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BLACK, WHITE, AND BLUE: BIAS, PROFILING, AND POLICING IN THE AGE OF BLACK LIVES MATTER

*Dr. Bridgette Baldwin**

“Most middle-class whites have no idea what it feels like to be subjected to police who are routinely suspicious, rude, belligerent, and brutal.”¹

Benjamin Spock

INTRODUCTION

On July 17, 2014, in Staten Island, New York, Eric Garner lost his life to an illegal chokehold at the hands of police officer Daniel Pantaleo.² With his last words, Garner uttered the phrase that became a rallying cry for social justice activists and their allies all across the country: “I can’t breathe.”³ Just a month later, on August 9, 2014, white police officer Darren Wilson shot and killed Michael Brown, an unarmed black teenager, in Ferguson, Missouri.⁴ For many, Brown’s death was a tragedy, but the horror escalated when hours later his bullet-riddled body was still in the street for all to see,⁵ generating a collective

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1. BENJAMIN SPOCK, *DECENT AND INDECENT: OUR PERSONAL AND POLITICAL BEHAVIOR* 103 (1970).

2. Jonathon Sizemore, *Eric Garner’s Death: No Justice, No Peace*, CITYLAND (Mar. 16, 2017), <http://www.citylandnyc.org/eric-garner-death-no-justice-no-peace/> [https://perma.cc/25SE-Q23V]; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0.

3. Goodman & Baker, *supra* note 2.

4. Frances Robles & Julie Bosman, *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, N.Y. TIMES (Aug. 17, 2014), <https://www.nytimes.com/2014/08/18/us/michael-brown-autopsy-shows-he-was-shot-at-least-6-times.html>.

5. *Id.*

confirmation that truly black lives do not matter. Officer Wilson was never indicted, charged, or convicted for Brown's death.⁶ On November 22, 2014, twelve-year-old Tamir Rice lost his life when officer Timothy Loehmann shot him in Cleveland, Ohio.⁷ This child, who many say had a severe learning delay, was outside at the park playing with a toy gun. A 911 call revealed that someone, probably a juvenile, was outside with most likely a fake weapon.⁸ With no investigation, no conversation, no attempt at de-escalation, the police rolled up to the park, opened their doors, and opened fire.

The deaths of Eric Garner in New York City, Michael Brown in Ferguson, Tamir Rice in Cleveland, and too many others caused waves of nationwide protest and appeals for justice.⁹ What could possibly account for such violations of civil rights against citizens protected under the law? How could the justice system in many cases offer no remedy to the families of these victims? How could this spark such revolutionary movements such as Black Lives Matter (#BlackLivesMatter)¹⁰ and Colin Kaepernick's #TakeAKnee¹¹ campaign? In this article, I will attempt to offer an answer to these questions.

6. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

7. Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 57, 61 (Angela J. Davis ed., 2017); see also Lindsey Bever, *Cleveland Police Kill 12-Year-Old Boy Wielding BB Gun That Looked Like a Semiautomatic Pistol*, WASH. POST (Nov. 24, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/11/24/cleveland-police-kill-12-year-old-boy-wielding-bb-gun-that-looked-like-a-semi-automatic-pistol/?utm_term=.cc618ef838e8 [<https://perma.cc/ZDQ5-QCT2>].

8. See Bever, *supra* note 7; see also *Hear the 911 Call About Tamir Rice: Gun is 'Probably Fake,' Caller Says*, L.A. TIMES (Nov. 26, 2014, 5:59 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-tamir-rice-911-call-20141126-htmlstory.html> [<https://perma.cc/AA8Q-D3FQ>].

9. Nicole Fuller et al., *'Millions March NYC,' Protesting Grand Jury Decision in Eric Garner Death, Ends in Manhattan*, NEWSDAY (Dec. 13, 2014, 11:01 PM), <https://www.newsday.com/news/new-york/millions-march-nyc-protesting-grand-jury-decision-in-eric-garner-death-begins-in-manhattan-1.9711149> [<https://perma.cc/BK9V-AZBM>].

10. *Platform*, THE MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform/> [<https://perma.cc/G2R8-U379>].

11. AJ Willingham, *The #TakeAKnee Protests Have Always Been About Race. Period.*, CNN (Sept. 27, 2017, 10:24 AM), <https://www.cnn.com/2017/09/27/us/nfl-anthem-protest-race-trump-trnd/index.html> [<https://perma.cc/P2RD-SUNQ>]; Lilly Workneh, *#TakeAKnee Isn't About the Flag. It's About America's Racism*, HUFFINGTON POST (Sept. 25, 2017) https://www.huffingtonpost.com/entry/taketheknee-isnt-about-the-flag-its-about-americas-racism_us_59c91ddb4b06ddf45f9cee5 [<https://perma.cc/3BZG-L9T6>].

First, the blackness of a suspect has become the justification for a violent response by not only law officials but by people in general. Implicit bias, or unconscious association, gives the actions of the African American a different meaning, particularly in a society that reacts and acts according to the race of an individual. If we associate blackness with suspicion, violence, laziness, drug use and distribution, etc., then such associations become the normative frame for how all African Americans are perceived.

Second, countless acts of violence against unarmed black citizens by law enforcement officials are not new; what is new is the technological circulation of these events with a greater speed and reach. Social media has allowed rapid recording and dissemination of police violence. So, what appears to be a new phenomenon is an old dog with no new tricks, but now showcased within a digital age.

Third, the over-criminalization of communities of color has led to higher rates of surveillance, arrest, prosecution, and convictions. These higher rates of prosecution support a false premise that African Americans are more dangerous and prone to criminal behavior. Just imagine the increased levels of crime that would be uncovered if more affluent neighborhoods were subject to the same rates of policing. Just policing will never occur until we can approach all neighborhoods, and the people within them, with the same presumption of humanity, presumption of civility, and presumption of innocence.

I. I AM WHATEVER YOU SAY I AM: IMPLICIT BIAS

In the context of policing, African Americans are more likely to be stopped, arrested, and confronted with a violent response if suspected of criminal behavior. The blackness of a suspect has become the justification for not only a violent response by law officials but also justification for that violence by the public in general. Although civil rights ideology posits that in order to end racism, we must be colorblind, the reality is that “[w]e are not perceptually, cognitively, or behaviorally colorblind” in our policing efforts.¹² Studies suggest there are moments of unconscious presumptions that impact our interactions and behavior toward other groups.¹³ Societal implicit bias or unconscious associations, particularly in a society that acts and reacts according to the

12. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 468 (2010).

13. See generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

race of an individual, gives black social behavior a different meaning when it comes to what would be considered typical, normal, or “non-criminal” by our majority white society.

Implicit biases are unconscious beliefs, attitudes, or stereotypes that individuals hold about a particular group of people.¹⁴ It is said that these biases operate outside our conscious awareness.¹⁵ Perceptions, actions, or decision-making is often influenced by psychological and unconscious beliefs. These beliefs are often formed by repeated associations of particular groups with particular ideas, actions, or presumptions.¹⁶ Therefore, if police officers associate blackness with suspicion, laziness, drug abuse, or violence, then such associations directly inform how African Americans will be perceived or treated, even in what would normally be understood as a non-criminal and non-threatening situation.

Research conducted around police officers’ interactions with citizens has shown that implicit bias is responsible for many of the negative responses by police officers when interacting with African Americans.¹⁷ One such study indicated that police officers were more likely to find suspicious behavior if the individual was black than if the individual was white.¹⁸ In a series of studies involving over 200 officers, researchers found that stereotypical associations demonstrated that the use of benign words, such as crime, shoot, arrest, etc. influenced an officer’s word association with a black face.¹⁹ These studies suggest that the race of an individual influenced the perception and attention deployed in police decision-making.²⁰ The more an African American appeared stereotypically “Black,” the more likely that individual was

14. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 152 (2010); Greenwald & Krieger, *supra* note 13, at 951.

15. Greenwald & Krieger, *supra* note 13, at 946.

16. *Id.* at 951–52.

17. See B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 190–91 (2001).

18. GEOFFREY P. ALPERT ET AL., U.S. DEP’T OF JUSTICE, POLICE OFFICERS’ DECISION MAKING AND DISCRETION: FORMING SUSPICION AND MAKING A STOP 3 (2004), www.ncjrs.gov/pdffiles1/nij/grants/213004.pdf [<https://perma.cc/52GZ-JLT9>].

19. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 887–88 (2004).

20. *Id.*

perceived as a criminal.²¹ Black men are labeled as aggressive and violent, and densely populated communities where African Americans live are labeled as “high-crime areas,” which may have little to do with the actual behavior of an individual person.²² When police officers continuously interpret a particular behavior along racial lines, implicit biases become more than opinions held, but actually govern their interactions with black citizens.²³

Implicit bias, or perceived ideas about a racial group, leads to racial profiling. The race of the individual becomes a determinative factor in whether a person should be considered a criminal suspect, and in some cases, the target of police violence. African Americans become targets of police suspicions simply because of their racial identity. Police officers, unlike Mark Fuhrman,²⁴ will rarely admit that they hold any racist beliefs or that racism motivated their actions. In fact, because of repeated associations of blackness with criminal conduct, when police officers are confronted with a black suspect, unconscious implicit biases suggest that a heightened level of control is required. Therefore, in the mind of the officer, racism is not even an issue because the suspect is perceived to be acting in a “suspicious” manner or moving through a “high-crime” area; the justification for the contact is built into the bias. Racial profiling allows certain ideas about behavior to be associated with a group of people simply because of racial identity. In the 1980s, African American mothers were profiled as welfare queens, which signified their hyper-sexuality and laziness.²⁵ African American youth in the late 1990s were described as super-predators, which signified their criminality.²⁶ The phenomenon that put racial profiling on the map,

21. *Id.*

22. See generally Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC. PSYCHOL. 871 (2000); Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322 (2008).

23. Eberhardt et al., *supra* note 19, at 878.

24. Over a span of about ten years, writer Laura McKinny interviewed then Los Angeles police officer Mark Fuhrman for a story about the treatment of women in the police department. Douglas O. Linder, *The O.J. Simpson Trial: Excerpts from the Trial Transcript: Testimony of Laura Hart McKinney*, FAMOUS TRIALS, www.famous-trials.com/simpson/1880-mckinneytestimony [https://perma.cc/2RJ3-3XB3]. During those interviews, he openly admitted to abusive practices targeting the African American community and used racist terminology including “nigger” when referring to African American citizens. *Id.*

25. Bridgette Baldwin, *In Supreme Judgment of the Poor: The Role of the United States Supreme Court in Welfare Law and Policy*, 23 WIS. J. L. GENDER & SOC’Y 1, 13 (2008).

26. John J. Dilulio, Jr., *My Black Crime Problem, and Ours*, CITY J. (1996),

“driving while black,” justified the overzealous roadside stops of African American motorists based on the view that black drivers were more likely to either exceed the posted speed limit or be couriers of illegal controlled substances.²⁷ Race, then, not only serves as a legitimate reason to confront the individual, but also to subdue him or her by whatever means is deemed necessary, despite the fact that racially motivated suspicion has never correlated to a reduction of crime.²⁸

Police brutality is not only a direct descendant of racial profiling, but also of implicit bias. Police brutality occurs when a police officer uses more force than is needed to approach, arrest, or subjugate a citizen. Police officers engage in excessive force when they use physical force to subdue a person. This can be done with the use of hands, a weapon, or even sexual abuse. Some forms of psychological intimidation, particularly during interrogation, have also been considered to be a form of excessive police behavior.²⁹ When it comes to minority suspects, police officers are more likely to use excessive force to initiate a stop or make an arrest. Minority suspects, particularly African American males, are perceived as more threatening, less compliant, and more violent. The linking of blackness to criminality will shape whether an unarmed African American will be shot when confronted during a traffic stop³⁰ or

<https://www.city-journal.org/html/my-black-crime-problem-and-ours-11773.html>
[<https://perma.cc/P7HQ-KCU6>].

27. Before being killed in 2016, Philando Castile had been stopped by police more than fifty-two times over the course of fourteen years. Donald F. Tibbs, *Racial Profiling in the Era of Black De-Constitutionalism*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 181, 181–86 (2016) [hereinafter Tibbs, *De-Constitutionalism*]. For further reading, see generally David A. Harris, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); the brief but useful summary of the profiling controversy in Michael K. Brown et al., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY (2003); and the most widely quoted report on profiling, STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, SELECTED HIGHLIGHTS OF THE INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (1999), http://www.state.nj.us/lps/intm_exe.pdf [<https://perma.cc/9JLF-Q46C>].

28. CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 154 (2014).

29. S. Danilina, *What is Police Brutality?*, LAW DICTIONARY, <https://thelawdictionary.org/article/what-is-police-brutality/> [<http://perma.cc/L4CK-DFL3>].

30. See Tibbs, *De-Constitutionalism*, *supra* note 27. On July 6, 2016, during a traffic stop to check for identification because the motorist, Philando Castile, resembled a robbery suspect, police officer Jeronimo Yanez fired seven bullets into Castile. Madison Park, *The 62-Second Encounter Between Philando Castile and the Officer Who Killed Him*, CNN (May 30, 2017, 12:10 PM), <https://www.cnn.com/2017/05/30/us/philando-castile-shooting-officer-trial-timeline/index.html> [<https://perma.cc/GWD6-9P79>]. Although he was charged with second-degree manslaughter and dangerous discharge of a weapon, he was acquitted on June 6, 2017. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June

while sitting on the ground with their hands in the air.³¹ While this might account for why African Americans are disproportionately killed by police officers, it certainly does not justify the social problem of disproportionate death at the hands of state agents. While one can recognize that certain unconscious biases might exist, the outcome that these biases produce should not relieve the individual—especially those pledged to protect and serve equally—of responsibility for their actions.

II. THE REVOLUTION WILL BE DIGITIZED: SOCIAL MEDIA

Traditionally, communities are informed about incidents of police violence, locally and around the country, through news reporting. However, citizen-news reporting through social media broadcasting has become a dominant place for the consumption of police violence. Social media news consumers watch countless violent acts against unarmed individuals as they are beaten and killed by law enforcement officials. Moreover, these digitized events are frequently re-circulated, surrounded by additional commentary, and even edited or combined with other events to enhance the meaning of police violence as a collective social experience. Although these violent atrocities are horrific, they are unfortunately not uncommon or even new. What is new, however, is the visual reporting of these actions through the use of digital technology. Social media broadcasting allows rapid recording and dissemination of police violence to reach a larger audience.

To be clear, the state-sanctioned attack or killing of African Americans has served as a carnivalesque spectacle or even public amusement since at least the era of post-emancipation. For example, white communities, filled with not only men and women, but also children, would gather to watch African Americans be lynched at the hands of vigilante mobs.³² Following a lynching, the black body was

16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philandocastile.html>.

31. On New Year's Day 2009, BART Officer Johannes Mesherle was responding to a call of a fight at the Fruitvale train station. See Donald F. Tibbs, *Who Killed Oscar Grant?: A Legal-Eulogy on the Cultural Logic of Black Hyper-Policing in the Post-Civil Rights Era*, 1 J. RACE, GENDER, & POVERTY 1, 1–2 (2010). Without any indication of criminal conduct, Mesherle ordered Oscar Grant to lay face down on the ground. *Id.* at 3. Although compliant, Mesherle pulled out his gun and shot Grant in the back. *Id.* at 4. Grant died moments later. *Id.*

32. PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF AMERICA* 306 (Modern Library 2003); CYNTHIA CARR, *OUR TOWN: A HEARTLAND LYNCHING, A HAUNTED TOWN, AND THE HIDDEN HISTORY OF WHITE AMERICA* 13 (2006); see also *History of Lynching*, NAACP, <http://www.naacp.org/history-of-lynchings/>

often burned while, sometimes, the knuckles or testicles from the body were taken as a keepsake or even put on display in store windows, thereafter.³³ In fact, the reason we have such a striking visual record of lynching is because the images were placed on postcards and circulated amongst family and friends across the country.³⁴ Although these state-sanctioned acts of racial violence were not circulated at the same pace and reach of Facebook or Twitter, they certainly paved the way for our current understanding of police brutality as a both public horror and voyeuristic spectacle.³⁵

Both the social media broadcasting and live coverage of police brutality has changed the way news is reported. The professional journalist is being replaced with the “citizen” reporter, and the broadcasting is largely unrestricted and uncensored. By example, the initial beating of Rodney King was recorded by “citizen” reporter George Holliday from his apartment with a Sony Handycam.³⁶ Although this was long before smartphones and social media were available, the circulation of King’s beating not only opened the door to recording police interactions with citizens, but also put an evil face on police brutality on a national scale. The onslaught of social media amplifies the callousness of individual police behavior and provides a vehicle for the world to see the graphic imagery of injustice that African Americans face, which can amplify a demand that something be done. The availability of Vine, Instagram, Periscope, and other social media platforms changes the rules of the game when it comes to media censorship, real-time reporting, reporting of police force, and even the interpretation of violence. Social media broadcasting has allowed the country to watch in horror the killing of Philando Castile in front of his girlfriend’s young daughter, the shooting of Alton Sterling while being held down by police,³⁷ and the senseless death of Walter Scott, who was

[<https://perma.cc/Q5ZF-5D8C>].

33. See Leon Litwack, *Hellhounds*, in *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* 8, 11 (James Allen et al. eds., 10th ed. 2000).

34. *Id.*

35. During the Civil Rights Era, Wide Area Telephone Service (WATS) lines were used to disseminate information across the country to other organizations and individuals. See VANESSA MURPHREE, *THE SELLING OF CIVIL RIGHTS: THE STUDENT NONVIOLENT COORDINATING COMMITTEE AND THE USE OF PUBLIC RELATIONS* 39–47 (2006).

36. George Holliday, *Rodney King Beating Video Full Length Footage Screener*, YOUTUBE (Mar. 12, 2015), <https://www.youtube.com/watch?v=sb1WYWlpUtY&t=10s>.

37. See generally Leah Donnella, *Two Days, Two Deaths: The Police Shootings of Alton Sterling and Philando Castile*, NPR (July 7, 2016) [https://www.npr.org/sections/codeswitch/2016/07/07/485078670/two-days-two-deaths-the-police-shootings-of-alton-](https://www.npr.org/sections/codeswitch/2016/07/07/485078670/two-days-two-deaths-the-police-shootings-of-alton-sterling-and-philando-castile)

shot in the back following a traffic stop for a broken brake light.³⁸ Traditionally, outside of war, such news would most likely have never been reported or certainly not circulated visually.

The popularity of social media platforms has not only transformed the way in which we now communicate, but it has also changed the way we view and observe the world around us, particularly how we understand and sometimes experience victimization and criminal behavior. Social media has developed “citizen” news reporting and provided a venue for its broadcast. This is particularly important as it relates to violence that has been committed against minorities by the police. The unjustified use of force is being filmed by these “citizen” reporters and then uploaded across social media sites in an effort to broadcast the news. When it comes to brutality against African American communities, there is no doubt that social media news broadcasting has proven to be an effective tool for galvanizing a political response.

Traditional media outlets would have been unlikely to report the death of Freddie Gray³⁹ or even the arrest and death of Sandra Bland.⁴⁰ However, social media broadcasting has either replaced or supplemented real-time reporting for the community. Additionally, grassroots organizations like #BlackLivesMatter have sprung up all over the country in reaction to the violence at the hands of police.⁴¹ After the killing of Trayvon Martin and then the display of Michael Brown’s body in Ferguson two years later, #BlackLivesMatter began to use hashtags to

sterling-and-philando-castile.

38. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>; see also Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html>.

39. For more discussion on the death of Freddie Gray, see Corinthia A. Carter, *Police Brutality, the Law & Today’s Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 545 (2017).

40. For more discussion on the death of Sandra Bland, see Belén V. Lowrey-Kinberg & Grace Sullivan Buker, *“I’m Giving You a Lawful Order”*: *Dialogic Legitimacy in Sandra Bland’s Traffic Stop*, 51 L. & SOC’Y REV. 379, 379–80 (2017) (explaining that after a routine traffic stop for failure to signal for a lane change, Sandra Bland was found hanging in her jail cell).

41. Such organizations include, but are not limited to, Black Organizing Project Membership Center, Movement for Black Lives, Causa Justa: Just Cause Priorities Project, Dream Defenders, One DC: Organizing Neighborhood Equity, One Voice, Organization for Black Struggle, Worker Center for Racial Justice, and Southern Rural Black Women’s Initiative.

create awareness of the problem and to garner support and solidarity from the general public. Social media directly impacted the growth and awareness of the #BlackLivesMatter Movement as a concrete organization.⁴²

Social media's presence has become an influential tool for public scrutiny; its platforms offer powerful sites for documenting and challenging incidences of police brutality. Social media broadcasting can be an effective tool in changing society's association of criminality with the African American community, while at the same time scrutinizing the lawless behaviors of police officers. The Civil Rights Movement has taught us that much of the progress toward equality is fueled largely in part by the efforts of grassroots organizations and the technology available to them at the time. During the 1960s, it was the telephone or the newsreel and today, it is the Internet. The #BlackLivesMatter Movement has been hailed as the new civil rights movement of today. While this movement represents the primary organization formed out of the senseless killing of Michael Brown, its tenets have spurred other organizations to press for change.⁴³ #BlackLivesMatter has used social media broadcasting not only to spread live, unedited footage of police violence, but also to organize groups of people in real time. For example, social media broadcasting by #BlackLivesMatter was instrumental in getting the Confederate flag removed from the state capitol building in Virginia⁴⁴ and was influential in Missouri and Maryland⁴⁵ when residents pressed the criminal justice system to investigate police brutality.⁴⁶ Through these actions, social

42. See DEEN FREELON ET AL., *CTR. FOR MEDIA & SOC. IMPACT, BEYOND THE HASHTAGS: #FERGUSON, #BLACKLIVESMATTER, AND THE ONLINE STRUGGLE FOR OFFLINE JUSTICE* 9 (Feb. 2016), http://cmsimpact.org/wp-content/uploads/2016/03/beyond_the_hashtags_2016.pdf [<https://perma.cc/3GQR-9RA7>].

43. Lilly Workneh, *11 Big Accomplishments Black Activists Achieved in 2015*, HUFFPOST (Dec. 22, 2015), https://www.huffingtonpost.com/entry/11-big-accomplishments-black-activists-achieved-in-2015_us_567996bae4b0b958f6583320 [<https://perma.cc/H3LJ-ERGJ>].

44. Harriet Sinclair, *Black Lives Matter Calls for U.S. to Ban Confederate Symbols After Charlottesville Violence*, NEWSWEEK (Aug. 15, 2017), <http://www.newsweek.com/black-lives-matter-ban-confederate-symbols-charlottesville-violence-651106> [<https://perma.cc/B3FD-Z762>].

45. Sheila E. Isong & Nicholas Kitchel, *Fighting for a Future: Millennials Tackle Criminal Justice Reform in Baltimore, MD*, GEN. PROGRESS (Apr. 28, 2016, 8:00 AM), <http://genprogress.org/ideas/2016/04/28/43211/ideas2016042843211fighting-future-millennials-tackle-criminal-justice-reform-baltimore-md/> [<https://perma.cc/K6ME-ZVZ6>].

46. See Matt Apuzzo, *Department of Justice Sues Ferguson, Which Reversed Course on Agreement*, N.Y. TIMES (Feb. 10, 2016), <https://www.nytimes.com/2016/02/11/us/politics/>

media is being used as an effective tool to change negative and unwarranted police practices.

Yet, while these horrible acts of violence are made visible on computer and cell phone screens across the country, the meaning of these violent acts remains contested. We must remember that even the meaning of real-time reporting is never self-evident and that these visual images of violence are shaped by an older racial logic that continues to justify the killing of black people. While thousands saw Eric Garner get choked to death, many responded that it was his poor health that killed him.⁴⁷ When Cleveland police rolled up on twelve-year-old Tamir Rice and opened fire without asking a question, many responded that his parents should have taught him to take better care of a *toy* gun.⁴⁸ The underlying theme in the interpretation of these racial assaults has been a notion of “noncompliance” by these African American victims.

Varied charges of black noncompliance can be seen all across social media comment boards; put plainly, they state that if African Americans would just follow orders, they wouldn’t get shot or killed by the police.⁴⁹ There is no concern for the age of the victim, their mental health, or even their legal right to question or challenge illegal police behavior. For a large portion of the social media sphere, the bottom line is that African Americans are failing to comply with all police orders, even when police are violating their citizen rights. Now, of course this notion of black compliance has a long lineage in the history of racial control and subordination, whether it be physical shackles, lynch rope, Jim Crow

justice-department-sues-ferguson-over-police-deal.html.

47. *Medical Examiner Rules Eric Garner’s Death a Homicide, Says He Was Killed by Chokehold*, NBC N.Y. 4 (Aug. 1, 2014), <https://www.nbcnewyork.com/news/local/Eric-Garner-Chokehold-Police-Custody-Cause-of-Death-Staten-Island-Medical-Examiner-269396151.html> [<https://perma.cc/9WVH-R97H>] [hereinafter *Garner’s Death a Homicide*]; Sam Levine, *Peter King Says Eric Garner Would Not Have Died From Chokehold Were He Not Obese*, HUFFINGTON POST (Dec. 3, 2014), https://www.huffingtonpost.com/2014/12/03/peter-king-eric-garner_n_6265748.html [<https://perma.cc/F62V-HTXV>].

48. Bryan L. Adamson, *Don’t Understand the Connection Between Tamir Rice’s Killing and His Parents’ History? Join the Club*, HUFFINGTON POST (Dec. 4, 2014), https://www.huffingtonpost.com/bryan-l-adamson/tamir-rice-media_b_6265114.html [<https://perma.cc/HK2Y-HA2X>]; see also Mark Guarino, *Video of Tamir Rice Shooting Shows Moment Police Killed ‘Peace-Loving’ Boy*, GUARDIAN (Nov. 26, 2014, 6:08 PM), <https://www.theguardian.com/us-news/2014/nov/26/video-tamir-rice-shooting-police-peace-loving-boy> [<https://perma.cc/PD6K-Z3QH>].

49. See *Garner’s Death a Homicide*, *supra* note 47 (“Pat Lynch of the Patrolmen’s Benevolent Association went on to say, ‘[w]e believe, however, that if he had not resisted the lawful order of the police officers placing him under arrest, this tragedy would not have occurred.’”).

Laws, restrictive covenants, racial profiling, or stop-and-frisk policies. But the point here is that even with the increased circulation of visual displays of police violence against black and brown people, the social meaning of these events remains contested primarily along racial lines. New digital technology generates greater access and speed, but it is not colorblind or objective; the visual meaning of this digital display is equally influenced by the racial rules and assumptions that allow such acts to initially take place. Such presumptions about the meaning of police violence have also shaped the way we police black neighborhoods.

III. BOYZ N THE HOOD: OVER-CRIMINALIZATION

We have all heard the neighborhood designation “high-crime area.”⁵⁰ But we must be clear that there is not always a direct correlation between a “high-crime area” and actual high rates of crime. The term “high-crime area” has become code for an urban area, and more specifically, an area with a predominately dense population of black and Latino families. These high-crime areas are heavily policed, the citizens in these communities are stopped and detained at enormous rates, and the residents are disproportionately represented in our prisons and jails. In short, because of their racial and sometimes economic make-up, these neighborhoods are disproportionately subject to greater levels of interaction and management at the hands of police agents and through the medium of the criminal justice system. These communities have become over-criminalized.

When most scholars speak about over-criminalization, they are referring to the tendency of the state and federal government to enact too many criminal laws, which encompass a range of behavior.⁵¹ These crimes are generally vast in scope, vague in description, and strict in punishment.⁵² In the context of this article, over-criminalization occurs when police officers use criminal law to enforce moral viewpoints and to regulate behavior in ways that would normally be regulated by community mores and other state agents, or would not be regulated at all. Ultimately, this over-criminalization of black neighborhoods has led

50. Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1590 (2008).

51. Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1197–1201 (2015).

52. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538–41 (2012).

to higher rates of surveillance, arrests, prosecutions, and convictions for behaviors that might not normally be governed by the criminal justice system.

Why does this happen? A common answer to this question is that implicit bias and racialized policing leads to the over-criminalization and over-surveillance of communities of color.⁵³ While implicit bias can account for the unwavering punitive approach by legislators to fight crime in communities of color, the power of the media's portrayal of the crime problem as a black behavior problem has also contributed to the increased pursuit to not only enforce the criminal laws against African Americans, but also to anticipate criminal behavior in black neighborhoods through surveillance. Once a group has been labeled as *violent criminals*, that group becomes the focus of both intense and pervasive policing regardless of whether individuals within the group deserve surveillance or criminal sanctions.

Since Nixon declared a "war on drugs," scholar Michelle Alexander points out that communities of color have been the targets of that war. She further notes that racial stereotypes erroneously posit that drug use and distribution is more prevalent in communities of color, which in fact directly contradicts the reality of our country's narcotic culture and economy:

[S]tudies consistently show that people of all colors use and sell illegal drugs at remarkably similar rates. In fact, some studies indicate that white youth are significantly more likely to engage in illegal drug dealing than black youth. Any notion that drug use among African Americans is more severe or dangerous is belied by the data. White youth, for example, have about three times the number of drug-related visits to the emergency room as their African American counterparts. That is not what you would guess, though, when entering our nation's prisons and jails, overflowing as they are with black and brown drug offenders. In some states, African Americans comprise 80 to 90 percent of all drug offenders sent to prison.⁵⁴

The rates of drug use for some illicit drugs are similar between blacks and whites, while for other substances, drug use is greater among

53. Renee McDonald Hutchins, *Racial Profiling: The Law, the Policy and the Practice*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 125 (Angela J. Davis ed. 2017).

54. Michelle Alexander, *The War on Drugs and the New Jim Crow*, 17 *RACE, POVERTY & ENV'T* 75, 76 (2010).

whites. However, the surveillance, arrest, prosecution, and conviction rates lean heavily in the direction of policing black communities. As a result, black and Latino citizens are disproportionately represented in the prison population. According to the NAACP Criminal Justice Fact Sheet, in 2014, among the roughly seven million incarcerated individuals, thirty-four percent were African Americans.⁵⁵ Additionally, African Americans and Hispanics represent fifty-six percent of those incarcerated despite only representing thirty-two percent of the general U.S. population.⁵⁶

Law enforcement officials acting on implicit bias, through over-criminalization and over-surveillance, helps us contemplate whether African Americans have ever been complete citizens with inalienable rights, or simply second-class citizens, with limited rights in order to pacify the fears of white citizens. As discussed above, racial profiling occurs when law enforcement officials target individuals for behaviors, suspicious or otherwise, based on the individual's race, ethnicity, religion, or national origin.

Our country engages in policing as if a person's race or the racial demographic of their neighborhood can determine and even predict the probability of a criminal act. Over-criminalization has been welcomed as a necessary evil, or just identified as good, rational policing that is needed to make city streets safer and to help poor communities of color be "saved" from themselves. It is obvious that people of color do want to make their neighborhoods safer. From one perspective, it is true that a disproportionate number of African American males do commit crimes. However, the fact that black men are currently under siege is left out of the equation. Black communities are being surveyed for crime in a manner that would be unacceptable in predominately white communities. We also know that white males are statistically more likely to be serial killers and mass shooters, but when we are faced with such a crisis, the country has never seen a blanket sweep or surveillance of white communities.⁵⁷ New York's Stop and Frisk program was a

55. *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet/> [https://perma.cc/WX46-XPYQ].

56. *Id.*

57. *Serial Killer Statistics and Demographics*, STATISTIC BRAIN (Sept. 23, 2017), <https://www.statisticbrain.com/serial-killer-statistics-and-demographics/> [https://perma.cc/MFD3-WSK4]. *But see* JUSTIN LEE COTTRELL, *RISE OF THE BLACK SERIAL KILLER: DOCUMENTING A STARTLING TREND*, (2d ed. 2015); M. G. AAMODT, *RADFORD UNIV. SERIAL KILLER INFO. CTR., SERIAL KILLER STATISTICS* (Sept. 4, 2016), <http://maamodt.asp.radford.edu/serial%20killer%20information%20center/Serial%20Killer%2>

prime example of a failed policy of racial profiling, employing the heavy surveillance of communities of color.⁵⁸

Policies like Stop and Frisk allow unchecked surveillance, which gives police officers carte blanche to not only illegally stop and harass residents, but also to commit acts of violence against people of color. In essence, these citizens are being told that their civil rights are subordinate to the safety of those deemed to be first class citizens—read white Americans. The justification for the Stop and Frisk policy—which had entire black and Latino communities under siege—was to assuage the white community that safety would increase. These “get tough” policies also suggested that procedures were only directed toward those areas considered infested with high crime and were not in fact influenced by the race of the communities. A unique facet, however, of the Stop and Frisk Policy was that, although it had been implemented across the country for a number of years, the general policy had never been used to police a particular community based on perceived criminality of that community and, in most cases, legitimate or legal actions of the individuals within that community. This racist policy essentially required minorities to sacrifice their civil liberties in order to benefit the larger body politic. However, studies have revealed that arrests under the Stop and Frisk agenda did not significantly decrease crime rates. In fact, there was no correlation between crime rates and the Stop and Frisk Policy at all. Ninety percent of the people stopped were, in fact, not guilty of anything.⁵⁹

Despite popular anecdotes, crime fighting should not have to involve subjecting entire communities to blanket and indiscriminate surveillance. When police officers engage in such behavior, it suggests that the distinctions between legal and criminal behavior do not matter in these particular neighborhoods—all that is important is getting the criminal, read as black criminal, off the street.⁶⁰ Moreover, imagine what would be found in elite, majority white suburban areas like Wilbraham, Massachusetts or Riverdale, New York if those areas sat under similar levels of surveillance. Civil rights are not guaranteed

0Statistics.pdf [<https://perma.cc/4R4G-GCAM>].

58. *Stop-and-Frisk Data*, N.Y. CIVIL LIBERTIES UNION, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/V5RM-QWP7>].

59. *Id.*

60. *See generally* Christine Hauser, ‘We Only Kill Black People,’ *Georgia Police Officer Says During Traffic Stop*, BOS. GLOBE (Aug. 31, 2017), <https://www.bostonglobe.com/news/nation/2017/08/31/only-kill-black-people-georgia-police-officer-says-during-traffic-stop/dlkgmKhtebTGED98Vo4P2J/story.html>.

based on race in order to defeat obsessive or perceived fears of violence. If so, we will all remain mired in failure, and more importantly, injustice.

CONCLUSION: THE COLOR OF CRIMINALIZATION

We cannot afford to overlook the link between racism and crime. It is imbedded in our history. Racism has an impact on how African Americans are treated, how white Americans perceive African Americans, and in some cases, life and death. Racial inequality, both actual and perceptual, is a social fact. Failure to acknowledge inequality not only ensures that it will continue, but also further exacerbates the pain experienced by its victims. So, I return back to my initial claim—such violations of civil rights occur because of police indifference to the humanity of communities of color. Implicit biases reveal that the race of the suspect becomes the justification for a violent response by police officers. Implicit bias endangers the lives of African Americans because these citizens' actions are given different meanings. Blackness means an unarmed man is armed, a cell phone is a gun, and an individual held down by twenty cops in a chokehold could break loose at any moment and grab a cop's gun. While Whiteness means innocent until proven guilty, boys will be boys, and we are here to protect and serve our citizens.⁶¹

Social media is a way that society can police the police. A rapid recording and dissemination of police violence gives society a front row seat to the vehement injustice that African Americans face at the hands of the police. There must be something more to the overpopulation of black individuals in the prison system than just the claim that African Americans commit more crimes. A consideration of an unjust policy of racial profiling which leads to over-criminalization in black communities points to higher rates of surveillance, arrest, prosecution, and conviction. If any community becomes the target of over-policing, the probability of finding crime will increase. We must advocate for the fair and equal distribution of policing so that all citizens are equally safe and equally prosecuted. We know that all lives should matter . . . but right now, #BlackLives are the ones in danger.

61. The Eberhardt et al. study confirmed that stereotypes “have the power to alter the threshold at which real-world objects” are misinterpreted. Eberhardt et al., *supra* note 19, at 881.