CONTENTS

INTRODUCTION .................................................................................................. 2

I. LOCKING UP OUR OWN .................................................................................. 5

II. POLICING OUR OWN ................................................................................... 10
   A. Same-Race Biases ............................................................................... 13
   B. Black Officer “Self-Threats” ............................................................... 17
      1. Social Dominance Threat ................................................................. 17
      2. Stereotype Threat ........................................................................ 23
      3. Masculinity Threat ...................................................................... 25
   C. “Fitting In” as Police Officers ............................................................. 30
   D. The Structure and Organization of Police Work ................................. 35
   E. The Legal Backdrop for Police Conduct ............................................. 38
      1. Implicit Bias and Reasonable Suspicion................................. 40
      2. Reasonable Suspicion and Identity Threats .............................. 41
      3. Promoting Negative Interactions and Constructing Suspicion ......................................................... 44

CONCLUSION ................................................................................................... 48
Introduction

Since Darren Wilson shot and killed Michael Brown in 2014, the problem of police violence against African Americans has been a relatively salient feature of nationwide discussions about race. Across the ideological spectrum, people have had to engage whether, especially in the context of policing, it’s fair to say that black lives are undervalued. While there is both a racial and a political divide with respect to how Americans have thus far answered that question, the emergence of black lives matter movements has made it virtually impossible to be a bystander in the debate.

Separate from the question whether racialized policing against African Americans is, in fact, a social phenomenon, is an equally contestable question about solutions: assuming that African Americans are indeed the victims of over-policing, meaning that by some metric they end up having more interactions with the police and more violent encounters than is normatively warranted, what can we do about it? And here, the answers range from abolishing police officers altogether to training them to diversifying police departments. It is on the last of these proposed solutions -- the diversification of police departments -- that we focus in this review essay. The central question we ask is: What are the dynamics that might shape how African American police officers police other African Americans? Asked another way, what do existing theories about race and race relations, and historical and empirical studies on race and policing, suggest about how African Americans will police our own?

Our point of departure is a review of James Forman’s Locking Up Our Own. Though not framed in precisely this way, Forman’s book is, in many ways, about the relationship between diversity and governance. Forman is particularly interested in the role African Americans have played, across different sites of governance -- as city council members, mayors, governors, prosecutors, police officers -- facilitating and legitimizing the mass incarceration of African Americans. The story he tells is largely a story about choices under constraints -- but choices that produced consequences for which African Americans bear some, though not the bulk, of the responsibility. Which is to say, Forman is clear to describe how African American leaders contributed to and participated in the war on drugs, clear to emphasize the fact that many of those leaders had unsuccessfully advocated for noncriminal justice and non-law enforcement-oriented interventions to address the growing drug epidemic in African American communities, and clear to highlight the broader racial and political context in which African American leaders acted.

Some might deploy Forman’s book to advance the proposition that race has played less of a role in the mass incarceration of African Americans than liberals
and progressives like to admit. After all, black people have been agents, and not just victims, of mass incarceration. Our own view is that Forman’s thesis is more nuanced than the preceding account suggests. Forman’s focus on African American governance is a way of complicating our understanding of how race has mattered in the mass incarceration of African Americans. His analysis of African American decisionmaking across various domains of the criminal justice apparatus reminds us that the persistence of racial inequality in the United States derives from problems of power and structure, and not simply individual choice and identity.

To recognize the existence of power is not to deny the possibility of agency, or the space African American leaders might have had to exercise at least some meaningful choices. The point is rather that the phenomenon of African Americans exercising governance does not eliminate the racial barriers to combating racial inequality. If the two-term presidency of Barack Obama teaches us anything on this issue it is that the racial identity of a leader -- even a President of the United States -- is not enough to dismantle or meaningfully mitigate the racial inequality of a society. Does this mean liberals and progressives are wrong to argue for racial diversity? No. It means that if racial diversity is the only game in town we are in civil rights trouble. That, we think, is the one of the most important lessons to be drawn from James Forman’s book -- racial diversity without meaningful reallocations or redistributions of power might not only limit the possibilities for social transformation but also potentially reproduce and legitimize the very forms of inequality the pursuit of racial diversity was intended to address. James Forman advanced that insight with respect to the mass incarceration of African Americans. Our focus is on a slice of that criminal justice problem -- policing.

Specifically, drawing on empirical, historical, and theoretical literatures, we examine how, if at all, black police officers’ race might shape how they police other African Americans. Fundamental to our approach is a Du Boisian - like conceptualization of race and professional identity -- namely, that African American police officers have to negotiate and reconcile two historically distinct strivings -- the strivings to be “Blue” and the strivings to be “Black” -- in one “dark body.” As we will explain, how they perform that negotiation and reconciliation is not simply a matter of individual choice, individual agency, and individual commitment. Structural factors are at play as well, in much the same way that structural factors shaped, though certainly did not fully determine, how the black leaders James Forman describes mobilized various dimensions of the criminal justice apparatus to address the proliferation of crime and drug usage in African American communities.

The remainder of the essay proceeds as follows. Part I summarizes Forman’s book, paying particular attention to where in Forman’s account he focuses
on individual agency and where he pays closer attention to structure. Part II builds on that summary to discuss the black police. Part of our aim here is to show that the very factors, including Fourth Amendment law, explicit and implicit biases,¹ and racial anxiety,² that explain why white police officers might systematically overpolice and deploy violence against African Americans arguably implicate black police officers as well. Moreover, the pressures black police officers likely experience to fit into their departments potentially compound the problem. Some black officers may believe that their failure to share and display fellow officers’ racial assumptions about African Americans will engender the perception that black officers are “soft” on crime and criminality and “hard” on racial affiliation and loyalty. That perception would create an incentive for black officers to “work their identities”³ to disconfirm assumptions that they will insufficiently identify with being “blue” and overly identify with being “black.” Overpolicing other African Americans would be one way for them to perform that work.⁵ We conclude by suggesting that just as the pursuit of diversity in the context of higher education has not eradicated the racial dimensions of educational inequality, the pursuit of diversity in the context of policing will not, without more, fundamentally change how African Americans experience the police.⁶

⁵ Carbado, What Causes Police Violence?, supra note [].
⁶ See Devon W. Carbado, From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence, 105 Calif. L. Rev. 125, 127 - 28 (2017) (discussing the multiple ways in which African Americans are exposed to police contact and violence).
I. Locking up Our Own

In his groundbreaking and insightful book, Forman traces how the incremental decisions made by African Americans as citizens, voters, mayors, legislators, prosecutors, police officers, and community activists in Washington D.C. over a forty-year period shaped criminal justice policy and contributed to the mass incarceration of African Americans. To understand how and why African Americans participated in the “punishment binge” (p. 10), Forman foregrounds two issues: the desire of African Americans to protect black lives from the unprecedented levels of crime and violence ravaging their communities during the 1960s and beyond (pp. 10, 217 – 18), and the role racism played in limiting their options to do so (pp. 11 – 12). The African Americans he highlights in the book always intended to address the root causes of crime, including education, employment, and antiracism efforts (pp. 11 – 12, 64, 76 – 77). The tough on crime responses were simply an expedient and readily available means of tackling the devastating effects of crime and violence in the short term. However, “the incremental and diffuse way the war on crime was waged made it difficult for some African American leaders to appreciate the impact of the choices they were making” (p. 13). Over decades, their decisions helped to create a criminal justice system that became grossly more punitive for indigent African Americans (p. 14) while the social programs they also envisioned never came to fruition. In sum, Forman’s account recognizes how “racism’s enduring role” not only constrained African American’s options at the front end, but also the possibilities at the back end (p. 12). Thus, despite his focus on the role of African Americans, Forman cautions against “minimizing the role of whites or of racism in the development of mass incarceration” (p.11).

In Part I of the book, Forman describes the origins of the tough on crime stance taken by many African Americans during the period from 1975 through 1978 in Washington, D.C. He explains that many black religious, government, political, and community leaders rallied against marijuana decriminalization and advocated for harsher gun regulations because of their overriding concern to protect black lives from the scourge of drugs and violence decimating their communities. With the benefit of hindsight, it seems inconceivable that African American leaders would advocate against marijuana decriminalization and for increased penalties for gun related crimes given the contributions both have made to the mass incarceration of black civilians. Yet, by highlighting the broader context and constraints under which these decisions were made, Forman makes sense of these decisions. In both instances, “elected officials and other community leaders identified an issue plaguing the community, focused on its racial dimensions, and led a political response that emphasized prohibition” (p. 75).
When marijuana decriminalization was proposed in D.C., the black community was still reeling from the devastating effects of the heroin epidemic in their communities. Many black leaders worried that decriminalization would keep drugs in their communities and encourage drug use, leading to more “crime and degradation” (p. 33). Forman relates that many leaders operated on the assumption that criminal punishment would drive drugs and the dealers who sold them out of the community. Furthermore, some were suspicious that whites wanted to encourage drug use amongst blacks in order to keep them passive. In their view, decriminalization would primarily help white individuals, who could bounce back from addiction to lead productive lives, whereas racism would prevent blacks from ever overcoming the effects (p. 46). The black leaders who opposed decriminalization, many of whom were seen as “guardians of the black community” and “were among the black community’s most dogged defenders” (p. 44), did not foresee the impact their decision to oppose decriminalization would have on the very black lives they were trying to save (p. 45), especially because at the time, most people who were arrested for drug crimes were neither convicted nor incarcerated (p. 45).

Forman explains that D.C.’s gun control movement was also animated by concerns over protecting black lives. In the 1970s and 1980s, some black leaders sought an expedient solution to the massive increase in violent gun-related crimes destroying their communities. Their goals were two-fold: to protect black communities from the ravages of guns and to rid the community of the small group of criminals who were terrorizing it (p. 61). To do so, they advocated stricter gun laws and more punitive sentences, including mandatory minimums (pp. 56, 59, 61). While they acknowledged that blacks would bear the brunt of these law enforcement responses, they believed it was necessary to pay this price in order to rid the community of the criminals limiting the mobility, safety, and economic growth of their broader community (p. 61). Black supporters of gun control “insisted that they had not abandoned the struggle against inequality and racial injustice” (p. 63). Rather, gun control was a useful first step (p. 63). Forman explains that while there was a century-old black tradition of gun ownership within the black community to protect against the tyranny of white violence (pp. 64 – 73), the salient problem facing black communities was not racial “genocide” but rather “racial suicide” (p. 73). In the end, “by a 12 - 1 vote, D.C. passed one of the nation’s strictest gun control laws” (p. 71).

As we see today, the irony of these decisions is that neither marijuana criminalization, gun control, nor more punitive sentences curbed crime and violence in black and brown communities. Instead, homicide rates and drug crime continued to rise while those falling victim to increased penalties and imprisonment
were primarily black and brown (pp. 77, 143).\footnote{Drug prosecutions increased by 300\% and sales arrests increased from three percent to forty-five percent (pp. 143 - 44). The same people were being arrested, but now prosecutors were charging them with more serious offenses, and the harsher sentencing guidelines increased pressure on them to plead guilty (pp. 143 – 44). During the crack cocaine epidemic of the late 1980s, homicide rates tripled (p. 160).} Black supporters of the aforementioned three responses did not envision that their short-term calls for law enforcement solutions crime and violence would become the sole response, while the long-term solution of addressing the social problems that gave rise to the problems in the first place would not follow. As Forman writes,

African Americans wanted more law enforcement, but they didn’t want only law enforcement. Many adopted what we might think of as an all-of-the-above strategy . . . . But because African Americans are a minority nationally, they needed help to win national action against poverty, joblessness, segregation, and other root causes of crime. The help never arrived . . . . So African Americans never got the Marshall Plan -- just the tough-on-crime laws. (pp. 12 – 13).

Forman ends Part I of the book with a discussion of black police. One of the major goals of the civil rights movement was to enlist black police officers. The purpose was two-fold: to end discrimination in the police force and to curb police brutality against the black community. However, neither goal was realized. Forman highlights structural constraints as well as how class and ideological divisions between those advocating for more black police and the citizens signing up to be police created mismatched or opposing goals.

Black civil rights advocates made assumptions about the attitudes of black officers and the role they would play to combat discrimination. “The case for black police had always been premised on the unquestioned assumption of racial solidarity between black citizens and black officers” (p. 107). However, Forman’s account reveals that the “blacks who joined police departments had a far more complicated set of attitudes, motivations, and incentives than those pushing for black police had assumed” (p. 107). The reality of employment discrimination meant that many black officers signed up to obtain a good job that was stable, secure and offered good benefits (pp. 89 - 90, 110 - 11). These officers did not conceive of their role within the police departments as an extension of the civil rights movement (pp. 111). Indeed, according to Forman, many did not view their work as racially significant (pp. 109 – 10).

Forman also highlights the racism that many black officers faced in the department. In the 1940s, black officers were segregated in separate and unequal
facilities, and did not have the same police powers as white officers. For instance, in Atlanta and other police departments across the country, black officers could not exercise power over whites and could only patrol black neighborhoods (pp. 86 – 91). Both the racism that limited the job prospects of blacks and the racism that existed within police forces, “made it less likely that [black officers] would do what many reformers hoped they would: buck the notoriously powerful police culture. The few who tried paid a high price” (p. 111). “Even those black officers inclined to use their political capital to fight police brutality would often find themselves in the minority. Most of their colleagues -- black or white -- wanted to fight for wages, benefits, and an equal shot at promotions” (p. 111).

In his discussion of the black police officer, Forman illuminates the influence of class differences within black communities. He argues that middle-class blacks would often advocate for more policing against the lower-class blacks who were engaged in crime (pp. 108 – 10). Citing to a handful of studies that black police were just as physically abusive as their white colleagues and sometimes even harsher, Forman concludes that “[i]t turned out that a surprising number of black officers simply didn’t like other black people -- at least not the poor blacks they tended to police” (pp. 108). Despite this observation, Forman also acknowledges that, “[o]f course, most black officers didn’t share those views. But even those who saw themselves as pro-black . . . engaged in aggressive tactics against black citizens whom they saw as a threat to law and order. In part, their conduct reflected class divisions within the black community” (p. 108). He notes that “[w]hen some blacks (usually middle class) demanded action against others (usually poor), many ‘pro-black’ officers responded with special enthusiasm” (p. 108). We think the issues are more complicated than that, as we discuss in more detail below. But Foreman is entirely right to note that black-on-black policing was not characterized by intraracial harmony. The end result was that while many police forces eventually integrated, the goal of reducing police violence against black communities was largely unattained.

In Part II of the book, Forman highlights how the tough-on-crime choices made by some African American leaders reshaped the criminal justice system in ways that contributed to mass incarceration and utterly failed to address the crime and violence decimating black communities. Over and over again, some black
leaders responded to crime within their communities with harsher policing practices and more severe punishments. Yet, violent crime rates continued to rise (p. 165).8

Their actions helped usher in a new era of policing and programs that primarily affected indigent African American communities in negative ways, and helped to create a “culture . . . of intrusion[] into the daily lives of black citizens” (p. 171). Police stepped up their weaponry and tactics (p. 167) and adopted “operations” throughout the country to battle drugs and violence (p. 167).

One example was D.C.’s antidrug initiative, Operation Clean Sweep, gave officers power to clear corners, establish roadblocks, participate in undercover purchases, seize cars, and condemn apartments (p. 167). Clean Sweep also created specialized units, such as the Rapid Deployment Unit (p. 170), to carry out these practices. RDU officers would swear, yell, and belittle citizens, issue illegitimate orders, and perform random and unwarranted searches (p. 170). While one might assume that these officers were white, more than fifty percent of the officers involved in Clean Sweep were black (p. 168).

A majority of black citizens saw Clean Sweep and asset forfeiture as a positive way to regain control of the streets (p. 170 - 71). However, rather than targeting king-pins, these measures treated users and street-level dealers harshly (p. 174), stymieing their ability to vote, find employment, obtain housing, and attend college (p. 175). Furthermore, Operation Clean Sweep completely failed to suppress the drug trade and reduce violence. Instead, murder rates continued to rise (pp. 176 – 79). By 1995, the murder rate was still three times what it had been in the years before the crack epidemic (p. 194), and blacks experienced violent victimization at rates fifty percent higher than those for whites (p. 194 - 95).

Once again, the response of many black leaders was to rely on the criminal justice system. The National Organization of Black Police Executives (NOBLE), while calling for the creation of solutions that would address the root causes of crime, also supported the war on drugs and mandatory minimum sentences (p. 114). Furthermore, United States Attorney Eric Holder, a highly respected African American prosecutor, advocated the use of pretext stops. This controversial policing practice trained police officers to identify suspicious vehicles and to find a reason to search them. Holder felt that pretext stops would reduce violence in the short term by getting guns out of the hands of young black men (p. 214). While Holder acknowledged that black drivers would be much more likely to be

8 Many African American leaders adopted the “war” rhetoric and some requested troops be sent to their streets while others asked Reagan to declare states of emergency and to deploy the National Guard (pp. 165 – 66).
stopped, searched, and arrested than white drivers, he also knew that ninety-four percent of black homicide victims were slain by black assailants, and thus the concerns about discrimination were outweighed by the need to protect blacks from crime (p. 202-03). Forman explains that pretext stops continue today and have become an integral part of racially disparate policing throughout the U.S. (p. 211-13). This is particularly frustrating, Forman argues, because ending pretextual stops is one of the easiest and most direct ways to combat racial disparities in the criminal justice system (p. 213).

Forman’s account of the decisions made by African American leaders to protect their communities from drugs and violence illuminates the dangers of failing to attend to power and structure. They relied upon criminal justice system responses with the belief that more systemic solutions to address the root causes of crime would follow. In hindsight, their choices seem naïve. The question is whether we are being similarly naïve in advocating for racial diversity in policing as a solution to discriminatory and violent policing. Our answer is “yes.” We elaborate below.

II. Policing Our Own

Discussions about race and policing almost always have as their predicate the idea that the agents of racial profiling and police violence are white. The notion, at least implicitly, seems to be that black police officers are not implicated in the race and policing problems we have witnessed from Ferguson to New York to Los Angeles to Chicago, among other places. Broadly articulated, our goal in this part is to challenge that assumption. In the context of doing so we explore what role, if any, black police officers can play in mitigating, if not eliminating, the overpolicing of African Americans.

Our starting point is the observation that, over the past few decades, the police departments in American inner cities have undergone significant demographic shifts. This demographic change is one of the reasons why David Sklansky has suggested that modern departments are “not your father’s police department.” See generally David Alan Sklansky, Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement, 96 J. Crim. L. & Criminology 1209 (2006).
The table reveals that in many police departments across the country, and certainly in police departments that are often at the epicenter of debates about race and policing, people of color are part of the force -- and in non-trivial numbers. The Los Angeles Police Department, for example, is now a majority-minority police department; 65% of the officers are nonwhite. In Chicago, 25.1% of the officers are black and 19.2% are Latino. Police departments in Houston, Philadelphia, and New York similarly have relatively robust levels of racial diversity. This demographic backdrop, even without more, militates against framing racial profiling and police violence solely with respect to white police officers.10 Other reasons also caution against the conclusion that racialized policing is solely a white officer phenomenon.11

First, the legal backdrop against which police officers act is the same for black and white officers. In particular, like white officers, black officers can draw on Fourth Amendment law as a source of empowerment to target other African Americans. Second, conscious or unconscious racial biases might lead black police officers to aggressively police other African Americans. Think of these biases as “same-race biases” or “intra-racial biases”12 because both the victims and the perpetrators of these biases have the same racial identity. Third, black police officers, like white police officers, might experience a set of anxieties or vulnerabilities that increases the likelihood that they will mobilize vio-

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<th>Latino</th>
<th>Asian</th>
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</tr>
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<td>34%</td>
<td>6%</td>
<td>1%</td>
</tr>
<tr>
<td>Houston PD</td>
<td>39.7%</td>
<td>19.4%</td>
<td>15.9%</td>
<td>—</td>
</tr>
</tbody>
</table>


11 For a more extended analysis, see Carbado, supra note 5.

12 See Devon W. Carbado, From Stop and Frisk to Shoot and Kill with One Amendment, 64 UCLA L. Rev. (forthcoming 2018).
lence against other African Americans. An example of what we mean is “mas-
culinity threat.” A relatively new body of research demonstrates that police of-
icers who feel that their masculinity is being challenged or undermined in the
context of a particular interaction are more likely to use violence than officers
who do not experience that masculinity threat. Another example is “racial an-
xiety.” Research on this concept shows that police officers who worry that they
will be perceived as racist in particular interactions are more likely to use force
against black citizens than officers who do not experience racial anxiety.

Still another reason to believe that black police officers might end up racially
targeting African Americans relates to some structural features of policing. If
police officers are specifically deployed to proactively police communities in
which African Americans live -- and if their performance evaluations, pay in-
creases, and promotions are tied to, among other measures, the number of stops
and frisks they conduct, the number of citations they issue, and the number of
arrests they effectuate -- black police officers, like white police officers, will end
up having significant contact with African Americans.

A final reason to expect that black police officers will be implicated in the
range of race and policing scenarios with which the United States has been grap-
pling post Ferguson is this: to fit into and become a part of the law enforcement
community of “blue,” black police officers may have to marginalize the concerns
of and disassociate themselves from the community of “black.”

We should be clear to note that, notwithstanding what we have said thus far,
at the end of the day, the question of whether and how black officers are impli-
cated in racially motivated policing against other African Americans is an em-

13 L. Song Richardson & Phillip Atiba Goff, Interrogating Racial Violence, 12 Ohio St. J.
14 Godsil & Richardson, supra note 2, at 2248 - 53.
15 Saki Knafo, A Black Police Officer’s Fight Against the N.Y.P.D., N.Y. Times Mag., Feb.
18, 2016.
16 See, e.g., Kenneth Bolton, Jr. & Joe R. Feagin, Black in Blue: African-American Police
Officers and Racism 201 (2004)(noting that officers who stood up to injustice were viewed
as oversensitive, troublemakers, or radical); R. Alan Thompson, Career Experiences of Af-
rican American Police Executives: Black in Blue Revisited 73 (2003)(explaining the view
of some black officers that “speaking out on sensitive issues had the potential to limit future
opportunities for promotion”).
pirical question. One of the reasons our arguments are largely, though not entirely, theoretical is because there is limited empirical evidence on the racial quality and effects of black policing and the literature that exists points in contradictory directions.\textsuperscript{17} In this respect, our goal in the rest of this part is relatively modest: to suggest that it does not go without saying that, with respect to African American communities, black policing and white policing look fundamentally different. We begin with a discussion of same-race biases.

**A. Same-Race Biases**

The basic point here is that African Americans (and other people of color) have some of the same racial biases against other African Americans that white people have. Think of these as “same-race” or “intra-racial” biases (an intragroup phenomenon analogous to same-sex sexual harassment). Consider, for example, the phenomenon of implicit biases. In order to make sense of our world and our experiences, our minds have developed mental processes that operate automatically, unintentionally, and without our conscious awareness.\textsuperscript{18} Research in the field of social psychology reveals that humans have developed unconscious, that is implicit, associations related to race that consist of stereotypes and attitudes about racial groups that often conflict with their consciously held thoughts and feelings. These implicit associations can shape people’s perceptions, judgments, and behaviors in both positive and negative ways.

Over four decades of research reveals that both whites and African Americans unconsciously associate black people with negative values and white people with positive ones.\textsuperscript{19} That is to say, African Americans often have negative “attitudes” about other African Americans. Second, both whites and African Amer-

\textsuperscript{17} See Thompson, supra note 16, at 82 - 83 (discussing early studies and their limitations).

\textsuperscript{18} For a more robust discussion of implicit biases, see Richardson, supra note 1.

\textsuperscript{19} That is, they associate blackness with negativity and whiteness with positivity. See, e.g., John T. Jost et al., A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo, 25 Pol. Psychol. 881, 897 (2004) (finding that forty percent of blacks show implicit negativity towards their ingroup, contrasted with less than ten percent of whites).
icans generally hold negative stereotypes of other black people, including stereotypes of black people as criminally inclined, violent, and dangerous. Graham and Lowery, for instance, found that priming words related to the category black promoted more negative trait ratings of a hypothetical adolescent offender. Importantly, this effect emerged among both black and nonblack police and probation officers. Moreover, the participants’ response to the prime was not impacted by the participant’s consciously held attitudes towards blacks, suggesting that even well-meaning, racially egalitarian officers may still fall prey to these biases. At least implicitly, then, black police officers likely feel just as unsafe around the average young black man in the inner city as do white police officers.

Studies reveal that police officers are not immune from these implicit racial biases. Consider, for example, the shooter bias line of research. In these studies, subjects, including police officers, watch a video that contains photographs of either black men or white men posed in front of different backgrounds and holding either guns or crime-irrelevant objects such as cell phones. Participants are asked to quickly decide whether the men are armed by pressing buttons labeled “shoot” or “don’t shoot.” These shooter-bias studies typically result in subjects mistakenly shooting unarmed blacks more often than unarmed whites. They also shoot armed targets more quickly when they are black versus white. Studies also demonstrate that officers who work in neighborhoods with high percentages of black and Latino individuals are more likely to exhibit shooter bias.

Relevant for our purposes is the fact that African Americans, including African American police officers, evidence shooter bias as well. Multiple studies have shown that white and nonwhite officers do not differ in racial bias on shooting tasks, either with respect to response time (for example, how quickly they “shoot” a black man as opposed to a white target with a weapon) or with respect


21 Graham & Lowery, supra note 20, at 496 - 97.

22 Id. at 515.


24 Joshua Correll et al., The Police Officer’s Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot, 8 Soc. & Personality Psychol. Compass 201 (2014).
to stereotype-consistent mistakes (for example, their propensity to “shoot” a black man without a weapon or to “not shoot” a white person who is armed).25

Moreover, evidence exists that police departments with more black officers engage in more racial-profiling than those with fewer black officers.26 Consistent with that, the Department of Justice uncovered extensive racial bias in the predominantly black New Orleans Police Department.27 According to the Justice Department, police officers in New Orleans failed to articulate sufficient facts to justify stops, searches, and arrests.28 Finally, there is some data indicating that black officers are more likely than their white colleagues to form nonbehavioral suspicions about black suspects,29 and that black officers who stop a black man are more likely than white peers to arrest that individual.30

The foregoing might explain why there is limited evidence that police forces with more minority officers show more equitable patterns of policing.31 As a result of implicit racial biases, officers are more likely to focus their attention on

25 See Joshua Correll et al., Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot, 92 J. Personality & Soc. Psychol. 1006, 1011 & n.3 (2007) (finding that white and nonwhite officers did not differ in response times); Melody S. Sadler et al., The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context, 68 J. Soc. Issues 286, 299 (2012) (finding that Latino officers did not differ from white officers in response time or accuracy); see also Correll et al., supra note 24; Correll et al., supra note 25, at 1011. Both show no difference between white and nonwhite participants in community samples.
27 The Department noted that the record of policing in New Orleans “reflected on [its] face apparent constitutional violations.” U.S. Dep’t of Justice, Civil Rights Div., Investigation of the New Orleans Police Department, at viii (2011).
28 See id.
29 Geoffrey P. Alpert et al., Police Suspicion and Discretionary Decision Making During Citizen Stops, 43 Criminology 407, 419 (2005) (a non-behavioral suspicion includes such criteria as the suspect’s location or appearance, and, according to Alpert and colleagues, “do[es] not necessarily provide a clear justification for a stop”).
31 See generally id. at 97 (discussing the lack of evidence of behavioral differences between minority and white officers).
black, rather than white individuals.\textsuperscript{32} This is true, even when the officers are consciously egalitarian, reject racial profiling, and are black themselves.\textsuperscript{33} Finally, these implicit biases may cause officers to evaluate any ambiguous behaviors they observe as more consistent with threat and criminality than innocence, and influence how quickly officers identify, or mis-identify weapons.\textsuperscript{34} In sum, the study of implicit bias demonstrates that race influences who will capture an officer’s attention and, once that attention is captured, whose ambiguous behaviors will be perceived as violent and dangerous.

The fact that implicit biases influence black and white officers alike is unsurprising. First, the nature of police work requires officers to think about crime. Researchers have found that simply thinking about crime is sufficient to trigger unconscious racial biases in police officers and that these biases influence their behaviors in ways that disadvantage blacks.\textsuperscript{35} Second, the fact that, across many American cities, black police officers, like white officers, spend a considerable amount of time policing majority-minority communities means that they are always effectively rehearsing the “black as criminal” stereotype. Practicing associations strengthens them, which might explain why officers working in these environments exhibit higher levels of implicit bias than those who do not.\textsuperscript{36} Finally, implicit biases are most likely to influence behaviors and judgments in situations where decisionmaking is highly discretionary, information is limited
and ambiguous, and individuals are cognitively depleted. These are the conditions under which most police officers, including black police officers, operate on the street.

That we have focused on implicit bias in this way is not to suggest that explicit biases are not also at play. Quite likely they are. Our point is to suggest that, assuming explicit biases away, the existence of implicit biases still leaves African Americans vulnerable to overpolicing.

B. Black Officer “Self-Threats”

In this section, we explain how a host of “self-threats” can create conditions that increase the likelihood of officers, including black officers, aggressively targeting black civilians. We focus on social dominance threat, stereotype threat, masculinity threat, and racial solidarity threat.

1. Social Dominance Threat. -- For more than twenty years, social psychologists have been developing and providing empirical support for what they call “social dominance theory.” The basic idea is that the persistence of social inequality derives in part from peoples’ endorsement of hierarchy-promoting ideologies that effectively lock-in extant advantages and disadvantages. Under the theory, people who endorse such ideologies are said to have a social dominance orientation, or SDO.

Although scholars typically describe SDO as an individual difference variable, empirical evidence suggests that it is also a group-based phenomenon. In other words, where one is located in a particular social hierarchy partly determines one’s SDO. Members of high status groups generally have a stronger

37 See, e.g., Eberhardt, supra note 33, at 876 (showing how implicit bias is more likely to operate when repeated mental stress impairs a person’s ability to make choices).

38 Felicia Pratto et al., Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes, 67 J. Personality & Soc. Psychol. 741, 741 (1994) (“The theory postulates that societies minimize group conflict by creating consensus on ideologies that promote the superiority of one group over others. . . To work smoothly, these ideologies must be widely accepted within a society, appearing as self-apparent truths; hence we call them hierarchy-legitimizing myths.” (emphasis omitted) (citation omitted)).


40 Pratto et al., supra note 38, at 742.
SDOOO than members of lower status groups. Men, for instance, tend to be more social dominance oriented than women. With respect to race, whites evidence a stronger SDO than blacks or Latinos, and police officers evidence a stronger SDO than civilians, even after controlling for a range of other characteristics, such as gender, social class, age, and educational background. A particular feature of the social dominance literature that bears emphasis is the finding that people’s SDO orientation increases when their sense of social position in society is threatened.

Social dominance theory likely applies to policing. For one thing, researchers have found that police officers -- especially white police officers -- have a high SDO. This may well derive from the fact that, at least to some extent, police cultures and trainings historically have promoted hierarchies as an ordinary and desirable feature of policing, a matter about which we will say more a little later. Moreover, “the criminal justice system is itself hierarchically ordered, with suspects at the bottom, police officers somewhere in the middle, and judges at the top.” Compounding matters is the fact that, “historically, race has been

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41 Id. at 758.
42 Id. at 747.
44 Eric D. Knowles et al., On the Malleability of Ideology: Motivated Construals of Color Blindness, 96 J. Personality & Soc. Psychol. 857, 860, 863 - 64 (2009). The researchers contrasted the distributive justice colorblindness principle (the belief that one’s race should not matter for outcomes in life) with the procedural justice colorblindness principle (race should not be a factor in how individuals are treated, even in situations where inequality exists and differential treatment could ameliorate it). Id. at 859. While the former has the potential to effect change, the latter tends to entrench inequality. Knowles and colleagues found that whites who perceived more threat from blacks tended to endorse procedural colorblindness more strongly. Id. at 862. Moreover, asking whites to identify their ethnicity, which was shown in pretesting to cause whites to think about racial threat, was associated with spontaneous generation of procedural (as opposed to distributive) descriptions of what colorblindness was. The authors interpreted these findings as evidence that whites feeling threatened would selectively endorse ideologies that maintained their high social status. Id. at 863.
45 Support.
46 Devon W. Carbado, What Causes Police Violence.
the most perniciously enforced hierarchy in the United States. Finally, “the criminal justice system and on-the-ground policing have functioned as significant sites in which state actors have enforced this hierarchy.”

As one of us has argued elsewhere, the preceding factors could coalesce to create a law enforcement investment in “social dominance policing” -- that is, “policing that consciously or unconsciously maintains the officer’s sense of authority, control, and power and the officer’s sense of the suspect’s vulnerability, diminished agency, and powerlessness.” To put the point another way, “social dominance policing is predicated upon police/civilian encounters in which the police and the suspect know who is in charge, where power and vulnerability reside, and conduct themselves in ways that affirm and re-inscribe this hierarchy.”

Various features of police training instantiate norms of social dominance. For example, officers are instructed to maintain control over every interaction because any threat to their authority is potentially dangerous. They are taught to do so by enacting “command presence,” which involves “tak[ing] charge of a situation [and] projecting an aura of confidence and decisiveness.” This command presence interactional technique is expressly designed to establish and signal the officer’s hierarchical position, a position of dominance that African Americans can “threaten” in any number of ways.

For one thing, simply asserting rights could undermine the hierarchy upon which social dominance policing rests. This is precisely why many black parents expressly instruct their children to over-comply during their engagements with

47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
the police. For another, questioning an officer’s authority more directly challenges that dominance and could lead the officer to carry out a quintessential expression of police power -- the power to arrest. Still a third way an African American might threaten an officer’s social dominance is through some form of confrontation. As one scholar observes:

[B]y approaching people from a dominance perspective, police officers encourage resistance and defiance, create hostility, and increase the likelihood that confrontations will escalate into struggles over dominance that are based on force. The police may begin a spiral of conflict that increases the risks of harm for both the police and for the public.

Although not as robust as that of white officers, black police officers typically evidence relatively high levels of SDO. Yet such an orientation, does not, a priori, guarantee that black police officers would be committed to social dominance policing. Indeed, research suggests that high-SDO, low-status individuals will only show bias in favor of the high status group when they believe that the hierarchy on which that group’s high status is based is legitimate. One way to understand this in the context of policing would be to say that black police officers are unlikely to manifest social dominance-oriented policing against other black men unless they perceive the policing practices of their police department

53 See Carbado, Eracing the Fourth Amendment (describing this as “surplus compliance”)
56 See Sidanius et al., supra note 43, at 350 (“[E]ven after the effects of ethnicity were accounted for, police officers were still found to be significantly and quite strongly more dominance oriented than civilians . . . .”). Note that the social dominance literature deals in relative endorsement of statements used to gauge SDO, rather than absolute endorsement, limiting what is known about exactly how strongly officers, or civilians, openly endorse dominance attitudes.
to be legitimate. A range of incentives exist for black police officers to view their departmental practices in precisely this way.\textsuperscript{58}

First, to view policing practices as illegitimate is to tell oneself that one is doing life and death work for a system that is not simply unjust but racially unjust.\textsuperscript{59} Second, people are more likely to justify systems and organizational cultures when they have a desire to create a common or shared experience.\textsuperscript{60} The fact that police cultures emphasize uniformity in attitudes and behavior, and as a matter of formal training,\textsuperscript{61} means that black police officers likely experience pressure to integrate themselves within and reproduce the department’s epistemic

\textsuperscript{58} A closely related theory to social dominance theory, system justification theory, explores why some low-status group members would endorse hierarchy-enhancing ideologies and engage in other behavior that runs counter to their group interests. For instance, research suggests that low income individuals tend not to support income redistribution efforts, a perplexing phenomenon. For further discussion of this point, see John T. Jost, System Justification Theory as Compliment, Complement, and Corrective to Theories of Social Identification and Social Dominance 223 (2011). This sort of behavior is problematic in the context of classic psychological theories like social identity theory, which predict that individuals will generally act to elevate the status and esteem of themselves and their group. See generally Michael A. Hogg, Social Identity Theory (2006) (for a review); Henri Tajfel & John C. Turner, An Integrative Theory of Intergroup Conflict, in The Social Psychology of Intergroup Relations 33 (William G. Austin & Stephen Worchel eds., 1979) (for the original formulation of the theory). For a more in-depth discussion of system justification theory and its applications to law, see Gary Blasi & John T. Jost, System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice, 94 Calif. L. Rev. 1119, 1126 - 44, 1155 - 62 (2006). The particular overlap and distinctions between system justification theory and social dominance theory is beyond the scope of this paper. For excellent discussions of the two theories, see Jost, supra, at 223; Jost et al., supra note 19, at 888; Felicia Pratto et al., Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward, 17 Eur. Rev. Soc. Psychol. 271 (2006); Jim Sidanius et al., Social Dominance Theory: Its Agenda and Method, 25 Pol. Psychol. 845, 868 - 70 (2004).

\textsuperscript{59} Our reference to life and death here is particularly relevant because system justification is predicted by mortality salience, such that individuals who consider their own death frequently tend to system justify more than those who do not. Erin P. Hennes et al., Not All Ideologies Are Created Equal: Epistemic, Existential, and Relational Needs Predict System-justifying Attitudes, 30 Soc. Cognition 669, 671, 675, 677 (2012).

\textsuperscript{60} Id., at 675, 677.

and cultural community. Third, individuals who are dependent on an organization or system tend to justify it. To the extent that black and white police officers alike rely on police authority to maintain their safety, they may take comfort in seeing that system as legitimate and well-constructed. Finally, black officers’ explicit and implicit biases of other African Americans would matter here as well. These perceptions would legitimize the utilization of aggressive


63 This should not be taken to suggest that black and white officers experience system justification similarly, however. To the contrary, an important element of system justification theory is that system justification operates fundamentally differently for high- as opposed to low-status individuals. Specifically, for high-status individuals, system justification motives and group esteem motives act in concert, such that believing one’s group to be highly motivated or talented (and thus legitimately deserving of high status) is complemented by the belief that one’s system works effectively and fairly to reward deserving parties. Note how different a calculus is necessary for low-status individuals, however. For these individuals, system justification motives act counter to group-esteem motives. For a Latina woman, for instance, believing that the system is just requires that she endorse the view that women, Latinos, and particularly Latina women are less able or less motivated (and thus less deserving of high status) than whites, men, and particularly white men. Likewise, maintaining a high opinion of her group’s worth demands that she reject the system as unjust and ineffective at elevating appropriate parties to high-status positions, a rejection which may cause her substantial anxiety. Thus, whereas for high-status members of a social system, endorsement of legitimizing myths like meritocracy should be relatively consistent across individuals and situations, for low-status members, the theory dictates that contextual or personal factors will predict whether legitimizing myths are endorsed. See, e.g., Arnold K. Ho et al., Social Dominance Orientation Revisiting the Structure and Function of a Variable Predicting Social and Political Attitudes, 38 Personality & Soc. Psychol. Bull. 583, 584 - 85 (2012) (suggesting that SDO is more accurately conceived as two component parts: a preference for unequal social relations (SDO-E, for equality) and a preference for some groups to dominate over others (SDO-D, for dominance)); see also John T. Jost & Erik P Thompson, Group-Based Dominance and Opposition to Equality as Independent Predictors of Self-Esteem, Ethnocentrism, and Social Policy Attitudes Among African Americans and European Americans, 36 J. Experimental Soc. Psychol. 209, 222 - 23, 229 - 31 (2000) (demonstrating for the first time that these concepts are related to one another differently for high- as opposed to low-status groups).

64 To appreciate how explicit biases might be operating here, it is helpful to distinguish between intentional discrimination on the basis of animus and discrimination on the basis of stereotype. For the most part, black police officers will not harbor racial animus toward
policing tactics against a group that is presumptively perceived to be violent and dangerous—African Americans generally and black men in particular.65

2. Stereotype Threat. — Another threat that could impact how black officers police other African Americans relates to stereotype threat. Stereotype threat refers to the anxiety that occurs when people are concerned about confirming a negative stereotype about a social group they value and to which they belong.66 People can experience stereotype threat even when they do not endorse the stereotype or believe it applies to them. All that is required is that individuals are aware of the negative stereotype and are in a situation that raises concerns that they will be judged in terms of that stereotype.67

Across a number of studies, researchers have learned that police officers experience stereotype threat arising from the concern that they will be perceived as racist by the civilians they encounter.68 Disturbingly, these concerns can result

65 See sources cited supra note 20. One study of police officers found that an exception to the racial tension that existed between black and white officers was when they came to each other’s aid. According to the author, police officers of both races “viewed the public as a common enemy.” Thompson, supra note 16, at 37.


67 See Steele and Aronson, supra note 66, at 798.

68 Phillip Atiba Goff et al., Consortium for Police Leadership in Equity, Protecting Equity: The Consortium for Police Leadership in Equity Report on the San Jose Police Department 1 (2013).
in racial violence. Studies demonstrate that the more officers experience stereotype threat, the more likely they are to use greater force against black suspects relative to individuals of other racial groups, both in the lab and in the real world.69

One of us has previously theorized that the reason stereotype threat is associated with greater uses of force against black civilians is because it influences officers’ perceptions of their moral authority, that is, their sense of self-legitimacy, and thus, their confidence that they can control a potentially threatening situation in non-coercive ways.70 After all, if officers believe that civilians do not respect their authority, they will be quicker to think that words alone will be insufficient to control the situation and be more likely to use physical force as a result. In fact, one study found that when officers believed that civilians did not respect them and did not view them as legitimate, officers were more likely to believe that interactions with these individuals would be more dangerous.71 That finding is particularly problematic for African Americans. Because the police-are-racist negative stereotype is most salient with reference to black civilians, African Americans are more likely than any other group to generate stereotype threat in police officers,72 including officers who are black.73

Recent research provides evidence to support the theory. The study we have in mind involved 514 police officers from a large urban police department. Researchers found that officers’ perceptions of their own legitimacy is tied to their views of how citizens perceive them.74 The more officers experienced stereotype threat, the less likely they were to perceive themselves as legitimate.75 Further-

69 Id. at 3, 4.
70 Richardson & Goff, supra note 13, at 127.
72 Godsil & Richardson, supra note 2, at 2250.
73 Goff et al., supra note 68, at 5 (observing that nonwhite officers frequently mentioned occasions when citizens of the same race accused them of racism).
75 Id. at 5.
more, officers who experienced stereotype threat felt less confident in their authority.\textsuperscript{76} Finally, the study found that the less legitimate officers viewed themselves to be, the more resistant they were to their department’s use of force policies, the more approving they were of unreasonable uses of force, and the less supportive they were of using procedurally just policing tactics in interactions with citizens.\textsuperscript{77} The officer’s race did not predict these experiences of stereotype threat.\textsuperscript{78}

Importantly, researchers have not found significant differences between black and white officers’ experiences of stereotype threat.\textsuperscript{79} Since stereotype threat influences both black and white officers, simply having more diversity in police departments may not, in and of itself, reduce uses of force against black citizens.

3. Masculinity Threat. -- Another phenomenon that may influence police officers regardless of their race is masculinity threat. Masculinity threat refers to the fear of being perceived as insufficiently masculine.\textsuperscript{80} While gender is often understood as denoting differences between the sexes that are “natural, essential, or biological,”\textsuperscript{81} masculinities theorists maintain that gender is socially constructed; in other words, it is “the socially generated consensus of what it means to be a man, to be ‘manly’ or to display such behaviour at any one time.”\textsuperscript{82} To

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 5 - 6.
\textsuperscript{79} Goff et al., supra note 68, at 5. As Goff notes, this either could be attributed to the small sample size of nonwhite officers or to the concerns white officers may have had with admitting to a fear of being judged to be racist. \textit{Id.}
\textsuperscript{80} For an in-depth discussion of masculinity threat, see Richardson & Goff, supra note 13, at 128 - 31.
\textsuperscript{82} Deborah Kerfoot & David Knights, ‘The Best is Yet to Come?’: The Quest for Embodiment in Managerial Work, in Men as Managers, Managers as Men: Critical Perspectives on Men, Masculinities and Managements 78, 86 (David L. Collinson & Jeff Hearn eds., 1996); see also James W. Messerschmidt, Masculinities and Crime 174 (1993) (“[W]e do gender according to the social setting in which we find ourselves.”); Angela P. Harris, Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation, 37 Wash. U. J.L. & Pol’y 13, 20 (2011) (noting that “gender is not a thing you have, but a thing you do”).
put all of this another way, “[o]ne must learn to be a man in this society because manhood is a socially produced category.”83 Far from being an existential given, “[m]anhood is a performance.” A script. It is accomplished and re-enacted in everyday relationships.84 Precisely because men do not perceive of their manhood or masculinity “as a developmental guarantee, but as a status that must be earned. . . .”85, men often experience a kind of masculinity precarity, or what we have been calling masculinity threat. This sense of precarity is compounded to the extent that men work in hypermasculine environments, where exaggerated displays of physical strength and aggression are glorified and rewarded as a means of demonstrating and maintaining one’s masculinity. In those contexts, when a man’s masculinity is threatened, he will often respond with violence86 because “physical aggression is part of men’s cultural script for sustaining and restoring manhood.”87

In police departments, hypermasculinity amongst the rank and file is encouraged, reinforced, and policed in numerous ways.88 Departments that highlight gender diversity often do so in a manner that foreground women’s “outsider” status;89 police academies often teach recruits in explicit and implicit ways that

83 Devon W. Carbado, Straight Out the Closet, Berkeley Women’s Law Journal at 93-94.
84 Carbado, Straight Out the Closet at 94.
85 Jonathan R. Weaver et al., The Proof Is in the Punch: Gender Differences in Perceptions of Action as Components of Manhood, 62 Sex Roles 241, 242 (2010); see also Joseph A. Vandello et al., Precarious Manhood, 95 J. Pers. & Soc. Psychol. 1325, 1335 (2009) (finding that “manhood is seen as more of a social accomplishment that can be lost and therefore must be defended with active demonstrations of manliness”).
87 Weaver et al., supra note 85, at 247.
88 Michael F Aiello, Policing the Masculine Frontier: Cultural Criminological Analysis of the Gendered Performance of Policing, 10 Crime, Media, Culture 59, 59 - 60 (2014); see also Goff et al., supra note 68, at 13.
89 Anastasia Prokos & Irene Padavic, “There Oughtta Be a Law Against Bitches”: Masculinity Lessons in Police Academy Training, 9 Gender, Work & Org. 439, 446 - 54 (2002); see also Aiello, supra note 88, at 72 - 74. Seven of the twenty-two departments overtly highlighted these gender differences. Id.
aggressive, misogynist forms of masculine identity are favored and expected, and emphasize physical fighting and violence inside and outside the classroom. Compounding all of this is the fact that policing is still a male-dominated profession, and “police work is still viewed by police themselves and the public as a masculine pursuit best characterized by aggressive macho crime fighting.” Finally, officer training continues to emphasize physical strength, danger, and the physical aspects of the job, all of which codes policing as hypermasculine.

Against the backdrop of the gendered dimensions of the practices and perceptions of policing, male officers often comment on the necessity of proving their masculinity through performance of a straight, macho identity. For instance, patrol officers may not call for help out of concerns that they will be viewed as insufficiently masculine in the eyes of other officers. As one veteran officer shares, “officers who ‘call for help’ are seen as weak, as vulnerable, and as feminine. . . . The subculture dictates that ‘real men’ will never need to call for help; those who do are often subjected to ridicule and scorn after having done so.” All of this helps to explain why male officers may feel at risk that their colleagues may view them as wanting in masculinity.

Researchers have found that masculinity threat predicts uses of force by police against black men both in the lab and in the field. One study found that the

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90 Prokos & Padavic, supra note 89, 440.
91 Id. at 449.
93 Id. at 316.
94 Jennifer Brown, Anita Maidment & Ray Bull, Appropriate Skill-task Matching or Gender Bias in Deployment of Male and Female Police Officers? 3 Policing & Soc’y 121, 121 (1993); Aiello, supra note 88, at 70 - 71 (citing John P. Crank, Understanding Police Culture 230 (2004)).
95 Susan L. Miller et al., Diversity in Blue, 5 Men & Masculinities 355, 369 (2003).
97 Goff et al., supra note 68, at 12; see also Goff, et al., Voices of Dominance (unpublished manuscript on file with author).
more officers were insecure in their masculinity, the more likely they were to use greater force against blacks relative to other racial groups.  

As a theoretical matter, there are reasons to think that black officers are not immune to the masculinity threat phenomenon we have described. Indeed, one might theorize that black officers have a stronger incentive than white officers to defend their masculinity (a) if they are subject to racism within their police departments (remember that being exposed to racism can cause black men to engage in compensatory performances of masculinity), or (b) if they believe that their white or nonblack colleagues will think that they are prone to be “soft” on black suspects out of a sense of racial loyalty or kinship.

As an empirical matter, at least one line of research indicates that black police officers experience masculinity threat at similar rates to white officers. Another line suggests that black officers may experience greater levels of masculinity threat. Hassell and Brandl, for example, found, in a study of over a thousand Milwaukee Police Department officers, that black officers were more likely than white colleagues to report that their peers underestimated their physical ability to do police work, an experience of doubt that has clear implications for masculinity. While research in the area of masculinity threat remains relatively new, the bottom line for our purposes is that the phenomenon likely impacts black officers.

4. Racial Solidarity Threat: A Version of Racism Stereotype Threat. -- Black police officers could experience a version of racism threat or what we call “racial solidarity threat.” The notion is that black police interactions with

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98 Goff et al., supra note 68, at 11.
99 Goff, supra note [].
100 Goff & Martin, supra note [] at 20 - 21 (finding no racial differences in responses to a masculine gender role stress scale).
102 For arguments about the importance of racial solidarity in the context of the black community, see David B. Wilkins, Identities and Roles: Race, Recognition, and Professional Responsibility, 57 Md. L. Rev. 1502, 1556 - 62 (1998); Stephen L. Carter, The Black Table, the Empty Seat, and the Tie, in Lure and Loathing: Essays on Race, Identity, and the Ambivalence of Assimilation 55, 66 - 67 (Gerald Early ed., 1993) (arguing that racial solidarity is essential for the professional success of the black community in modern America).
black men potentially threaten these officers’ sense of racial identity and kinship. More precisely, the threat is that the black men with whom they interact will perceive black police officers to be “sell-outs,”103 “Uncle Toms,”104 or people who disidentify with or disassociate from other black people.105

There are two reasons to posit that racial solidarity threat could engender aggressive policing. First, a black police officer could expect that black suspects, more than suspects of other races, should understand the difficult position in which black police officers find themselves. These suspects should thus make their encounters with the black police officer go as smoothly as possible by performing a kind of surplus compliance. In the absence of such compliance, the black officer may feel a reduced sense of kinship with his racial group. He could come to believe that the very fact that the black suspect is being noncompliant means that racial affinity or solidarity is doing no work and that the black suspect is invested in giving the black police officer a hard time. Under these circumstances, the officer would not be able to trade on a racially specific form of moral authority -- same-race affinity or community. He would thus -- consciously or unconsciously -- default to a more authoritarian form of engagement.

Second, black officers could think that the reason the black suspect is giving the black officer a hard time is because the suspect believes that the black officer has in fact “sold out.” This perception could engender anger or frustration on the part of the black officer (particularly if the officer himself worries that he has “sold out”), either of which could produce more aggressive police conduct. Alt-

103 For a thoughtful discussion of the politics of this term among the black community, see generally Randall Kennedy, Sellout: The Politics of Racial Betrayal (2008) (detailing the suspicion of racial betrayal in the black community and examining its manifestations in contemporary politics and culture).


105 Thompson, supra note 16, at 44 (2003)(citing John L. Cooper, The Police and the Ghetto 86, 116 (1980)) (“The competing demands of emotional separation versus the expected role of representing the ghetto community’s views thus caused black officers to eventually withdraw and turn their backs on racial peers just as Judas Iscariot was depicted in his betrayal of Christ.”).
hough preliminary evidence suggests that black officers worry about being perceived as racist as much as white officers, whether racial solidarity threat exists in the specific form we have described remains to be empirically determined.

C. “Fitting In” as Police Officers

Even assuming that black police officers don’t have implicit or explicit biases against other African Americans, and are not subject to the various “threats” we have described, there is a strong incentive for them to engage in various forms of racially motivated policing: to fit into the culture of their workplace. Like other employees in workplaces, how black officers are perceived by their peers matters. Indeed, within law enforcement, where cohesion and ability to work with one’s partner are emphasized as critical elements of effective policing, the perceptions of their peers are likely to shape not only black officers’ experiences in the workplace but also their sense of legitimacy and authority as police officers. Thus, it behooves black police officers to get along with their colleagues, to be good team players, and to fit into their work environment. In short, black police officers have an incentive to “work their identities” to demonstrate that they belong.

But there are racial constraints on their capacity to do so that could lead them to engage in various forms of racially motivated policing. In part, this derives from a potential tension that exists between a black officer’s sense of self and sense of his normative commitments, on the one hand, and his sense of what

106 Goff & Martin, supra note [], at 17.

107 Black officers might experience more threat when confronted by African American community members who make it known that they view the officer as a race traitor and a sell-out. Thompson, supra note 16, at 43. One study provides evidence of this. Researchers found that when officers believed that civilians did not respect them and did not view them as legitimate, officers experienced concerns that interactions with these civilians would be more dangerous than interactions with civilians who they believed respected their authority and their legitimacy. Phillip Atiba Goff et al., Illegitimacy Is Dangerous: How Authorities Experience and React to Illegitimacy, 4 Psychology 340, 343 (2013).


109 Professor Mitu Gulati and Professor Devon W. Carbado developed this theory on “working identity” in the context of theorizing workplace discrimination. See Devon W. Carbado & Mitu Gulati, Acting White?: Rethinking Race in Post-Racial America (2013); Carbado & Gulati, supra note 3, at 1267 - 79.
police cultures require, on the other. The effect of this tension is that race -- the very thing that might lead one to surmise that black police officers can change the racial culture of policing -- might limit their capacity to do so. The schematic below provides an indication of what this tension might look like.

Point One in the Model represents the black officer’s sense of self as a person with racial community ties and kinship who is committed to a progressive anti-racist agenda. At Point Two, the black police officer forms a view about the criteria his police department values: in this case, a racially targeted hard-on-crime sensibility. At Point Three, the black police officer experiences a conflict
between his sense of identity and his sense of the criteria that the institution values. This conflict has to be negotiated. This takes us to Point Four. Here, the officer has to decide whether to compromise his sense of identity. If he chooses not to do so he will produce a performance that, from the perspective of what our hypothetical police department values, renders him a “bad cop” -- a black police officer with a progressive anti-racist/soft on crime identity. On the other hand, the officer may decide to compromise his sense of self. Under the terms of the model, this would render him a “good cop” -- that is, a black police officer with a hard-on-crime approach to policing.

With the foregoing model in mind, and to make the discussion more specific, imagine that, while driving in a patrol car, a black police officer and a white police officer observe a car change lanes without signaling. Stipulate that the driver of the car is a black male in his twenties. Assume that the white officer says to the black officer, “Let’s go check things out.” The black officer is inclined not to do so. Because the officers observed many white drivers commit traffic infractions and the white officer did not suggest stopping any of them, the black police officer experiences the white police officer’s “Let’s go check things out” as an invitation to engage in racially targeted policing. On the flip side, the black officer also believes that if he refuses to stop the black driver, his white colleague will perceive him to be racially conscious and soft on crime. The officer is experiencing Point Three in the model -- the conflict -- and has to decide how to negotiate it (Point Four).

The table below, Figure 5, suggests that this conflict negotiation likely is a more salient dynamic than we have thus far discussed in that there are likely multiple moments of conflict between norms that a police department might value and stereotypical perceptions about black police officers.

<table>
<thead>
<tr>
<th>Institutional Culture/Norm</th>
<th>Black Racial Stereotypes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hard on crime</td>
<td>Soft on crime</td>
</tr>
<tr>
<td>Colorblind/Racially neutral</td>
<td>Color Conscious/Racially sensitive &amp; biased</td>
</tr>
<tr>
<td>Qualified</td>
<td>Unqualified</td>
</tr>
<tr>
<td>Status-Quo Oriented</td>
<td>Anti-institutional</td>
</tr>
<tr>
<td>Law abiding</td>
<td>Law-breaking</td>
</tr>
<tr>
<td>Institutional Loyalty</td>
<td>Racial Group Loyalty</td>
</tr>
<tr>
<td>Cooperative Institutional Citizen</td>
<td>Uncooperative/Institutional complainer</td>
</tr>
<tr>
<td>Police (Blue-) centered Identity</td>
<td>Race (Black-) centered identity</td>
</tr>
<tr>
<td>Trustworthiness (Code of silence)</td>
<td>Untrustworthiness (Breaking Code of Silence)</td>
</tr>
</tbody>
</table>

As the table reveals, each institutional norm of our hypothetical police department is negatively associated with a stereotype about race. For example, the
norm of law abidingness is positioned against the stereotype of blacks as law
breakers. Similarly, the norm of cooperative institutional citizenship is posi-
tioned against the racial stereotype of blacks as uncooperative institutional com-
plainers. These oppositional dualities create an incentive for black police officers
to align themselves with the norms that the institution values and signal that they
do not have the qualities that are in opposition to those values. This could lead
black police officers to engage in racially targeted policing, not because they
have implicit or explicit biases, but because of a pragmatic desire to survive, fit
into, and thrive within a particular institutional setting -- police departments.110

One could imagine these dynamics affecting other officers of color for sim-
ilar reasons. Think, for example, about the kind of pressure a Muslim law en-
forcement official would have to racially profile other Muslims in the immediate
aftermath of 9/11. Think as well about the pressures Latino border patrol agents
must experience to racially profile people based on their “apparent Mexican an-
cestry.”111

Elements of the model we have described have been substantiated by psy-
chological research. First, work by Jenessa Shapiro and Steven Neuberg supports
the idea that officers of color likely feel a conflict between their own values and
those of the white majority, and that they may strategically express bias in order
to gain esteem among white peers. The researchers found that black men, more
than white men, assumed that facially-egalitarian white men were likely to hold
unstated racial prejudice. Black men further expressed the belief that publicly
matching white men’s presumed-racist views would be socially rewarded.112
Moreover, the researchers found that black men would engage in public displays
of bias in contexts where they believed their behavior toward a fellow person of
color would be the basis of social evaluation by whites.113 In other words, though
not demonstrated in a police population, this research suggests that blacks engage
in precisely the kind of value comparison we describe in Point Two of the model,

and Racism 193 (2004) (providing accounts of black officers who stood up to racial injus-
tice being viewed as oversensitive, troublemakers or radicals); id. at 202, 204 (observing
that black officers are reluctant to report brutality for fear of retaliation and ostracism).


112 Jenessa R. Shapiro & Steven L. Neuberg, When Do the Stigmatized Stigmatize? The
Ironic Effects of Being Accountable to (Perceived) Majority Group Prejudice-Expression

113 Id. at 883 - 88.
and further that the choice to nonetheless engage in bias (Point Four) represents a compromising of their true attitudes.

Even more alarming, recent research suggests that racially biased policing by black officers seeking approval from white peers may in fact increase the expression of bias among white officers in the department. Professor Ines Jurcevic and colleagues have found that whites who observe a black person putting down a fellow black person will in turn derogate that target too.\textsuperscript{114} Again using the ruse that participants would be helping on a hiring committee, the researchers showed white participants negative evaluations of a job applicant, ostensibly provided by a member of a hiring committee.\textsuperscript{115} They varied the race of the applicant as well as the race of the committee member, and found that participants rated a black candidate more negatively after hearing a black committee member derogate him than after hearing a white committee member give an identical evaluation.\textsuperscript{116} In a follow-up study, they demonstrated the mechanism by which this occurred: hearing a black committee member give a negative evaluation, it turned out, reduced whites’ concern about appearing prejudiced, which in turn predicted whites’ own (lower) ratings of the candidate.\textsuperscript{117}

While none of what we have said conclusively establishes that black police officers engage in racial profiling, at the very least the above cautions against framing the problem solely with respect to white police officers. Black officers and other officers of color likely racially profile as well. They should thus figure more prominently in our discussions of the problem and the interventions we fashion to eliminate it.

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Thus far, we have argued that explicit and implicit biases, a number of different “identity threats” -- stereotype threat, masculinity threat, social dominance threat, and racial solidarity threat -- and the pressures black police officers likely feel to fit into their departments and the culture of “blue” may cause black police officers to aggressively police their own -- that is to say, other African Americans. Below we add two additional factors: (1) the structure and organization of police departments, including how those departments allocate work; and (2) the

\textsuperscript{114} Ines Jurcevic et al., Using Racial Minorities’ Opinions to Justify Prejudice Expression (June 2014) (paper presented at the 10th biennial convention for the Society for the Psychological Study of Social Issues) (on file with author).

\textsuperscript{115} Id.

\textsuperscript{116} Id.

\textsuperscript{117} Id.
legal backdrop against which police officers act. With respect to this second factor, our particular focus is on the Fourth Amendment. As we will explain, Fourth Amendment law permits police officers to force interactions with civilians with little or no basis. Black police officers, and not just white police officers, likely take advantage of this power.

D. The Structure and Organization of Police Work

Many people would be surprised to learn that police departments are sometimes run like a business. There are bottom lines, quotas, and benchmarks that must be met. One of the most pernicious examples of this dynamic is Ferguson, Missouri. A Department of Justice investigation into their police department revealed that city officials placed enormous pressure on the police to generate revenue through their enforcement practices. In fact, the city made revenue generation the police department’s top priority, over and above public safety concerns. Patrol officers were pressured to increase their productivity by writing more citations to enforce the municipal code. Supervisors monitored productivity, provided incentives to increase it, and made it one of the most important criteria for promotions. Moreover, additional officers were hired and shifts were extended to increase opportunities for municipal code enforcement. These practices occurred primarily in Ferguson’s black neighborhoods.

Throughout the nation, policing has become a numbers game, with departments focusing their energies on the “objectification and quantification of police work.” In police departments across the country, officers are routinely evaluated and rewarded for the number of arrests they make, how many tickets they

119 Id. at 9.
120 Id. at 2, 10, 16, 62 - 78.
121 Id. at 11.
122 Id. at 10, 13.
123 Id. at 2, 10, 16, 62 - 78.
write, and how many stops and frisks they make. This type of proactive policing is typically carried out in indigent, minority neighborhoods.

Recall that in his book, Forman highlights how violent crime rates led many African American leaders to embrace tough on crime measures, including proactive policing. They were not the only ones to do so; on the contrary, those officials were trading on a much broader law and order impulse, the intellectual precursors of which were manifested, among other places, in a 1982 essay by Professors George Kelling and James Q. Wilson titled Broken Windows: The Police and Neighborhood Safety. Kelling and Wilson argued that police could reduce major crimes by focusing on minor crimes that signaled physical and social disorder such as public urination and drinking, loitering and panhandling. The broken windows theory of policing captured the attention of police chiefs around the country. In cities such as New York, trespassing, marijuana possession and other low-level offenses went from the least enforced to the most enforced criminal charges, especially in communities of color.

Officers quickly learned that enforcing low-level crimes in neighborhoods of color would benefit their careers. For instance, in a program known as “Operation Impact,” the New York Police Department (NYPD) assigned rookie officers to flood “hot spots,” which could sometimes consist of areas as small as a single housing project, in order to conduct stops, frisks, interrogations, and arrests. At the end of their shift, they were evaluated on the number of arrests made and summonses issued. The pressure they faced encouraged widespread violations of the reasonable suspicion and probable cause standards. However,

125 Id.


128 Id. at 29 - 30.


130 Fabricant, supra note 129, at 384.

131 Id. at 392 - 93.
these rookies learned early on to engage in these policing practices as a means of moving up in the department. These pressures undoubtedly influenced rookies of all races.

Supervisors also face enormous pressure to promote these proactive policing practices in minority communities. One primary reason is the managerial program known as CompStat. Short for “compare statistics,” CompStat identifies areas of heightened criminal activity for targeted enforcement of quality of life offenses. In monthly CompStat meetings, precinct commanders would be grilled and bullied on whether they were able to decrease crime in their jurisdiction. These meetings are infamous for “excoriat[ing precinct commanders] over the crime numbers in their districts.” Because CompStat gathered data on each unit and each officer in the city as well as tracked the number of stops and frisks, vertical patrols, arrests, and so on, it created enormous pressure on commanders to worry about the activity of every single officer within their department. Thus, managers and supervisors put pressure on their officers to increase their productivity because managers’ promotions were also reliant on how well their precinct performed. Again, these pressures existed regardless of the race of the individual manager.

In sum, though the names of these policing strategies have changed, one common thread remains the same -- they create incentives for officers who seek to rise within the ranks of their departments to over-police African American communities. Given our earlier point about the pressures black officers likely feel to fit into their departments, these officers may experience stronger incen-

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134 Rayman, supra note 133, at 19.
135 Id. at 20; see also Eli B. Silverman, NYPD Battles Crime: Innovative Strategies in Policing (1999).
136 Rayman, supra note 133, at 23.
tives than white officers to proactively police. Whether we are right in this re-
spect is less important than our broader takeaway -- namely, that the structure
and organization of police work shapes the policing of all officers, not just those
who are white.

The same is true of Fourth Amendment law. Its impacts, too, transcend the
race of individual officers. Like the organization and structure of police work,
Fourth Amendment law creates conditions of possibilities for police officers
across race to aggressively police African American communities.

E. The Legal Backdrop for Police Conduct

The Fourth Amendment prohibits the government from engaging in “unrea-
sonable searches and seizures.” Because of the narrow way in which the Su-
preme Court has interpreted this prohibition, Fourth Amendment law operates
more as a source of police empowerment than as a meaningful constitutional
constraint. More precisely for our purposes, consistent with Fourth Amend-
ment law, police officers can make any of us -- and certainly African Americans
-- feel insecure in our persons, papers, houses, and effects. Consider, for exam-
ple, the list one of us has compiled indicating the kinds of interactions that the
Supreme Court has said are not seizures:

Following a person
Approaching a person
Questioning a person along any of the following lines:
What’s your name?
What are you doing here?
Where do you live?
Where are you going?
What’s in your bag?
Do you have any drugs?
Are you an “illegal”?

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138 U.S. Const. amend. IV.

139 Of course, Fourth Amendment is not the only legal constraint on what police conduct.
We focus on Fourth Amendment highlight dimensions of stop and frisk jurisprudence to
which scholars have paid insufficient attention.
Do you have ties to terrorism?\textsuperscript{140}

The fact that an officer follows a person onto a bus, or home, to ask some or all of the preceding questions would not change the analysis. The Court would still conclude that those engagements do not rise to the level a seizure.\textsuperscript{141}

The Court’s jurisprudence on what constitutes a seizure is important to foreground. Police officers need no evidence of wrongdoing -- none whatsoever -- to engage in conduct that the Court concludes is not a seizure.\textsuperscript{142} In this respect, the greater the number of instances in which the Supreme Court concludes that police conduct is not a seizure, the greater the forms of contact police officers, including African American officers, can make without any justification.

If the problem with Fourth Amendment law were only that it permits police officers to perform the kinds of interactions we have described without any evidence of wrongdoing, things would be bad enough. But the reality is worse in that the Court’s conclusions about when searches and seizures are reasonable make it relatively easy for officers to justify their searches and seizures. Below we elaborate on this point. We pay particular attention to stops and frisks and the constitutional doctrines that underwrite both practices.

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Roughly fifty years ago, the Court in Terry v. Ohio\textsuperscript{143} held that officers could detain individuals and conduct a limited frisk for weapons based on reasonable suspicion.\textsuperscript{144} While Justice Warren hoped that the standard would safeguard an individual’s right to be free from unjustified invasions of their liberty and bodily integrity while also giving police the ability to deal with suspects who present a

\textsuperscript{140} Carbado, supra note 6, at 132 - 49.
\textsuperscript{141} See id.
\textsuperscript{142} This logic applies to searches as well. Police officers need no evidence of wrongdoing to engage in conduct that is not a search.
\textsuperscript{143} 392 U.S. 1 (1968).
\textsuperscript{144} Id. at 30 - 31.
risk of harm to the officer or civilians,\(^{145}\) the standard has been more of a sword for police officers than a shield for civilians.\(^{146}\) Five reasons explain why.

First, reasonable suspicion is a low evidentiary bar that police officers can easily satisfy. Thus, police officers end up having tremendous discretion with respect to deciding whom to subject to stops and frisks. Second, implicit and explicit biases likely shape how and when police officers of all races exercise that discretion.\(^{147}\) Third, assuming that an officer stops an individual, those very same biases will shape whether the officer interprets the person’s behavior as evidence that the individual is armed or dangerous, resulting in an invasive and humiliating frisk.\(^{148}\) Fourth, recall our earlier points concerning identity threats. Once a police encounter is staged, the sense of threat that both police officers and black people experience can feed off each other in ways that increase the likelihood that a particular officer will conclude that a particular African American poses a risk of harm to the officer. Finally, consistent with current Supreme Court doctrine, police officers across race can easily create the very reasonable suspicion that should pre-exist their decision to stop and frisk a person.

To remind you, our overarching aim in this Part is to suggest that the impact of the Terry regime on African Americans is more a function of the power that body of law allocates to police officers than the racial identity of police officers. We elaborate below

1. Implicit Bias and Reasonable Suspicion. -- There are a number of ways in which implicit and explicit biases and reasonable suspicion interact to increase the likelihood that police officers will stop and frisk African Americans. First, as a result of racial biases of African Americans as both criminally suspect and dangerous, officers’ attention will be drawn more quickly to blacks than to whites. Second, “the reasonable suspicion test actually permits, rather than prevents, actions based upon racial hunches.”\(^{149}\) It does so by providing officers with the interpretive space to evaluate the ambiguous behaviors of black civilians.

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\(^{145}\) The decision authorizes officers to conduct stops and frisks as long as they can “point to specific and articulable facts,” id. at 21, which “lead[[]] [them] reasonably to conclude . . . that criminal activity may be afoot,” id. at 30, and that the individual with whom they are interacting is armed and dangerous, id. at 27.

\(^{146}\) Carbado, supra note 12.

\(^{147}\) For a more complete articulation of some of the interaction between implicit biases and reasonable suspicion, see Richardson, supra note 1, at 2059 - 72.

\(^{148}\) Id. at 2080.

\(^{149}\) Id. at 2062 - 63.
as aggressive, violent, or suspicious. (We will say more about this dimension of the doctrine later.)

Third, while the reasonable suspicion standard requires officers to justify their suspicions by pointing to the “specific articulable facts” that formed the basis for their suspicion, courts, including the Supreme Court, have watered down that requirement to mean very little indeed. Because an officer can rely on an individual’s appearance and demeanor, as well as the neighborhood in which they are located, those factors (as you will soon learn) can easily function as the rhetorical means through which implicit or explicit biases are both expressed and legitimized. The end result is that reasonable suspicion can provide constitutional cover for both conscious and unconscious biases.

2. Reasonable Suspicion and Identity Threats. -- The points we made earlier about identity threats also help to reveal the racially fraught dimensions of the Terry doctrine. Consider, for example, stereotype threat. During any given encounter, stereotype threat may cause both officers and individuals to exhibit behaviors that the other party will interpret as signs of danger, suspicion, or aggression.\textsuperscript{150} To appreciate how this dynamic might arise, let’s focus first on the individual’s sense of threat.

In the context of a police interaction, an African American civilian might worry that he will be the victim of police racism, creating expectations of harsh or discriminatory treatment, including the use of excessive force.\textsuperscript{151} That person might also be concerned that the officer will perceive him as a criminal because of the deeply entrenched black-crime stereotype about which we spoke earlier. Under these conditions, the black individual may approach the police interaction with a heightened sense of anxiety.\textsuperscript{152} That sense of racial anxiety has cognitive

\textsuperscript{150} For a comprehensive discussion of how stereotype threat might influence police-citizen interactions, see Godsil & Richardson, supra note 2, at 2247-2253.

\textsuperscript{151} See generally Tyler & Huo, supra note 55.

\textsuperscript{152} See generally Duncan, supra note 18; Charles G. Lord, Lee Ross & Mark R. Lepper, Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. Personality & Soc. Psychol. 2098 (1979).
and physiological effects.\textsuperscript{153} It can cause individuals to feel self-conscious,\textsuperscript{154} and to become hyper-vigilant\textsuperscript{155} during the interaction. The stress of racial anxiety is also associated with physiological responses including sweating, increased heart rate, facial twitches,\textsuperscript{156} fidgeting,\textsuperscript{157} and eye contact avoidance.\textsuperscript{158}

Let’s turn now to the police officer’s sense of threat. To begin with, the officer might interpret the black person’s behavioral manifestations of anxiety -- fidgeting, eye contact avoidance, and sweating -- as signs, reasonable suspicion signs, that the individual poses a threat.\textsuperscript{159} This is not at all farfetched. After all, police officers are often trained to interpret the behaviors we have described as suspicious and potentially dangerous.\textsuperscript{160} That interpretation could lead the officer to enact “command presence,” a posture police officers are encouraged to


\textsuperscript{154} Derek R. Avery et al., It Does Not Have to Be Uncomfortable: The Role of Behavioral Scripts in Black - White Interracial Interactions, 94 J. Applied Psychol. 1382, 1383 (2009).


\textsuperscript{156} Jennifer L. Eberhardt, Imaging Race, 60 Am. Psychologist 181, 182 (2005).


\textsuperscript{158} Trawalter et al., supra note 157, at 252, 256.


assume in the face of a possible threat. More particularly, the officer might attempt to establish immediate control of the situation by exercising precisely the kind of dominance we previously discussed.

But exhibiting a show of dominance and control can compound the individual’s sense of anxiety and increase the likelihood that the individual will challenge the officer’s authority. Any such challenge on the part of the individual could end up confirming the officer’s initial stereotypical view of the person as non-law abiding and dangerous. Through all of this, the officer may have no sense of the role he played, and the role of background racial biases, including stereotypes, in producing this recursive dynamic.

The short of what we are saying is that (1) the ease with which police officers can satisfy reasonable suspicion, and (2) the potential for identity threats on the part of both the civilian and the officer, create feedback loops and signals about racism, criminality, dangerousness, and authority. Those loops and signals increase not only the likelihood of stop-and-frisk contact between African Americans and the police but the possibility that those moments of contact will escalate into violence. Admittedly, there are racial particularities to the identity threat dynamics we have described (recall, for example, black officers, but not white officers, will experience racial solidarity threat). Put those to one side. Our broader point is that the recursive feedback loop between African Americans and police officers transcends the racial identity of the officers.

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163 Cooper, supra note 52, at 674; see also Phillip Atiba Goff et al., Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences, 94 J. Personality & Soc. Psychol. 292 (2008); Richardson, supra note 161, at 2969.


164 Research confirms that racial anxiety can increase the likelihood that force will be used during an interaction. In one study involving the police, researchers found that officers experience racial anxiety, regardless of their race. Goff et al., Protecting Equity, supra note 68, at 3 - 5, 17. They also discovered that the experience of racial anxiety predicted uses of
3. Promoting Negative Interactions and Constructing Suspicion. -- Rather than constraining police behaviors, post-Terry doctrine allows officers to construct the very reasonable suspicion they require to justify seizing a person in the first place. The ostensible right of every citizen to avoid police contact so long as police do not have reasonable suspicion or probable cause is illusory for black individuals who live in urban, majority-minority communities. To appreciate why, it’s helpful to know that if officers want to engage with individuals, and those individuals choose to exercise their right to avoid them, the Supreme Court has essentially said that officers may view that behavior as suspicious. The relevant case here is Michigan v. Chesternut.

In Chesternut, the Supreme Court found nothing problematic with officers pursuing people even in the absence of reasonable suspicion or probable cause. In the case, Chesternut ran away upon observing four officers in a patrol car and the officers pursued him and drove alongside him for an unspecified amount of time until they established probable cause to arrest him for drug possession. Chesternut argued that the police pursuit constituted a seizure unsupported by either reasonable suspicion or probable cause. However, the Court held that no seizure had occurred. Instead, it opined that:

[T]he police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent’s freedom of movement. . . . While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, . . . [it] was

force against black men. Id. at 11. The more officers were concerned with appearing racist, the more likely they were to have used greater force against black individuals, relative to individuals of other racial groups, in the previous two years. Id.

165 For a fuller discussion, see L. Song Richardson, Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks, 15 Ohio St. J. Crim. L. 73, 84 - 88 (2017).
166 City of Chicago v. Morales, 527 U.S. 41, 53 (1999) (plurality opinion) (“[T]he ‘right to remove from one place to another according to inclination’ [is] ‘an attribute of personal liberty’ protected by the Constitution.”) (quoting Williams v. Fears, 179 U.S. 270, 274 (1900))).
169 Id. at 575 - 76.
170 Id. at 569.
171 Id. at 572 - 73.
not “so intimidating” that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business.172 Consistent with this decision, officers are free to pursue individuals based solely on a mere hunch of criminality. Given all that we have said about explicit and implicit biases, police pursuits of people in the absence of reasonable suspicion are more likely to burden black civilians than white civilians.

The problem is worse given the factors on which police officers may base their reasonable suspicion. In Illinois v. Wardlow,173 officers were patrolling a so-called “high crime area” in search of criminal activity.174 When officers noticed Wardlow running, they pursued him.175 While the Court did not quite rule that fleeing in a high crime area gives rise to reasonable suspicion, it came pretty close to doing so.176 The Court did, however, expressly indicate that those factors -- flight in a high crime area -- are relevant to the reasonable suspicion determination.

Nothing in the above analysis changes if, prior to the civilian’s flight, officers did not have the requisite suspicion to conduct a forcible seizure. Thus, in “high crime neighborhoods,” officers can create the reasonable suspicion necessary to act on their racial hunches simply by goading people into fleeing. Doing so is easier than you might think. Exhibiting aggressive behavior, without more, may cause people to flee. Ordering people to stop might cause people to flee. And, using lights and sirens to follow people walking down the street might cause them to flee. Obviously, this is not an exhaustive list. The point is that, without much difficulty, officers can increase the likelihood that any particular person will flee. The more aggressive their behaviors, the greater the likelihood that people will flee. That’s one of the troubling dimensions of Illinois v. Wardlow.

The other is that, if a person runs away, then officers have effectively created reasonable suspicion to conduct a forcible seizure. Recall that at the outset of the encounter, the officer did not have reasonable suspicion and therefore could not have legally seized the person. The officer created that reasonable suspicion by goading the person into running. In sum, in high-crime neighborhoods, officers

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172 Id. at 575 - 76 (citations omitted).
174 Id. at 124.
175 Id. at 121.
176 Id. at 121, 123 - 24.
can easily transform their inchoate racial hunches into reasonable suspicion to conduct a seizure simply by engaging in aggressive shows of force that scare people into fleeing.

For reasons you might have already surmised, officers’ ability to construct reasonable suspicion in this way is easier with black individuals than white individuals. Consider, for example, the fact that “high crime area” is primarily used to describe urban, majority-minority neighborhoods. Which is to say, the designation is not typically based on objective measures but on the attribution of criminality to black and brown communities. Indeed, empirical evidence demonstrates that people view majority black neighborhoods as more disordered than majority white neighborhoods, whether or not those neighborhoods are otherwise similarly situated.

The history and contemporary realities of racialized law enforcement is another reason why police officers may have an easier time developing reasonable suspicion for African Americans than white Americans. Black peoples’ longstanding contestatory relationship with the police creates an incentive for them to avoid police contact altogether. Fleeing, of course, is one way for them to do so. But, against the backdrop of stereotypes of black criminality, fleeing reinscribes the perception of black non-law abidingness. As Justice Scalia puts it, quoting Proverbs, the “wicked flee when no man pursueth.”

179 In fact, negative attitudes about police “begin crystallizing during adolescence when youths have greater opportunities for direct and indirect contact with officers . . . .” Jamie L. Flexon et al., Exploring the Dimensions of Trust in the Police Among Chicago Juveniles, 37 J. Crim. Just. 180, 181 (2009); see also Craig B. Futterman, Chaclyn Hunt & Jamie Kalven, Youth/Police Encounters on Chicago’s South Side: Acknowledging the Realities, 2016 U. Chi. Legal F. 125, 125 - 26 (2016). Additionally, distrust of the police can occur vicariously. For instance, one report found that when high school students simply observed “other youths [being] stopped and treated with disrespect,” they were less likely to trust police. Flexon et al., supra, at 185 - 86. The bottom line is that while fleeing from police on the part of African Americans is completely consistent with innocence, Terry doctrine permits police officers to draw and adverse inference from the practice.
Perhaps the solution, then, is for African Americans to walk rather than run away? Presumably, there is nothing “wicked” about that. And, indeed, police officers may not, at least as a formal matter, draw an adverse inference from a person’s decision to walk (rather than run) away. That, it’s fair to say, is the good news.

The bad news is that if the individual chooses to walk away the officer may follow him, even without evidence that the person has done something wrong. Remember: Following a person is not considered a seizure. In other words, when a police officer follows you, you are technically free to ignore the officer and go about your business. You are, in the parlance of Fourth Amendment doctrine, “free to leave.” At the same time, the officer is free to follow and even question you! That is the meaning of Fourth Amendment freedom.

You now know that this logic of ostensible freedom applies when the officer’s decision to follow you takes the form of a chase. Here, too, you are technically free to leave - in this instance by running away. Recall, though, that if you are fleeing in a high crime area, the officer ends up having what he did not have at the outset of the interaction: reasonable suspicion. Armed with reasonable suspicion, the officer is now legally empowered to seize and possibly even frisk you. When one adds the fact that officers are more likely to use physical force against black individuals after a chase, it becomes clear that the Terry regime exposes African Americans not only to being stopped and frisked by the police, but to being shot and killed by the police.

As we have already said and want to repeat here, black police officers are potentially implicated in the doctrinal state affairs we have described. Our analysis of the racial boundaries of Terry v. Ohio and its progeny is not first and foremost about white police officers. That is to say, our aim has been to highlight police power, not the racial identity of police officers. When one incorporates into our discussion of Terry our earlier points about implicit biases, identity

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182 See Carbado, supra note 12. As Justice Stevens noted in his Wardlow dissent, “[t]he resentment engendered . . . is aggravated, not mitigated, if the officer’s entire justification for the stop is the belief that the individual is simply trying to avoid contact with the police or move from one place to another -- as he or she has a right to do (and do rapidly).” Illinois v. Wardlow, 528 U.S. 119, 127 n.1 (2000) (Stevens, J., concurring in part, dissenting in part).
threats, and the organization and structure of policing, the vulnerability of African Americans to police contact and violence, including at the hands of black police officers, is put into even sharper relief.

Conclusion

This brings us back to a central theme in Foreman’s book —namely, that diverse governance is not necessarily enough to disrupt patterns of inequality. We’ve advanced that claim vis-à-vis the racial dimensions of policing. We did so because it is critically important to intervene in the debate about the racial diversity (or lack thereof) of police officers given that one of the solutions people continue to proffer for police racial profiling of and violence against African Americans is the diversification of police departments.\textsuperscript{183}

At the same time, we should be perfectly clear to note that we are not arguing against efforts to diversify the police. Our point is that it would be a mistake to stop there. As we have explained, there are broader factors, factors that transcend the racial identity of police officers, that explain the exposure of African Americans to police contact and violence. We will not in this conclusion even gesture in the direction of articulating our own solution to a problem whose history is rooted in perhaps the most pernicious system of racial inequality — slavery.\textsuperscript{184}

Instead, we will conclude by noting that just as the diversity rationale has not ended racial inequality in the context of education,\textsuperscript{185} the redeployment of the rationale in the context of policing will not fundamentally change how African Americans experience the police. Which is to say, whether or not police officers are policing their own, if the broader structural forces we have discussed remain the same, the racial dimensions of policing with which the nation continues to grapple are likely to persist.

\textsuperscript{183} Typically, people do not advance diversity as the sole solution. We should be clear about that. At the same time, the diversity rationale quite often figures as one of the solutions. [FOOTNOTE].

\textsuperscript{184} For discussions of the extent to which modern policing is rooted in slave patrols, see [].

\textsuperscript{185} The diversity rationale emerged from Justice Powell’s concurring opinion in Bakke. Cite. For decades, scholars have criticized the rationale for insufficiently attending to the structural problems of education inequality. Cite. Richard Delgado; Derrick Bell. Others. For an effort to infuse diversity with more progressive possibilities, see Devon W. Carbado, Intraracial Diversity, UCLA Law Review.