THE YALE LAW JOURNAL

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Police Reform and the Dismantling of Legal Estrangement

ABSTRACT. In police reform circles, many scholars and policymakers diagnose the frayed relationship between police forces and the communities they serve as a problem of *illegitimacy*, or the idea that people lack confidence in the police and thus are unlikely to comply or cooperate with them. The core proposal emanating from this illegitimacy diagnosis is procedural justice, a concept that emphasizes police officers' obligation to treat people with dignity and respect, behave in a neutral, nonbiased way, exhibit an intention to help, and give them voice to express themselves and their needs, largely in the context of police stops. This Essay argues that legitimacy theory offers an incomplete diagnosis of the policing crisis, and thus de-emphasizes deeper structural, group-centered approaches to the problem of policing. The existing police regulatory regime encourages large swaths of American society to see themselves as existing within the law's aegis but outside its protection. This Essay critiques the reliance of police decision makers on a simplified version of legitimacy and procedural justice theory. It aims to expand the predominant understanding of police mistrust among African Americans and the poor, proposing that *legal estrangement* offers a better lens through which scholars and policymakers can understand and respond to the current problems of policing. Legal estrangement is a theory of detachment and eventual alienation from the law's enforcers, and it reflects the intuition among many people in poor communities of color that the law operates to exclude them from society. Building on the concepts of legal cynicism and anomie in sociology, the concept of legal estrangement provides a way of understanding the deep concerns that motivate today's police reform movement and points toward structural approaches to reforming policing.

ESSAY CONTENTS

INTRODUCTION

In the concluding paragraphs of her fiery dissent in *Utah v. Strieff*,[1] Justice Sotomayor invoked W.E.B. Du Bois, James Baldwin, Michelle Alexander, Ta-Nehisi Coates, and Marie Gottschalk in concluding that the Court's decision, which further weakened the power of the exclusionary rule to deter unconstitutional police conduct,[2] sent a message—particularly to people of color—"that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[3] Justice Sotomayor laments "treating members of our communities as second-class citizens."[4] Yet despite the boldness of her statements, in some ways Justice Sotomayor might not have gone quite far enough in articulating the troubling implications of our Fourth Amendment jurisprudence.

Justice Sotomayor's analysis understates the problem on two fronts. First, in addition to the jurisprudential message that poor people of color are "subject[s] of a carceral state" or "second-class citizens," research in sociology, criminology, political science, and other fields suggests that these groups often see themselves as essentially stateless—unprotected by the law and its enforcers and marginal to the project of making American society. Even as criminal procedure jurisprudence sets the parameters of what police may do under the law, it simultaneously leaves large swaths of American society to see themselves as anomic, subject only to the brute force of the state while excluded from its protection. The message conveyed in policing jurisprudence is not only one of oppression, but also one of profound estrangement.

A second understatement relates to the understanding of whose safety is at risk when the Fourth Amendment insufficiently checks the power of the police. Justice Sotomayor uses the second-person pronoun "you" to convey to a public audience both the universality and the personal proximity of the risk of police

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1.   136 S. Ct. 2056, 2069-71 (2016) (Sotomayor, J., dissenting).

2.   *See* Mapp v. Ohio, 367 U.S. 643 (1961); *see also* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 10 & n.25 (2009) (describing limitations of the exclusionary rule).

3.   *Strieff*, 136 S. Ct. at 2071. For the content cited by Justice Sotomayor, see MICHELLE ALEXANDER, THE NEW JIM CROW 124-26 (2010); JAMES BALDWIN, THE FIRE NEXT TIME 19 (Modern Library 1995) (1962); TA-NEHISI COATES, BETWEEN THE WORLD AND ME 82-91 (2015); W.E.B. DU BOIS, *The Souls of Black Folk*, *in* WRITINGS 364-65 (Nathan Huggins ed., 1986) (1903) (describing double-consciousness); and MARIE GOTTSCHALK, CAUGHT (2015). *See also* Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. F. 525 (2014) (explaining how Justice Sotomayor's jurisprudence relates to social science research on legitimacy theory).

4.   *Strieff*, 136 S. Ct. at 2069.

control.[5] Yet this literary technique, though effective, obscures the reality that the sense of alienation in a carceral regime emanates not only from what police might do to "you," but from what they might do to your friends, your intimate partners, your parents, your children; to people of your race or social class; and to people who live in the neighborhood or the city where you live. In other words, estrangement from the American citizenry is not merely an individual feeling to which people of color tend to succumb more readily than white Americans do; rather, estrangement is a collective institutional venture.

The Black Lives Matter era has catalyzed meaningful discussion about the tense relationship between the police and many racially and economically isolated communities, and about how policing can be reformed to avoid deaths like those of Rekia Boyd, Michael Brown, Eric Garner, Alton Sterling, Philando Castile, and more. However, contemporary discourse has often neglected or obscured deeper discussion about the relationship between African Americans—especially poor African Americans—and the police. What is the nature of these relationships? How can scholars and policymakers more roundly understand their contours and potential strategies for change?

Many scholars and policymakers have settled on a "legitimacy deficit" as the core diagnosis of the frayed relationship between police forces and the communities they serve. The problem, this argument goes, is that people of color and residents of high-poverty communities do not trust the police or believe that they treat them fairly, and that therefore these individuals are less likely to obey officers' commands or assist with investigations.[6] This argument took its most prominent position in the May 2015 *Final Report of the White House Task Force on 21st Century Policing*. The Report sets forth the goal of building trust and legitimacy as both the first pillar of its proposed approach to police reform and as "the foundational principle underlying [the Task Force's] inquiry into the nature of relations between law enforcement and the communities they serve."[7] "Trust" is a broad term, but the Report and much of the

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5. *Id.*; *cf.* I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES 98-99 (Mark Tushnet ed., 2008) (describing the rhetorical devices used by Justice Brandeis in *Whitney v. California*); Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008) (arguing that *oral* dissents provide an avenue for democratic communication to a public audience).

6. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 9-11 (2015) [hereinafter TASK FORCE REPORT].

7. *Id.* at 9.

policymaking energy surrounding shifts in police governance adopt an understanding of trust that treats it as virtually synonymous with legitimacy.[8]

Ample empirical evidence supports the idea that African Americans, and residents of predominantly African American neighborhoods, are more likely than whites to view the police as illegitimate and untrustworthy, along several axes.[9] Empirical evidence suggests that feelings of distrust manifest themselves in a reduced likelihood among African Americans to accept law enforcement officers' directives and cooperate with their crime-fighting efforts.[10] According to much of this line of scholarship, the primary tool to achieve greater obedience to the law and law enforcement, regardless of race, is procedural justice: police officers treating people with dignity and respect, behaving in a neutral, nonbiased way, exhibiting an intention to help, and giving people voice to express themselves and their needs in interactions.[11]

Yet many reformers would likely disagree that obedience to law enforcement is the central concern in America's current conversation on police reform. Indeed, in many of the cases that have most catalyzed the Black Lives Matter

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8. *See, e.g.*, *id.* at 11. Importantly, the empirical research that led to the legitimacy findings treats legitimacy and trust as related but distinct topics. For example, Tyler and Huo use legitimacy as an umbrella variable that includes trust and confidence in police as one component of the broader concept. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW 108-11 (2002); *see also* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 270-71 (2008) (assessing police legitimacy using three factors, one of which is trust and confidence).

9. *See infra* Part I; *see also* TYLER & HUO, *supra* note 8, at 146-52 (presenting the results of a study showing racial differences in perceptions of procedural fairness); David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOC. 1190, 1217 (2011); Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 777, 793 (1998); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003) (exploring the relationship between procedural fairness, police legitimacy, and public support of the police).

10. *See, e.g.*, Sunshine & Tyler, *supra* note 9, at 526 ("Compliance was also found to be influenced by ethnicity, income, and gender, with whites, the more well off, and female respondents more likely to comply with the law . . . ."); Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 POLICE Q. 322, 333 (2005) ("White respondents reported the highest level of cooperation in fighting crime, African Americans the lowest . . . . [I]nstitutional trust shaped cooperation among all groups . . . ."); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 294-95 (2003) [hereinafter Tyler, *Procedural Justice*] ("[M]inority group members are less willing to accept the decisions of legal authorities and less satisfied with those authorities with whom they deal . . . . [M]inority group members are less likely to accept decisions because they feel unfairly treated.").

11. *E.g.*, Sunshine & Tyler, *supra* note 9, at 537; Tyler, *Procedural Justice*, *supra* note 10, at 350.

movement, the victims of police violence were not disobeying the law,[12] were complying with officers' demands,[13] or were suspected of violating petty laws that are likely unworthy of strong enforcement efforts or penalties.[14] A large body of scholarship on criminal justice attempts to denaturalize the assumed

12. Consider, for example, the case of Antronie Scott, shot and killed on February 4, 2016. When San Antonio police officer John Lee stopped Scott in order to execute an arrest warrant, "Scott spun around quickly and the officer feared for his life." Jacob Beltran & Mark D. Wilson, *Man Wanted on Two Felony Warrants, Shot Dead by Police, Was Unarmed*, SAN ANTONIO EXPRESS-NEWS (Feb. 5, 2016, 10:57 PM), http://www.expressnews.com/news/local/article/Man-wanted-on-two -felony-warrants-shot-dead-by-6809709.php [http://perma.cc/962D-34M6].

13. Consider, for example, the case of Charles Kinsey, shot and injured on July 18, 2016. Kinsey, a behavioral therapist who was working with an autistic adult, was shot lying on his back, with his hands in the air. The facts surrounding the case are complex. Officer Jonathan Aledda, who shot Kinsey, later claimed that he was attempting to shoot the autistic Latino man with whom Kinsey was working; the man was holding a toy gun that the original caller had suggested might be a gun. However, several circumstances surrounding the incident weaken this potential explanation. Charles Rabin, *Charles Kinsey Was Shot Less Than Six Minutes After Police Arrived*, MIAMI HERALD (Aug. 5, 2016, 5:22 PM), http://www.miami herald.com/news/local/crime/article94009242.html [http://perma.cc/Z9K6-NBU7].

In general, it is important to note that police uses of force can be unreasonable, and thus punishable, even if the victims *were* disobeying the law or failing to comply with officer commands. The test of objective reasonableness in police excessive use of force cases depends on an assessment of the totality of the circumstances surrounding the use of force at issue, not simply whether the victim was breaking the law or disobeying the officer at the time of the forceful act. *See* Graham v. Connor, 490 U.S. 386, 388, 396-97 (1989).

14. Consider, for example, the case of Eric Garner, who suffered a fatal heart attack on July 17, 2014 after police attempted to arrest him for selling loose, untaxed cigarettes. *See* Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner -police-chokehold-staten-island.html [http://perma.cc/57S7-2FYX]; Stephen L. Carter, *Law Puts Us All in Same Danger as Eric Garner*, BLOOMBERG VIEW (Dec. 4, 2014, 10:56 AM), http://www.bloomberg.com/view/articles/2014-12-04/law-puts-us-all-in-same-danger-as -eric-garner [http://perma.cc/2X6Y-DJLB]; *see also* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 33-44 (2008) (analyzing the differences between core and peripheral criminal offenses); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1894 (2000) (describing legislative incentives to criminalize specific behaviors at the urging of even a minority of the population). One of the perils of broken-windows policing (also known as order-maintenance or quality-of-life policing) is that its emphasis on enforcing petty laws imbues the police with increased power and focus on social and racial control, particularly in high-poverty, racially marginalized communities. *See, e.g.*, Robert J. Sampson, *When Things Aren't What They Seem: Context and Cognition in Appearance-Based Regulation*, 125 HARV. L. REV. F. 97, 103-06 (2012). That officers enforce these laws at all likely decreases their legitimacy. *See* Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1582 (2015) (suggesting, using experimental research, that unconstitutional police conduct had less effect on people's assessments of police legitimacy when the police were intervening in serious crime compared to when they were intervening in more minor crime).

link between obeying the law and criminal justice contact.[15] Scholars have shown that recent trends in criminal justice such as pervasive stop-and-frisk, increased misdemeanor prosecution, and mass incarceration are not primarily consequences of increases in criminal offending. Instead, these scholars suggest that the American criminal justice system has dual purposes, only one of which is crime response and reduction. Its other, more insidious function is the management and control of disfavored groups such as African Americans, Latin Americans, the poor, certain immigrant groups, and groups who exist at the intersection of those identities.[16] From a social control perspective, increasing compliance and cooperation with law enforcement may well be valuable aims, but they should not be at the root of police reform efforts. Deploying legitimacy theory and procedural justice as a diagnosis and solution to the current policing crisis might even imply, at some level, that the problem of policing is better understood as a result of African American criminality than as a badge and incident of race- and class-based subjugation.

Reformers' emphasis on police legitimacy has caused them to focus heavily on training of frontline officers to behave in a procedurally just manner during

15. Criminal justice contact includes, but is not limited to, police stops, arrests, generalized interaction between police and communities in heavily policed neighborhoods, periods of incarceration, and periods of community supervision (including probation and parole). For a general discussion of criminal justice contact and surveillance, see, for example, Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOC. REV. 367, 370, 373, 375 (2014).

16. *See, e.g.*, ALEXANDER, *supra* note 3, at 4 ("[M]ass incarceration in the United States had . . . emerged as a stunningly comprehensive and well-disguised system of racialized social control."); KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA (2010); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME & SOCIAL ORDER IN CONTEMPORARY SOCIETY 75-92 (2001) (arguing that a variety of social, economic, political, and cultural changes arising in the late twentieth century led to changes in crime control, including shifts in policing strategy); GOTTSCHALK, *supra* note 3, at 258; MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, & PUNISHMENT IN AMERICA 17-26 (1995) (debunking claims that rising incarceration rates have reduced violent crime); BRUCE WESTERN, PUNISHMENT & INEQUALITY IN AMERICA 4, 43-51 (2007) ("[T]he prison boom was a political project that arose partly because of rising crime but also in response to an upheaval in American race relations in the 1960s and the collapse of urban labor markets for unskilled men in the 1970s."); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630, 653-70 (2014); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 162 (2015); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95 (2001) (arguing that the combination of "hyperghetto" and the prison is the current stage of "peculiar institutions" designed to control African Americans, in the lineage of slavery and Jim Crow); *see also* MICHEL FOUCAULT, DISCIPLINE & PUNISH 138-39 (Alan Sheridan trans., 2d ed. 1995) (describing the process of "disciplinary coercion" of human bodies through societal institutions, which include the prison).

stops, with a goal of promoting legitimacy. The White House report, for example, names training and education of frontline officers as Pillar Five of a six-pillar approach, and training is mentioned as an "action item" under all of the five other pillars.[17] Numerous news reports, professional reports, and articles in professional magazines tout procedural justice as the key intervention that will resolve the problems that have catalyzed Black Lives Matter.[18] Police departments across the country, in wide-ranging cities such as Chicago, Illinois; Stockton, California; and Birmingham, Alabama, have implemented procedural justice training.[19] The Obama Justice Department's consent decrees with

17. *See* TASK FORCE REPORT, *supra* note 6, at 51-60; *see also id.* at 17, 20-21, 34, 46 (describing training initiatives under each of the six pillars: legitimacy, policy and oversight, technology and social media, community policing and crime reduction, training and education, and officer wellness and safety). Note that the training described under Pillar Six (officer safety and wellness) is primarily safety training (e.g., training police officers to wear seat belts and bulletproof vests), not procedural justice training. The key point is that the Report leaves an overarching impression that solving the problems facing twenty-first-century police is a matter of training frontline officers, not restructuring and reimagining policing.

18. *See, e.g.*, Police Exec. Research Forum, U.S. DEP'T OF JUSTICE, *Legitimacy and Procedural Justice: A New Element of Police Leadership* 2 (2014), http://www.policeforum.org/assets/docs /Free_Online_Documents/Leadership/legitimacy%20and%20procedural%20justice%20 -%20a%20new%20element%20of%20police%20leadership.pdf   [http://perma.cc/H85N -MXAJ] ("As today's police executives strive to maintain the progress in reducing crime while serving as effective agents of change, many are taking on a new challenge: applying the concepts of 'legitimacy' and 'procedural justice' as they apply to policing."); Local 12, *Implementing "Procedural Justice" Nationwide*, YOUTUBE (Dec. 19, 2014) http://www.youtube .com/watch?v=P1Oo8U8RwFo [http://perma.cc/HF4R-9CFD]; Mark Sedevic, *Procedural Justice & Police Legitimacy Training in Chicago: Reaping the Benefits of the Golden Rule*, 911 MAG., http://www.9-1-1magazine.com/Sedevic-Procedural-Justice-Training [http:// perma.cc/75L4-SDBG]; Ronal W. Serpas & Remi A. Braden, *Reply to Community Policing Revisited: Implementing the Principles of Procedural Justice and Police Legitimacy*, POLICE CHIEF (Mar. 2016), http://www.policechiefmagazine.org/ideas-insights-reply-to-community -policing-revisited-implementing-the-principles-of-procedural-justice-and-police-legiti macy [http://perma.cc/9VYP-85T5] ("Integrating the principles of procedural justice and police legitimacy throughout policing is the answer to [community policing] problems. They form the basis for the core service delivery model that must be used in every citizen encounter to build the support and cooperation necessary to implement community policing more completely throughout the United States." (footnote omitted)).

19. *See, e.g.*, DANIELA GILBERT, STEWART WAKELING & VAUGHN CRANDALL, PROCEDURAL JUSTICE AND POLICE LEGITIMACY: USING TRAINING AS A FOUNDATION FOR STRENGTHENING COMMUNITY-POLICE RELATIONSHIPS 8-10 (2015) (describing the adoption of procedural justice training in three California cities—Oakland, Salinas, and Stockton); Wesley G. Skogan, Maarten Van Craen & Cari Hennessy, *Training Police for Procedural Justice*, 11 J. EXPERIMENTAL CRIMINOLOGY 319 (2015) (describing the Chicago training); Karim Shamsi-Basha, *Birmingham Community Service Officer Heather Campbell Offers Plenty of Compassion, Courtesy*, BIRMINGHAM TIMES (July 28, 2016), http://www.birminghamtimes.com/2016/07/birming ham-community-service-officer-heather-campbell-offers-plenty-of-compassion-courtesy/

troubled departments, such as Cleveland and Ferguson, mandate departments to adopt and implement procedural justice principles and training.[20] As the theory is at times presented, particularly among police officers, responding to the concerns of marginalized communities is as simple as following "the Golden Rule."[21]

While momentum for procedural justice training seems persistent on a local level,[22] the Trump Administration seems unlikely to embrace and advocate for this sort of reform. Trump has consistently indicated that he is generally supportive of police officers, but he has not fully articulated what support means at a concrete level. While Candidate Trump espoused the sanctity of state and local control over policing,[23] President Trump took to Twitter to threaten to send "the Feds" to Chicago to respond to shootings, which generally fall within the jurisdiction of local police departments.[24] Candidate Trump endorsed aggressive, ineffective "stop-and-frisk" policies[25]—meaning policies

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[http://perma.cc/Q8XQ-TXVR] (quoting Birmingham Police Chief A.C. Roper as saying, "We just went through 16 hours of procedural justice . . . . That talks about day-to-day interactions and learning how to be neutral and how to listen to people.").

20. *See, e.g.*, United States v. City of Cleveland, No. 1:15CV1046, at 10-11 (N.D. Ohio May 25, 2016); Consent Decree at 73-74, United States v. City of Ferguson, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016).

21. Sedevic, *supra* note 18 ("Procedural justice and police legitimacy [are] as basic as the old adage, 'It is not what you say, but how you say it. It is not what you do, but how you are doing it.' Procedural justice and legitimacy in law enforcement is not just a strategy, but a movement . . . . It is about doing the right thing all of the time and treating others how you would want to be treated.").

22. *See, e.g.*, Brandis Friedman, *Chicago Police Department Ramps Up Training for 'Police Legitimacy,'* CHI. TONIGHT (Jan. 17, 2017), http://chicagotonight.wttw.com/2017/01/17/chicago-po lice-department-ramps-training-police-legitimacy [http://perma.cc/RYA6-AJGT]; Kurt Rivera, *Stockton Police Strive for More 'Respectful' Department*, ABC10.COM, http://www.abc 10.com/news/local/stockton/stockton-police-strive-for-more-respectful-department/38691 7388 [http://perma.cc/66JS-23H9] (describing Stockton's adoption of a three-year strategic plan on procedural justice shortly before Trump's inauguration).

23. *See* Donald J. Trump, *2016 Presidential Candidate Questionnaire*, INT'L ASS'N CHIEFS POLICE (Aug. 20, 2016), http://www.theiacp.org/Portals/0/documents/pdfs/TrumpResponseFinal .pdf [http://perma.cc/5YKJ-NJN5].

24. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 24, 2017, 9:25 PM), http://twitter .com/realDonaldTrump/status/824080766288228352 [http://perma.cc/RWE6-WWCQ].

25. *See, e.g.*, ERIC T. SCHNEIDERMAN, A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 4 (2013); John MacDonald, Jeffrey Fagan & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, 11 PLOS ONE (2016); *see also* Max Ehrenfreund, *Donald Trump Claims New York's Stop-and-Frisk Policy Reduced Crime. The Data Disagree*, WASH. POST (Sept. 22, 2016), http://www .washingtonpost.com/news/wonk/wp/2016/09/22/donald-trump-claims-new-yorks-stop -and-frisk-policy-reduced-crime-the-data-disagree [http://perma.cc/N7NY-KGXH].

that target predominantly black and brown neighborhoods in the style declared unconstitutional in New York City,[26] not the stops-and-frisks based on *individualized* reasonable suspicion authorized in *Terry v. Ohio*.[27] Meanwhile, President Trump floated a preliminary federal budget, drafted by the Cato Institute, that indicated the administration would seek to eliminate funding for the Justice Department's Office of Community Oriented Policing Services (COPS).[28] The COPS Office distributes federal funding to local departments to hire more police officers, which enables departments to hire enough officers to carry out intensive approaches like stop-and-frisk.[29] Without COPS funding, local departments may lack the staffing to fulfill Trump's alleged goal of ratcheting up stop-and-frisk measures.

Recent executive orders on criminal justice, issued just one day after the Senate confirmed Trump's Attorney General Jeff Sessions, continue in the ambiguous vein of supporting the police while gently alluding to ways that impulse might conflict with responding to the concerns that yielded Black Lives Matter. One executive order, for example, creates a "Task Force on Crime Reduction and Public Safety" that supports "law and order" and authorizes the task force to "propose new legislation that could be enacted to improve public safety and reduce crime"—language that sounds supportive of increased criminalization and expansion of the carceral state.[30] Another, which purports to prevent violence against police officers, similarly proposes "new Federal crimes, and increase[d] penalties for existing Federal crimes" against officers.[31] In the context of recent debates over police legitimacy and police-community rela-

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

27. 392 U.S. 1, 27 (1968) (describing the type of factual analysis an officer must conduct to justify suspicion for a stop-and-frisk).

28. Alexander Bolton, *Trump Team Prepares Dramatic Cuts*, HILL (Jan. 19, 2017), http://thehill .com/policy/finance/314991-trump-team-prepares-dramatic-cuts [http://perma.cc/HK77 -FPGN].

29. *See* John J. Donohue III & Jens Ludwig, *More COPS*, BROOKINGS POL'Y BRIEF 3 (Mar. 2007) ("COPS increased the total number of police officers on the street in the peak year of 2000 by 11,900 officers, equal to around 2 percent of the total police force in the country that year.").

30. *Presidential Executive Order on a Task Force on Crime Reduction and Public Safety*, WHITE HOUSE (Feb. 9, 2017), http://www.whitehouse.gov/the-press-office/2017/02/09/presiden tial-executive-order-task-force-crime-reduction-and-public [http://perma.cc/K98A -6VDM].

31. *Presidential Executive Order on Preventing Violence Against Federal, State, Tribal, and Local Law Enforcement Officers*, WHITE HOUSE (Feb. 9, 2017), http://www.whitehouse.gov/the-press -office/2017/02/09/presidential-executive-order-preventing-violence-against-federal-state [http://perma.cc/QS39-X6SM].

tions, these orders implicitly paint the challenges facing criminal justice as stemming solely from criminality. They ignore the institutional failures of certain police departments and erase the structural underpinnings of tense police-community relations, specifically racial isolation and class marginalization.

The appointment of Jeff Sessions as United States Attorney General suggests that the Justice Department's Civil Rights Division will end its investigations of local departments,[32] as it did under Attorneys General Alberto Gonzales and Michael Mukasey during the second George W. Bush Administration.[33] It is also likely that the DOJ's funding support for the National Initiative for Building Community Trust & Justice, founded on legitimacy and procedural justice principles, will end.[34] Yet given the wide embrace of procedural justice on a local level and through national policing organizations, it would not be surprising if procedural justice remained the prevailing approach even if the federal government steps back from actively pushing it.[35]

Choosing a theory of the policing crisis and its solutions is critical for advancing meaningful, effective reform. In the world of police governance and practice, perhaps more than in other spheres, theory matters for determining what police departments and officers do on the ground. Much of the impetus for broken-windows policing,[36] community policing,[37] "hot spots" (or focused

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32. *See* John Fritze, *Jeff Sessions Voices Concern About Use of Consent Decrees for Police*, BALT. SUN (Jan. 10, 2017), http://www.baltimoresun.com/news/maryland/politics/blog/bal-jeff-sess ions-voicesconcern-about-use-of-consent-decrees-for-police-20170110-story.html [http:// perma.cc/2V9G-WP5J].

33. *See* Police Exec. Research Forum, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 4 (2013); *see also infra* notes 261-264 and accompanying text.

34. Shibani Mahtani, *Community Policing Program Faces Uncertainty Under Donald Trump Administration*, WALL ST. J. (Nov. 30, 2016), http://www.wsj.com/articles/community-polic ing-program-faces-uncertainty-under-donald-trump-administration-1480518002 [http:// perma.cc/KF6B-AAZ6].

35. *See, e.g.*, Samuel Walker, *Why Police Reform Won't Die Under Trump*, CRIME REP. (Nov. 28, 2016), http://thecrimereport.org/2016/11/28/why-police-reform-wont-end-with-the-trump -administration [http://perma.cc/H9XM-DZM3].

36. *See, e.g.*, George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/brok en-windows/304465 [http://perma.cc/E454-KWSW].

37. WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE 10 (1999) ("Interest in community policing has also been encouraged by the emergence of a cadre of well-educated and sophisticated administrators at the top of prominent police departments . . . . They have been impressed by two decades of research on policing, which has highlighted some of the limitations of the way in which it traditionally has been organized.").

deterrence)[38] and other predictive policing,[39] and now procedural justice and legitimacy came from or ripened in the academy. Through a panoply of large and small policy decisions, theory trickles into the daily work of frontline police officers. Thus, getting the theory right by accurately diagnosing the policing crisis is central to the practical project of reforming policing.

This Essay broadens the usual lens by proposing *legal estrangement* as a corrective to the prevailing legitimacy perspective on police reform. Like Justice Sotomayor in *Strieff*,[40] the legal scholars who are setting the police reform agenda have not fully captured the nature of the distrustful relationship between the police and poor and African American communities. The theory of legal estrangement provides a rounder, more contextualized understanding of this relationship that examines the more general disappointment and disillusionment felt by many African Americans and residents of high-poverty urban communities with respect to law enforcement.

Nearly twenty years ago, sociologists Robert J. Sampson and Dawn Jeglum Bartusch described "'anomie' about law" in predominantly black and poor neighborhoods in Chicago, a phenomenon they labeled "legal cynicism."[41] By "anomie," Sampson and Bartusch were describing ruptures in the social bonds that connect individuals to their community and, in particular, to the state through law enforcement. Building from their work and from other sociology and criminology scholarship on legal cynicism,[42] I introduce the concept of *legal estrangement* to capture both legal cynicism—the subjective "cultural orientation" among groups "in which the law and the agents of its enforcement, such as the police and courts, are viewed as illegitimate, unresponsive, and ill equipped to ensure public safety"[43]—and the objective structural conditions

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38. *See, e.g.*, Anthony A. Braga, Andrew V. Papachristos & David M. Hureau, *The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta-Analysis*, 31 JUST. Q. 633 (2014).

39. *See, e.g.*, Walter L. Perry et al., *Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations*, RAND CORP. 3-6 (2013), http://www.ncjrs.gov/pdffiles1/nij/grants /243830.pdf [http://perma.cc/5LM5-C5JY] (describing the origins of predictive policing, which partly derived from a growing interest in crime prediction among quantitative criminologists over the past forty years).

40. Utah v. Strieff, 136 S. Ct. 2056, 2069-71 (2016) (Sotomayor, J., dissenting).

41. Sampson & Bartusch, *supra* note **Error! Bookmark not defined.**, at 778.

42. *E.g.*, Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC'Y REV. 314 (2016); Jacinta M. Gau, *Procedural Justice, Police Legitimacy, and Legal Cynicism: A Test for Mediation Effects*, 16 POLICE PRAC. & RES. 402 (2015); David S. Kirk, *Prisoner Reentry and the Reproduction of Legal Cynicism*, 63 SOC. PROBS. 222 (2016).

43. Kirk & Papachristos, *supra* note 9, at 1191.

(including officer behaviors and the substantive criminal law) that give birth to this subjective orientation.

The concept of legal estrangement has the power to reorient police reform efforts because it clarifies the real problem of policing: at both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic. The legal estrangement perspective treats social inclusion as the ultimate end of law enforcement. This view extends and reformulates the legitimacy perspective, which tends to present inclusion primarily as a pathway toward deference to legal authorities.[44] The legal estrangement approach encourages a fuller, theoretically informed set of interventions into police governance.

Part I locates distrust of the police among many African Americans and in many disadvantaged neighborhoods as a particular, poorly understood problem. To illustrate the analytical advantages of legal estrangement over legitimacy theory, Part II tells the story of Shawna, a young African American woman living in Baltimore, Maryland. Part III explains how legitimacy theory and legal estrangement theory take different approaches to understanding the current policing crisis. It demonstrates the power of legal estrangement theory to improve legitimacy theory and its concomitant procedural justice approach, which has had great influence over the police reform agenda.[45] Part IV erects a tripartite theory of legal estrangement. It posits that three types of socio-legal processes contribute to legal estrangement: procedural injustice, vicarious margin-

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44. *E.g.*, Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1129-30 (2014) (arguing that signaling inclusion is a pathway for legal authorities to get people to comply and cooperate with the law); *see also* TYLER & HUO, *supra* note 8, at xiii. This difference arises not because legitimacy scholars disregard the intrinsic value of inclusion and cohesion, but because those ends are not their outcome (or independent variables) of interest. Notably, even when this scholarship does discuss inclusion, it does so more from an individualized identity-based framework than a collective one. *See, e.g.*, Tom R. Tyler & Allen E. Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES EXPERIMENTAL SOC. PYSCHOL. 115, 139, 142 (1992) (describing the "group-value model of procedural justice," which theorizes the consequences of treatment by authority figures on people's sense of their own status within a group, or within society, and their "feelings of self-worth"). Group-value theory provides an account of how procedural justice contributes to an individual's sense of belongingness within a group. It does not give an account of groups' sense of belongingness within society. Because group-sense (culture) cannot be understood merely as an aggregation of individual perceptions, these analyses are different in kind, not mere differences in scale.

45. *See* Tom R. Tyler et al., *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCHOL. SCI. PUB. INT. 75 (2015).

alization, and structural exclusion. In addition, Part IV illustrates the lived ex-
perience of these phenomena using portraits from rich narrative data collected
from youth in Baltimore, Maryland in the wake of the death of Freddie Gray.
Part V moves from the critical and theoretical to the prescriptive. It argues that,
in order to dismantle (or at least to reduce) legal estrangement, multiple levels
of government must engage in policy reform aimed not only at procedural in-
justice, but also at vicarious marginalization and structural exclusion. These re-
forms have a greater likelihood of producing social inclusion, the deepest pur-
pose of the policing regime.

I.   THE BLIGHT OF POLICE DISTRUST IN AFRICAN AMERICAN COMMUNITIES

For as long as scholars have studied the relationship between African Amer-
icans and criminal justice, they have documented deep distrust of the system.
In the early twentieth century, W.E.B. Du Bois was likely the first scholar to
empirically document this distrust.[46] As part of a series of studies of African
American life, Du Bois and his collaborators collected survey, interview, and
administrative data on crime, arrest, and incarceration.[47] They found, among
other things, that white officials and black men had greatly divergent perspec-
tives on the possibilities of justice for African Americans in Georgia courts.[48]
Du Bois reasoned that punishment practices prevalent at the time, such as
lynching, "spread[] among black folk the firmly fixed idea that few accused
Negroes are really guilty."[49] He also condemned the relative lack of legal protec-
tion for African Americans, as well as criminal justice practices such as the leas-
ing of convicts, that sent a message to African Americans that the purpose of

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46. *See* ALDON MORRIS, THE SCHOLAR DENIED: W.E.B. DU BOIS AND THE BIRTH OF MODERN SO-
     CIOLOGY 75, 191, 220-21 (2015) (describing the pioneering scholarship of the "Du Bois-
     Atlanta school" of sociology).

47. W.E. Burghardt Du Bois, *Preface* to SOME NOTES ON NEGRO CRIME: PARTICULARLY IN
     GEORGIA, at v, v (W. E. Burghardt Du Bois ed., 1904) http://scua.library.umass.edu/digital
     /dubois/dubois9.pdf [http://perma.cc/2H78-DHBZ].

48. *Id.* at 40, 43-48.

49. *Id.* at 65. In earlier work, Du Bois had been somewhat hesitant to draw a link between objec-
     tively unfair criminal justice practices and African Americans' perceptions of criminal injus-
     tice. *See* W.E.B. DU BOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY 175 (Henry Louis
     Gates, Jr. ed., 2007) (1899) ("It has been charged by some Negroes that color prejudice
     plays some part, but there is no tangible proof of this, save perhaps that there is apt to be a
     certain presumption of guilt when a Negro is accused, on the part of police, public and
     judge.").

the system was to make money for the state rather than to rehabilitate supposed lawbreakers.[50]

Du Bois's research was prescient, at least with respect to the direction of research and scholarship on African Americans' relationship to the crime control system over the next century. A high watermark was the 1968 Kerner Commission Report, commissioned by the Johnson Administration in the wake of twenty-three episodes of urban unrest during the mid- and late 1960s.[51] The Report concluded that, for many African Americans, the "police have come to symbolize white power, white racism, and white repression."[52] Like Du Bois's Georgia study, the Report documented "tension" and "hostility" between law enforcement and urban African Americans, blaming the "abrasive relationship" on a combination of increased demands for protection and service and the police practices thought necessary to provide those services.[53] In the South and in the Northeastern and Midwestern Rust Belt cities where many African Americans relocated during the Second Great Migration, police forces often functioned to maintain the expulsion of African Americans from the center of social and political life, at times violating the law in service of racial control.[54] Despite pervasive harsh policing that ostensibly was intended to suppress and deter crime, African Americans felt inadequately protected.[55]

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50. Du Bois, Some Notes on Negro Crime: Particularly in Georgia, *supra* note 47, at 65.

51. Nat'l Advisory Comm'n on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders*, Nat'l Crim. Just. Ref. Serv. 19 (1968) [hereinafter Report of the National Advisory Commission on Civil Disorders] http://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf [http://perma.cc/75NB-BTNG].

52. *Id.* at 5.

53. *Id.* at 157; *see also* Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. Crim. L. & Criminology 335, 342-43 (2011) (explaining that in recent years, police officers' "preference for toughness" was believed to be harmonious with order-maintenance policing models, thereby serving positive ends for urban communities).

54. *See, e.g.*, Marilynn S. Johnson, Street Justice: A History of Police Violence in New York City (2003); Khalil Gibran Muhammad, The Condemnation of Blackness 232-40 (2010).

55. *E.g.*, Alexandra Natapoff, *Underenforcement*, 75 Fordham L. Rev. 1715, 1718-19 (2006). It is interesting to note that the underlying logic for harshly present policing even then—well before the philosophical turn in policing toward "community policing" and broken-windows policing, and shortly before the earliest years of the War on Drugs—was that heavy presence and harshness were necessary to reduce crime. *See* Kelling & Wilson, *supra* note 36 (explaining the broken-windows theory of policing, also known as order-maintenance or quality-of-life policing). The frayed relationship between African Americans and law enforcement was deeply entrenched well before the War on Drugs. Mass incarceration increased in part due to the War, but the issue of racialized policing has much deeper roots. *Cf.* Western, *supra* note

The litany of evidence confirming the existence of a tense and distrustful relationship between African Americans and law enforcement mounted steadily over the ensuing decades. John Hagan and Celesta Albonetti, for example, used data from a national survey conducted in the late 1970s to conclude that, although African Americans were more likely than whites to see all aspects of the criminal justice system as unjust, they perceived the police as the most unjust aspect of the criminal justice system.[56] Drawing from nationally representative survey data from the late 1980s, Tracey Meares argued that many African Americans experience "dual frustration" with drugs on the one hand and with harsh courts and law enforcement on the other.[57] More recently, Lawrence Bobo and Victor Thompson reached similar conclusions, finding that while sixty-eight percent of white respondents expressed at least "'some' or 'a lot' of confidence in the police," only eighteen percent of black respondents would say the same.[58] Contemporary events, particularly the increased political, social, and academic attention directed at police use of force because of the Black Lives Matter movement, have shed new light on longstanding tensions between African Americans and law enforcement.[59] Newer research embeds the problem of police distrust within a larger framework of race- and class-based marginalization, examining a range of police practices and neighborhood conditions.[60]

16, at 58 (crediting, partially, the rise of mass incarceration to shifts in the punishment of narcotics crimes).

56. John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 Am. J. Soc. 329, 343 (1982).

57. Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 Buffalo Crim. L. Rev. 137, 140, 142, 144-45 (1997) (drawing on data from the 1987 General Social Survey); *see also* Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. Cal. L. Rev. 1219, 1228-29 (2000) ("[W]hile blacks are more likely than the general population to view police brutality and harassment as a problem, they are also much more likely to perceive crime as a serious problem. Thus blacks suffer from a 'dual frustration'—being fearful of both the police and criminals." (footnotes omitted)).

58. Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 Soc. Res. 445, 456 (2006).

59. *See, e.g.*, Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* 35 (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2006), http://www.nber.org/papers/w22399 [http://perma.cc/37MZ-3FYV] (finding that police in the cities studied were much more likely to use nonlethal force, such as pepper spray or batons, when dealing with blacks and Hispanics, but finding no evidence of racial disparity in their use of lethal force); Campaign Zero, http://www.joincampaignzero.org [http://perma.cc/Q5XM-EUBN].

60. *E.g.*, Charles R. Epp, Steven Maynard-Moody & Donald Haider-Markel, Pulled Over: How Police Stops Define Race and Citizenship 135-36 (2014).

Much of this research documents African American distrust or dissatisfaction with the law and law enforcement without clearly articulating the meaning of distrust or the precise content of dissatisfaction. This omission could exist, in part, because the sources of distrust and dissatisfaction are seen as relatively obvious. A large body of historical research has documented the entanglement of police in the long-running national project of racial control.[61] Yet our failure to be specific about the meaning, origins, and content of distrust has produced a worrisome incompleteness in the diagnosis of the problem, and thus in the prognosis and program of treatment.[62]

Trust is a multidimensional, difficult-to-define concept that scholars operationalize using myriad approaches.[63] Yet in the world of policing scholarship, the leading scholar and definer of trust is Tom Tyler. Rather than understanding trust and legitimacy as synonymous, Tyler conceptualizes trust as part of the larger umbrella of legitimacy. Theoretically, Tyler defines legitimacy as a person's "perceived obligation to obey" the law,[64] or "the belief that legal authorities are entitled to be obeyed and that the individual ought to defer to their judgments."[65] Different surveys and experiments define legitimacy in distinctive ways, but the core formulation considers people's sense of obligation to follow the law; their sense of whether the law "operates to protect the advantaged" (which Tyler and Huo call "cynicism about the law");[66] their trust in legal institutions, specifically police officers and judges; and their favorability

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61. *See, e.g.*, Johnson *supra*, note 54; Muhammad *supra*, note 54, at 232-40.

62. *Cf.* Schulhofer, Tyler & Huq, *supra* note 53, at 341 (identifying an analogous failure of the academic community to articulate the meaning of police legitimacy).

63. This literature is very extensive and cannot be fully cited here, but some foundational works in the development of a sociological perspective on trust are critical to note. *See, e.g.*, James S. Coleman, Foundations of Social Theory 91-116 (1990); S.N. Eisenstadt, Power, Trust and Meaning: Essays in Sociological Theory and Analysis 14-16, 311-14 (1995); Anthony Giddens, The Consequences of Modernity 26-36 (1990); Niklas Luhmann, Trust and Power (John Wiley & Sons 1979) (1973); Georg Simmel, The Philosophy of Money 178-79 (Tom Bottomore & David Frisby trans., 1978).

64. Tom R. Tyler, *Trust in the Twenty-First Century*, *in* Interdisciplinary Perspectives on Trust: Towards Theoretical and Methodological Integration 203, 204 (Ellie Shockley et al. eds., 2016).

65. Tyler & Huo, *supra* note 8, at xiv.

66. *Id.* at 108-09. *But see* Kirk & Papachristos, *supra* note 9, at 1207 & n.13 (focusing more narrowly on cynicism towards the legal system, as opposed to cynicism more broadly). Tyler and Huo's conception and operationalization of cynicism about the law bears only a tenuous relationship to how sociologists conceive of and measure legal cynicism, and instead focuses on the degree to which people see themselves as "against the law" rather than more deeply alienated from it. *See* Tyler & Huo, *supra* note 8, at 104-05 ("Certainly, people with this orientation feel little responsibility or obligation to obey the law voluntarily.").

toward the police and the courts in their city.[67] The conceptual distinctions between all of the manifestations of trust that appear in the large body of legitimacy scholarship can become blurry, and it is beyond the scope of this Essay to reconcile all of these iterations. The core insight to keep in mind is that, in the version of legitimacy theory that policing policymakers have adopted most completely, trust between police and communities is understood as a problem of illegitimacy: the key concern is the degree to which people will choose to obey the law and its enforcers.

Much literature has shown that, regardless of how trust is measured or conceived, African Americans, particularly those who are poor or who live in high-poverty or predominantly African American communities, tend to have less trust not only in police, but also in other governmental institutions, in their neighbors, and even in their intimate partner relationships in comparison to other racial and ethnic groups in the United States.[68] The picture that emerges from the full body of research on race and trust is one of profound marginalization, a social diminishment that—while not encapsulating the fullness of the African American experience—indicates that poor African Americans as a whole tend to have a social experience distinctive from those of other ethnic and class groups in the United States. Structural disadvantage yields a broader cultural structure of mistrust. Most discussions of African American distrust of the police only skirt the edges of a deeper well of estrangement between poor communities of color and the law—and, in turn, society.

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67. TYLER & HUO, *supra* note 8, at 108-09. Although obligation to obey the law is only one component of legitimacy surveys, that component supersedes the others in part because of the conceptual definition of legitimacy. Tyler usually incorporates the idea of trust into the concepts of "motive-based trust," or, alternatively, "normative alignment." Motive-based trust is the degree to which people believe the police have positive, trustworthy motives. *Id.* at 59. Normative alignment is a slightly different concept, and focuses on the degree to which people believe the police share their values. Tom R. Tyler, Jonathan Jackson & Avital Mentovich, *The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact*, 12 J. EMPIRICAL LEGAL STUD. 602, 620 (2015). This literature has also, alternatively, conceived of legitimacy as a form of institutional trust in the government. *Id.* at 602, 620-21 (describing how the authors operationalized police normative alignment and trust in police motives in their survey).

68. For a targeted review of links among race, poverty, and trust, see Sandra Susan Smith, *Race and Trust*, 36 ANN. REV. SOC. 453 (2010).

II. TWO DIAGNOSES

A. A Crisis of Legitimacy

The most widely accepted diagnosis of the cleavage between the police and African Americans (particularly poor African Americans) centers on *legitimacy*. Scholars argue that African Americans are less likely than other groups to see the police as legitimate authorities, meaning that as a group they are less likely to have "a feeling of obligation to obey the law and to defer to the decisions made by legal authorities."[69] Although trust and legitimacy are distinct concepts, scholars and policymakers tend to treat the ideas as functionally equivalent for reform purposes. The core determinant of whether law enforcement is perceived as legitimate, and thus worthy of obedience and assistance, is whether police officers behave in a procedurally just manner.[70] Procedural justice is believed to encapsulate several components, including treating people with dignity and respect, voice (which can include citizen participation and allowing individuals to express their concerns), neutrality (freedom from bias), and conveying trustworthy motives (explaining how the police are helping reach an important social goal).[71] Tyler and his colleagues were not the first to articulate a socio-legal rationale for procedural justice,[72] but their formulation has had the greatest influence over the push toward procedural justice in policing.

An overview of the genealogy of police legitimacy theory is helpful for distinguishing it from legal estrangement. Although the research on police legitimacy primarily draws from social psychology, the theoretical underpinnings of the concept (like much of the scholarship on legal legitimacy across domains)[73]

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69. Tyler & Fagan, *supra* note 8, at 235.

70. *See* TYLER & HUO, *supra* note 8; *see also* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 278 n.310 (2012) (pointing out that in Tyler's earlier work, the moral credibility of the system had more weight than legitimacy of the system in determining people's reported willingness to comply with the law); Michael D. Reisig, Jason Bratton & Marc G. Gertz, *The Construct Validity and Refinement of Process-Based Policing Measures*, 34 CRIM. JUST. & BEHAV. 1005, 1024 (2007) (confirming the link between procedural justice and legitimacy but also finding, inter alia, that trust in the police and perceived distributive fairness of outcomes were predictive of compliance and cooperation with law enforcement).

71. *E.g.*, Lorraine Mazerolle et al., *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice*, 51 CRIMINOLOGY 33, 40-41 (2013).

72. *See* John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978).

73. *See, e.g.*, RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (forthcoming) (chapter 1, manuscript at 3) (on file with author); Richard H. Fallon, Jr., *Legitimacy and*

usually derive from the work of sociologist Max Weber.[74] From Weber's stand-point, legitimation is a subjective process: it does not inhere in an authority's procedures or existence, but is continuously negotiated with subjects, taking into account their views.[75] Weber classified the types of authority that legitimate orders tend to exhibit into three "ideal types"[76]: charismatic authority, or authority based on perceived personal divinity or exemplariness; traditional authority, based on custom and epitomized by the King; and legal-rational authority, the form of authority found most frequently in modern advanced society, which is based on process and consent.[77] Weber believed that legal-rational authority (the focus of nearly all research on legitimacy today) is, in some ways, the preferred version of legitimation because this legitimation strategy makes clear that, in choosing government through transparent, rational means, human beings are exercising their autonomy and free will.[78] While the threat of violence from the state always lurks, the state's authority over its citizens primarily comes from the state's adherence to process.[79]

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the Constitution, 118 HARV. L. REV. 1787, 1795-1801 (2005) [hereinafter Fallon, *Legitimacy and the Constitution*]; Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379; *see also* Aditi Bagchi, *Intention, Torture, and the Concept of State Crime*, 114 PENN. ST. L. REV. 1, 23-25 (2009) (applying these concepts to illuminate a practical legal problem).

74. *See* Tyler & Fagan, *supra* note 8, at 239; *cf.* DAVID BEETHAM, THE LEGITIMATION OF POWER 24 (2d ed. 2013) (describing the author's "conviction that it is necessary for social science to be freed from the whole Weberian legacy if it is to make sense of the subject of legitimacy").

75. See Beetham, supra note 74, at 24-25; Fallon, Legitimacy and the Constitution, supra note 73, at 1795.

76. Ideal types can be roughly understood as archetypes or categories. *See* MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 90 (Edward A. Shils & Henry A. Finch eds. & trans., 1949); *see also* Kohler-Hausmann, *supra* note 16, at 623 & n.24.

77. 1 MAX WEBER, ECONOMY & SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 215-16 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1978); *see also* Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1037-44 (2004) (describing the "basic ideal typical categories Weber used in constructing his sociology of law").

78. *See* ANTHONY T. KRONMAN, MAX WEBER 96-117 (1983). For Weber, legitimacy was a sociological concept about the nature of the populace's belief in a given authority rather than a moral status, but one can perceive some slippage in Weber's work on this point between the sociological and the normative. *See generally* BEETHAM, *supra* note 74, at 7-8 (comparing political philosophy and social scientific ideas of legitimacy); Fallon, *Legitimacy and the Constitution*, *supra* note 73, at 1795-1801 (comparing sociological legitimacy with moral legitimacy).

79. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1607-08 (1986) (explaining the connection between law as state power and violence).

In the legal and political realms,[80] the purpose of legitimacy theory is to understand how the state, from a moral perspective, *justifies* its power and how, as an empirical matter, it most *effectively exercises* power over its subjects.[81] State power is the ultimate focal point of legitimacy analysis.[82] The question then becomes, how does the state attain power over its subjects? Theorists such as Habermas refined the concept of legitimacy to emphasize consent, adding a layer of deliberation and positing that legitimacy can be built through dialogue among equal citizens.[83] Along these lines, but with concern about the normative implications of consent, Gramsci argued that governments (and more precisely, capitalist governments) gained legitimacy through ideological and cul-

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80. As opposed to the institutional realm, which might focus on other authorities such as the church, the university, the corporation, and so forth.

81. BEETHAM, *supra* note 74, at 8-10 (describing the distinctions between moral and social scientific conceptions of legitimacy).

82. *Id.* at 20 ("[L]egitimacy is . . . a set of distinct criteria, or multiple dimensions, operating at different levels, each of which provides moral grounds for compliance or cooperation on the part of those subordinate to a given power relation.").

83. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 222-37 (William Rehg trans., 1996). Of course, by this metric, little about policing in racially and socioeconomically isolated neighborhoods could be seen as legitimate given that police governance is rarely subjected to dialogue or even to public process. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1835 (2015) ("[P]olicing suffers from a failure of democratic accountability, of policy rationality, of transparency, and of oversight that would never be tolerated for any other agency of executive government."); *see also* DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 13-58 (2008) (describing democratic pluralist approaches to police governance). Indeed, many police officials and unions, today and in the past, view the involvement of civilians in police governance as counterproductive to the work of crime response and deterrence. Thus, various measures have been taken to curtail their power. *See generally* SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT (2001) (describing attempts to introduce civilian oversight to various city police departments); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005) (describing setbacks for civilian review boards in several cities). In a recent debate over a set of extensive police reforms in Maryland, civilian membership on police accountability boards was reportedly the primary sticking point between the police union and reform advocates. Ovetta Wiggins, *Sweeping Maryland Police Reform Measure Hits Stumbling Block*, WASH. POST (Apr. 5, 2016), http://www.washingtonpost.com/local/md-politics/sweeping-maryland-police-reform-measure-hits-stumbling-block/2016/04/05/e5a0b2dc-fada-11e5-886f-a037dba38301_story.html [http://perma.cc/2A54-FQG6]. Ultimately, the reform act passed and went into effect with its original language mandating civilian involvement in police accountability removed, leaving it to individual jurisdictions to decide whether to include civilians in reviewing police misconduct complaints. Justin Fenton, *Citizens to Gain Peek at Police Discipline, but Not Full View*, BALT. SUN (Apr. 17, 2016), http://www.baltimoresun.com/news/maryland/crime/bs-md-police-accountability-bills-20160417-story.html [http://perma.cc/7LDG-DP9Q].

tural hegemony: legitimation is a bundle of processes that elites use to procure public buy-in to oppressive systems.[84]

Regardless of the normative valence of consent, its emphasis in the study of legitimacy has led social psychology research to focus largely on what makes people voluntarily obey and help the state.[85] This consent-based conception of legitimacy falls in line with a focus among policymakers on how to increase voluntary adherence to the law.[86] The empirical work also tries to ascertain how the circumstances under which the community sees legal authority as legitimate might vary across groups.

This focus on consent has produced some insights about the nature of racial divergence in police legitimacy. Two insights have been most central. First, across racial-ethnic groups, people tend to view police as legitimate when they are *procedurally just*, and people tend to interpret fairness similarly across ethno-racial divides.[87] Second, the primary reason African Americans do not see police as legitimate is because they tend to have more personal experiences in which police officers treat them in a procedurally unjust manner.[88] Although little is known about the specific behaviors and practices that people consider

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84. *See* 1 ANTONIO GRAMSCI, PRISON NOTEBOOKS 137 (Joseph A. Buttigieg trans., Columbia Univ. Press 1992) (1948).

85. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19-27 (1990) (orienting this application of legitimacy theoretically); TYLER & HUO, *supra* note 8, at 102 (explaining the importance of self-regulation and internalized obligation to defer to the law); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 254-55 (2004) (describing the public's view of police legitimacy in the context of racial profiling).

86. *See, e.g.*, TASK FORCE REPORT, *supra* note 6, at 1-2; Rich (Skip) Miller, *The Importance of Procedural Justice*, COMMUNITY POLICING DISPATCH (Sept. 2013), http://cops.usdoj .gov/html/dispatch/09-2013/the_importance_of_procedural_justice.asp [http://perma.cc /M6S7-96TH] (describing procedural justice implementation in the Sioux Falls, South Dakota police department and encouraging other departments to take a similar approach, explaining, "If the community views their officers as being legitimate they are more likely to comply with the law. They are also more likely to agree with police decisions and less likely to be confrontational or hostile toward us.").

87. *See, e.g.*, Schulhofer, Tyler & Huq, *supra* note 53, at 374; Tom R. Tyler, *Multiculturalism and the Willingness of Citizens To Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 999 (2000) ("Demographic characteristics such as ethnicity and gender do not affect the relative importance of procedural justice concerns in determining procedural preferences — everyone cares about procedural justice."); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens To Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 125 (1988).

88. *See, e.g.*, Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 POLICE Q. 322 (2005).

fair or unfair,[89] the police legitimacy literature empirically shows that people want the same type of treatment from police regardless of their race or class. This conclusion means that African Americans' greater distrust of the police results not from supposed subcultural values or "bad culture," but instead arises as the product of negative personal experiences.

This insight has driven legal scholarship in several directions.[90] Most central to the analysis of this Essay, police legitimacy scholarship encouraged legal scholars to explore ways that the law might better facilitate procedurally just policing and respond to procedurally unjust policing policies and practices. Steven Schulhofer, Tom Tyler, and Aziz Huq present one of the most fully

89. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 220 (2012); Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY (2016). *But see* Aziz H. Huq, Jonathan Jackson & Rick Trinkner, *Legitimating Practices: Revisiting the Predicates of Police Legitimacy*, 56 BRIT. J. CRIMINOLOGY (2016) (delving deeper into specific police practices that are perceived to be fair or unfair).

90. Although the police legitimacy research has inspired a great deal of legal scholarship, the overwhelming majority of that scholarship has applied the concept to topics other than the regulation of regular police. Scholars have applied the theory to areas as diverse as juvenile justice, *e.g.*, Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991), civil dispute resolution, *e.g.*, Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005); Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793 (2016); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004), other areas of criminal justice, *e.g.*, Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591 (2014) (on prosecutors); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008) (on plea bargaining); Elizabeth Ingriselli, Note, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690 (2015) (on jury instructions), to national security, *e.g.*, Aziz Z. Huq, *The Social Production of National Security*, 98 CORNELL L. REV. 637, 693-96 (2013); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008), and to other legal contexts and areas of the law, *e.g.*, Bernadette Atuahene, *The Importance of Conversation in Transitional Justice: A Study of Land Restitution in South Africa*, 39 LAW & SOC. INQUIRY 902 (2014) (applying procedural justice to transitional justice); Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC'Y REV. 1 (2012) (on procedural justice in employment discrimination litigation); Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715 (2011) (on procedural justice in workplace diversity management); Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387 (2015) (arguing that governmental transparency laws would reduce the threat of mass information leaks); Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725 (2010) (on lawyers' interpretations of procedural justice); Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. 643 (2016) (on the procedural justice rationale for the hearsay rule).

elaborated applications of legitimacy theory to policing, applying the theory to both conventional and counterterrorism policing.[91] They set forth three policy goals that should emanate from the procedural justice policing model: (1) training officers to treat force as a last resort and "to view every citizen contact as an opportunity to build legitimacy through the tone and quality of the interaction";[92] (2) eschewing regulation of the police through the blunt instruments of the law (for example, the exclusionary rule) in favor of internal department management policies designed to positively motivate police to treat the public fairly;[93] and (3) in the counterterrorism realm, avoiding the impulse to authorize the use of harsh tactics such as ethno-racial profiling and random checkpoints.[94] Schulhofer, Tyler, and Huq's approach is distinctively what Rachel Harmon calls "non law,"[95] in the sense that it explicitly rejects legal intervention into policing. Their core suggestions are training, the substance of which is highly discretionary and rarely encoded directly into law, and avoiding litigation-based pathways toward systemic reform, such as the Department of Justice consent decree process. The solutions do not involve creating, changing, or enforcing the law. This means that, even if these approaches are effective, they largely leave intact the legal structure that has given birth to distrust and illegitimacy.

Meares has made several proposals to encourage departments to adopt principles of procedural justice. Conceptually, she has advanced the notion of "rightful policing," the idea that policing should be designed to maximize both

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91. Schulhofer, Tyler & Huq, *supra* note 53.

92. *Id.* at 351.

93. *Id.* at 357-59. For more recent, extended discussions of departmental management as internal procedural justice, see TASK FORCE REPORT, *supra* note 6, at 10, 14; and Rick Trinkner, Tom R. Tyler & Philip Atiba Goff, *Justice from Within: The Relations Between a Procedurally Just Organizational Climate and Police Organizational Efficiency, Endorsement of Democratic Policing, and Officer Well-Being*, 22 PSYCHOL. PUB. POL'Y & L. 158 (2016). John Rappaport proposes second-order regulation of police through means other than the courts in part because of the argument against direct regulation of police through law in the police legitimacy literature. John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 240-45 (2015).

94. Schulhofer, Tyler & Huq, *supra* note 53, at 364-74. This impulse should be eschewed not only because of civil libertarian concerns, but also because these tactics make people less likely to cooperate with police to aid in local counterterrorism efforts. *See* Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834, 890-905 (2015) (urging caution about police strategies to engage American Muslim communities in counterterrorism efforts).

95. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 788-90 (2012) (characterizing the scholarship of Fagan, Harcourt, Meares, Tyler, and others as "non law").

lawful conduct and community perceptions of police legitimacy.[96] Building in part from Schulhofer, Tyler, and Huq's idea that persuading and incentivizing police to treat people fairly will be more effective than forcing them to do so, Meares's scholarship has embraced community policing efforts such as Project Safe Neighborhoods in Chicago, Illinois, Project Exile in Richmond, Virginia, and Operation Ceasefire in Boston, Massachusetts. These programs' methods include organizing meetings with ex-offenders to build relationships and inform them of alternative opportunities to crime, as well as holistic problem-solving approaches, such as legitimacy-based "hot spots" policing (also known as focused deterrence).[97] These approaches are a sort of proactive policing that should, according to their proponents, avoid the pitfalls of earlier forms of broken-windows policing because they now emphasize procedural justice in the micro-level interactions of police contact.[98]

Scholars have proposed a variety of other interventions to build legitimacy, as well. For example, some have proposed that law enforcement randomize police stops and searches. In theory, randomization should allow police to engage in hands-on crime prevention without negatively impacting the legitimacy of the system by making specific people, particularly young African American and Latino men, feel targeted.[99] Other scholars have incorporated these concerns about spatial and racial distribution of procedurally unjust policing into Fourth Amendment arguments. They propose that courts should consider whether officers were making an individualized determination of suspicion, as constitu-

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96. Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters*, 54 WM. & MARY L. REV. 1865, 1875-79 (2013); Tracey L. Meares & Peter Neyroud, *Rightful Policing*, NEW PERSP. POLICING (Feb. 2015), http://www.ncjrs.gov/pdffiles1/nij/248411.pdf [http://perma.cc/4QMX-JW3C].

97. Meares & Neyroud, *supra* note 96, at 8-11.

98. *See* Tracey Meares, *Broken Windows, Neighborhoods, and the Legitimacy of Law Enforcement or Why I Fell in and out of Love with Zimbardo*, 52 J. RES. CRIME & DELINQ. 609, 611 (2015) [hereinafter Meares, *Broken Windows*] (explaining Meares's skepticism of broken-windows policing, which she had earlier embraced, and the benefits of the legitimacy model); *see also* Tracey L. Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 653 (2009) [hereinafter Meares, *Legitimacy of Police*] ("The form of policing that has the potential to solve the 'race issue' emphasizes process rather than outcomes and moral engagement as opposed to notions of criminal deterrence.").

99. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809 (2011); *see also* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 237-39 (2007) (making an ambitious case that randomizing law enforcement is the only way to free it from the bias endemic to predictive or "actuarial" modes of criminal investigation and enforcement).

tionally required,[100] or rather engaging in a collective determination of suspicion based on race and geography.[101] Other recent work proposes using a disparate impact framework, similar to that used in Title VII analysis, to assess the spatial and racial impacts of stop-question-frisk.[102]

The greatest strength of the police legitimacy approach is its deceptive simplicity. Its two core ideas—that people will accept unfavorable police decisions so long as the preceding processes are perceived to be fair, and that the police should treat all people, *including* African Americans and the poor, with dignity and respect *in order to be more effective at the work of crime deterrence*—are marked deviations from the prevailing wisdom about policing that preceded legitimacy theory. For example, as noted above, the Kerner Commission Report partly blamed African Americans' cynicism about the police on the harsh tactics that police deemed necessary to control crime in predominantly black inner-city neighborhoods.[103] In one of the earliest in-depth studies of urban police, Wil-

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100. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976) ("[I]ndividualized suspicion is usually a prerequisite to a constitutional search or seizure.").

101. Meares, *supra* note 16, at 162; *see also* Report of Plaintiffs' Expert Dr. Jeffrey Fagan at 18, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 44-5) (describing the racial geography of stop-and-frisk in New York); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry*, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 461-64 (2000) (same); Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 68 (2015) (showing that police officers use group-based rather than only individual-based justifications for suspicion). For a similar argument that is *not* based on police legitimacy theory, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808 (1994) ("Even if racially disparate impact alone does not violate the Constitution, surely equal protection principles call for concern when blacks bear the brunt of a government search or seizure policy. Thus, in a variety of search and seizure contexts, we must honestly address racially imbalanced effects and ask ourselves whether they are truly reasonable."). *But see* Whren v. United States, 517 U.S. 806 (1996) (concluding that selective law enforcement on the basis of race must be addressed using a Fourteenth Amendment equal protection analysis, not via the Fourth Amendment).

102. Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop-and-Frisk as a Modality of Urban Policing*, 100 MINN. L. REV. (forthcoming 2017), http://papers.ssrn.com/sol3/papers .cfm?abstract_id=2845540 [http://perma.cc/4ZGT-Q45U].

103. Report of the National Advisory Commission on Civil Disorders, *supra* note 51, at 19. Disparate approaches are fundamental to the organization of modern policing. EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY 10 (1970) ("As is well known, the preferred targets of special police concern are some ethnic and racial minorities, the poor living in urban slums, and young people in general . . . . [T]his kind of reasoning was basic to the very creation of the police; for it was not assumed initially that the police would enforce laws in the broad sense, but that they would concentrate on the control of individual and collective tendencies towards transgression and disorder issuing from what were referred to as the 'dangerous classes.'").

liam A. Westley found that the police officers he studied tended to view both African Americans and residents of poor neighborhoods as requiring a fundamentally different type of policing than other groups because those two groups would "respond only to fear and rough treatment."[104] Officers today are not as likely to overtly express racial animus, but they might use different language focused on class and "culture" to make a similar point.[105] Justifications for race- and class-differentiated policing partly derive from a view that police tactics must vary by the type of community in order to be effective. The procedural justice approach is a partial corrective to that common wisdom.

However, police legitimacy is not all-encompassing, and it is often disturbingly oversimplified in practice. Policymakers and police department leaders attempting to apply the theory often condense it to empirically informed officer politeness.[106] Most legitimacy scholars would not claim that the lack of legitimacy is the sole problem in the relationship between law enforcement and African American and poor communities, or that procedural justice is the only solution needed.[107] Yet much of the current reform conversation has drawn heavily on legitimacy theory and the procedural justice approach as if they are silver-bullet solutions to today's policing crisis. Reformers have done so in part because the proposals that emanate from the procedural justice perspective, such as improved officer training,[108] are relatively easy for police agencies to

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104. William A. Westley, *Violence and the Police*, 59 AM. J. SOC. 34, 40 (1953).

105. PETER MOSKOS, COP IN THE HOOD 53 (2008) (describing Baltimore police officers' critiques of particular "cultures" rather than races); *cf.* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 87-90 (4th ed. 2014) (describing coded language that some whites use to describe negative interactions with blacks); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1063-64 (2010) (arguing that references to alleged cultures of criminality serve as a proxy for overt racist language in the era of "colorblindness").

106. *See, e.g.*, Mariano Delle Donne, *Procedural Justice: How a Simple Concept Can Help Cops Make a Big Impact*, POLICEONE.COM (May 6, 2016), http://www.policeone.com/patrol-issues /articles/178689006-Procedural-justice-How-a-simple-concept-can-help-cops-make-a-big -impact [http://perma.cc/G57E-ZF33]; Sedevic, *supra* note 18.

107. *See, e.g.*, Tyler et al., *supra* note 45, at 77 ("A focus on building legitimacy via procedural justice is surely not the whole of effective policing, but it is an important component and one that offers the possibility of making improvements that are both affordable and manageable by the police.").

108. *See* Wesley G. Skogan, Maarten Van Craen & Cari Hennessy, *Training Police for Procedural Justice*, 11 J. EXPERIMENTAL CRIMINOLOGY 319 (2015) (offering a positive evaluation of a Chicago police training program based largely on insights from legitimacy theory); *see also* TASK FORCE REPORT, supra note 6, at 17, 20-21, 34, 46, 67.

implement, relatively inexpensive, and relatively noncontroversial—while offer-
ing some real, on-the-ground benefits to civilians who encounter the police.[109]

If the solution to today's social and legal policing problems is training, the
path forward is clear. Yet some scholars have worried that without an emphasis
on the problem of collective estrangement through social and racial control, the
procedural justice solution could paradoxically teach officers more effective
ways to discriminate and violate privacy.[110] Indeed, Fourth Amendment juris-
prudence on the voluntariness of searches foregrounds this danger. Courts
often mention the politeness or courtesy of officers when using a totality of the
circumstances analysis to decide whether a warrantless search was voluntary, at
times debating the relative importance of politeness in the voluntariness analy-
sis.[111] Thin conceptions of procedural justice could produce what Jeremy Ben-

109. *See* Tyler et al., *supra* note 45, at 77.

110. *See, e.g.*, EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 60, at 4-5; Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1468 (2016) ("The problem with reform that is focused on improving perceptions about the police is that it can cloak aggressive policing in enhanced legitimacy, and it has the potential to blunt the momentum for rising up against overcriminalization, wealth inequali-ty, and white supremacy."); Robert MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 189 (2005) ("In the proce-dural justice domain, the concern is that authorities can use the appearance of fair procedure (dignity, respect, voice) as an inexpensive way to coopt citizens and distract them from out-comes that by normative criteria might be considered substantively unfair or biased."); Wil-liam J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2174 (2002) ("If Tyler's claims are even partly true, the police could simultaneously increase the number of *Terry* stops, de-crease the injury those stops cause, and substantially reduce complaints of police discrimina-tion—all without changing the way they select search targets."). From a Gramscian perspec-tive, procedural justice might be part of a politically hegemonic discourse that assures public consent to domination. *See* GRAMSCI, *supra* note 84, at 137.

111. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 203-04 (2002) (ruling that a search was vol-untary in part because the officer spoke in a "polite, quiet voice"); Florida v. Royer, 460 U.S. 491, 531 (1983) (Rehnquist, J., dissenting) (arguing that a search was voluntary in part be-cause "[t]here were neither threats nor any show of force," "[t]he detectives did not touch [defendant] and made no demands," and "the detectives were quite polite"); United States v. Hughes, 640 F.3d 428, 437 (1st Cir. 2011) ("The troopers were polite and never hectored the defendant or raised their voices. Details such as these are entitled to some weight in de-termining whether a particular interrogation was custodial."); Lopera v. Town of Coventry, 640 F.3d 388, 407-08 (1st Cir. 2011) (Thompson, J., dissenting) ("[T]he fact that the officers were polite, particularly given all else that was occurring at the highly charged scene, does not establish that [the defendant] was not coerced . . . . [S]ubtle and polite coercion is just as objectionable as more obvious browbeating."); United States v. Kim, 27 F.3d 947, 965-66 (3d Cir. 1994) ("Although the tone of the officer's voice is relevant to the extent that a force-ful tone of voice may make a reasonable person think that they must comply with the officer's requests . . . the lack of such a forceful tone does not entirely deprive blunt and di-rect questions of their coercive force."); United States v. Munoz, 987 F. Supp. 2d 438, 447

tham called "sham security,"[112] leaving some individuals with a vague sense that they have been treated justly while neglecting more fundamental questions of justice.

An expanded theoretical approach understands distrust as a problem of legal estrangement: a marginal and ambivalent relationship with society, the law, and predominant social norms that emanates from institutional and legal failure. In the following Part, I discuss estrangement theory and its distinctions from police legitimacy theory in greater detail. The legal estrangement perspective can provide a fresh perspective in research and policy on the extent to which African Americans and people who live in high-poverty communities feel a sense of solidarity with law enforcement and other legal institutions. Moreover, this approach could help scholars and policymakers imagine new ways to promote solidarity and social inclusion through law and policy.

B. A Crisis of Estrangement

While legitimacy theory has its roots in Weber,[113] the distinctive elements of legal estrangement theory are rooted in Émile Durkheim. For Durkheim, the central project of modern society is to maintain "organic solidarity," defined as social cohesion based on fulfillment of the different functions each person serves within society.[114] Ideally, law's function is to create and maintain social cohesion. Law is not understood as an end in itself, nor solely a means of bodily control.[115] In the Durkheimian view, the purpose of criminal justice is to restore those who break the law, with the ultimate goal of increasing social cohesion by reinforcing moral and legal norms.[116] A society that does not reinforce moral norms, and does not promote social trust, leaves its inhabitants in a state of anomie, with broken social bonds.

(S.D.N.Y. 2013) ("The police officers' polite treatment does not outweigh the coercive effect of a false promise that a warrant would issue, particularly when coupled with the threat of arrest.").

112. *See* JEREMY BENTHAM, THE BOOK OF FALLACIES 350 (Philip Schofield ed., 2015) (1824) ("A sham security is a great deal worse than none: a consciousness of insecurity keeps suspicion and vigilance alive: a sham security, according to the extent to which it is accepted as real, relaxes suspicion or destroys it.").

113. *See supra* text accompanying notes 76-78.

114. ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 102 (W.D. Halls trans., 2014) (1893).

115. *Id.* at 88-91; *cf.* FOUCAULT, *supra* note 16, at 138 (describing the project of modern criminal justice as bodily discipline).

116. DURKHEIM, *supra* note 114, at 90.

Although Durkheim originated the concept of anomie, the idea gained greater precision (and liberation from its purely pro-state perspective) in the work of Robert Merton. For Merton, anomie is "a breakdown in the cultural structure" of society.[117] These breakdowns are particularly likely to occur "when there is an acute disjunction between the cultural norms and goals and the socially structured capacities of members of the group to act in accord with them."[118] In other words, cultural structures break down when, despite a group's adoption of "mainstream" cultural norms and goals, certain aspects of the social structure prevent them from being able to act in ways that support those norms and goals. Although the suitability of Durkheim's comprehensive view of law and punishment for modern contexts is questionable,[119] the broadest reading of anomie theory—that the purpose of the legal system is to create a cohesive and inclusive society, and that a broken social order leaves some people without the resources for full social membership—is at the root of legal estrangement theory.

A century after Durkheim originated the anomie concept and decades after Merton refined it, sociologists Robert Sampson and Dawn Jeglum Bartusch offered "legal cynicism" as a framework for understanding how residents of predominantly African American neighborhoods in Chicago thought about the law and its enforcers.[120] Sampson and Bartusch defined legal cynicism as "'anomie' about law."[121] Anomie is more than distrust. Instead, it is a sense that the very fabric of the social world is in chaos—a sense of social estrangement, meaninglessness, and powerlessness, often a result of structural instability and social change.[122] It is a sense founded on legal and institutional exclusion and

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117. ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 216 (1957).

118. *Id.*

119. *See* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 347-68 (1998) (critiquing the use of Durkheim to support order-maintenance policing among law-and-social-norms scholars and proposing a Foucauldian bodily control perspective).

120. Sampson & Bartusch, *supra* note 9, at 777.

121. *Id.* at 778.

122. *See* ÉMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 246-58 (George Simpson ed., John A. Spaulding & George Simpson trans., Free Press 1951) (1897). Merton refined this conception of anomie. He saw anomie arising from "strain," the increasing growth of society's goals and the inability of society to provide to everyone the means necessary to achieve those goals. MERTON, *supra* note 117, at 211. This definition fits well with the problem of racialized and class-located anomie and disobedience of the law that concerns many scholars and lawmakers today.

liminality.[123] Perhaps the strongest articulation of legal anomie comes from eminent ethnographer Elijah Anderson, who credited the tendency to use extra-legal forms of violence among some of his research subjects in inner-city Philadelphia to "the profound sense of alienation from mainstream society and its institutions felt by many poor inner-city black people . . . ."[124] In contrast, law that is well designed and properly enforced should reassure community members that society has not abandoned them, that they are engaged in a collective project of making the social world.

One concern with labeling "anomie about law" as "legal cynicism" is that the word "cynicism" suggests that the attitudinal perspective of communities is the issue of interest rather than the process that led to a cultural orientation toward distrusting the police. The "legal cynicism" term works for the approach taken by Sampson and Bartusch as well as that of Kirk and Papachristos, as both seek to link "legal cynicism" (as measured in a survey) with a number of outcomes. However, anomie refers not only to the subjective feeling of concern; it is also meant to implicate a particular set of structural conditions that produced that subjective feeling.[125] I use "legal estrangement" in this Essay to better capture the fullness of the idea of anomie about law. Legal estrangement can help scholars understand situations where, even *despite* the embrace of legality by African Americans and residents of high-poverty neighborhoods, and regardless of the degree to which they embrace law enforcement officials as le-

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123. Liminality is a state of being in-between, not fully inside a particular institution or cultural milieu, but not fully detached from it. *See* VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 93-94 (1967); ARNOLD VAN GENNEP, THE RITES OF PASSAGE 11 (Monika B. Vizedom & Gabriel L. Caffee trans., Univ. of Chi. Press 1960). It is worth nothing that Van Gennep was a sharp critic of Durkheim, though the critique focused more on Durkheim's use of data and not on basic concepts like anomie. *See* Bjørn Thomassen, *Emile Durkheim Between Gabriel Tarde and Arnold van Gennep: Founding Moments of Sociology and Anthropology*, 24 SOC. ANTHROPOLOGY 231, 238-40 (2012). For examples of scholarship applying the concept of liminality in studies of marginal groups in the United States, see Khiara M. Bridges, *An Anthropological Meditation on* Ex Parte Anonymous - *A Judicial Bypass Procedure for an Adolescent's Abortion*, 94 CALIF. L. REV. 215, 223-24 & n.39 (2006); Jennifer Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 713-18 (2015); Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 1007 (2006); and Priscilla Ocen, *(E)Racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1596-1600 (2015).

124. ELIJAH ANDERSON, CODE OF THE STREET 34 (1999).

125. *See* Robert K. Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 672, 672 (1938) (arguing that anomie is not only the product of wayward human impulses with an insufficient amount of legal constraint, but that law and the social structure itself can "exert a definite pressure" on people, producing anomie and deviant behavior).

gitimate authorities, they are nonetheless structurally ostracized through law's ideals and priorities.

The theoretical and empirical genealogies of legitimacy and legal cynicism reveal important distinctions. First, the overwhelming majority of the legitimacy research has sought to describe a general perception of law enforcement and legal authority, based on a representative sample of the public.[126] In contrast, scholarship on legal cynicism—the attitudinal portion of legal estrangement theory—has generally sought to describe a contextualized, ecological view of law enforcement. This scholarship has particularly focused its efforts on understanding the nature of the fraught relationship between African Americans and high-poverty communities on the one hand, and the police on the other.[127]

Legal estrangement is a cultural and systemic mechanism that exists both within and beyond individual perceptions. It is partly representative of a state of anomie related to the law and legal authorities, and it interacts with legal and other structural conditions—for example, poverty, racism, and gender hierarchy—to maintain segregation and dispossession. The salience of a targeted, collective, community-oriented analysis is even greater when seeking to understand the realities that gave birth to Black Lives Matter. Many scholars and advocates have argued that African Americans are particularly likely to assess the legitimacy, effectiveness, and justness of institutions based on their beliefs about how these institutions treat African Americans *as a group*, and not just their individual experiences.[128]

A person could simultaneously see the police as a legitimate authority (believing that individuals should obey officer commands in the abstract) and feel estranged from the police (believing that the legal system and law enforcement,

126. However, an increasing body of research on legal legitimacy focuses specifically on communities that are generally understood to be high in legal cynicism. *Compare* Sampson & Bartusch, *supra* note 9, at 780-81 (discussing research on black and inner-city populations), *with* VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS (2011) (discussing the interactions between law enforcement institutions and young black and Latino men in Oakland).

127. *See* ROBERT J. SAMPSON, GREAT AMERICAN CITY 365-67 (2012); Kirk & Papachristos, *supra* note 9; *see also* Jacinta M. Gau, *Procedural Justice, Police Legitimacy, and Legal Cynicism: A Test for Mediation Effects*, 16 POLICE PRAC. & RES. 402 (2015) (analyzing links between legitimacy and cynicism); Neil Gross, *A Pragmatist Theory of Social Mechanisms*, 74 AM. SOC. REV. 358, 373-74 (2009) (examining the role of social mechanisms in cultural analysis); Alex R. Piquero et al., *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267, 270-72 (2005) (discussing legal socialization and legitimation of the law among adolescent offenders).

128. Eminent political scientist Michael Dawson has offered the most widely known articulation of this idea. *See, e.g.*, MICHAEL DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN AMERICAN POLITICS 57 (1994).

as the individual's group experiences these institutions, are fundamentally flawed and chaotic, and therefore send negative messages about the group's societal belonging).[129] Some scholarship on the legal mistrust of poor African Americans could be misread to suggest that a large subset of this group possesses values that are antithetical to law-abiding behavior, almost as if these individuals do not care what the law is and do not believe they should be bound by it. A better-supported interpretation is that many poor African Americans might see police as a legitimate authority in the ideal, and might even empathize with some police officers' plight, but they find the police as a whole too corrupt, unpredictable, or biased to deem them trustworthy.[130] Even as they accept the ideal vision of the police as the state-authorized securers of public safety, their nonideal working theory might be, as earlier research suggests, that the police are "just another gang."[131]

Estrangement theory can improve legitimacy theory in three main ways. First—certainly in its initial stages—legitimacy theory has emphasized whether people feel voluntarily obligated to obey or cooperate with law enforcement. The theoretical starting point of legitimacy analysis is whether and how the state maintains and exercises its power. In an analysis based on legal estrangement theory, increasing the power of the state bears at most a spurious relationship to the outcome of concern, which is social inclusion across groups. From a robust legal estrangement perspective, the law's purpose is the creation and maintenance of social bonds. An emphasis on inclusion implies concerns not only about how individuals perceive the police and the law (and thus whether those individuals cooperate with the state's demands), but about the

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129. *See* Sampson & Bartusch, *supra* note 9, at 784 ("One can be highly intolerant of crime, but live in a disadvantaged context bereft of legal sanctions and perceived justice.").

130. *See, e.g.*, Bell, *supra* note 42, at 316 (describing "'mothers' narratives of occasional police reliance, despite their overarching distrust"); Forrest Stuart, *Becoming "Copwise": Policing, Culture, and the Collateral Consequences of Street-Level Criminalization*, 50 LAW & SOC'Y REV. 279, 292-93 (2016) (describing Skid Row residents' strategies for understanding unpredictable police actions by learning to "see like a cop").

131. *See* Brooks, *supra* note 57, at 1224 & n.20; Ta-Nehisi Coates, *The Near Certainty of Anti-Police Violence*, ATLANTIC (July 12, 2016), http://www.theatlantic.com/politics/archive/2016/07/the-near-certainty-of-anti-police-violence/490541 [http://perma.cc/QZ87-XBY3] ("In the black community, it's the force they deploy, and not any higher American ideal, that gives police their power . . . . [I]f the law represents nothing but the greatest force, then it really is indistinguishable from any other street gang."); Kay Levine & Virginia Mellema, *Strategizing the Street: How Law Matters in the Lives of Women in the Street-Level Drug Economy*, 26 LAW & SOC. INQUIRY 169, 184 (2001); *see also* David K. Shipler, *Living Under Suspicion*, N.Y. TIMES (Feb. 7, 1997), http://www.nytimes.com/1997/02/07/opinion/living-under-suspicion.html [http://perma.cc/9GWC-RLJR] (explaining contrasting reactions by race on the outcome of the O.J. Simpson trial).

signaling function of the police and the law to groups about their place in society. While legitimacy theorists might acknowledge the value of these sorts of community feelings, they are not those theorists' key variables of interest.[132] Shifting the orientation of legitimacy theory from governmental power to social inclusion is one way that theory can better capture the concerns of activists in the era of Black Lives Matter.

Second, given its origins in legal cynicism theory, a legal estrangement perspective emphasizes cultural orientation toward the police rather than individual attitudes about the police. A cultural inquiry is concerned with the symbolic and structural meaning of the police to particular groups of people, as opposed to those individuals' opinions about police interactions. People's opinions about their interactions with the police, their beliefs about whether the police in general tend to be helpful, and the symbolic meanings they attach to the police can be sharply divergent from each other.[133]

Third, while most legitimacy theorists treat individuals as their unit of analysis and theorization, the legal estrangement framework is ultimately focused on groups and communities. Even as studies are unavoidably conducted by looking at individual experiences, the broader concern of legal estrangement is with understanding people in situ. Viewing distrust of the law as a problem of social psychological legitimacy suggests more micro-level solutions to the problem, centered on changing individual perceptions of the law and law enforcement. Conversely, seeing distrust as a problem of legal estrangement (legal anomie) focuses solutions on unsettling characteristics of the social structure. The goal is to enable marginalized groups to align their values of law-abiding and respect for law enforcement with their lived experiences and strategies for interacting with law enforcement.

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132. One could argue that some of the de-emphasized aspects of Tyler and collaborators' legitimacy theory, the ideas of motive-based trust or "normative alignment" ("a sense that police officers' sense of right and wrong mirrors that of the communities they work in"), account for these concerns about protection and threat. Jonathan Jackson & Jacinta M. Gau, *Carving Up Concepts? Differentiating Between Trust and Legitimacy in Public Attitudes Towards Legal Authority*, in INTERDISCIPLINARY PERSPECTIVES ON TRUST 49, 57 (Ellie Shockley et al. eds., 2016). Yet even if space can be found in legitimacy theory for these concerns, they are not central to the theory in the way they are to legal estrangement theory.

133. *See* Bell, *supra* note 42, at 326-29.

TABLE 1.
LEGITIMACY AND LEGAL ESTRANGEMENT[134]

	Legitimacy	Legal Estrangement
Theoretical Genesis	Weber	Durkheim
Analytical Focus	Individual	Collective/culture[135]
Vision of the Ideal	Trust and voluntary compliance with law enforcement	Social inclusion
Core Social Problem	Noncompliance with the law	Anomie, or collective alienation
Solution	Procedural justice	Procedural and structural inclusion

134. I do not claim that these theories are free of overlap, in certain respects. Yet that they are related to each other does not mean they are equivalent. For example, the primary analytical focus of legitimacy theory is individual compliance with the law, while the primary analytical focus of legal estrangement theory is a collective, cultural relationship with the law. Yet legitimacy theorists attempt to deal with the problem of collectivity by aggregating individual views (an approach that is antithetical to the way many sociologists think about culture). In contrast, legal estrangement recognizes that culture exists both within and outside individuals, and that in order to understand macro-level reality, one must have some vision of micro-level reality. Steven Lukes, *Introduction* to Emile Durkheim, The Rules of Sociological Method xvi (Steven Lukes ed., 2013, W. D. Halls trans., 1982) (2d ed. 1901) ("Every, macro-theory presupposes . . . a micro-theory to back up its explanations."). For this reason, procedural injustice on an interactional level is important to the development of a collective culture of legal cynicism. Yet simply because procedural injustice *contributes* to legal estrangement does not mean that procedural justice *alone* can dismantle legal estrangement, because culture is both individual and superindividual.

135. I use the word "culture" to refer to shared ways of seeing the world and strategies of action. Culture is not endemic to particular classes or ethnic groups, but instead emerged, and continues to evolve, in response to structural conditions. *See, e.g.*, Michèle Lamont & Mario Luis Small, *How Culture Matters: Enriching Our Understandings of Poverty*, *in* The Colors of Poverty: Why Racial and Ethnic Disparities Persist 76 (Ann Chih Lin & David R. Harris eds., 2008) (developing a structural account of culture that is separate from race); Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 Am. Soc. Rev. 273, 273 (1986) (describing culture as providing a "'tool kit of habits', skills, and styles from which people construct 'strategies of action'"); *see also* Erving Goffman, Frame Analysis 21 (1974) (describing "schemata of interpretation").

III. THE LEGAL SOCIALIZATION[136] OF SHAWNA

To more clearly illustrate some on-the-ground improvements that a legal estrangement perspective offers to legitimacy theory, this Part presents a portrait of Shawna. Shawna is one of sixty-four participants in *Hearing Their Voices: Understanding the Freddie Gray Uprising*, a study I led a few months after the Freddie Gray incident and subsequent unrest in Baltimore.[137] The purpose of this profile is to articulate, in a more grounded way, key distinctions between what scholars and policymakers usually learn from a police legitimacy perspec-

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136. One way in which the current scholarship on distrust in the law falls short is that it presents a limited view of what some scholars refer to as *legal socialization*—the developmental process through which people gain their perceptions of the law and law enforcement over time. Some scholars have probed legal socialization as a central concept; others omit that specific term but catalogue various pathways toward divergent perspectives on the police and law enforcement. *See, e.g.*, Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 221 (2005); June Louin Tapp & Felice J. Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974); Rick Trinkner & Ellen S. Cohn, *Putting the "Social" Back in Legal Socialization: Procedural Justice, Legitimacy, and Cynicism in Legal and Nonlegal Authorities*, 38 LAW & HUM. BEHAV. 602 (2014); *see also* RIOS, *supra* note 126 at xiv, 158-59 (2011) (describing the legal socialization process of young men of color as "hypercriminalization").

137. *Hearing Their Voices: Understanding the Freddie Gray Uprising* is an in-depth interview study of sixty-four young people, aged fifteen to twenty-four, who live within the city of Baltimore, Maryland. The study, funded in part by the Annie E. Casey Foundation, seeks to develop an in-depth understanding of how youth in the city perceive the death of Freddie Gray and its aftermath and to capture their recollections and perceptions of police and the criminal justice system. The study, which the author of this Essay designed and managed, used multiple recruitment strategies including random sampling in a neighborhood near the heart of the unrest, ethnographic sampling from spending time in key neighborhood venues, and sampling using participatory action research, a method in which people from the study population (here, youth who live in Baltimore) acted as co-researchers with the professional researchers. The purpose of using these strategies was to purposively construct a heterogeneous yet analytically meaningful sample of Baltimore youth and to gain a richer empathetic understanding of their experiences. *See, e.g.*, JACQUES M. CHEVALIER & DANIEL J. BUCKLES, PARTICIPATORY ACTION RESEARCH: THEORY AND METHODS FOR ENGAGED INQUIRY 1-6 (2013); *see also* 1 WEBER, *supra* note 77, at 5 ("Empathic or appreciative accuracy is attained when, through sympathetic participation, we can adequately grasp the emotional context in which the action took place."). This Essay draws upon selected cases within the interview sample to clarify key processes derived from theory. These cases are not intended to be representative of all respondents, but are instead used to illustrate theoretical points, drawing inspiration from case study logic and the qualitative research method of portraiture. *See* SARA LAWRENCE-LIGHTFOOT & JESSICA HOFFMANN DAVIS, THE ART AND SCIENCE OF PORTRAITURE (1997); Mario Luis Small, *"How Many Cases Do I Need?": On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOGRAPHY 5, 24-27 (2009).

tive and what they can learn from a legal estrangement perspective. Shawna[138] has a complex, but largely distrustful, perspective on the police. This Part and the vignettes in Part IV capture, in a more textured fashion, the multitude of factors that can contribute to legal estrangement.[139]

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Growing up in West Baltimore's Gilmor Homes in the mid-aughts, Shawna developed an affinity for chess, American Sign Language, and most of all, pick-up basketball. "I just played basketball all day, every day. Nine o'clock in the morning until nine o'clock at night when my mom was calling me to get off the court, that's where I was at."[140]

During Baltimore's sticky summers—the time of year when the rate of violent crime is at its apex[141]—Shawna sought freedom and community on Sandtown-Winchester's asphalt basketball courts. One can imagine Shawna sucking in the steamy air, wearing basketball shoes not unlike the red and white Nikes she is wearing now, teasing her opponents, being a kid. "I wanted to stay outside as long as I can," she explained. "Stay outside until nine or ten o'clock, in the summer time especially, yes. That's when the most violence happens, but that's when the most fun happens." Shawna understood pleasure more viscerally than danger, despite everything she had seen.

One of Shawna's first virtues was vigilance. She learned early how to manage the potentially deadly situation of being outdoors in the Gilmor Homes. "Just being so young, you have to be aware. I mean, you can have fun, but just be aware of what's really going on around you. There was so much drug activity. But, being so young, I didn't really pay a lot of attention because I was just worried about having fun."

Despite the pestilence of untimely death that—then and now—marks her neighborhood,[142] Shawna has thus far been spared the memory of seeing a

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138. All names of respondents are pseudonyms.

139. I have described complexity and contextual contingency of police trust and reliance in other work. *See generally* Bell, *supra* note 42.

140. All quotations attributed to Shawna were recorded during an interview conducted by the author and Janice Bonsu on July 1, 2015.

141. *Cf.* Solomon M. Hsiang, Marshall Burke & Edward Miguel, *Quantifying the Influence of Climate on Human Conflict*, 341 SCI. 1212, 1235 (2013) (finding that warmer temperatures increase conflict).

142. *See, e.g.*, Alisa Ames et al., *2011 Neighborhood Health Profile: Sandtown-Winchester/Harlem Park*, BALT. CITY HEALTH DEP'T 10-11 (Dec. 2011), http://health.baltimorecity.gov/sites

human being die. But she is familiar with the *pop-pop-pop* of gunshots inter-rupting a basketball game. She can still hear the hum of an open-windowed truck rolling closer while prowling for targets, the screams of neighbors recog-nizing a familiar horror, the thumps of her playmates' chests hitting the ground seeking safety, and the thuds of their shoes rapidly beating the hot asphalt where they had been dribbling a ball moments earlier. She remembers that a sudden paralysis afflicted her limbs on those occasions. She remembers that her mother would run to her, corral her. "Somebody would get shot. Some-body would get killed. Somebody would get stabbed. Outside my house, in front of my house, on the basketball court, where I spent most of my time there, for real."

Shawna's mother Denise was, in Shawna's estimation, "paranoid." Every now and then, Denise got fed up and called the police about various neighbor-hood disturbances. "She's a good person," Shawna explained. But Denise avoided calling the police from her own phone and instead went to a neighbor's home to call. To be sure, Denise sometimes called police from a neighbor's phone because her own phone was disconnected. But Shawna suspects that the more usual reason Denise called from her neighbor's phone was so the call would come from a number other than hers, making it more difficult for police and potential retaliators to learn that she was the snitch. "She had to call from some [other] number because she just—it was unsafe for her." People can call the police "anonymously,"[143] but Denise suspected the police would find out who she was anyway, and that they would be too careless to protect her identi-ty.

Denise warned Shawna about crime in the neighborhood and kept Shawna indoors as much as the active, extroverted girl could tolerate. Denise also warned Shawna about the neighborhood's police, petrified by her daughter's awe of them.

"[W]hen I was little," Shawna recalled, "I used to idolize the police. And I used to be like, 'Oh, can I be like you when I grow up? What is it that you do?' Asking them a whole bunch of questions." Her mother urged her to stay away from police officers. Once, when Shawna was about eight years old, she was chatting with two white police officers who she thinks were in the neighbor-hood to investigate drug activity. As Shawna remembers it, she asked the offic-ers what they do, how she could become a police officer, and so on. "I was a se-

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/default/files/47%20Sandtown.pdf [http://perma.cc/3E6E-TZXT] (documenting low life expectancy and high mortality in certain Baltimore neighborhoods).

143. *Cf.* Florida v. J.L., 529 U.S. 266, 276 (2000) (Kennedy, J., concurring) (explaining that "the ability of the police to trace the identity of anonymous telephone informants" is important for determining whether an anonymous tip is sufficiently reliable to justify a *Terry* stop).

rious young lady," Shawna joked. Denise saw Shawna with the officers and panicked. "Get over here! Get over here! Get over here, girl!" Shawna asked, "[W]hat did I do?" Denise continued, agitated. "Who told you to talk to them? They can do anything to you. They can take you and kill you!" Shawna was perplexed. "They're police. Why would they just take me and kill me?"

Over the decade or so since that incident, Shawna's once-pristine view of police has grown ever more tainted. This tarnishing process has been propelled not only by her personal experiences, but also through witnessing the encounters of her friends and neighbors, hearing about other incidents through television and social media, and gaining folk wisdom from family and older community members. For example, several years before the Daniel Holtzclaw case broke,[144] as a pubescent girl, Shawna learned from her grandmother that the police could rape her.

> I don't know the whole story, but my grandma told me how one of the police in my community . . . some man had taken this little girl. She was about twelve. I don't know if she was missing or if he just took her anyway. He took her and he raped her in the back of the police station and they caught it on camera. Then my grandmother told me about it. I was like twelve at the time, which was just a couple of years [after the rape]. I was like, "Wow."

Shawna's confusion grew. "The police is supposed to have power and supposed to be using it for good." But the police also "did that to that little girl. It's just terrible." That story, funneled through her beloved grandmother, is now embedded in her psyche and colors her more recent experiences with and observations of police officers. "That just made me think twice about the police ever since then. I just don't know."

The case Shawna is likely referencing involved William D. Welch, a former Baltimore police officer who entered an *Alford* plea[145] to a charge of misconduct in office in early 2008, when Shawna was ten.[146] After another officer arrested a

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144. *See, e.g.*, Sarah Larimer, *Disgraced Ex-Cop Daniel Holtzclaw Sentenced to 263 Years for On-Duty Rapes, Sexual Assaults*, WASH. POST (Jan. 22, 2016), http://www.washingtonpost.com/news /post-nation/wp/2016/01/21/disgraced-ex-officer-daniel-holtzclaw-to-be-sentenced-after -sex-crimes-conviction [http://perma.cc/5JXK-EUM9].

145. In an *Alford* plea, defendants maintain their innocence but concede that the prosecution has enough evidence that a judge or jury would likely find them guilty. *See* North Carolina v. Alford, 400 U.S. 25, 37-38 (1970).

146. Melissa Harris, *Officer Accused in Sex Case Is To Resign: Prison Term Suspended in Case Involving Girl, 16*, BALT. SUN (Jan. 11, 2008), http://articles.baltimoresun.com/2008-01-11/news/0 801110107_1_welch-missing-evidence-baltimore-county [http://perma.cc/79CN-KBEP].

sixteen-year-old girl based on an open warrant for prostitution, Welch alleged-
ly offered to dispose of marijuana that was in her possession if she sexually ser-
viced him. According to the accuser, she and Welch flushed the marijuana
down a police station toilet and returned to the interview room, where she
complied with his conditions.[147] Prosecutors originally charged Welch with
second-degree rape. However, after the police department's Evidence Control
Unit misplaced much of the physical evidence against Welch, prosecutors
offered, and Welch accepted, a plea deal.[148] Welch thus avoided prison. A judge
sentenced Welch to a suspended ten-year prison term after three years of pro-
bation and ordered him to resign from the Baltimore Police Department.[149]

But Shawna might have been talking about a different case. There were
other prominent rape cases against Baltimore police officers in roughly the
same time period. Like the Welch case, the facts of those cases do not perfectly
align with the story lodged in Shawna's mind today.[150]

Shawna's understanding of the police grew darker still through encounters
and observations at the bus station near the iconic Mondawmin Mall, arguably
West Baltimore's central hub. Mondawmin, one of the city's oldest enclosed
shopping malls, is more than a retail center. It is also the nerve center for ten
West Baltimore bus lines and the location of government social services offices
and various health clinics.[151] Inside the mall, uniformed private security guards
are tasked with maintaining Mondawmin's security, while on the outside,
Western District police officers handle the job. Shawna does not distinguish

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147. *Id.*

148. Julie Bykowicz, *Items Missing in Rape Case; Defense Seeks To Exclude DNA in Trial for Officer Accused of Assault*, BALT. SUN (July 17, 2007), http://articles.baltimoresun.com/2007 -07-17/news/0707170088_1_welch-evidence-control-baltimore-police-department [http:// perma.cc/5NGD-ZSDY].

149. Harris, *supra* note 146.

150. *E.g.*, Julie Bykowicz, *Jones' Rape Case Ends: City 'Flex' Officer Won't Face Trial Other Issues Pending*, BALT. SUN (Apr. 3, 2007), http://articles.baltimoresun.com/2007-04-03/news/070 4030038_1_jones-police-officer-flex [http://perma.cc/U7UF-JTS4] (describing charges against former Baltimore police officer Jemini Jones); Gadi Dechter, *Former City Officer Charged with Rape*, BALT. SUN (Aug. 3, 2008), http://articles.baltimoresun.com/2008-08 -03/news/0808020193_1_welch-baltimore-police-misconduct-in-office [http://perma.cc /4GBJ-9A6A] (describing accusations against former Baltimore police officer Rohan Mays).

151. The third floor of Mondawmin is essentially a social services center, a transition that began in the late 1960s after white flight from the neighborhood and the loss of the mall's anchor store, Sears. Among the mall's tenants are a city-run one-stop career center, an outpatient mental health clinic, a healthcare clinic, and a branch of Baltimore City Department of Social Services that helps adults avoid crises like eviction, electricity shutoff, and mental collapses. *See Directory*, MONDAWMIN MALL, http://www.mondawmin.com/en/directory/map.html [http://perma.cc/CXH2-W2NS].

between the public and private police. She just knows that when she is in or near Mondawmin, she encounters hostile people in uniform.[152] Shawna reports several negative encounters there, but nothing that would earn the attention of journalists, researchers, or most advocates. She has experienced, at most, (possibly idle) threats—that the next time a police officer sees her, he will mace or even arrest her. These threats, these forceful words, would not register as "uses of force" in the most sophisticated studies of police encounters.[153] Yet they have constrained her movement. The grind of injustice has led Shawna to avoid Mondawmin as much as possible, though the mall's ubiquity makes it hard to fully escape.

> I stopped going to Mondawmin because the police up there are rude. I mean, I know you're trying to keep order and peace, but you don't have to disrespect me and threaten me every five seconds. They threatened to mace people if they don't get to their bus stop. Then the man told me he was going to arrest me because I was talking to my home girl and I wouldn't get on the bus. It wasn't my bus. I was at the bus stop talking to her. Why are you threatening to arrest me?

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152. For scholarship describing the increasing prevalence of private police in American society, see Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004); and David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89 (2006). For people who frequently encounter public and private police, the officers may well blend into one miasma of police control, regardless of their governance structure. This indistinguishableness could mean that the bad acts of poorly trained, less regulated private security officers contribute to negative perceptions of city police, and further research should test this hypothesis.

153. *See, e.g.*, I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 68-69 (2009) (noting the stigmatic harm of minor police maltreatment); Fryer, *supra* note 59, at 3, 8 (describing the study's data, which ranks the use of hands—such as slapping or grabbing—as a "lower level use[] of force"). This limited conception of use of force also plagues governmental agencies tasked with investigating police misconduct. For example, in October 2016, police officers in Edina, Minnesota (a suburb of Minneapolis) arrested Larnie Thomas, an African American man, for "disorderly conduct and failure to obey a traffic signal." Christine Hauser, *Black Man Is Arrested While Walking, and Minnesota City Starts a 'Conversation,'* N.Y. TIMES (Oct. 19, 2016), http://www.nytimes.com/2016/10/20/us/minne sota-video-walking.html [http://perma.cc/2WFM-EUHE]. The officer initially on the scene, Tim Olson, confronted Thomas and grabbed him by his shoulder for walking on the white line near the shoulder of the road even though the sidewalk was closed for construction. *Id.* The city concluded that Olson "had followed proper procedures" when he arrested Thomas. *Id.* The State of Minnesota's Bureau of Criminal Apprehension, a bureau of the Minnesota Department of Public Safety, chose not to investigate the arrest because it did not result in "a death or serious injury." *Id.* The Bureau's decision did not acknowledge the social meaning of the incident—perhaps the deeper injury.

Shawna claims that the officer followed her and her friend after they began to walk away. "He kept getting smart with his little cowboy boots. I was just like, 'Who are these police?' Like, where did they come from?" Shawna had a few stories from Mondawmin, including watching a young man get arrested who "wasn't probably all innocent" but in her view "wasn't doing anything he wasn't supposed to be doing."

The Gilmor Homes, where Shawna spent the first sixteen of her nineteen years, has recently been in the national media as the home of Freddie Gray, the twenty-five-year-old Baltimore man who died in police custody on April 19, 2015.[154] Mondawmin was a starting site of the ensuing "riots."[155] Shawna was nearby when the riots broke out, trying to head to a friend's house for spaghetti.

Shawna's views on the riots vacillate from empathy for the good police officers who have been unfairly demonized, to frustration at the destruction of already limited West Baltimore institutions, to condemnation of unjust police practices, to pragmatic belief in the necessity of the police. "I felt bad for the police though, when they were rioting. They were throwing bricks at the police cars and all this other stuff . . . . First of all, you're going to need them. Second of all, every police officer is not bad." Belying usual portrayals of people like Shawna in the media and in most research, Shawna readily acknowledges the humanity of officers and the heterogeneity of police forces. "[H]e's got kids too. He's got to live too. He's got to eat too, and if he wanted to be a police officer, that doesn't mean every police officer is bad." Still, "some of them have to go."

Despite the negative representation of Baltimore youth in the national media during the riots and what she sees as the inherent wrong of riotous behavior, Shawna has ambivalently started to believe that the riots were a necessary

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154. *See* Manny Fernandez, *Freddie Gray's Injury and the Police 'Rough Ride,'* N.Y. TIMES (Apr. 30, 2015), http://www.nytimes.com/2015/05/01/us/freddie-grays-injury-and-the-police-rough -ride.html [http://perma.cc/ZH8V-P79A] (describing the practice of "rough rides" and "nickel rides," during which police subject often-unsecured passengers detained in the back of police vans to intentionally rough rides to cause displeasure or injury).

155. There has been much debate over the best term to use when describing the property damage that occurred in Baltimore in the aftermath of Freddie Gray's death. While most news outlets called the events "riots," others preferred "uprising" or "unrest." *See, e.g.*, Katy Waldman, *Is Baltimore Beset by Protests, Riots, or an Uprising?*, SLATE (Apr. 29, 2015, 5:01 PM), http://www.slate.com/blogs/lexicon_valley/2015/04/29/protest_versus_riot _versus_uprising_the_language_of_the_baltimore_freddie.html [http://perma.cc/X7DU -JNHV]. I do not take a position on the most accurate term but use "riot" here because it was the preferred language of study participants.

catalyst for the police officers to face criminal charges.[156] "It might not be right to riot, but if they wouldn't have done that, they would never have pressed charges on [the police officers] . . . . It might have been terrible for our community and made us look a mess, especially to the nation, to everybody who saw it." Shawna is upset that some leaders used the controversial term "thugs" when referring to Baltimore rioters. Despite not participating in the riot herself, Shawna felt that the label was directed at young African American West Baltimoreans in general. "It really hurt my feelings that they called us thugs. I saw a video on that too."

"They" included President Obama, who described the rioters as "criminals and thugs who tore up the place";[157] Maryland governor Larry Hogan, who depicted them as "gangs of thugs whose only intent was to bring violence and destruction to the city";[158] Baltimore City Council President Bernard C. "Jack" Young, who distinguished between legitimate Sandtown-Winchester residents and "thugs seizing upon an opportunity";[159] and Baltimore Mayor Stephanie Rawlings-Blake, who lamented that young rioters were disrespecting the lega-

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156. Six officers involved in Freddie Gray's final arrest were charged with an array of crimes in May 2015, a move that made the State's Attorney for Baltimore, Marilyn Mosby, a polarizing national figure. Between May and July 2016, three officers were acquitted. On July 27, 2016, after the judge declared a mistrial in a fourth officer's case, Mosby dropped charges against the three officers who had not already been acquitted. Sarah Almukhtar et al., *Freddie Gray Case Ends with No Convictions of Any Police Officers*, N.Y. TIMES (July 27, 2016), http://www.nytimes.com/interactive/2015/04/30/us/what-happened-freddie -gray-arrested-by-baltimore-police-department-map-timeline.html [http://perma.cc/9E3Y -L294]; Justin Fenton, *State's Attorney Marilyn Mosby Assails Police, Pledges To Pursue Reforms*, BALT. SUN (July 27, 2016, 10:41 PM) http://www.baltimoresun.com/news/maryland/fred die-gray/bs-md-ci-mosby-dropped-charges-20160727-story.html [http://perma.cc/6KQW -MVLB]. While others, including Baltimore's mayor and former police commissioner, criticized Mosby for continuing to argue that systemic failures plague the Baltimore Police Department when she announced dropping the remaining Freddie Gray charges, the DOJ's August 2016 report supported Mosby's assertions. *See* Civil Rights Div., *Investigation of the Baltimore City Police Department*, U.S. DEP'T JUST. 4 (Aug. 10, 2016) [hereinafter DOJ BALTIMORE REPORT], http://www.justice.gov/opa/file/883366/download [http://perma.cc /6RNF-GFXM].

157. Ben Feuerherd & Bob Fredericks, *Obama Calls Baltimore Rioters "Criminals and Thugs,"* N.Y. POST (Apr. 28, 2015, 3:36 PM), http://nypost.com/2015/04/28/obama-calls-baltimore-riot ers-criminals-and-thugs [http://perma.cc/ZU5G-8WWB].

158. Erin Cox & Michael Dresser, *Gov. Larry Hogan Promises More than 1,000 Additional Troops, Vows To Prevent Rioting*, BALT. SUN (Apr. 28, 2015, 1:52 PM), http://www.baltimoresun .com/news/maryland/politics/blog/bal-hogan-in-baltimore-vows-to-bring-rioting-under -control-20150428-story.html [http://perma.cc/A7L4-JEZU].

159. Mark Reutter & Fern Shen, *State of Emergency Declared for Baltimore*, BALT. BREW (Apr. 27, 2015, 11:17 PM), http://www.baltimorebrew.com/2015/04/27/state-of-emergency-declared -for-baltimore [http://perma.cc/VQH5-QUWM].

cy of people who had fought for the city in the past. "Too many people have spent generations building up this city for it to be destroyed by thugs who, in a very senseless way, are trying to tear down what so many have fought for," Rawlings-Blake said.[160] After extensive criticism, Rawlings-Blake and Young backed away from using the term "thug."[161] The White House stood behind the President's choice of words.[162]

Talking with us only a few weeks after the murder of nine people in Charleston, South Carolina's Emanuel African Methodist Episcopal Church,[163] Shawna compared Charleston officers' humane treatment of shooter Dylann Roof with Baltimore officers' aggression toward Freddie Gray. She shook her head with disgust. "They bought him Burger King. They bought him Burger King, but they couldn't even get Freddie Gray to a hospital."[164] I asked Shawna how she knew about all of these things—the details of Freddie Gray's arrest, the series of "thug" speeches, and the Burger King trip for Dylann Roof. "It was on Facebook. A lot of things are on Facebook," Shawna pointed out.

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160. Elizabeth Chuck, *Baltimore Mayor Stephanie Rawlings-Blake Under Fire for 'Space' To Destroy Comment*, NBC NEWS (Apr. 28, 2015, 1:59 PM), http://www.nbcnews.com /storyline/baltimore-unrest/mayor-stephanie-rawlings-blake-under-fire-giving-space -destroy-baltimore-n349656 [http://perma.cc/3992-98MK].

161. *See* Editorial, *The Problem with 'Thugs,'* BALT. SUN (Apr. 29, 2015, 3:52 PM), http://www .baltimoresun.com/news/opinion/editorial/bs-ed-thugs-freddie-gray-20150429-story.html [http://perma.cc/C9WF-VRJS].

162. David Jackson, *Obama Stands by the Term 'Thugs,' White House Says*, USA TODAY (Apr. 29, 2015, 2:59 PM), http://www.usatoday.com/story/theoval/2015/04/29/obama-white-house -baltimore-stephanie-rawlings-blake/26585143 [http://perma.cc/YN3M-HH57].

163. For background information on the Charleston mass killing, see, for example, Matt Ford & Adam Chandler, *'Hate Crime': A Mass Killing at a Historic Church*, ATLANTIC (June 19, 2015), http://www.theatlantic.com/national/archive/2015/06/shooting-emanuel-ame -charleston/396209 [http://perma.cc/6CTW-E3Z5]. The shooter, Dylann Roof, was eventually sentenced to death. *See* Alan Blinder & Kevin Sack, *Dylann Roof Is Sentenced to Death in Charleston Church Massacre*, N.Y. TIMES (Jan. 10, 2017), http://www.nytimes.com/2017/01 /10/us/dylann-roof-trial-charleston.html [http://perma.cc/ZXA4-8X86].

164. *See, e.g.*, Todd Sumlin, *Charleston Shooting Suspect's Burger King Meal Gets National Attention*, CHARLOTTE OBSERVER (June 24, 2015, 8:51 AM), http://www.charlotteobserver.com/news /local/article25394389.html [http://perma.cc/L7H7-ZB8R]. Withholding food from an arrestee during interrogation can indicate coercion under a totality of the circumstances analysis, thereby invalidating any evidence that police obtain. *See* Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968); Clewis v. Texas, 386 U.S. 707, 712 (1967); Reck v. Pate, 367 U.S. 433, 441-42 (1961). While some onlookers interpreted this provision of a Burger King meal as a special treat or an indicator of the greater respect they had for Roof's (white) life, it is worth noting that by providing Roof with a meal, officers also ensured that any evidence obtained from Roof would be admissible in court.

Later, I asked her, "Do you want to be a police officer anymore?" "Whoa," Shawna chuckled, "I gave that dream up." Now entering her final year of high school, Shawna desultorily explained that her goals for the next several years are to "just better myself in the years to come. That's what I want to do. I just want to be better."

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The legitimacy perspective would offer an incomplete diagnosis of the un-settled relationship between the police and someone like Shawna—a thought-ful young woman who has never had any serious police encounter, who has managed to avoid getting a criminal record, and who is a general law-abider, wanting to trust the police but convinced that the police are not trustworthy for people like her. Shawna is generally compliant with the law and believes police officers should be respected. She thinks that it is good to help police officers, and she appreciates that her mother would stealthily report crime. From a law enforcement perspective, people like Shawna are allies and assets to the community. Shawna behaves like someone who views the police as a legitimate legal authority.

Yet Shawna's views also reflect a deep sense of alienation about police. She stopped going to the mall to avoid interacting with the officers there. She abandoned her childhood dream of becoming a police officer, even though she possesses the presence, personality, and background to be an excellent law enforcement official. She fears that police might kill or sexually assault someone like her: a young, low-income black woman who lives in West Baltimore. Although Shawna sees the law and its enforcers as worthy of obedience as a theoretical matter, she does not believe that law enforcement officials see her, and people like her, as a true part of the polity. She is nothing more than a "thug." This understanding of her group's place in the world does not lead to law-breaking or noncooperation, as a legitimacy perspective might predict.[165] Yet her words nonetheless reveal a cleavage, or estrangement, from the enforcers of the law. Her story reveals that the empirical outcome that legitimacy theory is best used to explain is the wrong outcome: Shawna's problem is not noncom-pliance, but symbolic community exclusion.

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165. *But see* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authori-ty: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL. PUB. POL'Y & L. 78, 89 (2014) (finding, using survey data, that although African Americans view the *police* as less legitimate than whites do, they do not see the *law* as less legitimate than whites do). This finding may stem from a belief that the police do not actually represent the law, that they are just another group or gang. *See supra* note 131 and accompanying text.

IV. A TRIPARTITE THEORY OF LEGAL ESTRANGEMENT

To this point, this Essay has argued that scholars and policymakers should understand persistent police distrust among African Americans and residents of high-poverty communities as a problem of legal estrangement, a cultural orientation about the law that emanates from collective symbolic and structural exclusion—that is, both subjective and objective factors. In this Part, I further define legal estrangement theory. I argue that legal estrangement is a product of three socio-legal processes: procedural injustice, vicarious marginalization, and structural exclusion. All of these processes are supported in the empirical literature, although their primary justifications emerge from theory. Below, I explain each process in greater detail, drawing upon the literature and offering real-world illustrations from qualitative data.

A. Procedural Injustice

Building from the legitimacy and procedural justice scholarship described in Part II, I argue that experiences in which individuals feel treated unfairly by the police are one key provocateur of legal estrangement. The procedural injustice component operates at the individual and attitudinal level but, writ large, expands to the cultural level.[166] Survey research indicates that a feeling that the police have behaved disrespectfully feeds into an overall disbelief in the legitimacy of the law and law enforcement.[167] The path to legitimacy, from a procedural justice perspective, requires "treatment with dignity and respect, acknowledgment of one's rights and concerns, and a general awareness of the importance of recognizing people's personal status and identity and treating those with respect, even while raising questions about particular conduct."[168]

Consider the example of Justin,[169] an eighteen-year-old African American man living in Northeast Baltimore who is heading to a small religious college out of state on an athletic scholarship. (He had wanted to aim for an Ivy League school because his high school grades were strong, but according to him, his SAT score was nearly 100 points shy of the baseline.) Justin's police encounters typify and bleed into a general feeling that he is socially and politi-

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166. *See* Kirk & Papachristos, *supra* note 9, at 1191.

167. For an overview of a wide variety of literature on the connection between procedural justice and legitimacy, see Tyler et al., *supra* note 45, at 86.

168. Tyler, *Procedural Justice*, *supra* note 10, at 350.

169. All quotations attributed to Justin were recorded during an interview conducted by Janice Bonsu and Trinard Sharpe on July 23, 2015.

cally powerless. The criminal justice system "just get[s] so irritating, just to know you can't do nothing about it," he groused. "You have a voice, but then it's your voice and billions of other voices. If everybody's not together and its one side against the other, your voice basically doesn't matter. It just gets so frustrating how disrespectful somebody with high power can be. It just gets annoying."

To illustrate his point about disrespect from people in power, Justin told us about his most recent police encounter.[170] He and his friends were in Hunt Valley, a small suburb just north of Baltimore city limits, known for its expansive, recently reinvigorated outdoor shopping mall. At around 11:30 PM, as they walked toward the light rail station that would carry them home to West Baltimore, they were stopped by a police officer. They were walking in the street along one side; they felt more comfortable walking in the road than on the sidewalk because there were woods on either side of the street. "It's night time. I don't want to be over there. For one, you got to think, there's mosquitoes, ticks, and stuff like that. People could be hiding over there."[171] According to Justin, the officer pulled them over, questioned them about what they were doing, and ran all of their information. The officer ultimately only gave them warnings for walking in the street. Justin repeated the charge, still with a hint of disbelief. "For walking in the street. For walking in the street!"[172]

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170. It is not surprising that Justin projects his police encounters into views on the government and the powerful more generally. Police officers are the quintessential "street-level bureaucrats," the faces of abstract systems, whose interactions with citizens are believed to shape their larger view of the government. *See* GIDDENS, *supra* note 63, at 79-88; MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 3 (30th Anniversary ed. 2010).

171. This respondent's preference to walk in the street, avoiding proximity to trees out of concern for his safety, is reminiscent of a similar preference among some Chicago high school students that has been documented journalistically. *See Harper High School, Part I Transcript*, THIS AM. LIFE (Feb. 15, 2013), http://www.thisamericanlife.org/radio-archives/episode/487 /transcript [http://perma.cc/3HUN-GWG8] (quoting a student who explained that "we never like to walk past trees and stuff" in order to avoid gangs). One might expect a similar logic to operate among teens in inner-city Baltimore.

172. MD. CODE ANN., TRANSP. § 21-506 (LexisNexis 2016) requires pedestrians to walk on sidewalks when possible, and on the left shoulder or far left side of a roadway when a sidewalk is unavailable. Failure to comply with this transportation provision is a misdemeanor. Whitt v. Dynan, 315 A.2d 122, 126 (Md. Ct. Spec. App. 1974). The DOJ, in its investigation of the Ferguson, Missouri Police Department pursuant to 42 U.S.C. § 14141, noted that Ferguson police routinely ticketed and fined African Americans for violating a city ordinance that regulates the "Manner of Walking in Roadway," an offense similar to the one Justin and his friends were committing. Ninety-five percent of the people cited for manner-of-walking violations in Ferguson between 2012 and 2014 were African American. Civil Rights Div., *Investigation of the Ferguson Police Department*, U.S. DEP'T JUST. 62 (Mar. 4, 2015), http://www .justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police

What irked Justin more than the warning, though, was the police officer's apparent disregard for their travel timetable. While they were stopped, Justin and his friends told the officer that they were on their way to the light rail station and that they needed to get there quickly because the rail stops running at midnight. They were not sure when the last train to Baltimore would depart, so they were trying to get there as soon as possible. The officer assured them that they would make their train. Yet by the time he checked their information and issued their warning tickets, it was approximately 12:05 AM. Justin's bitterness about missing the train had not yet faded. "When I say they didn't let us go until about 12:05! They didn't let us go until 12:05 and only gave us warnings—for walking in the street."

Justin now expects that the police will not value his time. He has resigned himself to this signal of his own inconsequentiality.

> Whatever it is, whatever you need, go ahead, because now I know we on your time, now. Once you stop me, even if I did nothing wrong, we on your time. So I might as well just get it over with, let you do what you're going to do. I know you're going to be disrespectful. I'm prepared for that. I know you're going to be disrespectful. It's up to me how I'm going to react to that.

When asked if he had other experiences like that one, Justin could not answer precisely. He knows that he has been stopped many times, but he tries not to dwell on those encounters, preferring to focus on school, work, sports, and "females." He also tries to minimize the importance of race in this unnamed number of police encounters. "I just hate the way how they can be so disrespectful to us like we're not human or nothing. It's like this stereotype where you think a young African American—or not even a young African American, just a young individual, period, just walking, you think they're up to something." He tries instead to look at his police encounters from a power and authority perspective, in part just to avoid the stress of seeing the world as racist.[173] "People who have never had power before, they finally get power, and they want to abuse it. I try my best not to look at it as a racial thing because I

_department_report.pdf [http://perma.cc/FF7V-XCCL]. The Justice Department's Baltimore report roundly criticizes the Baltimore Police Department for criminalizing African Americans' presence in public spaces, especially streets and sidewalks. *See* DOJ BALTIMORE REPORT, *supra* note 156, at 6-7. However, it does not mention section 21-506 of the state transportation code as a potential pretext for some walking stops.

173. *See* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1145 (2008) ("[T]he net psychological impact of making an attribution to discrimination is negative.").

know that's only going to make me mad and stress me out. So, I try to look at it from all angles."

Justin is an ambitious young man, one of the few in the sample who had the good fortune of having solid college plans. He has carefully curated his group of friends to include only those who "keep each other focused," mostly fellow college-bound athletes. If Justin had been answering a survey about legal compliance, there is a reasonable chance that he would have marked that he adheres to most laws and believes that it is important to do so. Yet he deeply distrusts the police, partly because he believes that they treat him and other young Baltimoreans with disrespect in order to assert their authority.[174] In addition, he has serious doubts about whether the police would be helpful if he needed them, saying that no matter what the issue was, he would not call the police: "I call the police—I'm not doing nothing for nobody. If I call the police, there's a possibility they might turn on me." Those feelings of being both under surveillance and unprotected have created a devil's brew of legal estrangement such that even a youth like Justin, who has thus far been able to avoid the criminalization process common for young men of color,[175] would rather pursue extra-legal help with neighborhood concerns than trust in the police.

As for the midnight police encounter: on the facts as Justin presented them, there is little doubt that the stop was lawful. The officer saw Justin and his friends walking in the middle of the street in violation of Maryland state law.[176] He stopped them, asked them what they were doing, ran their identification (apparently finding no open warrants), and sent them on their way with only a warning. Justin had two problems with the stop: he feels that the very reason they were stopped was generalized suspicion of young people (and possibly young *black* people), and that the officer did not care that this stop caused them to miss their ride home. This stop was less awful than it could have been, but it factors heavily into Justin's concerns about the police and the larger social structure.

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174. Justin identified the exercise of power more generally as an aspect of procedurally unjust policing. Research from social psychology suggests that officers who use a disproportionately large amount of force against African American men might be trying to assert their manhood even more than their authority. *See* L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 128-42 (2014); *see also* Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 175-85 (2016) (summarizing the different types of social and psychological threats police officers might feel, which increase the likelihood of officer violence).

175. *See* RIOS, *supra* note 126, at xiv-xv.

176. MD. CODE ANN., TRANSP. § 21-506.

Justin's story illustrates how procedural injustice, even at a relatively minor level, creates and reinforces legal estrangement. The legitimacy literature, though concerned with procedural injustice, does not offer an account that illuminates Justin's concerns about the police: he willingly complied with the officer's commands, not out of fear but from a sense that, generally speaking, he ought to obey the instructions of law enforcement officers. However, the experience nonetheless contributed to his sense that there is a schism between young Baltimoreans and the police. Yet procedural injustice is only one leg of legal estrangement's three-legged stool. The benefits of a legal estrangement perspective emerge more clearly when considering the additional processes of vicarious marginalization and structural exclusion.

B. Vicarious Marginalization

The second contributor to legal estrangement discussed here is vicarious marginalization: the marginalizing effect of police maltreatment that is targeted toward others. Although the literature on legal socialization, legitimacy, and legal cynicism vaguely acknowledges the influence of police experiences within people's social networks and the impact of highly publicized misconduct on cultural orientations about the law, the scholarly treatment of vicarious experience is thin relative to the treatment of personal experience.[177] This deficit is, in part, a disciplinary artifact. Most legal socialization and legal legitimacy research draws from social psychology, which by definition focuses primarily on understanding individuals' internal lives and how they relate to their personal interactions and behaviors.[178] The legitimacy literature has been interested in generalized views and "societal orientations," but it focuses mostly on whether one can generalize from personal experiences instead of whether and how im-

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177. *See* Rod K. Brunson & Ronald Weitzer, *Negotiating Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, 40 J. CONTEMP. ETHNOGRAPHY 425, 429 (2011); *cf.* TYLER & HUO, *supra* note 8, at 133 (finding that recent personal experience explained thirty percent of the variance in people's assessments of the legitimacy of law and legal authority); Tyler & Fagan, *supra* note 8, at 255 (excluding respondents who had zero personal experiences with the police from their analysis); Tyler & Sevier, *supra* note 44, at 1127 (explaining that only nine percent of their interview sample had recent personal experience with the courts).

178. *See* TYLER & HUO, *supra* note 8, at 29 ("As psychologists, our primary concern is with people's attitudes, judgments, and feelings, and with the role of these subjective elements in shaping behavior."); *see also* Lars Udehn, *The Changing Face of Methodological Individualism*, 28 ANN. REV. SOC. 479, 487-88 (2002) (locating "psychologism" in debates over methodological individualism in early American sociology).

personal, vicarious experiences also contribute to social orientations.[179] Socio-logical and socio-legal theory, in contrast, provides a theoretical grounding for the idea that *other* people's negative experiences with the police, whether those people are part of one's personal network or not, feed into a more general, cultural sense of alienation from the police.[180] Legal estrangement is born of the cumulative, collective experience of procedural and substantive injustice.

In the study of incarceration, scholars have developed a clearer view of the cultural contagiousness of criminal justice contact. For example, Naomi Sugie finds that the female romantic partners of formerly incarcerated men are less likely to vote, to register to vote, and to believe that voting is important than similarly situated women who are not partnered with a formerly incarcerated man.[181] While voting and registering are behaviors, the belief that voting is important is an attitude that might, in the aggregate, reach the level of a cultural orientation. Along similar lines, Megan Comfort argues that the romantic partners of men serving time in prison undergo a process of "secondary prisonization," adopting routinized behaviors, styles of self-presentation, ways of speaking, and even sexual desires that are shaped by their vicarious incarceration.[182] Researchers are exploring the effects of incarceration on the worldviews of the children of incarcerated parents.[183] Moreover, the vicarious effects of incarceration are not limited to the intimate partners and children of the incarcerated. For example, in their study of the relationship between race, mass incarceration, and distrust in the law, Christopher Muller and Daniel Schrage find that African Americans who had a formerly incarcerated close

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179. *See* TYLER, *supra* note 85, at 94 (confirming through survey data that personal experience with the police affects people's assessments of its legitimacy); TYLER & HUO, *supra* note 8, at 131-38 (showing that personal experiences influence "societal orientations" but without mentioning vicarious experiences).

180. *See, e.g.*, RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA 183-84 (2006) (describing "negativity bias"); Kirk & Papachristos, *supra* note 9, at 1201 ("Direct experiences with harassing police may influence an individual's cynicism, but this cynicism becomes cultural through social interaction. In this sense, individuals' own experiential-based perception of the law becomes solidified through a collective process whereby residents develop a shared meaning of the behavior of the law and the viability of the law to ensure their safety.").

181. *See* Naomi F. Sugie, *Chilling Effects: Diminished Political Participation Among Partners of Formerly Incarcerated Men*, 62 SOC. PROBS. 550 (2015).

182. MEGAN COMFORT, DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON 65-98 (2008).

183. *E.g.*, Ande Nesmith & Ebony Ruhland, *Children of Incarcerated Parents: Challenges and Resiliency, in Their Own Words*, 30 CHILD. & YOUTH SERVS. REV. 1119 (2008). *See generally* NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2005) (offering a journalistic account of the experiences and perspectives of children of incarcerated parents).

friend or family member were more likely than other African Americans to blame bias among the police and courts for the criminal justice system's racial disparities.[184]

Yet at the front end of the criminal justice continuum, scholars rarely probe these cultural emergences.[185] More work needs to be done to examine the collective memory of police interaction, defined as the cultural conception of what it is like to interact with the police that emanates in part from membership in a group or identity category (here, in various degrees, being African American or residing in a racially and socioeconomically isolated neighborhood). Collective memories are based on some combination of personal experience, observing and hearing about the experiences of others, passing accumulated wisdom from parent to child, observing interactions in public space, seeing (or not seeing) murals and other forms of public commemoration, watching television, scrolling through social media, and sharing all of these personal and vicarious experiences in the community.[186] In other areas of legal inquiry, such as constitutional interpretation, state-sponsored mass violence, interracial marriage, and general racial inequality, scholars have probed the role that collective memory plays in the law and legal institutions.[187] Through a combination of major social upheavals and everyday forms of information gathering, people

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184. Christopher Muller & Daniel Schrage, *Mass Imprisonment and Trust in the Law*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 150 (2014).

185. There are a few examples in sociological literature. *See, e.g.*, RIOS, *supra* note 126, at 151-52; Nikki Jones, *"The Regular Routine": Proactive Policing and Adolescent Development Among Young, Poor Black Men*, 143 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 33 (2014). Emerging legal scholarship is beginning to recognize this process and explore potential solutions to it. *See, e.g.*, Huq, *supra* note 102.

186. *See* J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 67-73 (1998) (describing memes and processes of cultural transmission); Jeffrey K. Olick & Joyce Robbins, *Social Memory Studies: From "Collective Memory" to the Historical Sociology of Mnemonic Practices*, 24 ANN. REV. SOC. 105 (1998).

187. *E.g.*, Robert S. Chang, *Closing Essay: Developing a Collective Memory To Imagine a Better Future*, 49 UCLA L. REV. 1601 (2002) (arguing that the collective memory of Asian Americans can be deployed to improve constitutional law); Meir Dan-Cohen, *Skirmishes on the Temporal Boundaries of States*, 72 LAW & CONTEMP. PROBS. 95 (2009) (describing how collective memory can inform state conflicts); Katherine M. Franke, *The Uses of History in Struggles for Racial Justice: Colonizing the Past and Managing Memory*, 47 UCLA L. REV. 1673 (2000) (articulating challenges for the use of collective memory in the pursuit of racial justice); Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995) (identifying six problems with states using criminal prosecutions to solidify collective memory of state-sponsored mass-murder); Norman W. Spaulding, *Constitution As Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003) (arguing for the relevance of the collective memory of the Civil War and Reconstruction to contemporary federalism jurisprudence).

come to understand themselves and gain perspective on what it means to be a part of a group (be it a religion, a race, or even a business).[188]

Most studies of collective memory focus on clear, often tragic historical events that had a cognizable beginning and end, such as American slavery or the Holocaust.[189] However, some research and theory argue that there can be broader sorts of collective memory, such as a "collective memory of racism and discrimination," that ground people's interpretations of day-to-day interracial experiences.[190] In this sense, police maltreatment and discrimination can also become sites for collective memory and collective identity construction. Vicarious marginalization in the context of policing, then, is ultimately about how people draw upon information other than their own experiences as police targets or suspects to understand their group's common experience with law enforcement.

There is no better illustration of how vicarious marginalization might operate, and what its repercussions might be, than current events involving police officer maltreatment of African Americans. As explained above, distrustful relationships between police officers and African American communities are longstanding and deep-seated. However, the recent stream of videos of violent police interactions has, along with organizing techniques, given birth to the Black Lives Matter movement. This movement has elevated police violence to

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188. *See, e.g.*, MAURICE HALBWACHS, ON COLLECTIVE MEMORY 54-83 (Lewis A. Coser ed. & trans., Univ. of Chi. Press 1992) (1952) (describing the collective memory of the family); Michel Anteby & Virág Molnár, *Collective Memory Meets Organizational Identity: Remembering To Forget in a Firm's Rhetorical History*, 55 ACAD. MGMT. J. 515 (2012) (analyzing ways of sustaining a firm's collective identity); Lauren A. Rivera, *Managing "Spoiled" National Identity: War, Tourism, and Memory in Croatia*, 73 AM. SOC. REV. 613, 631 (2008) (discussing limitations on collective memory in response to societies' "difficult pasts").

189. *See generally* JEFFREY C. ALEXANDER ET AL., CULTURAL TRAUMA AND COLLECTIVE IDENTITY (2004) (drawing upon case studies of September 11, American slavery, and the Holocaust to explore group-level traumatic memories).

190. Reuben A. Buford May, *Race Talk and Local Collective Memory Among African American Men in a Neighborhood Tavern*, 23 QUALITATIVE SOC. 201, 202 (2000). This form of collective memory might be particularly salient among African Americans. *Id.* Although the empirical evidence is mixed, some scholars have argued that African Americans are more likely to believe in "common" or "linked" fate, i.e., the idea that their individual success and experience of justice is connected to the success and just treatment of African Americans as a group. *See* DAWSON, *supra* note 128, at 76; Paula D. McClain et al., *Group Membership, Group Identity, and Group Consciousness: Measures of Racial Identity in American Politics?*, 12 ANN. REV. POL. SCI. 471, 477-79 (2009). *But see* Claudine Gay, Jennifer Hochschild & Ariel White, *Americans' Belief in Linked Fate: Does the Measure Capture the Concept?*, 1 J. RACE ETHNICITY & POL. 117, 139-40 (2016) (suggesting that either linked fate is no longer as unique to African Americans as once suggested or that the usual instrument used to measure linked fate is insufficient).

the national collective consciousness, sparking community organizing and policy advocacy.[191] Some have claimed that the seemingly ceaseless stream of grisly scenes on television and social media are giving birth to a new form of race-based posttraumatic stress.[192] But short of (or in addition to) race-based trauma, the ritualistic observation of black men and women having unjust, and often deadly, interactions with law enforcement conveys a message to their coethnics and other similarly situated observers.[193] That message might be that the police as a whole are dangerous, untrustworthy, and opposed to the idea that African Americans and the poor are truly members of the polity. Group conversations, both in person and through social media, can crystallize that message.[194]

Legal estrangement, emerging out of personal and vicarious experiences, serves as a lens through which many African Americans interpret past and future engagements with law enforcement officials. Videos of negative police interactions may elevate personal experiences to a cultural level by demonstrating to people who have had negative police interactions that their experiences are not unique. Media coverage that emphasizes particular aspects of police interactions, such as race, gender, or perceived criminality, provide a schema for interpreting one's own experiences in ways that positive experiences may not fully overcome by contributing to conceptions of how police treat particular groups.[195] Media coverage may heighten legal estrangement by providing evidence that we are living in a moment of cultural and legal instability regarding race and the police, and it may increase culture's power to drive perhaps unde-

191. To understand the origins and positions of the Black Lives Matter and corresponding police-reform movements, see, for example, BLACK LIVES MATTER, http://blacklivesmatter.com [http://perma.cc/QSS4-VXYP]; and CAMPAIGN ZERO, *supra* note 59. *See also* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016) (conceptualizing organized videotaping of police interactions as an adversarial form of police accountability).

192. *See* Jenna Wortham, *Racism's Psychological Toll*, N.Y. TIMES MAG. (June 24, 2015), http://www.nytimes.com/2015/06/24/magazine/racisms-psychological-toll.html [http://perma.cc/M8FW-GT4V].

193. *See* WEITZER & TUCH, *supra* note 180, at 183-84 (finding that mass media coverage of police deviance alters citizens' perceptions of the police and noting that media influence on citizens' perceptions of the police has received little scholarly attention).

194. *See* BALKIN, *supra* note 186, at 43 (explaining that the "building blocks" of culture are transmitted "either face to face or through media of communication like writing, television, or the Internet"); Buford May, *supra* note 190, at 202.

195. *Cf.* Tyler & Wakslak, *supra* note 85, at 261-62 (finding an association between the belief that racial profiling is more prevalent and the tendency to interpret personal interactions with the police as examples of profiling).

sirable behavior such as avoiding the police, refusing to call on them for help, or engaging in law-breaking activity. [196]

Yet the mechanisms that give birth to vicarious marginalization are not limited to television and social media. Some youth in the Baltimore sample reported observing the police mistreating others, whether strangers, parents, and friends, and they factored those observations into their assessments of police untrustworthiness. Others talked about the experiences of parents, siblings, and friends that they did not personally witness, but that were nonetheless salient in developing their orientations toward police.

Eighteen-year-old Jamila[197] lives in the McCulloh Homes family public housing development[198] with her mother, her mother's boyfriend, and her eight siblings. The space is crowded, and the neighborhood is dotted with liquor stores, payday lenders, and street memorials, institutional and symbolic indicators of concentrated poverty and heavy crime.[199] But Jamila is grateful to be there, more or less. Having spent significant periods of her childhood bouncing through a series of homes and homeless shelters as her mother cycled through abusive relationships, Jamila's four years in the McCulloh Homes have been, in a way, a welcome reprieve.

The first time Jamila remembers interacting with the police, she was ten and her mother got into a physical fight with her boyfriend. The officers, who were both people "of noncolor" (a term Jamila prefers to "white"), spoke to Jamila and her sister using words they could understand. They walked the two

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196. *See* Swidler, *supra* note 135, at 278-80 (explaining that culture is more likely to drive human behavior during periods of social transformation when prescribed social rituals are less clear); *cf.* DURKHEIM, *supra* note 122, at 246-59 (describing anomie as a problem of cultural instability); Mark Anthony Hoffman & Peter S. Bearman, *Bringing Anomie Back in: Exceptional Events and Excess Suicide*, 2 SOC. SCI. 186, 187, 190-92 (2015) (same).

197. All quotations attributed to Jamila were recorded during an interview conducted by the author and Janice Bonsu on June 17, 2015.

198. The McCulloh Homes, erected in the mid-1930s, was one of Baltimore's first public housing developments intended to house solely African American residents. The Housing Authority's intent was to erect "a splendid barrier against the encroachment of colored" residents into the nearby predominantly white Bolton Hill neighborhood. *See* Plaintiffs' Statement of Material Facts Submitted in Support of Their Pre-Trial Memorandum at 37-41, Thompson v. U.S. Dep't of Hous. & Urban Dev., 348 F. Supp. 2d 398 (N.D. Md. 2005) (No. CIV. A. MJG-95-309), http://www.aclumd.org/uploaded_files/0000/0169/statementoffacts.pdf [http://perma.cc/8U8Y-2VGJ].

199. *See, e.g.*, Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 107 (2012); Steven M. Graves, *Landscapes of Predation, Landscapes of Neglect: A Location Analysis of Payday Lenders and Banks*, 55 PROF. GEOGRAPHER 303, 311 (2003); Rhonda Jones-Webb et al., *Alcohol and Malt Liquor Availability and Promotion and Homicide in Inner Cities*, 43 SUBSTANCE USE & MISUSE 159, 160 (2008).

young girls to the store for snacks, hoping to momentarily distract them from the violence at home and shield them from the sight of their mother's contused face. She said it "was a good experience," but she does not believe police officers today, about eight years later, could reproduce that positive interaction. "People in enforcement now, there [are] a lot of younger officers in the force today, than it was then. People really cared about their job then. Now, people just look at it for the money that they are going to make."[200]

When Jamila graduated from high school in 2015, she became the first person in generations of her family to do so. This triumph has inspired her younger brothers. "That's very big for them—very, very big. And they look up to me now," Jamila explained to us. One of them, like a younger Shawna, aspires to enroll in the police academy and join the ranks of police officers. Jamila appreciates this goal, as she thinks police have an important social role to play. "Police men and women, at the end of the day, we kind of need them to keep [the] city safe . . . . But it's how you do it, is what really matters. Because you can't just walk into a neighborhood and get scared." Jamila herself has recently completed the first stage of an intensive and competitive college-readiness program and is preparing to start community college, intending to transfer into a local bachelor's degree-granting college in two years. Her long-term goals include studying philosophy and becoming a lawyer. She believes that practicing law would be the best way to help people: "I love law too, because I like giving people second chances. Everyone's not a bad person."

Despite her positive early experience with police, her model citizenship, her brother's goal of becoming a police officer, her own goal of joining the bar, and her embrace of the broad role that police can serve, Jamila is profoundly skeptical that the police—and government officials more generally—value people from her community. "We need real, real people that care about people . . . Any kind of state official, anything that has to do with dealing with people, we need better people." Jamila's assessment of police seems to stem from a mixture of community wisdom and the experiences of her friends and neighbors.

A few months ago, Jamila and her friend Rock were waiting outside of a middle school to walk Rock's brother, a student at the school, home. Jamila and Rock were about fifteen minutes early. They were hanging out outside to pass the time, and a police officer came by and asked them to leave. Jamila immedi-

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200. It is not clear whether there has been an actual shift in the average age of Baltimore police officers in the eight years since Jamila was ten. However, some police leaders claim that police officers have become, on average, younger and newer to the force and thus have a more "millennial" approach to policing. Zoe Mentel, *Racial Reconciliation, Truth-Telling, and Police Legitimacy*, U.S. DEP'T JUST. 10-11 (2012), http://nnscommunities.org/uploads/Racial-Reconciliation_Truth-Telling_and-Legitimacy.pdf [http://perma.cc/XEL2-A3ES].

ately started to walk away, as she did not have any reason to be there. Rock, however, started running away. According to Jamila, running away from police is a standard practice for young men even when they are clean (i.e., not carrying anything illegal).[201] When the officer caught up with Rock, he pushed Rock to the ground, pulled out his baton, and started beating him with it. The officer may have searched Rock, but if so, Jamila did not mention it. The officer did not lock Rock up then, but he seems to have cited him for loitering or some other minor offense. As Rock lay on the ground, Jamila called his mother.

"The officer just beat him, walked off, and left him there in the parking lot," Jamila bitterly recounted. Jamila fears that if she had not been there, Rock might have died.

> Then what? Would it still have mattered then? Or does it not matter at all? And I feel like, they're given too much power. Because they feel like, okay they're officers. "I have a gun. I have a badge. You have to listen to me. You have to do this. You have to do that." When really, you're the same as . . . you're the same person as me, whether you know right away. You're the same person. We breathe: just like I breathe, you breathe. You bleed just like I bleed. We're the same people.

Jamila's anger is not born primarily of her own experiences; most of her personal experiences have been positive or neutral. Instead, she tells stories of the mistreatment of her friends and of African Americans more generally.[202] "We don't have a good relationship, black people with police, because of what they're known to [be] doing." She does not specify who knows what police are doing. There is no active person or group passing these stories along. They are just "known."

Jamila also distrusts the media, including both network news and social media. She believes that both of these sources are advancing a destructive racial trope about the nature of police-community relations in Baltimore. "[M]edia is the cause of all of this," Jamila pontificated, at rapid speed. "[T]hey kept putting emphasis on white, white, white, white cop, white guy, white cop, white cop, white guy—they were putting emphasis on it." Jamila thinks that the narrative about Freddie Gray promoted through broadcast and social media is responsible for the April 2015 unrest: "If the media didn't broadcast it as big as

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201. Jamila's insight here is reminiscent of the Massachusetts Supreme Judicial Court's in 2016. *See infra* text accompanying notes 322-324.

202. To some degree, this way of thinking could be attributable to the human brain's tendency to recall negative information longer and more vividly than positive information. *See, e.g.*, Roy F. Baumeister et al., *Bad Is Stronger than Good*, 5 REV. GEN. PSYCHOL. 323, 323-24 (2001).

they did," she argued, "it wouldn't have happened like this. Because people started reacting when they came on to the news, and it came across on that social media—on that timeline of Facebook and stuff like that."

Sticking to her preference for class-based rather than race-based arguments, Jamila contends that the broadcast media promotes a racial narrative to make money.

> I used to think that they just want people to [be] aware of what was going on. But then, how they started wording things: "Another white cop kills blacks, another unarmed black teen." . . . I feel they got the outcome they wanted. I feel like, they wanted people to react and get mad. Because as views go up, they get paid more money.

Jamila rejects this narrative, arguing that instead of race, "it's bigger than that. This is a nation[al] problem; it's worldwide." Although Jamila's specific critique of the media's racial analysis was at times hard to follow, her general argument was that the government is interested in maintaining brute authority in any way that it can. Thus, the media narrative surrounding Baltimore's policing troubles distracts people with a partial explanation—race—instead of forcing them to confront the fuller explanation: maintenance of social and economic hegemony at all levels.

Of course, not all Baltimore youth shared Jamila's particular take on the role of race or her skepticism of all media. Myron,[203] for example, was thrilled at the broadcast media's coverage of the Freddie Gray incident. Using "news" like a verb, he related, "I'm glad they finally newsed our shit." Myron is pleased that these incidents, which have been going on for years in his estimation, were deemed newsworthy. The broadcast media attention spurred a shift in the social media experience as well: "Finally, Facebook and Instagram went to something other than us killing each other or fighting each other. They finally went to something like helping us, broadcasting what they're doing to us." Johnson[204] had yet another take, disparaging broadcast media coverage in similar tones to Jamila, but viewing the use of video and social media as a way to offer an alternative narrative. "[I]f the media was here now, they [would] be saying some crazy things about a situation instead of the truth about it," he contended. "That's another reason why people need to actually [be] active into social media a little bit more . . . . [I]n order to find the truth, you need to have your

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203. All quotations attributed to Myron were recorded during an interview conducted by Kaitlin Edin-Nelson and Geena St. Andrew on August 4, 2015.

204. All quotations attributed to Johnson were recorded during an interview conducted by Geena St. Andrew and Juliana Wittman on August 4, 2015.

phone out, tweet things, take videos about things." While opinions of these media sources vary, young people commonly consume them and deploy them as filters to understand the experience of being policed in Baltimore.

A few days before our interview, Jamila saw an officer in her courtyard, surrounded by a crowd of children, blasting the popular song "Watch Me (Whip/Nae Nae)"[205] and dancing. Some of the children took out their phones to record. (Indeed, there have been several similar officer-dance videos from jurisdictions across the country over the past two years, often using the Whip/Nae Nae song.)[206] When the officer left, the children told him goodbye, a nicety between community kids and the police that Jamila had never seen before. Jamila appreciated the gesture. "When I seen that, I was like, 'Yeah.' I kind of, like, gave the officer a nod. Because that's a good thing . . . . You usually don't see that." At the same time, she does not expect the encounter to make much of a change in the way she sees police, or in the way other adults from her community perceive police. "Once a man's mind's already made up, there's no telling him different."

Pathways of vicarious marginalization, such as stories from family members, witnessing friends' interactions, and watching videos and media coverage of strangers' experiences of police-related violence and injustice, are poorly considered in current theory and policy. The legitimacy approach tends to deemphasize the importance of interlocking social contexts, including peer influences.[207] The existence of these pathways is not surprising, though, when one considers what social scientists have long understood about the stickiness

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205. Silentó, *Watch Me (Whip/Nae Nae)*, YouTube (June 15, 2015), http://www.youtube.com /watch?v=vjW8wmF5VWc [http://perma.cc/QV7D-MS4Q].

206. *See, e.g.*, Katie Mettler, *Tampa Police Officers 'Whip' and 'Nae Nae' with Sulphur Springs Youth on Halloween*, Tampa Bay Times: Bay Buzz (Nov. 2, 2015, 11:14 AM), http://www.tam pabay.com/blogs/baybuzz/tampa-police-officers-whip-and-nae-nae-with-sulphur-springs -youth-on/2252272 [http://perma.cc/EE58-MQ6Y]; Perry Stein, *A D.C. Cop Tried To Break up a Group of Teens. It Ended in This Impressive Dance-Off*, Wash. Post (Oct. 28, 2015), http://www.washingtonpost.com/news/local/wp/2015/10/28/a-d-c-cop-tried-to -break-up-a-group-of-teens-it-ended-in-this-impressive-dance-off [http://perma.cc/7NVV -58G5]; Lyndsay Winkley, *Watch Officer Whip, Whip, Then Watch Him Nae Nae*, San Diego Union-Trib. (Oct. 7, 2015), http://www.sandiegouniontribune.com/sdut-police -officer-whip-nae-nae-facebook-video-2015oct07-htmlstory.html [http://perma.cc/S847 -GDQ8].

207. For example, Jeff Fagan and Tom Tyler find that most contextual variables, including having deviant peers, are not associated with adolescents' assessments of legal legitimacy. Fagan & Tyler, *supra* note 136, at 231-33. However, the survey and analytical method used by Fagan and Tyler provides a quite limited way of understanding how networks produce perceptions of the law and law enforcement officials.

of negative events in the human memory,[208] the socialization function of family and friend networks,[209] the ways culture is created and transmitted,[210] and the social construction of knowledge.[211] Personal experience with the police is only one stick in the bundle of information that people use to form their perspectives on law enforcement. How they understand the policing experiences of others varies based in part on their relationship with the person who had the interaction and—especially when the vicarious experience comes through a viral police video—varies based on how well the experience at issue matches up with metanarratives about the police. Shared narratives about how the police treat African Americans and people who live in poor communities propel legal estrangement. To reduce legal estrangement, counternarratives that focus on respect and value for black and poor lives must emerge and take root.

C. Structural Exclusion

The third part of the theory of legal estrangement is structural exclusion. This component describes the ways in which policies that may appear facially race- and class-neutral distribute policing resources so that African Americans and residents of disadvantaged neighborhoods tend to receive lower-quality policing than whites and residents of other neighborhoods.[212] Laws and policies produce and normalize vastly different experiences by race and class.[213] The apparent neutrality of most modern laws and policies means that even those who are disadvantaged under them might not fully perceive them as discriminatory.[214] These policies serve as a form of *legal closure*, a means of hoard-

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208. Baumeister et al., *supra* note 202, at 323.

209. *See, e.g.*, Brunson & Weitzer, *supra* note 177, at 426.

210. *E.g.*, BALKIN, *supra* note 186, at 67-73 (on memes); HALBWACHS, *supra* note 188, at 54-83 (on family).

211. *E.g.*, PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966).

212. Some scholars understand unequal distribution of policing quality as a Rawlsian distributive justice problem. *See* Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171 (2012).

213. *Cf.* Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 475 (1997) (arguing that one advantage of a structural framework for studying race issues is that "[r]acial phenomena are regarded as a 'normal' outcome of the racial structure of a society").

214. *See, e.g.*, BONILLA-SILVA, *supra* note 105, at 170-72 (arguing that colorblind ideology indirectly affects many African Americans' explanations of social problems and policy perspectives even as they tend to perceive discrimination more readily than whites do); MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 179-82 & 179 n.2 (2016) (ex-

ing legal resources for the socially and socioeconomically advantaged while locking marginalized groups out of the benefits of law enforcement. This idea draws from the theory of social closure.[215] The process of legal closure leaves some areas essentially lawless—harshly policed yet underprotected[216]—while others may be rigorously defended over and above the degree to which they are at risk.

The concept of legal closure acknowledges that there are both losers and winners in the current policing regime. Current scholarship and policymaking focuses on how to address problems with the losers without examining the current system's beneficiaries. Part of the reason that the harshest and least effective police officers can be found in high-poverty communities is because department policies on pay and seniority, as well as state laws on officer wages and additional employment, send the most experienced and highest-paid police officers to the wealthiest areas. Residents of wealthier urban and suburban neighborhoods benefit from the current policing regime; this insight reframes the problem that police reform attempts to address as not only a problem of racism or poverty, but a problem of *inequality* in access to the machinery of the law.[217] The structural exclusion prong of legal estrangement theory also emphasizes that police violence is not primarily a problem of wayward officers or misunderstood suspects, but instead a problem embedded in the legal system itself.

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plaining that many poor people do not organize against inequality because, in line with the dominant cultural perspective on the causes of poverty, "[n]o one thought the poor more undeserving than the poor themselves"); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1142-46 (2008) (citing a large body of social psychology research to explain that social "outsiders," such as women and racial/ethnic minorities, "tend to avoid attributing adverse treatment to discrimination unless such attributions are very difficult to avoid").

215. *See* 1 WEBER, *supra* note 77, at 43-46, 339-48; 2 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 926-55 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (1922); Frank Parkin, *Strategies of Social Closure in Class Formation*, *in* THE SOCIAL ANALYSIS OF CLASS STRUCTURE 1 (Frank Parkin ed., 1974).

216. Several scholars and commentators have noted the paradox of overpolicing and underprotection in racially and socioeconomically marginalized communities. *E.g.*, JILL LEOVY, GHETTOSIDE 9 (2015) ("[O]ur criminal justice system . . . is at once oppressive and inadequate."); Haney López, *supra* note 105, at 1054; Natapoff, *supra* note 55, at 1718-19.

217. *See* Loïc Wacquant, *A Janus-Faced Institution of Ethnoracial Closure: A Sociological Specification of the Ghetto*, *in* THE GHETTO: CONTEMPORARY GLOBAL ISSUES AND CONTROVERSIES 1, 2 (Ray Hutchison & Bruce D. Haynes eds., 2012) (describing racially and socioeconomically marginalized neighborhoods as the product of a relational "power asymmetry").

One indicator that poor African Americans in particular have been excluded from police resources is that police repeatedly fail to respond, or to respond in a timely fashion, when they are called.[218] Structural exclusion often occurs in ways that community members do not recognize, but police nonresponse is an inequality that community members often notice, and it is usually evidence of local, state, and federal policy decisions. In response to police abandonment, marginalized people seeking protection or redress of grievances have generally turned to "self-help," either by calling upon family members or friends (and thus increasing violence in the aggregate),[219] or by creating or enlisting the help of informal institutions.

For example, Sudhir Alladi Venkatesh's historical and ethnographic account of life in Chicago's now-defunct Robert Taylor Homes describes a series of alternative community law enforcement groups ("indigenous law enforcement") that residents used to police themselves after the police abandoned the development as early as the 1960s.[220] In the early 1980s, however, as the drug trade grew and gangs evolved from largely familial enterprises to more impersonal, almost corporate entities,[221] those gangs ultimately took over the pseudo-law enforcement role from the community law enforcement groups.[222] At no point did police step in to reclaim meaningful authority within the neighborhood.[223] The incentive structure for police officers was to avoid neighborhoods like the

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218. *See, e.g.*, ANDERSON, *supra* note 124, at 34; PHILIPPE BOURGOIS, IN SEARCH OF RESPECT 109-13 (2d ed. 2003); ALICE GOFFMAN, ON THE RUN 2 (2014); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29-75 (1997); SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR 280 (2006) ("Though life on the street was changing in many worrying ways, one thing remained consistent. For nearly a century, black Chicagoans had never been able to rely on law enforcement, be it for gang- or nongang-related problems.").

219. *See, e.g.*, Donald Black, *Crime as Social Control*, 48 AM. SOC. REV. 34, 36 (1983) (describing homicide as private capital punishment); Kirk & Papachristos, *supra* note 9, at 1203-04; Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 386 (2003).

220. SUDHIR ALLADI VENKATESH, AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO 77-83 (2000).

221. *See* Sudhir Alladi Venkatesh & Steven Levitt, *"Are We a Family or a Business?" History and Disjuncture in the Urban American Street Gang*, 29 THEORY & SOC'Y 427 (2000) (describing the metamorphosis of Chicago street gangs from primarily social groups that committed petty crimes to primarily criminal financial enterprises).

222. VENKATESH, *supra* note 218, at 177-87 (describing the relationship between one Chicago street and the neighborhood it controlled).

223. *Id.* at 125-47.

Robert Taylor Homes, particularly in the era before federal policy incentivized police departments to prevent crime in high-crime neighborhoods.[224]

Of course, policing has changed since the early days of the Robert Taylor Homes. Much of the early critique of police officers' treatment of racially and socioeconomically marginalized neighborhoods (or what many scholars call "the ghetto") stemmed from law enforcement's neglect of those communities,[225] leading to some mid-twentieth century racial justice advocates to urge police to become more active in poor urban neighborhoods.[226] Yet several forces converged in the 1970s, 1980s, and 1990s that shifted the problem from one of utter neglect to the current problem of overpolicing and underprotection. First, policing underwent a move toward professionalization, which brought about improvements such as the use of technology, reliance on evidence (rather than confessions given during investigations), and requirements that police undergo more extensive education and standardized training.[227] However, as part of the professionalization package, and because of shifts in technology and the sprawl of cities, departments shifted their tactics from having officers walk a "beat" (an area that they specifically focused on) to using cars and technology to respond to calls for service.[228] Second, partly in reaction to the massive increase in urban crime during the 1970s, "broken-windows policing" (also known as order-maintenance or quality-of-life policing) took root in the 1980s and 1990s. This type of policing moved in the opposite direction of the call-for-service model by urging officers to heavily and proactively enforce laws against minor criminal activity, particularly in distressed communities. The shift meant that people in racially and socioeconomically isolated communities first felt abandoned, then felt heavily monitored—but primarily monitored only for minor crimes that were not at the heart of their public safety and security concerns.

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224. The era of proactive policing is relatively young, really beginning with the advent of broken-windows policing in the early 1980s. *See* Kelling & Wilson, *supra* note 36; *see also* Meares, *Broken Windows*, *supra* note 98 (discussing the effectiveness of broken-windows policing).

225. *See, e.g.*, KENNEDY, *supra* note 218, at 29-75; Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOC. REV. 339, 340-41 (2009).

226. MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY 7-9 (2015).

227. *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 25-26, 106 (1967); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 773 (2000).

228. *E.g.*, GARLAND, *supra* note 16, at 114-15; Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, 15 CRIME & JUST. 51, 58 (1992).

The War on Drugs altered policing as well. Although much of the critique of the War on Drugs has focused on its hotly debated role in the rise of mass incarceration,,[229] the War on Drugs altered the front end of the criminal justice system—policing—just as significantly. Beginning in the 1970s and increasingly throughout the 1980s and 1990s, the War on Drugs funded special narcotics-enforcement police units and gang units across the country, arming regular police departments with military-grade armor and weaponry, and authorizing virtually free reign over marginalized neighborhoods.[230] Because police often relied on bad information when making busts and conducting raids, whole communities felt under police suspicion, regardless of whether particular individuals had done anything to earn that suspicion.[231]

The twin perils of harsh policing and neglectful policing indicate structural exclusion from public safety, an exclusion that corresponds with intersecting race, class, and geographic marginalization. Some scholarship on overpolicing and underprotection portrays the phenomenon as a gendered and generational issue, meaning that young people, especially young men, feel overpoliced while older, "decent" people in poor African American communities feel underprotected.[232] The reality is far more complex. Many young men, too, would ideally want the police to protect them and their communities. Patrick Carr, Laura Napolitano, and Jessica Keating reached this finding in their qualitative criminology study of an ethnically diverse (Latinx, white, and African American) sample of young men and women, ages twelve to twenty-three, in three high-crime, socioeconomically challenged Philadelphia neighborhoods. Although most of the youths, regardless of race or gender, had a negative disposition toward the police, most of them—including young African American men—also suggested greater presence of police and harsher enforcement of the law as

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229. *See* ALEXANDER, *supra* note 3, at 188-89; FORTNER, *supra* note 226, at 258-60; James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 35-36 (2012).

230. RADLEY BALKO, RISE OF THE WARRIOR COP 157 (2013); Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1, 6-9 (1997).

231. *See* Fagan & Geller, *supra* note 101, at 79-81 (arguing that, between 1998 and 2011, New York City police officers began forming suspicion based on neighborhood characteristics rather than making individualized assessments based on suspects' behavior); Meares, *supra* note 16, at 162 (arguing that *Terry* concerned a stop based on suspicion of an individual, as opposed to stops based on generalized suspicion, as part of a "program" to regulate young African American and Latino men).

232. *E.g.*, ANDERSON, *supra* note 124, at 47; GOFFMAN, *supra* note 218, at 175.

ways to address crime in their communities.[233] One way to understand this result is as a kind of bounded creativity: because these youths were growing up in high-crime urban neighborhoods in the 1990s and 2000s, a time and place where the police were highly visible and when alternative community social control resources were relatively limited, perhaps they could not imagine a world where the government could use noncriminal justice means to deter crime. This view would counsel hesitancy before relying on youths' words as true statements of their ideals.[234] Yet the authors settle on the explanation that, despite the youths' negative experiences with the police, they cling to the mainstream cultural ideal that police should protect them and their communities. Along with protection, the youths desire procedurally just policing.[235] The critical point about structural exclusion is that, despite the youths' cynicism about the police, they nonetheless believe that the police are failing to provide protective services to their communities.

This conflicted desire for police protection is observable in Lemuel's story. Lemuel is a twenty-four-year-old African American young man who grew up in the Lexington Terrace housing project in West Baltimore.[236] Lemuel, unlike Shawna, Justin, and Jamila, has spent a large portion of his youth engaged in criminal activity.[237] Unlike his brothers, one of whom is incarcerated and one of whom was murdered seven years ago, Lemuel managed to avoid becoming an official member of any street gang or "clique." (In his terms, he was a "thug," not a "gangster.") Mostly, he stole food, sports jerseys, cars, and other property

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233. Patrick J. Carr, Laura Napolitano & Jessica Keating, *We Never Call the Cops and Here Is Why: A Qualitative Examination of Legal Cynicism in Three Philadelphia Neighborhoods*, 45 CRIMINOLOGY 445, 461-63 (2007).

234. *See also* Carol Steiker, *More Wrong than Rights*, *in* TRACEY L. MEARES & DAN M. KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 49, 51 (1999) (analogizing the conditions of inner-city residents who supported order-maintenance policing in the 1990s to a swimmer drowning in the sea: "In dire straits, and with limited options, [inner-city residents] will grasp at any rope, no matter how steep the price."). Pierre Bourdieu encapsulated this idea in his concept of *habitus*, the idea that while individuals have agency in thought and action, thoughts and actions are nonetheless deeply embedded in social structure. People's perceptions and opinions both represent and reproduce existing social conditions. PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE 170-72 (Richard Nice trans., Harvard Univ. Press 1984) (1979).

235. Carr, Napolitano & Keating, *supra* note 233, at 467-69.

236. All quotations attributed to Lemuel were recorded during an interview conducted by Geena St. Andrew and Janice Bonsu on July 2, 2015.

237. Indeed, most youth, even in disadvantaged urban communities, are generally law-abiding. *See* James Forman, Jr., *Community Policing & Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 26-28 (2004).

with his brother and dealt small amounts of marijuana to earn a baseline income.

> When I was robbing people, there was a reason why I was doing it. My stomach was literally growling, nothing to do. Either I die, starve, or I do something. I was too young for a job. I mean, I cut grass during the summer. I shoveled snow through the winter. But [what] do you do in between?

Lemuel's family was so poor that his parents made deliberate choices to forego necessities for their male children. Lemuel mimicked his stepfather with an acerbic chuckle: "My father, he always said, 'They boys. They don't need no shoes. They don't need no underwear. They don't need socks.'" The first time he remembers feeling scared and realizing that his family was very poor, was when "the eviction people came, and we're holding the door so they won't come in." Petty theft was Lemuel's family's livelihood. "What we going to do? Whatever you can do. So we made sure we ate."

Not surprisingly, Lemuel had numerous run-ins with the police in his younger, delinquent years. He likened the police he encountered, the "knockers," (plainclothes officers assigned to "flex squads" focused on drugs and violent crime)[238] to Denzel Washington's character in the 2001 movie *Training Day*.[239] According to Lemuel, these officers—all African American[240]—often

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238. *See* Gus G. Sentementes & Julie Bykowicz, *Questions Raised for Years About City "Flex Squad,"* BALT. SUN (Jan. 15, 2006), http://articles.baltimoresun.com/2006-01-15/news/0601150112 _1_squad-flex-mengel [http://perma.cc/HUH5-PD66].

239. *See* sources cited *supra* note 227.

240. Lemuel is convinced that African American officers in Baltimore are more abusive than white officers. "Black cops are the worst ones," he declared. His observation mirrors that of *The Wire* creator and author David Simon and former Baltimore police officer Edward Burns: "[T]oday, it's a new generation of young black officers that is proving itself violently aggressive. A white patrolman in West Baltimore has to at least take into account the racial imagery . . . . Not so his black counterparts, for whom brutality complaints can be shrugged off—not only because the victim was a corner-dwelling fiend, but because the racial aspect is neutralized." DAVID A. SIMON & EDWARD BURNS, THE CORNER 165 (1997); *see also* Robert A. Brown & James Frank, *Race and Officer Decision Making: Examining Differences in Arrest Outcomes Between Black and White Officers*, 23 JUST. Q. 96, 120 (2006) (finding that, although white officers decide to arrest more frequently than black officers do, black officer-black suspect encounters were more likely to lead to arrest than any other officer-suspect combination); Rod K. Brunson & Jacinta M. Gau, *Officer Race Versus Macro-Level Context: A Test of Competing Hypotheses About Black Citizens' Experiences with and Perceptions of Black Police Officers*, 61 CRIME & DELINQ. 213, 233-34 (2015) (arguing that urban African Americans' perceptions of the police are not significantly different based on the racial composition of the force); Ivan Y. Sun & Brian K. Payne, *Racial Differences in Resolving Conflicts: A Comparison*

wore ski masks. "He don't want you to know who he is because he's about to do something that he ain't supposed to do." Lemuel says that the "knockers" would give him an ultimatum during every run-in. They could either take him to jail, or they could allow him to go home. When a boy took the "go home" option, "they sit you in the back seat with a knocker back there and they'll beat your ribs, take all your money out your pocket, leave you in the 'hood that you ain't supposed to be in."

One of Lemuel's most formative experiences with a police officer took place at a high school located in the heart of gang territory. One day when he was about fifteen years old, Lemuel showed up to school drunk on Bacardi Gold rum. "At the time, I was doing a lot of drinking . . . . I was going through stuff," he explained. He was also carrying drugs for his personal use and a "knuckle knife"—a set of brass knuckles with a knife attached—for protection. As is common at Baltimore's public high schools, security was on high alert.[241]

Between Black and White Police Officers, 50 CRIME & DELINQ. 516, 534-36 (2004) (finding that black officers are more likely to use coercive techniques than white officers). *But see* Joshua C. Cochran & Patricia Y. Warren, *Racial, Ethnic, and Gender Differences in Perceptions of the Police: The Salience of Officer Race Within the Context of Racial Profiling*, 28 J. CONTEMP. CRIM. JUST. 206, 219, 221 (2012) (finding that black citizens were more likely to view an officer as behaving legitimately if the officer was black and arguing that greater minority representation on police forces might improve perceptions of policing among African Americans); David Eitle, Lisa Stolzenberg & Stewart J. D'Alessio, *Police Organizational Factors, the Racial Composition of the Police, and the Probability of Arrest*, 22 JUST. Q. 30, 54 (2005) (associating greater minority representation on police forces with increased use of community policing practices). Baltimore's population is 63% African American; its police force is 44% African American. Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America's Police Departments*, N.Y. TIMES (Apr. 8, 2015), http://www.nytimes.com/interactive/2014/09/03/us/the-race -gap-in-americas-police-departments.html [http://perma.cc/MKH9-D8RE]. These observations highlight a potential shortcoming of reform efforts aimed at diversifying police departments. While officer diversity is surely a positive goal, diversification without department-wide cultural change is unlikely to meaningfully improve the experience of police presence in poor and African American communities. *See* David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1242 (2006) (calling the increased diversity of some urban police forces an "incomplete revolution").

241. Security concerns at Baltimore high schools led the city to establish a separate school policing unit, the Baltimore City School Police Force, in 1967. The statute that authorizes the School Police Force specifies that its officers may only carry their service weapons onto campuses when school is out of session. MD. CODE ANN., EDUC. § 4-318(d)(3) (Lexis 2016). In 2015, the Baltimore school system's CEO and Baltimore school police led a massive legislative and public advocacy campaign to remove this prohibition. *See* H.B. 101, 2015 Leg. Reg. Sess. (Md. 2015); Erica L. Green, *School Police Plead To Resurrect Weapons Bill*, BALT. SUN (Mar. 16, 2015, 10:49 PM), http://www.baltimoresun.com/news/maryland/baltimore -city/bs-md-ci-school-weapons-20150316-story.html [http://perma.cc/82Z7-K445]. The city held several listening sessions at high schools and public libraries in the summer after

In addition to the usual metal detectors, officers were on hand to frisk the students. A female officer patted Lemuel down and found the drugs in his pocket. According to Lemuel, the officer grabbed his scrotum and squeezed. She allegedly told him, "You better not say nothing." As he remembers it, she told him that, if he screamed, she would remove the drugs from his pocket (perhaps simply taking them, or turning them in so that he would get into legal trouble). Though tears welled in Lemuel's eyes, he stayed silent, and the officer let him go. But he returned home swollen and in pain.[242]

Despite those horrific recollections ("procedural injustice" seems too clinical a word for bodily assault), there have been times when Lemuel has wanted to call the police for help. When Lemuel was younger, someone from his neighborhood robbed him and took his sports jersey, an item that was relatively expensive given his financial background and thus had great significance to him. He wished that he could call the police to report the crime and get the jersey back, but instead he reluctantly fought the older boy who took it. "Got my ass whipped. Got my jersey back, though." There have been other times when he has wanted to call the police as well, times when an old-fashioned schoolyard brawl would not be of much help. People have shot near him, and "things . . . was a little bit out of my control." Yet he still did not call the police because "it's never good." Lemuel's uncle is a police officer, but instead of making him feel closer to the police, he thinks the job reflects poorly on his uncle's character. Lemuel told us, chuckling, "Even my uncle, my uncle's an asshole. He don't come to no family reunions or nothing."

Lemuel does not think the problems of policing that he has experienced, and that gave rise to the Freddie Gray unrest, are attributable to race. In his view, the problems of police-community relations are problems of neighborhood income inequality. "Black, white, Hispanic, it doesn't matter your race. It matters where you live. It's almost—your income." Because Lemuel has committed crimes in higher-income neighborhoods, he has seen firsthand that po-

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the bill failed, one of which I attended while conducting field research (July 17, 2015, Forest Park High School). The overwhelming majority of meeting participants–mostly parents of Baltimore high school students or community activists who seemed to have friendly preexisting relationships with the school police–spoke in favor of permitting Baltimore school police officers to carry guns in school buildings. For now, the law is unchanged.

242. In March 2016, after a cellphone video surfaced that showed a Baltimore school officer aggressively slapping and kicking a teen boy, the training and recruitment of Baltimore school police officers garnered new attention from school officials. Tim Prudente, *Baltimore Schools CEO Will Review Officer Training, Selection After Slapping Incident*, BALT. SUN (Mar. 8, 2016, 1:30 PM), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-community-meeting-reach-20160307-story.html [http://perma.cc/U7TX-QQ7H]. Lemuel's alleged assault occurred years before videotaping emerged as a response to harsh police tactics.

lice respond quickly in those areas. He and a friend attempted to burglarize a home in a wealthier part of Baltimore County, and they assumed that because the house was in a semirural area, it would take the police a long time to arrive. They were wrong. Someone called the police, and officers arrived very quickly. "When you're in another neighborhood, you get treated with more respect. I realized that when I went to try to do my first home invasion. The cop response was so quick . . . . It was so quick. I never seen the cops respond to this neighborhood so quickly." Lemuel believes that slow police response is inevitably part of the experience of living in "the projects," including trailer parks.

One distinction between the police in West Baltimore and the police where Lemuel attempted the burglary is jurisdictional. West Baltimore, located within Baltimore's city limits, is under the jurisdiction of the Baltimore City Police Department. By contrast, outside the city limits in Baltimore County, the Baltimore County Police Department handles policing. Assuming Lemuel's experience is representative, the alleged discrepancy in response times could come from the differences in policies and workloads between the city and the county police departments. The differences between these jurisdictions might relate to their relative emphases on responding to crime reactively versus implementing preventive or proactive approaches. It might be the case that in the county, the police department still places heavy emphasis on responding to calls for service, while in the city (particularly in high crime areas), there is greater emphasis on patrolling. These different approaches could explain city residents' simultaneous sense that there is a heavy presence of police cars[243] and delayed response to calls for service.[244] More research is needed to compare police response times

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243. For example, one young man who resides primarily in Northwest Baltimore's Park Heights neighborhood said that there are so many cars on every corner in that neighborhood that he constantly feels that he is being watched: "I'll go up to Park Heights and every corner I go to I'm going to see a police car. I'm not trying to say that's a bad thing . . . . I'm not even saying a cop is watching, but when you see a police car, eventually that's somebody saying you're being watched, for real. That's how I feel. And I guess that's how people see it when they see a cop car. It's like they're being watched." This quote was recorded during an interview conducted by Kaitlin Edin-Nelson and Janice Bonsu on June 24, 2015.

244. One young woman discussing the same neighborhood said that it takes the police about twenty-five minutes to arrive when someone calls about a murder, accident, or other major event despite their common presence:

> Geena: I heard you say earlier that a situation has to be "serious" before you call the police. What kind of situation would that be?

> Respondent: Like murder or a robbery, accident, somebody being injured. Not just a little dispute or fuss. Somebody that has [an] injury or someone in trouble.

> Geena: How long would the police take to respond and get there?

across and between jurisdictions, and to locate the department-level policies and practices that might explain any undue delay.

Lemuel's earlier experiences of procedural injustice could also be attributable not only to individual bad officers, but to policies and department cultures that incentivize bad behavior. As noted above, Lemuel's most vivid negative experiences were with the "knockers," the plainclothes police officers who work in units that focus solely on violent crime and drug crime in distressed Baltimore neighborhoods. These units, which have been called "flex squads" in the past but are often renamed, are allowed broad discretion, including whether they wear uniforms, whether they drive marked cars, where they police (they are not limited to a post), and the hours they work.[245] They usually carry out drug raids as well. Although Baltimore's flex squads came under fire in the mid-2000s due to deep corruption in the Southwest police district's squad, including the rapes that Shawna fears,[246] the squads now exist with somewhat greater oversight. Yet some people—including former police officers—claim that street enforcement units are still given wide discretion that they often grievously misuse.[247]

Arrest incentives, and the more general culture of arrest,[248] might also have contributed to experiences like Lemuel's. Although he reports being arrested

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Respondent: I don't know. I think like twenty-five minutes . . . unless they're in the area and they just got called over.

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Monica: Do you see the police around a lot? Like you said, "Unless they're in the area"—are they in the areas where you are that much?

Respondent: Yeah, they do, because I live right up the street from the police station, so they just be around.

This conversation was recorded during an interview conducted by Geena St. Andrew and the author on July 22, 2015.

245. Bykowicz, *supra* note 150; Sentementes & Bykowicz, *supra* note 238.

246. *See supra* notes 145-150 and accompanying text.

247. *See* Radley Balko, *An Interview with the Baltimore Cop Who's Revealing All the Horrible Things He Saw on the Job*, WASH. POST (June 25, 2015), http://www.washingtonpost.com/news/the -watch/wp/2015/06/25/an-interview-with-the-baltimore-cop-whos-revealing-all-the-horri ble-things-he-saw-on-the-job [http://perma.cc/87G8-QH6L] (describing street enforcement unit bad behavior during raids, such as urinating or defecating on the belongings of suspects and their housemates).

248. *See* Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 308 (2016) (calling arrest the "paradigmatic police activity"); Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y 319, 331-35 (2014). *See generally* Elina

only once (and not through an encounter with a "knocker"), it is possible that police were more present in his neighborhood because they were looking for people to arrest. (Perhaps because Lemuel was so young, police were slower to arrest him.) While we do not have evidence of what those specific officers believed, insider accounts suggest that department policy encouraged greater police presence in predominantly poor and African American neighborhoods, even for officers who were not assigned to those areas. Former Baltimore police officer Michael Wood told reporters that, after getting a plum assignment to an upper-middle-class, predominantly white neighborhood, he would sometimes leave his post to go to a poor, predominantly black neighborhood to make arrests. He needed to meet his expected number of arrests, but even though there were people using drugs and committing other crimes in the neighborhood where he was assigned, he knew there would be "trouble" if he arrested the wrong person. So, even though it technically violated policy for Wood to patrol for arrests outside of his post, his supervisors signed off on his work. "They knew that judges and court officials lived in that neighborhood. If I locked up the judge's 18-year-old son for drugs or whatever, things could get really bad for me," Wood told reporters.[249] Several scholars have described the perils of arrest incentives, arguing that such policies have contributed to mass penal control through misdemeanor arrests and noncarceral forms of state supervision.[250] Lemuel's story and the Baltimore context suggest that incentives to arrest might also simply bring more people into contact with aggressive policing. Even if those people are never arrested, and even if they do not become suspects of any particular crime, this contact might have negative effects on their perceptions of police, reminding them of their relative worthlessness in the eyes of the state. Consequently, arrest-incentivizing policies may serve to deepen legal estrangement.

On a broader scale, of course, structural exclusion through policing is layered atop deeper structural disadvantages that arise in the contexts of growing up poor and African American, and living in the city of Baltimore. Good polic-

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Treyger, *Collateral Incentives To Arrest*, 63 KAN. L. REV. 557 (2015) (critiquing indirect incentives to arrest and resultant systemic distortions).

249. Ema O'Connor, *A Former Baltimore Police Officer Exposed His Department's Corruption*, BUZZFEED NEWS (June 30, 2015, 12:57 PM) http://www.buzzfeed.com/emaoconnor /baltimore-police-officer-tweets-up [http://perma.cc/6W2G-BMWU].

250. *See, e.g.*, Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 819 (2015); Kohler-Hausmann, *supra* note 16; Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1057-58 (2015).

ing is just one additional resource, or another form of capital,[251] from which the law writ large may exclude people like Shawna, Justin, Jamila, and Lemuel.

V. DISMANTLING ESTRANGEMENT

How can police reform dismantle legal estrangement? There is little scholarship that tackles this question in even a cursory way. Research suggests that procedural justice can unsettle the psychological process that leads people to perceive the police as illegitimate. Evidence also indicates that the procedural justice solution can effectively increase perceptions of legitimacy across race and, to some extent, class.[252] Yet — other than the well-trodden but hazy path of "community policing"[253] — there has been little discussion of reforms that can disrupt the sociological process leading whole communities to see the police as a symbol of their status on the social periphery. Measures that emanate from legitimacy theory and the procedural justice approach, such as police training, are ultimately an impoverished response to estrangement.[254]

One might reasonably view legal estrangement not as a problem of policing, but as a problem of concentrated poverty and racial inequality. Certainly, as is apparent in the vignettes offered in this Essay, concentrated poverty and

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251. *See* Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241 (John Richardson ed., 1986).

252. *See e.g.*, Tyler & Fagan, *supra* note 8; Sunshine & Tyler, *supra* note 9.

253. *See e.g.*, BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 46-47 (2009) (explaining that the "community policing" label has been applied to systems that use directly opposing strategies, including broken-windows policing and stop-and-frisk, and thus avoiding the term); GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS 158 (1997) (noting that "community policing has come to mean all things to all people" and declaring that the changes in New York City's policing strategies during the Giuliani era "are congruent with the basic elements of community policing"); Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 628 (2016) (arguing that "[t]he absence of a functional definition of community policing" led to inevitable implementation challenges and department resistance).

254. The distinction between legitimacy and legal estrangement is analogous to the distinction between ideological and structural understandings of racism. As Eduardo Bonilla-Silva explains, "Most analysts regard racism as a matter of individuals subscribing to an irrational view, thus the cure is educating them to realize that racism is wrong . . . . The alternative theorization offered here implies that because the phenomenon has structural consequences for the races, the only way to 'cure' society of racism is by eliminating its systemic roots." Eduardo Bonilla-Silva, *supra* note 213, at 476. Along similar lines, legal estrangement demands a structural response, while legitimacy theory ultimately implies that an education-based approach, focused on changing the behavior of a few bad actors, is sufficient to cure the problem of policing.

systemic racial injustice are major structural problems that produce legal estrangement. *Fully* dismantling legal estrangement will be impossible without more fundamental shifts in economic distribution and eradication of racial discrimination: the problems of policing that have motivated Black Lives Matter are problems of America's broken opportunity structure.[255] The root causes of estrangement, similar to the root causes of crime and mass incarceration, may seem inappropriate to address through the criminal justice system.[256]

Admittedly, the structural factors believed to contribute most fundamentally to cynicism, such as concentrated poverty, segregation, and residential instability,[257] are not generally seen as the province of police practice and policy. Yet to demand that curing poverty and eliminating race discrimination are the only ways to meaningfully effect change in policing is to accept paralysis. The "root causes" mentality encourages scholars and policymakers to ignore ways that police practices and policy *directly and actively* contribute to legal estrangement and its concomitant racial and socioeconomic conditions. For instance, some scholars have argued that police practices directly contribute to persistent residential segregation.[258] Police contact can negatively influence the prison reentry process, making it difficult for returning citizens to maintain employment and familial relationships.[259] Multiple experiences with arrest of a parent can result in court dates for children that keep them out of school and siphon them into the criminal justice apparatus; this process interrupts their education and ultimately places them at risk for incarceration and its related perils.[260] Because

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255. *See, e.g.*, *A Vision for Black Lives: Policy Demands for Black Power, Freedom & Justice*, MOVEMENT FOR BLACK LIVES 3-4 (July 2016), http://policy.m4bl.org/wp-content/uploads/2016/07/20160726-m4bl-Vision-Booklet-V3.pdf [http://perma.cc/488M-NWUF]; *Forward Through Ferguson: A Path Toward Racial Equity*, FERGUSON COMMISSION, 15-17 (Oct. 14, 2015), http://3680or2khmk3bzkp33juiea1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf [http://perma.cc/R32G-76LX] (framing the problem that gave rise to the death of Michael Brown as a problem of police-citizen relations, municipal court and local governance, child well-being and education, lack of economic opportunity, and racial inequity); *cf.* Ta-Nehisi Coates, *The Myth of Police Reform*, ATLANTIC (Apr. 15, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-myth-of-police-reform/390057 [http://perma.cc/8XJN-P9J6] ("A reform that begins with the officer on the beat is not reform at all.").

256. *See* GOTTSCHALK, *supra* note 3, at 258-59 (critiquing the paralysis that results from the "root causes" perspective in advocacy against mass incarceration).

257. Sampson & Bartusch, *supra* note 9, at 778.

258. Capers, *supra* note 153, at 60-77.

259. *See* DEVAH PAGER, MARKED 16 (2007).

260. *See, e.g.*, RIOS, *supra* note 126, at 36; Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 151

there has been insufficient attention to legal estrangement in the regulation of policing, opportunities to link the structural factors in estrangement with concrete reforms to policing have been underexplored. The proposals here are not offered as a cure-all to legal estrangement, but are instead an opening salvo to encourage police reformers to dedicate energy toward new strategies and structures of police governance.

A. Using Federal Tools To Change Local Practices

Scholars often overlook many of the structural issues that confront policing outside the purview of federal law because the policing crisis is embedded in state and local laws and policies. Even though federal law and policy has brought some uniformity to local policing through spending initiatives since the 1930s, police administrative rules and practices still vary intensely among states, counties, and municipalities.[261] In addition, there is rich debate over the appropriate institutional actors that should regulate local police behavior.[262] Faced with disagreement over the depth of the solutions needed, issues of federalism, and potentially limited institutional capacities, one would be hard-pressed to find a legal silver bullet capable of resolving the legal and social problems of policing.

One tool that provides the federal government with leverage to force local departments to change or eliminate structurally exclusive policies is section 14141 of the Violent Crime Control and Law Enforcement Act of 1994, also known as the Clinton Crime Bill.[263] Section 14141 authorizes the U.S. Attorney General to sue a local police department for engaging in a pattern or practice of violating constitutional and legal rights. The Department of Justice (DOJ) may use the threat of litigation to reach an agreement with the agency to pursue specific reforms, or take the agency to court and mandate actions through a consent decree. Although section 14141 has many merits—for example, the law

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(2004) (characterizing incarceration as a "new stage in the life course" of young black men who have not completed high school).

261. *See* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 876-77, 879-84 (2015).

262. *See, e.g.*, Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2057-65 (2016) (critiquing the "administrativist turn" in scholarship on police regulation and arguing for a robust role for local criminal courts); Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 437 (introducing a framework for thinking about which actors are best suited to pursue police reform).

263. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401(a), 108 Stat. 1796, 2071 (codified at 42 U.S.C. § 14141).

is credited with providing a path to successful long-term reform for police departments in Cincinnati, Los Angeles, and Pittsburgh[264]—many scholars have offered an array of potential improvements to the law.[265]

One of the biggest shortcomings of section 14141 is that its use is politically cyclical.[266] During the second term of President George W. Bush, the DOJ did not enter into a single consent decree with a police agency, opting instead to enter into nonbinding agreements with wayward departments.[267] In contrast, the Obama Administration has investigated dozens of departments.[268] Even this figure is relatively small considering that there are more than 12,000 police departments across the United States; many scholars believe that the costly and invasive nature of the process limits its capacity to reach the full set of departments that may require oversight.[269] One suspects that a Trump DOJ will investigate very few, if any, police departments.

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264. *See, e.g.*, Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1359-63 (2015).

265. *E.g.*, Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1417-18 (2000) (arguing that the statute should permit the DOJ to deputize private citizens to bring pattern or practice suits against police departments if the government has declined to do so); Harmon, *supra* note 2, at 4 (proposing more aggressive DOJ pursuit of section 14141 lawsuits and a safe harbor from lawsuit for police departments that voluntarily reform); Stephen Rushin, *Using Data To Reduce Police Violence*, 57 B.C. L. REV. 117, 154-66 (2016) (arguing that data availability on civilian deaths caused by law enforcement could increase the effectiveness of section 14141); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 494 (2008) (arguing that the DOJ should use a different deliberation model in reform efforts it instigates pursuant to section 14141).

266. *See* Harmon, *supra* note 2, at 3-4; Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3232-33 (2014).

267. *See* POLICE EXEC. RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 4 (2013); Simmons, *supra* note 265, at 493 ("[G]overnment officials have expressly articulated a preference for avoiding litigation and negotiating with municipalities to ensure compliance with the suggested reforms.").

268. *Conduct of Law Enforcement Agencies*, U.S. DEP'T JUST. (June 2, 2016), http://www.justice .gov/crt/conduct-law-enforcement-agencies [http://perma.cc/LBR2-V6ZR].

269. *See* Brian A. Reaves, *Local Police Departments, 2013: Personnel, Policies, and Practices*, U.S. DEP'T JUST. 1 (May 2015), http://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf [http:// perma.cc/4NHA-ZFGZ]. While there is no direct evidence to suggest that the Obama Administration is underproducing section 14141 investigations, other scholars have written about the inherent barriers to initiating section 14141 actions even if a given administration is more willing to use that tool. *See, e.g.*, Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 44 (2012) ("Assuming even a small minority of [police departments] is engaged in a pattern or practice of constitutional violations, the Department of Justice cannot achieve national reform by suing every department

Indeed, perhaps the major drawback of relying on § 14141 is that it likely allows so much unlawful and procedurally unjust policing to go undetected. Baltimore provides an excellent example of this issue. On August 10, 2016, the DOJ released a 163-page report lambasting the Baltimore Police Department for its persistent violations of the rights of Baltimore's African American population, emphasizing in particular the Department's mistreatment of youth[270] (such as the participants in the *Hearing Their Voices* study).[271] The DOJ concluded that the Department's discriminatory practices violate Title VI of the Civil Rights Act of 1964 and the Safe Streets Act of 1968.[272] Yet just sixteen months earlier, in May 2015, the *Final Report of the President's Task Force on Twenty-First Century Policing* described Baltimore's efforts to build community legitimacy. The Report summarized testimony from then-Police Commissioner Anthony Batts touting the Department's establishment of a new Professional Standards and Accountability Bureau "tasked with rooting out corruption, holding officers accountable, and implementing national best practices for polic[i]es and training."[273] The DOJ Report, which denounces the Department for its failure to properly train officers, does not even mention this Bureau. In fact, the Report only briefly mentions the Baltimore Police Department's other efforts to address its legacy of bias.[274] It took the death of Freddie Gray, and the corresponding public uproar, to push the DOJ to commence this investigation and issue the Report. While section 14141 provides a helpful backstop, it allows departments to maintain a veneer of community orientation until a crisis strikes. Major pushes for structural reform should not rely on litigation that is rarely initiated before tragedy occurs.

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with a pattern of widespread constitutional violations."); Harmon, *supra* note 2, at 21-22; Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 812-14 (2016).

270. DOJ BALTIMORE REPORT, *supra* note 156, at 85-87.

271. *See supra* note 137 and accompanying text.

272. DOJ BALTIMORE REPORT, *supra* note 156, at 72-73; *see also* 42 U.S.C § 2000d to d-7 (2012) (barring race, color, and national origin discrimination in federally assisted programs, which includes the Baltimore Police Department because of the funding it receives from the federal Community Oriented Policing Services agency); Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d (2012) (providing the federal government a tool to force local policy departments to eliminate structurally exclusive policies); 28 C.F.R. § 42.203 (2010) (barring programs that receive federal funding from the Justice System Improvement Act or Juvenile Justice Act from using practices that discriminate on the basis of race, color, religion, national origin, or gender unless necessary).

273. TASK FORCE REPORT, *supra* note 6, at 12.

274. DOJ BALTIMORE REPORT, *supra* note 156, at 72.

While recognizing the inherent insufficiency of incremental interventions as a full remedy for legal estrangement, in this Part, I provisionally discuss Fourth Amendment jurisprudence and four areas of police governance reform that could contribute to dismantling estrangement. These reforms have garnered much less attention in the most recent police reform debates than police training, community policing initiatives, or even structural reform litigation. Whereas most scholarship on police regulation tends to focus on constitutional criminal procedure,[275] these reforms are aimed at statutory and municipal law at the federal, state, and local levels. Unlike the legitimacy approach, legal estrangement theory *directly suggests* structural reform: the theory demands attention to group societal membership and the deep-seated laws, policies, and structures that have produced the policing crisis. Microlevel procedural justice reforms aimed at producing individual-level feelings of legitimacy are anemic responses to legal estrangement.

B. Paying the Police

The police wage system is a structural factor that functionally excludes many poor people and African Americans from policing resources, thereby contributing to legal estrangement. The wage structure under which police officers generally operate works inversely to the way it should: some of the busiest and most dangerous jobs in law enforcement often pay the least. Particularly in cities, towns, and counties that are financially strapped, finding the means to retain police-officer talent is a serious challenge. Moreover, officers are frequently aware of localized pay disparities. For example, a journalistic report on St. Louis County claimed that officers in some parts of the county were making "poverty wages," as low as $10.50 per hour.[276] The DOJ Ferguson consent decree required that the city increase officer salaries as part of its recruitment plan.[277]

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275. *See, e.g.*, Harmon, *supra* note 95, at 802; Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2182 (2014); *see also* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 855 (2004) (explaining that wiretapping tends to be regulated by statute more than by Fourth Amendment jurisprudence); Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 535-37 (2013) (comparing courts and political processes in their ability to protect privacy).

276. Seth Freed Wessler, *Police Pay Gap: Many of America's Finest Struggle on Poverty Wages*, NBC NEWS (Oct. 26, 2014), http://www.nbcnews.com/feature/in-plain-sight/police-pay-gap -many-americas-finest-struggle-poverty-wages-n232701 [http://perma.cc/33V8-62PE].

277. United States v. City of Ferguson, No. 4:16-cv-000180, at 65 (E.D. Mo. Mar. 17, 2016) (consent decree).

Low officer wages introduce two major perversions to the system. First, when salaries are too low, the most skilled and experienced officers will (rationally) leave higher-crime areas to work in easier areas where they are paid more. Second, low wages mean that many officers feel pressure to pursue large amounts of overtime hours and off-duty work, also known as secondary employment or "moonlighting."[278] Police officers typically receive a base hourly wage, but many earn a significant amount of their take-home pay through overtime. In Baltimore, for example, over one hundred officers in fiscal year 2013 earned more than $40,000 in overtime pay. In that year, the highest-paid employee of the Baltimore City Police Department earned $110,00 in overtime pay and $67,000 in base pay for a total of $177,000, more than the city's mayor and more than the police commissioner.[279] In 2015, six of the ten highest-paid people in Baltimore city government were employees of the police department.[280] Only one of those employees, the police commissioner, had a top-ten base salary. The others received substantial amounts of money in what appears to be overtime pay.[281]

The stress and burden of extended work hours can make even the most promising officers terrible at their job.[282] The President's Task Force report devotes one of its six pillars to officer wellness and safety, with emphasis on mental health.[283] It stresses the riskiness and trauma of the job and blames officer judgment errors on fatigue. It even discusses shift length as a potential con-

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278. Seth W. Stoughton, *Moonlighting: The Private Employment of Off-Duty Officers*, 2017 U. ILL. L. REV. (forthcoming).

279. Joce Sterman, *ABC2 Investigators Find Highest Paid City Employees Are Everyday Police Officers*, ABC2NEWS (Oct. 3, 2013, 9:01 PM), http://www.abc2news.com/news/local-news/in vestigations/abc2-investigators-find-highest-paid-city-employees-are-everyday-police -officers [http://perma.cc/V2RS-P96D].

280. Sean Welsh, *Top Baltimore City Salaries for 2015*, BALT. SUN (July 30, 2015, 6:19 PM), http://www.baltimoresun.com/news/maryland/baltimore-city/bal-10-highest-balti more-city-salaries-for-2015-20150730-story.html [http://perma.cc/S878-UGC5].

281. According to the city salary database, gross salary includes overtime, furloughs, and adjustments, and it does not include any compensation for "comp time" or leave time. It thus seems highly likely that the lieutenant's pay is largely attributable to overtime. *See Baltimore City Employee Salaries FY2015*, OPEN BALT., http://data.baltimorecity.gov/ City-Government/Baltimore-City-Employee-Salaries-FY2015/nsfe-bg53 [http://perma.cc /6RZC-28MD]. Note that the city did pay out more than expected in FY 2015 overtime in part because of the Freddie Gray response and subsequent spike in crime. Kevin Rector, *Baltimore Police Shifting Officers To Rein in Overtime Costs Amid Historic Year*, BALT. SUN (Apr. 8, 2016, 9:04 PM), http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-police -overtime-20160408-story.html [http://perma.cc/5AGC-P9JK].

282. *See* TASK FORCE REPORT, *supra* note 6, at 65.

283. *Id.* at 61-68.

tributor to officer fatigue.[284] But the report does not directly draw a link between fatigue, exposure to risk and trauma, long shifts, and wage-related pressures and overwork, all factors that may affect economically depressed jurisdictions more than other jurisdictions. Wage disparity is a structural issue that occurs far upstream from the events that have catalyzed the police reform movement. Bringing greater transparency and equity to officer salaries will likely decrease procedural injustice and vicarious marginalization on the ground, which could, over time, reduce legal estrangement.

Even where officers are paid on the same scale within the same departments, they still may be earning less to police tougher neighborhoods. Collective bargaining means that departments are often bound to pay salary, assign shifts, assign beats, and give promotions or transfers on the basis of seniority.[285] And even where collective bargaining is not in place, decision making based on seniority is often embedded into police culture. Seniority rules mean that new patrol officers tend to get the least-desired assignments — graveyard shifts and tough neighborhoods — while receiving the lowest compensation.[286]

Although problems of police wage inequality and job insecurity are tied partly to local governments' financial insolvency,[287] federal intervention could help bring balance between urban and suburban wages. Since the establishment of the federal Office of Community Oriented Policing Services in 1994, federal funding has flowed to local departments to incentivize various reforms.[288] Federal funding, then, could partially close the gap between the wages that local taxes can fund and the wages needed to attract the most skilled officers to the highest-need areas. State legislation could help as well. In Indiana, for example, legislators have proposed requiring the state's Office of Management and Budget to prepare an annual report comparing the salaries of state police with salaries in the three largest local police departments and to make recommendations about wage parity.[289] It is difficult to tell whether such legislation will be effective, but this bill represents one way that states could help reduce local wage disparity between officers.

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284. *Id.* at 65.

285. *See* Michael E. Walleman, *Seniority Rights*, 77 POLICE CHIEF 32 (2010).

286. *Id.*

287. *See* Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1120-21 (2014).

288. Jihong "Solomon" Zhao, Matthew C. Scheider & Quint Thuman, *Funding Community Policing To Reduce Crime: Have COPS Grants Made a Difference?*, 2 CRIMINOLOGY & PUB. POL'Y 7, 9 (2002).

289. H.R. 1384, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016).

Another practice that allocates policing resources to wealthier neighbor-hoods, to the detriment of poorer neighborhoods, is police departments' prac-tice of taking on secondary employment.[290] Under secondary employment ar-rangements, private entities such as sports teams or neighborhood associations can pay the police department extra money to provide additional police ser-vices. The DOJ has criticized such local government arrangements for "con-tribut[ing] to inequitable policing."[291] For example, when the DOJ first inves-tigated the New Orleans Police Department in 2011, some of its most significant criticism fell upon the Department's Paid Detail program.[292] Paid Detail gave officers the opportunity to earn extra money by working overtime for private pay, and most of the places they worked were the areas lowest in crime:

> The breadth and prevalence of the Detail system has essentially privat-ized officer overtime at NOPD, resulting in officers working Details in the areas of town with the least crime, while an insufficient number of officers are working in the areas of New Orleans with the greatest crime prevention needs. Those with means in New Orleans are essentially able to buy additional protection, while those without such means are unable to pay for the services and extra protection needed to make up for insufficient or ineffective policing . . . . While any community that wants extra security certainly has a right to pay for it, it raises troubling legal and ethical questions when that extra security might otherwise have been focused on parts of the City most in need of police assis-tance.[293]

This language might have been a clarion call to municipal governments to prohibit—or at least to regulate more effectively—the use of sworn police offic-ers as private security for overtime pay. However, perhaps because the investi-

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290. For instance, the Dallas Police Department receives payment from neighborhood associa-tions in exchange for special patrolling and related services. The number of hours and array of services varies based on the amount of money the association raises. *See* Naomi Martin, *As More Dallas Neighborhoods Pay for Extra Patrols, Some Question Fairness*, DALL. MORNING NEWS (Oct. 25, 2015), http://www.dallasnews.com/news/crime/headlines/20151025 -as-more-dallas-neighborhoods-pay-for-extra-patrols-some-question-fairness.ece [http:// perma.cc/FA9G-E2ED].

291. Civil Rights Div., *Investigation of the New Orleans Police Department*, U.S. DEP'T JUST. 73 (Mar. 16, 2011) [hereinafter DOJ NEW ORLEANS REPORT], http://nolaipm.gov/main/up loads/File/All/doj_report_110317.pdf [http://perma.cc/9SXB-5JWB].

292. *Id.* at 69-75.

293. *Id.* at 73.

gation revealed such a massive number of issues, the Report's critique of Paid Detail did not gain national traction.[294] In addition, the DOJ did not mention Paid Detail in its ultimate consent decree with the New Orleans Police Department.[295] Importantly, the Report's critique of Paid Detail is not general: it does not state that officer "moonlighting" is per se corrupt. It limits its analysis to the particularities of New Orleans, and even suggests an acceptable alternative Paid Detail governance structure. Based on that suggestion, local governments might do well to heed DOJ's call and centralize requests for private employment of off-duty officers so that they can better monitor the practice and use it to bring additional funds into their police departments.[296]

Another option would be to bar sworn police officers from taking on this type of secondary employment altogether. Instead, local governments could expect private entities who want extra security to hire staff through private firms. Some Seattle neighborhoods have instituted this approach.[297] Yet there are reasons to hesitate to take this path: private police do not have the same powers, nor operate under the same constitutional constraints, that apply to sworn police officers.[298] Private security officers might be used only for neighborhood observation and suspect tracking, but they need to contact public police to conduct searches and arrests. In any event, finding a way to maintain a public/private distinction in policing would solve the ethical problem of allow-

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294. Some have expressed concerns about these arrangements. For example, the Auditor of the City of San Jose, California issued a report in 2012 stating that "urgent reform and a cultural change" are needed in the off-duty employment program and expressed a concern about "inequities," though the specific concern was that there would be inequities among officers rather than unequal effects on the community. OFFICE OF THE CITY AUDITOR, POLICE DEPARTMENT SECONDARY EMPLOYMENT: URGENT REFORM AND A CULTURAL CHANGE NEEDED TO GAIN CONTROL OF OFF-DUTY POLICE WORK 13 (2012); *see also* STEVE TOPRANI, PITTSBURGH BUREAU OF POLICE, OUTSIDE AND UNMANAGED EMPLOYMENT: A REPORT DETAILING EXISTING POLICIES AND RECOMMENDING REFORMS (2014) (describing various police departments' approaches to the governance of secondary employment).

295. United States v. City of New Orleans, No. 12-1924 (E.D. La. Jan. 11, 2013) (consent decree).

296. DOJ NEW ORLEANS REPORT, *supra* note 291, at 74-75. Although the New Orleans system has been restructured, critics claim that it remains burdened with favoritism and inequality. David Hammer & John Simerman, *Despite Reforms, NOPD Officers Still Keep Details for Themselves*, WWL-TV (Feb. 10, 2015, 10:49 PM), http://legacy.wwltv.com/story/news /local/investigations/david-hammer/2015/02/10/despite-reforms-nopd-officers-still-keep -details-for-themselves/23212303 [http://perma.cc/4Z92-EU9K].

297. *See, e.g.*, Jessica Lee, *Seattle Neighborhoods Hire Private Security Amid "Blatant Lawlessness,"* SEATTLE TIMES (Jan. 23, 2016, 8:44 PM), http://www.seattletimes.com/seattle-news/citizen -anti-crime-movement-afoot-in-seattles-neighborhoods [http://perma.cc/8ADP-HDBS].

298. Joh, *supra* note 152, at 49.

ing the training, equipment, and culture that the public provides to sworn police officers to directly reproduce neighborhood inequality.

Secondary employment is thus a mechanism through which poorer communities are structurally excluded from good policing. Officers may receive overtime pay for working as officers in wealthier areas, while they only earn paltry wages to keep distressed neighborhoods safe. This dynamic sends a stark message that protecting wealthier areas is more lucrative than protecting higher-poverty areas. Secondary employment policies like these might even suggest, at least symbolically, that African American and poor lives truly lack value.

C. Reorganizing the Police

There are more than twelve thousand police departments in the United States, nearly half of which employ fewer than ten police officers.[299] Even as philosophies of policing have shifted dramatically over the past century, governance structures of policing have largely remained intact.[300] Consolidation of very small police districts might be another way to ameliorate the structural exclusion from police resources that contributes to legal estrangement. Although consolidating districts would not constitute a total reorganization of departments, it might be a strong first step toward creating a structure more amenable to meaningful community engagement and checks on police power.

The proliferation of many small police departments means that some neighborhoods can essentially become individual fiefdoms for certain officers. The issue of unchecked power in extremely small rural or suburban police departments came to national attention for a very short time in late 2014, when a South Carolina prosecutor attempted twice to win the conviction of Richard Combs, the police chief and sole police officer in Eutawville, South Carolina—a town with a population of 315. Combs was charged with murder for shooting Bernard Bailey, a fifty-four-year-old unarmed African American man, in the parking lot of Eutawville's town hall in May 2011. Bailey had intervened when Combs issued a traffic ticket to Bailey's daughter, and the shooting allegedly occurred a few days later when Combs attempted to serve Bailey with a warrant for obstruction of justice. Some onlookers saw Combs as an example of an

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299. Reaves, *supra* note 269, at 1.

300. GARLAND, *supra* note 16, at 169 ("[T]he stated purposes of police have changed, sometimes quite dramatically, and new tactics increasingly define how they deploy their resources. But studies of police budgets and working practices suggest that the daily practices of most police forces have not changed so drastically as this would suggest. And, moreover, these new priorities and tactics have not, as yet, led to any basic reorganization of the police as a public agency.").

officer who, because he functioned as the sole traffic officer, regular patrol officer, and police chief, had unfettered power to use the machinery of criminal justice for vindictive purposes—a structure that seems almost destined to produce corrupt police action.[301] Yet after the briefest of moments, as Combs ultimately took a guilty plea for misconduct in office and as bigger-city shootings took over news cycles again, the issue of small police department governance returned to obscurity.[302]

Small departments can also create various interjurisdictional inconsistencies ranging from the amount of training officers receive to the equipment available to keep themselves and civilians safe. For example, one of the arguments that Combs's attorney made to explain his decision to shoot Bailey was that, because the town he policed is very small, they did not have less lethal equipment such as a "stun gun" (Taser) or pepper spray. This meant that the only means of force he had available was his gun.[303] Whether giving Combs a Taser or pepper spray would have saved Bailey's life is a difficult question; however, it does seem likely that, in part because of the governance structure of his department, Combs did not have access to expensive Taser technology.

Moreover, the prevalence of very small departments in close proximity to each other increases the likelihood that an officer fired from one jurisdiction for serious reasons could find work as an officer in another. Poor communities are more likely to hire "gypsy cops," officers with spotty work histories who have been fired elsewhere, because their resource constraints make it more difficult for them to discriminate between good and bad officers.[304] Again, the officers least likely to conduct their work in a procedurally just manner are siphoned toward poor communities.

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301. Alan Blinder, *Rural Justice Focus of Ex-Police Chief's Murder Trial*, N.Y. TIMES (Jan. 7, 2015), http://www.nytimes.com/2015/01/08/us/richard-combs-bernard-bailey-shooting-case.html [http://perma.cc/GP2C-4HK8].

302. *See* John Monk, *Ex-Eutawville Chief Pleads Guilty to Lesser Charge, Will Serve No Time for Killing Black Motorist*, STATE (Sept. 1, 2015), http://www.thestate.com/news/local/crime/article33213873.html [http://perma.cc/HK6R-R4JV].

303. *Prosecutor: Death of Man Shot by Police Chief Was "Senseless,"* CBS NEWS (Jan. 8, 2015, 3:41 PM), http://www.cbsnews.com/news/richard-combs-case-prosecutor-death-of-man-shot-by-police-chief-was-senseless [http://perma.cc/H3LY-A6H5].

304. *See, e.g.*, Timothy Williams, *Cast-Out Police Officers Are Often Hired in Other Cities*, N.Y. TIMES (Sept. 10, 2016), http://www.nytimes.com/2016/09/11/us/whereabouts-of-cast-out-police-officers-other-cities-often-hire-them.html [http://perma.cc/A39R-Q9ZG] (describing departments' failure to screen previously fired officers as a factor contributing to incidents of police misconduct). It is also worth noting that there is no national database of police officers who have been fired or lost their certification, in part because of police union opposition. *Id.*

Some have claimed, in line with strong federalism advocates and some basic tenets of public choice theory, that having more police agencies within close proximity increases competition, which in turn could improve their responsiveness to community needs and allow dissatisfied people to "vote with their feet" by relocating elsewhere. [305] Yet there is little evidence that these benefits emerge from the existence of very small police departments that lack meaningful external oversight, while there is some evidence that the current extreme fragmentation is detrimental to the overall quality of policing.[306]

Historically, one argument against department consolidation was that administrative centralization could threaten officers' ability to engage in community policing.[307] However, it may not be empirically true that fragmentation of police administration is correlated with, let alone a catalyst of, effective community-oriented policing. Indeed, some of the most celebrated efforts to link police and community have taken place in larger departments.[308]

By contrast, the sheer volume of locally controlled police departments, all of which have slightly different policies and issues, creates a major barrier to systemic reform. The seemingly infinite variations on police policy means that scholars and policymakers may *observe* common problems across local contexts but find it difficult to sufficiently address those problems on a larger scale.

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305. *E.g.*, Dagney Faulk & D. Eric Schansberg, *The Effects of City-County Consolidation: A Review of the Recent Academic Literature*, IND. POL'Y REV. FOUND. 4 (Nov. 16, 2005), http://www .in.gov/legislative/interim/committee/2005/committees/prelim/MCCC02.pdf [http:// perma.cc/2YPU-ZWLC]. *But see* Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 HARV. J.L. & PUB. POL'Y 29, 31 (2009).

306. *See, e.g.*, *Overcoming the Challenges and Creating a Regional Approach to Policing in St. Louis City and County*, POLICE EXECUTIVE RES. F. 40-42 (Apr. 30, 2015), http://www.policeforum .org/assets/stlouis.pdf [http://perma.cc/V3LA-M8UW].

307. *See* Mark Ernst, *What Impact Will Consolidation of Police Services by Small and Medium Size Police Agencies Have on Community Oriented Policing by the Year 2003?*, CAL. COMMISSION ON PEACE OFFICER STANDARDS & TRAINING 2 (July 1994), http://www.ncjrs.gov/pdffiles1/Digit ization/151687NCJRS.pdf [http://perma.cc/FA7W-CBMU] ("On the face of it, the concepts of community oriented policing and consolidation of police services appear to be diametrically opposed."); Stephen D. Mastrofski & James J. Willis, *Police Organization Continuity and Change: Into the Twenty-First Century*, 39 CRIME & JUST. 55, 62 (2010).

308. For example, Cincinnati, Ohio, provides one of the most celebrated stories of police restructuring done well. *See, e.g.*, Alana Semuels, *How To Fix a Broken Police Department*, ATLANTIC (May 28, 2015), http://www.theatlantic.com/politics/archive/2015/05/cincinnati-police-re form/393797 [http://perma.cc/M22E-KNZR]. The Cincinnati Police Department employs roughly 1,000 sworn officers. *About Police: Cincinnati Police Department*, CITY CINCINNATI, http://www.cincinnati-oh.gov/police/about-police [http://perma.cc/4GYX-WYTW]. As noted above, one of the pitfalls of "community policing" is its nonspecificity. *See supra* note 253 and accompanying text. Yet the problem-oriented community policing model employed in Cincinnati seems to offer a potential positive way forward.

Consolidation would help if only because it would decrease the number of departments and make it easier to gain a picture of their policies and practices.

Unlike many of the structural reforms proposed in this Part, department consolidation has gained some support from advocates for money saving in criminal justice. After the 2008 recession, municipal budgets shrank and many officers were furloughed or laid off.[309] Local executives are increasingly considering police consolidation as a potential cost-effective structural reform, and some departments have already consolidated as a way to cut redundancies.[310] Thus, consolidation could win the mutual support of fiscal conservatives and liberals, building a coalition reminiscent of the left-right nexus on cutting mass incarceration.[311] However, significant hurdles could impede such a reform. For one, members of the public who live in very small towns may interpret consolidation of small departments as a cut to their public safety and to local control of their police force. In addition, consolidation would mean that some people who have immense power would be required to yield it. These fundamental issues mean that securing support for department consolidation in local areas will pose a significant challenge.

D. Raising the Stakes of Fourth Amendment Jurisprudence

Understanding today's policing crisis as a problem of legal estrangement clarifies and raises the stakes of our Fourth Amendment jurisprudence. When judges rule on the lawfulness of police conduct in a single case, they are ruling on a "program."[312] That program is bigger than systematic *Terry* stops-and-frisks of young African American and Latino men.[313] The program is endemic

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309. *See* Jeremy M. Wilson, Alexander Weiss & Clifford Grammich, *Pathways to Consolidation: Taking Stock of Transitions to Alternative Models of Police Service*, OFF. COMMUNITY ORIENTED POLICING SERVICES 3 (2015), http://policeconsolidation.msu.edu/sites/default/files/Path waysToConsolidationAlternativeModels.pdf [http://perma.cc/833U-2PVH].

310. *Id.*

311. On the conservative argument for reducing criminal justice spending, including through cutting incarceration, see *Statement of Principles*, RIGHT ON CRIME, http://rightoncrime.com /statement-of-principles [http://perma.cc/C6M4-Xp3X] ("Conservatives are known for being tough on crime, but we must also be tough on criminal justice spending. That means demanding more cost-effective approaches that enhance public safety. A clear example is our reliance on prisons . . . .").

312. Meares, *supra* note 16, at 179.

313. Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding the New York City Police Department liable for a pattern and practice of racial profiling and unconstitutional *Terry* stops).

to policing itself, including serving warrants[314] and responding (or not responding) to calls for assistance. Because of the longstanding social, cultural, and symbolic meaning of the police among African Americans and in racially and socioeconomically marginalized communities, policing cases—more than others—send messages to groups about social inclusion and, indeed, social citizenship. Legitimacy theory does not offer a consistent mode of response to this problem.[315]

What messages are conveyed in Fourth Amendment jurisprudence? Justice Sotomayor's impassioned dissent in *Strieff* showed her understanding that this case, even though it involved a white defendant, blessed police discretion to behave in ways that denigrate and alienate minority populations. To illustrate, we can return to the facts of *Strieff*.[316] In *Strieff*, a narcotics detective, Douglas Fackrell, conducted surveillance outside a home in southern Salt Lake City, Utah, for about a week. Fackrell had received an anonymous tip that people were selling and purchasing methamphetamine there. Fackrell saw several people enter and leave the home after short periods of time—behavior that, in his view, was consistent with drug dealing and purchasing. Edward Strieff was one of the people who visited the home. On one of these surveillance days, Strieff left the home in question and went to a nearby convenience store. Even though Fackrell only knew that Strieff had visited the home—information that did not amount to reasonable suspicion to justify a search—Fackrell followed Strieff to

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314. *E.g.*, Wesley Lowery, *Korryn Gaines, Cradling Child and Shotgun, Is Fatally Shot by Police*, WASH. POST (Aug. 2, 2016), http://www.washingtonpost.com/news/post-nation/wp/2016/08/02/korryn-gaines-is-the-ninth-black-woman-shot-and-killed-by-police-this-year [http://perma.cc/7JMQ-U78W]. While some media focused on Gaines's actions as a catalyst for the police response and her death, activists have claimed—more in line with a legal estrangement perspective—that the officers' decision to fire on Gaines when she was holding her five-year-old son was symbolic of their devaluation of African American lives. From a legitimacy perspective, the fact that Gaines was carrying a shotgun, which she allegedly fired, could be relevant—officers can explain, in a seemingly neutral way, why they made the decision to fire. From an estrangement perspective, regardless of whether the officers' decision was objectively reasonable, it was subjectively unreasonable and reproductive of the social exclusion of African Americans.

315. One exception to this characterization is some of Tracey Meares's scholarship. In particular, in a lecture on the legitimacy of police among young African American men, Meares argues that legitimacy-based policing can build trust between this population and the police. Meares, *Legitimacy of Police*, *supra* note 98, at 666. Yet Meares notes that a core assumption of legitimacy theory—that noncompliance with the law and law enforcement is attributable to a lack of belief in the legitimacy of the law or law enforcement—may not be fully supported in research, including her own. *Id.* The faultiness of this assumption, particularly as applied to young African American men, calls into question whether it is correct to assume that legitimacy-based policing will address this group's perception of police marginalization.

316. Utah v. Strieff, 136 S. Ct. 2056 (2016).

the convenience store, stopped him, and questioned him about what he was doing at the home in question. Fackrell also took Strieff's identification card and shared his information with a police dispatcher. The dispatcher told Fackrell that Strieff had an open warrant for his arrest on a minor traffic violation. Fackrell then arrested Strieff, and in a search incident to arrest, found the evidence he was looking for: Strieff was holding a small baggie of meth and other drug paraphernalia.[317]

Why is this case troubling? Fackrell violated the Fourth Amendment by stopping Strieff in the first place; even the prosecutor conceded that point.[318] Yet the Court ruled that because Fackrell learned that Strieff had an open warrant for arrest—even if just for a minor traffic violation—the search he conducted was sufficiently attenuated from the unconstitutional stop that the evidence Fackrell discovered was admissible. In a world where few people had open warrants, this decision might seem somewhat troubling, but not catastrophic. Yet in a scenario where a substantial number of people have open warrants, often for the most minor of infractions, often for noncriminal violations of probation and parole conditions, and often because of their poverty,[319] the *Strieff* decision authorizes tremendous power. Police officers are now free to arbitrarily (and even unconstitutionally) stop people, ask them for their identification, have a dispatcher search their record, find an arrest warrant for a long-unpaid parking ticket or a missed appointment with a probation officer, and use that ticket as a reason to conduct any physical search that they would like to conduct. If they find any contraband, that contraband could be used as evidence in court. While police officers need discretion in order to locate and deter crime, this ruling gives them a worrisome amount of license. When one views this ruling in context and imagines strategies like Fackrell's playing out in racially and socioeconomically marginalized places like West Baltimore, one understands more clearly that the Court has endorsed the wholesale exclusion of poor African Americans (and often Latinx communities) from the protection of the law and from their rightful place in society.

In *Whren v. United States*, the Court ruled, inter alia, that challenges to police investigations based on race-based selective enforcement must proceed through Fourteenth Amendment equal protection analysis rather than Fourth Amendment analysis.[320] Given the very high bar for proving racial discrimina-

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317. *Id.* at 2059-60.

318. *Id.* at 2060.

319. *See, e.g.*, Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 667-68 (2009).

320. 517 U.S. 806, 813 (1996).

tion under the Equal Protection Clause post-*Washington v. Davis*,[321] *Whren* significantly curtails the degree to which Fourth Amendment jurisprudence on police investigation could be used to correct racial discrimination in the conduct of police investigations.

Thus, state courts might under some circumstances be better suited than federal courts to factor in the local context of racial discrimination and disparity reflective of legal estrangement. For example, in late 2016, the Massachusetts Supreme Judicial Court ruled in *Commonwealth v. Warren* that an African American man's decision to flee from the police is not, on its own, sufficiently probative of reasonable suspicion.[322] The court partly based its reasoning on statistical evidence that African American men in Boston disproportionately experience stops based on racial profiling.[323] Black male Bostonians, the court cautioned, "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity."[324] In other words, in an environment where the police have signaled strongly to African American men that their group is not a full part of society entitled to the presumption of innocence, the natural response to that communication is to avoid the police, regardless of any involvement in crime. This was a judicial acknowledgement of the potential effects of legal estrangement.

Judges who rule on the constitutionality of searches should keep in mind the stakes of giving too much leeway to the police, stakes that legal estrangement theory illuminates. Traditionally, we think of the potential harms of policing gone awry as violations of privacy and individual dignity, and on the opposite side, we weigh the police's ability to respond to and reduce crime.[325] Yet as important as individual privacy is, the collective stakes are even higher. Moreover, some have argued that the text of the Fourth Amendment, emphasizing reasonableness, demands that courts consider distributional outcomes of

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321. 426 U.S. 229 (1976); *see also* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1453 (2016) (explaining the difficulty of challenging a pattern of discriminatory arrests under the Equal Protection Clause).

322. Commonwealth v. Warren, No. 11596, slip op. at 15-17 (Mass. Sept. 20, 2016); *see also* Commonwealth v. Mercado, 663 N.E.2d 243, 246 (Mass. 1996) (concluding that "evasive behavior" is insufficient to support reasonable individualized suspicion).

323. *Warren*, slip op. at 15-19.

324. *Id.* at 19.

325. *E.g.*, Schmerber v. California, 384 U.S. 757, 767-69 (1966). *But see* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 249-50 (1988) (suggesting that Fourth Amendment jurisprudence is aimed at regulating bureaucratic actors as well as protecting individual rights).

searches and seizures by race, gender, and other group categories.[326] The question of reasonableness has grown obscure as Fourth Amendment jurisprudence has come to focus so heavily on warrants, consent, probable cause, and so forth, perhaps distracting courts from the fundamental reasonableness inquiry that should take into account distributional concerns between groups.[327] Getting Fourth Amendment rulings wrong by giving the police too much power risks both individual and collective membership in the American social order.

E. Democratizing the Police

Legal estrangement demands a deep, meaningful approach to democratizing police governance. Bringing about cohesion and solidarity between police and African American and poor communities will require a more aggressive infusion of deliberative participation in policing than most proposals demand. A legitimacy approach might not *object* to deep democratization—these processes would arguably make the police more effective in securing voluntary compliance and would arguably encourage the police to use procedurally just methods—but legitimacy would not require it.

Barry Friedman and Maria Ponomarenko have recently argued against police exceptionalism in policymaking. They propose that police policies, such as the use of SWAT teams and warrantless searches, require legislative authorization, administrative rulemaking with notice-and-comment, or some other democratic process similar to other areas of regulation.[328] While their argument is persuasive, the communities most affected by legal estrangement are often locked out of the democratic process more generally. For a panoply of reasons, ranging from the education gap, to felony disenfranchisement and its chilling effects on turnout in high-incarceration communities, to active efforts at voter suppression, to gerrymandering, to the capture of policymaking through high-stakes lobbying, African Americans—particularly if they live in high-poverty communities—have relatively little say in who their representatives are or in the legislation that their representatives ultimately pass.[329] The

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326. Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 37-39 (1997).

327. *Id.* at 37.

328. Friedman & Ponomarenko, *supra* note 83, at 1834-36.

329. *See, e.g.*, Amy E. Lerman & Vesla M. Weaver, Arresting Citizenship 142 (2014) (describing the asymmetric power orientation toward government that arises from being subjected to the carceral state); Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy 185, 312-46 (2012) (discussing education and organized political action); Guy-

public in general participates sparingly in administrative rulemaking, and race- and class-distributed access gaps have long been seen in that area of lawmaking as well.[330] Shifting toward more democratic processes is important on the grounds of democracy and the rule of law, and it does provide an opening for meaningful change. However, it is unlikely on its own to unsettle legal estrangement in the communities that are most affected by it.[331] Combining these processes with other democracy-enhancing reforms might be necessary.

Transparency measures, including data collection and "hot ticket" reforms such as police officer body cameras, can also contribute to the overall democratization of policing in a way that could begin to root out legal estrangement.[332] Currently, the most widely distributed videos that focus on police generally show officers either engaging in forceful or other distasteful behavior, or performing acts such as dancing, playing basketball, or distributing ice cream. The former are unsettling because they emphasize police wrongdoing rather than police officers' effective interactions with the public, which are likely more common; the latter are unsettling because they suggest such acts are core to today's iteration of "community policing." Data might alert scholars and activists to overlooked systemic problems, but they could also illuminate police agencies and officers that are doing their work properly. If one suspects that most police interactions go the way that they should, data and transparency can potentially be a boon to solidarity between officers and communities. Data can perhaps put what police actually do most of the time in clearer perspective.

Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1260-62 (2003).

330. *E.g.*, Charles A. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1259-60 (1966); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1333-52 (2016) (describing reliance on questionably representative interest groups to ensure participation in administrative rulemaking).

331. Offering a more optimistic account, Friedman and Ponomarenko point to national civil rights organizations, such as the NAACP and ACLU, along with more regional and local groups, like churches, as giving voice to the disenfranchised communities. Friedman & Ponomarenko, *supra* note 83, at 1789-80. However, given what political sociology reveals about the processes through which community groups often come to represent community interests, it might not be safe to assume that large national organizations or community nonprofits are a reliable channel for ensuring sufficient democratic voice in policing to root out legal estrangement. *See, e.g.*, Jeremy R. Levine, *The Privatization of Political Representation: Community-Based Organizations as Nonelected Neighborhood Representatives*, 81 AM. SOC. REV. 1251, 1268-72 (2016) (arguing that, although community-based organizations help channel resources to under-resourced neighborhoods, those resources may come at the cost of democratic accountability).

332. *See* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1121-31 (2000) (describing the democratic bases for increasing availability of governmental information about policing).

When then-State Senator Obama led the Illinois Legislature in passing antiracial profiling legislation in 2003,[333] he emphasized that the purpose of the bill was to collect data on police activity. He convinced the Fraternal Order of Police that the data would give them an opportunity to show that they were doing valid police work, not engaging in racial discrimination.[334] This initiative represents only one example of a transparency measure that could serve both to root out estrangement and to provide a more informed understanding of police. Yet perhaps an even more effective approach would include ways to make policing more qualitatively transparent — for instance, making videos of regular police work more publicly available, opening access to police departments, and perhaps even finding ways to support more adversarial forms of transparency and accountability, such as organized cop watching.[335]

Reconciliation is a third type of democratic reform that the legal estrangement perspective might suggest. Criminologist and activist David Kennedy, along with leaders of the DOJ-funded National Initiative for Building Community Trust and Justice, have proposed that police departments undertake a "reconciliation" process between officers and historically distressed communities.[336] Although the specific mechanisms that would be officially instituted are unclear, the proposed process would involve "a method of facilitating frank engagements between minority communities, police, and other authorities that allow them to address historical tensions, grievances, and misconceptions, and reset relationships."[337] The idea of reconciliation builds on Kennedy's groundbreaking work as founder of Operation Ceasefire and the National Network for Safe Communities (NNSC). Through these two organizations, Kennedy and others engaged in a deep strategy of violence prevention by working with local gangs and bringing those offenders together with key stakeholders, including the police.[338] The newly proposed reconciliation efforts represent an effort to

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333. *See* Ill. Public Act 093-0209 (2003).

334. *See* Edward McClelland, *Barack Obama and Racial Profiling*, NBC CHI. (July 18, 2013), http://www.nbcchicago.com/blogs/ward-room/Barack-Obama-and-Racial-Profiling -215986531.html [http://perma.cc/QPP3-XL22].

335. On organized copwatching, see generally Simonson, *supra* note 191.

336. Zoe Mentel, *Racial Reconciliation, Truth-Telling, and Police Legitimacy*, U.S. DEP'T JUST. 19 -21 (2012), http://nnscommunities.org/uploads/Racial-Reconciliation_Truth-Telling_and -Legitimacy.pdf [http://perma.cc/TP5G-U4SJ]; *Reconciliation*, NAT'L INITIATIVE FOR BUILD-ING COMMUNITY TR. & JUST., http://trustandjustice.org/resources/intervention/recon ciliation [http://perma.cc/NJ3B-TKUS].

337. *Reconciliation*, *supra* note 336.

338. *See* DAVID M. KENNEDY, DON'T SHOOT 83 (2011).

scale up some of the insights gained from these local violence-reduction interventions.

The mechanics of this reconciliation proposal remain unclear. The proposal is distinct from prevailing democratic reform recommendations because it takes very seriously the historical roots of legal estrangement, accommodates the complexity of the dynamics between officers and communities, and in some ways meets the Habermasian ideal of a truly deliberative, consent-based approach to policing. Taking full account of historical distrust is essential to the success of cultural change, to avoid "merely replacing one modality of domination with another."[339]

However, governments usually use truth and reconciliation processes to address injustices that occurred over a cognizable, bounded time period and involved a fairly identifiable set of wrongdoers.[340] To deal with the problem of legal estrangement, a restorative reconciliation model would have to recognize the deeply systemic nature of the problem. Moreover, NNSC's goal of reducing violence is not the same as rooting out legal estrangement. A key insight that drives the innovation in Operation Ceasefire and other programs is that most of the violence in a community is concentrated within relatively confined networks.[341] Thus, deeply targeting those networks in a deliberative, legitimacy-building way is a successful approach. Legal estrangement, in contrast, is more dispersed and broadly influential. However, the basic intuitions of reconciliation — intentionally bringing police and communities together to build trust on a group level, and actively reckoning with the collective memories of harsh policing — reflect the type of intensive, deeply democratic process that might produce long-lasting cultural change.

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339. Mustafa Emirbayer & Victoria Johnson, *Bourdieu and Organizational Analysis*, 37 THEORY & SOC'Y 1, 32 (2008).

340. *See* Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315, 319 (1999) ("Truth commissions are thought to play the symbolic role of making a decisive break with the official sponsorship of human rights violations that characterized the past."); *see also* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 62 (1998) (characterizing the truth commission as a possibility for healing and justice "*after* periods of terror and violations of human rights" (emphasis added)).

341. Andrew V. Papachristos, David M. Hureau & Anthony A. Braga, *The Corner and the Crew: The Influence of Geography and Social Networks on Gang Violence*, 78 AM. SOC. REV. 417, 438 (2013).

F. Shrinking & Refining the Footprint of the Police

Finally, the legal estrangement perspective raises fundamental questions about the role of police in society. Police—and more broadly, the criminal justice system—have become the primary vehicle through which the state responds to social deprivation.[342] At times, police can play a positive role in channeling resources to people who need them, particularly as a conduit into diversion and decarceration programs that may, for example, help people get into counseling and narcotics rehabilitation programs.[343] Yet as a matter of principle, routing rehabilitation and social services through the police could perversely widen the carceral net and reify the "culture of control."[344] The expansion of policing control has added to police departments' coffers over the past three decades, leading to the growth of many forces.[345] Yet even police officers complain that the system expects them to play an outsized role in poor people's daily lives, performing functions that supplant work ideally done by the welfare state and social services.[346] This work—responding to mental

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342. *See, e.g.*, Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity, at xx-xxii (2009); Coates, *supra* note 255 ("Vexing social problems—homelessness, drug use, the inability to support one's children, mental illness—are presently solved by sending in men and women who specialize in inspiring fear and ensuring compliance."); Kohler-Hausmann, *supra* note 16, at 691-92; Bruce Western, *The Rehabilitation Paradox*, New Yorker (May 9, 2016), http://www.newyorker.com/news/news-desk/the-rehabilitation-paradox [http://perma.cc/PT4M-E27B].

343. *See, e.g.*, Bell, *supra* note 42, at 332-34; Mary Fan, *Street Diversion and Decarceration*, 50 Am. Crim. L. Rev. 165, 167-68 (2013); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 Ga. L. Rev. 1253, 1299-1301 (2000).

344. *See* Garland, *supra* note 16; *see also* Jessica Eaglin, *The Drug Court Paradigm*, 53 Am. Crim. L. Rev. 595, 635 (2016) ("[D]rug courts may have incentivized police and prosecutors to expand the number of individuals processed within the system for drug offenses due to the well-meaning belief that the justice system would offer better treatment."); Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 Geo. L.J. 1587, 1619-20 (2012); Natapoff, *supra* note 250, at 1059.

345. George Gascón & Todd Foglesong, *Making Policing More Affordable: Managing Costs and Measuring Value in Policing*, Nat'l Inst. Just. (Dec. 2010), http://www.ncjrs.gov/pdffiles1/nij/231096.pdf [http://perma.cc/9NTG-K986].

346. *See, e.g.*, Brady Dennis, Mark Berman & Elahe Izadi, *Dallas Police Chief Says 'We're Asking Cops To Do Too Much in this Country,'* Wash. Post (July 11, 2016), http://www.washingtonpost.com/news/post-nation/wp/2016/07/11/grief-and-anger-continue-after-dallas-attacks-and-police-shootings-as-debate-rages-over-policing [http://perma.cc/X72P-7EFG]. This is not a new issue. *See, e.g.*, Albert J. Reiss, Jr., The Police and the Public 63 (1972); Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, *in* The Potential for Reform of Criminal Justice 17 (Herbert Jacob ed., 1974).

health crisis,[347] truancy,[348] homelessness,[349] and more[350]—is done by civil servants who are authorized to carry guns and use lethal force.[351] It is done by civil servants who, through the mechanisms of self-selection,[352] institutional culture,[353] and perhaps more, may be more punitive or less empathetic than the average civil servant.[354]

The legal estrangement perspective should encourage serious reflection on whether, and how much, armed officials should inhabit the role of social caretaker. Recently, scholars and policymakers have pushed for a cultural shift in policing, proposing that officers see themselves as "guardians" rather than "warriors."[355] While this work is commendable, it demands greater discussion of the nature and scope of the guardianship that we should expect the police to provide. It might be that reforms that enable greater collaboration between police and social services could make the police more legitimate at an individual level—but it might also, in the aggregate, worsen disparities in criminal justice

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347. *See* Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 4-5 (2010) (introducing three modalities of police interaction with the mentally ill).

348. *See* Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 867 (2015).

349. *See* BECKETT & HERBERT, *supra* note 16, at 12-14.

350. *See* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority To Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 403 (2001).

351. *See* MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H.H. Gerth & C. Wright Mills eds. & trans., 1946) ("[A] state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.").

352. Richard H. McAdams, Dhammika Dharmapala & Nuno Garoupa, *The Law of Police*, 82 U. CHI. L. REV. 135, 142-47 (2015).

353. *See generally* Barbara E. Armacost, *Organizational Culture & Police Misconduct*, 72 GEO. WASH. L. REV. 45 (2004) (arguing that the powerful culture of police departments sets conditions that produce violent misconduct).

354. *See* Canice Prendergrast, *The Motivation and Bias of Bureaucrats*, 97 AM. ECON. REV. 180, 192 (2007); *see also* Richard H. McAdams, Dhammika Dharmapala & Nuno Garoupa, *Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure* (Coase-Sandor Inst. for Law & Econ., Working Paper No. 644, 2015), http://chicagounbound.uchicago.edu/law_and_econ omics/642 [http://perma.cc/N2C8-GGFH].

355. *See* TASK FORCE REPORT, *supra* note 6, at 1 ("Law enforcement culture should embrace a guardian—rather than a warrior—mindset to build trust and legitimacy both within agencies and with the public."); Sue Rahr & Stephen K. Rice, *From Warriors to Guardians: Recommitting American Police Culture to Democratic Ideals*, NAT'L INST. JUST. (Apr. 2015), http:// www.ncjrs.gov/pdffiles1/nij/248654.pdf [http://perma.cc/355P-JDJD]; Stoughton, *supra* note 253, at 612-14.

treatment by race and class. This aggregate effect would increase legal estrangement.

Ultimately, the legal estrangement perspective demands a more holistic discussion of institutional competence. A legitimacy analysis often examines institutions in a decontextualized way, assessing whether a particular institution (here, the police) has legitimacy or not. Legal estrangement encourages a more relational examination of institutions. The frailty of one bundle of institutions—here, the welfare state—might chip away at the legitimacy of the police, of other institutions, and perhaps the state itself. Shrinking the footprint of armed bureaucrats and creating a more robust system of civil supports might bring more legitimacy to these institutions and increase their capacity to produce social inclusion.

CONCLUSION

This Essay argues that legal estrangement—a theory that focuses on the symbolic and structural marginalization of African Americans and the poor from society—provides richer theoretical grounding for police reform. Legal estrangement theory incorporates procedural justice, a solution derived from legitimacy theory, as a first step toward understanding police distrust among African American and poor communities. Yet legal estrangement surpasses legitimacy theory by fully considering two larger levels at which distrust operates: vicarious marginalization and structural exclusion. Vicarious experiences range from the mistreatment of a friend, as Jamila experienced, or through learning about more distant negative treatment, as Shawna experienced when she learned about the officer rapes. Structural aspects of policing—the drug searches that happened at Lemuel's school, the "knockers" that he encountered in his neighborhood, and the discretion to enforce questionable walking ordinances against kids like Justin—exclude whole groups of people from experiencing policing as a protective benefit and create a dividing line between the valued and the valueless.

Drawing on these theoretical insights, I have proposed a number of areas for reform that, taken together, should help create the deep and lasting cultural change that will be required to truly overcome legal estrangement. These reforms range widely, including more technocratic reforms (restructuring police wages and consolidating districts), judicial measures (rethinking Fourth Amendment levels of interpretation), community-centered measures (democratization, reconciliation, and transparency), and a fundamental revisitation of institutional roles (shrinking and refining the police footprint while linking it to a shoring up of critical social welfare institutions). These solutions offer a deeper path forward than the legitimacy perspective does, pushing beyond

procedural justice. They do, of course, remain incomplete. The legal estrangement perspective demands taking account of historically rooted group marginalization and the collective consciousness of discrimination and mistreatment. This historical and collective perspective is central to the project of police reform. Accordingly, the perspective sensitizes police reformers to the idea that, while modifications within the institution of policing are critical and should move beyond individual line officers, their work will not be finished until it spurs change in the full array of institutions that perpetuate poverty, race-correlated disadvantage, and symbolic statelessness.