding et al., *A Natural Experiment Study of the Effects of Imprisonment on Violence in the Community*, 3 *NATURE HUM. BEHAV.* 671, 671 (2019).

251. *Id.*

252. See Gary Kleck & J.C. Barnes, *Do More Police Lead to More Crime Deterrence?*, 60 *CRIME & DELINQ.* 716, 717 (2014) (internal quotation marks omitted).

253. *Id.* at 727.

254. Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 *ANN. REV. L. & SOC. SCI.* 335, 344 (2014).

Other studies echo these results, including one finding that the police practice of concentrating traffic stops in high crime areas had no immediate or long-term impact on serious crime.²⁵⁵ Further, the idea that police officers exist to prevent crime or stop it before it happens is belied by data regarding how police spend their time. It is “relatively rare” that officers respond to a crime in progress—one study found that the average officer spent one hour a week doing so.²⁵⁶

Unsurprisingly, massive increased investments in policing have netted very little measurable good. The 1994 federal crime bill, the Violent Crime Control and Law Enforcement Act, “authorized appropriations of \$8.8 billion for fiscal years 1995 through 2000 for grants to states and local communities to increase the hiring and deployment of community police officers.”²⁵⁷ This funding led to an estimated increase of 88,000 additional officer-years.²⁵⁸ Yet, despite putting thousands of officers in the street at incredible expense, the Government Accountability Office concluded that only 1.3% of the declining crime rate from 1993 to 2000 could be explained by the addition of police officers.²⁵⁹ The GAO cited research hypothesizing that the decline in crime in the late 1990s resulted from declines in demand for crack cocaine and changing economic conditions.²⁶⁰

III. GROUNDING POLICE POWER IN THE REALITIES OF POLICING

The evidence described above demonstrates that policing is discriminatory, violent, and harmful, that police officers are ill-equipped to make life and death decisions without bias, and that policing does not create safe communities. Nevertheless, the law empowers police with the ability to harm and intrude because of a legally unproven and untested assumption that a legitimate governmental interest is furthered by the institution of policing. In light of this evidence, how should courts evaluate the government’s interest in policing and balance this interest against individual and collective interests to be free from police intrusion and harm? Courts that fully consider both the scope and scale of harm resulting from policing—and the minimal benefits received in exchange—would be required to significantly curb police power and presence.

The Fourth Amendment balancing test thus should no longer automatically

255. *Traffic Stops Have ‘No Discernible Impact’ on Crime Prevention: Study*, THE CRIME REPORT (Feb. 13, 2019), <https://perma.cc/LY3L-ACM9>.

256. Friedman, *supra* note 222, at 44.

257. U.S. GOV. ACCOUNT. OFF., REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES: COMMUNITY POLICING GRANTS: COPS GRANTS WERE A MODEST CONTRIBUTOR TO DECLINES IN CRIME IN THE 1990S I (2005) [hereinafter GAO REPORT].

258. *Id.* at 12.

259. *Id.* at 13-14; see also Derecka Purnell & Marbre Stahly-Butts, *The Police Can’t Solve the Problem. They are the Problem.*, N.Y. TIMES (Sept. 26, 2019), <https://perma.cc/EBK9-4KZD>.

260. GAO REPORT, *supra* note 257, at 1.

defer to police judgment and experience when evaluating the lawfulness of a stop or risk of harm. Instead, courts should balance the significant risk of harm and/or discrimination inherent in every police interaction against the limited public good resulting from policing. In short, courts should read into the Fourth Amendment a requirement that policing be both least intrusive and least harmful.

In 1988, Professor Nadine Strossen proposed that the Court evaluate police searches to determine if they were the least intrusive measure to substantially promote the state's goals.²⁶¹ Professor Strossen suggests that this test would prevent courts from "undervalu[ing] privacy and liberty rights, or . . . inflat[ing] the countervailing law enforcement interests."²⁶² Professor Strossen describes how under this test a search and seizure "should first be analyzed from the perspective of the law enforcement officer who carried it out at the time and under the circumstances in question. "If, viewed from that perspective, the officer's legitimate objectives could have been substantially promoted through less intrusive means than those actually employed" then the search and seizure would be unlawful.²⁶³ Specifically, Professor Strossen proposes that police intrusion and violence should only be deemed constitutional when "1) its benefits exceed its costs, and 2) there is no significantly less intrusive alternative measure through which the state could substantially achieve its goals. To be held reasonable in its execution, a search or seizure must be carried out by means which comport with basic notions of fairness and dignity."²⁶⁴

Given the expanded presence of policing since Professor Strossen first made this proposal in 1988, and the increased likelihood that encounters with police will result in harm, there is now even more evidence supporting the adoption of this standard. I propose to update the standard in three ways.

First, the least intrusive, least harmful policing standard shifts the Fourth Amendment's center of gravity. Under current law, governmental interest in policing trumps all but the most intrusive government conduct.²⁶⁵ But even police-community interactions that don't lead to violence still have serious consequences. The test proposed here requires a threshold inquiry regarding whether the government's interest is legitimate and significant enough to support *any* police intrusion.

Second, I propose to extend the least intrusive, least harmful test beyond the contexts of searches into the realm of excessive force. Justice Sotomayor endorsed this approach to evaluating excessive force in her dissent in *Kisela v. Hughes*. In *Kisela*, the majority granted qualified immunity to a police officer who used lethal force against a woman who was standing in her yard with a knife while experiencing symptoms of mental illness. The officer shot the woman

261. Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U.L. REV. 1173, 1266 (1988).

262. *Id.*

263. *Id.* at 1260.

264. *Id.* at 1257.

265. See *Graham v. Connor*, 490 U.S. 386, 396 (1989).

through a chain-link fence because he perceived her as a threat to her roommate.²⁶⁶ The roommate later testified that she did not feel threatened by the woman.²⁶⁷ In her dissent, Justice Sotomayor wrote that the officer could have—but failed to—use least intrusive means prior to using lethal force. Such least intrusive means could include less lethal weapons or verbal de-escalation. On this basis, she would have denied the officer qualified immunity and allowed the Plaintiff to proceed with her claims against the police officer who shot her.²⁶⁸ The updated least intrusive, least harmful standard I propose would require officers to exhaust all other means—including retreat—before engaging in violence.

Third, and finally, an updated least harmful, least intrusive standard would recognize that policing and race are inextricably intertwined and that racialized policing is inherently harmful. In order to redress this harm, the least intrusive, least harmful standard would provide that when an individual asserts that a stop, seizure or use of force was motivated by race, the burden shifts to the police officer to demonstrate that the police action was in fact race neutral.

1. Heightened justifications for any police intrusion

Officer Derek Chauvin famously began his interaction with George Floyd because Mr. Floyd was accused of attempting to use a counterfeit \$20 bill. Officer Chauvin proceeded to murder Mr. Floyd by kneeling on his neck. Under the current Fourth Amendment analysis, Officer Chauvin had reasonable suspicion to stop Mr. Floyd. But Officer Chauvin had the right to stop Mr. Floyd only because the courts assume that a legitimate governmental interest is served by having armed police officers respond to instances of petty theft. Given the serious risks of harm created by police during any interaction with a community member, and the existence of data demonstrating that shoplifters are not deterred by criminal legal sanction,²⁶⁹ under the least intrusive standard, Officer Chauvin would have had no right to engage with George Floyd, let alone kill him.

Similarly, Dnigma Howard was a sixteen-year-old Chicago Public Schools student with learning differences whom school administrators ordered to leave school because she refused to put away her cell phone during a test. When Ms. Howard refused to leave school grounds, Chicago police officers wrestled her down a flight of stairs and eventually tased her.²⁷⁰ As with shoplifting, there are

266. *Kisela v. Hughes*, 138 S. Ct. 1148, 1151 (2018).

267. *Id.*

268. *Id.* at 1155 (Sotomayor, J., dissenting) (“If this account of Kisela’s conduct sounds unreasonable, that is because it was . . . a jury could find that Kisela violated Hughes’ clearly established Fourth Amendment rights by needlessly resorting to lethal force.”).

269. M. Jeffery Kallis et al., *Consumer Shoplifting: Orientations and Deterrents*, 13 J. CRIM. JUST. 459, 470 (1985).

270. Fran Spielman, *Committee OKs \$300K Settlement to Former CPS Special Needs Student Tased by Cops at Marshall HS*, CHI. SUN-TIMES (Dec. 14, 2020, 2:52 PM), <https://perma.cc/4T9F-P6RN>.

empirically proven alternative approaches to school safety.²⁷¹ Ms. Howard should never have come into contact with an armed police officer the day CPD officers harmed her.

The Fourth Amendment should no longer simply assume that a legitimate governmental interest is served through police presence and arrests for law violations. Instead, the Fourth Amendment analysis should begin with an inquiry regarding the initial legitimacy of the police presence/government interest when balanced against the risk of harm from police. Under this standard, courts should conclude that, given the risk of harm posed by police and the meager collective benefits of policing, the Fourth Amendment prohibits police response to the activities consuming the majority of police officers' time (traffic stops, mediating domestic disputes, and responding to general requests for service).²⁷² Adoption of this standard will require local jurisdictions to invest in alternative, non-police based approaches to the issues that are currently in the police's wheelhouse, but cannot remain so under a least intrusive standard. Based on Professor Friedman's research regarding how police officers spend this time, the adoption of this standard would reduce the "need" for police officers by over 50%.²⁷³

The application of the least intrusive, least harmful policing standard would radically change the power and presence of police. Least intrusive policing would significantly limit the presence of police, particularly in circumstances where the risk of police presence clearly outweighs the benefit. Jurisdictions across the United States are already adopting this approach and prohibiting police presence in schools,²⁷⁴ eliminating police response to people in mental health crisis²⁷⁵ and eliminating or reducing police-involved traffic stops.²⁷⁶ Some of the most troubled police departments in the country—including Baltimore and Ferguson—have in place consent decrees that require limits on police power to arrest for minor offenses and mandate creation of mediation processes to resolve disputes without involving the police.²⁷⁷

271. Ron Avi Astor et al., *How Can We Improve School Safety Research?*, 39 EDUC. RESEARCHER 69, 72 (2010); Shabnam Javdani, *Police Policing Education: An Empirical Review of the Challenges and Impact of the Work of School Police Officers*, 63 AM. J. CMTY. PSYCH. 253, 265 (2019).

272. Friedman, *supra* note 222, at 44.

273. *Id.*

274. Kalyn Belsha, *Some School Districts Are Cutting Ties with Police. What's Next?*, CHALKBEAT (Jun. 9, 2020, 4:50 PM), <https://perma.cc/D32F-FGC7>.

275. Jerry Jannelli & Joshua Vaughn, *What Public Safety Without Police Looks Like*, APPEAL (Jan. 8, 2021), <https://perma.cc/XG6G-W4NA>.

276. *Berkeley Moves Toward Removing Police from Traffic Stops*, ASSOCIATED PRESS (July 15, 2020), <https://perma.cc/JW77-QWSG>; Jeff Cohen, *To Reduce Bias, Some Police Departments Are Rethinking Traffic Stops*, NPR (July 25, 2020, 4:17 PM), <https://perma.cc/7GV5-JABA>.

277. Consent Decree, *United States v. Ferguson*, No. 4:16-CV-180 (E.D. Mo. Mar. 17, 2016), at ¶¶ 34, 90-93, 212-216; Consent Decree, *United States v. Baltimore*, No. 1:17-CV-99 (D. Md. Jan. 12, 2017), at ¶ 19(g).

Professor Barry Friedman describes these efforts as part of “disaggregating” the police function. Professor Friedman argues that disaggregation is required:

[T]oo much of what we treat through the criminal law and agencies of law enforcement are really problems of public health and social welfare. For various reasons, it has become our default to address them with the police power, literally, in the name of “public safety.” Then Dallas, now Chicago Police Chief David Brown echoed this sentiment when he said “We’re asking cops to do too much in this country. . . . Every societal failure, we put it off on the cops to solve. Not enough mental health funding, let the cops handle it. . . . Schools fail, let’s give it to the cops. . . . That’s too much to ask. Policing was never meant to solve all those problems.”²⁷⁸

Given that the majority of police time and effort is devoted to responding to minor offenses and calls for services that could be addressed by community responders,²⁷⁹ curbing police presence will significantly reduce the demand for police and the number of police on the streets.

2. Officers must police in the least harmful manner

The adoption of the least intrusive standard will not immediately eliminate all police community contact so police violence must be evaluated under a “least harmful” standard.

Breonna Taylor was shot and killed by police officers when they conducted a raid on her home, attempting to find her ex-boyfriend who was suspected of a drug offense. The officers raided her home in the middle of the night, banging on her door and waking Ms. Taylor and her then-partner. Both were asleep in bed. When Ms. Taylor’s partner mistook the police for an intruder, he fired a shot. The police fired back, shooting and killing Ms. Taylor. Under the traditional Fourth Amendment police violence related jurisprudence, the analysis would begin at the moment the police perceived that they faced a serious threat while inside the apartment. But under the least intrusive, least harmful standard (assuming that officers could demonstrate a legitimate governmental interest), officers would have been required to carefully plan this raid and to execute it in a manner that would have focused on protecting the lives of the people in the apartment. The officers would therefore have been required to refrain from a violent, middle of the night home raid and to use other, non-violent tactics, to achieve their aim.

Further, the application of the least harmful standard would ultimately disarm the police. The general risk of harm posed by armed police officers who often receive training that encourages violence and fails to mitigate bias relative

278. Brady Dennis et al., *Dallas Police Chief Says ‘We’re Asking Cops to Do Too Much in this Country,’* WASH. POST (July 11, 2016, 7:56 PM), <https://perma.cc/6BGY-MUAQ>.

279. Friedman, *supra* note 222, at 44.

to the poor public safety outcomes generated by policing would require disarmament. 911 data from eight cities led researchers from the Center on American Progress to estimate that “between 33 and 68 percent of police calls for service could be handled without sending an armed officer to the scene; between 21 and 38 percent could be addressed by Community Responders.”²⁸⁰ The presence of armed police officers in cases that may be addressed by Community Responders is more likely to introduce the risk of violence than mitigate it.

Disarming police would also require eliminating the threat of violence entailed in the use of all weapons. Police do not have to shoot their firearm to create harm. Police officers who point a gun at an individual commit serious harm—even if they opt not to shoot. Police departments themselves acknowledge that “[u]nnecessarily or prematurely drawing or exhibiting a firearm limits an officer’s alternatives in controlling a situation, creates unnecessary anxiety on the part of citizens, and may result in an unwarranted or accidental discharge of the firearm.”²⁸¹ Harrowing media reports detail the trauma that people—including young children—experience when encountering an officer with a gun pointed at them.²⁸² Police also use batons, chemical restraints, and tasers to create significant harm.²⁸³

Disarming the police would be an “effective harm reduction tactic, given the number of people that are killed by firearms and tasers each year in the United States. Countries where law enforcement do not carry weapons experience far lower rates of officer-involved violence.”²⁸⁴ Indeed, some researchers argue that police themselves would be safer without access to weapons because guns and other weapons have an inherently escalating effect on already tense situations.²⁸⁵ For these reasons, a number of college and university-related police departments around the country have recently taken action to disarm their police departments

280. Amos Irwin & Betsy Pearl, *The Community Responder Model: How Cities Can Send the Right Responder to Every 911 Call*, CTR. FOR AM. PROGRESS (Oct. 28, 2020, 9:06 AM), <https://perma.cc/D6EA-MBDR>.

281. *Vol. 1: Policy-556.80 Drawing or Exhibiting Firearms*, L.A. POLICE DEP’T, <https://perma.cc/GV5J-FNRQ> (last visited Aug. 26, 2021); see also *8.300-Use of Force Tools*, SEATTLE POLICE DEP’T, <https://perma.cc/UZ3A-GD7N> (last visited Aug. 26, 2021).

282. Carlos Ballesteros, *Chicago Police Pointed Gun at Baby While Searching the Wrong Home in Woodlawn: Lawsuit*, CHI. SUN-TIMES (Nov. 14, 2019, 7:21 PM), <https://perma.cc/S9Q3-GTUQ>; Lauren Gill, *Chicago Police Pointed Guns at and Traumatized Children in Botched Raids, Lawsuits Allege*, APPEAL (Aug. 14, 2019), <https://perma.cc/UAD8-ZZZL>; Erin Donaghue, *Chicago Police Pointed Guns at Kids, Cuffed 8-Year-Old During Raid, Lawsuit Alleges*, CBS NEWS (May 29, 2019, 6:13 PM), <https://perma.cc/J2FY-VGTP>.

283. See, e.g., BCPD REPORT, *supra* note 185, at 98-99; CPD REPORT, *supra* note 179, at 6, 34; FPD REPORT, *supra* note 175, at 28.

284. Meghan G. McDowell & Luis A. Fernandez, ‘Disband, Disempower, and Disarm’: *Amplifying the Theory and Practice of Police Abolition*, 26 CRITICAL CRIMINOLOGY 373, 381 (2018).

285. Gregory Smithsimon, *Disarm the Police*, METROPOLITICS (Sept. 29, 2015), <https://perma.cc/9B9J-BKYM>.

and some lawmakers have proposed to disarm city police departments.²⁸⁶

3. Officers must explicitly engage with racial bias and discrimination

Employment law provides that once a plaintiff proves that 1) she is a member of a protected class; 2) she was qualified for and applied for a position; 3) she was rejected for the position; and 4) the potential employer continued to seek applications for the position from people with comparable qualification, she has proved a prima facie case and “a rebuttable presumption of discrimination arises” so that the burden shifts to the employer to articulate a legitimate, non-discriminatory justification for the rejection.²⁸⁷ In the policing context, an individual alleging an adverse police action would need to assert membership in a protected class and that she was subject to police intrusion or violence. The burden would then shift to the police officer to assert a non-discriminatory, legitimate justification for the police action, consistent with the other requirements of the least intrusive, least harmful standard. Given the extent to which police officers rely on racial stereotypes in making all sorts of decisions from who to arrest, to who to charge, this burden shifting will significantly limit police power.²⁸⁸

4. The path towards implementing least intrusive, least harmful policing

There are two distinct paths towards implementing the least harmful, least intrusive policing standard. The first, and most challenging path is directly through the courts. Attorneys could begin challenging the assumptions courts make about policing—and particularly related to minor, non-violent offenses—constituting a legitimate governmental interest. This would require police misconduct and criminal defense attorneys to proffer novel arguments about the risk of harm resulting from police community contact and submit evidence about the meager public safety benefit resulting from policing. This path would require courts to overrule well-established precedent, but as demonstrated throughout this article, that precedent is built on fictitious assumptions about the harms of policing. The empirical data about the harm of policing and the questionable

286. Meerah Powell, *PSU to Disarm Campus Police Officers this Fall*, OR. PUB. BROAD. (Aug. 13, 2020), <https://perma.cc/3WA7-9KKN>; Meghna Maharishi & Kathryn Stamm, *Reversing Stances, S.A. Approves Cornell Police Disarmament in 3-Hour Meeting Marred by Procedural Debates*, CORNELL DAILY SUN (Dec. 12, 2020), <https://perma.cc/TV2R-A6TB>; Erin Brown, *Councilmember Pushes to Disarm Police in Burlington*, WCAX (Aug. 26, 2019), <https://perma.cc/5SYY-S9BW>.

287. Sandra F. Sperino, *Beyond McDonnell Douglas*, 34 BERKELEY J. EMP. & LAB. L. 257, 258-59 (2013).

288. Robin Walker Sterling, *Through A Glass, Darkly: Systemic Racism, Affirmative Action, and Disproportionate Minority Contact*, 120 Mich. L. Rev. 451, 504 (2021) (“The Court has endorsed implicit reliance on racial stereotypes in . . . the . . . criminal legal system cases—even if reliance on those stereotypes produces racially disparate results—and suggested that those stereotypes are unavoidable.”)

benefits of policing should convince the courts to revisit the power the law provides to police harm.

The second, more realistic path is through state and local lawmakers and then back to the courts. State legislatures including Illinois and California have already passed laws that hold police officers to higher use of force standards than those found in federal law. In California, police officers may only use deadly force when “necessary” to protect against a serious threat (as opposed to force that would have been used by a “reasonable police officer” in a similar situation, though the decision to use force is still evaluated from the perspective of a reasonable officer).²⁸⁹ In Illinois, the state legislature adopted a new use of force standard that incorporates the “necessary” standard and prohibits the use of lethal force against someone suspected of a property offense, among other restrictions.²⁹⁰ Through consent decrees with the federal government multiple jurisdictions have agreed to use of force standards more stringent than those provided under federal law.²⁹¹ Similarly, as described above, multiple jurisdictions have reduced or eliminated police response for low level offenses and calls for service.²⁹² None of these reforms go far enough to implement the least restrictive, least harmful policing standard, but they demonstrate that some lawmakers have an appetite for regulating police power and presence beyond those restrictions contained in Fourth Amendment jurisprudence. For example, in Chicago, members of City Council co-sponsored an ordinance that would require Chicago police officers to use “tactics that are the least intrusive to people’s home, property and person and least harmful to people’s physical and emotional health.”²⁹³ Chicago lawmakers developed this ordinance after Chicago Police officers mistakenly raided the home of Anjanette Young and forced her to stand in her home naked and exposed until officers confirmed that they were in the wrong place.²⁹⁴ Once a critical mass of jurisdictions have adopted this standard, attorneys will be better able to argue to the courts that more permissive policing standards fail to further a legitimate governmental interest. This approach echoes the Court’s analysis in *Tennessee v. Garner*, where it found the fact that many jurisdictions banned the use of lethal force on people who posed no threat—even if they ran from the police—, and therefore so should the Fourth Amendment.

Limiting police power and presence under the least intrusive, least harmful standard would significantly transform policing. Armed police would not engage in traffic stops or arrest people for minor non-violent crimes. This means Eric

289. CAL. PENAL CODE § 835(a)-(c) (2019).

290. 720 ILL. COMP. STAT. 5/7-5 (2021).

291. Butler, *supra* note 174, at 1463 (concluding that the consent decree in Ferguson provides the community there with more protections against police violations than currently found in federal law, but questioning whether these reforms—forced upon a police department by the federal government and thus subject to political whims—will be sufficient to change the core of what causes police abuse and violence).

292. Rowan Moore Gerety, *An Alternative to Police That Police Can Get Behind*, ATLANTIC (Dec. 28, 2020), <https://perma.cc/BJ5E-RKVS>.

293. CHI., ILL., O2021-764 (2021).

294. *Id.*

Garner, Alton Sterling and George Floyd would still be here. Armed police officers would not invade the homes of Black women in search of evidence or to support a criminal conviction. Breonna Taylor would still be here. And no armed officer would encounter and shoot an individual who is struggling with either substance abuse or mental illness. Instead, trained mental health providers would be on the scene to help de-escalate and evaluate. Laquan McDonald and Elijah McClain would still be here.

5. From least intrusive, least harmful policing to alternatives to police

*Bring the power back to the street where the people live! We sick of working for crumbs and filling up the prisons*²⁹⁵

Because limiting police power and presence will not alone create community safety, Black activists have demanded that cities reinvest the savings achieved from defunding police departments into community-led strategies for safety and wellness.²⁹⁶ Limiting police power and presence will result in significant savings that should be reinvested into communities. United States cities currently spend \$100 billion annually on policing.²⁹⁷ Chicago and Baltimore combined spend almost \$2 billion on policing. New York City police operations cost the city \$5.6 billion.²⁹⁸ Across the country, many cities allocate between 20-45% of entire city budgets to fund policing.²⁹⁹

Examples of effort to create safe communities without reliance on police include Mothers Against Senseless Killings (MASK). MASK is a group of community members (mostly, but not all mothers) who “occupy” a Chicago neighborhood where gunshots were once frequent. MASK creates a positive presence and builds community—and their presence correlates with a significant reduction in fatal shootings.³⁰⁰ Tamar Manasseh describes what she calls MASK’s “simple” approach to community safety:

“We put on hot-pink T-shirts, got our lawn chairs and a couple of packs of hot dogs, and went to the corner and cooked some dinner. We showed up and established a presence in the neighborhood. We’re also creating small community centers in vacant lots around the city, where kids can play, study and get a hot meal. We also listened to the people there. They told us how to stop gun violence in their neighborhood and pretty much all the other ones just like it.

295. DEAD PREZ, *Police State*, on LET’S GET FREE (Loud 2000).

296. BALIGA ET AL., *supra* note 4, at 2.

297. CTR. FOR POPULAR DEMOCRACY, *FREEDOM TO THRIVE: REIMAGINING SAFETY & SECURITY IN OUR COMMUNITIES 3* (2020) [hereinafter POPULAR DEMOCRACY REPORT].

298. CITIZENS BUDGET COMM’N, *Seven Facts About the NYPD Budget* (June 12, 2020), <https://perma.cc/3B27-2XNX>.

299. See POPULAR DEMOCRACY REPORT, *supra* note 296, at 1.

300. Jennifer Mascia, *Chicago Block Patrolled by Moms Goes Two Years Without a Fatal Shooting*, THE TRACE (Sept. 7, 2017), <https://perma.cc/A3WA-SXTF>.

They told us they needed resources, jobs and skills training.³⁰¹”

Youth led anti-violence group Good Kids/Mad City (GKMC) has a similar approach. Young people affiliated with GKMC receive political education, restorative justice training and conflict resolution skills. They then go out to the streets to recruit other young people to take their “peace pledge” and commit to resolve conflict productively and join GKMC’s efforts to recruit other young people to become peaceworkers. GKMC views mutual aid as interwoven with peace keeping—particularly given that the COVID-19 related downturn has increased the material needs of Black and brown communities.³⁰² GKMC’s legislative proposal to scale their program citywide has been described as a proposal that could result in an immediate reduction in the Chicago Police Department’s budget.³⁰³ Similar programs exist in New York City, where LIFE Camp uses a bus called the “Peacemobile” to go into communities to help mediate conflict and provide trauma-based wellness services.³⁰⁴ Life Camp also provides wrap-around services and employs a community-health model for violence prevention.³⁰⁵

The “community responder” model of community safety would eliminate police response to people in mental health crises, and instead refer such situations to trained mental health officials. One such model, Crisis Assistance Helping Out on the Streets (CAHOOTS), based in Eugene, Oregon, has taken a pioneering approach to eliminating police response. Through CAHOOTS, calls for services related to mental health or addiction are referred to “unarmed outreach workers and medics . . . trained in crisis intervention and de-escalation.”³⁰⁶ CAHOOTS estimates that it saves \$8.5 million annually by “reducing the need for police response.”³⁰⁷ Programs based on the CAHOOTS model are being considered in Denver, Oakland, Portland, and New York.³⁰⁸

Proven and promising models for achieving public safety that pose no risk of harm to communities exist and are being developed and implemented in communities on a daily basis. The existence of these programs—and their successes—provides further evidence that the governmental interest presumed by the courts when evaluating police conduct must be viewed with skepticism.

301. Tamar Manasseh, *We Are Reclaiming Chicago One Corner at a Time*, N.Y. TIMES (Oct. 22, 2017), <https://perma.cc/HT6P-GZGQ>.

302. Sophie Sherry, *In Neighborhoods Where It Fights Violence, GoodKids MadCity Is Raising Money for Those Struggling During the Pandemic. ‘We Have to Take Care of Each Other’*, CHI. TRIBUNE (May 1, 2020), <https://perma.cc/5WLT-5K86>.

303. Grace Del Vecchio, *4 Actual Proposals for Cutting Chicago’s Police Budget Right Now*, INJUSTICEWATCH (Nov. 23, 2020), <https://perma.cc/P4CK-MYE7>.

304. *About Us*, LIFE CAMP, <https://perma.cc/G3M2-SPBZ> (last visited Aug. 26, 2021).

305. *Id.*

306. Gerety, *supra* note 291.

307. Irwin & Pearl, *supra* note 280.

308. Sarah Holder & Kara Harris, *Where Calling the Police Isn’t the Only Option*, BLOOMBERG CITYLAB (Sept. 2, 2020) <https://perma.cc/XZ5K-U96C>.

CONCLUSION

*I got faith in the people and they power to fight
We gon make the struggle blossom
Like a flower to light.*³⁰⁹

Over two hundred years ago, Alexander Hamilton issued his own critique of government intrusion into people’s lives in the name of safety and security. Hamilton warned that if “nations the most attached to liberty” resort “to institutions which have a tendency to destroy their civil and political rights . . . they . . . become willing to run the risk of being less free.”³¹⁰ Founding Father James Madison predicted that “[a] standing military force” like that of local police forces would pose a grave danger to the people.³¹¹ He urged checks on the power of the policing function. Of course, Hamilton and Madison concerned themselves only with the rights of white men. Nonetheless, like the hip-hop artists and rappers quoted throughout this article, the Founding Fathers expressed serious concerns about government intrusion that prioritizes notions of collective security over individual freedom. That is precisely what has happened with the policing function, except that the individualized harms caused by policing have affected so many millions of people that the adverse consequences of racialized violent policing are felt by entire communities.

For generations, Black and brown communities have documented police harm and have risen up in protest against policing—insisting that police presence brings so little benefit to Black and brown communities and comes with such great risk.³¹² More recently, criminologists, social scientists and mental health professionals have provided objective, empirical evidence of policing’s significant risks relative to slim rewards.³¹³ The courts can no longer ignore the facts about policing: the risks to communities of color far outweigh any benefit to a governmental interest. Fourth Amendment jurisprudence must be recalibrated to acknowledge this truth—and this recalibration must lead to defunding of the police and contemporaneous investments in Black and brown communities.³¹⁴

309. THE COUP, *Heven Tonite*, on PARTY MUSIC (75 Ark 2001).

310. ALEXANDER HAMILTON, FEDERALIST NO. 8 (1787).

311. See Matt Ford, *The Police Were a Mistake*, NEW REPUBLIC (June 2, 2020), <https://perma.cc/BVP4-DVRJ> (internal quotation marks omitted).

312. Peniel E. Joseph, *From the Black Panthers to Black Lives Matter, the Ongoing Fight to End Police Violence Against Black Americans*, WASH. POST (May 29, 2020, 4:26 AM), <https://perma.cc/4D4X-8UN5>.

313. See generally Burrell et al., *supra* note at 54 (reviewing data on the increase of community violence experienced by Black males in select U.S. cities).

314. ANDREA J. RITCHIE, INTERRUPTING CRIMINALIZATION, THE DEMAND IS STILL #DEFUNDTHEPOLICE 4 (2021).