

THE IMPACT OF RACE AND POLICING— PAST, PRESENT, AND FUTURE

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This article is drawn from a keynote address I gave at the UCLA School of Law’s October 2015 Critical Race Studies Symposium, “Race and Resistance: Against Police Violence.” I was asked to speak because of the 2013 opinion I authored in *Floyd v. City of New York*,¹ a landmark decision ending New York City’s unconstitutional practice of stop and frisk as carried out by the New York City Police Department. However, in order to create a context in which to understand the *Floyd* decision I have broadened the scope of the topic to incorporate events taking place before and after the publication of that Opinion.

I begin with a brief historical background that sets the stage for the spotlight on race and policing that has been the focus of so much recent attention. It all begins with slavery—the way that African-Americans were brought to this country, bought and sold as property, forced to labor without pay, and treated cruelly by their owners or masters. African-Americans could not look to the law to protect them. Indeed, the law was employed to ensure that they and their descendants remained slaves.

After the American Civil War, and after the rise and fall of Reconstruction, debt peonage emerged as a new form of slavery in the Southern States. This unfortunate stain on our history is brilliantly recounted in *Slavery by Another Name* by Douglas Blackmon.² African-Americans were often arrested for nonexistent offenses—like speaking rudely to a White woman, walking in a certain way (yes, literally), spitting on the

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¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

² DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

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sidewalk, or for petty offenses like gambling, disturbing the peace (making noise) or vagrancy (unemployment).

After the arrest, the defendants would usually plead guilty to avoid an inevitably unjust trial and harsh prison term. After a plea, local judges would sentence the defendant to fines that they could not afford to pay. Under this system, “businessmen,” such as plantation, coal mine, or factory owners, paid the defendant’s fines and forced the defendant to sign a contract to repay the debt (a contract the defendant could neither read nor sign other than with an “x”). The defendant was then forced to labor for months or years, treated as a slave—underfed, chained, chased by dogs if he tried to escape, beaten, and often killed. Thousands of African-Americans served in debt peonage from 1880 through World War II. Law enforcement played a leading role in maintaining this system, from the arrest by the sheriff, through the sentencing by the judge.

No discussion on this topic would be complete without at least a mention of extrajudicial punishment. The history of lynching in the South is a shameful chapter in American history. A recent report from Bryan Stevenson of the Equal Justice Initiative, based on five years of research, revealed that between 1877 and 1950, there were 3,959 victims of racial terror across twelve Southern states.³ Stevenson reports that these lynchings were not about administering popular justice but focused on terrorizing the African-American community. Many lynchings were not punishment for any crime but rather for violating the racial hierarchy—offenses included bumping against a White woman or wearing an Army uniform. In short, lynchings were a message to other African-Americans: violate the racial hierarchy, and you could be next. Again law enforcement personnel never protected the victims, but rather often joined in this lawless conduct.

We also know that law enforcement officials often appointed themselves as judge, jury, and executioner. The most notorious case is that of Sheriff Willis McCall of Lake County Florida, who arrested four African-American men for the alleged rape of a White woman—even though one of them was in police custody at the time of the alleged rape!

³ See EQUAL JUSTICE INITIATIVE, *LYNCING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR REPORT SUMMARY* 4–5 (2015), available at <http://www.eji.org/files/EJI%20Lynching%20in%20America%20SUMMARY.pdf>. See also Campbell Robertson, *History of Lynchings in the South Documents Nearly 4,000 Names*, N.Y. TIMES (Feb. 10, 2015), <http://www.nytimes.com/2015/02/10/us/history-of-lynchings-in-the-south-documents-nearly-4000-names.html>.

Gilbert King painstakingly reports on this case—known as the Groveland affair—in an outstanding book, *Devil in the Grove*.⁴ After the men were tried, convicted, and sentenced to death, they won a new trial from the U.S. Supreme Court. On the day before the second trial, Sheriff McCall personally transported two of the men to the courthouse—but they never arrived. He took back roads and at some point ordered them out of the car. He shot them both, later claiming that they had attacked him and tried to run away—all while handcuffed. One victim lived—surviving by pretending to be dead—and reported the truth about what had happened. Nonetheless, Sheriff McCall was repeatedly reelected and remained in office for the next twenty-five years.

Before turning to a discussion of the Floyd case, three additional historical notes are worthy of mention to provide further context to the issues raised and decision reached in that case. The first note is the War on Drugs, which has been ongoing for more than one hundred years. It began in 1914 with the passage of the Harrison Act (criminalizing the possession, use, and sale of narcotics).⁵ This so-called War revealed an ugly dose of racial bias from its inception. The first head of the Federal Bureau of Narcotics was Harry Anslinger, who took office in 1930. Although he originally was only interested in prosecuting heroin and cocaine cases, he quickly turned to marijuana. He believed that Mexican immigrants and African-Americans were using marijuana much more than White people. “The most frightening effect of marijuana, [Anslinger] warned, was on Blacks. It made them forget the appropriate racial barriers—and unleashed their lust for White women.”⁶ According to Johann Hari, the author of a devastating exposé of the War on Drugs, “[t]he main reason given for banning drugs—the reason obsessing the men who launched this war—was that the [B]lacks, Mexicans, and Chinese were using these chemicals, forgetting their place, and menacing White people.”⁷ Anslinger could wage the drug war in the way he did only because he created and exploited racial fear in the consciousness of the American people. The press embraced this theme, claiming that cocaine turned “[B]lacks into superhuman hulks who could take bullets

⁴ GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* (2012).

⁵ Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 785 (1914).

⁶ JOHANN HARI, *CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS* 17 (2015).

⁷ *Id.* at 26.

to the heart without flinching.”⁸ This “was the official reason why police across the South increased the caliber of their guns.”⁹

The second historical note that provides context is the decades of sentencing policies that have resulted in the over-incarceration of African Americans. Most readers are familiar with the steep rise in the prison population based on the mandatory minimum sentencing which emerged twenty-five years ago as part of the continuing War on Drugs. These mandatory sentences were imposed primarily on African-Americans, who make up 37 percent of the national prison population—the largest percentage of any group.¹⁰ Indeed, of the total of 1.5 million federal and state prisoners, as of 2014, over 60 percent were members of racial or ethnic minorities.¹¹ In California, as of 2010, African-Americans represented 7 percent of the population but 29 percent of the prisoners.¹² In New York, also as of 2010, African-Americans made up 16 percent of the population but 53 percent of the prisoners.¹³ The disparity in sentencing for possession or sale of crack as opposed to powder cocaine resulted in lengthy sentences for African-Americans, who were more likely to be charged or convicted for crack versus powder cocaine-related offenses.¹⁴ It took two decades to correct the gross disparity of the 100-to-1 ratios in drug sentencing, but even today a disparity remains.¹⁵ Because of that, 43 percent of all federal inmates serving time for drug offenses were

⁸ *Id.* at 27.

⁹ *Id.*

¹⁰ See THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5 (2015), *available at* http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

¹¹ See *id.* at 6; E. ANN CARSON, U. S. DEP’T OF JUSTICE, PRISONERS IN 2014, at 15 (Sept. 2015), *available at* <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

¹² See SONYA RASTOGI ET AL., U. S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 8 (Sept. 2011), *available at* <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>; CAL. DEP’T OF CORR. & REHAB., CALIFORNIA PRISONERS AND PAROLEES 2010, at 19 (2011), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CALPris/CALPRISd2010.pdf.

¹³ See RASTOGI ET AL., *supra* note 13, at 8; *50 State Incarceration Profiles: New York Profile*, PRISON POLICY INITIATIVE, <http://www.prisonpolicy.org/profiles/NY.html>.

¹⁴ See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 261, 275 (2009); FEDERAL SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY B-7, B-18, B-23 (2007), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

¹⁵ See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 STAT. 2372 (2010).

African-American as of 2005.¹⁶ Now, at long last, it appears that a political consensus has recognized the need to reduce the prison population by lifting the draconian sentencing laws that had such a disparate impact on African-Americans.¹⁷

The third historical note is the growing awareness of the number of wrongful convictions and the accompanying exonerations. In short, many wrongful convictions were obtained as a result of corrupt or sloppy police work, including providing false testimony, hiding exculpatory evidence, planting evidence, or simply not investigating alibis or other suspects. A great example was chronicled by Nate Blakeslee in *Tulia: Race, Cocaine and Corruption in a Small Texas Town*.¹⁸ Almost 20 percent of the Black residents of Tulia were convicted of narcotics offenses and sentenced to lengthy prison terms based on the false testimony of an undercover officer.¹⁹ All were eventually exonerated but only after having spent years in prison.²⁰

With this historical background in mind—with a particular focus on the role of law enforcement—I turn now to the current scene. Many of the practices I have described continue today in various forms. The recent Department of Justice Report concerning the Ferguson Police Department and the Municipal Court in Ferguson, Missouri, provides a stark example.²¹ The first paragraph of the report states that “[t]his investigation has revealed a pattern or practice of unlawful conduct within the Ferguson Police Department that violates the First, Fourth, and Fourteenth Amendments to the United States Constitution. . . .”²² The report goes on to detail unlawful police and Municipal Court practices. The report found a pattern of stops made without reasonable suspicion and arrests made without probable cause, infringement of and retaliation

¹⁶ See MARC MAUER, *THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS* 6 (Apr. 2009), available at http://www.sentencingproject.org/doc/dp_raceand-drugs.pdf

¹⁷ See Matt Apuzzo, *Holder and Republicans Unite to Soften Sentencing Laws*, N.Y. TIMES (Mar. 3, 2014), <http://www.nytimes.com/2014/03/04/us/politics/holder-and-republicans-unite-to-soften-sentencing-laws.html>.

¹⁸ NATE BLAKESLEE, *TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN* (2005).

¹⁹ *Id.* at 5.

²⁰ *Id.* at 384, 386.

²¹ U.S. DEP’T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEP’T* (Mar. 4, 2015), available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf.

²² *Id.* at 1.

for free expression, and the use of excessive force.²³ Here are some of the relevant statistics: From 2012 to 2014 African-Americans made up 67 percent of Ferguson's population.²⁴ Nonetheless, African-Americans accounted for 85 percent of vehicle stops, 90 percent of citations, and 93 percent of arrests.²⁵ African-Americans were twice as likely to be searched during a vehicle stop than White drivers, but were found in possession of contraband 26 percent less often than White drivers.²⁶ Some offenses were almost exclusively charged against African-Americans. From 2011 to 2013, African-Americans accounted for 95 percent of Manner of Walking in Roadway charges, and 94 percent of Failure to Comply charges.²⁷ Eighty-eight percent of documented use of force was against African-Americans.²⁸ Less than 10 percent of the Ferguson police force is African-American.²⁹

The Ferguson Municipal Court operates as part of the police department—supervised by the Chief of Police, and located within the police station.³⁰ All court personnel—the Municipal Judge, Court Clerk, Prosecuting Attorney and all assistant clerks—are White.³¹ The purpose of this Court is not to administer justice but to maximize revenue. In total, the municipal court system raised more than \$52 million for St. Louis County municipalities in 2014.³² For example, the court imposes charges for missed court appearances and payments. A 67-year old woman was arrested for an outstanding warrant for failure to pay a trash-removal citation. She did not know about the warrant until her arrest and was ultimately charged \$1,000 in fines.³³ From April to September 2014, 256 people were jailed on an outstanding warrant and 96 percent of them were

²³ See *id.* at 15–41.

²⁴ See *id.* at 62.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.* at 5.

²⁹ See *id.* at 7.

³⁰ See *id.* at 8.

³¹ See *id.*

³² Jeremy Kohler, Jennifer S. Mann & Stephen Deere, *Municipal Courts Are Well-Oiled Money Machine*, ST. LOUIS POST-DISPATCH (Mar. 15, 2015), http://www.stltoday.com/news/local/crime-and-courts/municipal-courts-are-well-oiled-money-machine/article_2f-45bafb-6e0d-5e9e-8fe1-0ab9a794fcdc.html.

³³ See U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEP'T, *supra* note 21, at 42.

African-American.³⁴ Of the twenty-eight people who were held for more than two days, twenty-seven were African-American.³⁵ All of this, needless to say, has led to terrible police-community relations in Ferguson.

The state of police-community relations described above leads me to a discussion of the distrust and anger that the Black community has developed toward the police and how hard it will be to repair. In his bestseller *Between the World and Me*, Ta-Nehisi Coates reflected on the shooting of his close friend by the police. These are his words:

I knew that Prince was not killed by a single officer so much as he was murdered by his country and all the fears that have marked it from birth. . . . At this moment the phrase ‘police reform’ has come into vogue, and the actions of our publicly appointed guardians have attracted attention presidential and pedestrian. You may have heard the talk of diversity, sensitivity training, and body cameras. These are all fine and applicable, but they understate the task and allow the citizens of this country to pretend that there is real distance between their own attitudes and those of the ones appointed to protect them. The truth is that the police reflect America in all of its will and fear, and whatever we might make of this country’s criminal justice policy, it cannot be said that it was imposed by a repressive minority. The abuses that have followed from these policies—the sprawling carceral state, the random detention of Black people, the torture of suspects—are the product of democratic will. . . .³⁶

Coates goes on to describe details of the shooting:

The officer [who shot Prince] was a known liar. A year earlier he had arrested a man on false evidence. Prosecutors had been forced to drop every case in which the officer was involved. The officer was demoted, restored, then put out on the street to continue his work. [Dressed as a drug dealer] [h]e’d been sent out to track a man whose build was five foot four and 250 pounds. . . . Prince . . . was six foot three and 211 pounds. . . . [T]he officer confronted Prince with his gun drawn [T]he authorities charged with investigating this shooting did very little to investigate the officer and did everything in their power to investigate Prince. . . . This officer, given maximum power, bore minimum responsibility. He was charged with nothing. He was punished by no one. He was returned to his work.³⁷

³⁴ *See id.* at 56.

³⁵ *See id.*

³⁶ TA-NEHESI COATES, *BETWEEN THE WORLD AND ME* 78–89 (2015).

³⁷ *Id.* at 80.

Considering the sentiments expressed by Coates, and the likelihood that many members of the minority community share such sentiments, it is perhaps not so surprising that some misguided people have targeted innocent police officers in order to express their rage and frustration. Tragically, there have been unprovoked attacks on innocent police officers that have resulted in their death or injury.³⁸ These attacks must be and have been condemned by public officials and ordinary citizens.

Just before turning to the *Floyd* case it is important to briefly discuss what is often called “unconscious racial bias” and the role it plays in policing. This term refers to instinctive racial biases that almost everyone holds. Without any conscious decision to act based on racial (or other) stereotypes, many people make snap judgments about people based on their race, their gender, their employment status, even their clothing. Police officers are no exception. Just as potential employers have been known to make judgments about people based solely on their race, police officers will often engage in dangerously aggressive conduct based on their instinctive belief that someone appears to be threatening.³⁹ President Obama had this to say in a speech he gave on July 19, 2013, after the shooting of Trayvon Martin:

There are very few African American men in this country who haven't had the experience of being followed when they were shopping in a department store. That includes me. There are very few African American men who haven't had the experience of walking across the street and hearing the locks click on the doors of cars. That happens to me—at least before I was a senator. There are very few African Americans who haven't had the experience of getting on an elevator and a woman clutching her purse nervously and holding her breath until she had a chance to get off. That happens often.⁴⁰

More pointedly, in a July 16, 2013 New York Times op-ed following the Trayvon Martin shooting, Professor Ekow Yankah of Cardozo School of Law wrote:

³⁸ See, e.g., Peter Holley, *Two New York City Police Officers Are Shot and Killed in a Brazen Ambush in Brooklyn*, WASHINGTON POST (Dec. 20, 2014), https://www.washingtonpost.com/national/two-new-york-city-police-officers-are-shot-and-killed-in-a-brazen-ambush-in-brooklyn/2014/12/20/2a73f7ae-8898-11e4-9534-f79a23c40e6c_story.html.

³⁹ See Sendhil Mullainathan, *Racial Bias, Even When We Have Good Intentions*, N.Y. TIMES (Jan. 3, 2015), <http://nyti.ms/1AnvWzW>.

⁴⁰ President Barack Obama, Remarks by the President on Trayvon Martin (July 19, 2013), available at <https://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>.

What is reasonable to do, especially in the dark of night, is defined by preconceived social roles that paint young Black men as potential criminals and predators. Black men, the narrative dictates, are dangerous, to be watched and put down at the first false move. This pain is one all Black men know; putting away the tie you wear to the office means peeling off the assumption that you are owed equal respect. Mr. Martin's hoodie struck the deepest chord because we know that daring to wear jeans and a hooded sweatshirt too often means that the police or other citizens are judged to be reasonable in fearing you.⁴¹

As these comments indicate, unconscious racial bias—rather than objective facts—often dictates behavior by police or citizen watch groups, a reality that can have tragic consequences.

Turning now to *Floyd*, the finding of racial bias in New York's stop and frisk policy was built on four forms of proof: (1) the uncontested statistical evidence; (2) the testimony of experts who analyzed more than 4.4 million stops to determine whether there was racial bias; (3) institutional evidence of deliberate indifference (including the unconscious racial biases or indirect racial profiling exhibited by police officers); and (4) the examples of individual stops by selected plaintiffs who were members of the *Floyd* class.

The uncontested facts, some of which I will recount below, provided the backbone of the finding of a pattern of disparate racial impact of New York's stop and frisk policy.

- Between January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops.⁴²
- Of the 4.4 million stops, 52 percent of those stopped were Black, 31 percent were Hispanic, and 10 percent were White. In 2010, New York's population was 23 percent Black, 29 percent Hispanic, and 33 percent White.⁴³

⁴¹ Ekow N. Yankah, Op-Ed, *The Truth About Trayvon*, N.Y. TIMES (July 15, 2013), <http://www.nytimes.com/2013/07/16/opinion/the-truth-about-trayvon.html>.

⁴² See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013). Derived from the Supreme Court's decision in *Terry v. Ohio*, a "Terry stop" is a brief detention of a person by police based on reasonable suspicion of involvement in criminal activity. See *Terry v. Ohio*, 392 U.S. 1 (1968). If the police reasonably suspect that the stopped person is armed and dangerous, they may also conduct a frisk of the person's outer clothing. See *id.* at 27. The "reasonable suspicion" threshold to conduct a *Terry* stop (or *Terry* stop and frisk) is lower than the probable cause required to make an arrest. See *id.* at 22.

⁴³ *Id.* at 559.

- The number of stops rose sharply from 314,000 in 2004 to a high of 686,000 in 2011.⁴⁴
- 52 percent of all stops were followed by a protective frisk for weapons. A weapon was found in only 1.5 percent of these frisks.⁴⁵
- No further law enforcement action was taken in 88 percent of the stops.⁴⁶
- Force was used in 23 percent of the stops of Blacks, 24 percent of the stops of Hispanics, but only 17 percent of the stops of Whites.⁴⁷
- Between 2004 and 2009, the percentage of stops where the officer failed to state a specific suspected crime rose from 1 percent to 36 percent.⁴⁸
- For the period 2004 through 2009, when any law enforcement action was taken following a stop, Blacks were 30 percent more likely to be arrested (as opposed to receiving a summons) than Whites, for the same suspected crime.⁴⁹
- For the period 2004 through 2009, all else being equal, the odds of a stop resulting in any further enforcement action were 8 percent *lower* if the person stopped was Black than if the person stopped was White. In addition, the greater the Black population in a precinct, the less likely that a stop would result in a sanction. Together, these results show that Blacks are likely stopped based on less objectively founded suspicion than Whites.⁵⁰

The next form of proof was based on expert testimony where the following question was addressed: What would the racial distribution of the stopped pedestrians have been if officers' stop decisions had been racially unbiased?⁵¹ The competing experts used different benchmarks in their analyses. The plaintiffs' expert used "both population and reported crime as benchmarks for understanding the racial distribution of police-citizen contacts."⁵² He testified that: "Since police often target resources to the places where crime rates and risks are highest, and where

⁴⁴ *Id.* at 573.

⁴⁵ *Id.* at 558.

⁴⁶ *Id.* at 558–59.

⁴⁷ *Id.* at 559.

⁴⁸ *Id.* at 575.

⁴⁹ *Id.* at 589.

⁵⁰ *Id.* at 560.

⁵¹ *Id.* at 583.

⁵² *Id.*

populations are highest, some measure of population that is conditioned on crime rates is an optimal candidate for inclusion as a benchmark.”⁵³ By contrast, the defendant’s experts used a benchmark consisting of the rates at which various races appear in suspect descriptions from crime victims.⁵⁴ His assumption was that if the stop decisions had no racial bias, then the racial distributions of those stopped would approximate the racial distribution of criminal suspects in the area.⁵⁵ Both experts controlled for various common characteristics of a precinct.

But the benchmark chosen made all the difference in the conclusions they reached. I found that the defense expert’s benchmark was flawed because there was no basis to assume that the racial distribution of the stopped group should resemble the racial distribution of the local criminal population. The stopped population was *not* primarily criminal (90 percent were neither arrested nor received a summons).⁵⁶ Thus it appeared to me that the stops should reflect the racial composition of the *neighborhood’s* population—taking into account that local crime rates must also be considered because stops are more likely to take place in higher crime rate areas.

When cross-examined, the City’s expert defended his benchmark by asking “how do we know [that those stopped] . . . were utterly innocent[?]” and proposed that “the stop prevents a crime.”⁵⁷ Thus, the expert believed, without basis, that those stopped were likely criminals. This shows that if a researcher has already concluded that an officer’s decision as to whether to make a stop is not affected by conscious or unconscious racial bias, then he will look for—and find—a race-neutral explanation for the disproportional stopping of minorities.

Because objectively there should be no behavioral difference between law abiding minorities and law abiding Whites, the remaining explanation is that law abiding minorities appear more suspicious than Whites because that is the racial makeup of the criminal population. The only explanation for the close correlation between the racial composition of crime suspect data (87 percent minority), and the racial composition of the stopped population (83 percent minority) is that people

⁵³ *Id.*

⁵⁴ *See id.* at 584.

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *Id.* at 585.

were stopped because they resembled the criminal population.⁵⁸ That is racial profiling.

The third form of proof was the institutional evidence of conduct by the police department. A quick summary of that proof is that police department policy created pressure to continually increase the number of stops on the theory that this functioned as a crime prevention tool.⁵⁹ This pressure translated to the precinct level in terms of productivity quotas—more stops led to more pay and promotions.

Evidence of fewer stops was viewed as shirking. This caused precinct commanders to encourage officers to stop the right people at the right time in the right place—which, in turn, translated into racially biased policing.⁶⁰ Other institutional failures included ignoring notice of statistics demonstrating racial bias;⁶¹ a failure to discipline officers engaging in racially biased policing;⁶² and a failure to review training materials to ensure that they were race neutral.⁶³ Finally, the evidence revealed a failure of oversight over how stops were conducted and recorded—the documentation of stops was often sloppy and rarely reviewed by any supervisor.⁶⁴ And patterns in the recorded bases for stops—such as furtive movements or high crime areas—were accepted without question.⁶⁵

A few examples support these points. The first is the perception of what constitutes a “furtive movement,” which is often used as a basis for a stop. Two officers in the *Floyd* trial testified to their understanding of the term “furtive movements.” One explained that “furtive movement is a very broad concept” and could include a person “walking in a certain way,” “[a]cting a little suspicious,” being “very fidgety,” “going in and out of a location,” “looking back and forth constantly,” “adjusting their hip or their belt,” “moving in and out of a car too quickly,” “[t]urning a part of their body away from you,” “[g]rabbing at a certain pocket or something at their waist,” “getting a little nervous, maybe shaking,” and “stutter[ing].”⁶⁶ Another officer explained that “usually” a furtive

⁵⁸ See *id.* at 588.

⁵⁹ See *id.* at 590.

⁶⁰ *Id.* at 602 n.280.

⁶¹ See *id.* at 620–24.

⁶² See *id.* at 617–20.

⁶³ See *id.* at 613–16.

⁶⁴ See *id.* at 607–10.

⁶⁵ See *id.* at 610.

⁶⁶ *Id.* at 561.

movement is someone “hanging out in front of [a] building, sitting on the benches or something like that” and then making a “quick movement,” “going inside the lobby . . . and then quickly coming back out,” or “all of a sudden becom[ing] very nervous, very aware.”⁶⁷ If officers believed that the behavior described above justified stopping a person, then it is not surprising that stops so rarely produced any evidence of criminal activity. These descriptions do not constitute articulable reasonable suspicion that criminal activity is afoot. Rather, they are vague generalizations of what might be perceived as suspicious activity—which does not provide a legal (or factual) basis for a *Terry* stop. Because the stops were often based on such vague descriptions of suspicious conduct, a vast number of innocent people were stopped.⁶⁸

Courts have recognized that furtive movements, standing alone, are a vague and unreliable indicator of criminality. As Judge Richard Posner has stated in a related context: “Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited.”⁶⁹

Recent psychological research also suggests that officers may be more likely to perceive a movement as indicative of criminality if primed to look for signs that “crime is afoot.”⁷⁰ In a related case I wrote that “[g]iven the nature of their work on patrol, officers may have a systematic tendency to see and report furtive movements where none objectively exist.”⁷¹ It is no surprise that many police officers share the latent biases that pervade our society.

Another example from the trial record were the surreptitious recordings of police talk within certain precincts, which demonstrated the contempt and hostility of supervisors toward the local population. For example, at a roll call on November 8, 2008, at a precinct in Bedford

⁶⁷ *Id.*

⁶⁸ As noted, 88 percent of stops made by police between January 2004 and June 2012 resulted in no further law enforcement action. *See Floyd*, 959 F. Supp. 2d at 574.

⁶⁹ *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005).

⁷⁰ *See* Robert J. Sampson & Steven W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows”*, 67 *Soc. PSYCHOL. Q.* 319 (2004); Geoffrey P. Alpert, John M. MacDonald, & Roger G. Dunham, *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 *CRIMINOLOGY* 407 (2005).

⁷¹ *Ligon v. City of New York*, 925 F. Supp. 2d 478, 530 (S.D.N.Y. 2013) (emphasis in original).

Stuyvesant in Brooklyn—an overwhelmingly Black neighborhood, a Lieutenant stated:

[W]e've got to keep the corner clear. . . . Because if you get too big of a crowd there, you know, . . . they're going to think that they own the block. We own the block. They don't own the block, all right? They might live there but we own the block. All right? We own the streets here. You tell them what to do.⁷²

At another roll call the same Lieutenant stated that the officers are “not working in Midtown Manhattan where people are walking around smiling and happy. You're working in Bed-Stuy where everyone's probably got a warrant.”⁷³

A Sergeant in the same precinct made the following comment at a roll call, reflecting an utter disregard for the requirement that a stop only be made based on a reasonable suspicion that crime is afoot:

If you see guys walking down the street, move 'em along. Two or three guys you can move, you can't move 15, all right? If you want to be a[n] asshole or whatever you want to call it, make a move. If they won't move, call me over and lock them up [for disorderly conduct]. No big deal. We could leave them there all night. . . . The less people on the street, the easier our job will be. . . . If you stop them[,] [write up a stop & frisk form] a 250, how hard is a 250. I'm not saying make it up but you can always articulate robbery, burglary, whatever the case may be. That's paperwork . . . It's still a number. It keeps the hounds off, I've been saying that for months.⁷⁴

At another roll call, the same Sergeant also directed his officers to “[s]hake everybody up. Anybody moving, anybody coming out that building.”⁷⁵ Because exiting a building—even in a high crime area—is not a sufficient basis for reasonable suspicion, these words are an instruction to stop people without legal justification. Finally, the same sergeant repeatedly instructed the officers that their careers depend on carrying out high levels of activity.⁷⁶

With respect to identifying who to stop, Chief Joseph Esposito, the highest ranking uniformed member of the NYPD testified as follows: “[Stops are] based on the totality of, okay, who is committing the—who

⁷² *Floyd v. City of New York*, 959 F. Supp. 2d 540, 597 (S.D.N.Y. 2013).

⁷³ *Id.*

⁷⁴ *Id.* at 597–98.

⁷⁵ *Id.* at 598.

⁷⁶ *Id.* at 599.

is getting shot in a certain area . . . Well who is doing those shootings? Well it's young men of color in their late teens, early 20s.”⁷⁷ A Deputy Inspector gave a virtually identical answer, testifying that: “This is about stopping the right people, the right place, the right location. The problem was, what, male Blacks. . . [A]nd I have no problem telling you this, male Blacks 14 to 20, 21.”⁷⁸ In fact, the then-Police Commissioner, Ray Kelly, allegedly said at a meeting that the NYPD focused on stopping young Blacks and Hispanics “because we wanted to instill fear in them, every time they leave their home, they could be stopped by the police.”⁷⁹ This evidence led me to conclude that Blacks were targeted for stops in order to deter crime regardless of whether they appeared to be objectively suspicious!

After finding a pattern of indirect racial profiling, I imposed certain remedies. The one that has drawn the most attention was a pilot program placing body cameras on a group of police officers. This program is now being implemented as part of the *Floyd* settlement. Today body cameras have become all the rage—and for good reason. Without the video captured at the scene, there will always be a dispute as to what actually occurred. The victim—if he or she is alive—has one story, and the police officer has another. But a video provides incontestable evidence—it will show a person running away from the police rather than toward them or with their hands empty and raised in the air. This is not to say that there aren't problems associated with body cameras. There are numerous issues with body cameras, including: Who controls the on or off switch? How long are records kept and who has access to them? What angles do the cameras capture and how accurate is the captured image as compared to what the officer actually observed?

Despite these problems, we have learned that body cameras can be effective. It is well known that behavior changes when you know you are being watched. For example, in Rialto, California, after the police force had worn body cameras for a full year, the use of force by officers declined by 60 percent and citizen complaints against police declined by 88 percent.⁸⁰ In a controlled study conducted in Rialto, incidents occurring

⁷⁷ *Id.* at 604.

⁷⁸ *Id.*

⁷⁹ *Id.* at 606.

⁸⁰ See Christopher Mims, *What Happens When Police Officers Wear Body Cameras*, WALL STREET J. (Aug. 18, 2014), <http://www.wsj.com/articles/what-happens-when-police-officers-wear-body-cameras-1408320244>. See also POLICE FOUND., SELF-AWARENESS TO BEING WATCHED

during shifts where officers did not wear cameras were twice as likely to result in the use of force than during shifts where the officers wore cameras.⁸¹ When officers wore cameras, a member of the public initiated every physical contact, but when the police were not wearing cameras, the police initiated 24 percent of the incidents involving physical force!⁸²

Additional remedies being implemented as a result of the *Floyd* decision include improved training regarding stops, frisks, and use of force; better record keeping of street stops and oversight of those records; and improved discipline both within the NYPD and externally by the Civilian Complaint Review Board.

My final topic is a quick look at the post-*Floyd* world. In New York, stops have declined sharply from 532,911 in 2012, to 191,558 in 2013, to 46,235 in 2014, and to a projected 24,468 for 2015.⁸³ This is a 96 percent decrease from the height in 2011 of more than 600,000 stops!⁸⁴ And what has happened with crime statistics in the meantime? They have remained steady! In 2012, there were approximately 1,352 shootings resulting in 419 murders;⁸⁵ in 2013, 1,100 shootings resulting in 335 murders,⁸⁶ and in 2014, 1,390 shootings resulting in 333 murders.⁸⁷ A September 1, 2015, New York Times article reported rising murder rates nationwide but

AND SOCIALLY DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE OF FORCE (2013), available at <http://www.policefoundation.org/publication/self-awareness-to-being-watched-and-socially-desirable-behavior-a-field-experiment-on-the-effect-of-body-worn-cameras-on-police-use-of-force>.

⁸¹ See POLICE FOUND., *supra* note 79, at 8.

⁸² See *id.* at 9.

⁸³ See NEW YORK CIVIL LIBERTIES UNION, STOP AND FRISK DATA, available at <http://www.nyclu.org/content/stop-and-frisk-data>; NEW YORK CIVIL LIBERTIES UNION, NYC: STOP-AND-FRISK DOWN SAFETY UP (Dec. 2015), available at <http://www.nyclu.org/publications/stop-and-frisk-down-safety-2015>.

⁸⁴ See NEW YORK CIVIL LIBERTIES UNION, STOP AND FRISK DATA, *supra* note 84.

⁸⁵ See NEW YORK POLICE DEP'T, MURDER IN NEW YORK CITY 2 (2012), available at http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/murder_in_nyc_2012.pdf; Press Release, Mayor Bloomberg & Police Commissioner Kelly Announce 2012 Sets All-Time Record for Fewest Murders and Fewest Shootings in New York City History (Dec. 28, 2012), available at http://www.nyclu.org/files/publications/stopfrisk_briefer_FINAL_20151210.pdf.

⁸⁶ See CITY OF NEW YORK, FINAL WEEKLY UPDATE ON MURDERS AND SHOOTINGS IN 2013 (Dec. 30, 2013), available at <http://www1.nyc.gov/office-of-the-mayor/news/918-13/final-weekly-on-murders-shootings-2013/>; NEW YORK CITY POLICE DEP'T, CITYWIDE SEVEN MAJOR FELONY OFFENSES 2000–2014, available at https://www1.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/seven_major_felony_offenses_2000_2014.pdf.

⁸⁷ See WILLIAM J. BRATTON, N.Y. CITY POLICE DEP'T POLICE COMMISSIONER, CRIME & ENFORCEMENT ACTIVITY IN NEW YORK CITY II (2014); NEW YORK CITY POLICE DEP'T, CITYWIDE SEVEN MAJOR FELONY OFFENSES 2000–2014, *supra* note 87.

showed that New York City's rate increased by 9 percent based on an increase of eighteen incidents.⁸⁸ In short, the enormous decrease in stops has clearly not caused an upsurge in crime despite alarmist predictions by our former Mayor Michael Bloomberg and Police Commissioner Ray Kelley.

Since the *Floyd* opinion was issued, the United States has experienced a number of high profile violent police encounters involving unarmed Black men and women, spurring a national debate about race and policing. An overview of these sad events reveals some patterns, and the challenges that remain. The period of police violence after *Floyd* begins with the death of Eric Garner in July 2014 in New York, who died as a result of an unauthorized chokehold applied by a White police officer. Garner was unarmed and was approached based on the alleged sale of untaxed cigarettes. Although the incident was captured on cellphone video, in December 2014, a state grand jury declined to indict the officer who caused Garner's death.⁸⁹ A federal grand jury began hearing evidence in February 2016.⁹⁰

In August 2014, John Crawford died in Ohio as a result of a police shooting. He was shopping at a Walmart. He picked up an unpackaged, unloaded air rifle and walked with it while on a cell phone. He was shot by a White police officer that thought he was carrying a weapon. Despite a surveillance video, a grand jury declined to indict the officers.⁹¹

In August 2014, Michael Brown was shot in Ferguson, Missouri. Brown, who had been seen stealing cigarettes on a store video, and another Black teenager were walking down a street. Officer Darren Wilson, who is White, blocked the teenagers and became involved in an altercation with them. Officer Wilson fired two shots from his vehicle at Brown, who was fleeing. Officer Wilson pursued him on foot, ultimately firing twelve

⁸⁸ Monica Davey & Mitch Smith, *Murder Rates Rising Sharply in Many U.S. Cities*, N.Y. TIMES (Aug. 31, 2015), at A1.

⁸⁹ See Matt Zaptosky, *Federal Grand Jury Begins Hearing Evidence in Eric Garner's Death*, WASHINGTON POST (Feb. 11, 2016), https://www.washingtonpost.com/world/national-security/federal-grand-jury-begins-hearing-evidence-on-eric-garners-death/2016/02/11/4751b36a-d0f5-11e5-88cd-753e80cd29ad_story.html.

⁹⁰ *Id.*

⁹¹ See Leigh Remizowski, *Grand Jury Gets Case of Ohio Man Shot by Police in Walmart Store*, CNN (Sep. 22 2014), <http://www.cnn.com/2014/09/22/us/ohio-walmart-death/index.html>; Catherine E. Shoichet & Nick Valencia, *Cops Killed Man at Walmart, Then Interrogated Girlfriend*, CNN (Dec. 16, 2014), <http://www.cnn.com/2014/12/16/justice/walmart-shooting-john-crawford/>.

shots and killing Brown. Brown was unarmed. Due, in part, to conflicting eyewitness testimony, a grand jury declined to indict Officer Wilson.⁹²

In November 2014, Akai Gurley was killed in Brooklyn, New York, by a gunshot wound to his chest. Two officers (one White and one Asian) were patrolling stairwells in a public housing unit with their guns drawn. Gurley and his girlfriend were unarmed and walking fourteen steps below the officers. One officer's gun discharged, allegedly by accident, ricocheted off the wall, and hit Gurley. That officer was convicted of Second Degree Manslaughter (criminal recklessness) and Official Misconduct on February 11, 2016,⁹³ and was sentenced on April 19, 2016 to five years' probation and 800 hours of community service.⁹⁴

Also in November 2014, in Cleveland, Ohio, Tamir Rice, a twelve-year-old, was sitting on a park swing pointing and playing with a toy gun. Tragically, the gun lacked the orange safety feature indicating that it was not real. A White officer fired twice within moments of exiting his police car, reporting that Rice had reached toward a gun in his waistband. Despite video recording, a grand jury declined to indict the officer in December 2015.⁹⁵

In February 2015, in Wellston, Missouri, Thomas Lee Allen Jr. died as a result of a police shooting, which was not recorded on videotape. He was a back seat passenger in a car pulled over for making an illegal turn. While the officer (who has not yet been identified so his race is not known) was speaking to the driver outside the car, Allen attempted to drive away. The officer jumped into the passenger seat and shot Allen three times as he drove. As yet, no grand jury has been empaneled.⁹⁶

⁹² See Larry Buchanan, *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

⁹³ See Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 11, 2016), <http://nyti.ms/1o8ijni>.

⁹⁴ Matt Hansen & Matt Pearce, *No prison time for ex-NYPD Officer Peter Liang in fatal shooting of Akai Gurley*, L.A. TIMES (Apr. 19, 2016), www.latimes.com/nation/la-na-liang-sentencing-20160419-story.html.

⁹⁵ Kim Bellware, *No Indictment For Cop Who Fatally Shot 12-Year-Old Tamir Rice*, HUFFINGTON POST (Dec. 28, 2015), http://www.huffingtonpost.com/entry/tamir-rice-inductment_us_56818253e4b0b958f65a0909

⁹⁶ Joel Currier, *Wellston Cop Feared for His Life and Girl's When He Fatally Shot Fleeing Driver, Police Say*, ST. LOUIS POST-DISPATCH (Mar. 2, 2015), http://www.stltoday.com/news/local/crime-and-courts/wellston-cop-feared-for-his-life-and-girl-s-when/article_1ab0c618-5eb4-5c33-b604-7fa938713367.html.

In March 2015, in Los Angeles, a homeless man—Leundeu Keunang—died as a result of a police shooting captured by cellphone video and a police body camera. The officers approached him near his Skid Row tent in connection with a reported robbery. The officers, two of whom were Latino and one who was Middle Eastern, allege that Keunang reached for one of the officers' guns. Keunang, who was unarmed, was shot six times. Due to an ongoing investigation, a grand jury has not yet been empaneled.⁹⁷

In March 2015, in Chamblee, Georgia, Anthony Hill died as a result of a police shooting, which was not recorded on videotape. The police had responded to a call that a naked man was running around an apartment building. The police allege that Hill charged at a White officer who then fired two shots. A civil grand jury is still deliberating and until that case is decided no grand jury will be empaneled.⁹⁸

In April 2015, in North Charleston, South Carolina, Walter Scott died as a result of a police shooting. A White officer pulled over Scott in a parking lot during a daytime stop for a broken brake light. Dashboard camera and cellphone video showed that the officer returned to his car after speaking with Scott, but that when Scott fled on foot, the officer pursued him and fired both his Taser and handgun at Scott's back. In his initial police report the Officer stated that Scott had taken his Taser and he shot Scott because he felt threatened. The videotape revealed that the officer's statement was patently false. The officer has been indicted on a state murder charge as well as on federal charges for violating Scott's civil rights, for using a weapon during the commission of a violent crime, and for obstruction of justice.⁹⁹

In April 2015, in Baltimore, Maryland, Freddie Gray died from spinal cord injuries suffered while being transported by the police. Gray was arrested for allegedly possessing an illegal switchblade—which is now in question. A video shows Gray being dragged into a police van,

⁹⁷ Gale Holland, *Body Camera Video Undercuts Police Account of Skid Row Shooting, Suit Says*, L.A. TIMES (Aug. 5 2015), <http://www.latimes.com/local/lanow/la-me-ln-police-shooting-skid-row-20150805-story.html>.

⁹⁸ Ashley Southall, *Naked Black Man Fatally Shot by White Police Officer in Georgia*, N.Y. TIMES (Mar. 9, 2015), <http://www.nytimes.com/2015/03/10/us/naked-Black-man-fatally-shot-by-white-police-officer-in-georgia.html>.

⁹⁹ Tony Santanella, *Witness: S.C. Victim, Cop Struggled Before Killing*, USA TODAY (Apr. 8, 2015), <http://www.usatoday.com/story/news/nation/2015/04/08/sc-police-shooting-family-civil-suit/25450485>; Chris Dixon & Tamar Lewin, *South Carolina Officer Faces Federal Charges in Fatal Shooting*, N.Y. TIMES (May 11, 2016), <http://nyti.ms/1UT3r9j>.

in which he was not secured during transport as required. Six officers—three White and three Black—have been indicted. The first officer’s trial began in December 2015 and resulted in a mistrial.¹⁰⁰ A second officer’s trial began in May 2016.¹⁰¹

In April 2015, in Houston, Texas, Frank Shephard died as a result of a police shooting, which was captured on live TV. The police pursued Shephard’s car because of what they described as “suspicious activity.” A car chase ensued during which Shephard hit two vehicles. When he stepped out of the car he was ordered to raise his hands. The officers (one White, one Latino) say they fired because Shepard reached back into the car, leading the officers to believe that he was trying to reach a weapon. There has been no information yet regarding an indictment.¹⁰²

Sandra Bland was arrested in July 2015 in Hempstead, Texas, an event captured in large part by a police cruiser dashboard camera. She was pulled over by a Latino officer for failing to signal a lane change. When the officer asked Bland to put out her cigarette she asked why that was necessary. He then ordered her out of the car and when she refused, he arrested her. When she continued to refuse to exit the car, the officer pulled her out, shouting and pointing his Taser. She was taken to a county jail where three days later she allegedly hung herself. A grand jury declined to indict anyone for Bland’s death. The arresting officer, however, has been indicted for perjury in relation to false statements in the affidavit of the arrest.¹⁰³

In July 2015, in Memphis, Tennessee, Darrius Stewart died of a police shooting. He was a passenger in a car that was pulled over by a White officer based on a broken headlight. The driver produced his license but

¹⁰⁰ See Sheryl Gay Stolberg & Jess Bidgood, *Baltimore Trial Leaves Unanswered Question: What Happened to Freddie Gray?*, N.Y. TIMES (Dec. 14, 2015), <http://www.nytimes.com/2015/12/15/us/baltimore-freddie-gray-police-trial.html>; Sheryl Gay Stolberg & Jess Bidgood, *Mistrial Declared in Case of Officer Charged in Freddie Gray’s Death*, N.Y. TIMES (Dec. 16, 2015), <http://www.nytimes.com/2015/12/17/us/freddie-gray-baltimore-police-trial.html>.

¹⁰¹ See Camila Domonoske, *2nd Officer’s Trial in Freddie Gray Case Opens in Baltimore*, NPR (May 12, 2016), <http://www.npr.org/sections/thetwo-way/2016/05/12/477772308/2nd-officers-trial-in-freddie-gray-case-opens-in-baltimore>.

¹⁰² See *Suspect Fatally Shot by Officers at End of Police Chase*, ABC 13 NEWS KTRK-TV (Apr. 15, 2015), <http://abc13.com/news/suspect-shot-by-officers-at-end-of-police-chase/661643/>.

¹⁰³ See generally, David Montgomery, *Sandra Bland Was Threatened With Taser, Police Video Shows*, N.Y. TIMES (July 21, 2015), http://www.nytimes.com/2015/07/22/us/sandra-bland-was-combative-texas-arrest-report-says.html?_r=0; David Montgomery, *Texas Trooper Who Arrested Sandra Bland Is Charged With Perjury*, N.Y. TIMES (Jan. 6, 2016), <http://www.nytimes.com/2016/01/07/us/texas-grand-jury-sandra-bland.html>.

Stewart had no identification. He was unarmed. He was placed uncuffed in the backseat of a police car while the officer checked for outstanding warrants, which he found through use of Stewart's name and birthdate. The officer then opened the door in order to handcuff Stewart and a struggle, which was captured on a cellphone video, ensued in which Stewart was fatally shot (the shooting was not captured). The DA is investigating the shooting.¹⁰⁴

In July 2015, in Cincinnati, Ohio, Sam Dubose died as a result of a police shooting. A White campus police officer stopped Dubose for lack of a front license plate. The officer claimed that he was dragged by Dubose's fleeing car and that he fired his gun because he feared for his life. Body camera footage disputed that version. The officer fired once striking Dubose in the head. This officer has been indicted.¹⁰⁵

In August 2015, in Decatur, Georgia, Troy Robinson died of head and neck injuries sustained after being tasered while scaling a fence. Parts of the incident were captured on video. Robinson was a passenger in a car that was pulled over by a White officer for a license plate violation. When stopped, the driver (not Robinson) admitted he had a weapon in the car, at which point he was asked to step out while the weapon was secured. Robinson attempted to flee on foot. He was tasered while climbing a fence and fell to his death. An investigation is in progress.¹⁰⁶

Most recently, in November 2015, the Chicago Police Department released a dashboard camera video from October 2014 showing the fatal police shooting of seventeen-year-old Laquan McDonald. McDonald was shot sixteen times while walking diagonally across the street away from

¹⁰⁴ See Maya Rhodan, *Feds to Review Fatal Police Shooting of Tennessee's Darrius Stewart*, TIME (Dec. 14, 2015), <http://time.com/4148226/doj-tennessee-darrius-stewart-shooting/>; Wesley Lowery, *DOJ Will Investigate July Death of Darrius Stewart, an Unarmed, Black 19-Year-Old Shot by Police in Memphis*, WASHINGTON POST (Dec. 14, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/12/14/doj-will-investigate-july-death-of-darrius-stewart-an-unarmed-Black-19-year-old-shot-by-police-in-memphis/>; *Family: Officer Killed 19-Year-Old after Mistaking Him for Someone Else*, WMCANews5.COM (July 20, 2015), <http://www.wmcanews5.com/story/29578116/man-dead-after-struggle-with-mpd-officer>.

¹⁰⁵ See Richard Perez-Pena, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html>; Michael Martinez, *Video Shows the Encounter Between Samuel DuBose, Officer Ray Tensing*, CNN (July 29, 2015), <http://www.cnn.com/2015/07/29/us/video-sam-dubose-ray-tenzing-chronology/>.

¹⁰⁶ Steve Visser, *Man Identified After Suffering Fatal Fall From Dekalb Officer's Taser*, AJC.COM (Aug. 7, 2015), <http://www.ajc.com/news/news/crime-law/man-who-died-after-dekalb-officer-shot-him-with-ta/nnp/ps/>.

the police. The video contradicts the police report of the incident—which stated that McDonald had swung a knife at police in a threatening manner. Officer Jason Van Dyke (White) has been charged with murder.¹⁰⁷

What, if any pattern, emerges? All of the stops were for minor offenses—which raises the issue of the broken windows theory of policing—and all appear to be overreactions by the police.¹⁰⁸ In most of the incidents, the police and their victim were of different races. However, even when the race of the officer and the victim were the same—as in the case of Freddie Grey where three of the officers were White and three were not—the police response may well have been triggered by the effects of unconscious racial bias described earlier in this article. In none of these incidents does it appear that the officer's safety was clearly endangered. In many instances it was apparent that the victim was unarmed. It may well be that the officers felt fear, but I have already discussed how such fears may result from ingrained racial stereotyping. For example, why did the officers in the Gurley case patrol the stairwell with guns drawn? Out of fear. Finally, the existence of a video record, in at least ten of the fifteen incidents I just described, made a huge difference in revealing what happened and in two instances directly contradicted the officer's explanation.

Where does all this leave us? We need to follow the lead of the *Floyd* case and our current Attorney General, Loretta Lynch, both of which call for constitutional policing. If we can conquer the fear and mistrust that has grown between the police and the communities they police—by eliminating racial stereotyping, by addressing the imbalance in the racial makeup of the police force, by moving away from police acting as paramilitary forces and towards a community-oriented approach, by increasing the use of body cameras, and by providing officers with more sophisticated training—then we will all live in a safer world.

¹⁰⁷ See *Lingering Questions in the Shooting of Laquan McDonald* by Chicago Police, N.Y. TIMES (Dec. 6, 2015), <http://www.nytimes.com/interactive/2015/12/04/us/questions-in-laquan-mcdonald-shooting.html>.

¹⁰⁸ The broken windows theory of policing – introduced by social scientists George L. Kelling and James Q. Wilson in 1982 – is the criminological theory that preventing small crimes in urban environments (e.g., broken windows) promotes order and prevents more serious crimes. See George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.