

Protect and Serve

Marissa Jackson Sow*

There exists a substantial body of literature on racism and brutality in policing, police reform and abolition, the militarization of the police, and the relationship of the police to the State and its citizenry. Many theories abound with respect to the relationship between the police and Black people in the United States, and most of these theories rest upon the basic assumption—undergirded by constitutional, civil rights, and human rights law—that Black people in the United States are entitled to due process and equal protection when they are in contact with the police or other law enforcement officers.

This Article uses critical contract theory and the theory of Whiteness as Contract to challenge that basic assumption and instead advance the claim that the mandate that police “protect and serve” does not apply to Black people, notwithstanding the provisions of constitutional and statutory law, because Black people are the objects of racial contracting rather than participants therein. The police are charged with protecting the racial contract and serving the contract’s signatories; accordingly, they enforce the contract’s terms, requiring them to specifically target Black people for surveillance, harassment, deprivation, and even death, lest the contract be subject to breach or other interference.

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INTRODUCTION

“It’s not acceptable.”¹ Such was Aurora County, Colorado Police Chief Vanessa Wilson’s angry proclamation on July 21, 2021 as she delivered a press conference announcing that thirty-nine-year-old officer John Haubert would be charged for felony assault for pistol-whipping twenty-nine-year-old Kyle Vinson and choking him for thirty-nine seconds during an arrest.² Vinson had been wanted for arrest in Denver, but according to Chief Wilson, he likely did not know that the outstanding warrant for his arrest existed.³ Footage of his arrest shows that he was compliant, and that as Officer Haubert pointed a gun at him, his response was, “Okay, bro. Don’t shoot me.”⁴ Haubert responded by placing the gun closer to Vinson’s head before beginning to beat him with the pistol.⁵

“This is not police work,” Chief Wilson said, referring to the assault, which was captured by Officer Haubert’s body camera, while his partner, Officer

1. Eduardo Medina, *After a Violent Arrest, 2 Police Officers in Colorado Face Charges*, N.Y. TIMES (July 28, 2021), <https://www.nytimes.com/2021/07/28/us/aurora-police-officers-unarmed-beating.html> [<https://perma.cc/BYC7-VNUP>] (quoting Aurora County Police Chief Vanessa Wilson). Wilson gave the remarks at a press conference on July 27, 2021. Aurora Police, *Chief Wilson’s Press Conference Regarding the Arrest of 2 APD Officers*, YOUTUBE (July 27, 2021), <https://www.youtube.com/watch?v=4mOjXGjJ5Yc> [<https://perma.cc/A4B9-ZCYN>] (featuring video footage of Officer Haubert’s assault of Kyle Vinson).

2. See Medina, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*; see also Aurora Police, *supra* note 1 (featuring footage of Officer Haubert’s assault of Kyle Vinson).

Francine Martinez, looked on without any attempt to intervene.⁶ Given the Department's recent history of brutalizing Black men, it would not be hard to wonder if Chief Wilson was trying to convince the public, or even herself and her staff, of the same.⁷ The Aurora County Police Department became infamous for racist police brutality on August 24, 2019, when Aurora police officers choked twenty-three-year-old Elijah McClain—a massage therapist and musician—to death after having stopped him because he was wearing a ski mask.⁸ Mr. McClain repeatedly apologized to police officers for vomiting while he died.⁹

Several weeks after Mr. McClain was killed, and in response to the police killing of Atatiana Jefferson in Fort Worth, Texas on October 12, 2019,¹⁰ *Washington Post* columnist Eugene Robinson published an opinion essay titled, “What can a black person do to keep from getting killed by police in this country?”¹¹ Opening by stating, “This is a serious question,”¹² Mr. Robinson presented his readers with this question less than two weeks after Dallas Police Officer Amber Guyger was convicted of murder for barging into the apartment

6. See Medina, *supra* note 1.

7. See *id.* (referencing “a series of cases involving residents being hurt by [Aurora Police] officers”).

8. See Lucy Tompkins, *Here's What You Need to Know About Elijah McClain's Death*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [<https://perma.cc/4X3M-EPJB>]. The U.S. Department of Justice and the Colorado Attorney General's Office are conducting separate investigations into Mr. McClain's killing, and the Colorado Department of Public Health and Environment launched an investigation into the Department's use of ketamine to sedate Mr. McClain before his death. *Joint Statement of the Colorado U.S. Attorney's Office, Department of Justice Civil Rights Division, and the Denver Division of the FBI Regarding the Death of Elijah McClain*, U.S. DEP'T OF JUST. (June 30, 2020), <https://www.justice.gov/usao-co/pr/joint-statement-colorado-us-attorneys-office-department-justice-civil-rights-division-and> [<https://perma.cc/QWM4-2FWF>] (announcing the investigation of McClain's death, which began in 2019); *Colorado Attorney General's Office Opens Grand Jury Investigation Concerning Elijah McClain*, COLO. ATT'Y GEN. (Jan. 8, 2021), <https://coag.gov/press-releases/1-8-20/> [<https://perma.cc/QKP6-DPAB>]; see also Elise Schmelzer, *Colorado Health Department Re-Opens Investigation into Use of Ketamine on Elijah McClain*, DENV. POST (July 29, 2020), <https://www.denverpost.com/2020/07/29/elijah-mcclain-ketamine-aurora-colorado-health/> [<https://perma.cc/C738-DMZW>] (detailing Colorado's investigations into the use of ketamine to tranquilize Mr. McClain, following hundreds of separate complaints regarding the use of ketamine).

9. See Tompkins, *supra* note 8 (detailing Elijah McClain's detention and death).

10. Atatiana Jefferson, a twenty-eight-year-old Black woman, was shot to death by a White Fort Worth, Texas, police officer responding to a call about an open door at her home. See Derek Hawkins, *Fort Worth Police Officer Fatally Shoots Woman in Her Home While Checking on an Open Front Door*, WASH. POST (Oct. 13, 2019), <https://www.washingtonpost.com/nation/2019/10/13/fort-worth-police-officer-fatally-shoots-woman-her-home-while-checking-an-open-front-door/> [<https://perma.cc/5LHA-F9PC>]. At the time she was shot, Ms. Jefferson was at home with her nephew, playing video games with him. *Id.* She died at the scene of the shooting. *Id.*

11. Eugene Robinson, Opinion, *What Can a Black Person Do to Keep from Getting Killed by Police in This Country?*, WASH. POST (Oct. 14, 2019), https://www.washingtonpost.com/opinions/what-can-a-black-person-do-to-keep-from-getting-killed-by-police-in-this-country/2019/10/14/28ab0ea8-eeb9-11e9-89eb-ec56cd414732_story.html [<https://perma.cc/9Q97-7K78>].

12. *Id.*

of Botham Jean, a Black West Indian immigrant and Guyger's neighbor, and shooting him to death while he ate ice cream.¹³ At the time Mr. Robinson's opinion column was published, George Floyd was still alive,¹⁴ as were Breonna Taylor¹⁵ and Daunte Wright.¹⁶

Mr. Robinson's question is indeed a serious one, but viewed through a human rights or civil rights framework, it is the wrong question to ask. His question—querying what a Black person could do to keep from getting killed by police—is Equality's question: it assumes that there is some gap between the treatment Black people experience at the hands of law enforcement and the

13. See Erik Ortiz, *Amber Guyger Found Guilty of Murder at Trial in Fatal Shooting of Neighbor Botham Jean*, NBC NEWS (Oct. 1, 2019), <https://www.nbcnews.com/news/us-news/amber-guyger-found-guilty-murder-trial-fatal-shooting-neighbor-botham-n1060506> [https://perma.cc/GL85-Z7W7]. Guyger was sentenced to ten years in prison for the murder. *Id.* Guyger would later appeal her conviction. Maia Niguel Hoskin, *The Beginning of Amber Guyger's Appeal Begg the Question: Who Draws the Line Between 'Reasonable' Self Defense and Anti-Black Violence?*, FORBES (Apr. 27, 2021), <https://www.forbes.com/sites/maiahoskin/2021/04/27/the-beginning-of-amber-guygers-appeal-begs-the-question-who-draws-the-line-between-reasonable-self-defense-and-anti-black-violence/?sh=76d6c2612a41> [https://perma.cc/QBR5-NDBE] (noting the date of publication, April 27, 2021, as the beginning of Guyger's appeal). Guyger appealed her conviction based on her claim that there was insufficient evidence to support a conviction for murder. The Associated Press, *Court to Hear Appeal of Former Dallas Officer Who Killed Botham Jean*, NBC NEWS (Apr. 26, 2021), <https://www.nbcnews.com/news/us-news/court-hear-appeal-former-dallas-officer-who-killed-botham-jean-n1265440> [https://perma.cc/GK39-BQAT].

14. Minneapolis Police Officer Derek Chauvin killed George Floyd on Memorial Day, Monday, May 25, 2020. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/L88L-B66C]. Derek Chauvin was convicted of murdering George Floyd in 2021, with the prosecution successfully arguing that "Floyd died as a direct result of Chauvin's actions: that due to Chauvin's weight on Floyd's neck and back while holding him in the prone position, Floyd died of low oxygen levels that caused a brain injury and arrhythmia, causing his heart to stop." Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR (Apr. 20, 2021), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial> [https://perma.cc/J7RH-ZWR9].

15. Louisville Police Department officers shot Breonna Taylor to death as she slept in her home, in a botched raid targeting her partner, on March 13, 2020. Brakkton Booker & Rachel Treisman, *A Year After Breonna Taylor's Killing, Family Says There's 'No Accountability'*, NPR (Mar. 13, 2021), <https://www.npr.org/2021/03/13/973983947/a-year-after-breonna-taylors-killing-family-says-theres-no-accountability> [https://perma.cc/CC2A-2N27]. None of the officers who fired their weapons were charged for killing Taylor, though Brett Hankinson was charged with three counts of wanton endangerment for causing danger to Taylor's neighbors. Theresa Waldrop, *Wanton Endangerment Charge: What It Means in the Breonna Taylor Case*, CNN (Sept. 23, 2020), <https://www.cnn.com/2020/09/23/us/wanton-endangerment-charge-breonna-taylor/index.html> [https://perma.cc/3HLJ-BH6W]. The City of Louisville announced a twelve-million-dollar settlement with Taylor's family in September 2020. Rukmini Callimachi, *Breonna Taylor's Family to Receive \$12 Million Settlement from City of Louisville*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html> [https://perma.cc/VK8F-YB47] (detailing that the settlement amount included an agreement to institute policy changes aimed at preventing future police killings).

16. Brooklyn Center, Minnesota police shot twenty-year-old Daunte Wright to death during a traffic stop on April 11, 2021. See *What to Know About the Death of Daunte Wright*, N.Y. TIMES (Feb. 21, 2022), <https://www.nytimes.com/article/daunte-wright-death-minnesota.html> [https://perma.cc/NP8D-9SCG].

treatment Black people deserve that can be bridged. It places the burden—of creating the bridge, building the bridge, and being the bridge—on Black people. This assumption stands even as Mr. Robinson himself acknowledges that the civil rights promised to Americans are not applied to Black people and that the fact that police view Black people not as citizens, but as suspects, is what causes their deaths.¹⁷

A human rights framework would ideally orient us beyond the Equality desired by American civil rights and anti-discrimination law and instead toward Liberation. A human rights framework does not require Black people to prove, over and over, and to insufficient effect on a Saturday night in one's own home, that they should be treated the same way they would be treated if they were White. Per the letter of human rights law, equality is not a ceiling, but a floor.¹⁸ Human rights place the burden of “what can [be done]” where it rightfully belongs—upon the State.¹⁹ Police are, after all, State actors—and when they shoot innocent Black people, they do so in the name of, and on behalf of, the State.²⁰ The Constitution provides that all Americans have a fundamental right

17. See Robinson, *supra* note 11 (remarking that “Second Amendment Rights don’t apply to African-Americans” in reference to Philando Castile’s killing by police for lawfully possessing and carrying a firearm, and making the claim that “until officers’ default assumption is that black Americans are not suspects but citizens, more innocents like Atatiana Jefferson will die”).

18. The United Nations describes “the principles of equality and non-discrimination” as “part of the foundations of the rule of law.” *Equality and Non-Discrimination*, UNITED NATIONS, <http://web.archive.org/web/20220121040031/https://www.un.org/ruleoflaw/thematic-areas/human-rights/equality-and-non-discrimination/>. The United Nations also describes equality as a “core principle[]” of human rights. *Universal Declaration of Human Rights: The Foundation of International Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> [<https://perma.cc/8PQG-FFUG>]; see also U.N. GAOR, 3d Sess., pt. 1, at 71, U.N.Doc. A/810, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948) (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .”).

19. See Robinson, *supra* note 11.

20. U.S. federal courts have consistently held that police departments cannot be sued, because as arms of the State, they are not proper parties to litigation. In so holding, these courts have regularly affirmed that police are the vehicle through which the government, or “body corporate,” carries forth its policing function. See *Grech v. Clayton Cnty.*, 335 F.3d 1326, 1342 (11th Cir. 2003) (“Under Georgia law, the defendant Clayton County is a ‘body corporate’ capable of suing and being sued and is headed by the county governing body, the Clayton County Board of Commissioners.” (citation omitted)); see also *Shelby v. City of Atlanta*, 578 F. Supp. 1368, 1370 (N.D. Ga. 1984) (holding that suit cannot be brought against the Atlanta Police Department because it is an arm of the Atlanta city government, reasoning that “[t]he Department is an integral part of the City of Atlanta government and is merely the vehicle through which the City government fulfills its policing functions.”); *Simon v. St. Louis Cnty. Police Dep’t*, No. 76-963C(2), 1977 U.S. Dist. LEXIS 16080, *2 (E.D. Mo. 1977) (“First, plaintiff’s claim against St. Louis County Police Department must be dismissed for lack of a proper party defendant. Because the Department is an integral part of the St. Louis County government, being simply the vehicle whereby the County fulfills its policing function, it lacks a legal identity apart from that of the County, and therefore is not a suable entity.”), *aff’d in part, rev’d in part on other grounds sub nom. Simon v. St. Louis Cnty.*, 656 F.2d 316 (8th Cir. 1981).

to life,²¹ and it is generally understood and accepted that the State may not take one's life away arbitrarily, especially not on account of a person's race or other protected class.²² Why then, has the American legal system failed to prevent law enforcement officers from violating the rights of Black people, and in case after case, threatened or deprived them of their lives?

This Article uses critical contract theory—a facet of private law—to analyze issues most closely associated with human and civil rights: racism, racial discrimination, police brutality, and arbitrary deprivations of the right to life by the State. The Article contends that viewed through the lens of contract theory, asking what a Black person could do to keep from getting killed by police is the wrong question to ask. Insofar as the United States promises all its citizens equality under the law as well as both substantive and procedural due process, Black people have the right to rely upon those promises and expect that the promises be implemented on their behalf. The question that Mr. Robinson should ask is: given the Constitution's promise that the State will respect Black peoples' rights to life, liberty, and property and afford them due process before depriving them of life, liberty, and property, *what can the State do to keep police from killing, brutalizing, and terrorizing Black people?*²³

While human rights law cannot answer Mr. Robinson's question, the law of contracts can: presently, Black people can do absolutely nothing to avoid being killed by police in the United States, because the United States is not in contract with them and because, in many cases, they are actually the objects of the contract.²⁴ Black people are excluded from the Nation's body politic intentionally and strategically to more efficiently exploit their labor, to extract their resources, and to remove them from physical spaces that local, state, and

21. This right is guaranteed by the Fifth and Fourteenth Amendments of the U. S. Constitution. See U.S. CONST. amend. V, amend. XIV, § 1. The United States Supreme Court has long regarded the right to life as a fundamental right. See *Furman v. Georgia*, 408 U.S. 238, 359 n.141 (1972) (“[B]ecause capital punishment deprives an individual of a fundamental right (*i.e.*, the right to life), the State needs a compelling interest to justify it.” (citation omitted)).

22. See *State v. Nichols*, No. 05SC29988, 2006 Ga. Super. LEXIS 116, *9 (2006) (“Because the right to life is fundamental, when a state implements a death penalty system it must establish mechanisms to ensure that system values the lives of its citizens equally . . . [S]ince the Constitution has ensured the right to life and to the equal protection of the laws, a state may not, by arbitrary and disparate treatment, value one person's life over that of another.” (citation omitted)).

23. See U.S. CONST. amend. V, amend. XIV, § 1.

24. See Marissa Jackson Sow, *Coming to Terms: Using Contract Theory to Understand the Detroit Water Shutoffs*, 96 N.Y.U. L. REV. ONLINE 29, 35 (2021) (“In Detroit, however, the overwhelmingly Black populations harmed by the water shutoffs have neither received the benefits of a bargain with their government, nor have they been able to claim duress as a defense to the expectation that they would pay ever-increasing and extremely unaffordable water bills. Black Detroiters seem to be objects of, rather than parties to, the contracts respected by the city.”). Other scholars have described the racial contract differently. For example, Monica C. Bell offered the theory of legal estrangement to describe the understanding among African-Americans that “at both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic.” Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067 (2017).

federal governments reserve for those citizens with whom they *are* contracting.²⁵ Police, as vehicles of the State, are the enforcers of that exclusion.²⁶

At least six police killings immediately followed or accompanied the conviction of Derek Chauvin for gruesomely murdering George Floyd.²⁷ Police in Columbus, Ohio shot teenager Ma'Khia Bryant to death just before the Chauvin verdict was announced,²⁸ and her killing was followed almost immediately by the fatal police shooting of Andrew Brown, Jr. in North Carolina,²⁹ and the non-fatal police shooting of Isaiah Brown in Virginia.³⁰

Prevalent narratives concerning the role that police play in American society are often more disconnected from reality than the narrative-holders realize.³¹ Particularly in urban metropolises, the seemingly friendly officer who helps elderly women carry her groceries across the street and rescues cats from

25. See Jackson Sow, *supra* note 24, at 41 (“Central to the racial contract is the construction of race in a manner that supports economic exploitation and extraction—those raced as white, as human, as political, as citizens, as shareholders, and as contractor-proprietors; those raced as Black and Indigenous, as subhuman, as apolitical, as strangers and trespassers and criminals, as leeches, and as contracted-for property.”).

26. See *supra* text accompanying note 20 (discussing police as integral parts of the government, or “body politic”); *Grech v. Clayton Cnty.*, 335 F.3d 1326, 1342 (11th Cir. 2003) (quoting GA. CONST. art. 9, § 1); Marissa Jackson Sow, *Whiteness as Contract as a Framework for Understanding America’s Police Problem* (pt. 1), L. PROFESSOR BLOGS NETWORK: CONTRACTSPROF BLOG (Apr. 27, 2021), https://lawprofessors.typepad.com/contractsprof_blog/2021/04/guest-blogger-marissa-jackson-sow-on-whiteness-as-contract-and-the-police-part-i.html [https://perma.cc/D5NB-TLSC] (describing Whiteness as a “matter of law and policy” and noting that “Whiteness is not inherently biological, though it is biologized over time, so long as the terms of whiteness remain stable.”).

27. See Daniel Politi, *Police Officers Killed Six People in the 24 Hours After Chauvin Verdict*, SLATE (Apr. 24, 2021), <https://slate.com/news-and-politics/2021/04/police-officers-killed-six-people-day-chauvin-verdict.html> [https://perma.cc/HY4P-VS5L].

28. Chris Walker, *As Chauvin Verdict Was Read, Police Killed Black Ohio Teen Ma'Khia Bryant*, TRUTHOUT (Apr. 21, 2021), <https://truthout.org/articles/as-chauvin-verdict-was-read-police-killed-black-ohio-teen-makhia-bryant/> [https://perma.cc/59FD-DM39]; see also Brian Dakss, Victoria Albert & Jordan Freiman, *More Bodycam Video Released of Fatal Shooting of Teen Girl in Ohio and Protesters Again Hit the Streets*, CBS NEWS (Apr. 22, 2021), <https://www.cbsnews.com/news/makhia-bryant-shooting-more-bodycam-video-new-protests/> [https://perma.cc/A7SH-KQ5X] (featuring bodycam footage of Bryant’s killing).

29. A Pasquotank County Sheriff’s Deputy shot Andrew Brown, Jr. to death in Elizabeth City, North Carolina on April 21, 2021 while executing search and arrest warrants. Christina Morales & Michael Levenson, *Sheriff’s Deputy Kills Black Man in North Carolina*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/04/22/us/elizabeth-city-shooting-nc.html> [https://perma.cc/5M83-C6R6]; see also Giulia McDonnell Nieto del Rio, *After Fatal Shooting, North Carolina Sheriff Calls for Release of Video*, N.Y. TIMES (Apr. 27, 2021), <https://www.nytimes.com/2021/04/24/us/fatal-shooting-north-carolina-sheriff-video.html> [https://perma.cc/RM4A-GASB] (detailing calls for the release of video footage after the shooting).

30. See Dakin Andone & Melissa Alonso, *An Unarmed Man Was Shot by a Virginia Deputy Who Gave Him a Ride Home an Hour Earlier*, CNN (May 28, 2021), <https://www.cnn.com/2021/04/24/us/virginia-deputy-shooting-isaiah-brown/index.html> [https://perma.cc/8GCP-GMVT] (featuring audio and video footage of the police shooting Brown).

31. Connie Fletcher has written that police “war stories,” which “form perhaps the most massive single source of narrative in contemporary popular culture,” obfuscate for the public the generally mundane nature of police work. Connie Fletcher, *The Police War Story and the Narrative of Inequality*, 2 DISCOURSE & SOC’Y 297, 298 (1991).

trees might also be carrying dangerous automatic weapons and wearing combat gear.³² Understanding the origin of American policing and its current role and purpose is critical to decision-making about how to structure policing in the future. This is especially true as local and state governments in the United States contemplate police reform—including decisions related to increasing, reducing, or eliminating police budgets.³³ As police behavior continues to run afoul of American anti-discrimination laws, figuring out which law—as codified in statutes, or in other unspoken sets of norms³⁴—American police are enforcing against Black Americans is a critical endeavor.

This Article contemplates paths away from police brutality and toward transformation of American law enforcement by locating police as the guardians and enforcers of the racial contract. It argues that the commitment of American police to protect and serve is in concert, rather than in conflict, with police abuse of Black people. Part I summarizes the theories of the racial contract and of Whiteness as a contract and explains critical contract theory as a necessary intervention in private commercial law. It asserts that critical contract theory bridges an unnecessary bifurcation between private and public law and clarifies how both work together to facilitate and sustain White supremacy.

Part II locates the origins of American policing as a mechanism for enforcing the commercial agreements for the purchase and sale of slaves, and after the formal end of slavery, for enforcing a social, political, and economic order dependent upon the subjugation of Black people. Against this historical backdrop, Part II asserts that police are the guardians of racial capitalism and the racial contract sustaining that economic order. Specifically, the author uses the

32. See Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 105, 105 (“We usually think there is a difference between the police and the military. Recently, however, the police have become increasingly militarized – a process which is likely to intensify in coming years Indeed, in recent years, police forces across the globe—and particularly in North America—have increasingly adopted military models.”). See generally BERNARD E. HARCOURT, *THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS* (2018) (describing the militarization of police as part of a new governance paradigm in the United States focused on surveillance and the pacification of American citizenry and other residents).

33. See Steve Eder, Michael H. Keller & Blacki Migliozi, *As New Police Reform Laws Sweep Across the U.S., Some Ask: Are They Enough?*, N.Y. TIMES (Apr. 18, 2021), <https://www.nytimes.com/2021/04/18/us/police-reform-bills.html> [https://perma.cc/J6KB-Y435] (noting that since George Floyd’s 2020 murder, “[o]ver 30 states have passed more than 140 new police oversight and reform laws, according to a New York Times analysis of data from the National Conference of State Legislatures”). Notably, efforts to advance federal police reform legislation in Congress fell apart in September 2021, due to a lack of Republican support in the United States Senate. See Juana Summers, *Congressional Negotiators Have Failed to Reach a Deal on Police Reform*, POLITICO (Sept. 22, 2021), <https://www.npr.org/2021/09/22/1039718450/congressional-negotiators-have-failed-to-reach-a-deal-on-police-reform> [https://perma.cc/VJR2-P89J].

34. See Adam Serwer, *The Coronavirus Was an Emergency Until Trump Found Out Who Was Dying*, ATLANTIC (May 9, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389/> [https://perma.cc/9UQS-PYZD] (“The Declaration of Independence states that all men are created equal; the racial contract limits this to [W]hite men with property. The law says murder is illegal; the racial contract says it’s fine for [W]hite people to chase and murder [B]lack people if they have decided that those [B]lack people scare them.”).

theories of Afropessimism and necropolitics to describe policing as a mechanism of subordinating Black people below humanity, and between life and death, as a governing strategy.

Part III uses the doctrine of reliance to evaluate the gaps between public expectations of police performance versus actual police performance with respect to Black Americans. Turning to the lived experiences of Black members of the United States Capitol Police who became the targets of largely unpunished racist violence during the Capitol Hill Riot of January 6, 2021, Part IV demonstrates the racial contract's durability and integrity, and the limited, conditional power possessed by police officers as the racial contractors' agents. The Article concludes with a call to consider that the true purpose of police is to protect and serve the authors and beneficiaries of White supremacy by guarding their domination of land, labor, and wealth, and that, as such, police reform may be intrinsically futile. Should the racial contract be revoked, would policing as it currently exists even be necessary?

I.

LAW AND ORDER: LEGAL THEORIES OF HOW WHITENESS IS NEGOTIATED AND ENFORCED

To understand policing in the United States is, to a great extent, to understand the negotiation, formation, and maintenance of Whiteness. Racial definitions exhibit fluidity across space and time, depending on the economic and political interests of the ruling class.³⁵ To support a comprehensive understanding of both policing and the construction of race, this Part defines Whiteness using the theories of the racial contract and of Whiteness as Contract. It also sets forth the relevance of contract theory—and critical contract theory, in particular—by analyzing how police support and guard the parameters and bargained-for benefits of Whiteness.

35. See, e.g., *Dow v. United States*, 226 F. 145, 145–48 (4th Cir. 1915) (holding that George Dow, a Syrian immigrant living in South Carolina, could be naturalized as an American citizen because Syrians were considered racially White); see also Sarah Gualtieri, *Becoming “White”: Race, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States*, 20 J. AM. ETHNIC HIST., Summer 2001, at 29, 29–30 (recounting how Syrian and Lebanese immigrants considered *Dow* to be the “righting of a historic wrong” as they believed they merited to be included in the Whiteness contract). *Dow* demonstrated that the terms of Whiteness, including full citizenship, remain static, while the ability of certain demographics to access Whiteness can be altered by the law. Professor Ian Haney López has written about race as a “*sui generis* social phenomenon” and not as “genetically distinct branches of humankind”; Haney López described judges and lawmakers as “arbiters and violent creators of the social order,” and argued that law is a “prime instrument in the construction and reinforcement of racial subordination.” Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3–7 (1994). For additional discussion of how policing has demarcated Whiteness and Blackness, see generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (describing how late nineteenth and early twentieth century policing shaped the urban American north by trafficking in the narrative of Black Americans as a danger and threat, and then by policing Black people according to that narrative).

A. The Racial Contract and Whiteness as Contract

Whiteness is not inherently biological, though it is biologized over time, so long as the terms and benefits of Whiteness remain stable.³⁶ Whiteness is, rather, a matter of law and policy—both formal and informal.³⁷ It is “a constructed identity that is imbued with power and control,”³⁸ which “uses the law to perpetuate social order—capitalizing on both public and private law when it can and resorting to private ordering when public law is unavailable or too inconvenient.”³⁹ Whiteness is an asset bargained-for via a system of interrelated and coordinated commercial contracts, which are legally enforceable, and social contracts, which are often tacit though given force through the law.⁴⁰ Because Whiteness is not biological, it must be constructed and re-constructed as necessary if Whiteness is to be maintained.⁴¹ Because Whiteness is the sum of certain benefits that are bargained-for, Whiteness and its assets must be protected.

Whiteness as Contract describes a system of public agreements operationalized by commercial contracting and authorized by law, which intentionally created a state in which White domination of land and capital was once the express law of the land and now remains so informally.⁴² To discuss the contracting of Whiteness is to discuss social contract theory, traditional contract theory, and critical contract theory all at once, as Whiteness—as negotiated by White bodies politic—is defined by the domination of property and labor.⁴³ This

36. See Haney López, *supra* note 35, at 6; Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1842 (2022) (“Race is political and legal, rather than biological.”).

37. See Jackson Sow, *supra* note 36.; see also Gabriel Chin, *The Supreme Court’s Role in Defining American Citizenship*, SCOTUSBLOG (Jan. 27, 2021), <https://www.scotusblog.com/2021/01/the-supreme-courts-role-in-defining-american-citizenship/> [<https://perma.cc/34WF-BLNW>] (featuring an interview of Amanda Frost by Gabriel “Jack” Chin on Frost’s book *about citizenship stripping of classes of people by the U.S. government*); see generally AMANDA FROST, *YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS* (2021) (discussing various situations in which the U.S. government stripped certain classes of people of their citizenship); *About the Topic of Race*, U.S. CENSUS BUREAU (Dec. 3, 2021), <https://www.census.gov/topics/population/race/about.html> [<https://perma.cc/34VY-8WSW>] (articulating the U.S. Census Bureau’s definitions of racial classifications); CHARLES W. MILLS, *THE RACIAL CONTRACT* 63 (1997) (“‘White’ people do not preexist but are brought into existence as ‘whites’ by the Racial Contract The white race is invented, and one becomes ‘white by law.’”).

38. Jackson Sow, *supra* note 36, at 1842.

39. *Id.* at 1832.

40. See *id.* at 1832 (“[T]he contracting of whiteness is a complex system of tacit social contracting and commercial contracting that secures and protects property and wealth”).

41. See MILLS, *supra* note 37, at 37 (“[T]he Racial Contract . . . is continually being rewritten.”).

42. See Jackson Sow, *supra* note 36, at 1832.

43. Cheryl Harris defined the systems of oppression under which Black Americans and Indigenous Americans lived during the modern construction of race in the United States as follows: “Although the systems of oppression of Blacks and Native Americans differed in form—the former involving the seizure and appropriation of labor, the latter entailing the seizure and appropriation of land—undergirding both was a racialized conception of property implemented by force and ratified by law.” Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1715 (1993). For his part, Mills

domination occurs via the letter of law where White supremacy flourishes overtly, and elsewhere via White control of the public sphere (government) as well as the commercial sphere.⁴⁴ Further, to discuss the contracting of Whiteness is to discuss the meta-contracting involved in a polity's governance structure and norms while also discussing the commercial contracting—involving both private and public entities—supporting, and being supported by, the polity.

Whiteness as Contract expands upon Charles Mills's Racial Contract⁴⁵ and Cheryl Harris's Whiteness as Property theories.⁴⁶ The racial contract is an "invisible law,"⁴⁷ "stating that the rules as written do not apply to non-White people in the same way" as White people.⁴⁸ Cheryl Harris described Whiteness as Property, explaining race as something that is not biological or natural, but a status that is conveyed and enjoyed—as capital that is possessed or owned.⁴⁹ Whiteness as Contract articulates how this status, and the invisible common law legitimizing the status, is constantly re-negotiated and maintained by a body politic that has bargained for its Whiteness as is defined by the State for race-based economic domination.⁵⁰

The most common critique of the theory of Whiteness as Contract is that it describes a social contract—an implicit agreement among a society's body politic to bargain away individual liberties in exchange for the benevolent protections of the State—and that social contracts are not real contracts. But the value of this theory has little to do with how well it can parrot mainstream contract law. Considering the tacit force of the racial contract in American society, it is important to consider that contracts are at least as social and political as they are legal; whether social contracts are contracts is not necessarily a decision for those who benefit from America's racial contract to make.⁵¹

described the racial contract as "an exploitation contract that creates global European economic domination" when discussing Europe's global colonial settler project, its expropriation of land and labor, its extraction of natural resources, and the justification of both through White supremacist ideology. MILLS, *supra* note 37, at 31–35; *see also* Haney López, *supra* note 35, at 3 ("Race determines our economic prospects. The race-conscious market screens and selects us for manual jobs and professional careers, red-lines financing for real estate, green-lines our access to insurance, and even raises the price of that car we need to buy.").

44. *See* Haney López, *supra* note 35, at 3.

45. *See* Jackson Sow, *supra* note 24, at 36 ("I bring classical private contract theory together with Mills's theory of the racial contract to articulate a theory of governance as sociopolitical contracting. Governments, under this theory, uphold a racial and social contract that is bargained for by a white body politic, and they engage in private commercial contracting in order to meet and avoid public accountability for the predatory and anti-Black terms of the agreement.").

46. *See* Jackson Sow, *supra* note 36, at 1810 ("Cheryl Harris has described whiteness as property. This Article sets forth the theory of whiteness as contract; or, whiteness as property that is bargained-for.").

47. *See id.* at 1832.

48. *See* Serwer, *supra* note 34.

49. *See* Harris, *supra* note 43, at 1714–16.

50. *See* Jackson Sow, *supra* note 36, at 1867–68.

51. *See* Jackson Sow, *supra* note 36, at 1814.

Moreover, race has always played a central role within contract law and the right to make and enforce contracts.⁵² Further, it perpetuates an insulting tradition within the legal academy of labeling race scholarship as neither serious nor rigorous enough to belong (much less center) within legal literature. The theory of Whiteness as Contract contemplates the major social contracts that hold a social and political order together as well as the legally enforceable contracts undergirding it.⁵³

The elements of a legally enforceable contract are: mutual assent to contract, represented by offer and acceptance; consideration, or a bargained-for-exchange; and the absence of defenses, such as fraud, misrepresentation, duress, or unconscionability, that would render the agreement void or voidable.⁵⁴ America's racial order has been sustained by countless legally enforceable agreements across centuries—from the purchase, sale, and subleases of enslaved Africans and their labor; to the sales and purchases of real estate according to racially restrictive covenants;⁵⁵ to the practice of denying the opportunities to contract to Black people via redlining and racially discriminatory appraisals of

52. See Jackson Sow, *supra* note 36, at 1829 (describing Sections 1981 and 1982 of the Civil Rights Act of 1866 as “an attempt at formal revocation of the racial contract,” and noting that “it is significant that lawmakers viewed as crucial the combined dismantling of the Contract and the legal construction of racial equity with respect to the rights of contracting and proprietorship.”).

53. See *id.* at 1827 (defining Whiteness as a “political status” established by both “social” and “legally enforceable” contract).

54. See Restatement (First) of Contracts § 1 (Am. L. Inst. 1932); see also Restatement (Second) of Contracts § 1 (Am. L. Inst. 1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).

55. In 1948, the U.S. Supreme Court struck down the enforcement of racially restrictive covenants by states as unconstitutional. *Shelley v. Kraemer*, 334 U.S. 1, 20–23 (1948). Yet such covenants are not entirely a thing of the past. For example, racially restrictive language remained on property records in Baltimore City as recently as 2020. See Jayne Miller, *Racial Covenants Remain in Some Baltimore-Area Property Records*, WBAL-TV 11 (Feb. 25, 2020), <https://www.wbalv.com/article/racial-covenants-baltimore-property-records/31103729#> [<https://perma.cc/773B-JQXV>] (describing the efforts of residents in some Baltimore communities to remove the language from the property records); see also Elizabeth Evitts Dickinson, *Roland Park: One of America's First Garden Suburbs, and Built for Whites Only*, *JOHNS HOPKINS MAG.* (Fall 2014), <https://hub.jhu.edu/magazine/2014/fall/roland-park-papers-archives/> [<https://perma.cc/H6SX-QDTV>] (describing the Roland Park Company's employment of racially restrictive covenants in the neighborhoods surrounding Johns Hopkins University, in what is now Baltimore City, during the development of some of the earliest, and most influential, suburban communities in the United States).

real property;⁵⁶ to employment agreements featuring racially disparate salaries;⁵⁷ to the exclusion of Black people from labor unions;⁵⁸ and far beyond. But the racial contract, the social contract that secures and perpetuates White supremacy, itself involves mutual assent between those raced as White and the State: through their elected representatives, “Whites” bargain for citizenship and its benefits, securities, and freedoms on the basis of shared Whiteness.⁵⁹ Written another way, the parties to the racial contract—the racial contractors—have attached Whiteness as a condition precedent of the social contract in which they exchange liberty for security and individuality for collective statehood.⁶⁰

By attaching the rights to contract and proprietorship to the benefits of citizenship, which themselves are premised upon Whiteness, the racial contract perpetuates expropriation of real property and extraction of natural resources from non-White communities.⁶¹ Racial contractors gave exclusive social

56. See Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html> [<https://perma.cc/V86R-N2T5>] (recounting, in a discussion of how homes owned or occupied by Black people are appraised at lower values, that “Black Americans consistently struggle more than their [W]hite counterparts to be approved for home loans, and the specter of redlining — a practice that denied mortgages to people of color in certain neighborhoods — continues to drive down home values in Black neighborhoods”); Troy McMullen, *For Black Homeowners, a Common Conundrum with Appraisals*, WASH. POST (Jan. 21, 2021), https://www.washingtonpost.com/realestate/for-black-homeowners-a-common-conundrum-with-appraisals/2021/01/20/80fbfb50-543c-11eb-a817-e5e7f8a406d6_story.html [<https://perma.cc/S7RQ-R2XW>] (discussing, in the context of the history of redlining, the experience of a Denver family, whose home was appraised for \$145,000 less when Black members of the family were present in the home than when a White family member was present in the home without the Black family members).

57. See Stephen Miller, *Black Workers Still Earn Less than Their White Counterparts*, SOC’Y HUM. RES. MGMT. (June 11, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx> [<https://perma.cc/XR5W-RTGZ>] (detailing the disparities in compensation between Black and White workers in the United States, including persistent disparities between workers who are similarly pedigreed and performing similar work).

58. Documents held by the University of Maryland demonstrate the struggle of African-American workers to desegregate labor unions and the labor movement; they are available to the public via digital exhibit. See *A House Divided: African American Workers Struggle Against Segregation*, UNIV. OF MD. LIBRS., <https://exhibitions.lib.umd.edu/unions/social/african-americans-rights> [<https://perma.cc/T6BS-49VF>].

59. Jackson Sow, *supra* note 36, at 1832 (“Whiteness as contract is an agreement of the authors of the global settler colonial project, bargained-for amongst themselves to establish white supremacy, via the expropriation, extraction, and exclusive domination of real property, natural resources, human or other capital, and sociopolitical franchise. The contractors bargained for exclusive [W]hite economic, political, and social power—or full personhood—and they also, then, bargained for the exclusion of Black people from full personhood, including the right to contract with the [W]hite body politic or exercise personal, social, or political proprietorship.”).

60. See *id.*

61. Dorothy Brown and Bernadette Atuahene’s works illuminate exactly how the government extracts disproportionate amounts of capital from Black people in the United States, thus ensuring the perpetuation of the racial wealth gap by impoverishing Black Americans. See *generally* DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021) (detailing the federal government’s disproportionate extraction of

contractual capacity and full citizenship rights (and thus, privacy, a relationship recognized by law, with their government) to landowning White people.⁶² The contractors then relied upon the courts to codify and legalize the terms and benefits of Whiteness, along with the burdens and penalties of non-Whiteness.⁶³ They rely upon law enforcement to ensure that the contract is not breached, that all breaches are remedied, and that the integrity of the contract, and the White supremacy it upholds, is maintained.⁶⁴

Central to American policing is the police's exertion of physical force to maintain social order—and racial order.⁶⁵ Equally important to American policing, however, are the narratives purveyed by law enforcement that attempt to justify their uses of physical force.⁶⁶ According to Mills, the racial contract relies upon ideological conditioning and physical violence for its sustenance.⁶⁷ Stated alternatively, ideological conditioning and physical violence are employed against non-White people and anyone else who might breach the terms of the racial contract to exclude them from enjoying their rights to commercial contracting and proprietorship.⁶⁸ Additionally, this conditioning and violence is exercised against anyone who breaches the racial contract to exclude them from enjoying their rights to exercise political proprietorship and negotiate terms of the social, political, legal, and economic order with the State.⁶⁹ Accordingly:

The violence against Black people in the United States should not be regarded as a failure of democracy's engineering but as evidence of its flawless operation. We should instead regard water shutoff programs and land grab policies, along with the scourge of anti-Black police brutality and vigilante harassment, as sophisticated mechanisms for repairing breaches—real or perceived—to the terms of whiteness [W]hat appears to be a gap in legal protections is actually where the terms of whiteness are written negotiating

wealth from Black households via the federal tax code, and the history of forcing Black taxpayers funding their own exclusion from overtly racist government benefit programs via the Federal Housing Administration and the Department of Housing and Urban Development); Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107 (2020) (analyzing the structural problem of disproportionate extraction of revenue from Black people by American cities, which Atuahene defines through the concept of the predatory city).

62. See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 576–77, 584–605 (1823) (codifying the right of European settlers to conquer and expropriate Indigenous land on the basis of their statuses as Europeans and Christians, which quickly became defined as Whiteness in the years following); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1857) (enslaved party) (formally excluding Black people from U.S. citizenship and defining citizenship as the province of White Americans), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

63. See, e.g., *Johnson*, 21 U.S. (8 Wheat.) at 576–605; *Dred Scott*, 60 U.S. (19 How.) at 406.

64. See Jackson Sow, *supra* note 36, 1811.

65. See *id.*

66. See Fletcher, *supra* note 31, at 298 (describing police “war stories” as a “massive . . . [police] narrative in contemporary popular culture.”).

67. See MILLS, *supra* note 37, at 83–84.

68. See *id.*

69. See *id.*

and maintaining a sociopolitical and economic order that places Black and Indigenous people outside of the law, outside of personhood, and—as necessary—outside of property, via displacement, dispossession, disenfranchisement, or death.⁷⁰

The social contract, which creates and perpetuates Whiteness in the United States, is dependent upon interrelated systems of government policy and commercial contracting.⁷¹ Policing is one such institution that highlights the way in which private contracting supports social contracting; locating policing within the history of American racial capitalism provides even greater insight into the role of policing in preserving White supremacy today.⁷²

Whiteness as Contract conceptualizes race as a social, political, and economic agreement that has been given the express force of statutory law, and which also governs society through private ordering.⁷³ Whiteness “constructs Blackness such that Black people lack the capacity to contract with the state, and therefore have no claims to property they may possess, or even own, at any given time or place.”⁷⁴ Stated another way, the racial contract excludes Black people from the body politic and its social contracts.⁷⁵ As such, the lack of mutual assent between Black Americans, who intend to bargain with the State, and a State which does not intend to bargain with them, reveals the formal provisions of civil rights laws to be an agreement between the State and its Black population that is illusory.⁷⁶ Black citizenry are objects of the agreement between the American body politic and the State, rather than participants,⁷⁷ and even ownership of social capital—such as the ability to be present in the public square without being surveilled or harassed by one’s fellow citizens—is verboten for Black people.⁷⁸

70. Jackson Sow, *supra* note 36, at 1811.

71. See generally Jackson Sow, *supra* note 24 (discussing the intertwined systems of government policies and law enforcement that brutalize Blacks, with a focus on the City of Detroit.).

72. See Jackson Sow, *supra* note 26.

73. See *id.*

74. Jackson Sow, *supra* note 24, at 36.

75. See *id.*

76. See *id.*

77. As an example, following the 2020 elections, Republicans in state legislatures ramped up efforts to curb voting rights, voting in favor of measures that disproportionately affect Black voters. Legislation to curb voting rights passed in Georgia and Florida in early 2021. See Nick Corasaniti & Reid J. Epstein, *What Georgia’s Voting Law Really Does*, N.Y. TIMES (Apr. 2, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> [https://perma.cc/5P6V-XC4H] (noting that measures similar to those enacted in Georgia “have depressed voting mostly among people of color”). This governmental consolidation of White voting power demonstrates the status of Black citizenry as a nonparticipant contractual object—as repositionable at the will and discretion of the contract’s White parties.

78. See Jackson Sow, *supra* note 36, 1843 (“Black people’s possession of property—whether as owners or occupiers of space—is consistently and persistently threatened, whether by deed theft or discriminatory property tax assessments, by unfair utility pricing structures, immigration policy, or modern-day lynch mobs. Black people are tenants at best and trespassers at worst . . .”). For example, Amy Cooper’s infamous harassment of Christian Cooper in New York City’s Central Park on Memorial Day, 2020 stands as evidence of the risk that Black people face by simply being alive in public when

Even more grave is Black people's lack of guarantee that their ability to be present and at liberty in private will also not be disturbed by law enforcement.⁷⁹ The rigorous enforcement of the Whiteness contract by law enforcement officers means that there is no domain within which Black people in the United States are not prone to surveillance, intervention, removal, or even elimination.⁸⁰

B. Critical Contract Theory and American Policing

Whiteness as Contract is a critical contract theory: it is an intervention in contracts and commercial law that also accounts for the apparent paradoxes between formal grants of equality under the law and the lived conditions of

private citizens target them for surveillance, police contact, and other forms of harassment and violence. See Sarah Maslin Nir, *How 2 Lives Collided in Central Park, Rattling the Nation*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/14/nyregion/central-park-amy-cooper-christian-racism.html> [https://perma.cc/G2BD-3NPR]. On that same day in Minneapolis, Minnesota, a store clerk called the police on George Floyd on suspicion of passing counterfeit money, and Floyd was murdered by Minneapolis Police Department Officer Derek Chauvin. See Heidi Stevens, Column, *George Floyd, Killed in Minneapolis, Is Why Amy Cooper's Central Park Call Was So Repugnant*, CHI. TRIB. (May 27, 2020), <https://www.chicagotribune.com/columns/heidi-stevens/ct-heidi-stevens-amy-cooper-george-floyd-weaponized-whiteness-0527-20200527-voun4un45zarte3zdayulr573m-story.html> [https://perma.cc/QWK8-PPNY]; John Eligon, Shaila Dewan, Tim Arango & Nicholas Bogel-Burroughs, *Clerk Who Questioned \$20 Bill Watched Floyd Arrest with 'Disbelief and Guilt'*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/us/chauvin-trial-floyd.html> [https://perma.cc/HBV8-UVR5]. Black people are at risk of being killed by private citizens while in public. Michael Dunn murdered seventeen-year-old Jordan Davis for playing music loudly at a gas station in Jacksonville, Florida in 2012. See Richard Luscombe, *Michael Dunn Sentenced to Life Without Parole for Killing of Florida Teenager*, GUARDIAN (Oct. 17, 2014), <https://www.theguardian.com/us-news/2014/oct/17/michael-dunn-sentenced-life-without-parole-florida> [https://perma.cc/N7KN-HCUH]. In 1998, White supremacist John William King and two friends murdered James Byrd, Jr., beating him, chaining him to the back of a truck and dragging him along a road for a mile and a half until his head and other body parts tore away from the rest of his body. See Shane Croucher, *The Lynching of James Byrd Jr.: Two Decades Ago This Racist Murder Shocked America. Now His Killer Faces Execution*, NEWSWEEK (Apr. 20, 2019), <https://www.newsweek.com/james-byrd-jr-lynching-texas-death-row-execution-1394474> [https://perma.cc/F7BZ-Y2S8]. In 2020, a group of men, at least one of whom was wearing clothing featuring the Confederate flag, attacked Black human rights advocate Vauhxx Booker and attempted to lynch him near Lake Monroe in Indiana on the Fourth of July. See Steve Gorman & Mark Hosenball, *FBI Investigates Reported July 4 Lynching Attempt in Indiana*, REUTERS (July 9, 2020), <https://www.reuters.com/article/us-indiana-lynching/fbi-investigates-reported-july-4-lynching-attempt-in-indiana-idUSKBN24B042> [https://perma.cc/K7Z3-XSDL].

79. See Jackson Sow, *supra* note 36, 1843 (“[E]ven physically speaking, while alive, Black people are often *near death, near-death, or nearly dead.*”). Black people are at risk even when in the private domain, and law enforcement officers have recently killed unarmed and unwitting Black people in their own private residences, including Botham Jean, Atatiana Jefferson, and Breonna Taylor—all of whom were young Black professionals in their twenties who were shot to death in their homes. See Ortiz, *supra* note 13; Erik Ortiz, *Fort Worth Police Officer Who Fatally Shot Atatiana Jefferson Indicted on Murder Charge*, NBC NEWS (Dec. 20, 2019), <https://www.nbcnews.com/news/us-news/fort-worth-police-officer-who-fatally-shot-atatiana-jefferson-indicted-n1105916> [https://perma.cc/U739-3KS6]; Richard A. Oppel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [https://perma.cc/3N8C-MQYF].

80. See *supra* note 77 and accompanying text.

marginalized people seeking to make and enforce contracts.⁸¹ The theory brings into sharp focus the centrality of commercial interests to American public law and the role that public law plays in supporting racially exploitative commerce—and more broadly, racial capitalism.⁸² This Article seeks to thread a needle between the police’s historical role as literal enforcers of racial capitalism and their present role as protectors of White property and proprietorship from what the body politic views as Black breach and encroachment.

Critical contract theory refers to efforts by contemporary contract and commercial law scholars to decolonize and deconstruct classical contract theory.⁸³ Critical contract theory challenges the assumptions upon which the law of contracts rests, such as the assumption that contractors are equal in power and agency.⁸⁴ It also seeks to unveil the inequality and injustice prevalent in many contracts, including those in many of the cases taught to first-year law students and presented as banal agreements, when they were in fact premised on slavery or exploitation.⁸⁵ In so doing, critical contract theory counters mainstream understanding by suggesting the contract and contract law are inherently, and often expressly, political.⁸⁶ Critical contract theory disabuses those who study it of the notion that private ordering and commercial law are efficient, pure spaces, free of human excess and evil, and thus immune from critique.⁸⁷ In fact, the history of free markets, and the transactions occurring therein, demonstrates that one person’s freedom of contract has meant exploitation, extraction, and expropriation for many others.⁸⁸

It is through legally enforceable contracting that people are able to amass the personal wealth, autonomy, and authority that motivate them to collectively organize and delegate resources and labor. The inherently political nature of

81. See Jackson Sow, *supra* note 36, at 1842 (“Despite formal status as American citizens, Black Americans do not fully enjoy the rights of citizenship; they instead occupy a place and space outside of both politics (social contracting) and proprietorship (commercial contracting).”).

82. See Jackson Sow, *supra* note 24, at 41–42.

83. Chaumtoli Huq described her critical contracts pedagogy, which she uses to challenge the concepts of the reasonable man and freedom of contract, which obscure the ways in which racism and colonialism impact commercial contracting and states’ economic development. Said Huq:

When I speak to students of economic theories or the theory of freedom to contract that underpin contracts doctrine, I make it clear that the economy to which I am referring was racialized . . . I introduced a decolonial framework to the discussion of two durable doctrinal features of classical contract law: the idea of objectivity and the reasonable man (now person) standard. The presentation of the doctrine as rational and neutral obscures the techniques of racial and colonial subordination that the doctrine employs.

Chaumtoli Huq, *Teaching Contracts Through a Critical Race and Decolonial Framework* (pt. 2), L. PROFESSOR BLOGS NETWORK: CONTRACTSPROF BLOG (July 14, 2020), https://lawprofessors.typepad.com/contractsprof_blog/2020/07/guest-post-by-chaumtoli-huq-part-ii-freedom-to-contract-and-the-reasonable-man.html [<https://perma.cc/Y59L-BBFE>].

84. See *id.*

85. See *id.*

86. See *id.*

87. See *id.*

88. See *id.* (“Freedom to contract . . . reinforced racial hierarchies.”).

contracting explains why legally enforceable agreements undergird the shaping of democratic governance in neoliberal societies. Contracting facilitates and undergirds social contracts.⁸⁹ Of course, it is because the Whiteness contract is a “social contract,” or an implicit political agreement among a group of people rather than an explicit (or commercial) one to which people are legally bound, that some argue that the principles of contract law do not actually apply here. And even though racial contracting is real, not all are easily convinced that the racial contract is a real *contract*.⁹⁰

International law is social contracting on a global scale—it is a body of norms, conventions, treaties, and accords for which states bargain with each other, giving up some national sovereignty in exchange for geopolitical stability and security guaranteed by international governance. Social contracts, commercial contracts, and other agreements and pacts—some binding, and others, like social contracts, non-binding, collectively form the corpus of international law. Indeed, in *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984), Justice Sandra Day O’Connor wrote for the Supreme Court that, consistent with the Court’s longstanding posture, “A treaty is essentially a contract between or among sovereign nations.”⁹¹ Treaties are a cornerstone of international law.⁹² As international law depends upon the willing participation and accession of sovereign states dealing with each other as equals, the accords and other agreements among states, and between states and international organizations, much more closely resemble commercial contracts than do the implicit pacts between states and their citizens.⁹³ Per the Vienna Convention on the Law of Treaties, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁹⁴ Laurence Helfer described states’ obligations to their treaties in the following way:

No state can be forced to accept a treaty without its consent, nor can it be compelled to join an intergovernmental organization against its will. Once a state has assented to a treaty and has successfully shepherded it through its national approval process, however, it must

89. See Jackson Sow, *supra* note 36, 1831 (exploring the “role that commercial contracting plays in facilitating and enforcing the United States’ racist social contract”).

90. See MILLS, *supra* note 37, at 9, 19 (“[T]he racial contract is real The racial contract is a historical actuality.”).

91. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (citing *Washington v. Wash. Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979)); see also *Rocca v. Thompson*, 223 U.S. 317, 331–32 (1912) (“But it is urged that treaties are to be liberally construed. Like other contracts, they are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting.”).

92. According to Laurence Helfer, “[t]he international legal system is grounded on a fundamental principle: *pacta sunt servanda*—treaties must be obeyed.” Laurence Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1580 (2005).

93. *Id.* at 1580–81.

94. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

observe its treaty commitments in good faith. International law takes a dim view of challenges to this meta norm of treaty adherence.⁹⁵

Treaties are legally enforceable agreements between states, but their enforceability is governed and regulated by other norms and conventions that are, in turn, governed by international bodies created through global social contracting.⁹⁶ Treaties, then, are both enforceable agreements between states that are sustained by social contracts between states and international governing bodies, or the global supra-state.⁹⁷ Treaties function very similarly to commercial contracts, with international law taking compliance with treaties seriously—so much so that violations of treaties are known as treaty breaches.⁹⁸ International law favors renegotiation of treaties rather than unilateral abandonment thereof, as renegotiation allows states to come to a new bargain, featuring renewed mutual assent to contract and a new bargained-for exchange, curing any existing or threatened breach of previous terms.⁹⁹ Helfer wrote:

When shifts in the political landscape or domestic preferences undermine a treaty's objectives or render its terms unduly burdensome or obsolete, international law directs states to eschew unilateral action in favor of negotiation with their treaty partners. The plausible outcomes of such collaborative efforts . . . range from a temporary suspension of the treaty to a modification of its terms, to wholesale abrogation of the agreement with or without the adoption of a fresh set of treaty commitments.¹⁰⁰

The United Nations Convention on Contracts for the International Sale of Goods (CISG), which governs enforceable international commercial agreements, is not an enforceable bilateral treaty between two states.¹⁰¹ Rather, the CISG is a public convention governed by the United Nations, and thus more closely resembles the type of public law produced by social and political contracting that occurs within the United States.

The United Nations, which governs international commercial contracting along with international criminal law, international humanitarian law, international trade and labor, and international human rights, is the global

95. Helfer, *supra* note 92, at 1580–81.

96. See Vienna Convention on the Law of Treaties, *supra* note 94, at art. 53 (establishing that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law,” and directing parties to seek solutions to disagreements by the “means indicated in Article 33 of the Charter of the United Nations,” an international body).

97. See *id.*

98. See Helfer, *supra* note 92, at 1581.

99. *Id.*

100. *Id.*

101. This Convention is also known as the Vienna Convention and has been ratified by the United States despite some differences between it and the Uniform Commercial Code; the multilateral sales treaty sets forth a uniform standard for international commerce, including contractual formation and the sale of goods. See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

manifestation of social contracting amongst states for a global government and facilitates the maintenance of a global institutional, legal, and humanitarian order. The United Nations is bargained for by states in the same way as the United States is bargained for by citizens; social and political will to perpetuate each entity—known in contract terminology as mutual assent—hold each entity together. Each entity promulgates public laws that reflect those national and supra-national bargains, including bargains for the regulation of legally enforceable agreements

Thus, the United Nations and the CISG exemplify, at a global level, why the dichotomization of public and commercial law that leads scholars to erect barriers between “real” and “social” contracts is but a fiction. International law shows us that social contracts are real contracts and can deal with commercial and private concerns; as such, social contracts can also be analyzed using critical contract theory.

Social contracts are not pseudo-contracts, but are instead real, valid contracts through which goods and services are exchanged, particularly in support of the maintenance and distribution of social and political power.¹⁰² Though social contracts are tacit, they feature the same elements as enforceable agreements: mutual and multilateral intent to cooperate and negotiate, a bargained-for exchange, and the absence of violative activities that the contractors agree will make their agreements void or voidable.¹⁰³ Though social contracts are not justiciable, the parties to them do implement enforcement mechanisms and take all possible measures to avoid breaches of their bargains.¹⁰⁴

Breaches and remedies for breach take various forms in social contracting. At the international level, breaches of non-binding norms may result in states engaging in retaliatory breaches of enforceable agreements or in strategic formations of accords with other states—all under the umbrella of international bodies and organizations.¹⁰⁵ In the United States, violations of tacit social agreements relating to race may result in more visible political bargaining, such as redistricting and gerrymandering, meant to restore breached social and economic order.¹⁰⁶ Alternatively, too much purchase contracting for real property by Black people for the likes of White neighbors in one neighborhood may result in “White flight,” or sale contracting, by White people in the same neighborhood.¹⁰⁷ These sales are an act of resistance against Black encroachment upon White property and privileges.¹⁰⁸ And when that fails, uniformed officers

102. See MILLS, *supra* note 37, at 3–4.

103. See Jackson Sow, *supra* note 36, at 1833.

104. See *id.*

105. See Helfer, *supra* note 92, at 1616–17.

106. See *supra* note 78 and accompanying text.

107. See Jackson Sow, *supra* note 24, at 51.

108. See *id.*

or vigilantes, like Kyle Rittenhouse, George Zimmerman, or Gregory and Travis McMichael, will step in to police the social order and keep it intact.¹⁰⁹

Much like classical contract theory, classical social contract theory fails to account for the distributions of power and contracting authority in a racialized society.¹¹⁰ The theory of Whiteness as Contract elucidates the materiality and validity of social contracts as contracts, even as racial contract theory also highlights how governments use commercial contracting in support of social contracts.

II.

POLICE AS GUARDIANS OF THE AMERICAN RACIAL CONTRACT

A system of governance that premises the benefits of citizenship of some—in the United States, the rights to life, liberty, and property—upon the deprivation of others of those same benefits is bound to meet resistance from the deprived. This is particularly true in a polity that purports to be a liberal democracy, and especially when that liberal democratic polity abandons an overt system of apartheid for one that promises formal, legal equality to all. Historically, police in the United States have served as the protectors of those benefits of some against the deprived.¹¹¹

History makes clear that the origins of American policing were rooted in the protection of White men's property rights during a period when the United States overtly embraced racial apartheid and gave it the force of law.¹¹² Specifically, police—as sheriffs, slave patrolmen, militiamen, bounty hunters, and overseers—were responsible for enforcing White men's contracts for the sale and purchase of Black slaves, who were White men's personal property, and therefore deprived of any agency to contract or own property themselves.¹¹³ Thus, historically, policing was expressly strongly tied to (1) commercial contracts and (2) the dehumanization and oppression of people of African descent.

The origins of American law enforcement were centered around enforcement of the purchase and sale of Black people as slaves.¹¹⁴ Law enforcement was also responsible for preventing the escape of slaves, and they therefore were charged with restricting the free movement of Black people and, quite literally, policing—restricting or requiring—the presence of their bodies in certain spaces.¹¹⁵ Today, the racial contract continues to require enforcers who

109. See MILLS, *supra* note 37, at 109.

110. See Huq, *supra* note 83.

111. See Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [<https://perma.cc/MW23-YUM2>] (detailing Greek and Latin derivations of “police”).

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

will maintain raced spaces by keeping undesired minorities out of certain spaces and contained in others structured and reserved for them.¹¹⁶ Likewise, the contract requires enforcement officers and procedures empowered to extract capital from non-White people—through bail and bond requirements flowing from arrests and detentions, and through civil forfeiture processes.¹¹⁷ Police interrupt potential contracting activities by Black people when they respond to requests by business owners racially profiling Black people on their premises.¹¹⁸ Police also interrupt Black people’s enjoyment of their contracts for real property, as they did, fatally, for Atatiana Jefferson, Breonna Taylor, and Botham Jean.¹¹⁹

This Part establishes that police remain the guardians of the United States’ racial contract. Policing evolved after the end of slavery, then expanded again as non-White populations began to emigrate to the United States, to use force and legal authority to control and contain populations who could no longer be forced to work for free, and with whom White people would have to compete for capital.¹²⁰ The theories of Afropessimism and necropolitics clarify why modern policing has been designed to minimize such economic competition from Black people through force and the threat of force. In the case of Black people specifically,¹²¹ policing is meant to reduce their existence to that which is just human enough to fulfill the demand for their labor but not human nor citizen enough to enjoy due process rights or the equal protection of law.

A. *Afropessimism and Necropolitics: Blackness, Arrested*

The theory of Whiteness as Contract is heavily informed by philosophy concerning racial formations and constructions of legal personhood.¹²² While the existence of a widespread policing problem impacting Black people, and a need

116. See Jackson Sow, *supra* note 26.

117. See Atuahene, *supra* note 61 (analyzing the structural problem of the disproportionate extraction of revenue from Black people by American cities, which Atuahene defines through the concept of the predatory city).

118. See Hill et al., *supra* note 14 (exemplifying an aggressive, lethal police response to a business owner calling the police in response to a Black person).

119. See Hawkins, *supra* note 10; Booker & Treisman, *supra* note 15; Ortiz, *supra* note 13.

120. See Lepore, *supra* note 111.

121. In this Article, the author focuses primarily on people of African descent who are raced as Black in the United States and, to a lesser extent, Indigenous Americans. The author focuses on anti-Black racism and Black people to demonstrate how Whiteness works, and not to exclude or erase the experience of Indigenous, Latinx, Middle Eastern and North African, or Asian and Pacific Islander communities, who also endure the burdens of being raced as non-White people in the United States. Anti-Blackness is universal, and even where non-White people comprise a majority within a polity, proximity to Whiteness comes with greater access to the rights discussed in this Article, while proximity to Blackness comes with greater exclusion therefrom. Because Blackness is constructed in opposition to Whiteness in the United States, and in all places throughout the world where White supremacy has been established, focusing on the experiences of Black peoples’ exclusion from social contracts allows us to measure the degree and profundity of a society’s racism and race-based brutality.

122. See MILLS, *supra* note 37, at 56 (“The terms of the Racial Contract mean that nonwhite *subpersonhood* is enshrined simultaneously with white personhood.”).

for solutions thereto, is widely acknowledged within legal scholarship,¹²³ *why* the police target Black people for harassment and violence, much less egregious levels of brutality, is much less well-understood. Undergirding the thesis that police exercise a mandate to enforce the exclusion of Black people from political and commercial contracting and proprietorship is the following sub-thesis: within polities bound by racial contracting,¹²⁴ the legal and political personhood of non-White people, and especially Black people, is subordinated, curtailed, or denied outright.¹²⁵ Thus, the levels of violence that police apply to Black people may exceed those levels that would be applied to White people, to whom greater levels of personhood are attributed.¹²⁶ Moreover, to enforce and maintain the parameters of personhood, police *must* apply violence to Black people, specifically to reify their sub- or non-humanity.¹²⁷

Within the liberal State, personhood and citizenship are fused, and the benefits of citizenship encompass both commercial and political contracting and proprietorship, with the law legitimizing both.¹²⁸ And within the liberal racial State—and it is unclear that any liberal state can be anything other than a racial State¹²⁹—the benefits of citizenship must be reserved for, or at least dominated

123. See, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN passim* (2017) (explaining that White supremacy drives the policing of Black men in the United States); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679 *passim* (2020) (analyzing a model of community-controlled policing in communities impacted by police violence as a possible solution to structural inequality); John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 713 (2020) (noting the disproportionate killing of Black Americans by police within a system of racially disparate police violence); Jocelyn Simonson, *Police Reform Through a Power Lens*, 30 YALE L.J. 778, 859–60 (2021) (making the case for a model of police reform that redistributes power to the communities most harmed by police violence and mass incarceration). See also Bennett Capers, *Afro-Futurism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 45–55 (2019) (imagining a future world in which Black and Brown people comprise a majority of the U.S. population and a majority of police officers, and in which technological advances render much police work unnecessary, resulting in greatly reduced police forces, and forcing existing policing to become freer of racist bias); Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 989–90 (2019) (clarifying the distinctions between arrests and guilt, and noting that the distinctions are often blurred, to the detriment of the arrested).

124. Charles Mills refers to such polities as racial polities. See MILLS, *supra* note 37, at 12–14. David Theo Goldberg also argues that race is fundamental to modern state formation and sustenance in discussing what he calls the racial state. See *generally* DAVID THEO GOLDBERG, *THE RACIAL STATE* (2002).

125. See MILLS, *supra* note 37, at 56 (“The terms of the Racial Contract mean that nonwhite subpersonhood is enshrined simultaneously with white personhood.”).

126. See BUTLER, *supra* note 123, at 48–56.

127. See MILLS, *supra* note 37, at 44–45 (describing state brutality and violence as an “organic part” of a “system predicated on nonwhite subpersonhood”).

128. See Jackson Sow, *supra* note 36, at 1829.

129. One thesis concerning liberal democracies is that liberty and democracy in the Western world is forged out of atocity, including genocide and apartheid. See MICHAEL MANN, *THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING* 70 (2005); MATTHEW SHAW, *WHAT IS GENOCIDE?* 184 (2015) (discussing Mann’s theory that ethnic cleansing is implicated in the creation of modern democracy and that most now-stable democracies have conducted ethnic cleansing in their histories). Right-wing nationalists have ascribed to this thesis; for example, Senator Tom Cotton referred to the

by, those to whom personhood is attributed based on the State's racial assignments for its population.¹³⁰ In the liberal State, the citizens are the *polis*, or the polity/citizenship, and they are therefore meant to be represented, and protected by the police.¹³¹ In the racial State, however, this means that the White people, or the citizens, are, as the *polis*, not only protected by the police, but the police themselves.¹³²

Because the police are to maintain and enforce law and order, they are responsible for keeping a close watch on those who have been excluded from the *polis*, lest those excluded threaten the *polis*, either by interfering with their commercial and political activity and creating inefficiencies, or by seeking inclusion in the *polis*, or presenting competition thereto.¹³³ The police are responsible for keeping these people, who are not persons, in their place.¹³⁴ Of the racial State, Mills noted that “[p]ersonhood can be taken for granted by some, while it (and all that accompanies it) has to be fought for by others, so that the general human political project of struggling for a better society involves a different trajectory for non-[W]hites.”¹³⁵ Afropessimism does not take the humanity of natural human beings for granted, and in this way, Afropessimism takes a more radical stance than those who recognize that Black people are constructed outside of personhood politically, legally, and socioeconomically.¹³⁶ Afropessimism goes further, into terrifying territory, positing humanity, too, as

enslavement of Africans in the United States as a “necessary evil.” See Devan Cole, *Tom Cotton Describes Slavery as a ‘Necessary Evil’ in Bid to Keep Schools from Teaching 1619 Project*, CNN (July 27, 2020), <https://www.cnn.com/2020/07/27/politics/tom-cotton-slavery-necessary-evil-1619-project/index.html> [<https://perma.cc/SZ3Z-WRN3>]. Critical theorists have also ascribed to this thesis, albeit for different purposes, challenging the narratives advanced by champions of Western exceptionalism that liberal democracy is necessarily benevolent and hallmarked by innocence and divine blessing. See ACHILLE MBEMBE, *NECROPOLITICS* 66 (Steven Corcoran trans., Duke University Press 2019) (2016) (arguing that state sovereignty is marked by the power of deciding who lives and who dies).

130. See MILLS, *supra* note 37, at 56 (“European liberalism restricts ‘egalitarianism [sic] to equality among equals,’ and blacks and others are ontologically excluded by race from the promise of ‘the liberal project of modernity.’”).

131. See Lepore, *supra* note 111 (detailing Greek and Latin derivations of “police”).

132. As discussed, *infra*, the police work for the White body politic, but the body politic retain an ability to choose how and when to delegate power to the police by calling on them. In recent years, now-notorious incidences of White citizens, such as “BBQ Becky,” “Permit Patty,” and “Cornerstone Caroline,” policing Black people themselves have gone viral on social media or have attracted mass media attention. See Bill Hutchinson, *From “BBQ Becky” to “Golfcart Gail,” List of Unnecessary 911 Calls Made on Blacks Continues to Grow*, ABC NEWS (Oct. 19, 2018), <https://abcnews.go.com/US/bbq-becky-golfcart-gail-list-unnecessary-911-calls/story?id=58584961> [<https://perma.cc/B59S-XTCC>].

133. See Jackson Sow, *supra* note 26.

134. See *id.*; FRANK B. WILDERSON III, *AFROPESSIMISM* 15 (2020).

135. MILLS, *supra* note 37, at 111.

136. See WILDERSON, *supra* note 134, at 15 (“Blacks are not Human subjects, butt are instead structurally inert props, implements for the execution of White and non-Black fantasies and sadomasochistic pleasures.”).

a construct outside of which Blackness falls, and definitionally so.¹³⁷ Afropessimism contends that humanity, and beyond humanity, personhood, are constructed and organized in opposition to Blackness, and that humanity, therefore, needs Blackness to exist.¹³⁸ Humanity rests upon Blackness; its presence requires Blackness, but it requires that Blackness achieve the impossible feat of being present and absent all at once.¹³⁹

That Black people are people should be so obvious that any suggestion to the contrary is both jarring and viscerally offensive. And yet, there was a time when the idea that Black people were not people was equally obvious, and these historical beliefs about Black sub-humanity continue to persist.¹⁴⁰ Throughout history, people of African descent have been constructed outside of both political and natural humanity.¹⁴¹ The most rabid of President Barack Obama's detractors took pleasure in depicting him as an ape when simply questioning his American

137. See *id.* at ix (“[T]he Human is not an organic entity but a construct; a construct that requires its *Other* in order to be legible; and . . . the Human Other is Black.”).

138. *Id.* at 16 (“[Blacks] suffer as the hosts of Human parasites, though they themselves might be the hosts of parasitic capital and colonialism.”).

139. *Id.* at 17.

140. See Clarissa-Jan Lim, *Three Cops Have Been Fired After Their Racist Rants About Black People Were Caught on Tape*, BUZZFEED (June 25, 2020), <https://www.buzzfeednews.com/article/clarissajanlim/cops-fired-over-racist-rants-about-black-people> [<https://perma.cc/YU7C-MKWA>].

141. See MILLS, *supra* note 37, at 111. This continues today, as the dehumanization of Black people persists via institutions such as the International Olympic Committee. The preparations for the rescheduled 2020 Summer Olympics in Tokyo, Japan were marked by a number of punitive measures meted out to Black women athletes from across the globe, including a ruling by the International Swimming Federation (FINA) that swimming caps designed to accommodate natural Afro-textured hair could not be used during competition. See Evan Nicole Brown, *How a Ban on a Swim Cap Galvanized Black Swimmers*, N.Y. TIMES (July 14, 2021), <https://www.nytimes.com/2021/07/14/style/olympics-soul-cap-ban-swimming.html> [<https://perma.cc/9NWY-VSCD>] (“FINA’s ruling, [Erin Adams] said, feels—even if just symbolically—like yet another barrier for Black swimmers to participate in the sport, particularly for Black women who ‘usually have more hair.’ ‘We’re always policed on what we can wear and what our bodies are looking like, and what our hair is looking like,’ she said. ‘They’re just trying to make it difficult for us to have ease when participating.’”). The Committee has also ruled a number of African women ineligible for competition as women because of their testosterone levels (the athletes, presumably, would not qualify for competition as men, either). See Gerald Imray, *Namibia Teenagers Barred from Olympic 400 over Testosterone*, AP NEWS, (July 2, 2021), <https://apnews.com/article/namibia-africa-olympic-games-2020-tokyo-olympics-sports-f71b7d1e9f5ba0fbc08a1e0ab346c20b> [<https://perma.cc/M9J8-WQYN>]. See also David Barron, *Beauty in Beastly Athleticism*, HOUS. CHRON. (July 21, 2021), <https://www.pressreader.com/usa/houston-chronicle/20210721/282102049693401> [<https://perma.cc/N9MV-2TRL>] (referring to gymnast Simone Biles). Barron’s title generated uproar via social media. See, e.g., Karen Attiah (@KarenAttiah), TWITTER (July 30, 2021, 6:32 AM), <https://twitter.com/karenattiah/status/1421101290524975106?lang=en> [<https://perma.cc/8MWW-96A3>] (“And the disrespect to Simone Biles from her hometown newspaper?? ‘Beastly athleticism’?!? @HoustonChron, this is complete trash.”). The use of scientific racism to construct Black people outside of humanity consequently places them outside of eligibility for the enjoyment of contract (such as engagement in competitive sport in exchange for recognition and reward) and property (the rewards one receives if one is successful at the competition) in the realm of professional sports.

citizenship was insufficiently insulting.¹⁴² In the context of sports, racist soccer fans harass and abuse Black soccer players by calling them monkeys and throwing banana peels at them from the stands.¹⁴³ Banning these fans from sporting events¹⁴⁴ may provide some peace to the insulted players; it does little, however, to combat the position taken by many people across the globe that to be Black is to be outside of, and beneath, natural humanity. Afropessimism thus provides some very helpful insight into humanity and personhood as constructs and why it is necessary for police to target people of African descent for dehumanization and brutality.

In *Afropessimism*, Frank Wilderson III asked the following question:

Why is anti-Black violence . . . the *genome* of Human renewal; a therapeutic balm that the Human race needs to know and heal itself? Why must the world reproduce this violence, this social death, so that social life can regenerate Humans and prevent them from suffering the catastrophe of psychic incoherence—absence? Why must the world find its nourishment in Black flesh?¹⁴⁵

This violence, says the Afropessimist, is necessary to secure social order and the blessings of liberty for those constructed into humanity. Afropessimism comports with Achille Mbembe's theory of necropolitics, which contends that Black people must be dehumanized for liberal democracy to operate as intended.¹⁴⁶ While necropolitics does not only apply to Black people, and may apply to people raced as White and non-White people who are not raced as Black,

142. See, e.g., Adam Beam, *GOP Hopeful Not Sorry for Posts Depicting Obamas as Monkeys*, AP NEWS (Sept. 30, 2016), <https://apnews.com/article/90ec82dfca4f45e48628e4ae45b8247f> [<https://perma.cc/6KNK-WEPV>]; Frank James, *Portraying Obama as Chimp Not Like Showing Bush as One*, NPR (Apr. 27, 2011), <https://www.npr.org/sections/itsallpolitics/2011/04/27/135771740/portraying-obama-as-a-chimp-not-the-same-as-showing-bush-as-one> [<https://perma.cc/H6XN-65FM>] (“In the U.S., there’s not a history of white Protestants like Bush being portrayed as simians by anyone in a more privileged and powerful social and economic position. By contrast, [W]hites in relatively powerless groups like Irish Catholic immigrants in 19th Century America, were portrayed as ape-like. As were [B]lacks then and sometimes now, too.”).

143. This longstanding practice by racist fans has also made its way to social media. See Phil West, *Racist Fans Flood Black England Player’s Instagram with Banana, Monkey Emoji After Euro Final Loss*, DAILY DOT (July 12, 2021), <https://www.dailydot.com/irl/racist-fans-black-england-players-euro-finals/> [<https://perma.cc/P92X-TMML>]; Patrick Smith, *Soccer in the Spotlight as Europe Grapples with Racism on and off the Field*, NBC NEWS (Apr. 14, 2019), <https://www.nbcnews.com/news/world/soccer-spotlight-europe-grapples-racism-field-n992911> [<https://perma.cc/A5XT-ZKF3>] (“Trailblazing [B]lack players regularly had to endure monkey chants and banana skins being thrown at them on the field in the 1970s and the 1980s.”).

144. See Lexi Lonas, *UK Banning Soccer Fans with History of Online Racist Abuse*, HILL (July 14, 2021), <https://thehill.com/policy/international/562995-uk-banning-anyone-guilty-of-online-racist-abuse-from-soccer-matches> [<https://perma.cc/2CG7-JDC2>].

145. WILDERSON, *supra* note 134, at 17.

146. See generally MBEMBE, *supra* note 129 (contending that Black people must be dehumanized for liberal democracy to operate as intended). The theory of necropolitics is consistent with Mann’s theory of democracy. When considered in the context of settler colonial societies, that Black people are the objects of necropolitical governance upon which liberties and wealth for White people are constructed easily follows. See MANN, *supra* note 129, at 55–69.

Black people are often subjected to necropolitical governance.¹⁴⁷ The necropolitical governance of Black people is a global project that is rooted in racial capitalism, settler colonialism, and the theories of Black sub- or non-humanity that make such systems of oppression possible.

Necropolitics is a form of governance that subjects a portion of a State's citizenry to threat, or to the threat of death, to maximize and optimize life and its benefits—power, wealth, and liberty—for another portion of the citizenry.¹⁴⁸ Per Mbembe, the “pro-slavery democracy” is characterized by paradoxical duality, a “community of fellow creatures governed . . . by the law of equality” and a “category of nonfellows . . . that is also established by law.”¹⁴⁹ The White body politic that forms the racial State is that community of fellow creatures, while non-White people are governed “by the law of inequality” in what Mbembe described as a “community of separation.”¹⁵⁰ Necropolitics's connections to racial capitalism and colonialism are obvious, and indeed European colonialism, South African apartheid, American chattel slavery, and Jim Crow are clear examples of necropolitical governance available in modern history. Within each of these systems of oppression, public law decreed that Black people were to be dehumanized or removed from the body politic and the rights to contract and property so they themselves could be converted into property and contracted.

The necropolitical governance of the non-fellows plays out in deadly police intervention¹⁵¹ and in racist police fantasy.¹⁵² It has manifested in events such as the MOVE bombing, which resulted in the gratuitous massacre of members of the Afrika family, including young children, in Philadelphia;¹⁵³ it has manifested

147. See, e.g., Jackson Sow, *supra* note 24, at 46 (framing water shutoffs in Detroit as “part of a necropolitical method of Mayor Duggan’s to gentrify the city by pushing Black Detroiters with large homes in nice neighborhoods out of the city to make room for newcomers.”).

148. See MBEMBE, *supra* note 129, at 17; see also BUTLER, *supra* note 123, at 11 (defining a chokehold as “a process of coercing submission that is self-reinforcing” because “a chokehold justifies additional pressure on the body because the body does not come into compliance, but the body cannot come into compliance because of the vise grip that is on it”). Butler compares the chokehold to “the black experience in the United States” and states, “The Chokehold . . . is the process by which [B]lack lives are made vulnerable to death The Chokehold works through overt state violence . . . and slower forms of vulnerability” *Id.*

149. MBEMBE, *supra* note 129, at 17 (emphasis omitted).

150. *Id.*

151. See BUTLER, *supra* note 123, at 1 (summarizing a litany of abuses of Black people in the United States by American police during President Obama’s tenure, including severing Freddie Gray’s spinal cord; shooting Tamir Rice, Walter Scott, Philando Castile, and LaQuan McDonald to death; and physically assaulting a teenage girl in Texas).

152. Mbembe asserted, “[F]antasy is present in every context in which social forces tend to conceive the political as a struggle to the death against unconditional enemies. Such struggle is then qualified as existential. It is a struggle with no possibility of mutual recognition, and even less of reconciliation. It opposes distinct essences to one another” MBEMBE, *supra* note 129, at 63.

153. For reporting on the 1985 MOVE bombing, see Lindsey Norward, *The Day Philadelphia Bombed Its Own People*, VOX (Aug. 15, 2019), <https://www.vox.com/the-highlight/2019/8/8/20747198/philadelphia-bombing-1985-move> [https://perma.cc/79HJ-XPZT] (“[T]he city of Philadelphia dropped a satchel bomb, a demolition device typically used in combat, laced

in the stalking and killing of Korryn Gaines in her home and in front of her young son;¹⁵⁴ and it has manifested in kneeling the life out of George Floyd for over nine minutes.¹⁵⁵

Patricia Williams's recounting of the police killing of Eleanor Bumpurs in *The Alchemy of Race and Rights* serves as a reminder that the police are also deployed to enforce commercial contracts, and that as they do, they also place Black life at risk.¹⁵⁶ Williams's retelling of the Bumpurs story also tells us why, reminding us that police willingness to remove or altogether eliminate Black people in order to enforce commercial contracts and protect White people's property and financial interests is, indeed, a reflection of policing's mandate—protect White property, and proprietorship, from threats to it coming from the breaching presence of Black life.¹⁵⁷ “On October 29, 1984,” Williams wrote, “Eleanor Bumpurs, a 270-pound, arthritic sixty-seven-year-old woman, was shot to death while resisting eviction from her apartment in the Bronx. She was \$96.85, or one month, behind in her rent.”¹⁵⁸ Necropolitics was making life difficult for Bumpurs long before the police came to drag her out of her apartment and into the crisp autumn New York outdoors.¹⁵⁹ Her landlord, placing the paltry sum of rent she owed above her humanity, chose to throw her out into the streets, despite her age and disability.¹⁶⁰ The threat and enforcement of an eviction order against desperately impoverished Black people is meant to force them to do whatever they can to find the money in order to preserve their lives, all while squeezing the life—and certainly any *joie de vivre*—out of them. The landlord expected the police to enforce the eviction order pursuant to Ms. Bumpurs' material breach of their contract; it was, after all, a term of the social contract for which the landlord had bargained with the State.¹⁶¹

These private decisions, too, support the theories of Afropessimism and necropolitics and exhibit racial contracting at work—the exploitative extraction of resources and dispossession of Black people of their property, which subjects

with Tovex and C-4 explosives on the MOVE organization, who were living in a West Philadelphia rowhome known to be occupied by men, women, and children . . . Eleven people were killed, including five children and the founder of the organization. Sixty-one homes were destroyed, and more than 250 citizens were left homeless.”)

154. See Wesley Lowery, *Korryn Gaines, Cradling Child and Shotgun, Is Fatally Shot by Police*, WASH. POST (Aug. 2, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/08/02/korryn-gaines-is-the-ninth-black-woman-shot-and-killed-by-police-this-year/> [https://perma.cc/QFW2-SAQC].

155. See Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds – Not the Infamous 8:46*, CNN (Mar. 30, 2021), <https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html> [https://perma.cc/8ZVG-JR66].

156. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 136–45 (1991).

157. See *id.*

158. *Id.* at 136.

159. *Id.*

160. *Id.*

161. See *id.*

them to an existence suspended between life and death.¹⁶² By calling upon the police, the landlord was asking for the racial contract to be enforced, and enforced it was.¹⁶³ Ms. Bumpurs, in an apparent attempt to place her life above the paltry sum she owed her landlord, resisted her eviction and wielded a knife during her resistance.¹⁶⁴ One of the police officers who came to enforce her eviction shot at her with his revolver, reportedly shooting off half her hand.¹⁶⁵ The Bronx District Attorney's Office would later determine that the shot made it "anatomically impossible" for Bumpurs to hold the knife.¹⁶⁶ However, the officer decided to shoot again, though Bumpurs no longer posed a threat, and killed her.¹⁶⁷ Because Ms. Bumpurs dared to fight to remain housed, she was shot down like an animal.¹⁶⁸

Three weeks before her death, relatives of Ms. Bumpurs attempted to make a partial payment of her rent, but a Housing Authority employee refused to accept the payment because policy forbade the acceptance of partial payments without written consent from a supervisor.¹⁶⁹ Such is life, and death, for Black people, under the law of inequality, under the law of Whiteness, as enforced by the police. Williams also noted the impact of physical and discursive violence by the State upon the Black psyche as she concludes her discussion of Bumpurs's death.¹⁷⁰ The police commissioner accused Bumpurs, posthumously, of being psychotic for claiming to have seen Ronald Reagan coming through her walls shortly before she died.¹⁷¹ Williams muses that she, too, would see Reagan coming through her walls in a future when the posthumous disparagement of Black victims by the State—post-assassination character assassination—is accepted as reasonable discourse.¹⁷² Said Williams, "I have not yet been able to settle within myself whether that would be the product of psychosis."¹⁷³ As the

162. Black Detroiters who endured the City's yearslong water shutoff campaign also expressed their feelings that the water shutoffs had reduced them to a state of subhumanity. See Joel Kurth, *In Detroit, Surviving Without Running Water Has Become a Way of Life*, BRIDGE MICH. (Oct. 24, 2018), <https://www.bridgemi.com/urban-affairs/detroit-surviving-without-running-water-has-become-way-life> [<https://perma.cc/4GW5-J5KF>] ("On her worst days, Mattie McCorkle admits, she feels 'less than a person.' Once or twice a week, the Detroit mother of three collects her loose change and buckets from her bathtub. She drives to a carwash and fills her buckets. This is how she's collected water to bathe herself and her three children since the City of Detroit shut the taps to her home for nonpayment . . ."). Similarly, Paul Butler characterized the Flint Water Crisis in the context of state violence against Black people, describing it as a "slower form[] of vulnerability" than the overt necropolitical state violence. BUTLER, *supra* note 123, at 11.

163. WILLIAMS, *supra* note 156, at 130–45.

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. *Id.* at 142.

170. *See id.*

171. *Id.*

172. *See id.*

173. *Id.*

theories of Afropessimism and necropolitics clarify, the place of Black people in American society—the raced, savage place—is out, or under, or gone.

B. *Police as Modern-Day Overseers*

To say that police are the guardians of the American racial contract is neither metaphor nor hyperbole. Law enforcement in the United States was established to support the development of racial capitalism and to protect and enforce the commercial contracts effectuating the purchases and sales of kidnapped and enslaved Africans.¹⁷⁴ Policing continues to protect and enforce the contracting of Whiteness today, while simultaneously providing officers access to wealth and masculinity through participation in its ranks.

Modern American policing and British policing share much in common,¹⁷⁵ each evolving out of a need to protect the wealth of the elite: planters in the American South; and nobility in the United Kingdom.¹⁷⁶ Through slavery and colonialism, the new world came to be viewed in racial (and gendered) terms as White men’s land,¹⁷⁷ and police were deputized to control the non-White populations.¹⁷⁸ Thus, policing expanded from enforcing quasi-private commercial agreements and securing private property to patrolling the public using methods modeled after military forces.¹⁷⁹

The first iteration of policing in the Southern states was established to help White slaveowners protect and secure their property—most notably, enslaved Africans.¹⁸⁰ Slavecatchers were responsible for catching escaped slaves.¹⁸¹ Enslaved Africans were also collateral assets, and a landowner who owed debts, say, to a bank, could lose his slaves to a banking institution.¹⁸² Law enforcement officers enforced the repossession of the enslaved when mortgage contracts defaulted, much as sheriffs and marshals continue to enforce the foreclosure of

174. See Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, AM. BAR ASS’N (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish/ [https://perma.cc/5TYL-DVZX].

175. See Lepore, *supra* note 111; see also Julian Go, *The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century*, 125 AM. J. SOCIO. 1193, 1195 (2020) (locating the origins of the civilian model of American policing with the London Metropolitan Police).

176. See Lepore, *supra* note 111.

177. *Id.*

178. *Id.*

179. *Id.*

180. See Hassett-Walker, *supra* note 174.

181. See *id.*

182. See Zoe Thomas, *The Hidden Links Between Slavery and Wall Street*, BBC (Aug. 29, 2019), <https://www.bbc.com/news/business-49476247> [https://perma.cc/YUK4-GSB6]; David Teather, *Bank Admits It Owned Slaves*, GUARDIAN (Jan. 21, 2005), <https://www.theguardian.com/world/2005/jan/22/usa.davidteather> [https://perma.cc/5RJ6-AFNX] (reporting that JPMorgan Chase apologized for accepting enslaved people as loan collateral and owning several hundred slaves).

real property today.¹⁸³ Judicial enforcement of foreclosure by police is codified in Article 9 of the Uniform Commercial Code.¹⁸⁴ While humans may no longer be legally bought, sold, or mortgaged in the United States, the history of policing in the antebellum South exemplifies the clear links between commercial contracting, racial capitalism, and the contracting of Whiteness.

This history provides insight about the current disparity between the police's treatment of White and Black individuals. Take, for instance, police treatment of White killers Kyle Rittenhouse¹⁸⁵ and Dylan Roof¹⁸⁶ as compared to their assaults of innocent Black citizens Walter Scott,¹⁸⁷ Philando Castile,¹⁸⁸

183. See generally Elizabeth Caldwell, *The Financial Frontier: Slave Mortgaging and the Creation of the Deep South* (Apr. 6, 2012) (B.A. thesis, Brown University), <https://www.brown.edu/academics/history/sites/academics-history/files/images/Caldwell%20Final%20Thesis%202-2.pdf> [https://perma.cc/DA4K-582L]. (describing the mortgaging and repossession of slaves in the U.S. Deep South).

184. U.C.C. § 9-609 (AM. L. INST. & UNIF. L. COMM'N 2010) (establishing the right of a secured party to repossess property upon default, with the assistance of law enforcement).

185. Numerous police officers donated to a GoFundMe campaign in Kyle Rittenhouse's name after his arrest. See Paige Williams, *Kyle Rittenhouse, American Vigilante*, NEW YORKER (June 28, 2021), <https://www.newyorker.com/magazine/2021/07/05/kyle-rittenhouse-american-vigilante> [https://perma.cc/4EYM-QCWN]; Katie Shepard, *Kyle Rittenhouse Flashed Hate Symbols, Posed with Proud Boys in a Wisconsin Bar, Prosecutors Say*, WASH. POST (Jan. 14, 2021), <https://www.washingtonpost.com/nation/2021/01/14/kyle-rittenhouse-proud-boys-bar/> [https://perma.cc/7C8U-KQXR]; Julia Ainsley, *Internal Document Shows Trump Officials Were Told to Make Comments Sympathetic to Kyle Rittenhouse*, NBC NEWS (Oct. 1, 2020), <https://www.nbcnews.com/politics/national-security/internal-document-shows-trump-officials-were-told-make-comments-sympathetic-n1241581> [https://perma.cc/MU5U-B95U].

186. The police officers who arrested Dylan Roof for gunning down Black parishioners during their Wednesday evening Bible study bought him fare from Burger King after the arrest. *Cops Bought Burger King for Dylan Roof Following His Arrest*, ABC 7 (June 23, 2015), <https://abc7.com/dylann-roof-south-carolina-church-shooting-emanuel-african-methodist-episcopal/801013/> [https://perma.cc/X27K-VJNF].

187. Walter Scott was shot in the back by a police officer after being pulled over for a broken taillight; Scott was unarmed. See Mark Berman, *Former South Carolina Police Officer Who Shot Walter Scott Sentenced to 20 Years*, WASH. POST (Dec. 7, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/12/07/former-south-carolina-police-officer-who-shot-walter-scott-sentenced-to-20-years/> [https://perma.cc/C9BB-FVD8].

188. Philando Castile was shot to death in his vehicle as he attempted to show the police his license and registration. See Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN (June 21, 2017), <https://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam/index.html> [https://perma.cc/2YEB-2DEQ].

Alton Sterling,¹⁸⁹ Eric Garner,¹⁹⁰ Breonna Taylor,¹⁹¹ Botham Jean,¹⁹² and Atatiana Jefferson.¹⁹³ Given the history of police as enforcers of slavery, police can be characterized as the guardians and enforcers of America's Whiteness contract. Understanding the role of police as such, the disparity between police's sympathetic responses to White killers and police's deadly responses to innocent Black citizens should be understood not as the result of implicit bias and inadequate training, but as systematic and intentional acts meant to *protect* the Whiteness contract and *serve* the White contractors.

But the police themselves are not the contractors. They are merely tools for enforcing the contract, and while they can participate in Whiteness to an extent, they are subject to the limitations imposed by the true holders of power. Domination of capital and the power to exercise commercial and political proprietorship are central to Whiteness, and such proprietorship has also historically been definitive of masculinity.¹⁹⁴ Thus, the ability to manage and guard property became a way for poor White men to secure their statuses as both men and as persons deserving of the status of Whiteness.¹⁹⁵ In *Race Unequals*, Teri McMurry-Chubb wrote of how overseers' employment contracts gave working-class overseers access to Whiteness and masculinity via the acquisition of middle-class property management positions and salaries.¹⁹⁶ The overseers' aristocratic bosses, the planters, judged overseers on their ability to create wealth for the planter through effective, efficient management of land and (human) chattel.¹⁹⁷ The material benefits and social status granted to overseers by planters could just as easily be curtailed by the same, as planters would refuse to compensate overseers based on claims that overseers had wrongfully harmed

189. Alton Sterling was shot to death by police outside of a convenience store on the mere suspicion that he was carrying a gun. See Eric Levenson, *Baton Rouge Police Chief Apologizes for Hiring the Officer Who Killed Alton Sterling*, CNN (Aug. 1, 2019), <https://www.cnn.com/2019/08/01/us/alton-sterling-baton-rouge-police/index.html> [<https://perma.cc/N7PJ-WGTY>].

190. Eric Garner was choked to death by a police officer while being detained for illegally selling cigarettes. Associated Press, *From Eric Garner's Death to Firing of NYPD Officer: A Timeline of Key Events*, USA TODAY (Aug. 20, 2019), <https://www.usatoday.com/story/news/2019/08/20/eric-garner-timeline-chokehold-death-daniel-pantaleo-fired/2059708001/> [<https://perma.cc/TW78-YV6G>].

191. Breonna Taylor was shot to death by police in her apartment while she slept. Opper et al., *supra* note 79.

192. Botham Jean was shot to death in his apartment while eating ice cream. See Ortiz, *supra* note 13.

193. Atatiana Jefferson was shot to death in her home by police who entered her yard while she was playing video games with her nephew. *What We Know About the Fort Worth Police Shooting of Atatiana Jefferson*, N.Y. TIMES (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/us/aaron-dean-atatiana-jefferson.html> [<https://perma.cc/6XLJ-G7JV>].

194. See TERI A. MCMURRY-CHUBB, *RACE UNEQUALS* 65–77 (2021).

195. See *id.*

196. See *id.* at 69 (“Planters created the terms, in this case that outlined the appropriate work ethic, by which other White men from the overseer profession might access planter masculinity—the key to wealth.”).

197. *Id.* at 83 (“[O]verseers were only as valuable to planters as the crop they produced and the enslaved labor they kept on the brink of alive from cultivation to harvest.”).

enslaved people or otherwise mismanaged the planters' property.¹⁹⁸ Such denials of compensation kept overseers in positions of social and financial vulnerability.¹⁹⁹ Additionally, policing requirements enacted by state legislatures to ensure control over enslaved people also placed constraints upon overseers' physical liberties.²⁰⁰

Police occupy a similar role in American society today. They are working-class laborers for whom promotions can provide access to a middle-class salary and lifestyle. For White police officers, their success as members of America's White body politic hinges upon their ability to protect White property and to guard, more generally, against threats to White proprietorship and authority.²⁰¹ For Black officers and other officers of color, it is the lure of a stable career and benefits, along with the respect of a certain rung of society within their communities, that makes the job attractive.²⁰² Whether or not they are White, police are required to contain and suppress Black and Indigenous populations, using the threat of violence as a mechanism to keep Black and Indigenous communities humble, subdued, and submissive to the terms of Whiteness.²⁰³ But, as Derek Chauvin's case showed the American public, individual police officers must not go too far in so doing, lest they suffer "pro-police prosecution" so that the *institution* of policing—and the Whiteness contract—can be publicly absolved and allowed to persevere.²⁰⁴

A system of racial capitalism, premised upon the ability to exclude, exploit, and extract capital from those raced as non-White (and, especially, Black), necessarily relies upon necropolitical forces. Policing is required to enforce this system, and policing that protects racial capitalism is thus both inherently American, and inherently racist.²⁰⁵ It is for this reason that critiques of policing

198. *See id.* at 65–77.

199. *See id.* at 68–95.

200. *See id.* At 41–42 (“As the Alabama legislature made clear, the state’s exercise of . . . policing regulation was to help the White men of its state to ‘more effectually secure subordination among slaves, by requiring the owner, or overseer to reside with them.’”).

201. BUTLER, *supra* note 123, at 2 (“Cops routinely hurt and humiliate black people because that is what they are paid to do.”).

202. *See* Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1986 (reviewing JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017)).

203. *See generally id.* (discussing structural and other factors that serve to keep Black police officers’ behavior similar to that of their White peers).

204. David A. Graham, *Chauvin’s Conviction Is the Exception that Proves the Rule*, ATLANTIC (Apr. 20, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/chaubin-verdict-george-floyd/618651/> [<https://perma.cc/59CM-8ASL>] (quoting Minnesota Special Assistant Attorney General Steve Schleier, in reference to the prosecution of Derek Chauvin, which he framed as a “defense of officers who do things right, portraying the defendant as a bad apple who besmirched his colleagues’ good names.”).

205. According to Paul Butler, “Cops routinely hurt and humiliate black people because that is what they are paid to do.” BUTLER, *supra* note 123, at 2; *see also* Zack Beauchamp, *What the Police Really Believe*, VOX (July 7, 2020), <https://www.vox.com/policy-and->

are often characterized as anti-American²⁰⁶ and anti-White: because policing protects Whiteness, abolishing the police is rightly viewed as an attempt to abolish Whiteness; because Whiteness has become a dominant American ideal, abolishing Whiteness is viewed as an attack on the country itself. Derek Chauvin's termination from his post after George Floyd's death, and his recent criminal convictions for Floyd's murder, represent a rare but potent breach of the racial contract, and in the eyes of police and right-wing commentators, a betrayal of the contract's enforcers.²⁰⁷ American history shows that no breach of the racial contract is ever left unpunished.²⁰⁸

Perhaps the campaign of vengeance has already begun. Video of Ma'Khia Bryant's shooting death appears to capture a police officer yelling "Blue Lives Matter" at Black neighbors who gathered at the scene of the killing.²⁰⁹ Analysis of the officer's statements through the lens of Whiteness as Contract lends support to the idea that the police are seeking to remedy breaches to the racial contract; viewed otherwise, the comments are inexplicable. Why would a uniformed, on-duty police officer feel comfortable yelling racially provocative statements at Black people, even though such actions directly violate the terms of their employment contracts? Police have long relied upon another contract, one that is tacit and invisible to the public, but palpable to those targeted by policing for containment, detention, and elimination.

For so long as the racial contract is in place, renegotiating and bargaining for Whiteness, policing will exist to enforce it. Whiteness is the law that police enforce, because Black proprietorship and contracting violate the terms of the racial contract. Using varied degrees of violence and force, policing—including vigilante policing—intentionally disrupts the legal commercial activity and

politics/2020/7/7/21293259/police-racism-violence-ideology-george-floyd [https://perma.cc/8X83-ZYDJ] ("Officers are conditioned to see themselves as constantly in danger and that the only way to guarantee survival is to dominate the citizens they're supposed to protect . . . [P]olice ideology holds that officers are under siege by criminals and are not understood or respected by the broader citizenry. These beliefs, combined with widely held racial stereotypes, push officers toward violent and racist behavior during intense and stressful street interactions.").

206. See *Trump: NFL Kneelers 'Maybe Shouldn't Be in Country,'* BBC (May 24, 2018), <https://www.bbc.com/news/world-us-canada-44232979> [https://perma.cc/RN2D-LL24] (reporting on then-President Donald Trump's praise of the NFL ban on kneeling during the US national anthem, saying, "You have to stand proudly for the national anthem or you shouldn't be playing, you shouldn't be there, maybe you shouldn't be in the country").

207. See Gino Spocchia, *Newsmax Host Claims Derek Chauvin Was 'Sacrificed to the Mob' as Right-Wing Outlets Accused of Racism*, INDEP. (Apr. 21, 2021), <https://www.independent.co.uk/news/world/americas/us-politics/rob-schmitt-chauvin-newsmax-twitter-b1835376.html> [https://perma.cc/F6S7-U5T8] (reporting that Fox News host Tucker Carlson also slammed the jury's guilty verdict).

208. See *generally* Jackson Sow, *supra* note 36 (explaining that all breaches of the racial contract are met with brutal resistance and retrenchment).

209. See Victoria Moorwood, *Cop Appears to Yell "Blue Lives Matter" at Crowd After Fatal Shooting of Ma'Khia Bryant*, REVOLT (Apr. 21, 2021), <https://www.revolt.tv/2021/4/21/22396183/makhia-bryant-shooting-blue-lives-matter> [https://perma.cc/GB9Z-7BKH].

property ownership of Black people. Such disruption denies Black people the opportunity to participate in America's social contract, and instead reinforces the racial contractors' exclusive control over capital and labor. Ending police killings of Black and Indigenous people in the United States will require a clean break with the racial contract. The role that police have played in enforcing the terms of that contract forces us to consider whether we must break with the institution of policing, too.

III.

EXPECTATIONS OF POLICE VS. POLICE PERFORMANCE: A CONTRACTS-BASED ANALYSIS

U.S. citizens have a formal expectation that police will protect and serve them, collectively and individually, and that the police will treat them, individually, with the same level of respect and service as they would treat any other citizen.²¹⁰ This expectation is undergirded by public federal law, which requires equal protection under the laws by the federal government or the states.²¹¹ In recent years, the militarization of policing,²¹² has given the citizenry the impression that the police are more loyal to the State than to its people, and that the police are loyal to the State *in opposition to* the people.²¹³ Even so, such fear that the police now represent the body corporate does not necessarily mean that police may deprive the body politic of their due process rights, nor treat some groups better than others because of race or other protected classes.²¹⁴

210. Despite this commonly held expectation, as legal theorists have written, policing is at odds with the principle of equality. See Lepore, *supra* note 111 (citing MARKUS DIRK DUBBER, *THE POLICE POWER* (2005), in which Dubber writes that police power has its origins not in the rule of law, which should guarantee equality, but in patriarchal domination).

211. See U.S. CONST. amend. XIV. ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). While the Fifth Amendment contains no equal protection clause, equal protection analysis of the rights provided therein is the same as under the Fourteenth Amendment, because Equal Protection is a substantive component of due process rights. See *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214–18 (1995) (discussing that the Fifth Amendment's equal protection guarantee is "coextensive with" that of the Fourteenth Amendment).

212. Scholars have traced police militarization in the United States to the early twentieth century. See Go, *supra* note 175, at 1193–254; see also HARCOURT, *supra* note 32, at 6, 11 (describing the highly repressive and violative militarized policing of Black American protesters and other exceptionally surveilled communities as part of a new regime of governance based upon counterinsurgency theory).

213. HARCOURT, *supra* note 32, at 8 ("The central tenet of counterinsurgency theory is that populations . . . are made up of a small active minority of insurgents . . . and a large passive majority that can be swayed one way or the other. The principal objective of counterinsurgency is to gain the allegiance of that passive majority . . . [C]ounterinsurgency is not just a military strategy, but more importantly a political technique.").

214. *But see id.* at 15 (noting that a new, militarized regime of governance involves the systematic targeting of minority communities in the United States by law enforcement, and that "[m]ore than ever, a distinct minority of the American population—Muslims, African Americans, Mexicans, and political protesters—is being turned into a putative active insurgency that needs to be isolated and extracted from the passive masses").

However, there is also a common understanding among those groups having the most negative contact with the police that the police do not protect and serve them, and that they are instead the police's targets.²¹⁵ For many in favor of police reform, this "legal estrangement" is evidence that the system of public law enforcement and criminal justice is broken.²¹⁶ For others, however, it confirms a tacit understanding in Black communities that the system is working as intended and that the system never intended to protect and serve them.²¹⁷ The theories of the Racial Contract and of Whiteness as Contract provide language and schema in support of that tacit understanding.

This Part invites a departure from analyses of racist policing and police brutality that are inclusive only of public law and policy frameworks and solutions in favor of an analysis that engages private law via the doctrines of reliance and estoppel.²¹⁸ This analysis envisions remedies for police racism and brutality that actually account for the costs incurred by non-White victims and highlights the importance of anti-discrimination policies and respect for human and civil rights.²¹⁹ Using contract theory allows one to evaluate the gap between the expectations of police and actual police performance. Further, it allows one to evaluate the gaps between those expectations held by various segments of society. Such comparative evaluation is critically important to those who craft public law and policy. It calls attention to the informal agreements made outside of the law that currently render public law futile and ineffective as written.²²⁰

Breaches of America's racial contract do not go unpunished:²²¹ in June 2020, the entire world witnessed the New York City Police Department's violent backlash against racial justice protests.²²² As guardians and enforcers of the tacit

215. See Bell, *supra* note 24, at 2054–57 (“The existing police regulatory regime encourages large swaths of American society to see themselves as existing within the law’s aegis but outside its protection Even as criminal procedure jurisprudence sets the parameters of what police may do under the law, it simultaneously leaves large swaths of American society to see themselves as anomic, subject only to the brute force of the state while excluded from its protection.”).

216. See *id.*

217. See *id.*

218. See Jackson Sow, *supra* note 36, 1843–46 (contending that Black Americans should employ the theory of promissory estoppel to demand concrete remedies for White supremacy, which breaches the terms of the formal laws upon which they rely).

219. See *id.* (describing the usefulness of the theory of Whiteness as Contract for measuring harms caused by racism and discrimination, and remedies that will cover the costs incurred by racism’s victims).

220. See *generally id.* (exploring the failures of traditional legal analysis in identifying the invisible common law of Whiteness, and the usefulness of the theory of Whiteness as Contract in describing the costs and remedies for racist policing).

221. See *generally id.* (explaining that all breaches of the racial contract are met with brutal resistance and retrenchment).

222. New York City Police Department officers brutalized people of all races during their crackdown on the racial justice protests. Anyone protesting racist policing and police brutality was viewed as a threat to law and order and was treated accordingly. See Allison McCann, Blacki Migliozi, Andy Newman, Larry Buchanan & Aaron Byrd, *N.Y.P.D. Says It Used Restraint During Protests. Here’s What the Videos Show.*, N.Y. TIMES (June 14, 2020),

racial contract between New York City's White body politic and its local government, the police used Mayor Bill de Blasio's 8 p.m. curfew to harass, provoke, brutalize, and terrorize New Yorkers—including those essential workers, who, like the author's husband, had to report to work in the City after 8 p.m.²²³ One particularly brutal attack on peaceful protesters in the author's South Bronx neighborhood, on June 4, was the subject of a damning Human Rights Watch report, which concluded that the Police Department had planned and executed the attack on the protesters, who were primarily Black and Latinx.²²⁴ A few days thereafter, the author and her family permanently left New York City thoroughly traumatized.

On the third night of the curfew, officers in riot gear descended upon peaceful protesters in Crown Heights, Brooklyn, at approximately 11 p.m., tackling and detaining them.²²⁵ After most of the officers' vehicles departed, one remained behind, unable to start, as the crowd began to jeer them.²²⁶ Once the vehicle started, the police gave the crowd the middle fingers and drove off, playing the ice cream truck song, which is titled "N****r Love A Watermelon Ha! Ha! Ha!"²²⁷ The incident was captured on video and posted on Twitter.²²⁸ For weeks thereafter, police allegedly played the song out of their cruisers unprovoked in historically Black neighborhoods.²²⁹

Months later, more inappropriate activity from the New York Police Department (NYPD) was captured on a recording device and posted on Twitter.²³⁰ Before the 2020 general elections, officers were recorded playing pro-Trump propaganda out of a police cruiser in predominantly Black Flatbush,

<https://www.nytimes.com/interactive/2020/07/14/nyregion/nypd-george-floyd-protests.html>
[<https://perma.cc/Z4A9-449T>].

223. The arrest of a delivery worker who was trying to make a delivery during the June 2020 curfew in New York City was captured on video; Mayor de Blasio, who instituted the curfew, condemned the arrest. See Mark Sundstrom, *Mayor Blasts Arrest of Delivery Worker Caught on Video on Upper West Side During Curfew*, PIX 11 (June 5, 2020), <https://pix11.com/news/local-news/manhattan/mayor-blasts-arrest-of-delivery-worker-caught-on-video-on-upper-west-side/> [<https://perma.cc/2596-W3WW>].

224. JULIE CICCOLINI & IDA SAWYER, HUMAN RIGHTS WATCH, "KETTLING" PROTESTERS IN THE BRONX: SYSTEMIC POLICE BRUTALITY AND ITS COSTS IN THE UNITED STATES 3–8 (Madeline de Figueiredo ed., 2020), https://www.hrw.org/sites/default/files/media_2020/10/us_mott%20haven0920_web.pdf [<https://perma.cc/YX94-FVDU>].

225. Luke Fater, *Why Are NYPD Cruisers Playing the Ice Cream Truck Jingle?*, ATLAS OBSCURA (June 16, 2020), <https://www.atlasobscura.com/articles/nypd-ice-cream-truck-jingle?fbclid=IwAR05Aqm96wckdoqyQvCTMpIvaVnaHQTtk9tZvWXvAepZ4RFinUPP49TVamg> [<https://perma.cc/G64B-ZUKF>].

226. *Id.*

227. *Id.*

228. See @Strangersproj, TWITTER (June 4, 2020, 11:46 AM), <https://twitter.com/StrangersProj/status/1268615046525001728> [<https://perma.cc/VM4N-9W8U>].

229. Fater, *supra* note 225.

230. Benjamin Fearnow, *NYPD Officers Blare 'Trump 2020' Using Patrol Car Speakers in Violation of Code*, NEWSWEEK (Oct. 25, 2020), <https://www.newsweek.com/nypd-officers-blare-trump-2020-using-patrol-car-speakers-violation-code-1541965> [<https://perma.cc/AMT8-ZSZH>].

Brooklyn.²³¹ Such activity is a flagrant violation of the official NYPD code of conduct.²³² The theory of Whiteness as Contract provides guidance, pointing to the invisible common law that governs police interests and behavior—anti-discrimination laws, police department codes of conduct, and police officers’ formal employment contract terms, notwithstanding.²³³

Contracts are about expectation, agreement, and performance, and such is the case whether discussing commercial contracts or social contracts. People do not call on the police in the hopes that the police will shoot them to death, or otherwise torture them. Indeed, police are theoretically meant to protect the social contract within democratic states by providing citizens with protection and assistance.²³⁴ Underlying any request for police assistance is the understanding of a contractual agreement between the citizen and the State; the agreement is that citizens pay taxes to the local government to fund the police, and in exchange, the police, as arms of the State,²³⁵ will protect and serve them.²³⁶ A contracts-based analysis reveals why and how this reasoning fails to translate. Here, I consider policing in relation to the contractual elements and concepts of unconscionability, misrepresentation, mutual assent, and promissory estoppel.

Calling on the police assumes membership in America’s social contract. However, Whiteness as Contract definitionally excludes Black and Indigenous people therefrom. Expectations by Black and Indigenous community members that the police work to protect and serve *them* because they pay police salaries with their tax dollars reflects the commonly held expectations of the American public with respect to their public and civil servants. However, these expectations only apply to members of the body politic from which Black Americans are tacitly excluded.

The State not only accepts the tax dollars of Black and Indigenous people that help fund police, but also *requires* that Black and Indigenous people pay their taxes as a condition of their citizenship—their formal participation in a

231. *Id.*

232. See New York City Police Department (@NYPDNews), TWITTER (Oct. 25, 2020, 7:07 AM), <https://twitter.com/NYPDnews/status/1320366299290210306> [<https://perma.cc/6Q28-9BD6>] (responding to the recording of uniformed NYPD officers in a NYPD cruiser in Flatbush, Brooklyn, who were playing “Trump 2020” repeatedly from the cruiser); @mxtaliajane, TWITTER (Oct. 24, 2020, 7:57 PM), <https://twitter.com/mxtaliajane/status/1320197887071051776> [<https://perma.cc/ZH7B-3SBV>]. The Twitter account that posted the video of the police officers playing the recording out of the cruiser also posted the NYPD policy prohibiting officers from endorsing political candidates while on duty or in uniform. See @mxtaliajane, TWITTER (Oct. 24, 2020, 7:58 PM), <https://twitter.com/mxtaliajane/status/1320198107431358464> [<https://perma.cc/LS3K-MKS9>].

233. See Jackson Sow, *supra* note 36, at 1804.

234. See Lepore, *supra* note 111 (“Police have a lot in common with firefighters, E.M.T.s, and paramedics: they’re there to help, often at great sacrifice, and by placing themselves in harm’s way. To say that this doesn’t always work out, however, does not begin to cover the size of the problem.”).

235. See cases cited *supra* note 20 and accompanying text (noting that police departments cannot be sued because they are arms of the government).

236. See Lepore, *supra* note 111.

social contract.²³⁷ The United States promises its citizenry that the police will not deprive them of their due process rights, and that where officers acting under the color of law violate such rights, the citizens can seek remedies from the State.²³⁸

Viewed through the lens of contract law, such an agreement between a common citizen and the State is an unconscionable contract of adhesion.²³⁹ The State forces Black people to participate in bargaining, accepting tax dollars from them in exchange for police services,²⁴⁰ knowing that while Black people may occasionally benefit from police protection, those police services are intended to cause them harm.²⁴¹

Alternatively, the State has intentionally misrepresented to Black people that their bargain is for the protection of the State, when it is in fact the

237. See generally Bell, *supra* note 24 (discussing the location of Black people within the law's jurisdiction but excluded from its protections).

238. 42 U.S.C. § 1983 provides that persons acting under the color of law who deprive a person under the jurisdiction of the United States of their constitutional rights will be liable to the injured party. 42 U.S.C. § 1983. Of course, those killed by the police cannot be made whole, even if remedies are eventually sought by, and awarded to, their estates. Moreover, successful civil rights suits are rare. See Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121, 130 (2015) (“Nevertheless, DOJ investigations [into the actions of police departments] do not guarantee a prosecution, regardless of its findings, and research has shown that, between 1986 and 2003, less than 2% of federal civil rights referrals to the DOJ were actually prosecuted.”).

239. A contract of adhesion is a contract between an enterprise with strong bargaining power and a weaker party, who “in need of the goods or services, is frequently not in a position to shop around for better terms”; “[it is] à prendre ou à laisser.” Friedrich Kessler, *The Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943). A contract of adhesion may be void for unconscionability. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448–50 (D.C. Cir. 1965) (finding that when one party lacks meaningful choice and the contract terms are unreasonably favorable to the other party, such a contract may be unconscionable because of extreme inequality in bargaining power, and thus, set aside).

240. By assuming that taxes are an exchange for social services provided by police, I seek to build upon Andrew Hammond's work in articulating a contemporary theory of social citizenship. Hammond's theory of social citizenship focuses on economic rights, but is based on work that recognizes “[t]he promise of social citizenship is the equality of treatment of citizens, to be achieved through common social benefits and public services available to all citizens throughout a country.” See Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 Mich. L. Rev. 1639, 1648 n.42 (quoting Keith G. Banting, *Social Citizenship and Federalism: Is a Federal Welfare State a Contradiction in Terms?*, in TERRITORY, DEMOCRACY, AND JUSTICE: REGIONALISM AND FEDERALISM IN WESTERN DEMOCRACIES 44 (Scott L. Greer ed., 2006)). My assumption that taxes are an exchange for the rights to just and equal policing services rests upon this theory. Hammond describes the U.S. federal government's claims that Puerto Rican residents are rightfully excluded from certain welfare benefits because they do not pay welfare tax. Based upon this rationale advanced by the federal government, payment of taxes should be reciprocated by public benefits—including the services provided by police. See *id.* at 1682–83.

241. See MILLS, *supra* note 37, at 44–45 (describing state brutality and violence not as an “excess by individual racists” but as an “organic part” of a “system predicated on nonwhite subpersonhood”—as a feature, rather than a bug, of policing).

consideration that the body politic and the State are exchanging for protection of their own Whiteness-based privileges.²⁴²

The presence of the racial contract that relies upon the forcible extraction and expropriation of Black and Indigenous²⁴³ peoples' resources to create and protect White wealth completely undermines their formal expectations of law enforcement. The State promises Black and Indigenous communities equal assistance and service from police, as per their formal rights under law, in exchange for their tax dollars.²⁴⁴ The State gaslights them by suggesting that such a contract is intact, while deploying police to target Black and Indigenous people for the very violence upon which the survival of the racial contract depends. The State, which represents, and negotiates with, the White body politic,²⁴⁵ knows that it has promised certain benefits of citizenship to all citizens and knows that Black and Indigenous citizens rely upon the promise. The State also knows that it has absolutely no intention to deliver on its promise. Because there is no mutual assent between the parties, no contract exists.

As guardians of America's racial contract, the police work to ensure that Black and Indigenous people stay in their physical and political place; to facilitate extraction and seizure of capital from Black and Indigenous people as the State so sanctions; and to remedy breaches, or perceived breaches of the racial contract.²⁴⁶ On June 25, 2020, for example, news broke of the firing of three Wilmington, North Carolina, police officers who were caught on a two-hour-long video accidentally recorded in a patrol car making intensely racist anti-Black statements and threats.²⁴⁷ One declared, "we are just going to go out and start slaughtering them fucking n[*****]s. I can't wait."²⁴⁸ He also suggested that he or others should "wipe [Black Americans] off the fucking map. That'll put 'em back about four or five generations."²⁴⁹ Another deplored, in response, that White people had begun "worshipping [B]lacks."²⁵⁰ Of a Black woman one of the officers had recently arrested, to whom he referred as a "n[*****],"

242. See Harris, *supra* note 43, at 1715; see also Jackson Sow, *supra* note 36, at 1811 ("This racial, *race-ist* social contract is bargained for by those raced white amongst themselves, and it functions as a contract for both goods and services—the continued expropriation of Indigenous land, and the exploitation of Black labor on that land.").

243. See *id.*

244. See U.S. CONST. amend. V, amend. XIV.

245. See, e.g., Jackson Sow, *supra* note 24, at 40 ("[I]n Detroit, the privatization of water delivery is an intentionally extractive and anti-Black system that operates pursuant to public and private contracting from which Black Detroiters are intentionally excluded. Black proprietorship—over water, and more broadly, over local government—is a threat to this system, which was bargained for by a white body politic in Michigan."). The government's actions in Detroit exemplify government's role as representative of, and negotiator for, the White body politic, insofar as the government used public contracting, achieved through negotiation, to benefit the White body politic at the expense of its Black subjects.

246. See Jackson Sow, *supra* note 36, at 1811.

247. Lim, *supra* note 140.

248. *Id.*

249. *Id.*

250. *Id.*

“n[***]o,” and “crazy bitch,” he remarked that, to reset the racial contract, she “needed a bullet in the head right then and move on. Let’s move the body out of the way and keep going.”²⁵¹

Because the State defrauds Black and Indigenous people by misrepresenting to them—via formal laws, policies, and codes of conduct—that they are in privity of contract with their local police forces, it both convinces and compels them to pay for their own murders or the murders of their families, friends, and neighbors. The failure of the State to respond to calls for police reform or abolition reveals to many members of these communities that their privity with the police and the State is illusory. The State has induced them into relying on protection never intended for them. It reveals, instead, that Black people are not contractors, but rather the subjects and objects of the contract itself. As insult to injury, if members of the communities targeted for police brutality were to decide to simply refuse to pay their taxes, they would be found to be in breach of the nation’s social contract, prosecuted accordingly, and brought into life-threatening contact with law enforcement through arrest and detention by police or the execution of orders for repossession of property by a sheriff or marshal.²⁵²

Thus, with each police killing of a Black or Indigenous American comes increased calls from the public, human rights advocates, and even progressive lawmakers for police reform or abolition.²⁵³ Serious calls to defund or abolish the police are now part of mainstream political lexicon.²⁵⁴ Communities targeted by racist, brutal police in the United States have a right, per the doctrine of promissory estoppel, to seek remedies from the State based on their reliance upon an agreement that the police would protect and serve them in exchange for their municipal funding. Abolitionists can base an argument for reparatory justice on the reliance doctrine. Indeed, if they were to make a case for detrimental reliance of a community on a contract with the local police department, a claim could theoretically be made against a municipal government for damages that would then be subtracted from the police department’s budget. Otherwise, the affected community could demonstrate reliance and breach, explaining that the State has made vitiating misrepresentations about the police’s duty to protect and serve Black and Indigenous people. Then, the non-breaching party can demand rescission of the agreement and put an end to its funding of the police.

251. *Id.*

252. *See generally* Bell, *supra* note 24 (demonstrating the life-threatening nature inherent to members of communities targeted by police brutality from contact with law enforcement).

253. *See* Lepore, *supra* note 111 (describing “Abolish the police” as a rallying cry).

254. *See id.*

IV.

THE RACIAL CONTRACT AND THE THIN BLUE LINE

This final Part considers the paradox of police powers. Though the State vests in the police the mandate to enforce the racial contract, and with that mandate the power over life and death, police as overseers occupy a casted place in American society and are, at best, considered middle management. The first Section contemplates Black police officers' relationship to the racial contract and the American body politic. This comes at a moment when Black law enforcement officers across the United States, reliant on the promises of statutory law, are seeking high political office and presenting themselves—and fellow Black American citizens—as people with equal opportunity to potentially lead the renegotiations of the American social contract. Being a Black police officer is paradoxical because a Black officer is charged with guarding a racial contract that is designed and constantly re-negotiated with the express goal of excluding all Black people from the benefits of American citizenship, which include the right to legal and political personhood, the right to life and physical integrity, the right to liberty, and the right to contract and own property as opposed to being contracted *as* property. Black membership, or even leadership, in police forces, does not breach the racial contract; as the United States Capitol Police discovered on January 6, 2021, the racial contractors will always choose the contract, and at all costs.

The second Section considers policing as a path to a muscular manifestation of Whiteness for White police officers. It is a manifestation belied and frustrated by their economically casted positions within, and at times, outside of and below, the White body politic. White police officers, like overseers, are lured to the profession with the hopes of acquiring and augmenting their stakes within Whiteness, such as their social and professional respectability, their middle-class socioeconomic status, and their personal and collective political authority and agency. Akin to overseers, they find that there are limits to the heights that they can achieve within Whiteness, due to their roles as Whiteness's faithful servants and bodyguards.

A. The Paradox of Being Black and Blue All Over

Policing is no longer exclusively a White man's profession.²⁵⁵ The police commissioner charged with defending Eleanor Bumpurs's killers, Benjamin Ward, was New York City's first Black police commissioner.²⁵⁶ In 2019, 67

255. See Lepore, *supra* note 111 (writing about the origins and history of police in the United States, where, at one point, only White men served as slave patrolmen, militiamen, or police officers).

256. See WILLIAMS, *supra* note 156, at 141–42 (noting that Commissioner Ward was New York City's first Black police commissioner and that Ward complained that he received disproportionate scrutiny because of his race—a contention with which Williams agrees).

percent of police officers were White,²⁵⁷ over 12 percent were Black,²⁵⁸ and just over 20 percent were non-White.²⁵⁹ Relative to the American population, which is approximately 76 percent White,²⁶⁰ these statistics prove policing is a relatively diverse profession.²⁶¹ It is commonly believed that the phenomenon of police brutality might be quelled if police forces became more diverse.²⁶² However, Black and other non-White police officers are also capable of participating in acts of police brutality, including those acts committed against other Black people.²⁶³ Moreover, Black law enforcement officers are also subjected to police brutality and harassment themselves.²⁶⁴

On August 2, 2021, an investigative journalist posted video footage to Twitter of a Black police officer flanked by approximately seven other White police officers punching a Black civilian man in the face and causing him to fall backwards, head-first, onto concrete pavement in the downtown Detroit²⁶⁵ district of Greektown.²⁶⁶ The video does not show the police detain or arrest the

257. *Police Officers*, DATA USA, <https://datausa.io/profile/soc/police-officers#demographics> [<https://perma.cc/7RCT-SWZ4>].

258. *Id.*

259. *Id.*

260. Per the U.S. Census Bureau, the estimated population of the United States as of July 1, 2021, was 76.3 percent White, 13.4 percent Black, 18.5 percent Latinx, 1.3 percent Indigenous American, 5.9 percent Asian, 0.2 percent Native Hawaiian or Pacific Islander, and 2.8 percent two or more races. *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/DFE8-B8B8>]. Different institutions calculate race using different methodologies and categorizations. For example, per Data USA, the United States was 60 percent White and 12.4 percent Black in 2019. *United States*, DATA USA, <https://datausa.io/profile/geo/united-states#demographics> [<https://perma.cc/Y7EE-A7YQ>].

261. But despite the overall diversity within the police profession, “[u]rban police forces are nearly always [W]hiter than the communities they patrol.” Lepore, *supra* note 111.

262. *But see* Carbado & Song Richardson, *supra* note 202, at 1980–82 (reviewing a book that discusses the role Black Americans have played in facilitating racialized mass incarceration and responding as follows: “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 . . . [R]acial 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”).

263. *See id.* (noting that racial diversity without transformation can reproduce and legitimize inequality).

264. *See, e.g.*, WILLIAMS, *supra* note 156, at 141–42 (noting that Commissioner Ward, New York City’s first Black police commissioner, complained that he received disproportionate scrutiny because of his race—a contention with which Williams agrees).

265. The City of Detroit is predominantly Black, with Black people estimated to comprise over 78 percent of the population as of July 1, 2021. *See QuickFacts: Detroit City, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/detroitcitymichigan,MI/PST045219> [<https://perma.cc/2L5B-VYPQ>].

266. *See* Steve Neavling (@MCmuckraker), TWITTER (Aug. 2, 2021, 7:26 AM), <https://twitter.com/MCmuckraker/status/1422202215666753543> [<https://perma.cc/7JF8-9W5U>]; Steve Neavling, *Internal Affairs Investigates Detroit Cop Who Punched Man in the Face in Greektown*, DET. METRO TIMES (Aug. 2, 2021), <https://www.metrotimes.com/news-hits/archives/2021/08/02/internal-affairs-investigates-detroit-cop-who-punched-man-in-the-face-in-greektown> [<https://perma.cc/F5LB-95PW>]; Olafimihan Oshin, *Detroit Police Investigating After Video Shows Officer Apparently Punching*

man who was assailed.²⁶⁷ The Interim Chief of Police in the City of Detroit, James E. White, is Black,²⁶⁸ as is his predecessor, James Craig, who recently resigned to run for Governor of the State of Michigan on the Republican ticket.²⁶⁹ Of the impact of Black American police officers in the over-policing of other Black Americans, Devon Carbado and L. Song Richardson have made the following observation and conclusion:

Some [B]lack officers may believe that their failure to share and display fellow officers' racial assumptions about African Americans will engender the perception that [B]lack officers are "soft" on crime and criminality and "hard" on racial affiliation and loyalty. That perception would create an incentive for [B]lack officers to "work their identities" to disconfirm assumptions that they will insufficiently identify with being "blue" and overly identify with being "[B]lack." Overpolicing other African Americans would be one way for [B]lack officers to perform that work. 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.²⁷⁰

If contemporary policing is the extrapolation of the roles of overseers and slave patrolmen, what should we make of Black people who wear the blue?²⁷¹

Man in Face, HILL (Aug. 2, 2021), <https://thehill.com/homenews/state-watch/565992-detroit-police-investigating-after-video-shows-officer-apparently> [<https://perma.cc/476N-PB3V>].

267. See Steve Neavling (@MCMuckraker), TWITTER (Aug. 2, 2021, 7:26 AM), <https://twitter.com/MCMuckraker/status/1422202215666753543> [<https://perma.cc/AX8B-WFXH>].

268. White is African-American and has been described as a "civil rights leader." See George Hunter, *Civil Rights Leader, Longtime Cop Named Interim Detroit Police Chief*, DET. NEWS (May 17, 2021), <https://www.detroitnews.com/story/news/local/detroit-city/2021/05/17/james-white-interim-detroit-police-chief-james-craig-mike-duggan/5126913001/> [<https://perma.cc/9LK9-R3X3>]; see also Shawn Ley & Natasha Dado, *James White Takes Over as Interim Chief of Detroit Police Department*, CLICK ON DET. (June 1, 2021), <https://www.clickondetroit.com/news/local/2021/06/01/james-white-takes-over-as-interim-chief-of-detroit-police-department/> [<https://perma.cc/833S-4HHQ>] (reporting that James White became Interim Chief of the Detroit Police Department after James Craig's retirement).

269. See Craig Mauger, *James Craig Says He's 'Running,' Launches Committee for Michigan Governor*, DET. NEWS (July 21, 2021), <https://www.detroitnews.com/story/news/politics/2021/07/21/james-craig-launches-exploratory-committee-michigan-governor/8038297002/> [<https://perma.cc/APL4-83SL>] ("Craig, who retired [from the Detroit Police Department] June 1 after working more than four decades in law enforcement, is seen by many in the GOP as the early favorite to win the party's nomination to challenge Democratic Gov. Gretchen Whitmer in 2022.").

270. Carbado & Song Richardson, *supra* note 202, at 1981–82.

271. Carbado and Song Richardson refer, as do I, to W.E.B. DuBois's concept of double consciousness. See Carbado & Song Richardson, *supra* note 202, at 1981 ("Fundamental to our approach is a Du Boisian 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 "[B]lack" – in one "dark body.") (quoting W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 45 (Signet Classic 1969) (1903)).

On July 27, 2021, United States Capitol Hill Police Officer Harry Dunn gave America a mouthful about the Capitol Hill Riots of January 6.²⁷² Dunn testified before the U. S. House of Representatives Select Committee about his experience guarding the Capitol during the insurrection.²⁷³ He shared with the Committee—and the world—the racist abuse to which the insurrectionists subjected him as a Black man in uniform.²⁷⁴

Dunn testified that he lost his composure when the insurrectionist mob refused to obey his orders to leave the Capitol, and instead told him that the Capitol was their property, and that they were present to take the government back for Donald Trump, because “nobody voted for Joe Biden.”²⁷⁵ Dunn breached his normal practice of keeping his politics to himself and he told the mob that he had voted for Joe Biden, asking the crowd of insurrectionists if they thought he was nobody.²⁷⁶

According to Dunn, the mob let him know exactly what they thought of him:

That prompted a torrent of racial epithets. One woman in a pink MAGA shirt yelled, “You hear that guys? This n[*****] voted for Joe Biden.” Then the crowd, perhaps around 20 people, joined in screaming, “Boo, fucking n[*****].” No one had ever, ever called me a n[*****] while wearing the uniform of a Capitol Police officer.²⁷⁷

Officer Dunn also testified that other Black officers told him about the racist abuse that they suffered at the hands of the mob:

In the days following the attempted insurrection, other Black officers shared with me their own stories of racial abuse on January 6th. One officer told me he had never, in his entire 40 years of life been called a n[*****] to his face, and that streak ended on January 6th, yet

272. See *January 6 House Select Committee Hearing Investigation Day 1 Full Transcript*, REV (July 27, 2021) [hereinafter REV], <https://www.rev.com/blog/transcripts/january-6-house-select-committee-hearing-investigation-day-1-full-transcript> [<https://perma.cc/L5QS-E4CK>]; *Watch Live: The Law Enforcement Experience on January 6th*, U.S. HOUSE OF REPS. SELECT COMM. ON THE JAN. 6 ATTACK ON THE U.S. CAPITOL (July 27, 2021), <https://january6th.house.gov/legislation/hearings/law-enforcement-experience-january-6th> [<https://perma.cc/JR5D-9NVY>] (hosting video footage of Day 1 of the congressional hearing); see also Press Release, U.S. House of Reps. Select Comm. on the Jan. 6 Attack on the U.S. Capitol, Select Committee to Investigate the January 6th Attack on the United States Capitol to Hold First Hearing July 27th (July 20, 2021), <https://january6th.house.gov/news/press-releases/select-committee-investigate-january-6th-attack-united-states-capitol-hold-first> [<https://perma.cc/Y3P5-3ZJH>] (naming Mr. Harry Dunn, Private First Class, U.S. Capitol Police, as a witness).

273. See REV, *supra* note 272.

274. See *id.*

275. *Id.*; see also Melissa Macaya, Veronica Rocha, Mike Hayes, Meg Wagner, Maureen Chowdhury & Melissa Mahtani, *Capitol Riot Committee Holds First Hearing, US Capitol Police Officer Recounts Rioters Calling Him the N-Word During Jan. 6 Insurrection*, CNN (July 27, 2021), https://www.cnn.com/politics/live-news/jan-6-house-select-committee-hearing-07-27-21/h_cf87174f0abe066667d1daf53a68d924 [<https://perma.cc/AEQ9-4GZ2>] (quoting Officer Dunn).

276. See REV, *supra* note 272.

277. *Id.*

another Black officer later told me he had been confronted by insurrectionists in the Capitol who told him, “Put your gun down and we’ll show you what kind of n[*****] you really are.”²⁷⁸

Officer Dunn later expounded on the psychological impact of confronting the racist abuse directed at him, as well as the discovery that because he is Black, being blue is still not enough to make him *American*:

I think that’s in the rotunda where I became so emotional because I was able to process everything that happened, and it was just so overwhelming and it’s so disheartening and disappointing that we live in a country with people like that, that attack you because of the color of your skin, just to hurt you. Those words are weapons. Thankfully, at the moment it didn’t hinder me from doing my job. But once I was able to process it, it hurt, it hurt just reading it now. And just thinking about it. That people demonize you because of the color of your skin when my blood is red, I’m an American citizen, I’m a police officer, I’m a peace officer, I’m here to defend this country, defend everybody in this building.²⁷⁹

Officer Dunn’s account, along with the experiences of other Black law enforcement officers who have confronted the immediate terror and lasting harms of anti-Black racism despite their participation in the institution of policing,²⁸⁰ poses a significant challenge to the belief that oppression can be eradicated through diversity, equity, and inclusion.²⁸¹ Similarly, the ideas that racism is purely visceral and interpersonal, or the product of ignorance and isolation, are commonly promulgated, but are incomplete. Examining White

278. *Id.*

279. Macaya et al., *supra* note 275 (quoting Officer Dunn’s testimony at the House Select Committee Hearing on July 27, 2021).

280. *See, e.g.*, Katherine Fung, *Black Minnesota Police Chief Describes Being ‘Taken Out at Gunpoint and Prone’ by Law Enforcement*, NEWSWEEK (Apr. 23, 2021), <https://www.newsweek.com/black-minnesota-police-chief-describes-being-taken-out-gunpoint-prone-law-enforcement-1585974> [<https://perma.cc/64FX-HFP7>] (capturing the account of the St. Cloud, Minnesota Police Chief, who shared the fear he feels when police officers pull him over and recounted that police officers mistreated him during a traffic stop during his tenure as police chief).

281. *See* Carbado & Song Richardson, *supra* note 202, at 1980–81 (expressing a skeptical view of the ability of diversity in policing alone to dismantle racist police practices). Carbado and Song Richardson conclude their review of James Forman’s book on Black police with the following declaration: “just as the diversity rationale has not ended racial inequality in the context of education, 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.” *Id.* at 2024–25. For a more scathing indictment of institutional diversity efforts (in the context of law school faculty hiring practices) as exercises in futility that allow racist oppression to persist, see Carliss N. Chatman & Najarian Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, 69 UCLA L. REV. DISC. 2, 11 (2021) (concluding, of institutional diversity and equity initiatives, “[d]iversity and inclusion, like all acts of compromise and moderation, is an inherent stasis of homogeneity with the deprioritized afterthought of looking around and asking: ‘Who are we missing now that we are all here (and now that the world tells us we should act like we care?)’”).

supremacy through the theory of Whiteness as Contract reveals that visceral racist hate—like that expressed by the insurrectionists on January 6, 2021—merely supports a system of oppression that has economic exploitation and political domination as its ultimate objective. Thus, there is no amount of diversity and inclusion within a system of oppression that will dismantle that system—particularly when those included in the system are also tasked with ensuring its sustenance and perpetuation.²⁸²

1. *White Police Officers as Guardians—and Servants—of White Nobility*

White police officers occupy a casted position as blue-collar workers within the White body politic.²⁸³ The White supremacist mob subjected White members of the United States Capitol Police to abuse, threats, violence, and even death,²⁸⁴ because the mob had decided that they—the insurrectionists—were the true guardians of the racial contract.²⁸⁵ The mob would not allow federal law enforcement agents to breach or interfere with the racial contract, even if they were White. As overseers of the American project, police enjoy latitude to use the means necessary to protect the racial contract, but they are inherently

282. See generally Chatman & Peters, *supra* note 281 (examining the performative ritual of diversity, equity, and inclusion initiatives in legal academia and the failure of such initiatives to foment meaningful change); see also FORMAN, *supra* note 202 (detailing the history of enthusiasm for tough-on-crime law enforcement measures within Black communities, especially those communities with Black law enforcement chiefs and Black leadership).

283. British elites, who hired poor people to guard their property, influenced the American policing system. Lepore, *supra* note 111. Policing as blue-collar work stems from that origin. *Id.* Modern American policing involved the recruitment of new American immigrants from Europe (“Hungarians, Italians, and Jews”) to control the movements of more undesirable minority communities in urban centers. *Id.* Today, many police are often also affiliated with the military, which is also blue-collar work. *Id.*

284. Capitol Police Officer Brian Sicknick died a day after engaging the Capitol Hill rioters; although he died of natural causes stemming from two strokes, two men have been accused of assaulting him with chemical irritants during the riots, and the medical examiner who conducted Sicknick’s autopsy noted of the Riot in his report that “all that transpired played a role in his condition.” Peter Hermann & Spencer S. Hsu, *Capitol Police Officer Brian Sicknick, Who Engaged Rioters, Suffered Two Strokes and Died of Natural Causes, Officials Say*, WASH. POST (Apr. 19, 2021), https://www.washingtonpost.com/local/public-safety/brian-sicknick-death-strokes/2021/04/19/36d2d310-617e-11eb-afbe-9a11a127d146_story.html [https://perma.cc/7GBT-DTMP].

285. The Capitol Hill rioters believed that President Trump called upon them to storm the Capitol to restore the Trump regime to political power. For the rioters who were White supremacists, storming the capitol was also about defending the White supremacy they believed the Trump administration supported. Officer Dunn testified at the House Select Committee hearing on July 27, 2021 that the rioters yelled at him, “No, man, this is our house,” when he instructed them to leave the Capitol. Officer Dunn testified that the rioters he engaged with told him that “President Trump invited us here. We’re here to stop the steal” before repeatedly assailing him with racist epithets. See Macaya et al., *supra* note 275; *supra* text accompanying note 275 (discussing Officer Dunn’s testimony); REV, *supra* note 272. Other rioters seemed to believe that they were involved in a battle, screaming, “We need fresh patriots to the front” before also saying, “They’ve got the gallows set up outside the Capitol Building. It’s time to start fucking using them” and “[m]obilize in your own cities, your own counties, storm your own Capitol buildings and take down every one of these corrupt motherfuckers.” *Id.*

dispensable.²⁸⁶ Like antebellum planters, the contractors demand loyalty and allegiance from Black people to law enforcement, and they also demand loyalty and allegiance *from* law enforcement.²⁸⁷ And as was made clear during the Capitol Hill Riots, they do not restrict themselves to peacefully kneeling on one knee²⁸⁸ or simply declaring that “Black Lives Matter”²⁸⁹ when they fear that the terms of Whiteness that they bargained for have been threatened.²⁹⁰

Like overseers, the police may be granted broad latitude as they do their work in the service of Whiteness; they may achieve managerial status,²⁹¹ and like the senior-most Black members of the American law enforcement apparatus, they may even be allowed to lead the enforcement of the racial contract.²⁹² Their loyal service should not, however, be confused for contracting authority or proprietorship; they are mere agents, and in the case of Black and other non-White law enforcement agents, they are agents of a system that has bargained for their permanent exclusion, systemic exploitation, and eventual elimination.²⁹³ When Black law enforcement officers benefit from racial contracting, they do so as third-party beneficiaries.²⁹⁴ However, when they find that they are the objects

286. In footage of the January 6 Capitol Hill riot replayed at the House Select Committee hearing on July 27, 2021, rioters can be heard saying to the Capitol Hill police officers, “Take a bullet” and “[f]uck you, police.” REV, *supra* note 272.

287. See MCMURTRY-CHUBB, *supra* note 194, at 68–95 (describing the expectations, by planters and legislatures, that overseers devote themselves to making profits for the planters, by successfully policing and controlling enslaved people).

288. See *Tokyo Olympics: What’s Taking the Knee and Why Is It Important?*, BBC (Oct. 13, 2021), <https://www.bbc.com/news/explainers-53098516> [<https://perma.cc/7RQN-VQKZ>] (explaining that the gesture originated with American football player Colin Kaepernick in protest of anti-Black racism in the United States).

289. *Anti-racism: What Does the Phrase ‘Black Lives Matter’ Mean?*, BBC (July 3, 2020), <https://www.bbc.co.uk/newsround/53149076> [<https://perma.cc/Y8BB-E46G>] (explaining that the phrase was first used in the United States in 2013 after George Zimmerman was acquitted after killing Trayvon Martin, and later evolved into an organization).

290. See Macaya et al., *supra* note 275.

291. See MCMURTRY-CHUBB, *supra* note 194, at 65–77 (discussing how overseers employed their management skills on the plantation to optimize their social capital as White people and as men, as well as how successful management of the planters’ assets became an arbiter of overseers’ merit of the benefits of Whiteness and masculinity). According to McMurtry-Chubb, “[a]n overseer who could provide . . . assurances remained in his place as a manager, a dutiful dependent to the ever-watchful patriarch. Behind every good planter was not a good woman, but a good overseer.” *Id.* at 77.

292. See generally FORMAN, *supra* note 202 (discussing the role that Black law enforcement leadership has played in the mass incarceration of African-Americans in the United States).

293. See Jackson Sow, *supra* note 36, at 1832 (“Whiteness as contract is an agreement of the authors of the global settler colonial project, bargained-for amongst themselves to establish white supremacy, via the expropriation, extraction, and exclusive domination of real property, natural resources, human or other capital, and sociopolitical franchise. The contractors bargained for exclusive [W]hite economic, political, and social power—or full personhood—and they also, then, bargained for the exclusion of Black people from full personhood, including the right to contract with the [W]hite body politic or exercise personal, social, or political proprietorship.”).

294. See *id.*

of the contract's fury, like Officers Harry Dunn or Eugene Goodman,²⁹⁵ they are reminded that they are mere agents of the contract, and not parties thereto.²⁹⁶ They experience, as do all other unarmed victims of racist police terror and murder, the brutality and humiliation of the racial contract's negative externalities. The paradox of Black policing in the United States thus lies, not with the relationship of law enforcement to the invisible common law of Whiteness, but in Black officers' participation therein.

CONCLUSION

Writing about police brutality as a Black woman is not easy: the author's oldest child was, at the time she wrote this Article, Ma'Khia Bryant's age. The author has herself been on the receiving end of police misbehavior²⁹⁷ and prays with regularity that she will never get the call that someone she knows has been gunned down by a police officer while driving, eating ice cream in the living room, or sleeping. To intellectualize one's trauma and transform it into scholarship is not only extremely difficult, but all academic writing requires the luxury of time, research assistance, and periods of workshopping and revision. Meanwhile, because the racial contract is never off-duty, and never without its weapons, policing continues to pose an existential threat to Black people in the United States, and indeed, throughout the contemporary Western world. Everyone who claims to wish for the end of White supremacy must therefore work diligently to dismantle it. They must void the contracts that hold White supremacy together, before it strikes its next victim via the barrel of another police gun.

And yet, it is critically important to specify that "we" do not bear equal burdens, nor do "we" bear equal levels of responsibility with respect to

295. See Rebecca Tan, *A Black Officer Faced Down a Mostly White Mob at the Capitol. Meet Eugene Goodman.*, WASH. POST (Jan. 14, 2021), https://www.washingtonpost.com/local/public-safety/goodman-capitol-police-video/2021/01/13/08ab3eb6-546b-11eb-a931-5b162d0d033d_story.html [https://perma.cc/ZQ6C-VRQJ].

296. See John Woodrow Cox & Michael S. Rosenwald, *Caron Nazario Saw Eric Garner, Who He Called 'Uncle,' Die in Police Hands. Then Officers Pepper-Sprayed Him Six Years Later.*, WASH. POST (Apr. 14, 2021), <https://www.washingtonpost.com/dc-md-va/2021/04/14/caron-nazario-eric-garner/> [https://perma.cc/EAB6-C4HM]; Macaya et al., *supra* note 275 (detailing how White people mistreated Second Lt. Caron Nazario and Capitol Police Officer Harry Dunn while they were in uniform). Nazario expresses shock at how Windsor, Virginia police treated him because he is a member of the U.S. Armed Forces; police body cameras capture him exclaiming, "I'm serving this country, and this is how I'm treated?" Timothy Bella, *A Black Army Officer Held at Gunpoint During Traffic Stop Was Afraid to Get out of His Car. 'You Should Be,' Police Said.*, WASH. POST (Apr. 10, 2021), <https://www.washingtonpost.com/dc-md-va/2021/04/10/virginia-police-gunpoint-army-nazario/> [https://perma.cc/QP5N-TLRM]. Officer Dunn also expressed surprise and dismay that Capitol Hill insurrectionists racially abused him. "I'm an American citizen, I'm a police officer, I'm a peace officer, I'm here to defend this country," said Dunn. See Macaya et al., *supra* note 275.

297. Jake Offenhardt, *City Human Rights Official Says NYPD 'Discouraged' Her from Reporting Racist Subway Attack*, GOTHAMIST (Dec. 4, 2018), <https://gothamist.com/news/city-human-rights-official-says-nypd-discouraged-her-from-reporting-racist-subway-attack> [https://perma.cc/6WAX-WMQQ].

dismantling of racial contract, and dismantling Whiteness. Black people have never achieved social and political equality in this country and as those who have been permanently excluded from America's body politic, we do not possess the decision-making power or capital to prevent our murders, beatings, and harassment.²⁹⁸ Neither are Black people able to end anti-Black racism. There is no degree of compliance, no profundity of American patriotism or nationalism, nor is there any level of participation in policing or any other sphere of government service that grants Black people full entrée into the American body politic, or that makes Black people immune to the wrath of White supremacy. So long as the racial contract is in force, Black people will be punished for interfering with its performance and subject to attack for the purpose of striking terror—and passive allegiance, with no benefits of full citizenship in return²⁹⁹—in Black communities. That is the sole responsibility of the contract's signatories and beneficiaries.³⁰⁰ Black people will, of course, continue to agitate for a recognition of our humanity and rights that is not just formal, but substantive, and complete with remedies for rights violations, for as long as is necessary. However, third parties will never rescind the racial contract. The contract is negotiated for and amongst people who have raced themselves as White in a country where they have a chokehold on the nation's capital and governance; the power of revocation also lies with them.

Racial justice is a burden that all legal scholars can bear—it is not the exclusive province of scholars of public law. Public and private law facilitate and sustain the construction and maintenance of Whiteness and its supremacy. That public and private law scholarship generally is generated in separate silos prevents academics and advocates alike from fully recognizing how the presence of formal anti-discrimination public law works with the generally *laissez-faire* nature of private ordering in the United States. These systems work together to sustain a structure of economic exploitation and necropolitical governance of Black people that uses physical terror and murder to subdue, disenfranchise, and even eliminate them. Using contract theory to evaluate policing also provides clarity concerning the costs of police brutality in a way that cannot be as easily or fully captured by public law alone. Justice is not possible for victims of police brutality and harassment because the costs are psychological and physical; this is perhaps most obvious in the case of fatal police interactions. The victim of a

298. See Bell, *supra* note 24, at 2059–60 (“[M]any reformers would likely disagree that obedience to law enforcement is the central concern in America’s current conversation on police reform. Indeed, in many of the cases that have most catalyzed the Black Lives Matter movement, the victims of police violence were not disobeying the law, were complying with officers’ demands, or were suspected of violating petty laws that are likely unworthy of strong enforcement efforts or penalties.”).

299. See HARCOURT, *supra* note 32, at 14 (describing the U.S. government’s “counterinsurgency strategies” as including “relentless targeting of suspected minorities, and the continuous effort to win the allegiance of the passive masses”).

300. See Jackson Sow, *supra* note 36, at 1888 (calling for White beneficiaries of the racial contract to denounce and divest from the contract by intentionally rejecting opportunities to renegotiate or assert the terms of Whiteness).

police murder can never be made whole, and neither can their family, no matter the size of any eventual civil settlement.

This Article has not squarely weighed into the debate over police reform versus police abolition; that conversation is beyond the scope of this work. However, the Article does present contract theory as a lens of analysis for people to use if they are interested in locating the police's contractual obligations, as well as their history of enforcing commercial and social contracting in the service of White supremacy. Police do protect and serve, but they do not protect and serve Black people in the United States; to the contrary, police are tasked, as they have been throughout the history of American policing, with targeting Black people and other undesired populations for surveillance, harassment, and suppression.³⁰¹ Police are enforcers of American racial capitalism, as guardians of White supremacy, and as agents of a body politic that depends on the death of Black people so that it may have life; upon Black people's detention, confinement, and harassment so that they may enjoy liberty; and upon Black people's dispossession of property and capital so that they may enjoy wealth. This Article should leave readers wondering if policing will be necessary if the racial contract is ever revoked.³⁰² This, too, is a serious question.

301. See HARCOURT, *supra* note 32, at 6, 11 (discussing the United States government's targeting of African-Americans, Muslims, other undesired minorities, and political protesters for harassment, surveillance, and repression); MILLS, *supra* note 37, at 81–89 (defining ideological conditioning and physical violence used against populations targeted for repression as the racial contract's primary operating mechanisms).

302. See *generally* Capers, *supra* note 123 (imagining, as a solution to policing's present problems, a world in which the racial contract has been revoked and policing becomes much less necessary).