

VERY ROUGH DRAFT – DO NOT CIRCULATE

Dear Readers,

Thank you for taking time to read this working draft. I am still working out the appropriate blend of literature review, empirics, and proposal and there is much left to do in all three sections, with the last one the least-developed. At the same time, there may be too much going on. While this paper is incomplete, hopefully it will give you an idea of its intentions. I worry that the paper tries to do too much, but I am not sure what, if anything, will be of most interest to a legal audience. I would appreciate all feedback, but especially feedback along those lines.

Thank you again,  
Monica

## **Integration through the Law of Policing**

### *A Experiential Extra-Constitutional Approach*

The literature on policing law has expanded in recent years beyond its traditional focus on the protection of Fourth and Fourteenth Amendment rights. That expansion has taken three main directions. One body of scholarship has asked how policing can be structured to best reflect pre-constitutional values, such as democracy and equality. Another line of scholarship reveals that state and federal statutes, including statutes on labor law and affirmative action that are not generally perceived as part of policing law structure the everyday nature of police work. Yet another body of scholarship draws upon experiential information—historical data, quantitative social science, personal narratives, and more—to explain and understand how policing should be regulated, and it has expanded the legal outcomes of interest from constitutional law to sub-constitutional law.

This Article pushes the new law of policing in an additional direction, suggesting that scholars and policymakers fully interrogate subtler functions of policing in daily life as they articulate policing law's ambit. In addition to its more recognized functions—enforcement of the law and ensuring public safety—policing metes out resources to families and communities. To support this idea, I draw upon in-depth interviews with 151 parents in Cuyahoga County, Ohio and Dallas County, Texas.

This Article argues that governments and police agencies should incorporate the principle of integration into to police regulation. An integration principle should lead governments to make several legal choices. For example, local governments should curtail or eliminate policies like “Expanded Neighborhood Patrol” that allow neighborhood associations to pay sworn officers for additional patrol hours and special services. In another example, states should consider wage parity laws that reduce disparities in police wages across localized space.

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“The first requirement of a sound body of law,” Justice Holmes wrote, “is, that it should correspond with the actual feelings and demands of the community.”<sup>1</sup> Yet, the law of policing has had difficulty incorporating the feelings, demands, perspectives, and needs of ordinary people. This is largely because, especially after the Warren Court’s criminal procedure “revolution,”<sup>2</sup> the task of directly regulating the police has belonged almost exclusively to the courts.<sup>3</sup> Courts are keen to understand the experiences of litigants that are relevant to the case, but there is no direct mechanism for learning the feelings and demands of community members in general. Legislative and administrative rulemaking processes provide somewhat better avenues for incorporating community voices, but to date, those have been overlooked or avoided in the area of police regulation.<sup>4</sup>

Although scholars have long questioned whether judicial review is best suited to regulate police for decades,<sup>5</sup> only recently has there been sustained questioning of the hyper-constitutional approach of police regulation. Some have argued that courts are poorly equipped to guide the use of new technologies of surveillance.<sup>6</sup> Some have claimed that the judicial incapacity to manage policing is not only about their inability to fully reckon with new technology, and have suggested that courts pull back from directing the work of officers and push policymakers to pass legislation, initiate public rulemaking, and create avenues for civilian oversight to more effectively and democratically regulate the police.<sup>7</sup> Some have pointed out that police officers’ daily work is guided by federal statutes that are rarely viewed as part of policing law,<sup>8</sup> while

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<sup>1</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 41 (1938).

<sup>2</sup> A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 249 (1968) (naming the Warren Court’s criminal procedure jurisprudence a “revolution”); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L. REV. 1, 2 (1995) (same).

<sup>3</sup> Several scholars have made this point over many years. See, e.g., Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 855 (2004); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

<sup>4</sup> See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015). Of course, both legislative and administrative rulemaking processes tend to privilege “insider” voices more than marginal voices. See, e.g., Cynthia R. Farina et al., *Knowledge in the People: Rethinking “Value” in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1188-95 (2012) (distinguishing between “insider” and “outsider” commenters in administrative rulemaking and characterizing “insider” rule commenters as a “community of practice”); Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1, 69 (2016) (“[I]t has been settled for decades that Congress affords greater consideration and access to the lawmaking process for those who have provided campaign contributions, and to the politically powerful”).

<sup>5</sup> E.g., Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 660-61 (1972); Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 L. & CONTEMP. PROBS. 500 (1975); see also Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEORGETOWN L.J. 1153, 1180 (1998) (lamenting “[t]he remoteness of judges from life in the inner-city”).

<sup>6</sup> See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 855 (2004).

<sup>7</sup> See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015), John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205 (2015).

<sup>8</sup> See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012); Seth Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179 (2014).

others point out that police officers have been carved out of laws that should to regulate their activities.<sup>9</sup> Still others, drawing upon social-psychological and criminological research, argue that police departments adopt policies and practices aiming to enhance community members’ sense of “procedural justice,” and thus the legitimacy of the police.<sup>10</sup>

Still, the “actual feelings and demands of the community” about police regulation today remain mostly mysterious. Social movements, such as Black Lives Matter, are moving the needle forward by amplifying the voices of people in marginalized communities. Instead of proposing court-based solutions, advocates are fighting for reforms like revised accountability processes, revision of union contracts, changes in police department policies, and new standards for the use of deadly force.<sup>11</sup> However, given the extreme and likely rare<sup>12</sup> situations that gave rise to the movement, the policy reforms that might be needed to guide departmental policy for day-to-day situations are less clear. The democratic policing literature, at least, advocates for processes that would allow the perspectives of community members to come to light in the lawmaking process.<sup>13</sup> This scholarship is helpful as it seeks an avenue that could elevate the voices of community members. The procedural justice literature tends to draw upon empirical data, mostly surveys, collected in from representative samples.<sup>14</sup> These surveys ask respondents for their opinions about their police encounters. To an extent, this literature captures the views of community members. However, by design, survey researchers control the range of answers respondents can give them. This means that while survey research is very helpful for testing preexisting hypotheses about the feelings and demands of community members, it is less helpful for discovering previously unanticipated demands, for bringing to light how demands arise out of specific institutional contexts and social conditions, or for understanding the larger social meaning of policing. In Foucauldian terms, what is policing producing?<sup>15</sup> Narrative analysis helps bring more answers to this question into sharper view. **This Article first applies narrative analysis and then uses that analysis to argue for an integration rationale for police regulation.**

This Article exercises a neglected method of understanding and improving policing law—experiential extra-constitutionalism. Then, it builds on narrative data to set forth a number of extra-constitutional interventions, **all oriented around the principle of integration**. By “experiential,” here I argue that legal scholars should push to incorporate the perspectives and experiences of community members in the analysis of law, though my specific focus in this Article is the law of policing. As an example, I use systematic narrative analysis. This analysis draws upon interviews with 151 parents in two American localities—

<sup>9</sup> E.g., 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 (2013).

<sup>10</sup> See *infra* text accompanying notes \_\_\_\_.

<sup>11</sup> See, e.g., Campaign Zero, Solutions, <http://www.joincampaignzero.org/solutions/> (last visited Apr. 9, 2016); Olevia Boykin, Christopher Desir & Jed Rubenfeld, *A Better Standard for the Use of Deadly Force*, N.Y. TIMES, Jan. 1, 2016, at A19.

<sup>12</sup> As is widely known, government record-keeping about police uses of deadly force has been slim or nonexistent. Thus, one of the projects of the police reform movement has been tracking uses of deadly force to have better information on the prevalence of negative incidents involving force. **CITES**. Either way, we can surely predict that use of deadly force incidents will be relatively less common than the manifold other types of interactions between police and civilians, particularly in high-crime urban communities.

<sup>13</sup> E.g., DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 130 (2008).

<sup>14</sup> See *infra* text accompanying notes \_\_\_\_.

<sup>15</sup> See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 194 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (“[P]ower produces; it produces reality; it produces domains of objects and rituals of truth”).

Cuyahoga County, Ohio (Cleveland metropolitan area) and Dallas County, Texas (Dallas metropolitan area). By “extra-constitutionalism,” I propose that these narratives be used to understand and draw attention to often-neglected aspects of police regulation, the law of policing that is not captured in the Fourth, Fifth, Sixth, and Fourteenth Amendments.

To position this analysis within the policing law literature, the Article begins with a methodological point. I provide a basic map of policing law literature, zooming in on three categories, all of which push policing law beyond constitutional criminal procedure. The three categories I highlight are (1) pre-constitutional extra-constitutionalism (or, for clarity, “value extra-constitutionalism”); (2) sub-constitutional extra-constitutionalism (or “statutory extra-constitutionalism”); and (3) experiential extra-constitutionalism. I plant my flag with the experiential extra-constitutionalists and argue for more expansive use of experiential extra-constitutionalism in policing law scholarship. I then situate my use of qualitative, in-depth interview data within a longer tradition of narrative evidence in the law and legal scholarship.<sup>16</sup> This is the task of Part I.

In Part II, I turn to data. I use parents’ own words and reported experiences to show how police policies and practices factor into their perceptions of neighborhoods and, ultimately, their decisions about where they should raise their children. These data from *How Parents House Kids*, an interview-based and ethnographic study of 151 parents (mostly mothers, but some fathers) in Cuyahoga County, Ohio (Cleveland) and Dallas County, Texas (Dallas). These data were collected between June 2013 and August 2014. *How Parents House Kids* features a heterogeneous sample of African-Americans, Hispanic Americans, and white Americans, including parents from low-income, middle-income, and high-income neighborhoods.<sup>17</sup>

In Part III, I broaden the lens from data to frameworks for legal intervention. Building from the themes identified in Part II, I argue that an integration principle might guide police regulation in the context of community and neighborhood inequality. After explaining the value of an integration principle in policing, drawing upon social and legal theory, I then make a number of suggestions for integrative policing law and policy.

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<sup>16</sup> See Monica Bell, *The Obligation Thesis: Understanding the Persistent Black Voice in Modern Legal Academia*, 68 U. PITT. L. REV. 643, 653-669 (2007) (describing the history and debates surrounding narrative in legal scholarship in the 1980s-early 2000s); see also, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 289-92 (1991) (drawing from government records and seventy-three narratives); Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 631 n.17 (1997) (drawing from twenty-three narratives of borrowers and lenders); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 653-70 (2014) (drawing upon, among other data, roughly fifty qualitative interviews); Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 522 (2013) (drawing upon in-depth narratives with heads of 194 families); Angela K. Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV. 451, 454 (2008) (drawing upon fifty in-depth narratives of low-income women); Avlana Eisenberg, *Expressive Enforcement*, 61 U.C.L.A. L. REV. 858, 861 (2014) (drawing on semi-structured interviews with fifty-two prosecutors); Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 TEX. L. REV. 961 (2005) (drawing from 60 interviews from professionals in the software industry); Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951 (2012) (drawing from an initial survey and interviews with fifty-five domestic violence advocates); Tracey L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315, 1334 n.68 (2007) (drawing on fifty-five in-depth, semi-structured interviews about a series of police-involved prayer vigils); Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 FORDHAM L. REV. 3115, 3128 (2015) (drawing on ninety-three narratives of law faculty members).

<sup>17</sup> See Appendix.

Part IV concludes. What is next for experiential extra-constitutionalism in policing law? Because legal analysis of policing has been inattentive to the feelings and demands of communities, there is much more work to do. I reassert the centrality of narrative to legal analysis and identify areas for future scholarly exploration. I also ask, where else does the integration principle take policing and criminal justice more broadly?

## I. Extra-Constitutional Approaches to the Law of Policing

This Part maps the landscape of current and potential academic approaches to understanding what police conduct produces in society, and how it should be regulated. To understand these approaches, one must think about two factors: (1) the methods a scholar uses to understand the promise and potential pitfalls of police conduct, or their *analytic process*;<sup>18</sup> and (2) the object of their legal inquiry, or *legal consequence*. For clarity of analysis, I divide the literature into four categories along these two axes—constitutional, pre-constitutional, extra-constitutional, and experiential (see Figure 1).<sup>19</sup>

<<Insert Figure 1 about here>>

There are twelve approaches in the model,<sup>20</sup> but this analysis focuses on three—the oft-neglected analytic processes that bring scholars to make extra-constitutional legal conclusions about the direction of policing law. Extra-constitutional approaches are understudied and have great promise to carve new paths in the regulation of policing.<sup>21</sup>

Traditional constitutional criminal procedure scholarship looked to the Fourth, Fifth, Sixth, and Fourteenth Amendments as both the starting point of inquiry about police conduct and the target of their analysis. The criminal procedure values most explicitly endorsed by the Court, and thus the most widely discussed in scholarship, are privacy and dignity. As articulated by the Warren Court in *Schmerber v. California*,<sup>22</sup> and as reasserted in numerous subsequent cases, “[t]he overriding function of the Fourth Amendment is to protect

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<sup>18</sup> Scholars should give closer attention to how courts and policymakers come to learn about the type of police conduct that should be regulated, as the method of learning about police conduct is critical to appropriate regulation of it. See David M. Jaros, *Preempting the Police*, 55 B.C. L. Rev 1149, 1157 (2014) (“When considering which government branch is best equipped to regulate police activity, scholars tend to ignore the basic question of how the legislature and the judiciary identify police activity that needs regulation”).

<sup>19</sup> Because experience is not a type of legal consequence, it is omitted from the legal consequence axis. Throughout the Article, I divide the literature and arguments for police regulation into several categories. In using categories, I am not claiming that the categories fully recognize the complexity of each group, nor do I claim that they are mutually exclusive. Instead, I draw inspiration from the sociologist Max Weber, who divided behavior into constructed “ideal types” for analytical purposes. See MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 90 (Edward A. Shils & Henry A. Finch eds. & trans., 1949); see also Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 623 and n.24 (“[Ideal types] are analytic tools precisely because they abstract away from [] extreme complexity and concrete variety”). The aspect of the scholarship I highlight here is where they look for information about the ills of police conduct gone awry. Of course, the categories are fluid, flexible, and incomplete as is true of any ideal-typical approach. All analysis of police regulation, to various degrees, operates in the shadow of the Constitution, in the shadow of pre-constitutional values, and in the shadow of social conditions.

<sup>20</sup> It is important to note that some of these approaches may not exist in current literature. For example, I am not aware of any scholarship that falls into Box 7, beginning with an analysis of policing-related statutes to make a value-based intervention. The empty or sparse boxes point to potential new directions in policing law scholarship.

<sup>21</sup> Harmon, *supra* note \_\_, at 763.

<sup>22</sup> 384 U.S. 757 (1966).

personal privacy and dignity against unwarranted intrusion by the State.”<sup>23</sup> Legal scholars began to parse privacy before the Warren Court’s criminal procedure “revolution,”<sup>24</sup> but the post-Warren Court scholarship has looked deeper to understand the full meaning and scope of the privacy<sup>25</sup> and dignity<sup>26</sup> rights at risk in police encounters. To coincide with this focus on the criminal procedure amendments, scholars working in this area tend to recommend expanding interpreting those Amendments. In contemporary work, those proposals often involve expanding rights in light of societal change, ranging from the nation’s early abandonment of torture,<sup>27</sup> to the possibilities of construing these amendments to fight racial bias in criminal justice,<sup>28</sup> to more recent technological innovations that have expanded the nature and possibilities of surveillance.<sup>29</sup> On the map above, this scholarship would fall into Box 1.

<sup>23</sup> *Id.* at 767; *Katz v. United States*, 389 U.S. 347 (1967) (extending Fourth Amendment protection to areas where individuals have a “reasonable expectation of privacy”); see, e.g., *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (describing bodily integrity as a privacy interest protected under the Fourth Amendment); *Maryland v. King*, 133 S. Ct. 1958, 1969-71 (2013) (clarifying the balance between privacy and law enforcement concerns). Note, as many onlookers have pointed out, that many of the subsequent cases have shrank the scope of the Fourth Amendment privacy right even while affirming that privacy is the core rationale for the Amendment. Moreover, there is of course some contestation over the ongoing centrality of privacy to Fourth Amendment jurisprudence. See, e.g., Eric J. Miller, *The Warren Court’s Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 4 (2010) (arguing that Warren Court Fourth Amendment jurisprudence aimed at protecting not privacy, but personal security or “non-domination”).

<sup>24</sup> See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (giving the earliest known argument for a constitutionally protected privacy right); see also Pye, *supra* note \_\_\_, at 249.

<sup>25</sup> E.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261 (seeking to expand the idea of reasonableness in police conduct to account for the “community caretaking” functions of police); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419 (2002); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069 (2014) (advancing the concept of privacy as a zone of refuge, not merely control over information); William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995) (arguing that constitutional criminal procedure should focus on rooting out coercion rather than privacy-as-information-protection to better harmonize with the rest of constitutional law).

<sup>26</sup> E.g., Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 STAN. L. REV. 987 (2014); John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655; R. Kent Greenawalt, *Silence as A Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 40-41 (1981); Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U.L. REV. 159 (2015).

<sup>27</sup> E.g., George C. Thomas III, *The End of the Road for Miranda v. Arizona? On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 6 (2000) (describing the Court’s move from toward excluding confessions based on “subtle coercion” rather than torture and abuse as a means of rooting out inequality in the criminal justice system); see also Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2631 (1996) (arguing that the original purpose of the protection against self-incrimination was to prohibit torture and inappropriate methods of interrogation).

<sup>28</sup> E.g., Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) (arguing for the incorporation of race into Fourth Amendment analysis); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1996); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163 (2002); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003); Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011).

<sup>29</sup> Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004); Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35 (2014); Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199 (2007); Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161 (2013); Stephen Rushin, *The Judicial Response to Mass Police*

In important recent work, legal scholar Rachel Harmon helpfully redirects scholars' attention to federal statutes that govern the police.<sup>30</sup> To frame her intervention, Harmon categorizes other strands of the literature as (1) conventional constitutional criminal procedure scholarship, (2) extra-constitutional "con law," or (3) empirical "non law." By labeling one strand of scholarship "extra-constitutional 'con law,'" Harmon argues that despite claiming to transcend the conventional constitutional framework by encouraging consideration of statutes that regulate police behavior, this scholarship is still "continues to contribute to the 'con law' enterprise" by using extra-constitutional insights to refine interpretation of constitutional law, or limits analysis of police behavior to police conduct during criminal investigations.<sup>31</sup> By referring to another strand of legal scholarship as "non law," Harmon argues that much interdisciplinary empirical policing scholarship "bypasses legal analysis entirely in favor of empirical or institutional conclusions—even when it purports to contribute to legal scholarship."<sup>32</sup> While Harmon's critiques and categorizations represent a significant step forward in framing the law of policing, the map presents a more nuanced picture of strands of legal scholarship on the regulation of police conduct.

Harmon's work captures a central frustration in the law of policing: The traditional focus on constitutional criminal procedure, and its resultant telescoped vision on police conduct in criminal investigations, has left most of the other conduct and structural elements of policing out of view and untouched by legal analysis.<sup>33</sup> However, there is much more to what police do, how they are perceived, and how the institution of policing can be regulated than is captured in Harmon's analytical framework. For one, Harmon does not demarcate the scholarship that I would call "pre-constitutional"—the work that begins neither with constitutional logic nor statutory law, but with fundamental societal values like democracy, equality, and autonomy. A leading strand of this literature is the scholarship on democratic policing.<sup>34</sup> While some of that scholarship is constitutional in its legal inquiry, much of it suggests reforms of a statutory, and even better, a more local quality.<sup>35</sup> Likewise, a great deal of the scholarship on race and policing is similarly pre-constitutional in its analysis of the stakes of police conduct. Those scholars are concerned about racial justice

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*Surveillance*, 2011 J.L. TECH. & POL'Y 281; see also *Maryland v. King*, 133 S. Ct. 1958, 1969-71 (2013) (upholding, 5-4, the constitutionality of a Maryland statute authorizing routine collection of cheek swab DNA from arrestees for serious offenses).

<sup>30</sup> Harmon, *The Problem of Policing*, *supra* note \_\_, at 796-801 (identifying various laws related to employment as parts of the statutory law of policing); see also Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870 (2015) (highlighting coercion costs of federal public safety programs); Seth Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2205-17 (2014) (pointing out labor law and local government law as facially unrelated law that affects policing).

<sup>31</sup> Harmon, *supra* note \_\_, at 786-88.

<sup>32</sup> *Id.* at 790. I think this particular critique is a bit overstated. Law consists of much more than the Constitution and federal statutes. The design of public institutions, such as police agencies, is a central and oft-ignored subject of legal analysis, and it goes to the heart of what Harmon calls "the problem of policing." Thus, scholarship that makes normative suggestions around the design of police institutions and internal departmental regulations is not appropriately labeled "non law." I make specific suggestions for the internal organization and external regulation of police departments in Part III.

<sup>33</sup> Harmon, *The Problem of Policing*, *supra* note \_\_, at \_\_. See also Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 806 (2004) ("[T]he legislative branch rather than the judiciary should create the primary investigative rules when technology is changing"); John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205 (2015) (describing the Supreme Court's "second-order regulation" of police, which routes instructions for law enforcement through police departments and policymakers rather than directly to officers).

<sup>34</sup> See, e.g., DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* (2008); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005).

<sup>35</sup> See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015).



in a more robust way than that conceived of in Fourteenth Amendment jurisprudence. To be sure, the proposed legal interventions very often focus on constitutional interpretations,<sup>36</sup> but some advances extra-constitutional reform.<sup>37</sup> In Section I.A., I discuss this “pre-constitutional extra-constitutionalist” scholarship in greater detail.

The contributions of “experiential extra-constitutionalist” analysis are also given insufficient attention in the literature on the law of policing. Much of the energy in national policy discourse and in legal scholarship on policing has moved toward figuring out what can improve individual encounters between police officers and civilians, particularly racial minorities and people living in urban, high-poverty neighborhoods.<sup>38</sup> Research seems to indicate that improving the perceived justice in those encounters will increase people’s sense that the police are a legitimate authority, and improve voluntary compliance with the law and cooperation with law enforcement.<sup>39</sup> Harmon classifies the scholarship that advances a procedural justice perspective as “non law,” presumably because its focal point is the departmental level, and because it tends to require voluntary adoption from police departments rather than compelled action. Harmon claims that these are “institutional conclusions” rather than legal ones.<sup>40</sup>

Why do these categories matter? Aside from analytic clarity, widening the lens reveals how much work policing law scholars have left to do. The legal problems of policing are yet broader in scope than is captured in a smattering of federal statutes, more nuanced and complex than imaginable from the ivory tower in which legal scholars and many lawyers sit. As scholars have noted, courts—and I would suggest, legal scholars—tend to describe aspects of how police officers and civilians experience policing with little empirical support, and they fail to account for the lived experience of living under new policing regimes.<sup>41</sup> While legislative and administrative rulemaking processes would allow more community voices to enter policing conversations,<sup>42</sup> those solutions will be insufficient to give voice in the making of law to those who live at the convergence of racial disadvantage and poverty, those whom eminent sociologist William Julius

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<sup>36</sup> E.g., Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) (arguing for the incorporation of race into Fourth Amendment analysis); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1996); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163 (2002); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003); Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004).

<sup>37</sup> See, e.g., Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 168-69 (2015); [ADD].

<sup>38</sup> See, e.g., PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 9-18 (2015); see also Tom R. Tyler, Philip Atiba Goff, and Robert J. MacCoun, *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCH. SCI. IN THE PUB. INT. 75 (2015).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 790.

<sup>41</sup> Seth Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 854-55 (2014); see also Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 660 (1972) (“[M]y observation point is both fixed as to angle and remote in space and time from the actual happenings and from the people involved in

them”); Orin Kerr?; Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1871-75 (2015).

<sup>42</sup> CITES

Wilson has called “the truly disadvantaged”<sup>43</sup>—or even, in today’s political climate, the moderately disadvantaged.<sup>44</sup> Without scholars’ direct engagement with ordinary people and amplification of their voices, the blind spots in policing law and legal scholarship will persist.

### A. Value Extra-Constitutionalism

Value extra-constitutionalists look not only to the Constitution, but to the social contractarian commitments that undergird the Constitution to understand what is at stake in police conduct and police governance.<sup>45</sup> They then suggest legal change that flows from their understandings of how policing risks doing violence to those pre-contractual values. Democracy, autonomy, equality, justice—all values are partly enshrined in the Constitution. However, scholarship that takes a pre-constitutional approach draw upon theories of these values. Many of the scholars who write in this vein are constitutional law scholars, but the scholarship’s argument surrounding what policing produces, and how it should be regulated, arises in pre-constitutional values. Then, this scholarship engages in a legal inquiry that moves beyond re-interpretation of the criminal procedure amendments.

The literature on democratic policing is also emblematic of a value-driven approach to police regulation. As David Sklansky has sought to clarify the meaning and possibilities of democracy with respect to policing. Sklansky resurrects mid-20th century theories of democratic pluralism, which tended to examine the distribution of power and influence in political processes, and pairs those ideas with more contemporary concerns about participatory democracy.<sup>46</sup> Drawing on these concepts to highlight democratic power as a source of concern, Sklansky identifies unjustified official and private domination as a risk of ineffective policing, as well as an area for policy intervention.<sup>47</sup> Sklansky thus endorses community policing as reflective of the ideals of participatory and deliberative democracy.<sup>48</sup> More broadly, he sets a partial agenda for structural police reform, including efforts to diversify police departments by race, gender, and sexual orientation; various measures to curb racial profiling, and potential means of curtailing the use of private police.<sup>49</sup>

Democratic theories have frequently been used to support administrative rulemaking as a tool for police accountability. More than four decades ago, Judge Carl McGowan argued for greater administrative regulation of police. On the bench, he observed that courts were often called upon to make directives to officers, resulting in a situation where “standards of law enforcement are imposed which subordinate [determining the guilt or innocence of the accused] to other objectives, related neither to the central

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<sup>43</sup> WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (2d ed. 2012).

<sup>44</sup> Cite stuff about campaign finance and people being shut out of the regulatory and legislative processes.

<sup>45</sup> See, e.g., DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 13-58 (2008) (articulating democratic pluralism as a means of protecting individual liberty and dignity, and as a basis for police regulation); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1121-31 (2000) (describing democratic bases for increasing availability of governmental information about policing).

<sup>46</sup> DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* (2008); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1708-29 (2005); see also JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1942); David B. Truman, *The American System in Crisis*, 74 POL. SCI. Q. 481, 486 (1959); see also, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 50 (1956).

<sup>47</sup> Sklansky, *supra* note \_\_\_, at 1808-09.

<sup>48</sup> SKLANSKY, *supra* note \_\_\_, at 190.

<sup>49</sup> *Id.* at 126-30, 138-39; 154.

mission of the courts nor to anything which, in the nature of things, they actually know much about.” Judge McGowan’s inquiry began with his experience on the bench and an inkling about the courts’ institutional incapacity to govern law enforcement, not a general concern about democracy. Thus, his article was more experiential than value-based in its rationale for extra-constitutional interventions.<sup>50</sup> However, value-based scholarship has led the push for administrative rule-making in policing. Gerald Caplan contemporaneously argued for administrative rulemaking in policing on the grounds that, among other things, administrative rulemaking “represent[s] a promotion of democratic values in that it gives public visibility to the rules governing difficult law enforcement problems.”<sup>51</sup>

Starting from the belief that democratic accountability is “primal to American democracy,”<sup>52</sup> Barry Friedman and Maria Ponomarenko have recently taken up the fight for legislation and administrative rulemaking in policing. They demonstrate, in line with Harmon, Kerr, and others, that police regulation has largely been left in the hands of courts applying the Procedure Amendments, with very little legislative or administrative oversight.<sup>53</sup> After cataloguing previous efforts to bring democratic accountability to policing and diagnosing why those efforts failed, Friedman and Ponomarenko endorse widespread administrative rulemaking, with public comment. They note that, given advances in the sharing of best practices over the past forty years, police agencies would not need to create new regulations from whole cloth. Model rules have already been created for some issues and are being drafted for others. To the extent that courts are involved in this process, Friedman and Ponomarenko argue that they should encourage democratic deliberation through the legislative and regulatory processes.<sup>54</sup>

In spurts, and growing from a similar concern about democratic process and voice, scholars have advocated for increased civilian review of police conduct. These spurts often follow incidents of police violence that come to public attention.<sup>55</sup> For example, although Los Angeles had a civilian review board in place during the Rodney King incident,<sup>56</sup> the incident, coupled with other well-publicized incidents of police violence such as those involving Abner Louima and Amadou Diallo meant that the 1990s and early 2000s saw an uptick in discussion of police accountability through civilian boards.<sup>57</sup> That scholarship thinned over time,

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<sup>50</sup> See Section I.C.

<sup>51</sup> Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 L. & CONTEMP. PROBS. 500, 514 (1975). *But see* Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 101-03 & n. 178 (arguing that the administrative rulemaking proposals of that era were anti-democratic).

<sup>52</sup> Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1837 (2015).

<sup>53</sup> *Id.* at 1865-77; *see, e.g.*, Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 855 (2004); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972); Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721 (2014).

<sup>54</sup> Friedman and Ponomarenko, *supra* note \_\_, at 1886-91; *see also* Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972); Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROBS. 500, 514 (1971).

<sup>55</sup> *See, e.g.*, Harold Beral & Marcus Sisk, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499, 512 (1964) (“Efforts to establish civilian complaint boards have typically been accompanied by emotionally charged struggles. Advocates of civilian systems have capitalized upon the public indignation arising when well-publicized incidents of police abuse are followed by exoneration of the accused officer by an internal review system”).

<sup>56</sup> Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 278-80 (1994);

<sup>57</sup> *E.g.*, Reenah L. Kim, Note, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461 (2001); Andrew J. Goldsmith, *External Review and Self*

and many civilian review processes fell out of view. However, in the wake of failed attempts to indict or to try police officers in the deaths of Michael Brown, Eric Garner, Tamir Rice, Aiyana Stanley-Jones, and others, there has been renewed scholarly interest in mechanisms for police accountability.<sup>58</sup> The Ferguson report called for a civilian review process,<sup>59</sup> among other proposals, despite mixed results in other cities.<sup>60</sup> Similarly on grounds of democracy and accountability, some have called for independent prosecutors in lieu of civilian review.<sup>61</sup>

Recent scholarship from Nirej Sekhon adds an additional layer of theory to the push for democratic policing.<sup>62</sup> Instead of conceptualizing democratic policing as process-oriented value, he emphasizes democratic equality as a goal for policing law. The central policy implication of Sekhon's democratic equality-based framework is that police departments should exercise their discretion to move beyond a probable cause framework for individual arrests, and instead look at the distribution of arrests across race and class.<sup>63</sup> Sekhon also suggests that departments use a distributive justice-based framework for other aspects of proactive policing, but does not specify what types of policy choices such a framework might produce. Sekhon, like Stuntz,<sup>64</sup> Sklansky,<sup>65</sup> Harcourt,<sup>66</sup> and Slobogin,<sup>67</sup> is deeply concerned about inequality as a matter of justice. However, Sekhon contributes to this literature by engaging with a specific, at least partly Rawlsian, conception of distributive justice, considering the bounds of equity and the desired form of equality in policing.<sup>68</sup> In addition, while Sekhon's legal intervention was focused primarily on arrest, his broader emphasis on department discretion is a needed improvement to scholarship on policing law. Future

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*Regulation: Police Accountability and the Dialectic of Complaints Procedure*, in COMPLAINTS AGAINST THE POLICE: THE TREND TO EXTERNAL REVIEW 13, 33-38 (Andrew J. Goldsmith ed., 1991); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 597-99 (1997); Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151 (2003); Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 278-80 (1994).

<sup>58</sup> See, e.g., Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. \_\_\_\_ (forthcoming 2016); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012).

<sup>59</sup> THE FERGUSON COMMISSION, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY 29-30 (October 14, 2015), available at [http://3680or2khmk3bzkp33juiea1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415\\_FergusonCommissionReport.pdf](http://3680or2khmk3bzkp33juiea1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf) (last visited Apr. 7, 2016).

<sup>60</sup> See, e.g., Samuel Walker, *The History of Citizen Oversight*, in CITIZEN OVERSIGHT OF LAW ENFORCEMENT 6-7 (Justina Cintrón Perino ed. 2006) (describing setbacks for civilian review boards in Minneapolis, MN; Santa Cruz, CA; Cambridge, MA; Washington, DC; Albuquerque, NM; Seattle, WA; Pittsburgh, PA; and New York, NY).

<sup>61</sup> Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J. L. & POL'Y 137 (2015).

<sup>62</sup> Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171 (2012).

<sup>63</sup> *Id.* at 1219-25.

<sup>64</sup> E.g., William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999).

<sup>65</sup> SKLANSKY, *supra* note \_\_\_, at 132-54; David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1821 (2005).

<sup>66</sup> See BERNARD E. HARCOURT, AGAINST PREDICTION 214 (2007) ("[O]ne of the victims of this misguided thirst for efficiency is the fundamental notion of justice that inheres in the idea that all criminal offenders, regardless of race, ethnicity, gender, class or national origin, should face the same likelihood of being apprehended and punished for engaging in criminal behavior").

<sup>67</sup> E.g., Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 U. FLA. L. REV. 391 (2003)

<sup>68</sup> See Sekhon, *supra* note \_\_\_, at 1216-17.

work in democratic policing might engage more deeply with other social contractarian theories of equality, explaining why a given conception of equality might be most helpful and most applicable to American police departments. Moreover, as I discuss in Part III, more direction about justice-enhancing ways of marshaling departmental discretion are greatly needed in the literature.

One area where there has been a surprising dearth of value extra-constitutional scholarship is on racial profiling. While there is an abundant scholarly literature on racial profiling, the overwhelming majority of it operates in the constitutionalist paradigm (Category 2).<sup>69</sup> Even legal scholarship that makes allusions to policing concerns that constitutionalism cannot address, such as implicit bias, tends to argue for Fourth Amendment-based solutions.<sup>70</sup> For example, Bennett Capers has argued that implicit bias is a part of police culture that should be controlled and rooted out. However, his discussion of how legal levers could be used to change police culture is minimal. Although Capers makes suggestions about potential reforms to training and personnel practices, “[u]ltimately, [his] goal is to reframe and re-imagine our Fourth Amendment jurisprudence.”<sup>71</sup> There are exceptions: Brandon Garrett, for example, began with a general rejection of racial disparity and argued for comprehensive police department reform, focused on data collection and problem solving, as a potential solution to racial profiling.<sup>72</sup> This type of approach to racial profiling is still rare.

Recent scholarship on implicit bias in policing has begun to remedy the constitution-heavy analysis of most of the racial profiling scholarship, on what seems a parallel track to the work of Harmon and others.<sup>73</sup> As the implicit bias literature tends to begin with social science rather than value proposition, reasoning in a different structure from the pre-constitutionalists, I address implicit bias policing scholarship further in Section I.C.

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<sup>69</sup> For exemplary scholarship seeking to interpret the Constitution to prohibit racial profiling, see, for example, Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) (arguing for the incorporation of race into Fourth Amendment analysis); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1996); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163 (2002); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003); Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011).

<sup>70</sup> E.g., I. Bennett Capers, *Policing, Place, and Race*, 44 HARV. C.R.-C.L. L. REV. 43 (2009); Gabriel J. Chin & Charles Vernon, *Reasonable But Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. U.L. REV. 882 (2015).

<sup>71</sup> I. Bennett Capers, *Policing, Place, and Race*, 44 HARV. C.R.-C.L. L. REV. 43, 74 (2009).

<sup>72</sup> Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUMAN RIGHTS L. REV. 41 (2001) (advocating for comprehensive police department reform, focused on data collection and problem solving, as a potential solution to racial profiling); see also Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1 (2005) (proposing adoption of state data collection statutes and the adoption of police agency protocols to potentially reduce racial profiling).

<sup>73</sup> E.g., L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961 (2015); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012); cf. L. Song Richardson & Philip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 100 (2013) (building from similar arguments and data in the police context to discuss an issue in public defense).

## B. Statutory Extra-Constitutionalism

Although most policing law scholarship has taken a constitutional approach, other scholars have reminded us that a body of federal statutes and local policies govern policing, and they are frequently neglected in legal scholarship.<sup>74</sup> The overwhelming majority of the scholarship has focused on statutes intending to hold police officers, and police departments, liable for violation of citizens' constitutional rights.

Section 14141 of the 1994 Violent Crime Control and Law Enforcement Act of 1994<sup>75</sup> (also known as the Clinton Crime Bill) has given rise to a small but growing body of statutory extra-constitutionalist scholarship. Although criminal justice experts view many provisions of the Act as barriers to reform, reformers generally endorse Section 14141, which authorizes the U.S. Attorney General to sue a local police agency for engaging in a pattern or practice of violating constitutional and legal rights.<sup>76</sup> 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.

One of the biggest shortcomings of Section 14141 as an enforcement tool is that its use is politically cyclical.<sup>77</sup> During the second term of President George W. Bush, the Department of Justice did not enter into a single consent decree with a police agency, opting instead to enter into non-binding agreements with wayward departments.<sup>78</sup> In contrast, the Obama Administration has investigated dozens of departments.<sup>79</sup> This is still not many considering that there are more than 13,000 police departments across the United

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<sup>74</sup> E.g., Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012); Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870 (2015); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004); 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 (2013) (analyzing law enforcement exemptions to federal information-protection statutes); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN L. REV. 1343 (2015) (arguing for broader use of Department of Justice structural reform litigation under 42 U.S.C. § 14141).

<sup>75</sup> 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 (2016)).

<sup>76</sup> 42 U.S.C. § 14141 (2016)).

<sup>77</sup> See, e.g., Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014);

<sup>78</sup> See POLICE EXECUTIVE RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 4 (2013); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Participation in the Federal Reform of Local Police Practices*, 98 J. CRIM. L. & CRIMINOLOGY 489, 493 (2008) (“[G]overnment officials have expressly articulated a preference for avoiding litigation and negotiating with municipalities to ensure compliance with the suggested reforms”); Simone Weichselbaum, *Policing the Police: As the Justice Department Pushes Reform, Some Changes Don’t Last*, MARSHALL PROJECT (May 26, 2015), <https://www.themarshallproject.org/2015/04/23/policing-the-police>. For examples of the George W. Bush Administration’s approach, see Letter from Steven H. Rosenbaum to Ruth Carter (Mar. 6, 2002) (Detroit Police Dept. Use of Force Findings Letter); Letter from Shanetta Y. Brown Cutlar to Michael T. Brockbank (Mar. 19, 2003) (Re: Investigation of the Schenectady Police Department); and Letter from David J. Kennedy & Bradley J. Schlozman to Gerard J. Pisanelli (June 21, 2005) (Re: Beacon Police Department). The second George W. Bush Administration did *draft* a consent decree: DOJ, the Virgin Islands, and the Virgin Islands Police Department filed a consent decree with the U.S. District Court for the District of Virgin Islands on December 23, 2008. President Obama was inaugurated on January 20, 2009. The Court entered the consent decree on March 23, 2009. See PoliceMonitor.org, News & Information, <http://www.policemonitor.org/VI/Vlindex.html> (last visited Apr. 13, 2016).

<sup>79</sup> U.S. Department of Justice, Conduct of Law Enforcement Agencies, <https://www.justice.gov/crt/conduct-law-enforcement-agencies> (last visited Apr. 13, 2016).

States. Some police officers have rejected the imposition of federal consent decrees; for example, 126 Seattle police officers sued federal and city officials under § 1983, claiming that the prescriptions of the consent decree violated their Second, Fourth, Fifth, and Fourteenth Amendment rights.<sup>80</sup>

Given that the uptick in Section 14141 consent decrees began only recently, most scholarship on Section 14141 has sought ways to expand its use. For example, just six years after passage of the law and likely realizing that the statute depends too heavily on the DOJ to identify departments in trouble, legal scholar Myriam Gilles suggested an amendment to the statute to allow more citizen involvement. Gilles argued that the law permit the DOJ to deputize private citizens to bring pattern or practice suits against police departments if the government has declined to do so.<sup>81</sup> Since Gilles made this proposal, scholars have similarly sought to expand and improve the use of Section 14141 suits, in various ways.<sup>82</sup> Others have proposed creating state statutes that would allow state attorneys general to file their own pattern or practice suits against departments that routinely violate civil rights.<sup>83</sup> Scholars have also sought to use other statutory devices to force police departments to reform. For example, Kami Chavis Simmons has suggested that Congress amend the authorizing statute of the Community-Oriented Police Services (COPS) program at the Department of Justice, also passed as part of the 1994 Clinton Crime Bill, to give COPS leverage to withhold funding from police departments if they do not initiate reforms.<sup>84</sup>

Although Section 14141 and methods of forcing department-wide reform have garnered the most recent attention in policing law, other scholars have focused on the more longstanding federal statutes intended to hold individual officers accountable for violation of civil rights, tools beyond the exclusionary rule.<sup>85</sup> On the civil side, police officers can be held civilly liable for misconduct under 42 U.S.C. § 1983. Yet, as in the

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<sup>80</sup> Mahoney v. Holder, Compl. Civil Action No. C14-0794, (W.D. Wa), available at <https://www.documentcloud.org/documents/1175039-complaint.html> (last visited Oct. 16, 2015).

<sup>81</sup> Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1417-18 (2000).

<sup>82</sup> E.g., Rachel Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 4 (2009) (proposing more aggressive DOJ pursuit of §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 Participation in the Federal Reform of Local Police Practices*, 98 J. CRIM. L. & CRIMINOLOGY 489 (2008) (arguing that the DOJ should use a different deliberation model in reform efforts it instigates pursuant to Section 14141). But see Elliot Harvey Schatmeier, *Reforming Police Use-of-Force Practices: A Case Study of the Cincinnati Police Department*, 46 COLUM. J.L. & SOC. PROBS. 539 (2013) (pointing out that Section 14141 consent decrees vary widely in effectiveness due to implementation problems and suggesting that the DOJ look at Cincinnati as a case study of effective Section 14141 reform).

<sup>83</sup> Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State 'Pattern or Practice' Statute*, 19 GEO. MASON U. CIV. RTS. L.J. 479, 481-82 (2009).

<sup>84</sup> Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 381-87 (2011).

<sup>85</sup> The exclusionary rule is thought to be the first-order penalty for police misconduct. See *Mapp v. Ohio*, 367 U.S. 643 (1961). However, many scholars across decades have argued that the exclusionary rule on its own is an unsatisfying remedy for and deterrent of police malfeasance, for numerous reasons. E.g., Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 10 (2009); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 448-49 (1978); William A. Schroeder, *Restoring The Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633 (1983); Joanna C. Schwartz, *Who Can Police the Police?*, U. CHI. LEGAL F. (forthcoming 2016), at 19.

Section 14141 context, most scholars have a sense that Section 1983 is severely underutilized,<sup>86</sup> not least because of qualified immunity.<sup>87</sup> Moreover, as Joanna Schwartz recently demonstrated empirically, in the rare event that a police officer *is* held liable and ordered to pay damages, the overwhelming majority of departments indemnify officers.<sup>88</sup> Thus, the financial pain of rights violation is almost never felt by the officers themselves, and the expected deterrent effect assumed in the design of Section 1983 litigation is never realized. (That said, given the financial position of many police officers, if the city did not indemnify officers, few complainants would fully recover).<sup>89</sup>

Officers can also be held criminally liable for violating individual rights under 18 U.S.C. § 242.<sup>90</sup> However, an infinitesimal number of complaints filed against officers in the years preceding the passage of Section 14141 resulted even in charges being filed against accused officers.<sup>91</sup> The situation is so dire that some have argued that Congress should adopt a new criminal liability statute for police misconduct altogether, one that would allow federal prosecutors to file charges against local officers for police misconduct if states fail to do so.<sup>92</sup> Others have proposed that not only the officers, but the governments who expressly authorize criminal civil rights violations, should be prosecuted.<sup>93</sup>

There is much more to the work of policing, however, than is captured in police accountability statutes. The statutes discussed above are intended to regulate extreme departments and provide relief in response to uncommon events. A more expansive body of statutory law structures the daily work and environment of police officers. Accordingly, more recently policing law scholars have identified bodies of law that regulate the work of police without focusing specifically on police.<sup>94</sup> Harmon identifies five categories of the law of policing: (1) “law that authorizes or restricts the conduct in which [police] may engage”; (2) “laws that remedy, punish, or disincentivize violations” of conduct rules; (3) “law that governs police qualifications and training”; (4) “law that regulates the management and organization of police officers”; and (5) “law that

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<sup>86</sup> *E.g.*, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 476-90 (2004); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 YALE L.J. 447, 453 (1978) (“[T]he section 1983 damage suit has potential as an effective deterrent and compensatory remedy but must be substantially restructured to afford the injured victim a better chance of success”); Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 369-70 (2011).

<sup>87</sup> *See generally* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (establishing an objective reasonableness standard in the doctrine on qualified immunity); *Graham v. Connor*, 490 U.S. 386 (1989) (applying this standard to police officers).

<sup>88</sup> Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014); *see also* Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810-11 (1979).

<sup>89</sup> *See, e.g.*, Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer’s 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1219 & n.46 (2001)

<sup>90</sup> 18 U.S.C. § 242 (2016).

<sup>91</sup> Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3203 (2014); *see also* *Screws v. United States*, 325 U.S. 91 (1945) (holding that federal criminal liability for official rights violations requires specific intent); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2124-48 (1993) (discussing 18 U.S.C. § 242 in the context of *Screws*).

<sup>92</sup> *See* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 792.

<sup>93</sup> Stuart P. Green, *The Criminal Prosecution of Local Governments*, 72 N.C. L. REV. 1197, 1199 (1994).

<sup>94</sup> *E.g.*, Harmon, *Problem of Policing*, *supra* note \_\_; Seth Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179 (2014).



governs the availability of information about police activities.”<sup>95</sup> Within those latter categories, Harmon identifies state laws that regulate the employment of public employees, collective bargaining laws, and laws that set standards for training and management of officers, and so forth.<sup>96</sup> Similarly, Seth Stoughton points out that federal, state, and local law incentivize and disincentivize police behavior through general rules.<sup>97</sup> Stoughton also identifies collective bargaining laws as an issue for greater exploration, along with federal race discrimination laws like Title VII of the Civil Rights Act of 1964 and the boundaries and structures of local government.<sup>98</sup> Both Harmon and Stoughton offer an invitation to explore the effects of these laws on the daily work of officers; they stop short of identifying specific laws and arguing forcefully that they should be modified or reformed in specific ways in response to the problems they (may) create.<sup>99</sup> They also stop short of prescribing ways to learn about the potential effects of the law of policing, or methodologies for gaining a grounded view of the full set of laws that might indirectly regulate police work. For that, experiential approaches—largely but not exclusively empirical—can move the development of policing law forward.

### C. Experiential Extra-Constitutionalism

The last category of extra-constitutionalist legal scholarship I discuss here is experiential extra-constitutionalism, scholarship that begins inductively with an analysis of human experiences in daily life as the grounding of an extra-constitutional contribution to the law of policing. “Analysis of human experiences” is intentionally broad: It is meant to incorporate a range of types of information-gathering, ranging from surveys with representative samples of respondents, to analyses of “big” administrative data, to field experiments, to demographic analysis of trends in social life over time, to archival analysis drawing upon information about life history, to in-depth qualitative interviews, to ethnographic studies of communities or clients, to auto-ethnographic narratives from critical race scholars. The common thread is that, instead of starting with law and deducing the areas where it needs to improve, experiential scholars begin with human experiences, behaviors, and perceptions and inductively investigate their relationship to the law. In the field of policing law, experiential scholarship has great possibilities for enriching our understanding of the law of policing beyond constitutional criminal procedure.

Although Bill Stuntz’s work was pluralistic and difficult to categorize, his work drew from public choice theory and ultimately took a strong experiential approach to criminal procedure as it pushed past the constitutionalist framework.<sup>100</sup> Stuntz drew on history and social science to demonstrate unequally and

<sup>95</sup> Harmon, *The Problem of Policing*, *supra* note \_\_\_, at 802.

<sup>96</sup> *Id.* at 795-808.

<sup>97</sup> Seth Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179 (2014).

<sup>98</sup> *Id.* at 2196-2220.

<sup>99</sup> A small amount of legal and criminological scholarship has made specific identifications of troubling law, with particular emphasis on police collective bargaining. *See, e.g.*, Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing*, in POLICE REFORM FROM THE BOTTOM UP (Monique Marks & David Sklansky eds., 2012); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 463 (2004); Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005) (describing the union-backed incorporation of “Law Enforcement Officers’ Bills of Rights,” which offer additional employment protection to law enforcement officers, into state law).

<sup>100</sup> *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520-34 (2001); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781 (2006); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1820 (1998). In *The Collapse of Criminal Justice*, Stuntz explained:

unjustly distributed costs of policing that fall particularly heavily upon minority groups living in poverty, starting analytically from the experiences he could catalog or estimate. However, in his magisterial book *The Collapse of American Criminal Justice*,<sup>101</sup> Stuntz focuses on a much larger swath of policing law and administration. For example, Stuntz advocates putting more officers on the street as a means of reducing incarceration rates and to as “an injection of local democracy” to high-crime neighborhoods, given that urban police who use community policing methods are more engaged in communities than are other institutions.<sup>102</sup> Stuntz also suggests shifting the police and incarceration budget allocations between state and local governments, federal aid to police departments to hire more officers, departmental adoption of community policing best practices, and a more democratic approach to police governance, among other reforms.<sup>103</sup> While much of Stuntz’s work provided guidance on improvements to constitutional interpretation around policing,<sup>104</sup> his work in general showed a capacious understanding of the day-to-day work of and political pressures surrounding policing, beyond constitutional criminal procedure’s framework.

Concurrently with Stuntz’s earlier work, the literature on law and social norms, sometimes called the “New Chicago School,”<sup>105</sup> was beginning to use experiential information to reshape understandings of law’s responsiveness to and capacity to shape social norms (or what many social scientists would call “culture”).<sup>106</sup> Those scholars tended to draw from social science theories that built from empirical research, from their

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The tendency, especially among lawyers, is to think that the chief remedy for those injustices lies in more law—especially more constitutional restrictions on the government’s ability to police and punish crime.... [T]he more urgent need is for a better brand of politics: one that takes full account of the different harms crime and punishment do to those who suffer them—and one that gives those sufferers the power to render their neighborhoods more peaceful, and more just.

WILLIAM J. STUNTZ, *THE COLLAPSE OF CRIMINAL JUSTICE* 11 (2011). *But see generally* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008) (taking a value extra-constitutionalist approach, focused on criminal justice equality).

<sup>101</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

<sup>102</sup> *Id.* at 287-88.

<sup>103</sup> *Id.* at 289-94.

<sup>104</sup> *E.g.*, William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001).

<sup>105</sup> Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 661 (1998).

<sup>106</sup> See Orlando Patterson, *Making Sense of Culture*, 40 ANN. REV. SOCIOLOGY 1, 13-14 (2014); see also TALCOTT PARSONS & EDWARD A. SHILS, *TOWARD A GENERAL THEORY OF ACTION* 55 (1965) (identifying norms as part of a “cultural system”); Stephen Vaisey, *What People Want: Rethinking Poverty, Culture, and Educational Attainment*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 75, 77-78 (2010). For illustrative contrary views on the centrality of group norms to culture, see, for example, ANN SWIDLER, *TALK OF LOVE: HOW CULTURE MATTERS* 6 (2001) (critiquing the Parsonian understanding of culture and offering an alternative view); Paul DiMaggio, *Culture and Cognition*, 23 ANN. REV. SOCIOLOGY 263, 264-65 (1997) (same); Michèle Lamont & Mario Luis Small, *How Culture Matters: Enriching Our Understandings of Poverty*, in *THE COLORS OF POVERTY* 76, 80-81 (Ann Chih Lin & David R. Harris eds., 2008) (same). Because the conception of social norms at the heart of the law and social norms was largely a refinement of the law and economics perspective, this ongoing internal debate over the meaning of culture in sociology has been tangential to the intellectual project of law and social norms scholars. *Cf.* Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2477 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914-16 & n.36 (1996).

own empirical research, or both. They applied the law and social norms lens to many subjects—criminal justice, tax law, and more.<sup>107</sup>

One of the law-and-social-norms scholars' areas of greatest influence has been policing law. In a series of pieces, mostly published in the late 1990s, Tracey Meares and Dan Kahan endorsed “broken windows”<sup>108</sup> or order-maintenance policing—the style of policing in which police engage in the enforcement not only of major criminality but also social norms-violating offenses such as littering, prostitution, loitering, public drunkenness, and so forth.<sup>109</sup> Meares and Kahan were deeply concerned about high crime rates in the 1970s-early 1990s, crime that fell most burdensomely on low-income, predominantly black urban neighborhoods.<sup>110</sup> They also took note, as did many scholars, that poor African Americans living in high-crime neighborhoods were deeply fearful of crime and were thus *requesting* the support and intervention of law enforcement.<sup>111</sup> Meares in particular drew upon rich qualitative data and empirically supported social theory in advancing this thesis.<sup>112</sup> Meares and Kahan (controversially) credited order-maintenance policing with the 1990s crime decline.<sup>113</sup> Others have criticized Meares and Kahan’s normative take (that police

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<sup>107</sup> See, e.g., 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 (2000); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO L.J. 1153 (1998); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 L. & SOC’Y REV. 805 (1998); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 576 (1997); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997). For overviews of the law and social norms “school,” which has influenced many areas of the law, see, for example, ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2002); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467 (2003). Some of the tenets associated with the law and social norms school in policing have fallen out of favor as “broken windows” policing has become a source of concern, and some of its main proponents have expressed concern about police regulation of social norms in practice. E.g., 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. CRIM. & DELINQUENCY 609, 611 (2015) (“Although I was a fan of broken windows policing early in my career... I became concerned as I watched how this kind of policing actually was carried out over time... and as our capacity to test its effects expanded”); see also George L. Kelling & James G. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. (1982) (explaining the “broken windows” theory). Although the “school” drew the most attention in the 1990s and early 2000s, contemporary scholarship continues to draw on its insights. E.g., Adam M. Samaha & Lior Jacob Strahilevitz, *Don’t Ask, Must Tell—And Other Combinations*, 103 CALIF. L. REV. 919, 921-22 (2015); Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012); Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103 (2010).

<sup>108</sup> George L. Kelling & James G. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC, March (1982).

<sup>109</sup> TRACEY L. MEARES & DAN M. KAHAN, *When Rights are Wrong: The Paradox of Unwanted Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 3-32 (1999); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEORGETOWN L.J. 1153, 1171-83 (1998); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) in the Inner City*, 32 L. & SOC’Y REV. 805, 830-32 (1998).

<sup>110</sup> See Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669 (1998).

<sup>111</sup> MEARES & KAHAN, *supra* note \_\_\_\_, at 4; see also MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* (2015); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769 (1992); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 101, 121-23 (2012).

<sup>112</sup> E.g., Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998); Tracey L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315 (2007).

<sup>113</sup> Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEORGETOWN L.J. 1153, 1164 (1998) (“The effect of curfews, gang-loitering, laws, order-maintenance policing in restoring norms of order in the inner-city [] deserves a

*should* regulate social norms), but nonetheless embraced the methodological and theoretical innovation, similarly drawing from data, narratives, and social theory to determine the appropriate design of law enforcement.<sup>114</sup> Meares herself has largely moved on from order-maintenance policing, despite remaining deeply concerned about urban crime.<sup>115</sup> Instead, her more recent work takes another experiential extra-constitutionalist pathway to crime reduction: procedural justice.<sup>116</sup>

The theory of procedural justice in policing has its origins in the research of social psychologist and legal scholar Tom Tyler and colleagues. In a large body of scholarship, Tyler and collaborators have shown that even if a police encounter ends with a negative result (e.g., a ticket), if a person perceived the police officer's actions and behavior as respectful and fair, they are more likely to perceive the outcome as legitimate,<sup>117</sup> to comply with officers' requests,<sup>118</sup> and to cooperate with police officers' crime-solving efforts.<sup>119</sup> Unlike *Miranda*, which requires officers to make specific statements,<sup>120</sup> procedurally just interaction is difficult to prescribe—it is a way of interacting that cannot be captured in a script alone. However, procedural justice scholars have identified four components of effective interaction—neutrality,

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critical share of the credit for the decline of crime rates in the 1990's"); *see also* FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* (2007) (cataloguing the plurality of views on why crime declined in the late 1990s and questioning the relative role of policing in the crime rate reduction); 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 (1998) (same). Law-and-economics scholar John Donahue and economist Steven Levitt have notoriously argued that the crime decline was attributable to the legalization of abortion, hypothesizing that many of those who would have become criminals were aborted post-*Roe*. John J. Donahue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON. 379, 414 (2001) ("These estimates suggest that legalized abortion is a primary explanation for the large drops in murder, property crime, and violent crime that our nation has experienced over the last decade"). This thesis has been widely criticized, though not conclusively debunked. *See, e.g.*, Angela K. Dills, Jeffrey A. Miron & Garrett Summers, *What Do Economists Know about Crime?*, in *THE ECONOMICS OF CRIME: LESSONS FOR AND FROM LATIN AMERICA* 269, 285-86 (Rafael Di Tella, Sebastian Edwards & Ernesto Schargrodsky, eds. 2010); Christopher L. Foote & Christopher F. Goetz, *The Impact of Legalized Abortion on Crime: Comment*, 123 Q.J. ECON. 407 (2008).

<sup>114</sup> *See generally* 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 (1998) (drawing upon quantitative data analysis and Foucauldian theory to debunk the idea that broken windows policing reduces crime and to critique New York City's 1990s policing regime).

<sup>115</sup> *See* Tracey Meares, *Broken Windows, Neighborhoods, and the Legitimacy of Law Enforcement or Why I Fell in and out of Love with Zimbaro*, 52 J. RES. CRIM. & DELINQUENCY 609, 611 (2015) ("Although I was a fan of broken windows policing early in my career... I became concerned as I watched how this kind of policing actually was carried out over time...and as our capacity to test its effects expanded").

<sup>116</sup> *See infra* text accompanying notes \_\_\_\_\_.

<sup>117</sup> *E.g.*, Robert MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 173 (2005); 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 (2011); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253 (2004); *see also* Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, J. CRIM. L. & CRIMINOLOGY (forthcoming), available at <http://papers.ssrn.com/abstract=2116645> (last visited Apr. 12, 2016).

<sup>118</sup> *E.g.*, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Aziz Z. Huq, Tom R. Tyler & Stephen J. Schulhofer, *Why Does the Public Cooperate with Law Enforcement? The Influence of the Purposes and Targets of Policing*, 17 PSYCH., PUB. POL'Y & L. 419 (2011).

<sup>119</sup> *E.g.*, 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 (2008).

<sup>120</sup> *See Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (describing explicitly information that a police officer must give a person prior to custodial interrogation).

voice, respect, and trust—that they emphasize in new police training, one of few police training curricula that has been rigorously and favorably evaluated.<sup>121</sup> There is a challenge to conceiving of procedural justice as a *legal* intervention in a framework where the role of law is to avoid violation of individual rights rather than to promote effective crime control and community security. How does one translate the insights of procedural justice and other theories of micro-level police-community interaction into structural change? While much remains to be seen, the U.S. Department of Justice has backed a pilot intervention through the National Initiative for Building Community Trust & Justice, with a core mission of helping police agencies structure their policies in line with the principles of procedural justice.<sup>122</sup> If the meaning of policing law is expanded beyond federal constitutional and statutory law to local agency governance, there is much possibility for theories like procedural justice, derived from community conceptions of what constitutes effective policing, to shape the law.

There have been other efforts to marshal social scientific knowledge of various kinds to shed light on policing law. For decades, legal scholars have drawn on cognitive bias theory to illuminate antidiscrimination law;<sup>123</sup> a burgeoning body of legal scholarship draws upon new social psychological research that documents cognitive biases of various stripes (e.g., racial, masculinity threat, prosecutorial bias) among police officers<sup>124</sup> and other players in the criminal justice system.<sup>125</sup> Bernard Harcourt has innovatively argued for randomization and against predictive statistical approaches to various aspects of criminal justice, including sentencing and *Terry* stops.<sup>126</sup> The fundamental idea is that because police officers do not exercise their discretion through individualized suspicion but are instead carrying out a “program,”

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<sup>121</sup> See Wesley G. Skogan, Maarten Van Craen & Cari Hennessy, *Training Police for Procedural Justice*, 11 J. EXPERIMENTAL CRIMINOLOGY 319, 324-25, 332-33 (2015) (describing measures used and preliminary results of a Chicago police training program designed to teach police to interact in accordance with procedural justice principles).

<sup>122</sup> See National Initiative for Building Community Trust & Justice, Mission, <https://trustandjustice.org/about/mission> (last visited Apr. 12, 2016).

<sup>123</sup> E.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, in CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 206, 207-08 (Gregory S. Parks et al. eds., 2008).

<sup>124</sup> E.g., L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961 (2015); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7 (2010).

<sup>125</sup> E.g., Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013) (on bias in “prosecutorial administration”); Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163 (2007) (on cognitive biases and plea bargaining); L. Song Richardson & Philip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 100 (2013) (on public defense); see also Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) (on unconscious racism in then-recent criminal procedure cases—*McCleskey v. Kemp*, 481 U.S. 279 (1987); *Turner v. Murray*, 476 U.S. 28 (1986); and *Batson v. Kentucky*, 476 U.S. 79 (1986)).

<sup>126</sup> BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 237-39 (2007). In later work with Meares, Harcourt argues that randomization could represent an alternative to individualized suspicion in Fourth Amendment definitions of reasonableness, returning somewhat to a constitutionalist legal proposal. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809 (2011).

their discretion should be constrained to curb various sorts of systemic inequities.<sup>127</sup> These scholars tend to make suggestions for both police departments and Fourth Amendment jurisprudence, but there is much more room for development of extra-constitutional approaches to the issues this scholarship raises. Finally, “big data”—for example, administrative datasets that include millions of data points—has made an impact on policing law in practice and scholarship.<sup>128</sup> Most notably, Jeffrey Fagan’s analysis of more than two million *Terry* stops in New York City<sup>129</sup> was critical to the outcome of *Floyd v. City of New York*,<sup>130</sup> which struck down the NYPD’s stop-and-frisk policy on the grounds that it violated the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>131</sup>

In the opposite direction of big data, narrative-based experiential analysis—intentionally “small” data—has not been used extensively in policing law. A small but intellectually significant body of policing scholarship, using core methodologies of critical race theory,<sup>132</sup> has drawn on personal narratives to shed light on problems of policing that previous scholarship had not fully considered. For example, legal scholar (and U.K. native) Devon Carbado begins his 2002 *Michigan Law Review* article, *(E)racing the Fourth Amendment*, with a powerful personal story of realizing, upon experiencing police racism on multiple occasions in Los Angeles, that he had become a black American.<sup>133</sup> While Carbado’s use of personal narrative here is some of the most poignant and widely read, it is only one of many pieces of critical race legal scholarship that draw from stories of police interactions.<sup>134</sup>

<sup>127</sup> *Id.*; see also 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).

<sup>128</sup> See, e.g., Jeffrey Fagan & Amanda B. Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 68 (2015) (describing their data). For other examples using “big data” in policing law literature, see David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN L. REV. 265 (1999); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUMAN RTS. L. REV. 551 (1997).

<sup>129</sup> Report of Jeffrey Fagan, Ph.D., *Floyd v. City of New York*, No. 08 Civ. 01034 (S.D.N.Y. Oct. 15, 2010), at 18; see also 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).

<sup>130</sup> 959 F. Supp. 2d 540 (2013).

<sup>131</sup> *Id.* at 658-77.

<sup>132</sup> See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: A DIARY OF A LAW PROFESSOR* (1991); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 370 (“[I]t is the little things, the small everyday realities of life, that reveal the deepest meanings and values of a culture, give legal theory its grounding, and test its legitimacy”); Alex Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2009 (1991); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); Margaret E. Montoya, Mascaras, Trenzas, Y Greñas: *Unmasking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185, 210-15 (1994). During the late 1980s and early 1990s, a heated debate erupted over the use of authorial voice in legal scholarship. See, e.g., Stephen L. Carter, *Academic Tenure and “White Male” Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2065 (1991); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); see also Monica Bell, *The Obligation Thesis: Understanding the Persistent Black Voice in Modern Legal Academia*, 68 U. PITT. L. REV. 643, 653-69 (2007) (describing the history and debates surrounding narrative in legal scholarship in the 1980s-early 2000s in greater detail). Today, voice scholarship virtually never appears in the pages of elite law journals as it regularly did twenty-five years ago. It is somewhat unclear why this is so.

<sup>133</sup> Devon Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 947-64 (2002) (drawing upon a personal narrative as the basis for a rejection of colorblindness in Fourth Amendment jurisprudence).

<sup>134</sup> E.g., I. Bennett Capers, *Policing, Place, and Race*, 44 HARV. C.R.-C.L. L. REV. 43, 60-61 (2009) (drawing upon four short stories of perceived biased policing from middle- to upper-class African Americans, including the story from Carbado’s article); [ADD MORE]

Moving away from the auto-ethnographic,<sup>135</sup> some scholars have drawn from policing narratives constructed from the facts of cases to shed light on issues in policing law.<sup>136</sup> Analyzing court cases for their facts rather than for their holdings can also be understood as experiential, narrative-based reasoning. There remains very little policing law scholarship that draws from a *collection* of narratives, in line with generally accepted practices in qualitative social science.<sup>137</sup> One major exception is an article by Meares, with Kelsi Brown Corkran, that provides a rich narrative account of a series of prayer vigils for crime reduction in Chicago.<sup>138</sup> However, Meares and Corkran’s primary legal focus is the First Amendment and possibilities for collaboration between African-American churches and the state on law enforcement issues.<sup>139</sup> Police regulation itself is not at the center of this analysis.

I join the experiential extra-constitutionalists. I too look to the social world for a set of principles that might animate innovation in policing law. My data source are rich narratives from 151 parents in two metropolitan areas (Cleveland, Ohio (Cuyahoga County) and Dallas, Texas (Dallas County)). Like the law and social norms scholars, I emphasize the connection between social dynamics and law enforcement. Unlike them, I argue that policing should take account of social dynamics and social conditions, but would not claim that police should regulate non-criminal social dynamics or root out “undesirable” social norms or

<sup>135</sup> The personal narratives used in critical race scholarship could be viewed as works of “autoethnography,” a still uncommon but growing method in humanities and more postmodern social sciences. See, e.g., Leon Anderson, *Analytic Autoethnography*, 35 J. CONTEMP. ETHNOGRAPHY 373 (2006).

<sup>136</sup> E.g., Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1 (2010) (building a Foucauldian theory of policing the mentally ill based on an in-depth analysis of civil police misconduct cases involving mentally ill persons).

<sup>137</sup> There is considerable debate within qualitative social science about valid research practices. There are debates between ethnographers and interviewers over the relative usefulness of hearing what people say versus observing what they do. Compare, e.g., Colin Jerolmack & Shamus Khan, *Talk Is Cheap: Ethnography and the Attitudinal Fallacy*, 43 SOC. METHODS & RES. 178 (2014) (arguing that interview research ignores the differences between attitudes and behaviors) with Michèle Lamont & Ann Swidler, *Methodological Pluralism and the Possibilities and Limits of Interviewing*, 37 QUALITATIVE SOC. 153, 154 (2014) (rejecting “methodological tribalism” in favor of a “pluralistic and pragmatic” approach). There are debates among interview researchers about the appropriate size and composition of samples, with some eminent sociologists claiming that sample sizes should prioritize depth and thus never exceed fifty participants, while others suggest that qualitative researchers explore using larger-*N* random samples and working on teams in pursuit of representativeness and internal validity checking. Compare Stefanie DeLuca, Susan Clampet-Lundquist & Kathryn Edin, *Want to Improve Your Qualitative Research? Try Using Representative Sampling and Working in Teams*, CONTEXTS, Mar. 19, 2016, <https://contexts.org/blog/want-to-improve-your-qualitative-research-try-using-representative-sampling-and-working-in-teams/> (last visited Apr. 12, 2016) (“Employing a representative sampling frame makes it less likely that researchers mistake the exceptions for the norm”) with Annette Lareau & Aliya Hamid Rao, *It’s About the Depth of Your Data*, CONTEXTS, Mar. 19, 2016, <https://contexts.org/blog/its-about-the-depth-of-your-data/> (last visited Apr. 12, 2016) (“The value of qualitative research is not about brandishing the large number of cases in a study. Instead, qualitative researchers need to focus on the quality and the meaning of the data they have collected. This is the source of their legitimacy”). Still others believe that focusing on sample size, and seeking representativeness, are essentially fool’s errands for qualitative researchers. Mario Luis Small, *How Many Cases Do I Need? On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOGRAPHY 5, 28 (2009) (arguing that good qualitative methodology “call[s] for logical rather than statistical inference, for case- rather than sample-based logic, for saturation rather than representation as the stated aims of research”). These are debates over data collection, but there are also debates over data analysis. The important point is, however contested the terrain of qualitative methodology, policing law scholars have not (generally speaking) sought to meet any of those methodological standards. But see Tracey L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315 (2007) (using qualitative data-gathering techniques).

<sup>138</sup> Meares & Corkran, *supra* note \_\_\_\_.

<sup>139</sup> *Id.* at 1362-80.

“bad culture.” Like many quantitatively oriented policing law scholars, I look to individual-level data to better understand the full range of what police produce in society. Unlike them, I proceed inductively and abductively, with an aim of gaining an in-depth view of community members’ subjective understandings of police, in a mode of hypothesis generation rather than testing.<sup>140</sup> This type of analysis brings into view a set of risks and rewards associated with policing that legal scholars have largely overlooked.

Finally, what is a “narrative”? How should narratives be understood? Here, I do not use personal narrative or more creative forms of storytelling, though I do not besmirch their value to legal analysis. The use of narrative in this Article is in line with that of Patricia Ewick and Susan Silbey: I “use stories as a lens to study law in everyday life.”<sup>141</sup> This is distinguishable from the “local knowledge” that has been endorsed in qualitatively oriented law and social norms scholarship.<sup>142</sup> As practiced here, narrative analysis is not primarily about identifying policy preferences, nor is collecting narrative data equivalent to conducting an elaborate opinion poll. I would not argue, for example, that the people most affected by a policy are best positioned to decide whether that policy protect their rights. It is incumbent upon scholars who rely on narrative data to move beyond simply asking people, “What sort of law do you want?” and then advocating for whatever interventions the majority supports.<sup>143</sup> This is because deep-seated inequality often makes the possibilities and perils of the law invisible even to those whose lives are shaped by it. Legal scholar Carol Steiker has analogized 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.”<sup>144</sup> Pierre Bourdieu encapsulated this idea in his

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<sup>140</sup> Abductive and inductive approaches start from data and reason from the data to generate new explanations, in contrast with deductive approaches, which aim to understand the world by starting with theory and supporting or disproving the theory. All are critical to the production of knowledge. Inductive and abductive approaches are helpful for the creation of new, previously unconsidered ideas, while deductive approaches test preexisting theories to see whether they are “true.” (There are differences between inductive and abductive reasoning: Induction requires close analysis of data and hypothesizes about the existence of a phenomenon, while abduction looks at an alleged phenomenon and generates the best explanation for it. Most qualitative social science, therefore, is mostly inductive and partly abductive). For discussions of these knowledge dynamics in law, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 942-49 (1996). See also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 86-98 (1993); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999); Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. CRIM. L. & CRIMINOLOGY 1045 (2009). In the context of legal process, Jeffrey Rachlinski has analogized these forms of reasoning to adjudication (bottom-up) and legislation (top-down), explaining that the forms of reasoning might lead to different legal resolutions. See Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 934 (2006) (“Adjudication thus builds law from the ground up, one dispute at a time. Legislation builds law from the top down by creating general principles that cover future disputes. This difference, though subtle, can be enough to inspire different resolutions to the same issues”).

<sup>141</sup> PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* 29 (1998).

<sup>142</sup> See Kahan & Meares, *supra* note \_\_\_, at 1177-80.

<sup>143</sup> This is important to keep in mind with respect to the role of narrative in lawmaking and legal analysis more generally. New scholarship in administrative law has begun to critically interrogate and expand what counts as “evidence” in evidence-based lawmaking. Dmitry Epstein, Cynthia Farina, Josiah Heidt, *The Value of Words: Narrative as Evidence in Policymaking*, 10 EVIDENCE & POL’Y 243 (2014) (describing four different types of narratives—complexity, contributory context, unintended consequences, and reframing—as useful in the design of regulation of air travel); see also ANTHONY G. AMSTERDAM & JEROME S. BRUNER, *MINDING THE LAW* 110-42 (2009) (describing the relationship between narrative and law in more general terms). As regulators gain more information from a wider swath of narrative data, it will be important for them to contextualize and critically analyze policy opinions that emerge from that type of evidence.

<sup>144</sup> 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); see also Bernard Harcourt, *Matrioshka Dolls*, in TRACEY L. MEARES & DAN M. KAHAN, *URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES* 81, 83-84 (1999).



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 inequalities.<sup>145</sup> Thus, when a researcher captures a person’s narrative, that researcher is learning just as much about social structure as about the individual before them. It is incumbent upon scholars, lawmakers, and adjudicators who draw on narratives to think critically about their content, to look beyond what is said to what is meant, to examine the context from which statements arise.<sup>146</sup>

## **Part II. Narrative-Based Experiential Extra-Constitutionalism in Action: Evidence from *How Parents House Kids***

In this Part, I draw upon semi-structured, in-depth interviews drawn from *How Parents House Kids* (HPHK), a qualitative empirical project conducted in two American metropolitan areas, Cleveland, Ohio and Dallas, Texas. The goal of this Part is to provide a grounded, nuanced view of how parents assess the influence of policing in their daily lives, and to demonstrate how legal and regulatory decisions about policing exert a direct influence over community life. In Part III, the Article shifts from understanding some of the legal and regulatory issues descriptively to providing a path forward for largely neglected aspects of the law of policing.

### **A. How Parents House Kids**

HPHK is a collaborative effort that brings together researchers from Johns Hopkins University, Harvard University, and Northwestern University. This study, funded by the John D. and Catherine T. MacArthur Foundation, was designed to seek an in-depth understanding of the factors families with young children consider when deciding where to live. Given persistent segregation in U.S. metropolitan areas by race and class,<sup>147</sup> the study is particularly interested in exploring potential class and racial differences in residential decision-making and meaning-making.

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<sup>145</sup> PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 170-72 (Richard Nice trans., Harvard University Press 1984) (1979) (describing *habitus* as both a “structuring structure” and a “structured structure”). Cf. EWICK & SILBEY, *supra* note \_\_, at 29 (“As a form of social action, stories thus reflect and sustain institutional and cultural arrangements, bridging the gap between daily social interaction and large-scale social structures”); CORNEL WEST, *RACE MATTERS* 21-22 (1993) (“[T]o call on black people to be agents makes sense only if we also examine the dynamics of this victimization against which their agency will, in part, be exercised”).

<sup>146</sup> See, e.g., EWICK & SILBEY, *supra* note \_\_, at 18-30 (2003); FRANCESCA POLLETTA, *IT WAS LIKE A FEVER: STORYTELLING IN PROTEST AND POLITICS* 1-31 (2004); CATHERINE KOHLER RIESSMAN, *NARRATIVE METHODS FOR THE HUMAN SCIENCES* (2008); Margaret R. Somers, *The Narrative Constitution of Identity: A Relational and Network Approach*, 23 *THEORY & SOC’Y* 605, 613-15 (1994). The role of narrative in courts and lawmaking, and through law and literature methodology, has proceeded largely separately from the social scientific discussion of narratives as data. For more information about longstanding debates over narratives in lawmaking and legal analysis, see, for example, RICHARD A. POSNER, *LAW AND LITERATURE* 345-80 (3d ed. 1998); Kathryn Abrams, *Hearing the Call of Stories*, 79 *CALIF. L. REV.* 971 (1991); Kenworthy Bilz, *We Don’t Want to Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 *ILL. L. REV.* 429; Daniel Farber & Susanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *STAN. L. REV.* 807 (1993); Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 *FORDHAM L. REV.* 787, 788 (2000); Mark V. Tushnet, *The Degradation of Constitutional Discourse*, 81 *GEO. L.J.* 251 (1992).

<sup>147</sup> See, e.g., EDWARD GLAESER & JACOB VIGDOR, *THE END OF THE SEGREGATED CENTURY: RACIAL SEPARATION IN AMERICA’S NEIGHBORHOODS, 1890–2010* (2012); Paul Jargowsky, *The Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy*, CENTURY FOUNDATION ISSUE BRIEF, Aug. 9, 2015; John R. Logan, *The Persistence of Segregation in the 21st Century*

## 1. Sampling & Data Collection

We pulled a random sample of addresses from stratified randomly sampled Census block groups in Cuyahoga County, Ohio and Dallas County, Texas.<sup>148</sup> The sampled block groups were stratified by median income of families in the block group, which we determined using Census data. The three sampled strata include low-income (<\$25K), middle-income (\$25K to \$50K), and high-income (>\$50K) block groups. To ensure an in-depth examination of decision-making processes among poor and minority families, we purposively over-sampled from predominantly African-American and low-income block groups in both counties and from predominantly Hispanic<sup>149</sup> block groups in the Dallas area. In all, the sample was 47.7% African American, 25.8% Hispanic, 22.5% non-Hispanic white, 4.0% of other races, across both cities. Also across both cities, 56.3% of the sample was from a low-income neighborhood, 28.5% was from a middle-income neighborhood, and 15.2% of the sample was from a high-income neighborhood. Given that we sought to interview the primary caregivers of young children, the focal respondent in more than 80% of the interviews was female (see Table 1). The Dallas-area sample contained a slight plurality of Hispanic respondents (43.2%, compared to 34.6% black and 19.8% white), while the Cleveland-area sample was majority-African American (62.8%, compared to 5.7% Hispanic and 25.7% white) (see Table 2).

<<Figure 2 about here>>.

A household was considered eligible for the study if children between ages three and eight resided there. Members of the research team visited each randomly sampled address in each block group to determine the household's eligibility for the study and to recruit the children's primary caregiver(s) for an interview. In total, after eliminating addresses where residents were ineligible for the study (i.e., were not the primary caretaker of a child between the ages of three and eight), the study had a combined response rate of more than 80% in both Cleveland (88%) and Dallas (80.2%), across both waves.

Data were collected using in-depth, semi-structured interview techniques. We collected data from 151 families, spread across two waves in 2013 and 2014, for a total of 264 interviews. We asked questions related to a vast array of social life, including an extensive history of every address respondents had ever resided as an adult, perceptions of current and past neighborhoods, factors they considered in moving from place to place (both retrospectively and prospectively), relationships with current and past landlords, experiences with foreclosure and eviction, their children's experiences with schooling, their own employment and educational backgrounds, marriage and relationship backgrounds, any immigration experiences, and issues related to their physical and mental health and the health of their partners and children. To maintain participant confidentiality, each sampled address was assigned a code that allowed the team to track the respondent's city, median neighborhood income, predominant neighborhood race, and block group without individually identifying information.

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*Metropolis*, 12 CITY & COMMUNITY 160 (2013); Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290 (2011).

<sup>148</sup> We defined metropolitan areas as U.S. Census Metropolitan Statistical Areas (MSAs). Thus, we pulled our sample from block groups within the Dallas–Fort Worth–Arlington, TX MSA and the Greater Cleveland MSA.

<sup>149</sup> I use the term “Hispanic” throughout as it is in-line with Census convention. I do not take a position on the accuracy or desirability of this term. The overwhelming majority of “Hispanic” respondents in *HPHK* are Mexican-American.

Although many of the interviews from 2013 involve some discussion of crime because of its relationship to residential preference and frequently included respondent-initiated discussion of the police, we only explicitly asked respondents about their opinions of and experiences with the police in the 2014 wave.<sup>150</sup> Because the interviews were both broad-ranging and in-depth, they were lengthy: the average interview took roughly 2.5 hours, ranging from 30 minutes to more than five hours. Respondents were offered a stipend of \$50 as compensation for their time. In addition to the primary 2013 and 2014 interviews, members of the research team conducted brief check-in interviews with respondents between and following the two waves of interviews. We also collected additional observational data, including a simulated on-line housing search, a detailed tour of respondents' current homes, and ethnographic "hangouts" with selected respondents in their neighborhoods.

## **2. Data Analysis**

After data collection was complete, a professional transcription company transcribed interview recordings verbatim. These full transcripts were uploaded into Dedoose qualitative data analysis software. Data were analyzed in a four-stage coding process using Dedoose and Microsoft Excel. At Stage 1, we read the transcripts through completely and engaged in "open coding," focused on any mention of crime or police. From the open coding, we created a simple coding dictionary that divided mentions of crime and policing into specific categories. At Stage 2, two research assistants read through the entire transcripts as well, applying the codes in the dictionary to quotations involving crime and police and suggesting modifications to the coding dictionary based on their readings. Each research assistant reviewed the entire body of transcripts to ensure inter-rater reliability and created memos on the data to express any concerns or disagreements about how a quotation should be coded. At Stage 3, we reviewed the coding, pulling out only the sections of transcripts that illuminated the emerging argument about policing and residential preference and reanalyzing them in Excel using close reading and summary. Finally, at Stage 4, I reviewed all of the codes and examined potential demographic interactions, focusing on the city, race, gender, age, and income of the respondents along with the specific demographics and characteristics of their neighborhood.<sup>151</sup>

## **3. Data Presentation**

Throughout this Part, I draw upon narratives to illustrate each of the five main arguments. Using only a small number of central narratives under each argument means that the Article prominently features only a few parents from a much larger sample. I have chosen to organize the data presentation this way for two reasons. First, in-depth narratives that reveal background, context, and interaction are key to the successful presentation of qualitative data, and discussing respondents in depth trades off on the number of respondents possible to discuss in one article. I could use shorter vignettes about each respondent to include more of them, but I tend to believe that presenting data as merely a list of decontextualized quotations or

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<sup>150</sup> Moreover, some interviewers skipped the policing module due to respondent-imposed time constraints. This fact underscores that HPHK is an exploratory qualitative study rather than a study that should be used to test hypotheses. This also reinforces that the prevalence of a certain finding within these data should not be the primary measure of its analytic value.

<sup>151</sup> See KATHY CHAMAZ, *CONSTRUCTING GROUNDED THEORY* (2006); BARNEY G. GLASER & ANSELM STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967); Ralph LaRossa, *Grounded Theory Methods and Qualitative Family Research*, 67 J. MARRIAGE & FAM. 837 (2005).

counts reduces the depth of the narrative, and thus reduces this type of data’s probative power.<sup>152</sup> Second, heavy reliance on quantification of narrative data often prioritizes the words stated over than the subjective and contextualized meanings of those words.<sup>153</sup> Accordingly, though more of the data speaks to the arguments below, I zero in on a few respondents whose stories reveal the more deeply the inner-workings of particular themes. However, to demonstrate that I am—except where specified—focusing on mundane rather than extreme stories, I provide mix in additional shorter quotes and abbreviated supportive stories, along with counts of the number of times various themes emerged from the data. In addition, to help readers understand the contexts that respondents refer to, the Appendix provides basic demographic information about each of the suburbs mentioned in the Article **[not included in draft]**.

All names used throughout the Article are pseudonyms, in keeping with the requirements of the Office of Human Subjects Research-Institutional Review Board at Johns Hopkins University and the Committee on the Use of Human Subjects at Harvard, both of which reviewed *HPHK*’s protocols and procedures. Because using the real names of the neighborhoods I discuss is analytically important, I have slightly altered some less essential information, such as respondents’ precise ages and occupations, to maintain confidentiality.

## B. Findings

The central theme in the interviews is that police play an important role in how respondents assess the quality of a neighborhood. Their presence, and the way they conduct their work, matters differently from the crime rate itself. Parents sought to bring themselves and their families close to police, but in a particular way—close enough to reap the benefits of proactive and community-oriented policing.<sup>154</sup>

Some parents were willing to sacrifice some privacy to acquire police proximity, but many were not. When police are responding to crime aggressively, parents tended to report feeling unsafe. However, respondents tended to view the maintenance of a consistent presence positively, as previous scholarship would predict.<sup>155</sup> A large proportion of parents spoke about the importance of proactive police patrolling and presence within their current neighborhood and their ideal neighborhood. In Cleveland, more than half of the sample (36/70, or 51.4%) spoke, mostly spontaneously, about the importance of proactive policing in their neighborhoods. In Dallas, a smaller proportion (38/81, or 46.9%) discussed the importance of police

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<sup>152</sup> See Lareau & Rao, *supra* note \_\_ (“Because doing qualitative research well is labor and time-intensive, it can be frustrating for scholars that they cannot share all of the collected evidence with the reader. Instead, researchers only share an extremely small fraction of the data. But qualitative researchers know that they have more data to support their claims than what they are able to present. This conviction is important. Yet, the writing and the quotes need to be judicious. Readers enjoy being told a story, and readers like to “connect” with a person in the text. Researchers who collect and analyze these rich details of social interaction are able to create clearer, more sophisticated arguments. Hence, it is valuable for these details to appear in the analysis. Too many studies using interview data prioritize including numerous quotes on the same analytical point as evidence of the robustness of their data. We find it better to present fewer people in more depth by helping the reader get to know a person in the study”).

<sup>153</sup> See *infra* discussion of narrative in Part I.C.

<sup>154</sup> In this way, despite massive changes in police policy and practice over the past few decades, the community perspective has not significantly changed in the nearly four decades since the Newark, New Jersey foot patrol experiment, conducted in the late 1970s. See POLICE FOUNDATION, *THE NEWARK FOOT PATROL EXPERIMENT* (1981), available at <http://www.policefoundation.org/publication/the-newark-foot-patrol-experiment/>. That study found that police foot patrol did not reduce crime, but did reduce neighborhood residents’ *fear* of crime. That is, police presence builds confidence but does not prevent crime. Much has changed in policing theory since the 1970s, and it may be that police presence in Dallas and Cleveland neighborhoods is also deterring crime.

<sup>155</sup> CITES.

presence in their neighborhood navigation and preferences.<sup>156</sup> Very few respondents were “negative cases” of a desire for police presence, meaning that they said that they did not want the police in their neighborhood.<sup>157</sup> Indeed, only six respondents in the complete sample made negative statements about police presence in a neighborhood. Even those respondents were clarifying that too much presence could backfire; they were generally desirous of police presence and were not broad police detractors.<sup>158</sup>

Instead of emphasizing the basic fact that parents wanted positive proximity to the police, this Section focuses on some of the strategies parents used to bring themselves and their families positively close to the police, emphasizing the strategies implicated directly in legal and policy decision-making. While many techniques emerged from the data in some form, I focus on five that have strong connections to police regulation and institutional practices: (1) avoiding the city, (2) anticipating discrimination, (3) paying for patrol, (4) pinpointing police stations, and (5) having a cop as a neighbor. In some but not all cases, these techniques are marshalled differently across geography, income, and race.

## 1. Avoiding the City

Although policing scholars rarely discuss geographic differences in the quality of policing *relationally*, comparing the actual or perceived quality of policing within a city and its suburbs or between different parts of cities, a substantial portion of both Cleveland-area and Dallas-area respondents analyzed policing in this way. In Cleveland, 32 of 70 participants (45.7%) articulated differences between the policing residents of different parts of the metropolitan area experience, many claiming that certain policing approaches, practices, or reputations attracted them to or repelled them from specific areas. Perhaps surprisingly, when these respondents are broken out by race, a larger proportion of white respondents described differences

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<sup>156</sup> Note that a substantial portion of the Dallas sample is comprised of undocumented migrants who spoke about trying to avoid all police contact. The preference for police presence was understandably decreased among that group, thus lowering this preference as a percentage of the Dallas and combined samples.

<sup>157</sup> In qualitative social science, it is generally good research practice to seek out disconfirming evidence, or “negative cases,” to avoid making unsupported inferences from data and to better identify the mechanisms that link one social phenomenon to another. See, e.g., BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* 103-04 (7th prtg. 2012) (describing analytic induction methods); Joanne Nagel, *Conceptions of a Former Program Officer*, in MICHELE LAMONT & PATRICIA WHITE, *REPORT OF THE WORKSHOP ON INTERDISCIPLINARY STANDARDS FOR SYSTEMATIC RESEARCH* 161, 163 (2009), available at [http://www.nsf.gov/sbe/ses/soc/ISSQR\\_workshop\\_rpt.pdf](http://www.nsf.gov/sbe/ses/soc/ISSQR_workshop_rpt.pdf); James Mahoney & Gary Goertz, *A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research*, 14 POL. ANALYSIS 227, 242-44 (2006); see also Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 9-10, 76-80 (2002) (applying the inferential logic of seeking disconfirming evidence and falsifiability to variable-based, hypothesis-driven, quantitative empirical legal research). While the logic of falsifiability does not perfectly apply to a study like this one that is looking descriptively for techniques rather than making causal claims about those techniques, for each of the themes presented here, I along with my research assistants have sought disconfirming cases, respondents who reject a theme advanced here and examined their logic. Except where a case is presented below, respondents did not reject the technique. In addition, we have looked for the prevalence of each technique within the data as a baseline, though noting that the true value of qualitative narrative data is in its nuance rather than its frequencies.

<sup>158</sup> Interestingly, these six respondents cut across racial, neighborhood-income, and gender lines. For example, Andrew, a high-income, white father in his forties living in one of the highest-median-income neighborhoods in the City of Dallas, became nervous when he saw a swarm of police cars in his neighborhood one morning. They were “like, the off-duty people,” he clarified. He realized later that they were there because there was a race in the area, but at the time, “it kind of scared me,” Andrew admitted. That was too much presence, a sign of disorder. But Andrew’s wife Maura still likes the somewhat less visible proactive policing they get in their neighborhood, explaining that “I tend to have a high level of trust. I prefer them around. (Except for if I’m speeding and then I don’t!)”

between policing in different parts of the county than did black respondents (10/18 white respondents versus 19/44 black respondents). In articulating spatial distinctions in policing, white respondents were usually explaining why they think the police in their suburban neighborhood are more effective and more desirable than Cleveland Police Department officers.

In Dallas, 27 of 81 participants (33.3%) made similar sharp distinctions between police practices, reputations, and behavior in different parts of the metropolitan area. However, a different racial breakdown emerged from the data. In Dallas, only three of sixteen white respondents drew distinctions between policing in different parts of the metropolitan area. Nine of thirty-five Hispanic respondents drew these distinctions. However, fourteen of the twenty-eight black respondents—half of them—differentiated between police in different parts of the metropolitan area.<sup>159</sup> The segregation of experiences of crime might be exacerbated in the Dallas area, particularly because, as described in Section II.B.3., many wealthier and whiter Dallas neighborhood associations pay the Dallas Police Department to provide additional community policing to their communities. Almost universally, Cleveland-area respondents viewed the Cleveland Police Department as ineffectual, while Dallas-area respondents' perceptions of the Dallas Police Department were more variant by race and neighborhood income level.<sup>160</sup>

a. Whites in Cleveland

Marie, a white thirty-seven-year-old mother of two in the Cleveland-area sample, has “the utmost respect” for Cleveland police officers, but prefers the quality of policing she receives in her tony suburb of Rocky River. Marie comes from a family of first responders and counts three Cleveland police officers as family members. She spent much of her early life living on Cleveland’s blue-collar, racially diverse West Side. As a child, she would visit relatives in Rocky River, and she hated it. They were “very snobby,” in her estimation. Yet, as an adult, she moved with her husband to Rocky River seeking quietness and safety.

According to Marie, although she heavily values school quality and proximity to her family when making residential decisions, an incident involving police was her and her husband’s breaking point in their decision to escape Cleveland for Rocky River a few years ago. In Cleveland, they were living next to a neighbor whose ex-girlfriend came over from time to time, and they would get into violent domestic disputes. This neighbor was “kind of gruff, but yet very nice to us,” Marie assessed. One day, the neighbor was fighting

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<sup>159</sup> There were no detectable differences on the basis of neighborhood median income in either site.

<sup>160</sup> The turbulent history of the Cleveland Police Department, articulated in part in a 2014 U.S. Department of Justice that preceded its May 2015 consent decree and, for many, reiterated in the Tamir Rice killing that occurred just three months after HPHK data collection concluded would lead one to predict that black Clevelanders would frame police aggression in terms of race more than any other group in the sample. However, black and Hispanic Dallas residents were more likely than black Clevelanders to draw upon scripts of racial bias when differentiating between the policing in different parts of the metropolitan area. See U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION & U.S. ATTORNEY’S OFFICE FOR THE NORTHERN DISTRICT OF OHIO, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 48-49 (Dec. 4, 2014), *available at* [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland\\_division\\_of\\_police\\_findings\\_letter.pdf?wpisrc=nl-wonkbk&wpmm=1](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf?wpisrc=nl-wonkbk&wpmm=1) (last visited May 6, 2016) ; see also *U.S. v. City of Cleveland*, Settlement Agreement (May 26, 2015), *available at* [https://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland\\_agreement\\_5-26-15.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland_agreement_5-26-15.pdf) (last visited May 6, 2016) (final consent decree). Although the Black Lives Matter movement was underway before data collection ended, one drawback of these data is that they cannot tell us whether the killing of Tamir Rice and its fallout altered Cleveland-area residents’ perceptions of the Cleveland police. As described above, opinions were already quite negative across racial groups. An interesting future study might compare views before and after Tamir Rice’s death to gain a sense of whether the killing and reaction produced more racially polarized opinions of the police.

with his ex-girlfriend, and someone called the police. Marie looked out the window and saw three police cars and officers with their guns drawn. “I was home with one of the kids one day, and I’m like looking out the window, like ‘Oh my gosh, there’s three police cars. They’re here, guns out. Oh my gosh.’ And [my husband’s] like, ‘Would you get away from the window?’ I’m like, ‘Well, they’re all outside talking now but they still have their guns out.’ And he’s like, ‘Oh my gosh.’ So I was like, ‘Okay, it’s getting time to move.’” One way to interpret Marie’s story is that the idea of living next to people who would cause that type of police response drove them out of the city. Yet when Marie describes their residential decision-making process, she attributes their move out of the city to systemic policing problems rather than concerns about crime alone. Talking about Cleveland police, she explains, “I mean, I have the utmost respect for them. It’s not their fault if they can’t get there right away. But I mean, it’s just like, I’m like, ‘I’m done.’ I can’t take a chance on that with the kids. So yeah, so I mean, that’s how we came [to Rocky River].” To Marie, living under the jurisdiction of Cleveland officers, would be to “take a chance,” to put her children at unnecessary risk.

What does Rocky River do better than Cleveland? Marie rattled off a list of benefits. “[T]he Rocky River Police have email that you can sign up for, and so if you have lights out, when there’s an altercation, or they are even just seeing a lot of house break-ins or car break-ins, they’ll send out an email and tell you. And you see them around a lot.” Living in Rocky River meant that the police would be more responsive, have a greater presence, and share more information. There is also a Rocky River officer who lives in Marie’s neighborhood, which makes her feel even more secure. Marie chuckled when she told us about her officer neighbor. “Right? So we get the extra.”

Todd, a thirty-eight-year-old white software engineer, and his wife Sienna are raising two young sons in Shaker Heights, a well-known affluent Cleveland suburb. He had a similar take on Cleveland police officers as Marie’s: “Pretty much any place where you’re served by Cleveland Police, we would not consider,” Todd definitely declared. In contrast, he sees the Shaker Heights Police Department as a real draw to the community, applauding their fast response time and thoroughness when investigating crimes. However, he fears that minorities who live in Shaker Heights might not be experiencing its police force as positively as he does: “[T]hey don’t get along very well with the minorities that live in Shaker Heights. I don’t even know that first hand, but that’s what I have heard from neighbors. . . . [T]hey are upstanding citizens, I guess you would say. So I take it at face value that it’s happening.” While Todd was one of many white Cleveland-area respondents who described the benefits of living under a suburban police regime, he was the only white respondent in either sample who expressed concern that those benefits might accrue unequally across racial lines.

Although it was easier for higher-income whites like Marie and Todd to avoid the city and seek the suburbs for better policing, lower-income whites also sought out suburban policing and made it a factor in their residential decisions. Sarah, for example, lives in a large house that was converted into four apartments in the less affluent part of the inner-ring suburb of Lakewood, Ohio. When we asked Sarah why she decided to move to her current home, she explained that it was “the cheapest for Lakewood. I wanted to stay in Lakewood because of the school systems and because of the emergency response systems.” She clarified that she was referring to the police and the fire department. “If you need somebody, the response time for a cop is on average around here five minutes.” Sarah also echoed the desire for a neighborhood police station: “Since the police station is actually right down the street. . . I could walk there. So those are the two things that I now look at more than anything else.” There is no obvious reason from Sarah’s history that emergency response systems would take on special salience in her residential choices. She does not, for example, suffer

from any chronic illnesses, nor do her children or husband. Yet, like her higher-income white counterparts, Sarah sees policing as one of many municipal resources that simply functions better in the suburbs.

b. Blacks in Cleveland

Some black respondents also preferred suburban policing to the City of Cleveland’s policing (though, as discussed in Section II.B.2, several were also concerned about potential discrimination in Cleveland’s suburbs). Silas, a thirty-year-old, African-American, divorced father of two and retired Marine, owns a home in a moderate-income neighborhood just outside of Cleveland’s city limits. When Silas and his wife were searching for their home, they looked at a variety of homes in several neighborhoods, all that seemed relatively similar in crime rates. One of the homes they looked at was near Garfield (a safer inner-ring suburb) but was technically located within Cleveland’s city limits. One of their decision-making factors was the police. “It depends on—it would have depended on, if I call the police, which police department’s coming? If it’s Garfield, I’d have probably stayed there. If it’s Cleveland, I wouldn’t stay there.” Jasmine attributes her preferences for the suburbs to the distinction between proactive and reactive policing. “See, the police in Cleveland, they focus on crimes that have already been committed,” Jasmine explained. “But the police in the suburban neighborhoods, they focus a lot on crimes that could be committed, so if they see people clustered around on a corner they tend to be a little nosier than the Cleveland cops. The Cleveland cops consider that normal.”

A few lower-income African-American respondents in Cleveland made finer-grained distinctions than city versus suburbs. They also drew distinctions between policing in city neighborhoods. For example, Nina, a thirty-four-year-old mother of two, enjoyed living in Old Brooklyn, a West Cleveland neighborhood because it was quiet. “The police don’t play in Old Brooklyn,” Nina explained. “On that bridge over there, they *will* pull you over.” Thirty-year-old Justin, now living in the neighborhood of Cudell<sup>161</sup> on the West Side, says that he would not return to his childhood neighborhood on the East Side. His mother still lives there, and he visits often, but “she stay in the part where nothing ever really happens... like closer to the police station.” Although only one Cleveland couple said that they would *prefer* to live on the city’s East Side, as described below in Section II.B.4, police presence (in the form of police stations or through other means of demonstrated responsiveness) can make particular spots in otherwise unpalatable neighborhoods feel livable.<sup>162</sup>

Micro-distinctions might emerge because of the structural factors that make it more difficult for lower-income African-Americans to fully avoid the city. Research shows that residential characteristics (like the presence of social networks), structural factors (like housing authority policies and landlord practices), and reasons of connection and identity tend to reify racial segregation and clustering in urban centers for African Americans in ways that operate differently for other groups.<sup>163</sup> Imani, for example, is a forty-year-old

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<sup>161</sup> There is tragic irony in Justin’s relative embrace of the police here and celebration of his neighborhood’s vibrancy and diversity. Cudell was Tamir Rice’s neighborhood; he was killed in a gazebo at Cudell’s recreation center. In news reports following the shooting, journalists depicted the neighborhood as an “impoverished, blighted area” riddled with graffiti and gang violence. See Cory Shaffer, *Tamir Rice’s Neighborhood Has History of Gangs, Violence*, CLEVELAND PLAIN-DEALER, Nov. 25, 2014, available at [http://www.cleveland.com/metro/index.ssf/2014/11/cleveland\\_neighborhood\\_where\\_t.html](http://www.cleveland.com/metro/index.ssf/2014/11/cleveland_neighborhood_where_t.html).

<sup>162</sup> [references to micro-places literature].

<sup>163</sup> See XAVIER DE SOUZA BRIGGS, SUSAN J. POPKIN & JOHN GOERING, *MOVING TO OPPORTUNITY: THE STORY OF AN AMERICAN EXPERIMENT TO FIGHT POVERTY* [chapter about networks] (2010); MATTHEW DESMOND, *EVICTED: POVERTY & PROFIT IN THE AMERICAN CITY* (2016) (identifying numerous federal policies and landlord practices that encourage eviction in poor



African-American woman who grew up in the Morris Black Apartments, a high-crime housing project on Cleveland’s east side, in the late 1970s. Her parents later bought a house, remaining close to Morris Black. After a stint in the military and after combining her income with her husband’s, they could theoretically afford a less expensive house in the suburbs, a place similar to the one Sarah, introduced above, bought in one of the humblest parts of Lakewood. But given her strong identification as a “real,” sixth-generation Clevelander (“I grew up in the inner-city. I didn’t do any outskirts or anything,” she clarified), and her concerns about the costs of living in the suburbs (“[T]he taxes are more, you’re out of Cleveland, and the water costs more,” she explained), Imani and her family remain within city limits. When we asked Imani about the things she looks for when thinking about where to live within Cleveland, one of the first items she listed after being close to “the elders” and children (which one might interpret as a sense of community), was “the police response time.” She continued, “Do they come over here? You guys ever see the police? Because you know, some communities, they just don’t bother. So, that is pretty important. Because I can’t be like a vigilante and just do my own policing.” Given a variety of constraints, it is reasonable that some lower-income African-American respondents would draw distinctions between the quality of policing in different parts of the city, while respondents who had greater access to better-off suburbs would not.

## 2. Anticipating Discrimination

Police can provide architecture for community-building within a neighborhood. However, policing also functioned to create stigmas against certain neighborhoods among Hispanics and blacks who anticipated discrimination. Black and Hispanic respondents, like whites, seek out neighborhoods with the lowest possible crime rates. However, they are also looking for neighborhoods where law enforcement will not discriminate against them. The troublesome inverse correlation between lower neighborhood crime rates and higher perceived likelihood of police racism means that some neighborhoods that might theoretically seem desirable to everyone are functionally off-limits to African Americans and Hispanics. In the aggregate, these dynamics could reinforce and reproduce racial residential segregation.<sup>164</sup>

As explained in Section II.B.2, Dallas-area residents were less likely than Clevelanders to draw spatial distinctions between the police, with 27 of 81 participants drawing such distinctions. However, African-American respondents, and to a lesser extent Hispanic respondents, were more likely than whites to make these distinctions. As in Cleveland, some African-American respondents admire suburban police forces. Nia, for example, lives in the troubled Dallas City neighborhood of Pleasant Grove but aspires to live in a northern Dallas suburb. “You don’t want to stay in the actual inner city because this is where all the negative is going on. As far as raising a family, you want to be out there in Carrollton, or Addison, or Farmers Branch, [or] Las Colinas, where you know that the police are cracking down on stuff like that.” Similarly, Yolande and her daughters were placed in the elite, predominantly black suburb of DeSoto, Texas, after living in a shelter for homeless families for a few months. Yolande noticed that the DeSoto police patrolled abundantly. The police presence reminded Yolande of Plano, Texas, a similarly elite but predominantly white Dallas suburb. When Yolande finally got subsidized housing through the Dallas

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predominantly black neighborhoods); PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* (2013) (describing macro-level processes contributing to persistent and intergenerational segregation and disinvestment in predominantly black neighborhoods); Stefanie DeLuca, Philip M.E. Garboden & Peter Rosenblatt, *Segregating Shelter: How Housing Policies Shape the Residential Locations of Low-Income Minority Families*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 268 (2013) (describing how landlord practices and housing authority policies keep Housing Choice Vouchers in disinvested neighborhoods).

<sup>164</sup> See I. Bennett Capers, *Policing, Place, and Race*, 44 HARV. C.R.-C.L. L. REV. 43 (2009).

Housing Authority, she had to move to an area where the police were less present, and she missed DeSoto's heavy police presence.

a. Blacks in Dallas

However, Dallas-area African Americans and Hispanics were more likely to anticipate and seek to avoid police stigmatization. While this sometimes meant avoiding high-crime parts of the city, more often it meant avoiding predominantly white parts of the city and predominantly white surrounding suburbs.

Edward, a thirty-year-old father of two living in Dallas' southern Redbird-Oak Cliff neighborhood, spoke about several low-level run-ins with police officers throughout his life. Edward's three-bedroom Section 8 apartment has become somewhat of a flophouse for struggling souls—I counted eight adults and at least four children present the first time I visited.<sup>165</sup> Despite the denseness of these quarters, the home was almost spotless even when I stopped by a few times unannounced. The tidiness and relative peacefulness of the housing situation might have been partly attributable to Edward's recent decision to "be a man" and implement a number of house rules, which were posted on the refrigerator and on a closet door at the top of the townhome's single stairwell. Rules demanded quiet, tidiness, and electricity conservation; established Saturday as "Laundry Day"; and reminded the numerous parents in the household that they should not just assume that another adult would care for their children. Edward also demanded that the adults living off the books in his Section 8 apartment sign a contract stipulating that they would contribute \$75 every two weeks toward the rent<sup>166</sup> and \$100 per month of their Supplemental Nutrition Assistance Program (food stamp) subsidy toward communal grocery purchases. Edward sees using his housing subsidy in this way as the primary way he helps the people in his life. "I have helped everybody get on track to know what they should do with their lives. You know? ... You know with housing you're not supposed to do that. I'm not supposed to have all these occupants in my house!"

The first time we met, Edward had just been released from the hospital after a flare-up of his severe sickle-cell anemia. He was having liver trouble; his eyes were the color of mustard. At thirty, he has also suffered from heart failure. Edward is usually gentle and soft-spoken, but his physical weakness exacerbated those traits. He enlivened when discussing three topics—God, his fiancée (now wife), and his array of experiences with law enforcement.

Edward believes that the police, even black officers, "do racial profiling" and are sometimes "an asshole for no reason." He has had a few negative experiences in his neighborhood. For example, he claims that police officers stopped him one night when he was walking home from his food service job, claiming that he fit the description of a suspect. They questioned him about the over-the-counter pain medicine he was carrying

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<sup>165</sup> Housing Choice Vouchers are known more commonly as "Section 8," named after the section of the United States Housing Act of 1974 that established the program. *See* 42 U.S.C. § 1437f; Section 8 Tenant-Based Assistance: Housing Choice Voucher Program, 24 C.F.R. § 982; *see also* Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992) (rechristening the policy the "Housing Choice Voucher Program" to avoid the stigma attached to the old label). The Section 8 program requires voucher holders to provide information for all members of their household, and prohibits the sublease or rental of a subsidized unit. 24 C.F.R. § 982.551. According to Edward, he lost his subsidy once for violating these rules, and he had to wait a long period of time "to prove to them that I was worthy of having my housing back." He recently received a warning from the Housing Authority and considered asking everyone to leave his home in 2013, but in 2014, most of the extra occupants were still there. He did, however, "evict" his sister, who argued with his wife and failed to pay rent.

<sup>166</sup> Given that Edward's rent with the subsidy is about \$180 per month, it seems that he was collecting rent both to pay the landlord and to cover other expenses.

and eventually dumped the pills onto the ground. The ground was wet from rain, so he lost nearly the whole bottle. He was frustrated, but he figured, “You live and you learn. There’s nothing to like, ‘Oh, I hate the police’ or—it’s just that, no, I won’t take no bottle of Ibuprofen with me to work, you know?” He resigned himself to a high level of scrutiny and would adopt strategies to cope with it.<sup>167</sup>

When we talked about Dallas’s neighborhoods and suburbs, one of the criteria he used was the level of crime, which deterred him from living in places like Pleasant Grove, a troubled neighborhood in southeast Dallas. Next, he thought about racism, which encouraged him to avoid certain suburbs. Edward claimed that a few years ago, he came across a Ku Klux Klan gathering while driving through Mesquite, a large Dallas suburb where we interviewed several parents. “That kind of messed my head up, because I’m like, ‘That’s still going on?’” Edward recounted, still seeming shocked even though this alleged incident had taken place years earlier. “The thing about that is, there was a police car right there. So who knows if a police officer...” Edward trailed off and chuckled in disbelief. “There’s still a lot of racism going on,” he explained. Notice that Edward had experienced “asshole” behavior in his own neighborhood, that time an officer emptied his pill bottle onto the soggy ground. Yet he expected something more egregious, more sinister and racialized, in a place like Mesquite. Even with a Section 8 voucher that ostensibly gives him access to the suburbs,<sup>168</sup> Edward’s expectations of racially biased policing might be one of many factors locking him and his family in place.

Nick, a 47-year-old African-American father of four, worked as a child in an area near NorthPark Mall, one of the nation’s toniest malls, near the affluent North Side of Dallas. Even as a child, police stopped him and asked him what he was doing over there. Despite those early negative experiences, Nick wanted to live there later in life because it was the kind of place where a carefree lifestyle seemed possible. This bucolic quality was verified through windows left open, through homes and cars departed fearlessly.

Nick: As I grew and got older, I actually moved right to that area. It was like, ‘I can get out of the ‘hood; I can go.’ And I think at that time it was just trying to find what I thought was a safer place or a—where I could go to work, leave home, not have to worry about people breaking in your house, just things like that...

[W]hat I saw over there was a total difference. It was people leaving their windows open, and you could see through houses, and you didn’t have to worry about nobody busting, breaking into your car and things like that.

Nick moved north, seeking that open and free lifestyle. But he returned to a predominantly African-American area of Oak Cliff shortly thereafter. He left the experience convinced that being an older professional could not inoculate him from racialized suspicion in North Dallas.

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<sup>167</sup> This strategy is reminiscent of the bodily practices that some black male adolescents adopt as part of their “regular routine.” Nikki Jones, “The Regular Routine”: *Proactive Policing and Adolescent Development Among Young, Poor Black Men*, 143 *NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV.* 33 (2014).

<sup>168</sup> A growing body of housing law and policy research is wrestling with the puzzle of why voucher holders tend to remain in poor neighborhoods. Although poor neighborhoods are “sticky” for many reasons, fear of discrimination in predominantly white neighborhoods is one potential mechanism driving this phenomenon. Cf. Xavier de Souza Briggs, Jennifer Comey & Gretchen Weismann, *Struggling To Stay Out of High-Poverty Neighborhoods: Housing Choice and Locations in Moving to Opportunity’s First Decade*, 20 *HOUSING POL’Y DEBATE* 383, 385 (2010); Kathryn Edin, Stefanie DeLuca & Ann Owens, *Constrained Compliance: Solving the Puzzle of MTO’s Lease-Up Rates and Why Mobility Matters*, 14 *CITYSCAPE* 181, 187-88 (2012).

Nick: When you move somewhere else to try to better yourself, try to live up to your expectations, and then you get pushed and pushed and pushed to the side and tampered with and tampered with, it's really not worth it. Because no matter what I said, no matter what I do, you're going to see me the same way in your eyes anyway. So it doesn't matter if I'm working; it doesn't matter if I don't drink; it doesn't matter if I don't do drugs.

Nick yearned for the neighborhood experience available to whites in North Dallas. Yet he ultimately concluded that their experience was beyond his grasp, even in the “best” of neighborhoods, and regardless of how he conducted himself.<sup>169</sup>

b. Hispanics in Dallas

Hispanic respondents were also deeply concerned about racial bias in some of the city's neighborhoods, particularly in the city's northern suburbs, which have been undergoing ethnic change.<sup>170</sup> Jacinta, twenty-eight and living with her long-time partner and two children in a one-bedroom apartment in a gated, predominantly Hispanic apartment complex, dreams of moving to Virginia. She is hesitant to move that far because Dallas is friendlier to immigrants. “Here, there is more tolerance,” she explained. But that only applies to the city itself. “They're stricter in Irving and Farmers Branch. They, the police, are stricter.” We asked Jacinta what the police do in Farmers Branch and Irving. “They stop people more often just because of the way they look. I don't know. That's what they say.” By “the way they look,” Jacinta meant that the looked Hispanic. “In Farmers Branch, they wanted to establish a law so that people would not rent to Hispanics, but I don't think it passed... The same thing in Irving. The police will pull you over if you look Hispanic.”

We asked Jacinta how she avoids detection when she visits those areas, given that she possesses deep tan skin and strong traditionally Mexican features. She usually just avoids going to North Dallas and its farther northern suburbs. But before Jacinta and her partner lived together, he used to live in Irving. He anticipated discrimination, but unlike Jacinta, he could pass as white. “Something very funny used to happen,” Jacinta announced, laughing. “I lived here. My husband lived in Irving. When he would come here, he said that when he went to Irving he would take his hat off, he'd put glasses on.” Jacinta chuckled more. “It's just too funny to me. He would put glasses on and—he's white... he can pass unnoticed.” For Jacinta, though, passing was impossible and thus she thought it wise to stay away from Farmers Branch, Irving, and other relatively elite Dallas suburbs.

Maryam, thirty-one and raising two daughters in Dallas's Oak Lawn neighborhood, ruled out North Dallas and Plano when she was looking for a house because the homes there were too new, and thus too expensive. She ruled out Irving, though, because she did not want to have run-ins with police that would risk deportation. The rumor mill exacerbated her impression that Irving and Farmers Branch were too risky for undocumented migrants. “[I]f the police see that you are Hispanic,” Maryam predicted, “they stop and deport you. I have a friend there and she told me that once the police stopped her but only because she is a

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<sup>169</sup> Note that Edward and Nick are both men. Although these data cannot test this hypothesis, it would not be surprising if future research found a gender difference in concerns about police racism in these suburban areas. In general, the black women in the Dallas sample expressed less concern about police racism in Dallas suburbs.

<sup>170</sup> See *infra* note \_\_\_\_.

Hispanic woman, but she has legal papers. It was just because the policeman saw that she was Hispanic.” Maryam and her husband do not have legal papers yet. “That is why we do not want to go there.”

Maryam’s daughter has special needs and has a therapist who is also Hispanic but was born in Texas. The therapist lived in Irving for a period of time and also heightened Maryam’s nervousness about Irving. “The police stopped them, but she was born here. It is just because they saw that they are Hispanic people.” Maryam is worried about being deported, but she believes the police are profiling on the basis of perceived ethnicity, assuming that many they stop will be undocumented. So she stays close to Oak Lawn, a neighborhood within Dallas known for its progressiveness. “So that [police profiling] is one reason why we do not go to other places. Another place is Farmers Branch. People there do not want Hispanic people.” Maritza, thirty-two and raising four children with her husband, Paul, echoed Maryam’s assessment. “[I]f they catch you driving, they’ll stop you just for being Hispanic. The police are very tough over there in Farmers Branch. Farmers Branch and Carrollton are very tough counties. . . . those three counties here [Irving, Farmers Branch and Carrollton] are very tough because of the police.”

Soledad and her husband Francisco are part of the undocumented immigrant sample. When deciding where to live, they say that they chose a black neighborhood because neither police nor immigration agents come there looking for undocumented immigrants. In low-income black neighborhoods like the one where Soledad and Francisco live, police are more focused on black crime, in their view. Francisco said that he “felt safer in this zone because it’s full of black people.”<sup>171</sup> Police looking for immigrants instead go to “East Dallas, South Dallas, North Dallas,” neighborhoods where undocumented migrants tended to cluster. This neighborhood choice was protective and spoke to Soledad and Francisco’s residential preference for places where they would not be racially profiled. While the specifics of their strategy was uncommon—they were the only undocumented migrants who stated that they lived in African-American neighborhoods to avoid police—they reflect the general sense that some neighborhoods are to be avoided because of police bias against immigrants was common, and that the stops would occur on the basis of perceived ethnicity, predicted to correspond with legal status.

Immigrant Hispanics’ concerns about Farmers Branch and its surrounding towns are not unfounded. As Jacinta mentioned, in 2006, in 2007, and in 2008, the Farmers Branch City Council passed local ordinances that effectively prohibited landlords from renting homes to undocumented migrants.<sup>172</sup> The 2007 ordinance went to popular vote and was approved by more than two-thirds of voters.<sup>173</sup> After the 2006 and 2007 ordinances were enjoined for various reasons, the City Council passed another ordinance in 2008 that operated through a complex licensing scheme. The 2008 Ordinance made it a Class C criminal misdemeanor for unlicensed people to rent homes in the city, and for landlords to rent to unlicensed occupants.<sup>174</sup> A group of landlords and tenants, aided by firms and nonprofit legal organizations such as the Mexican American Legal Defense and Educational Fund (MALDEF) and the ACLU Immigrants’ Rights Project, challenged the law on the grounds that it violated the Supremacy Clause. Plaintiffs argued that federal immigration law preempts such an ordinance.<sup>175</sup> The district court sided with the landlords and

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<sup>171</sup> This interview was conducted in Spanish, but have been transcribed into English by a professional translator.

<sup>172</sup> *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 839-41 (N.D. Tex. 2010).

<sup>173</sup> *Id.*

<sup>174</sup> Farmers Branch, Tex., Ordinance 2952 (Jan. 22, 2008); see also *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 840-43 (N.D. Tex. 2010).

<sup>175</sup> *Id.* at 851.

tenants, and despite appealing that ruling multiple times, the ordinance was never enforced.<sup>176</sup> In addition to the rental ordinances, the city council also passed a largely ceremonial ordinance establishing English as the city's official language.<sup>177</sup> Although only one respondent in *HPHK* mentioned these ordinances, several had a strong sense that Farmers Branch and its nearby predominantly white enclaves—Carrollton, Irving, and Addison—were keen to use the law and law enforcement officers to repel undocumented migrants.

While most Hispanics in the Dallas sample were undocumented Mexican Americans, there were some native born Mexican Americans who also avoided certain neighborhoods because they anticipated police discrimination. Xochitl, a 24-year-old Dallas native and Zumba instructor, bought a house between Dallas and Fort Worth in 2014. A realtor took Xochitl and her husband Mario to a place in Mansfield, a neighborhood they initially liked. But then they heard the police over there were racist, so they ultimately turned it down and moved farther away from Dallas. “He took us to another [house] right there... [W]e liked the neighborhood, it's just like—they kind of told us that the police over there were like pretty hard.” Clarifying what she meant by “hard,” Xochitl continued, “[The] police were like, pretty tough. And when I mean ‘tough,’ I mean kind of, like, racist.” I indicated that she should explain more: “Mmm.” “Yeah. Where they're always pulling over like Hispanics and Blacks, you know? So we didn't want it.”

Xochitl, her husband, and her sister are all U.S. citizens, as are the rest of their family. While many Hispanic respondents in Dallas were undocumented or had family members who were undocumented, and were solely Spanish speakers, Xochitl's family did not have any immigration or language concerns. Yet, they were just as concerned about racial profiling, underscoring the idea that the concern about police racial targeting was motivated not only by the fact of being undocumented, but by ethnicity-based targeting emanating from perceived criminality and perceived immigration status.

### c. Blacks in Cleveland

Only a few respondents in Cleveland, nearly all African-American, explicitly identified racism as the key mechanism of police aggression in certain neighborhoods. Bianca, for example, has resided in many parts of the city as well as the suburbs. She is currently staying on the West Side. Though biracial (African-American and white), Bianca primarily identifies as African-American. Comparing police service within the city, Bianca claimed that Cleveland is “almost like three cities in one.” She believes the quality of policing varies by police district. While some police are good, Bianca claims that “East Cleveland Police are assholes. Parma police are assholes.” These distinctions arose in a conversation about whether her boyfriend's son Denzel, who usually lives with his mother in another city. Bianca loves Denzel and wants to get partial custody of him. However, she hesitated to endorse having him move to Cleveland full-time, worried that he would not be able to adjust well.

[Q: Okay. So it would be okay if Denzel grew up in Parma because he'd just grow up fitting in there?]

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<sup>176</sup> See *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013), cert. denied, 134 S. Ct. 1491 (2014); see also Dianne Solís, *Supreme Court Refuses Farmers Branch Immigration Ordinance*, DALLAS MORNING NEWS, Mar. 3, 2014, available at <http://www.dallasnews.com/news/community-news/carrollton-farmers-branch/headlines/20140303-supreme-court-refuses-farmers-branch-immigration-ordinance.ece>.

<sup>177</sup> 701 F. Supp. 2d at 840.

Bianca: Mm-hmm. It would be okay because he'd already be there. But if he were to move over there and try to come back over here, move over here—[Denzel] would probably have a harder time getting adjusted because it's almost like three cities in one. Because everybody's divided each side of the city.

[Q: Hmm. Yeah.]

Bianca: We got different police for each side of the city.

[Q: Oh really?]

Bianca: They got East Cleveland Police. We have West Police. East Cleveland Police are assholes. Parma police are assholes.

When Bianca was characterizing the different parts of the city, she was thinking about the places where her hopefully-future stepson would be able to fit in and thrive. Yet, when she defined the parts of the city, her first reference was to the treatment her boyfriend's son might expect to receive from the police in a different part of the city. Parma is a suburb of Cleveland, but Bianca differentiated between East and West Cleveland police as well.<sup>178</sup>

Although we do not know what Bianca precisely meant by “asshole,” we do have clues based on her extended description of the treatment she expects in Parma when she brings her boyfriend's dark-skinned son with her. Because she is very light-skinned, she does not usually arouse suspicion in Parma, but with a noticeably black child, she believes that she is conspicuous. “Everybody in Parma is white,” Bianca declared. “So whenever I'm driving down the street, and I got him in the car with me, the police will follow me for six blocks just because I got him in the car with me... If I'm by myself, I won't get in trouble. I won't get followed. If I have him in the car, then they want to run my plates, they want to follow me, they want to pull me over just because I have him in the car and I'm in Parma.” Bianca lives in the city but works in Parma, and to some extent loves the area. However, she worries about the suburbs suitability for her growing black family.

Wes, a twenty-nine-year-old African-American father of three, and his girlfriend Jeanine, live in Clark-Fulton, an unusually ethnically diverse, low-income West Cleveland neighborhood. When we asked Wes and Jeanine about the places they would consider moving among Cuyahoga County's neighborhoods, they talked about most of the suburbs last. They named Lakewood, Rocky River, Waite Hill, and Westlake as areas that are “kind of high class.” A major negative attribute, though, is the racism they expect to experience in those places. “They don't like a lot of black people over there,” Wes explained. “Police will be on you.” Wes and Jeanine first rattled off a list of positive attributes of those communities, then pivoted to the suspicion of African Americans in those environments:

Jeanine: The houses are great. The school systems, I believe, are great.

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<sup>178</sup> In Cuyahoga County there is also a separate small city named “East Cleveland,” but it was clear throughout the interview that when Bianca referred to East Cleveland, she meant the eastern part of the City of Cleveland, not necessarily the town of East Cleveland.

Wes: The school system, places like that, their levies are based on their taxes. So, they got good tax money, their levies are passing.

Jeanine: They got good tax brackets over there.

[Q: Mm-hmm.]

Jeanine: Those kids aren't hurting for too much of anything.

Wes: It's like, when black people come around, it's like, "What are you guys up to?"

Jeanine: "What do you make? How much do you make? What did you do?"

Wes: Right. "What did you do? Why are you here?"

Wes and Jeanine avoid these areas as potential places to move, or even to drive around in, despite acknowledging their excellent resources for raising kids, due to their concerns about police discrimination. They are tempted to move back to the East Side of Cleveland where they both grew up, though recognizing its problems. In their conversation, it seems that their concern is prejudice in general, but they expect that the police would carry out these communities racial projects. In this light, police are emblematic of a deeper racism within these communities, the officials licensed to represent community prejudice and make it real in the lives of minorities who enter particular suburbs.<sup>179</sup>

### 3. Paying for Patrol

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<sup>179</sup> The shifting racial composition of some of these communities could be an aspect of expectations of police discrimination. In the Cleveland area, many respondents talked about the aggression of the Lakewood police force, but there has been no real racial change in that city, which was 87.5% white in 2010 U.S. Census data. (That said, the suburb does have a substantial foreign-born population from the Middle East and Eastern Europe.) In Dallas, the story is more complex. Some of the suburbs where African Americans and Hispanics expected some of the most aggressive treatment were suburbs in the midst of racial change, with growing Hispanic or African-American populations. Minorities, especially the mostly Mexican-American Hispanics in the sample, expected trouble in Farmers Branch (37.2% Hispanic, 2.4% black, and 55.8% non-Hispanic white in 2000 and 45.4% Hispanic, 4.5% non-Hispanic black, and 44.2% non-Hispanic white in 2010), Carrollton (19.5% Hispanic, 6.3% black, and 61.2% non-Hispanic white in 2000 and 30.0% Hispanic, 8.1% non-Hispanic black, and 46.3% non-Hispanic white in 2010), Mesquite (15.7% Hispanic, 13.3% black, and 65.4% non-Hispanic white in 2000; 31.6% Hispanic, 22.9% black, and 41.6% non-Hispanic white in 2010), and Irving (31.2% Hispanic, 10.2% black, and 48.2% non-Hispanic white in 2000 and 41.1% Hispanic, 11.8% non-Hispanic black, and 30.8% non-Hispanic white in 2010). Some also anticipated trouble in Lancaster, a predominantly black Dallas suburb that became proportionally more African-American between 2000 and 2010 (53.0% black, 11.6% Hispanic, and 33.6% non-Hispanic white in 2000; 68.3% non-Hispanic black, 17.0% Hispanic, and 12.9% non-Hispanic white in 2010) (see Appendix). Hispanic populations in these Dallas suburbs are noticeably growing and, with the exception of Lancaster, white populations are losing their previous numerical domination. Moreover, these indicators of racial change are captured in the Census, which undercounts the largely Mexican-American undocumented migrant population in Texas; this means that the real experience of racial change might be even greater than these numbers would suggest. This fact underscores the racial threat hypothesis of discrimination. See HUBERT M. BLALOCK, JR., *TOWARD A THEORY OF MINORITY-GROUP RELATIONS* (1967) (articulating the theory that as minority percentage in space or in an institution increases, the more minorities will be perceived as a threat and thus face discrimination); see also Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2199 n.252 (applying racial threat theory to the Voting Rights Act); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 371-72 (2016) (applying racial threat theory to political power).



In Dallas, unlike Cleveland, affluent neighborhoods can be found within city limits. Instead of avoiding the city police force altogether, Dallas' higher-income residents tend to congregate in neighborhoods that pay the city extra money for consistent community policing. The Dallas City Council established the "Expanded Neighborhood Patrol" policy in 1991, and it has generated substantial revenue for the city.<sup>180</sup>

Allie is a harried, tense 31-year-old white mother of two living in one of the wealthiest neighborhoods in the City of Dallas. She is college-educated and loved her previous work as a writer and administrative assistant, but she now works as a stay-at-home mother. Janie, her youngest daughter, a little over a year old, screams for large chunks of the day. "She just cried nonstop for like six months! She just, I don't know—I don't think she was colicky. She's just kind of a demanding personality," Allie explained. When we met, her thin, chin-length blonde hair was yanked into a tight ponytail. As wisps worked their way out, Allie's bony fingers ritualistically swept the hair back behind her ear. Throughout our conversation, Janie interjected with high-pitched screams, seeming to multiple Allie's thick disquietude.

The sources of Allie's worries are abundant. She is anxious about her previous career as a writer, which she desperately wants to pursue again. She is worried about the declining value of their house. She was anxious about the interview, clarifying before we turned on the tape that her husband let her do it on the condition that she would not reveal information about their income. She is especially nervous about her husband's plans for their future and their fundamentally divergent worldviews. He wants a big family, but given that her husband is not very good with kids and that her family is too far to help, she wants a smaller one. She does not care whether the children go to college and meet astronomic financial success; he and his family care deeply. Although Allie in speech and appearance resembles the emblematic wealthy young Dallas mother, she is unaccustomed to her luxurious surroundings. She grew up in a small town in a neighboring state and is the first and only person in her family to graduate from college. Her husband's family is part of the Texas elite class, and Allie is cautious in her relationship with them. I asked Allie how she copes with all of the stress she is experiencing. Allie is an introvert, but she said she had been making a conscious effort to communicate more with a friend: "I guess I just have to make myself talk to people, which I'm not very good at doing." Through her "mom-friend neighbors," Allie has gotten a recommendations for a therapist but has not yet followed up. "[I]f I feel like I really need that, that I'll do that. Haven't gotten to that point yet," Allie reasoned.

One aspect of life that has never worried Allie much is safety. Fresh from college, she and a friend moved into an apartment in Dallas's Oak Cliff neighborhood, a diverse area with a high-crime reputation. "We were just looking for affordable housing, honestly," Allie explained. "We frequently saw what we thought were maybe drug dealers the street or two over, but it was fun. It was a different experience." When I asked Allie how she navigated the neighborhood, she answered as if the answer was obvious. "I mean—we really weren't scared about crime or anything. Maybe we were a little naïve.... We loved it. We took advantage of the neighborhood."

Ten years later, Allie has moved to a neighborhood where crime is rare. So when a mysterious serial robber was terrorizing the neighborhood until a few months ago, Allie and the entire community were on high alert. "Everyone was just in a panic because they couldn't catch the guy," Allie recounted. She was particularly fearful: "I was terrified. I'm not the kind of person who gets scared very often. Like, I'm the idiot in Target parking lot struggling to find my keys at like midnight." This particular set of crimes had

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<sup>180</sup> CITES

affected people she knew, and the robber would even break in when her “mom-friend neighbors” were at home. “I’ve never felt like that. I couldn’t sleep. Even with my husband next to me, I couldn’t sleep for days.” In response to this set of crimes, her neighbors deeply engaged with the police, mobilizing with them. Because “the police station’s right there, like literally right in our back yard,” residents spent a lot of time at the station, directly engaging with the police, sharing all the tips they could. These tips eventually led to the robber’s arrest. The Dallas Police who patrolled her neighborhood were working even longer hours than usual, so neighbors came together to thank them. “We were so thankful. People went over to the police station, brought tons of goodies for all the officers and it was really nice.”

Allie’s neighborhood, like most Dallas respondents in the wealthiest neighborhoods, pays the Dallas Police Department for extra off-duty patrol.<sup>181</sup> Authorized by a municipal ordinance passed in 1991, neighborhood associations may pay the Police Department for “Expanded Neighborhood Patrol.” Under the program, sworn Dallas officers who are off-duty spend overtime hours in specific neighborhoods that pay for the privilege of greater protection and for a relationship with their assigned officer. In addition to the patrol hours, Extended Neighborhood Patrol includes benefits like checking on residents’ homes when they are away on vacation, responding “within seconds” when the assigned patrol is on duty instead of having to go through the regular system and, at residents’ request, a home security audit.<sup>182</sup> By design, officers are assigned to a specific neighborhood over a long period of time, essentially walking and driving a beat. Allie’s neighborhood’s experience with the police was not only with anonymous officers who came into the community to apprehend the robber. Instead, the neighborhood had built goodwill already by having an officer there as a consistent friendly presence. Often, scholars of policing write about community policing as if its main locale and benefits are for high-poverty (usually predominantly Black or Hispanic) neighborhoods.<sup>183</sup> In Dallas, though, community policing is consistently available in the low-poverty neighborhoods that pay for it.

Anna, the 37-year-old matriarch of one of the wealthiest Dallas families in our sample, echoed Allie’s appreciation for the neighborhood police and was particularly happy to have the Extended Neighborhood Patrol. “[T]hey have like an extended patrol, like you chip in, and we have a police car. A lot of them are parked right behind my house right there [pointing], so it kind of makes you feel good. [It] makes me feel good when I pull in because the alleys not... you know, that can make you feel a little vulnerable.” Anna was referring to an alleyway behind her home. I asked Anna who pays for the patrols. She explained that “here, our neighborhood does, or whoever wants to donate money to the fund pays for it. And... I think they’re asking for some money to increase the hours or something.”

Anna explained that if someone sees anything suspicious, they do not have to call 911. Instead, they can reach out to their neighborhood officer. This is more efficient because “they’re usually there, or at that street.” Anna pointed to the locations where their officer can usually be found. The neighborhood association distributes a direct number for their neighborhood Dallas Police officer, and the officer also maintains an active presence on social media that allows him to easily interact with the community. Anyone in the neighborhood can use the special number, text the officer, or reach them through social media. The

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<sup>181</sup> This information is independently verified. I cannot cite the support documents because it would reveal enough information about Allie to make her identifiable. However I can share this information with journal editors who sign a confidentiality agreement.

<sup>182</sup> <https://ligna.net/crime-watch/extended-neighborhood-patrol/>

<sup>183</sup> CITES

assigned officer also proactively keeps the community informed about crime in their neighborhood and surrounding areas. When something suspicious happens, like a strange car driving around, “they post it, and they give you the car [information], and what the person looks like. You know, it makes you feel better, I guess, knowing some of that. So yeah, we kind of keep each other informed.”

Due in part to the differences in police practice in different parts of the city, some higher-income white respondents seemed to use “Dallas” to refer only to the city’s tougher neighborhoods despite living within the city limits. Justin & Ashley earn one of the highest combined incomes in the sample, but live in a slightly lower-income predominantly white block group. Justin likes the “eclectic” nature of the neighborhood, while Ashley is eager to move; she is nervous about a nearby predominantly Hispanic low-income apartment complex. The neighborhood does have many of the trappings of Anna’s and Allie’s communities, such as a moms’ group and extended police patrol. Comparing the policing they receive with policing in other areas of the city, they explained, “I mean, the stuff in Dallas that the cops would have laughed at you about it, here they’ll actually show up. Like, some lady called the cops because there were kids smoking pot in the park. In Dallas, they would have said, ‘Did they shoot at you, did they do anything?’” Ashley snickered, then when Justin chimed in with agreement, she continued. “I mean, we’re still in Dallas, but I’m saying like East Dallas it would have been like, “Oh, we - okay, what, do you want us to come tell them to stop smoking pot?” All right. Whereas here it’s like, call the beat officers, they’ll patrol that area more, they’ll do this and they’ll do that and everyone is writing in and you got a few people going.” Justin thought this characterization was humorously accurate as well. “It’s just funny because it’s like, that’s the kind of stuff that gets attention here,” Justin delineated, also chuckling. “Whereas, in Dallas, the cops would have probably showed up and smoked pot with them.”

In order to get that type of community-based policing and information-sharing, neighborhood associations have to pay. The leader of one wealthy Dallas neighborhood’s Crime Watch applauded Extended Neighborhood Patrol in her neighborhood association’s magazine, explicitly referring to the neighborhood’s affluence as a definitive conduit better policing: “It made a huge difference for us,” the leader gushed. “We’re fortunate that many of our homeowners are affluent and can afford the cost of added patrol.”<sup>184</sup> In this way, socioeconomic segregation is perceived as a boon not only to lowered crime (one mechanism in reduced crime is neighborhood affluence, apart from police activity),<sup>185</sup> but also to police access. In lower-income neighborhoods, like the parts of Dallas where neighborhood associations tend not to pay for Extended Neighborhood Patrol, and in most parts of the City of Cleveland, respondents tended to emphasize other sources of positive proximity to the police. Primarily, they emphasized living near police, either in the same neighborhood as officers or close to a police station.

#### 4. Pinpointing Police Stations

While few respondents said that they moved to neighborhoods in order to be near a police station, several made note of proximity to a police station (including substations and satellite stations) when describing what made their generally higher-crime neighborhood more desirable and livable for them. Police stations can be assets to a neighborhood in the absence of other safety-enhancing characteristics.

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<sup>184</sup> Becky Vaughan, *Crime in Our Neighborhood*, ADVOCATE PRESTON HOLLOW/NORTH DALLAS, Feb. 1, 2003, <http://prestonhollow.advocatemag.com/2003/02/01/crime-in-our-neighborhood/> (last visited Apr. 18, 2016).

<sup>185</sup> CITE.

In Cleveland, 17 of 70 respondents (24.3%) spontaneously made reference to proximity to a police station as a positive aspect of either their current neighborhood or a past or desired future neighborhood. Thirteen of those respondents lived in low-income neighborhoods (or 32.5% of all Cleveland respondents living in low-income neighborhoods). More than half of those spontaneous references (11, or 64.7%) came from African-American respondents, but this number does not indicate that black respondents were more likely to mention police station proximity given that African Americans made up more than half of the Cleveland sample (62.9%).

In Dallas, twelve of eighty-one respondents (14.8%) described proximity of a police station as a key aspect of their neighborhood residential experience. Not all of these mentions were spontaneous. Four of twelve references were from respondents in a single block group due to its close proximity to a new police station. As in Cleveland, there was no detectable difference across racial groups in preferences for closeness to a police station; unlike Cleveland, there was also no detectable difference across neighborhood income groups either.

Most of the time, when respondents mentioned the proximity of a police station, they alluded to it quickly and in a list of items, rattling it off in the same breath as schools, parks, and other community resources. Elijah moved to a three-bedroom house in a lower-income East Cleveland neighborhood with his fiancée and three daughters two years ago. He did not exactly “select” the neighborhood: He and his fiancée were effectively evicted from their old apartment in West Cleveland, and his parents could get him into the East Cleveland house. He has moved around a lot in his life, both throughout the Cleveland area and in other states, and he admonished the interviewer to “trust me—I know the difference between a good neighborhood and a bad neighborhood, man.” He knew this neighborhood was in a generally rough area, but between his confidence in his own street smarts and the neighborhood amenities, he decided that his current neighborhood was “pretty good.” What amenities were important? According to Elijah, “The shopping centers are right there. The Rapid [transit] is right there. The bus lines run all night. They’re right there. The police station is right there. The park is right down the street. Daycare centers everywhere. Good schools—well, decent schools, decent schools.” Convenient shopping, public transportation, schools, green spaces—these are amenities that virtually all urban home-seekers take into account. However, policing scholars rarely think of police stations as neighborhood amenities on par with recreation centers and grocery stores, and even more rarely think about one of the legal problems of policing as problems of neighborhood structure and community development.

In the late 19th and early 20th centuries, in a South Dallas floodplain, city officials constructed the Bonton neighborhood as a segregated community for poor African Americans who worked on nearby white-owned farms. From the early 1950s to the late 2000s, the neighborhood was anchored by two desolate high-rise public housing projects, Turner Courts and Rhoads Terrace. The Dallas Housing Authority demolished both developments in 2009, partly replacing them with a mixed-income housing development and allowing nonprofit religious community development groups to take the lead in constructing new single-family homes. Part of the government’s role in the redevelopment effort was placing a police satellite station in the area. The satellite station is intended to function not only as a hub for public safety, but also as a community space for neighborhood association meetings and other events.

We learned of these plans from one of the neighborhood’s residents, Vanessa, a 35-year-old African-American woman who lives in a home she purchased, and helped construct, through Habitat for Humanity. **[Say more about Vanessa’s context].** The Bonton station’s grand opening took place in November 2014, and the Department hosted a community gathering to usher in its presence, complete with Texas

barbecue, face painting, bouncy houses, and more. Vanessa explained that the satellite station would help the different parts of the neighborhood, “kinda like come together and stuff.”<sup>186</sup> Vanessa told us more of the plans for the satellite police station as she understood them from the area’s new neighborhood association. “That’ll be, like, the community meeting—where they have things going on... and the neighborhood association and everything will take place in that. ‘Cause now, we all use the Turner Courts gym down at the end. So once that’s up and running and stuff, they’re hoping that both of the neighborhoods will use that space.”<sup>187</sup>

[Add more analysis]

## 5. Having a Cop as a Neighbor

Like police stations, some respondents in both cities attached heightened value to having police reside in their neighborhood in the absence of other markers of neighborhood security. Having an officer as a neighbor had both instrumental value—decreasing response time, making it less likely that crimes would occur—but also symbolic value for a few respondents who believed that living among “salt of the earth” people like police officers could render tolerable a neighborhood traditionally marked as dangerous. Police residence could signal that a neighborhood attracted “the right people,” even if its location and demographics might suggest otherwise.

Juanita is in her early forties; she is raising five kids largely on her own in West Cleveland after her husband’s drug abuse caused them to separate a few years ago, and she is doing it all on a disability check after a severe car accident left her unable to work full-time. Her neighborhood is located in a generally tough area, but she thinks her street is okay in part because of the type of people who are her neighbors. “It’s a lot of police and a lot of postal people that’s on this street.” We asked her what it’s like to live on a street with police and postal people, and she said it made her happy. “‘Cause I feel a little bit safer, you know. Not sayin’ that they gonna run to my rescue if something happen but...” Juanita trailed off and smirked. “You know, I haven’t seen a lot of young boys and all that kind of stuff, walking up and down the street late at night and all that kind of stuff so, that’s good.” The argument for police here is clear, but the argument for postal workers is more complex. Police officers provide safety, but their presence within neighborhoods, like postal workers, is emblematic of a type of neighbor—steady, reliable, wholesome enough to be in the public’s employ.

Like Juanita, Rick also saw both symbolic and instrumental value to police living in his neighborhood, over and above the direct safety benefit. Rick, a 48-year-old low-income white father of four, demonstrates the convergence of symbolic and instrumental value of police residing in a tough neighborhood. Rick is a lifelong resident of Cleveland’s somewhat more racially mixed West Side. Although he initially seemed proud to call himself a “West Sider,” he is ambivalent about the community. Rick aspired to move himself and his family to a suburb or a part of town that he considered “a better part of Cleveland,” but at the time,

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<sup>186</sup> For more background on these neighborhoods, see CITE.

<sup>187</sup> \_\_\_\_\_. This is similar to how police substations have been used in community development elsewhere, but mostly in apartment buildings rather than neighborhoods. See David Dominguez, *Getting Beyond Yes to Collaborative Justice: The Role of Negotiation in Community Lawyering*, 12 GEO. J. POVERTY L. & POL’Y 55, 61 n.18 (2005) (describing an effort in an apartment complex where residents worked with police to create a police substation that “underwent a metamorphosis, emerging as a community resource center offering—among other activities and services—weekly classes in English-for-Speakers-of-Other-Languages, medical screenings, and a summer sports league for Boulders kids”).

he and his wife could not afford it. So they looked for a workable neighborhood on the West Side. Rick asked around his neighborhood for information about good places to live. “I talked to some other people and they were like ‘Oh, yeah. That little brick land, you know? Good area, you know, lot of policemen, firemen.’” Yet, the value of police officer presence was more than symbolic: In Rick’s view, the fact that one of his neighbors is a police officer gives him a more direct line to the crime response than he would otherwise have. “We see something wrong ... I know he’s a policeman and I can call him and say, you know ‘Something ain’t right’ or whatever. He can get something expedited.”

Julia, who lives in Dallas, did not seek out police officer-neighbors and she does not think police have some sort of intrinsic value that makes them better neighbors than others. She is generally suspicious of police. However, she does appreciate having police officers reside in her troubled apartment complex on Dallas’s South Side. Julia is thirty-seven, African-American, and raising a sixteen-year-old daughter and a seven-year-old son. Julia lives in a low-income neighborhood in an apartment complex on the southern outskirts of Dallas, and she likes that a Dallas police officers resides in the complex as well. She had only recently moved there when we spoke, and she was working the graveyard shift on an assembly line. Despite the neighborhood’s rough reputation, Julia was finding it manageable and relatively better than other neighborhoods she could afford. She attributed the surprising quietness and safety to the involvement of police, particularly the on-site officer. “I like it over here in these apartments; they’re quiet. And there is a policeman that lives in this apartment, so there is never any issues. I feel real safe over here,” Julia reported. Julia went on to describe the officer’s broader involvement in the neighborhood, including his leadership of the Crime Watch and his visit to her apartment when she was moving in. As I sat on the couch where Julia usually slept, she told me that she refused to let the kindly officer in. In Julia’s recounting, the officer gave her a long speech and entreated her, “I just wanted to come in talk to you a little bit.” She says that she rebuffed his request: “I don’t want you to come in. We can stand at this door and talk.” He did not press the request. “I understand; I understand,” he reportedly told her. While she still does not seem to trust this officer, she does like that he patrols and that he seems to be watching and asking about irregularities. The approach the officer has taken in Julia’s neighborhood is not terribly distinctive from the approach taken in Allie’s or Anna’s, but the strategy for getting there is residential proximity rather than overtime pay.

Stephanie, a middle-class white mother living in Dallas, used the police officer who lives in her neighborhood as a barometer. Stephanie lives in one of those neighborhoods that is heavily saturated with crime control efforts—Extended Patrol, regular patrol, Neighborhood Watch, and other programs. She has concerns about over-aggression and racism in the Neighborhood Watch: “There is a Neighborhood Watch, and I only know that because we’ve seen quote un-quote ‘good Samaritans’ driving around in their SUVs patrolling for black people on the streets.” Stephanie was very distrustful of the Neighborhood Watch, calling them “so weird” and chuckling at them “driving down the street with their like fake cop lights.” She expects that the police officer who lives in her neighborhood will be less subject to that type of bias and over-excitability. “If he’s not worried, I don’t worry,” Stephanie professed.

Although only eleven people in the combined sample mentioned police officer residence in this way, the class divide here is sharp: Across both cities, only one respondent in the higher-income neighborhood group, Marie, said that they looked for neighborhoods where police officers lived, or mentioned an officer living in their neighborhood as a benefit of living in their community.<sup>188</sup> Despite the relative lack of

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<sup>188</sup> [INSERT INFORMATION ABOUT RESP WHO SAID LIVING NEXT TO A COP DIDN’T HELP WITH NOISE – CLB04U22] our neighbors across the street are- right directly across- are black and Puerto Rican and we get along with them really good. So, and the house diagonally; that’s the rental and we just met them a little bit ago. They’re nice people. Loud, but-

prevalence of this phenomenon within the sample, the finding is nonetheless important and should give rise to further research because (1) the topic only arose spontaneously among respondents who reported having a police officer in their neighborhood, which means that the potential value of police residency in neighborhood perception and reputation cannot be fully demonstrated through these exploratory data; and (2) given the larger number of respondents who spoke about the importance of police presence in their neighborhood in some form, it is likely that if asked explicitly about police residence, a much larger number of respondents would speak supportively of it.

## 6. When Nothing Works

This Part has focused on the strategies parents use and structural resources they seek to bring the police close to them in a way that enhances their sense of security. What kinds of experiences do parents have when these strategies are not available to them? Two stories, one from Cleveland and one from Dallas, illustrate the challenges of living farther from police.

China is raising six children and a grandchild on Cleveland's East Side, a heavy burden for a woman on her own who is not yet forty. Yet, she is grateful for her house. Before moving to her current home, she and her children spent time in a homeless shelter; a gas explosion at their previous home had left them with no other place to go. She got a Section 8 voucher and moved to this house as quickly as possible, without the luxury of carefully selecting an ideal neighborhood. China is scraping by on unemployment for the moment because the Wal-Mart where she was working closed. If China had the money, she would leave Cleveland altogether and go somewhere free of gang activity, a place where police will come when she calls them. When we asked China to share her thoughts about the different parts of Cleveland, she said she disliked the East Side because of all of the "drama."

*[Q: What is drama? What does that mean?]*

China: All the fighting. The gangs. The shooting and killing. I'm tired of that here. I'm trying to leave Cleveland...

*[Q: Where would you like to go?]*

China: Anywhere. Anywhere but here. Because now I'm seeing—it's like, my kids is getting into that stuff.

One of China's middle daughters is afraid to go to school because other girls try to fight her because of "where we stay," China explained. In Cleveland, like other cities, the structure of gang life has changed—gang "membership" is completely determined by place of residence, requires no initiation ritual or process, and is thus virtually unavoidable for young people in certain neighborhoods regardless of their best

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I: [laughs]

R: Obnoxiously loud at times. Like, when most people are sleeping. The other house is vacant.

I: Okay.

R: It doesn't help to have a policeman that lives next door to you. I know, because my other neighbor's a policeman.

efforts.<sup>189</sup> A few months ago, China's eldest daughter was jumped and robbed by a group of girls as she walked through a nearby park. China does not know the reason for the attack (or if there was a reason), but she knows that her daughter's leg was so badly battered that she had to take her to the emergency room. As the attack was happening, China called the police multiple times. According to her, they never responded to the incident. "You don't want to say nothing bad about the police and stuff because I know there's only so much they can do. Like, the night she got jumped, I called them, I think, three times. They never came." We asked China if she sees the police around much. "Not as much as they're needed," China lamented.

While most black respondents in Dallas felt that their neighborhoods were heavily policed, many Dallas Hispanic respondents felt that they were simultaneously targeted in white neighborhoods and neglected in many predominantly Hispanic neighborhoods.

Gina lives in a two-bedroom single-wide trailer in one of southeast Dallas's manifold mobile home communities. The space is cramped and hot. Gina shares a bedroom with her 16-year-old son, who sleeps on the floor while Gina sleeps on a mattress, and her 15-year-old and 4-year-old daughters share a bed in the other room. Gina has an on-again, off-again relationship with her daughters' father, but he does not live there. The setting, and the feeling of entrapment Gina feels because of her legal status, has made it difficult for Gina to raise her kids in as sheltered an environment as she would prefer. Gina lamented the influence of the neighborhood, concerned about her daughter's intensifying marijuana habit. "When I got here, there were a lot of kids at the park. They would hang out and play. That's where they started to smoke marijuana cigarettes—at the park. Sofia would always go to the park, and that's where she started. Since she hung out with kids who liked to smoke marijuana, that's where she started taking up those habits." Sofia's habit has started getting her into trouble at school; she has been detained by police and subjected to drug tests.

Sofia got into a fight with another girl at the trailer park one day, allegedly over the attention of a boy. Other kids crowded around Sofia and the girl, cheering them on and videotaping the fight on their cell phones. "When Sofia was fighting with the girl. I was outside. I was making sure they didn't fight on the cement. The other kids were making fun of her. They were recording with their cell phones. I was mad with the ones recording because they weren't helping, but they were making fun of them and recording." As the scene played out, Gina tried unsuccessfully to intervene. She tried to keep Sofia from going outside, but Sofia walked into the fight anyway. She tried to minimize potential injuries by encouraging them to fight on the grass rather than the sidewalk and street. She warned them that she would call the police, told them to leave, admonished the girl not to hit Sofia. When Gina intervened too aggressively, the group turned some aggression toward her. At that point, Gina called the police. "I told the girl not to hit Sofia again. So they started to hit me. So I stepped aside and called the police, but the police never came." Gina was afraid during the fight. "They could have easily killed each other out there." Fortunately, Sofia held her own, but Gina was still upset that the police did not respond to her call.

Unlike most respondents from Dallas apartment complexes, Gina reports that she almost never sees the police around. She has called the police a fair number of times, but she thinks that when police do respond, they just write things down but do not investigate, and she thinks that they are not proactively trying to deter crime. "Sometimes they come quickly and they ask you about what happened. They write what happened in a notebook they have. They write a report and that's it. They don't do anything about it....

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<sup>189</sup> See JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015); *This American Life: Harper High School*, Part One (Feb. 15, 2013) (downloaded using the *This American Life* App).



The police wait for bad things to happen before they do something.” Why didn’t police respond to her daughter’s fight? According to Gina, they did not come because they were too far away. “They said that this is too far from where they come from. They couldn’t come quickly. I don’t know if they really hurry or not,” Gina ruefully recounted. Many apartment complexes have private security that stands in for the police, but Gina’s trailer park does not have security anymore. The trailer park management got rid of it before she moved in, she says, because they were not able to collect enough money to pay the security company. (And of course, given Gina’s poverty—she lives on about \$300 per month of child support, plus food stamps—and the likely similar financial position afflicting many of her neighbors, their neighborhood cannot pay for the same level of community policing Anna, Allie, Justin & Ashley receive from the Dallas Police Department).

Cleveland’s police department is struggling throughout the city, as reflected in parents’ efforts to avoid the city, described in Part II.B.1. The problems Cleveland faces with respect to policing fit into a broader narrative of an insolvent city that struggles to provide all manner of municipal services.<sup>190</sup> In Dallas, the story is fraught but more complex. Dallas is a booming city. While the Cleveland story is largely one of municipal dispossession, the Dallas story appears to be one of municipal inequality on the basis of race/ethnicity, class, and legal status. Perhaps, while Dallas police harness the tools of patrol and surveillance to manage poor African Americans populations—making many parents in the sample feel less private but more secure—they neglect poor Hispanics in a similar way to that reflected in older writings on policing in urban context. Perhaps the anomic world introduced in sociologist Elijah Anderson’s *Code of the Street*, the police-deprived Philadelphia “ghetto,”<sup>191</sup> has been reincarnated and recolored in the mobile home parks of Dallas.

Policing law scholars generally ignore the structure, power, and resources within cities as an object of inquiry for policing law and regulation. These are practical issues, not the stuff of criminal procedure scholarship. However, leaving the practices and ideals of local government out of police regulation debates means that many critical aspects of the legal structure surrounding policing practices on a daily basis are under-analyzed. Part of this Article’s task is to bring aspects of the missing law of policing to light.

### **Part III. Implications for the Law of Policing: An Integration Paradigm**

One of this Article’s intentions is to reframe policy debates surrounding policing, articulating a clear set of goals for policing and police regulation much beyond the often narrow idea of “public safety.” Some scholars have recently expanded this idea, but still the mainstream understanding of the goals of policing is to maintain the security of the public—security in a narrow sense of protection from crime, not in the sense of freedom from government overreach,<sup>192</sup> and certainly not security in the sense of basic necessities of a flourishing life.<sup>193</sup> Safety from crime underlies each of these principles; it is a necessary but not a sufficient condition. Beyond public safety, this Article posits that police, and their regulators and reformers, should adopt a more expansive mission for policing: racial and socioeconomic integration.

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<sup>190</sup> Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1163-64 (describing cuts to police force personnel in general and particularly in Cleveland).

<sup>191</sup> ANDERSON, *supra* note \_\_\_, at \_\_\_.

<sup>192</sup> Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015).

<sup>193</sup> See Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33 (2003).

Taken together, this Article advances the idea that policing is engaged not only in a project of public safety and law enforcement, but also the distribution of social, cultural, and even material resources. The current distributional arrangement exerts control not only of bodies and disfavored groups, but of family life, access to public goods, and racial and social dynamics in geographic space. At the outset of the Article, we asked, “What is policing producing?” The answer, to a degree scarcely recognized in the law of policing, is social inequality. Racial and socioeconomic segregation are the backdrop against which policing (re)produces social inequality. Police regulation can, and should, promote racial and socioeconomic integration.

By making an effort to dismantle segregation, police departments can make fulfillment of their public safety role easier by unsettling pockets of crime. Integrative policing is more than just policing “hot spots.”<sup>194</sup> Integrative policing implicates a whole host of law at the local, state, and federal level. Building from the descriptive findings set forth in Part II, Part III articulates a rationale for an integration paradigm in the regulation of policing. I then identify six policies that are implicated when police departments and policy-makers adopt an integration paradigm.

#### A. The Essentiality of Integration

*[In this section, I will discuss the importance of integration (both racial and socioeconomic) generally, noting the debates in the literature over integration as a goal of racial justice after the Civil Rights Era, and explaining the much less-discussed issue of socioeconomic integration. I will build from case law, legal scholarship, sociological literature (e.g., Massey & Denton’s American Apartheid) and political theory (such as Elizabeth Anderson’s The Imperative of Integration)]*

### 1. Rethinking Residency Requirements & Incentives

*[In this section, I will discuss debates on police residency requirements historically and the new trend toward residency incentives, noting that policing law scholars have written virtually nothing about residency issues. I will mention the possibility of the federal government subsidizing residency incentives in struggling cities like Cleveland, and also direct federal benefits like the federal Good Neighbor Next Door program.]*

### 2. Officer Compensation

Police wages are another reason to think more creatively about the spatial structure and distribution of policing. The wage structure under which police officers generally operate works the inverse of the way it should: In the status quo, the busiest and most dangerous jobs in law enforcement usually pay the least. Consider wage disparities in New Jersey. In 2010, the median salary for officers in Camden, NJ (per capita income of \$13,597, a 48.1% African-American and 47.0% Latino population, and one of the nation’s highest crime rates) was more than \$40,000 less than the median salary in Closter (per capita income of \$46,781, a 4.1% Latino and 1.3% African-American and population, and a very low crime rate).<sup>195</sup> These disparities are in different regions of the state, but disparities are often more localized. In the City of

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<sup>194</sup> Hot spots literature

<sup>195</sup> Chris Megerian, *N.J. Police Salaries Rank Highest in Nation with Median Pay of \$90,672*, N.J. STAR-LEDGER, Sept. 19, 2010, available at [http://www.nj.com/news/index.ssf/2010/09/nj\\_police\\_salaries\\_rank\\_highes.html](http://www.nj.com/news/index.ssf/2010/09/nj_police_salaries_rank_highes.html); Demographic information from Census 2010 and American Community Survey 2014 5-year estimates.

Cleveland, officers start at \$10.50 per hour during training and earn a salary of \$45,904.64 as their starting salary thereafter. In nearby Rocky River, the starting officer salary in 2014 was \$52,611.85.<sup>196</sup>

One way to make inroads on interdepartmental wage inequality would be for states to influence officer wage disparities by adopting wage parity laws. Sometimes local governments adopt wage parity rules between different public employment sectors, usually police officers and firefighters. Although some courts have struck down parity rules, the rationale for doing so—that collective bargaining of firefighters’ unions is usurping the collective bargaining rights of officers’ unions, thus effectively withdrawing their rights—would not necessarily hold if the parity rule were adopted within a single profession.<sup>197</sup> Parity rules need not make salaries perfectly equal; issues such as cost-of-living in different regions of a state might be taken into account.

Some states have tried to reduce regional wage parity by making funding available to local departments for wages. The best practices for achieving regionalized wage parity will vary by state, as the set of bodies that exact control over officer wages varies. However, states can influence wages in this way. Recently, legislators in Virginia used the budget process to attempt to reduce regional wage parity. The school made the funding available to local departments for wages.

Even where officers are paid on the same scale, within the same departments, they still may be earning less to police tougher neighborhoods. Picking up on an earlier point, collective bargaining means that departments are often bound to pay, assign shifts, assign beats, give promotions and transfers, and so forth on the basis of seniority. And, even where collective bargaining is not in place, decision-making based on seniority is often embedded into police culture.<sup>198</sup> Seniority rules mean that new patrol officers tend to get the least-desired assignments—graveyard shifts and tough neighborhoods—at the same time they are paid at the lowest compensation rung. Localized wage inequality has severe consequences for communities. Many community members are aware of differences in pay and funding and believe there are attendant variations in the quality of policing between jurisdictions.

To attract the best experienced police to the toughest places, officers who work in high-crime areas should have the most extensive training and experience requirements, and should be the highest-paid. In other sectors, such as mining and agriculture, the riskiness of the job justifies higher pay.<sup>199</sup> While all officers have risky jobs, some are at greater risk than others. The complicating factor is that most of police departments’ budgets come from taxes; however, since the establishment of the federal Office of Community Oriented Policing Services in 1994, federal funding has flowed to local departments to incentivize specific reforms. Federal funding, then, could partially close the gap between the wages local taxes can fund and the wages needed to attract the most skilled officers to the highest-need areas. In addition, regional consolidation of departments can provide a mechanism through which governments can expand the tax base for policing in high-crime areas.

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<sup>196</sup> San Diego is another example. Officers for San Diego County Sheriff’s Department make about \$18,000 more per year than an equal officer for the city police department. Lisa Halverstadt, *Fact Check: \$18K More Working for the Sheriff’s Department*, VOICE OF SAN DIEGO, Sept. 24, 2013.

<sup>197</sup> See RICHARD C. KEARNEY & PATRICE M. MARESCHAL, *LABOR RELATIONS IN THE PUBLIC SECTOR* 164 (5th ed. 2014).

<sup>198</sup> See Michael E. Walleman, *Seniority Rights*, *POLICE CHIEF*, June (2010), pp. 32-36.

<sup>199</sup> See PETER DORMAN, *MARKETS AND MORTALITY: ECONOMICS, DANGEROUS WORK, AND THE VALUE OF HUMAN LIFE* (1996).

### 3. Payment for Patrol & Secondary Employment

One of the most concerning issues that arises in the Dallas data is that the city allows neighborhood associations to pay extra money, over and above tax dollars, to receive additional security and community investment from off-duty Dallas police officers through “Expanded Neighborhood Patrol,” a policy described in Part II.B. As mentioned above, this practice relies on socioeconomic segregation: Households in neighborhoods with a patrol are expected to pay a fee that ranges from roughly \$125-\$400 annually, a large bill for many families in higher-poverty neighborhoods, like Dallas’s Oak Cliff.<sup>200</sup> The more dollars neighborhood residents pay, the more patrol hours off-duty officers spend protecting them. Policies like this are not unique to the City of Dallas. The Bureau of Justice Statistics found that 97% of America’s more than 12,000 police departments have written policies on off-duty employment.<sup>201</sup> Maryland state law protects officer secondary employment (“moonlighting”) as a matter of right.<sup>202</sup> Of course, not all secondary employment policies are equally problematic: Much of the time, officers are working at private companies, events, or construction sites, not for neighborhood associations. However, these policies have received scant attention and demand further investigation and analysis.

The U.S. Department of Justice has criticized such local government arrangements for “contributing to inequitable policing.”<sup>203</sup> When the USDOJ first investigated the New Orleans Police Department in 2011, some of its most significant criticism fell upon the Department’s Paid Detail program.<sup>204</sup> Like Dallas, 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 privatized 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. When NOPD is able to do its job effectively, no community should feel that it has to pay extra to be secure. NOPD officers who work neighborhood Details do the same work—stand watch, patrol, investigate criminal activity—that the City pays them to do, but when they work these Details, they are not supervised by NOPD. 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 assistance.<sup>205</sup>

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<sup>200</sup> See Naomi Martin 2015. “As More Dallas Neighborhoods Pay for Extra Patrols, Some Question Fairness.” Dallas Morning News. October 25.

<sup>201</sup> BRIAN A. REAVES, LOCAL POLICE DEPARTMENTS, 2007 13 (2010).

<sup>202</sup> Law Enforcement Officers’ Bill of Rights, MD Public Safety Code Ann. §3-103(b).

<sup>203</sup> U.S. Department of Justice, Civil Rights Division, Investigation of the New Orleans Police Department. Washington, DC. March 16. (USDOJ 2011: 73).

<sup>204</sup> Pursuant to 42 U.S.C. § 14141.

<sup>205</sup> U.S. DEPARTMENT OF JUSTICE, *supra* note \_\_\_, at 73.

This language might have been a clarion call to municipal governments to prohibit, or at least to more effectively regulate, the use of sworn police officers as private security for overtime pay. However, perhaps because the investigation revealed such a massive number of issues, the Report's critique of Paid Detail did not gain national traction.<sup>206</sup> In addition, the DOJ did not mention Paid Detail in its ultimate consent decree with the New Orleans PD.<sup>207</sup> Importantly, DOJ did not state that officer "moonlighting" is per se corrupt. It limited its analysis to the particularities of New Orleans, and even suggested that a reform would be to follow Miami's off-duty overtime governance structure. Based on that suggestion, we might propose, based on the principle of spatial equity, that local governments heed DOJ's call and centralize requests for private employment of off-duty officers so that it might better monitor the practice and use it to bring additional funds into their police departments.<sup>208</sup>

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.<sup>209</sup> Yet, there are reasons to hesitate to take this path: Private police do not have the same powers nor operate using the same constitutional constraints that apply to sworn police officers.<sup>210</sup> Private security officers might be used only for neighborhood observation and suspect tracking but 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 allowing the training, equipment, and culture that the public provides to sworn police officers to directly reproduce neighborhood inequality.

#### 4. Consolidation

Consolidation of very small police districts might be another way to more fairly distribute policing. Moreover, unlike many reforms, local executives are increasingly considering police consolidation as a potential cost-saving structural reform. After the 2008 recession, municipal budgets shrank and many officers were furloughed or laid off. Some departments have consolidated as a way to provide public safety

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<sup>206</sup> 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 "inequity," though the specific concern was that there would be inequities between 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), available at <http://www.post-gazette.com/attachment/2014/01/03/Toprani-report-Pittsburgh-police-off-duty-work.pdf>. (describing various police departments' approaches to the governance of secondary employment)).

<sup>207</sup> *United States v. City of New Orleans*, 12-1924, Consent Decree Regarding the New Orleans Police Department (E.D. La. Jan. 11, 2013).

<sup>208</sup> USDOJ, *supra* note \_\_, at 74-75; *see also* John F. Breads, *Is the Devil in Paid Police Details?*, 79 POLICE CHIEF 12-13 (2012). 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.COM, Feb. 2, 2015; available at <http://legacy.wwltv.com/story/news/local/investigations/david-hammer/2015/02/10/despite-reforms-nopd-officers-still-keep-details-for-themselves/23212303/>.

<sup>209</sup> *See, e.g.*, Jessica Lee, *Seattle Neighborhoods Hire Private Security Amid "Blatant Lawlessness"*, SEATTLE TIMES, Jan. 23, 2016, available at <http://www.seattletimes.com/seattle-news/citizen-anti-crime-movement-afoot-in-seattles-neighborhoods/>.

<sup>210</sup> Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004).

services and cut redundancies.<sup>211</sup> From an integration standpoint, too-small departments mean that some neighborhoods can essentially become individual fiefdoms for certain officers, and can create various inconsistencies in everything ranging from the amount of training officers receive to the equipment available to keep themselves and civilians safe. These issues decrease spatial equity and more firmly entrench segregation. The existence of small departments in close proximity to each other also increases the likelihood that officers fired in one jurisdiction for serious reasons can efficiently be hired as an officer in another.<sup>212</sup> However, consolidation is politically challenging. Historically, one argument against consolidation was that administrative centralization could threaten officers' ability to engage in community policing.<sup>213</sup> However, it may not be empirically true that fragmentation of police administration is correlated with, let alone a catalyst of, effective community-oriented policing. Some have advanced the idea that having more police agencies within close proximity increases competition, which could increase their responsiveness to community needs. However, increased responsiveness is likely to be unequally distributed.<sup>214</sup>

[Will be going much deeper into this]

## 5. Placement of Substations

If criminal justice and policing scholars scrutinized the placement of police substations, it would probably be controversial. The physical siting of police-inhabited space operates differently from patrol itself – constant institutional presence rather than human and transient. *[Here I will discuss substations as “infrastructures of surveillance” (Lerman & Weaver) that have scarcely been in the view of policing scholars generally, but that have now almost completely disappeared from the view of policing scholars even as urban planners use them as tools to develop communities. I will mention Japanese kobans, public housing police officers, mentions of police substations from local government scholars writing about business improvement districts (e.g., Richard Briffault), and on the growing use of substations as community development, even by private developers). What can policing law scholars contribute to these conversations?]*

## 6. Biased Policing as “Steering”

*[Here I want to analogize policing to prohibited racial steering under the Fair Housing Act of 1968, Equal Credit Opportunity Act (1974); and further regulated in the Community Reinvestment Act of 1977. By policing neighborhoods in particular, disparate ways that become embedded into parents' understandings of communities (both directly from the police and indirectly), policing hardens segregation in ways that could be thought about through a fair housing lens.]*

## IV. Conclusion

[FILL IN]

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<sup>211</sup> JEREMY M., WILSON, ALEXANDER WEISS & CLIFFORD GRAMMICH, PATHWAYS TO CONSOLIDATION: TAKING STOCK OF TRANSITIONS TO ALTERNATIVE MODELS OF POLICE SERVICE (2015).

<sup>212</sup> See, e.g., POLICE EXECUTIVE RESEARCH FORUM, OVERCOMING THE CHALLENGES AND CREATING A REGIONAL APPROACH TO POLICING IN ST. LOUIS CITY AND COUNTY (2015).

<sup>213</sup> 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? (1994); Stephen D. Mastrofski & James J. Willis, *Police Organization Continuity and Change: Into the Twenty-First Century*, 39 CRIME & JUST. 55 (2010).

<sup>214</sup> Stoughton, *supra* note \_\_\_\_.

**Figure 1. Model of Approaches to Policing Law**

Legal consequence	Analytic process				
		<b>Constitutional</b>	<b>Pre-constitutional</b>	<b>Extra-constitutional</b>	<b>Experiential</b>
	<b>Constitutional</b>	[1] Traditional constitutionalist	[2] Value constitutionalist	[3] Statutory* constitutionalist	[4] Experiential constitutionalist
	<b>Pre-constitutional</b>	[5] Constitutional value analyst	[6] Value analyst	[7] Statutory* value analyst	[8] Experiential value analyst
	<b>Extra-constitutional</b>	[9] Constitutional extra-constitutionalist	[10] Value extra-constitutionalist	[11] Statutory* extra-constitutionalist	[12] Experiential extra-constitutionalist

\*Although “extra-constitutional law” involves much more than statutes, I use this shorthand in the Article for clarity because, to date, very little (if any) scholarship that begins with an extra-constitutional analytic process is starting with ordinances or police departmental regulations.

**Figure 2. Sample Characteristics of HPHK**

*Table 1. General Sample Characteristics*

	<b>N</b>	<b>%</b>
<b>MSA</b>		
Cleveland	70	46.4
Dallas	81	53.6
<b>Race/Ethnicity</b>		
Black/ African-American	72	47.7
Hispanic/Latino	39	25.8
White	34	22.5
Other	6	4.0
<b>Sex</b>		
Female	126	83.4
Male	25	16.6
<b>BG Race</b>		
Black/ African-American	64	42.4
Hispanic/Latino	23	15.2
White	64	42.4
<b>BG Median Income</b>		
<\$25,000	85	56.3
\$25,000-\$50,000	43	28.5
>\$50,000	23	15.2

*Table 2. Sample Racial Breakdown by City*

	<b>Black</b>	<b>Hispanic</b>	<b>White</b>	<b>Other</b>	<b>Total</b>
<b>Cleveland</b>	44	4	18	4	70
<b>Dallas</b>	28	35	16	2	81
<b>Total</b>	72	39	34	6	151